THE SPECIAL NORMS THESIS: WHY CONGRESS'S CONSTITUTIONAL DECISION-MAKING SHOULD BE DISCIPLINED BY MORE THAN THE USUAL NORMS OF POLITICS

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INTRODUCTION

Even if we accept that the most basic rules of fair play do not apply to our nation's political representatives when they battle one another in the ordinary lawmaking process, we should demand more when they engage in constitutional decision-making.[1] This Article explains why our constitutional system demands different rules of engagement when constitutional questions are at issue, and exactly what we should expect of members of Congress in these situations.

Congress does a surprisingly large amount of constitutional decision-making: it is the main ingredient of some important lawmaking (such as determining whether a governmental interest is

[1] This Article's thesis does not depend upon the behavioral standards of ordinary politics being as low as they presently seem to be, but only on there being a gap between the standards that apply to ordinary politics and constitutional decision-making. *See infra* Part III, note 150.

sufficiently important to justify regulating speech), and a key component of many of Congress's non-legislative responsibilities (such as deciding whether to impeach a government official, or to move forward with a president's nominations).[2] The Constitution itself differentiates between statutory and constitutional lawmaking by specifying a special procedure for the latter in Article V.[3] This Article's *Special Norms Thesis* extends this basic approach to the much more common practice of constitutional decision-making by Congress outside the amendment process.[4]

This Article's central claim is that the existence of Special Norms for constitutional decision-making is implicit in the widely shared understanding of what a constitution is and the work it performs in a large, heterogeneous modern democracy.[5] Special Norms are necessary to adequately legitimate governmental authority, to establish the type of political fraternity that modern democracies seek, and to decide a constitutional democracy's foundational political identity.[6] But while Special Norms are appropriate for constitutional decision-making, they should not apply to all of Congress's decision-making. Extending the Special Norms to everything is not only impractical but would reflect a misunderstanding of what ordinary politics consists.[7]

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2 *See infra* Part I.

3 *See* U.S. CONST. art. V.

4 Like Bruce Ackerman's *We the People* trilogy, this Article distinguishes between constitutionalism and ordinary politics, and focuses on constitutional practices outside of Article V. But our projects are otherwise quite different: Ackerman aims to develop a rule-of-recognition for identifying constitutional amendments made outside of Article V, *see* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 15–31 (1998); is mostly concerned with citizens' roles in such extra-Article V amendments, *see* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 7 (1991); and provides an account that is primarily "descriptive, not prescriptive," *see* Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments*, 44 STAN. L. REV. 759, 776 (1992) (describing Ackerman's *We the People*).

5 In another work I have advanced an independent, yet complementary, argument for the existence of Special Norms for constitutional decision-making. *See* Mark D. Rosen, History: Limit or License in Constitutional Adjudication? (Apr. 27, 2019) (unpublished manuscript) (on file with author) (grounding special norms in a 'shared agency' account of constitutionalism).

6 *See infra* Sections III.C–E.

7 *See infra* Section III.B.

The Article then identifies three Special Norms that should apply to Congress.[8] The norms of Proactivity and Explicitness are gatekeepers that determine when Congress must engage in constitutional decision-making. Proactivity sometimes requires that Congress act, and Explicitness is a defeasible duty that Congress forthrightly consider constitutional questions when they arise. The third norm, Tempered Politics, governs congressional behavior in the realm of constitutional decision-making. Tempered Politics disallows the brute majoritarianism that is permissible in ordinary politics, instead requiring persuasion and compromise in the service of achieving consensus. When consensus cannot be reached, Tempered Politics demands decisions that are more responsible and civic-minded than what might be minimally acceptable in ordinary politics. Tempered Politics is operationalized by two subnorms: (1) Reciprocity, which constrains disputants' substantive positions, and (2) Communicative Exchange, which disallows unilateralism by requiring that each side aim-to-influence, and be open-to-being-influenced by, its opponent's constitutional views.

More generally, the Special Norms aim to harness Congress's unique institutional capacities that should be brought to the multi-institutional process (comprising courts, the executive branch, the legislature, and the states) that collectively generates constitutional judgments. The Special Norms facilitate the making of constitutional decisions that are, one might say, constitution-worthy.

This Article is particularly timely for both practical and theoretical reasons. As to the practical, the Special Norms Thesis offers a framework that may help tame the excessive political partisanship and vicious divisiveness that has captured our political institutions.[9] Though the Special Norms discipline applies to only a subset of congressional action, constitutional decision-making is a crucial subset. Moreover, responsible and respectful decision-making in the constitutional domain might have beneficial cascading effects elsewhere. And even if today's political climate is not receptive to the adoption of Special Norms,[10] the Special Norms Thesis can help us better understand how

8 *See infra* Part IV.

9 *See* STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018).

10 *See infra* notes 70–89 and accompanying text (discussing some mechanisms through which the Special Norms might become binding).

we have gotten to where we are and how we might reshape our practice of constitutional politics in the future. As to the theoretical, among this generation of constitutional scholars' most profound insights is that courts are not the only institutions that interpret[11] the Constitution.[12] Yet virtually no one to date has considered whether Congress's great powers to interpret and apply the Constitution are accompanied by a great responsibility[13] when it does so.[14] The Special Norms Thesis answers with a resounding "yes."[15]

The Special Norms Thesis is fully independent of (albeit consistent with) the United States' practice of strong judicial review, where the Supreme Court has the last authoritative word on what the Constitution means.[16] As Part I shows, Congress still must engage in substantial

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11 Later I explain why "decision-making" is broader than, and conceptually superior to, the locution of "interpretation." *See infra* notes 166–68 and accompanying text.

12 *See* sources cited *infra* note 166.

13 The language above paraphrases "with great power comes great responsibility," which was likely penned by Voltaire but brought to the attention of most Americans by Peter Parker's Uncle Ben in the movie *Spider-Man*. SPIDER-MAN (Columbia Pictures 2002).

14 Paul Brest's seminal Articles provided helpful, but only limited, guidance. *See infra* note 153 (discussing Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986)); *infra* note 182 (discussing Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1974)). David Pozen goes considerably further when he argues that the concept of bad faith, as it has been developed in private and international law, should be applied to Congress's interpretations of constitutional law. *See* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 887–89 (2016). Pozen's project and this Article are complementary though distinct. The Special Norms Thesis reasons on the basis of considerations that are unique to constitutionalism rather than transsubstantively. *See infra* note 141 and accompanying text. The contents of constitutional bad faith and the Special Norms only partly overlap. *See infra* notes 30, 217 and accompanying text. And an implication of the Special Norms Thesis is that bad faith is an inadequate conceptual framework for describing the behavioral standards that should govern constitutional decision-making. *See infra* note 217.

15 While this Article develops its claims in relation to Congress, it has broader implications insofar as the Special Norms Thesis reasons from the consensus fundamentals of constitutional systems. Future work will explain how the Special Norms Thesis applies to other individuals and institutions that engage in constitutional decision-making (such as the President, executive agencies, and state governments), and to what extent the Special Norms Thesis carries over to other countries.

16 *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353–59 (2006) (distinguishing between strong and weak judicial review). The Special Norms Thesis might allay concerns that the rejection of strong judicial review might otherwise occasion.

amounts of constitutional decision-making concerning matters for which courts provide little or no guidance. The choice between strong and weak judicial review affects the size of the domain of the legislature's constitutional decision-making[17] but not the norms that should govern that domain.

More generally, the Special Norms Thesis's claim that Congress should conduct itself specially when engaging in constitutional decision-making neither presupposes nor determines the type of review a court should give to Congress's constitutional decisions. The three Special Norms this Article identifies guide Congress, and only Congress. As such, the Special Norms supplement, but do not displace, the legal doctrines that courts apply.[18] Nonetheless, the Special Norms Thesis may have implications for how judicial review should be operationalized. For example, compliance with the Special Norms may increase the deference-worthiness of Congress's constitutional judgments.

The Article unfolds in six parts. Part I identifies the domain of Congress's constitutional decision-making, showing both that it is larger than typically understood and that it goes far beyond what is naturally understood to consist of "constitutional interpretation." Part II clarifies the status of the Special Norms. They are not themselves constitutional requirements,[19] constitutional conventions,[20] or even non-constitutional positive law. Rather, the Special Norms are norms: behavioral standards that should discipline members of Congress, even if they are not positive law.[21] The Special Norms are not presently binding on Congress because they have neither been widely accepted nor are they generally complied with. But, as is true of all norms, the Special Norms could arise and

17 Weak judicial review, where courts' constitutional judgments do not *ipso facto* trump the legislature's, expands the domain. *See id.* at 1355–56.

18 Whereas courts' legal doctrines may be conceptualized as the script that courts follow, the Special Norms are Congress's script. Each institution plays a distinct role, and, when acting together, they comprise the multi-institution system that ultimately determines what the Constitution allows, requires, and prohibits.

19 With one exception. *See infra* Section IV.B.

20 *See* Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 999 (2008) (defining constitutional convention as "a practice that is widely understood as a settlement of a constitutional question and that is regular or stable over time").

21 Norms can be codified in positive law but need not be. *See infra* notes 57–58 and accompanying text.

become binding in the future, outside of formal lawmaking mechanisms, if they become generally accepted and are largely complied with.[22] The Article aims to serve as a "norm-entrepreneur" that seeks to "chang[e] social norms."[23]

Parts III–V comprise the Article's analytic core. Part III provides five arguments for the Special Norms Thesis's negative claim that Congress's constitutional decision-making should not be taken under the thin constraints that apply during ordinary politics. Part IV establishes the Special Norms Thesis's affirmative claim by fleshing out the contents of the Special Norms that should discipline Congress's constitutional decision-making.[24] Part V responds to four possible objections to the Special Norms Thesis, including the criticism that it is too impractical.[25] In so doing, Part V clarifies how the Special Norms operate in difficult cases and identifies the Special Norms' likely costs.

Part VI provides a final accounting of the Special Norms Thesis's benefits and costs. That accounting is the predicate for the Article's all-

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22 Even after this, the Special Norms should not be judicially enforceable, though they might be enforced by Congress. *See infra* notes 88–89 and accompanying text.

23 *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996). As such, the Special Norms Thesis does not depend on the historical facts of Congress's current or past practices. But while not determinative, such historical facts might prove illuminating. For even if contemporary congressional practice bears little resemblance to the Special Norms, earlier congresses may have substantially comported with the Special Norms Thesis when they considered constitutional questions. *See generally* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997) (describing an extended time during which Congress seems to have approached its constitutional decision-making with care and responsibility); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829 (2001) (same); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829–1861 (2005) (same); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861 (2005) (same); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1076 (2006) (referring to the so-called Decision of 1789 as "an episode when Congress approached its constitutional duties with deliberation, sincerity, and sophistication"). Bruce Ackerman's "constitutional moments," when the People engage in informal constitutional amendment, likewise are characterized by decision-making that is more responsible and public-oriented than what occurs during ordinary political times. *See infra* note 182 and accompanying text. In future work, I plan to examine to what extent the Special Norms Thesis reflects, or is in tension with, the historical practice of American constitutionalism.

24 The Special Norms Thesis's negative claim applies to all governmental institutions, while its affirmative claim is institution-sensitive. *See supra* note 15.

25 *See supra* Section V.D.

things-considered conclusion that the Special Norms should discipline Congress's constitutional decision-making.

I. THE DOMAIN OF CONGRESS'S CONSTITUTIONAL DECISION-MAKING

The Special Norms Thesis depends upon an understanding of the domain to which the Special Norms apply. The congressional activity most straightforwardly falling within the constitutional domain is "propos[ing] Amendments to this Constitution" and specifying whether ratification is to be by state legislatures or state conventions.[26] But Congress's role in producing new constitutional text does not exhaust its constitutional decision-making. A wide range of *post-production* activities—actions having nothing to do with amending the Constitution's text—requires that Congress engage in constitutional decision-making. Such constitutional decision-making may ultimately generate legislation or lead to the conclusion that a bill should not be enacted. And a large part of Congress's post-production constitutional decision-making has nothing to do with creating statutes.

Because the domain of Congress's constitutional decision-making is far broader than amending the Constitution, Article V's supermajority requirement, which demands higher-than-ordinary consensus, is not applicable to most of Congress's constitutional decision-making. Only the Special Norms discipline Congress's post-production constitutional decision-making.[27] It is important to be clear about what falls into this category.

A. *The 'May' Question*

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[26] *See* U.S. CONST. art. V. This Article does not consider the Special Norms Thesis's relationship to the initial drafting and ratification of a constitution. In fact, the Special Norms Thesis may not apply, or at the very least may apply differently, to a constitution's creation. *See generally* Rosen, History: Limit or License, *supra* note 5. Accordingly, Michael Klarman's masterful, partially deflationary account of the drafting and ratification of the U.S. Constitution has no direct bearing on the Special Norms Thesis. *See* MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016); *see also supra* note 23 (providing another reason why historical facts cannot disprove the Special Norms Thesis).

[27] Both the Special Norms and Article V apply to Congress's activities in connection with amending the Constitution.

One circumstance of post-production congressional constitutional decision-making is the threshold determination of whether the Constitution allows Congress to undertake an action it is contemplating. This determination has two constitutional components: (1) whether the Constitution grants Congress power to undertake the contemplated action, and, if so, (2) whether some constitutional limit disallows the action. These power and limit determinations together answer what might be called the *may question* of whether Congress may act. Answering the *may question* is an activity that belongs to the domain of constitutional decision-making. Answering the *may question* belongs to post-production decision-making because it is not connected to altering constitutional text.

Answering the *may question* does not itself result in any affirmative congressional action whatsoever: the answer does not generate legislation[28] or any other congressional action. An affirmative answer to the *may question* opens the door to two other questions that jointly determine what, if anything, Congress does: the *whether question* (of whether Congress should act), and (if so) the *what question* (of what exactly Congress should do). Almost always, answering the *whether* and *what questions* consists of wholly non-constitutional decision-making. For instance, once it is determined that Congress has power to enact tax legislation, whether Congress passes tax reform and what reform it should pass exclusively belong to the domain of non-constitutional politics.

So, while all congressional action contains at least one constitutional ingredient—an answer to the *may question*—*whether* Congress acts and *what* it does are almost always determined by wholly non-constitutional considerations. But not always.

B. *The* 'Whether' *and* 'What' Questions

Determining *whether* Congress should act sometimes belongs to the constitutional domain. So, sometimes, does determining *what* Congress should do. These are additional circumstances, beyond

28 Though a negative answer to the *may question* should lead to congressional inaction.

answering the *may question*, of Congress's post-production constitutional decision-making.

1. General Properties of the *Whether* and *What Questions*

The *whether* and *what questions* have several interesting, non-obvious properties. First, each question's legal status (constitutional or non-constitutional) is fully independent of the other: only one, both, or neither may belong to the constitutional domain. As indicated above, most of the time the *whether* and *what questions* belong to the non-constitutional domain. Other times, however, constitutional considerations determine whether Congress must act, though they do not determine what Congress must do; in such a circumstance, the *whether question* belongs to the constitutional domain, while the *what question* inhabits the domain of ordinary politics. Other times, constitutional considerations do not require congressional action, but the substance of Congress's discretionary action is determined by constitutional considerations. And sometimes constitutional considerations both demand congressional action and determine what those actions should be.

Next, the *whether question* is always binary—in each instance it belongs either to the constitutional or non-constitutional domain. This is because constitutional considerations either require congressional action or they do not. By contrast, the *what question* may belong to both domains insofar as constitutional considerations may be *among* the determinants of what Congress should do. When only some of the *what questions*' determinants belong to the constitutional domain, the Special Norms Thesis applies only to those constitutional determinants.

There are two broad circumstances when the *whether* and *what questions* belong to the constitutional domain: in relation to (1) tending to constitutionally-created or constitutionally-recognized institutions (*institution-tending*) and (2) tending to constitutional rights (*rights-tending*).

2. Institution-Tending

The Constitution creates an array of federal institutions (including Congress, the presidency, and the Supreme Court) and recognizes pre-

existing institutions (most importantly the states). These institutions must be tended to if they are to survive and function. Congress's *institution-tending* takes one of three forms: *enabling*, *building-out*, or *protecting* these institutions. Much of Congress's institution-tending belongs to the domain of post-production constitutional decision-making.

a. Enabling Constitutional Institutions

Congress's constitutionally-assigned powers sometimes need to be exercised if other constitutionally-created or recognized institutions are to be properly *enabled*. Determining *whether* it should exercise these enabling powers, and many ingredients of the determination of *what* it should do, belong to the constitutional domain.

For example, the Constitution vests the Senate with the power to give "Advice and Consent" concerning the President's nominees for officers of the United States.[29] Because officers are necessary for the executive and judicial branches to properly function, the confirmation of nominees belongs to the constitutional domain. This does not mean that a Senator's confirmation decision is guided exclusively by constitutional considerations. But it does mean that the confirmation decision comprises multiple constitutional ingredients. Those constitutional components are not limited to the trivial *may question* of whether the Senate has power to give advice and consent: Of course it does. But because officers are necessary for the executive and judicial branches to be properly enabled, the *whether question* also belongs to the constitutional domain. So, whereas political considerations alone determine whether Congress should enact tax reform,[30] the same is not true as regards Congress's confirmation decisions. Likewise, components of the *what question* (i.e., as to whether a particular nomination ought to be confirmed) can include constitutional components.

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29 U.S. CONST. art. II, § 2, cl. 2.

30 A decision guided solely by the norms of ordinary politics, which permits no-holds-barred warfare and obstructionism, accordingly, would not violate the Special Norms. By contrast, Pozen argues that obstructionist behavior in relation to ordinary politics can run afoul of constitutional bad faith. *See* Pozen, *supra* 14, at 929–30.

Impeachment is another circumstance of constitutional decision-making that belongs to the category of enabling constitutional institutions. Improper exercise of the impeachment power can *under-enable* or *over-enable* an institution, depending on the circumstance. Intemperate or unprincipled exercises of the impeachment power risk under-enabling constitutional institutions insofar as undue fears of impeachment may paralyze, or otherwise interfere with, officers subject to Congress's impeachment powers. Improperly aggressive exercise of the impeachment power also risks under-enabling the republican character of our government insofar as it would unduly disturb citizens' electoral choices. In the other direction, Congress's refusal to impeach can disable constitutional institutions. Improper refusal to impeach risks usurpations of power by the impeachment-worthy officer (*over-enabling*), as well as long-term damage to the prestige and power of the institution occupied by the impeachment-worthy officer (*under-enabling*). For these reasons, the *whether question* in relation to impeachment, as well as many ingredients of the *what question*, belong to the constitutional domain.

b. Building-out Constitutional Institutions

Many constitutional institutions are substantially underspecified by the Constitution and, for that reason, require building-out.[31] Congress has power to build-out these institutions by enacting statutes.[32] Though the build-outs themselves are not constitutional text, many of the considerations that inform them—both the *whether* and many of the *what* determinations—belong to the constitutional domain.

For example, Congress has power under the Constitution's Effects Clause[33] to enact choice-of-law legislation that would determine when a forum state may apply its own law rather than a sister state's.[34] Such legislation would literally help construct our system of horizontal

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31 Here, I adopt and extend Jack Balkin's helpful locution of building-out. *See* JACK M. BALKIN, LIVING ORIGINALISM 5–6 (2011).

32 Congress is not the only governmental institution with build-out power. For example, President Washington played this role in respect of the presidency. *See* Stephen E. Sachs, *The "Unwritten Constitution" and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1806–08.

33 U.S. CONST. art. IV, § 1.

34 *See* Mark D. Rosen, *Choice-of-Law as Non-Constitutional Federal Law*, 99 MINN. L. REV. 1017, 1093–95 (2015).

federalism in two respects. First, such legislation would create the necessary legal infrastructure that is called for by the states' political relationships. When a dispute straddles more than one state, there frequently arise difficult choice-of-law questions as to which state's law applies. Such uncertainty is undesirable and often leads to costly litigation battles that muck up our interstate system. A federal choice-of-law statute that resolved such uncertainties would build-out our system of horizontal federalism by providing legal infrastructure that would help operationalize our interstate system.[35]

Second, choice-of-law legislation has the power to literally determine the fundamental character of the sister states' political relations.[36] States may have diverse policies in relation to matters as to which neither the Constitution nor federal law demands nationwide uniformity.[37] But one state's restrictive law (say, a ban on a certain type of gambling) often can be substantially undermined if its citizens can simply cross a border and avail themselves of a sister state's more permissive laws.[38] States can address this risk of circumvention if they can extraterritorially apply their laws to their citizens when they are out-of-state. The Effects Clause gives Congress power to decide whether and when states have this extraterritorial power.[39] Congress's decision (which it has not yet made) would be a substantial determinant of what type of federal union we have: should we have a union in which states can require their citizens to conform with their idiosyncratic laws wherever they might find themselves, or a union in which the citizen of any state may avail himself of the law of any other state simply by traveling there?[40] Determining *whether* to create choice-of-law

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35 *See id.* at 1088–92.

36 Such a statute may also help protect the system of horizontal federalism insofar as clarity may reduce interstate tensions. For a sustained analysis of the many ways Congress might build out horizontal federalism, see Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007).

37 Mark D. Rosen, *"Hard" or "Soft" Pluralism?: Positive, Normative, and Institutional Considerations of States' Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 745 (2007) [hereinafter Rosen, *"Hard" or "Soft" Pluralism?*].

38 *Id.* at 745.

39 *See* Mark D. Rosen, *Marijuana, State Extraterritoriality, and Congress*, 58 B.C. L. REV. 1013, 1020–24 (2017) [hereinafter Rosen, *Marijuana*].

40 *See* Rosen, *"Hard" or "Soft" Pluralism?*, *supra* note 37; Rosen, *Marijuana*, *supra* note 39, at 1016–17.

legislation,[41] and many considerations that influence *what* its contents should be, accordingly belong to the constitutional domain.[42] Such legislation would be part of the post-production constitutional work of building-out our country's horizontal federalist system.

c. Protecting Constitutional Institutions

The institutions that the Constitution recognizes and creates can come under threat, and for that reason may require *Protection*. Determining whether constitutional institutions require Protection, and, if so, what should be done, fall within the constitutional domain. Congress's powers and responsibilities under the Guarantee Clause are an example of congressional decision-making that belongs to this constitutional category. The Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[43] Under contemporary doctrine, the Guarantee Clause is a non-justiciable political question whose enforcement rests exclusively with Congress.[44] Thus constitutional doctrine recognizes that it is Congress's responsibility to determine if a state does not have a republican form of government, and, if so, what should be done. Answering these *whether* and *what* questions belongs to the constitutional domain.[45] What results from this instance of Congress's constitutional decision-making might be a statute,[46] or something else entirely. For example, Congress has enforced the Guarantee Clause by refusing to seat people elected from states that Congress did not deem to be republican.[47]

3. Rights-Tending

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41 *See infra* Section IV.B (discussing the circumstances that give rise to a constitutional duty for congress to act).

42 *See* Rosen, *Marijuana*, *supra* note 39, at 1031–37.

43 U.S. CONST. art. IV, § 4.

44 *See* Baker v. Carr, 369 U.S. 186, 217–21 (1962).

45 For other examples of protecting constitutional institutions, see Mark D. Rosen, *Can Congress Play a Role in Remedying Dysfunctional Political Partisanship?*, 50 IND. L. REV. 265, 269–74 (2016) (discussing Congress's role in protecting the constitutionally-created and recognized institutions of representative democracy in federal and state governments).

46 *See id.* at 269–73.

47 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 366 (2005).

The Constitution creates an array of rights that also must be tended to if they are to survive and function. Congress's *rights-tending* takes one of two forms: *adequately realizing* constitutional rights and *resolving conflicts*. Much of the decision-making connected to *rights-tending* belongs to the domain of post-production constitutional decision-making.

a. Adequately Realizing Constitutional Rights

The rights declared in the Constitution's text can be inadequately realized in the real world relative to a minimal plausible baseline of what the constitutional right appropriately entails.[48] Consider the Fifteenth Amendment's guarantee that the right to vote not be denied or abridged on account of race, color, or previous condition of servitude. For nearly a century after the Fifteenth Amendment's adoption, state laws prevented a substantial percentage of African-American citizens from voting.[49] Congress properly plays a role in determining *whether* a constitutional right is adequately realized, and that determination falls within the domain of constitutional decision-making. If Congress believes a right is inadequately realized, many determinants of its decision of *what* it should do likewise belong to the constitutional domain. The Voting Rights Act of 1965[50] is an example of Congress's post-production constitutional decision-making so as to *Adequately Realize* constitutional rights.

b. Resolving Conflicts

Two types of conflicts can arise in relation to constitutional rights. First, virtually all constitutional rights are non-absolute in the sense that they can be regulated to achieve sufficiently important countervailing interests.[51] For example, strict scrutiny permits a right to be regulated or

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48 *See generally* LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE (2004).

49 *See generally* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 69–84 (3d ed. 2007); DAVID A. STRAUSS, THE LIVING CONSTITUTION 128–29 (2010).

50 Pub. L. No. 89-110, 79 Stat. 437 (1965)

51 For a thorough exploration of this property of rights, see Mark D. Rosen, *When Are Non-Absolute Constitutional Rights* McCutcheon*, Conflicts, and the Sufficiency Question*, 56 WM. & MARY L. REV. 1535 (2015).

infringed to pursue a compelling government interest.[52] In so doing, strict scrutiny understands there can be conflicts between constitutional rights and countervailing interests, and allows countervailing interests to prevail so long as they rise to the level of a "compelling government interest."[53] Before Congress passes legislation that regulates a constitutional right that is judicially protected by strict scrutiny, Congress ought to assess whether it believes the interest behind the legislation is sufficiently important to qualify as a compelling governmental interest. Resolving conflicts between constitutional rights and countervailing interests by ensuring that the countervailing interest is compelling belongs to the domain of post-production constitutional decision-making.

Second, constitutional rights can sometimes come into conflict with one another. Consider the circumstance of a gay couple that asks a baker with religious objections to create their wedding cake. This is plausibly described as presenting a conflict between the gay couple's equality rights and the baker's religious freedom or speech.[54] Resolving

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52 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

53 Any regulation also must be narrowly tailored to achieving the compelling interest, of course. Congress's judgment as to the means it adopts also belongs to the constitutional domain. *See infra* notes 142–47 and accompanying text.

54 I fully endorse the statement above in the text, though it might appear inconsistent with legal doctrine in two respects. First, on account of *The Civil Rights Cases*, it might be thought that constitutional rights cannot be implicated insofar as no state law governs the couple and baker, 109 U.S. 3 (1883). Second, on account of *Employment Division v. Smith*'s rejection of strict scrutiny for most free exercise claims, 485. U.S. 660 (1988), it might be thought that religious freedom could not be at issue. Though this Article is not the place to fully respond to these concerns, three points are worth making. Two are in response to the first concern: (1) state action unquestionably is present in states that have anti-discrimination law that protects either the baker or the couple; and, more controversially, (2) insofar as citizenship rights can impose obligations on citizens, *see* Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 ST. LOUIS U. L.J. 555, 600, 606–08 (2006) (quoting Senator Wilson's and Sherman's understandings of citizenship rights), it follows that citizens' acts can undermine other citizens' constitutional rights. As to the second concern, (3) the full scope of a constitutional right is not equivalent to what is judicially enforceable, *see generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978), and *Smith*'s holding is best understood as being tied to limits on judicial enforceability. More generally, the second and third points account for the legislature's role in the subdomain of constitutional decision-making that this Article calls the Adequate Realization of Constitutional Rights. (I do not mean to suggest that the legislature has the exclusive role in this subdomain. Courts, executives, and states also have crucial roles to play).

conflicts between constitutional rights is an activity that belongs to post-production constitutional decision-making.

II. NORMS

A. *What They Are, and How They Arise*

Because the Special Norms are norms, it is necessary to clarify what norms are. A norm is a "behavioral standard that individuals feel obligated to follow," and that generally is followed.[55] Norms are an important mechanism for coordinating behavior.[56] Those coordination benefits can serve as an incentive for norm-creation.

Norms are distinct from law. A norm can be generated by law or incorporated into law.[57] But norms also exist outside of law. They can arise without formal adoption or formal enforcement and may even be contrary to positive law.[58] I shall refer to a norm that is not incorporated into positive law as a *Bare Norm*. A norm's existence depends upon substantial compliance but does not require perfect compliance.[59] And norms may be applicable to only a subset of the population.

It might be wondered why people would restrict themselves by complying with norms that have been neither formally adopted nor are formally enforced. But the fact that people do so is the uniformly

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55 Though I quote here from Richard McAdams, my substantive definition diverges somewhat from his. *See* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338; SOCIAL NORMS, NONLEGAL SANCTIONS, AND THE LAW 101, 381 (Eric A. Posner ed., 1997) ("[B]y *norm* I mean a decentralized behavioral standard that individuals feel obligated to follow, and generally do follow . . . [to gain the esteem of others], *or* because the obligation is internalized, or both."). My usage closely tracks Allan Gibbard's and Scott Shapiro's. *See* ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 70 (1992) (defining norm as "a formulation of a pattern which, in effect, controls the organism's behavior" that can be formulated as a prescription or imperative by a sophisticated observer of the behavior); SCOTT J. SHAPIRO, LEGALITY 41 (2013) (defining norm as "any standard—general, individualized, or particularized—that is supposed to guide conduct and serve as a basis for evaluation or criticism.").

56 *See* GIBBARD, *supra* note 55, at 26–27; SHAPIRO, *supra* note 55, at 41.

57 Norms thus may be formally adopted and/or formally enforced or otherwise institutionalized.

58 *See, e.g.*, SHAPIRO, *supra* note 55, at 41.

59 *See* GIBBARD, *supra* note 55, at 73–80.

accepted understanding of the norms literature and is unquestionably true.[60] It is natural to ask how norms, particularly those that are neither formally adopted nor enforced, get their grip on people such that they guide behavior.

The norms literature identifies two mechanisms that generate norms: internalization and acceptance. Internalization is a biological adaptation for coordination[61] that occurs as people mimic, often unwittingly, patterns of behavior exhibited by others.[62] The mechanism of acceptance, by contrast, depends upon language and intentionality. Language allows for "shared evaluation" of not only the immediate situation, but also "past, future, and hypothetical situations."[63] Through language, people "[w]ork[] out in a community what to do, what to think, and how to feel in [hypothetical] situations," and in so doing come to accept norms that are to govern that situation.[64] Acceptance is not a unanimity requirement; it is enough that the norm be widely accepted by a group, and that it be widely known that the norm is widely accepted.[65] The normative discussion through which a community converges on a norm need not deeply engage every individual. People "tend[] to be influenced by the avowals of others,"[66] and the emerging consensus of key players may bring others along. Despite the complicated realities of life that people sometimes insincerely avow norms and that behavior does not always track even sincerely avowed norms,[67] norms exist and substantially guide behavior much of the time.

B. *Application to the Special Norms Thesis*

We now are in a position to understand the Special Norms Thesis and the burdens it bears. This Article aims to generate an account of

60 *See generally* sources cited *supra* note 55.

61 *See* GIBBARD, *supra* note 55, at 70–71.

62 *See id.* at 70.

63 *Id.* at 72.

64 *Id.*

65 *See id.* at 76 n.18.

66 *Id.* at 75.

67 *See id.* at 73–80.

norms that properly apply to members of Congress when they engage in constitutional decision-making. It does not claim that our representatives already have internalized such norms, but instead argues that they should accept these norms. This Article hopes to persuade readers that these norms should be accepted and hopes that this insight carries over to Congress.

The Article does not claim that the Special Norms can be tied to any formal legal texts,[68] that Special Norms are implied by the Constitution, or that they are constitutional conventions.[69] Indeed, the Special Norms would not be presently binding on Congress to the extent that they have not been widely accepted and are not generally complied with.[70] But, as is true of norms generally, the Special Norms could arise in the future outside of formal lawmaking mechanisms, and could then become binding on members of Congress.

There are several mechanisms by which the norms might be adopted by Congress. The question of whether there should be Special Norms might become a subject of normative discussion of Congress at large, or of an influential subset of its members. Or the conclusion that such norms exist may become so entrenched in society that our representatives internalize the conclusion. Precisely how such norms come to be accepted is important but is not this Article's subject. This Article instead focuses on the antecedent question of whether there ought to be such norms and, if so, what their contents should be.

Regardless of what transfer mechanism may be deployed, it must be acknowledged that considerable work must be done at the start by those who hope to propagate a new norm. A skeptic might grab this concession, point to the many self-serving people who populate Congress and to today's hyper-partisan political climate,[71] and declare

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68 With one exception: the norm of Proactivity sometimes may be of constitutional status. *See infra* Section IV.A.

69 *See supra* note 20.

70 I take no position here on the empirical question of to what extent Congress presently acts consistently with the Special Norms Thesis.

71 *See, e.g.*, Carroll Doherty, *Key Takeaways on Americans' Growing Partisan Divide Over Political Values*, PEW RES. CTR. (Oct. 5, 2017), https://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values [https://perma.cc/R4Z9-N265]; *The Partisan Divide on Political Values Grows Even Wider*, PEW RES. CTR. (Oct. 5,

the Special Norms Thesis a politically naïve, hopeless pipe dream—essentially a self-defeating proposal.[72]

This is unduly cynical. Successfully generating congressional norms is not dependent on the unrealistic assumption that members of Congress are self-sacrificing angels. For example, if Special Norms become strongly entrenched in the public's expectations, members of Congress may be inclined to act in accordance with them, if only to receive public acclamation and shore up their legacy. Alternatively, some influential members may come to understand the need for the Special Norms and convince sufficient numbers of their colleagues of such need, or at least of the wisdom of acting in accordance with them. Regardless of how acceptance of the Special Norms were to begin, sustaining them would require far less work, and correspondingly require far less in the way of self-sacrifice than is necessary to initially entrench them. It is not unusual for norms to be self-sustainingly internalized after their acceptance. So, while the case for the Special Norms is challenging, and strongly dependent upon norm entrepreneurs at its start, this does not mean the Special Norms are a pipe dream.

C. *Judicial Temperament, Reflective Equilibrium, and Norm Generation*

The role-specific norms that this Article champions are less mysterious than might appear at first. Indeed, role-specific norms can be found elsewhere in American government. Consider the behavioral standards applicable to judges, known as judicial temperament.[73] The primary source of the judicial temperament requirement is not formal legal materials, but expectations that have been developed and taken root over time. Further, the role-specific norm of judicial temperament

2017), https://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider [https://perma.cc/92WH-FPMW].

72 *See* Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV 631, 636–40 (2006).

73 *See generally* Terry A. Maroney, (What We Talk About When We Talk About) Judicial Temperament (January 2018) (unpublished manuscript), https://www.law.berkeley.edu/wp-content/uploads/2018/01/Paper-Maroney.pdf [https://perma.cc/X24T-QK26].

was not generated only by judges, but was developed with the assistance of other government officials (especially those who appoint judges), scholars, and the public. To this day, judicial temperament requirements are not primarily grounded in formal legal texts,[74] and are not primarily enforced through litigation or impeachment. Judicial temperament is primarily enforced on the front-end by those who select judges, and by judges themselves insofar as they have accepted and internalized the norm.

The norm of judicial temperament has another informative feature. As entrenched as it is, the contents of the norm of judicial temperament remain substantially unclear to this day.[75] Yet judicial temperament has been able to shape expectations and behavior throughout the long era during which its requirements have been substantially unspecified.

But how could judicial temperament have "serve[d] as a shared standard of conduct and justification"[76] if its contents have been so unspecified? To begin, people may "share a clear enough idea of what the non-normative conditions are that fulfill those conditions in most cases."[77] In other words, people know what falls outside the bounds of judicial temperament when they see it, even if they cannot articulate a clear principle that fully describes problematic judicial behavior. The "I know-it-when-I-see-it" character does not undermine the importance of the abstract category of judicial temperament. To the contrary, consensus as to the abstract category's existence grounds the normative conclusion that specific actions inconsistent with judicial temperament are wrongful.

Far from being a liability, judicial temperament's longstanding lack of specification may have been a necessary stage before its contents were understood. Fleshing out judicial temperament's contents is an exercise in normative thinking, and much normative thinking occurs through

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74 The most complete formulation is found in a series of standards promulgated by the American Bar Association. *See id.* at 2 n.8 (citing AM. BAR ASS'N, ABA STANDING COMMITTEE ON FEDERAL JUDICIARY: WHAT IT IS AND HOW IT WORKS 3 (2009)).

75 *See generally id.*; Lawrence B. Solum, *A Tournament of Virtue*, 32 FLA. ST. U. L. REV. 1365 (2005); JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 6–7 (2007) ("Elusive as it is important, judicial temperament is notoriously hard to define.").

76 T.M. SCANLON, BEING REALISTIC ABOUT REASONS 118 (2014).

77 *Id.*

the process that John Rawls famously dubbed the reflective equilibrium.[78] Tom Scanlon helpfully explains that process: "One begins by identifying a set of considered judgments, of any level of generality, about the subject in question. These are judgments that seem clearly to be correct and seem so under conditions that are conducive to making good judgments of the relevant kind about this subject matter."[79] These considered judgments correspond to the behaviors that were initially understood to be required by judicial temperament. Reflective equilibrium's next step is to "formulate general principles that would 'account for' these judgments."[80] This second step corresponds to the effort to articulate a more general, abstract statement of what judicial temperament requires. Arriving at a satisfactory general formulation typically is not immediately "successful," and divergences between principles and considered judgments are remedied by some combination of abandoning a particular considered judgment and modifying the principle.[81] Indeed, "working back and forth between principles and judgments" may not lead to a final resting point, but may "continue[] indefinitely."[82]

But why should "the fact that a judgment is among our judgments in such an equilibrium mean that we are justified in accepting that judgment?"[83] The mere fact of consistency between specific judgments and a principle cannot justify either the judgments or the principle, because consistency can be attained by mindlessly discarding an inconsistent judgment or mindlessly reworking the justifying principle.[84] The justificatory force of an equilibrium between judgments and principle "must lie in the details of how the equilibrium is reached."[85] In other words, it is "the *process of pursuing* reflective

78 *See* JOHN RAWLS, A THEORY OF JUSTICE 20 n.7 (1971).

79 SCANLON, *supra* note 76, at 76–77.

80 *Id.* at 77.

81 *See id.*

82 *See id.*

83 *Id.* at 79.

84 *See id.*

85 *Id.* Scanlon convincingly argues that those details extend beyond process, and beyond the subjective "credence attached to these judgments by the person carrying out the process," to include "the credibility of the considered judgments . . . ." *Id.* 82. "Credibility" includes an assessment of the considered judgment's substantive plausibility. *See id.* at 82–84.

equilibrium" that is critical to securing trustworthy conclusions as to both considered judgments and principles.[86]

This account of reflective equilibrium can help us understand how even an unspecified concept of judicial temperament could have performed substantial work in guiding expectations and behavior. Even in its unspecified state, the concept would have put people on the alert for paradigmatic instances of behaviors inconsistent with judicial temperament. Scholars are now trying to generalize from these agreed-upon clear instances (i.e., considered judgments) to generate more abstract formulations (principles) that can account for the agreed-upon judgments.[87] There likely will be a toggling back and forth between the considered judgments and the principle as each is adjusted in the search for a stable reflective equilibrium. Possibly an ongoing process rather than a final resting state, this back-and-forth may be what permits the generation of ever-deepening understandings of judicial temperament.

D. *Implications for the Special Norms Thesis*

The example of judicial temperament is highly instructive to the Special Norms Thesis. Judicial temperament is an example of development of behavior-shaping role-specific norms outside the formal mechanisms of law creation and enforcement, by some combination of acceptance and internalization. The success of the norm of judicial temperament suggests that other role-specific norms can also be developed, such as the Special Norms.

The example of Judicial Temperament also shows that a norm can have disciplining effects even while its contents are substantially unspecified. In fact, not prematurely codifying a norm's contents may be critical to reflective equilibrium, the very process that enables the norm's contents to be progressively developed. Because the notion that Special Norms govern constitutional decision-making has not yet been widely recognized or followed in practice, it would be unwise for any institution to immediately codify them. Better to allow the incremental process of reflective equilibrium to run its course, which is best

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86 *Id.* at 84.

87 *See sources* cited *supra* note 75.

accomplished by not formalizing the Special Norms as a matter of positive law at this point. Instead, after making members of Congress generally aware that Special Norms should govern their constitutional decision-making, Congress should be left to work out the Special Norms' contents through reflective equilibrium's iterative toggling back and forth between—and while modifying—shared considered judgments and more abstract articulations of the governing norms. While Parts IV and V of this Article provide a substantial first-cut at identifying the Special Norms' contents, they are only intended as a preliminary and provisional effort.

After some time, the Special Norms might become binding positive law, either by Congress adopting them as its internal rules[88] or by their becoming a constitutional convention.[89] Either way, courts should not have power to enforce the Special Norms because they govern Congress's purely internal operation. More plausibly, Congress might police compliance with the Special Norms at some future time.

III. WHY CONGRESS'S CONSTITUTIONAL DECISION-MAKING SHOULD BE DISCIPLINED BY SPECIAL NORMS

Part III presents five arguments why constitutional decision-making in large diverse democracies should be governed by Special Norms, not the thin norms applicable to non-constitutional decision-making.[90] After elaborating the five arguments in Sections A–E, Section F clarifies the precise relationships among them and the maximal limits of what the five arguments can establish.

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88 For example, former Senator Russ Feingold proposed that the Senate adopt rules requiring that members consider the constitutionality of their proposed actions. Russ Feingold, *The Obligation of Members of Congress to Consider Constitutionality While Deliberating and Voting: The Deficiencies of House Rule XII and a Proposed Rule for the Senate*, 67 VAND. L. REV. 837, 843, 850 (2014).

89 *See* Pozen, *supra* note 14, at 930 ("Constitutional conventions are unwritten norms of government practice that are regularly followed out of a sense of obligation but are not directly enforceable in court.").

90 Most, though not all, of the arguments apply to all governmental institutions. The first argument applies only to legislatures.

A. *The Argument from Considered Judgment (First Argument)*

1. What the First Argument Requires, and What it is Capable of Establishing

First, there is a substantial consensus—or there would be if people thought about it—that Special Norms should apply to some of Congress's constitutional decisions. These *Considered Judgments* can serve as starting points for developing, through the iterative process of reflective equilibrium, the more abstract principles that justify and determine the contents of the Special Norms. As such, the first argument appeals to the reader's sensibilities. Its claim is that if the question were posed to the reader under favorable circumstances—outside the heat of political battle, when the reader has time to calmly consider the matter—it would be agreed that some of Congress's constitutional decisions should not be made under the gossamer-thin norms that govern ordinary politics. Under what I will call the norms of *Hardball Politics* that apply to ordinary politics, a member of Congress may seek legislation that delivers benefits only to her preferred constituencies, and nothing (or worse) to unsupportive voters. Or she may oppose legislation only to politically harm the President or other legislators. The Argument from Considered Judgment appeals to the reader's sensibilities to conclude that some of Congress's constitutional decisions should not be taken under the norms of Hardball Politics.

The Argument from Considered Judgment is a bare-bones argument that can be established on the basis of only minimal conditions. It does not demand a rationale that explains its conclusion, only agreement as to the conclusion, because generating the principle that explains the Considered Judgment occurs later in the reflective equilibrium process. Likewise, the argument does not require that the contents of the Special Norms be identified. Nor does it require clarity as to the scope of the domain of constitutional decisions to which the Special Norms apply. Furthermore, the Argument from Considered Judgment acknowledges the possibility that one or more initial Considered Judgment may be subject to refinement—even rejection—as reflective equilibrium unfolds.

The first argument's bare-bones quality is both a strength and weakness. Its strength lies in the possibility for a streamlined argument

shorn of the complexities of justifying the Special Norms and specifying their contents—details that may be impossible to specify early on.[91] But the first argument's weakness is that it cannot be definitive. This is because while the first argument relies on the intuitions that give rise to Considered Judgments, the argument acknowledges the possibility that reflective equilibrium may show that some initial Considered Judgments were erroneous. This is why the Special Norms Thesis does not rest only on the first argument.

a. The First Argument

The first argument is established by showing a Considered Judgment that some of Congress's constitutional decisions should not be taken under the norms of Hardball Politics. Consider Part I's examples of Congress's constitutional decision-making. If people were asked under conditions conducive to making good judgments, I submit it would be agreed that none of those decisions should be rendered under Hardball Politics. For example, senators should not refuse to confirm the President's nominees for officers for the purpose of undermining his presidency. It would be wrongful for Democrats to initiate impeachment for the purpose of damaging a Republican president or the Republican party. And it would be wrongful for congressional Republicans to refuse to impeach an impeachment-worthy Republican president to avoid damaging their party or preserve their political majority.

While the first argument is largely speculative by its very nature, there is some evidence to back it. Consider the popular responses to the divergent approaches to the conflict between equality and religious freedom that were taken by the Indiana and Utah legislatures.[92] There was unitary Republican control in both states. Republicans in Indiana's legislature flexed their political muscle in classic Hardball Politics fashion, taking no input from the LGBT community and making no

91 Reflective equilibrium presupposes the impossibility of specifying from the get-go the principles that justify initial Considered Judgments. *See supra* notes 76–86 and accompanying text.

92 Though these examples come from state legislatures, their lessons fully carry over to Congress.

apparent effort to accommodate them.[93] Utah, by contrast, enacted legislation only after there had been a years-long dialogue between the religious and LGBT communities. In marked contrast to the Indiana law, Utah's legislation contained compromises that benefitted all constituents: The legislation simultaneously guarded religious liberty and granted substantial anti-discrimination protections to the LGBT community.[94]

What occurred in Utah substantially tracks what is called for by the Special Norms.[95] But all that need be established for purposes of the first argument is that Utah's Republican supermajority relied on something other than Hardball Politics, and that this has been widely perceived as a good thing. Whereas Indiana's legislation ignited a national firestorm in protest that led Indiana to quickly amend its statute,[96] Utah's legislation

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93 See Dwight Adams, *RFRA: Why the 'Religious Freedom Law' Signed by Mike Pence Was So Controversial*, INDY STAR (Apr. 25, 2018 11:30AM), https://www.indystar.com/story/news/2018/04/25/rfra-indiana-why-law-signed-mike-pence-so-controversial/546411002 [https://perma.cc/9EM3-3B5E]. For more examples in other contexts that track Indiana's approach, see Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2585–89 (2015) (noting that statutes granting broad conscience-based exemptions in the context of reproductive services typically have not included provisions that guarantee women access through other means).

94 *See* Harry Bruinius, *Utah LGBT Antidiscrimination Law Could Chart New Path for Compromise*, CHRISTIAN SCI. MONITOR (Mar. 12, 2015), https://www.csmonitor.com/USA/Politics/2015/0312/Utah-LGBT-antidiscrimination-law-could-chart-new-path-for-compromise [https://perma.cc/FYQ7-XLES] (reporting that Utah voted overwhelmingly to add sexual orientation and gender identity to the state's existing anti-discrimination laws in housing and employment); Niraj Chokshi, *Gay Rights, Religious Rights and a Compromise in an Unlikely Place: Utah*, WASH. POST (Apr. 12, 2015), https://www.washingtonpost.com/politics/gay-rights-religious-rights-and-a-compromise-in-an-unlikely-place-utah/2015/04/12/39278b12-ded8-11e4-a500-1c5bb1d8ff6a_story.html [https://perma.cc/U2GN-7HXB] (reporting that the Utah legislation was preceded by six years of face-to-face dialogue between the Mormon Church and Utah's LGBT community).

95 *See infra* notes 186, 202–16 and accompanying text.

96 Major companies, sports and entertainment figures, and national personalities harshly criticized Indiana, and legions threatened to boycott the state. *See* Michael Muskal & Matt Pearce, *Arkansas, Indiana Governors Sign Amended Religious Freedom Laws*, L.A. TIMES (Apr. 2, 2015, 4:30 PM), https://www.latimes.com/nation/la-na-indiana-religous-freedom-law-revise-20150402-story.html [https://perma.cc/F8RY-BRKS]; Danielle Paquette & Sandhya Somashekhar, *After National Outcry, Indiana GOP Amends Religious Freedom Law*, WASH. POST (Apr. 2, 2015), https://www.washingtonpost.com/national/indiana-gop-moves-to-add-lgbt-protections-to-religious-freedom-law/2015/04/02/b43a7796-d96b-11e4-8103-fa84725dbf9d_story.html?utm_term=.a9eac22dacbf [https://perma.cc/TY76-S888] (noting that

received nationwide praise from across the political spectrum.[97] This is evidence of a Considered Judgment that something other than Hardball Politics should be used to legislatively resolve conflicts between equality and religious freedom.

B. *The Argument from Exclusion (Second Argument)*

Because the Special Norms Thesis claims that Special Norms operate in the constitutional domain, there are two main alternatives to it.[98] Each alternative collapses the distinction between the constitutional and non-constitutional domains. The first, what might be called the *High Equivalence Thesis*, maintains that the "special" norms operative in the constitutional domain properly apply to ordinary politics as well. The second alternative, the *Low Equivalence Thesis*, claims that the same "non-special" norms that govern ordinary politics also operate in the constitutional domain. Disproving these two contenders—what I jointly refer to as the *Equivalence Theses*—would indirectly prove the Special Norms Thesis.[99] Sections III.B–III.E develop this indirect *Argument from Exclusion* for the Special Norms Thesis.

1. The High Equivalence Thesis

Indiana's law "drew heavy fire not only from gay rights activists but also from a wide range of large companies, including Apple, Levi's, the Gap, Angie's List, Eli Lilly, Twitter and Yelp"); Eric Bradner, *NCAA 'Concerned' Over Indiana Law That Allows Biz to Reject Gays*, CNN, https://www.cnn.com/2015/03/25/politics/mike-pence-religious-freedom-bill-gay-rights [https://perma.cc/RJF3-Q8EE] (last updated Mar. 26, 2015, 3:04PM); Richard Lugar, William H. Hudnut, Stephen Goldsmith, Bart Peterson & Greg Ballard, *Fallout from RFRA Very Concerning to Indianapolis Mayors*, INDY STAR. https://www.indystar.com/story/opinion/readers/2015/03/31/fallout-rfra-concerning/70744904 [https://perma.cc/S2H2-K2YM] (last updated Mar. 31, 2015, 8:09 PM).

97 *See* Chokshi, *supra* note 94. This is not to suggest there have not been any dissenting voices. *See, e.g.*, Ryan Anderson, *How to Think About Sexual Orientation and Gender Identity (SOGI) Policies and Religious Freedom* 2–5 (Heritage Found., Paper No. 3194, 2017), https://www.heritage.org/sites/default/files/2017-03/BG3194.pdf [https://perma.cc/9SNR-HQEA].

98 For a third possibility, see *infra* Section V.C.

99 Though the Argument from Exclusion cannot on its own definitively prove the Special Norms Thesis, it helps make the case for it. *See infra* notes 149–52 and accompanying text.

The High Equivalence Thesis posits that the same "special" norms that operate in the constitutional realm properly apply to the entire domain of public decision-making. The most carefully made case for the High Equivalence Thesis can be found in the deliberative democracy literature. Deliberative democracy's most important American scholars, Amy Gutmann and Dennis Thompson, identify extensive "conditions of deliberation" that they claim apply to the "normal processes of democratic politics."[100] Because Gutmann and Thompson believe these requirements operate across all public decision-making,[101] deliberative democracy is a species of the High Equivalence Thesis.

Deliberative democracy has been subject to sharp criticisms,[102] three of which carry over to the High Equivalence Thesis. First, critics argue that deliberative democracy fundamentally misconstrues the domain of politics. The critics argue that politics is "not merely adversarial *but [is] inherently and permanently conflictual*" because it concerns the allocation of the costs and benefits of living collectively.[103]

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100 AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 7 (1996) [hereinafter GUTMANN & THOMPSON, DISAGREEMENT]; *see* AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? (2004) [hereinafter GUTMANN & THOMPSON, WHY?]. Levitsky and Ziblatt likewise propound a form of the High Equivalence Thesis insofar as they argue that norms of institutional forbearance apply to all of Congress' decision-making. *See* LEVITSKY & ZIBLATT, *supra* note 9, at 125–26. But because almost all the examples they invoke to make their case belong to the constitutional domain, *see id.* at 118–43 (discussing the Senate's refusal to appoint any presidential nominees, court-packing, excessive pardoning, and impeachment), their argument establishes a proposition closer to the Special Norms Thesis than the High Equivalence Thesis. Insofar as Levitsky and Ziblatt believe their conclusions apply to the entire domain of politics, they may fall prey to the fallacy of composition. *See generally* Hans Hansen, *Fallacies*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2018), https://plato.stanford.edu/entries/fallacies [https://perma.cc/3RXN-W234] (noting that the fallacy of composition occurs when the "properties of parts . . . are mistakenly thought to be transferable" to the composite).

101 Though Gutmann and Thompson think "not all issues, all the time, require deliberation," GUTMANN & THOMPSON, WHY?, *supra* note 100, at 3, they think that deliberative requirements apply to far more than the constitutional domain, *see, e.g.*, GUTMANN & THOMPSON, DISAGREEMENT, *supra* note 100, at 354 (explaining that deliberative requirements applied to the EPA's decision of whether to close a copper smelting plant); GUTMANN & THOMPSON, WHY?, *supra* note 100, at 17–18 (applying deliberative requirements to determining how a state should allocate its health care resources).

102 *See, e.g.*, DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT (Stephen Macedo ed., 1999).

103 Michael Walzer, *Deliberation, and What Else*?, *in* DELIBERATIVE POLITICS, *supra* note 102, at 58, 66–67 (emphasis added).

Politics' allocative decisions are crucially important because they substantially determine people's material welfare and power, yet they are not susceptible to a determinate calculus that can generate objectively correct answers.[104] Consider, for example, how bankruptcy costs are divided among competing creditors. Many details concerning this cost-allocation decision are zero-sum games; for example, someone must absorb the costs of allowing the bankrupt to have a second chance, and everyone wants that to be the someone else who does not absorb the cost. Lacking objective criteria for dividing the spoils and costs of social living, politics invariably will be "the endless return to these disagreements and conflicts, the struggle to manage and contain them, and, at the same time, to win whatever temporary victories are available."[105] On this view of what the domain of politics consists of, deliberation is largely inapposite to resolving political controversies.[106] Instead, "[t]he democratic way to win is to educate, organize, [and] mobilize . . . more people than the other side has. 'More' is what makes the victory legitimate, and . . . the victory is rarely won by making good arguments."[107] Deliberative democracy's requirements are inapt to decision-making of this sort, as are the Special Norms.

A second criticism is that deliberative democracy does not adequately respect citizens and their preferences. Deliberative democracy harbors a not-so-secret ambition that deliberation will alter citizens' views.[108] Other conceptions of democracy, by contrast, posit that governmental policies should be "made on the basis of nothing

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104 *See id.* (arguing that "[p]ermanent settlements are rare in political life precisely because we have no way of reaching anything like a verdict on contested issues").

105 *Id.* ("Political history . . . is mostly the story of the slow creation or consolidation of hierarchies of wealth and power. People fight their way to the top of these hierarchies and then contrive as best they can to maintain their position."); *see also* Ian Shapiro, *Enough of Deliberation: Politics is About Interests and Power*, *in* DELIBERATIVE POLITICS, *supra* note 102, at 28, 29 (arguing that "disagreements in politics are shaped by differences of interest and power").

106 *See* Walzer, *supra* note 103, at 67 (arguing there is no "way to avoid the endless repetition of this story, any way to replace the struggles it involves with a deliberative process").

107 *Id.* at 66.

108 Deliberative democracy's hope that citizens' views will be modified through deliberation is implicit in its criticism of "aggregative conceptions" of democracy on the ground that "they do not provide any process by which citizens' views about [society's] distributions might be changed." GUTMANN & THOMPSON, WHY?, *supra* note 100, at 16.

other than the views of individuals" as they are.[109] Though the second criticism can stand even if the first criticism's conception of politics is rejected, the second criticism is fortified insofar as the first criticism is correct. For if politics is fundamentally a forum for self-interest and power struggle, then deliberative democracy's aspiration of changing citizens' views looks suspiciously like governmental overreach aimed at instilling a false consciousness in some citizens so as to achieve social stability.

A third criticism is that deliberative democracy is too impractical in the demands it makes of citizens and representatives. Decision-making in modern legislative chambers and administrative agencies looks nothing like the conditions of deliberation prescribed by deliberative democracy. Nor could it. The vast governmental bureaucracies that operate across our country create far too much law, and make too many enforcement decisions, for deliberative democracy's conditions to be met.

These three criticisms of deliberative democracy—that it misconceives of the domain of politics, inadequately respects citizens' preferences, and makes unrealistic demands—are powerful objections to the High Equivalence Thesis. As explained below, none of these critiques carry over to the Special Norms Thesis. But before doing so, it will prove useful to examine another alternative to the Special Norms Thesis that also avoids these critiques: the Low Equivalence Thesis.

2. The Low Equivalence Thesis

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109 JEREMY WALDRON, THE DIGNITY OF LEGISLATION 147 (1999). While Gutmann and Thompson treat Waldron as an exemplary aggregative democrat, *see* GUTMANN & THOMPSON, WHY?, *supra* note 100, at 14 & 191 n.16, even Waldron "hopes" that individuals' "views will be informed . . . by discussion among the members," WALDRON, *supra*, at 147. But Waldron ultimately thinks "a decision among options proposed by the members is to be made by the members with reference to *nothing other than the views of the members*," even if views have *not* been informed by discussion. *Id.* at 147–48 (emphasis added); *see also* Frederick Schauer, *Talking as a Decision Procedure*, *in* DELIBERATIVE POLITICS, *supra* note 102, at 17, 20 (distinguishing deliberative democracy from a decision procedure in which "deliberation might precede" a vote, but where "the preferences of citizens, however those preferences might be formed, are taken as dispositive").

Accepting the above three criticisms readily leads to a view of politics that is quite consistent with present day practice. If politics is the domain for determining how to allocate the benefits and costs of social living, and there is no "view from nowhere" from which objectively correct decisions can be made, then the familiar stuff of democratic politics[110] seems to be the appropriate way to make political decisions. Apart from only modest restrictions (such as on bribery), the Low Equivalence Thesis claims that legislators may engage in the hardest of Hardball Politics when engaging in public decision-making.

The Argument from Considered Judgment[111] presents a challenge to the Low Equivalence Thesis insofar as it identifies a domain of public decisions that should *not* be decided under the norms of Hardball Politics. Yet those Considered Judgments are only provisional, as they are subject to confirmation or rejection as justificatory principles are identified through reflective equilibrium. A sturdier response to the Low Equivalence Thesis accordingly requires more abstract justifications for the conclusion that Hardball Politics does not appropriately govern the entire domain of public decision-making.

The Article now identifies three profound weaknesses of the Low Equivalence Thesis. First, as explained immediately below in this Subsection, permitting Hardball Politics in the constitutional domain cannot satisfactorily legitimate governmental power. Second, as explained in Section III.D, Hardball Politics in constitutional matters cannot establish the type of political fraternity that modern constitutional democracies aspire to create. Third, as explained in Section III.E, Hardball Politics is inappropriate for those constitutional decisions that account for the core of a country's political identity.

a. Legitimacy Deficit

The Low Equivalence Thesis is plagued by two types of legitimacy deficits. First is a deficit in the type of legitimacy that concerns political

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110 For an excellent description, see Walzer, *supra* note 103, at 59–66 (identifying political education through indoctrination "so that each indoctrinated member becomes an agent of doctrinal transmission," organization, mobilization, demonstration, statement, and debate for the purpose of victory, bargaining, lobbying, campaigning, voting, and fund-raising).

111 *See supra* Section III.A.

theorists, namely the government's moral right to exercise political power.[112] I shall call this *philosophical legitimacy*.

Philosophical legitimacy "is a weaker notion than justice."[113] "Political power may be legitimately exercised in ways that are unjust, unfair, or otherwise unjustifiable."[114] But while legitimacy is weaker than justice, satisfying legitimacy is no easy matter. The easiest way to appreciate why is to consider the perspective of a political minority that is usually, or always, on the losing side of political skirmishes. Why is it morally right for the government's laws to require them to do something they do not want to do? Establishing the conditions that satisfy philosophical legitimacy has been a preoccupation of Western political theory, which has long sought to explain why the state can justifiably compel individuals against their will, and the limits of that power.[115]

For example, Locke predicated the legitimacy of the state's coercive powers on citizen consent.[116] Rousseau claimed the state never really forces citizens to do something they do not want to do because the state can only legislate the "general will," which consists only of those wants that each citizen shares with other citizens.[117] In effect, Locke and

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112 *See, e.g.*, Simon Căbulea May, *Religious Democracy and the Liberal Principle of Legitimacy*, 37 PHIL. & PUB. AFF. 136, 137–38 (2009). What I call philosophical legitimacy corresponds to Richard Fallon's category of "moral legitimacy." *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1792, 1796–1801 (2005).

113 May, *supra* note 112, at 148.

114 Simon Căbulea May, *Democratic Legitimacy, Legal Expressivism, and Religious Establishment*, 15 CRITICAL REV. INT'L SOC. & POL. PHIL. 219, 220 (2012) (citing JOHN RAWLS, POLITICAL LIBERALISM 427–28 (2005)).

115 *See, e.g.*, JOHN STUART MILL, ON LIBERTY 1, 58–61 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859) (discussing "the nature and limits of the power which can be legitimately exercised by society over the individual," which for Mill includes both state power and nonlegal customs); RAWLS, POLITICAL LIBERALISM, *supra* note 114, at 217 ("[W]e ask: when may citizens by their vote properly exercise their coercive political power over one another when fundamental questions are at stake?"); Waldron, *supra* note 16, at 1387.

116 *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 158 (Ian Shapiro ed., Yale Univ. Press 2003) (1689–90).

117 *See* DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK 103 (2008) (explaining Rousseau's "general will" as being "whatever is common to the wills of all citizens"); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT 75–77 (Maurice Cranston trans., Penguin Books 1968) (1762) (arguing that the state's legitimate powers extend only to "authentic act[s] of the general will," meaning "the common good" or "the common interest.").

Rousseau legitimate governmental power through denial, as both their theories presuppose that, properly understood, the state does not compel citizens against their will. But both solutions rest on counterfactual assumptions so far from reality that virtually nobody today accepts them.[118] As for Locke, it cannot be credibly suggested that each of our nation's citizens has given actual or even tacit consent to the government(s) to which they are subject.[119] And as for Rousseau, it cannot be plausibly claimed that the state only legislates what each citizen already wills on her own.[120] Nor do people appear to be prepared to conclude that any legislation beyond the overlap of citizens' wills is illegitimate. For purposes of legitimating state power, the simplifying assumptions on which Locke's and Rousseau's theories rely are problematic.

To this day, there is no universally accepted answer to what philosophically legitimates governmental power.[121] Probably the most influential family of contemporary approaches premises legitimacy on a variation of Locke, proposing that the terms of social cooperation must be decided by a decision-making procedure as to which people could plausibly be said to hypothetically consent.[122] This can be thought of as a two-stage solution to philosophical legitimacy, insofar as it distinguishes between the procedures for generating laws, as to which there must be hypothetical consent, and the substantive laws themselves, as to which there need not be hypothetical consent.[123] The Low Equivalence Thesis

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118 The fact that a theory simplifies reality itself is not a fatal defect, for virtually all do. *See generally* KWAME ANTHONY APPIAH, AS IF: IDEALIZATION AND IDEALS (2017). But while a theory's simplifications may make it useful for some purposes, the theory may not be helpful for others. *See id.* at 17–27. The critiques above in text accordingly are not tantamount to claiming that Locke's and Rousseau's theoretical constructs should be rejected.

119 *See* Fallon, *supra* note 112, at 1797 n.30 (noting that modern "theorists generally reject this basis for political obligation); RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 11–31 (2004).

120 *See, e.g.*, WALDRON, LEGISLATION, *supra* note 109, at 115–16.

121 *See* Fallon, *supra* note 112, at 1796–1801.

122 *See* RAWLS, POLITICAL LIBERALISM, *supra* note 114 (using the original position to determine what political structure reasonable persons hypothetically would consent to); *see generally* Cynthia A. Stark, *Hypothetical Consent and Justification*, 97 J. PHIL. 313, 313–14 n.1 (2000).

123 *See* Waldron, *supra* note 16, at 1386–87 (offering a "process-based" theory of political legitimacy).

is inconsistent with this family of approaches to legitimating state power, because it allows a political majority to select any decision-making procedure it wants, enabling it to unilaterally set the terms of the polity's political relationships. Political minorities surely would not consent to this, in actuality or hypothetically.

In fact, the Low Equivalence Thesis is consistent with only the sliver of contemporary approaches to philosophical legitimacy that Professor Richard Fallon helpfully characterizes as "minimal" theories of legitimacy.[124] Minimal theories "typically begin with the premise that decent human lives would be impossible without a government," and from there conclude that "the need for effective government generates a moral duty to support any reasonably just legal regime . . . ."[125] Because minimal theorists understand this "reasonably just" caveat to be easily satisfied,[126] minimal theories come close to legitimating governmental power simply on an inhabitant's failure to exit. Professor Fallon's terminology is quite accurate: This, indeed, counts as only a *minimal* theory of legitimacy.[127] In fact, it is so minimal as to not qualify as sufficient for most western political theorists, present and past.[128] For those who think the minimal theories to be inadequate, and who are committed to the western political tradition's longstanding effort to robustly legitimate governmental power, the Low Equivalence Thesis's legitimacy deficit should count as a powerful objection.

As if this were not enough, there is a second type of legitimacy deficit that plagues the Low Equivalence Thesis. Distinct from philosophical legitimacy is the question of whether a polity is legitimate

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124 *See* Fallon, *supra* note 112 at 1798.

125 *Id.* Fallon adds a caveat to this moral duty of "absent [there being] a fair prospect of its swift and relatively nonviolent replacement by more just institutions." *Id.* The most prominent of these theorists is Joseph Raz. *See id.* at 1835.

126 *See, e.g.*, *id.* at 1798 n.33 (quoting David Copp, *The Idea of a Legitimate State*, 28 PHIL. & PUB. AFF. 3, 43–44 (1999) ("Matters would have to be very bad for a state not to be legitimate . . . .")).

127 Fallon ultimately defends the U.S. Constitution as being "only minimally morally legitimate . . . ." *Id.* at 1803.

128 *See id.* at 1797 n.30 (citing George Klosko, *Reformist Consent and Political Obligation*, 39 POL. STUD. 676, 677–78 (1991) (noting that most political theorists reject the proposition that mere residence implies consent)).

as a sociological matter,[129] meaning that "the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward."[130] Sociological legitimacy is an empirical fact, and can exist even if the demands of philosophical legitimacy are not, or cannot be, met.[131] I now venture into the precarious world of untested empirical claims to suggest that constitutional decisions rendered under Hardball Politics are particularly vulnerable to being viewed as sociologically illegitimate. I suspect that the demand for sociological legitimacy plays a lot of work in generating the Considered Judgments concerning Special Norms. For example, I speculate that impeaching the president under Hardball Politics would not be viewed by the public as justified, appropriate, or otherwise deserving of support. While the tax code has sociological legitimacy despite its unmistakable marks of Hardball Politics, a Hardball Politics-driven impeachment of a president would not.

3. The Special Norms Thesis

The previous two Subsections identified substantial deficiencies in each of the Equivalence Theses. The next three Sections show that the Special Norms Thesis is not vulnerable to these critiques, thereby providing the final piece to the Argument from Exclusion. And there is more: each of the distinctions that separates the Special Norms Thesis from the Equivalence Theses is sufficiently important to count as a standalone argument for the Special Norms Thesis.[132]

C. *The Argument from Legitimacy (Third Argument)*

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129 This analysis relies on Professor Fallon's distinction between moral and sociological legitimacy. *See id.* at 1795–1801.

130 *Id.* at 1795–96.

131 *See id.* at 1795.

132 Because each is independent of the Argument from Exclusion, any one of them can establish the Special Norms Thesis even if the Argument from Exclusion were to fail.

The Special Norms Thesis does not suffer from the Low Equivalence Thesis's legitimacy deficit.[133] The Special Norms Thesis allows for more-than-minimal philosophical legitimacy because it proposes that Special Norms apply to the constitutional domain, which includes the polity's law-making procedures. Likewise, the Special Norms can play a critical role in establishing and maintaining government's sociological legitimacy.[134]

The Special Norms Thesis's capacities to more-than-minimally legitimate government and to satisfy sociological legitimacy are sufficiently important to qualify as a standalone argument for the Special Norms Thesis. Call it the *Argument from Legitimacy*. Legitimacy of governmental authority, both philosophically and sociologically, is crucial insofar as modern democracies are predicated on respect for individuals and equality of citizenship. Legitimacy of governmental power is deeply tied to both.

D. *The Argument from Political Fraternity (Fourth Argument)*

Having explained why the Special Norms Thesis is not susceptible to the legitimacy critique leveled against the Low Equivalence Thesis, let us now see why it also is immune to the High Equivalence Thesis's three vulnerabilities. The first criticism was that Deliberative Democracy misconstrues the nature of the political domain.[135] Because politics determines how the costs and benefits of social life are allocated, deliberation is inapt to address the enduring conflicts that are rooted in individuals' competing self-interests.[136] But the constitutional domain is different. It aims to establish, and provides the infrastructure for creating, a political fraternity by setting the basic political relations among citizens, and between citizens and their governments. The nature of a polity's political fraternity is distinct from the decisions allocating

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133 Though Deliberative Democracy also aspires to create a government that satisfies more-than-minimal legitimacy, it suffers other deficiencies from which the Special Norms Thesis is immune. *See infra* Sections III.D, III.E.

134 Below I explain how Tempered Politics' sub-norms of Reciprocity and Communicative Exchange support sociological legitimacy. *See infra* Section IV.C.

135 *See supra* notes 102–07 and accompanying text.

136 *See id.*

the benefits and costs of social life that are the subject of ordinary politics. While deliberation-driven consensus may be inapposite to ordinary politics, it is fitting for purposes of deciding upon the nature of a polity's political fraternity. Deliberative Democracy's merging of these distinctive domains makes it vulnerable to the first critique, whereas the Special Norms Thesis's sensitivity to the domains' distinctiveness immunizes it.

The second critique was that Deliberative Democracy inadequately respects citizens insofar as it does not accept them as they are, but tries to reshape their views.[137] That critique does not carry over to constitutionalism because one of the aims of constitutional decision-making is to identify, and if possible expand over time, the matters as to which consensus can be reached so as to secure an enduring political union. While liberal modern democracies must respect individual autonomy even in the constitutional domain, this is not inconsistent with the constitutional domain being the realm where citizens together aim to establish an enduring consensus as to the framework that will operationalize their political relations.

The third critique was that Deliberative Democracy is too demanding and unrealistic in its expectations. But this criticism carries less force in relation to the Special Norms Thesis, which posits that Special Norms apply to only a sub-domain of public decision-making. And to the extent the third critique relies on the wide divergence between deliberative democracy's demands and the actual practice of politics, the third critique has far less force vis-à-vis the Special Norms Thesis. This is so insofar as there is evidence that Congress has engaged in self-consciously responsible decision-making akin to what is demanded by the Special Norms when it has recognized that it was engaging in constitutional decision-making.[138] And so have other actors who participate in constitutional decision-making.[139]

These reasons why the Special Norms Thesis is immune to the three critiques against the High Equivalence Thesis constitute an

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137 *See supra* notes 108–09 and accompanying text.

138 *See supra* note 23.

139 Professor Ackerman claims that citizen' engagement during "constitutional moments" diverges from their behavior during ordinary politics. *See* ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 287–88.

additional standalone argument for the Special Norms Thesis that might be called the *Argument from Political Fraternity*. Special Norms are appropriate because a modern democracy's constitutional domain aims to establish a political fraternity of a certain type. Permitting the numerical majority to select the rules that determine citizens' political relations via Hardball Politics would both reflect and create political relations that are inconsistent with what is appropriate in a modern democracy.[140] Permitting the majority to select the terms of political engagement under Hardball Politics would not treat all members of the polity with the respect that is owed to free and equal citizens.[141]

The Argument from Political Fraternity plays triple duty. Beyond (1) immunizing the Special Norms Thesis from the three critiques of the High Equivalence Thesis and (2) constituting an affirmative standalone argument for the Special Norms Thesis, the Argument from Political Fraternity also (3) provides a second reason (independent of its legitimacy deficit) for rejecting the Low Equivalence Thesis.

E. *The Argument from Identity (Fifth Argument)*

The *Argument from Identity* also plays triple duty: it distinguishes the Special Norms Thesis from both Equivalence Theses while also serving as a standalone argument for the Special Norms Thesis. The Argument primarily applies to the part of the constitutional domain that has the effect of reflecting, and constructing, the polity's core political identity. The Argument from Identity asserts that in a liberal democracy, decisions determining a polity's core identity are properly taken pursuant to Special Norms, not the norms of Hardball Politics.

The Argument from Identity depends upon an appreciation of how constitutional rights operate in modern democracies. As a descriptive matter, each constitutional right (R_1) may be restricted for the purpose

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140 The Argument from Political Fraternity is related to, but independent of, the Argument from Legitimacy. As to their similarity, liberal democracies must satisfy legitimacy. But the two arguments are independent in two respects. First, legitimacy may not be a sufficient condition to establish the type of political fraternity to which a particular liberal democracy aspires. Second, even if no polity can satisfy legitimacy, the Argument from Political Fraternity may still be valid.

141 This formulation draws on John Rawls's influential approach. *See generally* RAWLS, POLITICAL LIBERALISM, *supra* note 114, at xviii, 9.

of achieving sufficiently important countervailing purposes.[142] The sufficiently important purpose that allows a right-restriction may be a countervailing constitutional right (R_2), or a sub-constitutional interest (I). The allowance of rights-restrictions means that rights are not absolute. R_1's non-absoluteness reflects the conclusion that there exist societal goals of sufficient importance (R_2 and I) such that it would be a mistake to allow R_1 to automatically and always prevail.[143]

Because constitutional rights are non-absolute, resolving conflicts among competing societal commitments is a component of post-production constitutional decision-making. These competing commitments are almost always incommensurable because no single metric fully captures each commitment's normatively relevant contents.[144] A polity's decision as to how it resolves such conflicts is both identity-reflecting and identity-defining.[145]

To illustrate, while both the United States and German constitutions protect speech, the two countries' constitutional jurisprudence are markedly different. Germany allows competing constitutional and sub-constitutional principles to justify speech restrictions far more frequently than does the United States. For example, Germany's Federal Constitutional Court upheld a substantial damages award against a satirical magazine for having referred to a paraplegic reserve officer as a "cripple."[146] The outcome under United States jurisprudence would almost certainly be different.

More generally, though the constitutions of today's liberal democracies embrace virtually the same set of constitutional rights, the characters of the polities they establish are not the same. The differences are substantially attributable to the distinctive ways each polity

142 *See* Rosen, *Non-Absolute Constitutional Rights*, *supra* note 51, at 1545–53, 1558, 1573–96.

143 *See id.*

144 *See* Mark D. Rosen, *Two Ways of Conceptualizing the Relationship Between Equality and Religious Freedom*, 4 J.L., RELIGION & STATE 117, 123–26, 139–40 (2016); Rosen, *Non-Absolute Constitutional Rights*, *supra* note 51, at 1585–87, 1600.

145 *See* Joseph Raz, *Incommensurability and Agency*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 110, 110–28 (Ruth Chang ed., 1997) (arguing that choice, not rationality, governs the selection among incommensurables); Charles Taylor, *Leading a Life*, *in* INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra*, at 170, 170–83 (arguing that justified choice among incomparables can be made by analyzing how the competing goods fit within the "shape" of a person's life).

146 Rosen, *Non-Absolute Constitutional Rights*, *supra* note 51, at 1587.

accommodates the competing constitutional and sub-constitutional interests that they all accept as valid. How each polity resolves conflicts among these incommensurable commitments both reflects and helps constitute each polity's core political identity.

Once the identity-reflecting and identity-constructing character of this aspect of post-production constitutional decision-making is recognized, the Argument from Identity is quite straightforward. Decisions determining a polity's core identity are properly taken pursuant to Special Norms in a constitutional democracy, not the norms of Hardball Politics. Insofar as the polity's core identity should come from the people, rather than being forced upon it by a mere political majority, Hardball Politics is inapt to post-production decision-making that resolves constitutional conflicts because such resolutions reflect and constitute the polity's core political identity.

The Argument from Identity fortifies the Argument from Exclusion in two respects. The first is straightforward: It provides yet another reason, independent of the Arguments from Legitimacy and Political Fraternity, for rejecting the Low Equivalence Thesis. Second, the Argument from Identity is another reason why the Special Norms Thesis is immune to the three critiques against the High Equivalence Thesis. This requires clarification. The three critiques presuppose that Deliberative Democracy misconstrues the nature of the political domain, naïvely believing politics to be a locus for consensus when it instead is a domain of the perpetually and inherently conflictual.[147] The Argument from Identity insists that some (at the least) constitutional decision-making is different from politics' domain of perpetual conflicts. Though conflicts are not absent from the constitutional domain, the subject of dispute is not the allocative question of *what I as an individual get*, but the identity question of *who we as a collective are*. While stable consensual resolutions may be neither realistic nor conceptually appropriate for ordinary politics' allocative questions, the same cannot be said about a democracy's questions as to core political identity. As to that, consensus is conceptually and pragmatically the proper aspiration. It follows that the sub-domain of public decision-making that reflects and constructs the polity's core identity may

147 *See supra* notes 102–07 and accompanying text.

appropriately be disciplined by different norms than those that govern ordinary politics.

F. *What the Five Arguments Do and Do Not Establish*

Having fully stated the five arguments for the Special Norms Thesis, it is time to clarify the relationship among them and explain the limits of what they establish.

The Argument from Considered Judgment addresses only a handful of specific constitutional decisions—not all of Congress's constitutional decision-making. Because the first argument is fundamentally intuition-based, its conclusions are provisional and cannot extend beyond the examples themselves.[148] The subsequent four arguments provide theoretical grounding for the first argument, thereby strengthening it. The subsequent four arguments also expand the domain to which the Special Norms apply, from a handful of Considered Judgments to the entirety of Congress's constitutional decision-making.

The Argument from Exclusion aims to disqualify both of the Special Norms Thesis's contenders by identifying devastating critiques as to which the Special Norms Thesis is immune. But the Argument from Exclusion cannot be sufficient on its own to definitively establish the Special Norms Thesis, because identifying deficiencies in the Equivalence Theses cannot establish that the Special Norms Thesis is deficiency-free, or even that it has fewer deficiencies than its competitors. This explains why the Special Norms Thesis cannot be established solely by negative argumentation directed against its alternatives. The Special Norms Thesis itself must be analyzed, which necessarily includes an accounting not only of its benefits but its costs as well.

But the fact that an affirmative argument ultimately must be made for the Special Norms Thesis does not mean the Argument from Exclusion is unimportant. By identifying the finite options among which a choice must be made, the Argument from Exclusion prevents

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148 Unargued extension to all constitutional decision-making would run afoul of the fallacy of composition. *See supra* note 100.

myopic preoccupation with the Special Norms Thesis's costs. In essence, the Argument from Exclusion helps us identify the Special Norms Thesis's appropriate burden of persuasion. The relevant question is what option is best, all things considered, not whether the Special Norms Thesis is perfect and cost-free.[149] Of course it is not—few things (if any) in life or politics are.

The Arguments from Legitimacy, Political Fraternity, and Identity identified the Special Norms Thesis's promised benefits.[150] But we have not yet considered the Thesis's costs. This Article's next two Parts identify those costs as they work out the Special Norms' contents (Part IV) and explain the Special Norms' operation in difficult cases (Part V). Part VI's final accounting of the Special Norms Thesis's projected benefits and costs is the predicate for the Article's all-things-considered conclusion in favor of the Special Norms Thesis.[151]

IV. CONTENTS OF THE SPECIAL NORMS APPLICABLE TO CONGRESS

This Part provides a preliminary specification of the contents of the Special Norms that should apply to Congress's constitutional decision-making. While Part III's arguments for the Special Norms Thesis substantially carry over to all other branches and levels of government,[152] this Part's analysis is tailored to only one institution: Congress.

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149 This observation echoes the fundamental insight of comparative institutional analysis. *See generally* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3–5 (1994).

150 While neither the Argument from Considered Judgment nor the Argument from Exclusion depends on Hardball Politics' norms being gossamer-thin, each Argument's force admittedly is reduced the more demanding the norms of Hardball Politics are. The Arguments from Legitimacy, Political Fraternity, and Identity, however, are unaffected by any plausible description of the norms that govern ordinary politics.

151 Having fully explained how this Article's argument operates, it is now possible to identify the difference between it and Pozen's argument regarding constitutional bad faith. Whereas this Article relies on arguments specific to the constitutional domain, Pozen relies on the fact that bad faith is prominent in other legal fields yet largely absent in constitutional case law. *See* Pozen, *supra* note 14, at 886–88, 909–18. The two articles' arguments are non-duplicative, though complementary.

152 Substantially, though not entirely. The Argument from Considered Judgment only considered examples of congressional constitutional decision-making, *see supra* Part III, and

Before proceeding, it is important to emphasize that what follows is only a preliminary effort at specifying the Special Norms. Neither Congress nor scholars have yet devoted attention to the question of what norms should govern when Congress engages in constitutional decision-making.[153] The impossibility of definitively specifying the Special Norms' contents before Congress has recognized their need, much less tried to flesh them out, is an artifact of reflective equilibrium's role in normative reasoning.[154] With these caveats, I proceed to explore three Special Norms that should discipline Congress' constitutional decision-making.

A. *The Norm of Proactivity*

Congress ordinarily has complete discretion in setting its agenda. But appreciation of the domain of constitutional decision-making indicates the need for a norm that sometimes imposes a proactive duty on Congress to act. Consider the sub-domain of Protecting Constitutional Institutions.[155] Threats to a state's republican form of government generate a duty on Congress to act so as to guarantee its republican form of government. This duty is an example of the *Proactivity Norm* in action. Consider, as well, the sub-domain of Enabling Constitutional Institution:[156] Congress's failure to make timely appointments of executive officers and federal judges would run afoul of the Proactivity Norm. As another example, Congress's failure to declare war when U.S. troops engage in sustained hostile combat may prompt

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the Argument from Political Fraternity might operate differently in relation to the federal and state governments, *see infra* note 183.

153 *See* Brest, *Congress as Constitutional Decisionmaker*, *supra* note 14, at 82, 102 (identifying the proper constitutional decision-making for Congress as consisting primarily in "interpreting the text, original history, and structure of the Constitution, as well as precedents and social and moral values that bear on constitutional questions," and advocating changes that "would make the [congressional] committees look and act more like courts").

154 *See supra* Section II.C.

155 *See supra* Section I.B.2.

156 *See supra* Section I.B.1.

the President to step into the void and take initiatives that properly belong to Congress,[157] leading to the presidency's *over-enablement*.

The Proactivity Norm should not require that Congress always be the front-runner. For example, it is sensible to allow courts to be the first-responders in creating the choice-of-law rules that help constitute our system of horizontal federalism.[158] Likewise, the Constitution itself gives States the presumptive power to fashion the rules that operationalize our republican system's elections.[159] But if other governmental institutions ignore risks to constitutional structures, or fumble in their attempts to address such risks, the Proactivity Norm imposes a duty on Congress to act.

Unlike the other Special Norms, the Proactivity Norm is not always a Bare Norm.[160] When the *whether question* belongs to the constitutional domain[161] and circumstances dictate an affirmative answer, the Proactivity Norm incorporates a constitutional duty. This is true of the Guarantee Clause question discussed two paragraphs above. But the Proactivity Norm is broader than the set of proactive constitutional duties.[162] Finally, the absence of a Proactivity-imposed duty to act does not imply that Congress should not act. Apart from instances where it demands congressional action, the Proactivity Norm does not displace Congress's ordinary discretionary authority to set its own agenda.

B. *The Norm of Explicitness*

The Norm of Explicitness determines when Congress must openly take account of constitutional considerations, thereby triggering application of the soon-to-be-discussed Special Norm of Tempered

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157 *See generally* Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1116–21 (2010) (discussing the phenomenon of "breach-stepping").

158 *See* Rosen, *Choice-of-Law*, *supra* note 34, at 1095–97.

159 *See* Rosen, *Congress and Political Partisanship*, *supra* note 45, at 277–78 (discussing the Time, Place, and Manner Clause).

160 *See supra* note 57 and accompanying text.

161 Determining when the *whether question* belongs to the constitutional domain is a substantive constitutional question. *See, e.g.*, *supra* notes 44–48 and accompanying text (discussing the Guarantee Clause).

162 *See, e.g.*, Rosen, *Marijuana*, *supra* note 39, at 1039–40.

Politics. To illustrate, if Congress considers choice-of-law legislation under the Effects Clause, must Congress explicitly take account of the fact that the bill belongs to the domain of constitutional decision-making insofar as it would build-out our system of horizontal federalism?[163] Or can Congress debate the bill in exclusively non-constitutional terms, for example by only considering whether it would reduce litigation costs?

Whether there should be a *Norm of Explicitness* that triggers an obligation to explicitly consider constitutional ingredients in Congress's decision-making turns on three considerations. Because none of the considerations is of constitutional pedigree, the Norm of Explicitness is not positive law, but is a Bare Norm.[164]

1. Quality

The first consideration is how a Norm of Explicitness would affect the quality of constitutional decision-making. The answer depends upon the epistemological question of how knowledge in the domain of constitutionalism is best developed. This consideration favors Explicitness. The quality consideration would count against Explicitness only on a pure intuitionist view that sound constitutional judgments are only made intuitively and are impeded by self-aware rational consideration. I am unaware of any sustained arguments on behalf of a pure intuitionist view of constitutional reasoning, and nothing recommends it.

2. Institutional Capacity for Responsible Constitutional Decision-Making

The second factor bearing on the Norm of Explicitness is Congress's institutional capacity for making quality constitutional decisions. Though many have expressed strong skepticism,[165]

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163 *See supra* Section I.B.2.

164 *See supra* note 57 and accompanying text.

165 *See, e.g.*, Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 610 (1983) ("Congress, however, has not been a model of constitutional

concluding that Congress is incapable of responsible constitutional decision-making would be premature for two reasons. First, institutional competence only can be assessed in relation to a clear understanding of the tasks an institution must discharge. And we presently lack that. Most everyone who has considered the question has asked whether Congress can competently interpret the Constitution.[166] But as Part I showed, most of Congress's constitutional decision-making does not consist in the hermeneutic process of interpreting constitutional text.[167] Because there is not yet an adequate account of the extra-hermeneutic components of Congress's constitutional decision-making, declaring Congress incapable of responsible constitutional decision-making would be premature. And such a conclusion would be self-defeatist, given the many constitutional decisions Congress invariably must make when exercising its powers and discharging its responsibilities.[168]

This Article spotlights a second reason why it would be premature to declare Congress institutionally incapable of constitutional decision-making. We presently lack an account of the norms that should govern Congress's constitutional decision-making. If responsible decision-making depends on these yet-to-be determined norms, concluding that

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decisionmaking . . . . Its hallmark has been superficial and, for the most part, self-serving constitutional debate."); *id.* at 609 ("Both institutionally and politically, Congress is designed to pass over the constitutional questions, leaving the hard decisions to the courts.").

166 *See, e.g.*, Brest, *Conscientious Legislator*, *supra* note 14, at 589, 601; David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861*, *in* CONGRESS AND THE CONSTITUTION 18, 20, 22 (Neal Devins & Keith E. Whittington eds., 2005); Mark Tushnet, *Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?: Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499 (2009); Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001).

167 As regards Resolving Conflicts, determining what interests are sufficiently important to justify a right-infringement does not depend upon the hermeneutic activity of interpreting constitutional text. *See supra* notes 51–53 and accompanying text. Likewise, answering the *whether* and *what questions* regarding the enabling, building-out, and protection of constitutional institutions typically does not rely in substantial measure on the interpretation of constitutional text. *See supra* notes 29–44 and accompanying text; *see also* Mark Greenberg, *The Moral Impact Theory of Law*, 123 YALE L.J. 1288, 1302, 1328 n.100 (2014) (noting that the "activity of working out the content of the law" is not coterminous with either linguistic or communicative content, and hence is "not a genuinely hermeneutic enterprise").

168 *See supra* Part I.

Congress is incapable of responsible constitutional decision-making would mistakenly confuse what is for what must be.[169]

3. Institutional Demands

Even if Explicitness would increase the quality of constitutional decision-making (as seems likely), and if Congress were institutionally capable of responsible constitutional decision-making (as is possible, and as to which a negative conclusion should not yet be drawn), a Norm of Explicitness still might be inappropriate for the specific institutional context of legislatures. One concern is that a Norm of Explicitness would interfere with the legislature's capacity to function. For instance, perhaps legislatures generally, or under certain conditions, can successfully operate only when they make decisions on the basis of incompletely theorized agreements.[170] Some may consider an Explicitness Norm to be inconsistent with the legislature's need to obtain "local" agreements while avoiding deeper (*viz.*, constitutional) issues about which legislators may be hopelessly divided. An Explicitness Norm may also risk amplifying conflict by heightening the perceived stakes, impeding the legislature's ability to get necessary things done.

But there are countervailing considerations. First, because "constitutional" is not synonymous with "detailed," a requirement that Congress explicitly address constitutional considerations is not inconsistent with incompletely theorized agreements. Think back to judicial temperament's longstanding lack of specification.[171] Because there was agreement as to the abstract proposition that judges should display judicial temperament, but no consensus as to its details, judicial temperament's entailments were worked out over time on a case-by-

169 Though such norms sometimes organically grow from the process of doing, sometimes they do not.

170 This reworks an idea of Cass Sunstein. *See* Cass R. Sunstein, *Incompletely Theorized Agreements in Constitutional Law*, 74 SOC. RES. 1 (2007). It also may be consistent with Rawls's "overlapping consensus," which presupposes that people can "sign on to the policy from within their differing points of view, and therefore on possibly very different grounds from each other" without "converg[ing] on a policy . . . for the same reason." AKEEL BILGRAMI, SECULARISM, IDENTITY, AND ENCHANTMENT 8 (2014) (emphasis eliminated).

171 *See supra* notes 75–86 and accompanying text.

case basis. Likewise, legislators can debate whether a specific action comports with a constitutional requirement, without trying to articulate a more abstract justification for the outcome or aiming to fill in all details as to what would be constitutionally required in other circumstances.[172]

Second, an Explicitness requirement may not, on balance, hinder congressional activity. This is because the Special Norms include sub-norms that facilitate consensus and responsible decision-making.[173] We must consider an Explicitness Norm's *net* effects on congressional activity, which are a function of all the Special Norms.

Third, even if an Explicitness Norm on balance made congressional action more difficult in some cases, or even generally, it would have to be asked whether the absence of an Explicitness Norm is normatively and pragmatically preferable. Because the absence of an Explicitness Norm would permit Congress to overlook constitutional considerations, a categorical answer of "yes" seems doubtful.

In short, whether there should be an Explicitness Norm for Congress's constitutional decision-making turns on multiple empirical and normative considerations. Yet some preliminary conclusions can be drawn. To begin, it seems unlikely, and at the very least would be premature to conclude, that there should *never* be an Explicitness requirement. Likewise, it seems unlikely, and at the very least would be premature to conclude, that there is a *categorical* Explicitness requirement. Instead there should be a non-categorical Explicitness Norm, whose precise scope could be refined by Congress over time through the process of reflective equilibrium.[174] On account of Explicitness' epistemological benefits, Explicitness should be presumed, though defeasible upon a showing that Congress is incapable of responsibly rendering a specific constitutional decision, or that Explicitness is inconsistent with some specific institutional need or responsibility of Congress. Where the presumption of Explicitness is overridden, the other Special Norms would be inapplicable. The correct

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172 Narrowly deciding constitutional questions is in tension with Holism, a sub-norm of the Special Norm of Tempered Politics. For a discussion, see *infra* notes 191–97 and accompanying text.

173 *See infra* Section IV.C (detailing the contents of the Norm of Tempered Politics).

174 *See supra* notes 77–86 and accompanying text.

specification of the Norm of Explicitness can eliminate the Special Norms Thesis's risk of bogging-down the legislative process.

An adequate showing of defeasibility should generate a narrow context-limited exception to the Explicitness Norm, not a broad conclusion against the existence of any Explicitness Norm, unless and until a substantial pattern of defeasibility were to emerge. Defeasibility arguments should be made to Congress itself, not courts, because the Explicitness Norm (like the other Special Norms) is best generated and enforced by Congress.[175] Finally, the Norm of Explicitness should apply whenever Congress must make a decision belonging to the constitutional domain, whether on account of the Norm of Proactivity or because Congress discretionarily embarks on an activity whose *may* or *what questions* belong to the constitutional domain, and for that reason calls for constitutional decision-making.

Some examples may prove useful.[176] First, consider a representative who holds an idiosyncratic, off-the-wall constitutional view. The Norm of Explicitness should not require that she raise her constitutional argument because premature articulation in Congress carries epistemological and pragmatic risks. For example, a constitutional argument's move from off-the-wall to on-the-wall may require that foundations for the argument first be laid outside of Congress.[177] If so, this would be a reason why the Norm of Explicitness should not be triggered vis-à-vis the idiosyncratic representative.

Next, imagine that a representative decides to assert an off-the-wall constitutional argument. This should not trigger the Norm of Explicitness vis-à-vis the rest of Congress. Only a *sufficient* constitutional argument does. That criterion might take account of the degree to which a representative's even good faith constitutional argument falls outside of a contemporary constitutional consensus, meaning that constitutional arguments that are sufficiently off-the-wall would not trigger the Norm of Explicitness.[178] Other relevant

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175 As to the risk of Congress's bad faith application of the Norm of Explicitness, see *infra* note 280 and accompanying text.

176 For others, see *infra* notes 264–65 and accompanying text.

177 *See* BALKIN, *supra* note 31, at 294.

178 For a discussion of the risk that individual representatives might try to invoke the Special Norms in bad faith, see *infra* notes 279–81 and accompanying text.

considerations might include the number and degree of political diversity of the representatives who support a constitutional argument, the length of time they have advocated the position, the argument's reception outside of Congress, and whether the position has ever enjoyed endorsement in the past, even if only by a few judges or scholars. To be clear, these suggestions are intended to be preliminary and provisional.[179] Precise specification of the Norm of Explicitness ultimately falls to Congress, and likely would only take shape over a period of time. Such is the nature of the reflective equilibrium process by which norms are developed.[180]

C. *The Norm of Tempered Politics*

Explicitness and Proactivity are gatekeepers that determine when Congress must self-consciously engage in constitutional decision-making. The third norm, the *Norm of Tempered Politics*, consists of the substantive guidelines and constraints that apply to Congress's constitutional decision-making. Before diving into its details, a macroscopic overview will be useful. Tempered Politics is a subset of politics: constitutional decision-making does not belong to the domain of pure logic or science but is part of the give-and-take by which a democratic community selects the rules that govern its political relations. There are three main ways such rules can be chosen: *brute force* of the majority imposing its preference, one group *persuading* the other, or *compromise* among groups.[181] Persuasion and compromise are mechanisms for achieving consensus, unlike the brute force of pure majoritarianism. Tempered Politics comprises sub-norms that jointly and severally favor persuasion and compromise in the service of consensus. And where consensus is not possible, Tempered Politics demands decision-making that is more responsible, more civic-minded, and more public-good oriented than the self-regarding Hardball Politics

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179 *See supra* notes 77–86 and accompanying text (explaining the reflective equilibrium process).

180 *See supra* notes 76–90 and accompanying text.

181 *Cf.* SEANNA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 56–60 (2014) (distinguishing brute force from jointly negotiated solutions, albeit in the very different context of a robber and her victim).

that is permissible during ordinary politics.[182] All in all, Tempered Politics aims to structure Congress's constitutional decision-making in a manner that is designed to generate constitution-worthy decisions.

Tempered Politics' details are a function of the character of the polity that the political community has constructed and aims to further develop. Tempered Politics has two component sub-norms in large heterogeneous democratic polities:[183] *Reciprocity* and *Communicative Exchange*. After specifying the contents of Reciprocity in Subsection 1 and Communicative Exchange in Subsection 2, Subsection 3 provides justifications for both sub-norms. Because these justifications are not grounded in constitutional text or tradition, Tempered Politics is another Bare Norm.[184]

1. Reciprocity

Tempered Politics' first sub-norm, *Reciprocity*, is a self-disciplining constraint on the substantive positions each side is permitted to stake out in the constitutional domain.[185] Reciprocity demands that members

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182 For similar positions, see Brest, *Conscientious Legislator*, *supra* note 14, at 599 ("As the interests affected by legislation become more important and the classifications more invidious, the parochialism, self-interest, logrolling, and the like, that pervade the political process must yield to generally shared principles of fair treatment."); ACKERMAN, FOUNDATIONS, *supra* note 4, at 273, 287 (constitutional moments are characterized when citizens seriously consider the "best interests of the United States" and "serious reflection on the country's future").

183 I take no position as to whether these requirements should apply to small homogeneous democracies. Likewise, these requirements may not apply to state legislatures when they undertake state constitutional decision-making. The Special Norms' details depend upon the type of political fraternity a polity aims to establish, *see infra* Sections IV.C.2, IV.C.3.a, and there conceivably could be differences in this regard between the national and state political communities, *see generally* Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053 (1998) (explaining that liberal political theory conceivably could justify divergent constitutional limitations on the federal and sub-federal governments on account of the fact that the national citizenry is heterogeneous whereas sub-federal polities might be culturally homogeneous).

184 *See supra* notes 57–58 and accompanying text (explaining what a Bare Norm is).

185 Here I draw upon, but modify, John Rawls's "criterion of reciprocity." *See* John Rawls, *The Idea of Public Reason Revisited*, *in* THE LAW OF PEOPLES 129, 136–37 (1999). Reciprocity figures prominently in the deliberative democracy literature. *See* GUTMANN & THOMPSON, DISAGREEMENT, *supra* note 100, at 52–94.

of Congress only take positions they "think it at least reasonable for others to accept . . . as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."[186] Reciprocity applies only to the constitutional components of Congress's decision-making, not to any non-constitutional ingredients that inform Congress's ultimate decision.

As the next two Subsections explain, Reciprocity requires two things of the constitutional decision-maker. First, she must make *imaginative leaps*, putting herself into the shoes of her political opponents and then imagining herself on the losing side of her proposal. Second, the constitutional decision-maker must think *holistically* rather than narrowly. When asking herself whether it is "at least reasonable" to expect her opponent could accept her substantive constitutional position, she must consider her position's implications for related contexts, not just the narrowest possible articulation of the question. Reciprocity's imaginative leaps and holistic reasoning in effect create a consistency requirement, insofar as they require representatives to take only positions that they would be willing to accept.[187]

a. Two Interpretive Leaps

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186 Rawls, *supra* note 185, at 136–37. A reciprocity-like approach can be seen in a statement from the Church of Jesus Christ of Latter-Day Saints concerning the Utah legislation that addressed conflicts between religious conservatives and the LGBT community: "[i]n a society which has starkly diverse views on what rights should be protected, the most sensible way to move forward is for all parties to recognize the legitimate concerns of others . . . ." Bruinius, *supra* note 94.

Reciprocity requires that a constitutional decision-maker reasonably think the other side *could* accept her position, not that the other side *in fact* accepts it. Interpreting Reciprocity the second way would transform it into a unanimity requirement, which would block too much constitutional decision-making. A related question in Reciprocity's specification is how narrowly sliced one's opponents should be. The more thinly sliced, such that there are more opponent groups as to which Reciprocity's "at least reasonable" requirement applies, the more unworkable Reciprocity becomes, because as slices become narrower and more numerous, Reciprocity in effect morphs into a unanimity requirement. Reciprocity must be properly specified to avoid this difficulty. *See* Rosen, *Marijuana*, *supra* note 39, at 1041–52.

187 Reciprocity overlaps with Pozen's bad faith constitutionalism insofar as both condemn "*inconsistent use of interpretive methodology*." Pozen, *supra* note 14, at 925. Reciprocity also features prominently in the deliberative democracy scholarship. *See* GUTMANN & THOMPSON, DISAGREEMENT, *supra* note 100, at 52–94; GUTMANN & THOMPSON, WHY?, *supra* note 100, at 98–110.

Reciprocity requires one of two types of imaginative leaps on the part of representatives when they engage in constitutional decision-making. Sometimes, representatives need only imagine themselves as they are, though on the loser's side of the proposal. For example, Reciprocity demands that democrats proposing a partisan gerrymander that would "waste" republican votes by packing a supermajority of republican voters into a single district[188] think it "at least reasonable" that democratic voters also should be stuffed into a single district. It does not take much imagination to conclude that political gerrymanders are inconsistent with Reciprocity.[189] Tempered Politics disallows parties from taking positions that do not comply with Reciprocity during constitutional decision-making.

But Reciprocity sometimes demands a second, more difficult, imaginative leap. Sometimes representatives must imagine themselves as if they *were* their political opponents. For example, in sorting out the conflict between religious freedom and equality in the religious florist controversy,[190] the gay couple must aim to put themselves in the place of a person who held religious-based objections to same-sex marriage, and the religious person must see herself as member of a gay couple.[191] Putting oneself in the position of one's adversary is a precondition for proposing positions that comply with Reciprocity, *viz.* positions a representative might "think [as] at least reasonable for others to accept . . . as free and equal citizens, and not as dominated or manipulated, or under the pressure of an inferior political or social position."[192] While there is no magic formula for achieving this often

188 For a clear explanation of the techniques of partisan gerrymandering, see Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 849–55 (2015).

189 For another example, consider voter registration laws designed to systematically disenfranchise voters likely to vote for one party. *See* Michael Wines, *Some Republicans Acknowledge Leveraging State Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/us/some-republicans-acknowledge-leveraging-voter-id-laws-for-political-gain.html [https://perma.cc/AS7M-YNLS].

190 *See, e.g.*, Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (2018).

191 This statement may part ways with Rawls's idea of public reason insofar as Rawlsian public reason, in the view of some at least, requires participants to disregard their religious commitments. *See generally* CHRISTOPHER J. EBERLE, RELIGIOUS CONVICTION IN LIBERAL POLITICS (2002) (reciting and critiquing this understanding of public reason).

192 *See* Rawls, *supra* note 185, at 136–37.

challenging second imaginative leap, ongoing respectful communication with the opposition may be a helpful, if not indispensable, ingredient.[193] More generally, the second imaginative leap probably demands that representatives expose themselves to others' perspectives, which also can be facilitated by consuming literature, films, and theater.

b. Holism

In addition to its two imaginative leaps, Reciprocity requires that decisionmakers think *holistically* about the larger social, political, and legal context in which a dispute is situated, rather than focusing narrowly on only an issue-by-issue basis. Holism's preference for situating constitutional disputes in a broader context serves multiple purposes. First, it helps ensure internal consistency of each party's espoused constitutional position. To illustrate, so long as the federal government in effect leaves the regulation of marijuana use to the states, a prohibitory state that believed marijuana to be dangerous or addictive might want to prohibit its citizens from using marijuana in a permissive state.[194] Whether Congress can authorize such extraterritorial regulation is a still unanswered constitutional question.[195] When a member of Congress considers that question, holism demands that she consider the related contexts where the constitutionality of state extraterritoriality might arise (such as parental notification laws and concealed carry laws). Her constitutional position as to marijuana must be consistent with her views concerning state extraterritorial powers in those related contexts.[196]

Second, holism aims to deescalate constitutional conflict by helping the parties take account of normatively relevant differences across contexts that may justify varying constitutional outcomes. Holism works against the tendency to elevate each and every constitutional dispute into an Alamo that must be defended at all costs so as to avoid a perceived cascade of constitutional implications.

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193 *See infra* Section IV.C.2 (discussing Communicative Exchange). Utah's successful legislative solution to conflicts between religious liberty and equality was preceded by six years of face-to-face dialogue between the Mormon Church and Utah's LGBT community. *See generally* Chokshi, *supra* note 94.

194 *See* Rosen, *Marijuana*, *supra* note 39, at 1014–15.

195 *See id.* at 1018–37.

196 *See id.* at 1042–52.

Consider once again the controversy regarding florists with religious objections to same-sex marriage.[197] It has been suggested that accommodating florists' religious objections would be tantamount to endorsing the Jim Crow era shopkeepers' refusal to serve African Americans.[198] Holism cautions against too-quickly crediting this analogy, and demands that disputants carefully consider the different factual contexts in which each refusal of service is situated. Refusals-to-serve during Jim Crow substantially impaired African Americans' equal citizenship rights insofar as such refusals were part of a systematic practice of denying Blacks basic services and of otherwise marginalizing them socially, politically, and economically. A florist's refusal-of-service may be less impairing of the same-sex couple's citizenship rights if the florist is on the social fringe, the couple can readily obtain services from other providers, and society-at-large supports gay rights.[199]

Holism invites inquiry as to whether there is a meaningful difference between a refusal-of-service exercised by the majority as part of a systematic regime of oppression, on the one hand, and a license to refuse service that political victors beneficently extend to conscientious objectors among the political losers, on the other. Holism insists that the parties take account of the larger social context—a cluster analysis of related circumstances, rather than a narrow issue-by-issue analysis—

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197 *See supra* note 191 and accompanying text.

198 *See, e.g.*, Tim Cook, *Tim Cook: Pro-Discrimination 'Religious Freedom' Laws Are Dangerous*, WASH. POST (Mar. 29, 2015), https://www.washingtonpost.com/opinions/pro-discrimination-religious-freedom-laws-are-dangerous-to-america/2015/03/29/bdb4ce9e-d66d-11e4-ba28-f2a685dc7f89_story.html [https://perma.cc/W5UH-HVE5] (equating refusal-of-services to same-sex couples with the Jim Crow era).

199 I am not making an empirical claim that the conditions enumerated above in text have been met. (Indeed, there would be substantial controversy in determining whether they were met insofar as it would have to be decided what counted as the relevant geographic or political unit for determining what counted as fringe and society-at-large). But the hypothesis forwarded above stands notwithstanding these empirical challenges. That is to say, if and insofar as these conditions are met, the race analogy is weakened, and it becomes more plausible to understand the refusal-of-service as an accommodation to fellow members of our political community. And even if white supremacists today stand on the social fringe, and if society-at-large condemns racial discrimination, it would not follow that supremacists should be permitted to refuse accommodation to African Americans. In contradistinction to today's religious-objecting florists, supremacists are no longer welcome members of the political community, and for that reason are not owed the respect and accommodation that constitutionalism entails for members of its political fraternity.

when considering what positions they think it at least reasonable that their political opponent, as a free and equal citizens, would accept.[200] Holistic analysis does not imply that the florist's refusal imposes no costs on the same-sex couple. But on account of the divergent social and historical circumstances, the nature and costs of a refusal-of-service may be quite different. Indeed, the holistic analysis demanded by Reciprocity may on its own point to a satisfactory resolution of the florist controversy.

2. Communicative Exchange

Reciprocity is a substantial disciplining norm, but on its own it cannot satisfy Tempered Politics. This is because even if the numerical majority self-polices by conforming to Reciprocity's demands, the majority's unilateral decision to adopt Reciprocity-compliant policies still would be incompatible with what a modern constitutional democracy demands. Though Reciprocity ensures the majority's position would be substantively fair, unilateral decision-making nonetheless is a form of brute political force. A necessary component to adequately legitimate the majority's actions in the constitutional domain is pre-enactment *Communicative Exchange* among the opposing sides that allows for the possibility of consensual constitutional decisions that are arrived at by some combination of mutual persuasion[201] and compromise.[202]

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200 Holism is in tension with the narrow decision-making that is characteristic of undertheorized agreements. *See supra* notes 170–72 and accompanying text. Precisely where congressional decision-making should be located along the continuum of narrow to broad decision-making depends on the issue. Narrow decision-making may facilitate consensus when issues are fresh and the underlying considerations are least understood. But other times, Holism's call for broader decision-making may facilitate compromise, insofar as Holism requires parties to identify for themselves, and then reveal to their opponents, their preferences as to a cluster of related issues. This invites bargaining and tradeoffs, which may lead to consensus compromises. The Special Norms Thesis leaves it to Congress to determine Holism's appropriate specification, a determination that is best made over time. *See supra* notes 76–89 and accompanying text.

201 Persuasiveness is a function of multiple factors, including a position's substantive merits and its proponent's rhetorical skills and power. As to the latter, a legislator's power partly owes to what she can credibly threaten. Insofar as the Special Norms Thesis narrows the range of credible threats that are available under current political practices, it is to be expected that the

Tempered Politics' sub-norm of Communicative Exchange imposes interactive requirements on disputants. It demands engagement with one's opponents that is designed to "[w]ork[] out in community what to do . . . ."[203] Communicative Exchange is not monologuing, but consists of discussion and other interactions[204] that are deployed to achieve consensus.[205] Communicative Exchange requires that participants be open to *Mutual Influence*, which has two components.[206] Participants must aim not only to influence how others think, but have genuine openness-to-being-influenced. The sub-norm of Communicative Exchange also requires that all sides make a genuine effort to achieve consensus through some combination of persuasion and compromise. Communicative Exchange thereby provides political minorities additional negotiation leverage beyond what they have in the domain of ordinary politics.[207]

a. Openness-to-Being-Influenced

A requirement that interlocutors have genuine *Openness-to-Being-Influenced* might be thought to unrealistically or unattractively

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Special Norms Thesis will play a role in determining what counts as persuasive. For example, to the extent that refusing to pass a yearly budget unconstitutionally disables governmental institutions, Tempered Politics would eliminate the threat of shutting down the federal government from a legislator's toolbox of negotiation options. In this important respect, the Special Norms Thesis has application to, and implications for, politicking in relation to non-constitutional disputes.

202 *Cf.* Coral Davenport, *A Climate Deal, 6 Fateful Years in the Making*, N.Y. TIMES (Dec. 13, 2015), https://www.nytimes.com/2015/12/14/world/europe/a-climate-deal-6-fateful-years-in-the-making.html [https://perma.cc/QQ9G-9YDY] (claiming that an important factor leading to the Paris climate agreement among the 195 nations was that the French hosts of the convention "made sure that each country, regardless of its size or wealth, felt its voice would be heard").

203 *See* GIBBARD, *supra* note 55, at 72; ACKERMAN, FOUNDATIONS, *supra* note 4, at 287 (constitutional moments characterized by "energetic exchange of public views" where each side "address[es] each other's critiques" and "talk[s] *to* one another" rather than "*past* one another").

204 Communicative Exchange is not limited to dialogue. Its contents turn on psychological empirics, namely what activities facilitate the "mutual influence" discussed above in text. Art and disruptive protest are examples of non-dialogic practices that likely belong to Communicative Exchange. *See generally* ESTLUND, *supra* note 117, at 200–04.

205 *See* GIBBARD, *supra* note 55, at 73.

206 *Id.* (using the term "mutual influence").

207 For a discussion of Tempered Politics' distributive consequences and its normative implications, see *infra* notes 242–46 and accompanying text.

presuppose that participants are not deeply committed to their positions. Not so. Openness-to-Being-Influenced is an artifact of what is—and what is not—at stake in constitutional decision-making. What *is* at stake are the basic rules that are to govern political relations in a large heterogeneous democratic polity. What is *not* at stake is truth with a capital "T."[208] Openness-to-Being-Influenced does not require that participants revisit or suspend the certainty they bring to their normative commitments. It only requires that they be open to reconsider what rules should govern citizens' political relations, upon better understanding their interlocutors' perspectives.

While Openness-to-Being-Influenced favors accommodation and compromise, it does not mean compromise always is appropriate. Some people are outside the fold of the political community, and Openness-to-Being-Influenced makes no demands as to them. And there is a small category of matters concerning which compromise would be wrongful.[209] But Openness-to-Being-Influenced imposes prima facie obligations of accommodation and compromise vis-à-vis fellow members of one's political community as to constitutional matters. Such openness to the constitutional claims of others may be a *sine qua non* of being part of a political community in a large and diverse constitutional democracy.

b. Aim-to-Influence

Next consider Mutual Influence's requirement that an interlocutor have an *Aim-to-Influence* her opponents to adopt her view. This might seem both self-evident (of course an interlocutor will try to convince her opponent!) and unhelpful (insofar as it does not demand tolerance of the other side's views). To the contrary on both accounts.

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208 This argument owes a debt to Rawls's distinction between political and comprehensive views. *See generally* RAWLS, POLITICAL LIBERALISM, *supra* note 114, at xv.

209 *See* AVISHAI MARGALIT, ON COMPROMISE AND ROTTEN COMPROMISES 54 (2010) (defining rotten compromises, which must be categorically avoided, as any "agreement that establishes or maintains an inhuman political order based on systematic cruelty and humiliation as its permanent features"). I am not persuaded that Margalit's definition exhausts the category of rotten compromises. For example, might rotten compromise extend to agreements that sustain political orders unwilling or unable to address human activities that threaten global devastation? Margalit's understanding of rotten compromise might, in other words, be unduly human-centric, though this Article is not the place to consider this matter any further.

As against that, the criticism of Aim-to-Influence is self-evident: the requirement counteracts the tendency to write off one's political opponents as "others" with whom one cannot have truck. The demand that I genuinely engage, rather than ignore or preemptively dismiss, my opponents is reflective of, and presupposes, a sharedness—a fraternity—among interlocutors.[210] Thus, Aim-to-Influence is an artifact of the sort of political fraternity that modern democratic societies aspire to establish.

As against the criticism that Aim-to-Influence is unhelpful or counterproductive, the demand that I genuinely engage my opponent for the purpose of influencing her carries important implications. The demanded exchange is not fundamentally confessional or monological—it is not simply an opportunity to state what I believe and why. Rather, the exchange must be directed at persuasion.[211] To be sure, confession sometimes may assist persuasion, as when it enables my opponent to understand why and how her views implicate my interests. But persuasion also may require that I make arguments using my opponent's frameworks and vocabularies—deploying reasons that may be persuasive to my opponent, though not necessarily to me on account of my prior understandings and commitments.[212] Done the right way, this form of argumentation is not dishonest.[213] It is another artifact of sharing a political community with others, insofar as it reflects a faith

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210 *Cf.* BILGRAMI, *supra* note 170, at 45–46 (arguing that serious engagement with others with whom one is "in a moral dispute" by "refus[ing] to allow him his own truth" and "striv[ing] to convince him of the truth as you see it and judge it, is to show the requisite attitude of inclusiveness" and "brotherhood" toward him).

211 Accordingly, I disagree with Lynn Sanders' critique of deliberation and call for "testimony." *See* Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347 (1997).

212 This is akin to Rawls's notion of reasoning from conjecture and Bilgrami's idea of internal reasons. *See generally* Micah J. Schwartzman, *The Ethics of Reasoning from Conjecture*, 9 J. MORAL PHIL. 521 (2012); *see also* BILGRAMI, *supra* note 170, at 54–55 (discussing "internal" reasons); Robb Willer & Matthew Feinberg, *From Gulf to Bridge: When Do Moral Arguments Facilitate Political Influence?*, 41 PERSONALITY & SOC. PSYCHOL. BULL. 1665 (2015) (arguing that political arguments reframed to appeal to the moral values of those holding the opposing political position are typically more effective than arguments framed only to reflect one's own moral values).

213 This generally requires making clear that I myself do not accept all the premises with which my argument works.

that all sides share enough in common that each can reason in their distinctive ways to the same conclusion.[214]

It takes time, effort, and a degree of empathy to enter my interlocutor's conceptual universe so that I can effectively engage with her on her own terms.[215] And Reciprocity places the same demands on my interlocutor. Accordingly, Aim-to-Influence may help each side come to a better understanding of, and perhaps even develop a sympathy for, her political opponent and her positions. Communicative Exchange thus may facilitate Reciprocity's second imaginative leap of seeing oneself as her political opponent.[216] And mutual sympathies that may arise from Communicative Exchange may further incline disputants towards the mutual accommodation and compromise that can lead to consensus.[217]

3. Justifications for Reciprocity and Communicative Exchange

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214 This shares much with Rawls's conception of the overlapping consensus. *See generally* RAWLS, POLITICAL LIBERALISM, *supra* note 114, at 164–68. And it contrasts with Habermas's view. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 166 (1996) (claiming that consensus "rests on reasons that convince all the parties *in the same way*").

215 *See* BILGRAMI, *supra* note 170, at 55–57 (noting that being able to make internal arguments calls for "elaborately empathetic attitudes of engagement"); JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 57–58 (2013).

216 In this important respect, Communicative Exchange and Reciprocity are complementary.

217 Having elaborated the Special Norms' contents, the differences between Pozen's and my conclusions should be easy to see. Pozen proposes that bad faith's "core meanings . . . center on dishonesty, disloyalty, and lack of fair dealing," to which he adds the "Sartrean" notion of "deception of self." Pozen, *supra* note 14, at 888; *see also id.* at 920–39. There is only a small amount of overlap with the Special Norms, namely between Communicative Exchange and what Pozen dubs an "unwillingness to compromise or negotiate across branch or party lines." *Id.* at 929 (emphasis removed).

More fundamentally, this Article's analysis suggests that bad faith may not be the best frame for conceptualizing and identifying the norms that should discipline Congress's constitutional decision-making: bad faith may be unduly narrow. Constitutional decision-making appropriately makes stronger demands, on account of the nature of constitutional domain. Tempered Politics' demands of Reciprocity and Communicative Exchange better capture the heightened demands that should apply to decision-making in the constitutional domain.

Having described the contents of Reciprocity and Communicative Exchange, this next subpart justifies those details. Tempered Politics' contents derive from the core considerations that give rise to the need for Special Norms: the Arguments from Legitimacy, Political Fraternity, and Identity.

a. Political Fraternity

Tempered Politics' first sub-norm, Reciprocity, facilitates the selection of impartial constitutional rules by demanding that a representative be willing to have the position she advocates be applied to her, both as she actually is and as she best can imagine herself as her political opponent. Constitutional rules that are impartial in this sense are suited to the political fraternity that modern democratic constitutions aim to establish—political relations that reflect citizens' political equality and mutual regard. Reciprocity's requirement that a representative support only those constitutional positions (as framed by Holism) she reasonably believes her opponents could accept (as appreciated via the Two Imaginative Leaps) reflects, and helps construct, political relationships of mutual respect, accommodation, and citizenship equality.

Tempered Politics' second sub-norm, Communicative Exchange, also is tightly connected to political fraternity. Communicative Exchange's requirement that the political majority interface with its opponents for the purpose of jointly determining what is to be done, and its preference that constitutional decisions be taken by consensus instead of brute majoritarianism, are suited to cultivating the type of political fraternity that modern democracies aspire to create.

b. Enhancing Legitimacy by Facilitating Consensus

Reciprocity and Communicative Exchange jointly facilitate the creation of a polity that satisfies more-than-minimal philosophical legitimacy as well as sociological legitimacy,[218] for two distinct reasons. First, as discussed immediately below in this Subsection, Reciprocity and Communicative Exchange increase the chance of reaching consensus, which is legitimacy's most secure grounding. Second, as

218 *See supra* notes 112–31 and accompanying text.

explained below,[219] even when consensus cannot be reached, Reciprocity and Communicative Exchange encourage the adoption of what might be called "constitution-worthy" decisions that can satisfy more-than-minimal theories of philosophical legitimacy and that support sociological legitimacy.

Multiple facets of Tempered Politics enhance the prospects of achieving consensus. Its sub-norm of Reciprocity channels disputes in the constitutional domain by constraining the substantive positions parties may stake out. Holism requires that disputants consider related circumstances all at once and enables those circumstances to be appreciated by all sides by means of Communicative Exchange and its two required imaginative leaps. The insights as to my opponents' perspectives, and any sympathies that result from placing myself in my adversary's shoes and my genuinely aiming to influence and being open to their influence, may affect my understanding of what positions my opponent can reasonably be expected to accept. Reciprocity requires that I only adopt such positions and requires that my opponents do the same.

Moreover, Tempered Politics channels disputes in a way that facilitates (though of course does not guarantee) consensus. The awareness of the fuller context made possible by Holism and Communicative Exchange may soften some disputes, and perhaps make some go away.[220] Communicative Exchange's demand that all parties have Aim-to-Influence and Openness-to-Being-Influenced invites persuasion, another avenue for reaching consensus. When persuasion alone does not lead to agreement, Reciprocity's constraints on what substantive positions parties can take, in conjunction with Communicative Exchange's Mutual Influence requirement, may reduce the range of disagreement as compared to what would be found under Hardball Politics. This compressed range of disagreement may increase the chances of reaching agreement. Also aiding consensus are any heightened mutual sympathies that result from Reciprocity's demand that each side imagine itself in the other's position,[221] and from Aim-to-

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219 *See infra* Section IV.C.3.e.

220 *See, e.g.*, *supra* notes 197–200 and accompanying text.

221 *See supra* notes 191–93 and accompanying text.

Influence's encouraging each side to enter her interlocutor's conceptual universe so as to effectively engage with her on her own terms.[222]

Holism's cluster analysis may further encourage compromise by virtue of its effect of placing related matters on the negotiation table at one time. Communicative Exchange helps each side to understand how the other side is affected in related situations. This simultaneous consideration of related issues can be expected to elicit the intensity of each party's interests in respect of each issue, which may help identify intelligible trade-offs across those issues that can lead to consensus through compromise. Consensus as to constitutional matters is strongly desirable because it is the most robust ground for philosophical legitimacy. And consensus is a virtual guarantee of sociological legitimacy.[223]

c. Other Benefits of Consensus

Consensus is a strong normative good for many reasons independent of legitimacy.[224] These reasons accordingly bolster the case for Reciprocity and Communicative Exchange, insofar as both sub-norms facilitate consensus. First, persuasion and compromise respect the agency[225] of fellow citizens because persuasion and compromise respond to the other's claims; Reciprocity-compliant unilateralism does not respect the other's agency, regardless of how enlightened the majority's Reciprocity-compliant position may be. Consensus also fosters ongoing relationships among competing factions that may allow each side's perspectives to transform over time, potentially leading to cascading convergences and consensus.[226] Compromise tends to be self-reinforcing, sowing the seeds for future good will and ongoing compromise. Finally, compromise tends towards stable solutions, and

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222 *See supra* notes 212–16 and accompanying text.

223 *See supra* notes 129–31 and accompanying text.

224 This is not to deny that compromise can sometimes be normatively problematic. *See* MARGALIT, *supra* note 209, at 54–62.

225 Agency refers to making choices, and thereafter acting pursuant to those choices, in a manner that can make a difference in the world. *See generally* CHRISTINE M. KORSGAARD, SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY 84–89 (2009).

226 *Cf.* SHIFFRIN, *supra* note 181, at 75. This is how participants in the Utah Compromise describe what occurred. *See* Chokshi, *supra* note 94.

stability is important to the ongoing large-scale cooperation among extensive populations that is a hallmark of modern polities.

It might be objected that compromise in relation to constitutional rights is a wrongful splitting of the baby. This objection might be valid if constitutional rights were absolute, but they are not.[227] Insofar as rights' non-absoluteness reflects a normative conclusion that no right is sufficiently important to prevail against all competing considerations,[228] a negotiated outcome that permits a right to prevail against some but not all competing rights and interests should not be facially suspect.[229] Indeed, compromise that allows each party to prevail in some circumstances, but not others, is more apt to reflect a normatively proper outcome than is the circumstance where one right unwaveringly trumps all competing considerations. To put it another way, the normative significance of constitutional rights is context-sensitive. As such, the normatively proper reconciliation between rights and competing commitments can be expected to vary as facts and circumstances change.[230] Compromise in the service of consensus may turn out to be a particularly good way to reach normatively appropriate resolutions of constitutional conflicts.

d. Jointly Determining Our Political Identity

Tempered Politics' facilitation of consensus is also beneficial insofar as how a polity reconciles competing rights and interests is a substantial determinant of its fundamental identity.[231] Consensus beats brute force as a mechanism for ensuring that citizens meaningfully identify with the polity's identity. Consensus-based identity is appropriate for a modern constitutional democracy, for who *we* are as a polity is appropriately determined by *us*, not imposed on us by others, to the maximal possible extent.

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227 *See supra* Section III.E.

228 *See supra* notes 143–41 and accompanying text.

229 For a similar argument, see Robin Fretwell Wilson, *Bargaining for Civil Rights: Lessons from Mrs. Murphy for Same-Sex Marriage and LGBT Rights*, 95 B.U. L. REV. 951 (2015).

230 *See* Rosen, *Non-Absolute Constitutional Rights*, *supra* note 51, at 1580–87.

231 *See supra* Section III.E.

e. Enhancing Legitimacy Where Consensus is Not Possible

Consensus is not always achievable. In this circumstance, Reciprocity and Communicative Exchange increase the likelihood that a large heterogeneous polity can satisfy more-than-minimal philosophical legitimacy. More-than-minimal theories justify political legitimacy on the ground that a polity's system for generating legal obligations is worthy of respect, even though citizens have not actually consented to the system.[232] Reciprocity and Communicative Exchange are well suited to generating constitutional decisions that satisfy the demands of these more-than-minimal theories of political legitimacy insofar as Tempered Politics encourages and facilitates constitution-worthy decisions.[233]

V. FOUR OBJECTIONS

Part V identifies and answers four objections to the Special Norms Thesis. The *Status Quo Objection* is that norms more demanding than Hardball Politics would unduly privilege the status quo, impeding constitutional progress. The *No Stopping Point Objection* is that the domain of constitutional decision-making is not susceptible of principled containment, which would mean that the Special Norms Thesis cannot be limited to a subdomain of Congress's decision-making. The *Mismatch Objection* accepts that Special Norms sometimes apply, but claims they apply to a different domain—only those matters that are extraordinarily important. Finally, the *Theory of the Second Best Objection* is that even if the Special Norms Thesis were correct in theory, our non-ideal reality warrants its rejection. This final objection encompasses, though is not limited to, the important criticism that the Special Norms Thesis is too impractical.

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232 Examples include hypothetical consent, *see, e.g.*, RAWLS, POLITICAL LIBERALISM, *supra* note 114, at 22–28, and epistemic approaches to grounding government authority, *see* ESTLUND, *supra* note 117, at 3–8.

233 Fully defending this proposition requires establishing what conditions must be met to satisfy more-than-minimal legitimacy, for which there is a vast and complex literature. *See, e.g.*, sources cited *supra* note 232 and accompanying text. Showing how Reciprocity and Communicative Exchange dovetail with even one theorist's approach would take more space than this already lengthy Article can provide.

These objections provide an opportunity to clarify how the Special Norms operate in difficult cases and help to identify costs that would attend acceptance of the Special Norms Thesis. These costs—some of which are contingent, and others which are unavoidable—are necessary for Part VI's all-things-considered analysis as to whether the Special Norms Thesis should be accepted.

A. *The Status Quo Objection*

The *Status Quo Objection* asserts that norms more demanding than Hardball Politics would unduly privilege the status quo by impeding constitutional progress. The objection begins with the observation that our nation's most important constitutional advances have come from sharp battles, not civil seminar-like discussions that led to consensus and fireside chants of Kumbaya.[234] The Special Norms are problematic, continues the Objection, insofar as the policies adopted under Tempered Politics will be less efficacious than what the political majority could have gotten. This is a natural consequence of Reciprocity's constraints on what position the political majority can take, and of Communicative Exchange's preference for compromise, which keeps the numerical majority from maximizing its political advantage.

For example, the Status Quo Objection claims that the Special Norms Thesis errs insofar as Tempered Politics' sub-norm of Reciprocity would have required abolitionists to imagine themselves as slaveholders and allowed them to put forward only constitutional positions that a slaveholder plausibly could have accepted. Likewise, Communicative Exchange wrongly favors persuasion and compromise with slaveholders, when the appropriate approach is brute majoritarianism against the evil of slavery. More generally, the Status Quo Objection claims that majoritarianism is normatively preferable to consensus-oriented Tempered Politics when resolving constitutional disagreements.

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234 *See supra* note 26 (noting that the Special Norms Thesis may not be applicable to a constitution's drafting and ratification).

As a preliminary matter, the Special Norms would not have been applicable during Reconstruction,[235] and therefore would not have constrained abolitionists. But this does not substantially blunt the force of the Status Quo Objection because the Special Norms would have applied at all other times in our nation's history, including the Jim Crow era. So, it is fair to ask whether the Special Norms would have impeded integration by constraining the constitutional positions integrationists could have propounded, and by otherwise favoring compromise and consensus-seeking with segregationists.

In fact, it is impossible to know what effect the Special Norms would have had on the cause of integration because the question is so counter-factual. Tempered Politics' requirements of Reciprocity and Communicative Exchange would have applied not only to the integrationists, but also to segregationists. Things could have played out in one of three ways, none of which would have clearly privileged the status quo.

First, both the traditional segregationists and the integrationists might have complied with Tempered Politics. Compliance with Reciprocity and Communicative Exchange almost certainly would have altered *both* sides' positions and encouraged them to work hard to reach a consensus outcome. This may have led to agreement.[236] Such consensus may have prevented the backlash that occurred, and which long hindered integration.[237] Consensus also may have laid the groundwork for continued civil dialogue and a growing convergence between the two sides over time.[238] All in all, Tempered Politics may have advanced the cause of integration faster and more peacefully than what actually transpired.

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235 *See infra* notes 291–95 and accompanying text.

236 This is not as unlikely as it may sound, because some progressive changes in fact began in the South before *Brown v. Board of Education*, including desegregation in sports, police forces, and some public accommodations. *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–442 (2004); Michael J. Klarman, *How* Brown *Changed Race Relations: The Backlash Thesis*, J. AM. HISTORY 81 (1994). There was even a pre-*Brown* movement toward desegregating schools in *Brown*'s own backyard, the state of Kansas. *See* KLARMAN, FROM JIM CROW TO CIVIL RIGHTS, *supra*, at 345.

237 *See* sources cited *supra* note 236.

238 *See supra* notes 224–26 and accompanying text.

Second, one side (say the segregationists) may not have complied with the Special Norms. This would have suspended the integrationists' need to comply with Communicative Exchange,[239] freeing them of the requirement of seeking consensus through persuasion and compromise. Though Reciprocity would still have constrained the integrationists' constitutional positions,[240] the Special Norms would not have prevented them from adopting their preferred Reciprocity-compliant position by simple majority rule. While Reciprocity limits the range of permissible substantive positions, many options typically remain available.[241]

Third, both sides may have complied with the Special Norms but still have been unable to come to a consensus outcome. Like the second case, the political majority would then have been free to adopt their preferred Reciprocity-compliant position through majority rule.[242]

More generally, the Special Norms do not threaten to stop progress in the way a supermajority requirement does.[243] The question for purposes of the Status Quo Objection is whether Reciprocity (which likely would have constrained integrationists' positions to some degree) and Communicative Exchange (insofar as it favors compromise) *unduly* privilege the status quo. While determining what counts as "undue" ultimately is a difficult normative judgment, undueness depends upon there being a *Gap* between the policies adopted under the Special Norms (SN_P) and the policies that would have been adopted under Hardball Politics (HB_P).

Before considering what properly counts as undue, it is important to observe that the Gap may be smaller than initially supposed. This is mostly for the reasons mentioned above in relation to desegregation: The Special Norms also constrain the other side, and may lead to policies that are not only more stable and enforceable, but that also pave the way for ongoing convergences and growing consensus. Another

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239 For an explanation as to why, see *infra* note 287 and accompanying text.

240 *See infra* notes 286–87 and accompanying text.

241 *See* Rosen, *Marijuana*, *supra* note 39, at 1042–52.

242 This does not mean the third scenario would have led to the same results as the second, for Communicative Exchange can affect the majority's understanding of what positions satisfy Reciprocity. *See supra* notes 211–16 and accompanying text.

243 Supermajority rules risk undersupplying decisions insofar as no action can go forward without a supermajority. *See* John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1150 (2007).

important factor limiting the Gap is that Reciprocity has an important internal limit. Reciprocity imposes restrictions only vis-à-vis opponents who share common ground with me; while Reciprocity requires me to espouse only those positions my opponents reasonably can be said to accept, those positions still must be acceptable to me.[244] Reciprocity's endogenous self-limit restricts the range of options that fall within SN_P, and is another reason the Gap may be smaller than initially thought.

Even so, the Gap is unlikely to always be zero. So, the question remains: Does the existence of any Gap amount to an undue privileging of the status quo? The answer is no. Although compromise sometimes can be wrongful, political compromise for the purpose of achieving a stable consensus that permits peaceful ongoing cooperative relations is ordinarily a strong normative good.[245] It follows that the mere existence of a Gap does not mean the status quo has been *unduly* privileged. While persuasion and compromise almost always will drive a gap between SN_P and HB_P, this is not problematic insofar as compromise is a necessary cost of social life. To the extent that compromise is a normative good, the Gap is a necessary and normatively unobjectionable cost.

But because compromise can be wrongful, the Gap potentially can be normatively problematic. To determine when compromise amounts to an undue privileging of the status quo, we need a thick normative theory of compromise. This merits additional study.[246] The thick theory's conclusions can, and should, inform how the Special Norms are operationalized, most especially Communicative Exchange's preference for consensus. The Status Quo Objection thus helps identify a contingent, though not a necessary, cost of the Special Norms Thesis.

B. *The No Stopping Point Objection*

244 Where there is no common ground, Reciprocity imposes no constraint.

245 *See* MARGALIT, *supra* note 209, at 7 ("[C]ompromises are vital for social life, even though some compromises are pathogenic."); *id.* at 37 ("Compromise . . . is cooperation based on mutual promises," the "cement of social life."); *id.* at 54–55.

246 While Avishai Margalit has given us an extraordinarily illuminating first cut, there is reason to think it should not be the final word on the subject. *See supra* note 209 (discussing Margalit's work).

The No Stopping Point Objection asserts that accepting the Special Norms Thesis would make the Special Norms applicable to all congressional decision-making. According to this objection, the effort to define a domain of constitutional decision-making that extends beyond the production of constitutional texts leads to a slippery slope because post-production constitutionalism lacks a principled border to separate the constitutional and non-constitutional domains. This objection would make the Special Norms Thesis an oxymoron, for how can "special" norms apply to everything? But the objection is far more than semantic. It threatens to collapse the Special Norms Thesis into the High Equivalence Thesis, making it vulnerable to the three critiques against Deliberative Democracy.[247]

As explained below, there are three versions of the No Stopping Point Objection. The first two are relatively easy to answer. The third has more bite, but also is answerable. It follows that post-production constitutionalism is not inconsistent with there being a finite domain of congressional constitutional decision-making. This rescues the possibility that Special Norms can apply to a sub-domain of congressional decision-making.

1. First Version

The first version of the No Stopping Point Objection builds on the Article's acknowledgment that every congressional action contains at least one constitutional ingredient, *viz.*, the *may question*.[248] Because every congressional action contains at least one constitutional ingredient, the Special Norms will be triggered every time Congress acts. Acknowledging this, it might be thought, concedes the validity of the No Stopping Point Critique.

But it does not, because the *may question* is only a subset of the considerations that inform congressional action. The Special Norms are

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247 *See supra* Section III.B.1. To be clear, the No Stopping Point Objection's validity would not destroy the Special Norms Thesis. The Thesis could be rehabilitated either by redefining the domain of congressional constitutional decision-making, or otherwise recalibrating the domain to which the Special Norms apply. But because the Objection's validity would undermine many of this Article's arguments for the Special Norms Thesis, it is important to consider it.

248 *See supra* Section I.A.

inapplicable to the non-constitutional considerations that typically inform Congress's *whether* and *what* determinations.[249] The Special Norms' applicability to the *may question* accordingly does not mean the domain of congressional constitutional decision-making is without limits. Moreover, on account of the Norm of Explicitness, not every constitutional issue in connection with the *may question* will trigger a duty of explicit consideration.[250] For example, constitutional issues that are well settled generally will not, as discussed above.[251]

2. Second Version

The second version of the No Stopping Point Objection targets the sub-domains where Congress's *whether* or *what* determinations belong to constitutional decision-making (namely Institution-Tending and Rights-Tending[252]). It asserts that one or both of these sub-domains lacks a principled border, with the result that most (or all) congressional activity can be fitted into it. The response is that although there inevitably will be ambiguities in application, most congressional action unambiguously does not fall under any of these sub-domains. This means the second formulation of the No Stopping Point Objection has no real traction.

But this version of the No Stopping Point Objection can be substantially rehabilitated because one of constitutional decision-making's sub-domains, *Adequate Realization*, is vulnerable to substantial swelling. What if a representative thought, or claimed to think, that Adequate Realization of constitutional speech rights required legislation that provided a substantial floor of goods—say food, housing, education, and health care?[253] This illustrates that the category of Adequate Realization conceivably can be very broad. I take up the response to this form of the No Stopping Point Objection in the next Subsection.[254]

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249 *See supra* Section I.A.

250 *See supra* text accompanying notes 175–80.

251 *See supra* text accompanying notes 175–80.

252 *See supra* Sections I.B.2, I.B.3.

253 *Cf.* SAGER, *supra* note 48, at 126–27 (propounding a serious claim quite close to this).

254 *See infra* text accompanying notes 257–59.

3. Third Version

The third version of the No Stopping Point Objection has substantial purchase. It circles back to the first formulation and avers that the Article's acknowledgment that every congressional action raises a constitutional question (the *may question*) *in effect* undermines any possibility that the Special Norms could apply to only a sub-domain of congressional decision-making. This is so, the third version insists, because there is a virtually infinite range of constitutional challenges that can be brought against a contemplated congressional action. For example, a member of Congress might think the Tenth Amendment radically limits Congress's legislative powers so that regulatory power is reserved to the states or the people,[255] or that all governmental regulation is presumptively unconstitutional insofar as it interferes with a citizen's liberty to do as she wishes.[256]

And the range of potential constitutional objections is even greater on account of the absence of a determinate, *a priori* line that separates on-the-wall from off-the-wall constitutional arguments.[257] There are many instances where constitutional arguments initially thought to be inconceivably weak became plausible, and sometimes black letter doctrine.[258] Moreover, continues the third version, a virtually infinite range of affirmative constitutional claims can be made to demand that

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255 Such an objection is not inconceivable under current Tenth Amendment doctrine, under which Congress alone determines that amendment's limits on Congress. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551–55 (1985).

256 This is not far from Randy Barnett's view. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004).

257 *See* BALKIN, *supra* note 31, at 18–19. Consider the broccoli hypothetical that was used to challenge the constitutionality of the Affordable Care Act. Though virtually no one viewed it as a serious challenge when it was first asserted, it quickly jumped the divide from off- to on-the-wall and ultimately gave rise to new commerce clause doctrine. *See* Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66 (2013).

258 *Compare* Slaughterhouse Cases, 83 U.S. 36, 80–81 (1872) (peremptorily rejecting substantive due process argument as self-evidently off-the-wall: "it is sufficient to say that under no construction of [the Due Process Clause] that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade . . . be held to be a deprivation of property . . . ."), *with* Lochner v. New York, 198 U.S. 45 (1905) (holding legislative restriction of baker's power to agree to work more than sixty hours per week violative of the Due Process Clause).

Congress undertake some action. (The second version's rehabilitated form, which asserts the potentially infinite scope of Adequate Realization, is an example.[259]) Because so many constitutional claims or objections always can be raised in relation to congressional action, continues the third version, accepting the Special Norms Thesis would mean that the Special Norms would govern an enormous percentage of the time.

And the third version's bite can be strengthened even more. The Special Norms may lead to a gaming of the system in which the political minority aims to characterize its mere policy preference as a constitutional claim. The gaming incentive is that Tempered Politics improves the political minority's negotiation position by favoring consensual solutions and discouraging the brute majoritarianism that is allowed under Hardball Politics.[260]

The No Stopping Point Objection is powerful, but there is an adequate response to it. The No Stopping Point Objection embodies an anxiety that principled borders cannot be drawn to demarcate the constitutional and non-constitutional domains. The objection assumes that it is necessary to clearly identify those borders from the start, and that an inability to do so undermines the case for the Special Norms Thesis.

But this assumption is mistaken. As explained above, norms can develop in an incremental process that begins with only one or a few consensus cases and builds outward over time to more difficult cases.[261] Demanding rule-like clarity from the start not only is unnecessary, but is self-defeating insofar as it short-circuits the iterative process of reflective equilibrium through which clarity is best obtained.[262] The initial question for purposes of norm development is not whether clear lines and rules can be identified now, but if there are widely shared considered judgments that can serve as the norm's starting points.[263]

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259 *See supra* text accompanying note 253.

260 They also might think the Special Norms will reduce the likelihood Congress will be able to go forward with the action they oppose. But that may be mistaken, because the Special Norms may facilitate congressional action. *See supra* text accompanying note 173 and Section IV.C.

261 *See supra* Section II.D.

262 *See supra* text accompanying notes 79–90.

263 *See supra* text accompanying note 79.

Norm-development can then proceed, despite initial uncertainties as to the norm's scope and content, due to the many coordination benefits that account for the human propensity to generate norms.[264]

This answer, which relies on the properties of norms in general, fully dispels the No Stopping Point Objection. Assume that the constitutional domain is not susceptible to determinate *a priori* borders, since what counts as on-the-wall and off-the-wall constitutional arguments is subject to change over time. And assume as well that the Special Norms create a gaming incentive. Even so, the Special Norms Thesis is not thereby invalidated, so long as there are some initial Considered Judgments as to when Special Norms properly apply.[265] The precise metes and bounds of the domain to which the Special Norms applies is itself determined by one of the Special Norms, namely the Norm of Explicitness.[266] So long as the conditions that give rise to norms pertain (*viz.*, coordination benefits that make norm-development valuable), and there are Considered Judgments that some matters fall within the constitutional domain, the process of reflective equilibrium can be relied upon to specify the Special Norms' scope and contents over time. Arguments as to what falls within the domain of constitutional decision-making will be made within Congress, and it is Congress's responsibility to determine what falls within the domain of constitutional decision-making.[267]

More generally, uncertainty as to a norm's scope and content is a characteristic of norm-development. That it takes time to work out the domain to which a norm is applicable is an inevitable cost of creating norms, but not a fatal blow against norms generally, or to the Special Norms Thesis in particular. For this reason, the No Stopping Point Objection is parasitic on there being no persuasive case for the Special Norms Thesis. If the arguments propounded in Part III establish a persuasive case for the Special Norms Thesis, the No Stopping Point Objection fails as an objection, and succeeds only insofar as it identifies costs of norm-development that must be factored into Part VI's all-things-considered final accounting.

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264 *See supra* text accompanying notes 80–82.

265 *See supra* Section III.A.

266 *See supra* Section IV.B.

267 *See supra* text accompanying notes 77–86.

C. *The Mismatch Objection*

The Mismatch Objection concedes that Special Norms sometimes apply to congressional decision-making but asserts that the Special Norms apply to a different domain—what might be called the Domain of the Extraordinarily Important. The Objection in effect claims that the constitutional domain is both over-inclusive and under-inclusive. As to its being over-inclusive, consider the various "constitutional workarounds" Mark Tushnet has identified, where "constitutional text obstructing our ability to reach a desired goal" is creatively circumvented.[268] For example, a plain reading of the Emoluments Clause would have prevented then-Senator Hillary Clinton from being appointed Secretary of State. The Secretary of State's salary had been adjusted for a cost of living increase during the time Clinton was Senator, and the Emoluments Clause provides that "[n]o Senator . . . shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States . . . the Emoluments whereof shall have been encreased during such time . . . ." [269] The so-called "Saxbe fix" returned the Secretary of State's salary to its pre-cost of living adjustment level.[270] If that is all the Emoluments Clause demands, continues the Mismatch Objection, it is hard to understand why congressional decision-making in relation to it must be governed by Special Norms. In the alternative, the Mismatch Objection might insist that if the Special Norms Thesis is correct that Special Norms apply to all constitutional matters, then workarounds must be rejected as wrongful because they inadequately respect the constitutional domain.

As to the constitutional domain's under-inclusiveness, consider the decision of whether this country should go to war, or whether the federal government should guarantee unemployment insurance or health insurance. None of these questions belongs to the constitutional domain, continues the Mismatch Objection, but all are sufficiently important that they should be decided by something other than the

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268 *See* Mark Tushnet, *Constitutional Workarounds*, 87 TEX. L. REV. 1499, 1503 (2009). I have simplified Tushnet's description of a constitutional workaround.

269 U.S. CONST. art. I, § 6, cl. 2.

270 *See* Tushnet, *supra* note 268, at 1501.

ordinary norms of Hardball Politics. After all, it plausibly could be said that whether there should be unemployment or health insurance determines the nature of our political fraternity far more than do many constitutional questions, such as what is demanded by the Emoluments Clause.

There are two main responses to the Mismatch Objection.[271] First, the claim that Special Norms should apply to the constitutional domain does not mean Hardball Politics necessarily governs *all* other congressional decisions. There may exist a set of non-constitutional, yet extraordinarily important decisions, such as whether to go to war.[272] The validity of the Special Norms Thesis does not depend on the conclusion that this extraordinary question should be answered pursuant to the norms of Hardball Politics.[273]

Second, and in the other direction, the Mismatch Objection fails because all constitutional decisions *are* appropriately made pursuant to the Special Norms. The constitutional domain consists of those matters that determine the nature of our nation's political fraternity by setting the decision-making structure that generates legal obligations and that determines the polity's core political identity. All these decisions are appropriately decided pursuant to Special Norms.[274] The Special Norms Thesis does not fetishize constitutional matters by freezing them forever, or by disallowing constitutional workarounds. The Thesis only demands that constitutional decision-making, which certainly would encompass whether a constitutional workaround should be crafted, be undertaken in accordance with the Special Norms.

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271 Also, some of what the Mismatch Objection takes to be extraordinary-yet-non-constitutional may properly belong to the domain of the constitutional. For example, perhaps rights to welfare, medical care, and social security properly are best understood as belonging to the constitutional dimension. For this suggestion, see Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 422–26 (2007); SAGER, *supra* note 48, at 87–88, 97–101.

272 Why such decisions ought to be made under stricter-than-usual decision-making norms, and what those norms should be, are neither addressed nor answered by the Special Norms Thesis. The arguments for the Special Norms, which in turn shape the contents of the Special Norms, are tailored to the constitutional domain, and do not automatically carry over to extraordinarily important-yet-non-constitutional decisions such as whether to declare war.

273 The Special Norms Thesis would be vulnerable to the Mismatch Objection only if the Argument from Exclusion were its only justification.

274 *See supra* Parts III, IV.

D. *The Theory of the Second Best Objection*

Whereas the No Stopping Point and Mismatch Objections attack the domain to which the Special Norms apply, the final objection takes aim at the Special Norms themselves.[275] It asserts that the Special Norms Thesis fails because it assumes ideal conditions that depart too far from reality. Consider three not-too-difficult-to-anticipate departures from the ideal conditions that the Special Norms Thesis might seem to presuppose. First, one side of the dispute may be a *norm-scofflaw* that does not abide by the Special Norms. Second, *intractable conflict* may make consensus impossible. Third, the Special Norms may be *too complex* to be workable in practice.

The theory of the second best teaches that if one optimal condition in an ideal theory cannot be satisfied, the best solution may require changing other variables away from what would be optimal under ideal conditions.[276] The theory gives rise to what might be called the *Second Best Objection*: even if the Special Norms Thesis were correct for ideal circumstances, it might not be desirable in our real world.

The *Second Best Objection* is a serious one. Its force is best assessed by a detailed examination of the Special Norms Thesis's operation under actual, non-ideal conditions. But one preliminary clarification is necessary. The Second Best Objection presupposes that the Special Norms Thesis *is* the optimal approach in an ideal world.[277] The analysis that follows accordingly assumes the optimality of the Special Norms Thesis, both the correctness of the arguments on its behalf (from Part III) and the exposition of its contents (from Part IV). The question is whether non-ideal conditions (like norm-scofflaws, intractable conflicts,

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275 The final objection thus is structurally similar to the *Status Quo Objection* insofar as both target the Special Norms themselves.

276 *See generally* Richard G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

277 It is important to distinguish between two different time periods: (1) before the Special Norms have been accepted, and hence become binding, through acceptance and internalization; and (2) after the Special Norms have become binding. The Second Best Objection is properly directed to the second time period. What circumstances must pertain for the Special Norms to become binding is an important question but is distinct from the Second Best Objection. *See supra* text accompanying notes 67–72.

or the needs of workability) are a basis for rejecting the Special Norms Thesis in practice.

1. Norm-Scofflaws

The norms literature recognizes that there always are and will be scofflaws who disregard norms, and understands that this deviation from ideal conditions neither undermines the normative case for norms nor prevents norms from arising.[278] The question remains whether norm-scofflaws in the specific context of congressional constitutional decision-making renders the Special Norms Thesis sub-optimal.

A careful consideration of the different types of norm-scofflaws demonstrates that the Second Best Objection is not a reason for rejecting the Special Norms Thesis. Consider first an abuser of the Norm of Explicitness, such as a legislator who tries to game the system by dressing her policy objections as constitutional objections so as to obtain the Special Norms' added negotiation leverage.[279] The Special Norms Thesis has adequate internal resources to address this scofflaw. Bad faith attempts to trigger the Special Norms are policed by Congress's application of the Norm of Explicitness,[280] for the Special Norms are not triggered if Congress does not believe they are in the domain of constitutional decision-making. While congressional self-policing presents a risk of "bad faith policing," the guard against bad faith policing is the value of the Special Norms themselves, which the Second Best Objection presumes. Once the Special Norms are in place, the bulk of representatives can be expected to comply with them, and to not endanger them by bad faith policing, on account of the norms' entrenchment as well as the coordination benefits that gave rise to the Special Norms in the first place.

Next consider Tempered Politics' handling of norm-scofflaws, i.e., those who refuse to follow Tempered Politics. To begin, although an individual or small group of noncompliant legislators would present an unfortunate circumstance, it would not affect the Special Norms' proper

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278 *See, e.g.*, GIBBARD, *supra* note 55, at 73–80.

279 *See supra* text accompanying note 207.

280 *See supra* text accompanying note 180.

operation so long as a sufficient number of legislators were norm-compliant. The presence of a single—or even several—scofflaws is not a sufficiently large deviation from ideal conditions to trigger the Second Best Objection.

But, some critical mass of scofflaws[281] would. Yet even if there were a critical mass, this would not be cause for rejecting the Special Norms Thesis because the Special Norms also have endogenous resources to manage scofflaws. A critical mass would suspend operation of Communicative Exchange, which by its nature requires both parties'[282] participation. Communicative Exchange's suspension would impose a substantial cost on the scofflaws, for they would lose the enhancement of their negotiation position that is provided by Communicate Exchange's encouragement of persuasion and compromise in the service of consensus. This cost may itself discourage some norm-scofflawing, though it may not be sufficient to completely eliminate it.

But a critical mass of scofflaws should not suspend all the Special Norms. Explicitness and Proactivity still should be fully operative, as would Tempered Politics' sub-norm of Reciprocity. Though it might be objected that basic fairness demands that norm-scofflawing suspend all the Special Norms, the considerations that account for the Explicitness and Proactivity norms lead to the conclusion that they should not be suspended by virtue of the other side's malfeasance.[283] The Norm of Proactivity arises to protect endangered constitutional institutions,[284] and the Norm of Explicitness exists insofar as explicit consideration improves the quality of constitutional decision-making.[285] It would make no sense to allow either of these Special Norms to be suspended due to the other side's malfeasance. Ignoring impending harm to a

281 A game theoretic analysis might be useful in identifying the parameters of that critical mass. I leave that important project to another day.

282 If the divergent positions on a constitutional dispute were fractured into more than two groups, and more than two but less than all the groups were willing to abide by Tempered Politics, then Communicative Exchange should be applicable to the subset of disputants that continue to abide by the Special Norms.

283 This does not mean these norms are categorical, but only that they are not defeasible on grounds of the other side's malfeasance.

284 This is one of several considerations that give rise to the Norm of Proactivity. *See supra* Section IV.A. The argument above in text applies *mutatis mundi* to all of them.

285 *See supra* text accompanying notes 165–68.

constitutional institution, or yielding explicitness' decision-making benefits, does not benefit the norm-abider, but only threatens systemic harm. If conditions appropriately trigger Explicitness or Proactivity, but the other side does not act in accordance with the Special Norms, the appropriate response is to penalize them by suspending Communicative Exchange and publicly calling them out.[286]

The basic fairness objection may seem to have substantial bite in respect of Tempered Politics' sub-norm of Reciprocity. Why, it might be asked, should Reciprocity constrain my substantive constitutional position if the other side does not comply? The answer is that Reciprocity appropriately disciplines a decision-maker, even if her opponents do not comply with it, on account of what constitutional decision-making consists in. The sub-norm of Reciprocity helps ensure the generation of constitution-worthy outcomes: outcomes that do not undermine legitimacy, that establish the political fraternity appropriate for a modern heterogeneous democracy, and that hold out the prospect of constituting the identity that the polity's citizens—including the heirs of today's norm-scofflaws—can ultimately call their own.[287] Only constitution-worthy decisions have these properties. The intrinsic and instrumental benefits of constitution-worthy constitutional decisions would be lost were norm-scofflaws treated as a license for Hardball Politics.

None of this is to deny that norm-scofflawing is deeply troublesome. Scofflawing before the Special Norms are entrenched risks impeding the norms' acceptance. And if scofflawing occurs too frequently after entrenchment, the Special Norms may be destroyed. But this is true of all norms. Norms come into existence, and persist, only if there is substantial compliance. And yet norms arise and persist.

The hardest challenge raised by scofflaws is whether the Special Norms can become entrenched norms in the first place. As explained

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286 For this reason, the Special Norms' efficacy may depend upon the public's participation in holding legislators accountable to them.

287 It might be thought that a non-reciprocal reciprocity requirement would create a pernicious incentive to the political minority, since the political majority must comply with Reciprocity regardless of the political minority's behavior. But there is no pernicious incentive because norm-scofflaws suffer in two ways. The political majority's ability to understand its opponent's position may be hindered, thereby reducing benefits they would likely enjoy under Reciprocity. And norm-scofflaws sacrifice Communicative Exchange's negotiation benefits.

above, this Article mostly leaves this important family of implementation questions for another day.[288] But this much can be said. Establishing the Special Norms would require hard work by norm entrepreneurs at the start, who must have the vision of a better way of conducting constitutional decision-making and must be willing to forbear the short-term political advantages they would otherwise enjoy under the (then-prevailing) norms of Hardball Politics. The motivation for such foresight and forbearance would be a conviction that the Special Norms are important and worthy of sacrifice—the very case this Article has tried to make. But once accepted, the Special Norms have sufficient internal resources to deal with intermittent scofflaws.

2. Intractable Conflict

Although the Second Best Objection on account of norm-scofflaws largely dissipates under inspection, the objection has real traction in relation to intractable conflict. This second form of the objection posits enduring intractable conflicts within a society. Conflict's stipulated persistence makes it a condition that properly triggers the theory of the second best, demanding that we consider whether such conflict renders the Special Norms Thesis suboptimal.

Enduring conflict actually grounds two related second-best objections. First, persistent conflict might be thought to be inconsistent with the Special Norms' pre-conditions. To put it bluntly, what is the point of Reciprocity and Communicative Exchange if intractable conflict means no one's views are susceptible of change? Second, persistent conflict unwinds the Special Norms' animating goal of seeking consensus.

a. The Objection's Limited Reach

The intractable conflict form of the Second Best Objection relies on a non-axiomatic, and ultimately empirical, assumption. It assumes that conflict as to constitutional matters—the fundamental way a society structures its political relations—is intractable to a degree as to make the

288 *See supra* text accompanying notes 67–72.

Special Norms Thesis suboptimal. Its empirical foundation limits the Objection's reach in three respects.

First, because the intractable conflict form of the Second Best Objection rests on empirics, it cannot be universally correct as a conceptual or theoretical matter. Instead, whether this Objection's assumption of enduring intractable conflict holds must be determined on a society-by-society basis. This Objection accordingly cannot ground a general rejection of the Special Norms Thesis.

Second, it seems unlikely that the Second Best Objection's assumption of intractable conflict would hold in every possible grouping of people. To put it more constructively, this form of the Second Best Objection suggests that attention should be given to the criteria for determining both the size of polities and who properly qualifies as a citizen.

Third, even where there is deep conflict, this form of the Second Best Objection holds only if conflict is *intractable*. Intractability presupposes that conflict is static, rather than dynamically subject to change. This presupposition is hardly self-evident, because external interventions might be capable of reducing conflict. And there indeed have been many successful interventions of this sort in the history of politics. For example, intra-society conflict has been substantially reduced by Locke's and other enlightenment thinkers' advocacy of toleration and disestablishmentarianism, which grew out of a deliberate effort to reformulate citizens' understanding of the relationship between politics and ultimate truth.[289] The Special Norms Thesis is another (perhaps more modest) proposed intervention, insofar as it aims to facilitate consensus as to foundational political relations through the aegis of Tempered Politics' requirements of Reciprocity and Communicative Exchange.

Put a bit differently, the intractable conflict form of the Second Best Objection succeeds only if we have come to the "end of history"[290] of reducing political conflict. Such a pessimistic position would require

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289 *See* RAWLS, POLITICAL LIBERALISM, *supra* note 114, at y; Mark D. Rosen, *Religious Institutions, Liberal States, and the Political Architecture of Overlapping Spheres*, 2014 U. ILL. L. REV. 737, 758–68 (discussing Locke's Letter Concerning Toleration).

290 *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (positing the possibility of an endpoint to the evolution of political arrangements).

reasoned argument, and surely cannot be simply presumed. Too ready acceptance of this form of the Second Best Objection may self-defeatingly hinder humanity's collective advance down the road of conflict-reduction. The Special Norms Thesis may be a vehicle for transporting us down that desirable road.

b. Where the Special Norms Thesis is Inapplicable

It cannot be denied that some political societies have extraordinarily deep conflict—think of present-day Iraq and Syria. Where there is such conflict, the Special Norms indeed do not apply.[291] Yet this conclusion emerges not in response to the Second Best Objection but is endogenous to the Special Norms Thesis. This is because the Special Norms Thesis is implicit in the social practice of constitutional democracies that aim to establish substantially legitimate polities that are marked by political fraternity of the sort described herein, and that have a political identity with which all citizens plausibly can call their own.[292] Insofar as the Special Norms Thesis is constitutive of polities that aspire to satisfying these demands of legitimacy, political fraternity, and identity, the Special Norms Thesis is inapplicable to polities that disavow these goals.

For example, if cleavages among groups are sufficiently severe, it may not be possible to establish a single polity that aims to satisfy the demands of legitimacy, political fraternity, and identity. Societies with deep intractable conflict typically can satisfy these demands only if all groups within the society agree to a decentralized political structure, such as a federalist or consociational unions.[293] Where severe cleavages are coupled with a subgroup's unalterable commitment to full political independence, a single polity cannot satisfy the demands of legitimacy, political fraternity, and identity. Without taking a position as to whether

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291 This presumes, without specifying, an appropriate time frame over which intractability is to be determined. The possibility that cleavages might disappear over a century is not relevant for determining the applicability of the Special Norms Thesis. The relevant period of time is probably closer to a half generation, though this topic deserves more consideration.

292 *See supra* Part III.

293 *See generally* AREND LIJPHART, DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION (1977). The Special Norms Thesis is fully applicable to such polities, though the substantive answers to constitutional questions that emerge will diverge substantially from the answers generated in those polities aiming to create a unitary political identity.

creating or sustaining a single polity in that circumstance is normatively justified, this much can safely be said: the Special Norms do not apply, because the predicates that give rise to them are absent.[294] For this reason, the Special Norms would have been inapplicable in the immediate aftermath of the Civil War, when the Reconstruction era amendments were ratified.[295] That the Special Norms are not universally applicable is not an objection to the Special Norms Thesis, but an implication of it.

3. Unworkably Complex

A final version of the Second Best Objection is that Tempered Politics' requirements are unworkably complex. This form of the Second Best Objection fails for two reasons. First, although spelling out Reciprocity's and Communicative Exchange's requirements required many law review pages,[296] this does not mean that complying with Tempered Politics would be complex or otherwise unworkable. Consider the activity of riding a bicycle. Although written instructions for someone unfamiliar with riding would be lengthy and complex, bicycle riding is quickly internalized as a new rider quickly finds the activity to be second-nature. The same would be true, I suspect, with Tempered Politics. I have labored to detail its requirements because it is novel, but its core is an orientation towards consensus that could readily become second-nature to legislators.

Second, if some aspects of this Article's specifications of Tempered Politics turned out to be overly burdensome, reflective equilibrium permits those problematic requirements to be rejiggered or outright rejected. Or if Tempered Politics' requirements should prove unworkable in respect of specific congressional decision-making, the

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294 This does not mean that those societies' constitutional decision-making is properly governed by the norms of Hardball Politics. This issue deserves future attention.

295 This is because the confederate states wanted to secede but were not permitted to. For a detailed discussion of the Hardball Politics used by the Reconstruction Congress to ratify the post-Civil War Amendments, see ACKERMAN, TRANSFORMATIONS, *supra* note 4, at 99–119.

296 *See also* Rosen, *Marijuana*, *supra* note 39, at 1042–52 (using ten pages to explain Reciprocity's application to extraterritoriality analysis).

Special Norm of Explicitness permits the suspension of Tempered Politics' demands vis-à-vis just those decisions.[297]

For these reasons, the unworkability version of the Second Best Objection does not disprove the Special Norms Thesis. Instead, it serves the important role of identifying transition costs of specifying the Special Norms' contents. As such, this version of the Second Best Objection addresses the Special Norms Thesis's affirmative claim (i.e., the Special Norms' contents), but not the Thesis's negative claim (that constitutional decisions should not be undertaken under the norms that apply to ordinary politics).[298] The potential transition costs spotlighted by the unworkability objection is relevant to the all-things-considered calculus regarding the Special Norms Thesis's affirmative claim, and for that reason are taken account of in the next Part. But transition costs cannot on their own defeat the Special Norms Thesis, on account of the potential benefits that are held out by the Thesis's negative claim.

CONCLUSION: THE FINAL ACCOUNTING

A concrete understanding of the array of constitutional decisions Congress must make[299] gives rise to a preliminary Considered Judgment that those decisions should be taken under something other than the norms that apply to Congress' ordinary political decisions.[300] The Article then developed four arguments that ground those Considered Judgments,[301] extended the Special Norms Thesis's negative claim to the entire domain of Congress's constitutional decision-making,[302] and that provided the conceptual resources for fleshing out the contents of the Special Norms that should apply to Congress.[303]

And now for the final accounting. First, consider the Special Norms Thesis's benefits. Special Norms have the capacity to generate a

297 *See supra* text accompanying notes 173–76.

298 *See supra* note 24 and accompanying text (identifying the Special Norms Thesis's negative and affirmative claims).

299 *See supra* Part I.

300 *See supra* Section III.A.

301 *See supra* Sections III.B–E.

302 *See supra* Sections III.B–E.

303 *See supra* Part IV.

polity that is more-than-minimally philosophically legitimate, and that is sociologically legitimate.[304] Special Norms can help create the sort of political fraternity that large, diverse modern democracies aim to establish.[305] And Special Norms are appropriate for constitutional decisions that account for the polity's core identity.[306] These benefits are usefully contextualized by considering the only alternatives to the Special Norms Thesis. The Low Equivalence Thesis falls short on all three of these criteria.[307] The High Equivalence Thesis does not, but it falls prey to other pitfalls. In misconceiving the nature of politics, the High Equivalence Thesis prescribes decision-making norms that are both conceptually and pragmatically ill-suited to the domain of ordinary politics.[308] The Special Norms Thesis is the middle path between the polar opposite extremes that the Equivalence Theses stake out. The Special Norms Thesis makes heightened demands for the appropriate sub-domain of public decision-making. Its alternatives do not.

Now consider the Special Norms Thesis's costs. Explicitness' requirement that Congress forthrightly address constitutional issues when they arise, and Tempered Politics' requirement of Communicative Exchange, risk bogging down the legislative process.[309] But Tempered Politics might have the opposite effect of facilitating congressional action because it encourages responsible decision-making in the constitutional domain.[310] And if this did not turn out to be the case—if Tempered Politics generally, or in some circumstances, interfered with Congress's functioning—the Norm of Explicitness permits waiver of the other Special Norms in just those cases.[311] So, to the extent bogging-down costs were real, they may turn out to be only the short-lived costs of norm-development. When properly specified, the Special Norms have the capacity to sidestep bogging-down costs.

A second family of costs is a byproduct of the fact that the Special Norms erect a two-track process in which Special Norms apply to

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304 *See supra* Section III.C.

305 *See supra* Section III.D.

306 *See supra* Section III.E.

307 *See supra* Section III.B.2.a.

308 *See supra* Section III.B.1.

309 *See supra* text accompanying notes 170–71.

310 *See supra* text accompanying note 173.

311 *See supra* Section IV.B.3.

constitutional decision-making and other norms apply to non-constitutional matters. To begin, a two-track system requires definition of each track's borders, as to which there undoubtedly will be uncertainty. But this is the type of cost that attends all norm-development, and that can be expected to diminish over time. Transition costs in connection with norm-generation are unavoidable. They are properly weighed against the Special Norms' promised benefits,[312] but are not reasons on their own for rejecting the Special Norms Thesis.

Further, a two-track system opens the door to the inequitable circumstance where the good guys comply with the Special Norms while norm-scofflaws play Hardball Politics. But proper specification of the Special Norms should ensure that these are mostly phantom costs. A properly calibrated Explicitness Norm should countermand efforts to game the system. And because norm-noncompliance frees the other side from the requirements of Communicative Exchange (the Special Norm that most benefits political minorities), would-be scofflaws might be inclined to comply most if not all the time.[313]

The two-track system has distributional consequences because Tempered Politics' preference for consensus over brute majoritarianism enhances the political minority's negotiation position. But many normatively problematic distributional consequences can be avoided by proper specification of the Special Norms. For example, while the Special Norms' negotiation benefits may incentivize political minorities to dress their policy claims as constitutional ones,[314] this gaming cost can be checked by proper specification of the Norm of Explicitness, which determines when a genuine constitutional claim triggers application of the other Special Norms.[315] The degree to which the Norm of Explicitness eliminates this gaming cost turns on the empirical question of how expertly Congress operationalizes the norm.

Yet not all distributional consequences would be eliminated. The Special Norms' enhancement of the political minority's position can be expected to impede constitutional change relative to what would occur

312 *See supra* Section V.B (discussing the No Stopping Point Objection).

313 *See supra* Section V.D.1 (discussing the Second-Best Objection).

314 *See supra* text accompanying note 260.

315 *See supra* Section IV.B (discussing Explicitness).

under a one-track system where Hardball Politics were the only operative norm, creating what this Article calls a "Gap."[316] Although ascertaining whether there is a Gap is more subtle than at first appears (because sometimes the Special Norms may bring about change that otherwise would not occur), it is unlikely that the Gap always will be zero.[317] But the existence of a Gap is not *per se* normatively problematic.[318] Compromise-generating Gaps are a necessary and normatively unobjectionable cost of securing stable social relations. Determining whether any Gap amounts to an undue privileging of the status quo ultimately requires a thick theory of compromise that lies beyond this Article's scope.[319] It must be acknowledged that the Special Norms Thesis carries a risk of undue privileging, at least until an adequate theory of compromise has been developed.

A final cost would be if the Special Norms' requirements operated as a suicide pact, demanding consensus through persuasion and compromise where consensus were unattainable.[320] But this cost is also avoided by proper specification of the Special Norms. The Special Norms encourage, but do not require, consensus. Constitutional decisions can be rendered by mere majoritarian decision-making where consensus cannot be reached, so long as the political majority's position complies with Reciprocity. And the Special Norms Thesis recognizes that the Special Norms may not be applicable at all to some countries, and at certain times.[321]

In short, while some costs invariably would attend norm-development, many of the Special Norms' costs ultimately can be contained, if not altogether eliminated, once the norms have been properly specified. And though determining whether the Special Norms' distributional consequences are normatively problematic turns on a thick theory of political compromise, compromise is a strong normative good most of the time, and the domain of rotten compromises that are to be categorically avoided is limited. From this it follows that most of

316 *See supra* Section V.A (discussing the Status Quo Objection).

317 *Id.*

318 *See supra* text accompanying notes 244–46.

319 *See supra* text accompanying notes 244–46.

320 *See supra* Section V.D.2 (discussing the possibility that intractable conflict renders the Special Norms Thesis sub-optimal pursuant to the Theory of the Second Best).

321 *See supra* Section V.D.2

the Special Norms' distributional consequences likely would be the normatively unobjectionable costs of securing peaceful and stable social relations among politically equal citizens.

In conclusion, while the Special Norms Thesis carries some costs, so do all alternatives to the Special Norms Thesis. The question boils down to this: setting aside the Special Norms' phantom costs, do the transition costs associated with norm-development, in conjunction with the Special Norms' ineradicable distributional costs, outweigh its benefits such that the Special Norms Thesis is less attractive than its alternatives? On account of the Special Norms Thesis's potential benefits, the answer would seem to be "no." All-things-considered, the Special Norms should be the governing standards when Congress engages in constitutional decision-making.