NON-IDEAL THEORY OF CONSTITUTIONAL ADJUDICATION

Roni Mann

Abstract

When a constitutional court faces opposition from other branches of government or significant segments of the public, should it always hold fast to what it considers constitutionally right, even where this would potentially harm its status and perceived legitimacy? Or are constitutional compromises sometimes justified? Identifying this as the dilemma of "institutionally-hard" cases, this Article then develops a principled approach to this question, one grounded in liberal constitutional thought and drawing on Rawls' notion of "non-ideal theory." In doing so, the Article addresses a troubling gap between, on the one hand, the (idealizing) discourse of normative constitutional theory – which overlooks or downplays the actual social and political pressures that courts must confront – and, on the other, a growing "realistic" political science literature that sees judges as strategic actors and, thereby, leaves no space for principled constitutional reasoning. Rawls' idea of non-ideal theory is precisely intended to bridge the gulf between a utopian normative project and prevailing political and social circumstances, by charting out a principled and legitimate path for changing a given reality into a more desirable one. In the case of constitutional courts, a court that aspires to make constitutionally right and just pronouncements, as well as see them implemented and sustained in practice, should also handle its own institutional status and perceived legitimacy as a matter of principle. Our evaluation of judicial decisions in institutionally-hard cases should not, therefore, consider simply the prudence of judicial choices, or comment casually on their cowardice or courage but should, rather, be a project of principle, of articulating standards for normative assessment. The principles of a non-ideal theory of constitutional adjudication should both reinforce the commitment to ideal constitutional principle and properly situate constitutional courts within the real, contingent, non-ideal social and political contexts in which they operate.

NON-IDEAL THEORY OF CONSTITUTIONAL ADJUDICATION

I. INSTITUTIONALLY-HARD CASES

Cases that are easy or straightforward as a matter of ideal constitutional principle may still be "hard" due to non-ideal social and political circumstances. Widely familiar, this predicament is insufficiently understood. In particular, when liberal constitutional courts face strong opposition from other branches of government or significant segments of the public, adjudication gives rise to a fundamental dilemma of constitutionalism, one not adequately diagnosed, much less addressed, within the main lines of existing constitutional theory.

Consider for example the situation facing the Federal Constitutional Court of Germany in 1995, when it had to rule on the constitutionality of the state requiring crucifixes to be displayed in public schools.[1] From the vantage of constitutional principle, this was a simple case of religious freedom protected by the Basic Law, requiring the invalidation of the regulation.[2] However, the judges must have known that their decision

[1] Judgment of May 16, 1995, 93 BVerfGE 1 ("*Crucifix*").
[2] Art. 4 Abs. 1 GG, further supported by Art. 140 (in turn incorporating Art. 136(4) of

would be highly unpopular with those whom it directly affected: public school boards in culturally-Catholic Bavaria. Nevertheless, the Court went ahead and declared void the relevant portion of the Bavarian elementary school regulation, and lived to face the consequences: mounting anger, politicians openly defying the Court, and the promulgation of new regulations and practices in blatant disregard of the decision. It is often said that there are more crucifixes in Bavarian schools now than there were before the *Crucifix* case was decided.[3]

Constitutional judges care about how their decisions are received and enforced, their social impact, and their effect on the court's own status and perceived legitimacy. The Chief Justice of the German constitutional court in *Crucifix* was evidently concerned enough to write an article in a daily newspaper, explaining to the public "why a judicial ruling deserves respect."[4] What made this case hard was not a difficulty in interpreting or elaborating constitutional norms. Rather, non-ideal social and political circumstances made this decision *institutionally* hard. In ideal circumstances, a court would see its decisions enforced, respected, and lived by. Non-ideal circumstances pertain to the *actual* position that constitutional values occupy in the social and political landscape of a *particular* polity, and to the role and status of the court as a "forum of principle"[5] *for* that polity. If the Federal Constitutional judges lost sleep over *Crucifix*, it was not due to a difficulty in finding the right answer[6] as a matter of constitutional principle, but to the foreboding sense that such a decision would be detrimental to the Court's status, to the constitutional system, and to the normative force that liberal constitutional values have within the actual practices of social life. In other words, the dilemma at hand concerns the tension between what would be right *constitutionally* and what would – given the circumstances – seem wise *institutionally*.

But is this properly seen as a dilemma? Should a Herculean judge lose any sleep over the institutional implications of her decisions? Why isn't the

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the Weimar Constitution). This does not mean that a principle argument the other way could not be worked out. But the real difficulty, as we will discuss, lay elsewhere.

[3] Vanberg [*infra* at] attributes this statement to an unnamed justice of the constitutional court [at 3], and describes at length the "storm of public protest" that followed the decision. *Ibid*. For an extensive account of the decision and its social and political context, *see* Peter Caldwell, "The Crucifix and German Constitutional Culture," 11(2) Cultural Anthropology 259 (1996).

[4] Dieter Grimm, "Unter dem Gesetz: Warum ein Richterspruch Respekt genießt" (Under Law: Why a Judicial Ruling Deserves Respect), Frankfurter Allgemeine Zeitung, August 18, 1995, 29.

[5] Discussed *infra* .

[6] "Right" in what sense? Discussed *infra* .

answer simply that judges should hold fast to constitutional principle, and ignore non-ideal circumstances? Is it not the very point of constitutional adjudication, the very essence of the rule of law, that the court be independent from all forms of public and political pressure and defend liberal ideals against such interests and sentiments? On this familiar understanding of constitutional legality, the German court was not faced with a dilemma, but did the right thing, plain and simple. A constitutional court will, by definition, not always be popular; so what? Herculean integrity should not be tainted by approval-seeking and savvy public relations.[7]

Against this uncompromising commitment to ideal principle, which undergirds official discourse in both judicial opinions and constitutional theory, an opposing ideal often comes to the fore in more informal discourse, one that accepts the importance of judges taking seriously the circumstances in which they make their pronouncements. This is the notion that good judges are good *statesmen*, their role calling for delicate, situational judgments concerning the timing and scope of their pronouncements of principle. This undercurrent is perhaps given clearest expression in cases where a decision is said to "mature." Consider the celebrated same-sex marriage decision of the U.S. Supreme Court in 2015, *Obergeffel*, where the Court recognized a constitutional right to marriage equality.[8] The ruling came after many state and federal courts had already held that same-sex marriage was guaranteed by the Fourteenth Amendment's Equal Protection clause,[9] decisions supported by a steady shift in public attitudes.[10] The line of Supreme Court cases preceding *Obergeffel* has been praised as masterful "judicial statesmanship" precisely for its intelligent timing vis-à-vis public opinion, and for avoiding the right outcome until it was "due."[11] Does this mean it would have been wrong for a federal court to issue such a decision earlier, say twenty years ago, because it would have been unpopular then?[12] Judge Posner clearly thought so when, in 1997, while in favor of marriage equality on the merits, he argued for letting "the matter simmer for a while before the heavy artillery

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[7] [Cite Judge Haim Cohen of the HCJ on the importance of running away from seeking the respect of the public.]

[8] *Obergeffel v. Hodges*, 576 U.S. _____ (2015) ("*Obergeffel*").

[9] [And the Due Process Clause]

[10] The process was described at length in the majority opinion in *Obergeffel*.

[11] *See e.g.,* David Cole, *A Surprise from the Court on Gay Marriage*, NYRB October 6, 2014. Discussed further *infra* .

[12] In 1997, even criminal anti-sodomy laws were deemed constitutional. *Bowers v. Hardwick* (1986), later repealed by *Lawrence v. Texas* (2003).

of constitutional rights making is trundled out."[13]

Here, then, is the issue. Had a principled but "premature" decision imposed from the bench a constitutional norm that most would have found unacceptable, this could have ensued in turmoil and deeper entrenchment in currently-held positions – effects that would have harmed not only the Court but also the cause of marriage equality.[14] But how can a "forum of principle" plausibly delay and deny constitutionally-protected fundamental rights, due to conservative public attitudes? The ideal of constitutional legality cannot tolerate a judicial practice of selective or strategic restraint, where constitutional rights are made to hinge on contingent majoritarian sentiment. And yet, for a constitutional system to be sustainable, it is evidently undesirable that judges be utterly disconnected from context and impervious to questions of institutional status and perceived legitimacy.

Indeed, a recent "realist turn" in political science literature on judicial behavior contends that judges not only consider context, including the attitudes of other actors, but in fact *strategize*, in the rational-choice sense of the term. That is, judicial outcomes reflect judges' calculation of expected results, with a view to maximizing their preferred policy outcomes.[15] This approach is diametrically opposed to ideal constitutional theory: skeptical of the normative force of principled constitutional reasoning, it sees judicial opinions as ex-post-facto rationalizations of the strategically-best decision. Yet, just like ideal constitutional theory, this notion also fails to recognize the dilemma of institutionally-hard cases, now for the mirror-opposite reason. Since judicial strategy is a rational calculation, it is free from normative grey areas. It simply takes into account the various possible outcomes and their effects on the relevant agents, perhaps aided by some game-theoretical sophistication. Where there is no principled normative constraint, there can be no dirty-hands insomnia.

We have, then, three competing approaches to institutionally-hard cases, two of which deny the dilemma and a third that sees but fails to address it. *Ideal constitutional theory* ignores the non-ideal or, as we will see, idealizes it, folding it into generalized principles and doctrines. *Judicial strategy*, propelled in part by ideal theory's disconnect from social and judicial realities, does the inverse: it neutralizes the force of the ideal, leaving judges free to calculate. Finally, *judicial statesmanship* recognizes institutional cases as truly hard and praises those judges that handle them

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[13] Richard A. Posner, "Book Review (reviewing William N. Eskridge, The Case for Same-Sex Marriage: From Sexual Liberty to Civilized commitment (1996))," 95 Michigan L. Rev. 1578 (1997), at 1585. Discussed further *infra* .

[14] [This was a central concern in the litigation strategy of the LGBT movement. Cite]

[15] *See e.g.,* [ ] and discussed at length *infra* .

wisely. But this notion offers no standards by which to guide and assess institutionally-hard decisions, treating their adjudication as an art form that reflects the personality and knack of individual judges. Judicial statesmanship is based on intuitive appreciation or dismay: any one decision may be considered brave or imprudent, cowardly or cautious, depending on the eyes of the beholder. In combination, the net result of these three approaches is the lack of a critical yardstick by which to evaluate decisions in institutionally-hard cases as better or worse decisions as a matter of constitutionalism.

To appreciate the far-reaching significance of this problem, consider the predicament of liberal constitutional courts facing political threats from executive and legislative branches that seek to weaken them and strengthen majoritarian institutions.[16] Should a court that responds by toning down its decisions and adopting a strategy of restraint, be praised for its shrewd pragmatism, or should we instead demand that it bravely stay the course, regardless of retaliatory consequences, even if these might amount to the demise of the constitutional system? One such example is Israel's High Court of Justice, which has come under escalating threats of constitutional reform, and appears to have heeded the call.[17] Consider for instance its decision from April 2015, upholding the Boycott Law enacted by the Knesset in 2011.[18] The law imposes civil liability on anyone who publically calls to boycott Israel or the Settlements, be it economically, academically or culturally.[19] As a matter of constitutional law, it would have seemed an easy decision to declare the law a violation of protected political speech. And, indeed, as a matter of substantive constitutional reasoning, the HCJ's opinion relies on some strikingly unpersuasive arguments, including the claim that public calls in support of a boycott do not fall within the core area of protected speech,[20] and the comparison of such advocacy with false

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[16] [Mention various jurisdictions and refer to scholarship.]

[17] While many statements against court "activism" have been made throughout the years, in particular following Aharon Barak's "constitutional revolution" of the 1990s, these have recently turned into concrete plans to weaken the role of the Court in Israel's political system. Members of the ruling coalition, in particular Prime Minister Netanyahu and Justice Minister Ayelet Shaked, have explicitly declared their intentions to effect constitution reform that would allow the Israeli parliament (Knesset) to override the High Court of Justice. *See*, e.g., "Netanyahu says he still 'aspires' to pass anti-Supreme Court bills" *Haaretz*, April 27, 2015, haaretz.com/news/israel/.premium-1.653867

[18] *Uri Avneri et al. v. The Knesset et al.*, Judgment of April 15, 2015, HCJ 5239/11 [check cite – P.D. not found] ("*Boycott*").

[19] Law for the Prevention of Harm to the State of Israel by Means of Boycott, 2011. The HCJ decision invalidated a section that provided for the imposition of punitive damages, but upheld the rest of the law's provisions.

[20] *Ibid* at 30.

cries of "fire" in a packed theater.[21] The question before us, however, is not whether, as a matter of substantive constitutional reasoning, the decision was tenable in terms of ideal principle, but rather, first, whether, or not this is indeed an institutionally-hard case and, second, supposing that it is, whether we can talk meaningfully about the way in which contingent non-ideal political considerations may or may not permissibly affect the court.

Note that, by contrast with the descriptive orientation of the "judicial strategy" school, this article is concerned with a normative question: how *should* judges decide institutionally-hard cases. Granted, the significance of the inquiry does rest on a rather modest empirical premise: namely, that, at least in some actual cases, courts do shy away from rendering the best possible constitutional decision – one that they would provide in ideal circumstances – due to non-ideal institutional pressure. Whether or not such non-ideal considerations did *in fact* play a role in any one case, such as *Boycott*, is of less importance here. What is required is a reasonable likelihood that such considerations play a role in some decisions, although (indeed, especially where) not explicitly articulated in the written opinions, or even in internal deliberations. Thus, the court in *Boycott* said nothing of the escalating threats from members of Israel's coalition government, citing instead standard legal-constitutional justifications, a gamut of authorities, an ethos of "restraint", and a balancing test that found the chilling effects on political speech to be proportionately outweighed by a legitimate state interest. Yet astute observers of the HCJ in the last few years have lamented its "cowardice" and its scaling-down of constitutionally protected rights.[22] It is easy to see, but unnecessary to prove, that non-ideal circumstances have had a chilling effect on the HCJ.

To properly address institutionally-hard cases, we need, first, to recognize the real dilemma they present arising from the tension between, on the one hand, the role of the court as a forum of principle and, on the other hand, non-ideal circumstances that make the very pronouncement of principle less likely to result in a *meaningful realization* of constitutional ideals. Second, we can and should normatively reflect on institutionally-hard cases, considering what kinds of non-ideal circumstances should or should not affect courts, and how. If the right answer as a matter of ideal principle is not always the right answer *all things considered,* constitutional

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[21] *Ibid* at 23. [Explain the reference]

[22] These normally take the form of op ed pieces. *See e.g.,* Emanuel Gross [cite Brave Court Wanted, Haaretz] and Mordechai Kremnitzer [cite]
"Especially in hard times, when its decision is likely to be unpopular, the Court is expected to manifest bravery and decide in a way that maximally protects human rights." (trans. RM)

theory should subject this intuition to reasoned reflection. In other words, to take seriously non-ideal circumstances we need to develop a non-ideal constitutional theory. This would be the constitutional version of John Rawls's notion of a non-ideal theory of justice. Rawls spoke of non-ideal theory as charting a legitimate and effective path for shifting from a currently unjust society to one where the principles justice are realized.[23] In other words, institutionally-hard cases should be addressed as concerning an *effective and legitimate* path toward a meaningful realization of constitutional ideals. The last part of this article proposes a first sketch for such a theory. Preceding it is a closer examination of the alternative approaches already mentioned: ideal constitutional theory, judicial strategy, and judicial statesmanship. Though unsatisfactory, each of these is crucial for informing the proposed theory and assessing it.

The problem of institutionally hard cases is a general and structural one, not limited to some jurisdiction or another. To highlight this, I will continue to consider cases from different courts (The U.S. Supreme Court, the German Constitutional Court, Israel's High Court of Justice, and the European Court of Human rights).

II. IDEAL AND IDEALIZATION

The prevailing constitutional discourse of both judges and scholars is inherently idealized, and either ignores non-ideal circumstances, or subsumes them under ideal doctrines and principles. While this judicial commitment appears necessary for defending constitutional principles and the court itself, its denial of the non-ideal comes at a heavy price: as non-ideal decisions are *idealized*, they create diluted or eroded ideal *precedent* as a matter of both doctrine (first-order) and theory (second-order). This kind of idealization is more troubling than the simpler concern with judicial opinions not revealing the "real" reasons behind them.

A. Ideal Constitutional Discourse: fiat iustitia et pereat mundus

Constitutional discourse, as it appears in judicial opinions, clearly admits no considerations of institutional prudence, and it is hard to imagine it being otherwise. Imagine a court opinion that read as follows:

> *While the applicant's rights have been infringed, and although the justifications provided are unpersuasive, a decision to that effect would expose the court to political retaliation, and we cannot afford that at this point. Denied.*

[23] [cite Rawls] discussed at length *infa* .

Instead of such jolting candor, we expect any constitutional court to provide a reasoned argument of doctrinal and theoretical considerations in support of one of the following: either the rights have not been infringed, or the infringement was within the state's legitimate interest (under doctrines of proportionality, margin of appreciation, a reasonableness test, etc.), or there was some identifiable ground of non-justiciability preventing the court from weighing in on the issue at hand. Court opinions are not meant to betray evidence of pressure that may plausibly have operated.[24] It is therefore entirely normal that, just as the US Supreme Court made no mention of Roosevelt's court-packing plan in its "switch in time" decision *West Coast Hotel v. Parish* (1937), the HCJ's opinion in *Boycott*[25] makes no mention of the recent political threats to reduce the power of the Court, and casts the grounds for the decision in the ideal and – seemingly – timeless language of legal-constitutional principle and precedent, distinction and analogy.

The prescriptive counterpart of this discourse for the real work of judges handling institutionally-hard cases is a purist command: "*fiat iustitia, et pereat mundus*" (do justice, and let the world perish). In other words, ignore all considerations outside of ideal constitutional principle. Decide only according to what is constitutionally right and just, and exclude concerns of institutional prudence as illegitimate, especially if they stem from popular or political pressure. Principled constitutional legality should be adhered to, without regard to institutional consequences.

Note that, among the considerations that courts *do* include in the language of legality, are doctrines couched in second-order constitutional principles of separation of powers, and theories concerning the proper role of a constitutional court in a liberal democratic system of government. This holds true also for constitutional scholars who, in turn, debate in abstract theoretical terms both the content of constitutional entitlements and the proper role of a constitutional court in a democracy (or, put another way, the proper normative force of "liberal" within "liberal democracy"). But these theorists, like the courts, do not address head-on the normative implications of contingent non-ideal circumstances and of expected institutional consequences. In other words, constitutional law and ideal constitutional theory are acutely aware of the difficult institutional position of constitutional courts from the point of view of democratic legitimacy. However, this remains an *ideal* question. A court applying, say the

[24] [We will consider in Part V whether a third option exists, other than absolute candor and utter denial].

[25] *Supra*

"political questions" doctrine to justify staying its hand, might plausibly be concerned with its non-majoritarian mandate, but would never explicitly link its restraint to a particular threat of non-compliance or a potential loss of popularity and perceived legitimacy.

Indeed the commitment to ideal normative discourse appears to be a cornerstone of liberal constitutionalism. Constitutional courts should be especially resilient to popular pressure, as their very mandate is counter-majoritarian, calling for an uncompromising insistence on what is right and just. They must be "independent" which means that their loyalty is to constitutional norms only – not to prevailing attitudes or powers that be. In other words, what is right constitutionally should not be tempered by what is prudent institutionally (the court's impact, its relationship with other branches and its perceived legitimacy).

Surely there is great force to this noble, categorical position about the role of law, principles and courts. But, ultimately, a court that is brave to the point of suicidal and "just" to the point of utter blindness to impact and to perceived legitimacy is unsustainable and unrealistic. Nobody really wants courts to be Kantian deontologists when it comes to institutional consequences, and nobody really believes that they are. The discourse, therefore fails to quite match either what should happen, or what we believe does happen. The result of this is the *de facto* condoning of "judicial statesmanship" – an informal ideal that praises judges for their responsiveness to context[26] – and a lack of normative guidance as to the appropriate scope and conditions for this responsiveness.

B. Two Kinds of Idealization

Because the purist prescription of *fiat iustitia* is unrealistic, constitutional discourse is not only ideal but *idealizing* – in a simple sense (ideal v. reality) as well as in a deeper sense (ideal v. non-ideal).

The most basic notion of "idealization" concerns what a written judicial opinion reveals and hides: real considerations are hidden behind ideal vocabulary, making the absence of institutional considerations in the decision conspicuous and always potentially suspect. Indeed this form of idealization appears as the last vestige of formalism, even in constitutional cultures that have abandoned classical formalism (in the sense of writing opinions as if formal legal materials automatically "determine" the case – excluding principles, policies, and purposes of political morality more broadly). Similarly with classical formalism, then, it is plausible to assume

[26] Discussed at length in Part IV below.

that legal arguments are regularly crafted to give effect also to institutional pressures or demands, while meeting the exclusionary discursive demands of legality. The normative vocabulary of constitutional argument is rich enough that, with some work, practitioners can craft legal opinions that rationalize the decision without recourse to the actual reasons that operated behind the scenes. Further, as with formalism, the veneer of ideal legality is in some cases quite thin. Consider, for example, how the question of crucifixes in classrooms was handled by the European Court of Human Rights. After the first chamber decided unanimously like the Federal Constitutional Court of Germany did (against crucifixes in classrooms), a public uproar erupted.[27] The Grand Chamber then reversed 9:2,[28] with an opinion that, obviously, made no reference to the uproar nor to the generally beleaguered status of the ECHR within the European institutional context, but instead relied on the doctrinal notion of the "margin of appreciation" reserved to member states.[29]

This form of idealization leads political scientists to advocate complete distrust of constitutional adjudication, and gives credence to their claim that principled constitutional reasoning is irrelevant to how judges actually decide cases, that constitutional language is whitewash for strategic considerations, and that a "realistic" approach to what judges do, should ignore what *say* they do.[30] In other words, a not-so-noble lie.

This accusation is to some extent justified.[31] However, the language of judicial opinions not realistically portraying how decisions are made is not, as such, the heart of the problem. Indeed, there are good arguments for why courts give principled and generalized justifications in the context of their public reason-giving, rather than pry open how decisions were really made in the earlier phase of deliberation. A judicial opinion is not an institutional record documenting a mental process, but rather an elaborated rationalization of a decision. The demand for an *ex post* rationalization

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[27] [cite]

[28] [cite *Lautsi*, Kumm 2016]

[29] [Check; discuss - the relations between the ECHR and the ECJ]. Further, similarly with the critique of formalism, in our context, too, we can say that "hard cases" – cases where institutional pressure becomes potentially relevant to the decision – are not a result of anything inherent in the materials themselves, but rather in their broader significance. Indeed the kind of cases we are looking at here are best understood as involving situations where the institutional concern are always concrete constellations of social facts outside the court which happen to be present at the time of the decision and which, by definition, are not relevant for deciding the substantive merit of the case. The point is that they may nevertheless be relevant to the decision.

[30] *See* Ran Hirschl 2009 [cite and bring quote].

[31] The claims of the "realist" scholarship on judicial behavior are discussed *infra* .

serves as some measure of constraint on the decision *ex ante*, and then opens it up to contestation on its own terms (internal critique). This is how we hope constitutional principles do some work.[32]

The real problem with this principled rationalization in judicial opinions is not that it is unrealistic, but that it idealizes the non-ideal, thereby jeopardizing precisely the kind of "work" that this form of reason-giving is supposed to do. That is, this deeper kind of idealization is not about what the decision hides or reveals, but what it *does*. When we force non-ideal considerations into an ideal framework, the contingent non-ideal turns into ideal precedent, distorting the elaboration of constitutional doctrine (first-order) and the evolving understanding of the role of the court in the constitutional system (second-order). In the long run, the result would be the dilution of substantive constitutional values and an erosion in the role and status of the court: outcomes that any proponent of constitutionalism should be very concerned with.

Doctrinalizing institutional (non-ideal, contextual) considerations, means that non-ideal considerations have affected the decision, but the rationale is made to rest on ideal doctrine, which now has *stare decisis* status.[33] In other words, due to circumstances that would impact the court institutionally, there was a (conscious or subliminal) compromise on the meaning of what is constitutionally right and just, yet, as soon as the opinion is issued, the compromise becomes the new *ideal* basis for the next case that comes before the court. Thus, after the *Lautsi* case, it is more likely that the ECHR would apply the margin of appreciation to other cases concerning religious freedom.[34] Similarly, in the *Boycott* case. Assuming that, if it were not for the political pressure that the HCJ has been under, the court would have appropriately interpreted calls to boycott as protected political speech,[35] the rationale actually offered is a doctrinalization of the non-ideal circumstances. The effect is a weakened notion of political speech for future generations of courts and citizens.

An especially powerful articulation of this critical point is found in Justice Jackson's dissent in the infamous *Korematsu* decision, in which the United States Supreme Court upheld the internment of Americans of Japanese ancestry by military order during World War II. It is worth quoting at length; note especially the idea of the "loaded weapon":

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[32] [Cite Kumm Socratic contestation, and others; further discussed *infra*]

[33] [consider comparative differences in the force of precedent]

[34] [check the decisions and discuss]

[35] At least insofar as it regards the Settlements (if not concerning the call to boycott Israel as such) – as was indeed the position of the dissent [cite].

> A military order, however unconstitutional, is not apt to last longer than the military emergency… But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." [citing *Nature of the Judicial Process,* p. 151]. A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.[36]

This deeper idealization of the non-ideal occurs also at the level of second-order principle – concerning the role of the court and its relationship with other branches. Here the danger is in the idealization of *restraint*. Once idealized, non-ideal considerations inform and revise *ideal* theories of how judges should decide constitutional cases. If, to deal with pressure, courts avoid a controversial pronouncement of principle, this later supports ideal constitutional theories that seek generally to curb the role of courts and the scope of judicial review, leading to gradual erosion which is unintended and perhaps imperceptible. For example, if a hypothetical Supreme Court in 1997 were concerned that imposing the position of a constitutional right to gay marriage on all the various states would lead to an outcry and deepen social divides, and if the court, therefore, decided not to issue such a decision, this would have to be expressed in ideal terms. The decision might then be seen as authority for the principle that courts – always and everywhere – have to abide by a strong dictate of federalism, in the sense of seeking always to defer to the legislative majorities and state-constitutional authorities in the various states. It might otherwise be interpreted to say that the court should stick to the text of the constitution and avoid recognizing "unenumerated" rights. Such constitutional theories relegate the court to a position of greater "restraint", to the detriment of protecting individual rights. What is more, the grounds for such a scaling-down of the constitutional court's position would be inappropriate. If courts feel compelled to scale down constitutional protections, it is crucial to take this to reflect the particularity of the circumstances rather than a changed ideal.

[36] [cite] [consider other state-of-emergency cases and literature.]

The concerns we have before us cannot be satisfactorily covered by ideal theories of judicial review and democracy. Ideal theories presuppose that not just the court, but other branches of government too, are carrying out their proper role in the system. In the world posited by ideal theory, the government does not pressure the court to avoid certain issues "or else." Further, the public that such theories imagine accepts whatever right and just decision a court would issue, so that the court enjoys acceptance and can continue to make similar judgments in the next instance. But the examples that we have looked at are all cases where some important element does not comply with this ideal framework of how the system runs. Existing constitutional theories therefore have little to say on how the court should handle these situations. But just because judges idealize, does not mean that scholars should. The notion of "judicial strategy" that we consider next claims to be the antidote.

III. JUDICIAL STRATEGY, OR: WHAT'S WRONG WITH REALISM

One response to the dilemma of institutionally-hard cases is that judges should be *strategic* about their decisions. What might this entail, and is it desirable? An increasingly influential approach in political science literature contends that judges already are *strategic actor*s, in the rational-choice sense of the term. In sharp opposition to ideal constitutional theory, scholars that take the "judicial strategy" approach examine judicial "behavior" and take pride in the "realism" of their findings. But, at least in this technical version of the theory, they fail to offer a satisfactory response to the problem identified here. This approach is premised on a radical skepticism of legal reasoning and, therefore, implies abandoning the notion of the constitutional court as a forum of principle altogether and, with it, the notion of institutionally-hard cases. If, as its proponents claim, judges act with the sole aim of maximizing their given policy preferences, the cases we have considered simply exemplify especially complex strategic scenarios, rather than constitutional dilemma.

Constitutional theory needs to reckon with the bold claims of the "judicial strategy" school which, if convincing, would undercut the very foundations of constitutionalism. Rather than contest their empirical accuracy as such, however, here I will discuss the theory's implausible jurisprudential premises and unacceptable normative implications. Yet it is also important to see that, despite these shortcomings, the frameworks developed by judicial behavior scholarship should inform the project of non-ideal theory, for they highlight the *kinds of considerations* – other than constitutional principle – that scholars and judges take to be significant in constitutional adjudication, as well as the social and institutional dynamics

that courts participate in. If these considerations and dynamics could be made to assume their proper non-ideal place in constitutional theory, normative legal scholarship would become more connected with, and relevant to, constitutional practice.

By contrast with theories of "adjudication," theories of "judicial behavior" take a self-conscious distance both from legal or constitutional doctrine and from normative prescriptions.[37] At the same time, however, the emergence of this field in political science rests on developments in twentieth-century legal thought: it was the insights of legal realism, as these political scientists perceive it, that rendered formalism obsolete as both a descriptive and a prescriptive enterprise, and which made possible non-legal and non-normative, but rather empirical, social-scientific, inquiry into judicial decision patterns. When political scientists in the 1960s and 1970s recognized that judges' behavior could not plausibly be described in terms merely of discovering and applying existing laws, they began developing what is now described as the "attitudinal" or "social-psychological" approach to judicial behavior, one that sees judges as single-mindedly pursuing their own individual policy goals.[38]

The "strategic" approach to judicial behavior has more recently emerged as a development that, to some extent, supersedes the "attitudinal" approach.[39] The judicial *strategy* line of research applies assumptions of rational behavior and game-theoretical models, to argue that judges do not single-mindedly pursue the dictates of their own policy views, but rather, taking into account the positions and expected behavior of other players (within the court and outside of it), engage in conduct calculated to maximize the attainment of their goals over the longer-run, given these constraints and expectations. Thus, a judge in favor of a particular policy – say, allowing religious symbols in public classrooms – might not decide in direct correspondence with this policy-orientation in a particular case, if she expects this to be bad strategy for maximizing this and other preferred outcomes in the longer run. The calculation would include her prediction of how her colleagues on the bench and other branches of government, as well as the population as a whole, would react. This rational-choice approach to public law adjudication claims to carry significant predictive and explanatory force of judicial behavior, and has gained significant influence

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[37] Jeffrey A. Segal, "Judicial Behavior," in the Oxford Handbook of Law and Politics, ed. Keith Whittington, R. Daniel Keleman, Gregory A. Caldeira (2008). [check out Christine Landfried; Karen Alter]

[38] Lee Epstein and Jack Knight, "Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead," Political Research Quarterly, 53(3), 625-661 (2000).

[39] *Ibid*.

in the last few decades, although some continue to argue for the "attitudinal" model as being better borne out by the data.[40]

For our purposes, the strategic model is of greater interest and relevance, for it claims precisely to take into account how courts respond to various actors. The increasing influence of the "judicial strategy" model has spurred various refinements that seek to modify and improve its basic tenets, often by considering particular courts and their practices, identifying the end-goals of particular judicial strategic behavior, and fine-tuning the detailed dynamics of legal rationalization and strategizing. Some works depart from the technical meaning of "strategy" while others seek to elaborate it.[41] Our primary focus here will be with the basic tenets of the rational-choice approach, postponing until later certain refinements, which inch notions of strategy closer to what is discussed below as "judicial statesmanship"[42] or "principled strategy."[43]

From the point of view of legal and constitutional theory, the first difficulty with this approach to adjudication is its provocative claim that legal principle is meaningless in the judicial decision. The judges' agenda are their pre-given and fixed policy "preferences." This problem is, to some extent, discussed in the literature, and some authors have sought to fold in legal normativity into the model, by bringing to the fore the *prudence* of courts giving the *impression* that they decide according to legal norms. In other words, since there is an expectation that judges interpret the law, and this expectation is the basis for the acceptance of the court's authority, these models posit a strategizing judge that maintains this perception and, with it,

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[40] *Ibid*, and *see also* Ran Hirschl, "The Realist Turn in Comparative Constitutional Politics," Political Research Quarterly, 62(4), 825-833 (2009).

[41] Note especially Theunis Roux's work on the South African Court, [cite and explain] Vanberg's work on the German Federal Constitutional Court [ditto]. Shai Dothan's work (forthcoming) focuses on the European Court of Human Rights and on the Israeli High Court of Justice, arguing that these courts strategize (in the technical sense) to build and spend reputational capital. Others talk about strategizing in less formal and more sociological terms. This includes Ronen Shamir's critical work, which claims that courts build legitimacy through landmark cases while, most of the time, subscribing almost automatically to government policy. Ronen Shamir, "Landmark Cases and the Reproduction of Legitimacy: the Case of Israel's High Court of Justice," Law & Society Review 24(3), 781-806 (1990). Eyal Benvenisti's comparative constitutional work claims that the behavior of national courts (specifically, by the sophisticated use of foreign and international law) is geared to strengthen domestic democracies against the debilitating forces of globalization Eyal Benvenisti, "Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts," Tel Aviv University Law Faculty Papers, No. 59 (2008).

[42] Part IV *infra* .

[43] Part V.B., *infra* .

the legitimacy of her decisions, by giving the impression of interpreting "the law."[44] That is, the concern – as understood by these scholars – is to explain why judges talk about legal norms as significant for deciding the case, while in fact they are not significant.

This is highly unpersuasive from a jurisprudential point of view. Brandishing a critical-cum-cynical perspective on legal norms, the "strategy" approach rests on a crude version of legal realism, and thereby fails to account for the complex phenomenology of the process of normative reasoning and the interaction between legal materials, deliberation and reason-giving.[45] While some judges may have a clear policy preference going into a legal decision, other judges may seek to "find out" what the legal materials most plausibly "require." Even in the former case, a strategically-minded judge hardly ever experiences the field of legal materials as a free-for-all playground that can be walked through to get to the other end. Political scientists that are wedded to the "strategic" model take the lesson of legal realism to mean the radical indeterminacy of the legal materials which, in turn, they take to mean that judges can extract from the legal materials any outcome they wish, in every case, effortlessly and costlessly.[46]

Any practicing lawyer or judge should not find this convincing. For our purposes, of seeking an evaluative and prescriptive take on the dilemma of institutionally-hard cases, the picture of the practice of adjudication should be truer to the experience of real judges, and to what they (and we) perceive as the operating demands, possibilities, and constraints of law. A much more persuasive account of the real practice of adjudication takes the "strategizing" (in a non-technical sense) judge – a judge whose mission is to get out of the materials what he or she independently believes to be the best policy – and demonstrates how the work of strategic legal interpretation calls for ingenuity, dedication, time and resources, that are not present in

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[44] *See* especially Georg Vanberg, *The Politics of Constitutional Review in Germany* (2005), for a model of how the combined quest for "pubic support" and "transparency" drive the strategic behavior of the German Federal Constitutional Court. [Discuss at greater length his account of the Crucifix decision].

[45] *See* Alec Stone Sweet, *Governing with Judges* [cite], for the point that this approach (which Stone Sweet considers under the more basic notion of the "attitudinal" model) ignores legal reasoning. He states that, in his account of the rise of judicial power in Europe, the actual causal relation of legal norms to a judicial decision remains a "mystery." [pincite]

[46] One "defense" of using the "strategic" model might be that it is makes no claim to accurate or even proximate *description* or *explanation*, but rather as a model with predictive qualities. To my knowledge, such strong predictive capacities have not yet been demonstrated.

every case in equal measure.[47] Such a phenomenology also speaks to how legal work – even with all resources present – does not always "yield" the desired outcome. Finally - and crucially – this account need also acknowledge the "normative force of the field," namely, how the legal materials regularly affect even the most strategically-minded judge in her perception of what is "right," not only of what is "possible."[48]

This descriptive / phenomenological failure also renders the "strategy" model deficient as a basis for an evaluative project. The model does not "fit" with the aspirations of the system, as participants see them and as they should indeed be seen: aspirations of giving content to our most fundamental political values though constitutional reasoning. Indeed, political scientists do not presume that judges *should* take and apply this model.[49] But while no one thinks to tell judges as a matter of political morality that they should strategize regardless of the position they are strategizing *about*, our prescriptive theory would have to deal with the more persuasive of these political-scientific accounts.

IV. JUDICIAL STATESMANSHIP: ANTI-THEORY

While the rational-choice notion of judicial strategy is unlikely to win many adherents among normatively-committed constitutional theorists, a softer, informal ideal of *judicial statesmanship* lives in the shadows of ideal constitutional discourse and offers a respite to the adherents of its harsh demands. This common-sense position recognizes that institutional cases are indeed (i.e., should be) hard, and affirms the desirability of judges looking behind the veil of ideal constitutional theory. In combination, this allows everyone to praise judges that seem to handle hard cases particularly well, all the while leaving both judges and scholars to idealize the non-ideal. The notion of "judicial statesmanship" therefore remains unreflective and lacks critical bite. Considering the adjudication of institutionally-hard cases as an art form (we just know a good judge when we see one), the notion of judicial statesmanship may too easily turn (as with idealization)

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[47] As most poignantly articulated in Duncan Kennedy's legal-theoretical work, especially in his seminal piece on "freedom and constraint." Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 Journal of Leg. Education 518 (1986).

[48] *Ibid.* [pincite] Political scientists should note that it is decidedly *not* the position of critical legal scholars such as Kennedy that law is "radically indeterminate" in the sense described above.

[49] [This might be ambiguous in some cases. Benvenisti e.g., does enter the normative question, endorsing the behavior that he identifies for supporting democracy. Yet he does not couch this in a general theory of the appropriate status of institutional considerations].

into blanket Bickelian support for the exercise of "restraint". In its more explicit variants, this position typically rests on conscious resistance to theorizing the non-ideal. And while such resistance is understandable, it is also ultimately deeply unsatisfactory, as a matter of constitutional aspiration, and our task is to overcome it.

The notion of judicial statesmanship thrives on the distinction between theory and practice. While law is, theoretically, about principles, matters of institutional, social and political prudence are a practical art. Great judges are master statesmen, for they "just know" how to issue the institutionally-wise decision for the time and place in which they operate, sensing what they can get away with given the prevailing social and political climate. The decisions issued are, then, not just "right" or "just" as a matter of principle, but are good decisions all things considered. That this skill cannot be formulated into principles is indeed what makes institutionally-hard cases the kind of cases where truly great judges shine – judges like Chief Justice Marshall or Aharon Barak. The reason why these giants of constitutionalism shine is their grandness as statesmen, not simply as jurists. This recurring, deep-seated image in our political culture sustains, in its least critical version, a myth of judges as especially wise and benevolent. Like Aristotle's golden mean, the image is of a virtuous and courageous statesman that masterfully draws the right line between recklessness and cowardice. By the same token, however, identifying which judges are good statesmen is also, alas, not amenable to well-reasoned justification. We only "know it when we see it," and some judges are clearly better than others. Chief Justice Marshall was one such judge, Chief Justice Taney was not.[50]

A perfect early articulation of this view is offered by Tocqueville's description of the justices of the U.S. Supreme Court, in a famous passage brimming with heroic metaphor:

> The Supreme Court is placed at the head of all known tribunals … The peace, the prosperity and the very existence of the Union are placed in the hands of the seven Federal Judges… The Federal judges must not only be good citizens, and men of that information and integrity which are indispensable to all magistrates, but they must be statesmen, wise to discern the signs of the times, not afraid to brave the obstacles which can be subdued, nor slow to turn away from the current when it threatens to sweep them off, and the supremacy of the Union and the obedience due to the laws along with them.[51]

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[50] *See* e.g., Edward J. Bander, *The Dred Scott Case and Judicial Statesmanship*, 6 Vill. L. Rev. 514 (1961). [expand]

[51] Alexis de Tocqueville, *Democracy In America, Vol. 1* (1899) [1835]. [check]

On a standard reading of this passage, it presents an antithesis to legal formalism.[52] Historically, its image of judges as statesmen (indeed seamen) neatly represents the period of what Morton Horwitz has called "grand-style" jurisprudence, the predecessor to the "classical legal thought" of the late nineteenth century, which avoided the latter's delusions of judicial passivity in discovering and applying the law.[53] But more specifically for us, it represents the antithesis to *ideal constitutional theory*, which denies that there are non-ideal circumstances and institutional concerns that good judges *do and should* factor into their decisions. From the swirl of this passage, two images in particular stand out for their memorable capture of distinct, yet equally central, concerns posed by institutionally-hard cases. The first is that of "threatening currents," vividly evoking concerns with legitimacy – both of the court and the constitutional system as a whole. The "obedience due to the laws" is precisely what Dieter Grimm was worried about when he published his newspaper piece in 1995.[54] Second, "the signs of the times" captures those cases where judges are concerned with having decisions "mature." Both images will provide crucial guide-posts for the non-ideal theory proposed below.[55] But until such metaphors are subject to critical reflection, they reinforce the perception that judicial statesmen are master craftsmen, and that we should not try to pin down their choices by theoretical reasoning.

Currently, as commentators on constitutional courts have, in the main, gone beyond formalist assumptions in their various guises, the idea of judicial statesmanship is quite common, especially in more public, rather than academic, commentary on courts. A case in point is David Cole's commentary on the Supreme Court's line of recent decisions on same-sex marriage preceding *Obergeffel*, which are interpreted to have promoted the cause, slowly but surely. In *Hollingsworth v. Perry*, the Court cited technical restrictions on "standing" (the right to appeal to the Court), to refuse to decide whether it was constitutional for state laws to restrict same-sex marriage. The effect was to leave intact a district court's invalidation of California's Proposition 8 – which prohibited same-sex marriage – and thus, without delving into the substantive legal issue, the Court indirectly supported the legalization of same-sex marriage in California. Cole hailed

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[52] [Cite Landfried with permission; check if 2015 article published]

[53] *See* Morton Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (1992). [Consider the relationship of "statesmanship" to Llewellyn's notion of "situation-sense" – especially his account in *The Common Law Tradition* (1960) of Cardozo's style (MacPherson v. Buick Motor Co.).]

[54] Discussed *supra* .

[55] Part V *infra* .

the decision as a "prudent if unusual act of judicial statesmanship."[56] His observation is reflective of a widely-shared perception of this kind of situation:

> In the past, judicial decisions that have gotten too far out ahead of the populace have occasionally sparked a backlash, and the Court may well want to avoid that this time.[57]

While superficially appealing, this statement is typical of non-reflective adherence to "statesmanship." After all, why should popular backlash, in and of itself, be even prima facie sufficient grounds to avoid issuing a principled constitutional decision on the merits? Cole's analysis reflects a common-sense assumption that it should. The notion that it simply takes as given – namely, that courts should try to avoid controversy – is a recurring, fundamental, and fundamentally flawed dimension of the image of judicial statesmanship.

The call to judicial "restraint" in this sense was nowhere more clearly articulated than in Alexander Bickel's well-known case for the "passive virtues."[58] One way to read Bickel is as a practical manual for the judicial statesman, where the art of practicing judicial virtue is all about the decision not to decide.[59] Bickel provides a clear account of the various doctrinal techniques of avoidance that permit judges to stay out of important controversies: standing, ripeness, mootness, abstention and justiciability, are all methods that he advocates.[60] While Bickel's notion of "restraint" has been rejected as a matter of general constitutional theory on the appropriate role of the Supreme Court, there is arguably a lingering hold to his imperative of "not deciding" when it comes to hot-button issues. Where the court acts carefully to avoid controversy, the image of statesmanship offers little basis for criticism. While some decisions may be hailed as "courageous" or "wise" in hindsight, few decisions would be described as "cowardly." In other words, the image of statesmanship, while structured as some form of balancing, lends in actual practice too easy a cover for

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[56] Cole, *supra* note ,*at* .

[57] *Ibid.*

[58] Alexander Bickel, *Passive Virtues* in Harvard Law Review [cite], later incorporated into the more famous book *The Least Dangerous Branch* (1986) [1962].

[59] [quote; note the influence of Felix Frankfurter: "…the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." United States v. Lovett, 328 U.S. 303, 320 (1946); [note Brandeis' influence, cite from Bickel.]

[60] Bickel's work occurred before the United Supreme Court became formally entitled to select the cases it would hear. [Explain]

failures to issue principled constitutional decisions on account of non-ideal circumstances, ones raising institutional concerns of impact and perceived legitimacy. The ideal of statesmanship, that is, can too easily devolve into a call always to prefer institutional prudence and perceived legitimacy over constitutional jurisprudence and normative legitimacy.

A distinct account, in contrast to the avoidance of "popular backlash," is also offered by Cole in an earlier piece praising the same-sex marriage line of cases. Writing that *Hollingsworth* as well as *Windsor* (which invalidated parts of the Defense of Marriage Act)[61] should together be seen as a "consummate act of` judicial statesmanship,"[62] Cole argues that, by refraining from imposing same-sex marriage on states that do not recognize it, the decisions thereby

> [a]llow[ed] the issue to develop further through the political process—where its trajectory is all but inevitable.[63]

The idea being advanced here – namely, of allowing a social movement to take its course through the democratic process – is a very different one from concerns over a negative popular reaction, and mixing the two showcases the inability of the "judicial statesmanship" idea to draw normatively-significant distinctions. By contrast with a concern with popularity, allowing a progressive social process to take its own path presents a better claim to be a proper reason for rolling back an otherwise right and just constitutional decision. To be sure, it raises complications of its own. In particular, who is to decide what counts as social "readiness?" We often hear that certain decisions were "premature,"[64] but, at the moment of decision, whence the confidence that the trajectory is a progressive one?

These problems indicate that, more importantly than its possible conservative tilt and Panglossian tendency, the heart of the problem with judicial statesmanship is that it offers no categories and standards with which to think through this issue normatively, an especially troubling deficit when the notion is being applied to the archetypal institution of principled normative reasoning. Why, when for the substantive aspects of adjudication we impose quite stringent demands of reasoned argument on judges, should

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[61] *United States v. Windsor* (in which the Supreme Court struck down a provision of the federal Defense of Marriage Act for its discriminatory effect).

[62] David Cole, Gay Marriage: A Careful Step Forward, NYRB June 27, 2013.

[63] *Ibid,* [pincite].

[64] A common example is the Roe v. Wade decision. *See,* Debra Cassens Weiss, Justice Ginsburg: Roe v. Wade Decision Came Too Soon, Feb 13, 2012, [cite], online at:

http://www.abajournal.com/news/article/justice_ginsburg_roe_v._wade_decision_came_too_soon

we be satisfied with the counsel to simply see them as artists when handling the fundamental dilemma of their institutional role? How can we take rights seriously, if we informally allow them to be circumvented by intuitive, unreflective statesmanship? The position is especially wanting when we wish to evaluate a court's behavior: in some institutionally-hard cases we want to be able to say that a decision was wrong or bad, and should have been otherwise, and that it was the court's duty also to get it right on this non-ideal level, not only on the level of ideal constitutional principle. Should Israel's HCJ have displayed greater audacity? Would it have been right for the US Supreme Court to have ruled on gay marriage much earlier? If not, did the German Court (as we imagine it) nevertheless do the right thing to act in disregard of a likely injury to its own position? What could make sense of the differences in how we think of these cases?

This is not to say that the dilemma has an easy or airtight normative answer – it may very well remain a "dirty hands" situation. But at the very least we should attempt some account of the kind of considerations that should and should not count in working out the answer, and the respective weight that different legitimate considerations ought to have.

On another interpretation of Bickelian "passive virtues," the crux is not for courts to be always and forever restrained, but rather for them to build up and preserve their legitimacy and credibility – the basis of their institutional power – in order to then "use it up" only when the time is right.[65] The question remains, then, what are the appropriate normative parameters for when such "accumulation" is legitimate and when it is time to "cash in." It is unpersuasive to think of this as simply an intuitive act of more or less talented statesmen. Consider, for example, a progressive court that shied away from controversy in order to build up its power, leaving aggrieved plaintiffs and other affected individuals with their rights violated, only to be later replaced by a less progressive court that is even less likely to recognize these violations. Is this to be understood simply as the unfortunate wreckage of a naval expedition whose captain misjudged the currents?

V. TAKING REALITY SERIOUSLY: NON-IDEAL THEORY

In order properly to recognize and address the dilemma of institutionally-hard cases, a theory of constitutional adjudication is needed that sees courts as playing a complex role, entrusted both with the articulation and elaboration of ideal constitutional values, and with the

[65] [Example]

realization of these values in actual social life. It is this realization which is the ultimate aspiration of the constitutional system in which courts participate. Courts, it then becomes clear, should not be concerned with their status and popularity *per se*, or even with policy outcomes in a narrow sense, but they should be concerned with having an impact within the polity they operate in, such that the principles that they propound will indeed be lived by. Every decision they make in an individual case, and in institutionally-hard cases in particular, should be seen through the lens of this role and purpose. This understanding of the particular institutional position of courts allows us to reorient the relationship between ideal aspirations and non-ideal circumstances, and to chart appropriate and workable principles and standards.

A. The Ideal-Non-ideal Distinction

The theoretical approach that undergirds the analysis so far, and that ultimately offers the most persuasive response to our problem, is one that John Rawls termed "non-ideal theory."[66] This notion is premised precisely on the distinction between the articulation of ultimate normative aspirations, on the one hand ("ideal theory"), and the articulation of the legitimate route toward the implementation of these aspirations, given the existing social and political context ("non-ideal theory"). In Rawls' own political thought, "ideal theory" refers to the principles that a just society should live by. These ideal principles must themselves be *realistic* in the sense of taking "people as they are" ("realistic utopia"[67]). But there is another dimension of reality, reality as it happens to be at the moment from which we begin acting, with the limitations of existing practices, institutions, convictions. It is this latter meaning of "reality" that non-ideal theory addresses. By contrast with the long-term horizon of ideal theory,

> [n]onideal theory asks how this long-term goal might be achieved, or worked toward, usually in gradual steps. It looks for courses of action that are morally permissible and politically possible as well as likely to be effective.[68]

In other words, while we should develop an ideal theory of justice,

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[66] John Rawls, *The Law of Peoples* (1999). [explain that this is undeveloped by Rawls.] *See also*, A. John Simmons, "Ideal and Non-ideal Theory," Philosophy and Public Affairs, 38(1), 5-36 (2010). [check: Hart's book on punishment apparently has a similar distinction between ultimate justifications of a practice (criminal punishment) and the kind of normative justifications used to determine the details of how to carry it out.]

[67] Rawls, *A Theory of Justice* (1971) [pincite].

[68] Rawls 1999, *supra* note , at 89.

which outlines what is ultimately right and just – what we should ultimately aspire to – we should also develop a non-ideal theory, to guide us with the question of the right way to *get there*. How do we move from our society as it currently is, characterized by its partial compliance with our ideal theory, *towards* a "more" just society? What is the legitimate order of priorities? What should we fight for first? And what compromises are we allowed to make along the way? These are the questions that non-ideal theory seeks to answer. Importantly, the legitimacy of the route from a current state of affairs toward that prescribed by the ideal is a combination of its moral permissibility and its effectiveness, which, for Rawls as well as for us here, are clearly distinct elements.

What does this mean for our question, and for the judge faced with a constitutional question? Applied here, "ideal theory" is the principled constitutional reasoning we are familiar with: deliberation and justification seen as political reasoning embedded within the given legal materials and the facts of a case. This is the ideal role of the judge in the aspired state of affairs: to give the best interpretation of what our fundamental political values require. By contrast, "non-ideal theory" refers to how to handle institutionally-hard cases – to prescribing, that is, whether and how to handle questions of institutional prudence. When a constitutional court is faced with a threat of noncompliance, or is concerned with being effective in prevailing social circumstances – in the short and long run – for such issues the court turns to non-ideal theory. This means that this aspect of the adjudicative practice is also undergirded by certain normative standards, which reflect the place of these considerations as *means to ends*; more precisely, of *legitimate* means to *just* ends. Non-ideal theory is therefore markedly different from ideal constitutional theory (the non-ideal is ignored or denied), judicial strategy (no normative constraints), and "judicial statesmanship" (no standards can be devised).

While in non-ideal theory the non-ideal is no longer considered foreign to the "reasoning" process but rather is enfolded within it, this does not mean that constitutional reasoning should simply blend the ideal with the non-ideal along a single continuum of "reasons." To the contrary, non-ideal theory implies a *distinctness* of the ideal from the non-ideal, and a requirement to work with this distinctness. That is, non-ideal theory draws a qualitative line between ideal and non-ideal considerations. It suggests that a two-phase deliberation (and possibly a two-tiered justification), is both possible and desirable. The first phase seeks to reach a principled outcome for the case at hand – to specify the "ideal considerations" at play – while the second phase seeks to determine what to make of "non-ideal considerations" that operate at a given time. Considerations, that is, that do not belong to the question of what is right or just in principle, but rather to

what is the right thing for the court to decide *given the foreseen social and political effects of the decision*, and granted the long-run aspiration of advancing what is right and just.[69]

So understood, the ideal/non-ideal distinction directly confronts the claim expressed by Richard Posner, in the context of his position on same-sex marriage, that one cannot distinguish "what is right" from "what is acceptable":

> Many constitutional theorists would say, with Ronald Dworkin, that the task of the courts should be to do what is right, regardless of the consequences, or at least that the *theorist* should say what is right even in he then advises the judges to duck the issue because it is too hot. I do not myself see a sharp line in constitutional law between what is right and what is acceptable.[70]

Posner contrasts his position with a version of ideal theory's "fiat iustitia," which he attributes to Dworkin, and also alludes to the unspoken coexistence of ideal constitutional discourse and informal statesmanship. On both points his insights are shrewd and persuasive. But Posner then proceeds to reject the very possibility of moral reasoning that might separate ideal from non-ideal considerations. Non-ideal theory frontally challenges that view, which is the equivalent of saying, in terms of personal morality: "I cannot judge an act wrong independently of whether others would disapprove of it." While such an admission may be descriptively quite plausible of one's inclinations, it cannot be the final aspiration of normative reflection.

B. Principled Strategy

What, then, should our non-ideal theory dictate? What kinds of non-ideal considerations are and are not legitimate in the adjudicative process,

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[69] Note that this approach does not have to rely on a naïve formalism whereby judges simply "apply" the constitution – according to the "plain" and/or perhaps "original" meaning of the text, along with that of precedent decisions – to "find" the right answer in a given case. Rather, we should see constitutional courts as engaging in the reasoned elaboration of constitutional principle through the medium of concrete cases – construing the broad and abstract provisions of constitutional text into the most persuasive larger principles that may be plausibly be understood to animate them, and bringing these principles into coherence with each other, with the structure of the document as a whole, and with a duty of fidelity to deep-rooted decisions and practices of the past. This does not mean that anything goes, and so we are able to distinguish between what is constitutionally right (not in the sense of one right answer from the text, but right as per the above process, and subject to contestation) and what is institutionally wise or prudent.

[70] [Posner 1997; *supra*] [pincite].

and how precisely are legitimate considerations to be weighed, or taken into account?

The first, perhaps most intuitive, non-ideal theory to construct and consider, is one that calls for the *strategic maximization* of constitutional principle. That is, it prescribes that judges calculate for their decisions to achieve maximum impact, in actuality, of the court's pronouncement of principle. While this might seem at first blush equivalent to "judicial strategy," it is actually a radical conversion of that notion. For, unlike judicial strategy, this principle takes seriously the normative force of ideal constitutional discourse, and looks to it – rather than to judicial "preference" – for what should properly be maximized. In other words, this theory takes the *form* of behavioral instrumental maximization, but inputs into it the *content* of a constitutional principle. The basic notion of dividing ideal from non-ideal considerations is clearly present: judges reach a decision about what is constitutionally – ideally – right, and then they calculate how to make it indeed the "law of the land" with the highest impact. To be truly effective, then, strategy in the long-term folds into the calculation concerns with the court's status and its perceived legitimacy.

For this non-ideal theory, there are exactly two types of non-ideal considerations that matter: effectiveness in the short run (round 1) and effectiveness in the long run (round 2). For example, Israel's HCJ court has to decide the question of the Boycott Law. The court considers it, in principle, unconstitutional as a violation of freedom of speech. It then also reaches a prediction that, although such a decision would be complied with and the law invalidated (round 1), the judgment would encourage the government in its self-professed ambition to enact anti-court measures (detrimental to effectiveness in round 2). The court would plausibly calculate it to be strategically preferable to let the law stand, so that it may continue to enforce human rights and freedom of speech violations in other instances in which it expects the government would curtail them.

This theory emphasizes the court's aspiration to ensure that the substantive principles it stands for are implemented and protected in the long run. Unlike the existing notion of "judicial strategy," here there is a separation of ideal from non-ideal considerations, and the starting point is not just "given preferences" but ideal theory. Therefore, some "ends" that existing political-science accounts suggest are operative in courts are left out. In particular, a "principled strategy" approach views as illegitimate the pursuit by courts of their own hegemony or elite interests, as ends in themselves. Note that a court that seeks to ensure effectiveness in round 2 would not blindly strive to strengthen its own institutional status, for it would have to take into account that round 2 may feature another court with a different interpretation of principle, or with other commitments altogether,

that might derail the project. The issue of perceived (empirical) legitimacy is, therefore, a legitimate concern only to the extent that it comes under long-term effectiveness (round 2).

Within this theory, then, constitutional principles are key, and are distinctly arrived at and committed to, but then the question is "how best to get there" – a question of non-ideal theory. Here "principled strategy" stands for the view that principles are not important as *pronouncements* per se. What matters is that they actually be implemented. We want to *maximize* implementation of the principles, and therefore the non-ideal considerations of effectiveness in round 1 and round 2 are *always* relevant.

However attractive this position may sound, there are three problems with it. First, a problem of *reflexivity*: the way the court handles the non-ideal shines back on how other institutions view it. If the court gives in to threats, for example, it would be threatened more often. Second, a problem of *endogeneity*: a court's decision affects the very non-ideal context in which it operates. The game theoretical account takes positions as fixed and exogenous, but the court's position affects the way others think, and may very well change their so-called "preferences." Indeed we may think it should aspire to do so. But the "strategy" we are talking about does not take into account the role of the court in influencing preferences: the court is a player, the material is fixed. Third is a problem of *corrosion*: the kind of freedom of speech that a strategizing court would be able to enforce in round 2 is already different and reduced in content, now that the court has given up on its original principled decision in round 1.[71] A committed strategist would point out that that "reduced" version is, by definition, the most we can have (having precisely "maximized" the content of the principle). But the question remains whether an ongoing dilution of constitutional principle is an acceptable result of good constitutional practice.

C. Non-ideal Forum of Principle

Non-ideal theories of constitutional adjudication develop and reflect particular notions of the purpose of constitutional courts. Thus, the non-ideal theory of "principled strategy" that we have just considered, reflects an understanding of constitutional courts as properly charged with the maximization, in actual social practice, of substantive constitutional principles, while taking as given and fixed the positions of all other players. The compromises and modifications that the court makes to its principled

[71] [Note the problem with this aspect of the analysis in Theunis Roux.]

findings are justified by the greater goal of actual maximal implementation of the content of constitutional principles, in the given social and political circumstances.

The non-ideal theory that I sketch here also rests – explicitly – on a normative conception of the role of the court in a liberal democracy, one that elaborates on Ronald Dworkin's well-known idea of "a forum of principle."[72] Here, the fundamental commitment conveyed by that notion is that, properly understood, the role of the court engaged in judicial review is not *simply* to interpret and articulate what constitutional justice requires, nor *simply* to ensure that society in fact lives by these values, but *also* to sustain a culture of normative discourse couched in liberal political morality. To ensure, that is, that key political issues are articulated within that normative vocabulary – or at least justified, *ex post facto,* within that vocabulary, and therefore subject also to its critical bite.

> Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself. [73]

In other words, a strong constitutional court that regularly pronounces on what constitutional values require in particular cases sustains a polity that rejects the world of Hobbes and Thrasymachus, and opts instead for a culture of public reason-giving between its free and equal members. Dworkin sees (a version of) this as the ultimate aim of the practice of judicial review, envisioning a society that lives by a certain ideal of a just and attractive form of political life:

> We have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophesy. I call it law.[74]

This vision might be described in more Habermasian terms as a deliberative/communicative ideal,[75] but its starting point is liberal political

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[72] [Dworkin 1981]

[73] [Dworkin 1981, at 517]

[74] [*Ibid* at 518, fn omitted] [add a quote that highlights that it is the general populace and politicians that Dworkin is talking about, not just public reason giving by the court itself].

[75] [Habermas, *Theory of Communicative Action*; explain]

morality rather than a commitment to all-encompassing deliberative democracy. It is offered by Dworkin in the context of what we have called here "ideal" theory. His claim comes in response to arguments against judicial review. Dworkin seeks to redeem the practice of judicial review by claiming that, even if constitutional reasoning neither yields a single right answer nor is independent of political morality, it is nevertheless desirable that we maintain a "legal and political culture of which judicial review is the heart."[76]

The explicitly institutionally-situated non-ideal theory sketched in the following sections begins from this understanding of the role of the court, in the sense that it always seek to ask not simply "what is right?" but rather, which principle of non-ideal theory would most befit a forum of principle? Or, in other words: how should a court act that seeks to remain true to its social role in sustaining a culture of reasoned normative argument between free and equals? The foundation of this non-ideal theory is therefore not abstract or "Kantian" but concrete-institutional and Aristotelian, in the sense that the right choice of action is not discoverable from the components of the action itself, assuming a universal moral agent, but rather through an elaboration of what is appropriate for the particular socially-situated actor – here, the institution of constitutional courts deciding institutionally-hard cases – and a particular set of aspirations for a "political culture." This position is roughly "teleological" (deriving the right rules from the specified purposes, or *point*, of practices and institutions), and is centered on a concern with promoting a conception of a desirable *character* for these institutions – and of the polity as a whole. This general conception of the role of constitutional courts supports (rather than dictates) the terms of the non-ideal theory that I will now propose, the latter thus being a particular elaboration of this institutional ideal.

What, then, does a non-ideal forum of principle entail for deciding institutionally-hard cases? First, like any plausible non-ideal theory, it stipulates that the court must distinguish clearly ideal considerations from non-ideal ones, and deliberate on ideal principle until an ideal outcome is identified, separate from any consideration of the non-ideal context. It then further prescribes the following two principles, and a procedural constraint:

First, apply a strong presumption in favor of taking ideal considerations as conclusive of the issues ("presumption of institutional blindfold"). Second, the presumption may be rebutted, thereby allowing non-ideal considerations to affect the outcome, only if it can be persuasively demonstrated that either: (1) the decision will very likely result in

[76] [Dworkin 1981, p. 518.]

immediate harm to the very existence of the court as a constitutional court, and there is good reason to believe that the threat is temporary; or (2) there is sociologically-grounded evidence that the social backlash of an ideal decision would be counter-productive, while a gradual approach to expanding the right at stake would be more sustainable. Finally, departing from the ideal outcome is only permissible provided that the court has instituted a procedure for flagging the decision as based on non-ideal considerations. We will now consider briefly each of these components.

1. Presumption of Institutional Blindfold

The first demand of our institutionally-situated non-ideal theory is structured as a presumption. It states that a constitutional court, to be true to its role, should always presumptively strive to give the best possible interpretation of constitutional principle as if there were no institutional constraints of any sort, and even at the price of losing effectiveness or status. The court should *not* be a strategic player. The conclusion it reaches in the first deliberative phase should in most cases, including institutionally-hard ones, be the end of the story. Note that this does not mean that the court should imagine itself in some vacuum or behind a veil for the purpose of determining what is just and right in the first place – a question to which "context" is often seen to matter, and rightly so.[77] Rather, the court should imagine itself as unconstrained from the point of view of the institutional outcomes of issuing the decision at a given time and place. That is, if there are threats of noncompliance, the court should ignore them. If there happens to be a fresh opinion poll demonstrating that 99% of the population would deeply resent the decision, the court should disregard it.

Why should this be so? Stated simply, as a forum of principle, the point of the court is not to be the executive committee of the constitution, but its most dedicated interpreter. The idea is that, to sustain a culture of principled discourse, an institution is needed that would offer an interpretation of constitutional values that is reflective, generalizable, and unmoved by temporary exigencies, and, further, that a constitutional court is the institution best placed to do this work of principled reasoned elaboration.[78] Non-ideal considerations are extraneous to this primary task. This conclusion finds anchor in any of three distinct reasons emerging from the notion of a forum of principle as described above:

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[77] [Explain and give example]

[78] Note that, in the first part of Bickel's *The Least Dangerous Branch*, where he speaks not of the need for restraint but of the justification for very institution of judicial review, he defends the practice against detractors on similar terms. [quote]

First, the principle itself. The most basic significance of a "forum of principle" is quite simply its commitment to giving a ruling of principle. This goes both for the individual case at hand and all immediately affected parties (at least where there is no immediate concern that the decision would not be enforced) – and for its precedent value. Second, a "culture of public reason" (liberal legitimacy). A constitutional court advancing an undiluted version of constitutional principle means that other political actors and members of civil society, who are dissatisfied with the outcome, will now also be pressed to articulate their claims from within the architecture of constitutional reasons. In other words, the task of the court is to hold up, to the rest of us, a mirror of what the principles we purport to live by actually require of us in particular cases. If we wish to contest that conclusion, either as citizens or as public officials, we must be prepared either to clearly articulate our grounds for a different interpretation, or expressly renounce the principle, to undertake a self-conscious and public (and hence morally and politically costly) departure from widely-shared commitments.

Third, the "deliberative process." On the premise that moral reasoning occurs through engaging others in argument, and that a deliberative process (whether fully public or through institutions) is the only meta-ethically plausible hope for groping toward political-moral "rights" and "wrongs", to foment and sustain such a debate we need to cultivate and nourish a practice of opposing pushes and pulls, rather than simply of ready-made compromise.[79] In order for the court to play its proper role in sustaining and promoting deliberation it must, therefore, not hand us a watered-down version of constitutional principles, based on what "we" can handle.

Thus far, the content of our non-ideal theory has simply rejected "principled strategy," in a manner leaning toward constitutional idealism. But the foundation of this non-ideal theory is not deontological but rather purposive and institutional: how does a constitutional court best serve its purpose as a forum of principle in a liberal democracy? This commitment is also what underlies two contextual rebuttals to the presumption of institutional blindfold, rebuttals which ideal constitutional theory would not accept.

2. Two Limited Contextual Rebuttals

We now come to the crux of the matter. If our non-ideal theory is going

[79] [Discuss: Tushnet "dialogic"; Maduro: "contrapunctual"; Kumm, "Socratic contestation"; particular function of provocation; courts should especially *not* be worried about their popularity, for it is to be expected that sometimes they would "offend the values and traditions of the community." (Kumm 2010); cite]

to be at all useful, it needs to inform us on when and how – under what the situations and with what preconditions – the institutional blindfold may be justifiably lifted, and what such "lifting" would entail. The theory offered here proposes two types of exceptional situations, roughly tracking Tocquville's "threatening currents" and "signs of the times."[80] In allowing each of these rebuttals of the presumption, however, the guiding beacon remains the institutional one just elaborated, namely, the court staying true to its role as a forum of principle.

Moreover, as important as the existence of these exceptions, is the need to keep clearly constrained both their scope and effect. Both of the rebuttals are contextually specific, that is, they identify particular kinds of institutional pressure, rather than endorse a formula for weighing or cost-benefit analyzing possible courses of action. Further, for either of them to apply in a given case, the court must strive to ensure both that non-ideal considerations are not camouflaged behind ideal language, and that they do not take effect as ideal precedent.

i. Temporary "Threatening Currents"

The first rebuttal of the presumption of institutional blindfold occurs in cases of threats to the status of the court that are existential, imminent, and persuasively understood as temporary. This formulation seeks to mediate between two considerations. On the one hand, while a forum of principle should not normally allow itself to be affected by political pressures, in extreme cases of impending threats to dissolve the court, sticking with the ultimate principled decision seems, at least on first blush, plainly self-defeating and, hence, even irrational. While more mundane concerns with noncompliance or popularity should not sway a forum of principle from its course, we do want the forum of principle to continue to exist, and so we do not want a suicidal deontologist for a court.

On the other hand, there are some forms of state conduct so contrary to our political values and traditions, so pernicious, that any judge and any court must refuse complicity – even at the expense of sacrificing itself. The issue here is not one of personal morality, but rather of the constitutive ethos of the court and its institutional raison d'être. The extreme cases that legal theorists call "evil regimes" clearly would justify a constitutional court sticking with principle, staking is existence for the sake of being true to its true purpose, but judges will have to decide whether a given situation is severe enough to justify such a final act of defiance as resistance. If the

[80] *Supra* .

threat is properly seen as temporary – if, for example, the particular political leadership that threatens the court is itself unlikely to stay in power – then the court should more easily modify its principled pronouncement in order to avoid the storm.

How would this look in practice? One implication is that a blow to popularity does not count, in and of itself, as an existential threat, and therefore – unlike principled strategy – is not to be considered relevant. A case in point is the German FCC decision allowing the criminalization of incest.[81] The dissent of Judge Hessner offered such an airtight argument from liberal principle (consenting adults; the over- and under-inclusive character of the prohibition), that we are led to conclude that the only rationale left standing is a lingering moral taboo. While this is arguably an institutionally-hard case, as a contrary decision could easily have a strongly detrimental effect how people perceive the Court, the Court should not have caved in to pressure that was far from existentially threatening in character.

Another example is the ECHR crucifix decision (*Lautsi*)[82] – what should the ECHR have done? Assuming again that the ECHR was persuaded, on principle, that the first chamber was right (no crucifix allowed), under what circumstances would it be right to compromise? On the any non-ideal theory, considering a compromise would first, require a two-phase deliberation: first the elaboration of ideal principle, and only then considering non-ideal threat. Second, lifting the institutional blindfold requires the threat to be existential and temporary. This means that the ECHR has reasons to believe that its very existence would be threatened by a contrary decision and that such a threat is temporary and thus worth avoiding rather than facing head on. The basic idea is that, if the political response is one of removing the ECHR, a forum of principle can accept this as a possible outcome if the alternative is to betray the very commitments that justify its existence. If, therefore, the ECHR let itself be affected by a more minor foreboding over non-compliance and perceived legitimacy, it improperly handed down a diluted or distorted constitutional principle.[83]

This assessment would extend also to the anti-court pressure on the HCJ. Judging by the general direction of the HCJ's decisions over the last few years, a plausible interpretation is that the Court has allowed itself to cave in to ongoing pressure over hot-button issues, only to be sure that it survives, perhaps with the expectation of preserving viability for when a "really important" issue finally arrives and needs the court to stand up to injustice. Yet it appears that the storm still rages on and, gradually, it is less

[81] 2 BvR 392/07

[82] Discussed *supra* .

[83] [discuss the reasons given in the decision]

clear that the court's survival is, all told, constitutionally desirable, or whether it is by now mostly a fig leaf for illiberal laws and state policies,[84] one that talks the constitutional talk while, in real social and political life, constitutional values are eroding beyond repair. The discursive culture has been impoverished, as public reason is made increasingly irrelevant. Politicians no longer see themselves as constrained by the demands of liberal principle, opting openly for particularist interests. Arguably, the court should have said "No!" long ago, even at a price.

ii. Progressive Social Change ("signs of the times")

The second rebuttal concerns institutionally-hard cases where a court is concerned that the ideally-right decision would be "premature," in the sense that it might interrupt and possibly harm a gradual process of change in prevailing social attitudes in a more liberal, progressive direction. These are the kinds of situations where the argument arises that "society isn't ready yet" for the principled decision, and that the court should stall. Let us first examine all that is problematic about this argument, before trying to see what aspect of it is worth preserving.

The recognition of a woman's constitutional right to terminate a pregnancy by the United States' Supreme Court – *Roe v. Wade* (1972) – is a landmark decision famously accused of being "premature".[85] Similar arguments were made at various points in the battle for federal recognition of same-sex marriage.[86] This idea that it is better to wait with a constitutional decision until "society" is "ready" suffers from a number of deep problems. Most obviously, the problem of denying justice in the individual case and in all the cases that occur up until the point that society is finally deemed ready. Martin Luther King's equation of "justice too long delayed" with "justice denied" recently echoed in Justice Kennedy's opinion in *Obergeffel*, rejecting the "better wait" idea because of the harm that would ensue in the interim to same-sex couples and their families.

But let us assume for a moment that offering justice "prematurely" from the point of view of society would be counter-productive even from the point of view of the victims themselves. This might be the case if the expected result is noncompliance, turmoil and increasing entrenchment in ideological positions. Still, the problems with "waiting it out" are vast. What is the basis for determining whether a society is or is not ready? How can a court know? More fundamentally, how do we know that "progress"

[84] [Give examples].
[85] [sources; Ruth Bader Ginsburg].
[86] [cite]

might not change course and go the other way, or simply oscillate between deeply conflicted positions? Perhaps most importantly, is it not part of the role of the court to influence the way views change? Should a court not be a "transformative changer" rather than simply a "majoritarian homogenizer?"[87]

Despite all of these problems, a court that aspires to be a forum of principle for the particular polity in which it operates, and that seeks to sustain a political culture of constitutional principle, should not be satisfied with empty pronouncement of "right" principle to deaf ears, for this would harm precisely the quality of principled debate in the political sphere. It could shut down citizens to universal normative argument and turn people's disagreements into crude sectarian fights. A society thus deteriorated is run by the clash of group interests – whether ideal or material – and, while it might remain democratic in a narrow sense, it would not likely sustain liberal (non-majoritarian) values.

The complaint that the more issues are "judicialized", the more they become removed from the public, is often raised in the context of objections to judicial review as such, resting on some version of the "countermajoritarian difficulty."[88] But this concern with democratic representation is not the one I raise here.[89] Rather, what is central for our purposes is the concern with institutional conditions that enable and promote a discursive culture grounded in public reason. This version is as much social theory and common-sense psychology as it is political theory. Interpreted as the latter, though, it echoes the tradition of civic republicanism more than the principle of democratic representation, although the two may sound alike in specific instances. "Why should nine old lawyers in robes decide this question?" can sound like it is simply about representation. But what is worth preserving about this sentiment of protest is the notion that, when the old lawyers in robes decide the case against a culture that is utterly hostile, the rest of us no longer talk about the issue as reflectively as we could. We may become passive or, perceiving the decision as an imposition rather than an act of discursive persuasion, resentful, and, in either case, suffer a loss in our capacity to deliberate with each other as free and equals.

In some situations, it can only make sense to expect that the social "material" adapt to changes gradually. This is best typified by the quiet same-sex marriage revolution. Laws have been institutionalized gradually and became a lived practice, allowing attitudes to change from the bottom

[87] [Borrowing from Kumm; cite Lautsi article 2011]
[88] [cite]
[89] [explain]

up, as people live in environments that render what seemed alien closer and closer to one's self, and permit an expansion of our perception of the "other" and of our fundamental affinities.

Of course, from the point of view of principle, this is not an easy rebuttal to allow. The resistance to sudden change is non-ideal; it is a cultural reality, and it may be more significant in some cases than in others. Some social movements are also more likely than others to make gradual progress. And how do we know when the time is finally "right"? The exception based on gradual progress is therefore not a clear-cut dictate, and preserves something of the situation-sense notion of "judicial statesmanship." However, the non-ideal theory does require, at the very least, that the consideration of gradual change be severed – in deliberation and in justification – from the consideration of principle, as this would at least allow the principle to simmer and percolate more explicitly rather than get lost behind legal decisions that deny it. It would also preclude simply giving in to popular attitudes as such. Finally, if this rebuttal to the presumption operates in a judicial decision, it would be subject to the following procedural limit.

3. Procedure (anti-"stare decisis")

For both of the rebuttals that we have discussed, the final demand of our non-ideal theory is that a non-ideal decision must be prevented from becoming ideal precedent. This reflects the lingering "dirty hands" nature of our dilemma. In both of the exceptions above, the presumption can be rebutted if we are convinced that this is what a "forum of principle" true to its role should do. But this does not mean that there is *nothing wrong* with the outcome. The non-ideal decision remains at some level *not* a right decision. This should be reflected in the language of the decision and in the effect it would have for the future, when circumstances change.

An example for such language was provided in the *Bush v. Gore* decision – perhaps an archetypical case of a decision where a court departed from ideal principle (though, on my theory, did so wrongly). The Court made clear there that

> Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.[90]

This could be useful language in cases affected by a temporary threat as

[90] [531 U.S. ___ (2000)]

discussed above. Another example, in the context of gradual social change, is the notion of "all deliberate speed" adopted in "Brown II" – where the Supreme Court had to respond to concerns with the slow pace of implementation of its earlier desegregation decision.[91] A court that reaches a non-ideal outcome because of a concession to gradual social change should build into its decision such a requirement that progress in fact be seen to happen.

CONCLUSION

Constitutional theory needs a non-ideal branch, charged with guiding and evaluating courts that operate in difficult social and political circumstances. The present work seeks to chart the issue and begin to address it as a matter of liberal constitutional theory. The problem of making constitutional decisions in such conditions can be framed quite generally: how should courts act where there is a tension between what is right and just *constitutionally* and what would be wise or prudent *institutionally*? In particular, the predicament of constitutional courts struggling to come to terms with climates hostile to liberal values makes it urgent for constitutional theory to address the non-ideal institutional context. Failing to face this theoretical-cum-political challenge could result in the collapse of ideal constitutional theory, as an obviously irrelevant and unrealistic enterprise, and lend growing credence to the troubling, indeed normatively unacceptable, notion of "judicial strategy" increasingly promoted by political scientists.

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[91] [cite]