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Non-ideal theory of constitutional adjudication

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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? Such 'institutionally hard' cases – those characterised by a sharp tension between constitutional principle and institutional prudence – pose a true dilemma for constitutionalism. This article advances a realistic, yet principled, liberal-constitutional approach to this dilemma, put forth in the vein of Rawlsian non-ideal theory. It addresses a troubling gap between, on the one hand, the *idealising* discourse of constitutional theory – which overlooks or downplays the actual social and political pressures that courts must confront – and, on the other, a growing political science literature which, in the name of 'realism', views judges solely as strategic actors, leaving no role for principled reasoning. What has stepped into the gap in normative theory is a vague notion of 'judicial statesmanship', which praises or criticises judges post hoc, on an intuitive basis, without any tangible prescriptive bite. Developing evaluative and prescriptive guidelines for institutionally-hard cases, a non-ideal theory of constitutional adjudication should construct principles that *both* reinforce the commitment to ideal constitutional principle, *and* properly situate constitutional courts within the real – contingent and often very non-ideal – social and political contexts in which they operate.

Keywords: constitutional dilemmas; constitutional theory; forum of principle; judicial behaviour; non-ideal theory; political philosophy; strategy

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. While this predicament is widely familiar, it 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 that the main lines of existing constitutional theory do not adequately diagnose, much less address.

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 point of constitutional principle, this was arguably 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 a decision to that effect would be highly unpopular with those whom it directly affected: public school boards in culturally-Catholic Bavaria. The Court nevertheless 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 *Crucifix* 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 for the court – and interesting for us – was not a difficulty in interpreting or elaborating constitutional norms. Rather, it was the social and political circumstances – circumstances we may say were non-ideal – that made this decision *institutionally* hard. In *ideal* circumstances, a constitutional court would see its decisions enforced, respected, and lived by – even if they are not universally thought to be 'right'.

An unpopular decision should not, in and of itself, translate into a concern with legitimacy and non-compliance. Non-ideal circumstances pertain to

[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 the Weimar Constitution). This does not mean that a principled argument the other way could not be worked out. Indeed, the dissenters made a 'positive freedom of religion' argument.

[3] Vanberg attributes this statement to an unnamed justice of the Federal Constitutional Court, and describes at length the 'storm of public protest' that followed the decision; G Vanberg, *Politics of Constitutional Review in Germany* (CUP, Cambridge, 2005) 3. For an extensive account of the Crucifix decision and its social and political context, see P Caldwell, 'The Crucifix and German Constitutional Culture' (1996) 11(2) *Cultural Anthropology* 2, 259.

[4] D Grimm, 'Unter dem Gesetz: Warum ein Richterspruch Respekt genießt' (Under law: Why a judicial ruling deserves respect) *Frankfurter Allgemeine Zeitung* (18 August 1995) 29.

the *actual* position that constitutional values and institutions 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, relations that are often more fragile and volatile than they appear in ideal images and frameworks of how constitutional institutions should act and interact. If constitutional judges lose sleep over cases such as *Crucifix*, this is not – or not primarily – due to difficulties in getting to the right answer[6] as a matter of constitutional principle, but to the foreboding sense that a right-but-unpopular decision could 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. The dilemma of institutionally-hard cases arises, then, where there is a significant tension or conflict between what the court would hold to be right *constitutionally* (in ideal circumstances) and what seems wise or prudent *institutionally*, given the actually existing non-ideal circumstances.

The first objection to this characterisation is that this should not be seen as a real dilemma: a Herculean judge should stand by what is constitutionally right, and not lose any sleep over the institutional implications of her decisions. And isn't this obvious? 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 constitutional rights *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.

But against this uncompromising commitment to constitutional 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 social and political 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. Resonating Bickel's avoidance tactics,[7] this undercurrent is perhaps given clearest expression in cases where a

[5] See below pp 43–45.

[6] 'Right' in what sense? Discussed below (n 68).

[7] A Bickel, 'Forward: The Passive Virtues' (1961) 75 *Harvard Law Review* 40, later incorporated into the more famous book *The Least Dangerous Branch* (Yale University Press, New Haven, CT, 1986) [1962].

decision is said to 'mature'. Consider the celebrated same-sex marriage decision of the US Supreme Court in 2015, *Obergefell*, where the Court recognised 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, decisions supported by a steady shift in public attitudes.[9] Indeed, the line of Supreme Court cases preceding *Obergefell* has been praised as masterful 'judicial statesmanship' precisely for its intelligent timing vis-à-vis public opinion, which carefully avoided the right outcome until it was 'due'.[10] Does this mean it would have been wrong for a federal court to issue such a decision earlier, say 20 years ago, because it would have been unpopular then?[11] Judge Posner clearly thought so when, in 1997, while in favour of marriage equality on the merits, he argued for letting 'the matter simmer for a while before the heavy artillery of constitutional rights making is trundled out'.[12]

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.[13] But how can a 'forum of principle' plausibly be affected by conservative public attitudes to delay and deny constitutionally-protected fundamental rights? 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 circumstances that could affect its institutional status and social impact.

[8] *Obergefell v Hodges*, 576 U.S. _____ (2015) ('*Obergefell*').

[9] Both the legal developments and the broader cultural shifts are described at length in the majority opinion in *Obergefell*, ibid 7–10.

[10] See, e.g., D Cole, 'A Surprise from the Court on Gay Marriage' *New York Review of Books* (6 October 2014) available at <http://www.nybooks.com/daily/2014/10/06/no-news-good-news-gay-marriage/>.

[11] At the time, even criminal anti-sodomy laws were still deemed constitutional in the United States. See *Bowers v Hardwick*, 478 U.S. 186 (1986), later repealed by *Lawrence v Texas*, 539 U.S. 558 (2003).

[12] RA Posner, 'Should There Be Homosexual Marriage? Is (*sic*) So, Who Should Decide?' review of *The Case for Same-Sex Marriage* by WN Eskridge, (1997) 95 *Michigan Law Review* 1578, 1585.

[13] This was a central concern of the LGBT movement. See ACLU *et al*., 'Make Change, Not Lawsuits' Joint Advisory of May 2009, available at <https://www.aclu.org/make-change-not-lawsuits-joint-advisory>, which sets out a legal strategy of postponing federal litigation. See also J Becker, *Forcing the Spring: Inside the Fight for Marriage Equality* (Penguin, New York, NY, 2014) ch 3.

Indeed, a recent 'realist turn'[14] in political science literature on judicial behaviour contends that judges not only consider context, including the attitudes of other actors, but in fact that judges *strategise*, in the rational-choice sense of the term.[15] That is, judicial outcomes reflect judges' calculation of expected results, with a view to maximising their preferred policy outcomes. This approach is diametrically opposed to ideal constitutional theory: sceptical of the normative force of principled constitutional reasoning, it sees judicial opinions as ex post facto rationalisations of the strategically best decision. Yet, like ideal constitutional theory, the idea that judges strategise also fails to recognise 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, to maximise the preferred outcome. In the absence of *principled* normative constraints, there is no dirty-hands insomnia.

We have, then, three competing approaches to institutionally-hard cases, two of which deny the dilemma and a third that recognises it but fails to address it. *Ideal constitutional theory* ignores the non-ideal or, as we will see, idealises it, folding it into generalised principles and doctrines. *Judicial strategy*, propelled in part by ideal theory's disconnect from social and judicial realities, does the inverse: it neutralises the force of the ideal, leaving judges free to calculate. Finally, *judicial statesmanship* recognises institutionally-hard cases as truly hard and praises those judges that handle them wisely. But this approach 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. Thinking in terms of judicial statesmanship leaves us with intuitive appreciation or dismay: any one decision may be considered brave or imprudent, cowardly or cautious, depending on the eyes of the beholder. The combined upshot of these three distinct approaches is a lack of critical yardstick by which to evaluate decisions in institutionally-hard cases,

[14] See R Hirschl, 'The Realist Turn in Comparative Constitutional Politics' (2009) 62(4) *Political Research Quarterly* 825.

[15] The 'realist' scholarship that Hirschl describes is not restricted to the claim that judges *strategise* but, rather, to the broader charge that 'constitutional courts and judges themselves may speak the language of legal doctrine, but their actual decision-making patterns reflect ideological preferences and attitudinal tilts, as well as strategic considerations vis-à-vis their political surroundings'. Ibid 826. For our purposes, it is specifically the notion of strategy that is the most relevant. See L Epstein and J Knight, 'Toward a Strategic Revolution in Judicial Politics: A Look Back, A Look Ahead' (2000) 53(3) *Political Research Quarterly* 625.

as better or worse decisions in terms of explicit constitutional principle and reflective practice.[16]

To appreciate the far-reaching significance of the 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.[17] 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.[18] Consider for instance its decision from April 2015, upholding the Boycott Law enacted by the Knesset in 2011.[19] The law imposes civil liability on anyone who publically calls to boycott Israel or the Settlements, be it economically, academically or culturally.[20] As a matter

[16] To be sure, some constitutional scholarship does not sit comfortably within the framework of these three contending approaches, which are set out here in sharp relief for sake of clear analysis and argument. In particular, many constitutional scholars speak of courts' 'strategy' in looser, less technical terms, seemingly splitting the difference between ideal theory and the rational-choice notion of judicial strategy. At least some of the scholarship in this vein may be seen to inch toward the 'non-ideal' direction proposed in this article. See below (n 41).

[17] Beyond Roosevelt's famous court-packing plan, majoritarian pressures on courts are as globally ubiquitous as the spread of constitutionalism itself, and range from tinkering with judicial appointments, through non-compliance, to wholesale constitutional coups. For the multiple kinds of political backlash against constitutional courts, and a review of numerous and worrisome cases worldwide, see R Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93, 109–12. Especially pressing in the EU context are the populist attacks on the courts in Hungary and Poland. For Hungary, see K Lane Scheppele, 'Constitutional Coups and Judicial Review' (2014) 23 *Transnational Law and Contemporary Problems* 51. For Poland, see T Tadeusz Koncewicz, 'Polish Judiciary and the Constitutional Fidelity: "In Judges We Trust?"' (2017) XLIII Nowa Kodyfikacja Prawa Karnego 216. See generally J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21 *European Law Journal* 141.

[18] While many statements against judicial 'activism' have been made in Israel following Aharon Barak's 'constitutional revolution' of the 1990s, these have more recently turned into concrete plans to weaken the role of the High Court of Justice in the political system. Members of the ruling Likud coalition have explicitly declared their intentions to effect constitutional reforms that would allow parliamentary (Knesset) override of Court rulings. See, e.g., 'Netanyahu Says He Still "Aspires" to Pass anti-Supreme Court Bills', J Lis, *Haaretz* (27 April 27 2015) available at <https://www.haaretz.com/news/israel/.premium-1.653867>. For a review and normative analysis, see Association for Civil Rights in Israel, 'Attacks on the Supreme Court and Its Role in Safeguarding Human Rights', position paper of February 2012, available at: <https://acri.org.il/en/wp-content/uploads/2012/02/Attacking-Bagatz-English-LIB-FINAL.pdf>.

[19] *Uri Avneri et al. v The Knesset et al*., Judgment of 15 April 2015, HCJ 5239/11 ('*Boycott*').

[20] Law for Prevention of Damage to the State of Israel through 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.

of constitutional law, it would have seemed an easy decision to declare the law a violation of protected political speech. And, indeed, to defend the opposite outcome, the HCJ's opinion relies on strikingly unpersuasive stretches of constitutional reasoning, including the claim that public calls in support of a boycott do not fall within the core area of protected speech,[21] and a comparison of such advocacy with false cries of 'fire' in a packed theatre.[22] The question before us, however, is not whether the decision was tenable in terms of principle but rather, first, whether it is useful to think of this as an institutionally-hard case – a case raising a dilemma between what is constitutionally right and what seems to be institutionally wise or prudent – and, second, supposing that it is useful to see the case as institutionally-hard, whether we can talk meaningfully about the way in which non-ideal circumstances may or may not permissibly affect the court's decision.

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 an empirical premise, but a rather modest one: 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 for this inquiry to be valuable is a *reasonable likelihood* that such considerations play some role in some decisions, although (indeed, especially where) this is 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.[23] It is easy to see, but unnecessary to prove, that non-ideal circumstances have had a chilling effect on the HCJ.

[21] Ibid 30.

[22] Ibid 23.

[23] These normally take the form of op ed pieces. See, e.g., E Gross, 'Darush Beit-Mishpat Amitz' (Wanted: brave court) *Haaretz* (6 August 2016). And note especially M Kremnitzer, 'ha-Refisut shel Beit ha-Mishpat ha-'Elyon' (The High Court's weakness), arguing that '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' (my translation).

To properly address institutionally-hard cases, we need, first, to recognise that they do present a dilemma, and that constitutional courts hold a dual position: on the one hand, they are a forum of principle – I will argue for this being their primary role. On the other hand, they are and should be concerned with the meaningful and sustainable *realisation* of constitutional ideals. Second, we should then extend constitutional theory to consider the dilemma of institutionally-hard cases as amenable to normative reflection, and seek to prescribe what kinds of non-ideal circumstances should or should not affect constitutional decisions, and how. If the right answer as a matter of principle is not always the right answer *all things considered*, constitutional theory should subject this intuition to reasoned reflection. This would be the only way to maintain the commitment to principle while taking reality seriously. In other words, to take seriously the reality of non-ideal circumstances, we need to develop a non-ideal constitutional theory. This would be the constitutional branch of the Rawlsian notion of non-ideal theory. Rawls spoke of non-ideal theory as charting a *legitimate and effective* path for shifting from a current – unjust – society, to one where justice is realised.[24] In the context of constitutional adjudication, a non-ideal theory should chart the legitimate and effective path toward a meaningful and sustainable realisation *of constitutional ideals*. The concern with perceived legitimacy and the status of the court is then not seen as a will to power, nor as the maximisation of preferred outcomes, but rather as an instrument for realising constitutional ideals – the pronouncement and development of which is the court's primary commitment. The last part of this article proposes a first sketch for such a non-ideal theory. Preceding it is a closer examination of the alternative approaches already mentioned: ideal constitutional theory, judicial strategy, and judicial statesmanship. Each of these, though unsatisfactory, is crucial for developing the inquiry, informing the proposed theory, and evaluating it critically.

The problem of institutionally-hard cases is a general one, emerging from the very structure of constitutional democracies and, therefore, not limited to one jurisdiction or another. To highlight this, I will continue to consider cases from different courts: the US Supreme Court, the German Constitutional Court, Israel's High Court of Justice, and the European Court of Human Rights. But, first, what is wrong with idealisation?

[24] J Rawls, *The Law of Peoples* (Harvard University Press, Cambridge, MA, 1999). See below (n 64) and accompanying text.

II. Ideals and idealisation

The prevailing constitutional discourse of both judges and scholars is inherently idealised, and its approach to non-ideal circumstances is to reject their relevance, deny it and/or subsume it under *ideal* doctrines and principles. While this judicial commitment appears necessary for defending the substance of constitutional principles and the court as a principled and independent institution, the categorical denial of the non-ideal comes at a heavy price: as non-ideal decisions are *idealised*, they create diluted or eroded ideal *precedent* as a matter of both doctrine (first-order) and theory (second-order). This kind of idealisation should be troubling to any committed constitutionalist, much more so than a simple concern with a lack of 'realism' or 'transparency' in judicial opinions, in the sense of their failure to reveal the 'real' reasons behind them.

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.

Instead of such jolting candour, 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. 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 principled and – seemingly – timeless language of legal-constitutional interpretation and precedent, distinction and analogy.

[25] See above (n 19).

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, decide only according to what is constitutionally right and just and exclude concerns of institutional prudence as illegitimate, especially if they take the form of popular or political pressure. Principled constitutional legality should be adhered to, without regard to institutional consequences.

This does not mean, of course, that this discourse ignores institutional considerations altogether. Principled constitutional legality is 'ideal' in the sense that it presupposes ideal circumstances, but this does not preclude it from being sensitive to 'institutional' issues, so long as these are internal to the terms of ideal theory. Thus, among the considerations that courts *do* include within the ambit 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 democratic system of government. The same holds true for constitutional scholars who in turn debate, in more abstract theoretical terms, both the content of constitutional entitlements and the proper role of a constitutional court in a liberal democracy (or, put another way, the proper normative force of 'liberal' within 'liberal democracy'). But these theorists, like the courts themselves, do not address head-on the normative implications of contingent non-ideal circumstances and of the *actual* expected institutional repercussions of rendering a principled decision. 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 'political questions' doctrine to justify staying its hand, might plausibly be concerned with its non-majoritarian mandate, but it would not 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.[26] 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

[26] Indeed courts have been described as 'Socratic' in this regard, as they are likely to 'offend the values and traditions of the community' and should not be weary of it. See M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law, Ethics & Human Rights* 141, 141.

what seems prudent or wise institutionally, including the perceived legitimacy of the court and its relationship with other political actors.

There appears to be great force in 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 circumstances that affect the impact of its decisions and its status in the polity 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 ideal discourse therefore fails to quite match either what should happen, or what we believe does happen. The result of this failure is the *de facto* condoning of 'judicial statesmanship' – an informal ideal that praises judges for their responsiveness to context – and a lack of normative guidance as to the appropriate scope and conditions for this responsiveness.[27] Another troubling result is the dilution of constitutional substance, as we will now discuss.

Two kinds of idealisation

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

The most basic notion of 'idealisation' 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 idealisation 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 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 rationalise 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

[27] Discussed at length in Part IV below.

did (against crucifixes in classrooms), a public uproar erupted.[28] The Grand Chamber then reversed 9:2, 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 idealisation 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 they *say* they do.[30] In other words, a not-so-noble lie.

This accusation is to some extent justified. 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 generalised 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 ratiocination of a decision through reasons considered valid and appropriate. The demand for an *ex post* justification serves as some measure of constraint on the decision *ex ante*, and, further, opens up the decision to evaluation and contestation on its own terms (internal critique). This is how we hope constitutional principles do some work.

The real problem with this principled rationalisation in judicial opinions is not that it is unrealistic, but that it idealises the non-ideal, thereby jeopardising precisely the kind of 'work' that this form of reason-giving is supposed to do. That is, this deeper kind of idealisation 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.

[28] For a critical account of the process See M Kumm, 'Comment: Contesting the Management of Difference: Transnational Human Rights, Religion and the European Court of Human Rights' Lautsi Decision' in K Raube and A Sattler (eds), *Difference and Democracy: Exploring Potentials in Europe and Beyond* (Campus, Frankfurt, 2011) 245.

[29] *Lautsi v Italy* (App No 30814/06).

[30] See Hirschl's quoted passage above (n 15).

Doctrinalising 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.[31] 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. 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,[32] the rationale actually offered is a doctrinalisation of the non-ideal circumstances. The effect of such doctrinalisation is a weakened notion of political speech for future generations of courts, governments, 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 in particular the idea of the 'loaded weapon':

> 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

[31] This brackets, for the time being, comparative differences in the force of precedent.

[32] At least insofar as it regards settlements in the Occupied Palestinian Territories (if not concerning the call to boycott Israel as such) – as was indeed the position of the dissent in *Boycott*.

> a generative power of its own, and all that it creates will be in its own image.[33]

This deeper idealisation 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 idealisation of *restraint*. Once idealised, 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 recognising '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.

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 democratic institutions as well, 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 sees the court as legitimate, even if it disagrees with its decisions, 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 diverges significantly from this ideal image of how the system runs. Ideal constitutional theories have, therefore, little to say on how the

[33] *Korematsu v United States*, 323 U.S. 214 (1944) 246. State-of-emergency cases are perhaps the easiest ones to think of as institutionally-hard, but the scope of our concern is broader.

court should handle these situations. But just because judges idealise, 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 problem 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 – descriptively – strategic actors, in the rational-choice sense of the term.[34] In sharp opposition to ideal constitutional theory, scholars that take the 'judicial strategy' approach examine judicial 'behaviour' and take pride in the 'realism' of their findings. Such realism is seen as the antidote to constitutional theory which, for the most part, 'grossly misrepresents reality', for it 'sticks to an idealist notion of constitutional law as a politically unencumbered sovereign virtue' and 'unreservedly portrays constitutional courts as a "forum of principle"'.[35] However, important as it is to demystify courts and adjudication, the notion of *strategy* cannot provide a satisfactory response to the normative problem identified here. This is because, at least in its technical version, this notion denies that the problem exists.[36] Premised on a radical scepticism of legal reasoning, 'judicial strategy' implies abandoning the premise of the constitutional courts being a forum of principle and, with it, the notion of institutionally-hard cases. If, as its proponents claim, judges act with the sole aim of maximising their given policy preferences, the cases that we have considered simply exemplify complex strategic scenarios, rather than a dilemma of constitutionalism.

Constitutional theory does have to reckon with the bold claims of the 'judicial strategy' school which threaten to 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 its unacceptable normative implications. Yet it is also important to see how, despite these shortcomings, the frameworks developed by judicial behaviour 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, and examine closely the institutional dynamics that courts participate in. If these considerations and dynamics

[34] Epstein and Knight (n 15).
[35] Hirschl (n 17) 113.
[36] This is less true of less technical versions, considered briefly below (n 41).

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 behaviour' 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 recognised that judges' behaviour 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 behaviour, one that sees judges as single-mindedly pursuing their own individual policy goals.[38]

The 'strategic' approach to judicial behaviour 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 behaviour 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 behaviour of other players (within the court and outside of it), engage in conduct calculated to maximise the attainment of their goals over the longer run, given these constraints and expectations. Thus, a judge in favour 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 maximising 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 public, would react. This rational-choice approach to public law adjudication claims to carry significant predictive and explanatory force of judicial behaviour, and has gained significant influence in the last few decades, although some continue to argue for the 'attitudinal' model as being better borne out by the data.[40]

[37] JA Segal, 'Judicial Behavior' in K Whittington, RD Kelemen and GA Caldeira (eds), *Oxford Handbook of Law and Politics* (OUP, Oxford, 2008).

[38] See Epstein and Knight (n 15).

[39] Ibid.

[40] Ibid, and see also Hirschl (n 27).

For our purposes, it is the 'judicial strategy' model that is of greater interest and relevance, for it claims precisely to take into account how courts respond to various actors. The increasing influence of this 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 behaviour, and fine-tuning the detailed dynamics of legal rationalisation and strategising. Some works depart from the technical meaning of 'strategy', while others seek to elaborate it.[41] Our primary focus here will be the basic tenets of the rational-choice approach, postponing until later certain refinements, which inch notions of strategy closer either to what is discussed below as 'judicial statesmanship' or to the 'principled strategy' version of non-ideal theory.[42]

From the point of view of legal and constitutional theory, the first difficulty with the rational-choice approach to adjudication is its provocative claim that legal principle is normatively 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 strategising judge that maintains this perception and, with it, the legitimacy of her decisions, by creating a

[41] Note especially Vanberg (n 3); T Roux, *The Politics of Principle*: *The First South African Constitutional Court 1995–2005* (CUP, Cambridge, 2013) (attributing the success of the South African Court to how it handled tensions between 'legal' and 'institutional' requirements with intelligent departures from the 'path of principle'); and S Dothan, *Reputation and Judicial Tactics*: *A Theory of National and International Courts* (CUP, Cambridge, 2014) (focusing on the European Court of Human Rights and on the Israeli High Court of Justice, arguing that these courts strategise – in the technical sense – to build and spend reputational capital). Others talk about strategy in more critical and sociological terms. See, e.g., R Shamir, 'Landmark Cases and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) 24(3) *Law & Society Review* 781 (claiming that courts build legitimacy through landmark cases while subscribing, most of the time and almost automatically, to government policy). Eyal Benvenisti's comparative constitutional work claims that the behaviour of national courts (specifically, by the sophisticated use of foreign and international law) is geared toward strengthening domestic democracies against the debilitating forces of globalisation; E Benvenisti 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) *Tel Aviv University Law Faculty Papers*, No. 59. As mentioned above, much of this wide and rich array of scholarship does not fit neatly within the contours of either ideal, or strategising or statesmanship approaches. Rather, it may be seen to provide intimations of a non-ideal approach, which the present work seeks to build upon.

[42] See below pp 32–37 and 41–43, respectively.

façade of interpreting 'the law'.[43] 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.[44] 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.[45]

Any practising 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 accepts the 'strategising' (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 then elucidates how the work of strategic legal interpretation calls for ingenuity, dedication, time and resources, which are not present in equal measure across cases.[46] Such a phenomenology

[43] See especially Vanberg (n 3) for a model of how the combined quest for 'pubic support' and 'transparency' drive the strategic behaviour of the German Federal Constitutional Court.

[44] See A Stone Sweet, *Governing with Judges* (OUP, Oxford, 2000) 27–8, for the point that this approach (considered there under the more basic notion of the 'attitudinal' model) ignores the possible normative force of legal reasoning (discussed there as a question of 'autonomy'). Stone Sweet states that, in his own account of the rise of judicial power in Europe, the actual causal relation of legal norms to a judicial decision remains a 'mystery'.

[45] A defender of the 'strategic' model might deny that it claims to offer an accurate or even proximate *description* or *explanation*, and present it, rather, as a model with *predictive* qualities. But such strong predictive qualities are yet to be demonstrated.

[46] Perhaps the most elaborate treatment in this vein is provided in Duncan Kennedy's legal-theoretical work; see especially D Kennedy, 'Freedom and Constraint in Adjudication: A Critical Phenomenology' (1986) 36(4) *Journal of Legal Education* 518 (conveying the experience of the judge who holds from the outset a clear favourable outcome: a 'HIWTCO', or 'how-I-want-to-come-out').

also speaks to how legal work – even with all resources amply present – does not always 'yield' the desired outcome. Finally – and crucially – this account needs also to 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'.[47]

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 through constitutional reasoning. Indeed, political scientists do not presume that judges *should* take and apply this model.[48] But while no one thinks to tell judges, as a matter of political morality, that they should strategise regardless of the position they are strategising *for*, any prescriptive theory would ultimately 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 recognises that institutionally-hard 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 idealise 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 idealisation) into blanket Bickelian support for the exercise of 'restraint'. In its more explicit variants, this position typically rests on

[47] Ibid 548–51. Political scientists should be put on notice that it is decidedly *not* the position of critical legal scholars such as Duncan Kennedy that law is 'radically indeterminate' in the sense described above.

[48] Some less technical – and, therefore, more plausible – accounts of 'strategy' do engage the normative question. See, e.g., Benvenisti (n 41), who endorses the behaviour that he identifies in the court, as supporting democracy. If this position were recast in terms of non-ideal theory, this would require the devising of principled parameters for what counts as properly supporting democracy where this conflicts with a principled decision.

conscious resistance to theorising 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.[49]

A perfect early articulation of this view is offered by Tocqueville's description of the justices of the US 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.[50]

[49] See, e.g., EJ Bander, 'The Dred Scott Case and Judicial Statesmanship' (1961) 6 *Villanova Law Review* 514.

[50] A de Tocqueville, *Democracy in America*, vol. 1 (Barnes & Noble, New York, NY, 2003) [1835] 130.

On a standard reading of this passage, it presents an antithesis to legal formalism. Historically, its image of judges as statesmen – indeed seamen[51] – 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.[52] But more specifically for us, it represents the antithesis to *ideal constitutional discourse*, which denies the existence of 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 and survival – both of the court and the constitutional system as a whole. The 'obedience due to the laws' is precisely what Dieter Grimm evidently worried about when he published his newspaper piece in 1995.[53] Second, 'the signs of the times' captures those cases where judges are concerned with having decisions 'mature'. Both images will provide crucial guideposts for the non-ideal theory proposed here.[54] 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 *Obergefell*, 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

[51] Naval metaphors have a long pedigree in constitutional reflections. An additional example is Lord Macauley's 1857 letter accusing the US Constitution of being 'all sail and no anchor', noted and rebuffed by R Dworkin, 'The Moral Reading of the Constitution' *New York Review of Books* (21 March 1996). Recall also the analogy of constitutional self-binding to Ulysses binding himself to the mast, going back to Spinoza and developed by J Elster, *Ulysses Unbound* (CUP, Cambridge, 2000) (and earlier versions of that work).

[52] See M Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (OUP, Oxford, 1992). Horwitz borrows the term 'grand-style' from K Llewellyn, *The Common Law Tradition* (Little, Brown, Boston, MA, 1960), where the notion of 'situation-sense' bears close affinities with 'statesmanship' as considered here.

[53] See above (n 4) and corresponding text.

[54] See below pp 43–52.

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 legalisation of same-sex marriage in California. Cole hailed the decision as a 'prudent if unusual act of judicial statesmanship'.[55] 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.[56]

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 judicial statesmanship image.

Nowhere was the call to judicial 'restraint' in this sense more clearly articulated than in Alexander Bickel's well-known case for the 'passive virtues'.[57] One way to read Bickel is as a practical manual for the judicial statesman, where the art of practising judicial virtue is all about the decision not to decide.[58] 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.[59] 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

[55] Cole (n 10).

[56] Ibid.

[57] Bickel (n 7).

[58] For a discussion situating Bickel in the context of a court dealing with difficult political circumstances, see C Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (OUP, Oxford, 2013). The praise of avoidance does not, of course, originate with Bickel. Note, e.g., 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 (1946) 320. Bickel himself relies on Justice Brandeis' doctrine of avoidance in *Ashwander v Tennessee Valley Auth*ority, 297 U.S. 288 (1936) 347. Dworkin (n 51) recounts Learned Hand's similar approach.

[59] It is worth remembering that Bickel wrote before the United Supreme Court became formally entitled to select the cases it would hear (as it would become under the Supreme Court Case Selection Act of 1988, 28 U.S.C. §1257).

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'.[60] In other words, the image of statesmanship, while structured as some form of balancing, lends in actual practice a cover for 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 general justification for privileging 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 recognise 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, 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 progressive social change 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', but, at the moment of decision, whence the confidence that the trajectory is a progressive one?

[60] See e.g. Hübner Mendes (n 58), who writes of the court as a 'tightrope walker … between prudence and courage' 211–18. Thus, on the other end of courage we have prudence, not cowardice.

[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] D Cole, 'Gay Marriage: A Careful Step Forward' *New York Review of Books* (27 June 2013) available at <www.nybooks.com/daily/2013/06/27/gay-marriage-careful-step-forward/>.

[63] Ibid.

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 or 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 on judges stringent demands of reasoned argument, should we be satisfied with seeing 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 behaviour: in some institutionally-hard cases, we need 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. The question persists also if we posit, on another interpretation of Bickelian 'passive virtues', that 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. For this notion does not indicate what would be the parameters for assessing when such 'accumulation' is legitimate and when it is time to 'cash in'. Thinking of such assessment as decisional 'all the way down', defying rationalisation and hanging on the intuitive act of more or less talented statesmen, is contrary to the most profound commitments of liberal legal thought. 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 recognise these violations. Is this to be simply understood – extending Toqueville's metaphor – as the unfortunate wreckage of a naval expedition whose captain misjudged the currents?

V. Taking reality seriously: Non-ideal theory

In order properly to recognise 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 elaboration, articulation and pronouncement of ideal constitutional values, and with the meaningful and sustainable *realisation* of these values in actual social and political life. It is this realisation 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 in which they operate, 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 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.

The ideal/non-ideal distinction

Put differently, what is required to address institutionally-hard cases properly is a theoretical approach that sees the courts as engaged in both an ideal *and* a non-ideal project, and sees the latter as concerned with the effective realisation of the former. This approach, which already undergirds much of the analysis so far, is one that John Rawls termed 'non-ideal theory'.[64]

Rawls' notion is premised precisely on the distinction between the articulation of ultimate normative aspirations, on the one hand ('ideal theory'), and the articulation of a legitimate and effective route toward the implementation of these aspirations, given existing social and political starting-points ('non-ideal theory'). In Rawls' own political thought, 'ideal theory' refers to the principles that a just society should live by. True, these ideal principles must themselves be *realistic* (a 'realistic utopia'[65]) in the sense of taking 'people as they are'.[66] 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,

[64] Rawls (n 24). For an illuminating analysis and development of Rawls' basic idea, see AJ Simmons, 'Ideal and Non-ideal Theory' (2010) 38 *Philosophy and Public Affairs* 5.

[65] Ibid, 11–22. In *The Law of Peoples*, the principles pertain to international norms.

[66] Ibid, 13, paraphrasing Rousseau.

> [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.[67]

In other words, in the Rawlsian context, while we should develop an ideal theory of justice that 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, characterised 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 should seek 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, of a court faced with an institutionally-hard case? In this context, we can say that a constitutional court is, paraphrasing Kant, a 'citizen of two worlds' – ideal and non-ideal – and it must determine the right relationship between the two. Unlike the moral philosopher, however, 'ideal theory' for constitutional courts is already itself circumscribed by the demands of principled constitutional reasoning: practices of deliberation and justification that are embedded in, and constrained by, the given legal materials and the facts of a case. The ideal role of the court in the aspired state of affairs is to provide the best interpretation of what our fundamental *legal-constitutional* values require. In turn, 'non-ideal theory' is concerned with the process of realising and sustaining these values, and prescribes how the court should handle its own institutional position where this concern comes into tension with ideal principle. When a constitutional court is faced with a threat of non-compliance, or is concerned, due to prevailing social circumstances, that its decisions would not have the intended effect (in the short and long run), in such cases it turns to non-ideal theory. As a result, even this aspect of the adjudicative practice is guided by certain normative standards, which reflect the significance of these non-ideal considerations as *means to ends*; more precisely, as *legitimate and effective* means to *right and 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).

[67] Rawls (n 24) 89.

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 imply 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 constitutionally right and just.[68]

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 if 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.[69]

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.

[68] 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 'original' meaning of the text, along with that of precedent decisions – to 'find' the right answer in a given case. Rather, constitutional courts as better understood 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 understood to animate them, and bringing these principles into coherence with each other, with the structure of the document as a whole, and with rule-of-law fidelity to decisions and practices of the past. Yet this more capacious understanding of constitutional reasoning does not mean that 'anything goes' and so on this account we still should be able to distinguish between what is constitutionally right (not in the sense of 'one right answer' from the text, but as 'right' per best undertaking of the foregoing enterprise, even if still subject to contestation) and what is institutionally wise or prudent.

[69] Posner (n 12) 1586 (original emphasis).

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 plausibly describe one's inclinations, it cannot be the final aspiration of normative reflection.

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, and how precisely are legitimate considerations to be weighed, or taken into account? Once the premise is accepted, that the ideal/non-ideal distinction should be the basis for handling the dilemma of institutionally-hard cases, the debate should come to revolve around the right principles of non-ideal constitutional theory. These principles will inevitably reflect different notions of the role of constitutional courts in liberal democracies. So there may be at least as many non-ideal theories as there are ideal theories.

The first, perhaps most intuitive, non-ideal theory to construct and consider as a candidate, is one that calls for the *strategic maximisation* 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 rational-choice 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 maximised. In other words, this theory takes the *form* of behavioural instrumental maximisation, but inputs into it the *content* of a constitutional principle. The basic notion of severing ideal from non-ideal considerations is here strongly present: judges should reach a decision about what is constitutionally – ideally – right, and then 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 emphasises 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.[70] 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, and which 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), not for its own sake.

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 *maximise* implementation of the principles, and therefore the non-ideal considerations of effectiveness in round 1 and round 2 are *always* relevant.

As attractive as 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 exogenous, but the court's position affects the way others think, and may very well change their so-called 'preferences'. Indeed we may think a court 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 given. Third is a problem of *corrosion*: the kind

[70] See Hirschl (n 14).

of freedom of speech that a strategising 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. A committed strategist would point out that that 'reduced' version is, by definition, the most we can have (having precisely 'maximised' the content of the principle). But the calculating method only works with a limited horizon, and a court that applies it could easily lose sight of a truly transformative vision. The resulting dilution of the aspirational force of constitutional principle should not be an acceptable outcome of constitutional practice.

The non-ideal forum of principle

Non-ideal theories of constitutional adjudication are not independently derived, but rather develop and reflect particular conceptions of the purpose of constitutional courts. Thus, the non-ideal theory of 'principled strategy' which we have just considered, reflects an understanding of constitutional courts as properly charged with the maximisation, 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 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'.[71] 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. [72]

In other words, a strong constitutional court that regularly pronounces on what constitutional values require in particular cases sustains a polity that

[71] R Dworkin, 'The Forum of Principle' (1981) 56 *NYU Law Review* 469.
[72] Ibid, 517.

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.[73]

This vision might be described in more Habermasian terms as a deliberative/communicative ideal,[74] but its starting point is liberal political 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'.[75]

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 centred on a concern with promoting a conception of a desirable *character* for these institutions – and of

[73] Ibid, 518, fn omitted.
[74] See J Habermas, *The Theory of Communicative Action* (Beacon, Boston, MA, 1984) [1981].
[75] Dworkin (n 71) 518.

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 favour 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 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 counterproductive, 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.

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, 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. 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 non-compliance, the court should ignore them. If there happens to be a fresh opinion poll demonstrating that 99 per cent

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, generalisable, and unmoved by temporary exigencies, and, further, that a constitutional court is the institution best placed to do this work of principled reasoned elaboration.[76] 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.

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 the 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). Where constitutional courts advance an undiluted version of constitutional principle, other political actors and members of civil society, who are dissatisfied with the outcome, are also pressed to articulate their claims from within the architecture of constitutional reasons. In other words, the task of the court is to hold up a mirror to the rest of us, 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 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. In order for the court to play its proper role in sustaining and promoting deliberation it must, therefore, not hand us a

[76] Note that, in the first part of Bickel's *The Least Dangerous Branch* (n 7), where he speaks not of the need for restraint but of the justification for the very institution of judicial review, he defends it against detractors on similar terms.

watered-down version of constitutional principles, based on what 'we' can handle.[77]

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.

Two limited contextual rebuttals. We now come to the crux of the matter. If our non-ideal theory is going to be at all useful, it needs to inform us on when and how – under what situations and with what preconditions – courts may justifiably lift the institutional blindfold, and what such 'lifting' would entail. The theory offered here proposes two types of exceptional situations, roughly tracking Tocqueville's 'threatening currents' and 'signs of the times'.[78] 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 analysing 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.

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,

[77] Asking that the court give an undiluted principled judgment does not have to mean that courts have the final say. Indeed, the court's pronouncement could be one pole of an ongoing 'dialogue'. See especially M Tushnet, 'Dialogic Judicial Review' (2008) 61 *Arkansas Law Review* 205 (focusing on the Canadian 'notwithstanding' clause, as the clearest example of what could be a broader framework for constitutional design). In other words, it is entirely plausible to give more weight to majoritarian institutions without undercutting the deliberative importance of clear principled judgments.

[78] See above p 33.

sticking with the ultimate principled decision seems, at least on first blush, plainly self-defeating and, hence, even irrational. While more mundane concerns with non-compliance 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 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 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 under "principled" strategy' – is not to be considered relevant. A case in point is the German FCC decision allowing the criminalisation of incest.[79] 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*)[80] – 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 any non-ideal theory, considering a compromise would require a two-phase deliberation: first the elaboration of ideal principle, and only then considering non-ideal threat. Further, 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

[79] 2 BvR 392/07. I thank Mattias Kumm for this example.
[80] Discussed above pp 24–25.

and that such a threat is temporary and thus calls for ducking rather than facing head on. The basic idea is that, if the feared political response is the extreme one of dissolving the ECHR, as a forum of principle the court should live with this possible outcome if the alternative is to betray the fundamental 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.

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 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, 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.

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'.[81] Similar arguments were

[81] Ruth Bader Ginsburg's remarkably long-held position is that the Court 'ventured too far' and its decision therefore backfired, as it 'stimulated the mobilisation of a right-to-life movement and an attendant reaction in Congress and state legislatures; R Bader Ginsburg, 'Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade' (1985) 63(2) *North Carolina Law Review* 375, 381. See also D Cassens Weiss, 'Justice Ginsburg: Roe v. Wade Decision Came Too Soon' *ABA Journal* (13 February 2012) available at <http://www.abajournal.com/news/article/justice_ginsburg_roe_v._wade_decision_came_too_soon>.

made at various points in the battle for federal recognition of same-sex marriage.[82] 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 *Obergefell*, 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 counterproductive even from the point of view of the victims themselves. This might be the case if the expected result is non-compliance, 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' 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'?[83]

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 pronouncements 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 'judicialised', 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'. But this concern with democratic representation is not the one I raise here. Rather, what is central for our purposes is the concern with institutional conditions that enable and promote a discursive culture

[82] See, e.g., *Obergefell* (n 8), where Justice Robert leans on Ginsburg (n 81) in support of his dissenting opinion.

[83] I borrow these terms from Kumm (n 28) 257, who speaks in particular of what one may expect from the ECHR.

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?' may seem to be simply about representation. What is most 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 may 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. In either case, we 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 institutionalised gradually to become a lived practice, allowing a bottom-up change in attitudes, 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 rebuttal based on gradual progress is therefore not a clear-cut dictate, and preserves something of the situation-sense notion of 'judicial statesmanship'. However, 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.

Procedure (anti-'stare decisis'). For both of the rebuttals that we have discussed, the final demand of this 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.[84]

This language could be useful in cases affected by a temporary threat as 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.[85] 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 in cases where tension arises 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.

[84] 531 U.S. 98 (2000).
[85] 349 U.S. 294 (1955).

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[86] R Mann and C Hübner Mendes, 'Worüber Richter schweigen: Strategie und Theorie in der Verfassungsgerichtsbarkeit' (2014) 146 *WZB Mitteilungen* 40.