What Judges Don't Say Judicial Strategy and Constitutional Theory

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Summary: Constitutional courts operate within an institutional context. Concerns with compliance and legitimacy factor into their decisions alongside considerations of constitutional principle. But neither judges nor legal scholars have reflected systematically on the proper scope of such "external" considerations in adjudication. Both portray the court as a forum of principle, generally ignoring its role as an institutional player. Political scientists, on the other hand, seem to agree that judges routinely „strategize" – thereby discounting legal principle. How should normative constitutional theory handle these contrasting visions?

Constitutional courts have become an almost universal solution to a perennial anxiety of democratic regimes, promising to reign in the excesses of majoritarian politics. Yet, however insulated from other branches of government courts are intended to be, their power is not exercised in a politics-free zone, and concerns over their political effectiveness, if not bare survival, accompany constitutional courts everywhere. Both in established and newly-emerging constitutional democracies, problems of overt or covert non-compliance by other political actors, and broader concerns with the court's legitimacy, influence constitutional courts and constrain their interpretation of fundamental constitutional principles. However, while courts are acutely aware of this institutional dimension, they leave it out of their written decisions, sustaining the myth that adjudication involves nothing but principled deliberation. This silence then extends to constitutional theory, which fails to discuss the normative implications of this ubiquitous phenomenon. We propose to address this gap.

It is well known that institutional considerations concerning compliance, as well as concerns with the image and popular legitimacy of the court, regularly feature in constitutional adjudication. Indeed, courts have a repertoire of more or less subtle techniques to increase the purchase of their decisions and protect their institutional integrity. Thus, when the German Federal Constitutional Court was asked last year to decide whether the European Central Bank would be acting in line with the German constitution if it bought state bonds, savvy observers knew that the Court would not simply reject this measure, which stabilized the European market by Draghi's declaration of intent alone, even though most judges on the bench would have wished to declare it ultra vires. The solution of referring the case to the ECJ was clearly designed to avoid this risky path. Similarly, it would be naïve to think that the switch in the Lautsi case – where the European Court of Human Rights approved the state practice of requiring crucifixes in public classrooms – was the outcome of substantive legal reasons alone, rather than also a response to the uproar over the lower chamber's decision against this practice in Italy and the concerns it raised over the ECHR's continuing authority. The subtlety with which courts craft their interventions was especially clear in the recent US Supreme Court decision in Hollingsworth v. Perry, where the Court cited technical restrictions on "standing" (the right to appeal to the Court), to refuse to decide whether it was constitutional for state laws to restrict same-sex marriage. The effect was to leave intact a district court's invalidation of California's Proposition 8 – which prohibited same-sex marriage – and thus, without delving into the substantive legal issue, the Court indirectly supported the legalization of same-sex marriage in California. The avoidance of popular backlash was subsequently hailed as a "prudent if unusual act of judicial statesmanship".

The phenomenon we are dealing with is as pervasive as it is subtle. It is no less than the judicial task of building, maintaining and spending institutional (indeed, constitutional) capital over time. Why, then, do constitutional theorists, entrusted with providing normative guidance to courts, avoid grappling with this contextual dimension? By and large, theorists have limited their work to the substantive interpretation of constitutional principle and to foundational questions of the appropriate role of the court in constitutional democracies. Their view on how constitutional courts manage their institutional status is therefore implicit and often inconsistent, alternately viewing strategic decisions as wise and prudent, or as inevitable compromises, or as disreputable politicking, with none of these assessments couched in any general framework.

This theoretical gap leaves courts to navigate their institutional choices in a normative vacuum.

Political scientists might object to this characterization of a gap in contemporary scholarship for they, unlike legal constitutional scholars, have long been interested in analyzing the institutional aspects of constitutional adjudication. Within the field pertaining to "judicial behavior," the growing consensus since the 1990s has been that judges are strategic actors in the technical sense of the term. This view begins with a legal-realist rejection of the notion that judges simply discover and apply existing laws while also taking as misguided the view – typical of 1960s and 1970s political science literature – that judges single-mindedly pursue their own individual policy goals. Drawing instead on game-theoretic analyses of interdependent interaction among rational actors, it models judges as strategic actors calculating to maximize the long-term attainment of their goals by factoring in the reactions of other players, within and outside the court. This increasingly influential approach claims to bear significant explanatory and predictive implications regarding judicial behavior. What do its findings imply for questions of constitutional theory?

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Not much, unfortunately, for at least two, related, reasons. First, the view that judges "strategize" is all about form, while constitutional theory is as much about content. Accepting, arguendo, that judges strategize, what is it that they strategize about? The strategic approach takes judges' policy goals as a fixed background, of given or exogenous "preferences." This brackets the question of how such goals come to be formed, sidelining entirely the driving force at the heart of constitutional theory, namely, the aspiration to give concrete normative answers to social issues by interpreting the principles of liberal democracy as enshrined in constitutional texts. Contemporary constitutional scholarship has traveled a long distance from the old formalist fable about "discovering" the law, but it has not given up on the rule of law in this broader and more plausible sense. That is, constitutional theory is premised on a commitment to reasoned elaboration by judges of the normative principles accepted as fundamental to our polities. In short, the strategic approach does not think of the court as a forum of principle, while constitutional scholars see this as fundamental. It is as a forum of principle that courts must manage carefully – strategically or otherwise – the demands of institutional legitimacy in a given political environment, that means, the court has a double role.

Second, the political scientists' agenda is of limited import because it is descriptive and external, while constitutional theory is (and should be) also prescriptive and at least partly internal. Descriptive accounts of judicial strategy are generally non-evaluative, although they may be read as either condemning or laudatory. In seeking systematically to guide and assess the behavior of courts, constitutional theory should find a way to reconcile the court's double role (and offer a principled answer as to the appropriate scope and purpose for strategizing, including how to prioritize when disparate concerns come into conflict. Theory, in other words, should be content neither with skeptical observations of judges' actual practice nor with an enigmatic call for virtuous judicial hunch.

How does one furnish a principled answer to this seemingly pragmatic question? The first task on our agenda is to provide some order to an otherwise messy field of explicit and implicit concerns that constitutional courts deal with. Constitutional courts strategize in diverse situations and with diverse tools. They may strategize for survival and self-protection in times of crisis, but also for increasing popularity, improving communication, and exercising moral leadership, political influence and soft power. A typology of pragmatic considerations tied to decisional contexts is an important component of a theory that candidly grapples with the reality of constitutional adjudication.

From this typology emerges a distinct category of normative considerations, which are not substantive but nevertheless relevant for constitutional adjudication. Our central goal is simply to establish this category of "considerations pertaining to institutional context" as second-order considerations, distinct

from first-order considerations pertaining to constitutional principle. Our modest claim is simply this, that this category of considerations is both distinct and relevant to constitutional adjudication. The first implication of this claim concerns the process of normative deliberation that the court engages in. We propose that courts first deliberate on constitutional principle in isolation from context, and only later deliberate on considerations of institutional context. They would thereby clarify to themselves – and possibly to the public – whether there is a gap between what the principles of constitutional justice require and what the court is willing and able to prescribe. By this modest move we already reject two extreme alternatives that echo, on the one hand, existing constitutional theory and, on the one hand, the recent consensus in political science. On one end of the spectrum is the position that gives categorical priority to constitutional principle, prescribing that the right decision be made in isolation from particular institutional context. "Fiat justitia, et pereat mundus" is the operational code of this deontological model, which ultimately pushes the court to risk also its own survival for the sake of standing on the side of justice. On the other extreme stand the dictates of a simple cost-benefit analysis, whereby the court would weigh, as perfect equivalents, the merits of the case against potential effects on its institutional capital. Neither of these models is apt for our aims: categorical priority to constitutional principle denies the court's institutional role altogether, while the cost-benefit option circumvents the rule of law.

Is there a principled alternative? Our more ambitious proposal argues that there is. According more weight to the distinction between first- and second-order considerations, this model gives lexical priority to constitutional principle over most considerations of institutional context. That is, in most cases, the court would be generally required to declare what is mandated by constitutional principle, uncompromised. It should not constrain its interpretation of constitutional justice with concerns over its status and legitimacy. However, one particular set of fundamental institutional considerations – those that bear on the very existence of the court and the constitutional order – would be allowed (with some procedural restrictions) to trump constitutional principle.

Some may object to this attempt at a principled answer altogether. It does not befit constitutional theory, they would argue, to prescribe how judges should handle real-world institutional considerations far removed from principled determination of what is lawful and just. This objection may be based on either of two views. The first is a lingering formalist ambition, which seeks to cordon off constitutional law from political theory. Although courts typically continue to

The German Constitutional Court in Karlsruhe had to decide on several aspects of EU finances, like the Union's Central Bank decision to buy state bonds.

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write as if such a separation is possible and desirable, thoughtful contemporary constitutional scholars rightfully reject it. A second objection may be that institutional considerations have no legitimate status in normative political theory, which should instead prescribe how things ought to be done in an ideal world – leaving the messy stuff of existing realities to ad-hoc and personal judgment, a kind of "situation sense" not amenable to principled deliberation. Against this view, we submit that responsible normative inquiry must aspire to address all the central elements that go into actual normative reasoning. Such an inquiry falls under the ambit of what John Rawls termed "nonideal theory." Unlike ideal theory, which is concerned with a just society, or with a "realistic utopia".

Nonideal 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. (Rawls, 1999). It is with a commitment to nonideal theory that constitutional theory should finally begin to tackle the question of judicial strategy.

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[Photo: private]

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