Judicial Politics Versus Ordinary Politics: Is the Constitutional Judge Caught in the Middle?

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Introduction

Democracies are built upon the majority principle, but at the same time no constitutional democracy can be purely majoritarian. Unconstrained democratic majorities can trample on individual rights, dignity and interests as well on those of ethnic, religious and cultural minorities within the polity. The very integrity of democracy thus requires some anti-majoritarian institutional mechanism to check against majoritarian overreach and excesses, and constitutional review by independent judges has been widely relied upon for this purpose. The role of protection for constitutional judges is fairly uncontroversial in many types of cases, such as free speech unpopular non-extremist political or ideological views or blatant discrimination on the basis of sex, race or religion. In more recent times, however, there has been a great expansion of judicial intervention leading to a vigorous debate about the "judicialization" of politics and criticisms of the seemingly ever more encompassing settling of policy issues by unelected judges.[1] Moreover, judges' recourse to expansive legal interpretation for purposes of securing a dominant role in the conduct of politics seems all the more objectionable where it appears that they invoke the constitution in furtherance of their own political agenda. Indeed, whereas judicial overreaches in ordinary legislative settings may be overridden by ordinary majoritarian means through further legislation, judicial excursions into the realm of politics cloaked in the mantle of the constitution typically depend in a vast number of constitutional democracies [2] on cumbersome super-majoritarian processes in order to be nullified. Furthermore, the resolution of a great majority of the most important political questions confronting a polity by courts may not simply stem from judicial self-aggrandizement, but also from the design of political and economic elites bent on insulating "substantive policy making from the vicissitudes of democratic politics".[3]

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[1] See R. Hirschl, *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism* (Cambridge/Massachusetts: Harvard University Press, 2004); Jeremy Waldron, "The Core of the Case Against Judicial Review"*, Yale Law Journal* 115 (2006), 1346-1406 [1349–1353].

[2] Canada stands as a notorious exception in this respect as its constitution allows for parliamentary override of specific provisions of the Charter of Rights and Freedoms and, by extension, of judicial interpretations of those provisions. *See* Canada Constitution Act, 1982, Sec. 33. The use of this override procedure, however, has been rather minimal to date.

[3] R. Hirschl, The Judicialization of Mega-Politics and the Rise of Political Courts, *Annual Review of Political Science* 11 (2008), 93 -118 [108].

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The constitutionalization of politics, particularly in the hand of judges who for all practical purposes have the last word, is certainly worrisome, particularly in countries, like the US, where virtually all major divisive political issues typically end up before the courts. Before condemning that practice, however, it is necessary to consider whether there may be extrinsic or intrinsic benefits in leaving authoritative constitutional review in the hands of judges. From an extrinsic standpoint, judicial review may not necessarily be more anti-majoritarian than the work product of a legislature beholden to lobbyists and special interests or an executive branch effectively dependent on a handful of businesses and social elites.[4] From an intrinsic perspective, on the other hand, much depends on whether a cogent and systematic distinction can be drawn between the exercise of the judicial function and ordinary politics, as customarily pursued through the electoral process and through the typical functioning of the legislative and the executive/administrative branches of government. The judicial function is clearly not apolitical in at least two important senses. First, constitutional adjudication most often has political consequences and in some cases, such as abortion in the US, important and divisive ones.[5] Second, the judicial function is embedded in its own politics defined in terms of diverse and at times conflicting judicial philosophies and approaches to constitutional adjudication. Some judges are originalists, others adaptionists, and yet others embrace a conception of the constitution as a "living tree".[6] Consistent with these differences, moreover, some judges are committed to restrictive interpretations of fundamental rights and others to expansive ones. In broad terms, one can therefore distinguish between judicial politics—that is, politics pertaining to the judicial function—and ordinary politics—that is, majoritarian politics in its electoral and institutional forms, including the non-judicial political repercussions and implications of judicial decisions within the polity.

Assessing the import and implications of the distinction between judicial and ordinary politics is particularly urgent in an era of extensive constitutionalization of politics which seems bound to go hand in hand with increasing politicization of the constitution. Indeed, a constitution restricted to structural provisions and to protection of a small number of formal rights seems less likely to impinge on the realm of ordinary politics than a constitution replete with substantive civil and political as well as social and economic rights. Thus, for example, it seems plain that there would be greater politicization of the constitution in a country where the constitution enshrines public education and public housing rights as contrasted with a country that left these matters to the

[4] Cf. N. Confessore, S. Cohen and K. Yourish, "Just 158 families have provided nearly half of the early money for efforts to capture the White House", *New York Times*, October 15, 2015 (reporting that a very small number of mainly white US families are having a decisive influence on the selection of candidates, both Democrat and Republican, for US presidential election) with B. Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux 2009) (indicating that US Supreme Court is often more attuned to public opinion within the country than the other two branches of the US federal government).

[5] See L. Tribe, *Abortion: The Clash of Absolutes* (New York: Norton & Company, 1992, 2nd ed.).

[6] See, e.g., Reference re Same Sex Marriage [2004] 3 S.C.R. 698, para. 22: "Canada is a pluralistic society…The 'frozen concepts' reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree…"

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vicissitudes of ordinary majoritarian politics. With that in mind, it is important to determine whether judicial politics are ultimately sufficiently distinguishable from ordinary politics as to allow for the maintenance of salutary checks and balances against potential excesses stemming from the latter. More particularly, it is crucial to determine whether judicial politics is inherently distinguishable from ordinary politics to allow for a principled division of labor among the two and to permit subjection of judicial decisions to criteria of legitimation that are independent from those applicable to majoritarian ordinary politics. Furthermore, assuming that such independent criteria could be successfully deployed, would the actual effects of judicial politics on ordinary politics be such that, for practical purposes, the ordinary politics implications of constitutional judicial decisions would far outweigh their import within the confines of judicial politics? Suppose, for example, that judges who support and oppose the constitutionalization of abortion can account in a principled way for their judicial politics—originalism for some, living tree constitutionalism and reliance on judicial precedents for others—but that the polity remains nonetheless vehemently politically divided over the issue. Would focus on judicial politics in that case not emerge as merely technical and as having a rather trivial effect on assessing the legitimacy of abortion policy in a constitutional democracy?

The main thesis I defend in this chapter is that it is possible to establish a principled distinction between judicial and ordinary politics, and that the two realms are distinct, each allowing for application of its own kind of criteria of legitimation. However, although judicial politics can be cogently differentiated from ordinary politics, their respective domains overlap, which raises many intrinsic questions. Is it better to leave abortion, public education or healthcare to judicial or to ordinary politics? To some extent, the answer depends of whether or not it is preferable to entrust the particular subject being considered to majoritarian or counter-majoritarian decision-making processes. But beyond that, it is also important to determine whether the subject in question is more likely to be better and more legitimately dealt with within the realm of judicial politics or within that of ordinary politics. With this in mind, Part I below briefly expands on the contrast between judicial and ordinary politics and on the connection between the constitutionalization of politics and the politicization of the constitution. Part II concentrates on the actual constitutionalization of politics as it emerges in different types of cases, ranging from those least likely to provoke (ordinary) political controversy to those virtually inevitably slated to exacerbate such controversy while keeping focus on how different kinds of cases may be easier or more difficult to resolve within the confines of judicial politics. Finally, Part III examines how the theoretical insights and case studies may be harmonized to provide a critical assessment of the potential and limitations of the constitutionalization of politics when left in the hand of unelected judges.

Law as a "Language Game" and the Dialectic between Constitutionalization of Politics and Politicization of the Constitution

Law, in general, and constitutional law, in particular, are not ultimately reducible to any other practice, such as politics or philosophy.[7] Moreover, law carves out a domain for itself, not necessarily because of the material it incorporates, but because of the way it deals with such material. Thus, for example, law and philosophy may deal with some of the same concepts, such as justice and equality, but discussion of these in a philosophy seminar is bound to differ from its equivalent in a court of law. The legal advocate and the judge cannot merely engage in a philosophical debate. Indeed, to the extent that legal practitioners can make pertinent reference to the latter, they must do so in light of existing legal doctrine, the relevant constitutional provisions and authoritative judicial precedent (at least in common law jurisdictions). In other words, those operating within the practice of law must "translate" material they wish to draw from other practices into the language of law.[8] Thus, whereas a philosophical debate on the relationship between affirmative action and equality need not be constrained by national boundaries, the Canadian constitutional equality provision specifically recognizes the legitimacy of affirmative action while its US counterpart is silent on the matter.[9] In short, judges and legal practitioners must operate within the internal perspective circumscribed by (constitutional) law as a practice with its own "language game", to borrow Wittgenstein's terminology.[10]

One need not embrace conceptions of law which cast law in key respects as completely "untranslatable"--such as Luhmann's autopoietic one which regards law as a self-contained system that is normatively closed,[11] or Kelsen's "pure theory of law"[12] to maintain that the barrier between law and other practices is thick enough to generate significant obstacles to, and gaps in, translation. A particular telling example, in this connection, is the transformation undergone by Richard Posner, the leading US proponent of "law and economics", due to his

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[7] The discussion that follows is mainly drawn from M. Rosenfeld, *Just Interpretations: Law Between Ethics and Politics* (Berkeley: University of California Press, 1998), pp. *42*-45.

[8] For an argument that philosophical and constitutional equality cannot be mutually reducible although some concepts of philosophical equality may be translated for incorporation into the language of constitutional equality and constitutional equality doctrine may be critically assessed from the standpoint of philosophical conceptions of equality, see M. Rosenfeld, *Affirmative Action and Justice: A Philosophical and Constitutional Inquiry* (New Haven: Yale University Press, 1991), pp. 136-144.

[9] Cf. Section 15(2) of the 1982 Canadian Charter of Rights *to* the Equal Protection Clause of the Fourteenth Amendment to the US Constitution.

[10] See L. Wittgenstein, *Philosophical Investigations,* translated by G.E.M. Anscombe (London: Macmillan Publishers, 1968, 3rd ed.), pp. 2, 7.

[11] See N. Luhmann, *Essays on Self-reference* (New York: Columbia University Press, 1990), p. 3 and "Closure and Openness: On Reality in the World of Law" *in* G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (Berlin: De Gruyter, 1987), pp. 335-348.

[12] In Kelsen's words, "The Pure Theory of Law undertakes to delimit the cognition of law against [psychology, sociology,, ethics and political theory], not because it ignores or denies the connection, but because it wishes to avoid the …mixture of methodologically different disciplines…which obscures the essence of the science of law and obliterates the limits imposed upon it by the nature of its subject matter". H. Kelsen, *The Pure Theory of Law*, ed. and translated by M. Knight (Berkeley: University of California Press, 1967, 2nd ed.), p.1.

experience after he left the academy for a US federal appellate judgeship.[13] Based on the assumption that human beings behave rationally,[14] as Posner envisages it, economics—in its two dimensions as a positive science that purports to explain the behavior of instrumentally rational self-interested human actors and as a prescriptive science oriented toward wealth maximization—furnishes scientifically testable criteria for the evaluation and interpretation of laws. Although Posner never abandons this ideal,[15] it is particularly telling that his practice as a judge leads him to conclude that some legal problems, such as whether constitutional privacy rights should be interpreted to cover a woman's right to an abortion, cannot be conceived cogently in terms of wealth maximization.[16] Thus, even the freest of all market societies could not function without a separable legal regime. Moreover, because it is not reducible to another practice, law must circumscribe some internal space for itself within which it can deploy its own language game. It also follows from this that law as a practice within its own space cannot be fully translatable into another practice or language-game.

Pursuit of the polity's common good, policy making, managing clashes of interests within the polity, and making law or a constitution all involve ordinary politics, whether it be highly principled and inclusive or purely strategic and bent on vindicating some narrow interests to the exclusion of others. Once a law or a constitution is enacted, however, its interpretation and application triggers a different kind of politics, namely judicial politics. For example, it is a matter of ordinary politics whether a legislature ought to enact a law making industry liable for damages it causes due to the environmental pollution it generates. After such law is enacted though, and judges are charged to interpret it, the ordinary politics delimited by its proponents and opponents prior to enactment has become to a significant degree frozen, giving way to handling by judges within the practice and language game of law. One could envisage the interpretive role as purely technical and hence as involving no politics whatsoever, but that option seems very limited in the context of constitutional interpretation in which divisions among proponents of competing judicial philosophies remain sharp and enduring. As already mentioned, judicial politics typically has ordinary politics repercussions just as constitutionalization of a right to abortion seems bound to have economic implications. But also just as abortion rights are impervious to economic rationalization or reduction, so too judicial politics are not reducible to ordinary politics.[17]

One prime example of judicial politics deploying within the confines of the language game of law is provided by the advent and evolution of the proportionality standard in constitutional

[13] After becoming a practicing judge Richard Posner has acknowledged the limits of law and economics and subsumed it under his pragmatism in contrast to his earlier position which boiled down to the prescription that law, in general, and judicial interpretation of law, in particular, ought to aim at wealth maximization. Cf. his *Economic Analysis of Law* (New York: Little, Brown & Company, 1977) *to* his *Problems of Jurisprudence* (Cambridge/Massachusetts: Harvard University Press, 1990) and *Overcoming Law* (Cambridge/Massachusetts: Harvard University Press, 1995).

[14] See Posner, *Problems of Jurisprudence,* p. 367.

[15] Ibid., p. 382.

[16] See Richard Posner, *Overcoming Law*, p. 22.

[17] See D. M. Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004), chapter 1.

adjudication. As a concept, proportionality already had emerged in Aristotle's philosophy,[18] and in nineteenth century German administrative law.[19] Moreover, proportionality has become dominant in modern constitutional law virtually everywhere besides the US as it reflects a vision of constitutional ordering centered on protection of fundamental rights in the face of conflicts among competing interests. The foundations of this vision are certainly, philosophical, moral and political, but its legal deployment remains distinct. This becomes manifest in judges' and legal scholars' debates about proportionality;[20] in the differences in the use of proportionality in various constitutional democracies;[21] and even in the legal consequences deriving from the lack of use of the proportionality standard in US constitutional law.[22]

Even if judicial politics remain sui generis, it seems appropriate in some contexts to reach beyond the language game of law so long as relevant materials found in other language games are properly adapted and reprocessed so as to "fit" within the language game of law. To stick to the nexus between economics and law, in the case of judicial interpretation of an anti-monopoly law, it would make obvious sense to combine an economic and a legal analysis. Thus, if an economic inquiry into the consequences of actual judicial interpretations of a given anti-monopoly law has led to greater economic concentration contrary to the purported intent of the legislator, that would be most helpful and would facilitate a change in judicial interpretation – assuming that were feasible with the constraints inherent within the language game of law---or a legislative amendment or repeal of the law in question. In contrast, whereas a study of the economic consequences of enforcement of a constitutional right to abortion might well be a valuable addition to the economic literature, it would be difficult to imagine it having any significant effect on constitutional scholarship relating to fundamental rights.

The line between judicial philosophy and ordinary politics may often be difficult to draw, but it remains conceptually sound. For example, a judge may have a restrictive view of fundamental rights and of national as opposed to local powers, but that would equally commit her to constitutionally upholding politically conservative individual subnational policies, such as bans on abortion, as well as politically progressive ones, such as the legalization of assisted suicide. Accordingly, so long as the constitutional judge remains consistently within the strictures of the language game of law, presumably she will be able to purge her constitutional interpretations

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[18] See Aristotle, *Nichomachean Ethics,* Book V. ed., revised and translated by J. A. K. Thomson (London: Penguin Books, 2004), pp. 118-120.

[19] See B. Schlink, "Proportionality I" in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative* Constitutional *Law* (Oxford: Oxford University Press, 2012), pp. 718-737 [728].

[20] Cf. e.g., Schlink, "Proportionality I", pp. 718-737 to A. Barak, "Proportionality II" in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012), pp. 738-755 (Schlink was a constitutional judge in Germany while Barak was the Chief Justice of the Supreme Court of Israel).

[21] *See* D. Grimm, "Proportionality in Canadian and German Constitutional Jurisprudence"*, University of Toronto Law Journal* 57 (2007), 383-397.

[22] See, e.g., ***District of Columbia v. Heller***, 554 US 570, 687-688 (2008) (Breyer, J. dissenting) (arguing that existing doctrine based on contrast between "rational-basis review" and "strict scrutiny" review is inadequate and that proportionality analysis should be used instead).

from the hold of ordinary politics or to reprocess ordinary politics materials so as to make them amenable to absorption within the bounds of judicial politics.

The constitutionalization of politics goes hand in hand, by and large, with transferring the resolution of political issues from the realm of ordinary politics to that of judicial politics. Take, for instance, the question of free public education which is quintessentially a political issue. If this issue becomes constitutionalized by being directly addressed in the constitution, then its resolution becomes a matter of judicial politics; and, otherwise, if it were a matter of ordinary politics, then it would be left to the majoritarian processes used to settle infra-constitutional political issues.

Leaving aside extrinsic factors, such as for example, as already mentioned, that the judiciary may be more responsive to public opinion than the political branches of government, there are certain matters that seem inherently better suited for anti-majoritarian as opposed to majoritarian handling. Likewise, several other matters seem inherently well suited for ordinary politics and ill suited for judge led constitutionalization. The constitutionalization of politics, understood as involving a shift from ordinary to judicial politics, can have beneficial stabilizing effects so long as it is not too extensive. Thus, so long as there is a broad consensus, such as, for example, over the need for constitutional protection for unpopular political views, deference to constitutional judges may hold in spite of vigorous disagreements over judicial philosophies. On the other hand, in the context of extensive constitutionalization of politics, such as in the case of broad protection of social and economic rights or pervasive intervention into private transactions as exemplified by the doctrine of Drittwirkung under German constitutional law,[23] there is a great danger of (over) politicization of the constitution.[24] Indeed, if a large number of matters of social policy over which the polity is sharply divided are entrusted to constitutional judges, they will increasingly give the impression of usurping the realm of ordinary politics while seeking to obscure this overreach by articulating their decisions in the language of judicial politics.

The greater the constitutionalization of politics becomes the more likely it will be that the constitution will become politicized. As we shall examine in greater detail below in the course of discussing actual judicially decided cases, where the optimal line may be drawn between such constitutionalization and politicization depends both on constitutional content as on constitutional and political context. For the moment, suffice it to draw attention to the two ends of the spectrum configured by the dialectics between constitutionalization and politicization. At a minimum, the constitution and politics barely overlap, and for all practical purposes remain completely apart. This is the case of purely procedural constitutional review where the judge functions, consistent with Kelsen's view, as a "negative legislator".[25] This would be the case, for example, where the constitutional judge strikes down a law of parliament because it was enacted

[23] See D. P. Kommers and R. A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham/North Carolina: Duke University Press, 2012, 3rd ed.), p. 432.

[24] See M. Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy", *Southern California Law Review* 74 (2001), 1307-1351, 1329.

[25] See H. Kelsen, *General Theory of Law and State*, translated by A. Wedberg (New York: Russell & Russell, 1961), p. 128.

without satisfying the legislature's constitutional quorum requirement. In that case, the judge's action has nothing to do with the law's content or political impact, and can thus be characterized as virtually apolitical.[26] At the other end of the spectrum, at a maximum, one can imagine all ordinary political decisions, whether through the enactment of legislation or otherwise, being subjected to constitutional review under a proportionality standard.[27] In the latter case, all politics becomes constitutionalized and the constitution (and all its interpretations) becomes politicized all the way through. Notice, however, that even in this extreme case, the constitutional judge applying the proportionality standard remains within the realm of judicial politics and the confines of the language game of law. Indeed, just as the constitutional judge may have to balance between free speech and security interests in an ordinary fundamental rights setting, she can analogously balance military security pursuits and basic civil liberties interests in a terrorist prevention context. In other words, because of its seemingly inexhaustible potential, the proportionality test allows for judicialization of all politics. But the feasibility of extending judicial politics to encompass the entire realm of ordinary politics by no means, as we shall see, implies its desirability.

The Constitutionalization of Politics in Actual Judicial Decisions

Except where the constitutional judge's function is genuinely reducible to that of a negative legislator, any constitutional adjudication involves some constitutionalization of politics. However, not all such constitutionalization is attributable to judicial intervention as a distinction must be drawn between constitutionalization through inclusion within the constitution and through judicial interpretation of the latter. Thus, for example, if the constitution explicitly provides a right to abortion that subject becomes removed from ordinary politics as a result of constituent power politics as distinguished from judicial politics. On the other hand, if the constitutional judge decides that a constitutional right to privacy encompasses a right to an abortion, then the constitutionalization at stake is the product of judicial politics. Whereas the broader questions of practical feasibility and desirability must compare both constituent power and judicial politics as against ordinary politics—and will be further addressed in Part III below—concentration on judicial politics and on the controversies it raises within the polity must avoid conflating constituent power politics with judicial politics. Thus, if the constitution explicitly protects a right to abortion, critics of abortion rights should pin blame on the constitution and not on the judge who strikes down a law that abridges the right involved.

[26] Although the judicial act itself would be apolitical, its consequences would obviously not necessarily be so. Failure to enact or to replace a consumer protection law, for instance, may have significant political repercussions.

[27] This maximalist position was embraced by the former Chief Justice of the Israeli Supreme Court, A. Barak. See, e.g., his opinion in Beit Sourik Village Council v. The Government of Israel HCL 2056/04 [2004] (ordering, over the Israeli military's objections, moving a separation barrier erected to deter Palestinian terrorism closer to the Israeli population than to that of the occupied territories where it had been initially erected, pointing out that whereas judges are not expert on military security and deterrence, they are experts on "proportionality").

Conversely, the existence of a broad consensus on the propriety and desirability of an existing right to free speech does not preclude deep political divisions over an exercise of judicial politics that equates donating money to political candidates with freely publicizing one's support for the latter's political agenda and views.[28] Accordingly, entrusting the subject in question to judges may be largely uncontroversial as it makes perfect sense to make judges the ultimate guarantors of individual free speech rights even if disagreements easily arise within the relevant confines of judicial politics.

The strongest case for entrusting a matter to judicial politics arises where the issue to be adjudicated ought to be preferably submitted to an antimajoritarian institution and when it can be best accommodated within the language game of judicial politics. Traditional fundamental rights cases generally satisfy these two requirements within the ambit of constitutional democracy. Unpopular views, historically reviled religious minorities, and traditionally persecuted racial and ethnic minorities seem bound to fare better with judges who are insulated from majoritarian pressures. Moreover, fundamental rights cases seem best handled within the realm of judicial politics as the latter's tool kit seems best suited –or at least not worse suited than any other—to the task at hand. Specifically, the constitutional judge appears particularly well equipped to resolve conflicts among constitutional rights and among the latter and societal interests embodied in law and policy. Indeed, these conflicts are either amenable to categorical resolutions resulting from legal interpretation of the constitution and of relevant judicial precedents or to resolutions pursuant to application of the proportionality standard. Thus, for example, if the free speech right of one citizen conflicts with the privacy right of another, the constitutional judge may either have recourse to an established hierarchy between these rights—found in the constitution itself or in relevant judicial interpretations of the latter—or to the proportionality standard to ascertain which judicial outcome would best approximate an optimal balance between these two rights. Furthermore, whether the proper domain of judicial politics in fundamental rights cases is deemed to be national or international--as reflecting the particulars, tradition and history of a single country or an international consensus on the confines of, and balances among, virtually universally recognized fundamental rights—it will in all likelihood be sufficiently carved out to allow for a clear demarcation of the language game of (constitutional) law from all its counterparts.

Even in this best case, two seemingly weighty objections arise. First, reliance on judges may not mitigate majoritarian biases to the extent that the judges involved belong to the country's majority religion or ethnic and cultural dominant groups. Second, even if adjudication can be demonstrated to remain within the four corners of judicial politics, its ordinary politics effects may be so disruptive as to undermine confidence in judicial review. When properly considered, these two objections do not actually weaken the prima facie case for entrusting the cases under consideration to constitutional judges. This is due, in large part, because these objections are extrinsic rather than intrinsic in nature. Even a culturally insensitive judge may be in a better position than her legislative counterpart to resolve a claim of discrimination brought by a

[28] See Citizens United v. Federal Election Commission, 558 U.S. 310 (2010).

member of a cultural minority. Accordingly, the mitigation of cultural bias under the circumstances may be best achieved by including members of discriminated against cultural minority within the judiciary as opposed to shifting from judicial to ordinary politics. Similarly, the fact that routine adjudication of fundamental rights controversies may be politically highly divisive does not impact on the feasibility or integrity of judicial politics, but only on its desirability under the circumstances.

Ronald Dworkin has characterized judicial vindication of fundamental rights as being a matter of principle whereas determinations left to ordinary politics he regarded as involving questions of policy.[29] In the realm of civil and political rights, the division of labor between principle and policy appears to hold up for the most part, thus legitimating the boundaries between judicial and ordinary politics. Realization of a policy may be upset or its scope of success limited if it must subordinated to the vindication of fundamental rights, such as free speech or equality between the sexes. Nevertheless, the priority of principle over policy ought to remain fairly clear and uncontroversial within this domain as the battle lines are for the most part clearly drawn out. For example, there is a broad consensus that vindication of free speech rights is essential to the conduct of fair democratic elections. Moreover, the bitter controversy generated by the US Supreme Court 5-4 decision in the Citizens United case was not over the principle/policy divide or over where to draw the line between the two, but instead over whether free speech requires allowing an unlimited expenditure of one's own money in favor of one's favorite candidates and political positions in the context of a democratic election. Accordingly, Citizens United turned not on the bounds between principle and policy, but on what ought to be constitutionalized and on the proper uses and interpretations of the appropriate language game elements at play in the realm of judicial politics.

When compared to civil and political rights, also known as first generation rights, social and economic rights, which form part of second generation rights, are arguably, at least upon first impression, much less amenable to judicial politics both in terms of antimajoritarian concerns and of fit within the language game of constitutional law. Civil rights, such as freedom of speech or the right to formal equality, often merely require government refraining from acting and emerge thus as negative rights. On principle, the state should not interfere with unpopular speech and it should not enforce laws that discriminate on the basis of race or sex. Contrast that with a constitutional right to minimum welfare, to housing or to health. These latter rights cannot be vindicated without government intervention and thus amount to positive rights. Moreover, in order to insure a minimum level of welfare benefits, a decent shelter and health benefits for those who lack the means for being self-sufficient, the state will be obligated to orient its budgetary allocations in certain ways. State budgetary decisions, however, are quintessentially policy based and hence for the most part majoritarian in nature. Finally, whereas negative rights comprise a strict reciprocity between the right holders's constitutional entitlement and the state's corresponding constitutional obligation—the state is obligated to refrain from interfering with

[29] See R. Dworkin, *Taking Rights Seriously* (Cambridge/Massachusetts: Harvard University Press, 1978), p. 90.

the particular individual who seeks to express very unpopular views—positive rights, often create a state positive obligation without a corresponding individual entitlement.[30]

Upon closer examination, the actual differences between first and second generation rights are not as stark as may be initially thought. And this is for several reasons. First, first generation rights are far from being purely negative. For example, vindication of private property rights may well require police protection against private trespass as well as the state refraining from undue interference. Similarly, the exercise of free speech rights may on occasion require that the state provide a suitable platform or that it restrain private parties who would otherwise silence the voices of those with whom they sharply disagree. Second, in many cases second generation rights do not allow for claims of individual entitlement and thus may be regarded as constitutional directives encouraging certain policy preferences. In many other cases, however, social and economic rights create individual entitlements that can be vindicated through constitutional adjudication.[31] And third, in as much as social and economic rights are justiciable, they require judges to vindicate principles or limited constitutionally enshrined policies entitled to categorical or proportionate priority. For example, a right to a minimum guaranteed subsistence level for every individual may be viewed as embodying a fundamental principle requiring certain budgetary set asides that must be prioritized over competing budgetary policy objectives. Alternatively, the right in question may be understood as imposing a budgetary policy priority that stands on a higher footing than all other budgetary policy preferences which must be processed through the majoritarian legislative process.

Whether individualized or not, so long as they are justiciable economic and social rights can fit fairly comfortably within the strictures of judicial politics. For the most part, justiciable economic and social rights controversies involve conflicts among competing rights or clashes between a right and a majoritarian policy and hence call for the kind of categorical or proportionality based treatment that judges provide in first generation rights cases. Thus, for example, the Italian Constitutional Court held that the constitutional right to healthcare implied a right to preventive medical treatment based on a balancing of the interests protected by that right against competing interests also protected by that country's constitution.[32] Similarly, in the context of a non-individualizable right to access to a decent dwelling, the South African Constitutional Court, while mindful to avoid unduly interfering with budgetary policy, ordered that the government alter its low cost housing building policy in order to put the needs of the most impoverished class ahead of others who were also qualified for such housing.[33] Moreover, in this latter case, the court reached its conclusion by applying a rationality analysis which is a

[30] See, e.g., Government of South Africa v. Grootboom, 2001(1) SALR 46 (Constitutional Court of South Africa) (Constitutional right of access to adequate housing held not to create an individual entitlement, but imposes on government the duty to maintain a system of access to adequate housing).

[31] See C. Jung, R. Hirschl, and E. Rosevear, "Economic and Social Rights in National Constitutions", *American Journal of Comparative Law 62* (2014), 1043-1098 (One third of national constitutions make these rights justiciable; one third, aspirational; and, one third, a mixture of the two).

[32] See Italian Constitutional Court 267/1998, BCCL 1998, 260.

[33] See Government of South Africa v. Grootboom, 2001(1) SALR 46.

standard proportionality based judicial tool widely used in constitutional adjudication. In sum, second generation rights can be made amenable to the language game of judicial politics and accordingly entrusting them to constitutional judges is entirely feasible and consistent with a principled division of labor between judicial and ordinary politics. In addition, particularly in as much as economic and social rights protect those who are powerless and impoverished and affect basic dignity based concerns, a strong case can be made that they are best entrusted to antimajoritarian than to majoritarian institutional actors. Finally, it bears emphasizing once again, that feasibility and amenability to antimajoritarian decision making do not necessarily imply ultimate desirability, which will be addressed in Part III below.

To better assess the limits of justifiable constitutionalization of judicial politics, it is useful to concentrate on two kinds of seemingly borderline cases. The first of these concerns cases that because of their nature or institutional implications may appear ill suited for resolution within strictures of judicial politics; the second, cases that on the surface loom as ordinary instances of constitutional adjudication, but in substance suggest usurpation of the discourse of judicial politics to conceal an undue constitutionalization of (ordinary) politics or an illicit politicization of the constitution.

The following three cases provide a vivid illustration of the first kind of borderline situation mentioned above. The first of these is the Canadian secession case[34] which deals with a quintessentially (ordinary) political issue—albeit one that involves an exceptional and extraordinary subject-matter within the domain of ordinary politics. The second case is the South African one on the death penalty[35] in which that country's Constitutional Court undertook the institutional function of constitution maker in relation to an issue that is in substance squarely amenable to constitutional adjudication. Finally, the third case is the Israeli one dealing with the constitutional status of basic laws enacted by the Knesset, Israel's parliament,[36] which would seem to involve a routine exercise of judicial politics, but for the fact that Israel had failed to enact a constitution prior to the Court's decision (and has not yet enacted one as of this writing).[37]

Secession is not only an intensely political and for the most part highly divisive subject, but also Quebec had had a very close vote on independence from Canada in 1995, three years before the Canadian Supreme Court issued its decision, and the Canadian Constitution is silent on the matter. While recognizing that secession is ultimately a matter left to (ordinary) politics, the Court imposed substantive and procedural constitutional preconditions based on the "four fundamental and organizing principles" of the Canadian Constitution: "federalism; democracy;

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[34] See Reference re Secession of Quebec, [1998] 2 S. C. R. 217 (Supreme Court of Canada).

[35] S. v. Makwanyane, 1995 (3) SALR 391 (Constitutional Court of South Africa).

[36] United Mizrahi Bank Ltd. V. Migdal Village, CA 6821/93, 49 (4) P.D. 221 (1995) (Supreme Court of Israel).

[37] I have extensively discussed these three cases in M. Rosenfeld, "The Judicial Constitutionalization of Politics in Canada and Other Contemporary Democracies: Comparing the Canadian Secession Case to South Africa's Death Penalty Case and Israel's Landmark Migdal Constitutional Case" in R. Albert and D. Cameron (eds.), *Canada in the World: Comparative Perspectives* (Cambridge/England: Cambridge University Press, 2018 [in print]). The following discussion summarizes some of the analysis in that previous work.

constitutionalism and the rule of law; and respect for minorities".[38] Given Canada's common law tradition, and the canons of constitutional adjudication that it has embraced throughout its history, the constitutionally derived legal preconditions to the political negotiations that must take place once a Canadian Province officially seeks to secede fall squarely within the language and accepted practices of judicial politics.[39]

The South African Constitutional Court decision on the constitutionality of the death penalty would have been a well worn and fairly routine instance of judicial politics, but for the fact that due to the unique historical circumstances surrounding the making of that country's post-apartheid constitution, the Court was actually delegated constitution making power over the subject before it. As the Court made clear, what it had to decide above all was whether "the death penalty is cruel, inhuman, or degrading",[40] a question that is frequently and with scant objection entrusted to constitutional adjudication. [41] But because the official constitution maker had specifically abstained from dealing with the death penalty question within the written constitution it was drafting, it officially cast the Court in a constitution making role which it was expected to fulfill through an instance of constitutional adjudication which in all appearance remained within the bounds of judicial politics. Focusing, among other things, on international human rights standards and on critical appraisal of other countries' death penalty constitutional jurisprudence, the Court's decision would have been unexceptional had it been limited to interpreting a constitution with no explicit reference to the death penalty in the context of the internationalization of constitutional law. Consistent with this, the only serious question raised by this decision does not relate to its feasibility or consistency within the canons of judicial politics, but only to its desirability from the standpoints of both judicial politics and constitution making.[42]

The Israeli case certainly emerges as the most far reaching of the three in terms of the bounds of judicial politics. In that case, the country's Supreme Court held that "Basic Laws" enacted by the Knesset, Israel's Parliament, enjoyed constitutional status and could not be repealed or superceded by the Knesset as if they had been ordinary laws.[43] The case is particularly

[38] Reference re Secession, para. 32.

[39] Within the realm of judicial politics, some judges may argue for the restrictive judicial philosophy which requires that constitutional rights or obligations be explicitly found in the language of the constitution. Other judges with more expansive views have, however, long derived constitutional rights and obligations that are arguably only implicitly relatable to the relevant constitutional text. See, e.g., Griswold v. Connecticut, ---*U.S.*—(1965) (US Supreme Court recognized an unenumerated constitutional right to personal privacy).

[40] Makwanyane, para. 78.

[41] See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976) (US Supreme Court majority and dissenting justices disagreeing over whether the death penalty amounts to "cruel and unusual" punishment).

[42] It should be noted that in its transition to a permanent post-apartheid constitution South Africa had entrusted the Constitutional Court with approval of the latter consistent with agreed upon constitutional principles. Moreover, in the case of the death penalty an impasse was reached between the two principal parties charged with crafting a pacted constitution: members of the outgoing apartheid regime and liberation movements, principally Nelson Mandela's African National Congress (ANC). [42] See Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 7440, at Para. 11 (Constitutional Court of South Africa).

[43] United Mizrahi Bank Ltd. V. Migdal Village, CA 6821/93, 49 (4) P.D. 221 (1995) (Supreme Court of Israel).

remarkable for two principal reasons: it invokes and applies constitutional norms in a country that had thus far (and as of this writing) failed to adopt a constitution; and it assumes that the country's highest court, as opposed to its parliament, is empowered to resolve constitutional disputes, thus purporting to enshrine constitutional review by judges in the absence of a constitution.[44] In his long and remarkably reasoned opinion, then Chief Justice Aaron Barak was very mindful of the vulnerability of judges as wholesale (as opposed to intermittent and exceptional in South Africa) constitution-makers and as appropriating for themselves the authoritative resolution of constitutional conflicts. To ward off accusations that his Court was engaging in plain ordinary (constitutional) politics while trying to conceal its overreach through deployment of the trappings of judicial politics, Barak resorted to two principal arguments. The first of these is based on an appeal to the internationalization of constitutional law. Specifically, Barak emphasized that there is a broad based consensus relating to constitutional essentials among post World War Two democracies, both with respect to the constitutional protection of certain basic fundamental rights and to reliance on constitutional adjudication to interpret such rights and to dispose of conflicts between parliamentary laws and constitutional rights.[45] This argument is certainly plausible and falls well within the bounds of judicial politics. Barak's second principal argument, however, does not fare as well. Barak insisted that judges must draw on "the values of society as they are understood by the culture and tradition of the people as they move forward through history".[46] Barak specified, moreover, that the judge must not approach the values at stake subjectively, but instead objectively so as to reflect these as they inhere within the State of Israel "as a Jewish and democratic state".[47] But precisely, as already indicated, Israeli society is thus far irretrievably divided over constitutional essentials[48] such that the country's constitution making potential has been thwarted for nearly seven decades. And accordingly, the judge who invokes consensus when there is none in the context of a constitution yet to be written inescapably engages in ordinary politics in a setting with no plausible resolution within the confines of judicial politics.[49]

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[44] Israel's failure to adopt a constitution is not for lack of opportunity as the first Knesset in operation after the country's independence was also designated as a constituent assembly. Instead, the main reason for Israel's lack of a constitution is a profound division within the citizenry over constitutional essentials, such as the relationship between religion and the state. See G. Stopler, "National Identity, Religion-State Relations: Israel in Comparative Perspective" in G. Sapir, D. Barak-Erez and A. Barak (eds.), *Israeli Constitutional Law in the Making* (Oxford: Hart Publishing Ltd., 2013), pp. 503, 510 ("While some consider that the definition of Israel as a Jewish state constitutes an establishment of the Jewish religion in the state…others argue that the term 'Jewish state'…merely designat[es]… Israel as the home of the Jewish people…").

[45] United Mizrahi Bank Ltd., para. 58.

[46] Ibid., para. 81.

[47] Ibid.

[48] *See* G. Sapir, D. Barak-Erez and A. Barak (eds.), *Israeli Constitutional Law in the Making* (Oxford: Hart Publishing Ltd., 2013).

[49] Unsurprisingly, the Migdal decision has proved politically controversial and has given rise to a number of initiatives bent on depriving the Israeli Supreme Court of the power to engage in constitutional adjudication. See N. Dorsen et al., *Comparative Constitutionalism: Cases and Materials* (St. Paul, Minnesota: West Academic Publishing, 2016, 3rd ed.), pp. 165-166.

The second kind of cases mentioned above are those that appear to belong squarely in the class of cases amenable to judicial politics but in which constitutional judges appear to unduly cross the line between the language game of law and that of politics. A particularly dramatic example of this is provided by Justice Kennedy's reference in Roper v. Simmons[50]-- a US Supreme Court case on whether imposing the death penalty for a crime committed by a juvenile amounted to "cruel and unusual punishment" under the US Constitution's Eighth Amendment-- to the fact that the US and Somalia were the only two countries in the world that had not signed an international covenant barring the death penalty for crimes committed by juveniles. The mere association of the US to Somalia as standing against all other nations amounts to a strong political message and casts a dramatic negative political and identitarian spell. It is therefore not surprising that dissenters who would have upheld the death penalty in Roper were vehement in their condemnation of Kennedy's focus beyond American shores.[51]

Another example of apparent spilling over from law to politics, albeit in a considerably different way, is provided by what looms as the most divisive decision of the US Supreme Court in the past half century, namely that in Roe v. Wade[52] which recognized a constitutional right to having an abortion. The ongoing bitter political divisiveness unleashed by the Court's decision in Roe v. Wade is ubiquitous, but one key aspect of the decision bears particularly salient political consequences. Roe would have been in any case inescapably controversial as it recognized an unenumerated right to abortion, a subject over which Americans have been passionately divided. But even under these circumstances, the *Roe* decision, as alluded above, could have been easily confined within the language game of law had the Court strictly adhered to the constraints imposed by the accepted judicial common law interpretive practice of confining its ruling to the strict minimum necessary to resolve the constitutional issue raised in the concrete case before it. In *Roe,* a woman who wanted to have an abortion challenged a Texas law that criminalized all abortions except those undertaken to save the life of the mother. The Supreme Court could have simply struck down the Texas law, and specified that as the right to an abortion is constitutionally protected, the state would have to advance a compelling interest for any limitation it sought to impose on the exercise of that right. That may have been enough for the plaintiff in Roe to obtain relief and for further specifications of the right involved to await further state legislation and future cases raising specific objections to the latter. Instead of that, however, the Court acted pretty much as a legislator, dividing pregnancy into three trimesters and then granting a woman an unrestricted right to abortion in the first trimester, authorizing limited state restrictions in the second trimester and allowing for all state restrictions save when the mother's life or health is endangered in the third semester. Whereas the contrast between strict adherence to the "case or controversy" constraint and the broad lawmaking approach in Roe is dramatic, the tension between tailoring constitutional adjudication to particular facts and fashioning it so as to provide greater guidance and unity within the decentralized US system of constitutional review

[50] 543 U.S. 551, 576 (2005).
[51] Ibid., 622-28.
[52] 410 U.S. 113 (1973).

is an inescapable one. And although more general decisions going clearly beyond the facts at hand will in most cases seem more political, there is much to be said for the need for US Supreme Court constitutional adjudication relating to fundamental rights to provide meaningful unity throughout the country and sufficient guidance to judges and other official actors charged with interpreting and protecting fundamental rights.

Two of the most controversial relatively recent US Supreme Court decisions, Bush v. Gore (2000)[53] and Citizens United v. Federal Election Commission (2010)[54] may at first appear to belie the distinction between judicial and original politics, but upon further examination provide an excellent illustration of the proposition that the distinction in question is conceptually sound and yet at the same time difficult to maintain in practice. Both decisions undoubtedly had a profound political impact: Bush v. Gore practically handed the contested 2000 US presidential election to George W. Bush, and that by a 5-4 decision in which all the justices in the majority happened to have been nominated by Republican presidents;[55] and Citizens United, which was also a 5-4 decision, as already mentioned, struck down a federal law that limited corporate contributions in support of political candidates through television commercials and other means on the grounds that such law violated free speech rights, thus giving corporate interests virtually unrestrained power to disproportionately influence the outcome of elections. The judicial handing over the 2000 election to Bush and the Court's equating of money to speech have been widely criticized and have cast the US Supreme Court in a particularly bad light.[56] Nevertheless, the two cases are clearly distinguishable along the judicial versus ordinary politics divide.

In Bush v. Gore, the five justices who handed the presidency to Bush departed from their restrictive judicial philosophy which had hitherto led them to strike down an unusually high number of immensely popular federal laws—including the prohibition of possession of guns in schools[57] and the law tackling violence against women on a nationwide basis[58]--in order to deviate from one of the firmest and longest standing pillars of US federalism honored consistently by restrictive and expansive judicial interpreters alike. Indeed, it is a mainstay of American federalism that the highest state court is the authoritative interpreter of that state's law and that federal judges are bound to conform to such highest state court's interpretation when considering the (federal) constitutionality of any such law. In spite of this, however, five US Supreme Court justices in fact handed the election to Bush by ordering an end to the recount of Florida voting ballots which had been imposed by the Florida Supreme Court based on its interpretation of Florida's election law. In order to reach the result they did, these justices had to

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[53] 531 U.S. 98.
[54] 558 U.S. 310.
[55] For an extended account and critique of the US SCt's Bush v. Gore decision, see M. Rosenfeld, "Bush v. Gore: Three Strikes for the Constitution, the Court and Democracy, But There is Always Next Season" in A. Jacobson and M. Rosenfeld (eds.), *The Longest Night: Polemics and Perspectives on Election 2000* (Berkeley: University of California Press, 2002), p. 111. The discussion that follows is largely based on the account provided in the just cited work.
[56] See, e.g., A. Liptak, "Supreme Court Gets a Rare Rebuke, in Front of a Nation," *New York Times* (Jan. 28, 2010).
[57] See United States v. Lopez, 514 U.S. 549 (1995).
[58] See United States v. Morrison, 529 U.S. 598 (2000).

substitute their own interpretation of the relevant Florida law for that of that state's highest court. And this is precisely what the justices in the majority did. Furthermore, there was yet another glaring anomaly in the Court's decision which may not have been outcome determinative,[59] but which figures as strong evidence of politics taking over standard judicial practice. Indeed, the Court majority held that the disparity in the means of recounting votes accepted by the Florida Supreme Court violated the Equal Protection rights of Florida voters, but specified that its decision on this issue should not be construed as a judicial precedent in the context of future elections. Arguably, for a responsible judge, serious consideration that present decisions will serve as future precedents provides a significant buffer against fashioning judicial results solely geared to the politics of the moment. If the Equal Protection holding in Bush v. Gore were to become a precedent for future presidential elections, it would have had to require a complete overhaul of the way in which Americans vote. In 2000, in Florida alone, there were sixty-seven electoral districts with a variety of different ways of recording and counting votes leading to citizens in different districts having measurably different probabilities that their vote would not be properly counted.

The equating of speech and money in Citizens United is also consistent with an elitist brand of American conservative politics that promotes corporate interests and that abhors state policies that have a redistributive effect. Unlike in the Bush v. Gore instance, however, judicial philosophy and ideology standing alone afford a plausible justification to the holding in Citizens United. Two related factors account for this latter proposition. The first of these is American exceptionalism in the context of free speech jurisprudence. Not only does the US Bill of Rights enshrine free speech rights that are articulated in absolute terms, but also US protection of such rights has been much more extensive than those promoted by most other constitutional democracies.[60] The second factor, in turn, derives from the Lockean tradition in the conception of fundamental rights. For Locke himself, natural rights were conceived as flowing from a broad conception of property that weaves together individual dominion over his or her person, thoughts, conscience, beliefs and possessions.[61] Viewed accordingly, keeping in mind the metaphor of the individual as sovereign over his land, his crops and his pursuit of happiness within his own delimited space, it seems perfectly logical to regard one's money and one's ideas as inextricably linked. To be sure, for many this Lockean scenario cannot be credibly transplanted from its eighteenth century pre-industrial original setting to the contemporary world dominated by multi-national corporations controlling wealth and resources that far exceed those of many nation-states. Be that as it may, the dispute between the Lockean speech absolutists and

[59] Even if the methods of vote recount accepted by the Florida Supreme Court were unconstitutional, the Supreme Court could have prescribed federally acceptable standards which would have allowed Florida to restart the recount from scratch and still meet all the pertinent deadlines for formally submitting the results of the recount to the US Congress which has the constitutional task of providing final certification of the outcome of presidential elections. See US Const., 12th Amendment.

[60] See M. Rosenfeld, "Hate Speech in Comparative Perspective: A Comparative Analysis", *Cardozo Law Review* 24 (2003), 1523-1581.

[61] J. Locke, *Second Treatise of Government* (Hollywood/Florida: Simon & Brown Book Publishers, 2012, 3rd ed. [1689]), chapter 5.

those seeking to achieve a proportionate balance between free speech and the integrity of the democratic process can be construed as tracking the conflict between originalists and adaptionists and that between the respective proponents of conflicting philosophies of fundamental rights. In sum, even if in practice it is impossible to determine whether politics shapes judicial philosophy or vice versa, in theory it remains possible to cast the two as distinct.

What the contrast between Bush v. Gore and Citizens United illustrates, is that although all legal determinations resulting from judicial review---and particularly those within the ambit of constitutional law where broad open ended standards predominate as against narrowly tailored rules--have political consequences, judicial politics can be kept distinct from ordinary politics. Moreover, even if certain particular brands of judicial politics seem better aligned with particular positions and ideologies within the ambit of ordinary politics, a constitutional judge who adheres to her own judicial politics with integrity will undoubtedly have to rule on some occasions against her ordinary politics convictions and predilections. In short, the constitutional judge cannot be completely isolated from ordinary politics both because she cannot shed all her ordinary politics vestiges as she enters the language game of law and because it is, for the most part, impossible for judicial decisions not to have consequences that impact the realm of ordinary politics. That said, however, so long as the constitutional judge remains consistently within the strictures of the language game of law, she will be able to purge her constitutional interpretations from the hold of ordinary politics or to reprocess ordinary politics materials so as to make them amenable to absorption within the bounds of judicial politics.

Legitimating the Constitutionalization of Politics within the Proper Scope of Judicial Politics

The language game of law, in general, and of constitutional law, in particular, is virtually unlimited. This implies that most issues within ordinary politics can be "translated" into the vernacular of judicial politics and potentially brought within the power of judges. However, keeping in mind the distinction referred to above between what is feasible and what is desirable in terms of delimiting the domain of judicial politics, the discussion of cases in Part II suggests that there is an important difference between judicial politics *in form* and judicial politics *in substance*. Indeed, a mere reading of Bush v. Gore reveals, for the most part, that the various opinions of the US justices conform to the arguments and rhetoric of the language of judicial politics as they allude to the US Constitution, state and federal law, judicial precedents and the lower court decisions on the controversy before the justices. Accordingly, Bush v. Gore largely conforms to judicial politics in form,[62] but given its various inconsistencies and anomalies discussed above it largely fails the test of judicial politics in substance.

[62] Arguably, the Court's majority insistence that its Equal Protection holding should not be considered as having precedential value exceeds the confines of judicial politics in form in a common law jurisdiction such as the United States.

Even if one could systematically eliminate all instances of judicial interventions that would fail the test of judicial politics in substance, that would leave an enormous territory ripe for extensive expansion of the constitutionalization of politics which would inevitably result in excessive and undesirable politicization of the constitution. To avoid such an outcome, the actual domain entrusted to judicial politics should not be merely determined by criteria of feasibility, but also by those of desirability. Moreover, criteria of desirability are bound to be based both on content and on context. As emphasized above, the principal content based criteria involve preferable entrusting of a constitutional entitlement or obligation to an antimajoritarian institutional resolution as opposed to a majoritarian one; and greater (or at least equal) amenability to resolution pursuant to the canons of the language game of law than to those of the language game of ordinary politics. To this, one can add all that is structurally and functionally constitutive of the polity's constitutional order, or that which amounts to secondary rules as opposed to primary ones, to borrow Hart's distinction.[63]

Context based criteria, on the other hand, obviously vary from one setting to the next, but can generally be characterized in terms of acceptable line drawing between what is entrusted to judicial politics and what left to ordinary politics within a particular polity consistent with the preservation of the essentials of constitutional democracy. Thus, for example, it would be inappropriate to entrust all free speech controversies to the legislative and executive power to the exclusion of the judicial power. By the same token, it would be illegitimate to leave elections to parliament or to the presidency (in presidential or semi-presidential systems) exclusively in the hands of judges. On the other hand, depending on the prevalent constitutional and political culture, it seems equally acceptable to leave guaranteeing a minimum basic education to ordinary politics or to place it under judicial supervision.

To better grasp how content-based and contextual factors ought to be harmonized to generate an optimal division of labor between judicial and ordinary politics, it seems useful to start by considering two separate scenarios, each of which stands at the opposite end of spectrum extending from the most restrictive to the most expansive acceptance of judicial politics as presumptively legitimate. At the minimalist end of the spectrum is the basically essentialist conception that enjoys broad popular support. As translated into the language of the perspective advanced here, a constitution that appears to rise above politics amounts to one that commands a consensus within the realm of ordinary politics. Such a consensus, moreover, is likely to be based in part on ideological grounds and in part on contextual adherence to particular ordinary politics convictions. For example, in a classical liberal ideological setting, a constitution with formal negative constitutional rights and bereft of extensive social, cultural and economic rights is much more likely to garner widespread acceptance than a constitution that emphasizes positive and collective rights. Also, depending on the particular context involved, there may be significant variations even in the presence of a shared commitment to the same broad ideological ideals. For instance, constitutional democracies that are essentially secular in nature can differ on the particulars concerning the relationship between the state and religion. Thus, separationist

[63] *See* H.L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), p. 71.

countries, such as France and the US differ on particulars, including the permissibility of state subsidy of religious education, while non-separationist secular democracies, like Italy and Germany allow for certain preferences, including religious education in state schools, accorded to majority religions.[64] Furthermore, what the minimalists consider as being within the proper scope of authority of constitutional judges also translates into that which commands consensus within the realm of ordinary politics and also combines an ideological and a contextual component. In the narrowest version of this, the ordinary politics consensus must go all the way and accordingly legitimate judicial politics would be confined to the narrow spectrum of judicial decisions that would command a consensus throughout the polity. Thus, if there were a consensus on textualist interpretations of purely formal negative rights, then use of any other judicial technique or philosophy would be presumably illegitimate. In contrast, in the broadest version of this same position, the ordinary politics consensus is limited to drawing the line between what is fit to be entrusted to judicial politics, and what not. Thus, for example, so long as constitutional judges are limited to deciding formal structural and process issues and negative rights controversies, differences relating to judicial philosophy over which the citizenry might be divided would not affect the legitimacy of the judicial politics generated outcomes actually produced.

At the other end of the spectrum is the situation in which a judicial decision is formally within the ambit of the language game of judicial politics, but substantively barely so. The Bush v. Gore case may be at the very limit and arguably barely within or just outside of the relevant boundary. The Migdal case, on the other hand, seems within the spectrum but very near its outer boundary. Moreover, the other two cases discussed in Part II that are borderline in similar ways do not fall at either end of the spectrum identified above. Indeed, both the Canadian and South African cases can be solidly defended as legitimate exercises of judicial politics based on a combination of structural, substantive and contextual factors. Both these cases promote a significant degree of constitutionalization of politics: the Canadian case by imposing constitutional preconditions to the (ordinary) political process of secession; the South African case, by judicially opting for a constitutional provision against the death penalty notwithstanding that a majority of the country's citizens favored capital punishment for certain crimes.

The main danger stemming from taking the constitutionalization of politics too far is the unleashing of an excessive politicization of the constitution that tends to blur the proper boundary between ordinary and judicial politics. In other words, a matter may be well within the legitimate bounds of judicial politics structurally and substantively and yet prove so divisive on an ordinary politics plane—either because of the subject-matter involved or because of a widely perceived undue extension of judicial power—that the polity at large regards an actual judicial decision on the matter in question as amounting to an abuse of power. A particular salient example of this is provided by the open defiance against the German Constitutional Court's decision that the display of the crucifix in state school classrooms in Bavaria was

[64] *See* S. Mancini and M. Rosenfeld, "Introduction" in S. Mancini and M. Rosenfeld (eds.), *Constitutional Secularism in an Age of Religious Revival* (Oxford: Oxford University Press, 2014), xv, xxiii-xiv.

unconstitutional.[65] In Germany, the constitutionalization of politics has been quite extensive, due in significant part to the high regard to which constitutional judges had been held in comparison to the ordinary political branches which had been significantly diminished as a consequence of their reprehensible moral and political failures during the Third Reich.[66] In spite of this high regard for German constitutional judges and of the fact that their decision was on a question quintessentially within the realm of judicial politics relating to the freedom of religion rights of religious minorities and of the non-religious in Bavaria, the Bavarian polity reacted to the Court's decision as if it had been an illegitimate exercise of judicial power.

The precise boundaries between legitimate constitutionalization of politics and illegitimate politicization of the constitution are undoubtedly hard to draw and are in most cases likely to be genuinely contestable. Furthermore, a case such as that concerning the crucifix in Bavaria can equally plausibly be interpreted as involving an unacceptably poor exercise of judicial politics or as comprising an abusive intrusion by judges into the realm of ordinary politics. In the former alternative, the judges would be accused of having grossly misinterpreted the freedom of religion protections afforded by the German Basic Law; in the latter alternative, the judges would be charged with having usurped the right of the people of Bavaria to decide by majority vote whether or not to require the presence of crucifixes in public school classrooms by wrongly converting an (ordinary) political question into a constitutional one.

Taking into account the substantive and context-based considerations, there is a strong argument that the seemingly borderline Canadian and South African decisions, discussed in Part II above, were ultimately desirable as well as legitimate. Indeed, in the case of Canada, placing the quintessentially political process of secession through constitutional filters may well enhance deliberation, comity and the protection of vulnerable fundamental interests traditionally entrusted the protection of judges. Moreover, the desirability in question is enhanced by Canada's traditional broad tradition of constitutionalism and extensive toleration of a broad conception of the constitutionalization of politics. The only apparent drawback from the standpoint of desirability would arise in the eventuality of a unilateral secession that would be carried out in open disregard of the constitutional prerequisites now in place. That drawback should be deemed as relatively minor, however, as such a unilateral secession would most likely be in any event politically divisive on a nationwide basis regardless of particular rule of law or constitutional considerations. Turning to the South African case, delegation of constitution-making regarding the death penalty to the Constitutional Court emerges as highly desirable for both substantive and contextual reasons. As already noted, the constitutionality of the death penalty is a subject that falls squarely within the ambit of judicial politics. In addition, the South African Constitutional Court, a highly trusted institution, in the context of South Africa's pacted post-Apartheid constitution-making, was entrusted with a unique role that place it at the center of the entire

[65] See Classroom Crucifix II, 93 BverfGE 1 (1995) (German Constitutional Court) and M. Rosenfeld, Constitutional *Adjudication in Europe and the United States: Paradoxes and Contrasts*, *International Journal of Constitutional Law* (I.CON) 2 (2004), 633-668.

[66] See ibid., 665.

constitution-making enterprise. Indeed, the desirability of the Constitutional Court's intervention was bolstered by its mandate to determine the conformity of the proposed permanent post-apartheid constitution with a set of previously agreed to constitutional principles.[67] In the Israeli case, in contrast, there is a strong argument that the decision was undesirable in addition to being at the borderline of legitimacy. That argument seems bolstered by the above noted subsequent efforts within the Israeli polity to formally deprive the Supreme Court of any power to engage in constitutional adjudication.

Conclusion

Based on the preceding analysis and on focus on the salient implications deriving from the contrast between judicial and ordinary politics, it becomes clear that the much criticized "judicialization" or constitutionalization of politics is not in and of itself either good or bad. Although from the standpoint of the overall good of society as a whole all intersubjective dealings have (ordinary) political dimensions, as we have seen a combination of content-based and contextual considerations justify entrusting certain key decisions to judges while leaving others to those who operate within the realm of ordinary politics. More generally, some constitutionalization of politics seems inevitable and desirable for any constitutional democracy. How much, however, depends on contextual factors. For example, in the early 1990's following the fall of the Soviet Union, constitutional courts in East/Central Europe, and most notably in Hungary, played a key and extensive role in the transition from communism to liberal democracy.[68] In the last few years, however, this trend has been dramatically reversed, the Hungarian Constitutional Court stripped of most of its powers, and that country as well as others stirred in a populist and illiberal direction.[69] On the one hand, the new political ethos prevalent in those countries has shown little patience toward the constitutionalization of politics. On the other hand, because fundamental rights and minorities seem particularly threatened as illiberal populist democracy takes hold, there is a strong argument that judicial politics and the constitutionalization of politics ought to be preserved or expanded rather than dramatically limited. In short, the contrast between judicial and ordinary politics provides us with a valuable analytical and critical tool in the assessment of the optimal role that constitutional judges ought to play consistent with the pursuit or preservation of liberal constitutionalism in various historical, political and cultural contexts.

[67] See Certification of the Constitution of the Republic of South Africa, 1996 (4) SALR 744 (CC) (Constitutional Court of South Africa) (paras.11-13).
[68] *See* W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (New York: Springer Publishing, 2014, 2nd ed.), p. 13.
[69] Ibid., pp. 10-13.