Chapter 1

The Myth of the Political Question

Ours is a government of laws, not of men.

—John Adams

The "political questions" phenomenon can be studied as a *doctrine*, by exploring the ramifications of the law/politics dichotomy which underlies and necessitates the doctrine; or it can be approached as a question of institutional *behavior*, by asking under what circumstances courts have in fact sought to avoid deciding cases "on the merits." This chapter will pursue each approach in turn.

The "political questions" doctrine states that courts must and do avoid deciding questions that are not legal but political in nature. This is upheld by judges and many academicians, even though we routinely find courts deciding about controversial matters such as abortion, election districting, affirmative action, prayer in schools, and police misconduct. What then is the doctrine, and what does it achieve?

There is a threshold question that must be addressed if this inquiry is to have any point: Is all law, in fact, "nothing but" politics carried out in a certain style? If this reductionist critique is valid, then the "rule of law" turns out to be a mere ideological disguise for,

say, the hegemony of a ruling class. In that case, it would not really matter much which government institution—legislative, executive, or judicial—the ruling class used to effect its will and repress the ruled in a particular case.

E. P. Thompson responds powerfully to this critique in a well-known essay where he argues that law, to perform its acknowledged ideological functions, must be seen as upholding "standards of universality and equity": "If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing, contribute nothing to any class's hegemony."[1]

Thus, the rhetoric and the rules of law normally have a dual, potentially contradictory function: "They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions. And it is often from that very rhetoric that a radical critique of the practice of the society is developed . . . ."[2]

Thompson concludes with a suitably dialectical prescription: "We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good."[3]

This argument indicates that the law/politics dichotomy is by no means inconsequential, since law can impose significant constraints upon politics. If so, the "political questions" doctrine is worth taking seriously. First, it might make a significant difference whether the courts become involved in a given controversy or whether they abstain from involvement; second, we cannot say *a priori* that it is impossible to give a principled account of the sorts of cases in which judicial involvement is inappropriate.

While Thompson seems convincing on the point that the law/politics dichotomy is consequential,[4] his argument is by no means sufficient to prove that its consequences are necessarily entirely benign. As Jennifer Nedelsky has powerfully argued, a major use of this dichotomy in the American context has been to establish a domain of higher "law" in which the judicial power was supreme and the "political" process forbidden to intrude.

Nedelsky's study focuses on the constitutional visions of three of the Framers: James Madison, Gouverneur Morris, and James Wilson. Her primary concern is the consequences for democratic politics of the Framers' emphasis on the protection of private property. Her thesis is that our constitutional tradition has tended to limit democratic participation more than to foster it. Nedelsky does not discuss the modern "political questions" doctrine, but she does give

a penetrating account of the Federalist theory of judicial review elaborated by John Marshall. Insofar as the modern doctrine comports with and follows from the classical theory (as it surely claims to do), Nedelsky's analysis suggests that, while the "political questions" doctrine purports to *limit* the judicial power, its primary purpose may be indirectly to *defend* that power against those who criticize judicial review as profoundly undemocratic. As Nedelsky puts it: "The establishment of judicial review added the law-politics distinction to the conceptual foundation of American constitutionalism. This distinction was the justification for the courts' authority to define the limits to government."[5]

The objective was not a neutral one of defending personal rights. Rather, it had a decidedly partisan character: "The Federalist strategy was to try to remove the most fundamental and most threatened issues from the contested political realm by designating them 'law.'"[6]

In cases such as *Marbury v. Madison*, the Court pursued its strategy precisely by *avoiding* overt partisan confrontation: it claimed authority to adjudicate legal *rights*, not political *interests*.[7] In *Marbury* the power of judicial review was established, but the interests of Federalist would-be officeholders were sacrificed.

This approach of course depended upon a general consensus on certain basic principles that could be stipulated as fundamental rights: "Everyone agreed that property was a fundamental right, although there were serious differences over what constituted violations of property rights. Property was thus a perfect issue around which to build judicial review . . . ."[8]

The next step in Chief Justice Marshall's strategy in *Marbury* was the equation of the courts' role in enforcing the Constitution—the "supreme *law* of the land"—to its role in enforcing the common law. Thus the separation of powers itself fell under their jurisdiction—even though that separation had been supported from its birth[9] by the old maxim that "no man shall be judge in his own cause!" "This subtle confusion of categories of law sustained the claim that the political structure itself . . . should be thought of as law. The structure was the Federalists' solution to the problem of democratic excess."[10]

The political consequences, according to Nedelsky, have been quite faithful to the Federalist vision, despite all the democratizing changes in the political and legal systems: "[T]he protection of property *required* disproportionate power for the few with property since they needed to be able to defend themselves against the many without."[11]

Nedelsky's critique of Marshall's project focuses on the courts' necessary reliance on consensual, *seemingly* "self-evident rules of justice to define the bounds of legitimacy": "Once we acknowledge the mutability of basic values, the problem of protecting them from democratic abuse is transformed."[12]

Here, Nedelsky briefly takes issue with Ackerman's "dualist" formulation of democratic theory (see below):

> First of all, what counts as mere private interest or higher public values is itself part of the terms of constitutional discourse. And these terms are constantly shifting, not static until moments of focused attention on constitutional debate. . . . Judicial review has, in fact, provided a means of insulation from ordinary politics which has proven capable of ongoing change.[13]

Where Ackerman's Founders were dualist democrats who cherished property along with other rights, Nedelsky's were essentially distrustful of democracy and virtually obsessed with property. Where Ackerman's Court has essentially preservationist functions, hers has been a bastion of conservative activism. Accordingly, where he focuses on preserving what is best in the liberal-constitutionalist-democratic tradition, her critique culminates in a proposal for a more radical rethinking:

> The autonomy the Madisonian system sought to protect could be achieved by erecting a wall of rights between the individual and those around him. Property was the ideal symbol for this vision of autonomy . . . . A proper conception of autonomy must begin with the recognition that relationship, not separation makes autonomy possible. . . . Political liberty is a dimension of autonomy as well as a potential threat to it. . . . And once the setting of boundaries is rejected as the ruling metaphor, we will need a new understanding of the nature of law. Not only will the task of law cease to be drawing boundaries of rights between the individual and the collective, but the boundary between law and politics will blur. . . . And those transformations are, in any case, underway.[14]

Unfortunately, Nedelsky has little to say about the specific role that law and courts would play in her more participatory democratic system. Like Roberto Unger,[15] she has some difficulty explaining why *any* sort of law is appropriate—much less essential—in a fluid political system committed to ongoing, open-textured discourse, in

which the axiom of self-government requires that all questions remain perpetually open to (re)consideration. I shall refrain from considering further the details of her argument, noting only its implications about the likely historic functions of the "political questions" doctrine: to safeguard the legitimacy of judicial review by avoiding "political" controversy and, at the same time, to further the courts' own specific political agenda by securing urgently desired outcomes. The hallowed *Marbury* precedent suggests that, where these two aims conflict, the courts may well give priority to their long-run institutional potency, even if abstention entails substantial short-run political costs.

While the Marshall Court's legacy and doctrines can be criticized on numerous grounds, we cannot criticize them simply for having acted politically until we offer a clear account of how law and politics could, in principle, be completely separated. If this cannot be done, then the Court can be charged, at worst, with failure to offer an adequate and candid account of the distinction between the sort of politics in which courts may properly engage, and the sort in which they may not—and with practicing *sub rosa* a politics of the latter sort.

In Nedelsky's view, the Court's primary error stemmed from its hostility to inclusive, participatory democracy. Historians will continue to debate the extent to which such hostility was in fact deliberately built into the constitutional design. The crucial point, however, is that—purposely or not—the Framers did leave open ample space for ongoing debate between very different conceptions of our polity. Such debate has always been the stuff of American constitutional politics, conducted inside and outside the courts.

The labeling and classification of the different conceptions and their advocates is a tricky business—a matter, moreover, pertaining more to rhetoric than to science, whether one is labeling oneself or others. Yet it seems useful to observe that, from the outset, constitutional politics has focused on competing views of the relative values of:

1. energetic government vs. individual liberty;
2. national unity vs. local control;
3. elite leadership vs. popular participation;
4. virtue and normalcy vs. inclusiveness and tolerance;
5. stability vs. expansion (economic and territorial).

These issues were already visible in the constitutional ratification debates, but have since undergone many transformations. The complex, overlapping interaction of these issues in different periods and

the changing perspectives induced by changing circumstances will confound any effort to reduce our history to, for instance, a bipolar contrast between two enduring paradigms. Nevertheless, it may be useful to employ certain familiar (if much-abused) terms as a rough shorthand for concerns with which they have often been associated. I take liberalism to refer to a focus on the liberty and flourishing of the individual; republicanism to refer to a focus on the self-government and flourishing of the united community; and democracy to focus on the norms of inclusiveness, equality, and expansion.

Each of these ideas can be shown to be, when pushed to extremes, in sharp conflict with each of the others—and, moreover, already to contain within itself the seeds of contradiction. The clash between individual liberty and effective government is a central preoccupation of *The Federalist*; expansion can easily make both harder to achieve. In general, personal flourishing is not ensured for all by a merely negative conception of liberty. The goal of unity places in question the boundaries of the "self" that is to govern; and, the larger the community, the more problematic equality and tolerance become. To these obvious points, at this stage I need add only a few others.

First, the term *conservativism* is largely absent from my schema. The reason is that I understand the conservative impulse not as a political theory or idea but as a situational opposition to change—which cannot be grasped or evaluated until it is specified *which* changes the speaker opposes and why. (Needless to say, the advocacy of "change," as such, is equally meaningless.)

Second, these terms as I use them do not map at all neatly onto the platforms of our political parties. Today there is no truly liberal major party, and the Democratic party is only vaguely democratic. The Republican party, in contrast, seems highly republican, *if* one understands republicanism to be an essentially authoritarian, intolerant doctrine.

Thinkers such as Michelman[16] and Sunstein[17] have attempted recently to reinterpret the republican tradition, emphasizing the possibility and attractiveness of accommodating it to the facts of diversity and the norms of tolerance. Their aim is to overcome the fragmentation and decay that beset the public realm, without reverting to the homogeneous exclusiveness of the Puritan colony or the small rural town. While their different suggestions are intriguing and often tempting in principle, they seem quite inconsistent with the ways in which republicans have generally historically spoken and behaved.

Michelman is keenly aware of the exclusionary impulses to which "solidaristic" versions of republicanism have succumbed. He attempts to show that "pluralistic" republicanism is equally inter-

nally coherent, and more consistent with our tradition and situation as a whole. The difficulty lies in specifying a range of shared "understandings about the ordering and direction of social life" that is, on the one hand, sufficient to make dialogic politics possible and inviting, yet, on the other hand, still tolerant of the variety of existing "perspectives on human interests and needs."[18] This challenging task remains to be accomplished.[19]

From experience, I doubt that Michelman's appeal to shared contexts of "language, culture, worldview, and political memory,"[20] admittedly essential to motivate a dialogue about the common interests of the whole community, would resonate effectively with citizens such as, for example, my African-American students, whose political discourse seems not just distorted but *constituted* by the opposition between "us" and "them." Yet today's conservative judges, to whom Michelman charitably imputes a sincere if inchoate republican theory, often have no difficulty determining that *those* citizens' interests, issues, and perspectives are special, deviant, and not legally valid.

Sunstein argues persuasively that, even in the aftermath of the New Deal reforms, our jurisprudence continues to incorporate a significant measure of "status-quo neutrality," meaning that actions altering the existing distributions of wealth and power tend to be more vulnerable to constitutional challenge than measures reinforcing the status quo. While he denies that such a bias is genuinely neutral and offers new readings of *some* constitutional rights that are less biased toward the status quo, he also concedes (perhaps too quickly) that status-quo neutrality is clearly ensconced in provisions such as the contracts clause of Article I, section 10 and the takings clause of the Fifth Amendment.[21]

It may be that cultural diversity, nihilistic egalitarianism, and the unabashed "liberal" pursuit of private interests are part of our problem, but it seems unlikely that a resuscitated and updated classical republicanism will prove to be our solution. In order to heal, unite, and reinvigorate this polity, it will be necessary to identify concrete projects and symbols that are not, in our present context, inherently divisive. The abstract philosophical underpinnings of republicanism may not be an insuperable obstacle, but its history, symbols, and current agenda are another matter.

Returning to our central theme, the different strands of constitutional thought place different values on the public and private domains of life, and thus suggest different assessments of the rule of law and the law/politics distinction. At one extreme, law is a regrettable but necessary invasion of private freedoms and an essen-

tial safeguard against governmental tyranny. The law/politics distinction urges courts to safeguard personal rights against political usurpation. At the other extreme, politics is an essential instrument of collective self-determination and safeguard against private vice. The law/politics distinction safeguards the public interest against selfish "special" interests and cautions courts to be wary of interfering with the will of the People.

An unusually interesting effort to reconcile and synthesize these different views is Bruce Ackerman's theory of "dualist democracy." Ackerman's ambitious, ongoing project is to specify historically and theoretically sound criteria for the constitutional integrity of American politics. Such criteria will test the validity of various governmental (particularly judicial) and popular actions. Ackerman hopes to persuade us that neither the accumulated amendments to the constitutional text nor the sometimes dramatic departures in judicial interpretation (especially those associated with the New Deal) have made the constitutional regime incoherent and illegitimate. To this end he combines a periodization of the constitutional regime with a distinctive theory of judicial review.

"We, the People,"[22] in his view, have constitutionally established a unique, "dualist" system of shared responsibilities, which uses different political and legal mechanisms at different times to accomplish different purposes. For ordinary public decisions, normally we employ representative institutions, influenced through elections and interest-group politics. Such "ordinary politics" is not sufficiently egalitarian or broadly participatory to reflect true popular sovereignty. Indeed, in this context "the People," strictly speaking, does not exist as a political agent. Only on special occasions does the People intervene by, after due deliberation, *constitutionally* transforming government's responsibilities.[23] This claim promises to resolve the tension between the "liberal" and "republican" strands in our tradition.

Various questions can be raised about Ackerman's theory and the way he applies it to specific historical cases. For present purposes, the key point pertains to his concept of 'dualism' itself: the thesis that our polity operates in two temporally discrete modes—ordinary politics (the self-centered, liberal-individualistic world of private citizens) and constitutional politics (the public-spirited, republican world in which alone "the People" deliberates and acts).

The device of temporal separation succeeds only if clear-cut definitions of the two modes can be developed, generating a workable "either-or" rule of recognition. Otherwise, we would be unable to distinguish between ordinary law (the product of ordinary politics)

and higher law (the will of "the People"), which takes precedence over ordinary law. Ackerman's insistence that the Constitution can be and has been basically transformed *without* resort to the Article V amendment process makes this problem especially severe. How are citizens, and judges in particular, to know when such a transformation has occurred?

The first American constitutional regime (leaving the revolutionary transition and the Articles of Confederation aside) of course began with the convention of 1787. Ackerman's claim that the post–Civil War amendments signaled a constitutional regime change is relatively easy to accept (although even here, Ackerman finds it necessary to distinguish between "transformative amendments" such as the Fourteenth and mere "superstatutes" like the Twenty-sixth). But the claim that the 1936 elections signaled a regime change of equal stature is another matter entirely. While it makes little sense to question the constitutionality of the Fourteenth Amendment (assuming proper ratification) and of statutes clearly enabled thereby, it makes perfectly coherent sense to question the constitutionality of statutes "enabled" by the 1936 elections. For a court to reject a constitutional challenge simply by citing a decisive electoral mandate would be to replace a constitutional form of democracy with a plebiscitarian form.

Recognizing the inadequacy of voting, taken alone, as a method for conducting constitutional politics or a test for recognizing it, Ackerman offers a fairly elaborate framework for recognizing moments of "higher lawmaking" and thus legitimizing their products. The overall process consists of four stages: signaling, proposing, deliberating, and codifying. Signaling refers to placing an issue on the agenda, by demonstrating that the issue has, in the country at large, "extraordinary support" in terms of "depth, breadth, and decisiveness." Depth refers to the *quality* of public involvement: the citizen has "deliberated as much about her commitment to a national ideal as she thinks appropriate in making a considered judgment on an important decision in her private life." Breadth refers to the *numbers* of citizens in support. As a rule of thumb, Ackerman proposes that a signaling movement should have the *deep* support (in the above sense) of 20 percent of the citizens, and the simple support of an additional 31 percent, to place its initiative on the agenda. The third criterion, decisiveness, responds to the paradoxes inherent in majority voting rules when more than two options are offered; it requires that the initiative enjoy enough support to "decisively defeat *all* the plausible alternatives in a series of pairwise comparisons."[24]

These criteria are subject to various objections. The definition of depth seems far too vague to use in a rule of recognition. The breadth criterion is even more troublesome. My problem is not with the specific numbers offered, but with the appropriateness of understanding breadth of support in gross numerical terms. The rationale for requiring broad support in the first place, as I understand it, is to filter out initiatives whose motivation is essentially *factional*—whose support is based on self-interest rather than a conception of the public good. Since factions come in all sizes, a gross numerical threshold has no relevance for this purpose. Rather, a case-specific analysis of *who* supports the initiative is needed. The ERA movement might need different levels of support from males and females, for example. For Reconstruction, we would separately measure Northern and Southern support.

Ackerman would probably answer that such painstaking care is not needed at the signaling stage. After all, the proposal must still pass several major hurdles; at this stage, taking a proposal more seriously than it deserves is far more acceptable than is the opposite mistake.

At any rate, Ackerman does not directly employ the aforesaid criteria in his study of historical cases. Instead, he reverts to rigorous, institutionalized procedural devices which he takes as embodying those criteria. Ostensibly, these devices are functionally adequate to accept for further consideration proposals having the requisite depth, breadth, and decisiveness, while rejecting at the outset proposals that lack them. The devices include, first, the amendment proposal procedures of Article V, and second, a modern, alternative system:

> [I]f a President can convince Congress to support the enactment of transformative statutes that challenge the constitutional premises of the preexisting regime, the American public treats his success as a higher lawmaking signal similar to the proposal of a formal constitutional amendment under the classical system.[25]

The classical system of course continues with the formal ratification procedure. In the modern system, the continuation is quite different.

> Precisely because of their revolutionary character, many of these statutes will be invalidated by the Supreme Court. This will return the burden of initiative back to the political

> branches: Does the constitutional movement have sufficient strength in the country to challenge the Court with a second round of statutes that refine and deepen the legal meanings adumbrated the first time around?. . . .
>
> [T]he modern system relies very heavily on the good judgment of courts. After making their "switch in time," they must reflect upon the deeper meanings of transformative statutes and seek to codify them in transformative opinions that will guide constitutional development in the regime ahead.[26]

This treatment, referring abstractly to the three branches without regard to the working of party systems, organized interests, and the special features of periods of divided government, seems excessively austere and unhistorical. Nor does Ackerman go deeply into studies of political sociology. For all his recognition that the typical citizen is *ordinarily* moved by private and not by public-spirited concerns, the required widespread capability for transcending this attitude on special occasions of constitutional politics is not convincingly demonstrated. Ackerman's model may thus fail to deal realistically with some fairly typical cases—let alone with unique examples of constitutional politics such as Dorr's rebellion or the post–Civil War amendments.

Even sticking to the formal level, Ackerman fails to provide clear criteria for courts to use in deciding whether to "switch," thus acknowledging that a legitimate constitutional transformation has occurred, or whether to adhere to precedent until the formal amendment procedure has been used. Once again, is "sufficient strength in the country" to be measured simply by some number or magnitude of victories in presidential elections and/or congressional votes? Does not the coherence of the ordinary law/higher law dichotomy depend on our ability to distinguish between cases where the Court interprets the Constitution *incorrectly*—errors we could in good faith set right by "transformative" Court appointments and other techniques proper to "ordinary politics"—and cases where the Court's *correct* decision persuades us that the Constitution itself is in some respect no longer right for us—a problem properly corrigible only through very distinct procedures reserved for "constitutional politics"?

The ongoing debate in political science over the identification of "critical" or "realigning" elections provides a useful caution.[27] This is a far simpler issue, in two senses. First, a realignment can be established by analyzing changes in demographic voting patterns,

without undue regard to the issues advanced in the campaign or direct evidence about the motives of individual voters. Second, the concept is used as a heuristic device for periodizing political history. To label a given election as "critical" is not really right or wrong; it is more or less explanatorily useful. The debate has produced very little closure; yet the task confronting a court faced with "transformative" legislation is far more demanding.

But perhaps the problem is more than one of measurement. Why isn't there a deep contradiction between the idea that in normal times the People does not exist, and the idea that even normal politics can and should pursue *the public good?* How can a nonexistent entity *have* an interest, and how could we know it if it did? Note: we cannot answer this just by referring back to the vision of the public good last announced (or cumulatively announced) at moments of constitutional politics. The People do not then address what specific actions should be taken to meet specific problems; they speak at a very abstract level. Indeed, if they tried to legislate in the ordinary sense, they would not be acting *constitutionally* at all. In moments of constitutional politics perhaps the public good, like "the People" itself, comes to exist by the very process of self-recognition. But how can we, mere private citizens, recognize it? This "People" is reminiscent of Wittgenstein's lion! "If a lion could talk, we could not understand him."[28] How can a republican politics confined to special constitutional moments "constitute" an ordinary politics whose participants and aims are so different?

One possible source of comfort, which Ackerman's theory obliges him to forego, is the *textuality* of the Constitution. Ackerman sees constitutional politics as especially serious, deliberative, and participatory, as well as fundamental in its concerns. Well and good; but these attributes are hard to measure and largely matters of degree. The "higher law" that emerges from such politics has also been distinguished—in the American tradition, at least—by its textual nature and its elaboration through specialized procedures, which support workable rules of recognition. It is this tradition that so often lures us into quasimetaphysical and, in my opinion, ultimately futile debate over whether or not a specific principle can "actually" be found "within the four corners" of the Constitution.

Now, Ackerman needs to break decisively with this tradition in order to validate his third, New Deal regime and its new approach to constitutional transformation. (Indeed, this outcome imperative seems to be a major impulse behind his theoretical innovations.) If the Constitution is a text, then it did not change in 1937. On the other hand, if it is not a text, then the distinction between consti-

tutional politics and constitutional law threatens to disappear. If the constitution can be radically overhauled without amending the text, what exactly is there left for courts to "interpret" during times of ordinary politics?

Ackerman recognizes the need for a concept of (preservationist) constitutional interpretation, as opposed to (transformative) constitutional politics; thus, he insists that *Brown*[29] and *Griswold*[30] are exercises in the former mode, not in the latter. In the end, it appears that dualist democracy must consist of more than the two stipulated forms of *politics*; it also needs both ordinary and constitutional *law*. Ackerman's temporal dualism and preservationist view of the judicial role imply a view of the law/politics dichotomy: law for him is essentially (in Unger's term) frozen politics.[31]

Note that by expanding the scope of constitutional politics beyond the framework of Article V amendment procedures, and also by labeling certain less transformative constitutional amendments as mere "superstatutes," Ackerman blurs *in both directions* our understanding of which rules are currently entrenched in the Constitution. On the one hand, matters not mentioned in the Constitution can come to have "constitutional" status. (This is, after all, already a consequence of traditional judicial review.) On the other hand, can we not now imagine a court saying (for entirely new reasons[32]) that a purported constitutional amendment is itself unconstitutional? That, although we *thought* we were doing constitutional politics, on close inspection it turns out we were only doing ordinary politics, because our deliberations did not have the depth, breadth, and so on that constitutional politics requires? After all, if the People did not follow the procedures laid down, courts cannot sanction that and still *be* courts.

One bloc on the court might view the distinction between ordinary and constitutional politics as itself purely procedural. Thus, courts are not themselves doing politics when they enforce the (procedural) distinction between substance and procedure. This bloc might still split, however, on whether the procedures laid down are simply those of Article V or whether the courts should look (perhaps in both directions) beyond mere formalistic compliance with those procedures.

Another bloc would predictably view the distinction between ordinary and constitutional politics—not to mention that between substantive and procedural distinctions—as ineluctably substantive. This bloc might still split, however, on whether it is proper for *courts* to make such substantive judgments.

A third bloc, on or off the court, might point out that such technical discourse as this is profoundly alienating, inaccessible, and ir-

relevant to the people at large. What we care about most is, in the short run: are we to have our way on this issue, or not? And in the long run: whose country, and what kind of country, is this?

To an extent, whether judicial review continues as a legitimate institution may well depend on the popularity, especially with elite opinion leaders, of major court decisions.[33] Yet in the long run, more esoteric arguments about the judicial role will continue to influence the fate of proposals for reform. To justify their actions in terms that we can recognize, courts must be able to discern the difference between ordinary and constitutional rules and to protect the boundary between ordinary and constitutional politics. To allow a confusion between the two would allow "ordinary majorities" to accomplish the sort of major change, potentially affecting fundamental rights and entrenched against future reform, that is reserved for special "supermajorities."

For Ackerman, this would be the ultimate evil. Indeed, he even professes interest in the idea of insulating rights such as free speech from the Article V amendment process, as the Framers did for the equal representation of states in the Senate. For, while he is far less critical than Nedelsky is of the courts' historic performance in preserving and reconciling constitutional principles, he knows we cannot trust them—nor even the sovereign People!—absolutely.

With these considerations in mind, let us quickly review the Supreme Court's own original assertion of its special constitutional role. In *Marbury v. Madison*,[34] the Supreme Court justified judicial review as a direct consequence of the competence and responsibility of the courts to say what the law is—a duty it could hardly perform without adverting to the Constitution, since that document is "the supreme law of the land." The courts can and must interpret the Constitution, in other words, because the Constitution is law.

To these assertions of Chief Justice Marshall, President Jefferson retorted that *all* public officials were sworn to uphold the Constitution, and therefore needed to interpret it on relevant occasions. Moreover, the people—not the courts—were sovereign; hence the decisive role in constitutional interpretation ought to belong to the branch of government closest to the people, namely the legislature. It is to make the laws, after all, that Congress is chosen.

Defenders of judicial review replied by appealing to the paramount need for a nationally uniform, stable, and nonpartisan understanding of our Constitution. Given the separation of powers, federalism, and the realities of party and faction, the elected, "political" branches would be unable to develop and sustain that understanding. The courts, with their professional skills, devotion to

precedent, hierarchical structure, and insulation from political pressures, could hope to do so.

This argument may appear simply to expand upon the claim that the Constitution is law. On closer inspection, however, it becomes clear that a significant distinction is involved—between ordinary law, subject to and produced by the ordinary political process, and higher law, superior to and insulated from that process. Since the Constitution is, in its very essence, a safeguard against abuses of power by elected officials, those officials cannot be entrusted with the last word on its interpretation. The only alternatives are the courts—or the people themselves. If (as Madison argued in *The Federalist*[35]) the people cannot safely be called upon to play such a role, then the courts must do so. But now, the claim that judicial power is no threat to democracy because courts engage only in legal interpretation, not political decision making, loses its *structural* sense. It is no longer true that courts simply carry out the policies of the other branches and can easily be corrected by them if they misinterpret those policies. Mistakes in constitutional interpretation are corrigible only by special constitutional lawmaking procedures which, history shows, very rarely succeed.

If so, the claim that judicial review is rife with gravely undemocratic implications must be refuted primarily by reference to the particular kinds of questions courts decide and/or the kinds of reasoning they employ. (One can also try to argue that the appointment process is indirectly democratic, but, without assuming a special judicial *competence*, the case for an elected judiciary is hard to rebut.)

The claim that courts engage only in a special sort of decision making that does not threaten democratic values brings us back to the law/politics dichotomy, which, once again, seems to raise the possibility that there are *some* constitutional questions that courts must not decide, because they are intrinsically "political"—that is, questions for the law*maker*, not the interpreter. If the courts themselves are to be responsible for identifying such political questions, moreover, it must be possible to do so in a judicial—that is, a principled—manner. Yet, as Nedelsky points out in her critique of Ackerman, even if there is to be a line between law and politics, it does not follow that the drawing of that line is itself a strictly legal exercise. To the extent that the Constitution makes Congress responsible for fixing the courts' jurisdiction, one might expect the opposite to be the case.

Let us now take a brief look at three criteria that might be invoked to define the boundary between law and politics. They are bias, competence, and authority.

In ordinary language, the most common sense of the term *political* refers to the domain of political parties and election campaigns. While there are enforceable laws regulating some aspects of this (formally) largely "private" domain, judicial involvement in general is tricky, since it risks compromising the crucial nonpartisan image of the judiciary.

Now, to hold that this kind of potential bias always makes a question *political* would create serious problems. If we must recuse the entire judiciary from involvement in overtly partisan controversies, why would the same risk of bias not extend beyond electoral matters, to *any* issue (such as abortion, affirmative action, or federal/state relations) on which political parties have taken sharply opposed positions? Moreover, judges have personal affiliations based on region, class, race, ethnicity, gender, religion, and so on as well as those based on party. Why can we trust them with controversies between citizens of different states, religious freedom cases, civil rights cases, and so forth? This ordinary-language sense of the term *political* simply discredits the very possibility of "judicial independence."

Apparently, then, the bias criterion can only prompt a prudential, contextual judgment: given the issues presented by the case, the stakes involved, the alignment of political forces, and the perceived position (balanced or unbalanced, moderate or extreme) of the courts with respect to that alignment and that issue, what are the prospects for a judicial decision being accepted as unbiased—and how great is the need for the courts to make such a decision?

The second possible criterion, competence, bespeaks the notion that judges are trained to apply distinctive materials and methods in their decision making. In the traditional view, judges deal with questions of principle, not policy; are informed by authoritative texts, not public opinion or social theory; determine rights and duties, rather than weigh interests; and seek to do justice, not find acceptable compromise. It follows that they can perform successfully *as* judges only when appropriate principles and texts are available; otherwise, their decision would be based on nonjudicial reasoning—typically, on the sort of weighing of interests that is the stuff of ordinary politics and, not coincidentally, is often encumbered by personal and/or partisan bias.

One difficulty with this competence criterion is that it is not inherently limited (as the "political questions" doctrine is) to *constitutional* questions. More serious, the argument once again appears to prove far too much. Few jurisprudents nowadays believe that all or most cases, and especially the controversial "hard" ones, have

right answers that are clearly determined by the "plain meaning" of available legal materials or the "original intent" of their authors. Even the persistent advocacy and practice of a "balancing of interests" approach to judicial review did not prevent Felix Frankfurter from being identified as a prime defender of "judicial restraint" and opponent of "activist policymaking."

In light of the ascendant Legal Realist thesis that interpretation *normally* looks beyond as well as to the text, the argument from competence cannot establish the *nonjusticiability* of all cases posing "political questions." More plausibly it suggests that courts should avoid unduly open-textured *grounds of decision* (such as the Ninth Amendment) and should avoid imposing *remedies* that call for judicial fact finding or open-ended supervision that will unduly tax the courts' administrative capacities. Once again, the ground of decision and the shaping of remedies are prudential choices; the only case requiring abstention from the outset on principle would be one where a majority agreed that the available texts and precedents provided inadequate guidance for any judicial ruling on the merits.

Since "cases of first impression" are inevitable in any domain of textual interpretation, it is hard to theorize abstractly any conditions for abstention on this ground that would not jeopardize the basis for judicial review itself. What makes the cases arising under the Ninth Amendment or the guarantee clause qualitatively more difficult than those arising under the due process or privileges and immunities clauses?

The third criterion, authority, is geared more specifically to *constitutional* politics. It refers us to decisions on constitutional lawmaking (as opposed to interpretation) so momentous that they can legitimately be made only by the sovereign People (or, perhaps, as Jeffersonians would have it, those uniquely qualified to speak for the people). In Ackerman's terms, such decisions are *transformative* rather than *preservative* of existing constitutional doctrine.

This approach would reserve from judicial decision only a small fraction of the questions normally termed "political," whether by ordinary language or by judicial doctrine. While such abstention may sound attractive in principle to believers in democracy, it still requires an ability on our and the courts' part to distinguish lawmaking from interpretation. Yet this distinction is notoriously the grist of incessant partisan political strife! What *we* see as an obligatory, preservationist adjustment of existing rules in light of changed circumstances, *you* see as a willful, transformative departure from well-settled understandings. Rarely would a majority have good reason to agree that this debate is too close to call. Once again, if they

did so, the judgment would smack of prudence, not principle.

However problematic the criteria of bias, competence, and authority may be, they appear to exhaust the range of *arguably* principled criteria for judicial abstention from "political questions." Conspicuously absent from the list are *clearly* prudential factors such as possible noncooperation by other officials with a judgment, financial costs of compliance, or the destabilizing implications of a ruling that some longstanding practice is and has been unlawful. These criteria must be excluded because they are purely circumstantial: they in no way depend on the nature of the *questions* presented or on the methods and materials needed to resolve them, and thus involve no issues of principle rooted in the separation of powers and the law/politics dichotomy—unless there is to be a principle that following the law must always be convenient for the authorities or for society in general. But that "principle," to quote Justice Stewart only slightly out of context, would not be "law as the courts know law."[36]

One further try at delineating the scope of "political questions" would reverse the figure/ground perspective: instead of asking what questions courts are *least* suited to decide, we can ask what questions elected politicians are *best* at. When are their competence and their authority most clear? When is their "bias" least disabling? Because this question depends essentially upon a theory of representation, its further exploration will be deferred to chapter 2.

The Judicial "Political Questions" Doctrine

Having laid out some of the background theoretical issues, let us turn now to an overview of judicial pronouncements on the questions at hand. As the courts' practice has historically developed, the term *political* is used primarily in an institutional-positivist sense. It refers to any decision typically made by (or, more technically, ostensibly reserved by the Constitution or laws for) nonjudicial officials—the so-called political branches of government. The theoretical distinction appears to involve elements of all three criteria—to be between matters susceptible to governance by legal *rules* and impartially supervisable by courts, and matters whose successful handling requires official *discretion*, accountable ultimately to voters.

This rules/discretion approach was already used in *dicta* in *Marbury v. Madison*,[37] long before the formulation of the "political questions" doctrine itself. In order to obtain the relief he sought from the Supreme Court, Marbury had to prove that he had been appointed

as a justice of the peace, and that the Jefferson administration had wrongfully withheld his commission. When both the executive branch and Senate declined to provide him with the documents he requested, Marbury subpoenaed several officials to testify. At trial, however, cabinet members protested that, in light of the separation of powers, they could not be compelled to answer any questions regarding confidential policy discussions within the executive branch. Marbury's counsel replied that the existence and disposition of documents of public record, such as Marbury's commission, could not be regarded as a confidential matter; but he reassured the Court that he did not mean to open all executive business to public view: foreign policy discussions between the president and the secretary of state, for example, were not subject to judicial intrusion or compulsory disclosure.

At trial the Court ordered the witnesses to testify to their knowledge about the preparation, signing, and sealing of the commission but declared that, since what was subsequently done with it was legally irrelevant to the merits of Marbury's case, questions on that point need not be answered. Then, in its opinion, the Court addressed the broader question whether Secretary of State Madison, in light of his official position, had immunity from a writ of mandamus: insofar as in this case he was performing record-keeping duties imposed by law, he was subject to the writ; however, had he been acting in his capacity as confidential foreign policy agent of the president, he would not be so subject, for such matters "respect the nation, not individual rights."[38]

On one level we see here an embryonic "state secrets privilege," adumbrating the distinction, further criticized in chapter 4 below, between a judicial realm of law and an executive realm of prerogative, carved out in the interest of national security. A still broader immunity, hinted at in the *Marbury* trial colloquy but squarely claimed and adjudicated only in the twentieth century, would establish an "executive privilege" covering all policy discussions among high executive officials. The idea here appears to be that all policy making involves the exercise of political discretion—a matter inherently immune to legal regulation. In *United States v. Nixon*,[39] the Court held that there is such a privilege regarding presidential communications with subordinates, but that the privilege is not absolute.

Neither in *Marbury* nor in *Nixon* did the Court actually refrain from inquiring into or deciding any matter essential to disposing of the case at hand. The "political questions doctrine," properly so called, pertains to questions that the courts *do* abstain from decid-

ing. Scholars have had difficulty finding a consistent, principled pattern to these cases; some have concluded that it is simply a matter of *ad hoc* judicial avoidance of cases where expected challenges to their neutrality, expertise and/or authority are difficult to rebut—and, in particular, cases where the "political branches" may therefore be tempted to defy judicial orders.[40]

Historically, cases involving the political questions doctrine have generally fallen into the categories of electoral politics (cases arising under the guarantee clause of Article IV), constitutional amendment politics (cases arising under Article V), and foreign policy (cases arising under the divine prerogative of Charles I and, according to Locke, William III). The Article IV and Article V cases revolve around issues of bias and authority, while the foreign policy cases involve the third criterion, competence, as well.

While the foreign policy cases (discussed in chapter 4) focus attention on the relations among branches of the government (not to mention those among nation-states), the others focus more directly on the relationship between our government and the American people. In both contexts, the question goes to the appropriate outer limits of the rule of law—whether as a restraint on the conduct of government officials or on that of the people themselves. If we take the rule of law and personal rights to be concerns central to liberalism, the authority and proper structure of government to be concerns central to republicanism, and equality and the power of the people to be concerns central to democracy, then the evolution of the political questions doctrine can be understood as an aspect of the triangular contest between liberal, republican, and democratic conceptions of our polity which has been a major theme of our constitutional history.

The courts are clearly an elite institution—if indeed that couplet is not redundant. Their expertise and impartiality must be in some sense *above* the level of the ordinary person if their assigned function as impartial arbiter is to be successfully performed. For citizens to tolerate this role is part of the mystery of authority in a republican regime. As Thompson points out, they will not continue to do so unless the "rule of law" provides returns. What consoles the disappointed litigant may of course vary greatly, depending on circumstances and beliefs.

In 1804 the Supreme Court's primary audience, in an important sense, was Federalists who needed a good reason to remain within the polity and accept the authority of Jefferson's odious administration. (Secession continued to be a discussible option for the Hartford Convention of 1814.) Only a constitution above ordinary