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THE WHY OF CONSTITUTIONAL ESSENTIALS

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In this Essay, I want to take up questions that emerge when we set Rawls's account of the constitutional essentials of political liberalism alongside what I regard as the best account of American constitutional practice—an account that I have elsewhere called "justice-seeking constitutionalism." This is not because I imagine that Rawls has this or any other account of American practice directly in mind, or that our practice should be strictly measured against Rawls's theory. Rather, my hope is that we can understand Rawls in *Political Liberalism*[1] more clearly if we set his ideas against questions raised by our practice, and, in turn, that we can better understand questions raised by our practice in light of Rawls.

The questions have a singular focus: Why the idea of constitutional essentials at all? Assume that we have a conceptual grip on the boundaries of political justice. And assume further that if we have judicial review at all, it will fall short of enforcing all of the constitutional essentials. Under these conditions, why should the constitutional essentials truncate political justice? Why not treat political justice as what is required? And how does the case on behalf of the constitutional essentials connect with our understanding of our own constitutional practice?

So that is the heart of my agenda: the question of the need for constitutional essentials in a conceptual environment created by the interaction between Rawls and the best account of American constitutional practice,[2] with the reciprocal ambition of better understanding our constitutional practice as it actually is.

I. THE CONSTITUTIONAL ESSENTIALS

The most arresting general feature of Rawls's constitutional essentials is their compactness or their thinness. Their reach is significantly shorter than the full domain of justice, and, for that matter, significantly shorter than the domain of political justice. This

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1. John Rawls, Political Liberalism (2d ed. 1996).

2. My efforts to render such an account are best represented in Lawrence G. Sager, Justice in Plainclothes: A Theory of American Constitutional Practice (forthcoming, Yale University Press).

is well illustrated with regard to rights of material well-being. The difference principle is an important premise of political justice, perhaps the precept for which Rawls is best known, but it does not, in Rawls's view, fall within the constitutional essentials.

There are rights of material well-being within the constitutional essentials, but they are considerably less sweeping in their scope than would be the difference principle in operation. Here, material well-being is focused on a set of constitutional minima—the minimum necessities of a decent life, or, alternatively, of a life that enables individuals to participate as members of their society or polity. This move from the comparatively robust difference principle to what Rawls at least intends to be the considerably narrower and more commonplace notions of minimal necessities is illustrative of the constricted reach of the constitutional essentials.

So the question is: Why this truncation? Rawls, of course, while possibly influenced by the American constitutional tradition, is talking about constitutional practice at large, and so neither a particular constitutional text nor a given body of precedent can offer any support for the thinness of the constitutional essentials. Nor can the limits of judicial competence or propriety be the basis of this foreshortening, for the simple reason that Rawls treats neither a written constitution nor judicial review as institutional prerequisites of the just political community; for Rawls, both of these fall into the category of contingent constitutional strategy.

We have, therefore, the making of a puzzle: Why, given the contingency of a written constitution and of judicial review, and in the midst of a political theory that takes the full domain of justice very seriously, does Rawls's set of constitutional essentials fall considerably short of the requirements of justice? What can be said on behalf of the narrowed set of constitutional essentials in the Rawlsian scheme?

Three things come to mind, each of which is either more or less explicitly invoked by Rawls or fairly attributable to the spirit of his case for the constitutional essentials construct. First, the constitutional essentials need to be able to command the allegiance of all persons who hold reasonable, comprehensive views. Rawls's hypothesized political audience is confined to the reasonable in *Political Liberalism*, but all those within the circle of the reasonable should, in principle, be able to embrace the constitutional essentials. We can think of this serving the demands of *constitutional legitimacy*. Second, there are practical concerns about the shape of the precepts that make up the constitutional essentials. In the real world, compliance or non-compliance with these essentials needs to be readily observable, and entwined with this need for transparency is the requirement that the essentials consist of precepts that are categorical and non-negotiable, as opposed to values that necessarily are to be traded against or compromised in the name of other good

things. We can think of this as serving the requirements of *constitutional efficacy*. Third, as a consequence of these first two concerns in combination, there is a requirement of severability or isolation.

Consider, for example, the difference principle, formulated in *Political Liberalism* as the requirement that "organizational and economic inequalities" be justified by their capacity to "improve everyone's situation, including [that] of the least advantaged."[3] That principle in operation is inextricably woven into complex, ongoing choices of a political community. Except at a level of abstraction that is so remote from choices on the ground as to be almost irrelevant in this context, the principle cannot be made the object of real-world political consensus or anything approaching such consensus. And even more clearly, the difference principle flunks the tests of practical application—the tests, that is, of transparency, categoricality and non-negotiability. Perhaps it would do just to stop there, but it seems helpful to observe that both of these indictments of the difference principle as a candidate for inclusion within the constitutional essentials seem to combine in—or perhaps derive from—our inability to sever or extract the difference principle from the dense factual environments in which it is meant to operate.

II. OUR OWN CONSTITUTIONAL PRACTICE

The foreshortening of justice is echoed in our own constitutional tradition. There are conspicuous absences of appealing principles of political justice in our constitutional tradition. There is no acknowledged right of material well-being in the form of a narrow right to minimum welfare. Nor does our constitutional tradition recognize anything like a governmental duty to repair the structural, entrenched residue of historic injustices like slavery and the legal disablement of women.

In our own tradition, there may appear to be simple explanations for this. We, after all, are working at base with an eighteenth century constitution and many decades of accumulated precedent, which together may seem to debar both a constitutional entitlement to material well-being and a governmental duty of repair. But the Constitution typically speaks in broad, moral generalities, and judicial precedent is relatively fluid over time. And the failure of the Supreme Court to move forthrightly in these areas is durable (spanning, for example, the Warren, Burger and Rehnquist Courts), and seems to reflect widely-shared contemporary judgment, rather than the tethers of text or history. If one believes that contemporary constitutional adjudication is and should be justice-seeking rather than originalist—

3. Rawls, Political Liberalism, *supra* note 1, at 282.

as I emphatically do—some other explanation is required for this moral shortfall.

There is such an explanation readily at hand, of course: Rawls is not wed to judicial review, but we are. Common both to a right of material well-being and a duty of repair is their poor fit with judicial enforcement. While constitutional obligations of this sort have comparatively crisp precepts at their core, they require elaborate programs of implementation, and these implementing programs depend on complex choices of strategy and responsibility. Courts seem poor venues for the shaping of these choices. So it might be simply the demands of justiciability that constrain the reach of American constitutional practice.

This assumes, however, that our constitutional practice is best understood as making questions of constitutional adjudication and constitutional meaning more or less congruent. And that assumption seems flatly wrong. Our constitutional tradition is best understood as one in which the constitutional judiciary, even in its most robust and plausible form, falls considerably short of exhausting constitutional meaning. On this account, it would be precisely areas like the right to minimum welfare and the duty to repair the entrenched consequences of historical injustice that would be underenforced by the judiciary.

This is not the place to rehearse at length the case for the underenforcement view of our constitutional practice.[4] But there are both normative and descriptive claims on its behalf that we can observe in passing. On the normative front, there are these two things to say. First, the reasons for limiting the reach of constitutional adjudication are exquisitely institutional; that is to say, they are good reasons for courts to stop short of enforcing a right to minimum welfare or a duty to repair, and not reasons at all for us to regard the Constitution itself as turning away from otherwise deeply appealing claims of political justice. Second, the precepts so conspicuously omitted from our adjudicated constitutional tradition are deeply appealing claims of political justice. The notion that we as a people are obliged to undo the bitter and pervasive consequences of entire regimes of unconstitutional behavior like slavery and its Jim Crow aftermath, or the systematic legal disablement of women, is surely compelling. So too is the proposition that we as a people are obliged to arrange our affairs so that, say, a person who is willing to work hard on behalf of herself and her family should be able, in turn, to provide for herself and her family minimally adequate nutrition, housing, medical services, and education. To the independent normative force of these claims there must be added the observation that without

4. I have tried to make that case in Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212 (1978), and Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993).

serious commitment to freeing the historically disadvantaged from the lingering consequences of their disablement and serious commitment to some form of minimum welfare, our more familiar constitutional commitments have a distinctly hollow ring. The point of this last observation is not that the persons should be fed and relieved of the burdens of historic discrimination so that they can exercise their more commonly recognized constitutional entitlements. The point is rather that robust constitutional entitlements that exclude some form of a right to minimum welfare and some form of a duty to repair are for that reason incoherently incomplete. All this being so, in a justice-seeking account of our constitutional practice, it is far better to include these precepts within the bounds of constitutional justice.

The descriptive claim on behalf of underenforcement centers on the durable presence within our constitutional jurisprudence of a number of cases that make much more sense when they are understood as reflecting what we might think of as the secondary, judicially recognized, consequences of the duty to repair and the right to minimum welfare. These consequences are *secondary* in the sense that the primary constitutional obligations are in each instance beyond the scope of judicial enforcement, but the existence of those primary obligations nevertheless inspires or demands judicial responses at one remove. Once again, this is not the place to make this argument at length, but perhaps a list of the salient cases would be useful. One such case is *Jones v. Alfred H. Mayer Co.*,[5] where the Court held: (1) that as a matter of spontaneous judicial interpretation and application, the Thirteenth Amendment bars actual slavery or indentured servitude, not mere private racial discrimination;[6] but nevertheless, (2) that Congress, in the name of enforcing the substantive provisions of the Amendment, can broadly prohibit private racial discrimination.[7] *Jones*, on this account is an instance of remedial underenforcement of the Constitution by the courts: The broad structural harm of slavery calls for equally wide-ranging remedial actions, but remedies of this sort depend on legislative rather than judicial action. Hence, *Jones* suggests the idea of a judicially unenforced duty to repair. More recent cases have implicated this reading of *Jones*, at least potentially.[8]

Another set of cases points in the direction of an unenforced right to minimum welfare. These divide into procedural cases, where a distinct tradition of civil due process seems to attach uniquely to

5. 392 U.S. 409 (1968).

6. *Id.* at 413.

7. *Id.*

8. A prominent missed opportunity to apply the lesson of *Jones* was *United States v. Morrison*, 529 U.S. 598 (2000), or so I have argued in Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morrison, 75 N.Y.U. L. Rev. 150 (2000). On the other hand, this lesson, I believe, best explains the Court's decision in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003), but that is a longer story than can be told in these pages.

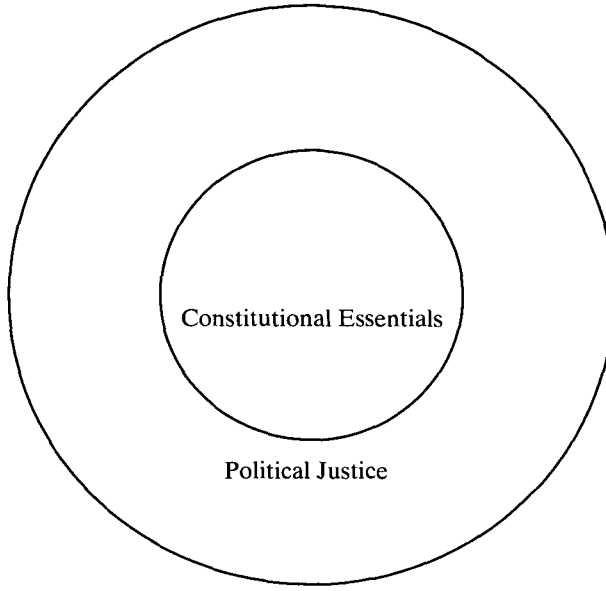
minimum welfare cases,[9] and substance cases, where in a number of cases the Court has policed the distribution of elements of minimum welfare against the possibility of unjust categorical exclusions. These last cases are striking in a number of ways, not the least of which is that they reach as far forward as the contemporary Rehnquist Court.[10] Each of the cases referenced in this paragraph is perfectly consistent with the tacit existence of a right to minimum welfare; each is anomalous as a matter of contemporary constitutional jurisprudence without the inclusion of a right to minimum welfare; and each is much more easily reconciled with contemporary constitutional jurisprudence when a right to minimum welfare is posited.

Thus goes the descriptive claim on behalf of the underenforcement thesis. Together, the normative and descriptive claims lend strong support to the idea that we should see the limits of adjudication as distinct from the limits of constitutional meaning.

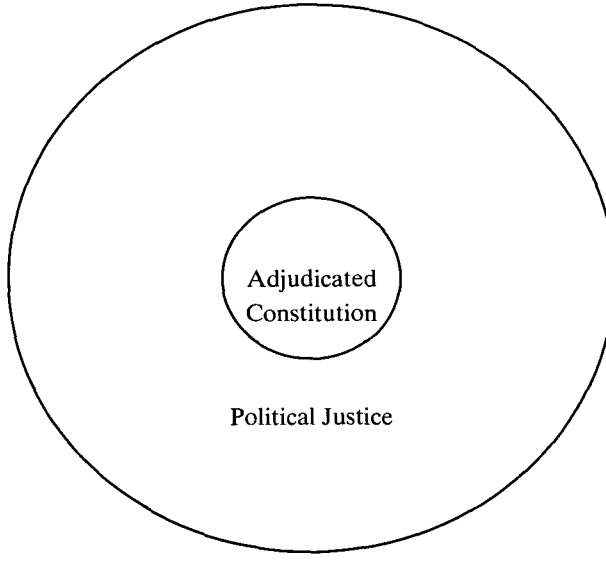
When we decouple the adjudicated Constitution from the Constitution as a whole, however, the question of whether—and, if so, why—we should understand our actual constitutional practice to embody an analog of Rawls's constitutional essentials becomes considerably more complex. As the following diagrams indicate, we can pose the question schematically. For Rawls, even in the absence of judicial review, there exists a subset of the requirements of political justice, the constitutional essentials:

9. The most important case here is *Goldberg v. Kelly*, 397 U.S. 254 (1970).

10. These closet minimum welfare cases were astutely invoked early on by Frank I. Michelman in *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U. L.Q. 659 (1979). The most recent and one of the most striking of these cases is *Saenz v. Roe*, 526 U.S. 489 (1999).



And, if our account of American constitutional practice embraces the idea that the constitutional judiciary systematically underenforces the Constitution as a whole, then the adjudicated Constitution is in effect a subset of the whole of the Constitution:

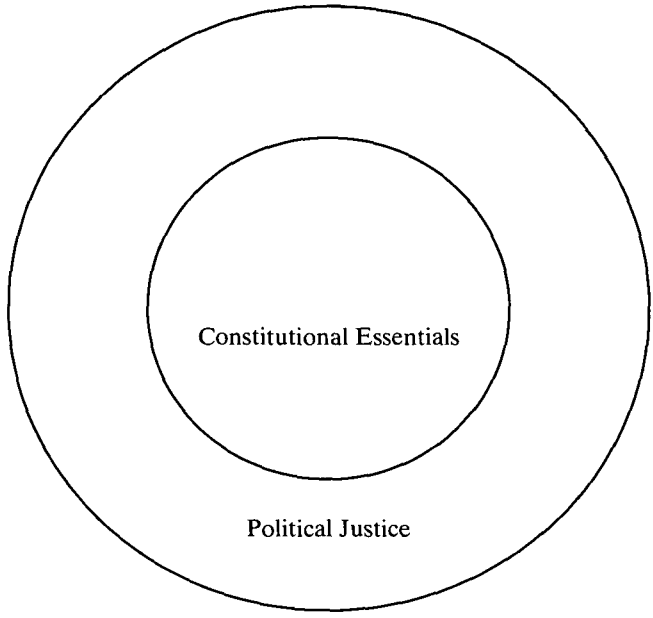


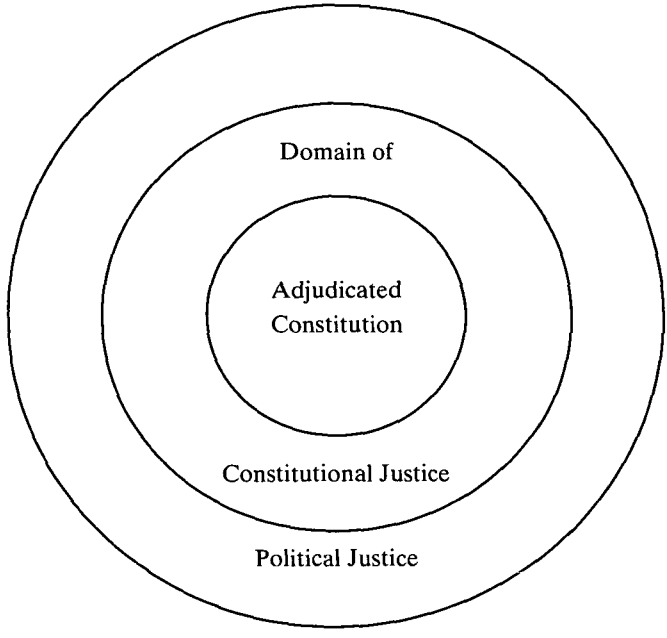
But these two divisions of justice are not conceptually congruent or even roughly analogous. Rawls, remember, is not committed to judicial review, which he regards as only one possible institutional

strategy for securing the constitutional essentials.[11] So issues of judicial capacity or propriety are not the explanation for the narrowing of political justice into the constitutional essentials, and, perforce, they do not determine the content of the constitutional essentials. In contrast, it is precisely questions of judicial capacity and propriety that determine the boundaries of the adjudicated Constitution in the justice-seeking account of our constitutional practice. And it is easy to identify specific elements of political justice that are good candidates for inclusion in the constitutional essentials, but are almost certainly destined to be excluded from the adjudicated Constitution. The right to minimum welfare and the governmental duty to repair are very good examples, as a matter of fact.

Our concern here, however, is different from this failed comparison. Our concern is with the possibility that there is a second division or gap to be observed as part of the best account of our constitutional practice. We have already argued for the existence of a gap between the adjudicated Constitution and the whole of constitutional justice. Is there also a gap between constitutional justice and political justice in its entirety? I think that there is such a second gap and, moreover, that we can better understand the reasons for and scope of that gap by thinking of it as at least roughly analogous to the gap between Rawls's constitutional essentials and political justice as a whole.

11. *See* Rawls, Political Liberalism, *supra* note 1, at 233.


Constitutional Essentials
Political Justice


Domain of
Adjudicated Constitution
Constitutional Justice
Political Justice

III. THE CONSTITUTIONAL ESSENTIALS AND THE DOMAIN OF CONSTITUTIONAL JUSTICE

Rawls's justifications for the thinness of the constitutional essentials, remember, are offered in a conceptual environment that is not committed to judicial review or, for that matter, even to a written constitution. In our own constitutional system, judicial review is a settled and important feature of the landscape; but it does not exhaust the whole of the Constitution. It follows that justiciability concerns cannot justify a limited domain of constitutional justice in our practice any more than such concerns can account for the limited contents of the constitutional essentials in Rawls's general prescription in *Political Liberalism*. In both cases, constitutional content can exist outside judicial enforcement; and in both, accordingly, the institutional limitations that attend to judicial enforcement should not foreshorten constitutional content.

When we considered the gap between Rawls's constitutional essentials and political justice as a whole, we saw three conjunctive justifications for the foreshortening of political justice. We can restate them as follows: first, as a matter of principle, the constitutional essentials should enjoy the broad support of all members of the political community who hold reasonable comprehensive views; second, as a matter of practical efficacy, the constitutional essentials in application should be transparent, categorical, and non-negotiable against competing social goods; and third, the constitutional essentials should be susceptible to isolation from the complex web of social circumstances characteristic of a modern society, in order to make them eligible for satisfaction of the first two stipulations.

My suggestion is simply this: Much the same reasons should encourage us to regard the domain of constitutional justice as falling significantly short of the whole of political justice as those reasons which led Rawls to truncate the constitutional essentials. The same ultimate concerns of legitimacy and efficacy that led Rawls to shrink his broad-reaching principles of political justice to the size of his constitutional essentials encourage a comparable narrowing in our own constitutional practice of what I have called the domain of constitutional justice.

Beyond this normative impetus to narrow the domain of constitutional justice, there is a descriptive claim on behalf of the gap between constitutional justice and the whole of political justice, just as there was on behalf of the gap between the adjudicated Constitution and the whole of the Constitution—or in the vocabulary that we have adopted in passing, the domain of constitutional justice. Indeed, much the same resources inform both claims. When we discussed this first gap, we gestured toward a variety of cases, spanning the Warren, Burger, and Rehnquist Courts, which seem best understood as reflective of a secondary judicial response to a right to minimum

welfare or a governmental duty to repair that are judicially unenforceable as primary rights. Those same cases indirectly intimate the existence of a domain or sphere of constitutional justice that falls far short of embracing all of political justice. They perform this role by virtue of their singularity: There are few if any other claims sounding in political justice that have, in effect, left secondary traces of their presence in our constitutional practice. (If there are such others, I predict, they will assume the form of core—well, essential—precepts of the sort represented by the right to minimum welfare and the duty to repair.) On at least one occasion, in fact, the Court by its secondary responses has drawn a sharp line at what might well be a boundary point marking the reach of constitutional justice: The Court has held that the recipients of basic welfare grants have a due process right to an evidentiary hearing before their benefits can be terminated;[12] but the recipients of other public benefits that do not implicate "the very margin of subsistence"[13] do not enjoy such a right.

If we accept the picture of our constitutional practice that I have argued for here, in which the adjudicated Constitution is reduced from the whole, and the whole of constitutional substance is reduced from all of political justice, we have gone a long way toward seeing a fertile parallel between Rawlsian theory and American constitutional practice. But many questions remain, and perhaps we can gesture towards one or two of those before bringing this discussion to a close. One question is intimated by the vocabulary I have offered here. We surely could call the middle circle in our schematic "the Constitution as a whole," or possibly "the constitutional essentials." But I offered "the domain of constitutional justice." My thought is this: On this account, many of the matters that fall within the domain of constitutional justice are subject to primary judicial enforcement and can be stated as more or less full-blown matters of principle and made the object of implementing doctrine. But some precepts, like the right to minimum welfare and the duty to repair, are not judicially enforceable. Of these latter precepts we can observe the following: they involve precepts that are comparatively transparent, categorical and non-negotiable, but they cannot be dispatched with anything resembling a doctrinal sweep. They are ongoing projects open for long intervals to adjustment, critique and refocusing. And even in the wonderful event that we should reach something like a stable and satisfactory equilibrium in one of these projects, a new wave of immigration, changes in medical technology, or other such events could easily unseat that state of affairs. In the face of this, it seems natural to speak in the spatial terms of a restricted domain in which

12. *Goldberg*, 397 U.S. at 264.
13. Mathews v. Eldridge, 424 U.S. 319, 340 (1976).

extra-judicial actors have the primary duty and authority to act, rather than in terms that sound in static or final dispositions.

The scope of the judicially unenforced portion of the domain of constitutional justice has consequences for at least two sets of institutional actors. For the constitutional judiciary there are—as we have already observed in passing—secondary consequences that explain and should guide specific outcomes. For popular political actors—importantly including, but by no means limited to, legislators—there are heightened responsibilities and potentially heightened political impact associated with actions proposed or taken in the name of the Constitution. For both sets of actors, it is important that the outer reach of constitutional justice be constricted. For the constitutional judiciary, it will generally be the case that public programs or provisions that fall within constitutional justice will be privileged in some significant way: Congress will have authority it would not otherwise enjoy, special procedural rights will attach, or the victims of categorical exclusions will be entitled to significantly enhanced judicial scrutiny of the decision to exclude them. Each of these forms of privilege carries significant costs. The expansion of national authority comes at the expense of the values of federalism; special hearings in the name of due process are costly in various ways; and increased judicial scrutiny commits the judiciary to increased interventions in the decisions of other governmental actors. All this places a premium on a bounded constitutional domain.

For popular political actors, some of the distinct features of projects undertaken in the name of the Constitution are merely reciprocals of the constitutional judiciary's secondary responses to such projects: Congress's authority to abrogate the Eleventh Amendment immunity of the states—and in some cases, authority to act at all—may turn on the question of whether it is understood to be acting within the bounds of constitutional justice; and legislation that is understood to be within those bounds may be subject to substantially increased judicial demands of substantive or procedural fairness. But other features that may distinguish constitutional politics will be wholly independent of the judiciary. Legislators ought to feel distinct responsibilities to act or withhold action because of the demands of constitutional justice, and discourse among legislators or between legislators and their constituents should offer these demands as reasons to act or withhold action. For popular political actors, too, on all these counts, there is a large premium to be placed on a bounded and at least roughly identifiable domain of constitutional justice.

CONCLUSION

In the world of Rawlsian justice, injustices that lie outside the constitutional essentials are not meant to be forgotten or forgiven; nor, to be sure, should we forgive or forget injustices outside the reach

of our Constitution. But both for Rawls and for us there are powerful reasons for understanding a constitution and the legal acts appropriately taken in the name of its concerns with justice to occupy a more limited and more focused domain than that occupied by political justice as a whole. For neither Rawls nor for us do the boundaries of constitutional justice depend on the appropriately limited reach of constitutional adjudication. And for us, notwithstanding our commitment to robust judicial oversight in the name of the Constitution, the boundaries of constitutional justice are measurably broader than the reach of the adjudicated Constitution.