

2005

## Can We Be Legal Positivists Without Being Constitutional Positivists?

Abner S. Greene

*Fordham University School of Law*

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Abner S. Greene, *Can We Be Legal Positivists Without Being Constitutional Positivists?*, 73 Fordham L. Rev. 1401 (2005).

Available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss4/5>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

## Can We Be Legal Positivists Without Being Constitutional Positivists?

### Cover Page Footnote

Professor of Law, Fordham University School of Law.

## CAN WE BE LEGAL POSITIVISTS WITHOUT BEING CONSTITUTIONAL POSITIVISTS?

*Abner S. Greene\**

Larry Sager's *Justice in Plainclothes*<sup>1</sup> offers a justice-seeking account of our constitutional practice. Judges are partners with, not agents of, the Constitution's framers. The framers have left all of us, judges included, textual provisions that cry out for normative elaboration. Such elaboration involves a delicate weaving between materials from our constitutional practice—such as text and precedent—and normative reasoning about the demands of political justice.

But Sager's book is not primarily an elaboration of the judicial role, nor of constitutional interpretation. At the heart of the book is Sager's attempt to deal with what he calls the "durable moral shortfall" of our constitutional practice.<sup>2</sup> Sager argues that the partnership between the Constitution's framers and judicial interpretation of the Constitution "will be a reasonably good guide to the most critical requirements of political justice."<sup>3</sup> But only a reasonably good guide. For our judicially enforced Constitution is, says Sager, thinner than the Constitution itself, and the Constitution itself is thinner than the demands of political justice. How can it be that a justice-seeking constitutional practice falls short of what justice demands?

Most of us are, to one degree or another, legal positivists. We accept that law and morality may, but need not, perfectly overlap. To identify what law is in a given regime, we cannot simply identify what morality entails. Perhaps, then, we are constitutional positivists, as well. Sager is. His discussion of the gaps between the judicially enforced Constitution and the Constitution, and between the Constitution and political justice, separates constitutional law from political justice just as a legal positivist might separate law from morality. I would like to argue that we can be legal positivists without being constitutional positivists. First I will explain how we might distinguish the two, and then I will critique Sager's constitutional positivism.

---

\* Professor of Law, Fordham University School of Law.

1. Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (2004).

2. *See id.* at 84-85.

3. *Id.* at 71.

One need not defend legal positivism normatively. One could instead argue simply that legal positivism is conceptually accurate, that law and morality need not perfectly overlap.<sup>4</sup> But there is value to a normative defense, especially since I would like to reject a normative defense of constitutional positivism. I will argue that law sometimes overly constrains freedom, and thus we should err on the side of believing law to be not fully regulative, whereas our Constitution's goal is to fully enhance freedom, both in enabling and disabling our governmental agents.

Legal positivism begins with a baseline of unregulated liberty, and recognizes the limits of governmental control. For various institutional reasons, we do not believe law should or can replicate morality. This is to some extent a separation of powers/anti-concentration of power point: Institutions that represent us collectively will not be able to perfectly replicate morality, because of factions and alliances leading to rent seeking, because of inevitable agency costs, and because enforcement will often involve discretion. Although ideally law can strike a perfect balance to restrict freedom the right amount to preserve freedom the right amount, in practice slippages are inevitable. Legal positivism thus helps us remember that law must be justified; it doesn't come fully justified. Also, adopting a rule of recognition approach to identifying law, and thus eschewing the need for moral argument in so doing, helps to provide an anchor for what we are required to do and forbidden from doing. We can

---

4. I need not discuss in this Essay precisely which gaps one must accept between law and morality to be properly deemed a legal positivist. Some accounts insist that one should be able to identify what counts as "law" from social facts about certain regimes or peoples, leaving no room for normative inquiry. I do not share this view. There's a line between a regime that issues "laws" and a regime that simply orders people around through brute force. To determine this line, one needs a theory of political legitimacy, and that theory is irreducibly normative. Furthermore, some accounts of legal positivism leave little room for interpretation that must go outside systemic materials such as text and precedent, i.e., for interpretation that acknowledges room for moral reasoning not specifically attached to "fit" points from the regime in question. This is a complex matter. It might be appropriate for a system to acknowledge that at some point internal materials—i.e., "law"—runs out, and that interpreters are left on their own, as it were, to do the best they can with moral reasoning. Neither of these points—that we must engage in normative argumentation to establish conditions of political legitimacy to distinguish a legal regime from a gunman-writ-large; and that a legal system might properly authorize interpreters to go beyond considerations of fit to considerations purely of justification—takes away from what I believe is the core of legal positivism. So long as we agree that within systems properly deemed legal ones (rather than gunman-writ-large) we can usually identify what counts as law without necessarily engaging in moral reasoning, we can be legal positivists. See H.L.A. Hart, *The Concept of Law* 185-86 (rev. ed. 1994) (defining legal positivism as follows: "it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so"). And although the arguments raised in this footnote, if accepted, would constitute a version of inclusive legal positivism, the text's normative defense of legal positivism, setting up a distinction with what I call "constitutional positivism," is consistent with either inclusive or exclusive legal positivism.

order our conduct with greater assurance and more consistent reliance if we need merely identify the rule of recognition and then the outputs of the regime, than if we have to supplement that with moral reasoning.<sup>5</sup>

Constitutions, on the other hand, and ours, in particular, need not be seen as ordinary law. Our Constitution's preamble is ambitious:

We the people of the United States, in Order to form a more perfect Union,<sup>6</sup> establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>7</sup>

These are aspirations of a liberty-loving, justice-seeking people. To achieve these aspirations, and to preserve both citizen sovereignty and a republican form of government, our constitutional text and our constitutional law both enable and disable our governmental agents. But although we should acknowledge the inevitable agency costs of the lawmaking process, and thus adopt a posture of legal positivism, with its gaps, regarding ordinary law, we should construe our Constitution as aspiring to reduce such costs to zero. Reading our Constitution as aspiring to the ends of political justice is another way of saying that the power we delegate to our agents should match the original scope of our liberty as principals.

One implication of this argument is that constitutional interpretation must be ultimately about justification, and not fit. Sager's account gives wide berth for fit—for interpretive attention to text, precedent, and history—and this makes sense given Sager's insistence on gaps between the judicially enforced Constitution and the Constitution, and between the Constitution and political justice. As I discuss later, part of Sager's account of the gaps turns on ensuring a role for the people in elaborating constitutional norms, and his insistence on a substantial role for fit is conceptually connected to this attention to democracy in the people-make-and-elaborate-the-Constitution sense. But the justifications for any significant reliance on fit are weak, and fail to appreciate the difference between ordinary law and the Constitution. The arguments for fit boil down to three: constraining judicial discretion, ensuring democratic pedigree, and keeping constitutional law diachronically coherent.<sup>8</sup> Consider the argument for fit based on the need to constrain judicial discretion.

---

5. Again I note that a regime might choose to have legal lacunae filled interpretively through moral reasoning, but it need not.

6. More perfect than the extant one, under the Articles of Confederation.

7. U.S. Const. pmbl.

8. My critique of fit does not turn on giving the judiciary some sort of superior or final role in constitutional interpretation. I will say more later about how we can view constitutional interpretation as dialogical, and how this can help undergird political obligation in our constitutional order.

Once we see the interpretive enterprise as shared among all participants in the constitutional culture, the need to defang judges diminishes. Additionally, as has been often pointed out, the fit materials are so vast that discretion cannot really be substantially constrained. Furthermore, difficult interpretive questions always involve an array of normative choices that can only be submerged beneath a veneer of deference to past authority, but never eliminated. The argument for fit based on an anchor theory of democracy faces similar difficulties. It is notoriously difficult to know which past authorities properly speak for the people; the people then were not enfranchised fully; the difficult interpretive cases we face today emanate from broad textual provisions that hardly seem to be the instantiation of a past desire to anchor specific commitments; and it is difficult to provide an account of democracy that privileges specific past commitments over current normative understandings, especially given the thinness of our constitutional text and the broad, vague justice-seeking language of that text. Finally, although one goal of ordinary law is a kind of diachronic coherence—fit over time—to ensure stability, reliance, and the like, constitutional law is primarily not about establishing a consistent framework over time for ordering private transactions, but rather seeks to perfect our understanding of liberty and the proper blend of enabling and disabling our governmental agents to achieve liberty. Diachronic coherence, in constitutional law, is not needed as it is in private law for basic reliance-type values, and it is often a facade, stitching together into an apparently coherent narrative what were, in reality, quite different readings of, and approaches to, our broad, vague, morally laden constitutional provisions.<sup>9</sup> In the end, there is no avoiding normative argument about the meaning of phrases such as “equal protection,” “due process,” “freedom of speech,” and the like.

Larry Kramer’s account of our Constitution as something other than ordinary law, in *The People Themselves*,<sup>10</sup> helps me make the argument that we can be legal positivists without being constitutional positivists. To be sure, Kramer’s conception of what the people often considered to be the content of fundamental (and then constitutional) law is narrower than my case for our Constitution as aspiring to political justice. And his primary goal in showing the difference between ordinary law and constitutional law is to concede (for the most part) a primary judicial role for the former, but an interpretive role shared by all for the latter. But Kramer’s account of constitutional law as different from ordinary law indeed helps the case against constitutional positivism. Consider this rendering:

---

9. See Abner S. Greene, *Constitutional (Ir)responsibility*, 71 *Fordham L. Rev.* 1807, 1825 (2003).

10. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

“Fundamental law was different from ordinary law . . . both in its conceptual underpinnings and in actual operation. It was law created by the people to regulate and restrain the government, as opposed to ordinary law, which is law enacted by the government to regulate and restrain the people.”<sup>11</sup> My argument in this Essay is that because ordinary law is the product of our agents, legal positivism aids in the reduction of agency costs by eliminating any presumption of an overlap between law and morality, thereby reminding us that the case must always be made for law’s correctness. Concurrently, I argue that constitutional law is an ongoing effort to enable and disable our agents, toward the goal of re-establishing, through a republican form of government, the perfection of liberty and justice that is our right as persons. Accordingly, constitutional positivism—insisting on a gap between the Constitution and political justice—improperly trades off the entirely appropriate agency costs concerns of ordinary law.

Sager’s constitutional positivism recognizes two gaps. Strictly speaking, the first gap—between the judicially enforced Constitution and the Constitution—does not make Sager a constitutional positivist, for he still might consider the Constitution coextensive with political justice. It is the second gap—between the Constitution and political justice—that makes Sager a constitutional positivist. I will discuss both gaps, however, because it helps in showing Sager’s view of our Constitution’s scope and of the role of the people in elaborating constitutional norms.

As to the gap between the judicially enforced Constitution and the Constitution: Sager explains that there are some constitutional rights—such as to “minimum welfare” and to governmental “reform [of] structurally entrenched social bias”<sup>12</sup>—that should be enforced through nonjudicial means. Such enforcement depends “upon a complex set of choices of strategy and responsibility.”<sup>13</sup> It is too difficult for courts to specify the precise content of, say, a right to minimum welfare, and to structure the complex financing of such a right. Legislatures have a comparative advantage, and since legislators also must uphold the Constitution, we should leave it to them (and trust them) to work out the policy nuances of the constitutional right. “Once the broad structural features of programs providing the entitlements are in place,” says Sager, “the judiciary can respond constructively in a number of ways.”<sup>14</sup> Sager follows this with a lucid discussion of the appropriate partnership between the courts and Congress in enforcing the Civil War Amendments.<sup>15</sup>

---

11. *Id.* at 29.

12. Sager, *supra* note 1, at 6.

13. *Id.*; *see also id.* at 87.

14. *Id.* at 102.

15. *See id.* at 102-14.

Many of Sager's observations about judicial underenforcement (as he calls it) are valid. But he oversells underenforcement. First, we already rein in our federal courts through the rule against advisory opinions. A case or controversy—understood as requiring an injured party—is required. Thus, we do not allow our federal judges to act as roving interpretive commissions. This helps to cut down on any tendency federal courts might have to flesh out complex constitutional norms in abstract situations, precisely where legislatures have a comparative advantage. Fleshing out complex constitutional norms in the setting of a concrete controversy is generally something our courts do well.

Second, in the setting of resolving concrete cases, federal courts could issue hortatory opinions when command opinions would be impossible or implausible for institutional reasons. For example, a court could say to a governmental unit, "you must reform your educational system in accordance with these constitutional principles," but leave it to the governmental unit to determine the mechanism.

Third, why should we carve out certain areas, such as a right to minimum welfare and a right to governmental action to undo "entrenched social bias," for judicial underenforcement, but allow judicial enforcement in other areas, areas that are also covered by broad, vague, morally laden constitutional text and that also involve complex structural dilemmas? Consider prison reform litigation and school segregation litigation. The Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's admonition that states may not deny persons equal protection of the law are hardly self-executing or easily understandable rights. Yet we have many federal court decisions implementing these rights in complex structural settings. Sager addresses this doctrine uneasily.<sup>16</sup> He says that reasonable minds might differ regarding such litigation (he calls the two sides "judicial optimists" and "judicial pessimists"). But he finesses having to reach a firm conclusion about these cases by saying, "[S]ome structural harm cases far outrun even very generous views of judicial capacity and authority."<sup>17</sup> It is never clear from Sager's account, however, how to draw the line between one broad, vague, morally laden constitutional textual provision as applied to situation X and another one (or perhaps the same one) as applied to situation Y. Since Sager's book purports to be an "account" of our constitutional practice, the presence of these structural reform cases is a deep thorn in the side of the underenforcement thesis. And, given the possibility of courts leading the way in announcing the broad contours of rights but leaving it to legislatures (and perhaps to an

---

16. *Id.* at 106-08.

17. *Id.* at 107.



ongoing judicial-legislative dialogue) to flesh out enforcement, Sager's normative case for underenforcement is problematic, as well.

It's not just in structural reform litigation that courts flesh out broad, vague constitutional rights provisions in complex situations. Take *Roe*<sup>18</sup> and *Casey*,<sup>19</sup> for example. The Court has elaborated an intricate balance between a woman's right to control her body and the State's power to protect fetal life. *Roe* established a trimester framework and *Casey* places the regulatory line at the point of viability. Of course Justices such as Scalia excoriate the Court in cases such as this for sounding legislative, for making things up, but the fact is that in fleshing out broad, vague, morally laden constitutional rights, courts always adopt a kind of balance of interests. Is it any clearer that courts have a comparative advantage in drawing the right line between interests, rights, powers, etc., in areas such as abortion than in areas such as prison conditions or school segregation?

Fourth, one does not need the underenforcement thesis to insist that the elaboration of constitutional norms is an enterprise shared by courts, other governmental actors, and the people. Kramer's book is enormously instructive on this score. According to Kramer's account, throughout most of the history of the colonies and then the United States, courts have had "a" role but not "the" role and certainly not "the final" role in interpreting, first, the dictates of "fundamental law" and, second, the Constitution. Kramer does not develop a theory of what I call "dialogical interpretation," but one could be elaborated, and I plan to do so in future work. First, we must overcome both first- and second-order arguments for a strong final role for the Court. We do the former by remembering that even though federal courts play an important checking function, ultimately they serve the people and are not the ultimate repository of interpretive power. We do the latter by refuting the "settlement function" argument, which has a stronger place in private law than in constitutional law, and which often masks current normative work done as changing social circumstances challenge court, legislator, and citizen alike to interpret old text and case law in a new terrain. Second, we should establish an analytic connection between participation in the adjudicative process and bindingness. Working outward from the core due process understanding, we can develop a conception of generational participation, bridging the gap between a too strong and too weak sense of how constitutional norms are settled. Third, we must account for various factors when asking either the Court to defer to other governmental actors or vice versa. These factors include: whether a prior case was decided by a lopsided or close vote; what the social response was to a prior case; whether the current case is really on all

---

18. *Roe v. Wade*, 410 U.S. 113 (1973).

19. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

fours with a prior case or whether meaningful distinctions may be drawn, perhaps distinctions that shift over time; and the complex question of positional duties, i.e., whether executives, legislators, and lower court judges have different roles in responding to Supreme Court constitutional interpretation, and whether this differs on a national, state, or local level. Finally, we must remember that in elaborating a theory of dialogical interpretation, the question is always not only how various interpreters should respond to Court decisions that are deemed incorrect, but also how the Court should respond to such interpretive challenges. The main point here is that even if we were to close the gap between the judicially enforced Constitution and the Constitution, there would still be much room for interpretive challenge to, and supplementation of, the work of the courts.

Before turning to Sager's account of the second gap—between the Constitution and political justice—I want to say a few more words about Kramer's book. The book tells our constitutional story as centrally concerned with decentralizing interpretive authority, with the core role always retained by the people, although their voice is manifested in various ways. But the undifferentiated sense of "the people," especially as applied to our history up until rather recently, in interpreting and enforcing the Constitution as fundamental law, masks a deep illegitimacy. The voice of white males (and the slow inclusion, bit by bit, of others) cannot properly undergird an interpretive practice. It is only when we recognize the nation as irreducibly heterogeneous in makeup and in conceptions of the good life that we can give a properly robust reading to a plural, dialogical understanding of constitutional interpretation. Thus, although I agree with Kramer's larger point about deflating the Court's role in constitutional interpretation, I disagree that the end is to capture what "the people" want. Rather, better to see dialogical interpretation as recognizing difference, plural visions of the good and plural understandings of right, and ultimately, through various manifestations of both voice (through not only interpretive practice but also dissent) and exit (real, via emigration, and represented, through legislative accommodations and judicial exemptions), helping to ground the political obligation of all Americans.

What, then, of Sager's argument for a gap between political justice and what the Constitution demands? I have already laid out the case for not being a constitutional positivist, focusing on how the Constitution is different from ordinary law, how constitutional law should focus on reducing agency costs between the sovereign people and their governments, and how constitutional interpretation (done by judges or others) is ultimately about justification and not about fit.

Our Constitution's aspirations are ambitious, and can easily be construed to reach political justice.<sup>20</sup>

The easiest way to defend a gap between political justice and the Constitution would be to understand distributional questions as "private" rather than "public" and to deem our Constitution concerned only with governmental action. Put a different way, government's failure to act to redress private distributional matters would be seen as regrettable, but not of constitutional moment. Sager quickly, and properly, dismisses this defense of the gap between political justice and the Constitution, in two ways. As he shows in his discussion of the gap between the Constitution and the judicially enforced Constitution, we should read our Constitution as attentive to some claims of positive liberty, such as ensuring minimum economic subsistence and undoing the effects of racism. He adds that our state action doctrine is capacious enough to include government enforcement of private arrangements. Thus, the argument that our Constitution protects only negative liberty and has nothing to do with positive liberty is unsustainable.

Sager's defense of the gap between political justice and the Constitution is threefold. It is an argument based on our practice, i.e., on fit, and on two normative arguments: one a theory of democracy, of the role of the people, the other a theory of the proper shape of the domain of constitutional justice. I will talk a bit about the fit argument, and then spend more time on the normative contentions. None, in my judgment, sustains the case for constitutional positivism, for the gap between political justice and the Constitution.

Regarding fit, Sager argues that we see traces of certain constitutional principles—such as a right to minimum welfare and to undoing racial injustice—in adjudicated cases, even though such principles are underenforced by the judiciary. As to full political justice, however, we see no such traces. Sager might be correct here, but for reasons I stated earlier, constitutional interpretation (by courts or otherwise) must ultimately be about justification, and not about fit.<sup>21</sup> Even an "account" of our constitutional practice, which Sager claims to be offering, cannot in the end rest on connecting the dots of text, precedent, etc. An account of our constitutional practice is an interpretive enterprise, and like any interpretive enterprise (including constitutional interpretation in any given case or instance), justification and fit are not equally important. Although fit points—such as text and precedent—are relevant to understanding the

---

20. In saying this, one must remember that political justice does not address issues of preference (such as whether to spend money on parks or museums, and similar questions). Moreover, this is not the place to flesh out the contours of political justice, which might be narrower than one thinks, in particular, regarding distribution of wealth and resources.

21. See *supra* text accompanying notes 8-9.

normative questions, they cannot resolve the ultimate question of any interpretive enterprise, which is reaching the most justifiable understanding of the matter under interpretation. In other words, interpretation is, in the end, irreducibly current—the interpreter has to make a final judgment call about how best to read the text or practice in question, and deferring to other sources of authority, past or present, is always a mask for sub rosa normative determinations by the interpreter.

In our constitutional culture, this is an easy argument to make. Our Constitution’s preamble, quoted earlier, is expansive and aspirational. Our Constitution’s text, at many key points, invokes broad morally laden language, crying out for explicitly normative argumentation at every turn. And the history of our adjudicated Constitution, fairly understood, involves the Supreme Court debating complex questions of political morality, with lip service to fitting its outcomes to extant sources of authority. When the Court has advanced the ball regarding free speech, equal protection, and the like, it has fleshed out the great goals of the preamble and the capacious rights provisions, developing a more sophisticated and progressive conception of political morality. Our adjudicated Constitution has—sometimes by taking two steps forward and one step back—been all about ensuring that our open-textured written Constitution be aligned with the demands of political justice. That we have not yet reached the full demands of political justice cannot overcome the strides we have taken in that direction.

Now I turn to Sager’s normative arguments for the gap between political justice and the Constitution. Throughout the book, Sager contends that this gap is needed for a robust democratic practice. He writes, “a satisfactory account of our constitutional practice must recognize and respond to our durable commitment to popular political institutions, and to our durable understanding that these institutions have broad leeway in managing our political affairs.”<sup>22</sup> Sager fleshes this out by making two points. First, “a comparatively robust commitment to democratic rule is an important part of political justice in general and of constitutional justice in particular.”<sup>23</sup> “[W]hatever values of constitutional justice lie outside democracy [should] not unduly congest the field over which democratic choice can operate.”<sup>24</sup> Even matters that are judgment-driven rather than preference-driven “belong to the people, not to the Constitution.”<sup>25</sup> Second, even if we were to agree on the basic principles of political justice, “there would remain staggering issues of strategy, priority, and timing.”<sup>26</sup>

---

22. Sager, *supra* note 1, at 129.

23. *Id.* at 139.

24. *Id.*

25. *Id.* at 140.

26. *Id.*

Thus, according to Sager, seeing the Constitution as coextensive with political justice would impose shackles on the sovereign people, and sap the people of both their right and their duty to debate and resolve many issues, especially those regarding distribution of wealth and resources. But both political justice and the Constitution make demands on the sovereign people; we are no more justified in departing from the demands of political justice than we are in departing from what the Constitution requires. There are shackles at every turn, in other words. The argument for the gap, then, must depend on a view that the Constitution imposes more definite, harder-to-break bonds than does political justice. But this need not be the case. The Constitution could be understood as sometimes imposing clear constraints on democratic action, and at other times as imposing more vague, open-ended constraints. Sager's discussion of the gap between the judicially enforced Constitution and the Constitution helps make this point—that sometimes the Constitution's demands are murky and require a substantial amount of contextual strategic working out, which must be done outside the courts. If we read the Constitution as coextensive with political justice, we could once again say that much of the work of identifying the demands of this politically just Constitution falls to the people, that they must do substantial work in fleshing out its contours and in ensuring its enforcement. Closing the gap would not deprive the people of democratic debate and action, because such debate and action would be needed to understand and develop the demands of the politically just Constitution. To the extent that we reach clear understandings about the demands of political justice, then, there would no longer be a good reason to leave the identification and fleshing-out decisions to the people.

In sum, Sager's argument for a gap between the Constitution and political justice, based on leaving matters to the people, assumes that closing the gap would improperly deprive the people of much of their energy and judgment. But if right answers to questions of political justice are known, the people are not free to disregard them. And if we are sometimes operating in a vast realm of doubt as to the contours of political justice, and as to implementation issues of strategy, priority, and timing, then closing the gap would leave the people just as free to debate and act on their best understandings of the demands of political justice as if the gap remained. Democratic theory will not, in the end, support a gap between the Constitution and the demands of political justice.

Sager's other normative argument is about the proper shape of the domain of constitutional justice. He writes that although we should never ignore the concerns of political justice, "to be effective, a constitution must be more focused and more insistent than general

principles of justice which by their nature are radically open to contest, offset, and temporizing.”<sup>27</sup> He adds:

A constitution can significantly enhance political judgment over the concerns of justice only if it restricts itself to demands so basic and so durable that they can generally and reasonably function as dominant and nonnegotiable. This, if anything, is the more true of constitutional precepts that elude judicial enforcement. If the judicially unenforced portions of our Constitution were swamped with the broad and undifferentiated concerns of distributive justice it would lose the capacity to offer a firm and unduckable basis for challenge and debate.<sup>28</sup>

Although focusing in the foregoing passage on the judicially unenforced Constitution, Sager quickly turns to a cognate argument, explaining that the “bite—the value and real-world significance”<sup>29</sup> of judicially underenforced constitutional rights depends upon an intricate connection to the judicially enforced Constitution: The judiciary must be able to police such rights at the margins, and such rights must be “recognizably of a piece with the adjudicated Constitution.”<sup>30</sup> Such rights will, after all, “constrict democratic choice.”<sup>31</sup>

Thus, closing the gap between political justice and the Constitution would have the following drawbacks, according to Sager. Because the demands of political justice are so open-ended, rendering constitutional demands equivalent to the demands of political justice would make it harder for one to invoke the Constitution as a trump. Moreover, because the bite of judicially underenforced constitutional rights depends upon an intricate connection to the judicially enforced Constitution, closing the gap between political justice and the Constitution would either constrict democratic choice too broadly or (and this is an implication, but I think fair to Sager’s argument) lose this intricate connection to the judicially enforced Constitution and thus deprive judicially underenforced constitutional rights of some of their bite.

I have the following four concerns with this line of argument. First, the demands of political justice are no more duckable than the demands of constitutional justice. It is unjust to act contrary to the demands of justice, be it political justice or constitutional justice. Second, given the wording of our Constitution’s preamble, and given the open-ended morally laden language of the key rights provisions, the demands of constitutional justice are broad and contestable. We do not have a constitutional text or a constitutional tradition with

---

27. *Id.* at 141.

28. *Id.* at 141-42.

29. *Id.* at 142.

30. *Id.*

31. *Id.*

simple, clear rules. What freedom of speech or equal protection (for example) requires in many complex settings is no easier to determine than what distributive justice requires in many complex settings. Third, precisely because our Constitution's meaning is so contestable, understanding the domain of constitutional justice to match that of political justice would still leave much room for democratic identification of the specifics of this domain. This is especially true if we give some weight to the gap between the Constitution and the judicially enforced Constitution. Fourth, and oddly, Sager's argument about the intricate connection between the Constitution and the judicially enforced Constitution (to ward off closing the gap between political justice and the Constitution) deprives the judicially underenforced Constitution idea of some of its power to motivate democratic participation.

The uncertainty that often exists regarding the appropriate scope of political justice (and therefore, if I am right regarding the gap, the Constitution as well) should not, as I have argued, be a cause for concern. These precepts are still unduckable, just harder to locate, and the very existence of doubt and uncertainty as to their contours leaves great room for democratic debate and experimentation. Foregrounding self-doubt about the scope of the Constitution can also help us see sovereignty, even in the U.S., as permeable, rather than complete.<sup>32</sup> Political obligation—the moral duty to obey the law—is a notoriously slippery and complex concept. Consent and fair play theories fail, and a theory based on a duty to obey just institutions requires us to delineate the scope of justice. Rather, we should develop a theory of voice and exit, which, if sufficiently robust, will go a long way toward providing the grounds for political obligation. Much attention is paid to voice—the right to vote, speak, use the press, petition for redress of grievances. I would add here interpretive dialogue over the meaning of the Constitution. But no matter how robust a conception of voice, it will never suffice to ground political obligation. We can never fully alienate our individual autonomy; residually retained autonomy requires that government respect our conscientious disagreements with its outputs, regardless of our inputs via voice. Exit can be real (emigration, if a viable option) or represented, through mechanisms such as judicial exemptions, legislative accommodations, prosecutorial discretion, jury nullification, etc. The predicate for political obligation, thus, can hold only to the extent that we understand sovereignty as permeable, as recognizing continually the autonomous selves who are the sovereign principals. Foregrounding our uncertainty about the scope of our Constitution (and therefore, if I am right regarding the gap, of

---

32. See Abner S. Greene, *Constitutional Reductionism, Rawls, and the Religion Clauses*, 72 *Fordham L. Rev.* 2089, 2096, 2098-99 (2004); Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 *Colum. L. Rev.* 1, 8-57 (1996).

political justice as well) makes it easier to understand our conceptions of the appropriate scope of governmental power as contestable, to see sovereignty as permeable rather than complete, and accordingly to insist on a robust recognition of exit. It might seem paradoxical, but only by recognizing sovereignty, even in a liberal democracy, as incomplete and struggling for the hearts and minds of the citizens at every turn, can we begin to provide the grounds for political obligation to such a sovereign.