

1993

Social Justice and Fundamental Law: A Comment on Sager's Constitution

Terrance Sandalow

University of Michigan Law School, sandalow@umich.edu

Available at: <https://repository.law.umich.edu/articles/445>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

 Part of the [Constitutional Law Commons](#), [Legislation Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Sandalow, Terrance. "Social Justice and Fundamental Law: A Comment on Sager's Constitution." *Nw. U. L. Rev.* 88 (1993): 461-8.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

SOCIAL JUSTICE AND FUNDAMENTAL LAW: A COMMENT ON SAGER'S CONSTITUTION

*Terrance Sandalow**

Professor Sager begins his very interesting paper by identifying what he considers a puzzling phenomenon: the Constitution, as interpreted by courts, is not coextensive with "political justice." "This moral shortfall,"¹ as he refers to it, represents not merely a failure of achievement, but a failure of aspiration: as customarily interpreted, the Constitution does not even address the full range of issues that are the subject of political justice. Sager regards that failure as surprising—so surprising that, in his words, it "begs for explanation."²

I am not certain I understand all that Professor Sager means to comprehend within the concept of "political justice," but at a minimum he intends to include a governmental obligation to eliminate poverty, reduce economic inequality, and redress historical injustice. Since these are the obligations of political justice, he wonders, why are they not also recognized as constitutional commands?

The question that vexes Sager would not, I think, have been regarded as a serious one at any time prior to the constitutional revolution initiated by the Warren Court. Conceptions of justice have, to be sure, informed each generation's understanding of the Constitution, but that is a far cry from supposing that the Constitution commands whatever justice requires. Even the Warren Court never adopted so embracing a conception of the Constitution's reach. But though it did not, its decisions and those of the early Burger Court are nevertheless responsible for the notion that all the precepts of justice are embedded in the Constitution. Initially, the Court's capacious interpretations of the document during those years led students of constitutional law sympathetic to its decisions to develop new justifications for the results it had reached in the name of the Constitution. Since the decisions were so often untethered to history, the justifications almost inevitably took the form of an appeal to abstract ideals such as "personhood," "equal concern and respect," or, as in Sager's case, "justice."

* Edson R. Sunderland Professor of Law, The University of Michigan.

¹ Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. REV. 410, 410 (1993).

² *Id.*

Recourse to such ideals has also been fueled by a lesson many have drawn from the Court's decisions: the Constitution, generously interpreted, can serve as a powerful engine of social reform, authorizing courts to intervene when legislatures cannot, or will not, act. At times, of course, significant social reform might be achieved by conventional methods of constitutional interpretation—to take the most obvious example, by securing to southern blacks the Fifteenth Amendment's promise that the "right of citizens to vote shall not be denied or abridged . . . on account of race."³ Such a straightforward approach to constitutional interpretation would not, however, enable the judiciary to achieve its perceived potential as an agent of social reform. More sophisticated methods are required if constitutional remedies are to be found for the full range of social ills. One possibility, increasingly popular among constitutional scholars, is to read into the Constitution the abstract ideals the interpreter considers necessary to justify its provisions—ideals such as "personhood," "equal concern and respect," and "justice," from which one can then "deduce" that the desired reform is a constitutional imperative.

Sager maintains that there is nothing new in this way of understanding the Constitution, indeed that Thayer himself so understood it. Although he carefully avoids attributing to Thayer a conception of justice akin to his own, Sager does claim that Thayer held "a rich view of the Constitution," one that saw it "as broad and binding in its breadth on governmental actors."⁴ The fault may be mine, but I am unable to find anything in Thayer's celebrated essay to support that interpretation, and I can find at least some indication that he rejected it.

Thayer's concern throughout the essay is with the relationship between the legislature and the judiciary in whatever areas of life the Constitution touches. His well-known view about the limited authority of judges hardly entails the distinct position that the Constitution, properly interpreted, extends to the full range of issues that might be thought to implicate considerations of political morality. Thus, Thayer may well have believed that the exclusion of women from the franchise was manifestly unjust or inconsistent with the nation's democratic ideals, but nothing in the essay suggests that either conclusion would have led him to the further conclusion that the exclusion was for that reason unconstitutional. To the contrary, toward the end of the essay, he carefully distinguished constitutional law and justice, complaining that "our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the minds of legislators with thoughts of mere legality, of what the Constitution allows."⁵ One who conceives of the Consti-

³ U.S. CONST. amend. XV.

⁴ Sager, *supra* note 1, at 413-14.

⁵ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7

tution as incorporating all the precepts of political morality is not likely to register that complaint.

Thayer's understanding that the Constitution does not command all that justice may require is hardly surprising. The same understanding has traditionally been common ground among proponents of widely differing approaches to constitutional interpretation. The distinction between constitutional law, on the one hand, and justice, wisdom, or political morality, on the other, is, as Sager recognizes, central to all who have urged what he labels a "positive account" of the Constitution—to Justice Black, for example, who seemingly never tired of inveighing against the "natural-law-due-process formula" for invalidating legislation.⁶ But it was, historically, no less central to those—in the tradition of Holmes, Frankfurter, and the second Harlan—who were prepared to look beyond the text and its historical meaning in order to give content to the document. Those who wrote in the latter tradition were insistent that the Constitution was "made for people of fundamentally differing views" and that it should, therefore, be read to embody only minimum standards of political morality as "they have been understood by the traditions of our people and our law."⁷ "The Constitution," as Justice Harlan put it, "is not a panacea for every blot upon the public welfare."⁸

Despite the obvious and important differences between them, the two approaches to constitutional meaning reflect a common understanding that the Constitution does not extend to the full range of issues to which conceptions of justice or political morality apply. Still, theories of constitutional interpretation do not exist in isolation. They are not simply ideas about how to arrive at the "true" or "best" meaning of the Constitution—whatever these adjectives may mean in this context. Because of the central role of the judiciary in interpreting and enforcing the Constitution, theories of constitutional interpretation have almost inevitably been influenced by theories about the appropriate distribution of power between the courts and other, more politically accountable institutions of government. Sager invites us to reconsider the connection between these two types of theories. Ideas about the limits of judicial power, he maintains, should not distort our understanding of the Constitution. Once the issues are separated, he goes on to argue, it can be seen that judicial refusal to read the Constitution as obligating government to remedy social and economic injustice rests upon arguments about the

HARV. L. REV. 129, 155 (1893). Thayer treats the tendency of legislators to defer to judicial interpretations of the Constitution as a distinct evil. *Id.* at 155-56.

⁶ See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 675 (1966) (Black, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 516 (1965) (Black, J., dissenting).

⁷ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

⁸ *Reynolds v. Sims*, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting); see also *Douglas v. California*, 372 U.S. 353, 362 (1963) ("The State may have a moral obligation to eliminate the evils of poverty, but it is not required by the Equal Protection Clause to give to some whatever others can afford.") (Harlan, J., dissenting).

boundaries of judicial power, not interpretive arguments about the meaning of the Constitution.

I am less certain than Sager that we can, by an act of will, disengage issues that history has so intertwined,⁹ nor in the end, as I will discuss presently, is it clear that Sager really means to do so. Even if issues of judicial authority are set aside, however, a good reason remains for refusing to recognize a constitutional obligation to remedy conditions of social injustice. The reason, stated succinctly, is that the constitution Sager describes is not our Constitution. In saying that, I do not mean to suggest that the boundaries of constitutional meaning are set by the text and the understandings of those responsible for its adoption. Our understanding of the Constitution has long since—and for good reason—overleapt those boundaries.¹⁰ But to say that the text and its history do not determine the meaning of the Constitution is not to say that they are irrelevant. The meaning of the Constitution evolves, but it does so within channels whose starting point is the text and the ideas that animated it.

Sager's reading of the Constitution is rooted in ideas about governmental obligation for individual welfare—call them the tenets of contemporary liberalism—that today enjoy widespread support and undergird a good deal of contemporary legislation. They are not, however, ideas that found expression in the original Constitution, nor even later in the Civil War Amendments. The concern of the founding generation was not that government would fail to act affirmatively to secure individual welfare, but that its powers would be employed oppressively. As a consequence, the obligations of government were stated negatively, as limitations on the exercise of governmental power. The powers themselves were stated only permissively, as authorizations, not obligations.

The course of constitutional development has proceeded along the path set by the framers. A rich language has evolved for assessing claims that government has exceeded the limits of its authority and thereby encroached upon the rights of individuals, but with rare, ambiguous, and hesitant exception¹¹ the Constitution has not been understood as requiring government to act affirmatively.¹² The failure of constitutional law to move in the latter direction may well be attributable, at least in part, to the tradition of relying on courts to interpret and enforce the Constitution, but whatever the reason, we simply do not have a conceptual framework within which to address claims of affirmative governmental

⁹ For example, Sager's preferred theory of constitutional interpretation, which he labels "pragmatic justice," very largely depends upon an interpretive tradition that has mainly been shaped by courts.

¹⁰ See Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We The People*, 9 CONST. COMMENTARY 309, 315-16 (1992); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

¹¹ See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Griffin v. School Bd.*, 377 U.S. 218 (1964).

¹² See *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).

obligation. Neither the text nor an evolving constitutional tradition provides concepts or even a language that would guide discussion of whether a particular obligation exists or how the demands that its recognition would make upon government should be balanced against other governmental responsibilities.

Although the centrality of the founding generation's concern with the potential for oppressive use of governmental power is most plainly expressed in the restrictions on the exercise of power that are so prominent a feature of the document, it is more profoundly reflected in the Constitution's structural provisions. Political accountability, federalism, the separation of powers, and institutional checks upon the exercise of power were the constitutional instruments chiefly relied upon by the framers for "the preservation of liberty."¹³ The premise underlying the structural provisions, in contrast with the tenets of contemporary liberalism, is that government is not a source of liberty, but a threat to it.

Recent interest in the influence of republicanism on the founders' thought has tended to emphasize the fear that government would be captured by private interests, but the framers were aware that the oppressive use of governmental power might result as well from claims made in the name of justice. As Madison put it:

A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice . . . [have] divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to cooperate for their common good.¹⁴

In a republic, as Madison famously argued, the primary safeguards against that threat to liberty are the diffusion of governmental power and a heterogeneous citizenry characterized by a multiplicity of interests and opinions. Liberty was to be secured by making legislation difficult. From the perspective of contemporary liberalism, which looks to government for the achievement of its goals, that "solution" to the problem of "majority tyranny" is not very satisfactory. As Robert Dahl once observed, "[N]o modern Madison has shown that the restraints on the effectiveness of majorities imposed by [the structural safeguards of liberty] operate only to curtail 'bad majorities' and not 'good' majorities."¹⁵ The framers were not unaware that the Constitution's structural provisions might obstruct desirable as well as undesirable legislation, but they concluded, as Hamilton wrote, that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."¹⁶

These elements of the original constitutional design are, of course,

¹³ See, e.g., THE FEDERALIST No. 51, at 319 (James Madison) (Isaac Kramnick ed., 1987).

¹⁴ *Id.* No. 10, at 124 (James Madison).

¹⁵ ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 29 (1956).

¹⁶ THE FEDERALIST No. 73, at 419 (Alexander Hamilton) (Isaac Kramnick ed., 1987).

still very much with us, and they do not fit comfortably with the notion that the Constitution obligates government to eliminate poverty, reduce economic inequality, and redress historic injustices. To meet any such obligation, government would be required to undertake and carry to fruition ambitious programs that necessarily would impinge upon—and perhaps cut deeply into—the interests of many citizens, among whom will be many who hold rival conceptions of justice. The Constitution's structural provisions are, however, designed to impede the enactment of legislation in just such circumstances, *i.e.*, when legislation is perceived as a significant threat to the important interests, either moral or material, of any substantial number of citizens. Sager's reading of the Constitution, to put the point somewhat differently, puts the Constitution on a collision course with itself, imposing obligations upon government that the structural provisions cannot accommodate.

My point is not, of course, that the Constitution is an insuperable obstacle to legislation directed toward ameliorating the social ills with which Sager is concerned. A good deal of legislation addressing those ills has been enacted during the past century, and more may confidently be expected in the years ahead—the product of a political process that is structured to achieve compromise among competing interests and accommodation of conflicting claims of right. Sager's reading of the Constitution would substitute for that process a regime of principle: the demands of justice are what they are, and they leave no room for compromise and accommodation. Precisely how the political regime established by the Constitution is to meet these demands is something of a mystery.

Sager advances at least a partial solution to the problem, but it is, unfortunately, one that Madison described as a "remedy . . . worse than the disease."¹⁷ What Sager proposes is that we look to "a power independent of the society"¹⁸ when government fails in its obligation to achieve social justice. Having argued that limitations on the judicial role are all that stand in the way of reading the Constitution to impose obligations of social justice upon government, he concludes that once the obligations are recognized, judges have an important part to play in enforcing them.

Although it is not entirely clear just how far Sager means to extend the boundaries of judicial authority, his argument, if I understand it correctly, would transfer to courts the power to decide important issues of public policy that heretofore have been regarded as within the exclusive domain of legislatures. To be sure, Sager acknowledges some limits to judicial authority—for example, that it may be beyond the competence of courts to devise entirely new programs and institutions to alleviate pov-

¹⁷ *Id.* No. 10, at 123 (James Madison).

¹⁸ *Id.* No. 51, at 321 (James Madison).

erty. He maintains, however, that once these programs and institutions are in place, the obstacles to judicial recognition and enforcement of the constitutional obligation of social justice have been removed. Courts would then be justified in subjecting to close judicial scrutiny “details” of the program established by the legislature, especially “exclusions of the needy from benefits that would ameliorate their need.”¹⁹

In effect, Sager’s argument concedes to legislatures much that in contemporary America has ceased to be controversial and authorizes courts to substitute their judgment for that of legislatures on many of the issues that are the subject of live controversy. Given the vast array of programs and institutions that currently exist to alleviate poverty, the opportunities for courts to engage in the kind of “infilling” that Sager proposes are, if not unlimited, at least very substantial. A single example will make the point. The State of Michigan, like a number of other states, has recently responded to budgetary pressures by abandoning its general assistance program. Since the state operates other welfare programs and since institutions for distributing welfare benefits already exist, the obstacles that, in Sager’s view, lead to “judicial underenforcement” of the Constitution have presumably been removed. All that remains is for the courts to recognize that governmental assistance to meet basic material needs is a constitutional right.

I have already suggested that there is little in our constitutional tradition to warrant such a reading and much to argue against it. Even if that difficulty is waived, however, the question remains whether courts are competent to undertake the responsibility that Sager would assign them. Governmental budgets call for the resolution of intractable issues, requiring not only choices from among the innumerable demands upon the public fisc, but judgments about the levels of taxation the citizenry will accept and the economic effects of both taxation and proposed expenditures. Responding to these issues requires access to technical resources unavailable to judges and a breadth of perspective that judges, just because they are politically unaccountable, necessarily lack.

The demands upon the treasury that Sager would authorize judges to make, to put the latter point somewhat differently, would necessarily be the product of tunnel vision. That may, indeed, be one reason that Sager and others who are dissatisfied with the outcomes of the political process look to courts for social reform. Since they are unencumbered by responsibility for—and perhaps even knowledge of—the full range of considerations that a broader perspective might bring into view, courts can “focus like a laser beam” upon a particular social ill, ignoring the implications of a remedy in other areas of social life. At times, of course, the limited perspective of courts is a virtue, one that is an important reason for assigning them the responsibility for determining questions of

¹⁹ Sager, *supra* note 1, at 431.

guilt or innocence or, more generally, the adjudication of rights. It is much less persuasive as a reason for assigning them responsibility for determining complex issues of public policy.