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## *Terry Firma: Background Democracy and Constitutional Foundations*

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# **TERRY FIRMA: BACKGROUND DEMOCRACY AND CONSTITUTIONAL FOUNDATIONS**

*Frank I. Michelman\**

## I

Ages ago, I had the excellent luck to fall into a collaboration with Terrance Sandalow to produce a casebook now long forgotten.<sup>1</sup> There could have been no more bracing or beneficial learning experience for a fledgling legal scholar (meaning me). What brought us together indeed was luck from my standpoint, but it was enterprise, too — the brokerage of an alert West Publishing Company editor picking up on a casual remark of mine as he made one of his regular sweeps through Harvard Law School. A novice law professor, I mentioned to him how much I admired a new essay in the field of local government law (a subject I was just then trying to learn) by someone I didn't know but who lived in that editor's home town of Minneapolis-Saint Paul. The essay was Terrance Sandalow's since-become-classic piece on municipal home rule,<sup>2</sup> and the West editor arranged to bring the two of us together to discuss the casebook project that in fact materialized.

Sandalow's article gained wide and deserved recognition as a jewel of municipal law scholarship. Few, if any, could have perceived it at

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\* Robert Walmsley University Professor, Harvard University. — Ed. The author wishes to thank Terrance Sandalow for watching over his shoulder as this Article was being written.

This Article is inspired by the following works: Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We The People*, 9 CONST. COMMENT. 309 (1992); Terrance Sandalow, *A Skeptical Look at Contemporary Republicanism*, 41 FLA. L. REV. 523 (1989); Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); Terrance Sandalow, *Equality and Freedom of Speech*, 21 OHIO N.U. L. REV. 831 (1995); Terrance Sandalow, *Federalism and Social Change*, 43 LAW & CONTEMP. PROBS. 29 (1980); Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977); Terrance Sandalow, *Racial Preferences in Higher Education*, 42 U. CHI. L. REV. 653 (1975); Terrance Sandalow, *Social Justice and Fundamental Law: A Comment on Sager's Constitution*, 88 NW. U. L. REV. 461 (1993); Terrance Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446 (1981); Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964); Terrance Sandalow, *The Supreme Court in Politics*, 88 MICH. L. REV. 1300, 1300-03 (1990) (reviewing ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989)).

1. FRANK I. MICHELMAN & TERRANCE SANDALOW, *GOVERNMENT IN URBAN AREAS* (1970).

2. Terrance Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643 (1964) [hereinafter Sandalow, *Limits of Municipal Power*].

the time — certainly I did not — as the opening of a distinctive and demanding path of thought through what would be the gathering thicket of our generation's constitutional-theoretic debates. More than a decade would pass before Sandalow started posing questions in the grand mode.<sup>3</sup>

## II

What are constitutional norms? Seemingly, they arrive as messages from something or someone we are supposed to accept as a social authority — the Constitution, its authors, or its licensed oracles. Encased in those messages are commands, instructions, or statements of principles or rules of conduct. These act as *norms* for me, or are *normative* for me, insofar as my awareness of their content — of their “being there” in the message from some social authority — gives me reason counter to sheer, brute desire to select certain action choices from some range of practically available alternatives, or to prefer some options over others. (The reason might be *prima facie*, subject to override.) Norms are in that sense obligatory. Some but not all norms are legal norms, and some but not all legal norms are constitutional-legal norms (hereinafter, for convenience, “constitutional norms”). A norm operates on me as a *legal* norm insofar as its constraining effect is a particular instance of a general, presumptive obligation of fidelity to law (the possible bases or justifications of which we need not here explore). A legal norm is *constitutional* insofar as what it constrains is the exercise of governmental powers, including the power to make (other) law. The constraint can be institutional, reserving various classes of powers to one or another branch or level of government. It can be procedural, scripting the acts and forms for valid exercises of powers. It can be substantive, dictating or restricting the topics respecting which, the purposes for which, or the results with which powers may and may not be exercised or, possibly, must be exercised.

Constitutional norms, then, are particular message-contents having directive effects on government operations, and, moreover, effects that really do depend on what recipients take these particular messages to *mean*. How sure are we that such things really exist and really happen? What we see directly, and all we see, are facts of general social obedience to the *pronouncements* of “constitutional law” by various official bodies. Who knows, though, what factors decisively shape these pronouncements? Might they not stem ultimately from causes quite aside from attempts by anyone to find out the meanings of any message-like things supposedly received from particular sources? Maybe, in the end, there are no message-like things constraining gov-

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3. See Terrance Sandalow, *Racial Preferences in Higher Education*, 42 U. CHI. L. REV. 653 (1975) [hereinafter Sandalow, *Racial Preferences*], discussed *infra* Part IV.

ernment action. Maybe there are only the facts about what judges and other actors actually do and get away with doing — facts rooted in habit, culture, and interest, and quite recalcitrant to control by message-meanings. Skeptical views of this sort appear in our debates.<sup>4</sup>

Professor Sandalow's name would not appear on your standard list of known skeptics. We don't think of him as doubting that the American practice of government commendably includes, as a main feature, an expectation of compliance with messages issuing from someone or something — "the Constitution" or its licensed oracles — to someone else, containing directive meanings which it is the obligation of recipients to find out and to follow. "There is not the same freedom in construing the Constitution," Sandalow has written, "as in constructing a moral code."<sup>5</sup> (Note carefully the difference between "construing" and "constructing."<sup>6</sup>) "Limits are implied by the very nature of the task."<sup>7</sup> Like anyone taking this view, Sandalow has to face the problem of how a political society acquires authoritative ascertainties of the contents of constitutional messages.

As usually understood, the problem has two facets: one semantic, the other institutional. The semantic aspect is this: Suppose you wanted to settle a disagreement about the constitutional law applicable to a case. Suppose further that you had before you someone who was guaranteed to know the answer to whatever precise question you put to him, not itself directly framed as a question of law or legal meaning. Exactly what question do you put to your wizard? Do you ask him how a typical ratifier of the Constitution would have decided the case, supposing he knew then all the social facts we know now? Do you ask what result the words dictate — or what range of results they allow — in the ordinary language either of the framers' generation or of ours? Do you ask which resolution would make constitutional law morally the best it can be, or which would maximize social wealth? Do

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4. See, e.g., Mark Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984).

5. Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1049 (1981) [hereinafter Sandalow, *Constitutional Interpretation*].

6. *But see infra* text accompanying notes 104-105.

7. Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1033; see also Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We The People*, 9 CONST. COMMENT. 309, 312 (1992) [hereinafter Sandalow, *Abstract Democracy*] (agreeing with Bruce Ackerman that "the absence of a satisfactory theory [of constitutional change] . . . has a corrosive effect on the commitment to constitutionalism"); Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1049 (adding that "[t]he question whether legislation is within the authority of the federal government must . . . be decided within a framework which recognizes . . . that government . . . as one of enumerated powers. We do not consider ourselves at liberty to ignore the question or to answer it merely by demonstrating that the power can best be exercised by the federal government"); Terrance Sandalow, *Social Justice and Fundamental Law: A Comment on Sager's Constitution*, 88 NW. U. L. REV. 461, 463 (1993) [hereinafter Sandalow, *Social Justice*] (referring sympathetically to the "common understanding" that constitutional law is not coextensive with speculative morality).

you ask which resolution most faithfully would track contemporary society's prevailing beliefs about fundamental values? Or what?

The institutional aspect is this: Having decided on a key question, to which branch of government or body of officials do we put it when what we need is an "institutional settlement?"<sup>8</sup> A fixed answer to the semantic question seems bound to affect how one responds to the institutional question, but the converse also is true. For example, Americans might, on the institutional side, feel committed to judicial review, or stuck with it, as our conventionally settled means for putting constitutional law into effect. If so, that could help explain, on the semantic side, the allure of the view that constitutional-legal meaning is to be drawn from the intentions of the framers — "originalism," as we now would call it. If constitutional interpretation does thus consist in exegesis of written messages launched from outside the current political and social scenes, it makes obvious good sense to have it done by a politically neutral body of exegetical experts.<sup>9</sup> That same institutional choice might seem strange, though, if, on the semantic side, we sought to explain constitutional-legal discourse as a decidedly *nonexegetical* activity by which "each generation gives formal expression to the values *it* holds fundamental."<sup>10</sup> It would be at least initially surprising to say, institutionally, that courts get the last word because of their presumed relative detachment from democratic political pressures, while at the same time saying, semantically, that constitutional meaning most aptly is sourced in contemporary society's prevailing, but constantly evolving, beliefs about "fundamental values."

The example is easily generalized. The semantic and institutional questions always and inevitably reciprocate.<sup>11</sup> Solving the simultaneous equation has been a major preoccupation for the field of scholarly debate we call constitutional theory.

Below, I will conduct a critical survey and parsing of Terrance Sandalow's contributions to the debate. These contributions are disciplined, contentious, stimulating, original, and undoubtedly distinctive — although not, of course, completely distant from contributions of

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8. See HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1-9 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

9. See Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1034 (suggesting that "the view that constitutional interpretation involves primarily an elucidation of the general intentions of the framers is . . . attractive . . . because it seems to support the institutional arrangements we have established for giving contemporary meaning to the Constitution").

10. *Id.* at 1068 (emphasis added).

11. See Sandalow, *Social Justice*, *supra* note 7, at 463 ("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.").

others.<sup>12</sup> If in hindsight they seem dated in some respects (the main pieces all appeared before 1993), or if they do not form a completely finished theory with all of its parts fully filled in and all of its uncertainties resolved, or if they do not answer every question we can put to them, they nevertheless succeed powerfully in putting questions to others — to the rest of us — to which satisfactory answers are awaited still. They richly repay review.

### III

Writing on local government law in 1964,<sup>13</sup> Terrance Sandalow offered a striking proposal. Courts, he said, ought sometimes to act as censors on city lawmaking *but without applying any specific statutory or constitutional restrictions on city powers*. What centrally concerned him, in a way soon to be explained, was not constitutional interpretation but the avoidance of it. Nevertheless, and perhaps quite unexpectedly even to Sandalow, the home rule essay marked the opening of his special contribution to the debate over the judicial role in the effectuation of constitutional norms.

In many states, constitutions or statutes confer a wide sweep of *prima facie* legislative authority on at least major-size municipalities.<sup>14</sup> The delegations usually can be read as stopping somewhere short of allowing cities to legislate for their respective territories or constituencies in whatever ways would constitutionally be open to a state legislature making laws for the whole state. For example, a state constitution may authorize cities to legislate on any and all “local” or “municipal” matters. The power usually is further qualified by subjecting local legislative powers to whatever limits state legislatures may impose by statutes applicable to all municipalities. The basic considerations favoring such a general set-up are widely understood to be these: On the one hand, cities should not have to obtain express enabling legislation from the statehouse every time an arguable need appears for some arguably not-yet-authorized type of municipal lawmaking. On the other hand, because city lawmaking can pose special risks to legitimate regional or statewide concerns not adequately represented in a given

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12. Sandalow's ideas, while distinct from all of the following, also contain anticipations of them all: current common-law approaches to constitutional adjudication, *see, e.g.*, David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999), current democratic-experimentalist approaches, *see, e.g.*, Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998), and current anti-judicial-supremacist approaches, *see, e.g.*, MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

13. *See* Sandalow, *Limits of Municipal Power*, *supra* note 2.

14. The matters summarized in this paragraph are described and discussed in detail in Sandalow, *Limits of Municipal Power*, *supra* note 2, at 645-71.

city's internal democratic processes, the state legislature should retain its ability to impose generally stated bounds on city legislative powers.

Among the putative transmunicipal concerns motivating the reservation of state legislative control, the most obvious are concerns about oppressive or inconsiderate extraterritorial applications or impacts of city legislation.<sup>15</sup> What will more directly engage us here is perception of a different sort of risk — the risk that city legislation, even if its extraterritorial effects are negligible, may threaten values that are basic in the view of the state as a whole. The term “values” here typically refers to the same family of considerations that inspire constitutional bills of rights, including individual liberty and equality and political democracy. (In later writing, Sandalow would link them closely with “conceptions of the proper role of government in our society.”<sup>16</sup>) The idea is that due regard for such values may require restraint of city legislative powers even when a court would not, or ought not, conclude that the city legislation in question is unconstitutional. For example, a city might adopt an ordinance or charter provision imposing sharp restrictions on “independent” candidacies for city elective office. Even supposing the restriction is not unconstitutional,<sup>17</sup> the thought runs, it is still desirable to leave the last word on its permissibility to someone regarding the matter from the standpoint of the state's constituency as a whole.

Such was Sandalow's view, and it leads to the question of a possible role for the courts in the requisite policing of city legislation. Typically, state constitutions provide sufficient, if inexact, textual handles for such a judicial role should courts see fit to use them. For example, a court might for this purpose seize on the constitution's having restricted its initial grant of city lawmaking power to legislation dealing with “municipal” matters. The court then could hold our illustrative ballot-access measure *ultra vires* as “unmunicipal” (although not otherwise unconstitutional), precisely in virtue of its hard pressure against a basic value of freedom of political association. The central question posed by Sandalow was: *ought* courts assume or be assigned such a role, and, if so, why, given the availability of the state legislature to rein in municipal legislation by general lawmaking?<sup>18</sup>

Sandalow's response to the first question was affirmative, his reasons Madisonian. The relative “homogeneity” to be expected of many city populations and governing bodies, in comparison with the state as

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15. *See id.* at 692-707.

16. Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1165 (1977) [hereinafter Sandalow, *Judicial Protection*]; *see also infra* text accompanying notes 68, 100.

17. *Cf. Storer v. Brown*, 415 U.S. 724 (1974) (upholding the constitutionality of a state statute of this kind).

18. *See Sandalow, Limits of Municipal Power, supra* note 2, at 708-09.

a whole, and the relative paucity of contending interests or factions to screen out lawmaking that offends seriously against substantial minority interests, heighten the risk of “majority excesses” and “precipitate majority action.”<sup>19</sup> The state legislature’s reserved power to hem in city lawmaking by general state legislation is a partial safeguard, but it is imperfect because of the inertial difficulties of spurring a state legislature to action.<sup>20</sup> Courts, by contrast, are immediately available to make precisely the contextually enriched evaluations that such situations require, and they are not hobbled by the organizational, procedural, and pluralistic political restraints that (quite properly) hobble legislatures. A judicial ruling of “unmunicipal,” moreover, has only the “suspensive veto” effect of “shifting the level of decision from municipal to state government” (because the legislature can always pass a general enabling act to authorize city actions of the type in question) — an effect that clearly tends to “maximize community values” once one grants the relative trustworthiness of state, as compared with municipal, legislative processes to give such values their dues.<sup>21</sup>

But cannot courts play the desired role, to exactly the constitutionally apt extent, simply by enforcing the provisions of state and federal bills of rights against municipal legislation exactly as they would against state legislation of parallel content? Why, then, launch the courts on some additional, transexegetical search for “basic community values” to enforce against the legislative products of local democracy, with the obvious extra risk of undue suppression of local democracy that such a launching involves?

Sandalow’s answer began with the observation — still dependent on the Madisonian premise of the state legislature’s superior trustworthiness to give basic values their dues — that it is unwise to leave courts with no possible recourse against possibly precipitate municipal actions, such as our ballot-access measure, except holding them unconstitutional. A court may be inclined toward a holding of unconstitutionality where it has nothing but the decision of one possibly wayward locality to testify to the existence of a sufficient public justification for the resulting restriction of political liberties. But a holding of unconstitutionality, once made, will bind as precedent if and when “the time comes that the larger community, as represented in the state legislature, determines that the general welfare requires” the restriction and that constitutional values at least can tolerate it.<sup>22</sup> In that way, due doubts about the reliability of local legislative proc-

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19. *Id.* at 710; cf. Sandalow, *Judicial Protection*, *supra* note 16, at 1191-93 (discussing pluralist safeguards in the operations of Congress).

20. See Sandalow, *Limits of Municipal Power*, *supra* note 2, at 714.

21. *Id.* at 711, 715.

22. *Id.* at 712.



esses may turn themselves into an undue judicial suppression of a statewide democratic will.

It remains still to describe some method to be used by courts, once loosed from the discipline of ordinary constitutional interpretation, to ascertain the content of basic community values and to measure the degree of disregard for them contained in any given instance of city lawmaking — bearing in mind that the method must be one that does not lead courts to trespass unacceptably on the proper domain of the legislature. Sandalow's home rule essay does no more, and purports to do no more, than make a start on showing how it may be possible to delineate such a method.

Acting in their role as guards against precipitate local action, courts are to invoke values that are “deeply rooted” not just at large in the community but “in the legal system.”<sup>23</sup> Thus, for example, the “novelty” of a piece of city legislation may weigh against it. But perhaps most obviously and simply, it follows from Sandalow's argument that a city law that would be found to “raise[] a substantial constitutional question” if enacted by the state legislature should not survive judicial review for ununicipalness.<sup>24</sup> To that extent, constitutional bills of rights can provide a “starting point” and an “analogy” for this ilk of judicial judgments. Nevertheless, if Sandalow's argument had stopped right there it would still have left us able to distinguish between a freer-ranging (but somehow still judicial) process of basic-value detection, special to the context of city legislation, and a more familiar and insinuatedly more conventionally disciplined process of constitutional interpretation. The argument, then, would have carried no interesting implications for standard-form constitutional interpretation.

The argument, however, did not stop there. It went further, because Sandalow wished to head off an easily anticipated objection: that it cannot be any business of an independent judiciary to contradict the people's elected representatives — even their local elected representatives — on the matter of the contemporary community's basic values. That objection is precluded, Sandalow said, to anyone who accepts in general the judicial “power to invalidate legislation on constitutional grounds.” Permitting judges to do that, he said, involves no different or greater encroachment on representative democracy than would be wrought by “authorizing [judicial] invalidation of novel municipal powers inconsistent with basic values.”<sup>25</sup> This is true, wrote Sandalow — adding that most lawyers know that it is true — even granting that constitutional interpretation is “to some extent circum-

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23. *Id.* at 716, 717.

24. *Id.* at 720.

25. *Id.* at 721.

scribed by the language of the constitution and the course of constitutional history.”<sup>26</sup> Sandalow thus pointedly denied that “constitutional interpretation” names a more tightly or objectively disciplined method of judicial decisionmaking — or even a substantially different method — than that involved in comparing a city law with the contemporary statewide community’s basic values.

The home rule essay ends with this denial, leaving it unexplained — except, perhaps, for one remark a few pages earlier, in a different context, to the effect that “the fundamental values of the community are not static; they are in a process of evolution.”<sup>27</sup> That community values change continuously over time — or, if you like, “evolve” — is a hard proposition to deny. Nothing follows, however, about whether constitutional meanings change apace unless you already have established an equation or linkage between constitutional meanings and contemporary community values. Needless to say, the claim of such an equation is highly controversial in American constitutional culture. No argument for it appeared in the home rule essay.

#### IV

Nor did a full one appear in 1975 when Sandalow — in an article supporting the constitutional permissibility of racial preferences in higher education<sup>28</sup> — first turned his attention directly to what he called “the great question of constitutional law,” that of “the means by which the [Supreme] Court can accommodate” the “democratic values” ensconced in our constitutional tradition with “the need to recognize evolution in the [other] values to be accorded constitutional protection.”<sup>29</sup> Certain premises were apparent in this way of framing the question: that a main point of the practice of constitutional law is to keep government operations in line with certain values; that the values thus to be redeemed are both traditional and evolving, but most fundamentally are the values “of our [contemporary] society,” which means they are not drawn from some source above, before, or outside it;<sup>30</sup> that they include both substantive values, of the sort that particular political decisions always must implicitly order in some way, and the democratic procedural values calling for “politically responsible

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26. *Id.*

27. *Id.* at 718 (offering this, along with the idea of local governments as sites of relatively safe “experimentation in the accommodation of competing values,” as a reason for cautious use of any roving judicial commission to invalidate municipal legislation).

28. Sandalow, *Racial Preferences*, *supra* note 3.

29. *Id.* at 662-63.

30. *Id.* at 700. The point would become more emphatic in subsequent writings. See *infra* Parts VI-VIII.

institutions”<sup>31</sup> to resolve disagreements over orderings of substantive values. A final, if somewhat dissonant, apparent premise was that the decidedly unrepresentative Supreme Court plays some sort of leading role in the pursuit of the required accommodations among values.<sup>32</sup>

The racial preferences article argues at length<sup>33</sup> that in equal protection litigation — assuming we are not simply to drop the subject of the compatibility of legislation with the equal protection guarantee, “a move toward which neither the Court nor its critics” (nor Sandalow) “seems disposed”<sup>34</sup> — there is no escape from the judiciary’s “substitut[ing] its judgment for the legislature’s on the relative merits of competing social goals.”<sup>35</sup> To speak more exactly, though, what Sandalow showed beyond a doubt is this: to find that a law discriminates impermissibly against some person or class of persons, or treats “unequally” some person or class, is necessarily to reject the lawmaker’s implicit selections and rankings of social goals in favor of some different selection and/or ranking. It does not precisely follow, and Sandalow did not show, that the adjudicating court must substitute its own goal-ranking choices for the legislature’s. A court imposing goal- or value-rankings upon a legislature still might purport, in perfectly good faith, to draw such rankings objectively, from sources beyond and prior both to its own action and to the legislature’s and by methods other than ungoverned choice. Such sources might include constitutional history, text, and tradition; such methods might also include exegesis or, oppositely, transcendent moral or economic reason.

Nevertheless, in the face of such obvious alternatives and with little supporting argument, Sandalow in 1975 proclaimed the view that “[c]onstitutional law evolves to reflect the changing circumstances and values of our society.”<sup>36</sup> “Few would wish it otherwise,”<sup>37</sup> he added, as if the proposition explained itself. Pragmatic reasons for it leap to mind, which Sandalow would mention in future writings.<sup>38</sup> Still, this

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31. Sandalow, *Racial Preferences*, *supra* note 3, at 662.

32. *See id.* at 700 (apparently acceding to judicial review as “the institutional mechanism that has developed for giving meaning to the Constitution”).

33. *See id.* at 654-81.

34. *Id.* at 661.

35. *Id.*

36. *Id.* at 700.

37. *Id.*

38. *See* Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1046 (“The amendment process . . . simply will not sustain the entire burden of adaptation that must be borne if the Constitution is to remain a vital instrument of government.”); Terrance Sandalow, *Equality and Freedom of Speech*, 21 OHIO N.U. L. REV. 831, 833 (1995) [hereinafter Sandalow, *Freedom of Speech*] (warning that a result of tying constitutional adjudication to “principles formulated in response to issues very different from those we now confront” will be that the contemporary issues “will not be intelligently resolved”).

central proposition — for that is what it turns out to be — of Sandalow’s constitutional thought stands obviously in need of a more substantial defense, if only because of its keenly paradoxical feel when combined with seemingly irreversible acceptance of a key role for the Supreme Court in the effectuation of constitutional law.<sup>39</sup> Sandalow’s choice on this occasion, however, was not to defend the proposition at length.

Of course there can be no doubt, and Sandalow showed, that community values and value-orderings inevitably change over time, along with changes in perceptions of social reality.<sup>40</sup> But the proposition that constitutional-legal meaning is yoked to social-value change is different, and much more controversial. Sandalow left unmentioned — possibly because it was nowhere near so well developed then in the debates as it has since become<sup>41</sup> — the contrary view that the Constitution’s meaning as law remains, *and for the sake of democracy must remain*, as it was made by those with self-governing authority to make it (the people) until they see fit to make it over (by amending the Constitution).

How, after all, might we confer upon constitutional law a democratic credential, a democratic pedigree, if doing so seemed important to us? (It has not always seemed, and does not now seem, overridingly important to everyone.<sup>42</sup>) Most straightforwardly, we would do it by explaining, if we could, how the people of a country, its *demos*, from time to time actually do legislate the constitution. That is the “democratic positivist” idea, as we may call it, to which Sandalow in 1975 paid no mind. He would do so later,<sup>43</sup> and it was then that his own answer to the question of the democratic pedigree and legitimacy of constitutional law, understood as a direct expression of contemporary community values, would come into sharper focus. For now, though, Sandalow confined himself to the question of how courts possibly could play a leading but still judicial role in the effectuation of constitutional law, taking for granted the tight linkage of constitutional-legal meaning to evolving community values.

*Marbury*-like,<sup>44</sup> Sandalow carved out such a role for the courts in the course of rejecting the judiciary’s claim to a final decisive voice in

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39. See Sandalow, *Racial Preferences*, *supra* note 3, at 659 (“Unless a particular choice of values is prescribed by constitutional tradition, a judicial determination seems incompatible with the nation’s commitment to democratic decisionmaking.”).

40. See *id.* at 662, 680-81.

41. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-7 (1991).

42. See, e.g., Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENT. 93, 111-12 (1995).

43. See *infra* Part VII.

44. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (disclaiming jurisdiction by upholding the judicial duty to disregard a statute found to be in conflict with the Constitution).

pending social and political controversies over the use of racial preferences in higher-education admissions. The key was a theory of political responsibility that had first appeared in the home rule essay of 1964. In the absence of a clear societal consensus *against* the “value choices” implied by adoption of racial preferences, Sandalow thought, a deliberate choice in their favor by a state legislature must be constitutionally decisive.<sup>45</sup> In such a case, priority must go to the body that is the more “politically responsible” — meaning, first, the more receptive and sensitive to information regarding “the impact of a policy upon the various segments of the society;” second, the more likely to keep its value-ordering judgments attuned to “the values of the citizenry;” and, third, the more amenable to “compromise and accommodation that facilitates development of policies that maximize the satisfaction of constituents’ desires.”<sup>46</sup>

State legislatures presumably measure up well to these standards. (Otherwise, what sense could we possibly make of the professed democratic “commitment” of American constitutionalism?<sup>47</sup>) But just as city councils presumptively do not fully measure up,<sup>48</sup> unelected state boards of regents and university faculties may fall even shorter, considering how parochial and how limited, by comparison with the population at large, we may expect to be the ranges of the interests, loyalties, experiences, and sensibilities of their members.<sup>49</sup> “[T]he reasons supporting judicial deference to legislative judgment [do not] support equal deference to the judgment of a . . . law school faculty.”<sup>50</sup> Moreover, trying to pretend that they do is bound over time to produce results that “unnecessarily encroach upon constitutional values.”<sup>51</sup> We learned the argument in 1964:<sup>52</sup> either courts treat the determinations of law school faculties with a deference they do not deserve, or courts allow themselves to be led by the faculty’s obvious lack of democratic credentials to produce a holding of unconstitutionality that will be excessive if and when a state legislature comes considerately to conclude in favor of preferences.

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45. See Sandalow, *Racial Preferences*, *supra* note 3, at 696, 698 (“Balancing the dangers of . . . preferences against their potential gains is a delicate, and ultimately legislative, task. There is no warrant for the courts to [with]draw the issue from the political forum.”).

46. *Id.* at 695.

47. See *id.* at 699 (“A commitment to democratic values requires considerable judicial deference to deliberate [state] legislative judgments . . .”).

48. See *supra* text accompanying notes 19-21.

49. See Sandalow, *Racial Preferences*, *supra* note 3, at 696.

50. *Id.* at 699.

51. *Id.*

52. See *supra* text accompanying note 22.

Sandalow nevertheless maintained that courts should refrain from overturning faculty-initiated preferential admissions policies. His arguments to that effect<sup>53</sup> need not concern us here. What does concern us is Sandalow's call upon courts engaged in constitutional review to "develop doctrines that consign ultimate authority" for policy choices under evolving basic community values "to the legislature, where in a democracy it rightly belongs."<sup>54</sup>

## V

If "democracy" generally prefers legislative to judicial policy choice, why does it? What exactly is the democratic ideal? Sandalow told us in 1975, not once but twice. It is, he said, the "ideal that government policies ought to respond to the wishes of the citizenry."<sup>55</sup> And it is, he said, the "ideal that politically responsible institutions should determine the direction of government policy."<sup>56</sup> Thus the same essay delivered two nonidentical statements of "the democratic ideal" — one cast in terms of process (that "politically responsible institutions should determine the direction of government policy"), the other in terms of outcome (that "government policies ought to respond to the wishes of the citizenry"). In the context of that essay, there was of course no contradiction. Whichever way you put it, Sandalow plainly meant, the democratic ideal is fulfilled, within American society's practical capacity to fulfill it, when a lawmaking forum and process are sufficiently "politically responsible."

In hindsight, we can see three major pieces still missing from the developing Sandalovian theory of judicial review as it stood in 1975. First, the theory as of then lacked a fully elaborated account of how courts — acting judicially as opposed to legislatively — can develop their own profiles of contemporary society's basic values, against which to test (deferentially) the lawmaking acts of a normally acting state or national legislature or to test (more aggressively) those of a local or unelected official body. Sandalow never has explained at length by what sufficiently disciplined methods judges possibly might reach and support the findings he would require of them in constitutional cases: that "the principles upon which they propose to confer constitutional status express values that our society does [now] hold to

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53. See Sandalow, *Racial Preferences*, *supra* note 3, at 701-03.

54. *Id.* at 703; see also Terrance Sandalow, *The Distrust of Politics*, 56 N.Y.U. L. REV. 446, 447-50 (1981) [hereinafter Sandalow, *Distrust of Politics*] (compiling examples of issues "remov[ed] from politics [by decisions of the Supreme Court] that, in a democracy, one would expect to be resolved by a political process").

55. Sandalow, *Racial Preferences*, *supra* note 3, at 695.

56. *Id.* at 700.

be fundamental.”<sup>57</sup> But the general outlines of his response seem clear, from this and subsequent work. Never doubting that the present is descended from the past, Sandalow has felt able to suggest approaches to the task using history, text, and precedent in ways not unfamiliar to constitutional lawyers — indeed not clearly distinguishable from typical constitutional-legal argument, except by the implied commitment to deference, in the end, to the acts of top-of-the-line representative government.<sup>58</sup>

Second, the theory as of 1975 lacked a full defense of contemporary-values constitutionalism against its looming democratic-positivist adversary.<sup>59</sup> Why *should* evolving but unenacted basic community values provide the touchstone of constitutional meaning? Third, the theory, in hindsight, needs further work on the matter of “the democratic ideal.” We have noticed Sandalow’s equivocation between a process-bound equation of the American democratic ideal with final decision of public questions by well-oiled institutions of representative government and an outcome-bound equation of this ideal with substantial correspondence between legislative choices and “the wishes of the citizenry.” Confinement of the ideal of democracy to a choice (or merger) between these two would soon, however, prove controversial. In the years to come, some would contend that democracy must encompass a good deal more than either — in order, in a liberal mindset, to figure as a value at all.<sup>60</sup>

## VI

In 1977, Sandalow undertook again to outline a mode of judicial constitutional review that would provide worthwhile support for constitutional values and still, “by respecting the ultimate authority of the political process to determine the values to be expressed by law,” conform to “the proper limits of judicial authority in a democracy.”<sup>61</sup> Again he made the challenge as hard as it can be, by equating constitutional values with basic, contemporary community value-orderings. Such an equation was required, as Sandalow repeatedly would contend,<sup>62</sup> by the plain facts of American constitutional-legal history and practice. Over the course of that history, applied constitutional law has

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57. See, e.g., Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1069.

58. See *id.* at 1055-60; Sandalow, *Freedom of Speech*, *supra* note 38, at 831-34; Sandalow, *Social Justice*, *supra* note 7, at 464-66; *infra* text accompanying notes 69-74, 79-80.

59. See *supra* text accompanying notes 40-41.

60. See, e.g., RONALD DWORKIN, *FREEDOM’S LAW* ch. 1 (1996); FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 11-25, 33-34, 40-51 (1999); Frank I. Michelman, *Human Rights and the Limits of Constitutional Theory*, 13 *RATIO JURIS* 63 (2000).

61. See Sandalow, *Judicial Protection*, *supra* note 16, at 1183.

62. See Sandalow, *Abstract Democracy*, *supra* note 7, at 311-12.

undergone many glaring alterations that cannot be explained by reference to any formally adopted constitutional amendment.<sup>63</sup> Of course, one can always try to explain these alterations as the results of judicially tooled-up interpretations and applications of underlying legal principles and rules whose meanings have remained unchanged since first they were textually laid down. But Sandalow shows that one can't do so convincingly without either wrenching historical enactments out of context<sup>64</sup> or else casting the supposedly constant, original meanings at a level of abstraction so high and decontextualized that the work of "applying" them to the major political issues of later times is not truly adjudicative, appropriate to a non-popular branch of government, but rather involves the sorts of choices that it seems committed democrats would reserve to the people or representative government.<sup>65</sup>

Sandalow's reasoning from these plainly true facts is simple. Granting (1) that the nation has a "democratic commitment[]" to "the proposition that the Constitution's legitimacy depends on popular consent;"<sup>66</sup> and therefore (2) that constitutional meanings "must have a purchase on values reasonably attributable to the society;"<sup>67</sup> then (3) if constitutional meanings have changed, they must have changed in tune with changes in basic community values. In sum: "constitutional law must . . . be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental in defining the limits and distribution of governmental power in our society."<sup>68</sup>

The parallel view of constitutional meanings is that they change along with changes in community value-orderings. On that view, it has seemed to Sandalow that an independent judiciary cannot plausibly compete with a decently well-functioning representative political assembly as the institution best situated to identify constitutional values and assign them their due weight in lawmaking. How, he has inquired, can courts, "*in the end*, set their judgment concerning the content of [contemporary societal beliefs and attitudes] against a deliberate and broadly based political decision[?]"<sup>69</sup> Harking back to the conception of political responsibility he had spelled out two years earlier,<sup>70</sup> Sandalow in 1977 again found that the outcomes of "broadly represen-

63. See *id.* at 310-12; Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1038-45.

64. See Sandalow, *Abstract Democracy*, *supra* note 7, at 1046-49, 1064-68; Sandalow, *Judicial Protection*, *supra* note 16, at 1180-81.

65. See Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1036-37, 1045-46.

66. See Sandalow, *Abstract Democracy*, *supra* note 7, at 330.

67. *Id.*

68. Sandalow, *Judicial Protection*, *supra* note 16, at 1184.

69. *Id.* at 1186 (emphasis added).

70. See *supra* note 46 and accompanying text.



tative” political processes are “as close as we are likely to get to the statement of a norm that can be said to reflect the values of the society.”<sup>71</sup> Also again, though, he found the premise of a “deliberate and broadly based political decision” to be variably applicable to various kinds and levels of lawmaking bodies. He suggested a hierarchy of reliability, running from decisions of “Congress after full debate or embodied in legislation recently enacted by most states” down through possibly maverick school boards and city councils.<sup>72</sup> Without locating a particular lawmaking process in the hierarchy, Sandalow thought, one could not say whether courts act counterdemocratically *or rather pro-democratically* by preferring their own readings of contemporary value-orderings to those implicit in the products of that particular process. For courts thus to act is antidemocratic where the particular legislative processes rank high. But when legislation comes out of lower-ranking processes — and that might include even Congress when its attentions have not been properly engaged<sup>73</sup> — then a court may advance rather than hinder democracy by forwarding its own readings of contemporary value orderings.<sup>74</sup>

Sandalow’s slight equivocation over “the democratic ideal”<sup>75</sup> now stands resolved. We see that democracy, for Sandalow, consists finally in a kind of outcome and not in a kind of institutional set-up or procedure. Democracy ultimately means a due correspondence between the value orderings wrought by representative government’s legislative acts and the value-orderings currently attributable to society or the people. Well-functioning representative institutions are, then, a means or medium of democracy, not the thing itself. If democracy is affronted by excessive subjection of representative government to judicial tutelage or restraint, that is not by reason of any intrinsic value ascribed to people deciding these things for themselves either directly or through representatives. The objection to judicial supremacy is not any right people have to active self-government, or any interest they have in political autonomy as such. The objection, rather, is that judicial supremacy “weakens law’s responsiveness to those who are governed by it.”<sup>76</sup> A democratic society indeed is defined as one that

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71. Sandalow, *Judicial Protection*, *supra* note 16, at 1187.

72. *Id.* at 1186-87. Sandalow’s rejection as “undemocratic” of the Court’s decision in *Roe v. Wade*, 410 U.S. 113 (1972), rests in part on his factual view that anti-abortion laws were not at the time contrary to any emergent state legislative consensus nor were they the product of state legislative heedlessness or inattention. See Terrance Sandalow, *Federalism and Social Change*, 43 *LAW & CONTEMP. PROBS.* 29, 35-36 (1980) [hereinafter Sandalow, *Federalism*].

73. See Sandalow, *Judicial Protection*, *supra* note 16, at 1188.

74. See *id.* at 1187; Sandalow, *Racial Preferences*, *supra* note 3, at 700-01.

75. See *supra* text accompanying notes 55-56.

76. See Sandalow, *Distrust of Politics*, *supra* note 54, at 459 (emphasis added).

makes heavy use of politically responsible institutions of representative government, but that is only because such institutions happen to recommend themselves as a chief means by which governmental policy is channeled into correspondence with “the interests and desires” — and one may as well add the values — “of those whose lives it governs.”<sup>77</sup>

Not that representative government is the only available means to that end, or in every contingency the most advantageous means. Believing that courts do have certain advantages of detachment and habituation to reasoned reflection,<sup>78</sup> Sandalow would want them available to challenge — suspensively, not irrevocably — not only the legislative products of local or otherwise politically not-so-responsible lawmaking bodies, but even congressional and statewide legislative actions to the extent that those appear to have been deviant, rash, or deliberately lax. The trick is for courts to find ways of framing their judgments in such cases in a way that avoids finality,<sup>79</sup> leaving them room to defer later to duly considerate, politically responsible processes coming out the other way. Judicial review thus would become a useful “step” in the “political process” of community-values expression, rather than a “means of imposing limits upon” that process.<sup>80</sup> All, then, would be well for democracy understood as correspondence between laws and contemporary community values — would be, indeed, about as good as it ever can get.

In sum, Sandalow’s 1977 contribution fleshes out the claim he started in 1964, and extended in 1975, for a process-based differentiation of the strictness of judicial scrutiny of the lawmaking products of various sorts of institutions that make law in our country.

## VII

We turn now to Sandalow’s rebuttal of the democratic positivist claim: that only from periodic acts of decided legislation by a country’s people may a court hope to draw democratically tolerable grounds for rejecting the legislative acts of representative bodies. The rejection came when the time was ripe, in the form of a review of the work of our foremost democratic-positivist theorist, Bruce Ackerman.<sup>81</sup> The first ground of the rejection was the seeming rank empirical failure of

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77. *Id.* at 468. Sandalow speaks in this sentence of “politics,” not “representative government.” But context makes clear that “politics” refers to conduct of the “political process” of representative government.

78. See Sandalow, *Judicial Protection*, *supra* note 16, at 1178.

79. See *id.* at 1186.

80. Sandalow, *Distrust of Politics*, *supra* note 54, at 447 n.4; see also Sandalow, *Judicial Protection*, *supra* note 16, at 1186, 1189.

81. See Sandalow, *Abstract Democracy*, *supra* note 7.

democratic-positivist theory to match the facts of American constitutional history and practice — the point being, again, that American constitutional-legal content has undergone, over the years, alteration too drastic to be explained convincingly as a product either of formal amendment or of any honestly “judicial” process of interpretation of enacted constitutional texts.<sup>82</sup> Evidently, constitutional meaning has changed apace with unenacted, undeliberated, indigenously, and organically developed changes in basic community values reflecting seismic changes in basic community conditions — changes occurring mainly in the social background, not the political foreground.<sup>83</sup> To give you the flavor:

A mobilized citizenry did not arise to demand greater sexual freedom, but changing sexual mores . . . nonetheless led to substantial restrictions on governmental power to interfere with sexual conduct. A mobilized citizenry did arise to demand that government cease discrimination on the basis of sex, but it failed to persuade the People . . . Yet, changing societal attitudes toward the social role of women yielded constitutional limits on sex discrimination that are, at most, only marginally different from those that would have existed if the equal rights amendment had been adopted.<sup>84</sup>

In other words, if you seek a democratic source for legitimate constitutional law, you may find it in the social background, even if not in the political foreground. So far as concerns the manufacture of constitutional-legal content, it is in the background, not the foreground, that the *demos* ultimately works its will: organically, nonfocally, nondeliberately, nonlegislatively, through the seismic movements that countless people’s actions produce over time in the social situations, needs, possibilities, and sensibilities that give rise to community values.

This seems a direct rejection of Ackerman’s view. In a democratic country, Ackerman believes (as accurately reported by Sandalow), constitutional adjudication must mean application of “*decisions made* by the People on those occasions when they have *spoken*, whether or not they have embodied their will in amendments adopted pursuant to the procedures prescribed by Article V.”<sup>85</sup> But then how discern that the People have spoken? The People, after all, are never corporately or instantaneously observable.<sup>86</sup> They are counterfactual, an idea of populist-democratic reason. Nevertheless, Ackerman maintains, the idea of them is capable of being approximately represented by time-

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82. See *supra* text accompanying notes 63-65.

83. See Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1046-49.

84. Sandalow, *Abstract Democracy*, *supra* note 7, at 324-25; see also Sandalow, *Federalism*, *supra* note 72, at 29-30.

85. Sandalow, *Abstract Democracy*, *supra* note 7, at 315 (emphasis added).

86. See generally EDMUND S. MORGAN, *INVENTING THE PEOPLE* (1988).

extended courses of political events.<sup>87</sup> Sometimes, Ackerman says, a course of events can disclose the existence of a “mobilized majority” in favor of some notable shift in the country’s officially recognized political orientation and practice — a majority of the populace, but counted by giving special weight to the fraction of them that in its address to the pending question is focused, persistent, informed, deliberate, public-spirited, and, finally, deeply persuaded. An Ackermanian “mobilized” majority is a clear and strong, sustained and committed numerical majority — one that arises, consolidates, and persists over a time during which the matters in question are publicly controverted at a high level of energy, earnestness, and concern.

Ackerman’s democratic ideal is one of decided, if nonformal, higher law-speaking by the People, made effective on ordinary lawmaking by courts exercising powers of judicial review. There is harmony, up to a point, between this ideal and an ideal conception of democracy as correspondence-in-fact of legislative value-orderings to contemporary community values. The harmony fails to the degree that contemporary community value-orderings may have left behind the ones expressed by the most recent episodes of higher-law speaking by the People, which may have occurred some years ago.<sup>88</sup> Still, so far as I can see, Sandalow offers no express conceptual or moral objection to Ackerman’s democracy-based demand for the subordination of government operations to the People’s most recent, nonformal, higher-lawmaking acts. He merely finds it empirically vapid to the point of uselessness for judges conscientiously aiming to keep within the bounds of the adjudicative function. Where Ackerman sees clearly marked elevations of focus and public-spiritedness in the People’s political participation during his designated “constitutional moments,” Sandalow sees no way for a court to determine whether popular political actions over any given passage of time evince any exceptional degree of deliberation or public spirit.<sup>89</sup> Where Ackerman claims a sufficiently clear and specific higher legislative content in the People’s agitations over Reconstruction and the New Deal, Sandalow sees endlessly debatable complexity and ambiguity<sup>90</sup> — or else, if clarity, then again clarity only at a uselessly high level of abstraction.<sup>91</sup> “The People,” writes Sandalow, have “decided too little to nourish judicial

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87. In regard to this statement and the balance of the paragraph, see Frank I. Michelman, *Thirteen Easy Pieces*, 93 MICH. L. REV. 1297, 1312-13, 1314 (1995), and sources cited.

88. See Frank I. Michelman, *Constitutional Authorship by the People*, 74 NOTRE DAME L. REV. 1605, 1624-25 (1999).

89. See Sandalow, *Abstract Democracy*, *supra* note 7, at 326-30.

90. See *id.* at 318-25, 330-36.

91. See *id.* at 325.

judgment on the issues that arise during the long periods of 'normal politics.'"<sup>92</sup>

## VIII

According to Sandalow's argument, democratic-positivist justifications of judicial review simply can't withstand the hard facts of temporal change in judge-declared constitutional-legal doctrine. The same facts also, in Sandalow's view, defeat the sort of "rights-foundationalist" justification that has come to figure as a kind of opposite to democratic positivism.<sup>93</sup>

Start with commitment to a "democratic ideal" having these as its three "central premises:" that "law should be responsive to the interests and values of the citizenry,"<sup>94</sup> that it should have "the consent of the governed,"<sup>95</sup> and that "in the long run" it will be thus responsive, and have this consent, "only if lawmakers are amenable to popular control through ordinary political processes,"<sup>96</sup> affording the governed "active and continuous participation . . . either directly or by representation."<sup>97</sup> The democratic commitment, thus defined, appears to be compromised by any subjection of the legislative determinations of representative government to final and insuperable displacement by courts in the name of any values defined externally and antecedently to those very determinations, including so-called fundamental rights. The incursion on democratic rule nevertheless might be "tolerable," Sandalow allows, for the sake of securing due respect for certain values aside from democracy — liberty would be an example — assuming said incursion is clearly confined, leaving unscathed the main core of representative-governmental authority.<sup>98</sup>

But the judicial incursion on democracy will be neither warranted nor confined unless courts have a special ability to see and to say, more or less exactly, what the other values are and what limits they impose on democratic choice. Courts might be comparatively well positioned for such work, if the other values were once and forever fixed: Sandalow recalls sympathetically the view that the courts' "relative isolation from men and events and their commitment to the processes of reason" give them a certain kind of comparative institutional ad-

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92. *Id.* at 331-32.

93. *See* ACKERMAN, *supra* note 41, at 10-16.

94. Sandalow, *Judicial Protection*, *supra* note 16, at 1166.

95. *Id.* at 1168.

96. *Id.* at 1166.

97. *Id.* at 1178.

98. *Id.*

vantage.<sup>99</sup> The advantage vanishes, however, when we see the other values in their true light, as changing over time along with evolving “conceptions of the proper role of government in our society.”<sup>100</sup> As Sandalow puts the matter:

The question that Marshall answered [in *Marbury v. Madison*] was whether courts or legislatures should have final authority to resolve controversies about the meaning of a document whose content was (understood to be) fixed at the time of its adoption. The question today is whether courts or legislatures should have final authority to resolve controversies about the meaning of a document whose content evolves over time.<sup>101</sup>

And since the facts unmistakably show that the “contents” (meaning the meanings) of *our* “document” *do* evolve over time, we can’t defend judicial review as a marginal compromise of the democratic ideal for the sake of fundamental rights for all time fixed.

True, we could think in terms of fundamental rights without thinking of their content as being for all time fixed. Community values evolving over time could sponsor similarly evolving ideas about fundamental rights. But once we admit that constitutional law thus aims to reflect values understood as at all times evolving in the bosom of the community, then constitutional meaning, being not tied to any “*independently existing* principles of societal morality,” would not be fit for final resolution by politically nonresponsible judges overriding politically responsible legislatures.<sup>102</sup> No advantage then could be claimed for the detachment and impartiality of an independent judiciary, viewed as an umpire of democratic political struggle bounded by rules of the game in the form of non-transgressible individual rights.<sup>103</sup> If the rules of the game are changing rather than fixed, then surely, on democratic principles, determination of their content belongs in the hands of the players, a.k.a. the People.

Is all this so obviously so? Granted — by Ackerman and by me — constitutional content cannot plausibly be understood to be fixed as of the times of formal adoption either of the original Constitution or its textual amendments. Granted — by me, for the sake of argument — content can only plausibly be understood as changing continuously, through time along with changes in the social background. Sandalow seemingly wants to deduce from that premise the conclusion that constitutional contents do not and cannot pre-exist a court’s or legisla-

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99. *Id.* at 1178.

100. *Id.* at 1165.

101. *Id.* at 1165-66.

102. *Id.* at 1172 (emphasis added); *see also id.* at 1179-80 (extending the critique to the “suspect classification” branch of equal-protection review).

103. *See id.*

ture's decisions regarding them; that they rather must be *constructed*,<sup>104</sup> meaning created,<sup>105</sup> on the very occasions of deciding — in and by the very acts of deciding — what they are. If so, then indeed we must grant the clear institutional advantage to the politically responsible legislature over the independent judiciary.<sup>106</sup> But why conclude that it is so? The premise of constantly evolving value-orderings does not support the conclusion of all-and-only “constructed” value-orderings, if by that we mean orderings that come into being only in and through the process of a court's or legislature's deciding or declaring what they are.

True, there is a sense in which anyone's report or rendition of contemporary society's up-to-the-minute basic value-orderings must involve the reporter in making “choices” that the community itself has not “made” and never will make.<sup>107</sup> The reporter, no doubt, will be required to choose, in the sense of identify, the best alternative “construction” from a number of competing reasonable “constructions,” meaning interpretations, of the societal value-orderings implied by some historical series of political and other social happenings.<sup>108</sup> But someone exercising that kind of *interpretative* selection or “choice” — granted that the choice is not deducible from the language or history of any particular documents, or from any other form of certified evidence<sup>109</sup> — need not and indeed cannot be regarding the object of interpretative choice as one that is brought into existence (“produced”) only by the choice she will make.<sup>110</sup> To the contrary, to interpret or “construe” an object is to position that object as one about whose best description or accounting people can disagree intelligently, and thus as one whose best description or accounting is independent of what anyone will say about it.<sup>111</sup> On Sandalow's own word, there are always “elements of reason . . . intrinsic to [a] process” of selecting the best interpretive account of contemporary community values.<sup>112</sup> The door thus remains logically quite open to a contention that an independent judiciary has a better chance of saying worthy things about constitu-

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104. *Id.* at 1170, 1185.

105. *See id.* at 1171-72. *But see supra* text accompanying note 6.

106. *See* Sandalow, *Judicial Protection*, *supra* note 16, at 1182 (“If the court is to judge from within an evolving tradition . . . it lacks the fixed point of reference that is necessary for deciding whether [community] values were given their due.”).

107. *Id.* at 1171.

108. *See id.* at 1168-70.

109. *See* Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1054.

110. *See* Sandalow, *Judicial Protection*, *supra* note 16, at 1173 (asking why, “[i]f constitutional rules are a product of judicial choice,” they should “be permitted to control” the acts of representative government).

111. *See generally* RONALD DWORKIN, *LAW'S EMPIRE* (1986).

112. Sandalow, *Constitutional Interpretation*, *supra* note 5, at 1055.

tional meanings, equated with contemporary community values; than a politically implicated, incumbent legislature has.

## IX

What logic admits, however, common sense and experience may reject. We cannot fault Sandalow for doubting that the latter give us much reason to think that small, inevitably somewhat elite or otherwise narrow judicial bodies are going to do better with assessments of contemporary community values than we may expect from the operations of state and federal legislatures working decently well. To give courts a plausible comparative advantage, we must put a substantial conceptual distance between the supposedly governing values and contemporary social life — as we would do if we sourced the governing values either in a fixed and transcendent table of rights or in somewhat remotely past political enactments. Sandalow, however, has denied the descriptive accuracy and the normative adequacy of both those sorts of accounts of American constitutionalism.

His grounds for rejecting them have been multiple and far from paltry. First, there have been the plain facts of American constitutional history and the just-as-plain limits on what plausibly can be made of these facts. In short, while history belies the fixity of constitutional meanings that moral-universalistic rights-foundationalism would imply, historiographical means are not up to the task of showing the American People “speaking” at the times and in a manner that credibly could support judicial review in the guise of mere enforcement of the law the People have spoken.<sup>113</sup> A second ground for rejecting time-bound democratic positivism is the pragmatic one: principles enacted years ago will not deal intelligently with current issues and problems, and the formal amendment scheme cannot sustain the burdens of transition.<sup>114</sup> And a second ground for rejecting timeless rights foundationalism is the demand, issued in the name of democracy, that the law’s value-orderings should be determined by politically responsible institutions.<sup>115</sup>

## X

Behind Sandalow’s double-edged critique of the democratic-positivist and rights-foundationalist approaches to constitutional adjudication, motivating it, lies a premise never quite in so many words laid down and defended: that the point of constitutional adjudication is the effectuation of some set of values, if not sheerly for the sake of

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113. See *supra* Parts VII-VIII.

114. See *supra* note 38.

115. See *supra* notes 55-56 and accompanying text.



those values then for the sake of due respect for the human beings, be they the People or the Framers, whose values they are. It is only that premise that gives point to Sandalow's effort to demonstrate that the governing values must be those right now held by contemporary society. But the premise is a contested one. It is one thing to conclude that both a democratic-positivist constitutional practice and a rights-foundationalist practice are noncredible, given both what history shows and the limitations on what it is able to show. It is quite another thing to claim that a country needs to have, or in any way benefits from having, a practice of constitutional-norm recognition geared to *anyone's* decided account of *any* set of values.

There remains, after all, to be reckoned with the view — call it constitutional formalism — that what a country relevantly needs, and all it relevantly needs, is to have in place an effective, nigh-universally recognized and accepted system of positive legal ordering, and that the point of constitutional adjudication simply is to uphold the formal rule of positive law. Thus if ordinary legislative enactments can be shown to violate norms that can, with fair certainty and near-unanimity, be derived by strict and formal legal reasoning from enacted constitutional texts, let them be stricken. Otherwise, leave them be.<sup>116</sup> No doubt that would leave the set of judicially operative constitutional norms quite shrunken by comparison with what we are used to or with what Sandalow-style, contemporary-community-values constitutionalism would deliver.<sup>117</sup> But that would seem exactly the conclusion devoutly to be wished by an ideal conception of democracy as majoritarian process, as good conduct under smoothly running majoritarian institutions of representative government.

What is it, then, that motivates Sandalow's attachment to a more robust conception of constitutional law drawn from active determinations of the contemporary lie of community values? Evidently, it is Sandalow's deeper conception of democracy as outcome and not as process — his conception of democracy as consisting in correspondence between the value orderings wrought by representative government's legislative acts and the value-orderings currently held by society or the people. I suggested earlier<sup>118</sup> that the outcome conception of democracy (outcomes corresponding with community values) and not the "process" conception (politically responsible, representative institutions get to make the final decisions) must have been the deeper one for Sandalow, and now we can see an additional ground for my suggestion. A majoritarian process conception seems to fit happily

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116. See Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

117. See, e.g., Sandalow, *Freedom of Speech*, *supra* note 38.

118. See *supra* text accompanying notes 75-77.

with a constitutional minimalism that Sandalow refrains from embracing. The outcome conception, by contrast, fits aptly with the proposition that constitutional meanings are to be drawn, by whomever draws them, from analyses of contemporary community values.

## XI

We are left with a remarkable theory of judicial review, one that appears to be unique among contemporary contenders. On the one hand, the theory rejects both interpretative formalism and interpretative minimalism. Far from calling for judicial retirement from the field,<sup>119</sup> the theory prescribes what only can be called an activist judicial role. It cuts courts loose from bindings either to constitutional texts or to the implications of historically verifiable, higher-lawmaking events. At the same time, though, it rejects a timeless, moral-universalist grounding for constitutional law. Indeed, it rejects judicial supremacy altogether — although not judicial activism — by demanding that the courts seek ways to purge their constitutional-legal pronouncements of finality vis-à-vis legislative operations measuring up to an achievable standard of political responsibility. In sum: (1) courts as courts — courts distinct from legislatures — have an important job to do in the project of constitutionalism; (2) that job does not, however, consist in overriding duly considered, legislatively enacted value-orderings; (3) and yet it does consist in bringing constitutional values effectively to bear on political lawmaking; and finally (4) neither the People's higher-lawmaking acts nor the timeless truths of morality provide the courts with standards by which to proceed in doing that job.

How can such a mix of conclusions possibly make sense and hold together? It can and does, if and only if you agree with Sandalow that (a) the democratic ideal — meaning, in the last analysis, the American constitutionalist ideal — boils down to keeping government operations, lawmaking included, in tune with basic, contemporary community values; and (b) in the practical execution of that ideal, courts can play a useful, assistive role to the country's more politically responsible institutions by lodging into the process, suspensively only, their legally informed and legally reasoned assessments of mismatch between historic American constitutional values and particular acts of government.

I have reservations. They pertain mainly to the conception of constitutional democracy as background democracy, as the due responsiveness of governmental outcomes to the basic values of the surrounding society. There is more to democracy than that, I believe,<sup>120</sup>

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119. As, for example, does TUSHNET, *supra* note 12.

120. See works cited *supra* note 60.

and there must be on the outspokenly liberal-individualist views put forth by Sandalow in some of his later writings, especially given the strong assumptions of value pluralism we also find in them.<sup>121</sup> In fact I would not bet the ranch that Sandalow's "contemporary community values" will not turn out, on extended, close examination, to be stand-ins or guideposts for certain transcendent-universal liberal verities. That would be, however, a story for another time.

## XII

Constitutional law is serious stuff. What people think about it and accordingly do about it can make a serious difference.<sup>122</sup> To say so is not yet to deny that the best way to deal with constitutional law might be to refuse to take it seriously. But don't try telling that to Terry Sandalow. Terry stands firm among those who cannot help responding to serious matters by trying to think and argue them through, step by step.<sup>123</sup> By his example, he sets us a daunting standard of rigor, study, plain speaking, nerve, and revulsion from cant. A good thing, too, even if we cannot always, or ever, quite measure up.

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121. See Terrance Sandalow, *A Skeptical Look at Contemporary Republicanism*, 41 FLA. L. REV. 523, 525, 528-34 (1989); Sandalow, *Distrust of Politics*, *supra* note 54, at 453-55, 457, 468.

122. I doubt this is controversial. Consider, for example, the difference possibly made by what Abraham Lincoln thought and did about constitutional law. See Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We Care What the Answer Is?* (David C. Baum Memorial Lecture Series on Civil Liberties and Civil Rights, Univ. of Ill. Law School, Apr. 5, 2001) (on file with author).

123. I do not mean he never writes with irony, wit, or a twinkle in the eye. See, e.g., Terrance Sandalow, *The Supreme Court in Politics*, 88 MICH. L. REV. 1300, 1300-03 (1990) (reviewing ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* (1989)).