CONSTITUTIONAL LAW

December 2, 2025

"Modern" Substantive Due Process

Based on the exchange between Tim Sandefur and Lawrence Rosenthal (February 2012):

Essay: https://www.cato-unbound.org/2012/02/06/timothy-sandefur/why-substantive-due-process-makes-sense/

Response: https://www.cato-unbound.org/2012/02/08/lawrence-rosenthal/not-so-fast-mr-sandefur/

Rejoinder: https://www.cato-unbound.org/2012/02/16/timothy-sandefur/come-side-prof-rosenthal-we-have-humility-prudence/

Timothy Sandefur, "Why Substantive Due Process Makes Sense"

- Since the New Deal, SDP has had bad connotations...
    - Often seen as a means by which (unprincipled?) judges impose their own preferences on legislative / popular majorities
    - Also associated with discredited / retrograde / right-wing ideas (e.g., the "Four Horsemen")
    - Shift has been towards procedural due process -- as long as procedures are followed, the courts' role is (generally) to defer to the legislature + executive in terms of the substance of laws (with a few specific exceptions, mostly defined by the Bill of Rights / 14th Amdt)

Sandefur disagrees...

- The guarantee that no person shall be deprived of life, liberty, or property "without due process of law" doesn't just guarantee procedural safeguards (like fair hearings or trials), but also a **substantive** guarantee: that some government actions are simply off-limits, even if procedures are followed

- "Law" must be more than procedural formality: it must be the exercise of government power under general, rational principles for the public good, not arbitrary, self-serving, or purely majoritarian commands

- If the legislature passes a law that is arbitrary or serves private interests rather than the public good, *that law is not "law" in the proper sense*

- Procedural due process is a subset of all due process:
    - A law imposing an official religion would be unconstitutional even if passed with proper procedures, because it violates deeper principles
    - Even where the Constitution does not explicitly prohibit a given statute, inherent or implicit limits on legitimate lawmaking mean some government actions remain forbidden

- Similarly, a "trial" that followed all relevant procedures but little fairness or reason (e.g., with a predetermined outcome) would not truly satisfy the Constitution's promise of lawful treatment

- He cites *Loan Association v. Topeka* (1876) and *Lawrence v. Texas* (1989)
    - In the former, the Court struck down an attempt to take money from one private group and give it to another (more powerful) one
    - In the latter, struck down law banning private, consensual homosexual conduct
    - Refers to the latter as *"the legal enforcement of private bias"*
    - In his view, neither of these government actions, despite being enacted in procedurally correct ways, are properly "laws"

Implications:

- "Due process of law" is a ***substantive safeguard*** against arbitrary government action, not just a guarantee of fair procedures

- For a legislative enactment to be a "law," the ***content of the law must be justifiable*** under broader principles of fairness, reason, and the public good

- Applying this doctrine requires ***normative and often difficult judgments***: deciding what counts as a "rational, general, public principle" and what is "arbitrary or self-serving"

- This means that ***courts*** play a crucial role in policing not just whether the government followed procedures, but whether the laws themselves are legitimate uses of governmental power

- ***Ideological valence***: Legislatures can use their power to do both "left" and "right" things, so SDP can "cut both ways"

Questions:

1. What do you think of "if it's not done for good reasons, it isn't a law at all"?
2. What does this imply about the relative power of judges vs. legislators / executives?
3. Sandefur is conservative, writing in 2012; is the implicit argument about ideological majorities a bit time-bound? Do you think he'd say the same thing in 2025?

Rosenthal, " Not So Fast, Mr. Sandefur"

Lawrence Rosenthal disagrees with Sandefur...

- About that "law" thing...
    - Ordinary + constitutional usage treats as "law" any rule properly enacted according to procedural requirements, even if we regard it as unjust, unfair, or arbitrary
    - If Congress passes a bill, and the president signs it (or Congress overrides a veto), the Constitution says it "shall become Law." In that sense, "law" does not imply "just" or "reasonable" in a substantive sense
    - restricting "law" only to morally or rationally just statutes — is contrary to how we normally use the term, and inconsistent with constitutional practice

- Defining "law" that way won't necessarily lead to fairer / more just outcomes
    - E.g., the law in *Lawrence v. Texas* might actually qualify as serving a "public, rational principle" under Sandefur's standard -- e.g. promoting procreative heterosexual relationships -- so calling it "arbitrary" is far from obviously correct
    - More generally, many contested or morally charged laws might survive, undermining the claim that his version of substantive due process systematically protects liberty

- Now, about "substantive" due process...
    - Historical and textual record is ambiguous and does not clearly support a broad "substantive due process" doctrine
    - None of Sandefur's historical examples (e.g., *Calder v. Bull*) used the due process clause to assert a general limitation on legislative power
    - At the time the Constitution was framed, the prevailing view among influential commentators (e.g. William Blackstone, Joseph Story, James Kent) treated due process as a *procedural* guarantee only

- And those judges, oy...
    - Allowing judges to strike down laws on the basis that they aren't backed by a "rational, general public principle" essentially gives them a permanent veto over legislation -- undermining democratic accountability
    - Judges are bad at making policy...
        - They generally lack democratic legitimacy, institutional capacity, or expertise to make broad policy judgments
        - Many issues (e.g. environmental regulation, taxation, zoning, social policy) involve multidimensional trade-offs and complex social judgments

where lawmakers — who are accountable to voters — are better suited to decide
    - Judicial precedents are "sticky" -- the cost of judges making mistakes will potentially be felt longer than one made by a legislature

Implications:

- ***Defining "law" that way*** runs counter to how we typically understand it, and invites concerns over legitimacy
- Once you erase the procedural/formal definition of "law," and substitute a normative standard ("rational, public-interest law"), you ***invite deep uncertainty, subjectivity, and judicial activism***.
- ***What counts as "public interest" may vary radically*** across judges, eras, and social contexts.
- Could lead to "***judicial tyranny***"...
- Protecting individual rights does not require granting judges carte blanche to veto legislation; it can and should be done through the *constitutional text* (especially explicit limits), stable *precedent*, and ***democratic processes***

Questions:

1. Who's version of "the law" makes more sense?
2. Empirically speaking, how big of a concern is "judicial tyranny"?
3. Rosenthal is on the (political) left, and wants to protect rights; why (in 2012) might he be less concerned about legislatures and more about courts?

Timothy Sandefur: "Come to My Side, Prof. Rosenthal - We Have Humility and Prudence!"

His rejoinder to Rosenthal...

- True humility and prudence demand a robust judiciary -- to check the "brazen, often imprudent, passion-driven actions of legislatures"

- On "prudence":

    - Democratic majorities often do not "reason right about the means of promoting the public good"
    - Thus, "guardians of public interests," (courts) must sometimes step in to restrain majoritarian excesses
    - "Law" demands non-arbitrary, reasonable, fair, general, public-oriented rules
    - When legislatures enact statutes that fail these standards (e.g., favoritism, rent-seeking, expropriation framed as "public use"), courts should strike them down

- On "humility":

    - A deferential judiciary -- one that routinely upholds legislative action unless extremely unreasonable -- has historically allowed massive government overreach (e.g., in *Kelo v. New London*)
    - Errors by an over-deferential judiciary are often more harmful than "errors of over-enthusiastic judicial review," because legislative mistakes inflict lasting harm on individuals, while judicial overrides temporarily delay -- rather than eliminate -- the political process
    - Judicial review under substantive due process is thus part of the constitutional equilibrium, not a departure from it

Questions:

Has he convinced you that an unjust / arbitrary / etc. enactment is not a "law"?
When do (and don't) judicial decisions merely "delay" the political process? (staturory interpretation vs. judicial review...)

General questions:

- Is the distinction between "substantive" and "procedural" so dichotomous?
    - All procedural protections encode substantive judgments (e.g., what counts as fairness)
    - All substantive rights have procedural dimensions

- Sandefur is arguing for a particular form of "natural law" republicanism, one where there are fixed / immutable conceptions of what is and is not "fair," "arbitrary," etc.

    - What's the practical effect of this?
    - What does it bake into the process?

- What do the empirics say?

    - On the one hand:
        - Legislatures routinely pass arbitrary, interest-group-driven laws
        - Regulatory agencies often act with minimal democratic oversight
        - Electoral accountability is weak, uneven, and highly sensitive to partisanship and information deficits
        - Legislatures are often *structurally biased* against minorities

    - On the other hand:
        - Courts have limited actual power (responsive / reactive, negative power, powerless absent conflict, etc.)
        - Many courts are in fact responsive (elected judges, public opinion effects, etc.)