Nomocracy in Politics

"Shall We Be Ruled By Libertarian Philosopher-Judges?" A Review of Timothy Sandefur's *The Conscience of the Constitution*

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Libertarian legal scholar Timothy Sandefur endeavors in his latest tome to lay out an alternative judicial approach to the Progressive-inspired free rein for Congress and, when it comes to economic rights, for state legislatures under which we have lived since the Revolution of 1937. His theory, in which a particular conception of natural right should be considered judicially enforceable, would replace the Progressives' beloved centralized, unlimited democracy with a regime in which judges exercised far more power. While perhaps appealing in the abstract, this proposal suffers from serious deficiencies.

Chief among those deficiencies is that Sandefur, citing Harry Jaffa, holds the Declaration of Independence to be the touchstone of constitutional correctness. In his 1791 "Opinion on the Constitutionality of a National Bank," Secretary of State Thomas Jefferson had a different idea:

I consider the foundation of the Constitution as laid on this ground: That "all powers not delegated to the United States, by the Constitution, nor prohibited by it to the States, are reserved to the States or to the people." [XIIth amendment.] To take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition.

What Jefferson here called the "XIIth amendment," which was before the states for their ratification as he wrote, would become known as the Tenth Amendment when the states ultimately both refused to ratify one of the twelve amendments Congress had proposed and delayed ratifying another. Where Jefferson understood "the foundation of the Constitution as laid on" the Tenth Amendment, Timothy Sandefur mentions the Tenth Amendment almost not at all.

How to account for this? Is Sandefur right in saying that Jefferson's Declaration is the Constitution's "conscience," or was Jefferson himself right that the chief element of the federal system was the principle that the Federal Government had only the few powers that the Constitution had given it, with the rest of government power being reserved to the states? In

short, did Thomas Jefferson somehow misapprehend his own central role in founding America, mistakenly declining the credit he rightly deserved, or has Sandefur exaggerated the importance of Jefferson's most famous writing?

Put that way, the answer seems obvious. Let us examine Sandefur's text with the goal of verifying our intuition's accuracy.

Sandefur's subtitle indicates the game he wants to play: he wants to elevate "the right to liberty" to primacy in America's constitutional order. He would do this by showing that American statesmen at the time of the American Founding made Lockean-sounding statements about natural rights. Does the tendency of leading figures at the time of the Revolution to sound Lockean themes mean that federal judges are entitled within the Federal Government, federal officials are entitled against the state governments, and state judges are entitled within the state governments to strike down otherwise constitutionally unobjectionable policies on the ground that they run contrary to a "right to liberty?" The federalism principle that Jefferson highlighted in that famous 1791 essay implies that the Constitution did not empower the Federal Government to assume more powers than what had been clearly delegated to the Federal Government, because all such powers rightfully belonged to the states. Sandefur's teleocratic position, to the contrary, would empower the Federal Government to act as censor of state policy.

Sandefur's idea of a certain kind of Lockean founding also encounters another obstacle: as Mark David Hall recently demonstrated in a fine biography of Connecticut Founder Roger Sherman, natural rights/natural law talk was not purely, or perhaps even primarily, a Lockean argot at the time of the Revolution. Far more Americans subscribed to Calvinism than to any other creed in America in the late eighteenth century, and Calvinism included the ideas of natural right, the right of revolution, etc., just as Lockeanism did. In fact, Hall speculates that Calvin influenced Locke, so that one might nearly say that Locke was a Calvinist on this score. If, then, we are to read the Constitution through a natural-law lens because that is the way the people meant for it to be read when they ratified it, there is reason to doubt that an overwhelmingly Protestant, highly Calvinist population understood natural right in the way that Sandefur wants today's officials to understand it.

Sandefur's claims about the Declaration's place in American history suffer from a yet more basic weakness than this: when he says, for example, that "the Declaration of Independence. . .created the United States as a political unit and defines the terms of its sovereignty" (p. 2), there is nothing to support him. Even the Declaration itself does not say that it is creating anything. It does not say that there is "a political unit" in North America, but echoes Congressman Richard Henry Lee—who himself used the language he had been told to use by the Virginia Convention—that the former colonies "are and of right ought to be free and independent states." Not a single sovereign entity, but states, in the plural. Since Machiavelli introduced the term into modern political science, a "state" has been a sovereign entity.

The Declaration, like other documents of the same genre, made an announcement; it did not establish the states' independence. Like other declarations, it had no legal effect—pace Sandefur. (pp. 14–15) Sandefur would have known this if he had read the outstanding scholarly treatment of the subject, the late MIT professor Pauline Maier's classic *American*

Scripture: Making the Declaration of Independence. For some reason, not only does he not grapple with her argument, but Sandefur neither mentions nor even cites Maier's book, as any historian or political scientist would have done.

Of course, one need not have read Maier's book to know that, during the Revolution, no one would have said that the Declaration of Independence founded anything. It had not been ratified by the people, nor had it been adopted by anyone with authority to speak for the people in elaborating a political philosophy. Jefferson later said that in penning the Declaration's first draft, he had hoped to capture the American mind, but his doing so was only for explanatory purposes, or by way of preamble. The congressmen, each representative of a state, had been instructed either to declare independence (in the Virginians' case) or to join in the cause in case other states did (most of the other congressmen). That was all.

If it were needed, further evidence disproving Sandefur's claim that the Declaration made the states independent and melded them into one sovereignty could be found in the fact that by the time it was promulgated, Virginia's first republican governor, Patrick Henry, had been in office for nearly a week. He was inaugurated on June 29, 1776. Virginians of that day, and at least through the state constitutional convention of 1829–30, dated their Commonwealth to May 15, 1776, when the revolutionary Convention adopted resolutions for a declaration of rights, a republican constitution, federal relations, and treaty relations.

All of this shows that not liberty, but federalism is the federal Constitution's underlying assumption—just as Jefferson said in 1791. Sandefur gets this wrong throughout the book, viz., "Even the requirement that a bill must receive a majority vote in both houses before it can become law makes sense only if the Constitution's authors intended a presumption in favor of liberty, with restrictions only permitted for good reasons." (p. 11) One supposes his point to be that provisions making legislation more difficult are consistent with a general fear that legislation will infringe on liberty. Of course, by that reasoning, bicameralism also makes perfect sense if, as James Wilson said in his famous Statehouse speech a couple of weeks after the Philadelphia Convention of 1787 ended, the central government only has a few enumerated powers, with the rest reserved to the states—and if there was a general fear that legislation would infringe on local control.

In his book's second chapter, Sandefur attacks Jefferson's understanding head-on. "The States' Rights Party," he says, "held that sovereignty resides primarily in each separate state and that the federal government's powers are delegated to it by the states, not by the people." (p. 33) Here we see evidence that Sandefur's training is as an attorney, because he echoes the claims made by Chief Justice John Marshall in a string of cases—cases that form the germ of any constitutional law class. In reality, this distinction between the states and the people is one that was made by *opponents* of the federal model. As for proponents of that understanding, James Madison explained in his "Report of 1800" (unmentioned in Sandefur's book) that the word "state" can refer to a state's territory, a state's government, or a state's sovereign people, and when Jeffersonians said that the states created the Federal Government, they meant "state" in that third sense: the sovereign people of each state ratified the Constitution.

Sandefur denies that the states created the Federal Government. Unfortunately for him, readers of his book can be expected to be familiar with Article VII of the Constitution, which says that the Constitution will go into effect among the ratifying states as soon as nine states have ratified. So who ratified? The states, in Madison's sense of the word "state"—the sovereign people of each state. Sandefur never mentions Article VII, but instead quotes John Marshall, Daniel Webster, and a bevy of other politicians hostile to it who mischaracterize the states'-rights position. Anyone who would like more detail should consult my JAMES MADISON AND THE MAKING OF AMERICA (New York: St. Martin's Press, 2012), which develops these facts in considerable detail. It also provides chapter and verse in refutation of Sandefur's claim that "Nobody ever said" that the peoples of the separate states were ratifying the Constitution. To the contrary, no one said at the time that only one great American people was ratifying the Constitution; in light of Article VII, such a statement would have been absurd.

One has the impression, in reading Sandefur's description of the history of the Early Republic, that he is completely unfamiliar with even its basic outline. Thus, for example, he says, "It was not until long after ratification, under the influence first of Thomas Jefferson's 1798 Kentucky Resolutions and then John C. Calhoun's philippics during the Nullification Crisis of the 1830s, that Southern political leaders devised a states' rights [sic] theory that resurrected the idea of a league of sovereignties." (p. 36) This is simply mistaken. In 1788, Federalists assured the Virginia Ratification Convention that Virginia would be one of thirteen parties to the federal compact, which would give the Federal Government only the powers "expressly" enumerated, and that they could reclaim the powers they were granting it in case those powers were abused. In 1790, Virginia's General Assembly responded to Congress's Hamiltonian legislation assuming state debts with a formal resolution denying that Congress had power to do such a thing and insisting that Federalists live up to their vow that Congress would have only the few powers enumerated in the Constitution. The Old Dominion, they warned, would maintain its vigilant attitude toward federal usurpation. In 1791, the states ratified a Bill of Rights whose stated purpose (found in its preamble) was to clarify limits on the powers that had been granted to the Federal Government. In the House of Representatives that year, James Madison developed the argument that would be made famous by Secretary of State Thomas Jefferson later in the year: Congress had no power under the Constitution to charter a bank, because the states had delegated the Federal Government only the enumerated powers via the Constitution.

In 1794, Congress responded to *Chisholm v. Georgia* by sending the states the Eleventh Amendment for their ratification. That amendment reiterated the tacit principle that Article III's enumeration of classes of cases over which federal courts could exercise jurisdiction was exhaustive—that is, that the states had given the federal government only specified judicial powers. That amendment was ratified in 1798, the year that Virginia and Kentucky adopted the famous Republican *pronunciamientos* against unmoored federal policy-making. Contrary to the myth that Sandefur seems to have accepted, Virginia's version was every bit as clear as Kentucky's in insisting that the states were the parties to the federal compact, that they had given the Federal Government only certain powers, and that in case the Federal Government adopted an unconstitutional and dangerous policy, "the states have the right, and are in duty bound, to interpose" (as Madison put it for Virginia). Note that here Madison uses the word "state" to refer to the state *government*.

Why would Sandefur be at pains to deny the plain facts of the American Founding? Perhaps because he is unfamiliar with them, but more likely because he dislikes the principle of federalism. To his mind, one of the best features of the American regime today is that federal judges have power, if only they would use it, to veto state laws he dislikes.

Sandefur denies that this is what he wants. Rather, he says that "natural law" is perfectly clear, if only federal judges had sense to apply it. He describes Justice James Iredell's powerful objection to this idea in *Calder v. Bull* (1798), which was that no two men agreed concerning the content of natural law, and so when they attempted to apply it they must be left simply to say that the law the legislature had passed struck them as contrary to natural justice. (p. 89; 3 U.S. 386) Iredell was simply wrong, avers Sandefur: "The philosophical propositions on which the Constitution rests are set forth in the Declaration," he says, and that means people must not be hindered in doing what they want in an arbitrary way.

What evidence has Sandefur provided for this claim that the basis of the Constitution is the Declaration? Citations to Harry Jaffa, whom he parrots quite a lot. One might have hoped that he would provide evidence that Federalists of ratification days had said, "Ratify this, and federal judges will strike down statutes inconsistent with the Declaration." After all, James Madison, Thomas Jefferson, and other Early Republic statesmen said that the meaning of the Constitution was to be found in the explanation provided by Federalists to the ratification conventions. The reason Sandefur does not do so is that there are no such statements for him to provide. In the three volumes of *The Documentary History of the Ratification of the Constitution* (hereafter *DHRC*) on ratification in Virginia, for example, no one ever said anything about measuring the Constitution's goodness by the standard of the Declaration, let alone about an imperative to read the Constitution in light of the Declaration. Like Maier's classic account of the Declaration, the *DHRC* goes unmentioned in Sandefur's book.

Even if the Federalists had said that, such statements would provide almost no guidance anyway. When Jaffa says the Declaration provides the Constitution's principles, he has in mind only *some* of the Declaration's principles. The Declaration is, after all, a justification of secession. For Sandefur, secession is a horror to be avoided.

His claim about the relationship between the Declaration and the Constitution is the basis of Sandefur's advocacy of "substantive due process." This is the judge-made notion that the Due Process Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment are not solely about process, as one might have thought a process clause would be, but are also about empowering judges to strike down laws that violate those judges' philosophical principles.

Substantive due process was first employed by the Supreme Court in the 1857 case of *Dred Scott v. Sandford*. Sandefur concedes this inconvenient fact, but he adds that we should ignore it. To my mind, that case is paradigmatic of a regime in which unelected, unaccountable judges are free to let their policy whims run riot. As Justice Iredell warned in 1798, that is what allowing judges to enforce their own ideas of goodness and truth will entail.

Sandefur's book is in the end, then, entirely results-oriented. In that, too, it is typical of historical and philosophical scholarship by lawyers. Sandefur's idea that a particular version of natural law underlies the Constitution provides a rationale judges might use to veto laws. . .well, seemingly laws that Sandefur dislikes. Which means simply laws that the judges dislike.

Thomas Jefferson went to his grave lamenting the Marshall Court's several decisions instantiating Hamiltonian principles in constitutional law. The people had been sold the Constitution on opposite principles, the former president lamented, and then had voted the Federalist Party into non-existence because it advocated Hamilton's principles, and still Marshall twisted the Constitution in the direction of more centralized, less republican government. Although his book purports to elevate Jefferson's principles, then, Sandefur actually advocates a model that Jefferson vehemently, desperately opposed. Oddly, he seems to have persuaded himself that he is a thorough Jeffersonian. Beware lest you join him.