The Volokh Conspiracy » A small correction for Sandefur

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Timothy Sandefur produces important research on economic liberty. I'm pleased that the Independence Institute, where I work, recently hosted an event for him to promote his book. I'm also happy that he has become part of the team of Cato Institute writers, which I have been part of since 1988. As a contributing editor of *Liberty*, I have followed his writing since he was a law student. And of course I commend Eugene for inviting him to guest-blog for VC. However, one item in his blogging appears to me to be erroneous:

> When talking about "substantive due process," as I've been doing, one must address a number of myths about that theory that, sadly, are so common that many law students are never even taught what the theory even means.
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> Here is a good example: "the Supreme Court has never in its entire history tried to derive [substantive due process] from the text of the Constitution." Nelson Lund & David B. Kopel, *Unraveling Judicial Restraint: Guns, Abortion, and the Faux Conservatism of J. Harvie Wilkinson III*, 25 J.L. & Pol'y 1, 3 (2009). Now, whether one accepts or rejects the idea of "substantive due process," this claim is just false. The Supreme Court had repeatedly explained how substantive protections arise from the Constitution's text.

The quote is not precisely accurate, and here, the lack of precision leads to a serious error. In the article that Sandefur cites, Nelson Lund and I were discussing and criticizing *Roe v. Wade.* After a quote from *Roe* about "the Fourteenth Amendment's concept of personal liberty," we then wrote: "This was presumably a reference to the doctrine of substantive due process, which the Supreme Court has never in its entire history tried to derive from the text of the Constitution."

Our statement as actually written was accurate. Sandefur supplies no example to counter our statement that "the doctrine of substantive due process" (that is, of selective incorporation, unenumerated substantive rights such as those in Meyer v. Nebraska and Roe v. Wade, and so on) has never been the beneficiary of a Supreme Court attempt to derive it from the text of the Constitution.

Instead of showing a case where the Supreme Court did what we had said it did not do (explicate a textual basis for "the doctrine of substantive due process"), Sandefur instead supplies two quotes from Supreme Court cases that did something else.

The first quote, from *Loan Ass'n v. Topeka* (1874) is little more than an asserted conclusion, albeit one I happen to think is correct. The block quote from *Hurtado v. California* (1884) provides a litany of things that are not "due process of law"; such as bills of attainder, or special laws enacted to favor or harm a particular individual or group. The *Hurtardo* quote presents a common nineteenth century view of "due process of law," with, at least arguably, hundreds of years of roots in American legal understandings. Some of the background of this thinking can be found in Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 Emory L.J. 585 (2009) and James W. Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315 (1999). Both authors trace the "due process of law" concept from Magna Carta's "law of the land" provision, through *Dr. Bonham's Case* (voiding a local monopoly on the practice of medicine) and its explication by Edward Coke, and to its understanding by the American colonists. This understanding (which might have been incorrect as a matter of English law) was adopted by the American Framers, and carried forward by antebellum state courts.

So yes, "due process of law," in a textualist sense, can require judicial action against even laws which may have been enacted under proper procedures, such as special legislation (e.g., taking property from X to give it Y). And, quite obviously, this traditional view of "due process of law," summarized in *Hurtardo*, has very little to do with "the doctrine of substantive due process." The former, text-based view, condemns special legislation; yet you can't use the modern Supreme Court's "doctrine of substantive due process" to attack a congressional statute that was enacted for the obvious benefit of one corporation, whereas such a challenge might be plausible under the "due process of law" principle of *Hurtardo*.

In short, Nelson and I did not voice any objection to the principle of "due process of law" as briefly explicated in *Hurtardo*. Instead, we claimed that the *Supreme Court's doctrine of substantive due process* (which is much more wide-ranging and dubious) has not been derived by the Court from the text of the Constitution. Hypothetically, it might have been possible to so derive at least some of the modern SDP decisions, but I suggest that the absence of any Supreme Court citations from Sandefur rebutting what we actually said is further support for our point.