Timothy Sandefur on the Conscience of the Constitution

Interviewed by Ari Armstrong

Timothy Sandefur is a principal attorney at the Pacific Legal Foundation who focuses on economic liberty. Recently I had the opportunity to interview him about his new book on the Declaration of Independence, his work at the Foundation, and related matters. —Ari Armstrong

Ari Armstrong: Thank you for taking the time to share your thoughts with us.

Timothy Sandefur: Thanks for having me.

AA: Your book, *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty*, was published early this year. How would you summarize its central arguments?

TS: I argue that individual liberty is the central value, the conscience, of the Constitution. The Constitution says in its very first sentence that liberty is a "blessing." But it doesn't say the same thing about democracy or about government in general. That is because the authors of the Constitution were building on a foundation of political philosophy, and that philosophy is articulated in the Declaration of Independence—that we are all properly equal before the law and have inalienable rights that no just government may infringe. This principle is the guidepost—the conscience—that helps us to guide our constitutional course.

Or it would be the guidepost, if 20th-century thinkers had not abandoned the principles of the Declaration and replaced them with the ideas that government action is presumptively legitimate and that individual rights are just privileges the government gives to us when it chooses to. That shift is how our constitutional understanding has gone awry, and it's a leading reason why so much of the legal profession is unable to understand the document they're interpreting.

The result is that our constitutional law has bizarre blind spots and contradictions. The "public use" clause was essentially erased in the infamous *Kelo*

eminent domain case. The privileges or immunities clause was essentially erased in the 1870s in the *Slaughterhouse Cases*. The due process clause has been radically curtailed. These trends are a consequence of lawyers, judges, and law professors typically prioritizing democracy over liberty as a central constitutional value.

So the "conscience" I refer to is a voice in our constitutional order telling us when we do something wrong. That voice is the Declaration of Independence. That's why I defend the idea of "substantive due process" [defined below]—something both conservatives and liberals have rejected nowadays. And it's why I don't buy arguments for "judicial restraint"—which usually seem to mean that when the legislature violates the Constitution, the courts should just look the other way—again, to prioritize democracy over liberty.

AA: You argue that early American lawyers and political leaders understood the Declaration of Independence as an important interpretive guide to the Constitution. How was that understanding lost in American law?

TS: I think there have been periods of constitutional crisis when people have looked to the Declaration for principles that animate the constitutional machinery. Various individuals in the antislavery movement did this, including John Quincy Adams, Charles Sumner, and Frederick Douglass. During the civil-rights movement in the 1960s, Martin Luther King relentlessly pressed for America to make good on the "promissory note" that is the Declaration. The Constitution is a machine designed to run on certain philosophical fuel—and that fuel is the principles of the Declaration.

Primarily, the reason modern courts turned away from those principles is the rise of Progressive political philosophy in the early 20th century. Such men as John Dewey, Louis Brandeis, Woodrow Wilson, and Oliver Wendell Holmes rejected the ideas of classical liberalism. They argued that man is not born free, but is made free by society. That, of course, has always been the argument of the Declaration's enemies, whether they have been slavery advocates such as John C. Calhoun or Alexander Stephens, or segregationists such as George Wallace, or today's "legal positivists." They think you should be free only if they say so. And that's the basis of most of today's regulatory welfare state.

AA: What has been the reception to the book so far, what impact do you hope it eventually has, and what are the chances of it having that impact?

TS: I'm really honored to have had very kind words from a lot of people I really admire. This book is my manifesto of my constitutional philosophy. So, naturally, I hope that it will help change the climate of ideas—especially on the question of substantive due process. This is a doctrine that is denounced roundly on both left and right, and that is

one of the oldest, most important, central constitutional concepts. But I think few law students today are even taught what it means, let alone given a fair chance to decide whether or not it's valid. Professor Nelson Lund at George Mason University has often said that the Supreme Court "hasn't even bothered to explain" substantive due process. And that's just false, as I show. It's a shame that even people otherwise committed to understanding the Constitution and enforcing its protections for freedom are led so astray on this topic. So I hope my book can change people's minds about that.

I also hope it challenges people's thinking about the idea of "judicial restraint." That nonsense just has to go. If the courts are to defend liberty, they need to start standing up for the Constitution and stop deferring to the legislature all the time. James Madison regarded the legislative branch as the most dangerous—and he was right.

AA: You've mentioned "substantive due process" a couple of times. The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law." How does the "substantive due process" you defend differ from due process as it is usually upheld by today's courts?

TS: Today's lawyers tend to distinguish between "procedural" and "substantive" due process. "Procedural" due process refers to your right to some sort of legal procedure before your rights are taken away, such as a trial. "Substantive" due process refers to the idea that legislatures can't take away certain rights no matter what kind of procedure is used. So the government simply can't criminalize the private, consensual sex between two adults of the same gender, for example.

Ultimately, the distinction between procedure and substance makes no sense. The due process clause means the government may not arbitrarily take away your life, liberty, or property. What we call "procedural" due process is a subset of this overall guarantee. Procedural rights are just one way to protect you against arbitrary government power. But an arbitrary law—such as the one allowing bureaucrats to take away Suzette Kelo's home just because they thought it should be given to someone else—is not made less arbitrary just because government grants a hearing. Due process of law incorporates certain substantive principles such as generality and fairness. An arbitrary government rule is not properly considered law, and you're entitled to *lawful* government. A government that can take away your home and give it to someone else who has more political influence is a government not of law, but of arbitrary rule. Such government action properly is restrained by the due process of law clause.

The understanding of due process as encompassing the substance of law as well as its procedures dates back to the Magna Carta. But the Progressives rejected

substantive due process and argued that government can basically do whatever it likes so long as the procedures are "fair." The reason they made this argument is that they and their intellectual descendants essentially reject the ideas of universal justice and human rights. To them, rights are privileges the government gives individuals for the government's purposes. That means, basically, that whatever the government does qualifies as "law." By this view, government's edicts need not comport with any deeper principles rooted in human nature or justice in order to qualify as law. And that robs the due process clause of any real meaning. It means the government can do whatever it likes so long as it engages in certain rituals first. That's not logical, because then what accounts for those rituals? This view reduces trials and other legal proceedings to nothing more than traditional superstitions, like tossing salt over your shoulder when you spill it.

It's better to see due process as a substantive guarantee against arbitrary rule of any sort, with procedural rights as part of that scheme. That explains procedural as well as substantive constitutional protections. Consider the "trial" of Alice in *Alice in Wonderland*. That's not really a trial at all, because it's not governed by logic or evidence; the Queen of Hearts does whatever she likes. A legitimate trial seeks truth and justice. We understand that whether something qualifies as a trial is to be determined based on a deeper understanding of principle. The Progressives rejected this. Law, to them, was whatever the ruling majority decided it was. By their premises, there would be no reason why Alice's trial would flunk the "due process of law" test.

Today, both liberals and conservatives have substantially adopted the principles of the Progressives. They think whatever the majority does not only is law; it is moral. Judge Robert Bork said "moral outrage is sufficient ground for prohibitive legislation." Former chief justice William Rehnquist said that constitutional provisions "take on a certain moral rightness simply because they have been incorporated into a Constitution by a people." That kind of moral relativism is simply incompatible with the rule of law—it substitutes for the arbitrary will of a king the arbitrary will of the majority (or those who claim to speak for the majority). There was a time when the "due process of law" promise was understood to block that kind of arbitrariness. Not anymore. Relativism has disarmed the legal profession in its eternal war against the forces of arbitrary rule and tyranny. The only way out of that trap is a return to the principles of classical liberalism and the conscience of the Constitution.

AA: You work for the Pacific Legal Foundation, a law firm committed to advancing "individual freedom, responsible government, and color-blind justice." What are some of your recent and current projects with PLF?

TS: I oversee our Economic Liberty Project, devoted to protecting the right to earn a living free from arbitrary government restrictions.

In February, we won a case challenging the constitutionality of licensing laws for moving companies. In twenty-three states—well, twenty-two, now—if you want to run a moving company, you first have to get permission from the existing moving companies! These laws are called Certificate of Public Convenience and Necessity (or Certificate of Need) laws, but I call them "the Competitor's Veto." These laws don't even pretend to protect the public. They just protect established companies against economic competition. In our case, we represented an entrepreneur named Raleigh Bruner, whose moving company was the top-rated company on Angie's List. Bruner's company operated several trucks, employed dozens of hardworking people, and had a great reputation with customers—but the state tried to shut him down because bureaucrats had decided that the "existing moving services were adequate." Such government bullying is wrong. Consumers, not bureaucrats, should decide what kinds of services are "adequate" by how they choose to spend their money. Certainly, the decision should not be left with the companies that are already operating! We proved that every applicant for a moving company license had been denied, simply because the state didn't think there should be new competition. The court held that the law violated the Constitution's protections for the right to earn a living. It's a very exciting outcome. But, like I said, one down, twenty-two to go.

I also do a variety of other kinds of cases. I'm currently litigating a constitutional challenge to Obamacare, along with my colleague Paul Beard. We argue that, assuming it is a tax, as the Supreme Court said, then it's still unconstitutional because all taxes are required to originate in the House, and Obamacare originated in the Senate. That case is scheduled to be heard by the DC Circuit Court of Appeals May 8.

PLF defends property owners from regulatory "takings"—environmental regulations that often go far beyond constitutional boundaries—and works to erase race preferences by which government institutions judge people by the color of their skin rather than by the content of their character. Personally, my main interest is in defending the rights of wealth creators, America's persecuted minority.

AA: To what degree is there a clash between what you call the "the primacy of liberty" in American government and the Founders' use of government power to regulate the economy? For example, in his book *The Original Constitution*, Robert Natelson argues that, under the Commerce Clause, "Congress could stimulate American agriculture and manufacturing by prohibiting or discouraging importation of selected articles"—a practice that clearly violates freedom of trade. In

your view, what is the proper way to resolve the frequent clashes between liberty and constitutional grants of power?

TS: The answer in such cases is to amend the Constitution. Honestly, although I love the Constitution, and think, like Frederick Douglass, that it is "a GLORIOUS LIBERTY DOCUMENT" (Douglass wrote that in all capital letters), I recognize that it is not entirely consistent in its protections of liberty. It is, far more so than most lawyers want to admit, but it's not a pure laissez-faire document. That said, remember that the Commerce Clause was primarily meant to free the market from state-imposed barriers. It was mainly intended to deprive states of the power to limit free trade.

I think your larger point is that, as good as the Constitution is, it has some problems, even if rightly interpreted. So how should we regard the Constitution, and what sort of claim does it rightly make of us? That's a reasonable question. The Constitution has flaws—obviously. But it is a machine. And every machine needs maintenance and repair—and maybe alteration.

The process of amending the Constitution is better for freedom overall, even if the amendment in question is bad for freedom. For example, although I would not support putting Social Security into the Constitution, I would prefer that to the way courts have "creatively" interpreted the Constitution to rationalize such unconstitutional programs. Such stretching and tearing of the Constitution has all sorts of terrible side effects that an amendment would not have. Look at our Commerce Clause cases! When Americans decided to prohibit alcohol, they amended the Constitution to do it. That made it a lot easier to repeal Prohibition later. By the time government decided to ban marijuana, the Commerce Clause had been so distorted by New Deal courts that Congress didn't feel the need to amend the Constitution. That makes it far harder to repeal the illegal, immoral, unwinnable War on Drugs today.

The Constitution could certainly be improved. But, for now, I'd settle for it being obeyed. Or even just understood.

AA: Natelson also advocates conventions of the states, as authorized by Article V of the Constitution, as a means to rein in federal power by Constitutional amendment. What is your opinion of such efforts?

TS: Some such proposals involve amendments to expand state power, and I'm always suspicious of efforts to give states greater power relative to that of the federal government. That's usually a recipe for abuse by fifty states instead of by one federal government.

However, I do think that some of the proposals to give states greater power to resist federal encroachment could be helpful. Under the current system, the federal government has strong incentives to take away state power—and states have strong incentives to let them. State officials often love it when the federal government takes over traditional state functions, as it did with No Child Left Behind and many other laws. That way the state officials can blame the feds when something goes wrong, and yet still avoid having to formulate their own policies. To boot, the federal government typically throws in hefty federal subsidies. So long as amendments don't allow states to interfere with individual rights, I think it would be nice to find a way for states to resist federal expansion. But I'm not optimistic on that front.

AA: In what ways, if any, have Barack Obama's appointments to the Supreme Court shifted the tenor and conclusions of the court? How do you anticipate the court might further shift if Obama has the chance to appoint another justice?

TS: So far, we've only seen liberals replaced by other liberals, so there hasn't been that much change. The courts of appeals and district courts, though, are another thing. The recent change in Senate rules—the so-called "nuclear option"—allowed Obama to make many important judicial appointments. The decisions of those judges will affect the Supreme Court, and some of the judges eventually could join the Supreme Court.

It is impossible to say in the abstract what another Obama Supreme Court appointment would do. On some issues, Democratic appointees are better than Republican appointees, and vice versa. If Justice Scalia were replaced by a liberal justice—say, a clone of Justice Kagan—the result would be bad for gun rights, private property rights, and the freedom of expression of business owners. But it likely would be good in areas of "privacy rights"—sex, drugs, and rock and roll.

I favored the "nuclear option" even though I knew it would hurt the cause of liberty in the short term, because I think it makes judges less beholden to Congress. And nothing is worse for our Constitution than the idea that courts should defer to Congress or state legislatures. That is a poisonous idea, totally alien to the Constitution. Perhaps, ironically, Obama appointees are less likely to buy into it than are Republican appointees.

AA: What do you think are the most significant legal cases currently in the courts or likely to end up there soon?

TS: That depends on the issue. The most important economic liberty case in a very, very long time is *North Carolina Board of Dental Examiners v. FTC*, which the Supreme Court recently agreed to hear. That case is about whether state agencies that regulate businesses should be immune from the antitrust laws even when they're just façades

by which existing firms use government power to block their own competition. Now, you and I don't like antitrust law, but that's because we know that true monopolies can only exist if created and enforced by the government. In this case, the question is whether a true government-created monopoly should be immune from the antimonopoly laws. Amazingly, they usually are. Absurd as it may seem, the only entities that can actually create real monopolies are typically *exempt* from the antimonopoly laws. In this case, the Fourth Circuit said no to immunity. That was right, and the Supreme Court should affirm that decision—no matter what one's opinion of antitrust law in general.

I also think the anti-Obamacare cases are very important. Several are still going on as we conduct this interview. There's the challenge to the subsidies in federal exchanges, now pending in the D.C. Circuit. And there's my case, in the same circuit. And there's the Goldwater Institute's case—being argued by my wife, Christina Sandefur—in the Ninth Circuit. That is a crucial case about the constitutionality of an agency that Obamacare creates, called the Independent Payment Advisory Board, which regulates Medicare reimbursement rates. This agency is immune from control by Congress, the president, and the courts—and the law creating it absurdly claims that it is unrepealable. Worse, the Board has power to do whatever it considers to be "related" to Medicare expenditures. Now, the law also says the Board isn't allowed to "ration care," but, because the law doesn't define "rationing," and because the Board is immune from judicial review, the law allows for no remedy if the Board does ration care. That's truly astonishing.

AA: Given the dangers of and damages caused by such rights-violating laws, what advice do you have for activists who want to help spread the ideas on which liberty depends?

TS: Frederick Douglass, when he was an old man, was asked by a young man what he should do with his life, and Douglass answered, "Agitate, agitate, agitate!" There's something for everyone in this area. We need writers, speakers, teachers, lawyers, doctors—everyone. If you're a cashier in a restaurant, there's a way you can help spread the ideas of liberty—point out to people how much they pay in taxes, for instance. My mother used to do this when she was a cashier. She'd tell every customer, "You paid $1.50 in taxes!"

Fundamentally, know your ideas, know your arguments, know the relevant people, know the institutions, know your goals, and know your limits.

Know your ideas by learning everything you can about important legal and political issues; don't be satisfied with a superficial understanding that flatters your preconceived ideas or existing beliefs.

Know the best arguments and know the reasons some people reject those arguments. Usually your opponents are not driven merely by bad motives. If you think your opponent sounds crazy, it's more likely that you don't understand his position well enough.

Know the people and organizations involved in the freedom movement—a lot of resources out there can help you.

Know your goals. Set specific goals for yourself, even if they're ambitious. Don't settle for a hazy notion of what you would like to do somehow, someday. But, realize that the chances of single-handedly saving the world are very small—and if you squander your time on too many tasks, you'll never accomplish them. As the saying goes, "If the water table is thirty feet down, it matters not at all how many twenty foot wells you dig." (I try to live by these pearls of wisdom, although I don't always succeed.)

I consider myself an Objectivist, and I have a couple of additional thoughts on that. Objectivists tend to emphasize the radicalism of their philosophical vision. In some ways, that's a good thing. But I prefer to emphasize the consistency of that vision with some of the oldest, deepest, most powerful elements of our cultural heritage. I think it's great to be able to say that these ideas *aren't* all brand-new—many have just been too often ignored.

In any event, students interested in Objectivism should heed Ayn Rand's advice to learn as much as they can about the full panoply of ideas and thinkers in the classical liberal tradition and about the hard realities of these ideas and their history. Don't be satisfied with Rand's arguments alone. Study her allies—and enemies—and study the real-world, technical problems of government policy. Spend a year reading technical journals in the area of your interest, and you'll see that philosophical principles are crucial as orienting guides or foundations—but they don't, by themselves, provide concrete answers to specific problems. Rand herself understood that, but I've met many Objectivist students who don't.

Consider a thought experiment. Imagine it's 1820, and you're in Congress. What would you do, now, with your limited resources, about admitting Missouri to the Union as a slave state and prohibiting the spread of slavery westward? It's not as simple as just saying slavery is evil. What are you going to do about that evil in this particular context?

I think some Objectivists are so wary of the idea of compromise that they prefer to wash their hands entirely of no-win situations like that. But the problem

is that this perceived purity can come at the cost of actually reforming politics for the better. That was the crisis that the abolitionists faced. Some thought the Constitution was irredeemably corrupt because of slavery and said they could have nothing to do with it. Some abolitionists wouldn't even vote, because that meant lending one's moral sanction to the system. Douglass rejected that strategy because, he said, the abolitionists started out to free the slave, and were now leaving the slave to free himself. Douglass chose to work within the system and to reclaim the Constitution according to its bedrock principles of liberty.

I think Objectivists and other advocates of freedom today are caught in the same sort of dilemma. On one hand, you can be like William Lloyd Garrison and refuse to lend your name to a corrupt system—but pay the price of accomplishing little. On the other hand, you can be like Douglass and work to achieve real results—at the price of sometimes having to accept half a loaf. I've met Objectivists who have a real problem with the latter because of the problem of moral sanction. I understand that. But I think the better answer is to work within the existing system and, as Rand said, to pronounce moral judgment. If you're going to be an activist, sometimes you're going to have to make uncomfortable alliances. But if you make clear *why* you're working with a particular alliance and make clear where *you* stand, that's not a moral sanction or compromise in the negative sense.

The easiest way to preserve your "moral purity" is by doing nothing. Then you can't be blamed for anything. It's a lot harder to put yourself on the line working for a better world. The last thing we need right now is Objectivists "going on strike." To paraphrase Patton, we only win this by making the *other* poor bastards go on strike.

That said, I am really optimistic about the rising generation of intellectuals. I know primarily about law students, but I think the same optimism is warranted in regard to economics, history, and other social sciences. I think we are witnessing a slow renaissance of the ideas of individual liberty and reason.

There's a lot of progress still to make, but when you look back a century, or half a century, or even just a decade, we believers in reason and freedom have made tremendous strides. I graduated from high school in 1994. At that time, postmodernism was at its peak, and many people had never heard the ideas of the classical liberal tradition. There were few resources for students interested in Objectivism, for example—I remember at the time maybe five books on Objectivism that were not written by Rand herself. At that time, virtually no federal court had, since the New Deal, invalidated a state law restricting economic liberty.

Now, postmodernism is widely ridiculed, there are worlds of resources for students interested in liberty, people are comfortable with (or at least knowledgeable

about) the ideas of liberty, most people are angry about the *Kelo* decision, and there are a string of cases in which courts have protected the right to earn a living. No wonder activists on the other side are attacking us more harshly and unfairly than ever. They're terrified!

I think that in a decade or so, we will start to see real change for the better because of the young intellectuals of today. That may seem a long way off. However, as Martin Luther King said, the arc of the universe is long, but it bends toward justice.

AA: Thank you for speaking with us, and best success as you continue your work.

TS: Thank you.