DUE PROCESS AND AGENCY: COMPLIMENTS, NOT SUBSTITUTES

Timothy Sandefur[*]

In 1816, in answer to an inquiry from a lawyer, former president Thomas Jefferson wrote that the political writings of Aristotle, valuable as they may be in general, were "almost useless" for understanding practical political life under the U.S. Constitution.[1] That was because while the ancient Greeks "had just ideas of the value of personal liberty," they had not devised the mechanism of representation.[2] "The full experiment of a government democratical, but representative, was and is still reserved for us."[3]

Jefferson's words are a useful reminder that our Constitution comprises elements devised over time through a process of abstract theory and historical experience. The Constitution itself establishes a multilayered system of protections in which federal branches not only check each other, but are also balanced against state-level institutions.[4] On top of that are the Bill of Rights protections, designed to reinforce the protections for liberty already implicit in the system of limited and enumerated federal powers without denying or disparaging the existence of other rights retained by the people.[5] Surrounding the whole system is the right of the people to alter or abolish their government if it proves destructive to their lives and liberties.[6] In other words, the constitutional system has multiple layers, each of which involve legal protections for the citizenry. Like a Russian nesting doll, the natural law constraints referred to in the Declaration of Independence limit what kinds of constitutions the people may adopt; the Constitution then limits what types of statutes may be passed (and what the state constitutions may do); the state constitutions limit what state officers may do; statutes impose further limits, etc.

This is an important point to keep in mind when considering the duties and legal constraints on public officials such as discussed by Professors

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* Vice President for Litigation and Duncan Chair in Constitutional Government at the Goldwater Institute.

1. Letter from Thomas Jefferson to Isaac H. Tiffany (Aug. 26, 1816), *in* 15 WRITINGS OF THOMAS JEFFERSON 65 (A.E. Bergh ed., 1907).

2. *Id.*

3. *Id.* at 65–66.

4. *See* THE FEDERALIST NO. 51, at 351 (James Madison) (J. Cooke ed., 1961) ("In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.").

5. *See* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION 238 (PRINCETON: PRINCETON UNIVERSITY PRESS, REV. ED. 2014) (2004).

6. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

Gary Lawson and Guy Seidman.[7] They are obviously correct that executive, legislative, and judicial officials are agents exercising powers delegated to them by the people in the Constitution. The founders took this for granted; they understood that the people are sovereign, and that government officials exercise power only as their agents.[8] *Federalist* No. 78, for instance, speaks explicitly in principal-agent terms when it contrasts statutes—which represent only the will of the particular legislatures that pass them—with the Constitution, which is the will of the people. In the event of a conflict, "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."[9] To contend otherwise "would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves."[10]

Recent scholarship by Robert Natelson, Geoffrey Miller, and others[11] has elaborated on how the constitutional powers of public officials should be understood in the principal-agent terms that were well known to eighteenth century corporations law—and that this explains such terms as "necessary and proper." This should not be surprising, given that English corporation law was coming into its youth at the same time that North America was being colonized, and that the American colonies were themselves corporations.[12] This is not an extraordinary statement—"corporation" simply means a legal entity whereby a group of people are treated as a single unit, and cities are routinely termed "municipal corporations" today. (That is why they lack sovereign immunity.[13]) Corporate officers are answerable to the corporation's proprietors—but in a *free* society, "[e]very man is a proprietor,"[14] and the government's officers are therefore answerable to all the citizens.

Professors Lawson and Seidman are therefore right that the obligations of government officers should be understood as "agency law applied to a governmental context."[15] That much results from the logic of

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7. Gary Lawson & Guy I. Seidman, *By Any Other Name: Rational Basis Inquiry and the Federal Government's Fiduciary Duty of Care*, 69 FLA. L. REV. 1385, 1389 (2017).

8. *See* TIMOTHY SANDEFUR, THE CONSCIENCE OF THE CONSTITUTION 38 (2014).

9. THE FEDERALIST NO. 78, at 525 (Alexander Hamilton) (J. Cooke ed., 1961).

10. *Id.* at 524.

11. GARY LAWSON, ET AL., THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE (2010).

12. The colonies were originally classified as corporate colonies and proprietary colonies. A corporate colony was chartered by the monarch to stockholders who together owned the colony. A proprietary colony was owned by a single proprietor or a partnership, with the monarch's permission. (Under the Stuart monarchy, a third category, Crown colonies, was created; these were directly controlled by the king who ruled as an autocrat, much to the anger of the colonists.)

13. Monell v. Dep't of Soc. Svcs., 436 U.S. 658, 664–69, 701 (1978).

14. Thomas Paine, *Rights of Man, Part Two* (1792), *reprinted in* THE COMPLETE WRITINGS OF THOMAS PAINE 375 (Philip S. Foner ed., 1945).

15. Lawson & Seidman, *supra* note 7, at 1394.

a Constitution of *delegated* authority. The Supreme Court has referred to the idea that "[t]he Constitution creates a Federal Government of enumerated powers" as a "first principle[]," [16] but those powers are not merely enumerated—they are *delegated*, meaning that those powers belong to the people, who have decided to let their chosen agents exercise some of those powers on their behalf. [17]

That *inherently* includes a limiting principle, because it cannot be supposed that the people have delegated power to their agents for purposes of self-destruction or subjection. [18] It also inherently forbids the legislature from giving away its authority to a single person, [19] or making a binding promise not to exercise its authority. As the Court explained in *Stone v. Mississippi*, [20] "the power of governing is a trust committed by the people to the government, no part of which can be granted away." [21] Since that power does not belong to the government, the government cannot surrender it.

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But these conclusions result from the nature of the principal-agent relationship that undergirds *representative government*. There are other, more fundamental, and perhaps more rudimentary, limits that originate elsewhere, and that apply to *all* governments, regardless of whether they are representative or not. Among these is the Due Process of Law requirement.

Due Process of Law is the oldest and most basic of all constitutional protections. It marks the boundary between a government that operates by means of law and a government that operates on an autocratic or master-slave basis. And this is a matter Aristotle understood quite well. [22]

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16. United States v. Lopez, 514 U.S. 549, 552 (1995).

17. Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1, 16–17 (1998).

18. *See* John Locke, *Second Treatise of Civil Government* § 134, *in* TWO TREATISES OF CIVIL GOVERNMENT 402 (Peter Laslett ed., rev. ed. 1963) (government has only the power given it by the people, who act to protect themselves, and therefore government can never have a right to destroy, enslave, or designedly to impoverish the subjects). *See also* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (government cannot have arbitrary or complete power because "[i]t is against all reason and justice, for a people to entrust a Legislature with SUCH powers; and, therefore, it cannot be presumed that they have done it.").

19. Hence the non-delegation principle inherent in Article I of the Constitution, which by giving "all legislative powers herein granted" to "Congress," includes an anti-entrenchment principle. *See* John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CAL. L. REV. 1773, 1783–84 (2003).

20. 101 U.S. 814 (1879).

21. *Id.* at 820.

22. Aristotle, *Politics* 1295b, *in* ARISTOTLE: THE POLITICS AND THE CONSTITUTION OF

He explains in *Politics* that the key distinction between a political society rightly understood and a perversion of political society is that in the perverse political society, the ruler governs for his own sake, whereas in the proper political society, the ruler governs for the benefit of the society's members.[23] A society ruled for the sake of the ruler is not, correctly speaking, a *political* relationship at all—it is "a city, not of freemen, but of masters and slaves"[24]—because the people are governed for the profit of the rulers and is therefore based not on *law* but on *command*.[25]

The Magna Charta's Law of the Land Clause—which is the basis of our Due Process of Law Clause—was aimed at blocking this type of command-rule, and ensuring that England would be governed, not by the commands of a single man, but by general rules that are predictably applicable in all similar circumstances.[26] The Due Process of Law Clause, in short, mandates that government rule in a *lawful* manner—that is, operate in accordance with a rule of law—as opposed to arbitrary dictates that are the product of the ruler's mere will.[27] If the government is going to deprive a person of life, liberty, or property, it must do so in accordance with a lawful principle, rather than on the ruler's *ipse dixit.* This true regardless of whether the "ruler" in question is a single person or a legislative majority. Also, it applies even where the arbitrary edict *looks like* a law. Because the Constitution "deals with substance, not shadows,"[28] the Due Process of Law Clause's guarantee of lawful rule *necessarily* requires courts to determine whether a legislative enactment *purporting* to be a law *really is* a law:

> It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of [Daniel] Webster…"the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders

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ATHENS 119 (C.D.C. Reeve, ed. & trans., Indianapolis: Hackett, 1998).

23. *Id.*

24. Aristotle, *Politics* 1295b, *in* ARISTOTLE: THE POLITICS AND THE CONSTITUTION OF ATHENS 107 (Stephen Everson ed., Cambridge University Press, 1996).

25. *See generally* H.L.A. HART, THE CONCEPT OF LAW (1961), for the best discussion of the difference between laws and commands.

26. Timothy Sandefur, *Lex Terrae 800 Years on: The Magna Carta's Legacy Today*, 9 NYU J.L. & LIBERTY 759, 760–65 (2015).

27. *See id.* at 790.

28. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1866). The Court was paraphrasing Justice Story's dissent in *Briscoe v. Bank of Ky.*, 36 U.S. (11 Pet.) 257, 331 (1837) (Story, J., dissenting) ("Surely, it will not be pretended, that the constitution intended to prohibit names, and not things; to hold up the solemn mockery of warring with shadows, and suffering realities to escape its grasp?").

> judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.[29]

This is the doctrine of "substantive due process" (or as its practitioners called it, "due process"). Contrary to Professors Lawson and Seidman's strange assertion, there is no "implausibility"[30] about reading the Due Process of Law Clause this way—as a promise that government will operate pursuant to lawful, rational principles rather than arbitrary, self-interested, or *ipse dixit* commands. On the contrary, that conclusion is supported by legal theory,[31] and original meaning,[32] and has a long pedigree of British common-law precedent behind it.[33]

I say "strange," because both here and elsewhere, the authors write in flippant tones about the theory of "substantive due process" while simultaneously acknowledging that it does in fact have these strong legal roots. Professor Lawson, for example, asked in an earlier article whether there is "room in an originalist account of the Constitution" for substantive due process, and then answered "yes."[34] He did, however, raise two objections there: first, "[w]hether [the] move from fiduciary duty to due process of law is interpretatively unsound depends on whether the idea of due process of law has application to legislative action," and second, he was concerned that to read the Due Process of Law Clause as including a substantive component would violate the rule against reading constitutional provisions as redundant of other provisions: "Whatever can plausibly, or perhaps even implausibly, be

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29. Hurtado v. California, 110 U.S. 516, 535–36 (1884). The quotation of Webster is from his oral argument in *Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 250, 314 (1819), which throughout the nineteenth and early twentieth century was taken as the definitive exposition of what "due process of law" means.

30. Lawson & Seidman, *supra* note 7, at 1405.

31. *See generally* SANDEFUR, CONSCIENCE, *supra* note 8, at 71–120.

32. *See, e.g.*, Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 667 (2009).

33. *See* SANDEFUR, CONSCIENCE, *supra* note 8, at 102–10.

34. Gary Lawson, *Take the Fifth . . . Please!: The Original Insignificance of the Fifth Amendment's Due Process of Law Clause*, 2017 B.Y.U. L. REV. 611, 644–56 (2017).

read into the Fifth Amendment's Due Process of Law Clause with respect to congressional action is already contained in the Constitution of 1788."[35]

As to the first objection—whether the Due Process of Law requirement applies to legislative action—the answer is plainly yes.[36] If the answer were no, the Clause would be rendered essentially void, because the legislature could then mandate that criminal trials should be decided by "consulting a Ouija board"[37] or flipping a coin. The Due Process of Law Clause would then simply say to the legislature, "[y]ou shall not do the wrong, unless you choose to do it,"[38] which would make no sense. Also, the founding era certainly understood the Due Process of Law guarantees of *state* constitutions as applying to legislative action,[39] and there is no evidence to suggest the authors of the Fifth Amendment thought it meant anything less protective of individual rights than those. Aside from originalist considerations, however, one fact is plain: legislative process simply *cannot* be due process of law. Legislatures are *political* bodies, not legal ones, and they operate on the basis not of legal but of political considerations, many of which can hardly be described as *reasons* at all: proposed legislation is sometimes enacted or not enacted for the most arbitrary and irrational of causes—a fact the founders knew well, which is why they created an independent judiciary, instead of allowing legislative bodies preside over legal cases involving the deprivation of life, liberty, or property.[40]

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Still, it is common for opponents of "substantive due process" to invoke the rule against redundancy—arguing that to interpret the Due Process of Law Clause to include a substantive component would render it redundant of other constitutional provisions that, implicitly or explicitly, forbid certain wrongs.[41] Professors Lawson and Seidman

35. *Id.* at 646.

36. *See* SANDEFUR, CONSCIENCE, *supra* note 8, at 107–09.

37. Lawson & Seidman, *supra* note 7, at 1395.

38. Taylor v. Porter & Ford, 4 Hill 140, 145–46 (N.Y. Sup. Ct. 1843).

39. State v. Anonymous, 2 N.C. 28, 30–31 (1794).

40. *See* THE FEDERALIST NO. 78, at 522–23 (Alexander Hamilton) (J. Cooke ed., 1961). Certainly, no person whose life, liberty, or property hung in the balance would *ever* imagine that a legislative process—with all its arbitrariness, cliquishness, personal animosities, partisanship, bickering, and sometimes outright childishness—qualifies as "due process of law." And this is true *even if* one understands that phrase as referring only to procedural regularity. Due process of law means a process of reasoning, not a process of political negotiation and compromise.

41. *See, e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 548–49 (1997) (discussing the possibility of an unwritten constitution alongside the written one).

appear to make this argument when they say that "there is little to be said" in support of a substantive understanding of the Due Process of Law Clause, "*independent of that clause's possible reflection of the fiduciary principles implicit in the Constitution's original* text."[42]

But this redundancy argument disregards how constitutional protections evolve. Constitutional guarantees such as the Fifth Amendment are added to constitutions over time, as new kinds of government abuse are experienced by the people. It is virtually never considered wise to *erase* an *existing* constitutional guarantee just because some new, more specific one is added. Constitutions thus tend to grow, to include a larger number of protections, sometimes of increasing precision, even though these may overlap. For instance, when railroad corporations abused the power of eminent domain in the nineteenth century, leading many states to add restrictions on that power far more extensive than the "public use" requirement already found in their existing constitutions, the framers of the new constitutions did not then *eliminate* their Public Use Clauses. The Missouri Constitution, for example—which has been revised or rewritten seven times—includes *five* clauses addressing eminent domain, including its original 1820 Public Use Clause.[43] In short, "redundancy is a weak (and ironic) interpretive argument in any legal context," and particularly in the constitutional context. After all, the founding fathers considered the entire Bill of Rights redundant.[44] Yet the Constitution was written in order to provide different layers of protection for the citizen—layers that are sometimes redundant.[45] That is not surprising: laws can be unconstitutional in more ways than one.

Professors Lawson and Seidman seem to recognize that their principal-agent account of constitutional limits is *not* coterminous with Due Process of Law theory.[46] If it were, their redundancy argument might support their (apparent) rejection of Due Process of Law. But the opposite is the case: the agency principles Professors Lawson and Seidman rightly see as limiting the discretion of public officials in a

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42. Lawson & Seidman, *supra* note 7, at 1405 n.89 (emphasis added).

43. MO. CONST. of 1945, art. I §§ 10, 26, 27, 28; art. VI § 21.

44. Gedicks, *supra* note 32, at 667.

45. Professors Lawson and Seidman also seem to reject the idea that the Due Process of Law Clause of the Fifth Amendment includes an equal protection component. Lawson & Seidman, *supra* note 7, at 1405. But they go on to say that there may be a "general equality norm applicable to federal action" inherent in the Due Process of Law Clause. *Id.* at 1405 n.88. But that, of course, is *exactly* what the Supreme Court said in Bolling v. Sharpe, 347 U.S. 497, 500 (1954)—and rightly so. If Due Process of Law excludes arbitrary action by the government, then for government to treat citizens differently for utterly irrelevant reasons or arbitrary reasons is the kind of arbitrary action that violates the Due Process of Law Clause.

46. *See* Lawson & Seidman, *supra* note 7, at 1404 (seeing their position as "not very far removed from" substantive due process theory).

republican government *overlap without displacing* the broader Due Process of Law guarantee that imposes substantive limits on government power, *in whatever form*.[47] The reason is that these principles operate at different levels of political structure: the Due Process of Law Clause is the most basic guarantee of lawful rule; the principal-agent limit is a restriction inherent in a fiduciary relationship. There is plenty of room (thank goodness!) for both.

In their conclusion, Professors Lawson and Seidman observe that "[a]gency law arguably demands a bit more than modern rational basis inquiry provides."[48] That is not saying much, since rational basis review, alas, typically, and wrongly, functions as a rubber stamp.[49] But even if rational basis review operated rationally, this would remain true—because the limits on government power that Professors Lawson and Seidman are discussing function at a later, more specific level than does the more elementary Due Process of Law Guarantee. The latter is a constitutional promise that whatever the government does, it shall comply with the substantive and procedural protections that differentiate lawful from arbitrary, unlawful rule. The former is a more specific assurance that elected officials will discharge their duties and promote, in a general way, the interests of their constituents. These protections nest within one another—they do not copy or override one another.

Is it possible, then, that a government act could violate Due Process of Law and not violate a government actor's fiduciary duty—and vice-versa? Yes: a statute that is constitutional under one set of circumstances might be rendered irrational due to a change in circumstances, so that any future enforcement would violate Due Process of Law,[50] without any fault on the part of the government actor. And a government act may satisfy the principles of Due Process of Law but fall short of the fiduciary responsibilities of the officials in charge: for example, the type of official negligence Professors Lawson and Seidman describe[51] is unlikely to constitute lawlessness in violation of the Due Process of Law requirement.[52] Still other government actions would violate both—as, for

47. Properly understood, "procedural due process" is only a subset of the substantive guarantees provided by the Due Process of Law Clause. *See* SANDEFUR, CONSCIENCE, *supra* note 8, at 98.

48. Lawson & Seidman, *supra* note 7, at 1405.

49. *See* Clark Neily, *Litigation without Adjudication: Why the Modern Rational Basis Test is Unconstitutional*, 14 GEO. J.L. & PUB. POL'Y 537, 542–43 (2016) (discussing the "rubber-stamp" form of rational basis review).

50. *See, e.g.*, Nashville, C. & St. L. Ry v. Walters, 294 U.S. 405, 414–15 (1935).

51. Lawson & Seidman, *supra* note 7, at 1402.

52. It cannot be doubted that, for example, the President's refusal to enforce a constitutional law is a violation of his constitutional duty to see that the laws are faithfully executed. *See* Timothy Sandefur, *The President shall take care that the law be faithfully executed. Or ignore it. Whatevs.*, FREESPACE, (Dec. 16, 2014), http://sandefur.typepad.com/freespace/2014/12/the-president-shall-

example, when a public officer abuses his power to jail a person without legitimate lawful authority.

CONCLUSION

Anthony de Jasay has warned us that we should be wary of treating justice as if it were something else.[53] In the same way, we should be careful when reading the Constitution as something else. There's much to learn from comparing it to the law of agency, or the law of corporations, or the law of contracts.[54] But we must never forget that it is a *Constitution* we are expounding. It draws on principles of agency, corporation, contract, and other things, but in the end, it is a unique type of legal instrument; a product of both history and abstract principle. Some of its guarantees are ancient and broadly worded; others newer and more detailed. Some are purely stipulative;[55] others are "not derived from any positive law, but from the nature and reason of the thing."[56] There is no doubt that the principal-agent rules Professors Lawson and Seidman discuss play a role in our constitutional scheme—but they cannot displace the more fundamental guarantee of Due Process of Law.

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take-care-that-the-law-be-faithfully-executed-or-ignore-it-whatevs.html. But this would likely not deprive any person of life, liberty, or property without due process of law.

53. *See* Anthony de Jasay, *Justice as Something Else*, 16 CATO J. 161, 161 (1996).

54. *See, e.g.*, Tom. W. Bell, *The Constitution as if Consent Mattered*, 16 CHAP. L. REV. 269, 273 (2013).

55. For example, the requirement that the President be 35 years of age. U.S. CONST. art. II, § 1, cl. 5.

56. THE FEDERALIST NO. 78, at 526 (Alexander Hamilton) (J. Cooke ed., 1961).