

Edward Keynes, *Liberty, Property and Privacy: Toward a Jurisprudence of Substantive Due Process*. University Park, PA: Pennsylvania State University Press, 1996, pp.xvi, 238.

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One of the most fundamental conflicts in the constitutional republic of the United States is that between individual rights and democratic politics. Constitutional restrictions on government power are needed to protect individual rights, but if these rights stand in the way of actions demanded by the majority, then the very principle of constitutional government may be threatened.

This tension clearly emerges in the debate over substantive due process. The Fifth Amendment of the United States Constitution states: "nor shall any person...be deprived of life, liberty, or property, without due process of law." This was originally a restriction solely on the national government; the Fourteenth Amendment, adopted in 1868, applied this same restriction to the state governments. There are two schools of thought about what these amendments mean. The procedural school argues that the amendments merely require that certain procedures be followed, and do not bar governments from taking life, liberty, or property. The other school contends that the amendments are absolute prohibitions against government action and not merely procedural safeguards. The latter position is called "substantive due process."

On one hand, courts may rely on the doctrine of substantive due process to recognize new rights which protect individual freedom. The United States Supreme Court did so, for example, when it recognized the right of women to have abortions in the 1973 decision, *Roe v. Wade*. However, such court decisions, not based on public opinion or legislative investigations, may provoke criticism of the courts and undermine the moral authority of constitutionalism and the rule of law.

Important developments in American political and legal life have hinged on substantive due process. In the late 19th and early 20th centuries, the US Supreme Court struck down a number of state laws regulating the economy. The due process and contract clauses were used to justify these decisions.

During the 1930s the Court struck down key measures of Roosevelt's New Deal. Roosevelt responded with his "Court Packing Plan." Congress rejected this proposal, but the Court got the message: it invalidated no more New Deal laws. In more recent times, substantive due process, no longer applied to economic regulations, has been used to strike down laws prohibiting birth control and abortion as violations of privacy or family autonomy.

The issues raised by the debate over substantive due process - individual rights, constitutionalism, the rule of law, constitutional interpretation, the purpose of government, among others - are profound. If the body of literature discussing these questions has not been profound, at least it has been prodigious. The articles and books on various

ramifications of the subject keep coming. One of the most recent is *Liberty, Property, and Privacy*, by Edward Keynes.

Keynes is a political science professor at Pennsylvania State University. He has been writing on the interaction of politics and court decisions for many years, so this is not his first treatment of these problems. He believes substantive due process is a valid constitutional doctrine, but contends that it does not transform the Supreme Court into "a roving commission with authority to set aside legislative policies of which it disapproves." According to Keynes, "the justices cannot determine the wisdom of public policy, but they can inquire into the factual premises of legislation. Does the record support the legislature's ostensible purpose? What are the policy's foreseeable legal consequences? Does the policy serve a valid public purpose?"

The topic of substantive due process is important, but unfortunately Prof. Keynes does not have the intellectual equipment to make a contribution to the debate. This is shown very clearly by his uncritical reliance throughout his book on concepts which have no specific meaning and which cannot provide guidance to judges in deciding cases. These non-objective concepts include "public interest," "well-ordered society," "valid public purpose," and "arbitrary, capricious, or unreasonable government interference with life, liberty, and property interests." Allowing judges to strike down legislation by applying such wild-card concepts is simply a grant of arbitrary power inconsistent both with the rule of law and with democratic principles. Prof. Keynes is unable to bring rationality to the doctrine of substantive due process because his own ideas are naive, vague, and contradictory.

The era of the Constitutional Convention and the early decades of the new republic were marked by a national debate over the proper role of government in our society. The Federalists or Hamiltonians favored a strong national government; the Antifederalists or Jeffersonians feared government and wanted to limit its power. The Framers of the Constitution argued that most governmental power was to be exercised by the new states and that the national government would be limited to the specific powers delegated to it. During the debates over whether the Constitution should be adopted, some political figures (the Jeffersonians) called for a list of individual rights which the new government would be barred from violating. Defenders of the Constitution as originally written (Federalists or Hamiltonians) argued that a list of rights was unnecessary. The new government had not been given the power, for example, to stifle the press or endorse a religious denomination. The Framers added that if specific rights were stated to be inviolate, then the new government could claim to do anything that was not expressly forbidden. Supporters of a list of rights won the debate and the new document was amended almost immediately.

The evolution of federal power in the 200 years following the Constitutional Convention has shown that the views of the Jeffersonians were more accurate than those of the Hamiltonians. The Framers were wrong in thinking that the limited government they had created would not threaten individual rights. Inconsistencies within the document and vague concepts such as interstate commerce and "necessary and proper" powers allowed lawmakers and jurists to stretch federal authority far beyond anything envisioned by the Enlightenment statesmen. Over the years, judicial interpretations of Constitutional powers

reversed the original concept of the national government. Instead of a government of narrowly defined powers now we have a government of vast authority limited primarily by the very Bill of Rights which the Framers scorned. Every American should be grateful for the foresight of Jefferson and his allies who bequeathed us small islands of freedom protecting, for example, speech, religion, and press, from an encroaching sea of governmental coercion.

The attempt by judges to create new constitutional rights based on the Due Process clause or other provisions in the charter is an understandable but unwise effort to restrain burgeoning government power. Although the judges may create some rights we think are valid, such as the right to have abortions, they may just as easily invent other rights which allow criminals to go free, which prohibit capital punishment, or which require racial discrimination. Rather than encouraging the courts to bypass the process for amending the Constitution, and thereby undermining the moral authority of the courts, we should work toward amendments which make the Constitutional text a more explicit and more complete guardian of individual rights. Seen in this light, Prof. Keynes' support for substantive due process is not only unsuccessful, it is also misplaced.