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John V. Orth. *Due Process of Law: A Brief History.* Lawrence: University Press of Kansas, 2003. 116 pp. $25.00 (cloth), ISBN 978-0-7006-1241-3; $9.95 (paper), ISBN 978-0-7006-1242-0.

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Due Process of Law: The Big Picture

Understanding the history of the notion of due process of law has of late become increasingly important to American constitutional historians. Over the past two decades, scholars have produced a number of important works on the origins and the meaning of due process. Much of this recent work has taught constitutional historians that the U.S. Supreme Court's landmark decision in *Lochner v. New York* (1905) and the notion of substantive due process were far more complex–and more deeply rooted in higher law constitutionalism?than many realized or acknowledged a generation ago.[1] Building upon this scholarship, John V. Orth takes an even broader look at the notion of due process. In this thoughtfully conceived book, Orth examines the idea of due process of law from its common law origins in the seventeenth century to the present.

Orth's approach and interpretation are inseparable. That is, he begins with the common law–rather than the founding–because he believes that the origins of due process date back to the Middle Ages, when English barons protested royal prerogative in Magna Carta by holding the king accountable to "the law of the land." The great English legal scholar Sir Edward Coke later argued that adherence to "the law of the land" required "due process," and it was this phrase that the American founders adopted in the U.S. Constitution's Fifth Amendment. Orth's goal is to discover how this "seemingly uncomplicated phrase 'due process of law' came to have such complicated (and contested) meanings" (p. ix). He does this by focusing on two questions that had roots in medieval legal maxims: "Can a law make a man a judge in his own case?" and "Can a law take the property of A and give it to B?" These two queries, he claims, "illuminate the demands of due process" and thus frame his entire discussion (p. 6).

Orth explores the first of these questions–"Can a law make a man a judge in his own case?"–in order to offer insight into the early history of due process. Old enough to have appeared in Sir Thomas Littleton's *Tenures*, a 1481 land law treatise, this question especially took on significance in *Dr. Bonham's Case*, in which the Royal College of Physicians convicted and imprisoned Thomas Bonham for practicing without a license. When Bonham challenged his imprisonment, Coke, at the time the chief justice of the Court of Common Pleas, ruled that the Royal College lacked the authority under its charter and a parliamentary statute to imprison for practicing medicine without a license. Because the same entity–the Royal College–both suffered the wrong and collected the fine, Coke argued, the College had acted as both a party and a judge in the dispute. Generalizing beyond this case, Coke famously declared that all such acts of Parliament "against common right and reason" were void (p. 20). William Blackstone later disagreed with Coke's assertion that unreasonable acts were invalid. Writing after England's century of revolution and the establishment of Parliamentary supremacy, Blackstone refused to acknowledge any challenge to the authority of Parliament. Nevertheless, Orth argues, Coke's assertion in *Dr. Bonham's Case* was significant–not so much as an attempt to establish judicial review as an effort "to give content to the law's restraint on power." "There were, [Coke] thought, things that the supreme power in the state, even the king in Parliament, could not lawfully do, no matter how hard he tried," Orth writes (p. 29).

At the end of the first chapter, after an eloquent discussion of the significance of *Dr. Bonham's Case*, Orth abruptly notes that "due process" failed to retain vitality in England but became an important part of American state constitutions and the U.S. Constitution. At the same time that due process thrived in the United States, Orth acknowledges, many magistrates and justices of the peace received their salaries out of the fines they levied–a violation of the "judge in his own case" principle. In fact, he acknowledges, not until 1928 did the U.S. Supreme Court rule that the practice of a man serving as judge in

his own case violated the Constitution. But given Orth's assumption that the "judge in his own case" paradigm epitomized the notion of due process, how was it that due process retained vitality in the U.S. if men continued to serve as judges in their own cases? In this the weakest chapter of the book, Orth struggles to connect the English background to the American experience and to show the relevance of the "judge in his own case" issue to the historical development of procedural due process in the United States.

In the next three chapters, Orth examines the second of his initial questions: Can a law take the property of A and give it to B? Justice Samuel Chase mentioned this problem (along with that of a man serving as a judge in his own case) in *Calder v. Bull* (1798), when he listed several types of statutes "against all reason and justice" (p. 33). In *Calder* and afterward, American jurists debated exactly what the problem was with a law that took the property of A and gave it to B. Orth notes that while it could have been categorized as a "takings" issue, "property taken for a private rather than public use, in violation of the Fifth Amendment's Takings Clause–most conceived of the A to B paradigm as a matter of due process. By the early twentieth century, state and federal courts used the A to B paradigm as "a powerful rhetorical weapon against regulatory legislation" (p. 51). Orth takes particular note of *Ives v. South Buffalo Railway Co.* (1911), in which a New York court invalidated the state's Workmen's Compensation Act. According to the court, the law imposed "upon an employer who has omitted no legal duty and committed no wrong, a liability based solely upon a legislative fiat…." This constituted "taking the property of A and giving it to B" (pp. 52-53). Here the parties A and B became entire classes of people: A represented the employers who had to pay into the workmen's compensation fund, while B represented those employees who could draw upon it. In other early-twentieth-century cases, such as *Lochner*, the exact nature of the giving and the taking became a bit murkier. Liberty–specifically, the liberty to contract–became what was taken, while the "giving" portion of the paradigm became increasingly irrelevant. "From the judges' point of view," Orth notes, referring to *Lochner*, "the giving part of the equation seemed less important; taking had become the problem" (p. 64). By emphasizing the taking of rights, due process took on a more substantive meaning than before.

Orth characterizes President Franklin Roosevelt's Court-packing plan and the famous Footnote Four in *United States v. Carolene Products* (1938) as further turning points in the evolution of substantive due process. After Roosevelt proposed to expand the size of the Court, the justices adopted the notion of "preferred freedoms," by which the Court assumed a greater interest in protecting non-economic liberty than in safeguarding property rights. Here the story that Orth tells is a familiar one. But placed in the broader context of the evolving A to B paradigm, this traditional narrative takes on new meaning. It was a simple step, Orth shows, from a substantive interpretation of due process and an emphasis on non-economic liberty to the famous reproductive freedom cases, *Griswold v. Connecticut* (1965) and *Roe v. Wade* (1973), where the Court acknowledged a right to privacy for married couples and established a woman's rights to an abortion, respectively. But more than that, Orth insightfully shows the ways in which our modern understanding of non-economic substantive due process emerged out of the earlier economic version. "[T]he former solicitude for economic rights had played a role in getting the Court to accept this new mission as defender of personal autonomy," he argues (p. 80). Concern for the protection of property had led to a concern for the protection of contract. "The protection of contract had in turn directed attention to the primacy of the individual will, so interference with intention or expectation came in time to seem as egregious as interference with property and, unless justified by a compelling government interest, just as impermissible" (p. 81). Orth concludes by observing that the decline of economic substantive due process has of late breathed new life into the Takings Clause of the Fifth Amendment.

This insightful little book–the complete text is only 102 pages?clearly summarizes centuries of doctrinal development, particularly in the United States. It will serve as a useful volume on any constitutional historian's reference shelf and might be appropriate for advanced courses in constitutional and legal history. Although weakest on the "judge in his own case" paradigm and on the transmission of English notions of due process to the American experience, Orth has done a splendid job of both synthesizing existing scholarship and offering his own interpretive slant. Orth's ultimate conclusion–that "the past will shape future demands for due process"–is not earth-shattering (p. 102). Nevertheless, this book will give constitutional history teachers and scholars a renewed appreciation of the essential continuity of the development of due process of law.

Note

[1]. See, for example, Michael J. Phillips, *The Lochner Court, Myth and Reality: Substantive Due Process from the 1890s to the 1930s* (Westport: Praeger, 2001); Howard Gill-

man, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993); Michael Les Benedict, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism," *Law and History Review* 3 (Fall 1985): p. 293; Charles W. McCurdy, "The Roots of Liberty of Contract Reconsidered: Major Premises in the Law of Employment, 1867-1937," *Yearbook of the Supreme Court Historical Society* (1984): pp. 20-33.

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