University of Miami Law Review

Volume 6 | Number 3 Article 20

4-1-1952

DUE PROCESS OF LAW 1932-1949: THE SUPREME COURT'S USE OF A CONSTITUTIONAL TOOL. By Virginia Wood. Baton Rouge: Louisiana State University Press, 1951.

Dr. Thomas J. Wood

time has been spent by Cooper in the preparation and assembling of these materials, as evidenced by several hundred cases advantageously used to emphasize his opinions. The author has used clear and concise language. He has approached the subject matter from a very practical point of view. In my opinion Mr. Cooper's book would serve a useful purpose in the library of the student, the practitioner and the theorist.

G. HUGO WEIDHAAS ATTORNEY AT LAW
MEMBER OF THE FLORIDA BAR

DUE PROCESS OF LAW 1932-1949: THE SUPREME COURT'S USE OF A CONSTITUTIONAL TOOL. By Virginia Wood. Baton Rouge: Louisiana State University Press, 1951. Pp. ix, 436. $6.00.

This is a valuable study of the work of the Court in an era in which a substantial percentage of its work has been concentrated during the past two decades and in which there are fewer than usual signposts in the Constitution to guide the justices in their deliberations. The principal purpose of Professor Wood in her analysis of the Court's interpretation of the due process clause is to demonstrate that the "Constitutional Revolution" of 1937 was already well under way five years earlier insofar as this part of the Constitution was concerned. Employing the categories of the freedoms of the First Amendment, socio-economic legislation, criminal proceedings, administrative actions and the tax power, she finds that in each of these areas the Court had laid down the precedents which enabled it in 1937 and thereafter to build a new structure of values for due process.

While it has been generally recognized that the pre-Roosevelt Court considerably extended the scope of the due process clause to the freedoms of the first amendments and the rights of the accused in criminal proceedings, this reviewer for one had not fully realized that in the other areas—socio-economic legislation and administrative action (the dividing line here being most tenuous)—the great majority of decisions favored the states in the first four or five years of the period under consideration. Starting with Justice Sutherland's statement in *Stephenson v. Binford* (1931) that the Court would not overrule the legislative judgment as to the necessity of a given economic policy, Professor Wood builds up a line of decisions in which the Court displayed willingness to permit a greater degree of economic experimentation by the states. She states that after 1932 "generally speaking, a majority of the justices . . . had held that our constitutional system does not require judicial protection of the free enterprise, laissez-faire system."

There are, it is true, few exceptions to this statement but the pattern they seem to form is interesting and has not been noted by Professor Wood, although she has written that they are some of the most momentous decisions of the 1930's. The exceptions as listed by the author are *Carter v.*

Carter Coal Co., Louisville Joint Stock Land Bank v. Radford, Railroad Retirement Board v. Alton R.R., and *Morehead v. Tipaldo* (a fifth much less important case is *Thompson v. Consolidated Utilities Corp.*). It is worth noting that the first three of the important four involve federal legislation and that the subject matter in the *Carter, Tipaldo* and *Alton* cases is the employer-employee relationship. In her list of decisions favorable to the legislatures prior to 1937 Professor Wood has none applying to the employer-employee relationship and only one involving a federal law. There is some indication, therefore, that the justices, while permitting the legislatures to regulate more aspects of business, such as minimum prices, were still reluctant to allow substantial alteration of the existing relationship between employer and employee or to permit the federal government to widen its sphere of economic regulation. The employer-employee relationship represented the last citadel of laissez-faire which the Supreme Court almost perished in defending.

The other purpose—that of showing that the present Court is as lacking in definite standards and is as capricious as the pre-1932 Court in its use of the due process clause—is a more familiar one but the author has accomplished it quite skillfully, especially in the area of criminal proceedings. She has collected a number of beautifully impressive clauses by which the Court has sought to explain what the Constitution guarantees to the individual in a criminal proceeding in a state court. Due process is said to be "the consensus of society's opinion," to comprise "fundamental notions of fairness and justice embedded in the feelings of the American people," to be a "compendious expression of all the rights which are basic to a free society," and to require procedures compatible with "the immutable principles of justice which inhere in the idea of a free government." In such circumstances the author says the Court may select "its rule from among a number of alternatives, all equally vague and general. It applies the rule to the indefinite phrase 'due process of law' and the result can be protection or no protection without contradictions."

But this is not a new position for the Court, which has always tried to protect through the use of this clause that which it felt to be reasonable and fair. The post-1932 justices simply have had different standards—standards which permit substantial economic regulation, broad use of state taxing power, a freer hand for state administrative agencies and more protection for the individual's political and civil liberties.

As is frequently and perhaps inevitably the case in studies of the Court we are told only what the Court did; the more important question of why the Court did it is for the most part left unanswered. Professor Wood had briefly referred to the economic pressures of the depression and to the political pressures of 1937. She has made a very cursory examination of the philosophies of three—Black, Douglas and Frankfurter—of the twenty-one justices who sat on the Court during this period. But she has not found it

possible within the scope of this book to analyze deeply the reasons for the changing use of the due process tool. A partial explanation lies in the fact that the legislatures and the justices saw eye to eye on most matters during these years. Equally important is the conviction on the part of most of the justices that the Court in these areas should not try to substitute its judgment for that of the legislature. As the pressure of international tensions drives legislatures to more incursions on the freedoms of the first amendment the Supreme Court will perhaps be forced to reveal which of these explanations is sounder. Decisions of the last few years apparently indicate that the majority of the Court, though doubtful of the wisdom of certain ideas, will find nothing in the Constitution to prevent their enactment.

Two small omissions slightly impair the usefulness of this book. The absence of an introductory chapter summarizing the development of due process in the field of economic legislation prior to 1932 handicaps the non-specialist who is unacquainted with the judicial history of the previous half-century. This is only partially overcome by occasional references to several of the leading cases of the past. The other deficiency is the lack of a table showing the number of cases decided in each category in each year and whether the decision was favorable to the governmental action. Certainly the quantitative approach has its limitations but here it would be a justifiable supplement to the qualitative analysis. This reviewer found himself much more convinced of the early tendency toward change in the economic field after constructing one for himself.

DR. THOMAS J. WOOD — ASSOCIATE PROFESSOR OF GOVERNMENT, UNIVERSITY OF MIAMI

FREE ENTERPRISE AND THE ADMINISTRATIVE STATE. By Marshall E. Dimock. University, Alabama: University of Alabama Press, 1951. Pp. 179. $2.50.

The author, a teacher of political science in several of the outstanding universities of this country and Puerto Rico, who is also a writer of many worth-while books on business, government, administrative agencies and political enterprises, approaches the subject with a wealth of personally gained knowledge, experience and study.

He approaches the subject by first establishing his interpretation of "Free Enterprise" as the system in which the predominant characteristics are individual ownership, competition, and managerial freedom, and the "Administrative State" as the control of economy by government or by public administration.

The book deals with a series of related problems and is divided into five "essays" (as the author chooses to designate them) or chapters: the free enterprise system, what it is and what causes it to change; the problems of monopoly and antitrust laws, with the conclusion that administrative factors will be the center of any lasting solution; consideration of the