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TAKING FROM A AND GIVING TO B: SUBSTANTIVE DUE PROCESS AND THE CASE OF THE SHIFTING PARADIGM

*John V. Orth**

The Fifth Amendment prohibits the federal government from depriving any person of "life, liberty, or property, without due process of law," and the Fourteenth Amendment extends that prohibition to the states. State constitutions say the same thing, in one form of words or another.¹ Scholars have traced the phrase "due process of law" to Sir Edward Coke's seventeenth century commentary on Magna Carta,² in which he used the words, claiming a Law French original,³ to restate (and perhaps enlarge) the Great Charter's guarantee of freemen's rights against governmental invasion except *per legem terre* ("by the law of the land").⁴ It should be unnecessary to remark that a guarantee of due process is a procedural guarantee. Before a

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1. The earliest state constitutions used the phrase "law of the land," rather than "due process of law." See, e.g., *Md. Const.*, Declaration of Rights, § 21 (1776) ("no free-man ought to be taken, or imprisoned, or disseised of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the law of the land"). Some state constitutions continue that usage. See, e.g., *Md. Const.*, Declaration of Rights, Art. 24. Later, state constitutions began to follow the wording of the Federal Bill of Rights. See, e.g., *Cal. Const.* Art.I, § 7 ("A person may not be deprived of life, liberty, or property without due process of law. . .").

2. Edwardo Coke, 2 *Institutes of the Laws of England* 50 (W. Clarke and Sons, 1809). See Sir William Holdsworth, 1 *A History of English Law* 61 (Methuen & Co., A.L. Goodhart and H.G. Hanbury, eds., 7th rev. ed. 1956).

3. 25 Ed.3, st.5, c.4 (1350) ("*en due manere ou proces fait sur brief original a la commune lei*").

4. Magna Carta § 39 (1215) ("*Nullus liber homo capiatur, vel imprisonetur, aut dis-seisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruat, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legum terre.*") ("No free man shall be taken or imprisoned or disseised or outlawed or exiled, or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land.") (Latin text and translation in J.C. Holt, *Magna Carta* 326-27 (Cambridge U. Press, 1965).

person can be deprived of life, liberty, or property, certain procedures must be observed, procedures designed to ensure fairness.⁵ In its English origin, insistence on due process of law—or the law of the land—was designed to protect against executive (or judicial) overreaching.

Six hundred and fifty years after Magna Carta, in the last decades of the nineteenth century, due process in America had become a constitutional limitation on legislative power. No longer exclusively concerned with how the executive (or judiciary) proceeded, due process developed a concern with what the legislature did. Due process had acquired, in other words, a substantive dimension. United States Supreme Court Justice Samuel Miller had the historical perspective to recognize the contrast. In *Davidson v. New Orleans*⁶ in 1878 he wrote on behalf of the Court:

It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the crown, except as provided by the law of the land, they meant by "law of the land" the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England.⁷

But, he continued, the Fourteenth Amendment directed attention to state action. "[C]an a State make anything due process of law which, by its own legislation, it chooses to declare such?"⁸ he asked rhetorically, and answered on behalf of his brethren:

To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation. It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A, shall be and is hereby vested in B, would, if

5. John E. Nowak, et al., *Constitutional Law* 557 (West Publishing Co., 2d ed. 1983) ("The essential guarantee of the due process clause is that of fairness.")

6. 96 U.S. 97 (1878).

7. *Id.* at 102. Modern scholars have established that it is anachronistic to speak of "parliament" as a legislature at the time of Magna Carta. "The word has been traced back to Henry II's reign [1154-89], but it was first used by the chronicler Matthew Paris to describe such a meeting [of the great council] in 1239." Bryce Lyon, *A Constitutional and Legal History of Medieval England* 413 (Harper and Brothers, 1960).

8. 96 U.S. at 102.

effectual, deprive A of his property without due process of law, within the meaning of the constitutional provision.⁹

Taking from A and giving to B had become the shorthand to describe what substantive due process was designed to prevent.

A similar case of taking from A and giving to B had been hypothesized nearly fifty years earlier by Justice Joseph Story in *Wilkinson v. Leland*¹⁰ in 1829. In the actual facts of that case, the state of Rhode Island had attempted by statute to confirm title to Rhode Island real estate. The property had been sold by an executrix of an insolvent New Hampshire testator pursuant to authority granted by a New Hampshire probate court. Because the United States Supreme Court held that the title was valid without regard to the legislation, it did not need to decide the question of the constitutionality of the statute. In extensive dicta, however, Justice Story examined the issue nonetheless. Today, perhaps, the question would seem to be one of attempted legislative revision of a final judicial decision, a violation of separation of powers. To Justice Story the question involved an attempted taking without due process of law. Any such attempt, he thought, would be plainly unconstitutional: "We know of no case, in which a legislative act to transfer the property of A to B without his consent, has ever been held a constitutional exercise of legislative power in any state in the Union."¹¹

From its original use to encapsulate what was wrong with legislative interference with individual titles, the phrase "taking from A and giving to B" became in the heyday of *laissez-faire* a powerful linguistic weapon against regulatory legislation. In its notorious 1911 decision in *Ives v. South Buffalo Ry. Co.*,¹² invalidating New York's pioneering Workmen's Compensation Act, the New York Court of Appeals used the phrase to clinch the case against the statute under both state and federal constitutions. Describing the statute's "central and controlling feature" to be that "the employer is responsible to the employe[e] for every accident in the course of the employment, whether the employer is at fault or not, and whether the employe[e] is at fault or not," the Court denounced it as "plainly revolutionary."¹³ In a dubious excursion into legal history, the judges declared: "When our Constitutions were adopted, it was the law of the land that

9. *Id.*

10. 27 U.S. (2 Pet.) 627 (1829).

11. *Id.* at 658. This sentence was recently quoted with approval in *McDonald's Corp. v. Dwyer*, 450 S.E.2d 888, 891 (N.C. 1994).

12. 94 N.E. 431 (N.Y. 1911).

13. *Id.* at 436.

no man who was without fault or negligence could be held liable in damages for injuries sustained by another.”¹⁴ To change that principle by imposing “upon an employer, who has omitted no legal duty and has committed no wrong, a liability based solely upon a legislative fiat . . . is taking the property of A and giving it to B, and that cannot be done under our Constitutions.”¹⁵

Scholars often trace the origin of substantive due process to Justice Stephen Field’s dissent in the 1873 *Slaughter-house Cases*,¹⁶ in which he catalogued a series of individual liberties supposedly immune from government interference, such as “the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.”¹⁷ Even before the United States Supreme Court adopted this proposition in *Allgeyer v. Louisiana* (1897)¹⁸ and—most memorably—in *Lochner v. New York* (1905),¹⁹ activist state courts had begun turning it into constitutional dogma. In 1885 in the *Tenement House Cigar Case*,²⁰ for example, the New York Court of Appeals invalidated a statute prohibiting the manufacture of cigars in tenement houses because it interfered with the profitable use of real estate without compensating public benefit. Even earlier, as some scholars have noted, a substantive due process component had appeared in the infamous *Dred Scott Case* (1857).²¹

Before *Slaughterhouse*, before the *Tenement House Cigar Case*, even before *Dred Scott*, the ground was being prepared for substantive due process. Because the American constitutional requirement of due process was linked to the English constitutional tradition of fundamental law as a restraint on parliamentary power, it had a long history even before it was incorporated in American constitutional documents. Sir Edward Coke had made a sustained attempt to use the common law to limit Stuart absolutism, of which his insistence on due process of law was an example. By the time of Sir William Blackstone in the mid-eight-

14. *Id.* at 439.

15. *Id.* at 440.

16. 83 U.S. 36, 83 (1873) (Field, J., dissenting). See Roscoe Pound, *Liberty of Contract*, 18 Yale L.J. 454, 479 (1909); Bernard Schwartz, *The Law in America* 104 (American Heritage Publishing Co., Inc., 1974).

17. 83 U.S. at 97.

18. 165 U.S. 578 (1897).

19. 198 U.S. 45 (1905).

20. *Matter of Application of Jacobs*, 98 N.Y. 98 (1885).

21. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857) (Taney, C.J.) (act of Congress depriving slaveholders of their property if transported into free states or territories “could hardly be dignified with the name of due process of law”). See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford U. Press, 1978).

eenth century—after the English Civil War and Glorious Revolution, and on the eve of American independence—the supremacy of parliament was firmly established. The test case for Blackstone, one suggested earlier by Coke, was whether parliament could so violate natural justice as to make a man a judge in his own case. Coke had taken the negative;²² Blackstone, despite his obvious discomfort, took the affirmative: after counseling the judges to use every means to avoid finding so manifest a violation of right and reason, Blackstone candidly admitted:

[I]f we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.²³

Americans of the Revolutionary generation were, for obvious reasons, unwilling to concede so much to legislative supremacy. Many, Thomas Jefferson among them, preferred Coke to Blackstone²⁴ and agreed that no legislature could violate natural justice. James Iredell, a precocious theorist of judicial review, wrote in a private letter as late as 1787:

Without an express Constitution the powers of the Legislature would undoubtedly have been absolute (as the Parliament in Great Britain is held to be), and any act passed, *not inconsistent with natural justice* (for the curb is avowed by the judges even in England), would have been binding on the people.²⁵

A decade later, with an express Constitution in effect and Iredell a justice of the United States Supreme Court, he engaged with his fellow justice, Samuel Chase, in a celebrated exchange in *Calder v. Bull*²⁶ concerning a jurisprudence of “natural justice.” Chase flatly declared that “[a]n ACT of the Legislature (for I cannot call it a *law*) contrary to the *great first principles* of the

22. See, e.g., *Dr. Bonham's Case*, 8 Coke's Rep. 226, 235 (1610) (“if any act of Parliament gives to any to hold, or to have conusans of all manner of pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is party; for, as hath been said, *iniquum est aliquem suae rei esse judicem*” (it is wrong for a man to be a judge in his own case)).

23. William Blackstone, 1 *Commentaries on the Laws of England* 91 (1765).

24. Julian S. Waterman, *Thomas Jefferson and Blackstone's Commentaries*, 27 Ill. L. Rev. 629, 637 (1933) (quoting Jefferson as advising law students that “Coke's Institutes and reports are their first, and Blackstone their last work, after an intermediate course of two or three years”).

25. Griffith J. McRee, 2 *Life and Correspondence of James Iredell* 172 (D. Appleton and Co., 1858) (emphasis in original).

26. 3 U.S. (3 Dall.) 386 (1798).

social compact, cannot be considered a *rightful exercise* of *legislative* authority.”²⁷ Iredell in reply denied that judges could be guided by so uncertain a rule: “The ideas of natural justice are regulated by no fixed standard. . . .”²⁸

Chase, on the contrary, thought the demands of natural justice not so difficult to discover, and he offered a “few instances”:

A law that punished a citizen for an *innocent* action, or, in other words, for an act, which, when done, was in violation of no *existing* law; a law that destroys, or impairs, the *lawful private* contracts of citizens; a law that makes a man a *Judge in his own cause*; or a law that takes *property* from A and gives it to B: It 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.²⁹

Of these four examples, the first two were textually addressed by the “express Constitution”: the Ex Post Facto Clause (at issue in *Calder*) forbids laws punishing acts not criminal when committed, and the Contracts Clause prohibits laws impairing the obligation of contracts. In these cases there was no longer any reason to grope for principles of natural justice. It is the last two examples—particularly their juxtaposition—that are interesting: “a law that makes a man a *Judge in his own cause*” and “a law that takes *property* from A and gives it to B. . . .”³⁰ For these, there was no textual counter in the express Constitution. But no one familiar with the traditions of English constitutionalism—and Americans of the Revolutionary generation had recently been catechized in it—could doubt that making a man a judge in his own case violated due process. Coke had said it; Blackstone (after his fashion) had repeated it. Indeed, the right to an impartial decision-maker remains at the heart of procedural due process to this day.³¹

“Taking from A and giving to B” is, however, another matter. It is here in *Calder* that it makes its debut in the U.S. Reports. It is difficult to say whether, at this early stage, the principal concern is that the taking is without an apparent public purpose or without stated compensation. If either of those were involved (or, rather, not involved), the textual response would be

27. *Id.* at 388.

28. *Id.* at 399.

29. *Id.* at 388.

30. *Id.*

31. See, e.g., *Nowak et al.* at 558 (cited in note 5). See also *Connally v. Georgia*, 429 U.S. 245 (1977).

the Takings Clause of the Fifth Amendment. Time was to reveal other concerns, however. Justice Story in *Wilkinson v. Leland* seems to have objected to a legislative attempt to exercise judicial power. To judges in the heyday of substantive due process, the problem was legislative interference with beneficial economic activity. "Taking from A and giving to B" could accommodate all these meanings, which is what made it so useful.

Students of other bodies of organized knowledge have observed how changing paradigms have triggered relatively rapid rearrangements of existing data and opened new areas for examination. In the history of science, paradigm shifts have accompanied revolutions like Copernicanism and Darwinism.³² Without assuming too much similarity between scientific and legal revolutions,³³ it is still possible to see the origins of the substantive due process revolution in the shifting paradigm used to describe the abuse of due process.

Common law development often takes place out of sight. The blatant legal fictions of the past are only the most obvious examples. Formal continuity is maintained despite changing reality by pretending new facts fit within old rules. Standard hypothetical cases encapsulating basic principles remain static for centuries. On the rare occasions they are displaced, legal change may become obvious and rapid. Making a man a judge in his own case was the standard illustration of a violation of natural justice. It was for centuries (and remains) a prime example of a violation of procedural due process. When, in the late eighteenth century, it was paralleled as an exemplar (or paradigm) with "taking from A and giving to B," there was at first no conscious change: this, too, could violate procedural due process, if a judicial proceeding was denied. But under cover of the phrase "tak-

32. See generally, Thomas S. Kuhn, *The Structure of Scientific Revolutions* (U. of Chicago Press, 2d ed. 1970). As Kuhn himself belatedly recognized, he originally used the concept of "paradigm" in two distinct senses: "On the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science." *Postscript—1969*, in Kuhn, *The Structure of Scientific Revolutions* at 175. The concept is used in this article in the second sense.

33. Although Kuhn himself at one point likened a scientific paradigm to a legal precedent—"like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions," Kuhn, *The Structure of Scientific Revolutions* at 23 (cited in note 32)—I have deliberately refrained from emphasizing the simile; first, because with its overtones from the history of science it might prove distracting; and, second, because Kuhn himself expressed uncertainty about how his insight could be exported to other fields, *id.* at 208-09.

ing from A and giving to B” another meaning lurked, redistributive and substantive. When in the mid-to-late-nineteenth century regulatory legislation threatened vested interests and individual entrepreneurship, due process jurisprudence already contained the germ of a response. “Taking from A and giving to B” could do double duty, illustrating both a procedural and a substantive violation. As substantive due process emerged as a new legal category, “taking from A and giving to B” became *the* prime example of what it forbade.

The taking paradigm was tied to the use of substantive due process in cases concerning economic regulation, so its eclipse as a reference point in federal constitutional law was inevitable when in the *Carolene Products Case*³⁴ in 1938 the United States Supreme Court announced a general presumption in favor of “regulatory legislation affecting ordinary commercial transactions. . . .”³⁵ The simple (or simplistic) case of “taking from A and giving to B” was of no further use. Such simple paradigms had in any event become embarrassments as legal discourse, increasingly influenced by academic legal education, displayed new sophistication. But the concept of substantive due process that the taking paradigm had helped to midwife did not pass away. It remained to see active duty later in a new class of cases concerning claimed violations of individual privacy.³⁶

Just as Magna Carta’s Latin phrase *per legem terre* (“by the law of the land”) yielded to Sir Edward Coke’s Law French translation “due process of law,” so the paradigm of what due process prohibited enlarged to include not only the procedural horror of “making a man a judge in his own case” but also the ambiguous one of “taking from A and giving to B.” Over time, the emphasis in the taking paradigm shifted from denying legislative determination of individual title (essentially a judicial function) to denying legislative interference with economic enterprise. Once the shift was complete, substantive due process had emerged to parallel procedural due process. When substantive due process was eventually abandoned as a check on regulatory legislation concerning economic activity, the category was not closed altogether; instead, substantive due process was divided into economic substantive due process—now largely inac-

34. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

35. *Id.* at 152. It was to this sentence that the famous Footnote 4 was appended, suggesting the appropriateness of applying a higher degree of judicial scrutiny to legislation affecting certain types of non-economic activity, such as the exercise of civil rights.

36. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

tive—and non-economic (or social) substantive due process, a continuing source of constitutional development.