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A MISSING LINK IN THE EVOLUTION OF DUE PROCESS

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On the eve of the American Revolution Blackstone could comment that "so great . . . is the regard of the [English] law for private property . . . it will not authorize the least violation of it; no, not even for the general good of the whole community."[1] A similar concern for proprietary interests soon found expression on this side of the Atlantic in what Professor Corwin has called "The Basic Doctrine of American Constitutional Law";[2] namely, the "doctrine of vested interests." The general purport of this concept was that "the effect of legislation on existing property rights was a primary test of its validity. . . ."[3]

In brief a sense of insecurity among the comfortable classes in the face of early American democracy led courts at first to invoke natural law and social contract[4] principles for the insulation of vested interests from legislative regulation. But extra-constitutional restraints upon government were hardly compatible with written constitutions. For this and other reasons, after flirting with ex post facto[5] and contract clauses[6] and with the separation of powers[7], the doctrine of vested interests finally settled in the law of the land or due process[8] provisions that were (and are) ubiquitous in American constitutions.

Granting all this as accepted learning, the present thesis is that by the end of the eighteenth century the orthodox procedural meaning of due process was too thoroughly established semantically, contextually[9] and historically[10] to accommodate a radically new, i.e. substantive,

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1. 1 BLACKSTONE, COMMENTARIES 139.
2. Corwin, *The Basic Doctrine of American Constitutional Law,* 12 MICH. L. REV. 247 (1914). See also Corwin, *The Doctrine of Due Process of Law before the Civil War,* 24 HARV. L. REV. 366, 460 (1911).
3. CORWIN, LIBERTY AGAINST GOVERNMENT 72 (1948).
4. See, *e.g.,* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); Goshen v. Stonington, 4 Conn. 209, 225 (1822).
5. See, *e.g.,* Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798); *cf.* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 415 (1829) (note appended to Mr. Justice Johnson's opinion).
6. See, *e.g.,* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); *cf.* Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420 (1837).
7. See Lewis v. Webb, 3 Maine 326 (1825); Bayard v. Singleton, 1 N.C. (1 Mar.) 42 (1787); Bowman v. Middleton, 1 S.C. 252 (1792); Staniford v. Barry, 1 Aik. 314 (Vt. 1825).
8. The term "law of the land" is a literal translation from the original Magna Charta. In later versions, *i.e.* reissues, the term becomes "due process of law." By Coke's time the two phrases had become interchangeable. See 2 COKE, INSTITUTES 50-51. In general our earliest constitutions contained the former expression while later usage tended to adopt the latter.
9. In our Federal Bill of Rights and in all of the early state constitutions "due process" and "law of the land" clauses are found in the midst of purely procedural provisions.
10. See, *e.g.,* 2 KENT, COMMENTARIES ON AMERICAN LAW 13 (14th ed. 1896); 2 STORY, CONSTITUTION § 1789 (3d ed. 1858). Professor Strong, running counter

meaning without some respectable constitutional go-between; namely, the separation of powers. Professor Corwin was well aware of the importance of separation principles in the development of the doctrine of vested interests.[11] But neither he nor his followers appear to have noticed the importance of those principles in the metamorphosis of due process.[12] The burden of the present effort is to show how that ancient procedural concept got its initial substantive impetus by absorbing separation of powers ideas—an impetus great enough to carry on eventually without recourse to separation doctrine. So viewed the latter was a vital link in the evolution of due process, not merely one of several fumbling steps that were tried and found wanting before vested interests finally found sanctuary in the fourteenth amendment.

To put it shortly orthodox due process meant that government could not punish, or "go against," a person except in a procedurally proper manner. Of course certain powers and processes belong to legislatures and others to the courts. In the old phraseology "To . . . compare the claims of the parties with the laws of the land before established, is in its nature a judicial act. But to . . . pass new rules for the regulation of new controversies, is in its nature, a legislative act; and if those rules interfere with the past, or the present, and do not look wholly to the future, they violate the definition of a law, 'as a rule of civil conduct'; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."[13] Moreover while courts are created to apply the law retrospectively to *particular* persons in *particular* circumstances, the legislative function is to make "*general* and *public* law [of future application] equally binding upon every member of the community * * * under similar circumstances."[14]

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to what he admits is the accepted view, undertakes to show that there were some threads of substantive meaning in due process in England prior to the Glorious Revolution and also in Colonial America. See STRONG, AMERICAN CONSTITUTIONAL LAW 43-49, 307 (1950).

11. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 259 (1914).

12. In a recent recapitulation of his previous efforts Professor Corwin appends a short footnote to his discussion of an early due process case to say, "It will be observed again how the principle of the separation of powers helps out this [due process?] argument," namely, that "when anybody is deprived of his conceded property rights . . . it is with a view to *punishing* him, which can only be done by judicial—i.e., 'due'—process . . . ." CORWIN, LIBERTY AGAINST GOVERNMENT 93 (1948). Interested in a much broader problem, Professor Corwin thus casually passes over the relationship which is the crux of the present paper. Indeed it is not clear to me that even the above quoted remarks refer to the connection between due process and separation. For his word "again" is supported by reference to another page where clearly Professor Corwin is not talking about due process at all, but rather about the connection between separation and the doctrine of vested interests. See also text and note 60 *infra*.

13. Merrill v. Sherburne, 1 N.H. 199, 204 (1818). See also Ogden v. Blackledge, 6 U.S. (2 Cranch) 272, 277 (1804); Opinion of the Judges, 4 N.H. 565, 572 (1829).

14. Vanzant v. Waddell, 10 Tenn. 259, 270 (1829). See also Holden v. James, 11 Mass. 396 (1814).

(Emphasis added.) Accordingly if a legislature acts not in general and prospective terms, but retrospectively for a particular case, it encroaches upon the judicial process. This is the old problem of attainder and bills of pains and penalties. One whose vested right is disturbed by such "legislation" is hurt (punished) as the result of improper procedure. In striking it down a court merely enforces *process* requirements—though the substance of the measure is incidentally destroyed. This approach was especially relevant in the formative era of American law when, as Dean Pound has shown, legislatures deemed themselves "omnicompetent" even in the judicial domain. They "did not hesitate to enact statutes reversing judgments of the courts in particular cases. They sought to probate wills rejected by the courts. . . . By special laws they directed the details of local government for particular instances. They validated particular invalid marriages. They suspended the statute of limitations for a particular litigant in a particular case. They exempted a particular wrongdoer from liability for a particular wrong for which his neighbors would be held by the general law."[15] Such measures of special rather than general, and retrospective rather than prospective, application smack of the judicial decree. Some of them in essence are legislative adjudications. In disturbing vested rights they would be procedurally vulnerable for taking property by improper process, being among other things a repudiation of trial by jury and in effect bills of pains and penalties.

This problem and the separation approach to it are illustrated as early as 1787 in *Bayard* v. *Singleton*.[16] There, after confiscating by special act the land of certain royalists, the North Carolina legislature provided that actions for the recovery of such property should be dismissed by the courts upon motion. After some outside observations by Ashe, J.,[17] concerning the separation of powers, the court refused to honor the dismissal statute, observing according to the reporter:

> That by the constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the Legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury. . . .[18]

Soon thereafter Magna Charter (Due Process?) was introduced into the formula. In *Bowman v. Middleton*[19] a South Carolina statute,

15. POUND, THE FORMATIVE ERA OF AMERICAN LAW 39-40 (1950).
16. 1 N.C. (1 Mar.) 42 (1787).
17. *Id.* at 43.
18. *Id.* at 45.
19. 1 S.C. 252 (1792).

purporting to quiet title by confirming the claim of one of the contestants, was held invalid on the ground that:

> [P]laintiffs could claim no title under the act in question, as it was against common right, as well as against magna charta, to take away the freehold of one man and vest it in another, and that, too, to the prejudice of third persons, without any compensation, or even a trial by the jury of the country, to determine the right in question.[20]

Skipping for the moment some twenty-seven years brings us to the celebrated argument of Daniel Webster as counsel for Dartmouth College. His case was before the Supreme Court on federal question (contract clause) grounds which precluded consideration of state constitutional restraints.[21] Recognizing "the limits which bound the jurisdiction of the Court," Webster observed nevertheless that "it may assist in forming an opinion of [the] true nature and character [of the statutes altering Dartmouth's charter] to compare them with those fundamental principles, introduced into State governments for the purpose of limiting the exercise of legislative power. . . ."[22]

> One prohibition [Art. 15 of the New Hampshire Constitution] is "that no person shall be deprived of his property . . . but by judgment of his peers, or the law of the land". . . .
>
> Have the plaintiffs lost their franchises by "due course and due process of law?" On the contrary, are not these acts "particular acts of the legislature, which have no relation to the community in general, and which are rather sentences than laws?" By the law of the land, is most clearly intended, the general law; a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land. If this were so, 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, decrees and forfeitures, in all possible forms, would be the law of the land.[23]

In support of this argument that a legislature's performance of quasi-judicial acts is a violation of "the law of the land" and due process Webster cited *University v. Foy*.[24] There legislation purported to repeal an earlier grant of land to the university. Striking down the repealing measure the North Carolina Supreme Court had said:

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20. *Id.* at 254.
21. Webster was uneasy about going to "Washington on a single point" and took steps to broaden his base in later litigation should he lose on the federal issue. 1 FUESS, DANIEL WEBSTER 225 (1930).
22. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 557-58 (1819). It is, of course, interesting and perhaps significant that the Court permitted such argument.
23. *Id.* at 561, 581.
24. 5 N.C. 58 (1805).

> But one great and important reason which influences us in deciding this question is [the constitutional provision] "that no freeman ought to be . . . deprived of his life, liberty or property, but by the law of the land". . . . It seems to us to warrant a belief that members of a corporation as well as individuals shall not be so deprived . . . unless by a trial by Jury in a Court of Justice, according to the known and established rules of decision. . . . The property vested in the Trustees must remain for the uses intended for the University, until the Judiciary of the country in the usual and common form, pronounce them guilty of such acts, as will, in law, amount to a forfeiture of their rights or a dissolution of their body.[25]

The other case cited by Webster on this point was *Dash v. Van Kleeck*[26] in which both Thompson, J., and the great Kent, C. J., had used the separation of powers as a cloak to protect vested interests against legislative interference.[27] And they in turn had cited *Ogden v. Blackledge*[28] in which the Supreme Court of the United States had, as Kent put it, "considered the point too plain for argument, that a statute could not retrospect, so as to take away a vested civil right."[29] The supererogatory argument referred to began as follows:

> To declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative. One of the fundamental principles of all our governments is that the legislative power shall be separated from the judicial.[30]

The full significance of Webster's position can be appreciated only in contrast to the opinion below. There the Supreme Court of New Hampshire in then orthodox fashion had categorically rejected an unqualified substantive due process argument:

> What statute does not either directly or indirectly interfere with property rights? The principle urged would probably make our whole statute book a dead letter.[31]

Webster's genius was that he saw in separation a device for giving due process a *manageable,* if expanded, meaning in an age not yet prepared to recognize only the sky as its limit. No court in 1819 could be expected to hold, and few lawyers to argue, that due process embodied (as Holmes later put it) Mr. Herbert Spencer's *Social Dynamics,* or anything like it. But imaginative lawyers could see that a court might be induced to give the old provision such familiar, quasi-procedural overtones as were implicit in separation and the old struggle against bills of attainder and bills of pains and penalties.

25. *Id.* at 87, 88, 89.
26. 7 Johns. 477 (N.Y. 1811).
27. *Id.* at 497-98, 507-08.
28. 6 U.S. (2 Cranch) 272 (1804).
29. 7 Johns. at 507-08.
30. 6 U.S. (2 Cranch) at 277.
31. Dartmouth College v. Woodward, 1 N.H. 111, 131 (1818).

Once this step was accomplished more expansive constructions might be in order!

Of course for jurisdictional reasons the Supreme Court in the *Dartmouth* case could not make use of a "law of the land" or "due process" clause, but a famous lawyer had made a point in a forum where all judges and lawyers could take notice of it. Within a decade the Tennessee Supreme Court, perhaps fastening upon Webster's emphasis on generality as a necessary characteristic of legislation, had started a line of cases the crux of which was that special or "partial" laws directly or indirectly interfering with property rights violate "the law of the land" clause of the state constitution.[32] In due course the Tennessee court made more plain—what doubtless was implicit from the beginning—that while talking "law of the land," it was thinking separation.[33]

Meanwhile amalgamation of separation and due process had been accomplished in the jurisprudence of states far more influential in the legal world than Tennessee. When South Carolina tried to create a new medical school by transferring the "rights, powers and duties" of an existing institution to a new one, it met a "law of the land" barrier in *State v. Heyward.*[34] There, after noting that while in England Parliament was supreme, in South Carolina the separation of powers prevailed, the court said:

> An Act of the Legislature which takes from one man his property, or rights, and gives it, or them, to another, on a claim of right, is the exercise of Judicial power, which is [vested in the judiciary] * * * the State . . . cannot resume her grant, or transfer it to another, until a forfeiture of the grant is judicially ascertained. . . . It would hence seem that . . . a corporation can only be deprived of its powers, rights, privileges, and immunities by a judgment of forfeiture, obtained according to the *law of the land.*—By this, I understand a trial had, and a judgment pronounced, in the court of law of this State.[35] (Emphasis added.)

In the following year (1833) Chief Justice Ruffin in *Hoke v. Henderson*[36] delivered the classic separation-due process opinion. By general act North Carolina had made certain public offices elective rather than appointive as they had been previously. The effect was to deprive Hoke of an appointive position. Finding that Hoke had had a property right in his office, the Chief Justice for his court held that

> Whenever an act of Assembly therefore is a decision of titles between individuals, or classes of individuals, although it may in terms purport to be the introduction of a new rule of title, it is essentially a judgment against the old claim of right; which is not a legislative, but a judicial

32. Vanzant v. Waddell, 10 Tenn. 259, 270-71 (1829).
33. Jones v. Perry, 18 Tenn. 59, 71-80 (1836).
34. 15 S.C. 389 (1832).
35. *Id.* at 410, 412.
36. 15 N.C. 1 (1833).

> function. . . . The Legislature cannot act in that character; and therefore, although their act has the forms of law, it is not one of those *laws of the land,* by which alone a freeman can be *deprived* of his *property.*[37]

In the original edition of his *Commentaries on American Law* in 1826 Kent had defined due process in what appears to be purely orthodox, procedural terms: "it means law in its regular course of administration through the courts of justice."[38] In the editions that appeared after Hoke's case Kent added a footnote to the above definition in which he commended Ruffin's "elaborate opinion" as being "replete with sound constitutional doctrines." So indorsed in the *Commentaries Hoke v. Henderson* was insured a wide circulation. Under the authority of such great names as Ruffin and Kent it could not fail to carry enormous weight.

Within a decade Chief Justice Gibson of Pennsylvania in *Norman v. Heist,*[39] without citing any of the foregoing cases, wrote an opinion in which he came to similar conclusions:

> [T]he Constitution . . . declares that no citizen shall be deprived of his life, liberty or *property,* unless by the judgment of his peers or the law of the land. What law? Undoubtedly, a pre-existent rule of conduct, declarative of a penalty for a prohibited act; not an *ex post facto* rescript or decree made for the occasion. The design of the convention was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it, if such rescripts or decrees were allowed to take effect in the form of a statute.[40]

Thus a full generation before adoption of the fourteenth amendment three of the four leading ante-bellum state court judges, Kent, Ruffin and Gibson, had put their stamps of approval upon the absorption of the separation concept by due process.[41]

Professor Corwin considers the "great case of *Wynehamer v. State of New York*[42] . . . a new starting point in the history of [substantive] due process . . . ."[43] The difficulty with this evaluation is that in holding a prohibition act invalid on due process grounds the court emphasized the failure of the measure to distinguish between "liquors existing when it took effect as a law, and such as might thereafter be acquired . . . all the judges [being] of opinion that it would be competent for the Legislature to pass such an act [that] should be plainly and dis-

37. *Id.* at 13, 15.
38. 2 KENT, COMMENTARIES ON AMERICAN LAW 13 (14th ed. 1896).
39. 5 W. & S. 171 (Pa. 1843).
40. *Id.* at 173. See also Sharpless v. Philadelphia, 21 Pa. 147 (1853).
41. Chief Justice Shaw comes quite close to this position in Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 102-04 (1851). Earlier in Holden v. James, 11 Mass. 396 (1814), a special, retrospective statute had been invalidated via a constitutional clause similar to the more common due process provision.
42. 13 N.Y. 378 (1856).
43. See CORWIN, LIBERTY AGAINST GOVERNMENT 101-02 (1948).

tinctly prospective as to the property on which it should operate."[44] Thus like all of the cases discussed above *Wynehamer* turns on the judicial, i.e., particular or retrospective, nature of the legislation in question.

Perhaps a better candidate for a "new starting point" in substantive due process would be the earlier New York case of *Taylor v. Porter*.[45] There relying on *Hoke v. Henderson* and the later of the two Tennessee cases referred to above, Bronson, J., for his court struck down a *general* act authorizing, under limited circumstances, the construction of private roads on property owned by third parties.

> The meaning of the [law of the land] section then seems to be, that no member of the state shall be . . . deprived of any of his rights or privileges, unless the matter shall be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially that he has forfeited his privileges, or that some one else has a superior title to the property he possesses, before either of them can be taken from him. It cannot be done by mere legislation.[46]

While the language used is much like that in the earlier cases (fusing separation and due process concepts) there is no specific mention of retroactivity or particularity. In fact the act at issue was general in nature and the reported facts suggest that it long ante-dated plaintiff's acquisition of the property for which he claimed and received protection.[47] It is noteworthy that in this case Judge Bronson's language was not endorsed by his colleagues. One of them concurred separately without opinion, the other dissented.

The suggestion that *Taylor v. Porter* marks a new departure comes simply to this: in all prior cases the retrospective or "partial" application of the challenged legislation had been emphasized as the basis of invalidity. When Bronson, J., silently dispensed with both of these elements he was in effect holding—perhaps without awareness of what was involved—that separation was no longer the essential content of due process in vested interest cases. For the elements of retroactivity and particularity are important only when it is deemed necessary to show the judgment-like, or "pains and penalties" quality, of a legisla-

44. 13 N.Y. at 487 (1856). See text and note 60 *infra*.

45. 4 Hill 140 (N.Y. 1843). *Cf. In re* Jacobs, 98 N.Y. 98 (1885) in which substantive due process in the modern sense first reached full and unequivocal bloom.

46. 4 Hill at 146.

47. See dissenting opinion of Nelson, C. J., 4 Hill at 148-51. Professor Corwin at first mistakenly read *Taylor v. Porter* as involving only a special, or private, statute. See Corwin, *The Doctrine of Due Process of Law before the Civil War*, 24 HARV. L. REV. 366, 460, 465 (1911). On that basis of course there would be nothing unusual about the case. In his recapitulation thirty-seven years later Professor Corwin apparently recognized his mistake as to the nature of the statute in question. See CORWIN, LIBERTY AGAINST GOVERNMENT 97-98 (1948). But meanwhile, thanks to his earlier efforts, *Wynehamer* had become such a famous landmark that there was perhaps no retreating from it.

ture's act. If Bronson, J., could do without either or the old crutches, it is noteworthy that Ruffin, C. J., in *Hoke's* case had expressly dispensed with one of them, namely, particularity.[48] Consciously or not Judge Bronson was clearly ahead of his own court and ahead of his era.

In the only pre-Civil War majority opinion of the Supreme Court of the United States in which due process was substantively conceived both the special and the retrospective nature of the legislation at issue were stressed.[49] Congress by special act had extended the life of a patent on planing machines. *Bloomer v. McQuewan*[50] raised the question of whether an assignee under the original patent continued to enjoy his assigned rights under the extension. Construing the statute so as not to "interfere with rights of property before acquired."[51] Chief Justice Taney for the Court observed that, if the measure were construed otherwise,

> the power of Congress to pass it would be open to serious objection . . . . The right to construct and use these planing machines, had been purchased and paid for . . . . They were the property of the respondents. Their only value consists in their use. And a special act of Congress, passed afterwards, depriving the appellees of the right to use them, certainly could not be regarded as due process of law.[52]

So much for the ante-bellum cases. If not universally recognized, so well established was the nexus between separation and due process on the eve of the Civil War that the two could be presented in Sedgwick's well-known treatise as virtual equivalents. Thus, referring to the separation of powers, Sedgwick continues:

> This idea is sometimes conveyed in the phrase . . . that a legislature can do no judicial act; and it is almost identical with the constitutional declaration which insures to all persons attacked or charged, the protection of the law of the land. If, as we have seen, by the right to the law

48. See Hoke v. Henderson, 15 N.C. 1, 13 (1833). Rejecting a broad due process argument in 1854 the Supreme Court of Illinois observed, "The framers of Magna Charta and of the constitutions of the United States and of the states never intended to modify, abridge, or destroy the police powers of government. They only prohibited its exercize by ex post facto [i.e. retrospective] laws and regulated the mode of trial for offences." Goddard v. Jacksonville, 15 Ill. 589 (1854).

49. I have passed over two minority opinions, one per Mr. Justice Baldwin in Groves v. Slaughter, 40 U.S. (15 Pet.) 449, 510-15 (1841); the other per Chief Justice Taney in Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 450 (1856), in which due process is used in a purely substantive sense without reliance upon separation factors. In view of what went before and after, these must be considered sports. The fact that both deal with slavery suggests that they are the product of the abolitionists' peculiar political usage. See Graham, *Procedure to Substance—Extra-Judicial Rise of Due Process*, 1830-1860, 40 CALIF. L. REV. 483 (1952); Graham, *The Early Anti-Slavery Backgrounds of the Fourteenth Amendment*, 1950 WIS. L. REV. 479, 610.

50. 55 U.S. (14 How.) 539 (1852).

51. *Id.* at 554.

52. *Id.* at 553.

> of the land is meant the right to judicial procedure, investigation, and determination, whenever life, liberty, or property is attacked; and if it be conceded, as it must be, that our legislatures are by our fundamental law prohibited from doing any judicial acts,—then it would seem . . . that the rights of the citizens are as perfectly protected by the guarantee of the law of the land, as they can be by a preemptory distribution of power. *In fact, the special clause works a division of power.* . . . This, however, is merely a circuitous statement of the proposition that vested rights are sacred.[53] (Emphasis added.)

After the Civil War the Supreme Court's first brush with substantive due process came in *Hepburn v. Griswold.*[54] There, striking down national legal tender legislation on due process grounds *interalia,* Chief Justice Chase for his Court emphasized the retrospective character of the offending measure.[55] Shortly afterwards counsel first used the fourteenth amendment to press the unqualified, *i.e.,* non-separation, substantive position upon the Court in the *Slaughter House* cases.[56] The response was a categorical repudiation. Indeed the Court had never heard of such a claim.

> We are not without judicial interpretation . . . both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State . . . upon the exercise of their trade by the butchers . . . be held to be a deprivation of property within the meaning of that provision.[57]

But counsel's position found support in dissenting opinions by Justices Bradley and Swayne.[58] Both of them, however, rested more heavily upon the "privileges and immunities" clause than on due process. But this emphasis was soon to be reversed. The "privileges and immunities" of citizenship proviso perhaps was too slender a tool in the expanding world of corporate enterprise, or was it that due process was a more familiar, and hence handier, instrument thanks to its long tempering in the flames of separation doctrine at the state level? In any case we know that only a few months after rejecting a purely substantive due process argument in the *Slaughter House* cases, a majority in *Bartemeyer v. Iowa,*[59] sustaining a prohibition act, cited *Wynehamer* with the observation that, if the prosecution had involved the sale of liquor owned *prior* to prohibition, it would have raised "very grave" due process questions.[60] The narrowness of this separa-

53. SEDGWICK, STATUTORY AND CONSTITUTIONAL LAW 676-77 (1857). See also DWARRIS, CONSTRUCTION OF STATUTES 165, 428 (Potter ed. 1874).
54. 75 U.S. (8 Wall.) 603 (1869).
55. *Id.* at 624-25.
56. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872).
57. *Id.* at 80-81.
58. *Id.* at 111, 124 (Mr. Justice Field's dissent does not mention due process).
59. 85 U.S. (18 Wall.) 129 (1873).
60. *Id.* at 133. Professor Corwin calls this reasoning an "evasion" of the true issue which again suggests that he was oblivious to the role of separa-

tion concession to due process was emphasized in the following year when, Mr. Justice Miller, speaking for the Court (as he had in the two preceding cases), struck down a tax measure on the basis of "limitations which grow out of the essential nature of all free governments."[61] This atavistic reliance upon "natural law" must have amused Justices Field, Swayne and Bradley, but it certainly did not impede the fight to put the heady brew in the old "due process" bottle.[62] Perhaps they remembered that extra-constitutional limitations without more had long since been tried and found wanting.[63]

After a long and cautious flirtation with the Field-Swayne-Bradley position,[64] the Court finally in the *Minnesota Rate* case of 1890[65] took what is generally considered the decisive turn.[66] But, it is noteworthy that the challenged rate order of a regulatory commission in this case was not found to be unreasonable or confiscatory. Rather the holding was that, since under the authorizing statute the commission's order was final, the railroad had been denied a judicial hearing on the reasonableness of the rate which is "eminently a question for judicial investigation, requiring due process of law for its determination."[67] Here again is a resort to "separation of powers" help for giving content to due process.

Not until six years later in *Missouri Pacific Ry v. Nebraska*[68] does one find a Supreme Court majority invalidating legislation on non-procedural due process grounds without reliance upon some element of separation.[69] The highest court of the land had now caught up with

tion in the rise of substantive due process. CORWIN, LIBERTY AGAINST GOVERNMENT 128 (1948). If there is evasion here, what of *Wynehamer*?

61. Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1874).

62. See Hamilton, *The Path of Due Process of Law*, in THE CONSTITUTION RECONSIDERED (Read. ed. 1938).

63. See, *e.g.*, the dissenting opinion of Mr. Justice Iredell in Calder v. Bull, 3 U.S. (3 Dall.) 386, 398 (1798).

64. While sustaining challenged legislation, the Court made linguistic concessions in each of the following: Munn v. Illinois, 94 U.S. 113, 125, 134 (1876); Davidson v. New Orleans, 96 U.S. 97, 102 (1877); Stone v. Farmers' Loan & Trust Co., 116 U.S. 307, 331 (1886); Mugler v. Kansas, 123 U.S. 623, 661 (1887); Powell v. Pennsylvania, 127 U.S. 678, 684 (1888).

65. 134 U.S. 418 (1890).

66. See Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575, 600, 609 (1942).

67. 134 U.S. at 458.

68. 164 U.S. 403 (1896). After Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1869), the fifth amendment's due process clause first drew blood in Noble v. Union River Logging R.R., 147 U.S. 165, 176 (1893), in which separation elements are prominent.

69. The following extract from a letter written by Mr. Justice Miller in 1875 suggests what happened on the bench between Slaughter House and the principal case:

> "It is vain to contend with judges who have been at the bar the advocates for forty years of railroad companies, and all the forms of associated capital, when they are called upon to decide cases where such interests are in contest. All their training, all their feelings are from the start in favor of those who need no such influence. I am losing interest in these matters. I will do my duty but will *fight* no more. I am perhaps beginning

Judge Bronson. A long cycle in the evolution of due process had been fulfilled. But after the *Missouri Pacific* denouement what content was due process to have in vested interest cases? If separation was no longer to be its essence what would be? For neither language, nor context, nor history provide a touchstone when the ancient term is freed both of its procedural and separation moorings.[70] This, of course, is a classic riddle of American constitutional law. The first answer—for their have been many—came only months after the *Missouri Pacific* case. Laissez-faire had long been in the air. At least since the Civil War it had been the real stimulant, the substance behind the separation-due process form of protection for vested interests. In *Allgeyer v. Louisiana*[71] "liberty of contract" formally moved into the "void of due process" as separation faded out. The immediate fountainhead of this development, as Dean Pound has shown, was Mr. Justice Field's separate opinion a few years earlier in *Butcher's Union Co. v. Cresent City Co.*[72] Rejected by the highest court of the land, Field's position was treated in the more "advanced" New York, and other state, courts as of the highest authority.[73] Having been farmed out and proven in the minor leagues, so to speak, "liberty of contract" was taken up in the unanimous *Allgeyer* opinion by Mr. Justice Peckham who himself had come up from New York. Then, after all but wrecking the Supreme Court, the "liberty of contract" yardstick gave way to others. Indeed there have been so many others that it is quite plain the true measure of substantive due process is the length of the judge's foot. And there's the rub!

To summarize: Separation with its procedural connotations had been a ready, if narrow, bridge between orthodox procedural due process and the doctrine of vested interests in an age when legislatures habitually interfered with property by crude retrospective and special, *i.e.*, quasi-judicial, measures. But as legislation entered the broad police power domain (and showed more respect for the line between court and legislature) protection that hinged on separation offered little comfort for the claims of property. And so, having accomplished their intermediary purpose, the separation elements in due process were gradually abandoned in favor of principles better fitted to the needs of a new age. What remained constant in the transition from separation to laissez-faire as the nub of due process was substantive

to experience that loss of interest in many things which is the natural result of years. . . ." FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT 1862-1890, 374 (1939).

70. Traces of the mingling of separation and due process may be found as late as 1936, *i.e.*, as long as substantive due process lived in the realm of economic affairs. See Carter v. Carter Coal Co., 298 U.S. 238, 311-12 (1936) and cases cited therein.

71. 165 U.S. 578 (1897).

72. 111 U.S. 746, 754 (1884).

73. See Pound, *Liberty of Contract*, 18 YALE L.J. 454, 470 (1909).

protection for established proprietary interests. As usual, with judge-made law changing social pressures were accommodated, not by the sudden introduction of strange, new concepts, but by subtle, usually imperceptible, changes in the meaning of old, familiar principles.[74]

74. See POUND, THE SPIRIT OF THE COMMON LAW 166-92 (1921).