The Constitutional Limitations on State Choice of Law: Due Process

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Introduction

During the twentieth century the Supreme Court of the United States has, in varying degrees, applied the due process clause of the Fourteenth Amendment[1] and the full faith and credit clause[2] to limit state choice-of-law authority. For a time, the Court placed greater restrictions on state power under the full faith and credit clause than under the due process clause;[3] however, in its most recent decisions, the Court has indicated that both clauses impose identical limitations on the states.[4] The standard now governing state choice-of-law authority requires a state to have a "significant contact" with a case such that the state has a legitimate interest in having its law applied.[5] Essentially this means that the application of a state's law to a controversy will not be constitutionally invalidated unless the state has no legitimate interest in controlling the transaction or occurrence underlying the dispute.[6] The Court's adoption of this standard seems to confirm the view of the

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1. U.S. CONST. amend. XIV, § 1.

2. U.S. CONST. art. IV, § 1.

3. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 n.10 (1981); Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935); R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 495-547 (2d ed. 1980).

4. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308 (1981). *See also id.* at 320-32 (Stevens, J., concurring); Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); Nevada v. Hall, 440 U.S. 410 (1979); Clay v. Sun Ins. Office, 377 U.S. 179 (1964); Carroll v. Lanza, 349 U.S. 408 (1955); Watson v. Employer's Liab. Assurance Corp., 348 U.S. 66 (1954).

5. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 308-11, 320 (1981). Recent useful commentary on *Allstate* can be found in Hill, *Choice of Law and Jurisdiction in the Supreme Court*, 81 COLUM. L. REV. 960 (1981); Shreve, *In Search of a Choice-of-Law Reviewing Standard—Reflections on* Allstate Insurance Co. v. Hague, 66 MINN. L. REV. 327 (1982); Symposium, *Choice-of-Law Theory after* Allstate Insurance Co. v. Hague, 10 HOFSTRA L. REV. (1981); Symposium, *Choice of Law*, 14 U.C.D. L. REV. 841 (1981).

6. "[N]either [the due process clause nor the full faith and credit clause] interferes with choice of law except when the law applied is that of a state having no legitimate interest in the application of its policy to the case at hand." B. CURRIE, *The Constitution and the Choice*

late Professor Brainerd Currie that "the Due Process Clause and the . . . Full Faith and Credit Clause control state decision only in . . . the 'false-problem' cases: *i.e.*, cases in which one state has a legitimate interest and the other has none."[7]

The significant contact standard imposes only a "modest check on state power."[8] Nevertheless, it is probable that the Court has gone too far under both the due process clause and the full faith and credit clause in restricting state choice-of-law authority. I have argued elsewhere that the full faith and credit clause, properly interpreted, imposes no direct limitations on state choice-of-law decisions, although it does authorize Congress to establish nationwide conflict-of-laws rules to govern the states.[9] The purpose of this article is to evaluate the due process restrictions that may legitimately be placed on state power to choose the law applicable to a case. The article concludes that the Court's selection of standards with which to restrict state choice of law has exceeded the proper boundaries of the due process clause.

The evidence examined in later sections will demonstrate that the broadest legitimate principle incorporated within the due process clause is that no person may be deprived of a right without first being given an opportunity to be heard defending that right in a judicial proceeding. A "substantive" application of this opportunity to be heard principle is that a state may not enact laws that retroactively deprive a person of his rights. This nonretroactivity application was probably understood to be an appropriate part of due process of law at the time of the ratification of the Fourteenth Amendment, and it forms the basis for a legitimate, but limited, choice-of-law restriction on the states.

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of Law: Governmental Interests and the Judicial Function, in SELECTED ESSAYS ON THE CONFLICT OF LAWS 188, 195 (1963). *But see* R. WEINTRAUB, *supra* note 3, at 505.

7. B. CURRIE, *supra* note 6, at 193.

8. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302, 332 (1981) (Powell, J., dissenting).

9. *See* Whitten, *The Constitutional Limitations on State Choice of Law: Full Faith and Credit*, 12 MEM. ST. U.L. REV. 1 (1981) [hereinafter cited as Whitten—*Choice of Law*]. I have also argued elsewhere that neither the full faith and credit clause nor the due process clause incorporates rules of judicial jurisdiction that are based on a policy of protecting the status of the states as coequal sovereigns in the federal system, though the full faith and credit clause permits such an inquiry into sovereignty-based, territorial limits on state court jurisdiction, and the due process clause authorizes the judicial innovation of "convenience-based" limits on jurisdiction in order to protect the defendant's opportunity to be heard. *See generally* Whitten, *The Constitutional Limitations on State-Court Jurisdiction—A Historical-Interpretative Reexamination Of the Full Faith and Credit and Due Process Clauses (pt. 1)*, 14 CREIGHTON L. REV. 499 (1981) [hereinafter cited as Whitten I]; Whitten, *The Constitutional Limitations on State-Court Jurisdiction—A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (pt. 2)*, 14 CREIGHTON L. REV. 735 (1981) [hereinafter cited as Whitten II].

This restriction is, however, far narrower than even the "modest check on state power" currently enforced by the Court, and the due process clause will not support any other limit on state authority.

Section I of this article briefly examines the development of general choice-of-law restrictions on the states under the due process clause in order to establish a modern context for the historical interpretative issues to be examined in the remainder of the article. Section II investigates the original meaning of the Fourteenth Amendment's due process clause by surveying the development of due process prior to the formation of the Constitution. Section III analyzes the state and federal decisions on the meaning of due process of law before the Fourteenth Amendment; this pre-Fourteenth Amendment context will provide the most important evidence of the probable general understanding of due process of law held by the ratifiers of the Amendment. Section IV examines the framing and ratification of the Fourteenth Amendment for such light as those events may throw on the meaning of due process. The examination of the framing and ratification materials in section IV will be limited because there is no direct evidence on the choice-of-law issues of central concern to this article in the framing and ratification period, and because the evidence drawn from the "legislative history" of the Amendment is so much less reliable than the pre-Fourteenth Amendment context in establishing the general understanding of the due process clause. Section V considers the legitimate extent to which choice-of-law limitations on the states can be derived from the general understanding of due process of law established in the previous sections. This article concludes with a discussion of why the original, general understanding of due process of law in the Fourteenth Amendment should control today.

I. The Evolution of Due Process Limitations on State Choice-of-Law Authority

At the time the Fourteenth Amendment was adopted, the dominant mode of conflicts analysis in substantive matters was, and had been for some time, the rule of *lex loci*.[10] Thus, where issues of judicial[11] and legislative[12] jurisdiction were involved, the focus was on con-

10. *See generally* J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (Arno ed. 1972) (1st ed. n.p. 1834).

11. *See generally* Whitten I, *supra* note 9.

12. *See generally* R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM 78-87 (1977); Whitten I, *supra* note 9.

cepts of territorial sovereignty.[13] After the adoption of the Amendment, these same territorialist concepts were incorporated by the Supreme Court into the due process clause in order to limit state judicial and legislative power. In the area of judicial jurisdiction, the incorporation was accomplished through the now-famous decision in *Pennoyer v. Neff*.[14] In the area of legislative jurisdiction, the Court similarly used territorial rules to restrict state power to tax under the due process clause,[15] and also placed more general territorial limitations on state choice-of-law authority under the clause.[16]

One of the earliest cases in which the Court invalidated a state's power to apply its law to an event was the "substantive due process" decision of *Allgeyer v. Louisiana*.[17] *Allgeyer* involved a Louisiana statute prohibiting the procurement of insurance on property located within the state from any marine insurance company that had not complied with conditions of Louisiana law for doing business within the state. In a criminal prosecution, the state charged E. Allgeyer & Company with violating this statute by mailing a letter from Louisiana to New York, thereby notifying a New York insurance company of a shipment of cotton from Louisiana to certain foreign ports. The letter was sent in compliance with the terms of an open marine insurance policy issued by the New York company to defendant.[18] The defend-

13. *See generally* J. STORY, *supra* note 10.

14. 95 U.S. 714 (1878). For criticism of *Pennoyer*, see Whitten I & II, *supra* note 9.

15. *See, e.g.*, Western Union Tel. Co. v. Kansas, 216 U.S. 1 (1910); Buck v. Beach, 206 U.S. 392 (1907); Metropolitan Life Ins. Co. v. City of New Orleans, 205 U.S. 395 (1907); Union Refrigeration Transit Co. v. Kentucky, 199 U.S. 194 (1905); Delaware, Lackawanna & W. R.R. Co. v. Pennsylvania, 198 U.S. 341 (1905); Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U.S. 385 (1903). For a complete discussion of the evolution of due process limits on the power to tax, see H. GOODRICH, HANDBOOK OF THE CONFLICT OF LAWS 62-100 (4th ed. 1964). *See also* 1 J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 521, 627 (1935); Note, *Developments in the Law—State Taxation*, 75 HARV. L. REV. 953, 961-62 (1962). For a brief description of the status of due process restrictions on state taxing power today, see R. LEFLAR, AMERICAN CONFLICTS LAW 122-23 (3d ed. 1977). The taxing power cases are not further considered in this article, though the due process analysis advocated here would apply equally to them.

16. *See* notes 17-22 and accompanying text *infra*.

17. 165 U.S. 578 (1897).

18. The defendants exported cotton to purchasers in Great Britain and Europe. Their practice was to draw a bill of exchange for each sale on the purchaser and attach to it a bill of lading on the cotton and an order for a new and separate insurance policy on the Atlantic Mutual Insurance Company in New York. These documents were sent from New Orleans to New York, where the bill of exchange either would be negotiated or forwarded to the purchaser for collection. The bill of exchange could not be negotiated in New York unless accompanied by both the bill of lading and order for insurance, and unless the policy issued by Atlantic Mutual was attached to the bill of exchange, the purchaser of the cotton was under no obligation to pay the bill. *Allgeyer*, 165 U.S. at 581-82.

ant argued that the statute deprived it of its property without due process of law. This defense was rejected by the Louisiana Supreme Court, and the case was taken by writ of error to the Supreme Court of the United States.[19]

The Court held the Louisiana statute unconstitutional, declaring that Louisiana had no right to prohibit a citizen of the state from making a contract outside the limits of the state.[20] The Court found that the open marine insurance policy had been made outside the state and that the notification by defendants of the cotton shipment was merely a "collateral matter . . . an act performed pursuant to a valid contract which the State had no right or jurisdiction to prevent its citizens from making outside the limits of the State."[21] Consequently, the attempted prohibition was held to violate the liberty of the defendants to contract.[22]

Although the Court at one time indicated that a state court's "mistaken application of doctrines of the conflict of laws" did not amount to a violation of the due process clause,[23] the *Allgeyer* territorialism concept generally controlled the due process validity of state choice-of-law decisions for the first third of the twentieth century. Under territorial restrictions applied in accord with the *lex loci*, the states were permitted to restrict liberty of contract when the contract in question was made within the state.[24] The due process clause was held, however, to prohibit a state from controlling activities occurring in other places, or

19. *Id.* at 583.

20. *Id.* at 591-92.

21. *Id.* at 592.

22. *Id.* at 591.

23. Kryger v. Wilson, 242 U.S. 171, 176 (1916) (in suit to quiet title to land located within state, state court held plaintiff's rights under contract of sale made and to be performed in another state had been eliminated by proceedings to cancel contract brought in state where land was located; the Court held plaintiff was afforded due process by finding of default against him in his own suit to quiet title).

24. *See, e.g.*, Mutual Life Ins. Co. v. Liebing, 259 U.S. 209, 212-14 (1922) (law of state where life insurance policy executed may constitutionally control parties' later loan agreement; the Constitution and "the first principles of legal thinking" allow law of place where contract is made to control validity and consequences of the act); Selover, Bates & Co. v. Walsh, 226 U.S. 112, 123-25 (1912) (state may apply law of place where contract made to contract to sell land located elsewhere without violating due process; it is "elementary" that the obligation of a contract is determined by the law under which it was made); Western Union Tel. Co. v. Commercial Milling Co., 218 U.S. 406, 421 (1910) (state statute fixing liability to telegraph company for nondelivery of messages does not violate telegraph company's liberty to contract for limited liability; contract made in state whose statute applied to fix liability); New York Life Ins. Co. v. Cravens, 178 U.S. 389, 398-401 (1900) (state where insurance contract made has right to apply its statute to contract, notwithstanding policy provision that provides law of another state shall control); Orient Ins. Co. v. Daggs, 172 U.S. 557, 563-67 (1899) (state where property located and contract made does not deny due pro-

contracts technically "made" outside the state.[25] For example, in *Home Insurance Co. v. Dick*,[26] a policy of fire insurance was issued by a Mexican insurance company and assigned to a citizen of Texas then residing in Mexico. The Texan sued on the policy in a Texas state court by garnishing the obligations of two United States insurance companies that had reinsured part of the risk assumed by the Mexican company. The garnishees defended on the ground that plaintiff had not commenced his action until more than one year after the date of the loss, which would have barred the suit under a provision in the policy. Texas law, however, provided that no agreement limiting the time within which a party could sue to less than two years was valid. The Texas courts applied Texas law over the objections of the garnishees, who argued that this violated the due process and contract[27] clauses.

On appeal, the Supreme Court reversed this holding.[28] The Court held in part that application of the Texas statute deprived the garnishees of property without due process of law.[29] The Court explained:

> A State may . . . prohibit and declare invalid the making of certain contracts within its borders. Ordinarily, it may prohibit per-

cess liberty of contract to foreign corporation by applying its statute fixing liability on policy contrary to stipulation in contract).

25. New York Life Ins. Co. v. Dodge, 246 U.S. 357 (1918) (Missouri, place where insurance contract was made, deprived insurance company of liberty of contract without due process by attempting to control parties' subsequent loan agreement—made in New York—with Missouri law); New York Life Ins. Co. v. Head, 234 U.S. 149 (1914) (Missouri, place where insurance contract was made, violated insurance company's liberty of contract by attempting to apply its law to loan agreement transacted in New Mexico and New York between citizens of those states). *See also* Western Union Tel. Co. v. Brown, 234 U.S. 542, 547 (1914) (Holmes, J., for the Court) (when person recovers in one jurisdiction for tort committed in another, he does so on grounds that an obligation was incurred at place of the tort, and law of that place also determines maximum recovery; states may not constitutionally impose greater liability than that imposed by place of tort when to do so infringes on power of United States to regulate conduct in District of Columbia); Cuba R.R. Co. v. Crosby, 222 U.S. 473 (1912) (Holmes, J., for the Court) (in diversity case, law of place where tort occurred governs; plaintiff must prove that same obligation rests on defendant in a civil law country as in United States—this cannot be presumed); Western Union Tel. Co. v. Chiles, 214 U.S. 274 (1909) (state may not exact penalty for nondelivery of telegram within limits of place under exclusive jurisdiction of United States); Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904) (Holmes, J., for the Court) (in diversity case, law of place of tort governs existence and extent of liability; where right of recovery is so dissimilar to that of state where action brought as to be incapable of enforcement, federal court must dismiss action); Equitable Life Assurance Soc'y v. Clements, 140 U.S. 226, 231-32 (1891) (in diversity action, insurance policy was completed upon delivery of policy to insured in Missouri, and consequently was a Missouri contract governed by laws of Missouri).

26. 281 U.S. 397 (1930).

27. U.S. CONST. art. I, § 10, cl. 1.

28. Home Ins. Co. v. Dick, 281 U.S. 404-05.

29. *Id.* at 407-08.

> formance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws. But in the case at bar, nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas. All acts relating to the making of the policy were done in Mexico. All in relation to the making of the contracts of reinsurance were done there or in New York. And, likewise, all things in regard to performance were to be done outside of Texas. . . . Texas was, therefore, without power to affect the terms of contracts so made. Its attempt to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.[30]

A "territorial analysis" in due process cases seems to have prevailed as late as 1934. In *Hartford Accident & Indemnity Co. v. Delta & Pine Land Co.*,[31] the Court invalidated an application of a Mississippi statute that had the effect of annulling a limitations period in a contract for a fidelity bond made in Tennessee. Mississippi asserted an interest in applying its law to the contract because the employee whose honesty was insured was in Mississippi at the time of the loss, because the loss occurred there, and because both the insurance company and the plaintiff were doing business there.[32] The Court, however, stated:

> A state may limit or prohibit the making of certain contracts within its own territory . . . but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its

30. *Id.* Later, the Court added: "We need not consider how far the State may go in imposing restrictions on the conduct of its own residents, and of foreign corporations which have received permission to do business within its borders; or how far it may go in refusing to lend the aid of its courts to the enforcement of rights acquired outside its borders. It may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them." *Id.* at 410.

See also Young v. Masci, 289 U.S. 253 (1933), in which a New York statute making the owner of an automobile liable for personal injuries caused by someone to whom the owner had lent the car was applied to a nonresident owner. The Court upheld this application against a due process challenge, arguing that because the owner had entered into a contract of bailment in the state of his residence that conferred immunity on him from liability over the driver's negligence, the New York statute, by imposing liability, deprived him of his liberty to contract. The Court responded to this argument by explaining that "the contract of bailment could not have conferred upon the owner immunity from liability to third persons for the driver's negligence. Liability for a tort depends upon the law of the place of the injury; and (apart from the effect of the full faith and credit clause, which is not here involved) agreements made elsewhere cannot curtail the power of a State to impose responsibility for injuries within its borders." *Id.* at 258.

31. 292 U.S. 143 (1934).

32. The contract protected the plaintiff from loss from the dishonesty of any employee, in any position, anywhere. *Id.* at 145.

> jurisdiction, and lawful where made. . . . Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen . . . . Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would violate its laws . . . it may not, on grounds of policy, ignore a right which has lawfully vested elsewhere, if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. . . . In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum, regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment.[33]

Although the Court spoke partly in terms of the state's interest in applying its law, it seems clear that *Delta & Pine Land* did not represent a shift from a territorial analysis to a "state interest analysis" under the due process clause. One commentator observed that, "Although the Court spoke of governmental interests, it treated this as an argument that Mississippi might apply its law as that of the place of performance."[34] Another stated that, "In its *Delta & Pine Land* opinion the Court gave lip service to the significance of the forum's interests in applying its own law, but was apparently controlled by . . . notions of 'vested rights.' "[35]

Nevertheless, soon after *Delta & Pine Land* there were perceptible changes in the Court's analytical method in due process cases. In decisions involving the full faith and credit clause, the Court had, in the early part of the century, also employed a territorial analysis to determine whether or not one state was obligated to enforce the "public acts" of another.[36] By 1932, however, the Court had clearly begun to

33. *Id.* at 149-50.

34. B. CURRIE, *supra* note 6, at 234. Professor Currie also stated that "the Court's employment of the concept of governmental interest . . . treats the interest of Mississippi as being predicated on such artificialities as the place of payment rather than on incidents that realistically warrant the application of policy . . . ." *Id.* at 235.

35. R. WEINTRAUB, *supra* note 3, at 508.

36. *See* Modern Woodmen of America v. Mixer, 267 U.S. 544 (1925); Aetna Life Ins. Co. v. Dunken, 266 U.S. 389 (1924); American Fire Ins. Co. v. King Lumber & Mfg. Co., 250 U.S. 2 (1919); Supreme Council of the Royal Arcanum v. Green, 237 U.S. 531 (1915); Tennessee Coal, Iron & R.R. Co. v. George, 233 U.S. 354 (1914); Converse v. Hamilton, 224 U.S. 243 (1912); El Paso & Northeastern Ry. Co. v. Gutierrez, 215 U.S. 87 (1909); National Mut. Bldg. & Loan Ass'n. v. Brahan, 193 U.S. 635 (1904); Whitten—*Choice of Law*, *supra*

shift its methodology in full faith and credit clause cases from a territorial to a state interest analysis.[37] The Court began the same sort of shift under the due process clause in 1935, in *Alaska Packers Association v. Industrial Accident Commission*.[38] *Alaska Packers* involved an award of workmen's compensation benefits under the California Workmen's Compensation Act that was challenged on due process and full faith and credit grounds. The award was made to a worker who entered into a written contract in California, whereby he agreed to work for Alaska Packers in Alaska during the salmon canning season. The worker also agreed to be bound by the Alaska Workmen's Compensation Act. He was injured in Alaska and sought compensation under the California Act. The Supreme Court sustained the power of California to award benefits under these circumstances. Although there was some territorialist language in the Court's opinion,[39] the Court's ultimate decision on the due process issue was clearly evaluated in terms of California's legitimate interest in providing compensation to the injured worker.[40]

By 1943, the Court seemed to have abandoned the territorialist approach altogether. In *Hoopeston Canning Co. v. Cullen*,[41] the Court described its past and present approaches to choice-of-law restrictions in due process cases:

> In determining the power of a state to apply its own regulatory laws to insurance business activities, the question in earlier cases

note 9, at 46. See also New York Life Ins. Co. v. Head, 234 U.S. 149 (1914), a case decided on due process grounds, but which contained the following dictum concerning the full faith and credit clause: "[W]e must consider . . . how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York, from making [an] agreement in New York simply because it modified a contract originally made in Missouri. Such question, we think, admits of but one answer since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York and there destroy freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause." *Id.* at 161. For better reasons why "authorities directly dealing with it" did "not abound," see Whitten—*Choice of Law*, *supra* note 9, at 11-56.

37. *See* Bradford Elec. Light Co. v. Clapper, 286 U.S. 131 (1932); B. CURRIE, *supra* note 6, at 205-07; R. WEINTRAUB, *supra* note 3, at 518-19; Whitten—*Choice of Law*, *supra* note 9, at 6-7.

38. 294 U.S. 532 (1935).

39. *See id.* at 540-41.

40. *See id.* at 542-43; B. CURRIE, *supra* note 6, at 201-03.

41. 318 U.S. 313 (1943).

> became involved by conceptualistic discussion of theories of the place of contracting or of performance. [Citing *Allgeyer v. Louisiana*.] More recently it has been recognized that a state may have substantial interests in the business of insurance of its people or property regardless of these isolated factors. This interest may be measured by highly realistic considerations such as the protection of the citizen insured or the protection of the state from the incidents of loss. [Citing *Alaska Packers Association v. Industrial Accident Commission*.][42]

True to its word, the Court from *Alaska Packers* to the present has uniformly refused to invalidate state laws on due process grounds when a state has possessed a legitimate interest of any sort in applying its law to a dispute.[43] As indicated earlier, the Court, for a time, imposed greater restrictions under the full faith and credit clause than under the due process clause, but it has now established that the same standard will govern cases challenging state choice-of-law decisions under both clauses.[44]

Despite this lenient approach to state choice-of-law authority, there are serious questions about the extent to which the Court now limits state power under the due process clause. First, the language of the clause does not seem to encompass the sort of "substantive" restrictions on state power that the Court now applies or has applied in the past.[45] Second, it is doubtful that the Court has been correct in restrict-

42. *Id.* at 316. *See also* Griffin v. McCoach, 313 U.S. 498, 504-07 (1941) (state may refuse to enforce contract insuring life of one of its citizens in favor of persons having no insurable interest; this constitutes no violation of due process or full faith and credit).

43. *See* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (neither due process nor full faith and credit are violated by application of state law, when state has significant contact with a case that creates legitimate interest in having its law applied); Clay v. Sun Ins. Office, 377 U.S. 179, 181-82 (1963) (due process not violated by application of state law unless activities of company are slight and casual or wholly nonexistent); Watson v. Employers Liab. Assurance Corp., 348 U.S. 66, 72-73 (1954) (Louisiana had legitimate interest in applying its direct action statute; therefore, due process not violated); Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 476 (1947) (District of Columbia's legitimate interest in providing workers' compensation does not depend on fortuitous circumstances of place of work or injury; it depends on some substantial connection between the district and the employer-employee relationship present in a particular case; as applied, statute satisfies due process and full faith and credit); State Farm Ins. Mut. Auto Co. v. Duel, 324 U.S. 154, 158-59 (1945) (Wisconsin's legitimate concern with financial soundness of companies writing insurance contracts with its citizens permits it to apply its statute, dictating how unearned premium reserves shall be calculated, consistent with due process clause).

44. *See* notes 3-7 and accompanying text *supra*; Whitten—*Choice of Law*, *supra* note 9, at 1, 6-10.

45. The language is: "No state shall . . . deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV, § 1. *See* J. ELY, DEMOCRACY AND DISTRUST 18 (1980): "[T]here is simply no avoiding the fact that the word that follows 'due' is 'process.' No evidence exists that 'process' meant something different a century ago

ing state substantive power under the due process clause in a parallel area: the territorial restrictions on state judicial jurisdiction. These restrictions have evolved to protect the status of the states as coequal sovereigns in the federal system, but, in all likelihood, they have been erroneously incorporated into the clause.[46] If so, there is reason to question the Court's restriction of state sovereignty through choice-of-law limitations formulated for similar purposes under the due process clause. The following sections demonstrate that these questions about the Court's approach to state choice-of-law authority under the clause cannot be answered in support of this approach.

II. The Pre-Constitutional Background of Due Process of Law

It is clear that in English law the expression "due process of law" referred only to a general requirement of regular procedure in a court by which a defendant might have the opportunity to be heard in defense.[47] English and American concepts of due process originated in the "law of the land clause" of the Magna Charta and its interpretation by Sir Edward Coke.[48] Chapter 39 of the Magna Charta, containing the law of the land clause, translated from Latin, reads: "No freeman shall be taken and imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, nor will we send upon

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than it does now—in fact . . . the historical record runs somewhat the other way—and it should take more than occasional abberational use to establish that those who ratified the Fourteenth Amendment had an eccentric definition in mind. Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.' " *See also id.* at 14-21.

46. *See* Whitten I & II, *supra* note 9. *See also* Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981).

47. *See* Whitten II, *supra* note 9, at 743-44.

48. Important discussions of the origin of due process in the Magna Charta appear in R. BERGER, GOVERNMENT BY JUDICIARY 195-96 (1977); 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1103-04 (1953); A.E. HOWARD, THE ROAD FROM RUNNYMEDE 298-315 (1968); W. MCKECHNIE, MAGNA CHARTA 441 (1905); H. MEYER, THE HISTORY AND MEANING OF THE FOURTEENTH AMENDMENT 128-40 (1977); R. MOTT, DUE PROCESS OF LAW 1-87 (DaCapo ed. 1973); Berger, *"Law of the Land" Reconsidered*, 74 NW. U.L. REV. 1 (1979); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368-70 (1911); Denning, *Constitutional Developments in Britain*, in THE FOURTEENTH AMENDMENT 116 (B. Schwartz ed. 1970); Guthrie, *Magna Charta*, in MAGNA CHARTA AND OTHER ADDRESSES 1 (Books for Libraries Press ed. 1969); Howe, *The Meaning of "Due Process of Law" Prior to the Adoption of the Fourteenth Amendment*, 18 CALIF. L. REV. 583 (1930); Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 AM. J. LEGAL HIST. 265 (1975); McIlwain, *Due Process of Law in Magna Charta*, 14 COLUM. L. REV. 27 (1914); Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, in DUE PROCESS: NOMOS XVIII 3, 4-11 (J. Pennock & J. Chapman eds. 1977).

him, except by the lawful judgment of his peers and *per legem terrae* [literally, 'by the law of the land']."[49] In explaining the phrase "by the law of the land," Lord Coke stated: "No man shall be disseised . . . unless it be by the lawful judgment, that is, verdict of his equals (that is, of men of his own condition) or by the law of the land (that is, to speak it once for all) by the due course, and proces of law."[50] Subsequently, Lord Coke added:

> For the true sense and exposition of these words [by the law of the land], see the statute of 37 E. 3. cap. 8. where the words, by the law of the land, are rendred without due proces of law, for there it is said, though it be contained in the great charter, that no man be taken, imprisoned, or put out of his free-hold without proces of the law; that is, by indictment or presentment of good and lawfull men, where such deeds be done in due manner, or by writ originall of the common law.
>
> Without being brought in to answere but by due proces of the common law.
>
> No man be put to answer without presentment before justices, or thing of record, or by due proces, or by writ originall, according to the old law of the land.[51]

The phrase "due process of law" had appeared in numerous statutes at the time Coke wrote his *Second Institute*.[52] In 1352, a statute used the expressions "law of the land," "process made by writ original at the common law," and "course of the law," to guarantee that no one could be deprived of certain fundamental rights without an opportunity to be heard in defense.[53] Two years later, another statute provided "[t]hat no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to Death, without being brought in Answer by due Process of the Law."[54] In 1368, a statute also provided that "no Man be put to answer

49. As translated in H. MEYER, *supra* note 48, at 128. *See also* A.E. HOWARD, *supra* note 48 at 298. The original Latin text was as follows: "*Nullus liber homo capiatur vel imprisonetur, aut disseisiatur, aut utlagetur, aut exceletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nise per legale judicium parium suorum vel per legem terrae.*" As quoted in H. MEYER, *supra* note 48, at 128. *See also* Chapter 29 of Henry III's Reissue of 1225, 9 Hen. III ch.29 (1225), *quoted in* E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 45 (1642). Chapter 29 varied somewhat in wording. See the Latin and translation in 1 Statutes at Large 7-8.

50. E. COKE, *supra* note 49, at 46.

51. *Id.* at 50.

52. The statutes are discussed in Jurow, *supra* note 48, at 266-71. *See also* H. MEYER, *supra* note 48; Whitten II, *supra* note 9, at 739-41.

53. 25 Edw. 3, Stat. 5, ch.4 (1352).

54. 28 Edw. 3, ch.3 (1354). A later portion of this same statute directed that the Mayor, the Sheriffs, and the Aldermen of London should cause certain "Defaults, Errors, and Misprisons" to be corrected, or else their "Defaults of Good Governance" should be inquired

without Presentment before Justices, or Matter of Record, or by due Process and Writ original, according to the old Law of the Land: And if any Thing . . . be done to the contrary, it shall be void . . . ."[55]

From these authorities it strongly appears that the expression "due process of law" was used in English law to describe a regular procedure for summoning a person to trial in a judicial proceeding and adjudicating his civil or criminal liabilities. This observation is confirmed by references in Blackstone's *Commentaries on the Laws of England*.[56] Blackstone stated that the English Constitution "is an utter stranger to any arbitrary power of killing or maiming the subject without express warrant of law."[57] He added that it was "enacted . . . that no man shall be forejudged of life or limb contrary to the great charter and the law of the land: and again, by statute . . . that no man shall be put to death, without being brought to answer by due process of law."[58] In these passages Blackstone was speaking of the right of individuals to personal security. Similar passages discuss the personal liberty of individuals[59] and their right to property.[60] In his chapter on process, Blackstone also stated that if an indictment were returned, process had to issue to bring the accused into court, "for the indictment cannot be tried, unless he personally appears, according to the rules of equity in

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into by "Inquests of People of Foreign Counties," and if the officials were indicted by the inquests, "they shall be caused to come by due process before the King's Justices." *Id.* at ch.10.

55. 42 Edw. 3, ch.3 (1368). See also 15 Rich. 2, ch.7 (1391), which provided that the King's subjects should no longer be compelled to come before the "Council of any Lord or Lady" (meaning a private court) "to answer for his Freehold, nor for any Thing touching his Freehold, nor for any other Thing, real or personal, that belongeth to the Law of the Land in Any Manner," and if so compelled, the Chancellor was directed to "give him Remedy."

56. 1 W. BLACKSTONE, COMMENTARIES *121-45.

57. *Id.* at *132.

58. *Id.* at *133-34 (citations omitted).

59. Blackstone stated: "Here again the language of the great charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the process of the common law. By the petition of right, 3 Car. I, it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law." *Id.* at *134 (footnotes omitted).

60. Blackstone stated: "[T]he great charter has declared that no freeman shall be disseised, or divested, of his freehold, or of his liberties, or free customs but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes it is enacted that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary it shall be redressed and holden for none." *Id.* at *138 (footnotes omitted).

all cases, and the express provision of statute . . . in capital ones, that no man shall be put to death, without being brought to answer by due process of law."[61]

There is substantial scholarly opinion that Lord Coke was incorrect in concluding that "by the law of the land" meant "due process of law."[62] Furthermore, in translating *nisi per legale judicium parium suorum, vel per legem terrae* in Chapter 39 of the Magna Charta, Lord Coke stated that the phrase meant "unless it be by the lawful judgment, that is verdict of his equals . . . *or* by the law of the land."[63] The Latin word *vel*, however, may be translated either as "and" or as "or," and the better opinion seems to be that, contrary to Lord Coke's opinion, it should be translated to mean "and" in Chapter 39.[64] Nevertheless, these errors, if they are errors, clearly do not affect the meaning of *due*

61. 4 W. BLACKSTONE, COMMENTARIES *318. *See* Jurow, *supra* note 48, at 278.

62. Professor McIlwain states that in the year 1215 the word law, or *lex*, was sometimes used to describe a mode of trial, but that it could also be used in a "wider" sense and this wider sense was how it was used in Chapter 39. *See* McIlwain, *supra* note 48, at 44-46. In McIlwain's opinion, "the demand of Chapter 39 was for a restoration of the 'good laws' of an earlier time, and . . . those good laws cannot be compressed into the narrow mold of the ancient forms of judicial proof." *Id.* at 49. Professor Meyer concludes that "*Lex terrae* in the Magna Charta . . . meant a particular procedure." H. MEYER, *supra* note 48, at 130. Professor Meyer goes on to state that "due process is any regular procedure established by law, where it applies." *Id.* at 137. Meyer argues that Lord Coke was almost correct in equating "by the law of the land" with "due process of law," because both were procedural terms, the former referring to a particular procedure, the latter to any regular procedure. *See id.* at 140. Lord Coke erred, however, in translating "*per legem terrae*" simply as "by the law of the land" and then equating it with due process, which Lord Coke "identified with procedural forms of the common law"; this made no sense, "because the meaning of the law of the land in Coke's time was not the same as that of due process of law." *Id.* Professor Jurow concluded that the statutes discussed in notes 52-55 and accompanying text *supra* were not attempts to define law of the land in Chapter 39. They were attempts "to clarify certain aspects of 'the law of the land' about which serious grievances had arisen"; due process of law had a "much more specific" meaning than law of the land, the term "process" referring to "those writs which summoned parties to appear in court, as well as those by which execution of judgments was carried out." Jurow, *supra* note 48, at 271-72. Jurow's conclusions seem correct. The statutes all appear to be aimed at securing a regularized procedure for a hearing on an individual's rights.

63. E. COKE, *supra* note 49, at 46; *see* text accompanying note 48 *supra*.

64. Professor Meyer, who with others views *lex terrae* in Chapter 39 as referring to a particular mode of proof, argues that Coke's translation would permit "a deprivation of life, liberty, and property simply by a judgment of equals without a right to answer to the accusation and to have a proof procedure." H. MEYER, *supra* note 48, at 138. Professor McIlwain, who believed *lex terrae* had a broader meaning than a mere proof procedure, also concluded that "and" is the better translation: "[E]ven with the wider meaning of *lex*, *and* would seem the better reading, for there is no antithesis between *judicium parium* and *per legem terrae*. The former prescribes the manner of application, the latter the law to be applied. They are complimentary to each other, not alternative." McIlwain, *supra* note 48, at 50. Professor McIlwain, however, also concluded that "and" was the proper reading even if *lex terrae* only refers to proof procedure. *See id.*

process in English law, although they are important as indicators of Lord Coke's influence on the American colonies and states. Many of the colonies and states had charters and constitutions with law of the land clauses. The wording of these clauses varied, but most used the word "or" to connect "judgment of his peers" with "by the law of the land."[65] Such wording supports the notion that Lord Coke strongly influenced the American interpretation of the clauses and explains the translation of "law of the land" as "due process of law."[66] The meaning of "due process" remained basically the same from English law through the American colonial period and the period prior to the ratification of the Fourteenth Amendment.[67] The expression clearly meant that a person had to be afforded an opportunity to be heard in defense in a judicial proceeding before his life, liberty, or property could be taken from him by the government.[68] The question pertinent to this article is whether or not it meant *more* than this. That is, given the fact that twentieth century cases impose "substantive" restrictions on state choice-of-law authority through the due process clause of the Fourteenth Amendment,[69] can the clause be read to support such restrictions?

The English and colonial materials available generally do not tend

65. The colonial charters and constitutions are discussed in detail in Whitten II, *supra* note 9, at 754-55.

66. *See id.* at 742, 751-53, 768-70. Thus, for example, Joseph Story, in his *Commentaries on the Constitution of the United States*, published in 1833, stated that the due process clause of the Fifth Amendment "is but an enlargement of the language of the Magna Charta . . . . Lord Coke says that these latter words ("by the law of the land") mean due process of law . . . ." 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789, at 565-66 (5th ed. 1891). In 1858, the Michigan Supreme Court stated: "The words 'due process of law', mean the law of the land, and are to be so understood in the constitution . . . . Lord Coke construed the words 'law of the land', to mean *due process of law*. Hence, we sometimes find one phraseology used, and sometimes the other." Sears v. Cottrell, 5 Mich. 250, 253 (1858).

Numerous cases prior to the adoption of the Fourteenth Amendment held that law of the land and due process were equivalent expressions and cited Lord Coke's *Second Institute* as authority. *See, e.g.*, Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1855); cases cited in Whitten II, *supra* note 9, at 768 n.111. The early commentators agreed with this interpretation. *See* 2 J. KENT, COMMENTARIES ON AMERICAN LAW 13 (J. Gould 14th ed. 1896); 2 J. STORY, *supra* note 66, at 565-67. *See also* Whitten II, *supra* note 9, at 751-53, 768-70.

67. *See* Whitten II, *supra* note 9, at 754-55, 768-70, 772-92, 795-99.

68. *See id.* at 769-70, 795-98. Thus, Joseph Story stated that the due process clause of the Fifth Amendment "affirms the right of trial according to the process and proceedings of the common law." J. STORY, *supra* note 66, at 567. Similarly, Daniel Webster argued in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 581 (1819), that "[b]y 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."

69. *See* text accompanying notes 10-46 *supra*.

to indicate a basis for substantive choice-of-law limitations.[70] Subsequent to the ratification of the Constitution, however, there emerged a large body of decisional law interpreting various law of the land and due process clauses.[71] Some of the cases articulated due process standards that clearly deserve the label "substantive."[72] These cases have sometimes been offered as partial justification for the Supreme Court's later protection of economic interests through the due process clause of the Fourteenth Amendment.[73] However, the cases must be scrutinized closely before one concludes that they support a broad theory of "substantive" due process. The issue is whether or not the cases existed in adequate numbers and were considered sufficiently authoritative to form a part of the original, general understanding of the due process clause of the Fourteenth Amendment. As Professor Ely has stated: "[I]t should take more than occasional aberrational use to establish that those who ratified the Fourteenth Amendment had an eccentric definition in mind."[74]

The problem is complicated further by the fact that the pre-Fourteenth Amendment due process cases articulated very different kinds of substantive standards. This problem requires that each standard be evaluated separately, in order to determine whether or not it can be said to be a legitimate part of the general understanding of due process possessed by the Amendment's ratifiers. The different standards may not simply be lumped together under the label "substantive due process" and the conclusion drawn that, in the aggregate, the cases justify the imposition of any kind of substantive restrictions on state power that the Supreme Court may devise.[75] Unless each substantive application can stand on its own, it cannot be deemed a part of the general understanding of the clause.

It is also wise to keep in mind Justice Frankfurter's admonition that " 'substance' and 'procedure' are the same keywords to very different problems. Neither 'substance' nor 'procedure' represents the same invariants."[76] This point is especially true in considering whether or not to append the label "substantive" or "procedural" to a pre-Four-

70. *See* Whitten II, *supra* note 9, at 738-55. *But see id.* at 752-53 (Hamilton's remarks, discussed in text accompanying notes 135-40 *infra*).

71. *See* Whitten II, *supra* note 9, at 755-804.

72. *See id.* at 770-71, 793-95.

73. *See* B. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 41-46 (1980).

74. J. ELY, *supra* note 45, at 18.

75. As the discussion in text accompanying notes 76-207 *infra* will suggest, this is the mistake I believe Professor Siegan makes in his analysis of the cases. *See generally* B. SIEGAN, *supra* note 73.

76. Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

teenth Amendment application of a due process or law of the land clause. In one sense, all of the applications examined could be legitimately classified as "procedural," because all were derived from the core principle that no person could be deprived of life, liberty, or property without first being given an opportunity to defend in a judicial proceeding.[77] Nevertheless, it was clearly also true that some derivations of this principle were directly related to a guarantee of judicial process, while others were quite remote from it. These remote applications of the core principle tend most to warrant the label "substantive," but by no means can all of these applications justifiably be considered a part of the original, general understanding of due process. As the following discussion will indicate, only one of the "substantive" principles articulated prior to the Fourteenth Amendment has roots sufficiently anchored in the Amendment's context to be carried over into subsequent law. That principle forms the only legitimate basis upon which the Supreme Court may limit state choice-of-law authority.

III. The Pre-Fourteenth Amendment Context of Due Process of Law

Indisputably, the most important feature of American constitutions is the doctrine of separation of powers.[78] Many state charters and constitutions contain explicit separation of powers clauses, as well as law of the land or due process clauses.[79] Indeed, the requirement of due process of law is clearly an important separation of powers command in its own right. To the extent that the government cannot take a person's life, liberty, or property without a judicial proceeding in which he is afforded an opportunity to be heard in defense, substantial limitations exist upon executive and legislative power arbitrarily to deprive individuals of their rights.

The doctrine of separation of powers in the United States, as contrasted with the English doctrine, operated in conjunction with law of the land and due process clauses to produce "substantive" limitations on legislative power, as well as limitations on the power of legislatures to strip individuals of procedural rights. Lord Coke had written in his *Fourth Institute* that the power of "parliament, for making of laws in proceeding by bill . . . is so transcendent and absolute, as it cannot be

77. *See* Whitten II, *supra* note 9, at 793.

78. For a discussion of the development of the doctrine of separation of powers in England and America, see M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS (1967).

79. *See* Whitten II, *supra* note 9, at 746-55.

confined either for causes or persons within any bounds."[80] Blackstone, though conceding in the abstract the power of the people to "remove or alter the legislative when they find the legislative act contrary to the trust reposed in them,"[81] acknowledged the supreme power of Parliament: "So long therefore as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control."[82]

As the doctrine of separation of powers was implemented in the United States, however, limitations were placed on the powers of all branches of government, including the legislative branch. In states having separation of powers clauses in their constitutions, the doctrine operated directly to produce certain kinds of "substantive" limits on legislative power; but even in the absence of a specific separation of powers clause, concepts of separation of powers often surfaced in decisions under law of the land or due process clauses.[83] The substantive restrictions on legislative power imposed through these clauses were also based on English sources. When Lord Coke defined the phrase *per legem terrae*, he stated that "it is not said, *legem & consuetudinem Regis Angliae*, lest it might be thought to bind the king only, nor *populi Angliae*, lest it might be thought to bind them only, but that the law might extend to all, it is said *per legem terrae*."[84] Blackstone defined municipal law as

> a *rule*: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a *rule*.[85]

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80. E. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 36 (1644).

81. W. BLACKSTONE, *supra* note 56, at *161. *See also* J. LOCKE, TWO TREATISES OF GOVERNMENT § 149, at 385 (P. Laslett 2d ed. 1970).

82. W. BLACKSTONE, *supra* note 56, at *161.

83. *See* Whitten II, *supra* note 9, at 771-72. There seems to be no substantial disagreement that due process and law of the land clauses were designed to limit legislative as well as judicial power in the American system. *See, e.g.*, B. SIEGAN, *supra* note 73, at 40-46. The overwhelming evidence tending to prove that this limitation was so has not, therefore, been reproduced here. For a full survey of that evidence, see Whitten II, *supra* note 9, at 770-95.

84. E. COKE, *supra* note 49, at 51.

85. W. BLACKSTONE, *supra* note 56, at *44. *See also* J. LOCKE, *supra* note 81, § 142, at 381: "[The legislature is] to govern by *promulgated establish'd Laws*, not to be varied in

Blackstone also insisted that municipal law had to be " 'a rule *prescribed*' . . . . [because] a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. . . . All laws should be therefore made to commence *in futuro* . . . ."[86]

Substantive limitations on legislative power under American law of the land and due process clauses were derived from these statements in two related ways. First, legislatures were held obligated to enact only "general laws," rather than partial or particular ones, because the latter were, in Blackstone's words, "spent upon" individuals and had "no relation to the community in general"; consequently, they were "rather a sentence than a law."[87] In other words, "partial" or "particular" laws were exercises of judicial power because they were adjudications, rather than laws. They violated due process and law of the land clauses because they were *legislative* adjudications, and those clauses required *judicial* proceedings before life, liberty, or property could be taken from an individual.[88] In its most limited form, this idea was and still is uncontroverted: A legislature cannot adjudicate particular disputes between individuals.[89] Nevertheless, some courts held that the general law requirement of due process imposed broad restrictions on the legislature's regulatory power by restricting the legislature's ability to draw statutory classifications.[90] This broad judicial limitation on legislative power surely deserved the name "substantive due process."

The second "substantive" limitation on legislative power derived from the English context and enforced through law of the land and due process clauses was a variation on this same theme, but it translated into a proscription against retroactive lawmaking. Blackstone had insisted that municipal law, to be law, had to operate prospectively.[91] If a legislature enacted a retrospective law, it was not operating within the proper confines of its legislative function, and, therefore, the doctrine of separation of powers was violated.[92] Law of the land and due process clauses were similarly violated by such legislation, because it was considered a kind of judicial act.[93] The reason was again related to Black-

particular Cases, but to have one Rule for Rich and Poor, for the Favourite at Court, and the Country Man at Plough."

86. W. BLACKSTONE, *supra* note 56, at *45-46.
87. *Id.* at *44.
88. *See* Whitten II, *supra* note 9, at 741-43.
89. *See id.* at 794.
90. *See id.* at 794-95; text accompanying notes 102-121 *infra*.
91. *See* text accompanying note 86 *supra*.
92. *See* Whitten II, *supra* note 9, at 771-72.
93. *See id.* at 772.

stone's definition of municipal law: An act of the legislature directly confiscating the property of a particular person was a "sentence," an adjudication, not a law,[94] and it violated due process limitations because it was a legislative adjudication.[95] It was only a short step from this to the conceptualistic conclusion that a *general* act[96] having the *effect* of directly divesting individuals of property rights that had "vested" under prior law was also a violation of due process, because the taking of rights occurred without the intervention of judicial process.[97] The emphasis in this kind of case was placed on the idea that there had been no violation of a "standing" or "preexisting" law that would justify the taking.[98] This objection clearly translated the proscription against direct divestiture into one against *ex post facto* lawmaking.[99] In the American cases, Blackstone's objections against direct takings and *ex post facto* laws were integrated to produce the principle that retroactive laws constituted judicial actions undertaken by the legislature, which were consequently violative of due process.

An examination of the cases will illustrate how the "partial law" and nonretroactivity limitations operated. It will also demonstrate the extent to which they may be considered a part of the "general understanding" of due process at the time the Fourteenth Amendment was ratified.

A. The Partial Law Limitation

Although a substantial number of cases prior to the adoption of the Fourteenth Amendment recognized that due process of law forbade a legislature from passing "partial" or "particular" laws, only a few states applied this restriction broadly enough to restrict the regulatory power of the legislature by limiting its ability to draw statutory classifications. The general law requirement had its American origin in the argument of Daniel Webster before the Supreme Court in *Trustees of Dartmouth College v. Woodward*.[100] Webster's definition of law of the land was later cited in many state cases. He argued that partial laws, as opposed to general ones, violated the law of the land requirement:

94. *See* note 85 and accompanying text *supra*.

95. *See* Whitten II, *supra* note 9, at 772.

96. In other words, one that applied to the community at large, or a group within the community engaged in a specific business, profession, or activity, as opposed to an act directed at a particular individual or case.

97. *See* Whitten II, *supra* note 9, at 772.

98. *See id.*

99. *See id.*

100. 17 U.S. (4 Wheat.) 518 (1819).

> 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. Every thing 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.[101]

Despite the popularity of this statement in the state courts, only a few decisions seem to have applied the general law requirement broadly enough to restrict legislative regulatory power in any significant way. The largest number of cases to this effect were decided in Tennessee. In *Wally's Heirs v. Kennedy*,[102] the plaintiff brought an action of ejectment, asserting title to land as a reserve under treaties of 1817 and 1819 with the Cherokee Indians. The defendant relied on an act of the Tennessee Legislature, passed in 1827, which provided that if the defendant proved that the suit was prosecuted on a contingent interest or in trust for anyone other than the person in whose name the suit was brought, the plaintiff's recovery would be barred. The defendant established to the satisfaction of the jury that the suit was being prosecuted for persons other than the plaintiff's lessors. The plaintiff subsequently appealed to the Tennessee Supreme Court, contending that the act was unconstitutional as a partial act.[103] The court agreed,

101. *Id.* at 581-82. "[N]o definition [of the terms "due process of law" and "law of the land"] perhaps, is more often quoted than that given by Mr. Webster in the Dartmouth College Case . . . ." T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 353 (1868). Note that Webster's definition also provides support for the retroactivity limitation of due process of law, discussed in section III (B) of the text *infra*. Despite the popularity, in one degree or another, of the general law requirement among the state courts, the Supreme Court of the United States never adopted it as a definition of due process of law in the Fifth Amendment. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 450 (1857); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

102. 10 Tenn. (2 Yer.) 554 (1831).

103. In Vanzant v. Waddel, 10 Tenn. (2 Yer.) 259 (1829), the Tennessee Supreme Court had considered the constitutionality of an act of the legislature passed to provide for "the mode by which the holders of the notes of the Farmers' and Mechanics' Bank, at Nashville, and the Fayetteville Tennessee Bank, may, on their refusal to pay the same, recover judgment." *Id.* at 262. The act was challenged as a partial act. *See id.* at 263. The court upheld the act against this challenge, drawing a distinction betweeen "acts of the legislature which come in aid of a remedy and such acts as impose clogs and restrictions upon remedies existing at the time the contract was made," the former being constitutional while the latter are not. *Id.* at 265.

stating: "The act of 1827 is peculiarly partial. It is limited in its operation to a comparatively small section of the state, and to a very few individuals claiming a very small portion of the section of the country referred to."[104] The act was invalidated despite the court's concession that the legislature had a valid concern in preventing the manufacturing of evidence for the purpose of fraudulently establishing rights to reserves that the Indians never possessed.[105] The court felt that any other interpretation of the law of the land clause carried a potential danger of minority oppression and thus was antithetical to the clause's purpose.[106]

Another illustration of the Tennessee approach is found in *Bank of the State v. Cooper*.[107] The Tennessee Legislature created a special court for the disposition of suits commenced by the state bank against its officers and their sureties and against persons who had overdrawn their accounts. The act designated three existing judges by name to sit on the court and provided that the court was to be supreme in its sphere of action, with no appeal from its decisions. The bank brought suit under this act against one of its employees and his sureties. The suit was brought on the employee's bond after he had embezzled bank funds. The defendants pleaded that the court was without jurisdiction over the suit because, among other things, the Act setting up the court was a partial law. All three judges of the special court agreed, each writing a separate opinion.

Judge Green stated that the law of the land clause was designed "to restrain the legislature from enacting any law affecting injuriously the rights of any citizen, unless at the same time the rights of all others in similar circumstances were equally affected by it."[108] Judge Peck observed that "the act relates to the few specially named in it; the rules by which we are to be governed are not those common to the rest of the

104. Wally's Heirs v. Kennedy, 10 Tenn. (2 Yer.) at 556.

105. *Id.*

106. "The part of the constitution referred to was intended to secure to weak and unpopular minorities and individuals equal rights with the majority, who, from the nature of our government, exercise the legislative power. Any other construction of the constitution would set up the majority in the government as a many-headed tyrant, with capacity and power to oppress the minority at pleasure, by odious laws binding on the latter." *Id.* at 557. Though the court stated this as its concern, it had previously conceded that the actual operation of the act would adversely affect the "great body of the people," as well as the few individuals at which it was aimed. *See id.* at 556-57.

107. 10 Tenn. (2 Yer.) 599 (Special Ct. at Nashville 1831). *Cf.* Hazen v. Union Bank, 33 Tenn. (1 Sneed) 115 (1853) (charter of Union Bank, allowing it to charge 7% interest when generally permissible rate was 6%, upheld against challenges that it was a partial law; act of incorporation is a contract, unlike an ordinary law).

108. Bank of the State v. Cooper, 10 Tenn. (2 Yer.) at 606.

community; . . . under these circumstances, is the law of the land likely to be afforded to the defendants?"[109] Judge Kennedy stated that the assignment of judges by name caused the act to operate on the judges individually, rather than on the courts of which they were judges, contrary to Blackstone's "fundamental principle" that municipal law "must be 'permanent, uniform and universal.' "[110] Judge Kennedy also stated that the state's law of the land clause was violated because the act contemplated suit against "particular debtors to this bank before a tribunal where no other person can sue or be sued, and to have their rights ascertained and settled by rules that apply to no other debtors of this institution, nor to any other member of the community."[111] Numerous other Tennessee decisions applied this broad general law limitation to restrict the regulatory power of the legislature,[112] setting up a basic principle against discriminatory laws.[113]

Iowa also indicated a willingness to apply the general law restriction broadly. In *Reed v. Wright*,[114] the plaintiff sued to recover a tract located within what was known as the "half-breed" lands. To show title, he offered in evidence judgments, executions on the judgments, and sheriff's deeds from sales made pursuant to the executions. The defendant's objection to this evidence was sustained, and the plaintiff

109. *Id.* at 614.

110. *Id.* at 617.

111. *Id.* at 619-20.

112. *See* State v. Burnett, 53 Tenn. (6 Heisk.) 186 (1871) (statute directed at particular administrator of deceased tax collector declared invalid as partial law; also, statute invalid because it undertook to donate to certain individuals in county covered by the act amounts paid by them into state treasury in a particular year, without extending its benefits to other individuals in other counties who had made similar payments); Mayor of Alexandria v. Dearmon, 34 Tenn. (2 Sneed) 103 (1854) (statute requiring sheriff of a particular county to hold elections declared invalid as a partial law); Budd v. State, 22 Tenn. (3 Hum.) 482 (1842) (statute providing penalties for embezzlement by employees of the Union Bank of Tennessee declared invalid as a partial law); Jones' Heirs v. Perry, 18 Tenn. (10 Yer.) 59 (1836) (statute authorizing guardians of certain infants to sell tract of land for purpose of paying debts of infants' ancestor violated clause of constitution vesting judicial power in courts and law of the land clause, the latter being violated because the statute was a partial rather than a general law). Note that several of the cases cited, *e.g.*, *State v. Burnett* and *Jones' Heirs v. Perry*, come very close to the narrow view of the general law requirement discussed in the text accompanying notes 123-133 *infra*, in that they approach a situation in which the legislature is adjudicating an individual case by statute. The principle being articulated in the cases is best viewed, however, as a much broader limitation upon discriminatory laws of all sorts. See the cases discussed in the text accompanying notes 102-111 *supra*, and others such as *Mayor of Alexandria v. Dearmon* and *Budd v. State*. The narrower restriction against adjudicating individual cases by statute, of course, was encompassed within this broader one.

113. *See* note 112 *supra*.

114. 2 Greene 15 (Iowa 1849).

appealed. The judgment, executions, and sales were pursuant to certain acts of the Wisconsin and Iowa territorial legislatures, which established special procedures for the settlement of titles to the half-breed lands. The procedures involved the appointment of three commissioners to report on the titles to the district court of the county in which the lands were located. All persons claiming title to the lands had to file a written notice of their claim with the clerk of the district court. The commissioners were to take testimony on the validity of the claims. After the commissioners reported to the district court, the court was obligated to render judgment for the claimants at the next succeeding term in accordance with the report, unless exceptions were filed to the report by the fourth day of the term. The court had exclusive jurisdiction over these matters. The commissioners were to be paid a fee for their services, and they were authorized to commence an action for these fees in the district court against the owners of the half-breed lands. The court was authorized to enter judgment against the owners for the fees and expenses of the commissioners plus costs, and the judgment was to constitute a lien upon the lands. In this case, the plaintiff's title was derived from an execution sale pursuant to a judgment in favor of the commissioners for such fees, expenses, and costs. Pursuant to one of the acts at issue in this case, notice by publication had been given to the defendants for eight weeks in the *Iowa Territorial Gazette*, designating them simply as "owners of the half-breed lands lying in Lee County."[115] Trial of the suits was to the court, rather than to a jury.[116]

The court declared that the act violated provisions of the Northwest Ordinance, which guaranteed the inhabitants of the territory "judicial proceedings according to the course of the common law" and provided "that no man shall be deprived of his liberty or property but by the judgment of his peers or the laws of the land."[117] Relying on Blackstone's definition of law as a "rule, not a sudden transient order from a superior . . . but something permanent, uniform and universal,"[118] Lord Coke's equation of law of the land in Magna Charta with due process of law,[119] and Webster's definition of law of the land as a "general law,"[120] the court concluded that

> [t]he judgment of the court upon their report is to settle the title to more than one hundred thousand acres of valuable land, not

115. *Id.* at 17.
116. *Id.* at 16-17, 24-25.
117. *Id.* at 22.
118. *Id.* at 23.
119. *Id.*
120. *Id.*

> by any proceeding according to the course of the common law, not by service of process, by which the parties could have a day in court, not by a general law of the land, operating upon the whole community alike, but by a special and limited act, violating all of these valuable safeguards.[121]

Only Tennessee and Iowa decisions applied the general law restriction of due process broadly enough to limit the legislative power to draw classifications;[122] numerous cases decided in other parts of the country applied the restriction more narrowly. These cases either refused to restrict legislative power to draw classifications or applied the general law limitation in contexts where the legislature was attempting to adjudicate an individual case by statutory enactment.

In Alabama, for example, an 1859 decision upheld the power of the legislature to regulate liquor sales.[123] The legislature had prohibited the sale of intoxicating liquor within five miles of the City of Greensboro. The court sustained this regulation, stating that law of the

121. *Id.* at 25. The court elaborated on the reasons why the act should be invalidated as a partial law: "The power assumed by the legislature in this act, if sustained by the courts, would lead to the most fearful consequences, as it would enable them at will, by special and limited laws, to settle all controversies of title, and to bring about this object the property of one person could be taken against his consent, and given to another . . . .

"Laws affecting life, liberty and property must be general in their application, operating upon the entire community alike . . . . The life, liberty and property of one citizen rest upon the same legal foundation as those of another, and if these are taken from him, it must be by a law which operates upon all alike." *Id.* at 26-27. *See also* Mason v. Messenger, 17 Iowa 261, 270-72 (1864).

122. There was also dicta in James v. Reynolds, 2 Tex. 250, 252 (1847), suggesting that due process required general laws binding on all members of the community, rather than partial or private laws affecting only the rights of private individuals or classes of individuals. However, the case upheld a law authorizing summary judgments and seemed unconcerned with anything that could remotely be considered "substantive." Similarly, in Mayor of Mobile v. Yuille, 3 Ala. 137 (1841), the court interpreted a previous case, *In re* Dorsey, 7 Port. 293 (Ala 1838), as having invalidated a statute on the grounds that it was a "partial law"; however, it is clear that the two judges in *Dorsey* who found the law unconstitutional did so on other grounds. The law had imposed a duelling oath on attorneys as a qualification for practicing in the state courts. Refusal to take the oath resulted in disqualification from practice. The judges who invalidated the law saw this as an attempt to determine guilt without a judicial trial and thus considered it violative of due process. *See id.* at 367, 381. The statute in *Dorsey* was therefore partial only in the sense that it involved a legislative attempt at adjudication, and cannot be taken as authority for the broad application of the general law requirement. In *Ex parte* Woods, 3 Ark. 532, 536 (1841), the court stated that the Arkansas law of the land clause meant "the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial." The case, however, considered the judgment of a lower court rendered without service of process to be invalid, and it seems clear that the law of the land clause was violated because of the lack of an opportunity to be heard. Thus, the quotation might refer only to the hearing aspect of Webster's quotation.

123. Dorman v. State, 34 Ala. 216 (1859).

land and due process clauses were substantially identical and were designed to prevent legislative confiscation of property without a trial.[124] However, the court did not consider that this prevented legislative regulation of property:

> In every well ordered State, property is held subject to the tacit condition, that it shall not be so used as to injure the equal rights of others, or the interests of the community. Such injurious uses of property may be prevented by such regulations and restraints as the legislature may think proper to impose . . . .[125]

Michigan also adopted a narrow interpretation of the general law restriction. In *Sears v. Cottrell*,[126] a tax law provided that the state treasurer could levy and collect the taxes of a person by distress and sale of any goods in that person's possession. If someone else's goods were sold to pay the debtor's taxes, a remedy was provided that person against the debtor in the form of an action in assumpsit. In *Sears*, the plaintiff's lumber, while in the possession of a miller, was sold to pay the miller's taxes. The plaintiff sued the treasurer, who defended under the act; the plaintiff then challenged the act as unconstitutional under the state's due process clause.[127] The Supreme Court of Michigan upheld the constitutionality of the act, stating that due process and law of the land were equivalent phrases. Law of the land meant laws that were "general in their operation, and that affect the rights of all alike; and not a special act of the legislature, passed to affect the rights of an *individual* against his will, and in a way in which the same rights of other persons are not affected by existing laws."[128] The court, however, also stated: "The law in question is not one of this [latter] class. It was not designed or intended to operate on the rights of the plaintiff, *or any other individual, as such*."[129] From the reference in these statements to

124. *Id.* at 236-41.

125. *Id.* at 243-44. The court reserved judgment on whether or not an absolute prohibition of liquor sales would violate due process. *Id.* at 242.

126. 5 Mich. 250 (1858).

127. *Id.* at 252-53.

128. *Id.* at 253 (emphasis added).

129. *Id.* (emphasis added). See also Parsons v. Russell, 11 Mich. 113 (1863), in which the court stated: "Whatever may be the difficulty of defining [due process of law] . . . when sought to be applied to other proceedings, when used in relation to those of a *judicial* character, it is evidently, and has been so universally held, intended to secure to the citizen the right to a trial according to the forms g of law of the questions of his liability and responsibility, before his person or his property shall be condemned. Judicial action is in such cases imperatively required, and 'implies and includes *actor*, *reus*, *judex*—regular allegations, opportunity to answer, and trial according to some settled course of judicial proceedings.' While we adopt the common law, or, to speak more accurately, so long as we recognize and submit to it, we recognize and adopt the fundamental principle that no man shall be a party and judge in his own case; that if tried, it shall be by his peers, and if deprived of liberty or

laws aimed at individuals, it strongly appears that the general law limitation of due process did not operate in Michigan to prevent the legislature from drawing classifications. Rather, the Michigan court apparently considered the requirement merely to be one of preventing the legislature from adjudicating individual cases by statute.[130]

In Pennsylvania, there was an eloquent statement of the purposes of the general law requirement in a case that applied the requirement to narrow facts. In *Ervine's Appeal*,[131] a testator's will had provided that his lands should not be sold during the life of his son, Daniel, who was to be supported from the rents. After Daniel's death the lands were to be sold and the profits divided among the testator's remaining children. Daniel obtained an act of the Pennsylvania Assembly directing the Orphan's Court to appoint a trustee and order the sale of the lands and investment of the proceeds. The Orphan's Court refused to enforce the act on the grounds that it was unconstitutional and Daniel appealed. The Supreme Court of Pennsylvania held the act unconstitutional under the state due process clause. In explaining the reasons for the general law requirement, the court stated:

> [W]hen, in the exercise of proper legislative powers, general laws are enacted, which bear or may bear on the whole community, if they are unjust and against the spirit of the constitution, the whole community will be interested to procure their repeal by a voice potential. And that is the great security for just and fair legislation.
>
> But when individuals are selected from the mass, and laws are enacted affecting their property, without summons or notice, at the instigation of an interested party, who is to stand up for them, thus isolated from the mass, in injury and injustice, or where are they to seek relief from such acts of despotic power? They have no refuge but in the courts, the only secure place for determining conflicting rights by due course of law.[132]

property, it shall be by impartial judicial authority, after a trial and judgment under general laws." *Id.* at 120.

130. In Mississippi there was a cryptic statement in a case of narrow application. In Noonan v. State, 5 Miss. (1 S. & M.) 562 (1844), the defendant in a criminal case challenged the act under which he was indicted as a violation of the state due process clause. The grounds were that the act was in derogation of the common law, which he argued had been made a part of the constitution at the time of its adoption and was thus beyond alteration. The court rejected this, stating that the provisions of the Mississippi Constitution requiring that the rights of persons shall be " 'ascertained by law' " and protected " 'by the common law' " were designed only to condemn legislation in criminal cases that was partial and particular, rather than equal and general. *Id.* at 573.

131. 16 Pa. 256 (1851).

132. *Id.* at 268.

This language is broad, but the court's concern was narrow. The reference to the need for "summons and notice" before a deprivation of property refers to the core due process concept of an opportunity to be heard in defense. The court's main concern was to prevent adjudication of individual rights by the legislature, clearly a justifiable, nonsubstantive application of due process. Thus the court had stated earlier that the legislature had attempted to wrest the property of the remaining children away from them "by a summary process, unknown in any court of justice, by an *ex parte* statute."[133]

On the whole, the pre-Fourteenth Amendment decisions applying the general law component of due process provide no justification for reading a broad substantive restriction on state power into the Amendment. The requirement was seldom applied to restrict legislative power to draw classifications. The most frequent applications were to prevent "direct" deprivations of property by legislative action either adjudicating rights by statute or (what amounted to the same thing) providing for forfeiture of rights upon determinations made by state officials without a judicial determination of liability or guilt. The broader application of the general law concept evidenced in the Tennessee decisions did not command general support. Consequently, it must be considered "abberational."[134] Insofar as the pre-Fourteenth Amendment context determines meaning, therefore, the broader application cannot be considered a part of the general understanding of due process of law at the time of ratification.

B. The Nonretroactivity Limitation

Although the general law concept provides no basis for broad restrictions on legislative regulatory power, there is far greater support in the pre-Fourteenth Amendment decisions for a requirement that legislative acts not operate retroactively. The source of this requirement is much the same as that of the general law concept, but with a few additional twists. Legislatures could not directly take life, liberty, or property from an individual. A taking, therefore, had to be accompanied by a judicial proceeding. It followed that a statute adjudicating a particular individual's rights violated due process, as did one providing for a forfeiture of rights upon the occurrence of certain events without an intervening judicial determination of whether or not the events had oc-

133. *Id.*

134. *See* J. ELY, *supra* note 45, at 18. *See also* T. COOLEY, *supra* note 101, at 389-97 (discussing unequal and partial legislation). Cooley gives many examples of such legislation that were *not* held to violate due process.

curred. Additionally, a statute enacted to deprive persons of life, liberty, or property, even if general and prospective in some of its applications, could operate as a direct legislative taking to the extent that it also operated retroactively to divest individuals of rights acquired under preexisting law. Such statutes were often considered unconstitutional violations of due process of law. The rationale of the cases so holding was that a requirement of judicial process implied that the legislature could not by the indirect device of a retroactive statute practically avoid a judicial determination of an individual's liability.

The direct divestiture prohibition had roots extending back to preconstitutional concepts of due process. In 1787, for instance, the New York Legislature passed an "act concerning the Rights of Citizens of this State," which provided, in pertinent part, the following:

> *Second*, That no Citizen of this State shall be taken or imprisoned, or be disseised of his or her Freehold, or Liberties, or Free-Customs; or outlawed, or exiled, or condemned, or otherwise destroyed, but by lawful judgment of his or her Peers; or by due Process of Law.
>
> *Third*, That no Citizen of this State shall be taken or imprisoned for any Offence, upon Petition or Suggestion, unless it be by Indictment or Presentment of good and lawful Men of the same Neighborhood where such Deeds be done, in due Manner, or by due Process of Law.
>
> *Fourth*, That no Person shall be put to answer without Presentment before Justices, or Matter of Record, or due Process of Law, according to the Law of the Land; and if any Thing be done to the Contrary, it shall be void in Law and holden for error.[135]

After this statute was enacted, the New York Legislature passed "An Act for Regulating Elections," which disqualified certain persons from holding offices of trust in the state. A proposed Senate amendment to the act would have added to the categories of persons disqualified "owner or owners of . . . privateers," along with "captain[s],

135. Law of Jan. 26, 1787, 2 Jones & Varick 1 (New York Laws 1787-1789), *reprinted in* H. MEYER, *supra* note 48, at 142 n.1. Professor Meyer observed that the "Act copied almost verbatim Coke's translation of chapter 29, 9 Henry III (1225), and certain medieval statutes quoted by Coke in explanation of this clause. However, a few important changes were made evidently to make it more understandable. The New York Act uses 'due process of law' instead of 'the law of the land' in places where this is a translation of the term *lex terrae*, meaning procedure, and 'the law of the land' is used in a context where it makes sense in accordance with its modern meaning.

"Since 1821 every New York Constitution has contained both terms: the law of the land *or* the judgment of peers in connection with rights of citizens, and the due process clause in connection with procedural rights which apply to all persons." *Id.* at 143.

lieutenant[s], or master[s]."[136] Alexander Hamilton spoke in opposition of this amendment, stating:

> In one article of [the Constitution] it is said no man shall be disfranchised or deprived of any right he enjoys under the constitution, but by the *law of the land*, or the judgment of his peers. Some gentlemen hold that the law of the land will include an act of the legislature. But Lord Coke, that great luminary of the law, in his comment upon a similar clause, in Magna Charta, interprets the law of the land to mean presentment and indictment, and process of outlawry, as contradistinguished from trial by jury. But if there were any doubt upon the constitution, the bill of rights [referring to the "act concerning the Rights of Citizens of this State"] enacted in this very session removes it. It is there declared that, no man shall be disfranchised or deprived of any right, but by *due process of law*, or the judgment of his peers. The words "*due process*" have a precise technical import, and are only applicable to the process and proceedings of the courts of justice; they can never be referred to an act of legislature.
>
> Are we willing then to endure the inconsistency of passing a bill of rights, and committing a direct violation of it in the same session? In short, are we ready to destroy its foundations at the moment they are laid?[137]

Hamilton's remarks were directed at least in part to the retroactive effect of the law.[138] He had earlier observed that the operation of the amendment "would be very extensive; it would include almost every man in the city, concerned in navigation during the war."[139] The proposed Senate amendment[140] thus denied due process to individuals because it was a direct, legislative taking of a right without the intervention of a court to adjudicate liability under a law existing at the time the relevant act was committed. The right was taken by the very act passed to impose the penalty, with no opportunity given to the indi-

136. *See* IV THE PAPERS OF ALEXANDER HAMILTON: JANUARY 1787-MAY 1788, at 34-35 n.1 (H. Syrett & J. Cooke eds. 1962) [hereinafter cited as HAMILTON].

137. *Id.* at 35-36 (emphasis in original).

138. Hamilton's objections may also have been directed to procedures for determining whether or not someone was an owner of a privateer without judicial process. For example, another proposed section of the Act authorized election inspectors to require an oath of certain persons. Refusal to take the oath would have resulted in disfranchisement. *See id.* at 22-24. It has been previously noted that this sort of provision has been held to be a violation of due process on the grounds that guilt or liability was being determined without a judicial trial. See the discussion of *In re* Dorsey, *supra* note 119. *See also* text accompanying notes 145-47 *infra*. Hamilton's objection may have been similar, but his concern about the Act's applicability to blameless patriots suggests that retroactivity was his primary concern.

139. HAMILTON, *supra* note 136, at 35. *See also id.* at 36-37.

140. Hamilton obviously viewed at least parts of the rest of the statute to be unconstitutional on the same grounds, as he "lamented" the fact that the legislature had already violated the "act concerning the Rights of Citizens" to a certain degree. *See id.* at 36.

vidual to take himself out of its operation by tailoring his future conduct to its terms. It follows that any retroactive law that takes life, liberty, or property will constitute a direct legislative taking or adjudication violative of due process.

In addition to such enlightening legislative debate, numerous pre-Fourteenth Amendment judicial decisions adopted the view that a direct legislative divestiture violated due process. A substantial number of those cases also involved clear prohibitions against retroactive legislation.

United States. In *Dred Scott v. Sandford*,[141] Chief Justice Taney in his opinion stated:

> An act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.[142]

Although the Missouri Compromise, which the Court invalidated in *Dred Scott*, operated prospectively, Justice Taney's due process objection was quite similar to a retroactivity objection. His objection seemed to be that a person who performs an innocent act,[143] such as traveling with his property into a territory, should not have his property taken from him as a consequence of that act. Such a consequence was similar in some respects, though not identical, to the kind of direct legislative taking involved in a retroactive statute, which also "punished" innocent acts.[144]

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141. 60 U.S. (19 How.) 393 (1856).

142. *Id.* at 450.

143. It is not at all clear, however, why the act was considered "innocent," since a slaveholder who was deprived of his property would have to have first violated the law by deliberately taking a slave into territory declared free by the Missouri Compromise. This seems a clear case of prospective operation. *See* D. FEHRENBACHER, THE DRED SCOTT CASE 383 (1978), (describing Justice Taney's logic as "somewhat muddled" on this point). *See also* C. SWISHER, THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES: VOLUME V, THE TANEY PERIOD 1836-64, at 592-630 (1974).

144. *Cf.* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 390-91 (1978) (Justice Taney's opinion suggests that Congress had no power to interfere with "vested" rights).

Even to the extent (which is far from clear) that Justice Taney's due process opinion can be deemed authority for a nonretroactivity interpretation of due process, it may not have had much persuasive impact on the interpretation of the Fourteenth Amendment: "The first clause of the first section of that amendment was framed to overcome the part of *Dred Scott* relating to citizenship. The due process definition in Taney's opinion was not affected, but carried little weight as part of a discredited opinion." B. SIEGAN, *supra* note 73, at 41.

See also *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867), in which the Court held a retroactive act of Congress unconstitutional as a violation of the article I, § 9 prohibition

Alabama. Another decision imposing a limit on legislative power to take property without judicial proceedings was *In re Dorsey*.[145] In that case, Dorsey contended that an act of the Alabama Legislature imposing a duelling oath as a prerequisite to practicing law before the state's courts was unconstitutional. The court held, by a majority of two to one, that the oath was a violation of the state's "due course of law" provision. The majority felt that the act was a legislative attempt to determine guilt without trial, in that refusal to take the oath resulted in automatic disqualification from practice.[146] In this way, the act involved a direct legislative adjudication or taking of property, even though it operated prospectively.[147]

Arkansas. A similar case arose in Arkansas. In *Rison v. Farr*,[148] the state constitution set qualifications for voting. The plaintiff met all of these qualifications, but was denied the right to vote because he refused to take an oath affirming that he had not voluntarily borne arms against the United States or Arkansas, nor aided the Confederate authorities, since April 18, 1864. The Supreme Court of Arkansas invalidated the statute under a portion of the constitution setting

against bills of attainder and *ex post facto* laws. The Court observed that the rights involved could only be taken after an opportunity to be heard was afforded, something not present in *Garland*. *See* 71 U.S. at 378. The most important issue in the case, however, was whether or not the act of Congress, which imposed a test oath as a qualification for practice before United States courts, actually imposed a *penalty*, a requirement for bringing the statute within the prohibition of article I, § 9. If it had not been held to do so, the only provision left that might have invalidated the act would have been the due process clause, interpreted to prevent retroactive statutes depriving persons of vested rights. Yet the Court did not rely on the due process clause, and although counsel for petitioner made an argument based on the Fifth Amendment—*i.e.*, that the act violated the Amendment by compelling petitioner to be a witness against himself—the argument contained no due process component. 71 U.S. at 368-70. It seems that if the due process clause of the Fifth Amendment had been generally understood to prohibit retroactive laws divesting rights, an argument would have been made based on the clause, to safeguard against the possibility that the Court would not interpret the act as one that imposed penalties. On the other hand, petitioner did rely on *In re Dorsey* in a general way, *see id.* at 343-44, and *Dorsey* was clearly a due process case. *See* note 119 *supra*; text accompanying notes 145-47 *infra*. Moreover, the Court had also relied on *Dorsey*, again in a general way, in Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 332 (1866), a case invalidating a retroactive Missouri statute under the article I, § 10, prohibition against state acts of attainder and *ex post facto* laws. Thus, though the absence of a due process argument or holding in *Garland* poses obstacles to a theory that the Fifth Amendment was generally understood to prohibit retroactive statutes, the significance of the omission is far from clear. See also Munn v. Illinois, 94 U.S. 113, 120, 134 (1877), in which a clearly specious due process retroactivity argument was made and was rejected by the Supreme Court.

145. 7 Port. 293 (Ala. 1838).

146. *See id.* at 367, 381.

147. *See* note 122 *supra*.

148. 24 Ark. 161 (1865).

qualifications for voters. The court also extensively discussed legislative power under the constitution. It concluded that the legislature could not enact, apply, and execute the law, because to do so would violate the constitution's separation of powers clause and its law of the land clause, which the court interpreted to require due process of law.[149] Because the act did not require judicial proceedings to determine guilt, it violated the due process prohibition against direct legislative takings, even though it was general and prospective.

California. In *Sherman v. Buick*,[150] the plaintiff sued for trespass to his land, and the defendant justified the trespass under a statute providing for the establishment of "private" roads. The plaintiff asserted that the statute was unconstitutional in that the legislature did not have the power to take one person's property and give it to another, even when compensation was provided. The court agreed that the legislature had no such power, stating that article I, section 8, of the state constitution provided that no man could be deprived of life, liberty, or property without due process of law, and due process meant "something more than mere legislation."[151] Clearly, the court's statement refers to the general prohibition against direct legislative takings, though no retroactivity question was involved.

Illinois. In *McDaniel v. Correll*,[152] certain nonresidents were served by publication in an action to set aside a will. Under a statute prevailing at the time the suit was commenced, process had to be issued and returned unserved before the nonresidents could be served by publication. This had not been done, but the court nevertheless decreed the will void, thus depriving the nonresidents of their legacies under it. An act of the Illinois Legislature, operating retroactively, had declared proceedings such as this one valid, and the issue was the constitutionality of this act.[153] The Illinois Supreme Court declared the act invalid, stating:

> If we assume the act to be valid, then the legacies, which before belonged to the legatees, have now ceased to be theirs, and this result has been brought about by this legislative act alone. *The effect of the act upon them is precisely the same as if it had declared, in direct terms, that the legacies bequeathed by this will to*

149. *See id.* at 166-76.

150. 32 Cal. 241 (1867).

151. *Id.* at 250 (wherein the court pointed out that statute in question actually provided for public, rather than private, roads, and thus legislation was constitutional).

152. 19 Ill. 226 (1857).

153. *See id.* at 226-28.

> *these defendants should not go to them, but should descend to the heirs at law of the testator, according to our law of descent. This it will not be pretended that they could do directly, and they had no more authority to do it indirectly, by making proceedings binding upon them which were void in law.*[154]

In the quoted passage, the relationship between a direct legislative taking of property and a taking by retroactive law is clearly portrayed; this relationship was also demonstrated in other Illinois decisions.[155]

Maryland. In *Regents of the University of Maryland v. Williams*,[156] the regents had been incorporated under several acts of the legislature. Subsequently, the legislature passed an act abolishing the old corporation, so that a board of trustees composed of different persons might be appointed under a new corporate name and the assets of the old corporation transferred to the new corporation. The Supreme Court of Maryland held that this act violated both the separation of powers clause and the law of the land clause of the Maryland Bill of Rights. According to the court, the act amounted to an exercise of judicial power, because a sentence of dissolution was strictly a judicial act for some delinquency ascertained in proceedings at law. Law of the land meant due process of law, which in turn meant the general law, already prescribed and existing as a rule of civil conduct, to be administered by the courts. An act that affected and exhausted itself on a particular person's rights was an adjudication rather than a law.[157] From the dis-

154. *Id.* at 227-28 (emphasis added). *But cf.* Walpole v. Elliot, 18 Ind. 258 (1862) (court found that retrospective, curative legislation validated court holding that would have been void without the legislation).

155. For example, in Ross v. Irving, 14 Ill. 171 (1852), the plaintiff was successful in an action in ejectment, and commissioners were appointed to assess the value of improvements that had been made on the land. The appointment was made pursuant to a statute giving adverse possessors compensation for improvements under certain circumstances. The plaintiff challenged the constitutionality of this statute on the ground, among others, that it violated the state law of the land clause. The court agreed that the legislature did not have the power to take one person's property and give it to another, with or without compensation, but felt this was not the effect of the statute. Also, because the statute was enacted long before the improvements were made, it could not be deemed unconstitutional as a retrospective law. The clear implication was, therefore, that this would not have been so if the law had been enacted after the fact. *Accord* Goddard v. Jacksonville, 15 Ill. 589, 591 (1854) ("The framers of the Magna Charta, and of the constitutions of the United States and of the state, never intended to modify, abridge or destroy the police powers of government. They only prohibited their exercise by *ex post facto* laws, and regulated the mode of trial for offenses."). *See also* Newland v. Marsh, 19 Ill. 376, 384 (1857) (court held that if legislature directly reached property or vested rights of citizen of the state by providing for their forfeiture or transfer to another without trial and judgment in the courts, it would violate the state constitution's separation of powers and law of the land clauses).

156. 9 G. & J. 365 (Md. 1838).

157. *See id.* at 412.

cussion of the general law requirement in the preceding subsection, one can see that the court in *Williams* was applying the noncontroversial aspect of that requirement. It is also clear, however, that the objectionable act in *Williams* operated retroactively to divest rights previously conferred by the legislature. This illustrates that the objections to partial and retroactive laws could coincide in the due process theory of the day, and the reference to an already prescribed rule of civil conduct demonstrates that retroactivity was a key concern of the court's decision.[158]

Massachusetts. In *Holden v. James*,[159] the plaintiff's right of action was barred by a statute of limitations. The plaintiff petitioned the legislature for relief, and the legislature passed an act suspending the statute in the plaintiff's case. The Massachusetts court invalidated this statute under a state constitutional provision guaranteeing every citizen protection "in the enjoyment of his life, liberty, and property, according to standing laws."[160] The court indicated that the legislature could not prescribe a judgment for the courts to render, as that would be an "exercise of judicial power by the legislative department of government in violation of the express provisions of the constitution."[161] The peculiar wording of the Massachusetts constitutional provision prevents *Holden* from being direct authority for a nonretroactivity due process interpretation; however, the case is similar to others in its view of legislative power to adjudicate individual disputes, the concept from which the nonretroactivity principle was derived.

Michigan. In *Price v. Hopkin*,[162] the Michigan Legislature passed an act shortening the period of limitations within which actions for the recovery of lands might be brought. The Supreme Court of Michigan held that the act could not be applied to rights of action that had accrued prior to its effective date, at least not without giving the plaintiff a reasonable time within which to bring suit after the passage of the act. A statute that failed to give such a reasonable time period, said the court, "would be a palpable violation of the constitutional provision that no person shall be deprived of property without due process of

158. *See, e.g.*, Wright v. Wright's Lessee, 2 Md. 429, 452-53 (1852) (court approved constitutionality of legislative divorce, but indicated that legal consequences flowing from divorce had to be left to courts; thus, had legislature attempted to deal with matters of property in divorce act, it would have been exercising judicial power).

159. 11 Mass. 396 (1814).

160. *Id.* at 402 (citation omitted).

161. *Id.* at 396.

162. 13 Mich. 318 (1865).

law."[163]

Minnesota. *Baker v. Kelley*[164] was an action in ejectment, in defense to which the defendant offered a tax deed. To rebut this defense, the plaintiff offered to show that the land covered by the deed had not been offered for sale in the manner prescribed by statute. The defendant maintained that the plaintiff was barred by an 1862 statute from presenting such evidence, because the suit had not been commenced within one year after the tax deed was recorded. The Supreme Court of Minnesota concluded that the 1862 statute was unconstitutional under the state due process clause. The court stated that due process meant that when a person acquired rights

> under the existing law, there is no power in any branch of the government to take them away; but when they are held contrary to the existing law, or are forfeited by its violation, then they may be taken from him—not by an act of the legislature, but in a due administration of the law itself—before the judicial tribunals of the state.[165]

Mississippi. In *Griffin v. Mixon*,[166] a statute vested title to land in the state for nonpayment of taxes. The statute was held to violate the due course of law clause of the Mississippi Constitution, because it failed to provide for any judicial proceeding before divestment. Although not a "nonretroactivity" holding, the case nevertheless illustrates that Mississippi followed the principle that there could be no direct legislative divestment of rights, a principle which was closely associated with retroactivity prohibitions in other states.

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163. *Id.* at 324. Later the court concluded, "The naked case here presented, then, is this: By the law in force to the close of the year 1863, Mary Robinson, or her grantee, was allowed sixteen years within which to bring suit for recovery of this land; at that instant a statute took effect, which provided that all remedy whatever for its recovery was thereby barred. Whether passed at that moment or before, we conceive to be immaterial, and that the statute cannot be applied to this case without violating a plain principle of constitutional law." *Id.* at 328.

164. 11 Minn. 358 (1865).

165. *Id.* at 375. See also Beaupre v. Hoerr, 13 Minn. 369 (1868), involving a Minnesota statute which provided that an appeal had to be taken within six months after entry of a judgment. An appeal was attempted more than six months after entry of judgment on the date that a new statute went into effect providing a one-year time limit. The Supreme Court of Minnesota found this latter statute retroactive, and, as a result, a violation of due process. In the court's view, the judgment represented a vested property right that could not be taken retroactively.

166. 38 Miss. 424 (1860).

New York. Numerous decisions in New York supported direct divestiture and retroactivity prohibitions as a principle of due process. In *In re John & Cherry Streets*,[167] an 1818 statute authorized New York City, a public corporation, to take land from its owners and transfer it to the city on payment of just compensation. This act was invalidated under the state's law of the land clause, which was interpreted as the equivalent of a due process clause. In the court's view, the legislature had no power by virtue of the clause to transfer the property of one person to another.[168]

While *In re John & Cherry Streets* articulated a simple "direct divestment" prohibition, *Wynehamer v. People*[169] dealt more specifically with retroactivity. In *Wynehamer*, an 1855 statute prohibited the sale of intoxicating liquor, without distinguishing between liquor existing on the effective date of the statute and liquor acquired afterwards. One Wynehamer was indicted and convicted for violating this act and challenged it as unconstitutional. The New York Court of Appeals agreed with Wynehamer on the ground that, by failing to distinguish between existing and after-acquired liquor, the act deprived defendant of his vested property rights in violation of the state law of the land and due process clauses.[170]

Justice Comstock declared that the law of the land and due process clauses require "a judicial investigation, not to be governed by a law specially enacted to take away and destroy existing rights, but confined to the question whether, under the preexisting rule of conduct, the right in controversy has been lawfully acquired and is lawfully possessed."[171] Justice A. S. Johnson agreed that due process "imports a judicial trial, and not a mere declaration of legislative will by the passing of a law."[172] He added, however, that the legislature could not simply add a requirement of judicial process to an otherwise obnoxious statute and thereby cure its constitutional deficiencies:

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167. 19 Wend. 659 (N.Y. 1839).

168. *Id.* at 676-77. *See also* Taylor v. Porter, 4 Hill 140 (N.Y. Sup. Ct. 1843), in which a plaintiff sued in trespass, and defendants justified their entry on his land under the statute providing for the establishment of private roads after notice and hearing to the landowner. Damages were to be paid to the landowner by the party applying under a statute for the private road. The New York Supreme Court invalidated this statute under the state law of the land and due process clauses, as well as the clause vesting the legislative power of the state in a senate and assembly. The court stated that "when one man wants the property of another . . . the legislature cannot aid him in making the acquisition." *Id.* at 147.

169. 13 N.Y. 378 (1856).

170. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 144, at 390.

171. Wynehamer v. People, 13 N.Y. at 395.

172. *Id.* at 417.

> To provide for a trial to ascertain whether a man is in the enjoyment of [his] rights, and then, as a consequence of finding that he is . . . to deprive him of [them], is doing indirectly just what is forbidden to be done directly, and reduces the constitutional provision to a nullity. For instance, a law that any man who, after the age of fifty years, shall continue to live, shall be punished by imprisonment or fine, would be beyond the power of the legislature. It would be so, upon the ground that he cannot be deprived of life, liberty or property, without due process of law, and that the right to live and not be punished for living was put by the declaration of right beyond the power of legislative interference.[173]

Johnson's remarks strike a chord that was common to the direct divestment-retroactivity doctrine. The underlying theme of the doctrine was that due process precludes subsequent punishment for, or deprivation of rights that "vest" because of, acts that were, when performed, innocent, or nonliability producing. This appeared to be the concern of Alexander Hamilton in his remarks on the Act Regulating Elections,[174] for example, and it also seemed to have concerned Chief Justice Taney in the *Dred Scott* decision.[175] The persistent statements that legislatures had no power to take one person's property and give it to another also seem to reflect the idea that due process prevented certain kinds of legislative action absolutely, even if a court were somewhere employed to satisfy the "forms which belong to 'due process of law.' "[176]

It is important to remember that the prohibitions, whether or not absolute, were keyed to the central due process requirement of an opportunity to be heard in a judicial proceeding. Justice Selden, for example, stated in *Wynehamer* that a law that totally restricted the right to possess and use property violated due process "as it would in the

173. *Id.* at 420 (Johnson, J., concurring). Westervelt v. Gregg, 12 N.Y. 202 (1854), also dealt with retroactivity. An 1848 statute for the protection of a married women's property rights declared that a wife's property should be her separate property, as if she were single. The court interpreted this statute to include any interest the husband had acquired under preexisting laws. This inclusion was a violation of due process, because the act operated to deprive the husband of property rights that had vested prior to the statute. Commenting upon the state due process clause, Justice Denio stated, "The provision was designed to protect the citizen against all mere acts of power, whether flowing from the legislative or executive branches of the government. It does not, of course, touch the right of the state to appropriate private property to public use upon making due compensation, which is fully recognized in another part of the constitution; but no power in the state can legally confer upon one person or class of persons the property of another person or class, without their consent, whatever motives of policy may exist in favor of such transfer." *Id.* at 212.

174. *See* text accompanying notes 138-40 *supra*.

175. *See* text accompanying notes 141-44 *supra*.

176. Wynehamer v. People, 13 N.Y. at 420.

most effectual manner possible deprive the owner of his property, without the interposition of any court or the use of any process whatever."[177] However broad some of the language of the opinions, therefore, the outer limits of the due process concept insured that the limitations it imposed on legislative power would be relatively narrow, even if sometimes absolute, such as the prohibition against retroactive statutes.[178] General regulatory power over property like intoxicating liquor was thus conceded to the legislature, even though that power might be used to restrict "liberty" prospectively without a judicial proceeding.[179] Only the narrow limitation preventing interference with "vested rights" took on an absolute cast.[180]

North Carolina. In *Hoke v. Henderson*,[181] the North Carolina Supreme Court invalidated a retroactive statute.[182] The plaintiff claimed the office of clerk of the Superior Court of Lincoln by virtue of an election held pursuant to a statute enacted in 1832. The defendant claimed the same office by virtue of his previous appointment to it under an act of 1806. The 1832 act was held to violate both the separation of powers and law of the land clauses of the North Carolina Constitution. The act was general in form, requiring elections for clerks in every county of the state and providing for the expulsion of old clerks from office upon the election of new ones. In discussing why such a general act violated the separation of powers provision, the court stated

177. *Id.* at 434. Judge Selden added, "It follows, that a law which, by its own inherent force, extinguishes rights of property, or compels their extinction, without any legal process whatever, comes directly in conflict with the constitution." *Id.*

178. Two of the remaining justices in the majority agreed that the retroactive characteristics of the statute rendered it invalid under the due process clause. 13 N.Y. at 434. *See also id.* at 456 (Hubbard, J.), 459 (Denio, C.J.).

179. Compare this statement with text accompanying notes 16-21 *supra* (discussion of *Allgeyer v. Louisiana*).

180. *See, e.g.*, People *ex rel.* Baldwin v. Haws, 15 Abb. Pr. 115 (N.Y. Sup. Ct. 1862) (court declared that legislature may not, under law of the land and due process clauses, direct municipal corporation to pay claim for damages when corporation denies liability, without permitting claim to be submitted to judicial tribunal).

181. 15 N.C. (4 Dev.) 1 (1833).

182. Probably the earliest decision articulating a due process prohibition or retroactive legislation was Trustees of the Univ. of N.C. v. Foy, 5 N.C. (1 Mur.) 58 (1805). The North Carolina Legislature had granted lands to the university in 1789. The legislature repealed this grant in 1800, and the issue was the constitutionality of the repealer. The North Carolina Supreme Court held the 1800 act unconstitutional under the law of the land clause of the North Carolina Constitution. The court stated that neither members of corporations nor individuals could be "deprived of their liberties or properties, unless by a trial by jury in a court of justice, according to the known and established rules of decision derived from the common law and such acts of the Legislature as are consistent with the Constitution." *Id.* at 63.

that, unlike the British Parliament, the North Carolina Legislature had been expressly denied the faculty of adjudication.[183] Therefore,

> [w]henever an act of Assembly . . . 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 function . . . . [W]here a right of property is acknowledged to have been in one person at one time, and is held to cease in him and to exist in another, whatever may be the origin of the new right in the latter, the destruction of the old one in the former is *by sentence*.[184]

In evaluating the law of the land clause violation, the court stated that the term "law of the land" did not mean merely an act of the legislature.[185] Rather, the clause meant that a legislative act that attempted directly to punish a person or to deprive him of his property without a judicial proceeding "and a decision upon the matter of right, as determined by the laws under which it vested" was unconstitutional.[186]

Pennsylvania. In *Norman v. Heist*,[187] the Supreme Court of Pennsylvania reversed a lower court ruling on the grounds that the lower court had misinterpreted a statute by reading it to retroactively divest the plaintiffs of a property right. The court, however, clearly indicated that the statute would have violated the Pennsylvania law of the land clause if it had been retroactive. "Law of the land" was held to mean "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."[188]

In *Greenough v. Greenough*,[189] the plaintiff sued his brother in an

183. Hoke v. Henderson, 15 N.C. (4 Dev.) at 11.

184. *Id.* (emphasis in original).

185. *See id.* at 13.

186. *Id.* at 14.

187. 5 Watts & Serg. 171 (Pa. 1843).

188. *Id.* at 173. The court further stated, "It was deemed necessary to insert a special provision in the Constitution to enable them to take private property even for public use, and on compensation made; but it was not deemed necessary to disable them specially in regard to taking the property of an individual, with or without compensation, in order to give it to another, not only because the general provision in the bill of rights was deemed sufficiently explicit for that, but [also] because it was expected that no Legislature would be so regardless of [individual] right[s] as to attempt [to take the property]." *Id.* at 174. See also Brown v. Hummel, 6 Pa. 86 (1847), a case in which the legislature passed an act significantly altering the terms of a will which 40 years before had established an orphanage. One of the terms altered was that certain real estate was to be severed from the orphanage and sold. The Pennsylvania Supreme Court held this act unconstitutional under the state law of the land clause, because, without judicial proceedings, it had divested the original trustees of the orphanage of rights that had accrued to them under the will. *Id.* at 97.

189. 11 Pa. 489 (1849).

action of ejectment, asserting that his sister's will, under which the brother claimed, had not been properly executed. If this were the case, the plaintiff would have been entitled to take by intestacy upon the sister's death in 1841. The sister had made her mark on the will, but court decisions interpreting an 1833 statute had declared a mark to be insufficient where there was no proof that the name was written at the express direction of the testatrix. To overrule those decisions, the legislature passed an act in 1848 declaring marks without proof to be valid. The Supreme Court of Pennsylvania held that the 1848 act violated both the separation of powers and law of the land clauses of the state constitution. The separation of powers clause was violated because the act was a legislative command to the courts to establish a particular interpretation of a statute, and thus it was a judicial act beyond the legislature's power. The law of the land clause was violated because the statute, while general in operation, directly (and retroactively) divested particular rights.[190]

Rhode Island. Not all courts agreed that due process imposed a retroactivity limitation on the state legislature. In *State v. Keeran*,[191] for example, the Rhode Island Supreme Court confronted a case much like the New York decision in *Wynehamer v. People*.[192] Keeran was indicted for keeping "a grogshop and tippling-shop" in violation of a Rhode Island statute. He challenged the statute as unconstitutional on the ground, *inter alia*, that it deprived him of his property "in liquors lawfully held for sale at the time this system of legislation commenced, by making them unsalable."[193] The court disagreed with this interpretation of the Rhode Island law of the land clause, holding that the clause was designed only to protect the trial rights of an accused in a criminal case and did not limit the power of the legislature to define new crimes.[194]

190. *See id.* at 495. By no means would all states have considered such "curative" retroactive laws invalid. *See, e.g.*, Welch v. Wadsworth, 30 Conn. 149 (1861); Walpole v. Elliott, 18 Ind. 258 (1862); Boardman v. Beckwith, 18 Iowa 292 (1865); State v. Norwood, 12 Md. 195 (1858); Foster v. The Essex Bank, 16 Mass. 244 (1819); Gibson v. Hibbard, 13 Mich. 214 (1865); Rich v. Flanders, 39 N.H. 304 (1859); State v. City of Newark, 27 N.J.L. 185 (1858); Gould v. Town of Sterling, 23 N.Y. 457 (1861); Chesnut v. Shane's Lessee, 16 Ohio 599 (1847); Tate v. Stooltzfoos, 16 Serg. & Rawle 34 (Pa. 1827); Tallman v. City of Janesville, 17 Wis. 71 (1863).

191. 5 R.I. 497 (1858).

192. *See* text accompanying notes 169-78 *supra*.

193. State v. Keeran, 5 R.I. at 504.

194. *See id.* at 507. See also State v. Paul, 5 R.I. 185 (1858), a previous case in which the same court held that the statute did not constitute an *ex post facto* law merely because it

C. Summary of "Substantive Due Process" Before the Fourteenth Amendment

The Rhode Island court's narrow view of the limitations imposed by due process was decidedly a minority position.[195] The decisions from other states, discussed above, indicate that law of the land/due process clauses were generally understood to prohibit legislatures from directly divesting a person of rights established under preexisting law. Although these decisions may have been vulnerable to criticism on the grounds that they employed a highly conceptualistic view of the due process requirement and extended it beyond the generally understood reach of the respective constitutional clauses at the time those clauses were adopted,[196] this is beside the point insofar as interpretation of the Fourteenth Amendment is concerned. For the purpose of establishing the general understanding of the due process clause of the Amendment at the time it was ratified, the case law indicates that the clause most likely was understood to embody a restriction against retroactive statutes at the date of its adoption. At least twelve jurisdictions[197] indicated agreement that due process precluded direct legislative divestitures, the requirement from which the retroactivity limitation was, with relative ease, derived. Seven[198] of these explicitly held that retroactive statutes violated due process, and it is a fair inference that Tennessee and Iowa, the states that had adopted broad general law interpretations, can be added to the list of those opposing retrospective legislation.[199] Thus, it appears, though not conclusively, that the direct

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retrospectively destroyed the value of property in the hands of liquor sellers when it took effect. *See id.* at 190.

195. The Rhode Island cases are sometimes cited as authority for the proposition that the *Wynehamer* interpretation of due process was an abberation. *See, e.g.*, J. ELY, *supra* note 45, at 16, 190 n.18; Corwin, *supra* note 48, at 474-75; Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 442 (1926). Given the number of decisions supporting the *Wynehamer* position discussed in the text, this proposition seems doubtful. Moreover, even if *Wynehamer's* particular application of the retroactivity limitation was abberational, the limitation itself was broadly supported in the case law.

196. As the Rhode Island court observed in *State v. Keeran*, this may have been a remote inference from the core due process requirement of a judicial proceeding before life, liberty, or property could be taken. 5 R.I. at 504. The court also commented on "the loose habit of taking constitutional clauses, which, from their history and obvious purpose, have a well-defined meaning, away from all their natural connections, and, by drawing remote inferences from them, of pressing them into the service of any constitutional objection which the ingenuity or fancy of the objector may contrive or suggest." *Id.* at 504-05.

197. *See* notes 145-90 and accompanying text *supra*.

198. The states were Illinois, Maryland, Michigan, Minnesota, New York, North Carolina, and Pennsylvania.

199. *See, e.g.*, Brinton v. Seevers, 12 Iowa 389 (1861); Fisher's Negroes v. Dabbs, 14 Tenn. (6 Yer.) 78 (1834). *See also* notes 119 & 130 *supra* (discussing authorities in Texas,

divestiture-nonretroactivity application of due process was sufficiently accepted to constitute a part of the general understanding of the meaning of the phrase before the Fourteenth Amendment. A majority of the existing states had not so held,[200] but the application was far from aberational and seems to have followed easily from the opportunity to be heard principle, which was at the core of due process.[201] Certainly the retroactivity limitation was a clear majority position among the states that had considered the issue.[202]

Arkansas, and Mississippi that may indicate acceptance by those states of broad application of general law requirement).

200. There were 37 states at the time the Amendment was ratified. *See* J. JAMES, THE RATIFICATION OF THE FOURTEENTH AMENDMENT 192 (1965).

201. The direct holdings that retroactive statutes violated due process are buttressed by other evidence of the "general understanding." For one thing, whether they directly declared retroactive statutes to be violative of due process or not, the courts were very hostile to such statutes. Consequently, the courts often either invoked a presumption against the retroactive operation of a legislative act or simply construed statutes as prospective without reference to a rule of interpretation, thus avoiding any constitutional conflict (and constitutional holding) in the case before them. *See, e.g.*, Plumb v. Sawyer, 21 Conn. 351 (1851); Billings v. Detten, 15 Ill. 218 (1853); Thompson v. Alexander, 11 Ill. 54 (1849); State v. Barbee, 3 Ind. 258 (1852); Bartruff v. Remey, 15 Iowa 257 (1863); Hedger v. Rennaker, 60 Ky. (3 Met.) 229 (1860); Atkinson v. Dunlap, 50 Me. 111 (1862); State v. Norwood, 12 Md. 195 (1858); Medford v. Learned, 16 Mass. 215 (1819); Meighen v. Strong, 6 Minn. 111 (1861); Garrett v. Beaumont, 24 Miss. 377 (1852); Woart v. Winnick, 3 N.H. 473 (1826); Southard v. Central R.R. Co., 26 N.J.L. 13 (1856); Bay v. Gage, 36 Barb. 447 (N.Y. 1862); Briggs v. Hubbard, 19 Vt. 86 (1846); State v. Atwood, 11 Wis. 441 (1860). In addition, a number of cases indicated by way of dictum that retroactive statutes that interfered with vested rights were unconstitutional, though it was not always clear whether the courts were referring to a due process limitation or to a contract clause limit, a general separation of powers limit, a natural law limit, or a specific nonretroactivity clause in the state constitution. The "vested rights" reasoning of the courts was similar whichever sort of constitutional objection was involved. *See, e.g.*, Welch v. Wadsworth, 30 Conn. 149, 155-56 (1865); Boardman v. Beckwith, 18 Iowa 292 (1865); Atkinson v. Dunlap, 50 Me. 111 (1862); Medford v. Learned, 16 Mass. 215 (1819); Meighen v. Strong, 6 Minn. 111 (1861); Garrett v. Beaumont, 24 Miss. 377 (1852); Rich v. Flanders, 39 N.H. 304 (1859); Southard v. The Central R.R. Co., 26 N.J.L. 13 (1856); Syracuse City Bank v. Davis, 16 Barb. 188 (N.Y. 1853); Dash v. Van Kleeck, 7 Johns. 447 (N.Y. 1811); Butler v. City of Toledo, 5 Ohio St. 225 (1855); Bleakney v. Farmers & Mechanics' Bank, 17 Serg. & Rawle 64 (Pa. 1827). Similarly, a number of courts held retroactive legislation unconstitutional when, in their perception, it "divested" rights. Sometimes this was done under specific constitutional provisions prohibiting retrospective laws, and on other occasions very general "vested rights," "separation of powers," or "natural law" language was used, so that it is not possible to classify these cases as applications of a due process clause. Again, however, the reasoning in the cases was similar to the reasoning in the due process cases discussed in the text. *See, e.g.*, Brinton v. Seevers, 12 Iowa 389 (1861); Thompson v. Morgan, 6 Minn. 199 (1861); Routsong v. Wolf, 35 Mo. 174 (1864); Clark v. Clark, 10 N.H. 380 (1839); Fisher's Negroes v. Dabbs, 14 Tenn. (6 Yer.) 78 (1834).

202. Nevertheless, some modern commentators have disagreed that the due process clause of the 14th Amendment was generally understood to incorporate a nonretroactivity limitation on state power. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 144. "The

The same cannot be said of the "partial law" restriction of due process. Both "partial laws" and retroactive laws were prohibited by due process under the generally accepted view prior to the Fourteenth Amendment. Indeed, both were prohibited on the theory that the legislature had no power to directly divest someone of rights without a judicial proceeding. The restriction against partial laws, however, was *generally* accepted only to the extent of prohibiting the legislature from adjudicating individual cases by statute, while the nonretroactivity principle was generally thought to place broader restrictions on legislative regulatory power. The commonly understood meaning of due process at the time the Fourteenth Amendment was ratified would, therefore, have encompassed only a narrow partial law restriction.

Before one can demonstrate the extent to which due process may validly be utilized to limit state choice-of-law power, the pre-Fourteenth Amendment context must be supplemented by an examination of the framing and ratification of the Amendment. Such an examination will show whether or not the general understanding of due process prior to the Fourteenth Amendment was contradicted by a different understanding evidenced in the framing and ratification process.

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framers of the Fifth and Fourteenth Amendment Due Process clauses, however, did not specifically design those provisions to cover retroactive legislation. Therefore, . . . the Due Process Clauses fail to provide the Court with any definite criteria to determine when retroactive legislation violates constitutional principles." *Id.* at 428-29. It is not clear upon what basis the authors conclude that the Framers of the amendments did not "design" the provisions to prohibit retroactive legislation. To the extent that due process clauses are separation of powers commands—and they clearly are—it is far from apparent that the reasoning of the courts discussed in the text is invalid, however "remote" it seems to be from the core due process opportunity to be heard principle. Certainly other commentators have concluded that prospectivity in lawmaking is one of the essential elements that makes a statute "law." *See, e.g.*, L. FULLER, THE MORALITY OF LAW 39, 51-62 (rev. ed. 1969). Despite the analytical difficulty of distinguishing between "innocent" and "harmful" retroactive laws, therefore, it seems quite plausible to conclude that when a legislature attempts to make certain kinds of laws retroactive, it exceeds the proper boundaries of the legislative branch and performs the functions, instead, of a court. *Cf. id.* at 55 ("A second aspect of retrospective lawmaking relates . . . to the circumstance that it unavoidably attaches in some measure to the office of judge.")

In any event, it is important to note that if the nonretroactivity limitation is *not* considered a valid application of the due process clause of the 14th Amendment, then there is no justifiable "substantive" component in the clause. If true, this supposition would simplify considerably the task of this article. For in the absence of *any* substantive component, it is clear that the due process clause cannot be legitimately used to restrict state choice-of-law authority at all. *Cf.* Whitten II, *supra* note 9 (finding no justification for sovereignty-oriented territorial restrictions on state court jurisdiction under the due process clause). *See also* note 261 and accompanying text *infra*.

IV. The Framing and Ratification of the Fourteenth Amendment

One must use evidence drawn from the framing and ratification of a constitutional provision with extreme care. In establishing the meaning of a clause, the central concern, as suggested above, must be to identify the general understanding of the words used at the time of ratification. "The doctrine of ratification premises that the principal knows what he is ratifying."[203] This understanding cannot depend on special or secret meanings used by the Framers of a clause.[204] Otherwise there could never exist shared canons of action between Framers and ratifiers,[205] and, worse, the Framers might be able to proceed by subterfuge in proposing constitutional amendments.[206] Use of a concept of "general understanding" assures that the obligations of communicator (the Framers) and audience (the ratifiers) will be properly distributed. Common sense tells us that it is not customary for persons to communicate through language to which an abberational meaning is attached, and even if this should occur, it would hardly be fair to an audience to frustrate action it takes under the impression that a different, more generally understood, meaning is intended. Similarly, if the audience is permitted to understand and to act on the words used in a bizarre fashion, efficient communication processes can never be adequately established. To avoid problems such as these in the process of constitutional formation, it is imperative that both Framers and ratifiers be held to have respectively used and understood language in its commonly accepted meaning. More importantly, judges faced with the necessity of adjudicating future disputes under a constitutional clause must bind themselves to enforce the general understanding of the clause, lest they become super constitution makers, who frustrate the ordinary amendment processes by applying the Constitution too narrowly or too broadly.[207]

If a concept of "general understanding" is to control, the legislative history of an amendment can be used only in certain limited ways. It can, of course, be used as evidence of what the general understanding of a constitutional clause was when it was adopted. To the extent, however, that evidence drawn from the framing and ratification process tends to contradict the demonstrated general understanding of the lan-

203. R. BERGER, *supra* note 48, at 69.
204. *See* Whitten II, *supra* note 9, at 755.
205. *See* Whitten, Book Review, 13 CREIGHTON L. REV. 1479, 1490 (1980).
206. *See* Whitten II, *supra* note 9, at 755, 757.
207. *See* text accompanying notes 261-97 *infra*.

guage taken from the pre-amendment context, the "legislative history" cannot be allowed to control. Insofar as utterances of the Framers are concerned, Thomas Cooley long ago explained why they cannot be given "controlling force":

> When the inquiry is directed to ascertaining the mischief designed to be remedied, or the purpose sought to be accomplished by a particular provision, it may be proper to examine the proceedings of the convention which framed the instrument. Where the proceedings clearly point out the purpose of the provision, the aid will be valuable and satisfactory; but where the question is one of abstract meaning, it will be difficult to derive from this source much reliable assistance in interpretation. Every member of such a convention acts upon such motives and reasons as influence him personally, and the motions and debates do not necessarily indicate the purpose of a majority of a convention in adopting a particular clause. It is quite possible for a clause to appear so clear and unambiguous to the members of a convention as to require neither discussion nor illustration; and the few remarks made concerning it in the convention might have a plain tendency to lead directly away from the meaning in the minds of the majority. It is equally possible for a part of the members to accept a clause in one sense and a part in another. And even if we were certain we had attained to the meaning of the convention, it is by no means to be allowed a controlling force, especially if that meaning appears not to be the one which the words would most naturally and obviously convey. For as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.[208]

Many of the deficiencies present in legislative history drawn from the framing of a constitutional clause are also inherent in the legislative history of the ratification process, for precisely the same reasons. Thus, ratification materials seem almost as unreliable in determining meaning as framing debates.[209] For these reasons, the examination of the framing and ratification process is limited to an outline of what each contributes to the general understanding of the due process clause.[210]

208. T. COOLEY, *supra* note 101, at 66.

209. *See generally* R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 137-97 (1975).

210. I have elsewhere examined these processes more extensively in the context of determining the extent the due process clause may be read to limit judicial jurisdiction over nonresident defendants. Readers wishing a fuller account of the framing and ratification

Of particular concern is evidence that contradicts the general understanding of due process of law established by the pre-Fourteenth Amendment context.

A. The Framing of the Fourteenth Amendment

That there is no direct reference in the historical materials to the application of "due process of law" to choice-of-law problems is not surprising, given the great purposes of the Fourteenth Amendment.[211] It is surprising, however, that the references to the due process clause in the debates of the Thirty-ninth Congress were "scanty."[212]

The primary concern of the Framers was equality under the law.[213] The addition of the elements of privileges and immunities and due process seemed almost to be an afterthought, to which the Framers attached little significance.[214] For example, Senator Jacob Howard of Massachusetts explained the meaning of the Amendment to the Senate as follows:

> The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States . . . . It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man.[215]

Representative Thaddeus Stevens of Pennsylvania explained to the House of Representatives that the purposes of section one of the Amendment were to allow

> Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law protects the white man shall afford "equal" protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now differ-

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debates may, therefore, refer to Whitten II, *supra* note 9, at 804-21, and authorities cited therein.

211. *See id.* at 805.

212. R. BERGER, *supra* note 48, at 201.

213. *See* J. TENBROEK, THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 187-89, 190 (1951).

214. *See* Whitten II, *supra* note 9, at 805, and authorities cited therein.

215. CONG. GLOBE, 39th Cong., 1st Sess. 2766 (1866).

> ent degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws.[216]

Stevens' reference to "partial laws" might have meant that he understood the due process clause to incorporate the broad partial law limitation evidenced in the few state cases discussed above.[217] However, this interpretation is far from certain. Stevens' reference might have been to the more commonly accepted narrow application of the partial law restriction.[218] Alternatively, he might have been saying that the equal protection clause of section one, as opposed to the due process clause, was intended to embody the broad partial law restriction.[219] Even if Stevens meant to refer to the broad partial law limitation applied in some of the due process cases, his remarks alone cannot be given controlling effect, because they run counter to the generally accepted significance of the words "due process of law" at the time the Amendment was adopted.

There are other indications that the Framers used "due process of law" in its generally accepted sense. Ohio Representative John A. Bingham, speaking in favor of an early form of the Fourteenth Amendment,[220] quoted the due process clause of the Fifth Amendment while arguing in favor of giving Congress power to enforce the "protection of life, liberty, and property" against the states.[221] When Bingham was asked what he meant by "due process of law," he replied: "[T]he courts have settled that long ago, and the gentleman [asking the question] can go and read their decisions."[222] Bingham's reply seems to be a clear reference to the pre-Fourteenth Amendment context, which establishes no broad partial law restriction as a generally understood part of due

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216. *Id.* at 2459.

217. *See* section III(A) *supra*.

218. *See id.*

219. Others have seen the possibility that the equal protection clause was designed to codify a partial law restriction. *See, e.g.*, R. BERGER, *supra* note 48, at 176. This explanation makes sense given that the broad partial law restriction was not generally accepted as a part of due process. Thus, if such a requirement were thought desirable, it would have been necessary to express the requirement in language other than due process language to insure that it would become law.

220. "The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty, and property." CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866).

221. *Id.* at 1089.

222. *Id.*

process. This reference tends to counter the argument of some commentators[223] (an argument supported by language in certain congressional debates[224] and early decisions[225] interpreting the due process clause of the Fourteenth Amendment)[226] that the clause was *only* designed to require the states to establish nondiscriminatory procedures. There is additional evidence that due process had more meaning than this,[227] but even if there were no such evidence, the pre-Fourteenth Amendment context discussed in the previous section would remain the most reliable guide to the meaning of the due process clause. On the whole, therefore, the history of the Amendment's framing adds little or nothing to what we have previously learned from the pre-Amendment decisions about the meaning of due process.

B. The Ratification of the Fourteenth Amendment

There is a substantial body of evidence in the political speeches and ratifying debates about the Fourteenth Amendment that indicates that equality before the law was the primary objective of section one of the Amendment.[228] Nonetheless, this evidence is not conclusive support for those who argue that the due process clause only required nondiscriminatory procedures, for there also existed a great deal of evidence that the ratifying states feared the due process clause would result in an enormous increase in the power of the national government and a concomitant subordination of state authority.[229] Consequently, the evidence tends to indicate that the Amendment should be read as more than a requirement of equal access to judicial proceedings for all persons. In any event, the ratification evidence no more accurately indicates the meaning of due process of law than does the framing evi-

223. *See, e.g.*, H. MEYER, *supra* note 48, at 126-27.

224. *See, e.g.*, CONG. GLOBE, 42nd Cong., 1st Sess. app. 87 (1871) (Representative Storm of Pennsylvania, during the debate over the Civil Rights Act of 1871, remarked that due process in the Fourteenth Amendment was the process of the states).

225. *See, e.g.*, Hurtado v. California, 110 U.S. 516, 535 (1884); Davidson v. New Orleans, 96 U.S. 97, 105 (1877); Kennard v. Louisiana, 92 U.S. 480, 481 (1875); Walker v. Sauvinet, 92 U.S. 90, 93 (1875); Rowan v. State, 30 Wis. 129, 143-44 (1872).

226. There were also contradictory references in the debates and cases cited in notes 224-25 *supra*, indicating that due process did much more than require nondiscriminatory procedures. *See, e.g.*, Hurtado v. California, 110 U.S. 516, 535-36 (1884) (citing Webster's definition); CONG. GLOBE, 42nd Cong., 1st Sess. app. 87 (1871) (containing remarks of Representative Storm that due process is reaffirmation of principles of common law inhibiting what is wrong *per se*); Whitten II, *supra* note 9, at 810-11 n.344.

227. *See generally* Whitten II, *supra* note 9, at 807-10.

228. *See id.* at 811.

229. *See id.* at 811-17.

dence,[230] with the result that the pre-Amendment context remains the most reliable source of data with which to interpret the phrase.

The ratification debates cannot be said to contradict the meaning established by the pre-Amendment context, because content of the debates is not sufficiently clear. The broad fears expressed by some of the states about an "alarming concentration of power" in the federal courts and a "prostitution of the independence of the States"[231] do not reveal the precise mechanism by which the "concentration of power" and "prostitution of independence" would take place. Were the states' fears based on the view that the due process clause embodied a broad partial law restriction? Or were those fears based on the nonretroactivity principle established in the pre-Amendment context? The debates simply do not reveal the precise mechanism; therefore, they are of little value in fixing the meaning of the due process clause. There is, of course, no specific reference to choice-of-law issues in the ratification debates, any more than there is in the legislative history of the Amendment's framing.

C. Summary of the Evidence from the Pre-Amendment Context Through the Framing and Ratification Period

From English law through the pre-Fourteenth Amendment decisions interpreting due process of law and the framing and ratification of the Fourteenth Amendment, one concept remained constant: The outer limits of the phrase "due process of law" were accepted to be that a person could not be deprived of a right without first being given an opportunity to be heard in defense in a judicial proceeding. Within this principle, American courts evolved several subsidiary rules of decision. The primary one was that a legislature could not, consistent with due process, directly divest a person of his rights by statute. From this concept, the courts fashioned other rules. One of these rules was that the legislature could not adjudicate individual cases by statute; another was that the legislature could not retroactively deprive a person of rights that had validly been acquired under a preexisting law. This latter rule, though seemingly remote from the opportunity to be heard principle, was based on the idea that a statute that effectively destroyed rights established under existing law denied the aggrieved person of a judicial hearing. To arrive at this result, of course, the courts had to conclude that a judicial hearing implied the right to have one's liability adjudicated under a "standing" or "preexisting" law, thus removing so-

230. *See id.*
231. *Id.* at 812-15.

called "vested rights" from the scope of legislative power even if the legislature was prepared to provide compensation for the taking of the right.

However conceptualistic this may appear to twentieth century legal thinkers, the retroactivity principle seemed to follow easily from the established nineteenth century notion that the legislative branch of government could not directly take a person's life, liberty, or property. Thus, the limitation would seem to have been a generally understood part of due process at the time the Fourteenth Amendment was adopted. The central question concerning this article is whether or not limits on state choice-of-law authority may be validly deduced from this established meaning. In particular, it is of great interest whether or not any of the modern choice-of-law restrictions evolved by the Supreme Court under the due process clause are justifiable under the probable original meaning of the clause.

V. Due Process as a Limitation on State Choice-of-Law Authority

Superficially, it may appear that the original, general understanding of the due process clause of the Fourteenth Amendment discussed in the previous sections justifies the approach to state choice-of-law authority taken by the Supreme Court in *Allgeyer v. Louisiana*.[232] The pre-Fourteenth Amendment decisions interpreting due process of law were concerned with the protection of vested rights from legislative takings without judicial process. The *Allgeyer* doctrine was also concerned with protecting vested rights from interference by states with no legislative jurisdiction over the transaction or occurrence in which the right was acquired. Nevertheless, there are important differences between the two lines of doctrine. As discussed above, the pre-Fourteenth Amendment cases did not attempt to confine the regulatory power of the state legislatures to affect liberty or property in a general way. Although a legislature could not destroy vested property rights retroactively, or transfer rights from one private party to another, general regulatory laws operating prospectively could effectively limit liberty or property rights. *Allgeyer*, on the other hand, read into the due process clause of the Fourteenth Amendment a set of territorial rules that were generally designed to limit the power of the legislature to affect liberty and property rights prospectively. There is no general

232. 165 U.S. 578 (1897). See discussion in text accompanying notes 17-23 *supra*.

support for a doctrine of such breadth in the pre-Fourteenth Amendment cases.

One might think, however, that *Allgeyer* simply represents a justifiable extension of a settled due process principle to the choice-of-law area. Since the direct divestment-retroactivity limitation sought to protect vested rights intraterritorially, *Allgeyer* is arguably a logical extension of this doctrine to multistate events. By analogy, the pre-Fourteenth Amendment cases established principles that have been legitimately extended to different circumstances arising subsequent to the Amendment's passage. For example, the broadest principle established by the due process clause is that a person may not be deprived of life, liberty, or property without first being given an opportunity to be heard in a judicial proceeding. One of the essential attributes of this opportunity to be heard principle is notice to the defendant.[233] Although the pre-Fourteenth Amendment decisions permitted the legislature wide discretion in substituting different forms of notice for personal service of process,[234] modern decisions have established a more stringent notice requirement which mandates that the legislature employ the best notice practicable under the circumstances.[235] Whether or not a particular form of notice is the best form practicable under the circumstances depends on other forms available to a legislature; prior to the Fourteenth Amendment, notice by publication in a newspaper may have been the best form available, but today notice by mail may be easier, less expensive, and more likely to reach the defendant. Thus, a requirement that the legislature employ mail notice in many cases can be viewed as a valid application of the pre-Fourteenth Amendment notice requirements in a different context. Can *Allgeyer* similarly be viewed as the application of a settled principle for the protection of vested rights in a multistate setting—an application that could not have occured prior to the Fourteenth Amendment?

The answer is almost certainly "no." Certain courts viewed the direct divestment-retroactivity limitation as remote from the central premise of the due process clause.[236] Consequently, the cases establishing the limitation could perhaps have been criticized as wrong at the time they were decided.[237] Nevertheless, the limitation should be considered a valid part of the general understanding of due process at the

233. *See* Whitten II, *supra* note 9, at 798-99.

234. *See id.*

235. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318-20 (1950).

236. *See, e.g.*, notes 191-96 and accompanying text *supra*.

237. *See* note 196 and accompanying text *supra*.

time the Fourteenth Amendment was adopted, because there was substantial case support for it in the pre-Fourteenth Amendment context.[238] The essential point, of course, is not that, in a case of first impression today, such a remote doctrine would be derived from the core opportunity to be heard principle, but that the courts prior to the Fourteenth Amendment apparently did so derive it. However distorted the doctrine may seem today, it seems to have been ingrained in the meaning of due process when the Fourteenth Amendment was ratified, and it should, consequently, be enforced as a part of that Amendment.

The same cannot be said of the *Allgeyer* doctrine. The doctrine was not rooted in the pre-Fourteenth Amendment context, except as it can be described as an extension of the "remote" direct divestment-retroactivity limitation. It is one thing to argue that an unusual application of a principle should be part of a constitutional clause because that application was so widely supported that it constituted a part of the general understanding, and quite another to argue that the remote application, instead of being confined within its own boundaries, can be evolved into a fundamentally broader constitutional principle. The situation is quite unlike the due process notice example discussed above. A notice requirement is a straightforward application of the broadest principle to be found in the due process clause—the opportunity to be heard principle. Thus, the evolution of new notice requirements as better forms of notice become available is within the outer limits of the due process clause. Extension of the "remote" direct divestiture-retroactivity doctrine to protect vested rights through territorial choice-of-law rules, on the other hand, runs a severe risk of exceeding the proper boundaries of the clause. Such rules have apparently nothing to do with the opportunity to be heard principle, which is at most concerned with procedural matters such as notice, the right to an impartial judge, the right to a place of trial that does not enormously burden the defendant, and so forth.[239] Nor do the rules have any support in the pre-Fourteenth Amendment context.[240] Therefore, while retention of the direct divestiture-retroactivity limitation can be justified as part of the due process clause because of the support it finds in the pre-Fourteenth Amendment decisions, any expansion of it into a general, territorial limitation on state authority designed to protect "vested

238. *See id.*

239. *See generally* Whitten II, *supra* note 9, at 803-04.

240. See *id* at 835-36, which argues that territorial rules of *judicial jurisdiction* were improperly incorporated within the due process clause in Pennoyer v. Neff, 95 U.S. 714 (1877).

rights" would exceed the permissible limits of the clause as those limits were probably understood when the Amendment was ratified.

If the *Allgeyer* doctrine cannot be considered a valid appliation of the due process clause, is the same true of the narrower approach to state choice-of-law authority taken in *Allstate Insurance Co. v. Hague*?[241] In *Hague*, the Supreme Court indicated that a state's law could be applied to a dispute whenever the state has significant contacts with the parties and the occurrence or transaction that gives it a legitimate interest in controlling the matter in question.[242] As indicated earlier, this means the application of a state's law will not be invalidated unless the state has no legitimate interest at all in controlling the transaction or occurrence underlying the dispute.[243]

There certainly seems to be something wrong with the application of the law of a state with no legitimate interest in the dispute. Whether it is right or wrong as a matter of choice of law, however, is not the question. The question is whether or not even this limited choice-of-law restriction can be deemed a valid part of the due process clause. It seems clear that it cannot. To evolve choice-of-law restrictions from the due process clause in a legitimate fashion, the restrictions fashioned must, at a minimum, be within the outer boundaries of the most general principle incorporated within the clause. This is obviously not the case with regard to the legitimate state interest test. The test is designed as a restriction on state "legislative jurisdiction," and as such it is, at its core, founded upon the notion that the due process clause embodies a certain kind of territorial restraint on state lawmaking authority. Specifically, the test supposes that due process incorporates restrictions designed to regulate the status of the states as coequal sovereigns in the federal system. There is, however, no substantial evidence that the due process clause was understood in this way at the time it was ratified. Indeed, there is solid reason to believe that the similar sovereignty-based territorial rules of judicial jurisdiction incorporated within the clause in *Pennoyer v. Neff*[244] did not represent a legitimate application of due process.[245] There is surely no greater reason to conclude that the clause incorporated sovereignty-based choice-of-law restrictions on state power.

241. 449 U.S. 302 (1981).

242. *See id.* at 308.

243. *See* text accompanying note 6 *supra*.

244. 95 U.S. 714 (1877).

245. *See* Whitten II, *supra* note 9, at 835.

When additionally it is considered that there is no relationship between the usual contents of the opportunity to be heard principle and conflict-of-laws rules designed to regulate the sovereignty of the states vis-à-vis each other, it seems clear that the formulation of the legitimate state interest limitation under the due process clause is not valid. As noted above, the opportunity to be heard principle commonly focuses on the trial rights of the defendant. Notice, an impartial trier of fact, a place of trial that is not extremely burdensome, and other similar elements flow directly from this principle; however, the notion of choosing applicable law based upon an evaluation of the legitimate governmental interests of a state is unconnected with the principle. Therefore, while it is surely wrong for a state with no legitimate interest to have its law applied to a dispute, and while it is obviously desirable that there be national restraints on the power of the states to do so, the current choice-of-law restraints fashioned by the Supreme Court under the due process clause of the Fourteenth Amendment do not represent a legitimate means of establishing such limits on state power. Broad national restrictions on state authority must be formulated, if at all, under some other constitutional provision.[246]

Nevertheless, the Court does recognize one legitimate way in which the due process clause may be applied to restrict state choice-of-law authority. The plurality opinion in *Allstate Insurance Co. v. Hague* stated: "By virtue of its presence [in Minnesota], Allstate can hardly claim unfamiliarity with [Minnesota laws] and surprise that the state courts might apply forum law to litigation in which the company is involved."[247] Thus, the plurality concluded that

246. The obvious choice of a constitutional provision with which to limit state power is the full faith and credit clause. *See* U.S. CONST. art. IV, § 1. I have elsewhere argued that, while this clause imposes no direct limitations on state choice-of-law power, it does give Congress the authority to establish nationwide conflict of laws rules, if Congress so chooses. *See* Whitten—*Choice of Law*, *supra* note 9, at 68-69; Whitten I, *supra* note 9, at 604. Thus, the proper *means* of imposing choice-of-law restrictions on the states is through *legislative action* under the full faith and credit clause.

247. 449 U.S. 302, 317-18 (1981). The plurality opinion adopted the legitimate state interest test to determine the validity of a state's application of its own law under both the full faith and credit and due process clauses. *See id.* at 312-13. Furthermore, the plurality did not separate due process elements from full faith and credit elements in its discussion of the interest test, to demonstrate how the application of the test satisfied each provision. *See id.* at 307-20. This approach is to be contrasted with that of the concurring and dissenting justices, who distinguished between the operation of the clauses. *See id.* at 320-32 (Stevens, J., concurring), 332-40 (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, J.). The dissenters, while agreeing with the plurality that both the full faith and credit and due process clauses were satisfied if the state had significant contacts with the litigation giving it a legitimate interest in the application of its law to the dispute, were especially careful to discuss how each clause was satisfied by the test, making it clear in the process that "unfair

> [t]here is no element of unfair surprise or frustration of legitimate expectations as a result of Minnesota's choice of its law. Because Allstate was doing business in Minnesota and was undoubtedly aware that Mr. Hague was a Minnesota employee, it had to have anticipated that Minnesota law might apply to an accident in which Mr. Hague was involved.[248]

Similarly, in his concurring opinion in *Hague*, Justice Stevens declared that "a choice of law decision would violate the Due Process Clause if it were totally arbitrary or if it were fundamentally unfair to either litigant."[249] Justice Stevens later stated that the "desire to prevent unfair surprise to a litigant has been the central concern" of the Court in enforcing this fairness or reasonableness standard against the states in choice-of-law situations.[250]

The three dissenting justices agreed that the due process clause protected the legitimate expectations of the parties to a dispute: "[T]he contacts between the forum State and the litigation should not be so 'slight and casual' that it would be fundamentally unfair to a litigant for the forum to apply its own State's law. The touchstone here is the

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surprise" was an element of due process. *See id.* at 336. Therefore, while the plurality might agree that the "unfair surprise" objection is a due process limitation, and that additional limitations predicated on the idea that the sovereign power of the states should be held in check by the Constitution and flow from the full faith and credit clause, this agreement is uncertain. The plurality may instead view the due process clause as containing both unfair surprise and sovereignty-based limitations. For a different interpretation, see World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), where a six-member majority of the Court, in a jurisdiction case, concluded that the due process clause contained sovereignty-based restrictions on state power as well as "fundamental fairness" restrictions. The majority included one member of the plurality in *Hague*, Justice White (who wrote the majority opinion in *World Wide Volkswagen*), and Justice Stevens, who concurred in *Hague*. Justices Brennan, Marshall, and Blackmun, the remaining members of the *Hague* plurality, dissented in opinions that do not make it entirely clear whether or not they believe due process contains sovereignty-based limits, though they did emphasize the state's interest in asserting jurisdiction more thoroughly than the majority.

248. Allstate Ins. Co. v. Hague, 449 U.S. at 318 n.24.

249. *Id.* at 326 (Stevens, J., concurring). Justice Stevens believed that the due process and full faith and credit clauses should be distinguished from each other and that the "unfair surprise" limitation was a component of the due process clause. *See id.* at 320-22, 327. The full faith and credit clause prevents one state from infringing upon the sovereignty of other states. *See id.* at 322-23. That clause is violated when the state's application of its own law "threatens the federal interest in national unity by unjustifiably infringing upon the legitimate interests of another State." *Id.* at 323. On the other hand, the due process clause protects against a choice-of-law decision that is "totally arbitrary" or "fundamentally unfair" to either litigant. *Id.* at 326. According to Justice Stevens, such "unfairness" could be demonstrated in a variety of ways. For example, where the forum's choice of its own law "favored residents over non-residents," the choice represented "a dramatic departure from the rule that obtains in most American jurisdictions," or "was unfair on its face or as applied." *Id.* at 326-27.

250. Allstate Ins. Co. v. Hague, 449 U.S. at 327.

reasonable expectation of the parties."[251]

This doctrine, as stated by the various members of the Court, is much too broad. There is no evidence in the pre-Fourteenth Amendment context to support invalidation of state laws on the grounds that they *generally* are "unreasonable" or "fundamentally unfair."[252] It is true that the purpose of the law of the land and due process clauses was to protect against arbitrary invasion of an individual's rights by the government, and a variety of laws, including retroactive ones, might well deserve to be labeled "arbitrary," "unfair," or "unreasonable." To deduce from this purpose, though, that due process was meant to embody a broad fairness principle seems incorrect. The Framers of the due process and law of the land clauses did not set out to eliminate "arbitrariness," "unfairness," or "unreasonableness" in the abstract. Rather, they chose a specific constitutional mechanism with which to eliminate a particular kind of arbitrary action. The mechanism was the requirement of a judicial proceeding in which a person who was to be deprived of his life, liberty, or property by a state could be heard in defense. Once such a hearing was provided, however, the mechanism for the prevention of arbitrariness was exhausted. Any further qualities of unfairness or unreasonableness had to be dealt with by other constitutional provisions, or through the political processes. Due process clauses did not give the courts a mandate to roam about the legal-political landscape stamping out laws that seemed "unfair" or "unreasona-

251. *Id.* at 333 (Powell, J., dissenting) (citations omitted). The dissenters distinguished between the choice-of-law limitations imposed by the due process clause and those imposed by the full faith and credit clause. Due process is concerned with fundamental unfairness *and* the limitation of state sovereign power in the federal system, while full faith and credit is concerned only with the accommodation of sovereign power among the states. *See id.* at 332-40. Reasonable expectations are protected under the fundamental fairness component of due process. *See id.* Thus the dissenters agreed with Justice Stevens that, for analytical purposes, the full faith and credit and due process clauses should be separated from each other, but (i) concluded that due process also contains limitations designed to check the power of the states as coequal sovereigns in the federal system (whereas Justice Stevens allocated this function solely to the full faith and credit clause), and (ii) agreed with the plurality that the test to be applied to determine whether or not all the limitations of both clauses have been satisfied is the legitimate state interest test. *See* 449 U.S. 302, 332-40 (1981); notes 247 & 249 *supra*.

252. *See* R. BERGER, *supra* note 46, at 194; Whitten II, *supra* note 9, at 795. All members of the Court in *Allstate* seemed to agree that due process generally prohibits "arbitrariness" and "fundamental unfairness." *See* 449 U.S. 302, 308 (1981) (plurality noting that choice-of-law may be neither "arbitrary nor fundamentally unfair"); *id.* at 326 (Stevens, J., concurring) (noting that choice of law violates due process if "arbitrary" or "fundamentally unfair"); *id.* at 333 (Powell, J., dissenting, joined by Berger, C.J., and Rehnquist, J.) (stating that contacts between forum and litigation must not be so slight that it would be "fundamentally unfair" for forum to apply its own law).

ble" to the judicial mind.[253] The elimination of arbitrary or unfair deprivations of individual rights was accomplished exclusively within the confines of a judicial hearing; generally speaking, such an elimination had no substantive overtones.[254]

The pre-Fourteenth Amendment decisions did, however, articulate a "substantive" standard that probably formed a part of the general understanding of due process at the time the Amendment was ratified. This standard was the retroactivity limitation of the early cases, discussed above.[255] The retroactivity limitation was a "remote" and awkward application of the requirement of judicial proceedings, but it appears to have been commonly accepted by the state courts. At the bottom of this limitation seems to have been a feeling by the courts that a guarantee of a judicial proceeding was meaningless if the legislature could simply enact a statute prohibiting activity that was innocent when performed and thus require the courts to condemn an individual automatically if the facts were not in dispute. As Justice A. S. Johnson stated in *Wynehamer v. People*:[256]

> To provide for a trial to ascertain whether a man is in the enjoyment [of his] rights, and then, as a consequence of finding that he is . . . to deprive him of [these rights] is doing indirectly what is forbidden to be done directly, and reduces the constitutional provision to a nullity.[257]

This notion that conduct that was "innocent" or nonliability producing when performed cannot later be condemned by the government seems related to the "unfair surprise" standard articulated by the

253. *Cf.* J. ELY, *supra* note 45, at 44-48 (discussing use of judge's own values in constitutional adjudication).

254. The notion that the specific mechanism of the due process clauses can be disregarded in interpreting their overall scope is extraordinary, but widely held. It is similar to arguing that article III of the Constitution was intended to set up a federal court system in order to achieve national justice; therefore, Congress has the power to give the federal courts jurisdiction in any case it chooses, whether or not the case falls within one of the specific categories of jurisdiction listed in article III, § 2, in order that "justice" as a matter of "national" concern may be done. The argument portrayed is obvious nonsense, because it ignores the fact that article III carries specific, inherent, jurisdictional limits on the power to do "national justice." *See, e.g.*, Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 469-84 (1957) (Frankfurter, J., dissenting). *See also* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 416-17 (2d ed. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler eds. 1973). But the generalized "reasonableness" interpretation of the due process clause is no different. The mechanism selected by the Framers and ratifiers of that clause also limits the power to eradicate "arbitrariness," "unfairness," or "unreasonableness" in its name.

255. *See* section III(B) *supra*.

256. 13 N.Y. 378 (1856).

257. *Id.* at 420. *See also* text accompanying notes 173-74 *supra*.

Court. The harm of a retroactive condemnation of a party lies in his inability to remove himself from the ambit of the law being applied to him, even if he would wish to do so. No amount of good faith or planning will enable the party to escape the government's reach.[258] Yet this harm seems precisely to be the objection to a law that "unfairly" surprises a party. As Justice Stevens explained: "The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law."[259]

Therefore, despite the fact that there is no general "reasonableness" limitation on state legislative power in the due process clause, it is possible to agree that a law that is applied to parties who could not anticipate that they would be governed by it is the equivalent of a retroactive law. No amount of effort by the parties could have removed their conduct from the law's reach, because by hypothesis they were unable to foresee that the law would be brought to bear on them. Under these circumstances, it would seem permissible to invalidate the law as applied to the parties, not because of the "unfairness" in the abstract of applying the law to them, but because the situation fits within the narrow boundaries of the retroactivity limitation.

This limitation is, however, a more restricted ground than the legitimate state interest standard now approved by a majority of the Court. It is apparent that surprise of the sort that would fit within the nonretroactivity principle would seldom, if ever, occur in cases where a state applies the traditional territorial rules of conflicts, such as the place of wrong rule in tort cases, whereas the legitimate state interest test might well be violated by such an application.[260] Despite the argu-

258. Consider, for example, Justice Johnson's example of the law imposing a fine or imprisonment on one who continues to live after age 50. Wynehamer v. People, 13 N.Y. 378, 420 (1856). Obviously such a law could operate prospectively, but it is tantamount to a retroactive law because it cannot be escaped by any effort on the part of the individual short of suicide.

259. Allstate Ins. Co. v. Hague, 449 U.S. at 327 (Stevens, J., concurring).

260. *See* R. WEINTRAUB, *supra* note 3, at 505-06. All members of the Court in *Allstate* believed that the Constitution somehow imposed abstract limitations on the states' power to infringe on the sovereignty of other states in the federal system. The plurality opinion merged the due process and full faith and credit clauses in its analysis, but clearly indicated that one or both of the clauses contains *more* than an unfair surprise limitation. *See* note 247 *supra*. See also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), a jurisdiction case in which one member of the court, Justice White, clearly indicated that the due process clause contains both "fairness" and sovereignty-oriented limitations. The other members of the plurality, Justices Brennan and Marshall, though their opinions were less clear, seemed to focus on the state's interest in asserting jurisdiction over a nonresident de-

able desirability of the Court's current approach in a pure conflict of laws sense, the general understanding of the due process clause will not support a broader principle than can be fitted within the retroactivity limitation. Either the states, on their own volition, or Congress, acting under the full faith and credit clause, will have to establish any broader choice-of-law doctrines.

Conclusion: Adherence to the General Understanding

At least two sweeping objections might be made to the due process analysis in this article. One objection could be that the analysis produces an unduly broad interpretation of the due process clause; another objection could be that the analysis results in an unnecessarily narrow interpretation. Both objections would have as their central focus the use of a concept of "general understanding" in arriving at the proper interpretation of the clause.

The first objection is that the nonretroactivity doctrine is not a valid component of the due process clause of the Fourteenth Amendment, because its support in the pre-Fourteenth Amendment cases was insufficient for it to be considered a part of the general understanding of the clause. The consequences of allowing this argument would be that the due process clause could not be read as limiting state choice-of-law authority in any manner.[261] The basis of the objection is the concession made earlier in this article that the nonretroactivity doctrine was not supported by a majority of the states existing at the time the Fourteenth Amendment was ratified.[262] From this it might be supposed that there is insufficient certainty that the nonretroactivity cases actually represented part of the general understanding of due process,

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fendant. A clear majority of the entire Court in *Woodson* expressed the view that due process contained sovereignty-based restrictions on state power. For a criticism of this view, see Whitten II, *supra* note 9, at 838-40. Justice Stevens, in *Hague*, expressed the view that the full faith and credit clause, rather than the due process clause, contains the sovereignty-based limitations on state choice-of-law authority. *See* note 249 *supra*. The dissenters in *Hague*, true to their position in *Woodson*, expressed the view that both the due process and the full faith and credit clauses contained sovereignty-based restrictions on state power. *Cf.* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. at 293 (Framers of the Constitution intended that states retain many attributes of sovereignty; the sovereignty of each state implies limit on sovereignty of others and this limit is express or implicit in both original Constitution and Fourteenth Amendment). To the extent that the various members of the Court are incorporating sovereignty-based limits on state authority into the full faith and credit clause, they are in error. *See, e.g.*, Whitten—*Choice of Law*, *supra* note 9, at 62-63; Whitten I, *supra* note 9, at 501. To the extent that the due process clause is being used to incorporate limitations beyond the scope of the nonretroactivity principle, the Court also errs.

261. *See* note 201 *supra*.

262. *See* text accompanying notes 199-201 *supra*.

rather than merely the abberational viewpoint of a substantial minority.[263]

There is some weight to this argument. Certainly if there is no more reason for following a definition than that it has the support of a minority of the states in the pre-Amendment period, the definition ought not to control future decisionmaking if it restricts state power *more* than any available alternative interpretation.[264] Under such circumstances, it would be unwarranted to assume that the states approved a greater restriction on their power at the federal level than a majority of them had been willing to establish in interpreting their own constitutions.[265] This observation is especially true where a separate minority of cases in the pre-Amendment context articulates some less restrictive alternative interpretation.[266] The existence of doubt, produced by the absence of a formally evidenced general understanding in a majority of the states, or by controversy between contending minority points of view, arguably places greater burdens on the framers of a constitutional provision than would otherwise exist.[267] If the framers wish to obtain the agreement of the ratifying bodies to place restrictions on themselves, and if the context does not clearly indicate that a restriction will be imposed by the use of certain language, then the framers ought to particularize their message so that its meaning will be clear.[268] In the absence of such particularization, it ought to be presumed that the states are giving up less rather than greater control over their affairs through ratification.[269] Common sense tells us that when individuals or states place a restriction on their freedom of action, they will prefer a restriction that accomplishes their primary objective while leaving them with the maximum amount of freedom.[270] Thus, it seems to accord roughly with the probabilities of the situation to assume that the states understood a proposed amendment in its least restrictive meaning.

More importantly, this assumption distributes the obligations of constitution-making in the most efficient and justifiable manner. The Congress proposes and the states dispose of constitutional amend-

263. *Cf.* J. ELY, *supra* note 45, at 16, 18 (arguing that it should take more than occasional abberational use to establish particular definition).

264. *See* Whitten II, *supra* note 9, at 760.

265. *See id.* at 760-61.

266. *See id.* at 760-62, 764.

267. *See id.* at 761.

268. *See id.*

269. *See id.* at 761-62.

270. *See id.* at 762.

ments.[271] The Congress thus acts in the role of communicator, while the states perform as an audience. There are communicative obligations on both parties to the process, but the initial obligation to use language in some generally understood way is with the communicator. When the meaning of the words chosen is not clear, it is both unfair and inefficient to impose the most restrictive interpretation on the party—here the audience—whose freedom of action is being limited. Of course, we have no absolute way of knowing what actual understanding, if any, the audience had of the language used.[272] It is appropriate, however, as a general rule to adopt that meaning which least restricts freedom of action, because this places the burden of clarifying meaning on the party best able to shoulder the burden, in this case Congress.

Assuming the validity of this interpretative framework, can it be persuasively argued that the nonretroactivity doctrine should be treated as part of the general understanding of the due process clause? First, note that absolute certainty in establishing a general understanding is never attainable. Rather, the courts must measure general understanding on the basis of probability. The judges must look to the best evidence obtainable and be satisfied with it, whether or not it is conclusive or even relatively satisfactory, and they must abide by the results that flow from the meaning established by this process, even if the results are not to their liking. Sensitivity to the way in which the Constitution's Framers would have applied a clause is important in confining its scope to some maximum boundaries. Therefore, if it can be seen that a majority of states would have applied a clause in a given way, that majority application surely ought to control the postratification application of the clause. In the absence of such a majority application, the least restrictive interpretation concept ought to govern adjudication, all other things being equal. On occasion, however, all other things may not be equal, and there may be reasons to adopt a *more restrictive* interpretation embodied in a minority view as the general understanding of a provision. Sometimes there are obvious applications of a clause that

271. *See* U.S. CONST. art. V.

272. For the same reasons that it is impossible to trace the mental processes of the Framers and ratifiers in order to enumerate their "intentions" and thus fix the meaning, if any, that a majority of them would have agreed upon, it is also impossible to trace and enumerate the opinions of the many judges, lawyers, and legislators who made up the pre-Amendment context. We, therefore, employ the concept of "general understanding" as a way of getting around this problem, so that we may have some basis for attributing meaning to a clause without simply making it up as we go along. *Cf.* Colgrove v. Battin, 413 U.S. 149, 181-82 (1973) (Marshall, J., dissenting) (discussing the necessity of drawing arbitrary constitutional lines by reference to history).

ought to control decisionmaking even when a majority of states have not approved or considered those applications prior to ratification. For example, the notice requirements of due process would clearly and directly flow from the general opportunity to be heard principle, even if there were no cases requiring notice as a part of due process before the adoption of the Fourteenth Amendment. It would not be appropriate to conclude that a less restrictive interpretation—for instance, one that requires no notice to all—should be adopted in the face of an agreed-upon general understanding, such as the opportunity to be heard principle, that requires notice for its effective implementation.[273] To interpret the due process clause in such a manner would disregard its more fundamental purposes.

Similarly, it is possible to justify retention of the nonretroactivity doctrine as a part of the due process clause of the Fourteenth Amendment. Although a majority of the states had not approved such a doctrine before the Fourteenth Amendment, a sufficient number had approved it to preclude the conclusion that it was abberational, and certainly far more cases approved it than disapproved it.[274] Furthermore, the doctrine was, in one sense, an obvious or easy-case application; it followed directly (and persuasively, in the legal thinking of the time) from the concept that the legislature could not engage in direct divestment of rights. The direct divestment of rights standard was itself an uncontroversial doctrine limiting the legislature's power to engage in direct adjudication, to bypass the courts by using devices such as test oaths, and so forth. Thus, derivation of the retroactivity limitation from this direct divestment restriction was not implausible at the time, and even today there is some appeal to Justice A. S. Johnson's observation that if a legislature is permitted to enact retroactive statutes, the guarantee of judicial process is rendered meaningless through indirection.[275] Even if we would conclude as a matter of first impression that the retroactivity limitation is an awkward or remote deduction from the central premises of the due process clause, to nineteenth century judges and lawyers it was apparently uncontroversial, and it is their opinion, not ours, by which we must measure the general understanding of the Fourteenth Amendment. Therefore, while the case is in some ways a close one in the absence of a majority point of view in the states, the balance seems to tilt in favor of the nonretroactivity doctrine.

273. *See* Whitten II, *supra* note 9, at 763.

274. *See* text accompanying notes 201-02 *supra*.

275. *See* text accompanying notes 173-74 *supra*.

The significance of the issue is not great, however. As noted before, an "unfair surprise" standard is narrower than the legitimate state interest test currently approved by the Court.[276] Even if the conclusions of this article were rejected and the nonretroactivity doctrine were refused enforcement under the due process clause, there would be very little practical difference in the scope of state conflict of laws authority. The choice is between no due process conflict of laws limitations and a relatively minor limitation.

The second objection to this article's due process analysis is of far greater practical importance. That objection focuses upon use of the general understanding as a *limitation* on the meaning of due process of law. The objection can take many forms, but the typical approach is grounded in the seeming generality of the due process language. The due process clause, it has been argued, is an open-ended provision that invites judges interpreting it to look beyond its "four corners."[277] Properly understood, this argument is indisputable. The use of general language in a constitutional provision is designed to allow future decisionmakers to apply it to specific instances that are within the purposes of the clause, but that cannot be foreseen at the time of framing and ratification.[278] General language is used to deal with a generic problem, even though some aspects of the problem are as yet unknown or, more accurately, undeveloped.[279]

From this indisputable premise, however, one cannot validly draw the conclusion that an "open-ended clause" amounts to a delegation of unfettered discretion to future decisionmakers, allowing them to attribute any meaning they choose to the clause. No constitutional clause is entirely open-ended—none says: "Go and do justice—what constitutes 'justice' shall be determined by a majority of the Supreme Court at any given time." All clauses, including the due process clause of the Fourteenth Amendment, have outer boundaries that can usually be discerned through an investigation of the generally understood meaning of the language used at the time of ratification. In the case of the due process clause we can see that the broadest possible principle incorporated within the clause was the opportunity to be heard—*i.e.*, the principle that no person can be deprived of a right without first being given a judicial hearing. Certain applications of this principle, such as the retroactivity limitation, are also incorporated within the clause. Even

276. *See* text accompanying notes 260-61 *supra*.
277. *See* J. ELY, *supra* note 45, at 13, 14-21.
278. *See* Whitten, Book Review, *supra* note 205, at 1488.
279. *Id.*

though we might not have arrived at these applications in a twentieth century case of first impression, we can nevertheless see by examining the pre-Amendment context that they were generally accepted parts of due process. Other applications, such as the partial law restriction, do not have sufficient foundation in the pre-adoption context to be carried over into the Amendment. Because they also are not straightforward applications of the broadest principle incorporated within due process, such applications should not survive ratification.

The constitutional obligations of judges enforcing the due process clause require them to adhere to this decisionmaking structure, or something very nearly like it. In our system, the power of judges to declare state and federal laws unconstitutional is based on their owed fidelity to law.[280] In *Marbury v. Madison*,[281] Chief Justice Marshall explained the obligations of judges in the following way:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.[282]

Chief Justice Marshall's words are not simply a justification for the *power* of judicial review. They inextricably link with that power a correlative judicial obligation to apply the law given to the judge by superior lawmaking institutions.[283] When dealing with constitutional provisions, this obligation means that the judge is duty-bound to apply the law given to him by the Framers and ratifiers of the provisions.[284] At the most fundamental level, it requires the judge to make a good faith effort to understand what the Framers and ratifiers meant when they used certain language in a clause.[285] At the very least, this obligation means that they may not disregard the historical understanding of

280. *See* Whitten II, *supra* note 9, at 756-58.

281. 5 U.S. (1 Cranch) 137 (1803).

282. *Id.* at 177-78.

283. *See* Whitten II, *supra* note 9, at 756.

284. *See id.*

285. *See id.* at 756-58.

the persons who adopted the clause.[286] As noted earlier, there will never be a way of establishing this historical understanding conclusively,[287] but such inconclusiveness does not release the judges from their good faith obligation to try to discern how the Framers and ratifiers used the language they selected.[288] It merely requires the judges to rely on probability in determining meaning. The *probable general understanding* is thus what they must seek.[289] To adopt a different mode of decisionmaking in constitutional cases clearly violates the separation of powers doctrine from which the courts' authority to engage in judicial review is derived.[290]

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286. This is a principle securely grounded in the proper role of a judge in our system of separation of powers. *See, e.g.*, L. HAND, *How Far Is a Judge Free in Rendering a Decision?,* in THE SPIRIT OF LIBERTY 103 (3d ed. 1960) "[T]he judge must always remember that he should go no further than he is sure the government would have gone, had it been faced with the case before him. If he is in doubt, he must stop, for he cannot tell that the conflicting interests in the society for which he speaks would have come to a just result, even though he is sure that he knows what the just result should be. He is not to substitute even his juster will for theirs; otherwise it would not be the common will which prevails, and to that extent the people would not govern." *Id.* at 109.

287. *See* text accompanying notes 272-73 *supra*.

288. Even in cases where we are uncertain how the Framers and ratifiers would have drawn a constitutional line, because of new or changed circumstances, the proper performance of the judicial obligation imposed by the doctrine of separation of powers will often require the judges to draw the line in accordance with historical forms, rather than inventing an arbitrary line of their own. *See, e.g.*, Colgrove v. Battin, 413 U.S. 149 (1973) (Marshall, J., dissenting). "[I]n cases where arbitrary lines are necessary, I would have thought it more consonant with our limited role in a constitutional democracy to draw them with reference to the fixed bounds of the Constitution rather than on a wholly ad hoc basis . . . . The line must be drawn somewhere, and the difference between drawing it in the light of history and drawing it on an ad hoc basis is, ultimately, the difference between interpreting a constitution and making it up as one goes along." *Id.* at 181-82. Although *Colgrove* involved the constitutionality under the Seventh Amendment of a local rule of civil procedure for the District Court of Montana providing for six-member juries in civil actions, Justice Marshall's remarks have equal or greater force when applied in other contexts, such as where the Court is attempting to establish the outer boundaries of a general clause, for instance, the due process clause of the Fourteenth Amendment.

289. *See* Whitten II, *supra* note 9, at 755.

290. This is not to suggest that a simple dichotomy between lawmaking and law application is to define the judges' role. It is suggested, however, that the judges' lawmaking or policymaking role should be confined. *See* N. MACCORMICK, LEGAL REASONING AND LEGAL THEORY 187-88 (1978) ("Wide issues of legislative policy ought to be the concern of the political legislature, especially in democratic societies. Judges ought to abstain from taking side on issues of actual or potential partisan political controversy. Yet on the other hand the law as administered in the courts ought to exhibit coherence of principle, and should not be 'a wilderness of single instances', and so far as a society has, or is believed or perceived to have, certain values shared across party political differences and personal tastes, these 'common sense values' ought to be realized in its laws. These potentially conflicting principles can be kept in equilibrium by maintaining the principle that distinction and separation ought to be maintained between legislative and judicial functions and powers, not in the over-simplified terms of legislators making the laws and the judges only adjudicating upon

It should, therefore, be apparent that judges may not legitimately construe the due process clause of the Fourteenth Amendment to contain restrictions on state choice-of-law authority that are broader than can be justified under the nonretroactivity doctrine. Because that doctrine is adequately supported in the pre-Fourteenth Amendment context, it may be considered a part of the general understanding of the due process clause.[291] Similarly, because the "outrageous" or "unfair" surprise standard is closely related to the purposes of the nonretroactivity doctrine, the standard may be employed as a limit on state choice-of-law authority under the clause. The result is that the courts may conclude that a state violates due process whenever it applies a law that the parties could not have anticipated would govern their conduct;[292] however, the due process clause does not justify any greater restriction on state choice-of-law power. The probable general understanding of the Framers and ratifiers of the clause simply did not extend far enough to warrant imposing broader choice-of-law restrictions on the states.

The combined result of this narrow interpretation of the due process clause and an equally narrow interpretation of the direct effect of the full faith and credit clause is to place the responsibility for formulating broad-based, national choice-of-law standards upon Congress. As noted earlier, I have elsewhere argued that the full faith and credit clause does not directly impose any restrictions on state conflict-of-laws authority.[293] Nevertheless, it is clear that if it chooses, Congress has wide power to establish nationwide conflict-of-laws rules to govern the states under that clause.[294] The constitutional structure thus permits

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those laws, but in terms that the necessary judicial law-making function required in the interests of consistency and the pursuit of 'commonsense' values ought to be subject to definable restrictions. The highly desirable recognition of a judicial power to make law must be restricted by recognition of a duty to make it only 'interstitially' .").

291. Indeed, the nonretroactivity doctrine has been described as a part of the traditional doctrine of separation of powers presupposed by the ideal rule of law. *See, e.g.*, J. LUCAS, THE PRINCIPLES OF POLITICS 113-14 (1966) ("The Ideal Rule of Law presupposes the traditional doctrine of the Separation of Powers, which is itself only an approximation. It lays upon each organ of government its appropriate restriction, namely: (i) The Judiciary must apply existing law, not make up new laws. (ii) The Executive must act only on the instructions of the Judiciary in applying coercion. (iii) The Legislature must enact only general laws, not Acts of Attainder, nor retrospective laws.").

292. *See* text accompanying notes 259-60 *supra*.

293. *See* text accompanying notes 9-10 *supra*; Whitten-*Choice of Law*, *supra* note 9, at 62-63.

294. *See* Whitten—*Choice of Law*, *supra* note 9, at 62-63; Whitten I, *supra* note 9, at 604-05.

federal control of choice-of-law through legislative action.[295] Given the checkered history of the Supreme Court in evolving coherent constitutional standards to control state choice-of-law decisions, comprehensive legislative activity seems highly desirable.[296] Even if legislative activity is not forthcoming, congressional inattention to the problem certainly cannot justify Supreme Court action to fill the void. The doctrine of separation of powers bars judicial innovation that exceeds the general understanding of the due process clause at the time it was ratified, no matter how desirable action from some source may be.[297]

295. In fact, the full faith and credit clause of article IV, § 1, is itself a provision that was designed to allocate exclusive responsibility for national conflict of laws doctrine to Congress. *See* Whitten—*Choice of Law*, *supra* note 9, at 62-69; Whitten I, *supra* note 9, at 603-05. As a consequence, considerable protection was afforded to the states that their sovereign status relative to other states, as that status existed in 1789, would not be modified without an opportunity for representation and participation in the act of modification through the political branches of government. *See* Whitten—*Choice of Law*, *supra* note 9, at 68-69; Whitten I, *supra* note 9, at 604.

296. Such legislation is desirable, but concededly not likely. Congress has perhaps been even worse than the Supreme Court in exercising its power under the full faith and credit clause. *See* Whitten—*Choice of Law*, *supra* note 9, at 60-62; Whitten I, *supra* note 9, at 597-99 n.439.

297. The ordinary "criteria for judicial justification" are said to be: "(1) that a court publicly justify its decisions by giving reasons for them; (2) that a decision be consistent with principles, policies, and other decisions to which the court adheres; (3) that a court give weight to its earlier decisions bearing on the case before it; and (4) that the judgment of the court operate retroactively." P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1086 (1975). These criteria are at best only necessary conditions for the legitimacy of a judicial justification; in themselves they are not sufficient. The reasons a court gives must be keyed to sources of law given to it at a primary level by other institutions—in constitutional adjudication, for instance, the source would be the Framers and ratifiers.