

CHAPTER ONE

THE “HISTORY AND TRADITION” OF SUBSTANTIVE DUE PROCESS IN STATE CONSTITUTIONS

Substantive due process occupies a curious constitutional twilight zone, teetering somewhere between good law,¹ cautionary apologue,² and “constitutional meme.”³ The doctrine’s critics have been inventive, if not charitable, in their epithets. On a good day, unenumerated rights are merely “babble,”⁴ a silly “oxymoron.”⁵ On a bad day, they’re an outright “atrocious.”⁶

Unlike procedural due process, which dictates *how* government must act when it deprives people of their rights, substantive due process concerns *what* government may do to people in the first place.⁷ The latter concept “bar[s] certain government actions regardless of the fairness of the procedures used to implement them.”⁸ Substantive due process has no one accepted definition. But within this Chapter, due process and related unenumerated rights doctrines are described as substantive (or “protosubstantive”) if they impose content-based limits on legislative — as opposed to merely executive or judicial — authority.⁹

Critics often posit that due process offers little (if any) protection against laws enacted through the ordinary legislative process. The “due process of law,” they say, is nothing more than a promise of adequate

¹ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2309 (2022) (Kavanaugh, J., concurring) (“I emphasize what the Court today states: Overruling *Roe* . . . does *not* threaten or cast doubt on those [other unenumerated rights] precedents.”).

² See *id.* at 2302–03 (Thomas, J., concurring).

³ Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT. 253, 256 (2016).

⁴ Erwin Chemerinsky, *The Future of Substantive Due Process: What Are the Stakes?*, 76 SMU L. REV. 427, 427 (2023) (quoting Justice Scalia).

⁵ *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring in the judgment); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST* 18 (1980) (“[S]ubstantive due process’ is a contradiction in terms — sort of like ‘green pastel redness.’”).

⁶ *City of Chicago v. Morales*, 527 U.S. 41, 85 (1999) (Scalia, J., dissenting).

⁷ See *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

⁸ *Id.*

⁹ On a purely procedural view of due process, this proposition is a nonstarter. As Professor Lawrence Solum explains, “[t]he idealization of a pure rule of procedure assumes that procedural rules regulate the sphere of *adjudicative* institutions.” Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 215 (2004) (emphasis added); see also, e.g., Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 65 (2008) (noting “argument that the Due Process Clause protects only against arbitrary and capricious executive or judicial action”); Raymond M. Kethledge, *Hayek and the Rule of Law: Implications for Unenumerated Rights and the Administrative State*, 13 N.Y.U. J.L. & LIBERTY 193, 200–01 (2020) (“[S]o long as the citizen has fair notice of [a statutory] restriction, and a hearing to contest whether she in fact violated it, the requirements of due process are met.” *Id.* at 201.).

procedure.¹⁰ To recognize “new” substantive rights lurking in a constitution’s procedural penumbras is tantamount to “judicial usurpation,”¹¹ because it “‘inevitably’ requires courts to arrogate legislative power.”¹²

That position is not without rhetorical appeal. It dovetails neatly with a popular textualist-originalist strain of thought, which casts substantive due process as a scion of *Dred Scott*¹³ and the doctrinal engine of the *Lochner* regime.¹⁴ On this telling, substantive due process is the judiciary’s cautionary fable par excellence, a jurisprudential sin that produced decades of judicial overreach before entering its ignominious New Deal-era decline.¹⁵ Modern unenumerated rights doctrines are but a vestige of that bygone era, a “controversial”¹⁶ reminder of a jurisprudence that permitted personal sympathies to trump majoritarian will.¹⁷

But that narrative is incomplete. It neglects the states. And the states tell a different story. Since the early years of the Republic, state courts have recognized the dual character of due process. Those courts routinely relied on *state* due process clauses — and closely related theories of unenumerated rights — to enforce limits on legislative power. Too often, this history is reduced to cannon fodder in academic debates over the federal doctrine.¹⁸ This Chapter charts a different course. By analyzing the state due process decisions on their own terms, it aims to show that the substantive component of due process is not a federal judicial invention, but a deeply rooted feature of state constitutionalism.

This project has unique relevance today. All signs point toward retrenchment of substantive due process in the federal system.¹⁹ But the feds don’t have the final word on fundamental rights. The states do.²⁰ Courts navigating this new landscape need not write on a blank slate. Nor must state constitutional protections for individual rights recede in

¹⁰ See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2300–01 (2022) (Thomas, J., concurring); Calabresi & Agudo, *supra* note 9, at 65.

¹¹ *Morales*, 527 U.S. at 85 (Scalia, J., dissenting).

¹² Kethledge, *supra* note 9, at 201 (quoting F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 282 (1960)).

¹³ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; see *Obergefell v. Hodges*, 576 U.S. 644, 695 (2015) (Roberts, C.J., dissenting) (tracing the federal history of substantive due process to *Dred Scott*); *Dobbs*, 142 S. Ct. at 2303 (Thomas, J., concurring) (similar).

¹⁴ See *Dobbs*, 142 S. Ct. at 2248; ROBERT H. BORK, *THE TEMPTING OF AMERICA* 32 (1990).

¹⁵ See, e.g., Daniel Kelly, *Substantive Due Process: The Trojan Horse of Judicial Legislation*, 51 J. MARSHALL L. REV. 261, 261–62 (2018) (calling the doctrine “nothing more than a thinly veiled pretext for the most odious form of judicial legislation,” *id.* at 262).

¹⁶ *Dobbs*, 142 S. Ct. at 2246.

¹⁷ See Kelly, *supra* note 15, at 263.

¹⁸ See, e.g., Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010); Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012).

¹⁹ See, e.g., *Dobbs*, 142 S. Ct. at 2246; *Dep’t of State v. Muñoz*, 144 S. Ct. 1812, 1821 (2024).

²⁰ See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 16 (2018) (“As long as a state court’s interpretation of its own constitution does not violate a federal requirement . . . [o]ur federal system gives state courts the final say over the meaning of their own constitutions.”).

lockstep with their federal counterparts.²¹ Antebellum state courts pioneered their own substantive due process traditions. Contemporary state courts can — and should — keep those traditions alive.

A. *Protosubstantive Due Process in Antebellum State Jurisprudence*

Since the turn of the nineteenth century, state courts have relied on due process clauses to enforce limits on legislative power. Antebellum courts often framed these limits as broadly structural. Today, we'd call many of them substantive.²²

Consistent with the federal model, most early state constitutions protected individual rights to life, liberty, and property against undue government interference. By 1868, over three-quarters of then-existing state constitutions “explicitly prohibited the deprivation of life, liberty, or property” unless the government complied with certain conditions.²³

Two main types of due process clauses appeared in those states’ charters. Some mirrored the federal approach, specifying rights that could not be deprived without “due process of law.”²⁴ Others appropriated the Magna Carta’s “law of the land” formulation.²⁵ The New York and

²¹ See *id.* at 174 (“There is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns, even guarantees with the same or similar words, must be construed in the same way.”).

²² Professor Ryan Williams, drawing on many of the same historical materials featured in this Chapter, has similarly argued that “courts in at least twenty of the thirty-seven then-existing states had endorsed some version of substantive due process” by 1868. Williams, *supra* note 18, at 469. On this basis, Williams concludes that “the original meaning of . . . the Fourteenth Amendment Due Process Clause[] encompassed a recognizable form of substantive due process.” *Id.* at 512. Professors Nathan Chapman and Michael McConnell read the history differently. They posit instead that “[t]he original understanding of due process,” Chapman & McConnell, *supra* note 18, at 1679, as applied to legislation, rested exclusively on structural “separation-of-powers logic,” *id.* at 1678, as opposed to freestanding reasonableness or natural law considerations. *Id.* at 1677–79. This Chapter takes no firm position on that debate and is not concerned with the meaning or scope of the federal due process clauses. But it’s worth noting that the Chapman-McConnell framing is compatible with, and indeed implies, substantive limits on legislative authority. If due process requires that vested rights be adjudicated by courts rather than legislatures, then legislatures *lack constitutional power* to adjudicate such rights. The limit is substantive in its effect even if structural in its rationale. For this Chapter’s purposes, what matters is the *existence* of judicially enforceable constraints on the substance of legislative action — constraints that go beyond the procedural regularity of legislative process. Whether those constraints are grounded in structural principles, natural rights, general law, or some combination thereof, they represent limits on *what* legislatures may do, not merely *how* they may do it.

²³ Calabresi & Agudo, *supra* note 9, at 66. As Professor Steven Calabresi and Sarah Agudo note, Virginia’s law of the land clause covered liberty but omitted reference to life or property. *Id.* at 66 n.245; see VA. CONST. of 1864, Bill of Rights, art. I (incorporating VA. CONST. of 1776, Declaration of Rights, § 8).

²⁴ Calabresi & Agudo, *supra* note 9, at 66; e.g., GA. CONST. of 1868, art. I, § 3 (“No person shall be deprived of life, liberty or property, except by due process of law.”).

²⁵ Calabresi & Agudo, *supra* note 9, at 66; e.g., MASS. CONST. of 1780, Declaration of Rights, pt. I, art. XII (“[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, . . . but by the judgment of his peers, or the law of the land.”). For a

Minnesota constitutions featured both variations.²⁶ Case law and conventional wisdom suggest that early Americans would have understood these two clauses as roughly synonymous.²⁷ That's likely because the crucial word in these clauses was not "process." It was "law."²⁸

By the mid- to late nineteenth century, courts had identified several implied limits on state police powers, each grounded in a concept of what was not valid "law." This section traces the state-law origins of three such limits: (1) prohibitions on legislative deprivations of vested rights, (2) constraints on "special" or "partial" lawmaking, and (3) checks on legislative arbitrariness. These categories provide an analytical scaffold, but they are not meant to suggest uniformity. Courts across numerous states recognized implied limits on legislative power. But those courts varied considerably in how they articulated, justified, and applied such limits. The discussion that follows uses these three categories as a framework for identifying common patterns, while acknowledging significant interstate differences within each.

I. Vested Rights. — The ink had scarcely dried on the nation's nascent state constitutions before lawmakers began to test the bounds of their legislative authority. The first recognizably substantive strains of due process emerged when legislatures deigned to interfere with "vested" property rights.²⁹

complete list of state due process clauses as of 1878, see THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 351 n.2 (Boston, Little, Brown, & Co. 4th ed. 1878).

²⁶ See Calabresi & Agudo, *supra* note 9, at 66 n.249.

²⁷ See Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856); Regents of the Univ. of Md. v. Williams, 9 G. & J. 365, 412 (Md. 1838); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 221–22 (Boston, Little, Brown, & Co. 1880); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320–21, 325 (1999); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 594–96 (2009). But cf. Calabresi & Agudo, *supra* note 9, at 66–67 (suggesting that the presence of both clauses in the Minnesota and New York constitutions "may bolster the notion that the two formulations [had] distinct meanings," *id.* at 67).

²⁸ Professor Frederick Gedicks has made a similar observation about the "restrictive" understanding of "law" in the eighteenth-century American legal community. See Gedicks, *supra* note 27, at 596 ("Legislative acts that violated natural or customary rights . . . were not considered to be actual 'laws,' irrespective of their compliance with written constitutional prescriptions for the creation of positive law.").

²⁹ Courts rarely defined vested rights. Even Thomas Cooley, who authored several of the leading nineteenth-century state constitutional law treatises, spoke of the category tautologically. See COOLEY, *supra* note 25, at 358 (defining "vested rights" as "the interests of which one cannot be deprived by the mere force of legislative enactment"). In an influential 1911 article tracing the antebellum history of due process, Professor Edward Corwin more helpfully described a "vested" right as "a right which a particular individual has equitably acquired under the standing law to do certain acts or to possess and use certain things." Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 375 (1911). By "standing law" Corwin likely meant the state's positive law, as reflected in its statutes or common law rules. See Chapman & McConnell, *supra* note 18, at 1737–38.

Under the vested rights doctrine, private property rights, once conferred, could not be extinguished by ordinary legislation.³⁰ Divestiture was considered an exercise of judicial, not legislative, power.³¹ It was this structural inference, predicated on the separation of legislative and judicial powers, that enabled courts to fashion quasi-substantive constraints on legislative takings.

The concept of vested rights, though not unlimited, was capacious and contestable.³² Courts used that flexibility to invalidate legislation that retroactively burdened individuals' established interests under preexisting customary or positive law,³³ even where constitutional texts offered no affirmative protection for the particular "right" in question.³⁴ In so expanding the scope of constitutional "property," antebellum state courts dictated which interests qualified for the heightened protections that accompanied that category — much in the same way postbellum federal courts did for constitutional "liberty."³⁵

(a) *Origins.* — North Carolina's *Trustees of the University of North Carolina v. Foy*³⁶ established the template. There, the state's highest law court took up a challenge to a state statute that repealed an earlier land grant to the university and escheated the property to the state.³⁷ The trustees challenged the repeal act under the state's law of the land clause.³⁸

The trustees arguably faced an uphill battle. North Carolina's 1776 constitution had no express takings clause.³⁹ Nor, nearly a century before incorporation, could the state have owed compensation under the federal Takings Clause.⁴⁰ True, the state's due process clause prohibited the government from "depriv[ing]" citizens of their property.⁴¹ But, as

³⁰ See COOLEY, *supra* note 25, at 358; Gordon S. Wood, Lecture, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1441 (1999).

³¹ See COOLEY, *supra* note 25, at 358.

³² See *id.* ("[T]he term 'vested rights' is not used in any narrow or technical sense, . . . but rather as implying a vested interest . . . of which the individual cannot be deprived without injustice."). For a collection of the various nineteenth-century understandings of vested rights, see *id.* at 357–85.

³³ See Wood, *supra* note 30, at 1444–45 ("American judges in the early Republic interpreted the common law flexibly in order to mitigate and correct the harm done by the profusion of conflicting statutes passed by unstable democratic legislatures Even the strongly pro-Jefferson Virginia Court of Appeals in 1804 took the position that the state legislature could do many things, but it could not violate private and vested rights of property.").

³⁴ See, e.g., *infra* notes 39–48, 159–165 and accompanying text.

³⁵ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848 (1992) (describing constitutional "liberty" as a "rational continuum" (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting))).

³⁶ 5 N.C. (1 Mur.) 58 (1805).

³⁷ *Id.* at 58–59, 81.

³⁸ See *id.* at 67, 73–74.

³⁹ See N.C. CONST. of 1776, Declaration of Rights.

⁴⁰ See *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897) (holding federal Takings Clause applicable to the states through the Fourteenth Amendment's due process clause).

⁴¹ N.C. CONST. of 1776, Declaration of Rights, § XII.

the defendants pointed out, that prohibition was conditional: By its terms, the clause permitted such deprivations manifested "by the law of the land."⁴² On their view, the law of the land necessarily included laws made by the legislature; by definition, then, due process posed no obstacle to legislative deprivations.⁴³

To modern ears, that defense might sound reasonable. To the *Foy* court, it was "absurd."⁴⁴ Given the relatively limited powers of the state's executive and judicial branches, the court explained, the law of the land guarantee would be "a dead letter" were it not addressed to the legislature.⁴⁵ Clearly, the clause "was intended as a restraint on [legislative] acts."⁴⁶ And at a minimum, the "law of the land" required that "individuals . . . not be . . . deprived of their liberties or property," except after a jury trial conducted "according to the known and established rules of decision."⁴⁷ The repeal act failed that test: It divested property without any judicial proceeding whatsoever.⁴⁸

Foy's "substantive" application of the law of the land clause rested on both structural and procedural intuitions. The repeal act offended constitutional structure because taking away a vested property right was akin to entering a legal judgment requiring forfeiture — a function reserved for the judicial branch.⁴⁹ The act also flouted procedural prerequisites for forfeiture.⁵⁰ *Foy's* unarticulated premise was that procedural due process "consists of judicial proceedings based on existing law."⁵¹ Taking that premise as true, the repeal act amounted to a taking "without due process . . . because legislatures cannot give people [judicial proceedings based on existing law]."⁵² Legislatures are not courts; "[they] do not apply preexisting law, they change it."⁵³

As Professor John Harrison has observed, whether these intuitions really add up to substantive due process "is a matter of nomenclature."⁵⁴ By Harrison's (and this Chapter's) standards they do, "because [they] result[] in limitations on legislative power that are" independent of "the procedures prescribed by the legislation."⁵⁵ As the *Foy* court said, forfeiture could only occur pursuant to "such acts of the Legislature as are

⁴² *Id.*; cf. U.S. CONST. amend. V (prohibiting deprivations of property, inter alia, "without due process of law").

⁴³ See *Foy*, 5 N.C. (1 Mur.) at 87.

⁴⁴ *Id.* at 88.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See *id.* at 88–89.

⁴⁹ See *id.* at 89.

⁵⁰ See *id.* at 88.

⁵¹ John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 518 (1997); see *Foy*, 5 N.C. (1 Mur.) at 88–89.

⁵² Harrison, *supra* note 51, at 518.

⁵³ *Id.*

⁵⁴ *Id.* at 519.

⁵⁵ *Id.*

consistent with the constitution.”⁵⁶ That wasn’t a request for a more procedurally sound confiscatory policy; it was a reference to preexisting rules of conduct under which forfeiture could only be prescribed as a penalty after adjudicated wrongdoing.⁵⁷ Thus, from a substantive perspective, *Foy* meant that vested property rights couldn’t be subject to the state’s “arbitrary will.”⁵⁸ Because a statute that confiscated property directly was not “consistent with the constitution,” it was not “law” in the constitutional sense.⁵⁹

Foy’s logic quickly spread to other states.⁶⁰ And as the vested rights doctrine gained popularity, it also took on new dimensions. Under that doctrine’s separation of powers logic, “any deprivation worked directly by statute was achieved without due process.”⁶¹ Thus, the threshold question — whether a constitutional deprivation had occurred — was where the real action lay. As legislatures extended the arm of state power into new regulatory domains, courts mediated competing individual rights claims by setting the metes and bounds of constitutional property.

(b) *Expanding Vested Rights*. — Limitations on what legislatures could do to vested rights came from the structural premise that such rights could only be diminished through adjudication, not legislation. But neither the term “vested rights” nor the content of that category derived directly from state constitutional text. Instead, courts identified protected property interests through a common law process of case-by-case adjudication. The meaning and scope of constitutional property protections could thus vary state to state, as circumstances demanded.⁶²

The South Carolina judiciary invoked a *Foy*-like separation of powers rationale to extend vested rights protections to corporate charters. *State v. Heyward*⁶³ reached a state appeals court after the legislature attempted to dissolve one medical college and transfer its charter to another.⁶⁴ The court invalidated the statute, explaining — in a manner reminiscent of *Foy* — that repealing a corporate charter by statute was an exercise of judicial power.⁶⁵ The “law of the land,” it said, guaranteed

⁵⁶ *Foy*, 5 N.C. (1 Mur.) at 88.

⁵⁷ See *id.* at 88–89; cf. COOLEY, *supra* note 25, at 362 (“Forfeitures of rights or property cannot be adjudged by legislative act . . .”).

⁵⁸ *Foy*, 5 N.C. (1 Mur.) at 89.

⁵⁹ *Id.* at 88–89; cf. Harrison, *supra* note 51, at 513 (“Under the old analysis, courts could assume that due process had not been given because it was equated with judicial procedures, and legislative bodies did not employ those procedures in passing statutes. Thus, any deprivation worked directly by statute was achieved without due process.”).

⁶⁰ See COOLEY, *supra* note 25, at 354 n.1 (collecting cases).

⁶¹ Harrison, *supra* note 51, at 513.

⁶² See RODNEY L. MOTT, DUE PROCESS OF LAW §§ 67–68, at 171–72, 172 n.19 (1926); Wood, *supra* note 30, at 1444–45.

⁶³ 37 S.C.L. (3 Rich.) 389 (1832).

⁶⁴ See *id.* at 394.

⁶⁵ *Id.* at 410.

that vested corporate franchises could not be taken away without judicial process.⁶⁶

Reasoning in a similar vein, North Carolina courts treated lawful appointment to a fixed statutory term as creating a vested property right in the office. The state legislature in 1832 abolished tenure protections for numerous county clerk offices and converted the offices from appointed to elected positions, effectively ousting sitting officeholders in favor of newly elected clerks.⁶⁷ In *Hoke v. Henderson*,⁶⁸ the state supreme court stepped in to vindicate the displaced officeholders' vested rights in their positions.⁶⁹

Vested property rights took on an even more abstracted connotation in New Hampshire when, in 1818, the Granite State's highest court affixed the vested rights label to final judicial judgments. In *Merrill v. Sherburne*,⁷⁰ the court voided the legislature's attempt to grant a new trial to a losing litigant following the entry of final judgment.⁷¹ Because the judgment conferred a property right that vested prior to the act in question,⁷² the court reasoned, "the legislature interfered; not to enact . . . a law, but to pass a decree."⁷³

Other elements of judicial process also obtained vested rights status in certain contexts. Although "the general rule" was that citizens had no vested right in "a particular remedy,"⁷⁴ state courts recognized several exceptions. For instance, certain common law and contractual causes of action were insulated from statutory modification, so long as the individual's property or contractual rights had vested prior to the statute's enactment.⁷⁵ Following a similar logic, "the Tennessee and the Pennsylvania courts refused to enforce retroactive interpretive statutes which impaired vested rights."⁷⁶

Not all states embraced the vested rights doctrine with equal vigor. New York developed an especially robust jurisprudence, extending due process protections from property to a broad range of associated

⁶⁶ *Id.* at 411–12.

⁶⁷ See *Hoke v. Henderson*, 15 N.C. (4 Dev.) 1, 3, 5–6 (1833).

⁶⁸ 15 N.C. (4 Dev.) 1 (1833).

⁶⁹ See *id.* at 15, 19.

⁷⁰ 1 N.H. 199 (1818).

⁷¹ *Id.* at 199, 217. *Merrill* was decided under New Hampshire's separation of powers clause, not its law of the land provision. See *id.* at 207–08, 217. In 1817, the state supreme court had held that the latter provision "was not intended to abridge the power of the legislature." *Mayo v. Wilson*, 1 N.H. 53, 57 (1817).

⁷² See *Merrill*, 1 N.H. at 214.

⁷³ *Id.*; see also *id.* at 212–15 (reasoning that interference with a vested right "is forbidden by first principles," *id.* at 212, and noting "[t]he expense and inconvenience of another trial," *id.* at 215).

⁷⁴ COOLEY, *supra* note 25, at 361.

⁷⁵ See *id.* at 362 ("[A] vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary [legislative] interference."); *id.* at 362 n.2 (collecting cases).

⁷⁶ MOTT, *supra* note 62, § 102, at 262–63.

interests.⁷⁷ Other states, particularly in the South, proved more deferential to legislative judgments.⁷⁸ The theoretical and constitutional justifications for the doctrine also differed. Courts usually emphasized the distinction between legislative and judicial power, but some also invoked natural rights or general law.⁷⁹ These variations reflected the plural character of state constitutionalism. Different texts, different customs, and different normative conceptions of state power bred different judicial traditions and different relationships with state power. What state courts (mostly) shared was the foundational premise that “law” imposed limits on legislative power.

These cases demonstrate how due process principles, once articulated, could be used flexibly to combat novel forms of legislative excess. At a minimum, vested rights included property rights “conclusively acquired pursuant to the positive law in effect at the time of acquisition.”⁸⁰ In some states, they extended further.⁸¹

(c) *Defining and Limiting Legislative Power.* — Identifying a vested right was only half the battle. Next, courts had to articulate the constitutional principles governing legislative interferences with such rights. Three related doctrinal constraints on legislative power emerged from the vested rights cases. *First*, retroactive legislation — that is, statutory impairment of preexisting property rights — was broadly disfavored,⁸² though the legislature could take private land for public use if it compensated the owners.⁸³ *Second*, deprivations were permitted only pursuant to general laws. Legislatures lacked authority to effectuate forfeiture through “special” or “partial” acts, which targeted the property rights of particular individuals or classes by setting forth rules of decision “applicable to their case[s] alone.”⁸⁴ *Third*, the state could never simply “take the property of A[] and give it to B[]” for B’s private use.⁸⁵ Property could only be taken for public purposes — full stop.⁸⁶

Taken together, these doctrines established a trio of implied constitutional limits on legislative power. A valid legislative act qualified as “law” if it was (1) prospective, (2) generally applicable, and (3) served public rather than private purposes.

⁷⁷ See *id.* § 68, at 171 & n.18.

⁷⁸ See *id.* § 69, at 172 & n.19.

⁷⁹ See Williams, *supra* note 18, at 448 & n.170 (collecting cases).

⁸⁰ Chapman & McConnell, *supra* note 18, at 1737–38; cf. COOLEY, *supra* note 25, at 359 (“[A] mere expectation of property in the future is not a vested right.” (emphasis omitted)).

⁸¹ See *supra* notes 63–76 and accompanying text; *infra* notes 166–173 and accompanying text.

⁸² See COOLEY, *supra* note 25, at 357–58.

⁸³ *Id.* at 357. On this view, retroactive application was effectively used to distinguish unconstitutional takings from valid exercises of legislative power.

⁸⁴ Jones’ Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 77 (1836).

⁸⁵ Taylor v. Porter, 4 Hill 140, 144 (N.Y. Sup. Ct. 1843); see, e.g., *id.* at 143–45; Rockwell v. Nearing, 35 N.Y. 302, 307–08 (1866).

⁸⁶ COOLEY, *supra* note 25, at 357.

Some commentators have argued that these constraints mainly relied on “a separation-of-powers logic” under which “a law was distinguished from a judicial sentence by being prospective and for the general welfare.”⁸⁷ That’s a fair reading of the vested rights cases. But a few features of the antebellum period’s protosubstantive due process jurisprudence sit uneasily with a purely structural understanding of due process. The first is interstate variation. Nearly all states boasted a divided government. Only some, however, interpreted the “law of the land” as constraining legislative authority — and even among those that did, the established limitations varied significantly.⁸⁸

Another complication for the structural account is the close relationship between structural and individual rights-based justifications for the early substantive due process cases. As Judge Thomas Cooley explained in his renowned treatise on the limits of state legislative power, the very “purpose” of states’ law of the land and due process guarantees “was individual protection *by* limitation upon [legislative] power.”⁸⁹ Prospectivity, generality, and public purpose requirements can thus themselves be understood as unenumerated individual (or quasi-individual) rights. A person whose property was taken for public use could seek and receive compensation.⁹⁰ An individual could likewise obtain judicial relief from a statute that subjected her to substantive or procedural burdens not shared by similarly situated peers.⁹¹ And a person whose property was taken solely for another individual’s use was entitled not merely to compensation but to reinstatement of her property rights.⁹²

This individual rights reframing is crucial to a robust understanding of the doctrines described in the following subsections. Neither a purely procedural nor a purely structural due process framework can account for how state courts transformed generality, prospectivity, and public purpose principles into freestanding limits on legislative authority. In doing so, courts often paid lip service to separation of powers principles. But the deeper logic of these decisions — and their doctrinal evolution — is evocative of a more modern values-based approach to substantive due process.

2. *Partial, Special, and Class Legislation.* — Vested rights doctrines addressed one form of legislative overreach: retroactive legislation altering established legal entitlements. But courts recognized that legislatures could threaten individual rights in other ways, too. One common method was by singling out specific people or groups for either retrospective or *prospective* burdens. This concern gave rise to limits on

⁸⁷ Chapman & McConnell, *supra* note 18, at 1727.

⁸⁸ See discussion *supra* section A.1(b), pp. 1385–87.

⁸⁹ COOLEY, *supra* note 27, at 242 (emphasis added).

⁹⁰ See *Taylor*, 4 Hill at 143.

⁹¹ See *infra* section A.2, pp. 1388–94.

⁹² See, e.g., *Taylor*, 4 Hill at 147–48 (holding that compensation was not an adequate remedy for nonconsensual transfers of property between private individuals).

partial, special, and class legislation: laws that either facially or in practice discriminated against particular individuals or groups.⁹³

At first glance, constitutional limits on special legislation appear to follow the same structural logic that animated the vested rights cases. Much like an act providing for forfeiture without adjudicated wrongdoing, an act that operated exclusively on one person rather than on the “community in general” was “rather a sentence than a law.”⁹⁴ The formal distinction between legislating and adjudicating featured prominently in special legislation jurisprudence.⁹⁵ So did concerns about procedural fairness — several early cases concerned acts that provided for non-standard judicial proceedings for specific individuals.⁹⁶ But a close reading reveals a second, independent strand of reasoning that cannot be reduced to structural or procedural concerns: an individual right to be treated equally by the political community.

Bank of the State v. Cooper,⁹⁷ one of the first reported cases in the special legislation line, demonstrates “the way by which many . . . courts bridge[d] the gap between [procedural] due process . . . and due process as a guarantee of equality.”⁹⁸ In 1829, the Tennessee legislature created a specialized court to adjudicate claims against a single bank’s officers.⁹⁹ Rather than allowing designated claims to proceed through the ordinary judicial process, the statute fashioned a one-off court system to handle a single class of cases.¹⁰⁰

Fortunately for the defendant, the court refused to countenance that maneuver. Instead, it declared itself unconstitutional.¹⁰¹ Tennessee’s

⁹³ See Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 299 n.243 (1997) (collecting cases and observing that “[m]ost of the antebellum cases condemning partial or special laws defined those laws solely by reference to their discriminatory operation or effect”).

⁹⁴ *Reed v. Wright*, 2 Greene 15, 23 (Iowa 1849); cf. MOTT, *supra* note 62, § 101, at 261 (“[S]pecial acts of the legislature were by their very nature . . . judicial decrees and hence could not be considered valid under the ‘law of the land.’”).

⁹⁵ See, e.g., sources cited *supra* note 94; see also *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 616–17 (1831) (opinion of Kennedy, J.) (“The legislature can only assign the duties of the judges, by general laws . . . but surely they cannot prescribe and define the jurisdiction of the courts, by enacting that particular judges by name shall do particular things.” *Id.* at 617.); *Vanzant v. Waddel*, 10 Tenn. (2 Yer.) 260, 269–71 (1829) (opinion of Catron, J.) (describing the legislative power as encompassing the power to enact “general and public law[s],” *id.* at 271, not “to legislate partially in reference to particular individuals, affecting their rights by partial and extraordinary remedies,” *id.* at 270); cf. *Taylor*, 4 Hill at 144–45 (suggesting that “a legislative act to transfer the property of A[] to B[] without his consent,” *id.* at 144 (quoting *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 658 (1829)), would not be a proper exercise of legislative power); *Holden v. James*, 11 Mass. (10 Tyng) 396, 402 (1814) (remarking, in dicta, that “prescrib[ing] to the courts of justice the judgment which the laws of the land would require them to render . . . would be an exercise of judicial power by the legislative department . . . in violation of the express provisions of the constitution”).

⁹⁶ See *infra* notes 97–123 and accompanying text (discussing Tennessee cases).

⁹⁷ 10 Tenn. (2 Yer.) 599 (1831).

⁹⁸ MOTT, *supra* note 62, § 101, at 261.

⁹⁹ *Cooper*, 10 Tenn. (2 Yer.) at 599 (opinion of Green, J.).

¹⁰⁰ See *id.*

¹⁰¹ *Id.* at 605–08; *id.* at 613–15 (opinion of Peck, J.); *id.* at 620–21, 623 (opinion of Kennedy, J.).

law of the land clause, the tribunal's members agreed, required "even-handed justice" and an "equal distribution of rights" among individuals.¹⁰² A statute that was "partial in its operation" could not, "for that reason," be a "law of the land."¹⁰³

Judge Green's lead opinion elaborated on the connection between generality, equality, and the law of the land. When the legislature enacts a general law, it binds the majority that enacted it; self-interest therefore constrains abuse.¹⁰⁴ But when the legislature enacts a partial law — one affecting only a minority of citizens — this structural safeguard disintegrates. The majority can then impose burdens on the minority it would never accept for itself.¹⁰⁵ By singling out disfavored individuals for special treatment, Judge Green suggested, the legislature had threatened the basic rule of law principles that underpin American (or, at least, Tennessean) constitutionalism.¹⁰⁶

The problem in *Cooper* wasn't that a special tribunal could never afford the defendants constitutionally adequate procedures.¹⁰⁷ It was that those procedures, no matter how fair, were different from the ones afforded to other similarly situated individuals.¹⁰⁸ By cordoning off adjudicative proceedings in this "special case[]," the statute deprived the defendant alone of his rights to jury trial and appeal — "privileges . . . every other member of the community, having incurred similar liabilities, enjoy[ed]."¹⁰⁹ *Cooper's* holding was straightforward: Partial legislation "is not law."¹¹⁰ True "law," the court's members insisted, must be "general and public . . . , operating equally on every individual in the community."¹¹¹ The 1829 Act did no such thing. Thus, the Act was not law.

Now consider *Wally's Heirs v. Kennedy*,¹¹² another case out of Tennessee, this time involving a statute that targeted Indian reservation claimants. The Act provided a complete defense to recovery in ejectment suits upon a showing that the suit was "prosecuted in trust for

¹⁰² *Id.* at 614 (opinion of Peck, J.); *see id.* at 605 (opinion of Green, J.); *id.* at 621 (opinion of Kennedy, J.).

¹⁰³ *Id.* at 601 (opinion of Green, J.) (emphasis omitted).

¹⁰⁴ *See id.* at 606.

¹⁰⁵ *See id.*

¹⁰⁶ *See id.* ("[Majorities] need no written constitution[] [to] defin[e] and circumscrib[e] the powers of the government. Constitutions are only intended to secure the rights of the minority.").

¹⁰⁷ *See id.* at 607–08.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 607.

¹¹⁰ *Id.* at 608.

¹¹¹ *Id.* at 605; *accord id.* at 613–15 (opinion of Peck, J.) (concluding that the 1829 legislation was unconstitutional "partial in its provisions, and personal in its application," *id.* at 613); *id.* at 621 (opinion of Kennedy, J.) ("The clause, *law of the land*, means a general and public law, equally binding upon every member of the community. . . . [E]very partial or private law, which directly proposes to destroy or affect individual rights . . . is unconstitutional and void." (quoting *Vanzant v. Waddell*, 10 Tenn. (2 Yer.) 260, 270 (1829))).

¹¹² 10 Tenn. (2 Yer.) 554 (1831).

another.”¹¹³ Here’s the twist: The defense was available only in reservation cases, not in ordinary ejectment actions.¹¹⁴ In declaring the legislation “partial” (and therefore void), the court explicitly adopted the framework from *Cooper*: The law of the land meant that “[t]he rights of every individual must stand or fall by the same rule or *law*, that governs every other member of the body politic, or land, under similar circumstances.”¹¹⁵ On its face, the Act was unconstitutionally “partial” because it “appl[ie]d only to suits . . . brought in the name of any Indian reservee” — not to identical suits brought by other landowners.¹¹⁶

Remarkably, the *Kennedy* court didn’t rely solely on the statute’s text for this conclusion. It also scrutinized the legislature’s motivations. “The act,” the court observed, “was intended to drive from the courts of justice a few odious individuals, who it was supposed had speculated upon . . . and fraudulently obtained [the reservees’] claims”¹¹⁷ As the court acknowledged, “there was good cause for public indignation” against the fraudsters.¹¹⁸ Yet popular disdain, however noble, could not justify “the passage of a law . . . by which the great body of the people, or the legislators themselves, were unwilling to be bound.”¹¹⁹

Some commentators cite *Cooper* and its progeny as examples of “the generality principle,” a species of separation of powers analysis.¹²⁰ But notice what Tennessee’s due process clause actually demanded: similar treatment for similarly situated individuals.¹²¹ That requirement can hardly be reduced to a command that legislatures refrain from adjudicating. The *Kennedy* statute wasn’t equivalent to a judicial decree. It didn’t determine the rights of the parties to a particular dispute; it simply eliminated judicial remedies in a class of cases. So too in *Cooper*. By cordoning off adjudicative proceedings in one “special case[],”¹²² the legislature hadn’t declared anyone guilty. But it had deprived the defendants of “privileges . . . every other member of the community, having incurred similar liabilities, enjoy[ed].”¹²³

By the mid-nineteenth century, other state courts were also beginning to develop constitutional doctrines requiring legislative impartiality.¹²⁴ The “aversion to partial or special laws” was powerful — so powerful, in fact, that many American courts opted to “transform[] [it] . . . into positive law, as a state constitutional limitation on legislative

¹¹³ *Id.* at 555.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 556.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 557.

¹²⁰ See Chapman & McConnell, *supra* note 18, at 1768.

¹²¹ See *Kennedy*, 10 Tenn. (2 Yer.) at 555.

¹²² *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 607 (1831) (opinion of Green, J.).

¹²³ *Id.*

¹²⁴ See Saunders, *supra* note 93, at 257–58.

power.”¹²⁵ Courts sometimes read this constraint directly into due process — the approach Tennessee had pioneered.¹²⁶ In 1849, for instance, the Supreme Court of Iowa relied on the law of the land clause in the territorial government’s founding charter¹²⁷ to invalidate an act that discriminated against a class of “half-breed” Native American landowners.¹²⁸ Maryland, Texas, and Michigan courts similarly recognized impartiality and generality as facets of due process.¹²⁹ Some courts invoked more general or fundamental principles of law and personal liberty to reach similar constitutional conclusions.¹³⁰ Some states even adopted express constitutional equality guarantees.¹³¹

Variation in state law sources of equality cuts toward, not against, an unenumerated rights understanding of these early state efforts. It illustrates how each state’s unique constitutional traditions can illuminate different paths for enforcement of fundamental constitutional principles. For instance, Tennessee’s muscular prohibition on specialness was not met with universal approval. Many state courts administered milder medicine. Their approach looked more like burden-shifting, requiring the state to provide special justifications for laws that “singled out certain individuals or classes for special benefits or burdens.”¹³² This presumption against partiality, so to speak, was not necessarily fatal. Although courts “disfavor[ed]” legislative favoritism, they would sustain partial laws “upon a showing that the ‘discrimination’ they worked was designed to further some legitimate ‘public purpose.’”¹³³ Courts could therefore “tolerate laws singling out certain persons or classes of persons for special treatment when they could be justified . . . on public grounds, rather than on the basis of mere favoritism or prejudice.”¹³⁴

¹²⁵ *Id.*

¹²⁶ See *supra* notes 97–123 and accompanying text.

¹²⁷ See *Reed v. Wright*, 2 Greene 15, 21–22, 25 (Iowa 1849).

¹²⁸ See *id.* at 24–25. The term “half-breed” appears to have been used in reference to persons of mixed Native American and European ancestry, although it was also used more generally to refer to a variety of mixed-race people. See Jack D. Forbes, *Mustees, Half-Breeds and Zambos in Anglo North America: Aspects of Black-Indian Relations*, 7 AM. INDIAN Q. 57, 72–73 (1983).

¹²⁹ See *Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365, 412 (Md. 1838); *Sears v. Cottrell*, 5 Mich. 251, 254 (1858); *Janes v. Adm’rs of Reynolds*, 2 Tex. 250, 252 (1847).

¹³⁰ See, e.g., *Williams*, 9 G. & J. at 408–10; *Norman v. Heist*, 5 Watts & Serg. 171, 174 (Pa. 1843). Professors William Baude, Jud Campbell, and Stephen Sachs have persuasively argued that “[g]eneral principles” limiting legislative power “were . . . part of each state’s positive law,” at least in the sense that they “matched the interpretive principles of the time.” William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1201 (2024). “Just as a generic grant of legislative power in Article I would not license one Congress to bind a future Congress, contrary to the common-law rule against legislative entrenchment, so a generic grant of legislative power in a state constitution would be read narrowly in derogation of general fundamental rights.” *Id.* (footnote omitted).

¹³¹ See Saunders, *supra* note 93, at 258.

¹³² *Id.* at 261.

¹³³ *Id.*

¹³⁴ *Id.* at 260.

The requirement that legislation be general, impartial, and public-minded may have evolved out of some of the same separation of powers instincts that animated the vested rights cases.¹³⁵ But antebellum courts came to apply these principles in a manner far more reminiscent of a post-Lochnerian rational basis standard: requiring “every restriction on liberty or property . . . to be reasonably related to a legitimate public purpose.”¹³⁶ Much like modern approaches to substantive due process and equal protection, this standard gave rise to some hard limits on legislative authority. A legislature could not “proscribe a class or a party for opinion’s sake.”¹³⁷ And the law of the land would not readily tolerate completely arbitrary class distinctions¹³⁸ or the suspension of general laws for particular cases.¹³⁹ But it also afforded legislatures substantial flexibility to “impos[e] . . . special benefits and burdens” when doing so was “necessary to promote the general welfare.”¹⁴⁰

These patterns cannot be explained solely in terms of separation of powers or procedural due process principles. Proscription for opinion’s sake, for instance, identifies a substantive wrong — such as punishing individuals for their beliefs¹⁴¹ — that would seem equally unlawful whether done by a legislative, executive, or judicial actor.¹⁴² A court that convicted defendants based on their political opinions would presumably violate the same principles that Cooley identified as implicit in due process and law of the land requirements.¹⁴³ The wrong would not have been that one branch had usurped the other’s power to discriminate but instead that the government had acted on an impermissible basis for distinguishing among citizens.¹⁴⁴

Thus, drawing upon due process frameworks that emerged long before the Fourteenth Amendment, many states recognized that “[f]air legislative process meant that legislatures would create impartial rules of law that served the public good.”¹⁴⁵ Indeed, “[t]he idea that laws should

¹³⁵ See *supra* section A.1(a), pp. 1383–85.

¹³⁶ Harrison, *supra* note 51, at 499; see Charles Grove Haines, *Judicial Review of Legislation in the United States and the Doctrine of Vested Rights and of Implied Limitations on Legislatures*, 3 TEX. L. REV. 1, 19 (1924).

¹³⁷ COOLEY, *supra* note 25, at 390; see also, e.g., *Mayor of Baltimore v. State ex rel. Bd. of Police*, 15 Md. 376, 379 (1860) (remarking, in dicta, that a city ordinance that barred “Black Republican[s]” from holding office would be unconstitutional if “that class of persons [were] pr[o]scribed on account of their political or religious opinion[s]”).

¹³⁸ See COOLEY, *supra* note 25, at 390–93.

¹³⁹ See *id.* at 391.

¹⁴⁰ See Saunders, *supra* note 93, at 260.

¹⁴¹ See *Mayor of Baltimore*, 15 Md. at 379.

¹⁴² Cf. COOLEY, *supra* note 27, at 247–48 (“A State . . . has no business to bestow favors or to establish unjust discriminations.” *Id.* at 248.).

¹⁴³ See COOLEY, *supra* note 25, at 389–97.

¹⁴⁴ Cf. MOTT, *supra* note 62, § 119, at 317 (contending that the incorporation of substantive limits on state police powers partially derived from the “idea that due process was a limitation on unjust classification”).

¹⁴⁵ JACK M. BALKIN, *LIVING ORIGINALISM* 429 (2011).

be general and not tainted by considerations of class or caste" — however imperfectly realized in an era of racialized chattel slavery — was, in many states, "part-and-parcel of the presumed fairness of governmental processes, of due process of law."¹⁴⁶

3. *Arbitrary Mandates.* — As Cooley would later point out, courts were perhaps less concerned with "the partial character" of legislation than with "its arbitrary and unusual nature."¹⁴⁷ Not every special law was unconstitutional.¹⁴⁸ Nor was every "general rule[]" legitimate.¹⁴⁹ Even a general law could "transcend the due bounds of legislative power" if, for example, it arbitrarily singled out "one class of citizens" for worse treatment.¹⁵⁰ Absent "some reason" for deeming the class-based distinction "important," Cooley explained, such a law would unconstitutionally "deprive[] [the targeted class] of *liberty*."¹⁵¹

This nonarbitrariness principle demonstrated how a discriminatory law might be invalid even if it were generally applicable and purely prospective. Legislation was "legitimate," and thus had "binding force,"¹⁵² only when it established one rule for everyone: a law "for rich and poor" alike.¹⁵³ Anything else was "an arbitrary mandate."¹⁵⁴ And arbitrary mandates were no law at all.¹⁵⁵ These observations led Cooley to conclude that the due process of law functioned as a limit on states' police powers, "to secure the individual from the arbitrary exercise of the powers of government," as measured against "established principles of private rights and distributive justice."¹⁵⁶

By the mid-nineteenth century, various limitations on state police powers were becoming more closely associated with due process.¹⁵⁷ Still, before the Civil War, most courts were reluctant to embrace such an abstracted construction of their due process guarantees.¹⁵⁸ Some, however, came close. In 1838, the Alabama Supreme Court partially voided a statute requiring every lawyer, as a condition of bar admission, to take an oath that he had never participated (and would never

¹⁴⁶ Mark G. Yudof, *Equal Protection, Class Legislation, and Sex Discrimination: One Small Cheer for Mr. Herbert Spencer's Social Statics*, 88 MICH. L. REV. 1366, 1376 (1990) (footnote omitted) (reviewing WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988)).

¹⁴⁷ See COOLEY, *supra* note 25, at 355.

¹⁴⁸ *Id.* at 390–91.

¹⁴⁹ *Id.* at 355.

¹⁵⁰ *Id.* at 393.

¹⁵¹ *Id.*

¹⁵² *Id.* at 392.

¹⁵³ *Id.* (quoting JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 142 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690)).

¹⁵⁴ *Id.*

¹⁵⁵ See *id.* at 355 (positing that rules of an "arbitrary and unusual nature" are "unknown to the law of the land").

¹⁵⁶ *Id.* (quoting *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819)).

¹⁵⁷ See MOTT, *supra* note 62, § 118, at 315–17.

¹⁵⁸ See *id.* § 118, at 314–15.

participate) in a duel.¹⁵⁹ The court held that the oath requirement, insofar as it operated “retrospective[ly]” to permanently “disqualif[y]” duelers,¹⁶⁰ unconstitutionally deprived past duelers of their fundamental “right to aspire to office, or to pursue any lawful avocation.”¹⁶¹ No such “right” was specified in the state constitution.¹⁶² But that was no matter; the justices comprising the majority simply pointed to the constitution’s residual clause, which urged against construing the enumeration of rights “to disparage or deny others retained by the people,”¹⁶³ and to its due process clause.¹⁶⁴ “Can it be seriously contended,” Justice Ormond asked, “that [the right to practice law] is not a valuable right, and as deserving of protection as property?”¹⁶⁵

Later, in the famous *Wynehamer v. People*¹⁶⁶ case, the New York Court of Appeals invalidated a state law prohibiting sales of liquor.¹⁶⁷ As Professors Nathan Chapman and Michael McConnell point out, “[r]egulation of this sort was entirely consistent with the reasoning of ‘vested’ rights cases because it involved general and prospective laws that merely limited the use of property without taking it.”¹⁶⁸ *Wynehamer* thus represents a departure; as antebellum cases go, it is perhaps the clearest example of a court striking down a general and arguably prospective regulation on due process grounds.¹⁶⁹ As relevant here, *Wynehamer*’s key innovations were threefold: It (1) equated unduly burdensome *use* restrictions with wholesale takings of property;¹⁷⁰ (2) construed New York’s due process clause as a “shield” against “the exercise of arbitrary power”¹⁷¹ (and thereby rejected an interpretation that would have empowered the legislature to effectively abolish preexisting property rights by redefining established categories of property as contraband¹⁷²); and (3) suggested (albeit in dicta) that “liberty” was similarly insulated from plenary legislative redefinition.¹⁷³

The judges acknowledged that “[a]ll regulations of trade . . . may more or less impair the value of property,”¹⁷⁴ and they conceded that the

¹⁵⁹ See *In re Dorsey*, 7 Port. 293, 354–56 (Ala. 1838).

¹⁶⁰ *Id.* at 359 (opinion of Goldthwaite, J.).

¹⁶¹ *Id.* at 368.

¹⁶² See *id.* at 365–66.

¹⁶³ *Id.* at 359.

¹⁶⁴ *Id.* at 381 (opinion of Ormond, J.).

¹⁶⁵ *Id.* at 382.

¹⁶⁶ 13 N.Y. 378 (1856).

¹⁶⁷ See *id.* at 387 (opinion of Comstock, J.).

¹⁶⁸ Chapman & McConnell, *supra* note 18, at 1769.

¹⁶⁹ The judges delivered their opinions seriatim, but a majority agreed that, with respect to liquor purchased before the law went into effect, the statute violated due process. See *Wynehamer*, 13 N.Y. at 486–87.

¹⁷⁰ See *id.* at 396–98 (opinion of Comstock, J.).

¹⁷¹ *Id.* at 398.

¹⁷² See *id.* at 396–97.

¹⁷³ See *id.* at 393.

¹⁷⁴ *Id.* at 435 (opinion of Selden, J.).

legislature had wide berth to regulate for the public health and welfare.¹⁷⁵ What it lacked was the power to “virtually take away and destroy”¹⁷⁶ an entire category of property, and in so doing criminalize those whose only “offence” was “the misfortune of being the owner.”¹⁷⁷

Commentators describe *Wynehamer* as “epoch-making.”¹⁷⁸ Professor James Ely calls it “the most significant invocation of the substantive component of due process by a state court in the antebellum era.”¹⁷⁹ That’s not to say its disposition was especially beloved at the time; in the years that followed, other states’ prohibition laws regularly withstood constitutional challenges.¹⁸⁰ But curiously, “[t]he principle behind the decision” — that due process prohibited the “arbitrar[y] exercise[]” of the state’s police power — “was quite generally accepted.”¹⁸¹

The notion that arbitrariness was inimical to law speaks to the institutional and normative justifications for protosubstantive due process doctrines. Courts did not see themselves as usurping legislative authority when they enforced implied limits on state action. Indeed, they typically expressed the opposite concern. Courts believed that lawmakers were the usurpers, unlawfully arrogating power either from the judiciary or from the people themselves. Only juries could order forfeiture, and only as punishment for a preexisting offense.¹⁸² So too with special legislation, which was a “sentence,” not a “law”¹⁸³ — or, if not a sentence, then nonetheless violated citizens’ implied rights to legal equality.¹⁸⁴

Everyone acknowledged the breadth of state police power.¹⁸⁵ But courts saw it as their duty to “separate the legal issues of individual rights from the tumultuous and chaotic world of democratic politics,”¹⁸⁶ safeguard the former by limiting the latter, and thereby “protect the rights of individuals from political abuse.”¹⁸⁷ In short, courts sought to ensure that state power would remain limited by “the purposes for which [it] exists.”¹⁸⁸

¹⁷⁵ See *id.* at 405 (opinion of Comstock, J.); *id.* at 413–14 (opinion of A.S. Johnson, J.); *id.* at 465, 475 (T.A. Johnson, J., dissenting).

¹⁷⁶ *Id.* at 435 (opinion of Selden, J.).

¹⁷⁷ *Id.* at 404 (opinion of Comstock, J.).

¹⁷⁸ MOTT, *supra* note 62, § 120, at 318.

¹⁷⁹ Ely, *supra* note 27, at 341.

¹⁸⁰ See *id.*; MOTT, *supra* note 62, § 120, at 318–19.

¹⁸¹ MOTT, *supra* note 62, § 120, at 326. For other state court decisions construing due process as a bar on arbitrary legislation, see, for example, *Norman v. Heist*, 5 Watts & Serg. 171, 173 (Pa. 1843), and *Dunn v. City Council of Charleston*, 16 S.C.L. (Harp.) 189, 199 (S.C. Const. Ct. App. 1824).

¹⁸² See, e.g., *supra* notes 36–53 and accompanying text.

¹⁸³ *Reed v. Wright*, 2 Greene 15, 23 (Iowa 1849); see also *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 607 (1831) (opinion of Green, J.) (holding that legislation taking away universal right to trial by jury and right of appeal from certain individual cases is not “law”).

¹⁸⁴ See *supra* notes 97–131 and accompanying text.

¹⁸⁵ See, e.g., *Wynehamer v. People*, 13 N.Y. 378, 405 (1856) (opinion of Comstock, J.).

¹⁸⁶ Wood, *supra* note 30, at 1444.

¹⁸⁷ *Id.* at 1445.

¹⁸⁸ COOLEY, *supra* note 25, at 357.

Whether striking down confiscatory statutes, invalidating partial and special laws, or condemning arbitrary mandates, state courts were engaged in a common enterprise: fashioning a workable conception of “law” to distinguish valid legislation from arbitrary power. Structural principles accounted for some of these limits. Legislation was the wrong mechanism for compelling forfeiture or transferring property from *A* to *B*.¹⁸⁹ But no state actor — legislative or otherwise — could destroy an entire class of property or strip people of their legal rights and privileges without good reason.¹⁹⁰ Those things were not law. They were tyranny.¹⁹¹

Due process clauses often furnished a textual hook. But the animating principles were more foundational. Many states had, at their conventions, simply rejected a maximalist conception of state power.¹⁹² Their legislatures were not omnipotent.¹⁹³ Due process clauses served as a reminder that state power was bounded. And courts, in interpreting and enforcing those clauses, gave content to each state’s promise of limited government.

Seen in this light, antebellum substantive due process was not a judicial invention *ex nihilo* but an organic outgrowth of the nation’s plural constitutional traditions. If legislatures could abolish property, punish disfavored individuals, or hand out favors with no eye toward the public interest, then states’ written constitutions were “parchment barriers”¹⁹⁴ indeed. But if due process was a substantive limit on state power, those constitutions had teeth.

B. Judicial Federalism for Unenumerated Rights

The foregoing account reveals substantive due process as a widespread but nonuniform feature of antebellum state constitutionalism. Courts across the nation recognized that due process imposed substantive limits on legislative power, but they differed in how they justified, articulated, and enforced those limits. New York’s high court developed an especially robust jurisprudence, eventually transforming due process

¹⁸⁹ See, e.g., *Bank of the State v. Cooper*, 10 Tenn. (2 Yer.) 599, 606 (1831) (opinion of Green, J.); *Taylor v. Porter*, 4 Hill 140, 143 (N.Y. Sup. Ct. 1843).

¹⁹⁰ See *Wynehamer*, 13 N.Y. at 405 (opinion of Comstock, J.); *Reed v. Wright*, 2 Greene 15, 26 (Iowa 1849) (“[G]overnment can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body without any restraint.” (quoting *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 627 (1829))); *supra* notes 36–53, 166–177 and accompanying text.

¹⁹¹ See *Wynehamer*, 13 N.Y. at 434 (opinion of Selden, J.); cf. COOLEY, *supra* note 27, at 251 n.2 (“The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business . . . [I]ts determination as to what is a proper exercise of its police powers . . . is subject to the supervision of the courts.” (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894))).

¹⁹² See MOTT, *supra* note 62, §§ 113–21, at 300–28 (discussing limits on state police powers).

¹⁹³ See COOLEY, *supra* note 25, at 354 & n.1 (collecting and analyzing state authorities in support of the proposition that “a legislative enactment is not necessarily the law of the land”).

¹⁹⁴ Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 THE WRITINGS OF JAMES MADISON 269, 272 (Gaillard Hunt ed., 1904).

into a general prohibition on arbitrary legislation.¹⁹⁵ Other courts, particularly but not exclusively in the South, were often more deferential to legislative judgments.¹⁹⁶

Despite ebbs and flows in federal substantive due process, unenumerated rights doctrines have remained relatively stable fixtures of state constitutional jurisprudence. For decades after *Lochner*'s decline and continuing to a lesser extent through present day,¹⁹⁷ state courts continued to apply more searching constitutional scrutiny to legislation burdening economic liberty.¹⁹⁸ Those courts also began to look to due process as a source of protection for a broader set of intimacy, family, and personal autonomy interests.¹⁹⁹ Like its antebellum ancestors, the new state substantive due process represents not one tradition but many. Georgia is more solicitous of economic freedom than California,²⁰⁰ Pennsylvania more skeptical of majoritarian morality than Texas.²⁰¹ Invariably, pluralism prevails.

That pluralism takes on renewed significance today. As the federal judiciary's commitment to fundamental rights wavers, judicial federalism

¹⁹⁵ See *Bertholf v. O'Reilly*, 74 N.Y. 509, 519 (1878) (defining due process "in legislative proceedings" as "conformity to the settled maxims of free governments, observance of constitutional restraints and requirements, and an omission to exercise [judicial or executive] powers").

¹⁹⁶ See MOTT, *supra* note 62, § 69, at 172 & n.19 (cataloging competing conceptions of due process among the various state delegations at California's 1849 constitutional convention and comparing New York's "strong vested rights" approach with "the looser ideas entertained" by other delegations, *id.* at 172).

¹⁹⁷ See Anthony B. Sanders, *The "New Judicial Federalism" Before Its Time: A Comprehensive Review of Economic Substantive Due Process Under State Constitutional Law Since 1940 and the Reasons for Its Recent Decline*, 55 AM. U. L. REV. 457, 491-96 (2005) (charting decline of economic due process in state constitutional practice).

¹⁹⁸ See Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 92-117 (1950); Sanders, *supra* note 197, at 491-96.

¹⁹⁹ See, e.g., *People v. Belous*, 458 P.2d 194, 199 (Cal. 1969) (recognizing a woman's "fundamental right . . . to choose whether to bear children" four years before *Roe v. Wade*, 410 U.S. 113 (1973)); *Powell v. State*, 510 S.E.2d 18, 25-26 (Ga. 1998) (holding that criminal prohibitions on private same-sex intimacy burdened individual privacy rights and could not be justified by state's interest in "social morality," *id.* at 26); *Commonwealth v. Bonadio*, 415 A.2d 47, 50-51 (Pa. 1980) (holding that state lacks authority "to regulate the private conduct of consenting adults," *id.* at 50); *In re Quinlan*, 355 A.2d 647, 663-64 (N.J. 1976) (holding that a young woman in persistent vegetative state had the right, through her family, to discontinue life support); *In re J.P.*, 648 P.2d 1364, 1372-73 (Utah 1982) (recognizing parents' rights to custody and care of their children as "presuppos[itions]" of constitutional liberty under Utah's constitution, *id.* at 1373).

²⁰⁰ Compare Sanders, *supra* note 197, at 490-91 (describing Georgia Supreme Court jurisprudence holding right to contract as a property right protected by due process), with *Landau v. Super. Ct.*, 97 Cal. Rptr. 2d 657, 672 (Cal. Ct. App. 1998) (holding that there is no fundamental constitutional right to one's occupation for equal protection purposes).

²⁰¹ Compare *Bonadio*, 415 A.2d at 50 (explaining that, under Pennsylvania's constitution, state police power is limited by "each individual's right to be free from interference in defining and pursuing his own morality" and thus cannot be used "to enforce a majority morality on persons whose conduct does not harm others" (emphasis omitted)), with *City of Sherman v. Henry*, 928 S.W.2d 464, 473 (Tex. 1996) (holding that "the right to commit adultery" is not "an essential component of life, liberty, or property" under Texas's constitution).

promises a path forward. That path holds promise for both supporters and skeptics of substantive due process.

State constitutions are “document[s] of independent force.”²⁰² Each of those documents has been shaped by, and has thereby become imbued with, distinct historical and linguistic context. Broadly worded guarantees such as “liberty,” “property,” “due process,” and “law” might therefore carry different connotations between and among the nation’s fifty-one distinct charters. This doesn’t mean that every (or any) constitution “enact[s] Mr. Herbert Spencer’s Social Statics.”²⁰³ But more than one American constitution probably asks courts to do more than “rubber-stamp . . . nonsensical encroachments on” personal freedoms.²⁰⁴

Early due process traditions surely influenced the meaning of contemporary state constitutions. Indeed, given the frequency with which those constitutions have been amended and reconstituted, it would be anachronistic to think otherwise. So constitutional formalists needn’t balk at this Chapter’s modest proposal. “In the compound republic of America,” Chief Judge Jeffrey Sutton reminds us, “‘a double security arises to the rights of the people’ — the protection of liberty by the state and federal governments as well as the separate state and federal courts.”²⁰⁵ Or, in the words of then-Governor Rick Perry: “If you don’t like medicinal marijuana and gay marriage, don’t move to California.”²⁰⁶

In fleshing out the contours of substantive due process, state courts enforced personal rights not specified in text but understood to inhere in the fabric of state laws and traditions. As antebellum courts recognized, the answers to questions like *what process is “due”?* and *which laws are “laws”?* can depend on the relationship between judicial and legislative power. So a state convention’s deliberate choices about how to allocate authority between those two branches may affect the scope of its due process guarantee. In other words, courts should take differences in constitutional language, structure, and history seriously. No matter which interpretive methodology one subscribes to, that proposition should invite no controversy.

Even so, interpretation and implementation are fundamentally different beasts. Judges cannot go looking for rights where they don’t exist. And substantive due process surely raises the temptation of “unvarnished gerrymandering.”²⁰⁷ This places courts in a bind. On the one hand, courts must give effect to the meaning of the constitution, even where the text is underdetermined. On the other, it can be easy to

²⁰² *Arnold v. City of Cleveland*, 616 N.E.2d 163, 169 (Ohio 1993).

²⁰³ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

²⁰⁴ *Patel v. Tex. Dep’t of Licensing & Regul.*, 469 S.W.3d 69, 93 (Tex. 2015) (Willett, J., concurring).

²⁰⁵ JEFFREY S. SUTTON, WHO DECIDES? 2 (2022) (quoting THE FEDERALIST NO. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961)).

²⁰⁶ RICK PERRY, FED UP! 8 (2010).

²⁰⁷ SUTTON, *supra* note 205, at 135.

mistake textual indeterminacy for an invitation to make policy from the bench. So what are courts to do?

Two approaches come to mind. The first is more straightforward: nothing. When in doubt, courts should err on the side of deference to the political branches. Perhaps that would be the most democratic way forward. It would also be deeply unsatisfying, and maybe even unconstitutional. As then-Justice Willett of the Texas Supreme Court pointed out in *Patel v. Texas Department of Licensing & Regulation*²⁰⁸: If judges are like umpires, then they should be calling balls and strikes, not letting the crowd vote on whether the home team can load the bases before the first inning.²⁰⁹ If a state constitution precludes lawmakers from acting in ways that pose special risks to individual liberty — for instance, by enacting unequal laws,²¹⁰ restricting bodily autonomy,²¹¹ or (like the licensing scheme at issue in *Patel*) placing “patently farcical and protectionist restrictions” on cosmetic service providers²¹² — then why should courts turn a blind eye? Kicking the individual-rights can down the political process road may be precisely what their state’s constitution forbids.

The second option is for state courts to embrace a more constructivist role in due process jurisprudence. This is not to be confused with out-and-out activism. As a threshold matter, a court should always ask whether the state’s constitutional tradition *in fact* supports implying limits on legislative discretion. But in assessing the nature of such limits, where they do exist state courts can and should tailor their inquiries to account for distinctive local decisional law, social and cultural norms, and contextual factors that bear on constitutional meaning.²¹³ Observations about a state’s special affinity for freedom, while perhaps less probative, are also fair game.²¹⁴

To be clear, this prescription does not require courts to embrace substantive due process in its most ambitious forms. The antebellum example shows how substantive constraints can be grounded in modest

²⁰⁸ 469 S.W.3d 69 (Tex. 2015). In *Patel*, a group of commercial eyebrow threaders brought an as-applied challenge to Texas’s salon licensing regime under the state’s due course of law clause. *See id.* at 73.

²⁰⁹ *See id.* at 93 (Willett, J., concurring).

²¹⁰ In some states whose constitutions lack an express equal protection clause, due process still serves as the textual hook for constitutional equality. *See, e.g.,* *Murphy v. Edmonds*, 601 A.2d 102, 107 (Md. 1992).

²¹¹ *See* cases cited *supra* note 199.

²¹² *See Patel*, 469 S.W.3d at 93 (Willett, J., concurring).

²¹³ The Kansas Supreme Court’s decision in *Hodes & Nauser v. Schmidt*, 440 P.3d 461 (Kan. 2019), is exemplary in this respect. *See id.* at 466, 472–502 (relying on text, intertextual comparisons, and state-specific constitutional history to determine that Kansas’s natural rights provision protects a woman’s right to reproductive autonomy).

²¹⁴ *See Patel*, 469 S.W.3d at 98 (Willett, J., concurring) (“[E]ven if the Texas Due Course of Law Clause mirrored perfectly the federal Due Process Clause, that in no way binds Texas courts to cut-and-paste federal rational-basis jurisprudence that long post-dates enactment of our own constitutional provision, one more inclined to freedom.”).

but vital principles of legislative rationality and fairness to individuals. Those principles remain relevant today. They offer a model of substantive due process that is compatible with constraints on judicial power, but which preserves breathing room for individual rights that are “deeply rooted in [each state’s] history and tradition.”²¹⁵

Conclusion

In truth, substantive due process is not strictly about individual rights. It has much more to do with “constitutional architecture” — structure, if you will.²¹⁶ Thus, the judicial inquiry will inevitably turn on two interrelated questions. First, what balance does each state constitution strike between personal liberty and majority rule? And second, who decides?²¹⁷ Reasonable minds may disagree about the answers to these questions.²¹⁸ But if courts are empowered (or perhaps condemned) to “say what the law is,”²¹⁹ then they “cannot build on foundations that are themselves merely assumptions.”²²⁰

Liberty in America has never rested on a single constitutional text. It has depended on the interplay of many texts and traditions, each reinforcing the principle that government must rule by law rather than will. Antebellum courts knew as much. They acted on this understanding, enforcing due process as a substantive limit on legislative power long before the Supreme Court spoke. If modern state courts embrace that inheritance, they might protect individual rights in a moment of federal retrenchment. They might also help restore the balance of American constitutionalism, reminding us that the Constitution is not one but many, and that liberty has always been secured by the plural and overlapping commitments of both state and nation.

²¹⁵ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

²¹⁶ *Patel*, 469 S.W.3d at 93 (Willett, J., concurring); see SUTTON, *supra* note 205, at 7–8.

²¹⁷ See generally SUTTON, *supra* note 205.

²¹⁸ See, e.g., *Tex. Dep’t of State Health Servs. v. Crown Distrib. LLC*, 647 S.W.3d 648, 677 (Tex. 2022) (Young, J., concurring) (gently pushing back against Justice Willett’s defense of judicially enforceable “inherent rights”).

²¹⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²²⁰ *Crown Distrib.*, 647 S.W.3d at 681 (Young, J., concurring).