CONSTITUTIONAL CONSTRAINTS ON RETROACTIVE CIVIL LEGISLATION: THE HOLLOW PROMISES OF THE FEDERAL CONSTITUTION AND UNREALIZED POTENTIAL OF STATE CONSTITUTIONS

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Young children have a strong sense that changing the rules after the game has been played is wrong and unfair.[1] As they move through various stages of moral development, children's understanding of rules becomes more sophisticated.[2] They transition from viewing rules as semi-divine revelations of enduring truth to comprehending that rules can be, and sometimes should be, changed or modified.[3] While modification of rules comes to be seen as morally permissible, and even an interesting common area of childhood cooperation in moral exploration,[4] children, nevertheless, proceed with a firm understanding that the players are bound by the rules of the game.[5] Playing by the same rules becomes an aspect of relationship-building among children and impacts the perception of the children's character among both their peers and adults.[6]

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[1] *See* FERGUS P. HUGHES, CHILDREN, PLAY, AND DEVELOPMENT 142–43 (4th ed. 2010); Anthony D. Pellegrini et al., *A Short-Term Longitudinal Study of Children's Playground Games Across the First Year of School: Implications for Social Competence and Adjustment to School*, 39 AM. EDUC. RES. J. 991, 992 (2002); Mille Almy et al., *Recent Research on Play: The Teacher's Perspective*, *in* 5 CURRENT TOPICS IN CHILDHOOD EDUCATION 14 (Lillian G. Katz ed. 1984); Daniel E. Troy, *Toward a Definition and Critique of Retroactivity*, 51 ALA. L. REV. 1329, 1330 (2000).

[2] MICHAEL PRESSLEY & CHRISTINE B. MCCORMICK, CHILD AND ADOLESCENT DEVELOPMENT FOR EDUCATORS 74–75 (2007).

[3] *Id.*

[4] *See* MARJORIE J. KOSTELNIK ET AL., GUIDING CHILDREN'S SOCIAL DEVELOPMENT AND LEARNING 208–09 (7th ed. 2012). In fact, children will often be more concerned with changing the rules of a game than actually playing it. MICHAEL REISS & HARRIET SANTS, BEHAVIOUR AND SOCIAL ORGANISATION 92 (1987). Working with their peers in changing rules, children come to learn mutability and learn to integrate change into social order through structuring and inventing rules. *Id.*

[5] HUGHES, *supra* note 1, at 142–43; HARRY M. JOHNSON, SOCIOLOGY: A SYSTEMATIC INTRODUCTION 139–40 (1960).

[6] *See* Marilyn Ellis, *Play and the School-Age Child*, UNIV. ME. COOPERATIVE EXTENSION PUBL'NS (2002), http://umaine.edu/publications/8048e/; LUTHER HALSEY GULICK, A PHILOS-

While children become more nuanced in their moral thinking about rules, they maintain a sense that fairness does not exist where the rules are changed after the game has been played.[7]

Lawyers and judges have given voice to a similar sense of playground justice regarding retroactive laws, describing them as, among other things:

> a violation of fundamental principles, inconsistent with "the nature of republican and free governments," contrary to the "fundamental maxims of free government," not in accord "with sound legislation" and against the "fundamental principles of the social compact," violat[ive] [of] "principles derived from the general nature of free governments," "repugnant to the common principles of justice and civil liberty," "absolute injustice," a violation of "natural right," against "the great principle of Eternal Justice," inconsistent with "the principles of general jurisprudence," and "monstrous."[8]

In general, philosophers and academics have not been much kinder. Philosopher Jeremy Bentham considered retroactive lawmaking to be a manner one would, in a less animal rights focused era, train a dog, rather than an appropriate approach for the governance of human beings: "When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog . . . ."[9] Professor Lon Fuller similarly asserted that "a retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing or directing conduct today by rules that will be enacted tomorrow is to talk in blank prose."[10] Professor Stephen Munzer put no lesser stakes upon prospective application of law than considering it to be a definitional aspect of the rule of law itself, asserting that "[t]he rule of law . . . is a defeasible entitlement of persons to have their behavior governed by rules publicly fixed in advance."[11]

Addressing the incongruity between retroactive applications of laws and the moral agency of the individual, Professor Matthew Kramer has explained:

> Nobody can go back through time to adjust his or her behavior retroactively . . . . For example, if a significant change in the contract law of a jurisdiction is made retroactive, and if the change was not fully predictable at the time to which it reaches back, it will almost certainly disadvantage some people who followed the then-prevailing procedures for contractual formation to the letter. Their fate is as unfair (in most circumstances) as the fate of people to whom a retroactive duty-imposing law applies detrimentally. In each case, the addresses of the law are in effect told today to do something yesterday. Such an upshot devalues the capacity of each addressee to deliberate and choose as a moral agent. Legal consequences supposedly determined

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OPHY OF PLAY 244 (1920); JUDITH SUHR, FROM KIDS TO CORPORATIONS: SUCCESSFUL LEADERSHIP IN THE HOME AND WORKPLACE 49 (2011).

[7] *See* ERICA BURMAN, DECONSTRUCTING DEVELOPMENTAL PSYCHOLOGY 285–87 (2d ed. 2008); *cf.* Ellis, *supra* note 6 (noting that fairness exists for children when there is consensus in understanding the rules); JOSEPHINE RUSSELL, HOW CHILDREN BECOME MORAL SELVES: BUILDING CHARACTER AND PROMOTING CITIZENSHIP IN EDUCATION 24–26 (2007) ("Rules are not absolute but can be changed if it is agreed [by the children] that [the rules] should be [changed].").

[8] Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 237 (1927).

[9] JEREMY BENTHAM, *Truth* Versus *Ashhurst; or, Law As It Is, Contrasted With What It Is Said To Be*, *in* 5 THE WORKS OF JEREMY BENTHAM 235 (John Bowring ed., 1843).

[10] LON L. FULLER, THE MORALITY OF LAW 53 (rev. ed. 1969).

[11] Stephen R. Munzer, *A Theory of Retroactive Legislation*, 61 TEX. L. REV. 425, 471 (1982).

> by individuals' choices are actually determined after the fact by the countermanding decrees of officials. People's expectations, which might be admirably reasonable at the time when they are formed, will have been dashed.
>
> Any frequent distributions of legitimate expectations are not only unfair to the individuals directly involved but are also inimical to the efficient workings of an economy.[12]

When those children from the playground who believed changing rules after the game has been played is improper become adults, whether they become lawyers, judges, philosophers, academics, or pursue another vocation, they generally maintain a sense that retroactive laws are "grossly unfair."[13] Within American society, there is a "general reluctance to 'change the rules after the game has been played.' "[14] In fact, "[m]any Americans mistakenly believe that retroactive legislation is barred by the *ex post facto* clauses [of the Federal Constitution], which apply to both Congress and state legislatures."[15] On the contrary, while legislatures more often act through prospective legislation,[16] retroactive civil lawmaking is far from uncommon.[17]

This Article addresses the constitutional constraints that exist upon state legislatures when they do engage in retroactive civil lawmaking. The Article begins by exploring in Section I the protections against retroactivity afforded by the United States Constitution. While the United States Constitution offers meaningful constitutional restraint against retroactivity with regard to criminal legislation, in terms of practical limitations upon state legislatures, these safeguards do not extend to civil legislation. Although several provisions of the United States Constitution offer potential sources of constitutional constraint upon retroactive civil lawmaking, ultimately, as they have been interpreted by the Supreme Court, these protections are extremely narrow, largely hollow, or both. The Article, in Section II, next transitions into exploring why lawyers, despite the limited nature of the protections available under the United States Constitution, nevertheless continue to pursue federal constitutional arguments while failing to advance claims that state legislatures' retroactive civil lawmaking is unconstitutional under the lawyers' respective state constitutions. The

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[12] MATTHEW H. KRAMER, OBJECTIVITY AND THE RULE OF LAW 154 (2007).

[13] ANTHONY D'AMATO, HOW TO UNDERSTAND THE LAW 55 (1989).

[14] ADVANCING MITIGATION TECHNOLOGIES AND DISASTER RESPONSE FOR LIFELINE SYSTEMS: PROCEEDINGS OF THE SIXTH U.S. CONFERENCE ON LIFELINE EARTHQUAKE ENGINEERING 4 (James E. Beavers ed., 2003).

[15] Daniel E. Troy, Retroactive Tax Increases and The Constitution, Lecture at The Heritage Foundation (April 15, 1998), *available at* http://www.heritage.org/research/lecture/retroactive-tax-increases-and-the-constitution.

[16] *See*, *e.g.*, Cnty. of L.A. v. Superior Court of L.A., 402 P.2d 868, 871 (Cal. 1965); Native Am. Rights Fund, Inc. v. City of Boulder, 97 P.3d 283, 287 (Colo. App. 2004); Aaron-Andrew P. Bruhl, *Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change*, 96 CORNELL L. REV. 203, 210 (2011) (noting that "prospectivity is still the norm for civil statutes").

[17] *See* Michael Bayles & Lawrence Alexander, *Hercules or Proteus? The Many Theses of Ronald Dworkin*, *in* The Legal Essays of Michael Bayles 105 (Wade L. Robison ed., 2002); Bernard W. Bell, Book Review, *In Defense of Retroactive Laws*, 78 TEX. L. REV. 235, 235–36 (1999) (reviewing DANIEL E. TROY, RETROACTIVE LEGISLATION (1998)); *see also* Christopher D. Pixley, *Finding Middle Ground on Federal Retroactive Regulatory Lawmaking*, 27 CAP. U. L. REV. 255, 255–57 (1999) (discussing the presence of retroactivity within the area of administrative law).

Article concludes by addressing in Section III some of the constitutional protections that attorneys will find if they shift their gaze from the United States Constitution to their respective state constitutions, providing a menu of potential options to pursue.

I. Retroactivity and the United States Constitution

Although the Ex Post Facto Clauses of the United States Constitution are often the first to come to mind when considering the Federal Constitution's treatment of retroactive application of law,[18] the antipathy of the framers of the Federal Constitution towards retroactive application is actually enshrined in multiple provisions of the United States Constitution.[19] The Supreme Court has observed that this antipathy appears not only in the Ex Post Facto Clauses, but also in the Bill of Attainder Clauses, the Contracts Clause, the Takings Clause, and the Due Process Clauses.[20] Nevertheless, where a legislature decides to enact retroactive civil legislation, the impact of these constitutional safeguards is limited at best and inconsequential at worst. When parties "have challenged statutes and regulations creating retroactive civil liability on several different grounds," the parties' suits have met with only "limited success."[21] The Ex Post Facto Clauses are limited in application to criminal matters and while the other provisions address civil legislation, they are nonetheless not significant barriers if a legislature decides to engage in retroactive civil lawmaking.

A. *The Ex Post Facto Clauses*

The prohibition upon ex post facto laws appears twice in the United States Constitution. Article I, Section 9, Clause 3 prohibits Congress from passing any ex post facto law,[22] while Article I, Section 10, Clause 1 applies the same limit to the States.[23] The terminology ex post facto, Latin for "after the fact,"[24] does not in-and-of-itself reveal the irrelevancy of this constitutional protection to retroactive civil legislation. Long-standing and consistently honored precedent stretching from the early years of the Republic, however, makes the insignificance of this provision to retroactive civil measures readily apparent. In *Calder v. Bull*, a 1798 decision, writing in the common seriatim opinion style of the era,[25] Justice Samuel Chase declared,

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[18] *See* Robert G. Natelson, *Statutory Retroactivity: The Founders' View*, 39 Idaho L. Rev. 489, 491 (2003).
[19] *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).
[20] *Id.*
[21] 1 William J. Rich, Modern Constitutional Law § 17:19, at 677 (3d ed. 2011).
[22] "No . . . ex post facto Law shall be passed." U.S. Const. art I, § 9, cl. 3.
[23] "No State shall . . . pass any . . . ex post facto Law . . . ." U.S. Const. art I, § 10, cl. 1.
[24] Jon R. Stone, The Routledge Dictionary of Latin Quotations 157 (2005).
[25] Twenty-four percent of the Supreme Court's decisions prior to the appointment of John Marshall to the position of Chief Justice of the United States Supreme Court were delivered in the seriatim style. John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 Wash. U. L.Q. 137, 140 (1999). Seriatim opinions in the early years of the American Republic were reflective of the British tradition in which each judge presented his individual reasoning in a separate opinion. Rory K. Little, *Reading Justice Brennan: Is There a "Right" to Dissent?*, 50 Hastings L.J. 683, 688 (1999); Robert C.

> I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[26]

Drawing upon the commentaries of William Blackstone and Richard Woodeson, the language of several state constitutions, and the historical practices to which the provision was deemed to be responsive, Justice Chase concluded that the prohibition upon ex post facto laws was not included in the Constitution to "secure the citizen in his private rights, of either property, or contracts."[27] Instead, the prohibition applied exclusively to criminal legislation.[28]

While Justice Clarence Thomas has indicated a willingness to reconsider the *Calder* distinction between retroactive civil and criminal legislation,[29] and Justice Ruth Bader Ginsburg has argued that the four *Calder* categories are dicta,[30] the core of *Calder*, including its limitation of the reach of the Ex Post Facto Clauses to criminal rather than civil matters, has held for more than two centuries.[31] The Supreme Court has declared, "[i]t is . . . settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description."[32] Thus, simply stated, "[u]nlike criminal liability, ex post facto civil liability is not unconstitutional."[33] Accordingly, the Ex Post Facto Clauses of the United States Consti-

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Power, *Affirmative Action and Judicial Incoherence*, 55 OHIO ST. L.J. 79, 125 (1994). In an effort directed towards increasing the power and prestige of the Supreme Court, Chief Justice John Marshall, striving assiduously for unanimity, helped to complete the transition from the seriatim approach to a majority opinion. *See* Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 267–68 (2000). Addressing current practices, Justice Ruth Bader Ginsburg has noted that

> [o]pinions for the court remain standard in our Supreme Court and in the federal courts of appeals as well, although separate opinions are not uncommon. Even Marshall, during his Chief Justiceship, dissented on several occasions and once specially concurred. As in civilian systems, we have but one judgment, and we mark it the Court's. But in tune with the British tradition, we place no formal constraints on the prerogative of each judge to speak out separately.

Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 138 (1990).

[26] Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (emphasis omitted).

[27] *Id.* at 390–92 (emphasis omitted).

[28] *Id.* at 390–91.

[29] *See* E. Enters. v. Apfel, 524 U.S. 498, 538–39 (1998) (Thomas, J., concurring).

[30] Carmell v. Tex., 529 U.S. 513, 567 (2000) (Ginsburg, J., dissenting) (stating that the four *Calder* categories are dicta because *Calder* "involved a civil statute and the Court held that the statute was not *ex post facto* for that reason alone").

[31] *See* Steven L. Schwarcz & Lucy Chang, *The Custom-to-Failure Cycle*, 62 DUKE L.J. 767, 792 n.123 (2012).

[32] Johannessen v. United States, 225 U.S. 227, 242 (1912).

[33] Schwarcz & Chang, *supra* note 31, at 792.

tution, while of considerable importance in criminal proceedings,[34] afford no protection against retroactive civil legislation.[35]

B. The Bill of Attainder Clauses

Like the Ex Post Facto Clauses, the prohibition upon legislatures acting through Bills of Attainder appears twice in the United States Constitution. Article I, Section 10, Clause 1 provides that the States shall not "pass any Bill of Attainder," while Article I, Section 9, Clause 3 imposes the same limitation upon the United States Congress. Historically, Bills of Attainder were those wherein the British Parliament imposed a death sentence without a trial through a legislative act that was generally accompanied by a finding of "corruption of blood," thereby denying inheritance to the soon to be executed person's heirs.[36] Where the punishment imposed by Act of Parliament without trial was short of death, for example, banishment, seizure of property, or imprisonment, then the Parliamentary act was termed a Bill of Pains and Penalties.[37] In *Fletcher v. Peck*, Chief Justice Marshall folded these two Parliamentary measures together, finding both to be within the scope the United States Constitution's prohibitions upon Bills of Attainder.[38] While acknowledging the distinction that had historically existed between the two types of legislative measures, by 1833 Justice Story was able to firmly declare that "in the sense of the [United States Constitution], it seems, that bills of attainder include bills of pains and penalties."[39]

Working within this broader understanding, the Supreme Court has interpreted the constitutional prohibition upon Bills of Attainder as applying to "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial."[40] There are three primary elements of a Bill of Attainder: (1) specification of the affected persons, (2) punishment, and (3) lack of a judicial trial.[41] In deciding what constitutes punishment for purposes of the restriction upon Bills of Attainder, the Supreme Court has considered three factors:

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[34] *See* 1 Joseph G. Cook, Constitutional Rights of the Accused § 1:18, at 1-50 (3d ed. 1996)); 1 Wayne R. LaFave, Substantive Criminal Law § 2.4(a), at 153–54 (2d ed. Supp. 2012–13).

[35] 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law § 15.9(b)(i) n.56, at 925 (5th ed. Supp. 2013); Neil Colman McCabe & Cynthia Ann Bell, *Ex Post Facto Provisions of State Constitutions*, 4 Emerging Issues St. Const. L. 133, 134 (1991).

[36] Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 Wis. L. Rev. 1203, 1228 (2010).

[37] *See* Charles H. Wilson, Jr., Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Calif. L. Rev. 212, 214 (1966).

[38] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810); Thomas B. Griffith, Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 Va. L. Rev. 475, 479 (1984).

[39] 3 Joseph Story, Commentaries on the Constitution of the United States § 1338, at 210 (1833).

[40] United States v. Lovett, 328 U.S. 303, 315–16 (1946).

[41] Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846–47 (1984).

> (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a congressional intent to punish."[42]

While prohibition upon Bills of Attainder can, at least in theory, serve as a constitutional limitation even where the punishment is prospective in nature,[43] it is readily apparent that the primary focus of the constitutional prohibition as historically understood and applied by the courts has been upon legislative punishment of a person for prior conduct.[44] Invalidation of retroactive civil legislation as an unconstitutional Bill of Attainder has been infrequent.[45] One of the principle reasons for the limited effect of the Bill of Attainder Clauses upon retroactive civil legislation is that the Bill of Attainder is at its core a "safeguard against legislative exercise of the judicial function, or more simply—trial by legislature."[46] Thus, so long as a legislature applies generally applicable rules, for example, addressing persons who commit certain acts or who possess certain characteristics, the measure, even if retroactive in nature, will not run afoul of the prohibition upon Bills of Attainder.[47] Additionally, even if the legislature "singles out an individual on the basis of irreversible past conduct," if the "statute furthers a nonpunitive legislative purpose, [then] it is not a 'bill of attainder.'"[48] Assuming the challenger somehow manages to surmount these two high hurdles, the Supreme Court has even further limited the Bill of Attainder's application by concluding that "only the clearest proof could suffice to establish the unconstitutionality of a statute" under the prohibition upon Bills of Attainder.[49] The approach adopted by the Supreme Court in addressing Bills of

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[42] *Id.* at 852 (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473, 475–76, 478 (1977)).

[43] *See* 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 210(c), at 527 (1984); Anthony Dick, Note, *The Substance of Punishment Under the Bill of Attainder Clause*, 63 STAN. L. REV. 1177, 1192 (2011); Michael P. Lehmann, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 HASTINGS CONST. L.Q. 767, 775–76 (1978); *see also* David P. Restaino, Comment, *Conditioning Financial Aid on Draft Registration: A Bill of Attainder and Fifth Amendment Analysis*, 84 COLUM. L. REV. 775, 776–77 (1984) (discussing one federal district court's rejection of "any distinction between prospective and retroactive specification").

[44] *See* 2 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 26:19, at 189–91 (3d ed. 2011); 2 NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 40:24, at 369–70 (7th ed. 2009); *see also* Alison L. LaCroix, *Temporal Imperialism*, 158 U. PA. L. REV. 1329, 1347 (2010) (noting Justice Marshall's emphasis on the temporal framing of the law's application); Timothy J. Hennessy, Note, *New York Legislature Attaints Con Ed: New Significance for the Protection from Bills of Attainder*, 37 U.C. DAVIS L. REV. 641, 665–66 (2003) (noting that "courts continue[ ] to look for . . . retrospective focus" despite the Supreme Court's "explicit statements that bills of attainder need not punish past acts").

[45] Foretich v. United States, 351 F.3d 1198, 1216 (D.C. Cir. 2003); R.I. Depositors Econ. Prot. Corp. v. Brown, 659 A.2d 95, 105 (R.I. 1995) (observing "that the bill of attainder clause is rarely used to invalidate legislation").

[46] United States v. Brown, 381 U.S. 437, 442 (1965).

[47] *See id.* at 450; *see also* Robert J. Cynkar, *Dumping on Federalism*, 75 U. COLO. L. REV. 1261, 1286–87 (2004).

[48] 16B AMERICAN JURISPRUDENCE, CONSTITUTIONAL LAW § 720, at 156–57 (2d ed. 2009).

[49] Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 83 (1961) (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

Attainder results in the Court's providing "[little] protection against retroactive civil legislation" and "enabl[ing] legislatures to impose a wide variety of retroactive burdens before running afoul of the bill of attainder clauses."[50]

C. *The Contracts Clause*

The Contracts Clause, Article I, Section 10 of the United States Constitution, provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." There are few provisions of the United States Constitution more closely tied with the concerns that gave rise to the Philadelphia Constitutional Convention than the Contracts Clause.[51] The acquiescence of weak state governments to the demands of debtors during the period of economic turmoil that followed the American Revolutionary War and the financial problems that this state legislative response created for creditors helped to generate interest among a particularly influential cadre of leaders in a stronger national government.[52] Employing stark, even apocalyptic language to describe the perceived crisis to which the framers were responding, Chief Justice Marshall explained in *Ogden v. Saunders* that

> [w]e cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in Convention, in order to unite thirteen independent sovereignties under one government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.[53]

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[50] DANIEL E. TROY, RETROACTIVE LEGISLATION 56, 59 (1998) ("little" substituted for original "limited").

[51] *See* JOHN MARSHALL, THE LIFE OF GEORGE WASHINGTON 263 (1857); James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 698–702 (2008).

[52] *See, e.g.*, BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 4 (1938) ("[O]ne of the principal causes for the dissatisfaction with the prevailing state of affairs under the [Articles of] Confederation among the well-to-do classes was the mass of legislation in the states which was highly unwelcome to creditors as it was popular with debtors."); Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 721 (1984) (indicating that the debtor-creditor relationship "was one leading concern of the framers in drafting the clause"); Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1459 (1989); Kurt T. Lash, *Rejecting Conventional Wisdom: Federalist Ambivalence in the Framing and Implementation of Article V*, 38 AM. J. LEGAL HIST. 197, 201–02 (1994).

[53] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 354–55 (1827).

Like Icarus,[54] the Contracts Clause would rise to precipitous heights, ascending too high, causing it to fall apart and crash into the ignominious depths below. The ascent began under the stewardship of Chief Justice Marshall. During Marshall's tenure, the Supreme Court "used the provision to invalidate statutes that retrospectively impaired almost any contractual obligation of private parties."[55] Through the course of the nineteenth-century, the Contracts Clause became the principle restraint upon the authority of state governments under the United States Constitution.[56] This limitation arose through the Supreme Court's interpretation of the Contracts Clause as preventing impairment of existing contractual obligations through subsequently passed legislation.[57] While the Due Process Clause would enjoy even greater prominence during the *Lochner* era, "the original historical and explicit textual basis for judicial protection of 'fundamental' economic rights, and, in particular, freedom of contract" was to be found in the Contracts Clause.[58]

However, in the early years of the twentieth-century, "[t]he vitality of the traditional contract clause doctrine . . . waned . . . and in 1934 its death knell sounded."[59] In 1934, the Supreme Court in *Home Building Loan Association v. Blaisdell* narrowed the reach of the Contracts Clause by expanding the constitutionally permissible police powers of the state that would not be deemed as interfering with existing contracts.[60] As Professor Leo Clarke observed, the Contracts Clause, otherwise, would have seemed well-positioned to stand with the Takings Clause in a rear-guard action against the emerging onslaught of the anti-*Lochner*, anti-economic constitutional liberties swing of federal constitutional jurisprudence.[61] Instead, through the Supreme Court's conclusion that the regulation of economic conditions under the State's police power justifies interference with private agreements, the Court's analysis had, at least with

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[54] Daedalus, a mythical craftsman and inventor, was imprisoned by King Minos of Crete. 5 C. SCOTT LITTLETON, GODS, GODDESSES, AND MYTHOLOGY 711 (2005). Daedalus constructed for himself and his son Icarus wings made of wax and feathers to allow for escape from both the prison and the Island of Crete. *Id.* Daedalus cautioned his son to neither fly too low, which might allow the sea spray to soak and ruin the wings, or too high, which might cause the wax to melt. *Id.* Icarus failed to heed his father's advice, flying too close to the sun, causing the wax to melt. *Id.* The wings came apart and Icarus crashed to his death in the water below. *Id.*

[55] 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.8(a), at 878 (5th ed. 2012).

[56] James W. Ely, Jr., *Whatever Happened to the Contract Clause?*, 4 CHARLESTON L. REV. 371, 371, 376 (2010) [hereinafter Ely, *Whatever Happened*].

[57] James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 CORNELL L. REV. 87, 103 (1993).

[58] Robert E. Charney, *The Contract Clause Comes to Canada: The British Columbia* Health Services *Case and the Sanctity of Collective Agreements*, 23 NAT'L J. CONST. L. 65, 66 (2007).

[59] Leo Clarke, *The Contract Clause: A Basis for Limited Judicial Review of State Economic Regulation*, 39 U. MIAMI L. REV. 183, 192 (1985).

[60] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 890–91 (1987).

[61] Clarke, *supra* note 59, at 184.

regard to retroactive lawmaking as to private contracts, "simply swallowed the Contract Clause."[62]

The Contracts Clause has fallen so far and so fast that the Supreme Court itself has conceded that "the Contract Clause receded into comparative desuetude."[63] The Court has even found it necessary to note that "the Contract Clause remains part of the Constitution. . . . It is not a dead letter."[64] Much of the scholarly discourse in the wake of the Supreme Court's pronouncement has been less than convinced by the assertion of continuing vitality. Subsequent descriptions of the Contracts Clause's status have included eviscerated,[65] "a dead letter,"[66] "almost a dead letter,"[67] "largely a dead letter,"[68] "dying but not wholly dead,"[69] "virtually comatose,"[70] reduced to insignificance,[71] and partially revived but only in narrow circumstances.[72]

In addressing impairments to private contracts, the approach used by the Supreme Court is akin to standard rational basis review.[73] In considering the constitutionality of retroactive impairments of private contracts under the Contracts Clause, Professors Ferejohn and Kramer have indicated that, under the Supreme Court's jurisprudence, state governmental action has been liberated from serious judicial review.[74] However, when state governments impair contractual obligations of an agreement to which the state government is a party, "complete deference to a legislative assessment" of the appropriateness of its actions "is not appropriate because the State's self-interest is at stake."[75]

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[62] James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J.L. & LIBERTY 370, 382 (2005).

[63] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978).

[64] *Id.*

[65] David B. Kopel, *The Right to Arms in the Living Constitution*, 2010 CARDOZO L. REV. DE NOVO 99, 101 n.9 (2010), *available at* http://www.cardozolawreview.com/Joomla1.5/content/denovo/KOPEL_2010_99.pdf.

[66] Michael W. Dowdle, *The Constitutional Development and Operations of the National People's Congress*, 11 COLUM. J. ASIAN L. 1, 22 n.91 (1997); Epstein, *supra* note 52, at 737; Robin West, *Response to State Action and a New Birth of Freedom*, 92 GEO. L.J. 819, 821 n.8 (2004) (describing the Contracts Clause as "a dead letter for purposes of protecting property against regulation"); Charles M. Freeland, Note, *The Political Process as Final Solution*, 68 IND. L.J. 525, 542 n.83 (1993).

[67] Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 271 (1993); Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 642 (2008).

[68] William E. Nelson, *Summary Judgment and the Progressive Constitution*, 93 IOWA L. REV. 1653, 1662 (2008).

[69] John Burritt McArthur, *The Take-or-Pay Crisis: Diagnosis, Treatment, and Cure for Immortality in the Marketplace*, 22 N.M. L. REV. 353, 404 n.221 (1992).

[70] Ely, *Whatever Happened*, *supra* note 56, at 376.

[71] Vincent Blasi, *Six Conservatives in Search of the First Amendment: The Revealing Case of Nude Dancing*, 33 WM. & MARY L. REV. 611, 646 n.163 (1992).

[72] Matthew Titolo, *Leasing Sovereignty: On State Infrastructure Contracts*, 47 U. RICH. L. REV. 631, 656–73 (2013).

[73] Paul M. Schwartz & William Michael Treanor, *Eldred and Lochner: Copyright Term Extension and Intellectual Property as Constitutional Property*, 112 YALE L.J. 2331, 2413 n.415 (2003).

[74] John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 1035 (2002).

[75] U.S. Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 25–26 (1977).

Accordingly, the Supreme Court has approached public contractual impairments with heightened scrutiny in comparison with its review of private contractual relationships, which receive rational basis review.[76] If a public contract has been impaired, the court assesses the severity of the impairment.[77] If the impairment is insubstantial, the inquiry ends; no constitutional violation will be found.[78] If the impairment is substantial, then the court balances the severity of the impairment with the public interest served.[79] The state bears the burden of demonstrating that the measure is " 'reasonable and necessary to serve an important public purpose.' "[80] A legislative action, even one that is unreasonable and unnecessary, that impairs a public contract will not, however, be found unconstitutional if the contract improperly ties the hands of a future legislature by bargaining away its police power.[81]

Even with a partial enlivening of the Contracts Clause in circumstances wherein the government impairs public contracts, it remains clear that, "as interpreted, the Contract Clause does not have much bite."[82] Thus, in assessing the vitality of the Contracts Clause, whether the vultures are considered to be circling above a seemingly collapsing potential target, landing for a creature that has fallen, taking the first pokes at one in its last gasps, or tearing into a creature that was, it is clear that the Contracts Clause will not be confused for being lively and robust anytime soon. Accordingly, only with regard to impairment of public contracts can a party anticipate the realistic possibility of any assistance from the Contracts Clause in providing constitutional protection against retroactive civil legislation.

D. Due Process Clauses

The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Due Process Clause of the Fourteenth Amendment states, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Neither the Fifth Amendment limitation upon the federal government nor the Fourteenth Amendment limitation upon the state governments "place significant restrictions on retroactive legislation."[83] The Supreme Court "in a series of cases that spanned two-thirds of the twentieth century, established the principle that retroactive legislation will violate due process only if the legislation does not have a rational relationship to a legitimate government interest."[84] The Court will apply mere rationality review to challenges under the Due Process Clause "even when the legislation 'upsets otherwise settled expectations . . . [or] impose[s] a new duty or liability based

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[76] Titolo, *supra* note 72, at 660–61.
[77] *Id.* at 661.
[78] *Id.* at 663–64.
[79] *Id.* at 661.
[80] *Id.* at 664 (quoting U.S. Trust Co. of N.Y., 431 U.S. at 25).
[81] *Id.* at 667–73.
[82] Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897, 941 (2010).
[83] ROTUNDA & NOWAK, *supra* note 55, § 15.9(a)(iv), at 911.
[84] *Id.* at 911–12.

on past acts.' "[85] Accordingly, "[s]o long as retroactive application of the change is rationally related to a legitimate legislative purpose, the constraints of due process have been honored."[86]

The Supreme Court found in *Satterlee v. Matthewson*, an 1829 decision, that "retrospective laws which do not impair the obligation of contracts, or partake of the character of ex post facto laws, are not condemned or forbidden by any part of" the Federal Constitution including the constitutional safeguard of due process.[87] Nearly a century-and-a-half later in *Usery v. Turner Elkhorn Mining*, the Supreme Court reached a contrary conclusion, finding that constitutional due process protections do impose additional limitations on retroactive civil legislation.[88] However, this constitutional hurdle is surmounted "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."[89] Moreover, it is readily apparent that "retroactivity alone does not make legislation irrational."[90] This limitation upon retroactive civil legislation, therefore, has been characterized concisely and accurately by Professor John Manning as "notoriously easy to satisfy."[91] "[R]etroactivity is a superfluous category in modern due process analysis."[92]

E. The Takings Clause

The Takings Clause of the Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation."[93] In *Calder v. Bull*, addressed above in relation to the

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[85] Donald T. Hornstein, *Resiliency, Adaptation, and the Upsides of Ex Post Lawmaking*, 89 N.C. L. REV. 1549, 1571 (2011) (quoting Usery v. Turner Elhorn Mining Co., 428 U.S. 1, 16 (1976)).
[86] Kopec v. City of Elmhurst, 193 F.3d 894, 903 (7th Cir. 1999).
[87] Satterlee v. Matthewson, 27 (2 Pet.) U.S. 380, 413 (1829).
[88] *Usery*, 428 U.S. at 16–17.
[89] Pension Benefits Guar. Corp. v. R. A. Gray & Co., 467 U.S. 717, 730 (1984); *see also* Gen. Motors Corp. v. Romein, 503 U.S. 181, 191 (1992).
[90] Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2150 (1996).
[91] John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 410 (2010).
[92] Kainen, *supra* note 57, at 102.
[93] In the 1890s, the Takings Clause became the first Bill of Rights provision to be incorporated under the Fourteenth Amendment as a constitutional limitation upon the States. Steven G. Calabresi & Nicholas Terrell, *The Number of States and the Economics of American Federalism*, 63 FLA. L. REV. 1, 23 (2011); Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of* Lingle v. Chevron U.S.A., Inc. *on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 457–58 (2006); Stephen Kanter, *Sleeping Beauty Wide Awake: State Constitutions as Important Independent Sources of Individual Rights*, 15 LEWIS & CLARK L. REV. 799, 803 (2011). There is, however, scholarship suggesting that the Supreme Court's decision, *Chicago, Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226 (1897), which is generally considered the first case in which the Supreme Court incorporated a Bill of Rights provision against the states via the Fourteenth Amendment, is actually not an incorporation decision. Jacobs, *supra* note 93, at 458 n.34 (citing Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle*,*"* 90 MINN. L. REV. 826 (2006)). The Supreme Court, however, has come to view *Chicago, Burlington & Quincy Railroad* as an incorporation case. *See*, *e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 383–84, 384 n.5 (1994).

Ex Post Facto Clauses, Justice Chase also addressed the Takings Clause.[94] Therein, he articulated a view of the Takings Clause as being designed to protect against deprivation, including retroactive deprivation, of vested rights in property unless that taking is for a public use, in which case just compensation is required.[95] Nearly two-hundred years later, in a 1994 decision, *Landgraf v. USI Film Products*, the Supreme Court reiterated Justice Chase's view of the anti-retroactivity protections of the Takings Clause. The Court therein noted that the Takings Clause "prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a 'public use' and upon payment of 'just compensation.' "[96]

Four years later, writing for a four justice plurality in *Eastern Enterprises v. Apfel*, Justice Sandra Day O'Connor declared that "[o]ur decisions . . . have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."[97] In assessing whether a retroactive taking has occurred, Justice O'Connor concluded that the *Penn-Central* Test, the general framework for assessing whether a regulatory taking has occurred, was applicable.[98] In *Penn Central Transportation Company v. City of New York*, the Supreme Court advanced a three-factor test for determining whether a regulatory action of the government constitutes a taking for purposes of the Takings Clause.[99] The Court considers (1) the economic impact of the regulation on the plaintiff; (2) the extent to which the regulation interferes with the plaintiff's identifiable investment-backed expectations; and (3) the character of the governmental action.[100]

While this framework would seem to offer some hope of rigorous review of governmental actions under the Takings Clause, reality has not met such expectations. The *Penn Central* Test has proven to be "a fact-bound and murky test heavily loaded in favor of governmental regulation."[101] The Supreme Court's "generous understanding of regulatory authority has encouraged far-reaching governmental infringement on the traditional rights of owners to enjoy their property."[102] Furthermore, while *Landgraf* suggested vitality to the anti-retroactivity of the Takings Clause, *Eastern Enterprises v. Apfel*, although striking down a severe retroactive civil measure, may have even further undermined this role. Five Justices concluded therein that the Due Process Clause, rather than the Takings Clause, is the proper constitutional provision for assessing retroactive civil legislation.[103] "This splintering produced a decision that stands for almost nothing because both of the stated rationales for striking the

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94 Calder v. Bull, 3 U.S. (3 Dall.) 386, 394 (1798).
95 *Id.*
96 Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).
97 E. Enters. v. Apfel, 524 U.S. 498, 528–29 (1998) (O'Connor, J., plurality opinion).
98 *Id.* at 529.
99 Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978).
100 *Id.* at 124.
101 JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 160 (3d. ed. 2008).
102 *Id.* at 161.
103 *E. Enters.*, 524 U.S. at 545 (Kennedy, J., concurring); *id.* at 556 (Breyer, J., dissenting).

employer mandate [(the Takings Clause and the Due Process Clause)] were explicitly rejected by a majority of the Court."[104] In subsequent years, the federal courts have permitted a parade of retroactive civil legislation without finding a constitutional violation in response to Takings Clause challenges. As illustrations, retroactive increases in taxes,[105] attachment of zoning restrictions to subdivision development plans,[106] alteration of a state's unclaimed property statute,[107] alteration of lien avoidance provisions of bankruptcy laws,[108] and imposition of civil liability under the Comprehensive Environmental Response, Compensation, and Liability Act have been found to not constitute takings.[109] Ultimately, as currently applied by the federal courts, the Supreme Court's Takings Clause jurisprudence "open[s] a door for constraints on retroactivity, but will only apply in relatively extreme cases."[110]

F. *Impact on Interpretation*

Though irrelevant in constraining an express legislative determination to impose civil legislation retroactively, perhaps the most important practical constraint on retroactive civil legislation is the judicial construction presumption in favor of prospective application. Though this concept's precise formulation has varied, it has been repeatedly expressed by the Supreme Court:

> There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.[111]

Simply stated, as a general rule, legislation and administrative rules will not be interpreted to apply retroactively unless the language of the statute or regulation requires such a result.[112] Courts generally presume prospective as opposed

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[104] Mark A. Hall, *Individual Versus State Constitutional Rights Under Health Care Reform*, 42 ARIZ. ST. L.J. 1233, 1237 (2011).

[105] *See, e.g.*, Quarty v. United States, 170 F.3d 961, 968–70 (9th Cir. 1999).

[106] *See, e.g.*, Willoughby Dev. Corp. v. Ravalli Cnty., 338 F. App'x 581, 583 (9th Cir. 2009).

[107] *See, e.g.*, Am. Express Travel Related Servs., Inc. v. Sidamon-Eristoff, 669 F.3d 359, 370–72 (3d Cir. 2012).

[108] *See, e.g.*, *In re* Thompson, 867 F.2d 416, 422 (7th Cir. 1989).

[109] *See, e.g.*, Franklin Cnty. Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 552–53 (6th Cir. 2001).

[110] RICH, *supra* note 21, § 17:19, at 677.

[111] U.S. Fid. & Guar. Co. v. United States, 209 U.S. 306, 314 (1908).

[112] Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988).

to retroactive application of statutes based upon considerations of fairness[113] and principles of constitutional question avoidance.[114]

Requiring a legislature to make clear its intent to apply a statute retroactively "helps ensure that [the legislature] itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[115] Retroactive legislative provisions may serve legitimate purposes, such as responding to emergencies, correcting mistakes, preventing against the circumvention of a new statute during the time after it is proposed but before it is enacted, and serving to advance health, welfare, or safety.[116] Where the legislature, perhaps deciding based upon one of the aforementioned reasons, elects to engage in retroactive lawmaking, this anti-retroactivity presumption gives way. After all, "the anti-retroactivity presumption is just that—a presumption, rather than a constitutional command."[117] Under such circumstances, the challenger will have to find recourse in the protections addressed above—the Contracts, Due Process, or Takings Clause—if they are to find relief under the Federal Constitution.

G. Retroactivity and Civil Legislation under the United States Constitution Summary

The distinction between the restrictive approach of the Supreme Court towards retroactive criminal legislation and the Court's permissive approach towards civil legislation is "manifest," reflecting a "sharp contrast."[118] Professor Charles Tiefer has offered perhaps the best synopsis of the Court's abandonment of protecting against the dangers of retroactive civil legislation:

> Since the end of the *Lochner* era, the courts have regarded the issues of civil retroactive legislation like other economic legislation, as one of the social and economic questions left to the legislature . . . . That the Constitution has an Ex Post Facto Clause, that venerated authorities criticize retroactivity, that continental jurisprudence abhors it, and that some consider it violative of "natural law," only serves to under-

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[113] 2 Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 41:2, at 393 (7th ed. 2009) ("The general rule that courts favor prospective application of statutes is founded on the premise that fundamental fairness requires that citizens be given notice of a statute so they may conform their behavior to new or revised requirements."); *see also* Gen. Motors v. Romein, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.").

[114] *See* Paul Boudreaux, *Covert Opinion: Revealing a New Interpretation of Environmental Laws*, 9 Vt. J. Envtl. L. 239, 256 (2008); Richard A. Michael, *Joint Liability: Should It be Reformed or Abolished?—The Illinois Experience*, 27 Loy. U. Chi. L.J. 867, 913–14 (1996); *see also* D. Benjamin Barros, *The Complexities of Judicial Takings*, 45 U. Rich. L. Rev. 903, 928 (2011); Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. Cal. L. Rev. 1281, 1304 n.127 (2002); Note, *Retroactive Expansion of State Court Jurisdiction Over Persons*, 63 Colum. L. Rev. 1105, 1109 (1963); Note, *Retroactive Death Taxes in Light of Binney v. Long*, 50 Harv. L. Rev. 785, 789 (1937).

[115] Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994).

[116] *See id.* at 267–68.

[117] Republic of Austria v. Altmann, 541 U.S. 677, 692–93 (2004).

[118] Krent, *supra* note 90, at 2146–52.

> line by contrast the acceptance of civil retroactivity by the judiciary. The arguments that retroactivity normatively imposes lack of notice and, consequently, lack of consciousness of any violation and that retroactively inefficiently defeats expectations have long been known and simply discounted. Since *Lochner* ended, courts have upheld challenges to retroactive civil laws notwithstanding the most dubious basis in either normative or efficiency analysis.[119]

As interpreted, despite the framers' antipathy to retroactive legislation, which helped to shape multiple provisions of the United States Constitution, it is apparent that the Supreme Court's jurisprudence has left these constitutional restraints when applied to retroactive civil legislation as hollow and rotted-out barriers. Therefore, under the Federal Constitution, if a state legislative body determines to break through by enacting retroactive civil legislation, the state legislature will find little in the way of constraint as long as the legislature clearly indicates the measure is to be applied retroactively.[120]

II. Federal Constitution Tunnel Vision

As noted in the introduction of this Article, most Americans would be surprised to learn that the United States Constitution, as interpreted by the Supreme Court, does not impose more substantial safeguards against retroactive civil legislation.[121] In thinking about the constitutionality of such governmental actions, Americans' collective focus would most assuredly be on the United States Constitution rather than the state constitutions of the fifty states or even their own state constitution. As noted by Professor James A. Gardner, "[w]hen Americans speak of 'constitutional law,' they invariably mean the U.S. Constitution and the substantial body of federal judicial decisions construing it."[122] This is not surprising given that only approximately half of adults in the United States are even aware that their state has its own constitution.[123]

More disturbing than the general public's lack of awareness, the members of the Advisory Commission on Intergovernmental Relations, as part of a study of state constitutional law, concluded that "[e]ven among lawyers, state constitutional law is relatively unknown and little practiced."[124] Simply stated, "most lawyers . . . are utterly ignorant about the contents of state constitutions."[125] Far

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[119] Charles Tiefer, *Did* Eastern Enterprises *Send Enterprise Responsibility South?*, 51 ALA. L. REV. 1305, 1308–09 (2000).

[120] The ability of Congress to enact retroactive legislation does not extend to authorizing reopening of final judgments before courts; however, this limitation is tied to separation of powers concerns. *See* Harold F. See, *The Separation of Powers and the Public Policy Role of the State Court in a Routine Case*, 8 TEX. REV. L. & POL. 345, 353 n.46 (2004).

[121] Troy, *supra* note 15.

[122] JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS 23 (2005).

[123] ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 1 (2009); G. Alan Tarr, *The State of State Constitutions*, 62 LA. L. REV. 3, 9 n.23 (2001).

[124] ADVISORY COMMISS'N ON INTERGOVERNMENTAL RELATIONS, STATE CONSTITUTIONS IN THE FEDERAL SYSTEM: SELECTED ISSUES AND OPPORTUNITIES FOR STATE INITIATIVES 2 (1989).

[125] Clint Bolick, *State Constitutions as a Bulwark for Freedom*, 37 OKLA. CITY U. L. REV. 1, 2 (2012); *see also, e.g.*, *A Symposium with Women Chiefs*, 13 CARDOZO J.L. & GENDER 305, 325 (2007) (quoting Chief Judge Kaye of the New York Court of Appeals: "I was speaking at the City Bar Association years ago, and I talked about the State Constitution. A

too many lawyers suffer from tunnel vision in approaching constitutional questions, thinking only about the Federal Constitution.[126] They are either entirely unaware of state constitutional provisions or do not understand the differences in state constitutional interpretation.[127] Even when lawyers do raise state constitutional law claims or arguments, those arguments are often minimally addressed as tag-along afterthoughts to the federal constitutional argument that the attorney is advancing in the case.[128] This singular focus is not without consequences. As examples, "the vast majority of states that have constitutional provisions directly addressing the care of individuals with mental disabilities or mental illnesses have not been the site of state-law-based right-to-treatment litigation."[129] Likewise, fewer than half of the state constitutional provisions relating to health-care have been the subject of litigation in state appellate courts.[130]

Well-respected jurist Sixth Circuit Court of Appeals Judge Jeffrey Sutton[131] offered a vivid description of this oddity of American law:

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lawyer came up to me afterwards, and said, 'Judge Kaye, I feel like I am swimming in a whole new sea of culture. I didn't know we had a State Constitution' ").

[126] *See* Michael F.J. Piecuch, *State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court*, 60 ALB. L. REV. 1757, 1764–65 (1997); Nathan Sabourin, *We're from Vermont and We do What We Want: A "Re"-Examination of the Criminal Jurisprudence of the Vermont Supreme Court*, 71 ALB. L. REV. 1163, 1166 (2008); *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1194–95 (1999); Hans A. Linde, *State Constitutions are not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 933 (1993) [hereinafter Linde, *State Constitutions*]; Justice Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392–93 (1980) [hereinafter Linde, *First Things*].

[127] *See Piecuch*, *supra* note 126, at 1764–65; Sabourin, *supra* note 126, at 1166; *see also* Hershkoff, *supra* note 126, at 1194–95; Linde, S*tate Constitutions*, *supra* note 126, at 933; Linde, *First Things*, *supra* note 126, at 392–93.

[128] *See, e.g.*, Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141, 1161 (1985) (stating that "all too frequently, counsel do not raise state constitutional issues in the trial or appellate courts, or make only passing reference to the state constitution"); Robert I. Berdon, *An Analytical Framework for Raising State Constitutional Claims in Connecticut*, 14 QUINNIPIAC L. REV. 191, 196–97 (1994).

> State courts often observe that even where parties squarely raise state constitutional issues, briefing frequently falls short of the mark, failing to make any substantive analysis or argument on the issue. . . . [L]awyers often view state issues as "throw-ins" most likely because they have not learned how to frame well thought out, persuasive state constitutional arguments.

Hon. Robert F. Utter & Sanford E. Pitter, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 653 (1987).

[129] Katie Eyer, *Litigating for Treatment: The Use of State Laws and Constitutions in Obtaining Treatment Rights for Individuals with Mental Illness*, 28 N.Y.U. REV. L. & SOC. CHANGE 1, 13 n.84 (2003); *see also* Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249, 1264–65 (1987); Alan Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7, 9 (1982).

[130] *See* Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1347–68 (2010).

[131] Perry W. Payne, Jr., *The Patient Protection and Affordable Care Act of 2010 and the Requirement to Maintain Minimum Essential Coverage (Individual Mandate): Constitutional Challenges and Potential Impact on Health Policy*, 55 HOW. L.J. 937, 978 (2012); John K. DiMugno, *The Future of the Patient Protection and Affordable Care Act, aka "Obama*

> Imagine an NCAA tournament basketball game. Your favorite team is down by one point. With no time left on the clock, the opposing team commits a two-shot foul on your star player. How would you react if the player took just one of the two free throws offered him? Strange, yes? A two-shot foul normally would give the player two chances to make one free throw, which would tie the game, and one chance to make both free throws, which would win the game. Not a bad situation to be in. But if a coach told his player to take just one of the free throws, he would reduce the team to the hope of at best forcing overtime. Any coach who made such a decision would be ridiculed out of the profession, particularly if his team lost the game.
>
> If you think this scenario is utterly implausible, so do I. But that leaves us with some explaining to do. Why is it that when we switch from basketball to American law, we find so many lawyers willing to give up the second free throw? Under our legal system, whenever a state or local government enacts a dubious law, lawyers and clients have two chances, not one, to invalidate it. They may invoke the United States Constitution to strike the law, and they may invoke that State's constitution to strike the law. Yet, in my experience as a federal judge, a private practitioner and a lawyer for the State of Ohio, that is not what most lawyers do.[132]

What Judge Sutton is describing is nothing short of widespread legal malpractice among practicing lawyers.[133] Failures of representation stemming from not considering state constitutional protections not only raise malpractice concerns but also, to some extent, catch the attention of attorney disciplinary authorities.[134] Unfortunately, this deficiency in understanding of and consideration of state constitutional law appears not just among practitioners but also among members of the bench and their law clerks.[135]

The cause of this deficiency brings together collective and individual failings of the bench, bar, and legal academy. In some respects, the problem arose initially as a result of unintended consequences. With the dynamic constitutional change brought about by the Warren Court, state constitutionalism became an afterthought for members of the bench and bar, relegated at best to a

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Care", 24 Cal. Ins. L. & Reg. Rep. 27, 31 (2012); Sallie Sanford, *The Impact of a 'Middle-Management' Health Care Ruling*, Jurist (July 5, 2011), http://jurist.org/forum/2011/07/sallie-sanford-middle-management.php.

[132] Jeffrey S. Sutton, *Why Teach—And Why Study—State Constitutional Law*, 34 Okla. City U. L. Rev. 165, 165–66 (2009).

[133] Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 Tulsa L. Rev. 813, 814 (2010).

[134] *See* State v. Jewett, 500 A.2d 233, 234 (Vt. 1985) (quoting former Oregon Justice Hans Linde as indicating that "[a] lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice"); *see also*, *e.g.*, State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring) ("Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution, except to exert federal limitations, should be guilty of legal malpractice."); Berdon, *supra* note 128, at 197 (noting that "[f]or the client, a lawyer's failure to do so may mean a loss of liberty or property. For the lawyer, it can mean professional embarrassment, a malpractice suit, or even disciplinary action.").

[135] *See Jewett*, 500 A.2d at 235 (quoting Charles G. Douglas III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 Suffolk U. L. Rev. 1123, 1147 (1978)); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 11–12 (1995) [hereinafter Kaye, *State Courts*].

secondary consideration when not entirely forgotten.[136] During the heady days of the Warren Court era, it was as if "[a]ll of the oxygen of constitutionalism was sucked out of the state constitutions and breathed into the Federal Constitution."[137] Reflecting upon the impact on state constitutional law, Justice Brennan wrote, "I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions."[138] With the federal courts in the midst of a judicial reformation, "it was easy for state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law."[139] As a result, "[a] generation of over-reliance by law professors, judges, and attorneys on the federal doctrines that grew out of Warren Court decisions left state constitutional law in a condition of near atrophy in most states."[140]

The Warren Court had led a jurisprudential revolution, but in his 1968 Presidential campaign, Richard Nixon would stake much of his candidacy on the contention that this revolution was reflective of judicial activism run amuck that needed to be curtailed. Nixon particularly emphasized a desire to respond to the Warren Court's criminal procedure jurisprudence by appointing "law and order" judges.[141] With Nixon's election and opportunity to appoint four Justices to the Supreme Court, the Burger Court would, in fact, engage in shifting the Court's movement from the path of the Warren Court.[142] In reaction, in a 1977 Harvard Law Review article, Justice Brennan enlisted state judiciaries in a counterattack against the conservative course-change of the Burger Court.[143]

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[136] *See* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 404–05 (1987); Antony B. Klapper, Comment, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739, 787–88 (1993).

[137] Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1491 (2010).

[138] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

[139] A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976); *see also* Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State–Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1637 (2010) (quoting Robert Welsh & Ronald K.L. Collins, *Taking State Constitutions Seriously*, CENTER MAG., Sept.–Oct. 1981, at 6) ("During the 'heyday of the Warren Court,' the 'Supreme Court took such complete control of the field that state judges could sit back in the conviction that their part was simply to await the next landmark decision.' "); Charles G. Douglas, III, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 133 (1988) ("State judges started to parrot federal cases and law clerks researched them to the exclusion of state charters.").

[140] 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1.01 n.11, at 1–4 (4th ed. 2006).

[141] Carl T. Bogus, *Introduction: Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1, 2 (2008); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1396–97 (2006); *see also* Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the Keith Case*, 41 U.C. DAVIS L. REV. 1259, 1277 (2008).

[142] CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 154 (2004).

[143] Brennan, *supra* note 138, at 500–04.

In response to the Warren Court's jurisprudential revolution grinding to a halt, "[l]awyers should have switched gears . . . but at first few were prepared. Thirty years later, the deplorable situation persists, despite the fact that many persons may be entitled to receive greater protection of their individual rights through application of rights derived from the state constitutions."[144] One of the key reasons that so few lawyers are prepared to consider state constitutional protections is that so few law schools teach state constitutional law or put any emphasis thereupon.[145] Constitutional law courses are reflexively courses about the Federal Constitution and fail to bring significant, if any, attention to state constitutions.[146] Having not been educated as to state constitutional law, law students become lawyers who do not appreciate the interpretive differences between state constitutions and the Federal Constitution.[147] Lacking the knowledge necessary to frame persuasive arguments under their respective state constitutions, lawyers eschew these arguments either by ignoring them entirely or by briefly referencing the state constitution but failing to develop their state constitution argumentation.[148] The quality of understanding state constitutions is so deficient that the Conference of Chief Justices[149] formally adopted as their number one Resolution in 2010 a recommendation to law schools that they provide a course in state constitutional law.[150]

[144] Michael A. Berch, *Reflections on the Role of State Courts in the Vindication of State Constitutional Rights: A Plea for State Appellate Courts to Consider Unraised Issues of State Constitutional Law in Criminal Cases*, 59 U. KAN. L. REV. 833, 841–42 (2011).

[145] Sutton, *supra* note 132, at 166; *see also* Susan N. Herman, *Portrait of a Judge: Judith S. Kaye, Dichotomies, and State Constitutional Law*, 75 ALB. L. REV. 1977, 1992 (2011/2012) ("[N]ot many law schools were paying attention to state constitutions and therefore there were a lot of lawyers who were missing bets because they just weren't making available arguments about how the law could or should be configured in particular states."); Kaye, *State Courts*, *supra* note 135, at 12 n.63 ("I believe it is largely the failure of our nation's law schools to teach state constitutional law that has resulted in the poor grade earned by the vast majority of counsel who fail to develop state constitutional issues in their court filings."); Hershkoff, *supra* note 126, at 1194–95 ("Constitutional law courses at U.S. law schools not only ignore state constitutions, but also more generally avoid any comparative approach."); Linde, *State Constitutions*, *supra* note 126, at 933 ("General constitutional law courses, which everyone takes, create the impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as the agenda of constitutional litigation."). Reviewing the curricular offerings of American Bar Association accredited law schools, Judge Sutton concluded that only approximately 15 percent of accredited schools offer a course on "state constitutional law" or a state-specific version of the subject. Sutton, *supra* note 132, at 166 n.2. Even then, schools put little emphasis on the subject and few students are impressed upon with its importance. *See id.*

[146] Piecuch, *supra* note 126, at 1765.

[147] *See* Usman, *supra* note 137, at 1477–91 (discussing the interpretive differences applied between the Federal Constitution and state constitutions).

[148] Utter & Pitter, *supra* note 128, at 653.

[149] The Conference of Chief Justices is comprised of the highest judicial officer of all fifty states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the territories of American Samoa, Guam and the Virgin Islands. *Conference of Chief Justices*, http://ccj.ncsc.dni.us (last visited Nov. 25, 2013).

[150] CONFERENCE OF CHIEF JUSTICES, *Policy Resolution of the 2010 Midyear Meeting: Encouraging the Teaching of State Constitutional Law Courses*, http://ccj.ncsc.dni.us/~/media/microsites/files/ccj/resolutions/06012010-encouraging-the-teaching-of-state-constitutional-law-courses.ashx (last visited Nov. 25, 2013) (adopted as proposed by the Profession-

In addition to failing to educate law students about state constitutionalism, legal scholars have not adequately assisted in stocking the arsenals of attorneys preparing for litigating state constitutional claims. While acknowledging that the field has certainly developed in more recent years, Professor Jim Rossi has noted that "the state of state constitutional law scholarship still remains underdeveloped."[151] Furthermore, "while research into the history of various aspects of the United States Constitution has been extraordinarily impressive, there are serious concerns about whether the existing historical materials in many states are adequate for constitutional analysis."[152] The adequacy of federal materials to the enterprise of federal constitutional interpretation has been a product of centuries of on-going efforts: "The raw material for federal constitutional jurisprudence did not spring fully-formed from the head of John Marshall. It evolved, often painfully, over a 200-year period, and continues to evolve today."[153] When seen in contrast with treatises, articles, and analysis of federal constitutional law, the chasm between federal and state scholarship is plain.

"While recent years have witnessed a significant increase in academic scholarship related to state constitutions, there is still considerably less scholarly commentary available to assist lawyers, judges, and law clerks on state constitutional law issues."[154] In many respects, unlike its federal counterpart, state constitutionalism "has not yet fully developed the interpretive material needed for . . . 'a successful adjudicative enterprise.' "[155] While this deficiency

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alism and Competence of the Bar Committee at the Conference of Chief Justices 2010 Midyear Meeting). The Resolution provides:

> Resolution 1
>
> Encouraging the Teaching of State Constitutional Law Courses
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> WHEREAS, all lawyers take an oath to support the United States Constitution and the constitution of their state; and
>
> WHEREAS, although all law schools offer a course in constitutional law, the overwhelming majority of those courses are taught from the perspective of the federal Constitution; and
>
> WHEREAS, the United States Constitution creates a dual system of government with two sets of sovereigns whereby all powers not delegated to the federal government are reserved to the states; and
>
> WHEREAS, state constitutions contain different structures of government, unique provisions, and substantive provisions or declarations of rights that are often greater than federally guaranteed individual rights and liberties; and
>
> WHEREAS, being a competent and effective lawyer requires an understanding of both the federal Constitution and state constitutional law; NOW, THEREFORE, BE IT RESOLVED that the Conference of Chief Justices encourages all law schools to offer a course on state constitutional law.

Id. See also Robert F. Williams, *Response: Why State Constitutions Matter*, 45 NEW ENG. L. REV. 901, 909 (2011) (noting that adoption of this resolution "reflects a notable recognition by the highest judges in the fifty states that further education on state constitutional law is necessary").

151 Jim Rossi, *Williams: The Law of American State Constitutions*, 109 MICH. L. REV. 1145, 1161 (2011).

152 Usman, *supra* note 137, at 1489.

153 Burt Neuborne, *A Brief Response to* Failed Discourse, 24 RUTGERS L.J. 971, 972 (1993).

154 Usman, *supra* note 137, at 1489.

155 Hershkoff, *supra* note 126, at 1194.

in law school teaching and limited volume of scholarship may do much to explain the lack of further development of state constitutional argumentation or judicial decision-making, it does not excuse either the bench or the bar from their responsibilities to engage with state constitutionalism.[156]

III. Retroactivity and State Constitutions

If the citizens, or at least the attorneys of the citizens, who believe that constitutional constraints should safeguard against retroactive civil legislation would shift their gaze from the Federal Constitution towards state constitutions, they would find something surprising. Whereas the Federal Constitution offers little recourse, there are substantial protections against retroactive civil legislation to be found in state constitutions. The state constitutional restrictions on retroactive civil legislation emerge both from distinctly state constitutional rights—those with no federal counterpart—and provisions that have a clear federal constitutional corollary but which have been interpreted by state courts as providing greater protections than the federal corollary.

A. *State Constitutional Provisions with no Federal Corollary*

Unmoored from federal precedent, rather than embroiled in the quandaries surrounding deviation from the federal interpretation of similar provisions, state courts have an opportunity to realize "[t]he full potential of state constitutionalism . . . [by] giving effect to distinct rights embodied in the state constitutions."[157] Significant restraints upon retroactive civil legislation can be found in a number of distinct state constitutional provisions that have no federal corollary. Three of the most important types of such provisions are (1) clauses that expressly prohibit retroactive or retrospective legislation, (2) open courts/right to remedy clauses, and (3) the many and varied prohibitions upon specific retroactive actions by state governmental actors.

i. *State Constitutional Provisions that Expressly Prohibit Retroactive/ Retrospective*[158] *Legislation*

Four years before becoming the critical ninth state to ratify the United States Constitution,[159] New Hampshire replaced its temporary Constitution of

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[156] *See* Sabourin, *supra* note 126, at 1166.
[157] Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. Pitt. L. Rev. 231, 239 (1998).
[158] In terms of the constitutional limitation imposed, retroactive and retrospective are synonymous. Singer & Singer, *supra* note 44, § 41:1, at 382–83 ("The terms 'retroactive' and 'retrospective' are synonymous in judicial usage and may be employed interchangeably."); *see also*, *e.g.*, State v. Indus. Tool & Die Works, 21 N.W.2d 31, 40 (Minn. 1945).
[159] On June 21, 1788, by a vote of 57 to 47 in the State's Constitutional Ratifying Convention, New Hampshire became the ninth state to ratify the United States Constitution, which pursuant to the terms of Article VII established a Constitution between the ratifying States. *See* 2 John R. Vile, The Constitutional Convention of 1787: A Comprehensive Encyclopedia of America's Founding 658 (2005). The legal importance of June 21, 1788, the date the Constitution was ratified by New Hampshire, is addressed by Professors Gary Law-

1776 with its still enduring Constitution of 1784.[160] Article 23 of the New Hampshire Constitution, in language unchanged since 1784, declares that "[r]etrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." This provision of the New Hampshire Constitution stands as the ancestor of state constitutional provisions that expressly bar the imposition of retroactive civil laws.[161]

In addition to New Hampshire, there are at least nine other states whose state constitutions include broad-based limitations upon retroactive civil legislation: Colorado, Georgia, Idaho, Massachusetts, Missouri, New Mexico, Ohio, Tennessee, and Texas. Citizens of these states constitute 24% of the population of the United States;[162] thus, nearly one in four Americans can find an express prohibition under his or her state constitution against retroactive civil laws. The Georgia[163] and Texas[164] Constitutions prevent their respective state legislature from enacting any "retroactive law." The Tennessee Constitution similarly bars the General Assembly from passing any "retrospective law."[165] The Missouri,[166] Idaho,[167] and Colorado[168] Constitutions bar the enactment of a law

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son and Guy Seidman in their profoundly interesting and informative account of when the Constitution actually became law. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 Notre Dame L. Rev. 1 (2001).

[160] John Alexander Jameson, The Constitutional Convention; Its History, Powers, and Modes of Proceeding § 132, at 120 (1873); Workers of the Fed. Writers' Project of the Works Progress Admin. for the State of N.H., New Hampshire: A Guide to the Granite State 42 (1938); *see also* Susan E. Marshall, The New Hampshire State Constitution: A Reference Guide 1 (2004) ("New Hampshire has had two constitutions. The first was the temporary constitution of 1776, the first written constitution adopted in the original colonies, which predated the United States Declaration of Independence by six months. The second was the permanent constitution, which went into effect in 1784.").

[161] Estate of Bell v. Shelby Cnty. Health Care Corp., 318 S.W.3d 823, 828 n.11 (Tenn. 2010) (citing Richard B. Collins, *Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity*, 86 Denv. U. L. Rev. 1433, 1452 (2009)).

[162] As assessed in the 2010, the population of the states was, respectively, Colorado (5,029,196), Georgia (9,687,653), Idaho (1,567,582), Massachusetts (6,547,629), Missouri (5,988,927), New Hampshire (1,316,470), New Mexico (2,059,179), Ohio (11,536,504), Tennessee (6,346,105), and Texas (25,145,561) for a total of 75,224,806 out of a total national population of 308,745,538. *Resident Population Data*: Population Density, 2010, U.S. Census Bureau, http://www.census.gov/2010census/data/apportionment-dens-text.php (last visited Nov. 25, 2013).

[163] Ga. Const. art. I, § 1, para. X states that "[n]o bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed."

[164] Tex. Const. art. I, § 16 provides that "[n]o bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

[165] Tenn. Const. art. I, § 20 states "[t]hat no retrospective law, or law impairing the obligations of contracts, shall be made." The Tennessee Constitution has a separate constitutional provision which prohibits ex post facto laws: "That laws made for the punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore no *ex post facto* law shall be made." Tenn. Const. art. I, § 11.

[166] Mo. Const. art. I, § 13 provides "[t]hat no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges or immunities, can be enacted."

that is "retrospective in its operation." The Ohio Constitution bars the state legislature from "pass[ing] retroactive laws," but expressly indicates that the legislature may, "by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."[169] The New Mexico Constitution imposes a ban on retroactive legislation but limits the application to pending cases: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."[170] The most unique of the broad-based limitations upon retroactive laws appears in the Massachusetts Constitution, which provides that "[e]ach individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."[171]

In *Woart v. Winnick*, an 1826 decision, the Superior Court of Judicature of New Hampshire, then the State's highest court,[172] addressed the New Hampshire Constitution's prohibition upon retrospective civil laws. In doing so, it offered an early insight into the protections afforded by these general prohibitions upon retroactive civil laws. The *Woart* Court explained that, as applied to civil proceedings, "the object of the clause is to protect both parties from any interference of the legislature whatever, in any cause, by a retrospective law."[173] Delineating the boundaries of the prohibition upon retrospective laws, the Court stated:

> A law for the decision of a cause is a law prescribing the rules by which it is to be decided;—a law enacting the general principles by which the decision is to be governed. And a retrospective law for the decision of civil causes, is a law prescribing the rules by which existing causes are to be decided, upon facts existing previous to the making of the law. Indeed, instead of being rules for the decision of future causes, as all laws are in their very essence, retrospective laws for the decision of civil causes are, in their nature, judicial determinations of the rules, by which existing causes shall be settled, upon existing facts. They may relate to the grounds of the action, or

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[167] The Idaho Constitution declares that the state legislature "shall pass no law for the benefit of a railroad, or other corporation, or any individual, or association of individuals retroactive in its operation, or which imposes on the people of any county or municipal subdivision of the state, a new liability in respect to transactions or considerations already past." IDAHO CONST. art. XI, § 12.

[168] Colorado Constitution Article II, Section 11 states that "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the General Assembly." In a separate provision, the Colorado Constitution also declares that the General Assembly "shall pass no law for the benefit of a railroad or other corporation, or any individual, or association of individuals, retrospective in its operation, or which imposes on the people of any county or municipal subdivision of the State, a new liability in respect to transactions or considerations already past." COLO. CONST. art. XV, § 12.

[169] OHIO CONST. art. II, § 28.

[170] N.M. CONST. art. IV, § 34.

[171] MASS. CONST. pt. 1, art X.

[172] New Hampshire's high court operated under a number of different names during the nineteenth-century, including alternating between the Superior Court of Judicature and the Supreme Judicial Court before settling upon the designation of the New Hampshire Supreme Court in 1876. MARSHALL, *supra* note 160, at 215 n.18.

[173] Woart v. Winnick, 3 N.H. 473, 477 (1826).

> the grounds of the defence, both of which seem to be equally protected by the constitution. And as, on the one hand, it is not within the constitutional competency of the legislature to annul by statute any legal ground, on which a pending action is founded, or to create any new bar, by which such an action may be defeated; so, on the other hand, it is believed, that no new ground for the support of an existing action can be created by statute, nor any legal bar to such an action be thus taken away. A statute, attempting any of these things, seems to us to be a retrospective law for the decision of civil causes, within the prohibition of this article in the bill of rights. It is the province of the legislature to provide rules for the decision of future causes. It is the province of courts to determine by what rules existing causes are to be decided.[174]

Applying the state constitutional prohibition on retrospective laws, the *Woart* Court held that the legislature could not retrospectively repeal the statute of limitations bar for actions that had already been filed and which remained pending.[175]

Similarly, in addressing the New Hampshire Constitution's prohibition upon retrospective laws, Justice Story, who was sitting as a Circuit Justice, offered what has become an enduring definition of what constitutes retroactive or retrospective law. Justice Story wrote,

> What is a retrospective law, within the true intent and meaning of this article? Is it confined to statutes, which are enacted to take effect from a time anterior to their passage? or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions? It would be a construction utterly subversive of all the objects of the provision, to adhere to the former definition. It would enable the legislature to accomplish that indirectly, which it could not do directly. Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective . . . .[176]

The protection referenced by the *Woart* Court and envisioned by Justice Story is not a relic of a bygone era in state courts. To the contrary, under state constitutions, application of this constitutional constraint on retroactive civil lawmaking remains robust. It is not, however, absolute. For example, the Tennessee Supreme Court has indicated that, despite the facial breadth of the Tennessee Constitution's prohibition that "[n]o retrospective law" shall be permitted, "not every retrospective law . . . is objectionable in a Constitutional sense."[177] The Tennessee Constitution does not prohibit the retrospective application of procedural or remedial laws unless the application of these laws impairs a vested right or contractual obligation.[178] The constitutional guarantee against retrospective laws is not, however, without teeth. It prohibits retrospec-

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174 *Id.*
175 *Id.*
176 Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156) (Story, J.); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1750 (2012).
177 Estate of Bell v. Shelby Cnty. Health Care Corp., 318 S.W.3d 823, 829 (Tenn. 2010); Collins v. E. Tenn., Va. & Ga. R.R. Co., 56 Tenn. (9 Heisk.) 841, 847 (1874).
178 Stewart v. Sewell, 215 S.W.3d 815, 826 (Tenn. 2007); Doe v. Sundquist, 2 S.W.3d 919, 923–24 (Tenn. 1999); *see also* Saylors v. Riggsbee, 544 S.W.2d 609, 610 (Tenn. 1976) ("[N]on-resident motorist statutes providing for service of process upon the non-resident

tive substantive legal changes "which take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed."[179] In applying this limitation, Tennessee courts have, as an illustration, concluded that a right of action to a tort suit vests for purposes of the prohibition upon retrospective laws "at the time of the commission of the tort against" the plaintiff and that any subsequent change to reduce the plaintiff's recovery violates that constitutional safeguard.[180] Thus, Tennessee appellate courts have consistently held that statutory measures altering the amount of damages constitute a substantive and hence impermissible change under the Tennessee Constitution.[181]

The approach of the Missouri, Ohio, and Idaho Supreme Courts is remarkably similar. The Missouri Supreme Court has explained that

> [r]etrospective or retroactive laws have been defined "as those which take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past." But the vested rights reference is a disjunctive option, along with a new obligation, or duty or disability. Because of the disjunctive "or," the constitutional principle . . . does not require a showing of a vested right. Because the phrase is disjunctive—"a new obligation . . . a new duty, or . . . a new disability"—an analysis need go no further than one of these.[182]

Thus, the Missouri General Assembly cannot either increase a defendant's potential damages or decrease the damages that a plaintiff may recover after the cause of action has accrued.[183] Similarly, the Ohio Supreme Court has indicated that a

> critical inquiry of the constitutional analysis is to determine whether the retroactive statute is remedial or substantive. A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even when it is applied retroactively. On the other hand, a retroactive statute is substantive—and therefore *unconstitutionally* retroactive—if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.[184]

Likewise, the Idaho Supreme Court has joined the chorus in concluding that its state constitution prohibits the imposition of laws that affect vested substantive legal rights.[185]

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motorist . . . are remedial or procedural in nature . . . and may be given retrospective application.").

[179] *Estate of Bell*, 318 S.W.3d at 829; *Sundquist*, 2 S.W.3d at 923 (quoting Morris v. Gross, 572 S.W.2d 902, 907 (Tenn. 1978)); *cf.* Kuykendall v. Wheeler, 890 S.W.2d 785, 787 (Tenn. 1994) ("Whether a statute applies retroactively depends on whether its character is 'substantive' or 'procedural.' ").

[180] Miller v. Sohns, 464 S.W.2d 824, 826 (Tenn. 1971).

[181] *See, e.g.*, Nutt v. Champion Int'l Corp., 980 S.W.2d 365, 368 (Tenn. 1998) (quoting Shell v. State, 893 S.W.2d 416, 420 (Tenn. 1995)); *Miller*, 464 S.W.2d at 826; Anderson v. Memphis Hous. Auth., 534 S.W.2d 125, 127–28 (Tenn. Ct. App. 1975).

[182] F.R. v. St. Charles Cnty. Sheriff's Dep't, 301 S.W.3d 56, 62 (Mo. 2010) (emphasis omitted).

[183] Klotz v. St. Anthony's Med. Ctr., 311 S.W.3d 752, 760 (Mo. 2010).

[184] Bielat v. Bielat, 721 N.E.2d 28, 33 (Ohio 2000).

[185] Coburn v. Fireman's Fund Ins. Co., 387 P.2d 598, 601 (Idaho 1963).

Massachusetts provides perhaps the least aggressive form of judicial review of retroactive civil legislation among states with a broad-based constitutional restraint upon retroactive laws. Even with the lesser restraint imposed under the Massachusetts Constitution, the analysis conducted by Massachusetts courts functions to provide meaningful restraint on retroactive civil legislation that extends considerably further in practice than the existent restrictions of the Federal Constitution. The Massachusetts Supreme Judicial Court has indicated that the court assesses the constitutionality of retroactive civil laws using the same rubric as the "standing [l]aws" requirement and the generalized state constitutional due process limitations.[186] The Massachusetts courts apply a balancing test to determine the reasonableness of the State's action.[187] "Ultimately, the 'principal inquiry—as to reasonableness—is essentially a review of whether it is equitable to apply the retroactive statute against the plaintiffs.' "[188] Massachusetts courts consider three factors in determining if the retroactive measure is equitable: (1) the nature of the public interest that motivated the legislature to enact a retroactive statute, (2) the nature of the rights that the retroactive measure is affecting, and (3) the extent or scope of the statutory impact or effect.[189] This is a balancing test the government has been capable of losing. Among other retroactive civil measures struck down by the Massachusetts Courts, application has been considered inequitable where the State retroactively extended sex-offender registration requirements without an opportunity to prove lack of future dangerousness,[190] expanded employer liability to cover discrimination based upon religious beliefs,[191] extended potential liability to single-home construction permit holders,[192] and imposed taxes retroactively.[193] The Massachusetts Supreme Judicial Court has concluded that prohibitions upon retroactive lawmaking extend to interferences with property rights as well as other protected liberty interests.[194]

Balancing is certainly not unknown among the other states with broad-based provisions, but in general, states with broad-based provisions tend to be even stricter in application than Massachusetts. The Texas Supreme Court has offered a particularly insightful formulation of the need for an even more constraining approach to balancing with regard to retroactive lawmaking:

> It is tempting to think that the real burden of [the retroactive civil legislation] on the [plaintiffs] and other plaintiffs in their shoes will be light compared to the benefit to [the defendant corporation], its current and former employees, and the State. . . . The impact of [the retroactive civil legislation] on individual cases may be slight, relative to the cumulative impact on [the defendant corporation] . . . . But we think that an important reason for the constitutional prohibition against retroactive laws is to preempt this weighing of interests absent compelling reasons. Indeed, it is precisely

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[186] Doe v. Sex Offender Registry Bd., 882 N.E.2d 298, 305 & n.15 (Mass. 2008).
[187] *Id.* at 305.
[188] *Id.* (quoting Am. Mfrs. Mut. Ins. Co. v. Comm'r of Ins., 372 N.E.2d 520, 526 (Mass. 1978)).
[189] *Id.*
[190] *Id.* at 309.
[191] Pielech v. Massasoit Greyhound, Inc., 804 N.E.2d 894, 899–900 (Mass. 2004).
[192] St. Germaine v. Pendergast, 626 N.E.2d 857, 860 (Mass. 1993).
[193] Keniston v. Bd. of Assessors, 407 N.E.2d 1275, 1285 (Mass. 1980).
[194] *Sex Offender Registry Bd.*, 882 N.E.2d at 305 n.15.

> because retroactive rectification of perceived injustice seems so reasonable and even necessary, especially when there are few to complain, that the constitution prohibits it.[195]

In other words, while retroactive lawmaking can be tempting, especially under circumstances wherein there is some perceived injustice that could be remedied retroactively, the state constitution removes this temptation. The Texas Constitution does so because it is fundamentally unfair to impair a vested right or impose a new or additional burden, duty, obligation, or liability as to conduct that is past and, therefore, as to which the actor may exercise no control.

ii. Open Courts/Right to Remedies Clauses

Anti-retroactivity has also been given effect in state constitutions through provisions that are commonly referred to as "open courts" or "right to remedy" clauses.[196] One of the more enigmatic of state constitutional provisions, open courts or right to remedy provisions have enjoyed a diverse and wide-ranging application. They have been utilized (1) to prevent either the legislature or the courts from imposing unreasonable financial costs and fees that prevent access to courts, (2) to block statutes of repose, damage caps, and retraction statutes, (3) to avoid requirements of proceeding through alternative dispute resolution, (4) to ensure judicial proceedings are open to the public, and (5) to require impartial judicial officers.[197] With constitutional origins that date back to the Magna Carta, the first state constitutional appearance of one of these measures was in the Delaware Constitution of 1776.[198] Open courts or right to remedy provisions are now found in at least thirty-eight state constitutions.[199] Approximately two-thirds of Americans live in a state with a state constitution that contains such a provision.

More importantly, for purposes of constitutionally restraining retroactive civil legislation, the reach of open courts and right to remedy provisions has been interpreted as protecting a cause of action upon accrual against retroactive elimination and, additionally, often safeguarding the right to the remedies

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[195] Robinson v. Crown Cork & Seal Co., 335 S.W.3d 126, 150 (Tex. 2010).
[196] *See, e.g.*, William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 434 (1997).
[197] *Id.* at 440–447.
[198] *Id.* at 340, 434.
[199] *Id.* at 434, n.591.

> ALA. CONST. art. I, § 13; ARIZ. CONST. art. 18, § 6; ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST., Bill of Rights § 18; KY. CONST., Bill of Rights § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. Declaration of Rights art. 19; MASS. CONST. art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. 3, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4; W.VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art I, § 8.

Id.

accompanying that cause of action.[200] For example, in addressing its state constitutional open courts provision, the Utah Supreme Court declared,

> [O]nce a cause of action under a particular rule of law accrues to a person by virtue of an injury to his rights, that person's interest in the cause of action and the law which is the basis for a legal action becomes vested, and a legislative repeal of the law cannot constitutionally divest the injured person of the right to litigate the cause of action to a judgment.[201]

Similarly, the Pennsylvania Supreme Court has concluded that:

> any statutory effort aimed at reformation must not offend the Remedies Clause, if it is to pass constitutional muster. That Clause, which binds . . . both the legislature and the courts, provides that an accrued cause of action is a vested right and as such, cannot be eliminated by subsequent legislation.[202]

The Wyoming Supreme Court, in construing the Open Courts Clause of the Wyoming Constitution, also concluded that "[t]he legislature . . . cannot destroy vested rights. Where an injury has already occurred for which the injured person has a right of action, the legislature cannot deny a remedy."[203] These decisions are reflective of a broad consensus among state courts in interpreting open courts or right to remedy provisions.[204]

iii. Prohibitions upon Specific Retroactive Actions

Whereas the Federal Constitution establishes the framework of the government and secures certain basic rights, "state constitutions have been generally drafted upon a different principle and have often become, in effect, extensive codes of laws."[205] All state constitutions are longer, and most substantially so, than the Federal Constitution.[206] This extensiveness results from addressing numerous topics unmentioned in the Federal Constitution,[207] and doing so in a manner that is seemingly more statutory in nature.[208] Arguably, state constitutions' "pronounced specificity . . . does not inhibit, but rather

200 *See* David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1206–08 (1992); Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655, 660 (1999).
201 Berry v. Beech Aircraft Corp., 717 P.2d 670, 676 (Utah 1985).
202 Ieropoli v. AC&S Corp*.,* 842 A.2d 919, 932 (Pa. 2004) (internal citation omitted).
203 Greenwalt v. Ram Rest. Corp., 71 P.3d 717, 729 (Wyo. 2003).
204 *See* Schuman, *supra* note 200, at 1208; Roesler, *supra* note 200, at 660.
205 16 OHIO JURISPRUDENCE, CONSTITUTIONAL LAW § 4 (3d ed. 2010).
206 Christopher W. Hammons, *State Constitutional Reform: Is it Necessary?*, 64 ALB. L. REV. 1327, 1328–29 (2001).
207 *See* Paul Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 873 (2007); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983).
208 Anderson & Oseid, *supra* note 207, at 873; *see also* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES §18, at 14 (Fred.B. Rothman & Co., 4th ed. 1997) (1879) ("[S]tate constitutions, as remodelled from time to time, have been made more unyielding, more minute, more like an elaborate code."); Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 735, 747 (2002) ("State constitutions are often far more detailed and specific, and for that reason less constitution-like."); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 121 n.276 (1999) ("[S]tate constitutions were amended much more frequently and often contained more

facilitates, responsible constitutional decisionmaking by state courts," while providing for greater perceived legitimacy in deciding a constitutional claim based upon the highly-detailed language of state constitutions rather than the more generalized language of the Federal Constitution.[209] Although the use of highly-specific, detailed provisions in a constitution "causes certain difficulties, not the least of which is that the constitution may not have the flexibility necessary to change with shifting societal needs, the greater specificity of many state constitutional provisions eases the task of interpretation."[210]

There are numerous and varied specific provisions that limit or curtail retroactive legislation in state constitutions. These state constitutional provisions create specific and narrowly-focused constitutional safeguards. For example, the Alabama Constitution imposes a procedural safeguard upon the Alabama State Legislature in considering retroactive legislation. When drafting legislation, Alabama state legislators must include in the title of any law that is intended to have a retroactive effect an express indication of that intended retroactive effect.[211] These types of detailed protections are not, however, limited to form or procedure. The North Carolina Constitution declares that "[n]o law taxing retrospectively sales, purchases, or other acts previously done shall be enacted."[212] While North Carolina focuses more on banning retroactive sales and use taxes, Delaware takes aim at retroactive income taxes: "Any law which shall have the effect of increasing the rates of taxation on personal income for any year or part thereof prior to the date of the enactment thereof, or for any year or years prior to the year in which the law is enacted, shall be void."[213] It is not only the revenue coming into the state's coffers from taxpayers where limitations on retroactivity are imposed; such limits also appear with regard to expenditures. For example, numerous state constitutions prohibit retroactive compensation being paid to public officials, state employees, or entities contracting with state or local governments.[214] Similarly, safeguarding the state's treasury and weary of fraud, the New York Constitution also takes aim at the ability of the legislature to revive time-barred claims against the state or to skirt this limitation by paying out funds to claimants in such cases.[215] The Alabama Constitution also applies a bar on reviving any time or statutorily-barred claim retroactively.[216] While not an exhaustive list, these examples represent some of

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detailed provisions than the United States Constitutions, making state constitutions look less like general declarations of timeless truths, and more like ordinary legislation.").

[209] Hon. James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1515–16 (1998).

[210] Usman, *supra* note 137, at 1516–17.

[211] ALA. CONST. art. IV, § 45, construed in Ala. Educ. Ass'n v. Grayson, 382 So. 2d 501, 505 (Ala. 1980).

[212] N.C. CONST. art. I, § 16.

[213] DEL. CONST. art. VIII, § 9.

[214] *See* JACK STARK, THE IOWA STATE CONSTITUTION: A REFERENCE GUIDE 103 (1998); *see also, e.g.*, ALA. CONST. art. IV, § 68; ARK. CONST. art. V, § 27; ARIZ. CONST. art. IV, pt. 2, § 17; COLO. CONST. art. V, § 28; IOWA CONST. art. III, § 31; NEB. CONST. art. III, § 19; OHIO CONST. art. II, § 29; S.D. CONST. art. XII, § 3; WASH. CONST. art. II, § 25; W.VA. CONST. art. VI, § 38; WIS. CONST. art. IV, § 26.

[215] N.Y. CONST. art. III, § 19.

[216] ALA. CONST. art. IV, § 95.

the detailed limitations appearing in state constitutions that inhibit retroactive civil lawmaking.

B. State Constitutional Provisions with Federal Corollaries

Compared to federal constitutionalism, state constitutionalism offers greater restraint upon retroactive civil legislation through not only the distinct state constitutional provisions that have no federal constitutional corollary, be they general or highly specific, but also through divergent interpretation of state constitutional provisions with a federal corollary. Like Charles Schultz's *Peanuts* character, Linus, holding onto his blue blanket, "state courts have become quite accustomed to the security of federal constitutional precedent."[217] When given the opportunity to strike out in a different direction, state courts instead often engage in a lock-step analysis with the federal courts.[218] Professor G. Alan Tarr has argued that "too many states continue to rely automatically on federal law when confronted with rights issues. . . . [T]oo many frame their analysis in federal doctrinal categories, making state constitutional law merely a poor relation, stuck with ill-fitting hand-me-downs."[219] While disagreeing with Professor Tarr on the advisability of such an approach, Professor Robert Schapiro concurs that "federal law has continued to provide the presumptive starting point for state constitutional analysis, and in interpreting state constitutions, courts generally adhere to federal doctrine."[220] The concepts and reasoning of constitutional analysis are dominated by discussions and decisions under the Federal Constitution, discussions and decisions which "form an extraordinarily strong undertow pulling upon state courts."[221] As a result of relying upon federal constitutional precedent, state courts "are out of practice speaking under their state constitutions."[222] Not surprisingly, the application of state constitutional limitations reaching beyond the confines of reflexively adopting federal analysis has been an intermittent and inconsistent application of state constitutionalism.[223] While the practice may be intermittent and inconsistent, state court jurisprudence has been seemingly more comfortable in putting down the federal interpretation security blanket with regard to inhibiting retroactive civil lawmaking. This comfort has been seen in some state supreme courts' interpretation of their state constitution's contracts clause and, even more so, due process protections.

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[217] Usman, *supra* note 137, at 1493. The term "security blanket" traces its existence as part of the American lexicon to Charles Schultz's character Linus. WEBB B. GARRISON, CAUSAL LEX: AN INFORMAL ASSEMBLAGE OF WHY WE SAY WHAT WE SAY 190 (2005).

[218] Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

[219] G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 208 (1998).

[220] Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 82 (1998).

[221] Usman, *supra* note 137, at 1493.

[222] Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 79 (2007).

[223] *See* Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 72–86 (2006) (examining the inconsistent application of state constitutionalism by Oregon, Washington, New Jersey, and New Hampshire).

i. The Contracts Clauses of State Constitutions

As discussed above, the federal constitutional prohibitions imposed through the Contracts Clause of the United States Constitution[224] once stood as a strong bulwark against retroactive civil legislation affecting private contractual relationships, but no longer. Now, "[t]hose who seek greater protection of private property rights and economic liberties may find state constitutions to be more congenial to their aims than the federal Constitution as interpreted by the U.S. Supreme Court."[225]

One particularly inviting area of exploration for attorneys litigating in state courts is the contracts clauses of state constitutions. There are at least thirty-nine states whose constitutions include a contracts clause;[226] these thirty-nine states contain approximately 82 percent of the population of the United States.[227] "The majority of states that afford greater protection against contract

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224 U.S. CONST. art. I, § 10, cl. 1.

225 Clint Bolick, *Brennan's Epiphany: The Necessity of Invoking State Constitutions to Protect Freedom*, 12 TEX. REV. L. & POL. 137, 139 (2007).

226 *See* ALA. CONST. art. I, § 22; ALASKA CONST. art. I, § 15; ARIZ. CONST. art. II, § 25; ARK. CONST. art. II, § 17; CAL. CONST. art. I, § 9; COLO. CONST. art. II, § 11; FLA. CONST. art. I, § 10; GA. CONST. art. I, § I, para. X; IDAHO CONST. art. I, § 16; ILL. CONST. art. I, § 16; IND. CONST. art. I, § 24; IOWA CONST. art. I, § 21; KY. CONST. § 19; LA. CONST. art. I, § 23; ME. CONST. art. I, § 11; MICH. CONST. art. I, § 10; MINN. CONST. art. I, § 11; MISS. CONST. art. 3, § 16; MO. CONST. art. I, § 13; MONT. CONST. art. II, § 31; NEB. CONST. art. I, § 16; NEV. CONST. art. I, § 15; N.J. CONST. art. IV, § 7 para. 3; N.M. CONST. art. II, § 19; N.D. CONST. art. I, § 18; OHIO CONST. art. II, § 28; OKLA. CONST. art. II, § 15; OR. CONST. art. I, § 21; PA. CONST. art. I, § 17; R.I. CONST. art. I, § 12; S.C. CONST. art. I, § 4; S.D. CONST. art. VI, § 12; TENN. CONST. art. I, § 20; TEX. CONST. art. I, § 16; UTAH CONST. art. I, § 18; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 23; WIS. CONST. art. I, § 12; WYO. CONST. art. 1, § 35. Contract clause provisions have long been widely incorporated into state constitutions. In their impressive study, Professor Steven G. Calabresi and Sarah E. Agudo note that

> twenty-five out of thirty-seven states in 1868—or just over two-thirds . . . prohibited laws impairing the obligation of contracts in their state bills of rights. . . . Sixty-three percent—or just under two-thirds—of the total population in 1868 lived in states with constitutions that forbade laws impairing the obligation of contracts. Contract clauses were present in 83% of Midwestern-Western state constitutions, in 73% of Southern state constitutions, and in 40% of Northeastern state constitutions. Contract clauses could be found in 61% of the pre-1855 and in 74% of the post-1855 constitutions.

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, 70 (2008).

227 As assessed in the 2010 Census, the population in these states were: Alabama (4,779,736), Alaska (710,231), Arizona (6,392,017), Arkansas (2,915,918), California (37,253,956), Colorado (5,029,196), Florida (18,801,310), Georgia (9,687,653), Idaho (1,567,582), Illinois (12,830,632), Indiana (6,483,802), Iowa (3,046,355), Kentucky (4,339,367), Louisiana (4,533,372), Maine (1,328,361), Michigan (9,883,640), Minnesota (5,303,925), Mississippi (2,967,297), Missouri (5,988,927), Montana (989,415), Nebraska (1,826,341), Nevada (2,700,551), New Jersey (8,791,894), New Mexico (2,059,179), North Dakota (627,591), Ohio (11,536,504), Oklahoma (3,751,351), Oregon (3,831,074), Pennsylvania (12,702,379), Rhode Island (1,052,567), South Carolina (4,625,364), South Dakota (814,180), Tennessee (6,346,105), Texas (25,145,561), Utah (2,763,885), Virginia (8,001,024), Washington (6,724,540), Wisconsin (5,686,986), Wyoming (563,626), for a total of 254,428,394 out of a total national population of 308,745,538. *Resident Population Data*: Population Density, 2010, *supra* note 162.

impairment apply heightened scrutiny within the basic framework of the federal test, either implicitly or explicitly."[228] The variance between state and federal constitutional protection of contract impairment appears through the more restrictive approach of state courts: compared to their federal counterparts, state courts review with less deference to state legislatures the purposes of legislative provisions when addressing contracts clause challenges under their respective state constitutions.[229] The variance also appears in state courts requiring a more substantial showing of the importance of the legislative purpose to justify impairing contractual obligations.[230] Other state courts holding an even sharper line are simply unwilling to apply the Supreme Court's lowering restrictions upon the impairment of contracts.

As illustrations of this divergence from federal standards, the North Dakota Supreme Court has rejected retroactive legislation that shortens the period of redemption to mortgages executed prior to the enactment of the legislation, concluding that such interference constitutes a per se unconstitutional impairment of contractual obligations.[231] The Arizona courts, while acknowledging that the constitutional prohibition on impairment of contracts is not absolute, nevertheless have indicated that

> we cannot ignore or render the prohibition completely ineffective based upon a currently popular legislative program, even if it is rational. . . .
>
> What then are the "conditions" that may "be found to be within the range of the reserved power" so as to allow the police power to supersede the impairment limitation? . . . [W]e can say that, at least, the condition that would allow legislation to impair contracts constitutionally must be of such magnitude as to bring to the general consciousness of the public a feeling of urgency and need. Anything less would unduly undermine the constitutional limitation against impairment of contracts.[232]

Furthermore, rather than simply accepting the legislature's purported rational purpose, or at least the purpose advanced by the state attorney general's office in defending legislation against challenges under state contracts clauses, state courts have been more willing than their federal counterparts to peer behind the curtain to ascertain the legislature's actual motive when imposing retroactive changes impairing the obligations of contracts. The Virginia Supreme Court, for example, found a legislative scheme that had retroactive effect unconstitutional under the Virginia Constitution because it was "not a proper exercise of the police power but simply an effort to protect a small group of wholesalers from possible economic loss."[233] Similarly, the Minnesota Supreme Court rejected a retroactive civil legislative measure because it "has all the earmarks of narrow special interest legislation devoid of any broad

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[228] Brian A. Schar, Note, *Contract Clause Law Under State Constitutions: A Model for Heightened Scrutiny*, 1 TEX. REV. L. & POL. 123, 133 (1997).
[229] *See id.* at 135.
[230] *See id.* (citing Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412 (1983)).
[231] First Fed. Sav. & Loan Ass'n of Grand Forks & Minot v. Haley, 357 N.W.2d 492, 494–95 (N.D. 1984).
[232] Earthworks Contracting, Ltd. v. Mendel-Allison Const. of Cal., Inc., 804 P.2d 831, 836 (Ariz. Ct. App. 1990).
[233] Heublein, Inc. v. Dep't of Alcoholic Beverage Control, 376 S.E.2d 77, 79 (Va. 1989).

public purpose."[234] While certainly not every state supreme court is likely to embrace a more expansive protection against retroactive civil lawmaking that impairs contractual obligations, there has already been success in finding protection in a number of states, and there is certainly opportunity for further expansion.

ii. State Constitutional Due Process Clauses

While contracts clauses in state constitutions offer potential opportunities for limiting retroactive civil legislation, perhaps the more significant state constitutional limitation upon the ability of lawmakers to legislate retroactively is state constitutional due process protections. Given the fundamental unfairness with which retroactive legislation is perceived, this is, perhaps, not surprising. Forty-four state constitutions contain express due process clauses or synonymous[235] law-of-land provisions,[236] while the remaining six states have construed various constitutional provisions to provide the same effect as due process clauses and law-of-land provisions.[237] Whereas the federal courts have largely retreated from meaningful restraint on retroactive lawmaking based upon due process considerations under the Fifth or Fourteenth Amendments, state courts addressing corollary state constitutional provisions have reviewed retroactive legislation in a manner with considerably more bite.

The Florida Supreme Court's approach is reflective of the more aggressive approach of state courts in handling retroactive civil measures:

> [E]ven where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested

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[234] Jacobsen v. Anheuser-Busch, Inc., 392 N.W.2d 868, 874–75 (Minn. 1986).

[235] *See* David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 585 (2009) (concluding that "[t]he 'law of the land' over time became synonymous with due process of law, and the early state constitutions typically contained law of the land clauses in lieu of due process clauses"). *See also, e.g.*, Commonwealth v. Lyons, 492 N.E.2d 1142, 1144 (Mass. 1986) ("The phrase 'law of the land' does not refer to the statutory law of the Commonwealth, as it exists from time to time. Rather, it refers, in language found in Magna Charta, to the concept of due process of law."); Commonwealth v. Devlin, 333 A.2d 888, 891 (Pa. 1975) ("It has been a long-standing tenet of Pennsylvania jurisprudence that 'the law of the land' in Article I, Section 9 is synonymous with 'due process of law.' ").

[236] *See* ALA. CONST. art. I, § 6; ALASKA CONST. art. I, § 7; ARIZ. CONST. art. II, § 4; ARK. CONST. art. II, § 21; CAL. CONST. art. I, § 7; COLO. CONST. art. II, § 25; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 7; FLA. CONST. art. I, § 9; GA. CONST. art. I, § 1, para. 1; HAW. CONST. art. I, § 5; IDAHO CONST. art. I, § 13; ILL. CONST. art. I, § 2; IOWA CONST. art. I, § 9; KY. CONST. § 11; LA. CONST. art. I, § 2; MD. CONST. Declaration of Rights art. 24; MASS. CONST. pt. 1, art. XII; ME. CONST. art. I, § 6-A; MICH. CONST. art. I, § 17; MINN. CONST. art. I, § 7; MISS. CONST. art. III, § 14; MO. CONST. art. I, § 10; MONT. CONST. art. II, § 17; NEB. CONST. art. I, § 3; NEV. CONST. art. I, § 8; N.H. CONST. pt. 1, art. 15; N.Y. CONST. art. I, § 6; N.C. CONST. art. I, § 19; N.D. CONST. art. I, § 12; N.M. CONST. art. II, § 18; OKLA. CONST. art. II, § 7; PA. CONST. art. I, § 9; R.I. CONST. art. I, § 2; S.D. CONST. art. VI, § 2; TENN. CONST. art. I, § 8; S.C. CONST. art. I, § 3; TEX. CONST. art. I, § 19; UTAH CONST. art. I, § 7; VT. CONST. ch. I, art. 10; VA. CONST. art. I, § 11; WASH. CONST. art. I, § 3; W. VA. CONST. art. III, § 10; WYO. CONST. art. I, § 6.

[237] John Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal*, 21 RUTGERS L.J. 819, 852 & nn.160–62 (1990).

> right, creates a new obligation, or imposes a new penalty. Therefore, the central focus of this Court's inquiry is whether retroactive application of the statute "attaches new legal consequences to events completed before its enactment."[238]

Setting forth in plain terms the limitations imposed by due process, the Arizona Supreme Court similarly concluded that "legislation may not disturb vested substantive rights by retroactively changing the law that applies to completed events."[239] Definitively breaking from a minimal rational basis approach, the Maryland Court of Appeals, the state's highest court,[240] declared that

> [i]t has been firmly settled by this Court's opinions that the Constitution of Maryland prohibits legislation which retroactively abrogates vested rights. No matter how "rational" under particular circumstances, the State is constitutionally precluded from abolishing a vested property right or taking one person's property and giving it to someone else. The state constitutional standard for determining the validity of retroactive civil legislation is whether vested rights are impaired and *not* whether the statute has a rational basis. . . .
>
> Moreover, with regard to the argument that the "rational basis" test is the appropriate standard for determining the validity of retroactive legislation, this Court has held that the General Assembly's view "of right or justice" will not validate retroactive abrogations of vested rights.[241]

Interpreting its constitutional protections of due process, Wisconsin allowed impairment of vested rights but required the retroactive application of the civil legislation to serve a public purpose that is valid, substantial, and intended to promote a general economic or social interest.[242] If the retroactive application surmounts that hurdle, then the Wisconsin courts balance the legislative interest against the affected private interest.[243] Ultimately, the determination for Wisconsin courts hinges upon "whether the retroactive statute unfairly overturns the challenger's settled expectation in any accrued rights."[244] Thus, acting under their respective state constitutional due process clauses, many states are applying approaches that bear a striking resemblance to state courts' interpretation of the express broad-based state constitutional limitations upon retroactive civil laws.

Adhering to an approach akin to the Arizona and Florida Supreme Courts,[245] the Illinois Supreme Court struck down an attempt by the state legis-

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238 Menendez v. Progressive Express Ins. Co., 35 So. 3d 873, 877 (Fla. 2010) (citations omitted). This test mentioned above is a common framing of assessment of whether a civil legislative measure is retroactive. *See also, e.g.*, Howell v. Heim, 882 P.2d 541, 547 (N.M. 1994) ("A statute or regulation is considered retroactive if it impairs vested rights acquired under prior law or requires new obligations, imposes new duties, or affixes new disabilities to past transactions.").

239 San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 189 (Ariz. 1999).

240 GIBBS SMITH EDUC., MARYLAND GOVERNMENT 128 (2010).

241 Dua v. Comcast Cable of Md., Inc., 805 A.2d 1061, 1072–73 (Md. 2002).

242 *See In re* Paternity of John R.B., 690 N.W.2d 849, 857 (Wis. 2005).

243 *Id.* at 859.

244 *Id.*

245 The Illinois Supreme Court indicated that, to determine if a law has a retroactive effect, the Court will "consider whether retroactive application of the new statute will impair rights a party possessed when acting, increases a party's liability for past conduct, or impose new duties with respect to transactions already completed." Doe A. v. Diocese of Dallas, 917 N.E.2d 475, 482 (Ill. 2009).

lature to lift the statute of limitations bar in clerical sex abuse cases, concluding that "once a claim is time-barred, it cannot be revived through subsequent legislative action without offending the due process protections of our state's constitution."[246] This is far from the only example of state courts imposing restrictions upon state governments for unconstitutionally interfering with vested rights in violation of state constitutional law due process protections. The Arizona Supreme Court rejected statutory changes that reduced the property interest of a group of private property owners to use surface water by, among other means, providing that certain past conduct relinquished water usage rights retroactively.[247] The Florida Supreme Court concluded that the legislature could not retroactively impose a statutory pre-suit notice provision on persons seeking to recover personal injury protection benefits from insurance policies obtained prior to the passage of the legislation.[248] The Maryland Constitution has been employed to prohibit retroactive permitting of cable television late fees and subrogation authorization for health maintenance organizations.[249] The due process protections of the Iowa and Louisiana Constitutions have each been interpreted to prohibit eliminating a right to a cause of action after it has accrued.[250] Additionally, the Wisconsin Supreme Court has invalidated the imposition of retroactive damage caps on parties after the occurrence of parties' injury.[251]

Pursuant to their respective due process provisions, "many state constitutions . . . prohibit retrospective laws that take away or impair vested rights acquired under existing laws, or create a new obligation, impose a new duty, or attach a new disability in respect to transactions or considerations already past."[252] However, "[d]etermining exactly when a right has become 'vested' is no easy task."[253] The vested rights doctrine "has long been recognized as the progenitor of our modern law of substantive due process."[254] In a remarkable work of scholarship, Professor James L. Kainen explores this connection between vested rights doctrine and substantive due process and addresses the distinctions between nineteenth-century and modern thought with regard to vested rights:

> The role that substantive due process currently plays in determining whether a statute is retroactive is the same role that the doctrine of vested rights played in the nineteenth century. In vested rights analysis, a statute that altered a vested interest would be viewed as retrospective, while a statute that altered a non-vested interest would be viewed as operating only prospectively. The analysis then turned on the

[246] *Id.* at 486.
[247] *See* San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 190–92 (Ariz. 1999).
[248] *See* Menendez v. Progressive Express Ins. Co., 35 So. 3d 873, 876–80 (Fla. 2010).
[249] *See* Dua v. Comcast Cable of Md., Inc., 805 A.2d 1061, 1081–85 (Md. 2002).
[250] *See* Thorp v. Casey's Gen. Stores, Inc., 446 N.W.2d 457, 460–63 (Iowa 1989); Bourgeois v. A.P. Green Indus., Inc., 783 So. 2d 1251, 1259 (La. 2001).
[251] Martin v. Richards, 531 N.W.2d 70, 91–93 (Wis. 1995).
[252] Clemens Muller-Landau, *Legislating Against Perpetuity: The Limits of the Legislative Branch's Powers to Modify or Terminate Conservation Easements*, 29 J. LAND RESOURCES & ENVTL. L. 281, 311 (2009) (internal quotation omitted).
[253] *Id.*
[254] Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 262–63 (1997).

definition of vesting with particular focus on what event was legally necessary to establish an interest as vested. The chosen legal vesting event served as a benchmark from which to judge whether a statute operated retrospectively. For instance, if inchoate dower is defined as vesting at marriage or at seisin of the husband, a statute abolishing inchoate dower would be considered retrospective in its application. On the other hand, if the vesting event is not marriage or seisin, but rather the death of the husband, inchoate dower interests are not vested, and a statute extinguishing those interests would be held to operate only prospectively.

In modern retrospectivity analysis, considerations of substantive due process play the same role as vesting analysis once did.[255]

Shifted from its nineteenth-century legal formalism application, the terminology of vested rights becomes not definitional but instead a locus of conceptual understanding of "[t]he traditions, mores, and instincts of a community" that frame, through political and sociological lenses, what will be deemed vested.[256] Accordingly,

> [w]hether a law is vested-rights retroactive is a question . . . which can only be answered after examining the interaction between the law and the society upon which it is imposed. The interaction is sometimes easy to foresee, however. It can confidently be predicted that a law delaying the collection of debts for one year will have a substantial impact on a commercial society such as ours. On the other hand, it was early held in response to the enactment of allegedly "retroactive" divorce laws that marriage contracts were "not the kind of contract" covered by the contract clause.[257]

For modern jurists approaching issues of retroactivity, their lenses are not focused on formal legal vesting principles as much as upon the attribution of present legal consequences upon past events.[258] In Professor Kainen's view, the modern jurist has essentially moved beyond being concerned with retroactivity; consequently, the modern jurist treats retroactive application for practical purposes no differently than any other legislative determination in assessing whether there is a violation of substantive due process.

While this analysis fits with federal court jurisprudence and offers tremendous insight into shifts in the vested rights doctrine, state courts have not entirely abandoned the legal considerations of whether a right has actually vested[259] and have not embraced the folding of prospective and retrospective legislation into undivided amalgamation. With due process, the jurists stand in much the same position as the children on the playground evaluating the basic

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[255] Kainen, *supra* note 57, at 118–19.

[256] Comment, *The Variable Quality of a Vested Right*, 34 YALE L.J. 303, 307 (1925).

[257] W. David Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CAL. L. REV. 216, 218 (1960).

[258] *See* Kainen, *supra* note 57, at 118–19.

[259] As a few examples, numerous state courts have spent a considerable amount on toner in considering whether a cause of action and/or defense constitutes "a right" and when exactly a cause of action vests. *See, e.g.*, Am. Optical Corp. v. Spiewak, 73 So. 3d 120, 123–30 (Fla. 2011); Holt *ex rel*. Holt v. Wesley Med. Ctr., LLC, 86 P.3d 1012, 1016–17 (Kan. 2004); Austin v. Abney Mills, Inc., 824 So. 2d 1137, 1148–54 (La. 2002); Weathers v. Metro. Life Ins. Co., 14 So. 3d 688, 692 (Miss. 2009); Manitoba Pub. Ins. Corp. v. Dakota Fire Ins. Co., 743 N.W.2d 788, 793 (N.D. 2007); Groch v. Gen. Motors Corp., 883 N.E.2d 377, 404 (Ohio 2008); Konidaris v. Portnoff Law Assocs., 953 A.2d 1231, 1242 (Pa. 2008); Estate of Bell v. Shelby Cnty. Health Care Corp., 318 S.W.3d 823, 830 (Tenn. 2010); Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co., 146 P.3d 914, 922–23 (Wash. 2006).

fairness of the imposition of present legal consequences upon past events over which the parties cannot exercise control. It is apparent from the jurisprudence of state courts that state supreme court justices are significantly more comfortable calling foul on the actions of state legislatures than their federal counterparts where the state legislature is engaged in retroactive civil lawmaking. This produces a form of due process review under which state supreme court justices apply state constitutional constraints to state legislative action that "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past."[260]

IV. Conclusion

During the nineteenth- and early twentieth-century, the federal courts interpreted the United States Constitution as imposing substantial limitations on the ability of state legislatures to engage in retroactive civil lawmaking. The federal courts, however, have significantly withdrawn from imposing a more searching review of retroactive civil legislation, collapsing much of the jurisprudential divide in assessing the constitutionality of prospective and retrospective lawmaking. Their state brethren, however, remain considerably more actively engaged in limiting retroactive civil laws through their interpretation of state constitutional provisions. The citizens and attorneys who anticipate that the Constitution will afford relief against retroactive civil laws imposed by state legislatures are not wrong; they are simply looking to the wrong constitution.

[260] Soc'y for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156).