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The Supreme Court's holding that the due process clause limited state courts' power was surprising only in that it had taken so long. Many legal commentators had argued for years that jurisdiction of state courts over specific people was a due process problem, not a question of the competing sovereignties of two or more states.¹⁵ Indeed, the older sovereignty theory, a relic of pre-Civil War jurisprudence, virtually had ignored an ancient line of English case law extending back to Article 39 of Magna Charta, ancient predecessor of the due process clause. These cases, dealing with the question of judicial immunity, long ago had established virtually the same due process limitation on judicial power announced in 1982 by the Supreme Court.

As early as 1613, English courts had recognized that Article 39 restricted the power of judges. Early English decisions had found that judges lost immunity from suit for acts clearly beyond their jurisdiction.¹⁶ Only in a single area did the English common law grant a broad form of immunity to judges, Recognizing a need to protect judges from the displeasure of the Crown and its ministers, the Star Chamber in *Floyd v. Barker*¹⁷ had held that a judge could not be prosecuted in another court for an alleged criminal conspiracy in the way he had handled a murder trial. In refusing to try the case, the judges of Star Chamber held simply that if the king wished to discipline a judge, the king must do so himself without resort to a criminal prosecution.¹⁸

Despite this narrow focus, Floyd frequently is cited as the foundation of the American judicial immunity doctrine.¹⁹ The federal courts' lavish reliance on this Star Chamber decision is puzzling. While the immunity doctrine focuses exclusively on civil liability for judicial acts, Floyd is concerned not with liability but with the proper method of disciplining alleged misconduct of judges. Indeed, Floyd's central concern is not judicial immunity at all, but judicial independence from the executive branch of government. The American constitutional system largely has resolved the problem that preoccupied the judges who wrote Floyd.

The current American immunity doctrine not only was a serious departure from its common law antecedents but also broke with early American case law. As early as 1806, the Supreme Court in *Wise v. Withers*²⁰ had recognized a right to sue a judge for exercising authority beyond the jurisdiction authorized by statute. In 1869, one year after passage of the Fourteenth Amendment and long before due process had assumed its modern contours, the Supreme Court



made its first effort to define the limits imposed on state judges. The Court held that state judges possessing general powers were not liable “unless perhaps when the acts ... are done maliciously or corruptly.”²¹ Then in 1872, one year after the civil rights laws were passed, the Supreme Court overruled its earlier dictum and announced that judges would not be liable even for malicious or corrupt acts.²²

This 1872 expansion of the immunity doctrine was an abrupt departure even from the common law recognized by a majority of the states in the Civil War era. By the time civil rights legislation passed in 1871, only 13 states had granted their judges a broad form of judicial immunity, while six states had found judges unquestionably liable for malicious acts in excess of jurisdiction.²³ Eighteen other states had not addressed the issue at all,²⁴ although many recognized English common law as binding precedent. Thus, from 1869 to 1872 the Supreme Court extended a sweeping form of immunity to state-court judges that a majority of the states themselves would not have recognized under their own law.

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Footnotes

¹⁵ See, for example, Lewis (1983) for a discussion of the historical development of the Supreme Court’s theory of state-court jurisdiction.

¹⁶ See **The Case of the Marshalsea**, 77 Eng. Rep. 1027 (K.B. 1613) (no immunity when Court of the Marshalsea asserted jurisdiction over persons outside the king’s household, its sole jurisdiction). The Marshalsea court specifically traced jurisdictional limits to Article 39 of Magna Charta (Id. at 1035).

¹⁷ 77 Eng. Rep. 1305 (Star Chamber 1608).

¹⁸ Id. at 1307.

¹⁹ See, for example, *Pulliam v. Allen*, 104 S. Ct. 1970, 1975 (1984). The Supreme Court first relied on Floyd as a precedent for judicial immunity in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351 (1872).

²⁰ 7 U.S. (3 Cranch) 331 (1806).

²¹ *Randall v. Brigham*, 74 U.S. (13 Wall.) 523, 535-36 (1869).



²² Bradley v. Fisher, 80 U.S. (13 Wall.)335, 351 (1872).

²³ Liability of Judicial Officers” (1969, pp. 326-27 and nn, 29-30).

²⁴ Id. at327 nn.31, 32 and accompanying text.

