October Term, 1896—Embracing Due Process

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By the time the Supreme Court handed down its famous liberty-of-contract decision in Allgeyer v. Louisiana, the "Lochner era"—according to most accounts—was officially under way. Although preceded by other decisions suggesting that the Fourteenth Amendment's Due Process clause might impose substantive limits on the scope of state legislative power, Allgeyer is often considered to be the first decision in which the Court struck down a state law on "substantive due process" grounds. In addition, what is often regarded as the first instance of "incorporation" of the Bill of Rights through the Due Process Clause took place during the same Term. In Chicago, Burlington & Quincy Railroad v. Chicago, the

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1. 165 U.S. 578 (1897). Allgeyer is discussed infra. text at notes 55-84.

2. See, e.g., Laurence H. Tribe, American Constitutional Law 1344 (3d ed. 2001) (observing that the Lochner era (Lochner v. New York, 198 U.S. 45 (1905)) began "around the turn of the century with Allgeyer"); see also Gerald Gunther & Kathleen M. Sullivan, Constitutional Law 457 (14th ed. 2001) (noting that with Allgeyer, "the slow movement to substantive due process was completed"); Kermit L. Hall, The Magic Mirror—Law in American History 236 (1989) ("The Court's transformation of the due process clause of the Fourteenth Amendment was completed in Allgeyer v. Louisiana"); Geoffrey R. Stone, et al., Constitutional Law 712 (4th ed. 2001) ("In [Allgeyer], the Court took the final step toward Lochner").

3. For a sample of some of the more familiar dicta, see Mugler v. Kansas, 123 U.S. 623, 661 (1877) (noting that not all legislative acts would be "legitimate exertion[s]" of legislative power); Railroad Comm'n Cases, 116 U.S. 307, 331 (1886) (doubting constitutionality of a state's taking of private property for public use without just compensation); Hurtado v. California, 110 U.S. 516, 535 (1884) ("It is not every act, legislative in form, that is law."); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 133 (1873) (noting "grave" due process question if state were to outlaw sale of property that was lawful to own when acquired).

4. See, e.g., Hall, supra note 2, at 236 (calling Allgeyer "the first case in which the justices relied fully on a substantive interpretation of due process to strike down a state law"); William E. Nelson, The Roots of American Bureaucracy, 1830-1900, at 152 (1982) (stating that, in Allgeyer "a majority of the Supreme Court first joined in an opinion deciding a matter on substantive due process grounds"); Herbert Hovenkamp, The Political Economy of Substantive Due Process, 40 Stan. L. Rev. 379, 447 n.46 (1988) (declaring Allgeyer "the first substantive due process case"); cf Stone et al., supra note 2, at 712 (concluding that Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890) ("Milwaukee Road"), was "the first time that the Court relied directly on the due process clause to invalidate a state economic regulation"). As noted below, it is open to question whether the Milwaukee Road decision rested on what today would be called substantive as opposed to procedural due process grounds. See infra note 47.

5. 166 U.S. 226 (1897).
Court concluded that the just compensation principle respecting takings of property (which the Fifth Amendment had made applicable to the federal government) was applicable against the states as an aspect of Fourteenth Amendment due process. In fact, both decisions—Allgeyer and Chicago, Burlington—were handed down the same day: March 1, 1897.6

The invocation of due process to impose substantive limits on state action hardly came out of the blue, at least given the Court’s earlier signals. As others have shown, the Court as a whole and certain of its Justices in particular (most notably Justice Field) had indicated that “special, partial or arbitrary” laws and “class legislation” were illegitimate exertions of governmental power.7 In addition, it is a familiar story that nineteenth century state courts had fallen into the habit of imposing fundamental limits on state action, frequently through generous readings of “due process” and “law of the land” clauses in state constitutions.8 Even the federal courts, including the Supreme Court, were accustomed to striking down state laws in diversity-of-citizenship actions.9 Ostensibly applying state constitutional law—but operating under the pre-Erie10 regime of Swift v. Tyson11—federal courts sometimes invalidated state laws based on their inconsistency with uniform “general” (but nonfederal) constitutional principles that, in hindsight, had a decidedly substantive-due-process ring to them. Nevertheless, and despite these developments, Allgeyer and Chicago, Burlington are often recognized as having first


11. 41 U.S. (16 Pet.) 1 (1842). The development of general constitutional law in diversity actions provides a public-law parallel to the private-law developments most often associated with Swift.
applied such substantive limits against the states as a matter of genuinely federal constitutional law.

There’s nothing terribly wrong with this account, as far as it goes. *Allgeyer* and *Chicago, Burlington* are both early and representative illustrations of the Court’s having crossed a threshold, and both involved decisions in which the due process language was necessary to the outcome. It does, however, overlook the fact that at least by a few months they were probably not the first examples from the Court. And it forgets that within a very short space of time during the 1896 Term—from November 1896 through March 1897—the Court began in earnest to federalize a number of general-law limits on state legislation (once applied only in the exercise of their diversity jurisdiction) under the aegis of the Fourteenth Amendment’s Due Process Clause.

Three less well remembered decisions earlier in the Term appear to have set the stage for the two better remembered opinions of March 1st—neither of which, as discussed below, entirely lives up to its reputation as due process “firsts.” These other decisions, along with those of March 1st, show that the new wave of judicial review of state legislation under the Fourteenth Amendment reflected considerable continuity with both the substance and methodology of the Court’s earlier elaboration of general constitutional limits on state action in diversity suits. Although the source of constitutional principles applied in the Term’s decisions underwent a shift from general law to genuinely federal law, the quiet changeover lends support to *Lochner* revisionists who argue that that the origins of substantive due process were considerably less innovative than others have pictured it. In addition, although the development of substantive due process associated with *Allgeyer* would eventually receive something of a jurisprudential black eye that incorporation of the Bill of Rights associated with *Chicago, Burlington* mostly managed to avoid, the shared origins of the two developments also suggests—as some have contended—that they once had more in common than is sometimes supposed. Finally,

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12. The term refers to those who see themes of continuity in the rise of so-called substantive due process. See Gary D. Rowe, *Lochner Revisionism Revisited*, 24 L. & SOC. INQUIRY 221 (1999) (describing and critiquing revisionist scholarship); see also Stephen Griffin, *American Constitutionalism* 101 (1998) (“The most important insight to emerge from the recent historiography of the *Lochner* era is that it was neither an aberrant period of activism that represented a fundamental break with the past nor a period in which the Supreme Court suddenly adopted a laissez-faire or pro-business ideology...”); *id.* at 100-101 nn.49-50 (noting revisionist and traditionalist scholarship).

13. Professor White, for example, has observed that the dichotomy between “substantive due process” and “incorporation” of the Bill of Rights was a modern construct, designed to legitimate the New Deal’s embrace of rigorous judicial review of certain preferred rights and its rejection of the Old Court’s police-power analysis that sought to mark out the respective spheres of legitimate state power and private rights. See G. Edward White, *The Constitution and the New Deal* 241-68 (2000); see also Robert Brauneis, “The Foundation of Our ‘Regulatory Takings’ Jurisprudence: The Myth and Meaning of Justice Holmes’s Opinion in Pennsylvania Coal Co. v. Mahon,” 106 YALE L.J. 613, 666-670 (1996) (arguing that the Court’s early twentieth-century takings opinions did not involve incorporation, but substantive due process).
this quick sketch of the Term’s due process decisions may also provide clues as to why, in a relatively short amount of time, the Court (rightly or wrongly)\textsuperscript{14} began to transform what were once only general law limits on state action into genuinely federal ones.

1. FROM GENERAL TO FEDERAL CONSTITUTIONAL LAW

The first of the stage-setting opinions of the 1896 October Term was an early Justice Peckham decision in \textit{Fallbrook Irrigation District v. Bradley}.\textsuperscript{15} Handed down on November 16th, the decision announced that the Due Process Clause imposed a “public purpose” limitation on state taxation. Up to then, the public-purpose maxim—which expressed a probably widely shared understanding that government could act only for the common good\textsuperscript{16}—had been a fixture in state court decisions as a matter of state constitutional law.\textsuperscript{17} It was also the staple of treatise writers who sought to develop uniform principles of American constitutional law that cut across various jurisdictions.\textsuperscript{18}

The principle had also been previously invoked as a substantive limit on the states’ police powers as a matter of general law in federal court diversity cases.\textsuperscript{19} In one well-known example, \textit{Loan Association v.}

\textsuperscript{14} The normative criticism of the Court’s embrace of substantive due process is well articulated elsewhere, and is beyond the scope of this brief Essay, which seeks to focus on the internal dynamics of the Court’s move from general to federal constitutional law. For critiques of the application of due process to matters other than “process,” see, e.g., \textit{John Harrison, “Substantive Due Process” and the Constitutional Text}, 83 VA. L. REV. 493 (1997); \textit{Frank Easterbrook, Substance and Due Process}, 1982 SUP. CT. REV. 85. Other critiques of the Old Court focus on its treatment of the incorporation of the Bill of Rights (and other limits on government). See, e.g., Akhil Reed Amar, \textit{The Supreme Court 1999 Term, Foreword: The Document and the Doctrine}, 114 HARV. L. REV. 26, 122-24 (2000) (disparaging due process analysis in favor of a “document-supported” reinvigoration of the Fourteenth Amendment’s Privileges or Immunities Clause); Kevin Newsom, \textit{Setting Incorporation Straight: A Reinterpretation of the Slaughter-House Cases}, 109 YALE L.J. 643 (2000) (concluding that incorporation of the Bill of Rights through the Privileges or Immunities Clause is not foreclosed by precedent).

\textsuperscript{15} 164 U.S. 112 (1896).

\textsuperscript{16} The sentiment, of course, had venerable roots. See \textit{John Locke, Two Treatises of Government, Book II}, at 131 (Peter Laslett ed., Cambridge Univ. Press 1988) (1698) (positing the “common good” as the touchstone of the legitimacy of governmental action).

\textsuperscript{17} \textit{See Jacobs, supra note 8, at 100-122, 128-52 (discussing articulation of the public-purpose principle in nineteenth century state courts); see also Barry Cushman, Rethinking the New Deal Court 47-48 (1998) (noting the deep roots of the public-private distinction in American law).

\textsuperscript{18} \textit{See}, e.g., \textit{Thomas A. Cooley, A Treatise on the Constitutional Limitations} 487-95 (1868); \textit{Tiedeman, supra note 8, at 474-77; see also Jacobs, supra note 8, at 59-63, 100-27 (discussing the roles of treatise writers Christopher Tiedeman, Thomas Cooley, and John F. Dillon in shaping the development of public-purpose limits in constitutional litigation).

\textsuperscript{19} \textit{See}, e.g., City of Parkersburg v. Brown, 106 U.S. 487, 500-02 (1883); Cole v. City of La Grange, 19 F. 871, 872-73 (C.C.E.D. Mo. 1884); \textit{aff’d}, 113 U.S. 1 (1885); Jarrott v. Moberly, 13 F. Cas. 366, 367 (C.C.W.D. Mo. 1878) (No. 7223); Commercial Nat’l Bank v. Iola, 6 F. Cas. 221, 223-24 (C.C.D. Kan 1873) (No. 3061); cf. Township of Pine Grove v.
Topeka, the Court held that a tax for nonpublic purposes was invalid—not as a matter of federal constitutional law, but ostensibly as a matter of state constitutional law, as freely interpreted by the federal diversity courts under Swift. Justice Miller’s opinion in Loan Association relied on nothing in the U.S. Constitution, but instead relied on various decisions interpreting state constitutions, the opinions of treatise writers, and general principles regarding “limitations on . . . power which grow out of the essential nature of all free governments.”

In Fallbrook, however, Justice Peckham, did not attempt to explain why—if the U.S. Constitution was now to be relied upon as imposing a similar limit—the procedurally sounding language of “due process” was the right place to look, and he expressly refused to provide an explanation of what the phrase meant. He was even so candid as to note that “[t]here is no specific provision in the Federal Constitution which acts upon the States” respecting a public-purpose requirement, before proceeding on the unarticulated assumption that the Due Process Clause was provision enough. To be sure, the Court in Fallbrook did not strike down the tax which was at issue in that decision (although Justice Field and Chief Justice Fuller would have done so), because the majority found the public-

Talcott, 86 U.S. (19 Wall.) 666, 672-79 (1874) (relying on general constitutional principles in a diversity suit to uphold a bond issuance as furthering a valid public purpose, state decisional law to the contrary notwithstanding).

20. 87 U.S. (20 Wall.) 655 (1874). In Loan Association, the Court struck down a tax enacted to pay off municipal bonds issued in aid of private manufacturing. See id. at 664 (calling such an act “robbery. . . done under the forms of law”). By contrast, the Court in decisions such as Gelpke v. Dubuque, 68 U.S. (1 Wall.) 175 (1863), had enforced general constitutional law to uphold bond issuances subsidizing railroads, on the theory that railroads, unlike manufacturers, were sufficiently imbued with the public interest. See Loan Ass’n, supra at 665 (noting that it was the Court’s job to discern the “line” between governmental action for private as opposed to public purposes); see also Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 Res. L. & Soc. 3, 6-7 (1980) (focusing on boundary policing as characteristic of classical legal thought).

21. 87 U.S. (20 Wall.) at 661-65. For Miller, opting for general constitutional law may have been a prudential move to avoid elaboration of the Due Process Clause. See Charles Fairman, Mr. Justice Miller and the Supreme Court 194-206 (1939). But Miller, like Peckham, was reluctant to ignore settled interpretations of state constitutional law. See, e.g., Gelpke, 68 U.S. (1 Wall.) at 209-10 (Miller, J., dissenting).

22. Fallbrook, 164 U.S. at 157 (after noting the difficulty of a “definition of what is embraced by the phrase ‘due process of law,’” Peckham deadpanned: “None will be attempted here.”).

23. Id. at 158. In Munn v. Illinois, 94 U.S. 113, 120 (1877), the Court turned back a Due Process Clause attack on legislative power to regulate rates charged by grain elevators, stating that government could regulate for “the common good” and that regulation of the use of property “affected with a public interest,” was a permissible exercise of the police power.

24. Fallbrook, 164 U.S. at 179. The Court upheld an assessment for an irrigation district alleged to benefit only certain of the assessed landowners, concluding that the “absolute right of ownership must yield to some extent” for the “public benefit.” Id. at 163. In the course of the opinion, the Court also disposed of a procedural due process claim (id. at 164-70), and a taking without just compensation claim (id. at 176-77). Professor Siegel therefore considers Fallbrook (rather than Chicago, Burlington) to have been the moment when the Court first
purpose requirement satisfied. But it made clear that the familiar public-purpose maxim articulated in Loan Association had found a home in the Fourteenth Amendment and that the Court would independently scrutinize the existence of such a purpose when passing on challenges to state and local legislation. That was significant because, after the narrow interpretation of the Fourteenth Amendment in the Slaughter-House Cases25 and before decisions such as Fallbrook, the federal courts’ development of fundamental limits on state action had taken place primarily through the mechanism of diversity jurisdiction (through the invocation of general law, and primarily on behalf of out-of-staters), rather than as a matter of due process (which, as a federal question, could be raised by in-staters as well).26

Interestingly, even though Fallbrook came from a lower federal court and involved diverse parties, Justice Peckham did not attempt to resolve the question as one of general constitutional law as he might have, and as had previously happened in Loan Association. Although the Lochner era is sometimes associated with an natural law bias,27 Peckham invoked positivist and federalist themes for not relying on “general principles of constitutional law”28 as had been urged by counsel:

We should not be justified in holding the act to be in violation of the state constitution in the face of clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we were deciding principles of general constitutional law. If the act violate any provision. . . of the Federal Constitution, it is our duty to so declare it; but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest state court upon questions involving the construction of state statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law.29

In part, then, it was the felt limitation on general constitutional lawmaking—at least in the face of unambiguous and settled state court decisions regarding state constitutional meanings—that prompted the Court to turn to the federal Constitution to assess the nonresident’s challenge. But the decision also meant that the Court would now be able to consider an in-stater’s public-purpose challenge to state taxation as raising a genuinely federal claim under the Fourteenth Amendment.

“incorporated” the Takings Clause of the Fifth Amendment through the Fourteenth. Steven A. Siegel, Understanding the Lochner Era: Lessons From the Controversy over Railroad and Utility Rate Regulation, 70 VA. L. REV. 187, 216 n.130 (1984).

25. 83 U.S. (16 Wall.) 36 (1873).


28. Fallbrook, 164 U.S. at 129 (argument of counsel (Maxwell)); see also id. at 131 (argument of counsel (Choate)) (arguing on the basis of the state constitution, the federal constitution, and “those uniform constitutional provisions” in all state constitutions).

29. Id. at 155.
II. FROM A. TO B.

Closely related to Fallbrook's conclusion that—as a matter of federal constitutional law—taxation must be for public purposes was the Court's unanimous decision in Missouri Pacific Railway v. Nebraska, which held for the first time that the Fourteenth Amendment prohibited governmental takings of property for the private use of another. As had been true of Fallbrook decided only two weeks earlier, the limitation of the state's eminent domain power that received its federal constitutional status in Missouri Pacific was already familiar to in state constitutional circles and elsewhere. The anti-redistributionist admonition against "tak[ing] property from A. and giv[ing] it to B." had previously been invoked by federal courts as a matter of general constitutional principles in diversity actions, including by the Court in Loan Association. Even when the Court once seemed reluctant to give a broad scope to the Due Process Clause, it had suggested in dicta that a taking of property for a nonpublic use presented a classic illustration of what federal due process would forbid.

But the Court never had to rely on due process to strike down a

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30. 164 U.S. 403 (1896). Missouri Pacific was decided on November 30, 1896. See id. at 403.

31. See Cooley, supra note 18, at 530-36 (noting that state courts were inconsistent that eminent domain power be for public uses only); Tiedeman, supra note 8, at 378-91 (making a similar point); see also Jacobs, supra note 8, at 165-66, 199 & n.11 (cataloging state court developments); Harry N. Scheiber, The Road to Munn: Eminent Domain and the Concept of Private Property in the State Courts, in 5 Perspectives in American History 329, 361-98 (Donald E. Fleming & Bernard Bailyn, eds., 1971) (discussing varied state court approaches to the "public use" requirement during the nineteenth century).


33. See Collins, supra note 9, at 1312-13 & n.238 (gathering lower court authority); cf. Mark A. Graber, Naked Land Transfers and American Constitutional Development, 53 Vand. L. Rev. 73, 74-78, 85-91 (2000) (demonstrating the antiquity of the nonpublic-use takings limitation in the early federal courts).

34. Loan Ass'n, 87 U.S. (20 Wall.) at 663. Given the lower federal court authority, and the Court's own precedents (to which it cited—see infra note 37), the principle that Missouri Pacific invoked had been explained in the past, at least as a matter of general law. Cf. Erwin Chemerinsky, Constitutional Law 477-78 n.34 (1997) (noting that in Missouri Pacific, "without explaining its reasons," the Court struck down a nonpublic use taking).

35. See Davidson v. New Orleans, 96 U.S. 97, 102 (1877) (Miller, J.) ("It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision."); cf. The Sinking-Fund Cases, 99 U.S. 700, 738 (1878) (stating that a statute transferring the property of A. to B. "is not legislation"). For a valiant effort to cast the A.-to-B. prohibition as largely a procedural limit, see Harrison, supra note 14, at 518-24.
nonpublic use taking so long as general constitutional law was available to do the heavy lifting in the federal courts’ exercise of their diversity jurisdiction. General constitutional law was not available in Missouri Pacific, however, because the case came to the Supreme Court not from a federal court but on direct review of a state court, where only federal questions could be reviewed. This time, therefore, when the Missouri Pacific Court struck down the state’s effort to require a railroad to allow private parties to build a grain elevator on the railroad’s right of way as a nonpublic-use taking, it did so as a matter of federal law. In support of its conclusion that eminent domain power must be limited to public uses, the Court was content to offer a string of citations to its own decisions in which it had elaborated the principle on review of diversity cases as a matter of general constitutional law. Apparently considering the issue to have been well explained before, the Court offered no additional rationale beyond its brief conclusion that a taking for private use “is not due process of law” under the Fourteenth Amendment.

Despite the absence of such an explanation, the federalization of the public use limitation on takings in Missouri Pacific was clearly of a piece with the federalization of the public-purpose limitation on taxation in Fallbrook. Both decisions expressed the common-law notion that the state had to act in the public interest, and both reflected the Old Court’s effort to police what it perceived to be the boundary between legitimate state power and private right—only now as a matter of the Fourteenth Amendment. In addition, the Court’s articulation of the takings principle in Missouri Pacific happened to precede the more famous takings decision in Chicago, Burlington by a few months. Even though the later decision would focus on the just-compensation requirement for takings of property for public use, those two decisions would also reinforce one another—takings must be for a public use (Missouri Pacific), and they must be justly compensated (Chicago, Burlington).

36. See Barbier v. Connolly, 113 U.S. 27, 30 (1885) (observing that, on direct review of a state court, the Supreme Court “cannot pass upon the conformity of [a state law] with the requirements of the Constitution of the State”); Murdock v. Memphis, 87 U.S. (20 Wall.) 590, 626-32 (1875) (Miller, J.) (noting that questions of state law or general law were unreviewable nonfederal questions); cf. G. Edward White, History of the Supreme Court of the United States—The Marshall Court and Cultural Change 1815-1835, at 674-76 (1988) (noting that the antebellum Court relied on “general principles” as well as federal law on review of federal court decisions, but only on federal law in review of state courts).

37. Missouri Pacific, 164 U.S. at 403 (citing, inter alia, Cole v. La Grange, 113 U.S. 1 (1885), Loan Ass’n v. Topeka, 87 U.S. (20 Wall.) 655 (1874), and Wilkinson v. Leland, 27 U.S. (2 Pet.) 627 (1829)). Nor did the Court rely on the Fifth Amendment’s express provision regarding takings of property for “public use” as an aid in interpreting the Fourteenth Amendment’s more generalized language barring deprivations of property “without due process of law.”

III. FROM PROCESS TO SUBSTANCE

The last of the Term's major decisions that paved the way for Allgeyer and Chicago, Burlington was the Court's unanimous ruling that the reasonableness of rates set by state agencies would be subject to scrutiny as a matter of federal due process. The decision most associated with putting the federal courts in the business of assessing rate-reasonableness, Smyth v. Ames,39 was not decided until over a year after Allgeyer. But shortly after the public-use takings decision in Missouri Pacific (and even before Allgeyer) came Smyth's unheralded forerunner: Covington & Lexington Turnpike Road Co. v. Sandford.40

Like Missouri Pacific, the Sandford case came to the Supreme Court on direct review from a state court. In an action to restrain a turnpike company from disregarding a statutory rate schedule in the charging of tolls, the company specifically set up the Fourteenth Amendment as a defense to what it considered to be a confiscatory pricing scheme. The Supreme Court took jurisdiction and reached the merits. In doing so, the Court expressly held that the company had made out a prima facie case of the invalidity of the state statutory schedule under the Due Process Clause, but remanded the case for further proceedings to determine whether the tolls chargeable were "reasonable."41

In the course of its opinion, the Court suggested that rate-reasonableness raised a federal due process question for many of the same reasons it supposed that a taking without just compensation would. The latter principle, the Court once said, "prevent[ed] the public from loading upon one individual more than his just share of the burdens of government."42 As the Sandford Court put it regarding rate-making (while quoting its own reasoning in an earlier diversity case): ""Is it any less a departure from the obligations of justice to seek to take not the title but the use for the public benefit at something less than its value? . . . [J]ustice demands that everyone should receive some compensation for the use of his money or property.""43 The Sandford Court's allusion to just compensation to support its conclusion that due process set substantive limits on rate-making is noteworthy both because it picked up on the anti-redistributionist themes of Fallbrook and Missouri Pacific, and because it was only later, in the March 1st Chicago, Burlington decision, that the Court first expressly held that due process required just compensation for more direct govern-

39. 169 U.S. 466 (1898).
40. 164 U.S. 578 (1896). Sandford was decided on December 14, 1896. See id. at 578.
41. Id. at 595-96. The state courts had upheld the plaintiffs' demurrer to the turnpike company's asserted federal defense of the rates' unreasonableness. Consequently, there had been no decision below as to whether the rates in question were reasonable or not.
43. Sandford, 164 U.S. at 594 (quoting Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 410 (1894)). As noted below, it was not clear whether Reagan, a diversity case, was based on federal law or general principles. See infra note 50. Sandford also relied on dicta in the Railroad Comm'n Cases, 116 U.S. 307 (1886). See 164 U.S. at 592.
mental takings of property.

Despite the Court’s reliance on what it considered to be familiar constitutional principles in construing the scope of Fourteenth Amendment due process, and despite its disclaimer of novelty ("There is nothing new or strange in this"). Sandford also shows the distance the Court had traveled. Not quite 20 years earlier in Munn v. Illinois, the Court came very close to saying (over Justice Field’s dissent) that the reasonableness of legislatively-fixed rates for businesses “affected with a public interest” would not be subject to judicial inquiry.

To be sure, there had been a certain amount of water under the bridge since Munn. But nothing before Sandford had squarely held that the substantive reasonableness of rates was to be measured by due process. For example, in 1890, the Court had told the states in its important Milwaukee Road decision that they were obliged as a matter of due process to provide judicial review of the reasonableness of agency-set rates. In so doing, the Court seemed to separate—as it later did in Sandford—the notion of bona fide regulation on the one hand and confiscation on the other, and to recognize that ownership of property included the right to use it for economic value, not just freedom from physical seizure. But Milwaukee Road’s insisting upon judicial review of a rate’s reasonableness did not necessarily mean that whether a particular rate was confiscatory was itself a federal question, even if that was the predictable next step.

44. Id. at 593 (quoting Reagan, 154 U.S. at 399).
45. 94 U.S. 113 (1877).
46. Id. at 126-28.
47. Chicago, M. &St. P.R.R. v. Minnesota, 134 U.S. 418 (1890). The state high court in Milwaukee Road had apparently refused to take evidence on the reasonableness of agency-set rates, which by statute were declared to be “final and conclusive.” Id. at 452. The focus of the U.S. Supreme Court appeared to be on the absence of “a judicial investigation” of the reasonableness of the rates, rather than on the substantive content of rate-reasonableness itself: “[I]f the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property...without due process of law.” Id. at 457; see also David P. Currie, The Constitution in the Supreme Court, 1888-1986, at 41-42 (1990) (viewing majority opinion as focused on judicial review); Fairman, supra note 21, at 202-206 (same). The distinction thus reflects the “substantive” versus “procedural” dimensions of due process, even if those terms were not part of the Old Court’s vocabulary. See White, supra note 13, at 245 (observing the absence of such labels before the New Deal). Justice Bradley dissented in Milwaukee Road along with two others, arguing that it “practically overrules Munn v. Illinois.” See 134 U.S. at 461. Only Justice Miller, who concurred separately, indicated that a rate’s reasonableness was governed by the federal Constitution as a substantive matter. See id. at 459-61. (Miller, J. concurring).
48. See Siegel, supra note 24, at 210-15 (discussing shifts in concept of property and governmental actions that would constitute deprivation). The dissent in Milwaukee Road attacked the majority’s linkage between confiscatory rates and issues of just compensation by noting the absence of a just compensation provision in the Fourteenth (as opposed to the Fifth) Amendment. See 134 U.S. at 465 (Bradley, J., dissenting). Miller had made exactly the same argument in Davidson v. New Orleans, 96 U.S. 97, 105 (1877), yet “with some hesitation,” he concurred rather than dissented in Milwaukee Road. See 134 U.S. at 459 (Miller, J. concurring).
Consequently, in the wake of *Milwaukee Road*, when lower federal courts resolved questions of rate-reasonableness in the exercise of their diversity jurisdiction, it was less than clear whether federal due process as opposed to "general principles" provided the relevant source of substantive law.\(^{49}\) And the same ambiguity was present when the Supreme Court took review of such cases from federal courts, as happened in *Reagan v. Farmers' Loan & Trust*,\(^{50}\) upon which the *Sandford* Court had relied. But until the Court clearly indicated that it was prepared to view the rate-reasonableness question as itself governed by federal due process—as occurred in *Sandford*—no review of such questions would have been available from the state courts, and no lower court challenges could be brought solely on federal question grounds.\(^{51}\)

The ruling in *Sandford*, therefore, was pivotal. If rate-reasonableness could be a federal constitutional question rather than just a question of general law, not only was direct review of such questions from state courts now possible, as in *Sandford*, but lower federal courts would be available to consider such matters in the proper case—not just in rate challenges by out-of-state parties, but by in-staters as well—under the rubric of federal question jurisdiction.\(^{52}\) Both the later decision in *Smyth*


\(^{50}\) 154 U.S. 362, 410 (1894) (striking down a rate schedule in a diversity action removed from state court). In *Reagan* the Court undertook an inquiry into a host of factors to assess rate reasonableness including the regulated entity's operating costs, its earnings, and its present value. It was unclear, however, whether the Court was applying general law or federal law in its assessment of reasonableness, referring once to the Fourteenth Amendment's equal protection guarantee, but elsewhere referring to "every constitution" and "the spirit of common justice." *Id.* at 399, 410. See Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 127-30 (1997) (noting *Reagan*'s ambiguity). Prior to *Milwaukee Road*, *Sandford*, and *Reagan*, the Court had hinted on review of a diversity action that there might be substantive limits on rate-making, but without indicating whether the limit arose from general law or the federal Constitution. See, e.g., *Railroad Comm'n Cases*, 116 U.S. 307, 331 (1886) (stating that "this power to regulate is not the power to destroy" and that a rate promulgated under the "pretense of regulating fares and freights" would amount to "a taking...without just compensation," yet noting that "unjust" rate regulation was subject to challenge as a matter of state law); *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354 (1884) (hinting that setting of "manifestly unreasonable" rate (or one set without "honest judgment") might present a different question from that of governmental power to set rates at all, which was all that the Court was prepared to say had been settled in *Munn v. Illinois*, 94 U.S. 113 (1877)).

\(^{51}\) Even though the turnpike company had raised a federal defense to the state court enforcement proceedings, removal was no longer possible on federal question grounds after the 1894 decision in *Tennessee v. Union & Planter's Bank*, 152 U.S. 454 (1894)—a harbinger of the Court's well-pleaded complaint rule better associated with *Louisville & Nashville R.R. v. Montley*, 211 U.S. 149 (1908).

\(^{52}\) Such jurisdiction was secured in 1875. *See Act of Mar.* 3, 1875, ch. 137, § 1, 18 Stat. 470.
(in which an out-of-stater successfully sought an injunction from a federal court to prevent the enforcement of an allegedly unconstitutional rate schedule) and the even more familiar decision in *Ex parte Young*\(^53\) (in which an in-stater successfully sought similar relief) were simple permutations on *Sandford*, which got the ball rolling. Not surprisingly, in the shift from general law to federal law, the outline of the reasonableness inquiry, with its focus on guaranteeing a fair return for the regulated party, remained essentially unaltered.\(^54\)

IV. MARCH 1, 1897

A. Liberty of Contract?

1. Liberty’s Scope—Given these decisions earlier in the Term, *Allgeyer* and *Chicago, Burlington* are best seen as additional illustrations of the due process methodology that the Court had already openly embraced in its federalization of general-law limits on the permissible reach of governmental power. As discussed below, *Allgeyer* turned back a state’s effort to penalize one of its citizens for contracting with an out-of-state insurance company that was not qualified to do business in the state. The decision is remembered, however, for the expansive scope it gave to the “liberty” protected by due process, including the freedom of contract—a freedom that *Allgeyer* tied to “the privilege of pursuing an ordinary calling and that of acquiring, holding and selling property.”\(^55\)

It is no secret that liberty of contract— with its antecedents in ante-bellum thought\(^56\)—had become a familiar part of state court constitutionalism well before it was federalized in *Allgeyer*.\(^57\) Although it never enjoyed the same recognition as a general law principle in federal diversity proceedings as did, for example, the public-purpose and reasonableness

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\(^53\) 209 U.S. 123 (1908). The 1896 Term also saw the groundwork being laid for the sovereign immunity holding of *Young*. *See* Scott v. Donald, 165 U.S. 58, 67-70, 112-14 (1897) (making clear that a suit against a state officer for an injunction preventing him from enforcing an unconstitutional statute would not be considered a suit against the state). The inability to remove state civil enforcement proceedings on federal question grounds after *Union & Planters’ Bank* made anticipatory suits like *Scott* even more attractive to regulated parties. *See* Michael G. Collins, *The Unhappy History of Federal Question Removal*, 71 Iowa L. Rev. 717, 767-69 (1986).

\(^54\) *See* Siegel, *supra* note 24, at 227-28 (describing the Old Court’s “present value” approach to rate-reasonableness determinations).

\(^55\) *Allgeyer* v. Louisiana, 165 U.S. 578, 591 (1897) (concluding that the privilege “embraced the right to make all proper contracts in relation thereto”). Although the *Allgeyer* Court stated that due process includes the right “to pursue any livelihood or calling; and for that purpose to enter into all contracts which may be proper,” it never actually used the phrase “liberty of contract” or “freedom of contract”.

\(^56\) *See* CUSHMAN, *supra* note 17, at 107 & n.6 (noting liberty of contract’s antecedents in “Adam Smith’s liberal political economy, Jacksonian liberalism, and the Northern ‘free labor’ ideology”).

\(^57\) *See* JACOBS, *supra* note 8, at 50-85; Pound, *supra* note 8, at 463, 465-68.
requirements discussed above, related themes had been part of the Court’s discourse for some time. For example, Allgeyer’s language of rights echoed the laundry list of “fundamental” common-law rights articulated long before in Corfield v. Coryell\(^{58}\) which made up the privileges and immunities that Article IV safeguarded from interstate discrimination. Allgeyer’s language of rights was also evocative of Justice Field’s famous dissenting opinion in Slaughter-House in which he argued for a broad construction of the Fourteenth Amendment’s Privileges or Immunities Clause that would have safeguarded a number of pre-constitutional common-law rights against the states (“the natural and inalienable rights which belong to all citizens”), including Corfield’s right to pursue a common calling.\(^{59}\)

The common-law rights of Corfield, however, were rights that a majority in Slaughter-House had refused to incorporate into the Fourteenth Amendment’s Privileges or Immunities Clause.\(^{60}\) So, instead of referring to Field’s dissent (or to Corfield), the Court played it safe by quoting from a concurring opinion of Justice Bradley’s in the post-Slaughter-House decision of Butchers’ Union Co. v. Crescent City Co.\(^{61}\)—an opinion, however, that largely reiterated Bradley’s own, and no-less-famous, Slaughter-House dissent.\(^{62}\) Peckham relied on Bradley for the proposition that the “right to follow any of the common occupations of life”\(^{63}\)—“an inalienable right”\(^{64}\)—was protected against unwarranted state interference by the Fourteenth Amendment.\(^{65}\) Although Bradley in Butchers’ Union was still

\(^{58}\) 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, Circuit Justice) (referring to those rights “which belong, of right, to the citizens of all free governments”). According to Corfield, Article IV placed nonresidents on an equal footing with residents when it came to pursuing one of the ordinary callings and the right “to take, hold and dispose of property.” Corfield, 6 F. Cas. at 552.

\(^{59}\) See Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 96-98, 109-110 (1873) (Field, J., dissenting). The similarity of language makes sense because Field himself invoked Corfield in Slaughter-House as a source for the fundamental right to ply one’s trade that he considered to be protected by the Privileges or Immunities Clause of the Fourteenth Amendment. See id. at 97-98 (Field, J., dissenting); see also Munn v. Illinois, 94 U.S. 113, 142 (1877) (Field, J., dissenting) (invoking Corfield to attack rate regulation of grain elevators).

\(^{60}\) See Slaughter-House, 83 U.S. (16 Wall.) at 79 (limiting the privileges or immunities of national citizenship under the Fourteenth Amendment to those “which owe their existence to the Federal government, its National character, its Constitution, or its Laws”).

\(^{61}\) 111 U.S. 746, 764 (1885) (Bradley, J., concurrence). Bradley concurred in the result only.

\(^{62}\) See id. at 764-65 (Bradley, J., concurring).

\(^{63}\) See Allgeyer, 166 U.S. at 762 (quoting Butchers’ Union, 111 U.S. at 765 (Bradley, J., concurring)). Butchers’ Union involved a Contract Clause challenge to Louisiana’s withdrawal of a prior grant of a slaughtering monopoly brought by the same slaughtering-house whose state-granted monopoly had been upheld in the original Slaughter-House decision.

\(^{64}\) Allgeyer, 166 U.S. at 589-90 (quoting Butchers’ Union, 111 U.S. at 765 (Bradley, J., concurring)).

\(^{65}\) As Bradley noted, what he called the “liberty of pursuit [sic]—the right to follow any of the ordinary callings of life” was “subject, of course, to regulations equally open to all.” Butchers’ Union, 111 U.S. at 764-65 (concurring opinion). It was a right that Bradley borrowed straight from Corfield. See id. at 760-66 (concurring opinion). Previously, he had
intent on locating this right in the Privileges or Immunities Clause of the Fourteenth Amendment, he offered as a fall-back argument (given Slaughter-House, presumably) that it could also be considered as part of the “liberty” or “property”66 protected by due process.

The use of Bradley’s concurrence in Butchers’ Union rather than Field’s dissent in Slaughter-House made the federalization of this particular freedom via due process look more seamless than it was.67 But perhaps, as the Court also tried to suggest, liberty of contract had been given the green light nearly a decade before when, in Powell v. Pennsylvania,68 it had assumed for purposes of argument that the common law “privilege of pursuing an ordinary calling and of acquiring, holding, and selling property”69 was among the liberties protected by due process. If so, it was an assumption that became a holding only in Allgeyer, and teasing out a more general principle of contractual freedom from the specific right to pursue an ordinary calling was an arguable improvement upon Powell.70 But just as it was for Justice Field,71 treating freedom of contract as part of due process “liberty” was old hat for Justice Peckham who had given it a similar reading while on the New York Court of Appeals, albeit as a matter of state constitutional law.72

invoked Corfield in Slaughter-House as authority for including the right to pursue one of the ordinary callings as a privilege or immunity protected under the Fourteenth Amendment. See Slaughter-House, 83 U.S. (16 Wall.) at 116-17 (Bradley, J., dissenting). Field had also invoked Corfield. See supra note 59.

66. Butchers’ Union, 111 U.S. at 765 (Bradley, J., concurring). Actually, Bradley had also relied on due process as well as privileges or immunities in Slaughter-House. See 83 U.S. (16 Wall.) at 122 (Bradley, J., dissenting).

67. For a particularly conspiratorial account of Peckham’s use of Bradley-concurring instead of Field-dissenting, see LOUIS B. BOUDIN, GOVERNMENT BY JUDICIARY 427-28 (1932); cf. Adamson v. California, 332 U.S. 46, 80-81 (1947) (Black, J., dissenting) (suggesting that Peckham played fast and loose by invoking Bradley’s concurring opinion in Butcher’s Union).

68. 127 U.S. 678, 684 (1888).

69. Id. at 684; cf. Glen O. Robinson, Evolving Conceptions of “Liberty” and “Property” in Due Process Jurisprudence, in LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL 86 (Ellen Frankel Paul and Howard Dickman, eds. 1989) (stating that the Court had, even before Powell, concluded in Ex parte Robinson, 86 U.S. (19 Wall.) 505, 512-13 (1873) that the “right to practice” law before a federal court was a property interest safeguarded by due process from deprivation without notice and an opportunity to be heard).

70. See Allgeyer, 165 U.S. at 590. The Court ultimately rejected the due process claim raised in Powell and upheld a regulatory ban on the manufacture and sale of a butter substitute as a legitimate health measure.

71. See, e.g., Powell v. Pennsylvania, 127 U.S. 678, 691-99 (1888) (Field, J., dissenting) (relaying on state court liberty-of-contract cases to inform the meaning of federal due process); Munn v. Illinois, 94 U.S. 113, 142-43 (1877) (Field, J., dissenting) (locating liberty of contract within due process); cf. Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 106 (1873) (Field, J., dissenting) (referring to contractual freedom in connection with the “sacred right” to labor in a lawful occupation).

72. In language mirroring Allgeyer’s, Peckham had previously stated that “The term ‘liberty’ [in the due process clause of the New York Constitution] is not...mere freedom from
2. Federalism and the Reach of State Power—Allgeyer’s significance also lies in the fact that it employed due process to limit the extraterritorial reach of state law, making it as much a decision about state power as it was about rights. Viewed in this light, Allgeyer—like the other due process decisions of the Term—made applicable to an in-stater a limitation on state power that typically could only be raised in litigation involving citizens of different states. It also suggests why the particular interference with the exercise of contractual freedom in Allgeyer was not considered to be within the state’s permissible regulatory powers.

Allgeyer (a Louisiana citizen) had been prosecuted for sending a letter from Louisiana to a New York insurance company notifying it of an impending shipment of cotton covered by an insurance contract purchased in New York by Allgeyer. Louisiana law prohibited “any” in-state act to “effect” a contract of insurance with an out-of-state insurer who had not complied with state registration and bonding requirements. The Supreme Court reversed Allgeyer’s misdemeanor conviction, concluding that Louisiana lacked “jurisdiction” to regulate the underlying insurance contract.

73. Others have made the point. See, e.g., Currie, supra note 47, at 46-47 (noting that due process had become “the constitutional peg on which to hang Justice Story’s territorialist choice-of-law views”).

74. See Allgeyer, 165 U.S. at 584-86. All premiums and claims were to be paid in New York. Id. at 579, 585. The Court had made clear before Allgeyer that a state could exclude out-of-state insurance companies from doing business in-state altogether, or condition the doing of business on compliance with various preconditions. See Hooper v. California, 155 U.S. 648 (1895) (rejecting dormant commerce clause attack on state statute barring out-of-state insurance companies from doing business in-state, absent compliance with bonding prerequisites). The Allgeyer Court, however, was satisfied that the New York insurance company was not “doing business” within Louisiana. See 165 U.S. at 592.

75. Id. at 588. It might be wondered why the giving of notice (which issued from within the state), might not be an act that the state had legislative jurisdiction to forbid. See Currie, supra note 47, at 46 & n.125 (so wondering). But the Court was untroubled. “The giving of notice,” it declared confidently, “is not the contract itself, but is an act performed pursuant to a valid contract, which the state had no right or jurisdiction to prevent its citizens from making outside the limits of the state.” Allgeyer, 165 U.S. at 588; see also id. at 592 (calling the letter of notification “collateral” to the contract).
Although nominally directed against an in-stater, the Louisiana statute was aimed in substantial part at the non-complying out-of-state insurer. Allgeyer's focus on extraterritoriality thus implicated a concern for policing interstate transactions that also propelled the Court's use of general commercial law in private-law diversity litigation, as well as its use of general constitutional law in nonresidents' suits against state and local officials. In addition, the focus on extraterritoriality suggests that the real problem in Allgeyer was that the regulation at issue exceeded the permissible powers of the state, not that contractual freedom was somehow generally immune from regulation—a point made clear later in the Term when the Court upheld federal legislation outlawing contracts in restraint of trade.

In addition, protecting under due process what formerly would have been an implicit federalism limitation on extraterritorial state action was not an altogether new role for the Fourteenth Amendment. In Pennoyer v. Neff, a federal court diversity action, the Court had accomplished something similar with the law of personal jurisdiction by invoking due process to constitutionalize the "general, if not universal" limits on a state's ability to render a binding judgment against nonresidents. And just a month before Allgeyer, the Court had indicated that due process would bar a state tax that operated in an extraterritorial manner.

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76. See Nelson, supra note 4, at 152-53 (noting that the real "issue in Allgeyer was whether the Court would tolerate state impediments to the transaction of interstate business").

77. See Allgeyer, 166 U.S. at 591 (stating "we do not intend to hold that in no such case can the State exercise its police power," and stating that contractual freedom could be "regulated and sometimes prohibited").

78. In United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897), the Court construed the Sherman Antitrust Act to outlaw all contracts in restraint of trade, the reasonableness of the restraint notwithstanding, given the tendency of such contracts to undermine "the public interest" in competition. See also id. at 355 (White, J., joined by Field, Gray, and Shiras, JJ., dissenting) (raising liberty-of-contract concerns); Owen M. Fiss, History of the Supreme Court of the United States—Troubled Beginnings of the Modern State, 1888-1910, at 119 (1993) (noting the importance of liberty-of-contract issues in Trans-Missouri Freight and the later development of a "rule of reason" as a limiting principle); cf. Cushman, supra note 17, at 110 (observing that, for the Old Court, a valid exercise of governmental police power would permit interference with contractual freedom). Nor did "freedom of contract" prevent the Court just months before, in Plessy v. Ferguson, 163 U.S. 537 (1896), from upholding a state's requirement of racial segregation in public conveyances as a permissible exercise of the police power on behalf of (according to the Court) "the public good." Id. at 550 (noting also that "the public...interfere with the freedom of contract"); see also id. at 557, 558, 563 (Harlan, J., dissenting) (objecting that segregation violated the "personal liberty" of citizens). Plessy was actually decided in the previous Term, but less than a year before Allgeyer.

79. 95 U.S. 714, 720 (1878). Pennoyer made clear that, with the arrival of due process, extraterritorial exertions of personal jurisdiction could be challenged "directly" (see id. at 733)—i.e., within the state court proceedings themselves as a federal question and on review of a state court's decision—rather than just collaterally by denying the decision full faith and credit. See also Currie, supra note 47, at 47 (stating that Allgeyer was "a choice-of-law decision, not strictly speaking a substantive one").

80. See Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 226 (1897); id. at 229 (White, J., joined by Field, Harlan, and Brown, JJ., dissenting). The Adams Court also rejected a dormant commerce clause attack on the tax.
By making due process the constitutional roadblock to extraterritorial exertions of state legislative power, *Allgeyer* enabled an in-state party to raise a constitutional limitation on state action that had previously been available primarily in diversity actions. At the time, most limitations on extraterritorial applications of state law could be policed in federal diversity actions by the uniform application of “an independent ‘general law’ of conflict of laws.” To be sure, the Court had previously hinted that the Full Faith and Credit Clause might supply a federal constitutional limit on a state’s ability to apply its own law in its own courts, and oblige it to apply the law of another state—an obligation that could be policed on direct review. But on direct review of a state’s criminal proceedings, policing extraterritoriality under full faith and credit was problematic. If the state forum could not apply its own penal law, it was not as though the state could then apply the penal laws of another state, as a matter of full faith and credit. Perhaps full faith and credit to a sister state’s laws could have been enforced in the criminal setting by simply dismissing the proceedings, but due process carried no hint that some other state’s law ought to be applied—only that one state’s law ought not. In any event, from this choice-of-law angle, *Allgeyer’s* resort to due process had a distinctly procedural flavor to it. In fact, it would be years later before the Supreme Court would deploy liberty of contract to strike down a state statute regulating contractual relationships that were otherwise within a state’s legislative jurisdiction. But that would not happen until *Lochner v. New York*.  

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82. *See* Chicago & Alton R.R. v. Wiggins Ferry Co., 119 U.S. 615, 622 (1887) (suggesting in dicta that the Full Faith and Credit Clause, U.S. Const. art. IV, § 1, cl. 1, might call for recognition and enforcement of a sister state’s laws by a state court).

83. In a criminal proceeding, unlike in a civil proceeding, the forum state could not apply a sister state’s criminal law through full faith and credit. *See* Wisconsin v. Pelican Ins., 127 U.S. 265, 289-90 (1888) (stating axiom that states do not enforce the criminal laws of other states); *see also* Ann Woolhandler & Michael G. Collins, *State Standing*, 81 Va. L. Rev. 387, 423-26 (1995) (discussing Old Court's admonition against cross-jurisdictional enforcement proceedings). Due process, by comparison, carried no hint that some other state’s law had to be honored, only that the applied law was off-limits. Other possible constitutional hooks were unavailable in *Allgeyer*. At the time, a challenge on dormant commerce clause grounds would not have been successful because a contract of insurance was not considered to be “commerce,” nor would an in-stater be able to invoke the antidiscrimination norm in Article IV’s Privileges and Immunities Clause. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 180-85 (1868) (stating also that corporations were not “citizens” protected by Article IV’s prohibition against interstate discrimination). For *Allgeyer*, it was probably due process or nothing.

B. Just Compensation and Incorporation?

1. The Substance of Due Process—The application of due process to vindicate liberty of contract and impose limits on extraterritorial legislation in Allgeyer might seem to have little in common with the apparent incorporation of the Fifth Amendment’s just compensation principle in Chicago, Burlington. In reality, however, they were two sides of the same coin. As with other decisions of the Term, the most notable feature of the Chicago, Burlington opinion was its due process methodology. Justice Harlan’s argument regarding just compensation was built upon an amalgam of state court decisions, the opinions of treatise writers, federal court decisions construing general constitutional law, as well as ancient principles of the common law that the Court read as suggesting inherent limits on governmental power.85 And this time, the Court at least made a gesture toward explaining why the language of “due process,” and not just general principles, should be read as imposing substantive limits on legislatures—a limit that the Court intriguingly glossed as “due protection.”86 The Fifth Amendment, however, went unmentioned.

The Court’s approach to its just compensation holding was virtually indistinguishable from its earlier common-law approach to questions of general constitutional law in diversity cases in which it sometimes ignored state court interpretations of their own constitutions in favor of the supposedly more settled and uniform rule. Indeed, as with the other due process decisions of the Term, the federal precedents to which Harlan looked were primarily those in which the Court had enforced the just-compensation principle in diversity proceedings.87 In one such decision, Pumpelly v. Green Bay Co.,88 the Court stated it was prepared to require compensation for a taking of property as a matter of general law, even if no such explicit provision existed in the constitution of the state that the Court was ostensibly interpreting.89 The Court in Pumpelly thus enforced as a matter of nonfederal law what it considered to be the “universal” principle against uncompensated governmental takings,90 just as it did on other occasions.91

85. Chicago, Burlington, 166 U.S. at 238. Although the Court did not mention the Fifth, it did include a citation to a decision involving a taking by the United States, but only for the general principle that it articulated. See id. (quoting from Monongahela Nav. Co. v. United States, 148 U.S. 312, 325 (1893)). The Court also referred to lower federal court decisions construing the Fourteenth Amendment. See id. at 238-39.

86. See id. at 235.

87. See id.

88. 80 U.S. (13 Wall.) 166, 178 (1871). The author of the general constitutional law decision in Pumpelly (as in Loan Association—see supra note 21) was Justice Miller.

89. See Pumpelly, 80 U.S. (13 Wall.) at 178-79.

90. Id. at 177.

91. See, e.g., Cole v. LaGrange, 113 U.S. 1, 6-9 (1885) (finding, in a diversity case, that just compensation was called for as a matter of general constitutional law); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 89 (1823) (concluding that state law as well as “the universal law of
That the *Chicago, Burlington* Court was prepared to transform a previously general law norm into a federal one was itself nothing new, of course, given that it had already done exactly that in *Fallbrook, Missouri Pacific*, and in *Sandford*. In addition, the uncompensated-takings provision had already been recognized as part of federal due process, if only implicitly, in *Sandford*’s treatment of rate-reasonableness. Nevertheless, *Chicago, Burlington* (like *Sandford* before it) represented something of a shift in tone, insofar as the Court had once seemed to doubt whether a taking of property without just compensation would violate federal due process even if it “may possibly violate some of those principles of general constitutional law of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States.” In that earlier decision, unlike in *Chicago, Burlington*, the Court had indeed invoked the Fifth Amendment’s Takings Clause to help construe the Due Process Clause of the Fourteenth Amendment. But it did so as an argument against incorporation of an uncompensated takings principle under the Fourteenth, insofar as the latter referred only to due process, whereas the Fifth referred to “just compensation” in addition to due process. Given the difficulty raised by the text, it is perhaps not too surprising that the Fifth Amendment went unmentioned in *Chicago, Burlington*—the very opinion in which the Court supposedly incorporated the Fifth’s just-compensation

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92. Actually, federalization of the just compensation principle had been foreshadowed earlier in the 1896 Term on at least two different occasions. First, as noted above, *Sandford*’s constitutionalization of rate-reasonableness was grounded on an assumption that takings of property for public use would require just compensation. (And that conclusion, in turn, was related to the anti-redistributionist norm articulated in the public-purpose decisions of *Fallbrook* and *Missouri Pacific*. ) Second, on direct review of a just compensation case from state court argued the same day as *Chicago, Burlington*, the Court had dismissed the appeal for want of jurisdiction. See *Chicago & N.W. Ry. v. Chicago*, 164 U.S. 454 (1896). In that decision, the Court specifically noted that the property owner’s objection to the absence of just compensation had not been premised on federal law, but only on “general principles.” *Id.* at 458. The Court thereby signaled its willingness to consider a properly raised challenge to rate regulations on Fourteenth Amendment grounds. And it made good on that promise in *Chicago, Burlington*. See also supra note 24 (noting the just compensation question raised in *Fallbrook*).

93. *Davidson v. New Orleans*, 96 U.S. 97, 105 (1877) (Miller, J.). See WILLIAM D. GUTHRIE, LECTURES ON THE FOURTEENTH ARTICLE OF AMENDMENT 91, 93 (1898) (expressing incredulity at Justice Miller’s “seem[ing]” suggestion in *Davidson* that the Fourteenth Amendment might not provide for just compensation, but noting that *Chicago, Burlington* “brushes away” any such suggestion).

94. *See Davidson*, 96 U.S. at 105; cf. *Hurtado v. California*, 110 U.S. 516, 534-35 (1884) (using the Fifth Amendment’s inclusion of both due process and grand jury clauses as an argument for not reading the Fourteenth Amendment’s Due Process Clause as incorporating a grand jury guarantee, since the Fourteenth had only a due process, not a grand jury clause).
provision through the Fourteenth.95

As was true of all the Term’s other due process decisions, Chicago, Burlington’s practical effect was to widen the class of beneficiaries who could claim constitutional protection. Because of pre-Fourteenth Amendment decisions such as Barron v. Baltimore96 which held the Bill of Rights inapplicable to the states, federal courts had been off-limits to claims by in-staters that their property had been taken without just compensation. Out-of-state property owners, by contrast, had long been able to invoke just-compensation principles in diversity litigation against state and local actors as a matter of general constitutional law, as happened in Pumpelly.97 Now, relief against governmental takings that Barron would have otherwise barred would be available under the aegis of federal law to in-staters and out-of-staters alike.

2. Incorporation and Due Process—Harlan’s treatment of the takings question in Chicago, Burlington also lends support to those scholars who have noted that “incorporation” of the Bill of Rights and “substantive due process” analysis were indistinguishable from one another, at least in their earliest manifestations.98 Of course, for some who have sat on the modern Court, most famously Justice Black, automatic incorporation of the guarantees of the Bill of Rights through the Fourteenth Amendment provided the antithesis of substantive due process analysis because of the Bill’s textual specificity and its perceived ability to cabin the judicial role in fashioning fundamental limits on state action.99 But for the Chicago, Burlington Court, the project of giving constitutional status to just compensation as a limit on state action was more like its decisions to federalize other general-law limits on state action as a matter of due process. Nor did the fact that this general law limit against uncompensated takings had itself been incorporated in the Fifth Amendment appear to give it any greater claim constitutional status as a matter of due process under the Fourteenth. If anything, these early efforts of the Court—including due process decisions in which guarantees spoken of in the Bill of Rights were held inapplicable to the states100—bear at least a loose kinship to the less

95. As Professor Brauneis has observed, the Court’s early twentieth-century takings opinions did not involve incorporation, but substantive due process. See Brauneis, supra note 13, at 666-70; see also White, supra note 13, at 256-68 (noting absence of such a dichotomy in the work of the Old Court).

96. 32 U.S. (7 Pet.) 243 (1833).


98. See supra note 13 (noting scholars who have so argued).

99. See Adamson v. California, 332 U.S. 46, 86 (1947) (Black, J., dissenting) (arguing against “piecemeal” incorporation of the Bill of Rights, yet focusing only on the first eight); cf. MICHAEL J. PHILLIPS, THE LOCHNER COURT, MYTH AND REALITY 36-40 (2001) (excluding certain incorporation cases from the calculation of substantive due process cases during the Lochner era).

100. See, e.g., Hurtado v. California, 110 U.S. 516, 538 (1884) (declining to hold applicable against the states as a matter of due process, the grand jury guarantee included in the
mechanical approach of Black’s contemporaries who eschewed incorporation as such, and who sought to identify as within the scope of due process those fundamental principles that were “of the very essence of a scheme of ordered liberty.” 101

What was “incorporated” in a case such as Chicago, Burlington, therefore, was not some provision of the Bill of Right’s Fifth Amendment, 102 but the pre-existing limitation on governmental action that the Fifth already happened explicitly to incorporate against federal action. 103 For the Chicago, Burlington Court, antecedent principles animating state constitutions and other “republican institutions” were themselves principles that it concluded were subsumed within the notion of federal due process. 104 From this perspective, just compensation was constitutionalized for many of the reasons that limits on state interference with liberty of contract were. 105 And the same was true for the public-purpose, public-use, and fair-return principles that were all given their federal constitutional status earlier in the Term.

Fifth Amendment, and relying on state decisional law, federal diversity decisions interpreting general constitutional law, English historical practice, and the opinions of treatise writers; cf. id. at 538-558 (Harlan J., dissenting) (relying on similar sources to argue the contrary as a matter of federal due process, and foregoing reliance on the Fifth Amendment).

101. Palko v. Connecticut, 302 U.S. 319, 325 (1937). Palko, however, was still a far cry from the police-power approach of the Old Court. See White, supra note 13, at 144 (stating that Palko shifted the due process focus to the “weight” of the liberty interest). For later Palko-like expressions, see Adamson, 332 U.S. at 65 (Frankfurter, J., concurring) (rejecting even “selective incorporation” and focusing instead on “those canons of decency and fairness which express the notions of justice of English-speaking peoples”); Duncan v. Louisiana, 391 U.S. 145, 174 (1968) (Harlan, J., dissenting) (“[T]he [Fourteenth] Amendment was meant neither to incorporate, nor to be limited to, the specific guarantees of the first eight Amendments”).

102. See Martin S. Flaherty, History “Lite” in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 560-61 n. 167 (1995) (stating that the Fifth Amendment was not incorporated by Chicago, Burlington, but merely its antecedent principle); see also Ely, supra note 84, at 104 (noting that the Fuller Court analyzed cases under due process that today would be treated as just-compensation questions, via incorporation); accord Brauneis, supra note 13, at 666-670 (arguing that Justice Holmes’s regulatory takings opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), was not a takings case so much as a substantive due process case, like Chicago, Burlington).

103. As the Court put it later in the 1896 Term, “The law is perfectly well settled that the first 10 amendments to the Constitution, commonly known as the ‘Bill of Rights,’ were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors.” Robertson v. Baldwin, 165 U.S. 275, 281 (1897); cf. Amak, supra note 97, at 225-30 (discussing the “declaratory” theory of the Bill of Rights as supportive of arguments for their application against the states).

104. See Chicago, Burlington, 166 U.S. at 234. Similar resort to such universal principles and state court constitutionalism informed the Court’s striking down of an industry-specific fee-shifting statute as an “arbitrary” classification violative of equal protection, later in the 1896 Term. See Gulf Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155-65 (1897).

105. Near the Term’s end, the Court considered and rejected a challenge to a regulation that prohibited unlicensed speech in Boston Commons. See Davis v. Massachusetts, 167 U.S. 43 (1897). Although rights to free speech were clearly at issue, only the Due Process
V. SIMILAR WINE, DIFFERENT BOTTLE

There has been no shortage of attempts to account for the Court’s ultimate embrace of substantive due process. Although once viewed as an ideologically driven fundamental break with the jurisprudential past and the byproduct of economic and political turmoil of the 1890’s, revisionist accounts of the *Lochner* era tend to stress its links to antebellum legal thought and to view it as a more or less ordinary outgrowth of nineteenth century currents of American constitutionalism. The Term’s due process opinions discussed above show elements of both change as well as continuity, although the change had less to do with the application of novel constitutional principles than with the identification of the source of applicable law. The opinions also highlight the incremental nature of the steps taken by the Court and, to that extent, lend support to a view of the early *Lochner*-era as something other than a judicial coup d’état. To be sure, the federalization of general constitutional norms had long been put off by the Court (in part because general law and diversity jurisdiction made it unnecessary). But the moment of transition had come gradually and it proved smooth. The Court wound up applying constitutional principles and a methodology that, for the most part, it was already quite used to applying as a matter of general constitutional law in diversity cases.

Clause was invoked, not the First Amendment. *See* *White*, *supra* note 13, at 132-33 (observing that pre-World War I free speech decisions were not incorporation cases, but police-power case in which the “liberty of speech” could be regulated if it interfered with public health, safety or morals).


107. *See*, e.g., PAUL, *supra* note 106, at 223-39 (focusing on economic and political turmoil); Howard J. Graham, Justice Field and the Fourteenth Amendment, 52 YALE L.J. 851, 856-70 (1943) (focusing on fears of radicalism). As Professor Purcell put it, the decade of the 1890’s was one “of turmoil marked by intensified labor unrest, sharpened class and ethnic hostilities, the rise of a seemingly radical populist political movement, and the most severe depression in the nation’s history.” EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY 272 (1992).

108. *See* generally GRIFFIN, *supra* note 12, at 101 (describing scholarly accounts of the era). Such accounts also note the frequency with which legislation was upheld against constitutional attack as a legitimate effort to promote the public good. *See*, e.g., GILLMAN, *supra* note 7, at 7, 64-99; ELY, *supra* note 84, at 80-81. But revisionists now have to contend with counter-revisionists. *See*, e.g., Barry Friedman, The History of the Counter Majoritarian Difficulty, Part Three: The Lesson of *Lochner*, 76 N.Y.U.L. REV. 1383 (2001) (doubting the strength of revisionists’ claims, yet largely ignoring the antecedent tradition of general constitutional law in the federal courts).
That the Term’s due process decisions may have had an anchor in the federal courts’ jurisprudential past, however, does not explain why the transformation took place more or less when it did, or why (in hindsight, at least) the 1896 Term’s due process decisions appear to stand out. Without discounting the role that external events described by others may have played, the events recounted in this Essay suggest additional institutional and doctrinal forces that may have been at work.

As indicated by Justice Peckham’s opinion in *Fallbrook*, the possible early stirrings of positivism at the century’s end, along with the imperfect ability of the general law to do all of the constitutional heavy lifting (even on diversity), may have played a part in the move away from general constitutional law toward federal law. Before *Fallbrook*, it had been a distinctly minority sentiment in diversity-based challenges to state action that the Court should apply either genuinely federal law or state law, rather than enforcing “a general latent spirit supposed to underlie” state constitutions.109

In addition, as Professor William Nelson has suggested, not everyone on the Court (which, over the preceding eight years, had seen eight new Justices)110 may have been convinced that the constitutional principles being applied all along in diversity cases were really general law rather than federal law.111 What is more, state constitutions had become even more prolix and detailed by the century’s end and state constitutional meanings had become more settled,112 thus making efforts to straightjacket state constitutions into the uniform garb of general constitutional law appear less legitimate than the open embrace of federal due process. Of course, while these positivist and federalism-based concerns may have operated as a constraint on upsetting well-settled state constitutional meanings, they obviously did not deter the Court from employing a largely pre-positivist common-law approach to fleshing out and giving substance to federal due process, and to do so in a way that significantly limited state action and the balance of federalism.


110. See *Gunther*, supra note 2, app. B, at B-3 to B-4. Chief Justice Fuller (appointed in 1888) and Justices White (1894), Lamar (1888), Jackson (1893), Peckham (1894), Brown (1890), Shiras (1892), and Brewer (1889), had all been appointed within six years of each other. Lamar, however, had been replaced by Jackson, who was in turn replaced by Peckham. Only Justices Field, Harlan, and Gray who were on the Court during the 1896 Term had been sitting longer than ten years. See *id*.

111. See *Nelson*, supra note 26, at 170 (noting that perhaps neither all litigants nor members of the Court were as scrupulous about observing the distinction between general and federal constitutional law as were some, like Justice Miller — the author of general constitutional law decisions such as *Loan Ass’n* and *Pumpelly*—who left the Court in 1890).

In addition, contemporary jurisdictional developments may have reinforced Peckham’s insight regarding the move from general to federal constitutional law. By the mid-1890’s, recently enacted congressional restrictions on diversity jurisdiction appear to have made diversity a less sure vehicle for policing state constitutional violations through the mechanism of general law. More importantly, the Supreme Court’s superintendence over federal court diversity cases had (at its own urging) been greatly restricted in the 1891 Evarts Act. The Act substituted discretion for mandatory Supreme Court appellate review of federal court cases, and created an intermediate level of federal courts through which most federal lawsuits would first have to be filtered. In so doing, it enhanced the institutional role of the lower federal courts and greatly freed up the Supreme Court to focus more on questions of national import and to direct its energies to elaborating federal law.

The Act also reflected the post-Reconstruction retreat from antebellum patterns of federalism that had been closely linked to the federal courts’ diversity jurisdiction which had long served as a kind of surrogate for due process until it matured into a fully federal concept. General constitutional law, of course, was the hand-maid of diversity; so the slide-over into due process also foreshadowed, at the lower court level, an eventual turn toward the 1875 federal question statute as the jurisdictional vehicle of choice to vindicate limits on state action. As a result, the jurisdictional “discrimination” in favor of out-of-state parties (who could invoke general constitutional law to strike down state action on diversity) would cease. And state court litigation that formerly would have only presented issues of general constitutional law, could now be reviewed directly in the Supreme Court.

Perhaps, over time, the Court had become sufficiently accustomed to invoking general constitutional principles on diversity that it eventually seemed more awkward not to continue to invoke similar principles when the case came to them on direct review. But if genuinely federal tools

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113. Congressional cut-backs in 1887—designed in substantial part to make access to the federal courts by out-of-state (often corporate) litigants more difficult—as well as other developments, made the scope of diversity jurisdiction more uncertain and harder to invoke as an original matter. See Purcell, supra note 107, at 127-47, 266-67 (discussing the Court’s reluctant implementation of Act of Mar. 3, 1887, ch. 373, 24 Stat. 552, amended by Act of Aug. 13, 1888, ch. 866, 25 Stat. 433).


116. See Nelson, supra note 26, at 171 (noting that use of diversity jurisdiction to protect rights “was quite consistent with antebellum patterns of federalism,” but that Reconstruction shifted the focus to federal law and federal jurisdiction).

117. It is at least interesting that four of the cases discussed above came to the Court on direct review (the one exception being Fallbrook, in which the Court went out of its way not
were now needed to do the former work of general constitutional law, they were in short supply. The Contract Clause—once the most invoked constitutional limit on state action—was not particularly well-suited to protect against new waves of prospective regulatory interference with property, given its focus on safeguarding vested rights from retrospective legislative interference.\textsuperscript{118} In addition, while the Court seemed to have drawn a line in the sand with respect to the Fourteenth Amendment's Privileges or Immunities Clause in *Slaughter-House*, it had declared early on that its elaboration of due process would proceed on a case-by-case basis, through "the gradual process of judicial inclusion and exclusion."\textsuperscript{119} Given that "due process" and "law of the land" clauses of state constitutions had in the past proved sufficiently adaptable by federal diversity courts to supply the substantive limits on regulatory power now being sought under the aegis of federal law,\textsuperscript{120} perhaps the choice of federal constitutional provisions was not that difficult—even if the choice went largely unexplained.\textsuperscript{121}

**CONCLUSION**

Although the 1896 Term was the scene of a number of due process "firsts," the Court's largely unanimous\textsuperscript{122} opinions were received without

to apply general constitutional law in a diversity case. The Evarts Act, by cutting off the flow of cases from the lower federal courts, but not from the state courts, had the necessary effect of increasing the percentage of cases coming to the Supreme Court from state courts, where parties claiming a denial of federal rights could still claim mandatory review.


\textsuperscript{119} Davidson v. New Orleans, 96 U.S. 97, 104 (1877). The language of "inclusion and exclusion" did not refer specifically to the incorporation of the Bill of Rights, but generally to the process of giving content to due process. The effort at incorporation under the Privileges or Immunities Clause, as opposed to the Due Process Clause, never quite succeeded after *Slaughter-House*, although it sometimes came close. See O'Neil v. Vermont, 144 U.S. 333, 361 (1892) (Field, J., joined by Harlan and Brewer, J., dissenting); Wildenthal, *supra* note 6, passim (chronicling the losing effort).

\textsuperscript{120} For state court reliance on state due process and law of the land clauses, see sources cited *supra* note 8. For federal diversity courts' use of such provisions, see Collins, *supra* note 9, at 1294-95 & nn.154-158.

\textsuperscript{121} See Harrison, *supra* note 14, at 536-41, 553-57; see also id. at 495 ("the textual pedigree of substantive due process has no definitive judicial articulation—there is no *Marbury*, no *McCulloch*, for substantive due process").

\textsuperscript{122} Justice Brewer had dissented in *Chicago, Burlington* on the question of the measure of compensation but agreed with the rest of the Court that just-compensation was a federal question. See 166 U.S. at 258-63 (Brewer, J., dissenting). Without opinion, Chief Justice Fuller and Justice Field dissented from the Court's decision in *Fallbrook* which found no violation of due process. See *supra* note 24.
much fanfare at the time, thus suggesting that the Court was operating in pretty familiar territory even while the source of constitutional limits on state action was being firmly secured as federal. The relative non-reaction to the displacement of the general constitutional law paradigm in favor of federal due process stood in sharp contrast to the outcry that greeted the Court's decisions less than two years before, in which it limited federal legislative power to tax incomes and to regulate monopolies, and in which it upheld broad federal judicial power to issue labor injunctions. Those decisions contributed to an aggressively anti-Court plank in the Democratic Party platform denouncing the Court's actions as violative of the Constitution, objecting to "government by injunction," and hinting at congressional reenactment of overturned legislation. Any immediate threat to the Court, however, ended with the November elections, the sweeping re-election of the Republicans, and the beginning of the Court's 1896 Term that same Fall.

Apart from this happy coincidence (if not quite "constitutional moment"), the Term was noteworthy in one last, if only symbolic,

123. The Harvard Law Review briefly noted Fallbrook, Missouri Pacific, and Sandford, and it seemed either untroubled or supportive. See Note, 10 Harv. L. Rev. 381, 450-51 (1897); see also Note, 12 Harv. L. Rev. 50 (1898) (praising Sandford and disparaging the position that "any statute properly enacted is due process of law" in favor of reasonableness review); Comment, 6 Yale L.J. 161 (1897) (noting Fallbrook); Note, 45 Am. L. Reg. 129 (1897) (noting Sandford and Missouri Pacific); Note, 44 Cent. L.J. 29 (1897) (noting Fallbrook); but cf. Note, 31 Am. L. Rev. 297, 298 (1897) (noting "unfavorable[ly]" reception of the Missouri Pacific decision "in some portions of the press in the extreme West"). Allgeyer's liberty-of-contract holding may have been less well received, even at the time. See Note, 31 Am. L. Rev. 777, 778 (1897) (criticizing Allgeyer as "an assumption of legislative power" that should be "resisted"); Note, 11 Harv. L. Rev. 61 (1897) (attacking liberty of contract (albeit without mentioning Allgeyer) and arguing that due process liberty covered only "freedom from bodily restraint"). But Allgeyer had its supporters, too. See, e.g., Note, Cent. L.J. 299 (1897) (noting that the decision "has met with very general approbation," and agreeing that Allgeyer is "sound in principle and eminently proper and just").

124. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 532 (1895) (striking down federal income tax argued by counsel to be "communistic, socialistic" and "populist").


128. See Westin, supra at id. All of the major due process decisions discussed in the text were decided after the Presidential election of November 1896 and the defeat of the Populist and Democratic candidate, William Jennings Bryan, and before the inauguration of the Republican, William McKinley, in March 1897.

129. Professor Ackerman dubs these events of 1896 a "failed constitutional moment." See 2 Bruce Ackerman, We the People—Transformations 248 (1998). But it is not clear whether it was "failed" from the perspective of the Populist movement which went down to crushing defeat that November; or from the perspective of their opponents (whose conclusive defeat did not come for another 40 years). Others have suggested, only half facetiously, that the "discovery of substantive due process in the 1890's might itself constitute a
respect. It marked the departure of Justice Field. The last holdover and dissenter-in-chief from *Slaughter-House* nearly a quarter of a century before—and long-time champion of the Fourteenth Amendment’s inclusion of the general law norms that the *Allgeyer-Chicago, Burlington* Court finally saw fit to constitutionalize—130—the aging Field submitted his letter of resignation only a month after the Court handed down its March 1st decisions. His long “wait[] for the rest of the court to assume his posture”131 finally over, the first full Term of the *Lochner* era would be Justice Field’s last.132

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130. Then-Professor Frankfurter once quipped that the Court in *Allgeyer* “wrote Justice Field’s dissents into the opinions of the Court.” Felix Frankfurter, *Mr. Justice Holmes and the Constitution*, 41 HARV. L. REV. 121, 141-42 (1927). Others, however, have suggested that Field’s liberty-of-contract focus had been limited to the problem of monopoly-based exclusions on the ability to engage in one of the common professions. See FRANK R. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW* 90-95 (1986); cf. McCurdy, *supra* note 7, at 1005 (suggesting that the *Lochner* Court later “transformed Field’s police-power dicta into an iron law of ‘liberty of contract’”). Field, of course, was on the Court that decided *Allgeyer.*


132. CARL B. SWISHER, STEPHEN J. FIELD—CRAFTSMAN OF THE LAW 442-46 (1969); see also Wildenthal, *supra* note 6, at 1503 (noting Field’s “double-barreled vindication” of March 1st). Field, who had been in declining physical and mental health much of the 1896 Term, submitted his letter of resignation in April 1897, effective that December. See SWISHER, *supra* at 444. Apparently, Field wrote no opinions in the 1896 Term, his last full Term on the Court. See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1009 (2000) (noting also that Field’s mind had become “noticeably feeble” during the Term).