Before *Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law

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Constitutional scholars have long sought to locate the roots of the "Lochner era" during which the United States Supreme Court actively enforced implied limits on governmental regulatory power. While much attention has been paid to the pre-Lochner development of substantive due process principles in the state courts, less attention has been paid to the contemporaneous development of similar principles by the federal courts in the exercise of their diversity of citizenship jurisdiction. Throughout the nineteenth century—and before the Fourteenth Amendment’s Due Process Clause came into its own—federal diversity courts often construed state constitutional law in suits brought by out-of-state citizens raising challenges to state and local legislation. Operating under the now discarded regime of *Swift v. Tyson*, these courts actively fashioned a body of uniform (but nonfederal) constitutional law, often echoing natural-law sentiments, that sharply limited the scope of legitimate governmental action. As discussed in this Article, many of the principles developed on diversity as "general constitutional law" would later be quietly absorbed as federal law under the Due Process Clause. Examination of these antecedents to Lochner thus sheds light on the federal courts’ independence in construing state positive law under *Swift* and on the role that diversity jurisdiction played as an early surrogate for due process. It also supports the revisionist view of the Lochner era as characterized less by the development of novel constitutional doctrines than by the federalization of already familiar ones.

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I. INTRODUCTION

The impact of Swift v. Tyson1 on the federal courts' development of nonfederal general common law in private-law litigation is a familiar story.2 Under its influence, federal courts sitting in diversity took an active role in fashioning their own substantive rules, state decisional law to the contrary notwithstanding.3 The public-law side of Swift—that is, the impact of the decision on the federal courts' treatment of state constitutions and state statutes—is less well known, perhaps because of a perception that Swift had little to do with the federal courts' interpretive freedom regarding a state's positive law, as opposed to its judge-made law.4

2. Scholarship on the subject probably reached saturation point a long time ago. As one nineteenth-century author noted, "So much has been written and spoken about the case[-] of Swift v. Tyson . . . that as [a] subject[-] of legal discussion [it] may well seem exhausted." William H. Rand, Jr., Swift v. Tyson versus Gelpcke v. Dubuque, 8 HARV. L. REV. 328, 328 (1895) (footnotes omitted). For a thoughtful modern retelling of Swift's rise and fall, see TONY FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981).
3. See FREYER, supra note 2, at 45.

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1. Swift v. Tyson
2. Federalization's Moment: October Term, 1896
3. Reallocation of Judicial Power
4. Conclusion
As discussed below, however, nineteenth-century federal courts often felt free to apply their own set of public-law principles in diversity suits challenging the lawfulness of state and local governmental action on state-law grounds. These were typically suits brought by out-of-staters against state and local governments or their officers to redress acts taken pursuant to statutes that ran afoul of the state’s constitution. In considering these suits, the federal courts gave independent and largely uniform readings to a variety of ostensibly state constitutional questions including takings of property, taxing and spending for public purposes, rate making and delegation doctrines, and the permissible limits of governmental power. This widespread articulation of nonfederal public-law principles in the nineteenth-century federal diversity courts proves, moreover, to have been an important, yet underexplored development in the growth of substantive due process near the end of the century.

This is not to suggest that Swift’s public-law side or even its relationship to substantive due process has gone entirely unnoticed. Most scholarly discussion, however, tends to concentrate on the now obscure (but once famous) group of decisions associated with Gelpke v. City of Dubuque and other nineteenth-century bond repudiation cases. In those decisions, federal diversity courts sometimes refused to follow a state supreme court’s latest interpretation of its own constitution as invalidating a particular bond issuance and enforced their own reading of the state’s constitution instead. By relying on “general” constitutional principles that were neither state nor federal in origin, federal courts upheld the validity of securities that were thought to be valid when issued and vindicated the claims of out-of-state creditors, state law notwithstanding.

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6. Id.
7. See cases cited infra note 43.
8. See, e.g., Gelpke, 68 U.S. (1 Wall.) at 205-06.
While cases such as these may have been the most prominent examples of what came to be known as "general constitutional law," they are probably not its most representative examples. And they may not fully capture the dynamic of Swift as it related to questions of state statutory and constitutional interpretation in the federal courts. There is a tendency, moreover, to view Gelpcke and cases like it as somewhat exotic and aberrational decisions in which the Court sought to enforce Contract Clause-like principles in settings in which the Clause did not apply to enforce investor expectations. With the waning of Contract Clause and other vested-rights issues from the forefront of American constitutional law, the cases now seem like


11. The link between the bond cases and substantive due process was previously developed in L.A. Powe, Jr., Rehearsal for Substantive Due Process: The Municipal Bond Cases, 53 TEX. L. REV. 738 (1975). Powe, however, focuses primarily on the judicial "activism" and "free-wheeling jurisprudence" of the Gelpcke and post-Gelpcke Court as foreshadowing the activism of the Court in decisions such as Lochner v. New York, 198 U.S. 45 (1905). See Powe, supra, at 747, 755-56. Although Powe is clearly right about the parallel of judicial attitudes in these two settings, he does not argue that general constitutional law created anything like a substantive springboard for Lochner and, in fact, he tends to discount the substantive continuities. See id.; see also Gardner, supra note 10, at 120-21 (finding antecedents to Lochner's "due process jurisprudence" in Gelpcke and its offspring).

12. See, e.g., Tony Allan Freyer, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY 121-41 (1979); William H. Rehnquist, THE SUPREME COURT: HOW IT WAS, HOW IT IS 170-75 (1987); Thompson, supra note 9, at 1405 n.183 (noting that most scholars find the municipal bond cases to be "merely quirky examples" of the Court's effort to nationalize commercial law); see also Hart & Wechsler, supra note 10, at 684 (referring to the decision in Gelpcke as "controversial"). A previous edition of the Hart & Wechsler casebook had suggested also that the decision was "abberational." See Paul M. Bator et al., Hart & Wechsler's THE FEDERAL COURTS AND THE FEDERAL SYSTEM 884 (3d ed. 1988).

13. See Edward A. Purcell Jr., Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958, at 62 (1992) (noting that "Gelpcke and its progeny came to symbolize the role of the federal courts as the protectors of investment capital"). Why the Contract Clause did not apply in cases such as Gelpcke is discussed infra note 27.
historical curiosities that may have little to tell us about more mainstream constitutional developments around the same time. But as argued below, using Gelpcke as the lens through which to view the development of general constitutional law obscures the prominent role that general public-law principles once played in a whole host of substantive areas. And it underestimates the historic function of the lower federal courts as well as the Supreme Court in enforcing fundamental limits on state action, even before the development of similar principles under the Fourteenth Amendment.

Although this Article reflects only a preliminary inquiry, the historical record indicates that there were far more varieties of general constitutional law in the federal courts than the Gelpcke model would suggest. What is more, these other varieties of general constitutional law prove to be more than simple variations on or expansions of Gelpcke’s theme, and they appear to be pervasive rather than sporadic.14 Thus, whether or not Gelpcke was aberrational, general constitutional law was not. Like parallel constitutional developments in the state courts during the last half of the nineteenth century that are probably better known,15 these Swift-era diversity cases not only reveal a “free wheeling” activist “attitude” that set the Court up for its later adventure with substantive due process, as some have argued.16 Rather, the nonfederal general-law principles that were long developed and applied by nineteenth-century federal diversity courts also provided a ready source of substantive limits on governmental action for the Court of Lochner v. New York17—a Court that transformed such

16. See Powe, supra note 11, at 754-56.
17. 198 U.S. 45 (1905). This is not to suggest that Lochner itself did the job of federalizing general constitutional norms, only that the federal courts of the period commonly associated with Lochner did. The process of federalization of previously nonfederal constitutional principles made use of in federal diversity courts has been previously pointed out by Clyde Jacobs. See JACOBS, supra note 15, at 58-63, 122-25, 152-53, 161-62. But
limits into genuinely federal limits on state action, enforceable in federal courts without regard to diversity of citizenship.

II. RECONSTRUCTING THE SCOPE OF GENERAL CONSTITUTIONAL LAW

A. Enforcing Judicially Settled Expectations: Gelpcke's Theme

Discussion of Swift v. Tyson’s impact on the development of general public-law principles in the federal courts usually begins and often ends with Gelpcke v. City of Dubuque. Gelpcke was representative of a series of mid-nineteenth-century cases in which local governments issued securities to provide financial support for railroads building through their communities, but later defaulted after the expected benefits failed to materialize. When out-of-state bondholders in Gelpcke sued the City of Dubuque in federal court, the city defended its nonpayment based on the Iowa Supreme Court’s recent construction of the state constitution as not allowing local governments to lend financial support to railroads. The city, therefore, claimed that, as a matter of state law, it lacked power to issue the bonds in the first place and that those who bought the securities therefore could not recover on them. The problem, however, was that at the time of the bonds’ issuance, decisions of the state supreme court clearly supported their validity—decisions that the United States Supreme Court in Gelpcke found to be “in harmony with the adjudications” of other states. Conveniently for the city, the state supreme court changed its mind and decided that the issuance was invalid only after the investors had invested and after the city had defaulted.

Jacobs spends the bulk of his effort discussing developments within the treatise tradition and in the state courts. See id.; see also BREST & LEVINSON, supra note 10, at 273-74, 291-92 (noting certain features of “general constitutional law,” including its eventual federalization as a matter of substantive due process).

18. 68 U.S. (1 Wall.) 175 (1863).
21. See id. at 191-92.
22. Id. at 205-06. Justice Swayne noted that earlier (i.e., preissuance) opinions from Iowa courts had upheld the issuance of the bonds, and that those decisions were based on “reason and authority” as well as being “in harmony with the adjudications of sixteen States.” Id.
23. See id.
1. The Murky Role of the Contract Clause

At first blush, the judicial turnabout by the state supreme court might seem to run afoul of federal law given the prohibition against retroactive contractual impairments embodied in the Constitution’s Contract Clause.\(^{24}\) State impairment of bonded indebtedness of municipalities had presented Contract Clause issues in a host of other settings in which cities sought state legislative help to avoid onerous financial obligations.\(^{25}\)

But in *Gelpcke*, the Contract Clause was not implicated because the retroactive impairment of the bondholders’ rights under state law had been the result of state judicial decision making, not legislation.\(^{26}\) According to the United States Supreme Court, retroactive legislative impairment, not mere judicial impairment, was a precondition to finding that a state had violated the Contract Clause.\(^{27}\) All the relevant state-law provisions that the state court eventually construed as denying cities the power to issue bonds for the development of railroads had preceded their issuance; only the state court judicial interpretation of those provisions was retroactive.\(^{28}\) And because *Gelpcke* was decided before the passage of the Fourteenth Amendment, the bondholders had no other federal constitutional

\(^{24}\) U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ").

\(^{25}\) See BENJAMIN FLETCHER WRIGHT, JR., THE CONTRACT CLAUSE OF THE CONSTITUTION 224-42 (1938) (discussing Contract Clause cases involving the impairment of state or local governmental contracts).

\(^{26}\) See *Gelpcke*, 68 U.S. (1 Wall.) at 202-07.

\(^{27}\) Throughout the nineteenth century, the Supreme Court insisted on legislative impairment of contracts rather than judicial impairment to make out a violation of the Contract Clause. See, e.g., Central Land Co. v. Laidley, 159 U.S. 103, 109 (1895) (stating that a Contract Clause violation must result from “some act of the legislative power of the State, and not by a decision of its judicial department only”); Commercial Bank v. Buckingham’s Executors, 46 U.S. (5 How.) 317, 342-43 (1847) (stating that judicial interpretation of a state statute does not amount to a violation of the Contract Clause, even if the interpretation has retroactive fallout); cf. Bacon v. Texas, 163 U.S. 207, 221 (1896) ("[W]e have no jurisdiction [on direct review of a state court decision], because a state court changes its views in regard to the proper construction of its state statute, although the effect of [the] judgment may be to impair the value of what the state court had before that held to be a valid contract."); Railroad Co. v. Rock, 71 U.S. (4 Wall.) 177, 181 (1866) (noting that if judicial impairment were enough, “every case of a contract held by the State court not to be binding, for any cause whatever, can be brought to this court"). But see Thompson, supra note 9, at 1416 (suggesting that the question of whether the Contract Clause itself "barred judicial impairments remained unsettled" until Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924)). In *Tidal Oil*, Chief Justice Taft stated that the *Gelpcke* line of cases “did not base th[eir] conclusion[s] on Article I, § 10, of the Federal Constitution, but on the state law as they determined it.” *Tidal Oil*, 263 U.S. at 452.

\(^{28}\) See *Gelpcke*, 68 U.S. (1 Wall.) at 175-78.
arguments at their disposal. The case therefore presented only questions of state law, and state law was now clear: the bonds were invalid. Nevertheless, the Supreme Court refused to follow the latest state court interpretation of the Iowa Constitution. It followed the older one instead and upheld the validity of the bonds in the hands of out-of-state creditors.

The Court was anything but clear as to the source of its authority to construe state constitutional provisions in a manner contrary to the latest state court decisions, if the Contract Clause was not the reason. Justice Swayne invoked precedent for the Court's conclusion that state judicial interpretations of state statutes could sometimes be ignored, although the precedent he chose was a case involving the Contract Clause. Perhaps the best effort at a rationale was Justice Swayne's

29. See id. at 179-91.
30. See id. at 191-202.
31. See id. at 202-07.
32. See id. There has been some debate concerning whether Gelpcke might really have been a Contract Clause case, with the Court expanding it to cover retrospective judicial impairments. See CARL B. SWISHER, THE TANEY PERIOD 1836-64, at 335-38 (5 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, Paul A. Freund ed., 1974). Others have concluded that the "constitutional justification for [Gelpcke] . . . has never been entirely clear." WRIGHT, supra note 25, at 81; see also DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 1789-1888, at 220 (1985) ("Whatever else may be said about Gelpcke, [Justice] Swayne can hardly be accused of having revealed the basis of his decision."). But there is ample proof that the Clause was not implicated in Gelpcke. First, and not insignificantly, the decision fails to mention it. Second, Justice Miller, in dissent, stated that no one "pretended" that the state court's decision was "in conflict with the Constitution of the United States." Gelpcke, 68 U.S. (1 Wall.) at 209-10 (Miller, J., dissenting). Third, when cases identical to Gelpcke came to the Supreme Court on direct review from the state courts, it turned them back because there had been no denial of any federal right. See cases cited supra note 27. Presumably, if the Court thought that Gelpcke and cases like it were Contract Clause cases, it would have reviewed them whether they came from state court or federal court. See Sherry, supra note 9, at 1267 n.32.
33. See Gelpcke, 68 U.S. (1 Wall.) at 202-07.
34. See id. at 205 ("It cannot be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur.").
35. See id. at 205-06. Justice Swayne relied on a statement from Chief Justice Taney in Ohio Life Insurance Co. & Trust Co. v. Debolt, 57 U.S. (16 How.) 416, 432 (1853) (separate opinion), to the effect that judicial constructions of state positive law that upset preexisting settled interpretations of it could sometimes be ignored, as could statutes that retroactively impaired preexisting contractual obligations. See also Thompson, supra note 9, at 1400-01 (questioning the propriety of Justice Swayne's reliance on Debolt). Even though Debolt was, unlike Gelpcke, a Contract Clause decision on direct review from a state court, Taney's statement was made in connection with the Court's independent assessment of whether a valid contract existed in the first place. See Debolt, 57 U.S. (16 How.) at 427-41. If a state court had given a novel reading to its constitution as not allowing the state to enter into its contract (and therefore no contract existed that later legislation could impair), Justice Taney was prepared to rely on prior settled constructions and ignore the more recent one. See id. Taney's principle is one that the Supreme Court continues to enforce on direct review of Contract Clause cases coming from the state courts. See generally HART & WECHSLER,
suggestion in a later decision that federal courts had the power under Article III to construe state law when their diversity jurisdiction was properly invoked, as in Swift, and that the power carried with it the ability to give an independent reading to state law including, in some cases, fundamental issues of state constitutional law.\textsuperscript{36}

The need for such independence may have been seen as particularly acute when interstate commercial transactions were at issue and vested contractual rights were threatened by after-the-fact state judicial interpretations of state law. Justice Swayne summed it all up quite sententiously: "We shall never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."\textsuperscript{37} So, despite the absence of any then-existing basis in federal law for holding the city to its bargain, and despite the fact that state law apparently forbade the city from issuing its bonds and would have barred recovery, the bondholders prevailed in their diversity actions in federal court.\textsuperscript{38}

Although the Court's rationale for ignoring state decisional law in \textit{Gelpcke} was unclear, and the legitimacy in doing so was doubtful, the Court's bottom line may be understandable even today. Insofar as the state judiciary could not disavow local governmental contractual obligations after it had previously given investors the green light, the result seems fair for the same reasons that the Contract Clause would have barred state legislative disavowal.\textsuperscript{39} Minimizing such retroactive

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\textsuperscript{36} See Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 678 (1874); see also \textit{Currie}, supra note 32, at 220-21 n.160 (suggesting that the \textit{Swift} analogy would have been Justice Swayne's best argument); \textit{Fairman}, supra note 9, at 937-38 (discussing Justice Swayne's explanation for the federal courts' interpretive freedom); cf. \textit{Harold M. Hynan & William M. Wiecek, Equal Justice Under Law: Constitutional Development 1835-1875}, at 368 (1982) (linking \textit{Gelpcke}, \textit{Swift}, and the grant of diversity jurisdiction); Jack Goldsmith & Steven Walt, \textit{Erie and the Irrelevance of Legal Positivism}, 84 VA. L. REV. 673, 683 & n.37 (1998) (noting nineteenth-century reliance on the Constitution as a justification for \textit{Swift}). Even at the time, commentators seemed to understand that the \textit{Gelpcke} line of decisions had been based on \textit{Swift}. See, e.g., \textit{Benjamin Robbins Curtis, Jurisdiction, Practice, and Peculiar Jurisprudence of the Courts of the United States} 212 (George Ticknor Curtis & Benjamin R. Curtis eds., 1880) (characterizing "commercial cases," such as \textit{Swift}, and judicial-impairment decisions, such as \textit{Gelpcke}, as "exceptions" to the principle that federal diversity courts would follow state law).

\textsuperscript{37} \textit{Gelpcke}, 68 U.S. (1 Wall.) at 206-07.

\textsuperscript{38} See \textit{id. at 202-07}; \textit{Fairman}, supra note 9, at 918-1116.

\textsuperscript{39} See \textit{Sherry}, supra note 9, at 1267; see also Society for the Propagation of the Gospel v. Wheeler, 22 F. Cas. 756, 766-68 (C.C.D.N.H. 1814) (No. 13,156) (Story, Circuit Justice) (holding a state statute violative of a state constitution's bar on "retrospective laws" and the general principles that underlie such a bar); cf. \textit{Eastern Enters. v. Apfel}, 524 U.S. 498, 538-39 (1998) (Thomas, J., concurring) (concluding that all retrospective laws, civil or criminal, should be tested under the Ex Post Facto Clause, U.S. CONST. art. I, § 9, cl. 3).
\end{footnotesize}
change respects the needs of contracting parties by providing stability to the legal environment in which contracting takes place. And to the extent that out-of-state investors may have borne the brunt of the state courts’ contractual impairment through a novel reading of state law, the decision in *Gelpcke* also protected out-of-staters from the possibility of discrimination, while facilitating the interstate market in municipal securities. In the period before the ratification of the Due Process Clause that was binding on the states, or the still-later engrazing of the just compensation principle of the Fifth Amendment onto the Fourteenth Amendment’s Due Process Clause, the decision in *Gelpcke* prevented a municipality from pocketing private investment capital for its own use or from transferring it to others.

2. Ignoring Shifts in State Decisional Law

Other bond cases followed a similar pattern and have been well explored elsewhere. But it is a mistake to think of general constitutional law as mainly involving cases such as *Gelpcke*, in which

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40. Such discrimination today might be associated with the interstate Privileges and Immunities Clause, U.S. Const. art. IV, § 2, or the dormant commerce clause, see id. art. I, § 8. Legislation that impacts out-of-staters may involve some political checks if there are also some in-staters who are affected by it, but with judge-made lawmaker, there is little possibility for such checks. Nevertheless, commentary on *Gelpcke* was not particularly favorable even among contemporaries. See, e.g., JAMES KENT, COMMENTARIES ON AMERICAN LAW 379 n.4(a), 471 n.1(a) (O.W. Holmes, Jr. ed., Boston, Little, Brown, & Co. 12th ed. 1873) (criticizing *Gelpcke*); William B. Hornblower, Conflict Between Federal and State Decisions, 14 Am. L. Rev. 211, 215-19 (1880) (same); see also James B. Thayer, The Case of Gelpcke v. Dubuque, 4 Harv. L. Rev. 311, 315, 317-20 (1891) (indicating support for the result, but not all of the reasoning in *Gelpcke*, arguing that *Gelpcke* should be limited to state judicial rules that were actually hostile to out-of-staters).

41. Both events—ratification of the Fourteenth Amendment and incorporation of the Fifth Amendment—took place after *Gelpcke*. See infra text accompanying note 122.

42. See *Gelpcke*, 68 U.S. (1 Wall.) at 201-07.

43. See, e.g., Douglas v. County of Pike, 101 U.S. 677 (1879); Havemeyer v. Iowa City, 70 U.S. (3 Wall.) 294 (1865); Coler v. Board of Comm’rs, 89 F. 257 (C.C.W.D.N.C. 1898); In re Copenhaver, 54 F. 660 (C.C.W.D. Mo. 1893); cf. Oclott v. Supervisors, 83 U.S. (16 Wall.) 678, 688-98 (1872) (upholding a county’s order of taxation when a preponderance of the state courts had upheld the validity of such orders, postorder decisions to the contrary notwithstanding). For scholarly discussion of these decisions and others, see sources cited supra notes 9-12.

The Court’s motivation in these cases, it is sometimes said, was to counter the rise of elected judiciaries who issued novel interpretations of state law repudiating older precedents to extricate state and local governments from bad business deals, usually at the expense of out-of-state bondholders. See FREYER, supra note 12, at 124-30; Thompson, supra note 9, at 1405-06. Even if true, it is at least interesting that states were often able to evade their bonded indebtedness when local governments could not, because of sovereign immunity concerns. See Michael G. Collins, The Conspiracy Theory of the Eleventh Amendment, 88 Colum. L. Rev. 212, 234-39 (1988) (reviewing JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES—THE ELEVENTH AMENDMENT IN AMERICAN HISTORY (1987)).
contracting parties might have relied on preexisting but later-reversed state court constructions of state positive law.\textsuperscript{44} Although the most visible examples of general constitutional law may have involved such circumstances, there were other important examples as well.

A second group of Supreme Court decisions consisted of cases in which there had been no preexisting state court judicial pronouncements on which contracting parties may have relied (in contrast to \textit{Gelpcke}), but in which there had been post hoc decisional law that the federal courts still chose to ignore.\textsuperscript{45} In addition, there was a third group of decisions, often having little to do with protecting contracting parties from retrospective state decision making. This third group of decisions simply involved the Court in the construction of a state’s public law—its statutes and constitution—when the law was unconstrued or otherwise less than clear.\textsuperscript{46} That, of course, is something modern federal courts sitting in diversity have to do as well, although today they might attempt to emulate (or predict) how the courts of the relevant state would answer the question.\textsuperscript{47} But under the influence of \textit{Swift}, federal courts often gave their own uniform readings of state constitutional law, and in the process relied on what the Supreme Court perceived to be a widely shared body of government-limiting, property-respecting principles “of all free governments.”\textsuperscript{48}

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\textbf{B. Enforcing Judicially Unsettled Expectations: Variations on a Theme?}
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1. Ignoring Post Hoc Decisional Law

Some of the bond cases departed from the pattern of \textit{Gelpcke} by allowing investors to recover even when there had been no state decisional law in place at the time of a bond issuance on which

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\item\textsuperscript{44} Some Justices would have so limited \textit{Gelpcke}, however. \textit{See} Butz v. City of Muscatine, 75 U.S. (8 Wall.) 575, 585 (1869) (Miller, J., dissenting, joined by Chase, C.J.).
\item\textsuperscript{45} \textit{See} discussion \textit{infra} Part II.B.
\item\textsuperscript{46} \textit{See} discussion \textit{infra} Part II.C.
\item\textsuperscript{47} Modern federal courts, however, have sometimes invoked abstention principles in connection with unclear questions of state law, especially questions of state constitutional law, to avoid having to decide such questions themselves. \textit{See}, e.g., Harris County Comm’rs Court v. Moore, 420 U.S. 77, 84-85 n.8 (1975); Reetz v. Bozanich, 397 U.S. 82, 85 (1970). \textit{See generally} Bradford R. Clark, \textit{Ascertain the Laws of the Several States: Positivism and Judicial Federalism After Erie}, 145 U. Pa. L. REV. 1459, 1464-65, 1541-42, 1549-62 (1997) (arguing for an increased state court role in elaborating the meaning of state law in diversity actions when state law is indeterminate).
\item\textsuperscript{48} \textit{See} Loan Ass’n v. Topeka, 87 U.S. (20 Wall.) 655, 663 (1875). \textit{Loan Ass’n} is discussed \textit{infra} text accompanying notes 100-113.
\end{enumerate}
investors might have relied; instead, decisions in this second category involved only after-the-fact state decisional law.\textsuperscript{49} Nevertheless, absent a clear and "settled" state court interpretation of a state constitution denying the power of municipalities to issue their bonds at the time of their issuance, the Court would typically uphold the claims of bona fide purchasers and ignore postissuance state court decisions that the bonds were invalid.\textsuperscript{50} This was true even though in other contexts the latest settled decisions of state courts as to the meaning of state law would ordinarily be controlling in federal court, retroactive or not.\textsuperscript{51} The lawfulness of the exercise of municipal power in issuing bonds under such circumstances was considered to be, as in \textit{Gelpcke}, a question of general jurisprudence that federal diversity courts could decide for themselves.

For example, in \textit{Township of Pine Grove v. Talcott}, the Court invoked general constitutional principles and ignored postissuance state decisional law in upholding the validity of a municipal bond measure under Michigan's constitution.\textsuperscript{52} Once again, railroad subsidies were at issue, and the town's defense to nonpayment was that the state statute authorizing the issuance was invalid under the state constitution as not being for a "public purpose."\textsuperscript{53} And this time, unlike in \textit{Gelpcke}, no preissuance decisions suggested anything to the contrary.\textsuperscript{54}

Unfazed by this distinction, the Supreme Court assessed the relevant provisions of the state constitution on its own and concluded that they did not invalidate the statute pursuant to which the township had acted.\textsuperscript{55} Contrary to the interpretation of the state courts, the Court found that governmental expenditures for railroads were indeed for a public purpose—a question that the Court felt it could resolve on the basis of what it considered to be the "general understanding" of such limits on the scope of governmental action.\textsuperscript{56} The Court's language of disregard for the role of the state courts in giving meaning to their state constitution was nothing short of remarkable:

It is insisted that the invalidity of the statute [authorizing the bonds] has been determined by two judgments of the Supreme Court of

\textsuperscript{49} See Powe, \textit{supra} note 11, at 742-43; Sherry, \textit{supra} note 9, at 1269-70.
\textsuperscript{50} See \textit{infra} text accompanying notes 86-93, 179-183.
\textsuperscript{51} See \textit{infra} text accompanying notes 86-93, 179-183.
\textsuperscript{52} 86 U.S. (19 Wall.) 666, 672-79 (1874).
\textsuperscript{53} See \textit{id.} at 676.
\textsuperscript{54} See \textit{id.} at 672-79.
\textsuperscript{55} See \textit{id.} at 674-76.
\textsuperscript{56} See \textit{id.} at 678. The purpose and scope of such provisions is noted \textit{infra} text accompanying notes 98-109.
Michigan, and that we are bound to follow those adjudications. We have examined those cases with care. With all respect for the eminent tribunal by which the judgments were pronounced, we must be permitted to say that they are not satisfactory to our minds. We think the dissenting opinion in the one first decided is unanswered. Similar laws have been passed in twenty-one States. In all of them but two, it is believed their validity has been sustained by the highest local courts. It is not easy to resist the force of such a current of reason and authority. The question before us belongs to the domain of general jurisprudence. In this class of cases this court is not bound by the judgment of the courts of the States where the cases arise.\footnote{57}

The Court went on to note that when the securities were issued there had been "no authoritative intimation" that they were invalid under state law, and that the "general understanding of the legal profession throughout the country" supported their validity.\footnote{58} In fact, the lower federal court in \textit{Pine Grove} had stated bluntly that the mistake of the Michigan courts in construing their own law was that they had disregarded the decisions of the courts of other states and had rejected a settled rule that had become "part of ‘American jurisprudence.’"\footnote{59}

Here, too, the Supreme Court recognized that the case before it did not involve a Contract Clause violation because no postissuance statute of the state had impaired the bondholders’ contract with the township.\footnote{60} Only the postissuance judicial decisions of the state supreme court had done so.\footnote{61} But Justice Swayne (\textit{Gelpcke}’s author) alluded to the admittedly inapplicable Contract Clause to make the point that, in disputes over which the federal courts had jurisdiction, contractual impairment "can be accomplished unwarrantably no more by judicial decisions than by legislation."\footnote{62} To yield to state court decisions would, said the Court, "abdicate the performance of one of

\footnotesize{\begin{itemize}
  \item 57. \textit{Id.} at 677 (footnote omitted); see also Gardner, \textit{supra} note 10, at 120 (discussing \textit{Pine Grove}).
  \item 58. \textit{Pine Grove}, 86 U.S. (19 Wall.) at 677-78.
    
    The first and most obvious objection to these [Michigan state court] judgments is that they disregard so great a number of antecedent decisions of the courts of other states, ... as to render them an extraordinary and unwarrantable departure from well settled judicial action. The rule which is denied had, in fact, become a part of "American jurisprudence."
  
  \textit{Id.} at 658.
  \item 60. \textit{See Pine Grove}, 86 U.S. (19 Wall.) at 676.
  \item 61. \textit{See id.} at 677.
  \item 62. \textit{Id.} at 678.
\end{itemize}}
the most important duties with which this tribunal is charged [under Article III].”63 This time, *Gelpcke* was expressly invoked.64 And once again, Justice Miller (*Gelpcke*’s dissenter) dissented, given the existence of state court decisions definitively construing the scope of local governmental powers under state law, albeit after the fact.65 Other decisions fell into this second category in which state court judicial elaboration of state law only followed, rather than preceded, the events that gave rise to the litigation.66

2. *Gelpcke*’s Scope and Its Antecedents

To the extent that decisions along the lines of *Pine Grove* were not premised on settled contractual expectations arising from preexisting state court readings of a state’s constitution, it might be argued, and some have argued,67 that such decisions were expansions of *Gelpcke*’s principle. On the other hand, as discussed below, it was often the case that federal courts would be presented with state constitutional questions to which state courts might not have spoken clearly, either before or after the events giving rise to the suit.68 In those cases, federal courts would not (as in *Gelpcke*) be forced to choose between two competing lines of state decisions; rather the

63. *Id.*
64. *See id.*
65. *See id.* at 679 (Miller, J., dissenting).
66. *See, e.g.*, Town of Venice v. Murdock, 92 U.S. 494, 500 (1875) (acknowledging the existence of post hoc state court authorities “without being convinced by them”); *Butz v. City of Muscatine*, 75 U.S. (8 Wall.) 575, 584 (1869) (stating that “this right [to a remedy existing when a contract was entered into] can no more be taken away by subsequent judicial decisions than by subsequent legislation,” and that if a “settled” state court interpretation of state positive law had *preceeded* the bond issuance, the case “would have presented a different aspect”); *see also* Burgess v. Seligman, 107 U.S. 20, 22-23, 34 (1882) (ignoring state court interpretations of a state statute rendered after relevant transactions because “there was no settled construction of the statute” at the time of the transactions); *Southern Pac. R.R. v. Orton*, 32 F. 457, 478-79 (C.C.D. Cal. 1879) (refusing to apply a state constitutional provision regarding corporate powers retroactively, despite state court decisions holding the provision retroactive as matter of state law); *Gilchrist v. City of Little Rock*, 10 F. Cas. 366, 366-67 (C.C.E.D. Ark. 1871) (No. 5421) (upholding bonds issued when there was no authoritative decision in the state courts regarding their illegality under state law, and without regard to how a state court might come out).
67. *See FREYER*, supra note 2, at 59-60; Sherry, *supra* note 9, at 1267. As Professor Suzanna Sherry has noted, *Gelpcke* and cases like it arguably articulated a less broad principle insofar as the Court in these cases seemed to indicate “the idea that only ‘oscillations’ in the state court[s] would justify ignoring state interpretations of state constitutions.” *Id.* And as she points out, sometimes the Court tried to pretend that there had been prior state court decisions that might have given rise to settled expectations when it was doubtful whether such decisions existed. *See id.* at 1267 & nn.34-35 (discussing *City of Kenosha v. Lamson*, 76 U.S. (9 Wall.) 477, 485-86 (1870)).
68. *See infra* text accompanying notes 98-170.
federal courts were stuck in the position of having to answer the state constitutional question largely based on sources other than decisional law from the relevant state.\(^{69}\) In one respect that is what the Court did in *Pine Grove*, too: it resolved the state constitutional question—whether the securities were issued for a public purpose—as a matter of first impression and without any help from the Michigan courts, although it did so by ignoring apparently clear after-the-fact state decisional law to the contrary.\(^{70}\) Instead, the Court conformed its rule to the general practice of other jurisdictions and to its own sense of legitimate governmental powers.\(^{71}\)

Despite their differences, decisions such as *Gelpcke* and *Pine Grove* complemented each other. They both concluded that in the context of vested contractual rights, courts could and perhaps should ignore post hoc state court decision making.\(^{72}\) And both are consistent with the idea that if there is settled decisional law from the relevant state’s courts at the time of contracting, it would likely be controlling.\(^{73}\) But in the absence of such preexisting decisional law, federal courts had to do their best to resolve what, at the time of contracting, was seen as a judicially unresolved question of state constitutional law.

The rationale for the Court’s interpretive default rule in contexts such as *Pine Grove* seems to have been that in the absence of any previously settled contrary rule from the relevant state, the settled and generally accepted norms from other jurisdictions were ones on which out-of-state contracting parties might be supposed to have relied; likewise, these parties could be presumed to have relied on the settled in-state judicial construction that preceded the issuance of securities in a case such as *Gelpcke*.\(^{74}\) The principle that cases such as *Pine Grove* articulated, however, even if broader than *Gelpcke*’s in one respect, may come closer to reflecting the federal courts’ historic role in independently administering state law, including state constitutional law in some settings. Indeed, as noted below, *Gelpcke* itself might

\(^{69}\) See infra text accompanying notes 98-170.

\(^{70}\) See Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 677 (1874).

\(^{71}\) See id.

\(^{72}\) See *Pine Grove*, 86 U.S. (19 Wall.) at 677; *Gelpcke* v. City of Dubuque, 68 U.S. (1 Wall.) 175, 205-06 (1863).

\(^{73}\) See *Pine Grove*, 86 U.S. (19 Wall.) at 678; *Gelpcke*, 68 U.S. (1 Wall.) at 206.

\(^{74}\) See, e.g., Talcott v. Township of Pine Grove, 23 F. Cas. 652, 655 (C.C.W.D. Mich. 1872) (No. 13,735), aff’d, 86 U.S. (19 Wall.) 666 (1874) (noting that federal courts might refuse to follow post hoc decisions if they were “at war with those general principles upon which all citizens must necessarily rely”). See generally Randall Bridwell & Ralph U. Whitten, *The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism* 90 (1977) (arguing that *Swift*’s focus on general rather than local practices helped preserve the expectations of commercial actors).
better be viewed as a variant on this larger theme of enforcing consensus default rules regarding the scope of governmental powers—a theme that seems to have preexisted Gelpcke.

For example, in Groves v. Slaughter, a pre-Gelpcke (and even pre-Swift) decision, the Supreme Court on review of a federal court diversity action gave an independent reading to a seemingly straightforward provision in Mississippi’s antebellum constitution.75 The relevant language purported to bar the importation for sale of slaves from out of state after a particular date, but the Court read the language as not barring the practice at all, absent the state’s passage of enabling legislation.76 Although some state court decisions had suggested the contrary, the Supreme Court concluded that the state’s decisional law was insufficiently “fixed and settled” on this issue because of the “diversity of opinion” expressed in those decisions.77 Without the enabling legislation, the Court concluded that a contract for the sale of slaves brought into the state after the relevant date was still enforceable in federal court if the contracting parties were diverse.78 Once again, the Contract Clause was not to blame because the underlying state constitutional provision was designed to be prospective only. Instead, the Supreme Court resorted to general principles of interpretation to resolve what it considered to be an unsettled question of state constitutional law.79

After the Supreme Court’s decision, however, the state high court made clear what might have seemed obvious under a plain reading of the state constitution: no slaves could be imported into the state for

75. 40 U.S. (15 Pet.) 449, 499-503 (1841). The litigation in Groves is recounted in depth by Professor Barton Thompson, who implies that the Court may have been disingenuous in finding that state judicial authority had not been settled prior to the contracts in question. See Thompson, supra note 9, at 1392-96. Clearly the Court pulled out all of the stops to enforce contracts for the sale of slaves imported from out of state, perhaps because of the lurking dormant commerce clause challenge should the contracts prove unenforceable as a matter of state law. See Groves, 40 U.S. (15 Pet.) at 504-08 (McLean, J., concurring) (discussing dormant commerce clause issues).

76. The state constitution provided that “the introduction of slaves into this state as merchandise, or for sale, shall be prohibited from and after the 1st day of May, 1833.” Groves, 40 U.S. (15 Pet.) at 499-500. Enabling legislation was supposedly required because the Court read the constitutional prohibition, which lacked any reference to a sanction for its violation, as necessarily looking forward to additional legislative action to make it enforceable. See id. at 500. The Court also appeared concerned about what would happen to slaves introduced into the state in violation of the constitutional provision if contracts for their sale were to be undone, without legislative provision for such circumstances. See id. at 500-01. In addition, the Court’s interpretation of state law enabled it to avoid ruling on a potentially difficult question of federal constitutional law. See supra note 75.

77. See Groves, 40 U.S. (15 Pet.) at 497, 500-03.

78. See id. at 503.

79. See id. at 499.
sale after the relevant date, contracts for the sale of such slaves were unenforceable, and enabling legislation was unnecessary to achieve that end. See Rowan v. Runnels, 46 U.S. (5 How.) 134, 137 (1847) (noting intervening developments in state decisional law). Nevertheless, in Rowan v. Runnels, a follow-up diversity case brought after the intervening state court decision had made clear the meaning of the state constitutional provision, the Supreme Court continued to apply its earlier precedent in Groves to contracts for the sale of imported slaves after the forbidden date, at least when the contract was entered into before the intervening state high court decision. See id. at 138-40.

According to Chief Justice Taney’s opinion for a nearly unanimous Court in Rowan, the state court’s intervening decision regarding the construction of the state constitution could have only prospective effect insofar as the federal courts were concerned. Even though such contracts were enforceable in federal court, they were unenforceable in state court. See id. at 140 (Daniel, J., dissenting) (noting that the outcomes would be different in state court). Nor could the Supreme Court review a state court judgment refusing to enforce such a contract because no federal question would be involved.

For the Chief Justice and the rest of the Court, however, these potential federalism concerns were trumped by concerns for the nonimpairment of existing contracts—in this case, for the sale of slaves. See infra text accompanying notes 199-213.


81. See id.

82. See id. at 138-40.

83. Even though such contracts were enforceable in federal court, they were unenforceable in state court. See id. at 140 (Daniel, J., dissenting) (noting that the outcomes would be different in state court). Nor could the Supreme Court review a state court judgment refusing to enforce such a contract because no federal question would be involved. See infra text accompanying notes 199-213.

84. See Rowan, 46 U.S. (5 How.) at 140 (Daniel, J., dissenting). For a similar assessment of such practices, see Ohio v. Knoop, 57 U.S. (16 How.) 369, 398 (1853) (Catron, J., dissenting). Rowan has been critiqued as having been the “first” case in which the Supreme Court failed to adhere to state constructions of their own constitutions. See William M. Meigs, Decisions of the Federal Courts on Questions of State Law, 45 Am. L. Rev. 47, 65-66 (1911).

85. See Rowan, 46 U.S. (5 How.) at 138-39. It may be tempting to dismiss the results in decisions such as Groves and Rowan because they involved slavery issues. See, e.g., Mary Cornelia Aldis Porter, John Marshall Harlan the Elder & Federal Common Law: A Lesson from History, 1972 Sup. Cr. Rev. 103, 112 n.56. But it is hard to do so given that these decisions were entirely consistent with what federal courts did when faced with similar issues in nonslavery settings, as discussed below. See also Talcott v. Township of Pine Grove, 23 F.
3. Statutory Parallels

Giving an independent reading to state constitutional law went hand in glove not only with the federal courts’ nonadherence to state common law under *Swift*, but also with nonadherence to state judicial treatment of state statutes in some settings. The Supreme Court itself exercised this independence, despite its repeated admonition that federal courts should ordinarily follow settled state court constructions of state statutes and constitutions.\(^6\) If, for example, the Court believed that state court decisions appearing to construe a state statute were actually resolved on the basis of “general principles,” it felt that it could ignore the decisions and try to elaborate those same general principles on its own.\(^7\) In this respect, the Court’s treatment of statutes somewhat paralleled its interpretation of state common law under *Swift*, with state court decisions as to such a statute’s meaning being merely “evidence” of its meaning.\(^8\)

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\(^6\) See, e.g., Forsyth v. Hammond, 166 U.S. 506, 518-19 (1897) (stating that a state court’s construction of a state constitution and state statutes was “as a general rule” binding on the federal courts); Elmendorf v. Taylor, 23 U.S. (10 Wheat.) 152, 159 (1825) (“This Court has uniformly professed its disposition, in cases depending on the laws of a particular State, to adopt the construction which the Courts of the State have given to those laws.”); Bennett v. Boggs, 3 F. Cas. 221, 229 (C.C.D.N.J. 1830) (No. 1319) (Baldwin, Circuit Justice) (noting that, absent “peculiar circumstances,” federal courts would “adopt the decisions of state courts on the construction and validity of local statutes, and the exposition of local common law”); see also infra notes 180-189 and accompanying text (discussing this principle and its exceptions); cf. Thompson, supra note 9, at 1388 & n.70 (relying to the Marshall Court’s deference to state courts as presenting a “mixed bag” of results).

\(^7\) See, e.g., Town of Venice v. Murdock, 92 U.S. 494, 501 (1875) (denying that state court decisions amounted to “judicial constructions of a statute” and that they instead “assert general principles”); see also Clark v. Bever, 139 U.S. 96, 116 (1891) (rejecting a state court ruling as not premised on the construction of a state statute but as grounded in “principles of general law”); Rothschild v. Hasbrouck, 65 F. 283, 291 (C.C.S.D. Iowa 1894) (considering a state court opinion to have involved an analysis of “general principles” when ruling on a matter as to which a state statute was silent); cf. Buchar v. Cheshire R.R., 125 U.S. 555, 585 (1888) (Harlan, J., dissenting, joined by Field, J.) (noting that the construction of a state statute restricting Sunday travel on railroads implicated a question of general law that should have been left to the federal courts to construe, state court decisions to the contrary notwithstanding); Watson v. Tarpley, 59 U.S. (18 How.) 517, 521 (1855) (ignoring a remedy-limiting state statute whose applicability to a negotiable instrument would be contrary to general principles of commercial law). See generally HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 89-90 (1991) (discussing Watson); Charles A. Heckman, Uniform Commercial Law in the Nineteenth Century Federal Courts: The Decline and Abuse of the Swift Doctrine, 27 EMORY L.J. 45, 49-50 (1978) (indicating that state court constructions of state statutes and sometimes even state statutes themselves could be ignored under *Swift*).

\(^8\) See, e.g., Pana v. Bowler, 107 U.S. 529, 540 (1883) (noting that settled constructions of state positive law will be accepted “as a general rule . . . as evidence of what
In order to heed its admonition to follow settled state court constructions of state statutes, however, the Court even went so far as to characterize state court decisions that relied on general principles to fill in the broad outlines of state statutes as not involving "interpretations" of the statutes at all. 89 Statutes were therefore given a presumptively narrow scope and the interpretation of them was considered to be a similarly narrow enterprise. For analogous reasons, federal courts would not have to follow state court constructions of state statutes that were themselves merely declaratory of the common law, 90 just as previously unconstrained statutes in derogation of the common law would be construed narrowly, as a general principle of statutory construction. 91 And if a state court's reading of a previously unconstrained statute would tend to upset settled contractual expectations, federal diversity courts might ignore it altogether. 92 Thus, even when there had been no prior state court decisions from which later ones deviated, federal courts could sometimes give their

the local law is"; Hollingsworth v. Parish of Tensas, 17 F. 109, 111 (C.C.W.D. La. 1883) (concluding that judicial glosses on statutes simply amount to "the best evidence of what the law is"); see also Clark, supra note 4, at 1285-86 (discussing Swift's view of decisional law as mere "evidence" of law).

89. See, e.g., Murdock, 92 U.S. at 501 ("[The state court decisions] are not attempts at interpretation. They would apply as well to the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute . . . ."); Findlay's Ex'rs v. Bank of the United States, 9 F. Cas. 62, 65 (C.C.D. Ohio 1839) (No. 4791) (McLean, Circuit Justice) (characterizing a state court decision purporting to rest on the "spirit" if not the "letter" of a statute as having been based "upon general principles, and not upon the construction of a statute"); CURTIS, supra note 36, at 206 n.1 (stating that federal courts were bound by state court decisions only when there was "a real and direct construction of a State statute by the State court," as opposed to decisions "made upon general principles"); see also cases cited supra note 87.

90. See, e.g., Byrne v. Kansas City, Fort Scott & Memphis R.R., 61 F. 605, 614 (6th Cir. 1894) (Taft, J.) (stating that "[i]f the statute is held to be merely declaratory of the common law," the case would present a question of "general common law, with respect to which we might exercise an independent judgment"). In Burns Mortgage Co. v. Fried, 292 U.S. 487, 494-95 (1934), the Court acknowledged this particular tradition, but specifically rejected it just a few years before the decision in Erie Railroad v. Tompkins, 304 U.S. 64 (1938).

91. See, e.g., Galpin v. Page, 85 U.S. 350, 369 (1873) (construing narrowly a California statute in a diversity action consistent with the practice of all states); Ransom v. Williams, 69 U.S. 313, 317-19 (1864) (construing an Illinois statute in a diversity action pursuant to a similar presumption).

92. See, e.g., Burgess v. Seligman, 107 U.S. 20, 32-33 (1882) (rejecting intervening state court decisions regarding the meaning of state law, stating that "we are unable to come to the conclusion reached by the [state court's] majority," and noting that the federal courts have an "independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts"); Pease v. Peck, 59 U.S. (18 How.) 595, 598 (1855) (offering an independent construction of a limiting provision in a statute of limitations for contracts that was contrary to intervening (i.e., postcontractual) state court decisions).
own reading of state statutes, just as they might give their own readings of state constitutions as in Pine Grove. 93

These pre- and post-Gelpcke decisions in which federal courts exercised an independent judgment in elaborating state positive law in the absence of preexisting settled state court decisional law all suggest a broader role for the federal courts in the interpretation and administration of state public law than does Gelpcke itself. The federal courts in Gelpcke and similar cases relied on the state courts’ prior decisions as temporarily freezing the meaning of the state’s constitution, as if it had been incorporated as part of the contract entered into by the parties. The independent interpretation of the state’s constitution attempted by the federal courts in such cases was therefore quite limited in the sense that the courts accepted a prior state judicial construction as conclusive. 94 But in decisions such as Groves, Rowan, and Pine Grove, federal courts were much more in the position of interpreting a state’s constitutional provisions on their own, independent of any possible gloss by the state courts. 95

Moreover, it was the practice of giving state constitutions an independent reading free and clear of the relevant state’s decisional law that proved to be the more enduring development in the federal courts’ articulation of nonfederal limits on state action, as discussed below. Although these decisions may reveal a broader principle that governed federal courts in the administration of state law, to call them “expansions” of Gelpcke when the principle seems to have preceded it, is to let the tail wag the dog. If anything, Gelpcke appears to be the variation, whereas Groves, Rowan, and Pine Grove appear to express the theme.

93. See infra note 115 and accompanying text.
94. See Thompson, supra note 9, at 1417. Professor Barton Thompson suggests that Gelpcke was different from Swift, because Gelpcke took state decisional law as “law,” binding on the federal courts, whereas Swift took it merely as “evidence of law” and not binding. See id. But Gelpcke’s adherence to judicial construction of state positive law in existence at the moment of contracting shows its affinity with, not its distance from, Swift. Gelpcke merely makes the existing legal milieu, including statutes and judicial constructions of them, part of the parties’ “contract” that federal courts, under Swift, could construe independently. Indeed, the state courts in a case such as Gelpcke would presumably not consider their earlier judicial construction of their constitution to be binding on them, while a federal court under Swift could. If so, it is hardly fair to accuse the federal courts in Gelpcketype cases of somehow following state decisional law in violation of Swift.
C. General Constitutional Default Rules and Unclear State Law

This broad federal judicial role in the enforcement of state constitutional law was particularly evident in a third category of decisions, which were often quite removed from litigation over municipal bonds or cases involving vested rights. When state constitutional law was unclear or when state courts had not settled the meaning of state law, federal courts were in the position of having to decide unresolved state constitutional questions on their own. As developed in this subpart, federal diversity courts fashioned a presumptive set of one-size-fits-all principles of state constitutional interpretation based on a variety of sources, including the consensus of other state courts resolving similar questions, prior interpretations of analogous federal constitutional provisions, as well as various domestic and foreign treatise writers. Unless a state’s constitution purported to speak with unusual precision, the federal courts’ own default rules would prevail in the resolution of open-ended and judicially unresolved state constitutional questions. Even if the state’s decisional law were settled, however, it would not always control in the context of vested contractual rights, such as Gelpcke and Pine Grove. The point in the text is simply that federal courts could exercise their greatest (and least objected to) power to fashion uniform general constitutional law when state decisional law was either unsettled or nonexistent.  

96. Even if the state’s decisional law were settled, however, it would not always control in the context of vested contractual rights, such as Gelpcke and Pine Grove. The point in the text is simply that federal courts could exercise their greatest (and least objected to) power to fashion uniform general constitutional law when state decisional law was either unsettled or nonexistent.  

1. Public-Purpose Limitations

Without settled state law with which to contend, federal diversity courts had no difficulty in deciding, for example, whether a tax had been imposed for a public purpose consistent with a state's fundamental law. Viewing such public-purpose requirements as designed to guarantee that the benefits and burdens of legislative action were spread fairly and broadly, lower federal courts declared that taxation in aid of merely private purposes would ordinarily be invalid as a matter of general constitutional principles, even in the absence of a specific state constitutional provision to that effect.

The tone for such decisions appears to have been set in Loan Ass'n v. Topeka. There, on review of a diversity action, the Supreme Court concluded that a state legislature had given cities the power to subsidize private manufacturers and had also given the city the power to tax to accomplish that end. Nevertheless, invoking principles of general constitutional law, the Court concluded that such taxation was not for a public purpose as implicitly required by the state constitution. That determination, of course, was in contrast to the subsidies for a railroad that the Pine Grove Court had concluded were for a public purpose, state judicial decisions to the contrary notwithstanding. The distinction between decisions such as Gelpcke and Pine Grove on one hand, and Loan Ass'n on the other was likely based on the Court's apparent perception that "railroads, unlike

98. See G. Edward White, Revisiting Substantive Due Process and Holmes's Lochner Dissent, 63 Brook. L. Rev. 87, 94-97 (1997); cf. Cass R. Sunstein, Naked Preferences and the Constitution, 84 Colum. L. Rev. 1689, 1690-91, 1695-98 (1984) (posing the basic constitutional requirement that legislation promote some "public value" rather than an exercise of "raw political power").

99. See, e.g., Cole v. City of La Grange, 19 F. 871, 872-73 (C.C.E.D. Mo. 1884) (stating that taxation in aid of a private enterprise would be a taking of property for a nonpublic use and would be void, even in absence of a state constitutional provision to that effect), aff'd, 113 U.S. 1 (1885); Jarrott v. Moberly, 13 F. Cas. 366, 367 (C.C.W.D. Mo. 1878) (No. 7223) (holding that taxation to pay off bonds issued to aid a railroad company in the building of "machine shops" was for a public purpose under the state's constitution), aff'd on other grounds, 103 U.S. 580, 588 (1880); Citizens' Sav. Ass'n v. City of Topeka, 5 F. Cas. 737 (C.C.D. Kan. 1874) (No. 2734) (finding that taxation in aid of private manufacturers was not for a public purpose), aff'd, 87 U.S. (20 Wall.) 655 (1875); Commercial Nat'l Bank v. Iola, 6 F. Cas. 221, 223-24 (C.C.D. Kan. 1873) (No. 3061) (declaring as a matter of general principles that taxes may be imposed under a state constitution for public purposes only), aff'd, 154 U.S. 617 (1894).

100. 87 U.S. (20 Wall.) 655 (1875).
101. See id. at 659, 665-67.
102. See id. at 663-65.
103. See Davidson v. New Orleans, 96 U.S. 97, 105 (1877) (characterizing Loan Ass'n as having invoked such principles); see also Loan Ass'n, 87 U.S. (20 Wall.) at 664-67 (eschewing reliance on the U.S. Constitution).
factories, were sufficiently public in character to warrant government investment."\textsuperscript{104} In the absence of any clearer indication in the language of the state constitution to the contrary, taxation for what the Court considered to be merely private purposes was presumed to be forbidden to the legislature as a matter of state law.\textsuperscript{105} Such legislative redistribution of wealth amounted to taking property from A and giving it to B,\textsuperscript{106} and, according to the Court, it was therefore not a legitimate effort at taxation or even legislation, but mere "robbery."\textsuperscript{107}

Policing whether a particular exercise of state power "falls upon the one side or the other of [the public-private] line" was, of course, the self-declared task of the judiciary in marking out the respective spheres of governmental and private power.\textsuperscript{108} Many state courts had come to similar conclusions regarding the limits of legislative power under their own constitutions and had made equally fine category

\textsuperscript{104} WILLIAM E. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY, 1830-1900, at 202 n.88 (1982); see also infra note 108 and accompanying text (discussing the public-private dichotomy and its impact on state regulatory power).

\textsuperscript{105} See Loan Ass'n, 87 U.S. (20 Wall.) at 664.

\textsuperscript{106} See id. at 663 (denying that a legislature could lawfully enact a statute declaring "that the homestead now owned by A. should no longer be his, but should henceforth be the property of B."); see also City of Parkersburg v. Brown, 106 U.S. 487, 501 (1883) (stating that taxation for nonpublic purposes "takes the private property of one person for the private use of another person"). For other instances of the often voiced (and for a long time, nonfederal) prohibition on such involuntary A-to-B transfers, both before and after Loan Ass'n, see infra note 238 and accompanying text.

\textsuperscript{107} See Loan Ass'n, 87 U.S. (20 Wall.) at 664; see also, e.g., Cole v. La Grange, 113 U.S. 1, 6-9 (1885) (noting in a diversity action that eminent domain and taxation powers were limited to public purposes); Brown, 106 U.S. at 500-02 (holding that taxation to pay off bonds issued in aid of building a foundry and machine works was not for a public object). For lower federal court authority, see cases cited supra note 99. This public-purpose principle began to be enforced as a matter of federal law under the Fourteenth Amendment's Due Process Clause only in the mid-1890s. See infra notes 238-242 and accompanying text.

\textsuperscript{108} Loan Ass'n, 87 U.S. (20 Wall.) at 665. The Court's confidence in being able to pigeonhole ostensibly private enterprises as either "public" or "private" in character paralleled similar efforts to identify activities "affected with a public interest" that could be the proper subject of state regulation consistent with the (federal) Due Process Clause. See, e.g., Township of Burlington v. Beasley, 94 U.S. 310, 312-14 (1877) (holding that a bond issuance to build a grist mill open to the public was for a public purpose); Munn v. Illinois, 94 U.S. 113, 124-26 (1876) (upholding the state's power to fix maximum rates for grain storage). But cf. Head v. Amoskeag Mfg. Co., 113 U.S. 9, 15-26 (1885) (upholding, without purporting to address the question of public use, a state mill act that allowed mill owners to flood private property for manufacturing purposes). On the significance of such judicial line drawing as characteristic of "classical legal thought," see Duncan Kennedy, \textit{Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940}, 3 Res. L. & Soc. 3, 8-9, 12 (1980). See also White, supra note 98, at 105-06 (observing that it was conceived as "the task of the judiciary in a constitutional republic" to adjudicate such "boundary disputes" to make sure that the state's action was a legitimate exercise of its "police power").
distinctions between public and private purposes. The conclusion in Loan Ass’n that the purposes of the taxation were private and not public had the effect of withdrawing from local governments a power that the state constitution did not clearly forbid them, and one that the state legislature clearly assumed local governments had.

So powerful was the Court’s general-law default rule that its application in Loan Ass’n actually worked against commercial interests that stood to benefit from the taxation which would have gone to pay off the interest on municipal bonds. The Court’s ruling that there was a lack of municipal power to tax for a nonpublic purpose meant the “bonds were held void even in the hands of a purchaser in good faith and for value.”

Given a legal landscape that did not generally consider the issuance of governmental securities to subsidize private manufacturers to involve a public purpose, and in the absence of any clearer contrary indication from the state’s constitution or its courts in advance of investment, investor reliance on the issuance of securities was apparently unwarranted.

Interestingly, the author of the Court’s opinion in Loan Ass’n was none other than Justice Miller, a dissenter in cases such as Gelpcke and Pine Grove, who apparently found the exercise of federal judicial power and the invocation of general constitutional principles on diversity to be a simpler matter when the case did not involve later overruled state court precedents on which investors may have relied to their detriment, or post hoc state court decisions that cleared up the meaning of previously unclear state law. He found it easy to declare, albeit without invoking the Constitution, that “[t]here are limitations on [governmental] power which grow out of the essential nature of all free governments,” including “[i]mplied reservations of

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109. See generally Cooley, supra note 97, at 487-95 (discussing state court authorities); Morton J. Horwitz, The Transformation of American Law, 1870-1960, at 21-22 (1992) (suggesting that while many states had limitations requiring taxes to be uniform and equal, which would be interpreted as disallowing taxation for merely redistributive purposes, some states apparently enforced similar limits without the aid of language of uniformity and equality in their constitutions).


111. Sutherland-Innes Co. v. Village of Evart, 86 F. 597, 600 (6th Cir. 1898) (characterizing the result in Loan Ass’n).

112. See Gudridge, supra note 10, at 671 n.26 (observing that Justice Miller espoused a “constitutional philosophy of limited government” and that his views regarding general constitutional law in Loan Ass’n actually complemented the bond decisions such as Gelpcke). Justice Miller may also have been pleased to be able to undermine the claims of the bondholders in Loan Ass’n, as he had wanted to do in dissent in Gelpcke and Pine Grove. See Township of Pine Grove v. Talcott, 86 U.S. (19 Wall.) 666, 679 (1874) (Miller, J., dissenting); Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175, 207-20 (1863) (Miller, J., dissenting).
individual rights,” and “implied limitation[s]” on governmental powers more generally.113 And those were limits that he was prepared to enforce on diversity, at least when state decisional law was not in the picture.

In other decisions, the Court was even more up-front about its interpretive gambit when policing the public-private boundary: “[W]hether a use is public or private is not a question of constitutional construction. It is a question of general law.”114 As such, “[i]t has as much reference to the constitution of any other State as it has to the [particular] State.”115 The task of construing public-purpose limitations on governmental activity (as in both Loan Ass’n and Pine Grove) was therefore not especially state-constitution specific inasmuch as the public-purpose limitation itself was the offspring of general constitutional principles applicable to “[all] free government[s],”116 and because the limitation was not always expressed in state constitutions.117 As it had with statutes that were construed along general-principles lines, the Court suggested that it was not engaged in an interpretive enterprise at all when confronting such constitutional concepts.118 The “law” in these cases of general constitutional law was

113. Loan Ass’n, 87 U.S. (20 Wall.) at 663-64; cf. id. at 669 (Clifford, J., dissenting) (objecting that the Court had struck down the state statute because it was “opposed to a general latent spirit supposed to pervade or underlie the [state] constitution, where neither the terms nor the implications of the instrument disclose any such restriction”).


115. Id. In fact, the Court had said as much in Pine Grove when it concluded that whether a particular tax was for a public purpose was a question within “the domain of general jurisprudence.” Pine Grove, 86 U.S. (19 Wall.) at 677; see also Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 180-81 (1871) (remarking that state court precedents regarding takings of property rested “not upon anything special” to the state constitution, but on general law); Hollingsworth v. Parish of Tensas, 17 F. 109, 111 (C.C.W.D. La. 1883) (giving an independent interpretation to the meaning of a state constitution when state courts had construed it based on “general principles”); Talcott v. Township of Pine Grove, 23 F. Cas. 652, 654, 665 (C.C.W.D. Mich. 1872) (No. 13,735) (remarking that state court precedent regarding the state constitution’s public-purpose requirement “is not based upon any principle peculiar to the state constitution,” and invoking “general canon[s] of interpretation for our American constitutions”), aff’d, 86 U.S. (19 Wall.) 666 (1874).

116. See Loan Ass’n, 87 U.S. (20 Wall.) at 663. Justice Miller’s language was at least evocative of that used by Justice Washington in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, Circuit Justice), who spoke of the “fundamental” rights of “the citizens of all free governments” that the interstate Privileges and Immunities Clause, U.S. Const. art. IV, § 2, would protect—the very rights whose federalization Justice Miller had resisted in the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

117. See Jacobs, supra note 15, at 100-06.

118. See Olcott, 83 U.S. (16 Wall.) at 690; see also supra notes 86-93 and accompanying text (noting parallel suggestions when courts construed statutes). As Professor Patrick Gudridge has remarked, within the general constitutional law tradition, texts were often of secondary importance: “The constitutional text, like a statute in
presumably the principle underlying the state constitution(s)—a principle that federal courts could ascertain on their own, just as they could independently ascertain the "law" underlying a state's common law under *Swift*. As a consequence of this seemingly cavalier approach to state law, federal diversity courts could construe a state's fundamental law based on "general canon[s] of interpretation for our American constitutions,"119 the weight of authority respecting similar questions arising from other state constitutions, and based on their own sense of legitimate governmental powers.

2. Takings and Just Compensation

Federal diversity courts also took general constitutional principles to heart in resolving ostensibly state-law questions surrounding takings of property. At the behest of out-of-staters, lower federal courts often entertained challenges to state and local governmental takings as a matter of nonfederal law,120 as did the Supreme Court on review of those courts.121 And they did so well before the Supreme Court had incorporated the Fifth Amendment's prohibition against uncompensa-


120. See, e.g., *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.*, 14 F. 194, 200-01 (C.C.E.D. La. 1882) (finding that a taking of property by a local government required just compensation under the state constitution based on general reasoning), *aff'd on other grounds*, 120 U.S. 64 (1887); *Hollingsworth v. Parish of Tensas*, 17 F. 109, 116-18 (C.C.W.D. La. 1883) (citing various state cases and *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871) (discussed *infra* text accompanying notes 123-137), and concluding that the state constitution mandated compensation for takings of property, state supreme court authority to the contrary notwithstanding); *Bonaparte v. Camden & Amboy R.R.*, 3 F. Cas. 821, 829-31 (C.C.D.N.J. 1830) (No. 1617) (concluding that a state legislature, as a "universal principle," was under a "duty" to provide compensation when property was taken for public use); *Vanhorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) (ostensibly construing Pennsylvania's constitution and concluding that it would be "inconsistent with principles of reason, justice and moral rectitude" for a state statute to take property without just compensation).

121. See, e.g., *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497, 506-07 (1870) (ignoring antecedent state court interpretation and requiring just compensation for a taking, as a matter of state constitutional law); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 89 (1823) ("[I]n the common law of Virginia, if not by the universal law of all free governments, private property may be taken for public use, upon making to the individual a just compensation."); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52 (1815) (invoking "principles of natural justice" and "the fundamental laws of every free government" to reject the notion that a state could enact a law having the effect of taking the property of a private corporation, previously confirmed by the state, and revesting title in it).
ted takings by the federal government as a part of what due process required of the states.\footnote{122. See U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); id. amend. XIV ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law."). Such incorporation would not happen until Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897). See infra text accompanying notes 232-237; cf. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247-51 (1833) (concluding that the Fifth Amendment’s takings provisions, along with the rest of the Bill of Rights, were inapplicable to the states).}

Although there were a number of such cases both before and after \textit{Swift}, perhaps the best remembered was \textit{Pumpelly v. Green Bay Co.}, in which the Supreme Court concluded that the flooding of the plaintiff’s land in connection with the construction of a state-authorized dam amounted to a taking under the Wisconsin Constitution.\footnote{123. See \textit{id.} at 172-74, 177. \textit{Id.} at 174-81. \textit{Id. at} 177. \textit{Id.}} The defendant had argued that because the plaintiff still had his land, there had been no taking, and that the damage should therefore be treated like other merely “consequential” injuries resulting from public improvements for which state courts had often denied compensation.\footnote{124. See \textit{id.} at 172-74, 177. \textit{Id.}} Nevertheless, the Court analyzed the ostensibly state-law constitutional question with scant attention to the law of the relevant state.\footnote{125. See \textit{id.} at 172-74, 177. \textit{Id.}} Instead, it looked to general principles to interpret the state’s takings clause, recognizing that such a clause was “so essentially a part of American constitutional law that it is believed that no State is now without it.”\footnote{126. See \textit{id.} at 172-74, 177. \textit{Id.}}

Once again, Justice Miller championed the independent federal interpretive role. His opinion for the Court reasoned that, given the “universal” nature of the principle evidenced by such clauses, it had to reject any interpretation that would undermine the “just principles of the common law” that such clauses were meant to put “beyond the power of ordinary legislation.”\footnote{127. See \textit{id.} at 172-74, 177. \textit{Id.}} It would be an odd result, said Justice Miller, “if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government,” the federal courts were to sanction an interpretation that would allow government to exercise a power “which had no warrant in the laws or practices of our ancestors.”\footnote{128. See \textit{id.} at 172-74, 177. \textit{Id.}} The Court also looked to other states’ judicial interpretations of similar takings provisions that spoke of the just
compensation principle's universality. And it referred to still other state court authorities that invoked continental and English jurists to flesh out the meaning of the just compensation principle. Here, too, the Court suggested that the principle would apply as a matter of general law whether or not there had been a just compensation provision in the state's constitution. 

The Pumpelly Court even managed to dig up a few Wisconsin precedents that spoke to the issue and which it acknowledged were entitled to "special weight." But not all of the state court opinions were in complete agreement, and the most recent decision from the state supreme court denying compensation had perhaps gone "beyond" the general principles that the Court saw as supported by the weight of authority. The Court therefore concluded that because the wayward state court opinion "rests its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights, we feel at liberty to hold as we do that the [plaintiff's] case ... is within the protection of the constitutional principle embodied in that instrument." 

Pumpelly and cases like it thus provide an instructive contrast to the Court's earlier, pre-Fourteenth Amendment, decision in Barron v. Mayor of Baltimore in which it held that the Fifth Amendment's just compensation provision applied only to the federal government. The Court therefore refused to review a state court decision upholding a local government's taking of property because no federal right had been denied. Pumpelly effectively reached the opposite result in a similar type of case on review of a federal court diversity action, albeit through the device of general rather than federal constitutional law.

Significantly, the federal courts' practice of entertaining takings claims on diversity as a matter of general constitutional law peacefully coexisted with Barron, suggesting that nonresident property owners might be better off than their in-state counterparts (such as the plaintiff

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129. See id.
130. See id. at 178-79.
131. See id.
132. See id.
133. See id. at 180-81.
134. Id. at 180; see also Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 504 (1870) (stating, in a diversity action, "[This property] cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation.").
136. See id.
137. See Pumpelly, 80 U.S. (13 Wall.) at 174-82.
in Barron) who would be confined to the state courts in their efforts to redress illegal state action. If the Bill of Rights were designed to control only national majorities as Barron supposed, the enforcement of general constitutional law on diversity proved to be a way to control local majorities on behalf of out-of-staters—even without the aid of the Fourteenth Amendment.\footnote{139}

3. Reasonableness Limitations and Due Process

Federal diversity courts also invoked general-law principles when they construed the “reasonableness” of governmental activity. The reasonableness inquiry served in part as a way to test whether a state’s action was a bona fide exercise of its “police power” and directed to public purposes or whether its action was for some impermissible nonpublic purpose, masquerading as an exercise of lawful state power.\footnote{140} In this respect, the reasonableness limitation bore a close affinity to the public-purpose limit on taxation and the public use limitation on takings of property.

Rate making, for example, was subjected to reasonableness review to make sure that it did not result in confiscation of one party’s property for the benefit of others and helped guarantee that regulated entities would receive a fair return on their investment while the public would be fairly charged.\footnote{141} The practice partly reflected the old common-law rule that rates set by private parties had to be reasonable

\footnote{138} See cases cited supra notes 120-121; see also Lessee of Livingston v. Moore, 32 U.S. 469, 551-52 (1833) (entertaining a challenge to state legislation based on the state constitution’s law-of-the-land provision while simultaneously refusing to consider a claim founded on the just compensation provision of the Fifth Amendment because of its inapplicability to the states under Barron).

\footnote{139} See Barron, 32 U.S. (7 Pet.) at 247-51.

\footnote{140} See, e.g., Cooley, supra note 97, at 577-78 (discussing limits on the legitimate exertions of state “police power”); William D. Guthrie, Lectures on the Fourteenth Article of Amendment to the Constitution of the United States 76 (photo. reprint 1970) (1898) (“[T]he inquiry is whether the regulation or classification has been designed to subserve some reasonable public purpose, or is a mere device or excuse for an unjust discrimination, or for the oppression or spoliation of a particular class.”); see also Mugler v. Kansas, 123 U.S. 623, 661 (1887) (noting in dicta that not all legislative acts would be “legitimate exertion[s]” of legislative power and that a statute without a “real or substantial relation” to a legitimate police power object would violate the Fourteenth Amendment); Gillman, supra note 15, at 72-73 (noting the role that reasonableness limitations played in promoting anticlass legislation and legitimate exertions of a state’s police power); cf. Kennedy, supra note 108, at 11-12 (discussing the function of the reasonableness inquiry in classical legal thought and noting that it was concerned not with balancing but with maintaining boundaries among spheres of individual and governmental power).

and that such reasonableness was ordinarily a judicial question.\footnote{142} Indeed, in the \textit{Milwaukee Road} decision\footnote{143} the Supreme Court insisted that states provide for judicial review of rate reasonableness of agency-set rates as a matter of federal procedural due process\footnote{144} even before the actual content of a rate's reasonableness was declared to be a matter of federal substantive due process.\footnote{145}

Accordingly, at the point of judicial review of the rate-making process in the state courts, if there was diversity of citizenship between the regulated party and the relevant state officer charged with the rates' enforcement, the state-law reasonableness inquiry could proceed in state court or in federal court.\footnote{146} In \textit{Reagan v. Farmers' Loan \\& Trust}, a pre-\textit{Lochner} era decision involving diverse parties, the Court resolved whether a particular rate schedule was so unreasonable as to

\footnote{142} See \textit{Stone v. Farmer's Loan \\& Trust}, 116 U.S. 307, 331 (1886) (suggesting the existence of substantive limits on rate making); \textit{Spring Valley Water-Works v. Schottler}, 110 U.S. 347, 354 (1884) (hinting at a similar possibility); \textit{Spring Valley Water-Works v. Bartlett}, 16 F. 615, 636 (C.C.D. Cal. 1883) ("To fix the price at unremunerative rates is to confiscate the property."). The common-law rule of assessing a rate's reasonableness as a judicial question was arguably developed in settings in which the state itself did not set the rate but where the power to set rates was expressly or impliedly delegated to private parties. See Stephen A. Siegel, \textit{Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation}, 70 Va. L. Rev. 187, 198 (1984).

\footnote{143} Chicago, Milwaukee \\& St. Paul Ry. v. Minnesota, 134 U.S. 418, 452-59 (1890) [hereinafter \textit{Milwaukee Road}].


\footnote{145} Justice Bradley lamented that the decision in \textit{Milwaukee Road} allowing judicial review of rate reasonableness was tantamount to reversal of \textit{Munn v. Illinois}, 94 U.S. 113 (1877). \textit{See Milwaukee Road}, 134 U.S. at 461 (Bradley, J., dissenting). \textit{Munn} had upheld a state's power to set rates charged by businesses that were "affected with a public interest" (such as the grain elevators in \textit{Munn}). \textit{Munn}, 94 U.S. at 126. The decision also indicated that the rate set by the legislature was not itself subject to judicial review. See \textit{id.} at 133-34 (noting that while the power to set rates is subject to abuse, the remedy for abuse is "resort to the polls, not to the courts"). The Court would later state that legislatively set rates (as opposed to agency-set rates) apparently did not require judicial review. See \textit{Budd v. New York}, 143 U.S. 517, 546-47 (1892) ("What was said in [\textit{Milwaukee Road}] as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed directly by the legislature."). In \textit{Milwaukee Road}, however, Justice Miller saw no reason to distinguish between legislatively set rates and agency-set rates and would have allowed a suit in equity to assess the reasonableness of either. \textit{See Milwaukee Road}, 134 U.S. at 459-61 (Miller, J., concurring).

be confiscatory, not as a question of federal due process as it later would,147 but apparently as a question of general constitutional law.148

In its earlier decision in Milwaukee Road, which called for state court judicial review of the reasonableness of agency-set rates, Justice Miller had also addressed the substantive limits on such rate making, declaring that no state could “establish arbitrarily and without regard to justice and right a tariff of rates for ... transportation, which is so unreasonable as to practically destroy the value of property” of the carriers, any more than a rate “so exorbitant and extravagant as to be in utter disregard of the rights of the public.”149 Reagan’s redeployment of nonfederal substantive limits on governmental action confirmed Justice Miller’s earlier acknowledgement that limits did indeed exist.150 Moreover, by requiring judicial review of rate reasonableness and having federal courts assess reasonableness as a matter of general law under the aegis of diversity jurisdiction, Reagan proved to be a temporary halfway house between procedural and substantive due process.151 And until such rate reasonableness issues were later federalized, lower federal court decisions followed a similar pattern in assessing rate reasonableness in the exercise of their diversity jurisdiction as a nonfederal question of general law.152

4. Other Limitations on State Power

The public-purpose, just compensation, and reasonableness limitations discussed above are hardly exhaustive of the sorts of nonfederal general constitutional limits that federal courts, in the exercise of their diversity jurisdiction, might enforce against the states. Other general-law limits, sometimes associated with state law-of-the-land provisions153 were being invoked by the federal courts, including

147. See infra text accompanying notes 245-246 (discussing Smyth v. Ames, 169 U.S. 466, 546 (1898), overruled by Federal Power Comm’n v. Natural Gas Pipeline Co. of Am., 315 U.S. 575 (1942), in which the Court federalized the content of rate reasonableness).


149. Milwaukee Road, 134 U.S. at 459 (Miller, J., concurring); see also Stone v. Farmer’s Loan & Trust, 116 U.S. 307, 331 (1886) (noting in dicta that there were substantive limits on rate making without identifying the source of such limits).


151. See id.


153. See Cooley, supra note 97, at 351-53. Many states had provisions, harking back to the Magna Charta, declaring that life, liberty, and property could not be taken except by judgment of one’s peers or the law of the land. See id. The nineteenth-century consensus
individual Supreme Court Justices while riding circuit, as a basis for striking down state action on nonfederal grounds.\footnote{154}

In an illustrative antebellum diversity action brought against a state official for replevin of the plaintiff's property, Justice Curtis ruled that the state statute on which the defendant relied to justify his seizure violated the state constitution's law-of-the-land clause.\footnote{155} Without a valid statute on which to rely, the state official was personally liable for his tortious acts.\footnote{156} The suit thus resembled other common-law actions brought against state officials in which the Federal Constitution might be used to rebut a claim of official authority, except that in a diversity action grounded in state law, nonfederal principles would guide the federal courts in assessing whether the officer's actions were lawful.\footnote{157} That in turn might lead the court, as it did Justice Curtis, to

seems to have been that these "law-of-the-land" clauses were synonymous with "due process." \footnote{See id. at 353-55; see also, e.g., Davidson v. New Orleans, 96 U.S. 97, 101 (1877) (making a similar equation in connection with the Fourteenth Amendment's Due Process Clause); Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 276 (1856) (making a similar equation in connection with the Fifth Amendment's Due Process Clause). The proscription against deprivations of property for private purposes (such as the A-to-B transfer complained of in Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875)) was closely linked to the concerns of state law-of-the-land provisions. \footnote{See infra notes 238-239.}

154. The Supreme Court long considered such clauses in the exercise of their diversity jurisdiction. \footnote{See, e.g., Garrison v. City of New York, 88 U.S. (21 Wall.) 196, 201-02 (1874) (entertaining claims that a state statute violated a state's law-of-the-land clause as well as the Federal Constitution's Contract Clause); Town of Queensbury v. Culver, 86 U.S. 83, 90 (1873) (considering but rejecting the argument that a state statute violated the New York Constitution's law-of-the-land clause "in view of the numerous decisions made by the highest courts of most of the States, including New York, as also of those made by this court"); Lessee of Livingston v. Moore, 32 U.S. 469, 551 (1833) (finding "nothing in this provision either inconsistent with natural justice or the constitution of the state"); Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 237, 241-44 (1819) (rejecting a challenge to a state statute in a diversity action based on the state's law-of-the-land clause, the general understanding of such clauses, and the "good sense of mankind"); cf. Missouri Pac. Ry. v. Humes, 115 U.S. 512, 515-23 (1885) (holding that the Supreme Court had no jurisdiction to review a state court decision raising only a state law-of-the-land claim because such a claim raised no federal question). Lower federal courts considered such clauses as well. \footnote{See, e.g., Myers v. Shields, 61 F. 713, 717-18 (C.C.N.D. Ohio 1894) (invoking state court law-of-the-land decisions to construe the scope of due process); Greene v. Briggs, 10 F. Cas. 1135, 1139-43 (C.C.D.R.I. 1852) (No. 5764) (Curtis, Circuit Justice) (enforcing a state's law-of-the-land clause to invalidate state action); Baring v. Erdman, 2 F. Cas. 785, 786-87 (C.C.E.D. Pa. 1834) (No. 981) (Baldwin, Circuit Justice) (same); cf. The Ann, 8 F. 923, 926 (D. Md. 1881) (rejecting, in a case premised on admiralty jurisdiction, a challenge under a state law-of-the-land provision, by relying on a federal court precedent construing Fourteenth Amendment's Due Process Clause).}

155. \footnote{See Greene, 10 F. Cas. at 1139-43.}

156. \footnote{See id.}

look to a variety of sources both inside and outside of the relevant state to construe the state constitutional provision in accordance with the general understanding of such clauses.\footnote{158} Similarly, equal protection principles that were directed at class-based or "partial"\footnote{159} legislation were also enforced as a matter of general law on diversity, especially in connection with the "uniformity and equality" provisions of state constitutions governing assessments and taxation.\footnote{160} In addition, some members of the Court argued early on for the federalization of such concepts under the Fourteenth Amendment at a more general level.\footnote{161} Such general-law equality principles also infused the just compensation, public-purpose, and reasonableness requirements discussed above because they too aimed at insuring that the burdens and benefits of legislation were spread

\footnote{158. In \textit{Greene}, Justice Curtis invoked a variety of authorities from different states' courts to construe Rhode Island's law, as well as making use of Lord Coke, the Magna Carta, and various treatise writers. \textit{See Greene}, 10 F. Cas. at 1139-42. Similarly, in \textit{Baring v. Erdman}, 2 F. Cas. 784 (C.C.E.D. Pa. 1834) (No. 981), Justice Baldwin interpreted Pennsylvania's law-of-the-land clause with the aid of Blackstone, various other states' judicial decisions, and the Fifth Amendment, and concluded that the defendant's actions were "in direct violation of the constitution and every principle of the common and public law held sacred in all governments." \textit{Id.} at 786-87.

159. \textit{See Cooley}, \textit{supra} note 97, at 389 (referring to "unequal and partial legislation"); \textit{White}, \textit{supra} note 98, at 93, 96-97 (referring to nineteenth century's proscription against "unequal" or class-based legislation as part of a more general hostility to "partial" as opposed to "general" legislation). Professor Melissa Saunders has noted that there had been a long-standing antebellum tradition against such legislation and argues that it influenced the framers of the Fourteenth Amendment. \textit{See Saunders}, \textit{supra} note 15, at 268-93.

160. \textit{See, e.g.,} Pacific Express Co. v. Seibert, 142 U.S. 339, 350-55 (1892) (addressing a claim that a state tax violated the requirements of "uniformity and equality" in a state constitution); Cummings v. National Bank, 101 U.S. 153, 154-56 (1879) (construing a state constitutional provision regarding the equality of valuation of property for taxation by resort to the general practices of other states); State R.R. Tax Cases, 92 U.S. 575, 615-16 (1875) (finding no violation of state "rule of uniformity" for taxation); Dundee Mortgage, Trust Inv. Co. v. School-District No. 1, 19 F. 359, 372 (C.C.D. Ore. 1884) (finding a tax violative of a state constitutional provision regarding uniformity of taxation); Albany City Nat'l Bank v. Maher, 9 F. 884, 885 (C.C.N.D.N.Y. 1882) (holding a tax void on nonfederal grounds because it violated the principles of "equality and uniformity").

161. Justice Field would have made the principle of anticlass legislation a part of the Fourteenth Amendment from the get-go. \textit{See, e.g.,} Barbier v. Connolly, 113 U.S. 27, 32 (1885) (Field, J.) (stating that the Equal Protection Clause generally proscribes "[c]lass legislation"); County of Santa Clara v. Southern Pac. R.R., 18 F. 385, 399 (C.C.D. Cal. 1883) (Field, Circuit Justice) (noting that unequal taxation "levied against special classes" is a source of oppression), \textit{aff'd on other grounds}, 118 U.S. 394 (1885); Railroad Tax Cases, 13 F. 722, 733-34 (C.C.D. Cal. 1882) (Field, Circuit Justice) (specifically incorporating "equality and uniformity" of taxation provisions of state constitutions as a measure of the Fourteenth Amendment's Equal Protection Clause); \textit{cf.} Ho Ah Kow v. Nunan, 12 F. Cas. 252, 255 (C.C.D. Cal. 1879) (No. 6546) (Field, Circuit Justice) (inveighing generally against class legislation).
evenhandedly as opposed to benefiting one particular group at the expense of another.\footnote{162} In addition, some scholars argue that notions of state sovereign immunity from suit in federal court may have been grounded, at least originally, in nonfederal general principles,\footnote{163} as were presumptions against the delegation of power within state governments.\footnote{164} Limits on a state’s jurisdictional reach were also once treated largely as matters of general law in the federal courts, even though they seem to have been federalized early on as a matter of procedural due process following the ratification of the Fourteenth Amendment and the landmark decision of \textit{Pennoyer v. Neff}.\footnote{165} By contrast, efforts to

\footnote{162} See Gillman, \textit{supra} note 15, at 64-75, 104-12. Notably, equal protection principles were often mentioned in the same breath as due process principles, because both could be read as proscribing class-based or partial legislation. See, e.g., Lake Shore & Mich. S. Ry. v. Smith, 173 U.S. 684, 698-99 (1899) (holding, as a matter of federal equal protection and due process, that a state could not compel a carrier to take a class of frequent-use passengers at reduced rates); Lawton v. Steele, 152 U.S. 133, 137 (1894) (declaring that legislative action, to be lawful, should affect “the interests of the public generally, as distinguished from those of a particular class”); Nashville, C. & St. L. Ry. v. Taylor, 86 F. 168, 186-88 (C.C.M.D. Tenn. 1898) (concluding that the Equal Protection Clause forbids “class discrimination” and that unequal taxation results in deprivation of property without due process); see also Guthrie, \textit{supra} note 140, at 73, 76, 84 (observing that the Due Process Clause seeks to insure that legislation is directed to “[t]he interests of the public generally, as distinguished from those of a particular class”); \textit{cf.} Reagan v. Farmers Loan & Trust Co., 154 U.S. 362, 409-10 (1894) (relying on general principles in suggesting that a confiscatory rate would violate anticlass as well as due process principles proscribing takings of property). The Court also noted that the just compensation principle embodied an equality notion by insuring that governmentally imposed burdens were fairly and evenly spread. See, e.g., Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (stating that the just compensation principle “prevents the public from loading upon one individual more than his just share of the burdens of government”). See generally Saunders, \textit{supra} note 15, at 261-63 (noting the interrelationship between public-purpose and anticlass principles); White, \textit{supra} note 98, at 93-94 (noting that public-purpose and anticlass principles worked in tandem with one another).

\footnote{163} See Sherry, \textit{supra} note 9, at 1265-72.

\footnote{164} See, e.g., Siler v. Louisville & Nashville R.R., 213 U.S. 175, 193-94 (1909); Parks v. Board of Comm’rs, 61 F. 436 (C.C.D. Kan. 1894). In \textit{Siler}, a federal question case, the Court decided in the exercise of its pendent jurisdiction whether a state agency had been delegated certain powers as a matter of state law, and it resolved that question by invoking general principles respecting delegation. See \textit{Siler}, 213 U.S. at 190-98. In addition, the famous decision in \textit{Yick Wo v. Hopkins}, 118 U.S. 356 (1886)—although better known for its holding that the Equal Protection Clause could be violated by the discriminatory enforcement of a facially neutral statute—primarily discusses why a statute that confers unbridled authority on enforcement officials runs afoul of general principles of nondelegation. See id. at 366-72; see also Western Union Tel. Co. v. Myatt, 98 F. 335, 340, 348-49 (C.C.D. Kan. 1899) (invoking, in a diversity action, Montesquieu, Blackstone, Cooley, and various state court decisions, to strike down on general nondelegation principles, a state statute creating a regulatory “court” that would have exercised multibranch powers).

\footnote{165} 95 U.S. 714 (1877), overruled in part by Shaffer v. Heitner, 433 U.S. 186 (1977). Prior to the adoption of the Fourteenth Amendment, a state court judgment entered without personal jurisdiction, as defined by “principle[s] of general, if not universal law,” could not
enforce liberty-of-contract principles as a matter of general law on diversity seem to have been infrequent. But individual members of the Court took occasion to campaign for the federalization of related notions as a matter of federal due process. These sorts of seemingly state-law constitutional questions were therefore given the spin that the federal courts chose to put on them, and in the absence of competing state judicial glosses on such questions there was little dissent to the practice within the Supreme Court. Federal courts thus provided substance to a variety of limits on governmental power above and beyond the vested-rights focus of decisions such as Gelpcke and Pine Grove. And their development
of a uniform body of nonfederal constitutional limits on state action neatly paralleled their development of uniform general common-law rules in private-law litigation under *Swift*.\textsuperscript{169} As the Court summed it up, "The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us."\textsuperscript{170}

Not surprisingly, this general-law approach to issues of public law was also reflected in the nineteenth-century treatise tradition that sought to generalize about substantive law across jurisdictional lines and that borrowed indiscriminately from state and federal judicial sources to develop uniform rules.\textsuperscript{171} Perhaps the classic example in the area of general constitutional law during this period was Thomas Cooley's influential work, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*,\textsuperscript{172} a study based primarily on an analysis of different state constitutions and state court interpretations of them and the common limits on governmental action that they had supposedly developed as a matter of nonfederal law.\textsuperscript{173} Invoked by the federal courts, state courts, and litigants alike, Cooley's treatise encouraged a uniformity of discourse about constitutional meanings and incidentally set the stage

\textsuperscript{169} *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19-22 (1842).

\textsuperscript{170} *Olcott v. Supervisors*, 83 U.S. (16 Wall.) 678, 690 (1872); *see also* Burgess v. Seligman, 107 U.S. 20, 33 (1882) (noting that when state law is not settled, including its positive law, "it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence"); Guadridge, *supra* note 10, at 672-73 (observing, in an extended analysis of *Olcott*, that constitutional questions were once perceived as calling for the same sort of analysis as used for questions of general commercial law under *Swift*).

\textsuperscript{171} *See* COOLEY, *supra* note 97.

\textsuperscript{172} *See id.*

\textsuperscript{173} The effort at homogenization was not complete, however. Cooley's treatise has separate chapters respecting interpretation of the federal as opposed to state constitutions, and he is inclined to believe that state courts are the ultimate arbiters as to the meaning of state constitutions. *See id.* at 13-15. But—as his title suggests—by articulating "the constitutional limitations" on governmental power that had been developed by a multiplicity of American jurisdictions, lawyers in any jurisdiction could rely on the treatise as a kind of premodern Restatement to aid them in arguments over the meaning of similar issues arising from different constitutions (including, eventually, the Federal Constitution). The clearly conservative dimension of Cooley's own views that tended to read certain kinds of constitutional provisions as designed to protect common-law rights against legislative incursion also encouraged a kind of uniformity in constitutional analysis respecting the notion of inherent or implied limits on government. *See id.; see also* Gardner, *supra* note 10, at 126-27 (viewing Cooley's distillation of constitutional principles as an example of "universalism" characteristic of nineteenth-century constitutional thought).
for their later federalization under the rubric of substantive due process.\textsuperscript{174}

III. \textit{Swift}, Uniformity, and State Public Law

A. Construed State Law

The federal court decisions discussed above, particularly those that departed from the limited model of \textit{Gelpcke}, lend strong support to a reading of \textit{Swift v. Tyson}\textsuperscript{175} as relying on a distinction between "general" and "local" law rather than simply a distinction between statutory and common law.\textsuperscript{176} To be sure, the Rules of Decision Act (section 34 of the original judiciary statute)\textsuperscript{177} required federal courts to follow state "laws" in cases not premised on federal law.\textsuperscript{178} So, even as interpreted by \textit{Swift}, their interpretive freedom was arguably limited to cases involving state common-law rules, as opposed to state

\begin{itemize}
\item \textsuperscript{174} See James W. Ely Jr., \textit{The Chief Justiceship of Melville W. Fuller}, 1888-1910, at 63-64 (1995). For the details of Cooley's impact on the development of substantive due process, see Jacobs, \textit{supra} note 15, at 23-63, which also discusses the impact of other major players in the constitutional treatise tradition. For the influence of the bar in the advancement of so-called laissez-faire arguments to the courts, see Benjamin R. Twiss, \textit{Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court} 42-62 (1942).
\item \textsuperscript{175} 41 U.S. (16 Pet.) 1 (1842).
\item \textsuperscript{176} See, e.g., Hovenkamp, \textit{supra} note 87, at 89-92 (noting the importance under \textit{Swift} and its progeny of asking whether a state's law was "local" or "general"); Clark, \textit{supra} note 4, at 1279 (stating that "\textit{Swift}'s interpretation" rested on distinctions between local and general laws and statutes); William A. Fletcher, \textit{The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance}, 97 Harv. L. Rev. 1513, 1527 (1984) (viewing \textit{Swift} as grounded in a distinction between general versus local law). As then-Professor William Fletcher described it:

[L]awyers and judges of the early nineteenth century understood the "laws of the several states" in section 34 to refer only to what was called "local" law. Cases to which the "local" law did not apply were governed by some other law. Sometimes this was federal law . . . . But frequently neither federal nor local law applied. In such cases, depending on the nature of the dispute, a number of different kinds of law could provide the relevant rules of decision. The general common law was by far the most important of these nonlocal and nonfederal laws.

\textit{Id.} at 1516-17.
\item \textsuperscript{177} Act of Sept. 24, 1789, ch. 20, § 34, 1 Stat. 73, 92. "[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." \textit{Id.}
\item \textsuperscript{178} See Woolhandler & Collins, \textit{supra} note 146, at 670-74. After Erie Railroad \textit{v. Tompkins}, 304 U.S. 64 (1938), the Rules of Decision Act requires adherence to relevant state law in all of its manifestations—constitutional, statutory, and judge-made. Indeed, when the state-law questions have to do with the structure of state government and the powers of regulatory subdivisions of the state, that adherence is so powerful today that it may counsel federal courts to abstain from exercising jurisdiction. \textit{See id.}
statutes or other positive-law enactments, such as state constitutions. But because state positive law could be subject to judicial glosses, the real issue often was whether those judicial glosses would have to be followed as religiously as would state positive law itself.

According to Chief Justice Marshall, settled interpretations of state statutes were as binding on the federal courts as the statutes themselves, for the very sensible reason that state courts were the appropriate organs for construing a state's legislative acts and state courts could not be said to have "misunderstood their own statutes." In addition, the very same Court that decided Gelpcke had elsewhere noted that federal courts ordinarily follow state court interpretations of their statutes and constitutions and even follow the latest rather than earlier interpretations, although the latter might have certain retrospective consequences. Accordingly, judicial treatment of state positive law had a sticking power that might be stronger than that associated with state common law. Departures from this basic principle of adherence to state court decision making were treated as "exceptions" to this general rule, but as this Article has suggested, there was no shortage of exceptions.

As noted above, both before and after Swift, the Court had intimated that the apparent command of section 34 might be departed from not only when state decisional glosses respecting state positive law threatened to run asfool of federal law, but when they were unsettled, or when following state decisional law would work a "gross injustice"—for example, by retroactively unsettling previously settled

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179. See Town of S. Ottowa v. Perkins, 94 U.S. 260, 267 (1876) (stating the general proposition that state law receives its authoritative construction from state courts); see also supra note 86 (gathering analogous authority).


181. See Leffingwell v. Warren, 67 U.S. (2 Black) 599, 603-05 (1863) (Swayne, J.). In Leffingwell, Justice Swayne, who also authored the opinion in Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1863), stated that the highest state court's construction of a statute "is regarded as a part of the statute, and is as binding upon [federal courts] as the text." Leffingwell, 67 U.S. (2 Black) at 603. Professor Barton Thompson concludes that prior to Leffingwell, the deference that federal courts gave to state court interpretations of state positive law was often stated in terms of comity and, as other scholars have suggested, only came to be seen as resulting from the command of the Rules of Decision Act during the last half of the nineteenth century. See Thompson, supra note 9, at 1389, 1415.

182. See, e.g., Fairfield v. County of Gallatin, 100 U.S. 47, 52 (1880) (following a state court's construction of a state constitution, but noting "some exceptions" to the rule); State R.R. Tax Cases, 92 U.S. 575, 618 (1875) (noting that "with some few exceptions" federal courts would follow state courts' construction of state positive law, but adding that the Court would have reached a similar conclusion on its own); Pease v. Peck, 59 U.S. (18 How.) 595, 598 (1855) (referring to "many cases of exceptions" to the "general rule"). Even in Gelpcke, the Court referred to its decision as "exceptional," while noting that such decisions had occurred and would continue to occur. See Gelpcke, 68 U.S. (1 Wall.) at 206.
contractual expectations. Federal courts also declined to give deference to state judicial glosses when the relevant state law had been analyzed on the basis of "general principles" or when it otherwise involved matters that the Court could conclude were "general" and not "local." The obligation to follow state statutes was sometimes said to be limited to statutes "local in ... character," and in at least one instance, the Court concluded that a state statute itself could be ignored on diversity because it ran counter to principles of general commercial law.

Thus, the statutory- versus common-law reading of section 34 turns out to be both overinclusive and underinclusive: even though state judicial glosses of state positive law were said to be as binding as the text, federal courts might feel free to depart from such glosses in

183. See Tidal Oil Co. v. Flanagan 263 U.S. 444, 452 (1924); see also Pease, 59 U.S. (18 How.) at 599 (cautioning against times when "some new light suddenly springs up, or an excited public opinion has elicited new doctrines, subversive of former safe precedent"); Polk's Lessee v. Wendell, 18 U.S. (5 Wheat.) 293, 306 (1820) (noting that federal diversity courts would "respect the decisions of the State tribunals, but there are limits which no Court can transcend"); cf. Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 50-52 (1815) (invoking "principles of natural justice" and "the fundamental laws of every free government" to construe Virginia's constitution and statutes in a manner consistent with the "great and fundamental principle of a republican government").

184. See cases cited supra notes 87, 115; see also, e.g., Olcott v. Supervisors, 83 U.S. (16 Wall.) 678, 690 (1872) (observing that whether a use is private or public is a question of general law); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 180-81 (1871) (concluding that because state courts had construed the no-taking provision of the state constitution based on "general weight of authority and not upon anything special in the language of" the constitution, the federal courts could reason using general principles); Hollingsworth v. Parish of Tensas, 17 F. 109, 112 (C.C.W.D. La. 1883) (concluding that the determination of what is "taking" of property under a state constitution required resort to "general reasoning").

185. See Butz v. City of Muscatine, 75 U.S. (8 Wall.) 575, 583 (1869) (stating that federal courts may make an independent judgment regarding the meaning of state law unless there are "settled decisions in relation to a statute, local in its character"); Bennett v. Boggs, 3 F. Cas. 221, 229 (C.C.D.N.J. 1830) (No. 1319) (Baldwin, Circuit Justice) (stating that a federal court would follow state court decisions construing "local statutes, and the exposition of local common law"). Swift itself appeared to limit the obligation to follow state statutes under section 34 of the Rules of Decision Act. See Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) (stating that section 34 was "limited [in] its application to state laws strictly local"); see also Charles A. Heckman, The Relationship of Swift v. Tyson to the Status of Commercial Law in the Nineteenth Century and the Federal System, 17 AM. J. LEGAL HIST. 246, 247-48 (1973) (noting that Swift itself did not make a statutory- versus decisional-law distinction).

186. See Watson v. Tarpley, 59 U.S. (18 How.) 517, 521 (1855) (refusing to apply a state statute that allowed suit only after the maturity of an already dishonored negotiable instrument, concluding: "A requisition like this would be a violation of the general commercial law, which a State would have no power to impose, and which the courts of the United States would be bound to disregard."); see also BRIDWELL & WHITTEN, supra note 74, at 51-55 (discussing Watson); HOVENKAMP, supra note 87, at 89-90 (discussing Watson).

matters of general law; and they might be obliged to follow state decisional law even when no statute was involved, provided the issues were local and the decisional law was well settled.

B. Unconstrued State Law

Of course, when federal courts were faced with a question of state positive law bereft of definitive state judicial interpretation, federal courts could follow their own compass, often without much regard to the particular circumstances that gave rise to the state law. It was in these contexts—contexts that did not involve the federal courts in the repudiation of state court decisions regarding the meaning of state positive law—that the exercise of interpretive freedom in giving uniform shape to state constitutional law was far less "exceptional" and far less objectionable than in cases like Gelpcke. The process was made even easier to the extent that, as previously noted, federal courts did not perceive that they (or the state courts) were engaged in an interpretive enterprise at all when they were elaborating general constitutional principles to which they believed most states presumptively adhered. And the more general the state provision in question, the easier the exercise of interpretive independence would be.

In the state constitutional context, therefore, express or implied limits on basic governmental powers such as the public-purpose and anticlass principles, could be considered matters of general and not local law. And for a majority of the Court, such limits could be

188. See supra notes 87, 115, 184 and accompanying text.
189. See, e.g., Burgess v. Seligman, 107 U.S. 20, 33 (1882) ("[I]t necessarily happens that by the course of [state courts'] decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes"); see also Jackson v. Chew, 25 U.S. (12 Wheat.) 153, 154, 162-63 (1827) (noting that the principle of following settled state law applies not just to statutes, but to common law "when applying settled rules of real property"); cf. Kuhn v. Fairmont Coal Co., 215 U.S. 349, 361 (1910) (concluding that general law, not local law, was applicable even though the suit involved land issues, because the state's decisional law was not settled before the relevant contractual events). The reality may have been that the Court never really acknowledged that it was "bound" by state courts' decisions "except, perhaps, in a class of cases where the State courts have established, by repeated decisions, a rule of property in regard to land titles peculiar to the State." Yates v. Milwaukee, 77 U.S. (10 Wall.) 497, 506 (1870).
190. See supra text accompanying notes 96-170.
191. See supra text accompanying notes 96-170.
construed without having to conform to state decisional law in many cases. In addition, ubiquitous provisions such as just compensation clauses might be treated as declaratory of general constitutional principles and not as peculiar to any one state (and thus, not local). As one federal court put it, if a particular constitutional issue might arise in one state as well as any other, it was, for that reason, a question of general law. State constitutions at the time did not yet speak with the proximity of a code, although they were starting to become more complex. So it was often easy to deal with many state constitutional questions and the possible judicial glosses upon them not as matters of local law but as questions of general law, thus allowing federal courts to fashion a kind of uniform constitutional common law on their own, all without reliance on the Federal Constitution.

In retrospect, such interpretive independence may seem startling in a post-Swift universe in which conformity to state substantive law is perceived as the highest ideal of the federal courts' diversity jurisdiction. But to the extent that state courts were also active in the development of substantive limits on state governments at about the same time, perhaps the federal courts' enforcement of fundamental limits while sitting as state courts on diversity is somewhat less startling than it might otherwise appear. Even though the law of the relevant state could be slighted in any particular case, the federal diversity courts were not behaving that much differently than their state court counterparts (in the aggregate) in applying fundamental limits on governmental action. And while federal courts exercised interpretive freedom on certain questions of state public law, it does not appear as though they sought to head off in entirely new directions; rather, they seemed to conform to what they fairly perceived as generally accepted constitutional norms within the various jurisdictions of the United States.

192. See supra text accompanying notes 114-115, 162-165.
193. See supra text accompanying notes 120-134.
194. See Northern Pac. R.R. v. Roberts, 42 F. 734, 737 (C.C.W.D. Wis. 1890) ("[T]he question related to the general powers of any state legislature over the subject of taxation within the state, and might arise as well in one state as another," thus allowing the court to proceed on the basis of general principles.).
195. Cf Stephen M. Griffin, American Constitutionalism: From Theory to Politics 11-12, 33-36 (1996) (noting the divergent purposes and styles of federal and state constitutions, but noting that the proximity of state constitutions developed only over time, in the second half of the nineteenth century).
196. See id.
198. See supra note 15.
IV. **General Law, Natural Law, and Federal Jurisdiction**

A. **The Nonfederal Nature of General Constitutional Law**

Although these general constitutional law precepts could provide a rule of decision in a given case over which the federal courts had jurisdiction, it is important to recall that they could not confer federal question jurisdiction, either originally (in the lower federal courts) or on direct review of the state courts (in the Supreme Court). See infra notes 201-202. In this respect, general constitutional law resembled other matters of general law that formed a part of American law at the time, such as commercial law, maritime law, and international law. Commercial law was obviously Swift's domain. For a discussion of admiralty's reconceptualization as federal law from its original status as general law, see Jonathan M. Gutoff, *Admiralty, Article III, and Supreme Court Review of State-Court Decisionmaking*, 70 TUL. L. REV. 2169 (1996). For the uncertain federal nature of customary international law, see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).


201. See *The Paquete Habana*, 175 U.S. 677, 700 (1900). For example, as discussed in Part II, the Court rather consistently held that a state's contractual impairment ran afoul of the Federal Constitution only when there was post hoc state legislative (or state constitutional) action. Judicial impairment was not enough. See *supra* text accompanying note 27. Thus, a case on all fours with *Gelpcke* would be dismissed for want of jurisdiction if it came to the Supreme Court on direct review from a state court because no "federal" right had been denied. See *Railroad Co. v. McClure*, 77 U.S. (10 Wall.) 511, 515 (1870) (dismissing such a case); *see also* cases cited *supra* note 27. Similarly, a state court decision involving a challenge to state action based on a state constitution's law-of-the-land clause would be dismissed for want of jurisdiction because no federal right had been implicated. See *Missouri Pac. Ry. v. Humes*, 115 U.S. 512, 518-24 (1885). Absent diversity of citizenship, the sorts of issues that made up the universe of general constitutional law would therefore not confer original jurisdiction in the lower federal courts under the rubric of federal question jurisdiction, after 1875, *see* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470, or on federal habeas corpus, after 1867, *see* Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385.

had to be available, at least until some of these concepts began to be treated as a part of genuinely federal law.

The nonfederal and hence nonjurisdiction-conferring quality of general-law limitations on government had been noted well before Gelpcke. Early on, a number of Justices in Calder v. Bull, resorted to natural-law based arguments regarding limits on the permissible scope of governmental power in reviewing state legislative action on direct review from a state court. But Justice Chase acknowledged that if the only basis for a challenge to the legislation had been those same natural-law limitations of which he spoke (as opposed to some more specific limit within the Federal Constitution) the Supreme Court could acquire “no jurisdiction” of the case on review. This jurisdictional limitation is consistent with the findings of legal historians that, during Marshall’s Chief Justiceship, the Court tended to confine its reliance on natural-law principles to those cases coming to it from the lower federal courts as opposed to cases coming to it on direct review.

To illustrate: It may have been violative of general principles of constitutional law and natural right for a municipality to take someone’s property for public use without just compensation. Yet when the Court held the Bill of Rights inapplicable to the states in Barron v. Mayor of Baltimore, it ruled that it was without jurisdiction to hear the plaintiff’s takings claim on direct review of a state’s high court because the general constitutional principles that the case presented raised no federal question. Until the Court was prepared to consider the no-takings principle as a component of the later-ratified Fourteenth Amendment, a federal court could vindicate property owners like the one in Barron only in the exercise of its diversity jurisdiction by following general constitutional principles, as in Pumpelly and similar decisions. The Court’s initial encounter with

203. 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J).
204. See id. at 392; see also Hill, supra note 202, at 1305 & n.258 (discussing Justice Chase’s opinion).
207. See supra text accompanying notes 120-121, 135-138. State courts could presumably do the same if they were so inclined. See Akhil Reed Amar, The Bill of
the Fourteenth Amendment was fundamentally no different than that in *Barron* in this respect. In the *Slaughter-House Cases*, Justice Miller concluded that insofar as the challenge to the constitutionality of the state-imposed slaughterhouse monopoly might have been based on general principles or limits in the state constitution, and not on some provision of the Fourteenth Amendment, the Supreme Court would have lacked jurisdiction to review the state court’s decision. 208

Nevertheless, it was still possible for the Supreme Court to consider such general-law limits on state governments on direct review of a case from state court when colorable federal issues were also presented, as an aid in its interpretation of those federal issues (as it may have done in *Calder* itself). 209 And arguably, at least in theory, if the Court otherwise had appellate jurisdiction because of the denial of federal rights in the state courts, it could resolve a case on the basis of general constitutional principles as a kind of pendent appellate jurisdiction. 210 But as a statutory matter, the Supreme Court was initially limited in its review of state courts to questions of federal law appearing on the face of the record. 211 Even after Congress struck this limiting proviso during Reconstruction, the Court continued to adhere to the principle that it would not entertain matters of either state law or general law on direct review even when appellate jurisdiction over the case otherwise existed. 212 In so concluding, the Court in *Murdock v. City of Memphis* sidestepped the potential constitutional problems that would have been presented had the Supreme Court begun to second-guess state courts on such questions on direct review. 213

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208. 83 U.S. (16 Wall.) 36, 65-66 (1872); see also Barbier v. Connolly, 113 U.S. 27, 30-31 (1885) (holding that the Supreme Court cannot rule on a question of conformity of a city ordinance with the state constitution on direct review from a state court, as opposed to on direct review of diversity action in federal court).

209. See CURRIE, supra note 32, at 42-47; WHITE, supra note 205, at 674.


211. See Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 73, 85-87.


213. See id. at 626-33, 639. As in *Slaughter-House*, Justice Miller authored the opinion, and Justice Bradley dissented. The alignment makes sense insofar as *Murdock* is the direct-review analog of *Slaughter-House* and other decisions that long refused to federalize certain general-law or common-law norms (even though they could supply rules of decision in diversity cases). See id.
B. *Fundamental Law in the Pre-Lochner Federal Courts*

These general-law constitutional limitations that the federal courts imposed on state action in the exercise of their diversity jurisdiction prior to the advent of substantive due process also suggest a certain affinity to natural-law reasoning. The relationship between American constitutional law and natural law, however, has always been complex and defies easy characterization. Natural-law thinking is variously said to have influenced the Framers of the Constitution and the Bill of Rights, to have played a role in some of the earliest opinions of the Supreme Court, to have influenced antislavery thought during the antebellum and Reconstruction periods, to have been resorted to by the state courts during the nineteenth century as an aid in striking down economic regulation, only thereafter to resurface in the federal courts in the form of substantive due process near the turn of the century.\(^{214}\)

Yet even this latter period’s reliance on natural-law notions probably did not mean that state (or federal) laws could be found unconstitutional because they conflicted with abstract principles of natural right.\(^{215}\) Rather, as Professor Morton Horwitz has observed, “natural rights discourse structured legal argument by suggesting starting points, background assumptions, presumptions, or first principles in the law.”\(^{216}\) Late nineteenth-century champions of


\(^{215}\) See *Horwitz*, *supra* note 109, at 157-58. Professor Morton Horwitz states that the use of natural law in the late nineteenth century was different from what had been suggested in *Calder*, because it was, at this later time, used in the service of interpreting positive law. See *id.* at 158.

\(^{216}\) Horwitz, *supra* note 109, at 158.
substantive due process made their peace with the then-emerging school of legal positivism by declaring that general provisions of constitutions could be informed by natural-law principles, and that they might thereby constitute part of the positive law of the land that federal courts could apply in the exercise of their jurisdiction.\footnote{217} In the process, state constitutions were often construed as presumptively embodying principles that limited the scope of legitimate governmental action to regulating activity that was injurious to others within a common-law framework.\footnote{218}

With a ready-made arsenal of nonfederal government-limiting and property-protecting principles to guide them in judging the lawful scope of state action in the exercise of their diversity jurisdiction, it was not a terrific intellectual leap to apply them to state action as a matter of federal law, as would happen with the arrival of substantive due process. In fact, as discussed in Part V, the transition from general to federal constitutional law was quite smooth as a substantive matter, the main difference being that the relevant state-limiting norms had now become federalized.\footnote{219} If one looks at what the federal courts were actually doing (not to mention the parallel developments in the state courts and the treatise tradition) the arrival of substantive due process turns out in important respects to be less a revolution respecting the substantive content of American constitutional law than the conversion into federal law of general-law norms that the federal courts had got quite used to applying on diversity. To this extent, the general constitutional law tradition in the federal courts tends to support "revisionist" claims that the \textit{Lochner} era was not a deviant

\begin{footnotes}

\footnote{218} In short, the common law's regulatory maxim regarding private parties—\textit{sic utere tuo et alienum non laedas} ("so use yours as not to injure another's")—came to be seen as an outside boundary to the scope of permissible state action. Not only was this approach taken by those identified as cheerleaders for substantive due process, see Tiedeman, supra note 217, at 76, but also by earlier champions of general constitutional law. See \textit{Cooley}, supra note 97, at 573-77; see also \textit{Horowitz}, supra note 109, at 28-29, 32 (noting the role of the \textit{sic utere} principle in the development of substantive limits on state action); \textit{Jacobs}, supra note 15, at 60-63 (same).

\footnote{219} See \textit{infra} text accompanying notes 227-249.
\end{footnotes}
period in American constitutional law but was instead a natural outgrowth of developments that preceded it, reflecting substantial continuity with constitutional traditions in both the state and federal courts.\footnote{220}

This is not to suggest that the content of due process, or what it protected, was not undergoing change in the later part of the nineteenth century. Scholars have argued that, during this period, the scope of due process was evolving from an emphasis on vested rights to protection of property interests that vested-rights analysis would have been ill-equipped to address.\footnote{221} For similar reasons, in part, the preeminence of the Contract Clause as a limit on state action was in decline just as substantive due process was on the upswing.\footnote{222}

Nor does this smooth transition from general to federal constitutional law suggest that federal substantive due process failed to mark an important break from the universe of general constitutional norms. It was, after all, the federalization of those norms perhaps more than the norms themselves that the Court had seemed to resist, at least since the \textit{Slaughter-House Cases}.\footnote{223} Although he dissented in \textit{Gelpcke, Pine Grove}, and similar cases in which state decisional law

\footnote{220} See Griffin, supra note 195, at 101 (observing that recent historiography of the \textit{Lochner} era shows 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 that led to an unjustified departure from precedent”); Stephen A. Siegel, \textit{Let Us Now Praise Infamous Men}, 73 Tex. L. Rev. 661, 667-78 (1995) (reviewing Owen M. Fiss, \textit{History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910} (1993)) (noting the development of revisionist perspectives on the \textit{Lochner} era among legal historians and constitutional scholars). For examples of such revisionism (in varying degrees), see Ely, supra note 174, at 61-65, 71-82 (suggesting that the \textit{Lochner} era has been wrongly caricatured as an effort to constitutionalize laissez-faire economic policy); Gillman, supra note 15, at 20, 61-99 (viewing the \textit{Lochner} era as primarily concerned with the problem of so-called class legislation); Benedict, supra note 15, at 293-98 (contrasting the revisionist view of \textit{Lochner} with the “orthodox” view that vilifies it); and Siegel, supra note 217 (noting important substantive continuities between the \textit{Lochner} era and the antecedent constitutional thought, and highlighting its nondeviant qualities). For a sympathetic assessment of the \textit{Lochner} revisionists’ “new narrative,” see Gary D. Rowe, \textit{Lochner Revisionism Revisited}, 24 L. & Soc. Inquiry 221, 241 & n.22 (1999).

\footnote{221} See, e.g., Kainen, supra note 217, at 123-41 (noting that an expanding concept of legally protected property interests aided in marginalizing the importance of retroactivity analysis associated with the Contract Clause); see also James L. Kainen, \textit{Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State}, 31 Buff. L. Rev. 381, 383-87 (1982) (discussing Contract Clause cases). Professor Stephen Siegel has pointed out that although there were substantive continuities between \textit{Lochner} and the eras that preceded it, \textit{Lochner} also reflects an important jurisprudential shift regarding the proper sources of constitutional principles. See Siegel, supra note 217, at 78-90, 100-10.

\footnote{222} See Ely, supra note 174, at 114-17.

\footnote{223} 83 U.S. (16 Wall.) 36 (1872).
had made clear the meaning of state positive law, Justice Miller
(Slaughter-House's author) was not one to shy from general
constitutional analysis in diversity cases where state law was unsettled,
as shown by his authorship of both Loan Ass'n and Pumpelly. 224

For Justice Miller, however, unlike the Slaughter-House
dissenters, the impact to federalism arising from the conversion of
those general-law norms into federal norms was too great a price to
pay. Enforcing those same nonfederal principles in the exercise of
diversity jurisdiction implicated a somewhat reduced federal role than
outright federalization of them. A federal court judgment striking
down state action on general-law grounds would not hamstring the
states in later litigation involving nondiverse parties because the
judgment would not implicate a question of federal law. 225 And, under
a regime of general constitutional law, federal power resided with the
federal courts and their common-law judges rather than with Congress,
whose powers would likely have been significantly enhanced by a
broad constitutionalization of such norms under the aegis of the
Fourteenth Amendment. 226

V. THE FEDERALIZING OF GENERAL CONSTITUTIONAL NORMS

The Court's ultimate conclusion that many of the principles that
made up the arsenal of general constitutional law also bound the states
as a matter of federal law produced results in the federal courts that
would have been hard to tell apart from those they would have reached
as a matter of state law had diversity of citizenship been present. In
some instances, federalization resulted from the process of application
against the states, through the Due Process Clause, of certain limits
that had previously been applicable only against the federal
government under the Bill of Rights, such as the prohibition against
uncompensated takings of property for public use. 227 Other times, the

224. See Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655, 658 (1875); Township of Pine
Grove v. Talcott, 86 U.S. (19 Wall.) 666, 679 (1874) (Miller, J., dissenting); Pumpelly v.
Green Bay Co., 80 U.S. (13 Wall.) 166, 174 (1871); Gelpcke v. City of Dubuque, 68 U.S. (1
Wall.) 175, 207-20 (1863) (Miller, J., dissenting).

225. See Conison, supra note 165, at 1149-50 (noting that, under Justice Miller's
approach, no state law would have to be struck down as violative of the Federal Constitution,
and that rulings would be applicable to the federal courts only, thus allowing state courts to
continue to apply their law as they saw fit).

226. See 1 Tribe, supra note 10, at 1341 n.57 (noting the problem of enhancing
congressional power that would come with the federalization of such norms); cf. The Civil
Rights Cases, 109 U.S. 3, 8-26 (1883) (denying Congress the power under Section 5 of the
Fourteenth Amendment to federalize various general- or common-law civil rights regarding
access to public accommodations).

227. See infra text accompanying notes 232-236.
Court simply took general-law norms regarding implied limits on governmental action and dressed them up in federal clothing.\footnote{See infra text accompanying notes 245-249.} Once it did so, cases implicating such issues presented genuinely federal questions and could confer jurisdiction for that very reason, without regard to diversity.\footnote{See Chicago, Burlington & Quincy Railroad v. Chicago, 166 U.S. 226 (1897).}

The need to federalize what had once been nonfederal did not arise immediately, however, even after Congress’s enactment of general federal question jurisdiction in 1875.\footnote{See Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470 (current version at 28 U.S.C. § 1331 (1994)).} So long as diversity of citizenship existed in federal court challenges to state action, there was no pressing reason for the federal courts or the Supreme Court to identify with precision the source of law on which they were relying in striking down state action. And the Supreme Court had generally given a flexible reading to the diversity statute to protect out-of-state capital and allow nonresident regulated parties to sue in (or remove to) federal court and thereby secure the blessings of the general law.\footnote{See generally Woolhandler, supra note 141, at 85-111 (noting the degree to which diversity served as a substitute for federal question jurisdiction before 1875).}

But for reasons that are less than certain, in a series of decisions in the mid-to-late 1890s commonly associated with the arrival of substantive due process, formerly nonfederal constitutional principles associated with takings, public-purpose limits, rate reasonableness questions and others, were expressly rechristened as federal limits on state governments.

A. Federalization’s Moment: October Term, 1896

For example, in Chicago, Burlington & Quincy Railroad v. Chicago,\footnote{See, e.g., Scott v. City of Toledo, 36 F. 385, 392-96 (C.C.N.D. Ohio 1888) (relying on general principles, Cooley’s treatise, and earlier dicta from the Court and individual Justices to conclude that the Fourteenth Amendment incorporates a just compensation principle); State v. Walnuff, 26 F. 178, 196, 198 (C.C.D. Kan. 1886) (relying on general constitutional law decisions such as Pompelly and principles of “natural equity” to find that a state’s prohibition statute took a beer manufacturer’s property in violation of Fourteenth Amendment’s Due Process Clause).} the Court resolved its first true takings case as involving a question of federal law, although it had been beaten to the punch by at least a couple of lower federal courts.\footnote{166 U.S. 226 (1897).} The Court did not, however, develop the no-takings principle out of whole cloth, nor, strictly speaking, did it incorporate the Fifth Amendment’s Takings Clause.
through the Fourteenth Amendment’s Due Process Clause.234 What it did was to draw upon general principles and its own general-law precedents in the takings and related areas—including Justice Miller’s opinion in *Pumpelly*, in which the Court had discussed such issues in the exercise of its diversity jurisdiction.235 The Court also looked to the decisions of state courts, and to treatises (like Cooley’s) that dealt with similar constitutional limitations in other jurisdictions.236 And it concluded that the no-takings principle, which it had long treated as a matter of general law, also made up a part of federal due process.237 At almost the same time, the Court took its often repeated proscription against legislation that takes the property of A and gives it to B and made it a part of Fourteenth Amendment due process as well.238

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235. *See id.* at 237-38; Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism,* 95 COLUM. L. REV. 523, 560-61 n.167 (1995) (noting that only the underlying principle of prohibiting uncompensated takings, not the Fifth Amendment itself, was “incorporated” as a part of due process). Justice Miller, however, had indicated in *Davidson v. New Orleans,* 96 U.S. 97, 105-07 (1877), that the prohibition on takings of private property for public use without just compensation—while enforceable as a matter of general law as in *Pumpelly*—would not be able to be enforced as a matter of federal due process against the states.


237. *See Chicago, Burlington & Quincy R.R.,* 166 U.S. at 240. Although the just compensation principle would go on to be vigorously enforced as a matter of due process, the related principle that property could be taken only for public and not private uses—although federalized at about the same time, *see infra* note 238—would not. *See* *Elk, supra* note 174, at 106-07 (noting authority suggesting that legislation was not frequently struck down on the basis of the public-use requirement).

238. *See Missouri Pac. Ry. v. Nebraska,* 164 U.S. 403, 417 (1896) (prohibiting a state from requiring a railroad to allow a grain elevator to be built on the railroad’s right of way (citing *Loan Ass’n* and prior cases decrying “A-to-B transfers of property”). What the decision in *Missouri Pacific* did was to insist on a public-purpose requirement for takings as a matter of federal constitutional law. Before then, the Court had often stated in diversity actions that legislation taking private property and giving it to another would run afoul of general principles of law and would be in excess of legislative power. *See, e.g., Loan Ass’n v. Topeka,* 87 U.S. (20 Wall.) 655, 663 (1875) (denying that a statute declaring “that the homestead now owned by A. should no longer be his, but should henceforth be the property of B.” would be lawful); *Township of Pine Grove v. Talcott,* 86 U.S. (19 Wall.) 666, 676 (1874) (stating that property could be taken only for public purposes as a matter of general principles); *Bonaparte v. Camden & Amboy R.R.,* 3 F. Cas. 821, 829-31 (C.C.D.N.J. 1830) (No. 1617) (concluding that a statute authorizing the taking of private property for the use of another would violate general-law norms); *see also* Wilkinson v. Leland, 27 U.S. (2 Pet.) 627, 657-58 (1829) (“We know of no case, in which a legislative act to transfer the property of A. to B. without his consent, has ever been held a constitutional exercise of legislative power in any state in the union.”); *Calder v. Bull,* 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (stating that a law which “takes property from A. and gives it to B.” would be in excess of legislative power); *cf.* The Sinking-Fund Cases, 99 U.S. 700, 738 (1878) (“A statute undertaking to take the property of A. and transfer it to B. is not legislation.”); *Davidson v.*
thereby federalizing another takings principle that prohibited deprivations of property for anything other than public purposes. 239

Similarly, in *Fallbrook Irrigation District v. Bradley*, the Court converted the public-purpose limitation on state taxation into a question of federal law, and thus subject to analysis under the Due Process Clause for the first time. 240 As the decision in *Loan Ass' n* had shown, the Court was willing to treat taxes for nonpublic purposes as being in excess of legitimate legislative power, at least as a matter of general law. 241 Decisions after *Loan Ass' n* and prior to *Fallbrook* had therefore continued to consider the limitation only as an issue of general law on diversity. 242 Yet in converting the public-purpose limitation into a matter of federal due process, the substantive scope of the limitation underwent no immediate change. Interestingly, *Fallbrook* itself was a diversity case, but general constitutional law proved unavailing because the relevant state courts had made it crystal clear that the particular tax was indeed for a public purpose as a matter of state constitutional law and because the setting was not one in which the affected party could claim that it had acted in reliance on

New Orleans, 96 U.S. 97, 102 (1877) (Miller, J.) (indicating that such legislation might violate the Fourteenth Amendment); *The Legal-Tender Cases*, 79 U.S. (12 Wall.) 457, 580 (1871) (Chase, C.J., dissenting, joined by Field & Clifford, JJ.) (invoking a similar principle as a limit on federal legislation). For an argument that, as originally conceived, the A-to-B proscription was meant only as a procedural limit on a state legislature being able to transfer land titles, and not as a substantive limit on private wealth transfers more generally, see John V. Orth, *Taking from A and Giving to B: Substantive Due Process and the Case of the Shifting Paradigm*, 14 CONST. COMMENT 337 (1997).

239. State and federal court decisions that invoked state law-of-the-land clauses were expressly relied on by the Supreme Court in *Missouri Pacific Railway*, 164 U.S. at 417, just as they had been by lower federal courts as an aid in construing the scope of due process. See, e.g., *Myers v. Shields*, 61 F. 713, 717-18 (C.C.N.D. Ohio 1894) (invoking state law-of-the-land decisions to construe the scope of federal due process); *Scott v. City of Toledo*, 36 F. 385, 393 (C.C.N.D. Ohio 1888) ("In a general sense, 'due process of law' [under the Fourteenth Amendment] is identical in meaning with the phrase, 'law-of-the-land,' as used in the constitutions of the several states."); *Lavin v. Emigrant Indus. Sav. Bank*, 1 F. 641, 660-66 (C.C.S.D.N.Y. 1880) (invoking state law-of-the-land decisions to define the content of federal due process).

240. 164 U.S. 112 (1896). The issue in *Fallbrook* was whether taxation for an irrigation district that would have benefited only part of the taxed public was a tax for a public purpose. Although the Court ruled that the tax was indeed for a public and not a private purpose, that cannot obscure the fact that the Court had treated the public-purpose limitation on state taxation as a question of federal law, apparently for the first time. See id. at 157-58.

241. See id. at 160-61.

242. See, e.g., *Cole v. La Grange*, 113 U.S. 1, 6-9 (1885) (noting in a diversity action that eminent domain and taxation powers were limited to public purposes); *City of Parkersburg v. Brown*, 106 U.S. 487, 498, 501 (1882) (holding that taxation to pay for a bond issuance to aid private parties in constructing a foundry was not for a "public purpose").
some antecedent general-law understanding.\textsuperscript{243} Thus, if a federal court challenge were to have any chance of success, federal due process was the only way to go.\textsuperscript{244}

Likewise, the reasonableness of rates that had once been treated as a matter of general law was eventually treated in \textit{Smyth v. Ames}, if not before, as a question of federal due process.\textsuperscript{245} Yet the substance of reasonableness and the Court's basic inquiry for assessing whether a rate was nonconfiscatory proved not much different from what it was before, when the Court had decided the same issue as a matter of general constitutional law in diversity actions. In both settings, lower courts were enjoined to make sure that the regulated entity recovered a fair return on the fair value of its business.\textsuperscript{246}

By contrast, it is somewhat less clear whether the "uniformity and equality" requirements imposed on taxation in various state constitutions and employed by federal courts on diversity were converted wholesale into federal law at this same time,\textsuperscript{247} although there were a handful of occasions in which federal courts began to enforce similar principles as a matter of the Fourteenth Amendment's

\begin{footnotesize}
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\item[\textsuperscript{243}] See infra note 263.
\item[\textsuperscript{244}] As with taxation and takings, state spending for private rather than public purposes began (at about the same time) to run afoul of federal and not just general law (as it had in bond cases such as \textit{Pine Grove}). See \textit{Jacobs, supra} note 15, at 134 (noting authority); \textit{cf.} \textit{United States v. Realty Co.,} 163 U.S. 427, 432-44 (1896) (noting the issue but not deciding whether a federal statute granting a subsidy to sugar producers would be unconstitutional, apparently as in aid of private not public purposes).
\item[\textsuperscript{245}] 169 U.S. 466, 515-18 (1898), overruled by \textit{Federal Power Comm'n v. Natural Gas Pipeline Co. of Am.}, 315 U.S. 575 (1942). \textit{Smyth} was decided in 1898 and was preceded by \textit{Covington & Lexington Turnpike Road Co. v. Sandford}, 164 U.S. 578, 592-96 (1896). In \textit{Sandford}, the Court recognized on direct review a state court decision involving a defense to a privately initiated rate enforcement action that claimed the rates were confiscatory raised a question of federal law. See \textit{id}. So \textit{Sandford}, not \textit{Smyth}, may be the better candidate to represent the magic moment of federalization of rate reasonableness.
\item[\textsuperscript{246}] See generally \textit{Siegel, supra} note 142, at 243-47 (discussing valuation issues in assessing rate reasonableness).
\item[\textsuperscript{247}] In \textit{Pollock v Farmers' Loan & Trust Co.}, 158 U.S. 601, 618 (1895), in which the Court on rehearing struck down a federal income tax law as a "direct" tax requiring apportionment among the states under Article I, Section 8 of the U.S. Constitution, it was only Justice Field (in a separate opinion rendered in connection with the Court's initial decision, see \textit{Pollock v. Farmers' Loan & Trust Co.}, 157 U.S. 429, 599 (1895) (Field, J., concurring)) who sought to constitutionalize the general principles of uniformity and equality that federal diversity courts and state courts had used to assess the proper scope and limits of taxation. See also \textit{supra} note 161 (noting Justice Field's approach to class legislation). The argument of counsel in \textit{Pollock} had apparently been much more aggressive in seeking the wholesale federalization of such principles. See \textit{Paul, supra} note 144, at 185-98; \textit{cf. Horwitz, supra} note 109, at 24-27 (referring to the \textit{Pollock} litigation as involving "the federalization of taxation doctrine").
\end{itemize}
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Due Process and Equal Protection Clauses in the area of taxation\textsuperscript{248} and elsewhere.\textsuperscript{249}

B. Reallocating Judicial Power

Although little may have changed as a matter of constitutional methodology or even substantively in these cases, what did change was the allocation of judicial power. Cases that would once have escaped the federal courts' scrutiny because of the want of diversity jurisdiction would now fall within their federal question jurisdiction, whether on direct review or originally. And in-staters could now obtain a measure of constitutional relief on federal-law grounds not unlike that which out-of-staters had long been able to obtain on general-law grounds.\textsuperscript{250}

Of course, this discussion of how these general-law norms became federalized does not explain why the Court did not federalize them earlier. Nor does it explain why some aspects of substantive due process, such as "liberty of contract," seem not to have been much developed in federal diversity courts as general-law principles, as

\textsuperscript{248} For examples of the federalization of equality notions in the taxation context, see Raymond v. Chicago Union Traction Co., 207 U.S. 20, 35 (1907) (suggesting that the Fourteenth Amendment's Equal Protection Clause was violated because a state equalization board failed to equalize assessments as called for by the state constitution); The Kentucky Railroad Tax Cases, 115 U.S. 321, 336-37 (1885) (considering whether a state tax operated equally and uniformly as a federal equal protection question); and Nashville, C. & St. Louis Railway v. Taylor, 86 F. 168, 186-88 (C.C.M.D. Tenn. 1898) (holding that unequal taxation resulted in the deprivation of property without due process). \textit{But cf.} Bell's Gap R.R. v. Pennsylvania, 134 U.S. 232, 237 (1890) (stating that the Fourteenth Amendment is not intended to compel an "iron rule of equal taxation" lest it "supersede [states'] constitutional provisions... whose object is to secure equality of taxation"); Davidson v. New Orleans, 96 U.S. 97, 105 (1877) (observing that the government's challenged actions might "violate some provision of the State Constitution against unequal taxation," but not the Fourteenth Amendment).

\textsuperscript{249} The more general principle against class legislation was easily federalized in other contexts at around the same time as the developments in the areas discussed in the text if not before. See, e.g., Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155-65 (1897) (referring to a virtual smorgasbord of state court decisions to hold a state fee-shifting statute violative of federal equal protection as involving an "arbitrary" classification); Lawton v. Steele, 152 U.S. 133, 137 (1894) (declaring that legislative action, to be lawful, should affect "the interests of the public generally, as distinguished from those of a particular class"); see also supra note 162 (noting decisions that used due process and equal protection principles interchangeably).

\textsuperscript{250} Cf. Horwitz, supra note 109, at 158 (emphasizing the continuity in thinking about due process between the Civil War and \textit{Lochner}, and noting that the expansion of federal judicial power under the Fourteenth Amendment was more controversial); \textsc{William E. Nelson}, \textit{The Fourteenth Amendment: From Political Principle to Judicial Doctrine} 170-71 (1988) (noting that the issue presented by a broad construction of diversity jurisdiction and a narrow construction of federal due process was really a question of "on whose behalf" judicial lawmaker would take place).
opposed to in state courts.\textsuperscript{251} As noted above, with general-law principles and diversity available to do much of the heavy lifting in the lower federal courts, the federalization step may have seemed less immediate. There were also the deep-seated fears regarding the federalization of formerly common-law or general-law limits on state action—a point made in the \textit{Slaughter-House Cases}.\textsuperscript{252} But because the arrival of substantive due process was as much a jurisdictional as a substantive event, it might make sense to consider, in addition to the reasons constitutional scholars have already suggested could account for the timing of substantive due process,\textsuperscript{253} whether there might have been changes in the jurisdictional landscape that made diversity jurisdiction and general constitutional law no longer a sufficient safeguard against unlawful state action.

The proof may be inconclusive, but there is at least a smattering of circumstantial evidence to suggest that jurisdictional concerns may have played a supporting role in the timing of the arrival of substantive due process in the mid-1890s.\textsuperscript{254} First, insofar as actions involving

\textsuperscript{251} For developments in the state courts in the liberty-of-contract area, see JACOBS, \textit{supra} note 15, at 64-93; see also \textit{supra} note 167 (noting the statements of individual Supreme Court Justices). General-law limits on state delegation of powers also seem to have remained primarily a question of general and not federal law. See cases cited \textit{supra} note 164; \textit{cf.} Michigan Cent. R.R. \textit{v.} Powers, 201 U.S. 245, 294 (1906) (sidestepping the question of whether state delegation of powers could be limited by due process or the Republican Form of Government Clause, \textit{U.S. Const.} art. IV, § 4). But see \textit{In re Ziebold}, 23 F. 791, 791-95 (C.C.D. Kan. 1885) (holding that the commingling of legislative and judicial powers in a state executive branch official violated federal due process).

\textsuperscript{252} 83 U.S. (16 Wall.) 36, 57-83 (1872); see also \textit{id.} at 123 (Bradley, J., dissenting) (noting but ultimately discounting “great fears” experienced with respect to expanding congressional power if certain general-law rights were to be federalized); \textit{id.} at 125-29 (Swayne, J., dissenting) (addressing the problem of enhancement of congressional power).

\textsuperscript{253} The standard treatments note a variety of ideological, historical, and jurisprudential factors that helped shape substantive due process. \textit{See, e.g.,} JACOBS, \textit{supra} note 15; PAUL, \textit{supra} note 144; see also William E. Nelson, \textit{The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth Century America}, 87 \textit{Harv. L. Rev.} 513, 551-65 (1974) (suggesting that formal styles of judicial reasoning and hostility to class legislation that were dominant in the latter part of the nineteenth century had their origin in, and were a predictable outgrowth of, noninstrumental modes of reasoning characteristic of the antislavery movement).

\textsuperscript{254} The federalization process at the Supreme Court level seems to have been accomplished within the space of a few months during the Court’s 1896 Term. The famous liberty-of-contract decision, \textit{Allgeyer v. Louisiana}, 165 U.S. 578 (1897), and the just compensation decision, \textit{Chicago, Burlington & Quincy Railroad \textit{v.} Chicago}, 166 U.S. 226 (1897), were both decided on March 1, 1897. The decision federalizing the proscription against deprivations of property for nonpublic purposes, \textit{Missouri Pacific Railway \textit{v.} Nebraska}, 164 U.S. 403 (1896), and \textit{Fallbrook Irrigation District \textit{v.} Bradley}, 164 U.S. 112 (1896), which federalized the public-purpose maxim in the area of state taxation, as well as \textit{Covington \& Lexington Turnpike Road Co. \textit{v.} Sandford}, 164 U.S. 578 (1896), the direct-review precursor to \textit{Smyth \textit{v.} Ames}, 169 U.S. 466 (1898), recognizing that rate reasonableness
government and its officials were concerned, the jurisdictional avenue of diversity began to narrow in important respects in the early 1890s.\footnote{255} In 1887 and 1888, Congress had enacted sweeping reforms that substantially restricted federal jurisdiction, in part by raising the amount in controversy, cutting back on jurisdiction by assignment, and eliminating jurisdiction for certain federally chartered corporations.\footnote{256} By 1891, the establishment of a middle tier of federal appeals courts, the introduction of discretionary Supreme Court review in most diversity cases, and the demise of the Justices' circuit-riding duties meant that the Court's once-prominent role in declaring general constitutional law would be markedly reduced.\footnote{257} Lower courts were also starting to develop abstention-like principles to prevent removal of state court enforcement actions,\footnote{258} and, in 1894, the Supreme Court read Congress's jurisdictional reforms as wiping out removal of civil cases from state to federal court based on the presence of a federal defense—a practice that had existed in uninterrupted fashion since the enactment of the 1875 federal question statute.\footnote{259}

Many of the civil actions removed during this interim period between 1875 and 1894 involved state-initiated regulatory enforcement proceedings with defenses based on the Contract

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was a federal question, \textit{see supra} note 245, were all decided in November and December 1896.

\footnote{255} \textit{But cf.} Purcell, \textit{supra} note 13, at 266-69, 286-87 (observing that in certain kinds of private-law litigation, diversity-based removal was actually expanding by the period of the mid-1890s).


\footnote{257} \textit{See id.} at 37 (discussing the Evarts Act, 26 Stat. 826 (1891)). Circuit-riding duties were not eliminated by the Evarts Act, but the duties had apparently come to be considered an imperfect obligation, and they remained such until the abolition of the circuit courts in 1911. \textit{See id.} at 37 n.66.

\footnote{258} \textit{See, e.g.}, Dey v. Chicago, Milwaukee \& St. Paul Ry., 45 F. 82, 87-88 (C.C.N.D. Iowa 1891) (denying federal question removal in a state-initiated suit to enforce rate orders made by state railroad commissioners because removal would interfere with state officials' discretionary powers to "enforce public rights [and] fulfill public duties").

\footnote{259} \textit{See Tennessee v. Union \& Planters' Bank}, 152 U.S. 454, 458-64 (1894). The decision in \textit{Union \& Planters' Bank} construed the effect of the 1887 judicial reforms on the 1875 federal question statute that had allowed for the removal of civil cases from state courts if they raised a federal defense. \textit{See id.} For the impact of the Court's restrictive reading of the removal statute on federal court constitutional litigation, see Michael G. Collins, \textit{The Unhappy History of Federal Question Removal}, 71 Iowa L. Rev. 717, 760-65 (1986) (showing that federal defense removal continued unabated after the 1887 reforms up to the decision in \textit{Union \& Planters' Bank} in 1894).
Absent the prospect of removal, it was often difficult for regulated parties to bring Contract Clause claims to federal court as original actions because of sovereign immunity problems in compelling a state (or its officials) to make good on its promises and because of the strictures of the increasingly important well-pleaded complaint rule. Given the relative difficulty in asserting such claims, especially when combined with their limitation to vested rights, there may have been procedural as well as substantive pressures for the development of alternative federal constitutional grounds to challenge state action that would not be weighed down with similar baggage.


261. See, e.g., Hans v. Louisiana, 134 U.S. 1, 9-21 (1890) (holding a Contract Clause action against a state barred by sovereign immunity); In re Ayres, 123 U.S. 443, 485-510 (1887) (holding a Contract Clause action for injunctive relief against a state officer barred by sovereign immunity); cf. Fergus Falls v. Fergus Falls Water Co., 72 F. 873, 875-76 (8th Cir. 1896) (holding that an action for contractual damages against a local government could not satisfy the then-developing well-pleaded complaint rule, and treating an allegation that city’s resolution violated the Contract Clause as mere surplusage). Things were much easier if the officer’s actions could be shoehorned into a claim for trespass or similar tort-like harm. See, e.g., The Virginia Coupon Cases, 114 U.S. 269, 308 (1885) (upholding federal question jurisdiction over suit to redress an official’s trespass pursuant to a statute that violated the Contract Clause); see also Walla Walla City v. Walla Walla Water Co., 172 U.S. 1, 9 (1898) (upholding federal question jurisdiction over a company’s action to enjoin the city’s construction of waterworks where the company claimed that legislation interfered with its exclusive franchise). The contract-tort distinction may partly explain why the suit to enjoin an official’s unconstitutional action in Ex parte Young, 209 U.S. 123, 142-68 (1908), was successful, while in In re Ayres, 123 U.S. at 485-510, it was not. For the emergence of the well-pleaded complaint rule as a limit on federal question litigation, particularly after the elimination of removal based on the presence of a federal defense, see Collins, supra note 259, at 766-71.

262. Jurisdictional concerns may also partly explain the dearth of general constitutional law versions of liberty of contract cases in the federal diversity courts. A great many federal court challenges to state action in the nineteenth century were grounded in equity, to enjoin unconstitutional behavior of state or local officers. Traditionally, equity did not protect liberty (as opposed to property), and according to the Court, corporations—although “persons” protected by the Equal Protection and Due Process Clauses and who depended greatly on the federal courts—had no liberty interests to protect. See Northwestern Nat’l Life Ins. Co. v. Riggs, 203 U.S. 243, 255 (1906). But cf. Coppage v. Kansas, 236 U.S. 1, 13-14 (1915) (stating that “constitutional freedom of contract” implicates both “liberty” and “property” rights). Liberty-of-contract issues might be raised by individuals in defense to an enforcement action brought in state court, but in either of these settings, lower federal courts in the mid-1890s would have little chance of acquiring jurisdiction. Perhaps not surprisingly, many of the major cases raising liberty-of-contract issues were criminal actions brought to the Supreme Court on direct review. See, e.g., Muller v. Oregon, 208 U.S. 412, 416-23 (1908) (challenge to the constitutionality of a maximum hours statute for women raised by the defense in a criminal prosecution); Lochner v. New York, 198 U.S. 45, 52-65 (1905) (challenge to a maximum hours statute for bakers raised by the defense in a criminal prosecution); Allgeyer v. Louisiana, 165 U.S. 578, 583-93 (1897) (challenge to the
The constitutional principles that the Court had developed on diversity, however, had their own baggage—they were not federal in content and could not be enforced by an in-stater against her own state or local governments and their officials. Yet their federalization was ultimately baggage the Court found it could handle. In fact, as Justice Peckham (Lochner’s author) once let on, there may have eventually arisen a sense that opting for authentically federal constitutional limits was more honest than acting “under the pretext [of] deciding principles of general constitutional law,” at least “in the face of clear and repeated decisions of the highest court of the State to the contrary.” For Justice Peckham, federalism concerns surrounding state autonomy in the interpretation of its law seem to have reinforced the jurisprudential move to nationalize general constitutional norms, even though such a move would have adverse federalism consequences of its own. Federalization may have also been the only way out once state courts began to wise-up and definitively construe their own constitutions in a manner contrary to the Court’s general-law default rules, or states had rewritten their constitutions in a sufficiently detailed manner that particular provisions could no longer be said to belong to the realm of “general jurisprudence.” And besides, it was not as though the Court—while fending off litigants’ arguments to give a substantive scope to the Due Process Clause—had

prohibition on purchases of out-of-state insurance raised by the defense in a criminal prosecution); cf. Holden v. Hardy, 169 U.S. 366, 380-98 (1898) (upholding the constitutionality of a state law against a liberty-of-contract challenge on direct review of a state habeas corpus proceeding).

263. Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 155 (1896). In Fallbrook, the Court federalized the public-purpose limit on taxation, a previously general-law principle. See supra notes 240-244. Although the Court ruled against the party raising the constitutional challenge, Justice Peckham’s preference for relying on federal law is revealing:

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, expressed or properly implied, 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.

Fallbrook, 164 U.S. at 155.

264. Cf. Nelson, supra note 250, at 171 (noting the competing tug of federalism concerns in the protection of rights against the state through diversity versus through federal due process).

265. Fallbrook was an example of definitive state court construction. See supra note 263. Other state tribunals took “a more liberal view of what constituted a public purpose” at this time. Jacobs, supra note 15, at 154. Still other states began to speak through their constitutions with the prolixity of a code. See Griffin, supra note 195, at 33-36.
ever missed an opportunity to drop unsubtle hints that the substantive axe might someday fall, next time perhaps as a matter of federal law.266

VI. CONCLUSION

This reexamination of the historical record sheds light on a number of issues. First, it suggests that Gelpcke is not the best lens or even a very good lens through which to view the phenomenon of general constitutional law. In other settings, federal courts did not rely on preexisting but later abandoned state decisional law, as in Gelpcke, but instead applied their own nonfederal default rules to give a uniform construction to a variety of ostensibly state constitutional questions. In those settings, federal courts sometimes found themselves rejecting state courts’ interpretations of their own constitutions; but at other times, federal courts were working from a clean slate regarding questions of state constitutional law and the permissible limits of lawful governmental action—sometimes in defense of vested rights, sometimes not. It was the clean-slate scenario that the Court found to be the least problematic and the one in which federal courts exercised their greatest creativity in fashioning general constitutional law. Indeed, it turns out that one of the preeminent architects of general constitutional law was Justice Miller, the dissenter-in-chief in Gelpcke and its progeny, and long-time opponent of the federalization of general constitutional norms.

Second, the historical record supports the suggestion of others that the real upshot of Swift was to permit federal courts to exercise judicial creativity in areas of “general” as opposed to “local” matters, without scrupulous regard to the statutory- versus common-law distinction that the Rules of Decision Act might suggest. Surprisingly, perhaps, many fundamental limits on legislative power arising from

266. For a few of the many hints (generally in dicta) about the possibility that the Court might find substantive limits on state action, one need look no further than Justice Miller, the Court’s most steadfast opponent of federalization of general constitutional principles. See, e.g., Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 460 (1890) (Miller, J., concurring) (indicating that unreasonable rates would “conflict with the Constitution”); Davidson v. New Orleans, 96 U.S. 97, 102 (1877) (Miller, J.) (acknowledging that legislation that vested the property of A in B would, “if effectual, deprive A. of his property without due process of law”); Bartemeyer v. Iowa, 85 U.S. (18 Wall.) 129, 133 (1873) (Miller, J.) (recognizing that a “grave” due process question would be presented if a state criminal statute banned the sale of liquor that was previously legal and that had been lawfully owned before the ban); see also Mendelson, supra note 15, at 135 n.64 (gathering other authority relative to substantive due process); Powe, supra note 11, at 738 n.3 (noting the excessive focus on such dicta in constitutional scholarship); cf. Hill, supra note 202, at 1317-22 (noting that Justice Miller’s views were not inconsistent with recognizing a substantive scope for due process).
state constitutions were treated as involving questions of general jurisprudence rather than local law, thus allowing the federal diversity courts to participate in the development of a uniform but nonfederal body of public law and constitutional law, much as they did in the area of private law.

Third, the general-law principles on which the federal courts drew in these cases bear witness to the continuity of natural law and related forms of reasoning in American constitutional law throughout much of the nineteenth century. It was not only the state courts, but the federal courts that were articulating fundamental limits on governmental action in the period leading up to *Lochner*. These decisions therefore reflected not just an attitude of judicial activism similar to that of *Lochner*; instead, their substantive message proved to be a dress rehearsal for substantive due process as well. 267 This same body of general constitutional decisional law eventually began to inform the interpretation of similar issues under the Federal Constitution, especially the Fourteenth Amendment’s Due Process Clause. Thus, far from suggesting a break in jurisprudential approaches, these developments suggest that the *Lochner* era may have been a somewhat more ordinary and less deviant outgrowth of developments in constitutional lawmaking that preceded it. 268

A final and related point is that the ready availability of general constitutional law principles to check state invasions of liberty and property meant, for a while at least, that many rights did not have to be federalized, or conceived of as especially federal, to be enforced against state officials in federal court. The ability of federal diversity courts to rely on state constitutional provisions for the protection of rights (while giving them their own uniform interpretation), may, in turn, have temporarily arrested the process of incorporation of at least some of the express guarantees of the Bill of Rights and other unenumerated fundamental federal constitutional rights, against state action.

Today, of course, federal courts no longer have the freedom they once had to fashion nonfederal general law, and enforcing state compliance with state law remains problematic. Federalism concerns for states’ lawmaking autonomy, the advent of legal positivism and its rejection of general-law reasoning, as well as concerns about the legitimacy of federal courts acting as

267. *Cf.* Powe, *supra* note 11, at 738, 754-55 (focusing on nonsubstantive links between the bond cases and *Lochner*).

268. *See supra* note 220 (discussing *Lochner* era revisionists).
lawmakers, have all contributed to a permanent shift in thinking about the sources of law applied by federal courts against unlawful state action.\footnote{269} Even Justice Peckham may have glimpsed the future when he observed that it was preferable to enforce substantive limits on the states as a matter of federal law than to act “under the pretext” of elaborating general constitutional law.\footnote{270} But despite these changes, the general constitutional law tradition still serves to illustrate the entirely familiar role of federal courts in the enforcement of fundamental limits on state action, and how diversity jurisdiction long acted as a surrogate for later-developed principles of federal due process.

\footnote{269} Telling state officials how to carry out their jobs as a matter of state law, for example, is thought to be sufficiently troublesome for the federal courts that it now raises sovereign immunity issues. See Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 197-24 (1984). Further, abstention (and related) principles may limit the ability of federal courts to resolve novel or undecided questions of state law, especially state constitutional law. See Woolhandler & Collins, supra note 146, at 670-72.

\footnote{270} See supra text accompanying note 263.