Transatlantica
Revue d'études américaines. American Studies Journal

1 | 2013
Revisiting the Gilded Age / Littérature et philosophie

The United States Supreme Court and Business Elites: Gilded Age Origins of Modern American Liberalism

Paul Kens

Édition électronique
URL : http://journals.openedition.org/transatlantica/6473
DOI : 10.4000/transatlantica.6473
ISSN : 1765-2766

Éditeur
AFEA

Référence électronique
Paul Kens, « The United States Supreme Court and Business Elites: Gilded Age Origins of Modern American Liberalism », *Transatlantica* [En ligne], 1 | 2013, mis en ligne le 26 février 2014, consulté le 29 avril 2021. URL : http://journals.openedition.org/transatlantica/6473 ; DOI : https://doi.org/10.4000/transatlantica.6473

The United States Supreme Court and Business Elites: Gilded Age Origins of Modern American Liberalism[1]

Paul Kens

Introduction

1 Although historians disagree about how to define and describe the Gilded Age, everyone agrees that it was an era of commercial revolution. In this sense it is often seen as an age of accomplishment and as the birth of modern America. It has also been portrayed as an age of corruption, greed, and inequality, both in government and business. Whichever characteristic any given historian emphasizes, however, most agree that it was an age of enterprise. The predominant attitude toward business at the time favored free enterprise in the extreme. Moreover it was supported by an economic philosophy that, whether called classical liberalism, laissez-faire economics, the neutral state, or entrepreneurial liberty, emphasized a society founded on a limited role of government in guiding or regulating economic activity.

2 By the late 1880s, at the height of the Gilded Age, a doctrine favoring limited government regulation of business had come to dominate American constitutional law. This raises the question of whether or to what extent this version of classical liberalism was a natural product of long standing American ideals, or whether it had its origins in the Gilded Age.

3 In the eyes of most American legal historians and constitutional scholars the answer to that question is that modern brand of American liberalism originated much earlier than the Gilded Age. Most agree with the eminent legal historian Morton Horwitz, who maintains not only that the idea of a neutral state or liberal state triumphed in American political thought, but also that it predominated American constitutional

doctrine almost from the time of the founding of the country (Horwitz, 1987). Thus, emphasizing a traditional American tendency to distrust government, today's conventional narrative depicts constitutional history as having developed along a straight line : always with an emphasis on individual liberty. It treats the issue as a matter of balancing entrepreneurial liberty or property rights against state power, with a presumption that entrepreneurial liberty should be favored over government's power to regulate (McCurdy, 1975, Gillman, 1993, Gold, 1990, Benedict 1985, Jones, 1967).

4 This paper will use the 1877 case Munn v. Illinois as a lens through which to take a fresh look at the development of constitutional doctrine governing economic regulation. I hope to demonstrate that the emphasis on entrepreneurial liberty is actually a product of the Gilded Age. Prior to the late 1880s the paradigm for determining the constitution's limits on government regulation of business was actually quite different. There is no doubt that the Court has always emphatically recognized the importance of property rights. Nevertheless, during the first century under the Constitution, it treated business regulation as a matter of balancing entrepreneurial liberty against the rights of the community. Furthermore, it consistently held that, because state economic regulations were an expression of popular sovereignty and rights of the community, they should be presumed to be valid.

5 Munn v. Illinois was one of eight related cases known as the Granger Cases.[2] The others involved state laws regulating railroads, but Munn challenged the constitutionality of an Illinois law that set maximum rates that grain elevators in the city of Chicago could charge for storage. The firm of Munn and Scott, which owned one of the elevators, complained that the state's regulation of the rates they could charge deprived them of their liberty and property without due process of law, and thus violated the Fourteenth Amendment. The Supreme Court disagreed. Writing for the majority, Chief Justice Morrison R. Waite reasoned that states could regulate "businesses affected with public interest." While doing so, however, Waite conceded that even though statutes regulating the use of private property do not necessarily deprive the owner of due process, under some circumstances they might.[3] Moreover, the decision was not unanimous. In one of his most well known opinions, Justice Stephen Field vehemently dissented. Munn thus became a focal point in a fierce debate about the extent of the Constitution's protection of property, the nature of individual liberty, and the role of the state in providing for the general welfare and protecting the rights of the community.

6 That debate secured Munn's place in history. According to the conventional narrative, Munn plays a significant role as a steppingstone in the straight-line evolution of constitutional doctrine that emphasizes entrepreneurial liberty. Waite's concession and Field's dissent laid the foundation for an era of constitutional history sometimes referred to as the *laissez-faire* era. Although the most fundamental meaning of due process was that no person could be deprived of life, liberty, or property without the benefit of proper judicial hearing and procedure, Waite and Field are said to have recognized that it promised something more : it was also meant to protect private rights from arbitrary government interference, regardless of whether that interference came from properly enacted legislation. Thus Munn is said to have opened the door for a theory that viewed the due process clause of the Fourteenth Amendment as a tool for balancing economic liberty against government power : a theory that would eventually

become constitutional doctrine in the mid-1890s and predominate until 1937 (Wiecek, 1998, 112). At its high point the Court applied a presumption that, in order for economic regulation to be constitutional, a state must demonstrate that the regulation fell within what was called the "legitimate police powers of the state." And, for the most part, it also subscribed to a narrow definition of what constituted the legitimate police powers of the state. Under this narrative Munn thus has a place in constitutional history not for what it did, but rather as a signal of things to come. It is usually treated as a window to the future.

7 By looking at what the Court actually did in Munn -- what it held and what rationale it applied to reach its decision -- it becomes apparent that Munn is also a window to the past. A closer look at the case and the events surrounding it will demonstrate that the majority in Munn actually based its opinion on the traditional emphasis on rights of the community. It will further demonstrate that for more than a decade after the opinion the Supreme Court steadfastly clung to that traditional view. And it did so even in the face of persistent efforts on the part of lawyers for Gilded Age corporate elites to change traditional constitutional doctrine. Their campaign to change traditional doctrine involved : maintaining that government regulation of business was the equivalent to confiscation of property, expanding the constitutional rights afforded to corporations, and reversing the traditional rule that economic regulation should be presumed valid. These changes eventually raised entrepreneurial liberty to preferred status under the Constitution, but they did not come about until well into the Gilded Age.

Background to the *Munn* Decision

8 The dispute of which the Granger Cases were a part was shaped in large degree by rapid changes in the economic and social landscape. America in the late 1870s was evolving from a predominantly local economic system to one that was national and interconnected. It was a revolution in commerce that entirely changed the way that people did business. And, to a large extent, it depended on a new system of transportation that centered on railroads. In fact, Munn v. Illinois was the only one of the Granger cases that did not involve regulation of railroads, but even the regulation of grain warehouses in Munn was part of a system of commerce linked with railroads.

9 Chicago's grain elevators were both a product and a symbol of the commercial revolution that was taking place in the late 19th century. In this system of commerce the sale and storage of grain was not a local transaction as it had been in the past. Most of the grain produced in the Midwest in the I870s made its way to the Chicago lakefront. There it was held for shipment via the Great Lakes or railroad to Eastern markets. All of the grain that reached this gathering point was stored in fourteen immense elevators, owned by nine business firms of which Munn & Scott was one. Most of the firms were directly connected to a particular railroad, often leasing the elevator from the railroad company.

10 From the farmers' point of view this new system fundamentally changed the way farm goods were marketed. The tendency to store grain in immense facilities concentrated in one location, combined with the ability to disperse them quickly through a web of railroad routes, allowed buyers to hold their grain hoping for the highest price. It essentially created a new business of speculating in grain futures. With speculation

affecting the price of grain, farmers, whose livelihood had always been at the mercy of factors beyond their control, now faced still another obstacle that seemed just as unpredictable as the weather (Cronon, 1991).

11 Adding to the farmers' dissatisfaction was the fact that cooperation among the nine Chicago firms allowed them to fix the prices they charged for storage of grain, farmers pushed for regulation of Chicago's grain elevators. But collusion was not the only complaint leveled against the elevators and the farmers were not the only group calling for regulation. Complaints also came from shippers who claimed that the elevators often under-weighed their shipments and undervalued the quality of their grain. They also came from traders in grain futures. For them the elevator firms' practice of overstating the amount and quality of grain they held, and their refusal to allow inspection, turned investment strategy into nothing more than a gamble. The staunchest proponent for regulating the elevators was not the farmers but the Chicago Board of Trade who wanted a uniform system of inspection (Kitch, 1978, 326).

12 Whatever the validity of complaints against the elevators, there is no doubt that the new market system created a bottleneck of commerce in the Chicago harbor. Nor is there any doubt that control of that bottleneck gave the owners of Chicago's elevators a stranglehold on the flow of commerce in the Midwest.

13 In the late 1860s, business leaders from small towns took the lead in calling for state control over the railroads and, in Illinois, grain elevators. By the early 1870s, farmers who had become organized as part of the Granger movement joined the bourgeoning push for reform. The terms Grange or Granger were the popular names of the Patrons of Husbandry, a farmers' alliance that came into being in 1867. Although it began as a cooperative movement to encourage education and trade among farmers, the Grangers quickly developed a political presence.

14 The Granger movement grew at an astonishing rate, and in 1873 and 1874 farmers' organizations placed a significant number of sympathetic representatives in the legislatures of Illinois, Iowa, Minnesota, and Wisconsin. Working with merchants, shippers, and civic leaders they helped enact laws that created railroad commissions to regulate railroads, prohibited railroads from discriminating among customers, and set maximum rates railroads and grain warehouses could charge for their services. The Grangers influence in passing reform legislation has probably been exaggerated (Miller, 1971, Buck, 1965, 80-122, Berk, 1994, 78, Fairman, 1953, 598-600). Nevertheless, the image of the Grangers as an agrarian revolt captured the popular imagination and the movement gave its name to Munn v. Illinois and the related Granger Cases.

15 Economic self-interest played a role in the railroad reform movement. The small town merchant, the shipper, or the farmer may not have been able to articulate in the language of economics their complaints about railroad ratemaking, but they understood the feeling of being gouged. Although most reformers agreed that the railroads had a right to make a profit, they also believed that companies did not have the right to set rates arbitrarily without regard to fairness.

16 But raw self-interest was not the only concern in what became known as "the railroad problem." Fear also played a role. Railroads were transforming the country from a commercial system made of regional and local economies to a system dominated by a national economy. Even under the old system outside forces, like the weather or price of grain, impacted on the livelihood of small town merchants and farmers. Now, swift transportation allowed farm products to be sold at distant locations. Massive storage

facilities that mixed one farmer's produce with another's allowed financiers to speculate in futures (Miller, 1971, 9-23, Kitch, 1978, 313-43). In this new national commercial system outside forces, over which they had no control, had an even greater impact on the wellbeing of farmers and small town shippers. James F. Hudson captured the feeling when he complained that railroads "hold a greater power over the fortunes and prosperity of individuals and communities than we have ever intrusted [sic] to our government" (Hudson, 1887). Many reformers were motivated by a desire to take back some control of their own economic destiny (Berk, 1994, 77-80).

17 Reformers intuitively understood that individuals could not achieve that fairness or take back control of their economic destiny on their own. Granger leader D.W. Adams told his followers that against the railroads, "the people, in their individual capacity, are powerless and only through their united action as sovereigns can they obtain redress." (Carr, 1875, 125). In the minds of many railroad reformers government alone had the strength to counterbalance the power and privilege of the railroad corporation and it could do so by enacting legislation regulating railroad rates and other practices.

18 Reformers' instinct to turn to regulation was no surprise. Regulation of business was common in nineteenth century America. There was plenty of precedent in American history for regulating prices and business practices. Mills, markets, hackmen (cabbies), draymen (truckers), taverns, inns, and various professions were just some of the businesses that states commonly regulated (Novak,1996). The pervasiveness of regulations of business practices undoubtedly reflects an understanding among the era's people, policy makers, and judges that, while the right to own private property was inviolable, the uses to which it might be put was subject to regulation.

19 Even so, on some theoretical level, the idea of regulating railroad rates and business practices ran afoul of American society's traditional respect for the rights of private property. It is because of this that the Granger laws and the Granger Cases are often depicted as a conflict between governmental power and private rights. As one opponent of regulation described it : "the power of the community to regulate business against the right of the citizen to enjoy the rewards of his enterprise." (Miller, 1971, 181). Indeed, Americans have always had a degree of distrust of governmental power, and a distrust of power, distrust of elites, and distrust of government was characteristic of the Age of Jackson – the pre-Civil War years in which most reformers as well as railroad leaders came of age. By choosing a paradigm that pitted government power against property rights, railroad advocates and opponents of regulation sought to emphasize that tradition and cast regulation in the worst possible light.

Rights of the Community and Popular Sovereignty in Political Discourse

20 The nineteenth century debate over economic regulation was not just a matter of the government's assertion of power being in conflict with an individual's property rights, however. Reformers saw it more as a matter of weighing an individual's claim of property rights against the rights of the people or the rights of the community. Although this may seem like an overly fine distinction it is not. For it linked economic regulation to another American tradition that is just as long standing and deeply held as property rights. That tradition, as we shall see, is popular sovereignty.

21 Emphasis on rights of the community or rights of the people and popular sovereignty played a key role in political debates over regulation. This was evident in the Illinois Constitutional Convention of 1869-1870, which enacted the constitutional reforms that set the stage for Munn. From the opening days of discussions, in debates about building canals, or public warehouses, limiting the state's borrowing authority, and railroad ratemaking, reform minded delegates referred to the rights of the people scores, perhaps even hundreds, of times. More informative than how often they used the phrase, however, is how they used it. On its most simple level the phrase was used to convey a speaker's sense of the greater good. But the more significant use of the phrase equated the "rights of the people" with popular sovereignty. Henry W. Wells explained that the power to regulate railroads derived from the rights of the people as sovereign.

> I believe it to be the right of the people, in their capacity as sovereigns... to fix what tolls shall be reasonable for these railroad companies to charge for transportation of freight and passengers. The railroad companies have their charters, but, behind, superior to them, are the rights of the people which require them [the railroads] to exercise their franchises consistently with the public [well-being] (Debates, 1870, II-1656, Miller, 1971, 75-82).

22 Popular sovereignty was said to give the people, as the creators of corporations, the power to control their creation. As Reuben M. Benjamin, a Harvard educated lawyer from Bloomington pointed out, a legislature, being a mere agent of the people, could not bargain away the people's rights or diminish the powers entrusted to it by the sovereign people. (Debates, 1870, II-1642,1651,1664,1642, Miller, 1971, 75, 77) Under this theory the rights of the people would take precedence over a corporation's claim that rate regulations would violate its vested rights or rights under its corporate charter. (Debates, 1870, II-1642, 1645)

23 The flip side of this belief that popular sovereignty justified state regulation of railroads and other corporations was reformers' fear that the growing political power of wealthy corporations threatened popular sovereignty itself. This fear also found expression in the Illinois Constitutional Convention where William P. Peirce, for example warned the delegation that, "One of the greatest dangers to our republic is the great and rapidly increasing wealth, the great extension and consolidation of railroad corporations and chartered monopolies." (Debates, 1870, II-1645)

24 The Illinois Constitutional Convention adopted, and the people ratified, reform measures that gave the legislature broad powers to regulate railroads and warehouses. In the following years the Illinois legislature passed several laws that were typical of the Granger laws enacted in other Midwestern states. One required that railroads charge uniform rates for any class of goods. This so-called "anti-discrimination provision" also specifically outlawed the practice of charging higher rates for a short haul from a town to a center of commerce than for a long haul from one center of commerce to another. A second act created a Board of Warehouse Commissioners, which was given the power to prescribe maximum rates. A third set maximum rates for passenger service. Another, which was destined to become the subject of the United States Supreme Court opinion in Munn v. Illinois, set a maximum rate that could be charged for storing grain in Chicago's grain elevators.[4]

25 As might be expected, much of the opposition to the Granger laws came from railroad leaders. Some of these were practical complaints. Railroad leaders argued that public authorities, be they legislatures or commissions, were not competent to determine proper rates and that the rates they set would be unfair.[5] The resulting rates, they

predicted, would drive out capital and make it impossible for railroads to meet their obligations to bondholders.[6] The railroad leaders' most significant contention was that the Granger laws violated their "exclusive right to fix the rate of transportation."[7] Sometimes they insisted that they derived this right from their charters.[8] But they also believed that both rate regulation and anti-discrimination provisions violated their property rights. In this vein Robert Harris wrote, "They [the legislature] have made a clear issue in the position assumed that they have the right to take away from the owners of the roads their property absolutely if they saw fit. And they seemed to have seen fit."[9] To this John N. Denison added sarcastically, "I suppose that there is no limit to the rights of the sovereign people."[10]

26 Although railroad leaders hoped to repeal or revise the Granger laws, they did not trust state legislatures. Railroad historian, Thomas C. Cochran noted, "Railroad men generally expected more favorable consideration from courts than from legislatures or commissions, more from judges than from juries, and more from the highest courts than from inferior ones."(Cochran, 1965, 191) Letters between these men reveal that they also preferred federal courts to state courts.[11] They also reveal that railroad leaders understood the legal issues involved.

27 Railroad lawyers steadfastly advised their clients that the Granger laws would not pass constitutional muster and polished the legal theories upon which the railroads would rely. Their advice set off a flurry of lawsuits in both the state and federal courts. The affected companies employed two tactics to get their cases into court : they either ignored the Granger legislation, thus forcing the states to sue for enforcement, or they initiated lawsuits that directly challenged the validity of the laws. (Miller, 1971) Either way, the railroad lawyers' first contention in all the Granger cases except Munn was that the state's effort to legislate rate regulation violated the guarantee of Article I, section 10 of the Constitution that, "no state shall pass any law ... impairing the obligation of contract."

28 In contract clause doctrine, franchises and acts of incorporation were considered a contract between the state and the corporation it had created.[12] Nevertheless, in conventional contract clause doctrine subsequent legislation regulating rates might not violate the contract clause -- even when a company's corporate charter contained an express provision allowing the company to determine reasonable rates. The reason was that Contract Clause doctrine included several exceptions to the inviolability of the corporate franchise. The most important of these recognized the state's right to include a provision in the grant reserving to itself the power to later revise the agreement.

29 A state's reliance on reserve clauses was, in turn, also subject to limitations. Under standard Contract Clause doctrine of the time, even a reserve clause would not give a state the power to defeat or substantially impair the essential object of the grant or any rights vested under it.[13] Under traditional doctrine the notion of what constituted "the essential object of the grant" was broad enough to make the Contract Clause a useful tool for protecting existing corporations. (Redfield, 1873, I-50) A corporation might turn to the contract clause to claim its franchise was exclusive and the state could not offer a new grant to a competitor. It might claim exemption from taxation, or from subsequent state regulation. It was so useful in this regard that some contemporary observers noted that the clause, more than any other provision of the Constitution, was a source of excessive and angry controversy. Others charged that the Contract Clause

was the bastion of corporate privilege and a shield for corporate power. (Ely, 2005, 397-99) Despite its usefulness in any particular case, however, traditional Contract Clause doctrine did not provide what railroad leaders wanted most—a constitutional condemnation of state rate making authority in general. (Ely 2005, 401)

30 To address this limitation, railroad attorneys in the Granger Cases proposed a subtle but important variation on the rule that a state cannot deprive a corporation of the essential object of its grant. Attorneys for the Chicago and Northwestern Railroad proposed the new theory to challenge the validity of a Wisconsin maximum rate law. There they argued that, "This act ... takes the income, and thus deprives the company of the beneficial use of its property, and the means of performing its engagements with its creditors, as if the road was confiscated."[14] The railroad's attorneys swayed one justice, Stephen Field.[15] But Field wrote in dissent. The majority of the Court rejected this argument and upheld the rate regulation.

31 The railroad's claim that regulation amounted to confiscation highlighted the degree to which lawyers for the corporate elite and reformers disagreed at the very most fundamental level : the question of whether regulation was consistent with American traditions and the American system of government. Where reformers maintained that the traditions of popular sovereignty and democracy justified or even required regulation, railroad leaders and their lawyers argued that the traditions of individual liberty and limited government prohibited it. Charles B. Lawrence, attorney for the Chicago & Northwestern Railroad, warned that "The idea that the legislature has the general power to set maximum rates is at war with every principle of free government, and all those provisions of our American Constitution which were designed to protect the natural rights of man against legislative aggression." (Miller, 1971 185) Another of the Chicago & Northwestern's lawyers, John Cary, maintained that the Granger legislation amounted to "communism pure and simple" which, if not checked, would "ultimately overthrow not only the rights of property, but personal liberty and independence as well." (Miller, 1971, 185)

32 While it was not unusual for opponents to cast the Granger laws as the product of an agrarian revolt, radical agrarianism, or communism, the roots of railroad reform were anything but radical. Historian George H. Miller has convincingly demonstrated that the call for reform originated in the business communities of small town America. Moreover, the theoretical underpinnings of reform can only be described as radical if we are willing to describe the American Constitution itself as radical. The theory of inalienable popular sovereignty that was so evident in the Illinois Constitutional Convention derives from one of the most revered ideals of the American founding.[16]

Popular Sovereignty and Rights of the Community in Legal Doctrine

33 The themes of popular sovereignty and the rights of the community were clearly common in political discourse, and they were also well entrenched in American Constitutional doctrine. The most famous statement of this principle is found in Chief Justice Taney's opinion in Charles River Bridge v. Warren Bridge (1837). Rejecting the Charles River Bridge Company's claim that its charter implied an exclusive right to operate a bridge over the Charles River, Taney reasoned that, "[T]he object and end of all government is to promote the happiness and prosperity of the community by which

it is established, and it can never be assumed that the government intended to diminish its power of accomplishing the ends for which it was created."[17] For Taney, the presumption in favor of the state was not just a matter of governmental power versus individual liberty. It was also a matter of balancing property rights against the rights of the community. "While the rights of private property are sacredly guarded," he observed, "we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."[18]

34 The notion that a legislature could not bargain away the attributes of a state's sovereignty also found expression in traditional constitutional law in cases interpreting the meaning of the contract clause. Thomas M. Cooley, the most renowned constitutional scholar of the time, pointed out that "...the State could not barter away, or in any manner abridge or weaken, any of those essential powers which are inherent in all governments, and the existence of such in full vigor is important to the well being of organized society ; and that any contracts to that end, being without authority, cannot be enforced under the provisions of the [contract clause]." Among those essential powers Cooley listed the police power, the power of eminent domain, and the taxing power. Cooley was firm that a legislature could not bargain away the police power of the state even by an express grant. (Cooley, 1874, 283)

35 That left open the question of whether economic regulation, especially regulation of rates and prices, fell within the normal police powers of the state. The history of economic regulation in early America makes it clear that most people and legislators thought it was. Americans accepted the distinction between the right of property and the rules of conduct under which property may be used. (Siegel, 1984, 197-98) Licensing, building and regulating public markets, controlling prices or quality of common goods, use of and access to waterways, eminent domain law, public trust doctrine, and the law of nuisance are common examples of states regulating the economy in the public interest. And the list goes on. Although the state's power to interfere with property was not unlimited, nineteenth century Americans certainly considered regulation normal. (Scheiber 1971, Novak, 1996, Mark, 1999)

36 Judges and legal commentators at every level gave states wide latitude regarding economic regulation. Moreover, they justified regulation not only in terms of balancing government power against individual liberty, but also in terms of protecting the rights of the public. Historian Harry Scheiber thus concluded, "... American judges and legal commentators have given sustained, explicit, and systematic attention to the notion that the public, and not only private parties, have "rights" that must be recognized and honored if there is to be rule of law." (Scheiber 1984, Talmadge, 2000) He and others commonly use Massachusetts Chief Justice Lemuel Shaw's opinion in Commonwealth v. Alger (1851) to support the point.

> We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.[19]

37 Defining the reach of state authority to regulate the economy, including regulation of rates and prices, was a matter primarily left to the states themselves. This general rule applied to railroads as much as any other business and, although many states gave

companies flexibility to set their own rates, regulation of railroad rates was a normal practice. (Miller, 1971, 31, Ely 2001, 71-90)[20]

38 Both common practice regarding economic regulation and legal doctrine indicate that, if by radical we mean an agent of change, the term more accurately applies to railroad lawyers than proponents of rate regulation. The lawyers who represented the railroads in the Granger Cases were among the most distinguished lawyers in America. They must have realized that under contract clause doctrine, as it stood, they really did not have very good cases. Yet they pressed on, in all likelihood because they had a purposeful and calculated desire to change the status of the law. They wanted to establish a doctrine that the Constitution guaranteed a fundamental right to be free of the type of price regulations created in the Granger laws. Such a doctrine would remove the issue of regulation from the political process.[21] Hindsight tells us that the due process clause of the Fourteenth Amendment, rather than the Contract Clause, would provide the vehicle for change.

39 The idea behind this theory was that government regulation denied businesses of both their property and their liberty and thus violated the Fourteenth Amendment guarantee that no state shall deny any person of life, liberty, or property without due process of law. The tactic of using the Fourteenth Amendment as a barrier to government regulation, however, was novel at the time. Ratified in 1868 in the aftermath of the Civil War, the amendment undoubtedly contained language sweeping enough to be used for the railroad leaders' purposes. Dissenting opinions in the The Slaughterhouse Cases (1873), the first case to interpret the new Amendment, did support the idea that it provided protection for business.[22] But the majority in that case, emphasizing that the overriding purpose of the Amendment was to guarantee the rights of recently freed slaves, soundly rejected the theory. Railroad leaders, who may have understood this limitation, nevertheless clearly intended to initiate a campaign to bring regulation within the protections of the due process clause. Regarding one suit brought against the Chicago, Burlington, and Quincy, James M. Walker, the company's president, gave the following directive to his lawyers.

> No pains must be spared upon this defense. It will take a great deal of time and much labor, perhaps more than any suit the company has had. ... The first suggestion that I have to make is whether this case cannot be removed to the United States Court under the 14th Amendment and the law under and in pursuance thereof.[23]

Proving Ground for a New Theory

40 Munn v. Illinois would provide the first proving ground to test the theory. Contract Clause arguments were not available in Munn because unlike the other Granger cases it did not involve a railroad and it did not involve a corporation. The defendant in this case was Munn & Scott, a partnership that owned and operated grain elevators and was charged with violating an Illinois law that set maximum rates that elevators could charge for storing and handling grain. When Munn v. Illinois reached the Supreme Court, William G. Goudy and John N. Jewett, the lawyers for Munn & Scott, thus pled that the state regulations violated the Fourteenth Amendment guarantee that no state shall deprive any person of life, liberty, or property without due process of law.

41 The concept of due process, sometimes referred to as "the law of the land," predates the Fourteenth Amendment. It traces its roots to the Magna Carta and is found in most state constitutions. It is also important to know that the guarantee is also found in the Fifth Amendment, which provides that no person "shall be deprived of life, liberty, or property without due process of law." Although standard constitutional doctrine of the time held that the Bill of Rights, including the Fifth Amendment, did not apply to the states, the guarantee of due process of law was part of the U.S. Constitution for almost a century before Munn. Its most fundamental meaning was that no person could be deprived of life, liberty, or property without the benefit of proper judicial hearing and procedure. In Munn, however, company attorneys argued that due process promised more than a trial according to settled judicial procedure. The guarantee, they said, was also meant to protect private rights from arbitrary government interference. This theory concentrated on the substance of legislation rather than the procedure by which the law was enforced. Substantive due process, as it thus came to be called, would give the federal judiciary the authority to overrule state legislation that interfered with individual rights.

42 The idea that the Constitution prohibits arbitrary assertions of government power that threatened individual liberty is undoubtedly part of the American legal tradition, but there was only sparse legal precedent to support the theory of due process and judicial power the company attorneys were proposing. They pointed to Daniel Webster's famous statement in the Dartmouth College case of 1819. The meaning of due process, Webster had reasoned, "is that every citizen shall hold his life, liberty, property, and immunities under the general rules which govern society. Everything which may pass under the form of [legislative] enactment is not considered the law of the land." (Goudy, 1975, 511) They could refer the Court to Thomas Cooley's treatise, Constitutional Limitations, which maintained that legislation could not interfere with vested rights beyond what was allowed by "settled maxims of law" and safeguards for the protection of individual rights. (Goudy, 1975, 511) They could also draw upon some state court opinions to support their argument. The most well known of these was Wynehamer v. New York, an 1856 case where New York's highest court ruled that a statute prohibiting the sale and possession of, and authorizing the destruction of, alcoholic beverages violated due process of law (Ely 1999, 338-44).[24]

43 Other than that, there was little support for the argument. The United States Supreme Court had used the concept of substantive due process only once—applying it to the Fifth Amendment's due process clause in the infamous Dred Scott case.[25] Justice Bradley had employed the theory in his opinion in The Slaughter-House Cases (1873), which was the first case interpreting the new Fourteenth Amendment. But Bradley's opinion was a dissent.[26] Justice Miller's opinion for the majority in that case conspicuously ignored the substantive due process argument. Miller did the same in the State Railroad Tax Cases, decided just a year before Munn. When railroad attorneys had argued that an Illinois plan for taxing railroad property took company property without due process, Miller's only response was, "The validity of the statute is not seriously questioned here on the ground of any conflict with the Constitution of the United States."[27]

44 Weaknesses aside, Jewett and Goudy were committed to their strategy. It would be easy enough for them to establish the general proposition that property rights fell among those liberties the Constitution was intended to protect. Nobody would disagree with that basic contention. The Fifth Amendment, the Fourteenth Amendment, and the

Contract Clause all contained provisions that protected property. The task that would test the company attorneys' skill was to show that setting maximum rates for grain elevators and railroads constituted the type of government activity that violated their clients' property rights.

45 The key was to convince the Court that regulation of rates amounted to confiscation. From a relatively recent Fifth Amendment case in which a government-sponsored canal project had flooded an individual's adjacent land, they offered the principle that destroying the value of property constituted confiscation. (Goudy, 1975, 515, Jewett, 1975, 558)[28] Rate regulation, they said, had the same effect. John Jewett best captured their argument, "It is not merely the title and possession of property that the Constitution is designed to protect, but along with this, the control of the uses and income, the right of valuation and disposition, without which property ceases to be profitable, or even desirable." (Jewett, 1975, 557)

46 Jewett and Goudy's argument embodied an attitude toward property rights that one modern observer, Mary Ann Glendon, calls an "illusion of absoluteness." (Glendon, 1991, 18-46) The illusion lay in their presumption that an owner has absolute dominion over his or her property. In other words, Jewett and Goudy rejected the idea that the owner's dominion over property can be limited by the rights of the community. Jewett made this abundantly clear. Ignoring the long tradition of economic regulation for the good of the community, including rate and price regulation, he maintained that, "for the first time since the Union of these States, a legislature of a State has attempted to control the property, capital and labor of a private individual, by fixing the prices he may receive from other private persons, who choose to deal with him." (Goudy, 1975, 483) Rather than balancing individual property rights against the rights of the community, Jewett postured the dispute as one of individual property rights versus government power. Legislation fixing prices represented an arbitrary and irresponsible power, he said, a power practically to annihilate private property by destroying the value of its use. (Jewett, 1975, 549)

47 To the extent that they predicted the Court would invalidate the Granger laws, company attorneys had badly miscalculated. Writing for a 7 to 2 majority in Munn v. Illinois, Chief Justice Waite upheld the Illinois warehouse regulations. Nevertheless, the Court had faced a barrage of legal argument from a force of the nation's most prominent attorneys. In the process of explaining why the Court had upheld the regulations, the Chief Justice made some concessions.

48 It was a major concession to the opponents of regulation that Waite did not deny the theory of substantive due process. Statutes regulating the use of private property do not necessarily deprive the owner of his property without due process of law, Waite wrote. "Under some circumstances they may, but not under all."[29] The Chief Justice admitted that the state has limited authority to interfere with property that is exclusively private. But when property is "affected with public interest," he continued, it ceases to be juris privati only and is thus subject to more extensive regulation for promotion of the general welfare.[30]

49 Although Munn is often remembered for its use of this "affected with public interest" formula, there was more to Chief Justice Waite's opinion. His reasoning also reflected a personal discomfort with the absolutist version of property rights that Jewett and Goudy favored, and a keen appreciation of the ideals of popular sovereignty and the rights of the people.

50 Waite's reluctance to accept substantive due process and discomfort in accommodating the absolutist view of property rights were put on display when he tried to explain guidelines for applying the "affected with public interest" formula. "Property does become clothed with public interest," Waite wrote, "when used in a manner to make it of public consequence, and affect the community at large."[31] So broad was this definition that it caused Justice Stephen Field, a champion of the absolutist view of property rights, to complain, "If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the prohibitions of the Constitution against such invasion of private rights, all property and all business in the State are held at the mercy of a majority of its legislature."[32]

51 Despite this strong language, even Field agreed that businesses were subject to the police power of the state. Unlike the majority, however, he did not believe that regulation of rates fell within the police power. Field did not give us much help in determining why he reached that conclusion. The police power, he said, extended to "Whatever affects the peace, good order, morals, and health of the community...."[33] In applying it, he continued, the state must be guided by the doctrine that each one must use his own and not to injure his neighbor. On the basis of these principles he then concluded that "The compensation which owners of property, not having any special rights or privileges from the government in connection with it, may demand for its use..." does not fall within that power.[34] Perhaps the most important factor leading Field to this conclusion was the presumption from which he started. Constitutional provisions intended for the protection of property, he insisted, should be liberally construed.[35] His implication was that the Court should be wary of any statute that interfered with individual liberty.

52 The Waite majority, by contrast, started from the opposite presumption. Waite would assume that the legislation is valid unless proven otherwise. "Every statute is presumed to be constitutional," he wrote. "The court ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the express will of the legislature should be sustained."[36] While he admitted that a state regulation might deprive an individual of property without due process of law, he would uphold regulation "...if a state of facts could exist that would justify such legislation" and would declare a regulation void only "... if no state of circumstances could exist to justify such a statute."[37]

53 The majority's presumption found solid roots in conventional Contract Clause doctrine of the time. It could be traced back to the majority ruling in the 1837 Charles River Bridge Case, which was discussed earlier. There the Court ruled that, in interpreting the meaning of a state granted charter, every legal presumption should be in favor of the state's power to protect the rights of the public.[38] Waite reiterated this idea in Munn observing that, "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations with others, he might retain."[39] "Under the police powers," he continued, "the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his property, when such regulation becomes necessary for the public good."[40]

54 The majority's presumption in favor of state legislation certainly disappointed railroad leaders and their attorneys who had hoped to move the question of what constituted reasonable rates and regulations from the legislative arena to the judicial. Field

captured their position, and their distrust for the democratic process, in his dissent. "Government can scarcely be free where the rights of property are left solely dependent on the will of the legislative body without any restraint," he warned.[41] And, in his mind, it was the Court's duty to ensure that this did not happen.

55 Contrary to Field, the majority of the Court believed that, in most instances, property rights would be adequately protected without judicial interference. Of course Waite could not deny that a state might abuse its power. But, for protection against that potential abuse, he said, "people must resort to the polls, not to the courts."[42] Bradley agreed and, in the process, revealed respect for popular sovereignty reminiscent of the debates in the Illinois Constitutional Convention. "The right to regulate rates and to declare what are reasonable and what are not must be regarded as reserved to the legislature." Any other rule, he said, "Would be subversive to the authority which the people have confided to the legislature for their protection." (Fairman, 1953, 677)

Reaction and Response to Munn

56 For railroad leaders, who placed much more faith in appellate courts than in elected legislatures, the majority decision inflicted a brutal blow. They had dreamed that the decision would establish an unequivocal right to be free of government regulation. More realistically, they hoped it would produce a doctrine that the reasonableness of government rates and regulations was inherently a judicial question and that courts would presume that rate regulation was an unconstitutional form of confiscation. Instead, the Supreme Court's decision in Munn reaffirmed the right of state legislatures to regulate.

57 John Jewett, one of the attorneys for Munn and Scott, warned that the opinion "has sent a chill of apprehension through the very heart of the business enterprise of the nation." (Jewett, 1975, 662) Robert Harris, president of the Chicago, Burlington, and Quincy Railroad, also detected a dire omen in Munn. Ignoring the fact that the nation was still in the throngs of an economic depression that began in 1873 and that the depression was caused in part by overexpansion of railroads and other railroad practices, he blamed the Court's decision for the drop in value of railroad stock. Harris predicted that the Court "has turned over this vast property to the whim of a legislative committee." "If this is good law," he complained, "then corporate property is the only property that has no protection [from legislative interference]."[43]

58 Reformers, as would be expected, found comfort in the decision. Two years later delegates to the California constitutional convention pointed to Munn as proof that they had the authority to regulate railroad rates and fares. (Debates, 1870, I-377) And, even a decade later, a reform minded governor of Minnesota reminded the legislature that while the expediency of railroad regulation might be doubted, the right of the state to regulate was no longer in question. (Cortner, 1993, 22-23) Editors of the Minneapolis Tribune were even more confident. "The power to regulate roads has been confirmed by the United States Supreme Court in the Granger Cases, there is no turning back and the ground will never be retraced." (Cortner, 1993, 38)

59 The second part of the Tribune's observation would prove to be wrong. By the mid 1890s the Court would reject Munn and replace it with a doctrine of substantive due process that took inspiration from Field's dissent. This new doctrine would give much of what railroad and corporate leaders had wanted. Under it all state regulation of rates

would be suspected of being a confiscation of property that violated the Fourteenth Amendment. The Court would thus become the final arbitrator of the validity of rates. Reflecting a distrust of the democratic process, the Court would start from a presumption that rate regulation violated individual liberty. It would also develop a narrow definition of the police powers of the state—that range of legitimate state authority to interfere with liberty. (Ely 1995, 57-127) Because of its emphasis on entrepreneurial liberty this new doctrine is often referred to as laissez-faire constitutionalism.

60 Although laissez-faire constitutionalism did not become entrenched until more than a decade afterward, constitutional history tends to treat Munn as a steppingstone in the development of that doctrine. Interest in the case tends to be directed toward Waite's "affected with public interest" formula.[44] Modern treatment of the case also highlights Waite's concession that some regulation may violate due process, and Field's dissent that all legislation should be presumed to do so. Chief Justice Waite's biographer points out that instead of being remembered as a victory for public regulation, Munn is thus more often viewed as the ideological forerunner to an era that emphasized economic liberty and saw the Court as a bulwark protecting business against interference of state regulation. (Magrath, 1963, 192-93) From this perspective it is common to conclude that the Court quickly moved away from the Munn doctrine. It is also commonly, and mistakenly, believed that Munn immediately came under attack from attorneys for railroad, industrial, and financial interests.

61 It was not until after four new justices joined the Court in the early 1880s, however, that attorneys for the corporate and business elite increased their efforts. They achieved some measure of success in Santa Clara County v. Southern Pacific Railroad (1886), which came to stand for the proposition that corporations are persons for purposes of the Fourteenth Amendment.[45] Even then they failed to obtain the kind of constitutional protections from government regulation that their clients wanted.

62 For more than a decade the Court continued to refuse to equate regulation with confiscation. It refused to interpret the Fourteenth Amendment as providing a general restriction on government regulation of business. In cases challenging the validity of regulations it continued to rely on the antebellum legal tradition that emphasized the right of the community as a limit on property. The ideas and theories that corporation and business attorneys pressed were gradually becoming part of constitutional discourse, but their elevation to constitutional doctrine would have to wait until after the Waite era. (Kens 2010, 110-25)

63 It was not until after Chief Justice Waite died and was replaced by Melville W. Fuller in 1888 that the Court subtly revised Munn's presumption of the validity of state legislation in the Minnesota Milk Rate Case of 1890. Writing for the majority, Justice Samuel Blatchford said, "The question of the reasonableness of a rate charged for transportation by a railroad company is eminently a question for judicial investigation."[46] Then, in the 1898 case Smyth v. Ames, it added force to the idea that regulation was a form of confiscation when it ruled that the due process clause guaranteed that businesses receive a fair return on the value of the property it employs for the public convenience.[47] At the same time the Court began to hone a theory called "liberty of contract" that subjected all regulation, not just ratemaking, to the challenge that it violated the due process clause of the Fourteenth Amendment. (Ely, 1995, 83-110)

Conclusion

64 The modern narrative of constitutional history tends to treat Munn as a steppingstone in the evolution of laissez-faire constitutionalism. But analyzing Munn in its own context puts a different spin on the majority decision. It demonstrates that the Munn majority, while concerned about the American constitutional tradition relating to liberty, was even more influenced by another constitutional tradition that runs equally deep. It was a tradition that emphasized popular sovereignty and that placed property rights in the context of balancing individual freedom and the needs of a democratically governed society. From this perspective Munn, instead of being a steppingstone for development of a doctrine that emphasized economic liberty, might better be described as a last gasp for the antebellum legal tradition that emphasized rights of the community as a limit on property.

65 Last gasp may be something of an exaggeration, however. From the perspective of long-term history it is true that the Supreme Court eventually did move away from Waite's reasoning and rejected the constitutional tradition based on popular sovereignty for a doctrine that idealized an absolutist right of property. Instead of balancing property right against right of the community it used a model of individual right versus government power, and it narrowly defined the reach of that power. But the demise of the Court's respect for the rights of the community was more of a drawn out sigh than a sudden gasp.

BIBLIOGRAPHIE

BENEDICT, Michael Les, "Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origin of Laissez-Faire Constitutionalism," *Law and History Review* 3, 1985, 293-331.

BERK, Gerald, *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917,* Baltimore, Johns Hopkins University Press, 1994.

BUCK, Solon Justus, *The Granger Movement: A Study of Agricultural Organization and Its Political, Economic, and Social Manifestations, 1870-1880*, Cambridge, Harvard University Press, 1965.

CARR, Ezra, *Patrons of Husbandry on the Pacific Coast*, San Francisco, A.L. Bancroft, 1875.

CHICAGO, Burlington, & Quincy Archives, Newberry Library, Chicago, IL.

COCHRAN, Thomas C., *Railroad Leaders 1845-1890: The Business Mind in Action*, New York, Russell & Russell, 1965.

COOLEY, Thomas M., *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union,* 2e éd., Boston, Little, Brown & Co., 1871.

---,*Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, 3e éd., Boston, Little, Brown & Co., 1874.

CORTNER, Richard C., *The Iron Horse and the Constitution: Railroads and the Transformation of the Fourteenth Amendment*, Westport (CT), Greenwood Press, 1993.

CRONON, William, *Nature's Metropolis: Chicago and the Great West*, New York, W.W. Norton & Company, 1991.

Debates and Proceedings of the Constitutional Convention of the State of Illinois, Convened at the City of Springfield, Tuesday December 13, 1868, Springfield (IL), Ely, Burnham & Bartlett official stenographers II, 1870.

ELY, James W., Jr., "The Railroad Question Revisited: Chicago, Milwaukee & St. Paul Railway v. Minnesota and the Constitutional Limits on State Regulations," *Great Plains Quarterly* 12, 1992, 121-34.

---, *The Chief Justiceship of Melville W. Fuller, 1888-1910,* Columbia (SC), University of South Carolina Press, 1995.

---, "The Protection of Contractual Rights: A Tale of Two Constitutional Provisions," *NYU Journal of Law and Liberty* 1, 2005, 370-403.

FAIRMAN, Charles, "The So-Called Granger Cases: Lord Hale and Justice Bradley," *Stanford Law Review* 5, 1953, 587-678, 598-600.

FRITZ, Christian G., *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War*, New York, Cambridge University Press, 2008.

GILLMAN , Howard, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence*, Durham (NC), Duke University Press, 1993.

GLENDON, Mary Ann, *Rights Talk: The Impoverishment of Political Discourse*, New York, Free Press, 1991.

GOLD, David M., *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism*, Westport (CT), Greenwood Press, 1990.

GOUDY, W. C., "Brief for the Plaintiff in Error, *Munn v. Illinois*," in Philip B Kurland and Gerhard Casper, dir., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, Washington (DC), University Publications of America, 1975, VII, 511 sq.

HORWITZ, Morton J., "Republicanism and Liberalism in American Constitutional Thought," *William and Mary Law Review* 29, 1987, 57-74.

HUDSON, James F., *The Railways and the Republic*, New York, Harper & Brothers, 1887.

JEWETT, John, "Brief for the Plaintiff in Error, *Munn v. Illinois*," in Philip B Kurland and Gerhard Casper, dir., *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, Washington (DC), University Publications of America, 1975, VII, 557 sq.

JONES, Alan, "Thomas M. Cooley and 'Laissez-Faire Constitutionalism:' A Reconsideration," *Journal of American History* 53, 1967, 751-71.

KENS, Paul, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age,* Lawrence (KS), University Press of Kansas, 1997.

---, *The Supreme Court under Morrison R. Waite 1874-1888*, Columbia (SC), University of South Carolina Press, 2010.

KITCH, Edmund W. & Clara Ann Bowler, "The Facts of *Munn v. Illinois*," *Supreme Court Review* 1978, 313-43.

KRAMER, Larry D., *The People Themselves: Popular Constitutionalism and Judicial Review*, New York, Oxford University Press, 2004.

MAGRATH, C. Peter, *Morrison R. Waite: The Triumph of Character*, New York, Macmillan, 1963.

MARK, Gregory A., "Review of William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America*," 5 H-Law, H-Net reviews, Nov. 1999. http://www.h-net.org/reviews/showrev.php?id=3572

MCCURDY, Charles W., "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism 1863-1897," *Journal of American History* 61, 1975, 970-1005.

MILLER, George H., *Railroads and the Granger Laws*, Madison (WI), University of Wisconsin Press, 1971.

NOVAK, William J., *The People's Welfare: Law and Regulation in Nineteenth-Century America* , Chapel Hill (NC), University of North Carolina Press, 1996.

REDFIELD, Isaac F., *The Law of Railways,* 5e éd., Boston, Little, Brown, &Co., 1873.

SCHEIBER, Harry N., "The Road to *Munn*: Eminent Domain and the Concept of Public Purpose in the State Courts," in Donald Fleming and Bernard Bailyn, dir., *Perspectives in American History: Law in American History*, Boston, Little, Brown, 1971, V, 327-402.

--- "Public Rights and the Rule of Law in American Legal History," *California Law Review* 72, 1984, 217-51.

SIEGEL, Stephen A., "Understanding the *Lochner* Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation," *Virginia Law Review* 70, 1984, 187-263.

TALMADGE, Justice Philip A., "The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights," *Washington Law Review* 75, 2000, 857-909.

WIECEK, William M., *The Lost World of Classical Legal Thought: Law and Ideology in America 1886-1937*, New York, Oxford University Press, 1998.

NOTES

1. . This paper is adapted from sections of my recent book The Supreme Court under Morrison R. Waite, 1874-1888 (University of South Carolina Press, 2010). An extended version of this material will be forthcoming in the Buffalo Public Interest Law Journal (Fall 2012)

2. . Munn v. Illinois, 94 U.S. 113 (1877) ; Winona & St. Peter Railroad v. Blake, 94 U.S. 180 (1877) ; Chicago, Minneapolis & St. Paul Railway v. Ackley, 94 U.S. 179 (1877) ; Stone v. Wisconsin, 95 U.S. 181 (1877) ; Peik v. Chicago & Northwestern Railway, 94 U.S. 164 (1877) ; Lawrence v. Chicago & Northwestern Railway, 94 U.S. 164 (1877) ; Chicago, Burlington & Quincy Railroad v. Iowa, 94 U.S. 155 (1887) ; Southern Minnesota Railroad v. Coleman, 94 U.S. 180 (1887).

3. . Munn v. Illinois, 94 U.S. 113, 125 (1877).

4. . Munn, 94 U.S. at 114-117 reproduces the statute.

5. . R. Harris to W.P. Hepburn, March 20, 1874, R. Harris out-letters, CB & Q, Newberry Library, Chicago, IL.

6. . J. M. Walker to "My Dear Counselor" (Hon. Sydney Bartlett), April 18, 1874 ; J. M. Walker to O.H. Browning, April 20, 1874, J.M. Walker out-letters, CB & Q, Newberry Library, Chicago, IL. Walker suggested that bondholders seek injunctions in the federal courts against the company and the railroad commission.

7. . J.M. Walker to J.N.Dennison, July 10, 1874, J.M. Walker out-letters, CB&Q, Newberry Library, Chicago, IL.

8. . J.N. Denison to Jacob B. Jewett, October 15, 1873, J.N. Denison out-letters, CB&Q, Newberry Library, Chicago, IL.

9. . R. Harris to W.P. Hepburn, March 20, 1874, R.Harris out-letters, CB&Q, Newberry Library.

10. . J.N. Denison to N.M. Beckwith, April 7, 1873, J.N. Denison out-letters, CB&Q, Newberry Library, Chicago, IL. Dennison was at the time the chairman of the board of the CB&Q.

11. . See, J.M. Walker to O.H. Browning April 20, 1874 ; J.M. Walker to Sydney Bartlett, May 14, 1874 ; J.M. Walker to Judge [Illegible}, April 14, 1874, J.M. Walker out-letters, CB&Q, Newberry Library ; J.N. Denison to N.M. Beckwith, April 7, 1873 ; J.N. Denison to Jacob B. Jewett, October 15, 1873 ; J.N. Denison out-letters, CB&Q, Newberry Library, Chicago, Il. See also, Miller, Railroads *supra* note 3, at 174-75.

12. . Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 519 (1819).

13. . See as an example Holyoke v. Lyman, 82 U.S. (15 Wall.) 500, 500 (1872).

14. . Peik v. Chicago and Northwestern Railway Company, 94 U.S. (4 Otto.) 164, 168 (1877).

15. . Field used Stone v. Wisconsin, 94 U.S. (4 Otto.) 181, 183 (1877) to express his dissent in all the Granger cases involving corporations. Field actually claims that the majority misses an opportunity to define the limits of the power of the states over corporations. He definitely rejected the Court's rationale in Munn and thus its application to the cases involving the contract clause.

16. . Two recent studies that emphasize the importance of popular sovereignty are Christian G. Fritz, American Sovereigns : The People and America's Constitutional Tradition Before the Civil War (2008) ; Larry D. Kramer, The People Themselves : Popular Constitutionalism and Judicial Review (2004).

17. . Charles River Bridge v. Warren Bridge, 36 U.S. (11 Pet.) 420, 547 (1837).

18. . Id. 36 U.S. at 547.

19. . Commonwealth v. Alger, 7 Cush. 53, 84-5 (Mass., 1851). Shaw goes on to say "All property in this commonwealth.... Is derived directly or indirectly from the government, and held subject to those regulations, which are necessary to the common good and general welfare." See, Scheiber, "Public Rights," supra note 59 at 222-23 ; Novak, Peoples Welfare, supra note 8, at 19-20. It is interesting that Shaw's language begins as a statement very similar to what advocates of *laissez-faire* constitutionalism would later use to describe the limits of property rights. That language, which was captured by the Latin maxim *sic utere tuo ut alienum non laedas* (so use your property as not to injure the property of others), differs only in that it drops the reference to the rights of the community.

20. . Ely recognizes that regulation of rates was common but emphasizes that legislative ratemaking was often ineffective.

21. . I borrowed some of the following description from my own previous writings on Munn in Paul Kens, Justice Stephen Field : Shaping Liberty from the Gold Rush to the Gilded Age (1997).

22. . The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873).

23. . J.M. Walker to O. H. Browning, March 7, 1874, J.M. Walker out-papers, CB&Q, Newberry Library, Chicago, Il. Walker continued, "Beckwith is disposed to think it can be. I enclose you his suggestions." [Possibly referring to Warren Beckwith, road master of the Burlington & Missouri River Railroad].

24. . Wynehamer v. People, 13 N.Y. 378 (1856).

25. . Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 450 (1857). Goudy did not make reference to Dred Scott.

26. . The Slaughterhouse. Cases, 83 U.S. (16 Wall.) 36 (1873) Bradley dissenting.

27. . State Railroad Tax Cases, 92 U.S. (2 Otto.) 575, 596 & 618 (1876).

28. . Pumpelly v. Green Bay Company, 80 U.S. (13 Wall.) 166 (1871).

29. . Munn, 94 U.S. at 125.
30. . Munn, 94 U.S. at 127.
31. . Munn, 94 U.S. at 126.
32. . Munn, 94 U.S. at 140, Field dissenting.
33. . Munn, 94 U.S. at 145, Field dissenting.
34. . Munn, 94 U.S. at 146, Field dissenting. (Scheiber, 1971, 389-91) notes that Field and Cooley favored a more limited use of taxation in support of railroads because they understood the link to justifying greater police power regulations.
35. . Munn, 94 U.S. at 142-43, Field dissenting.
36. . Munn, 94 U.S. at 123.
37. . Munn, 94 U.S. at 132 (emphasis added).
38. . Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. (11 Pet.) 420 (1837).
39. . Munn, 94 U.S. at 124. Waite continued, "A body politic is a social compact by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."
40. . Munn, 94 U.S. at 125.
41. . Munn, 94 U.S. at 148, Field dissenting.
42. . Munn, 94 U.S. at 133.
43. . R. Harris to Schuylar Colfax, March 12, 1877. R. Harris out-letters, president's office, CB& Q, Newberry Library, Chicago, Il. The actual quote is "if this is good law, then corporate property is the only property that has no protection from the constitutions of the Western States." See also, R. Harris to James Wentworth, March 9, 1877. R. Harris out-letter, president's office CB & Q, Newberry Library, Chicago, IL.
44. . See, New State Ice Company v. Liebmann, 285 U.S. 262 (1932) ; Nebbia v. New York, 291 U.S. 502 (1934).
45. . Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394 (1886). There is considerable controversy about the means by which this precedent was established. (Magrath, 223-24).
46. . Chicago, Milwaukee, and St. Paul Railway Company v. Minnesota, 134 U.S. 418 (1890) ; This statement led Justice Bradley to complain that the majority's decision "practically overrules Munn v. Illinois." *Id*, at 461, Bradley, dissenting. (Ely 1992, 121-34).
47. . Smyth v. Ames, 169 U.S. 466 (1898).

RÉSUMÉS

Un des sujets récurrents de la politique américaine pendant l'Âge doré portait sur les limites à la régulation de l'économie par l'État. Pour les plupart des historiens et juristes aujourd'hui, le problème est de trouver le point d'équilibre entre liberté économique et droit de propriété d'une part, et la puissance de l'État d'autre part. Pour eux, cette approche du problème est la tradition dominante en histoire constitutionnelle, datant de l'ère jacksonienne au moins. Cet article montre au contraire qu'avant la fin des années 1880, le paradigme pour déterminer les limites constitutionnelles à la régulation du monde économique par la puissance publique était fort différent. Dans son premier siècle, la Cour suprême pensait cette régulation comme équilibre entre droits entrepreneuriaux et droits de la communauté. Bien plus, elle tenait pour *a priori* légitime toute régulation économique par les États fédérés parce qu'elle exprimait la

souveraineté populaire. Ce n'est qu'à la toute fin du XIXe siècle que cette interprétation traditionnelle cède le pas à une nouvelle, qui donne de la liberté d'entreprendre un statut constitutionnel privilégié. Elle est le résultat d'efforts persistants d'avocats d'affaires, travaillant pour les grandes entreprises, qui ont travaillé à trois changements : faire de la régulation économique un équivalent d'une confiscation de propriété ; étendre les protections constitutionnelles des entreprises ; et renverser la présomption de légitimité de la régulation. Mais, au moins jusqu'à la mort de son président Morrison R. Waite en 1888, la Cour suprême a préféré réaffirmer avec constance la doctrine traditionnelle plutôt que promouvoir cette nouvelle approche.

One issue that permeated Gilded Age politics asks to what extent the United States Constitution places a limit on government regulation of business. Most of today's scholars treat it as a matter of balancing economic liberty or property rights against government power, and maintain that this balancing formula represents the predominant tradition in constitutional history, dating at least as far back as the Jacksonian era. On the contrary this paper shows that prior to the late 1880s the paradigm for determining the constitution's limits on government regulation of business was actually quite different. The Supreme Court in its first century treated business regulation as a matter of balancing entrepreneurial liberty against the rights of the community. Furthermore, it consistently held that, because state economic regulations were an expression of popular sovereignty and rights of the community, they should be presumed to be valid. Only at the very end of the nineteenth century did this interpretation give way to a new one, raising entrepreneurial liberty to preferred status under the Constitution. This was the result of the persistent efforts of lawyers for the corporate elite, who aimed to produced three changes: a tendency to equate regulation of business with confiscation of property; a trend toward expanding the constitutional rights afforded to corporations; and a reversal of the rule that economic regulation should be presumed valid. But at least until the death of Chief Justice Morrison R. Waite in 1888, the Supreme Court would rather steadfastly cling to the traditional doctrine than promote this new interpretation.

INDEX

Mots-clés : Cour suprême, régulation économique, Morrison R. Waite, Constitution, Âge doré, État

Keywords : Supreme Court, business regulation, Morrison R. Waite, Constitution, Gilded Age, State

AUTEUR

PAUL KENS

Texas State University-San Marcos