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PROPERTY, LIBERTY, AND THE RIGHTS OF THE COMMUNITY: LESSONS FROM *MUNN V. ILLINOIS*

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ABSTRACT

When considering the extent to which the United States Constitution places a limit on government regulation of business, today's historians and constitutional theorists treat the question as a matter of balancing economic liberty or property rights against government power. Moreover, modern scholars commonly maintain that this balancing formula represents the predominant tradition in constitutional history. Tracing it back to the tenants of Jacksonian democracy that emphasized distrust of government, they imply that constitutional history has developed as a straight line: always with an emphasis on individual liberty and always with a presumption that entrepreneurial liberty should be favored over governments' power to regulate.

This paper will use the 1877 case *Munn v. Illinois* to demonstrate that 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.

Munn is significant because in the conventional narrative it is portrayed as a steppingstone in the straight line evolution of constitutional doctrine that emphasizes individual liberty. A closer look at the case and the events surrounding it will demonstrate, however, that the majority in *Munn* actually based its opinion on the traditional emphasis on rights of the community. It will further

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demonstrate that for more than a decade after the opinion the Supreme Court steadfastly clung to that traditional view. Even under persistent pressure to change.

I. INTRODUCTION

When considering the extent to which the United States Constitution places a limit on government regulation of business, today's historians and constitutional theorists treat the question as a matter of balancing economic liberty or property rights against government power. Moreover, modern scholars commonly maintain that this balancing formula represents the predominant tradition in constitutional history. Some commentators trace the tradition to the tenants of Jacksonian democracy that emphasized individual liberty and distrust of government. [1] Others who trace it back to the founding argue that "The Supreme Court maintained an astonishingly constant vision during its first 150 years."[2] In either case, today's conventional narrative depicts constitutional history as having developed along a straight line: always with an emphasis on individual liberty and always with a presumption that entrepreneurial liberty should be favored over governments' power to regulate.

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[1] Charles W. McCurdy, *Justice Field and the Jurisprudence of Government Business Relations: Some Parameters of Laissez Faire Constitutionalism 1863-1897*, 61 J. AMER. HIST. 970-1005 (1975); *See also*, HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE (Durham, N.C.: Duke University Press, 1993); DAVID M. GOLD, THE SHAPING OF NINETEENTH-CENTURY LAW: JOHN APPLETON AND RESPONSIBLE INDIVIDUALISM (Westport Conn.: Greenwood Press, 1990); Michael Les Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origin of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV., 293-331 (1985); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism: A Reconsideration*, 53 J. AMER. HIST., 751-71 (1967); David E. Bernstein, REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (Chicago, IL: University of Chicago Press, 2011).

[2] Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM & MARY L. REV. 57 (1987).

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 will 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.

Munn v. Illinois was one of eight related cases known as the Granger Cases.[3] 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.[4] The Supreme Court disagreed. Writing for the majority, Chief Justice Morrison R. Waite reasoned that states could regulate "businesses affected with public interest."[5]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

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[3] Chicago, Burlington & Quincy R.R. v. Iowa, 94 U.S. 155 (1887); S. Minnesota R.R. v. Coleman, 94 U.S. 180 (1887); Munn v. Illinois, 94 U.S. 113 (1877); Winona & St. Peter R.R. v. Blake, 94 U.S. 180 (1877); Chicago, Milwaukee & St. Paul Ry. v. Ackley, 94 U.S. 179 (1877); Stone v. Wisconsin, 95 U.S. 181 (1877); Peik v. Chicago & Nw. Ry., 94 U.S. 164 (1877); Lawrence v. Chicago & Nw. Ry., 94 U.S. 164 (1877).

[4] *Munn*, 94 U.S. at 123.

[5] *Id.* at 130.

circumstances they might.[6] 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.

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 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 Fourteenth Amendment as a tool for balancing economic liberty from government power: a theory that would eventually become constitutional doctrine in the mid-1890s and predominate until 1937.[7] 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."[8]And, for the most part, it also subscribed to a narrow definition of what constituted the legitimate police powers of the

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[6] *Munn*, 94 U.S. at 125.

[7] WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA 1886-1937 112 (Paul L. Murphy ed., Greenwood Press 1998) (1990) ("All Justices of the Supreme Court in the last third of the nineteenth century agreed with Madison that the fundamental challenge of American Constitutionalism was mediating between the power of government and the liberty of the individual.").

[8] Lochner v. New York, 198 U.S. 45 (1905).

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.

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 a corporate elite 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.

II. RIGHTS OF THE COMMUNITY

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 eight related 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 to railroads.

In the late 1860s, business leaders from small towns took the lead in calling for state control over the railroads. By the early

1870s, farmers who had become organized as part of the Granger movement joined the bourgeoning push for railroad 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.

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.[9] 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.

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.

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[9] GEORGE H. MILLER, RAILROADS AND THE GRANGER LAWS (1971) (traces in detail the influence of small town merchants and shippers as well as farmers). *See also*, SOLON JUSTUS BUCK, GRANGER MOVEMENT: A STUDY OF AGRICULTURAL ORGANIZATION AND ITS POLITICAL, ECONOMIC, AND SOCIAL MANIFESTATIONS, 1870-1880, 80-122 (1965); GERALD BERK, ALTERNATIVE TRACKS: THE CONSTITUTION OF AMERICAN INDUSTRIAL ORDER, 1865-1917 (1994), 78; Charles Fairman, *The So-Called Granger Cases: Lord Hale and Justice Bradley*, 5 STAN. L. REV. 587-678, 598-600 (1953).

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.[10] 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."[11] Many reformers were motivated by a desire to take back some control of their own economic destiny.[12]

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."[13] 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.

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[10] *See* MILLER, *supra* note 9, at 9-23; Edmund W. Kitch & Clara Ann Bowler, *The Facts of Munn v. Illinois*, SUP. CT. REV. 313-43 (1978).

[11] JAMES F. HUDSON, THE RAILWAYS AND THE REPUBLIC (1887). Hudson wrote this during the debate over formation of the Interstate Commerce Commission but it captures the feelings of the Granger era as well.

[12] BERK, *supra* note 9, at 77-80.

[13] EZRA CARR, PATRONS OF HUSBANDRY ON THE PACIFIC COAST 125 (1875). (Annual Address of Worthy Master D.W. Adams, at the last session of the National Grange, held in Charleston, February 1875).

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.[14] 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.

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."[15] 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.

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

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[14] WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996).

[15] MILLER, *supra* note 9, at 181 (provides an example of this description).

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.

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].[16]

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

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[16] 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS, CONVENED AT THE CITY OF SPRINGFIELD, TUESDAY DECEMBER 13, 1868, at 1656 (Ely, Burnham & Bartlett, Official Stenographers, 1870) [hereinafter DEBATES AND PROCEEDINGS]. *See also* MILLER, *supra* note 9, at 75-82 (discussing the Convention).

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.[17] 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.[18]

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."[19]

The Illinois Constitutional Convention adopted, and the people ratified, reform measures that gave the legislature broad powers to regulate railroads and warehouses.[20] In the following years, the Illinois legislature passed several laws that were typical of the Granger laws enacted in other Midwestern states.[21] 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 set maximum rates for passenger service. A third act created a Board of Railroad and Warehouse Commissioners, which was given the power to

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[17] DEBATES AND PROCEEDINGS, *supra* note 16, at 1642. See additional commentary by Mr. Benjamin, Mr. Holdup, and Mr. Bromwell. *Id.* at 1642, 1651, 1664. Benjamin later helped prepare the brief for the state in *Munn v. Illinois*. MILLER, *supra* note 9, at 75 & 77.

[18] DEBATES AND PROCEEDINGS, *supra* note 16, at 1642, 1645.

[19] *Id.* at 1645.

[20] Charles Fairman, *Reconstruction and Reunion 1864-88, Part Two*, *in* THE OLIVER WENDELL HOLMES, DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES. (New York: Macmillian) 7: 329; MILLER, *supra* note 9, at 75-82.

[21] *See generally* MILLER, *supra* note 9.

prescribe maximum rates. 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.[22]

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.[23] The resulting rates, they predicted, would drive out capital and make it impossible for railroads to meet their obligations to bondholders.[24] The railroad leaders' most significant contention was that the Granger laws violated their "exclusive right to fix the rate of transportation."[25] Sometimes they insisted that they derived this right from their charters.[26] 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."[27] To this John N. Denison added

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[22] For description of these statutes, *see* Fairman, *supra* note 20, at 329-331; MILLER, *supra* note 9, at 82-96; Munn v. Illinois, 94 U.S. 113, 114-117 (1877) reproduces the statute.

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

[24] 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.

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

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

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

sarcastically, "I suppose that there is no limit to the rights of the sovereign people."[28]

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."[29] Letters between these men reveal that they also preferred federal courts to state courts.[30] They also reveal that railroad leaders understood the legal issues involved.

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.[31] 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 Article I, section 10 guarantees that "no state shall pass any law . . . impairing the obligation of contract."[32]

In contract clause doctrine, franchises and acts of incorporation were considered a contract between the state and the

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

[29] THOMAS C. COCHRAN, RAILROAD LEADERS 1845-1890: THE BUSINESS MIND IN ACTION at 191 (1965).

[30] *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, *supra* note 9, at 174-75.

[31] MILLER, *supra* note 9, provides details regarding the legal tactics.

[32] U.S. CONST. art. I, § 10, cl. 1.

corporation it had created.[33] In theory a subsequent law placing new conditions on the corporation would alter the terms of its franchise, thus impairing the obligation of that contract. In *Chicago, Burlington, and Quincy Railroad Company v. Iowa* railroad lawyers maintained the Granger laws did just that. In this and the other Granger cases the railroads' grants were silent on the subject of who had the ratemaking power. Yet lawyers argued that the company's right to determine the rates they would charge was an inherent part of their contract. The Supreme Court summarily rejected this contention. "Railroad companies are carriers for hire," Chief Justice Waite reasoned.[34] "They are incorporated as such, and are given extraordinary powers, in order that they may better serve the public in that capacity."[35] As such, he concluded, they are "subject to legislative control as to their rates of fare and freight, unless protected by their charters."[36]

Even when the charter had an express provision allowing the company to determine reasonable rates, as in *Peik v. Chicago and North Western Railway Company v. Lawrence*, subsequent legislation regulating rates might not violate the contract clause.[37] 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. In *Peik*, the Court noted that the existence of such a reserve clause meant the state had the power to pass subsequent legislation that set maximum rates.[38]

A state's reliance on reserve clauses was, however, 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

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[33] Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 519 (1819).
[34] Chicago, Burlington, and Quincy R.R. Co. v. Iowa, 94 U.S. 155, 161 (1877).
[35] *Id.*
[36] *Id.* (The Chief Justice also noted that they were businesses affected with public interest as in *Munn)*.
[37] Peik v. Chicago and Northwestern R.R. Co., 94 U.S. 164, 168 (1877).
[38] *Id.*

any rights vested under it.[39] 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.[40] 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.[41] 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.[42]

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.*"[43] The railroad's

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[39] Holyoke v. Lyman, 82 U.S. 500 (1872) (See as an example).

[40] ISAAC F. REDFIELD, THE LAW OF RAILWAYS I, 50 (5th ed. 1873).

[41] James W. Ely, Jr., *The Protection of Contractual Rights: A Tale of Two Constitutional Provisions*, 1 N.Y.U. J. L. & LIBERTY 370, at 397-99 (2005). (citing THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES, 280 n.2 (2nd ed. 1871) (which sharply criticized the use of the Contract Clause as a shield for Corporate Charters).

[42] *Id.* at 401 (pointing out that railroads were seldom able to successfully claim exemption from rate regulation by pointing to the language of their charters).

[43] Peik v. Chicago and Northwestern R.R. Co., 94 U.S. 164, 168 (1877) (emphasis added).

attorneys swayed one justice, Stephen Field. [44] But Field wrote in dissent. The majority of the Court rejected this argument and upheld the rate regulation.

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."[45] 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."[46]

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

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[44] 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.

[45] MILLER, *supra* note 9, at 185 (citing C.B. Lawrence's argument in *Peik*, 94 U.S. 164 (1877)).

[46] *Id.* at 185 (citing John Cary's argument in *Peik*, 94 U.S. 164 (1877)).

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.[47]

The principle of popular sovereignty and the concomitant respect for rights of the community also was 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*.[48] 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."[49] 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."[50]

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:

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[47] 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).

[48] Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).

[49] *Id.* at 547.

[50] *Id.* at 547.

> . . . 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].[51]

Among those essential powers Cooley listed the police power, the power of eminent domain, and the taxing power.[52] Cooley was firm that a legislature could not bargain away the police power of the state even by an express grant.[53]

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.[54] 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

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[51] Thomas M. Cooley, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 283 (1874).

[52] *Id.* at 280-84. *See also* Morgan v. Louisiana, 93 U.S. 217, 222 (1876) [taxes]. The Court applied this presumption in a similar case, ruling that when two companies consolidated a tax exemption applies only to the part of the new company that received it in the first place. Central Railroad and Banking Company v. Georgia, 92 U.S. 665 (1875); In a similar vein it ruled that a contract that exempted companies from a state tax did not imply that municipalities could not tax those companies, and that a grant of temporary tax immunity did not imply that a company was permanently exempted from being taxed. Home Insurance Company v. City Councils of Augusta, 93 U.S. 116 (1876); Bailey v. Magwire, 89 U.S. 215 (1874); Tucker v. Ferguson, 89 U.S. 527 (1874).

[53] *Id.* at 283.

[54] Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 197-98 (1984).

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.[55]

Regulation was also considered normal in nineteenth century legal doctrine. Judges and commentators 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."[56] He and others commonly use Massachusetts Chief Justice Lemuel Shaw's 1851 opinion in *Commonwealth v. Alger* 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

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[55] *See* Harry N. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, *in* PERSPECTIVES IN AMERICAN HISTORY: LAW IN AMERICAN HISTORY 329-331 (Donald Fleming and Bernard Bailyn, Eds., 1971); Novak, *supra* note 14; Gregory A. Mark, BOOK REVIEW, H-NET REVIEWS (Nov. 1999) (Reviewing WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA (1996)) http://www.h-net.msu.edu/reviews/showrev.cig?path=5155944065677 (observing that Novak's discussion of official markets demonstrated the naturalness of exchange and of regulation).

[56] Harry N. Scheiber *Public Rights and the Rule of Law in American Legal History*, 72 CAL. L. REV. 217, 219 (1984); *see also* Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857 (2000) (taking a similar position as a modern observer).

> enjoyment of their property, *nor injurious to the rights of the community*.[57]

Defining the reach of state power 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.[58]

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.[59]

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[57] Commonwealth v. Alger, 7 Cush. 53, 84-85 (Mass. 1851) (emphasis added). 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 56 at 222-23; Novak, *supra* note 14, 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).

[58] MILLER, *supra* note 9, at 31; JAMES W. ELY, JR., RAILROADS & AMERICAN LAW, 71-90 (2001) (recognizing that regulation of rates was common but emphasized that legislative ratemaking was often ineffective).

[59] 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, 164-66 (1997).

Hindsight tells us that the due process clause of the Fourteenth Amendment, rather than the Contract Clause, would provide the vehicle for change.

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*, the first case to interpret the new Amendment, did support the idea that it provided protection for business.[60] 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.[61]

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[60] The Slaughterhouse Cases, 83 U.S. 36 (1873).

[61] Letter from J.M. Walker to O. H. Browning, on J.M. Walker out-papers (Mar. 7, 1874) (on file with 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].

III. THE DEBATE IN *MUNN*

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 along the Chicago River. The case began when Munn & Scott was charged with violating an Illinois law that set maximum rates that elevators could charge for storing and handling grain.

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 1870s 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.

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.[62]

Adding to the farmers' dissatisfaction was the fact that cooperation among the nine Chicago firms allowed them to fix the

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[62] *See*, WILLIAM CRONON, NATURE'S METROPOLIS: CHICAGO AND THE GREAT WEST (W.W. Norton & Co. 1991) for an overview of the changes.

prices they charged for storage of grain. This caused the Grangers to push for regulation of Chicago's grain elevators. But collusion was not the only complaint leveled against the elevators and the Grangers 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 Grangers, but the Chicago Board of Trade, who wanted a uniform system of inspection. [63]

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. When *Munn v. Illinois* reached the Supreme Court, William G. Goudy and John N. Jewett, the lawyers for Munn & Scott, turned this complaint on its head. Describing the elevators as an essential cog in a national market of grain, they maintained that the Illinois maximum rate law violated Article I, section 8 of the Constitution, which gives Congress the power to regulate interstate commerce.[64] But their most important claim was 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.

The concept of due process, sometimes referred to as "the law of the land," predates the Fourteenth Amendment. It traces its

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[63] Edmund W. Kitch & Clara Ann Bowler, *The Facts of Munn v. Illinois*, SUP. CT. REV. 313-343 (1978). Kitch and Bowler point out that the most important reform for the Board of Trade was a system of uniform inspection. Rates were a secondary matter. *Id.* at 325. Railroad leaders expressed some concern about filling elevators for purposes of speculation. Letter from W.K. Ackerman to Capt. W.P. Halliday. W.K. Ackerman out-letters, Illinois Central, Newberry Library, Chicago, IL. (Sept. 6, 1881).

[64] U.S. CONST. art. I, § 8.

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."[65] 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 maintained, 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.

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.[66] 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.[67]

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[65] U.S. CONST. amend. V.

[66] Trustees of Dartmouth College v. Woodward, 17 U.S. 518 (1819).

[67] W.C. GOUDY, BRIEF FOR THE PLAINTIFF IN ERROR, *MUNN V. ILLINOIS*, *IN* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED

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.[68] 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.[69]

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.[70] Justice Bradley had employed the theory in his opinion in *The Slaughter-House Cases*, which was the first case interpreting the new Fourteenth Amendment. But Bradley's opinion was a dissent.[71] 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."[72]

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

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STATES: CONSTITUTIONAL LAW, 511 (eds. Philip B. Kurland and Gerhard Casper, VII, 1975).

[68] *Id.* at 512 (citing COOLEY, CONSTITUTIONAL LIMITATIONS, 351).

[69] *Wynehamer v. People*, 13 N.Y. 378, 427 (1856). *See also*, James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONSTITUTIONAL COMMENTARY 315, 338-44 (1999).

[70] Dred Scott v. Sanford, 60 U.S. 393, 450 (1857).

[71] The Slaughter-House Cases, 83 U.S. 36 (1873) (Bradley, J., dissenting).

[72] State Railroad Tax Cases, 92 U.S. 575, 596, 618 (1875).

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.

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.[73] 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."[74]

Jewett and Goudy's argument embodied an attitude toward property rights that one modern observer, Mary Ann Glendon, calls an "illusion of absoluteness."[75] 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

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[73] Goudy, *supra* note 67, at 515 (quoting Pumpelly v. Green Bay Co., 80 U.S. 166, 177-78 (1871); John Jewett, *Briefs for Plaintiffs in Error*, *in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW, 535, 558 (Phillip B. Kurland & Gerhard Casper, eds., 1975) (citing Pumpelly v. Green Bay Company, 80 U.S. 166 (1871).

[74] Jewett, *supra* note 73, at 557.

[75] MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 18-46 (1991).

private individual, by fixing the prices he may receive from other private persons, who choose to deal with him."[76] 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.[77]

To the extent that they predicted the Court would invalidate the Granger laws, the 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.

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."[78] 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.[79]

Company lawyers must have been especially dismayed that Justice Bradley voted with the majority to uphold the regulation. In the past, Bradley had shown an inclination to vote against state regulation. Four years earlier, in the first case interpreting the newly ratified Fourteenth Amendment, the Court upheld a Louisiana statute that created a central slaughterhouse and required

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[76] Goudy, *supra* note 73, at 483.
[77] Jewett, *supra* note 73, at 549.
[78] *Munn*, 94 U.S. at 125.
[79] *Id.* at 127.

that all butchers in New Orleans ply their trade in that facility.[80] Bradley had joined Field and Strong dissenting in the *Slaughter-House Cases*, and in his separate opinion in that case had done the most to articulate the idea that the due process clause of the Fourteenth Amendment gave the Court power to oversee the substance of state legislation. Now, in *Munn*, only Field and Strong dissented. Not only had Bradley seemed to have changed sides, as it turned out, he was the member of the Court most responsible for developing the "business affected with public interest" doctrine. In a memo "Outline of my views on the subject of the Granger Cases," Bradley acquainted Chief Justice Waite with the seventeenth century writings of British jurist Lord Chief Justice Hale who ruled that owners of wharves, cranes, or other conveniences used by the public must charge reasonable and moderate rates because those conveniences are affected with a public interest.[81]

In the *Slaughter-House Cases*, Bradley and Field had agreed that the Fourteenth Amendment's guarantee of liberty included a right to choose a trade or calling. They agreed that government regulation of business could infringe upon this right to a degree that it violated the Constitution. They also agreed that monopoly posed a threat to individual liberty and a free society. The extent to which they had agreed in the earlier case makes their disagreement in *Munn* even more enlightening and, by writing his memo to the Chief Justice; Bradley left an unusually vivid source of his views.

The disagreement between Bradley and Field begins with their differing definitions of "business affected with public interest." Field's interpretation of the phrase conformed to his belief that regulation was appropriate only for government-created monopolies. He pointed out that the writings of Lord Hale and many of the cases upon which Waite and Bradley relied, involved

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[80] Slaughter-House Cases, 83 U.S. 36, 82-83 (1873).

[81] *Munn*, 94 U.S. at 127. We have Charles Fairman to thank for bringing Bradley's "Outline of my views on the subject of the Granger Cases" to light. Charles Fairman, *The So-Called Granger Cases: Lord Hale and Justice Bradley*. 5 STAN. L. REV. 587 (1953) (Fairman reproduces the Bradley Memorandum).

companies that operated under an exclusive franchise–either by prerogative of the king or contract with the state.[82] The elevators in *Munn*, he argued, were private companies with no such exclusive franchise. To apply the rule to this kind of company would leave the state with an unlimited power to regulate private property. There would be no way to tell what business was affected with public interest and what business was not.[83]

Although Waite and Bradley failed to articulate a general rule, on one point they were very clear. Whatever might be the boundaries of the "affected with public interest" doctrine, the Chicago elevators fell within it because they operated as virtual monopolies. In this sense, they saw the facts of *Munn* and the facts of the *Slaughter-House Cases* as having much in common. In neither case did the company have an actual monopoly, but in both they dominated some essential element of a particular business. All of the butchers in New Orleans had to ply their trade in the Crescent City Company's slaughterhouse. Similarly, all grain shipped through Chicago had to be stored in the elevators owned by a few firms that cooperated to fix prices. The only significant difference between the two situations was the source of their privileged position. The New Orleans slaughterhouse obtained its privilege by virtue of a government franchise; the Chicago elevators attained theirs through private ownership and cooperation. This made all the difference in the world to Field but no difference at all to Waite and Bradley. Waite used the company attorney's own commerce clause argument to explain why:

> [The elevators] stand, to use again the language of counsel, in the very "gateway of commerce," and take a toll from all who pass. Their business most certainly "tends to a common charge, and is become a thing of public interest and use." Every bushel of grain for its passage "pays a toll, which is a common charge," and, therefore, according to

[82] *Munn*, 94 U.S. at 139-40 (Field, J., dissenting).
[83] *Id.* at 139-41 (Field, J., dissenting).

> Lord Hale, every such warehouseman "ought to be under public regulation, viz., that he take but a reasonable toll." Certainly, if any business can be clothed "with public interest," and cease to be *juris privati* only, this has been.[84]

Likewise for Bradley, the source of a monopoly was of little consequence. The important thing for him was that the public could not stand on equal footing with companies such as railroads and Chicago grain elevators. Despite the company attorneys' success in painting themselves as defenders of liberty and government oppression, Bradley did not forget that the heart of this dispute was a fundamental disagreement about the meaning of liberty and democracy. And, because his memo "Outline of my views on the subject of the Granger Cases" was only for his own use and Waite's, Bradley did not mince words. "Unrestricted monopolies as to those things which people must have and use, are a canker in any society, and have ever been the occasion of civil convulsions and revolutions," he wrote.[85] "A people disposed to freedom will not tolerate this kind of oppression at the hands of private corporations or powerful citizens."[86]

Bradley's memo undoubtedly influenced Chief Justice Waite's use of the "affected with public interest" formula in his opinion for the Court. But there was more to 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.

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

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[84] *Munn*, 94 U.S. at 132.
[85] Fairman, *supra*, note 81, at 670.
[86] *Id.*

community at large."[87] 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.[88]

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. . . ."[89] 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.[90] 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.[91] 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.[92] His

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[87] *Munn*, 94 U.S. at 126.
[88] *Id.* at 140 (Field, J., dissenting).
[89] *Id.* at 145 (Field, J., dissenting).
[90] *Id.* at 148.
[91] *Id.* at 146 (Field, J., dissenting). Scheiber, *supra* note 55, at 389-91. (noting 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).
[92] *Munn*, 94 U.S. at 142-43 (Field, J., dissenting).

implication was that the Court should be wary of any statute that interfered with individual liberty.

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.[93] "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."[94] While he admitted that a state regulation might deprive an individual of property without due process of law, he would uphold a 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."[95]

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.[96] 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."[97] "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."[98]

The majority's presumption in favor of state legislation certainly disappointed railroad leaders and their attorneys who had

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[93] *Id.* at 123.
[94] *Id.*
[95] *Id.* at 132 (emphasis added).
[96] Charles River Bridge Co. v. Warren Bridge Co., 36 U.S. 420 (1837).
[97] *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."
[98] *Id.* at 125.

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.[99] And, in his mind, it was the Court's duty to ensure that this did not happen.

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."[100] 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."[101] Any other rule, he said, "Would be subversive to the authority which the people have confided to the legislature for their protection."[102]

IV. *MUNN*: AFTERMATH AND LEGACY

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.

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[99] *Munn*, 94 U.S. at 148 (Field, J., dissenting).
[100] *Id.* at 134.
[101] Fairman, *supra* note 9, at 677.
[102] *Id.*

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 enterprises of the nation."[103] 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]."[104]

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.[105] 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 is no longer in question.[106] Editors of the *Minneapolis Tribune* were even more confident. "The power to regulate roads has been confirmed by the United States Supreme

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[103] Jewett, *supra* note 73, at 662.

[104] Letter from R. Harris to Schuylar Colfax (Mar. 12, 1877) (on file in 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." *Id.*; *see also*, Letter from R. Harris to James Wentworth (March 9, 1877) (on file in R. Harris Out-Letters, President's Office, The Newberry Library, Chicago, IL).

[105] 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, CONVENED AT THE CITY OF SACRAMENTO, SATURDAY, SEPTEMBER 28, 1878, at 455, 463, 482, 509 (Sacramento, State Office 1880).

[106] RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION 22-23 (1993) (citing MINNEAPOLIS TRIB., Jan. 6 1887, at 3 (statement of Governor R. McGill).

Court in the Granger Cases, there is no turning back and the ground will never be retraced."[107]

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.[108] Because of its emphasis on entrepreneurial liberty, this new doctrine is often referred to as laissez-faire constitutionalism.

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.[109] 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.[110] From this perspective it is

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[107] *Id.* at 38 (quoting MINNEAPOLIS TRIB., Dec. 24 1887, at 4).

[108] *See*, JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER: 1888-1910, at 57-71 (1995).

[109] *See*, Nebbia v. New York, 291 U.S. 502 (1934); New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

[110] C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER at 192-93 (1963).

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. Perhaps Justice Miller helped fuel that idea when he complained a year later, in *Davidson v. New Orleans*, that the Court's docket "is crowded with cases in which we are asked to hold that state Courts and State legislatures have deprived their own citizens of life, liberty, or property without due process of law."[111] This proliferation of cases, he said, was the result of "some strange misconception of the scope of this provision of the fourteenth amendment." [112]

Miller further complained that attorneys were viewing the Fourteenth Amendment as a means of bringing to the United States Supreme Court "the abstract opinions of every unsuccessful litigant in a State court [about] the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded."[113] His stern criticism certainly conveyed a warning to business attorneys who might be looking for a new means to fight economic regulations enacted by state legislatures.[114] In 1878 the Court issued one other opinion involving a claim that economic regulation violated the Fourteenth Amendment, *Railroad_Company v. Richmond.*[115] But after the Court had disposed of *Davidson v. New Orleans* and *Railroad Company v. Richmond*_in 1878, roughly six years would pass before its docket was actually crowded with cases in which it was asked to hold that state economic regulation deprived their own citizens of life, liberty, or property without due process of law.

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[111] 96 U.S. 97, 104.

[112] Davidson v. New Orleans, 96 U.S. 97 (1878).

[113] *Id.* at 104.

[114] MICHAEL A. ROSS, JUSTICE OF SHATTERED DREAMS: SAMUEL FREEMAN MILLER AND THE SUPREME COURT DURING THE CIVIL WAR ERA at 233 (2003).

[115] 96 U.S. 521, 529 (1878) (The Court first rejected the company's claim that the ordinance violated the contract clause. Justice Strong dissented without comment).

Railroad and business attorneys instead turned back to the contract clause to protect their client's interests. In at least one instance, attorneys even went out of their way to assure the Court that, "the company does not invoke the aid of the Fourteenth Amendment to the Constitution, but submits that the statute . . . impairs the obligation of the contract contained in its charter and is therefore unconstitutional and void."[116]

In response, the Court continued to apply principles for interpreting the Contract Clause that had developed earlier. One such principle was the presumption that a charter must be construed most favorably for the interests of the public. The outcome in *Northwestern Fertilizing Company v. Hyde Park* turned on this rule of construction. This case involved an ordinance that had the effect of prohibiting the company from operating a fertilizing plant in the village of Hyde Park, Illinois. The company had received a charter from the state to operate, in an uninhabited area south of the village, a plant that turned offal and other byproducts of Chicago slaughterhouses into fertilizer. As Hyde Park grew, however, the plant became ". . . an unendurable nuisance to the inhabitants for many miles around its location. . . "[117] Some justices were sympathetic to the company's claim that the ordinance had the effect of confiscating its property without compensation.[118] But Justice Noah Swayne, who wrote the majority opinion, pointed out that the company's charter did not contain a provision expressly exempting it from claims of nuisance. Applying the rule of construction that a charter should be construed most strongly against the corporation, he concluded that the charter's silence on the matter was fatal to the company's claim.[119]

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[116] Beer Co. v. Mass., 97 U.S. 25, 27 (1878).

[117] N.W. Fertilizing Co. v. Hyde Park, 97 U.S. 659, 664 (1878).

[118] *Id.* at 680. (Strong, J., dissenting).

[119] *Id.* at 671 (Miller, J., concurring) (Justice Miller agreed with Strong on the general principle that if the public welfare requires that a company's property be destroyed, the community ought to pay for it by condemning the property but he ultimately agreed with Swayne that the power of the legislature to abate a nuisance could only be limited by express terms of the contract).

The Court also continued to apply the principle that a legislature could not barter away the essential powers of sovereignty, such as the police power. In *Beer Company v. Massachusetts,* a corporation that had received a charter to manufacture beer claimed that a subsequent state prohibition law violated the contract clause. Writing for the majority in *Beer Company v. Massachusetts*, Bradley reasoned that Beer Company's possession of a charter could not be construed as exempting the corporation to legitimate controls to which an individual citizen would be subject.[120] The right of both the corporation and individual were held subject to the police power of the states. While Bradley did not attempt to define the police power he noted that protecting the lives, health, and property of citizens and preservation of good order and public morals "... belong emphatically to that class of objects which demand the application of the maxim, *salus populi suprema lex* (the welfare of the people is the supreme law)."[121]

It was not until after four new justices joined the Court in the early 1880s 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*, which came to stand for the proposition that corporations are persons for purposes of the Fourteenth Amendment.[122] Even then, however, they failed to obtain the kind of constitutional protections from government regulation that their clients wanted.

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

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[120] *Beer Co.*, 97 U.S. at 32.

[121] *Id.*; Stone v. Mississippi 101 U.S. 814 (1879) (applying similar reasoning to a state law prohibiting lotteries).

[122] Santa Clara v. S. Pac. R.R., 118 U.S. 394 (1886). There is considerable controversy about the means by which this precedent was established. *See*, C. PETER MAGRATH, MORRISON R. WAITE: A TRIUMPH OF CHARACTER 223-24 (1963).

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.

After Chief Justice Waite died and was replaced by Melville W. Fuller in 1888, the Court subtly revised *Munn's* presumption of the validity of state legislation in the Minnesota Milk Rate Case of 1890.[123] 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."[124] 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.[125] 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.[126]

V. CONCLUSION

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

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[123] Chi., Milwaukee, and St. Paul Ry. Co. v. Minnesota, 134 U.S. 418 (1890).

[124] *Id.* at 454. This statement led Justice Bradley to complain that the majority's decision "practically overrules *Munn v. Illinois*." *Id.* at 461 (Bradley, J., dissenting); *See*, James W. Ely, Jr., *The Railroad Question Revisited: Chicago, Milwaukee & St. Paul Railway v. Minnesota and the Constitutional Limits on State Regulations,* 12 GREAT PLAINS QUARTERLY 121-34 (1992).

[125] 169 U.S. 466, 546-47 (1898).

[126] *See*, JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910 83-110 (1995).

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.

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