A REPUBLICAN THEORY OF GRAIN ELEVATORS: THE CASE OF *MUNN V. ILLINOIS*

Working Paper

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Abstract:

This essay is a study in the changing definition of republicanism in the Gilded Age, and how state regulatory laws that claimed to protect "health, safety and morals" related to the Fourteenth Amendment to the Constitution. It focuses on the landmark Supreme Court decision in *Munn v. Illinois* (1877), which dealt with the power of state governments to regulate the price of grain elevators. The case is important because it featured a fragmentation in the conventional meaning of republicanism, which had long been embodied in both the state and federal constitutions. One view, following Chief Justice Morrison Waite, held that the power of state governments was practically unlimited within its sphere, meaning that state police power could easily override the rights of citizens; others, though, following Justice Stephen Field, held that the rights listed in the Fourteenth Amendment -- "life, liberty and property" -- were so inalienable that no consideration of public necessity could ever override them. There was essentially a disconnection between the ends and the means of republican government, as it was always understood in American political thought: regulatory laws had no distinct goal other than the desires of local majorities, while at the same time, the rights of individuals could find no protection in due process of law, and had to look instead to the judiciary, which became their sole protector. The opposition of the power and purpose of state police power, laid the groundwork for the coming Progressive Era and the popular turn to extensive regulatory laws, which have become such a prominent feature of modern American life.

A grain elevator would have been a marvelous thing to behold in the late nineteenth century. At the annual gathering of the American Institute, a congregation of science enthusiasts, Columbia University President F.A.P. Barnard identified the true fruits of modern science in his keynote address: "the industrial arts were born of it." In the "concourse of industries," Barnard was "proud to affirm that America held an honored place." Among other things, "[t]he planning machine is American. Navigation by sea is American. The mower and reaper are American." And, last but not least: "the grain elevator is American."[1] Americans were particularly good at bringing ancient and modern things together: one imagines second, third, or fourth generation country folk, so attuned to the dignity of working the land and transporting one's own good to the market, now gazing in awe at this new contraption – not only for its ability, but now for its direct involvement in their otherwise rustic and simple lives.

There was no other way to distribute grain without a method of storing it in central locations, and making it available for rapid movement on to railroad cars and sea vessels. In practice, in the 1870s, the exclusivity of grain transportation seemed to form a "virtual" monopoly, given the outrageous fees that railroad and elevator companies could impose on farmers. Those costs ran up against one of the influential agrarian movements of the day, the Order of Husbandry, better known as the Granges." This was hardly the sort of organization expected from farmers, who tended to be more isolated from each

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[1] "American Institute Fair," New York Observer and Chronicle 50, 37 (Sep. 12, 1872): 294.

other than urban labor unions and other urban interests. "The political significance of such an organization can hardly be overestimated," the *Massachusetts Plowman* reported. "A body of such thorough organization is a formidable instrument in the hands of able men, and the Order comprises many such." It could, no doubt, "affect permanent changes in legislation."[2] The Granges quickly became a critical instrument for farmers to cope with the new spirit of greed in urban interests that still expected food out of them. "Their former independence evaporated. No longer devoted to focusing on producing for their family and local community, no longer tied to the village craftsman or to the system of mutual bartering of goods and services, farmers suddenly found themselves immersed in an impersonal cash economy motivated by self-interest."[3] The organization followed other populist movements in its eccentricity, complete with late-night ceremonies, sacred oaths, and a structural hierarchy that seemed counter to their democratic principles. This was all for a focused and immediate purpose, though, and solidarity of all members was essential for the dignity and survival of the ancient agrarian way of life. The Granges "exerted considerable direct influence upon legislative activity in the different states of the Union. This was usually by means of resolutions or petitions requesting the enactment of desired legislation, in some cases particular bills before the state legislatures being specified." It was not just their power over voting in farming districts, though, since most lawmakers felt that the interest of the farming class out to always prevail, and "their petitions for legislation along these lines were likely to receive favorable consideration."[4]

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[2] "The Order of Husbandry," Massachusetts Plowman and New England Journal of Agriculture 32, 32 (May 10, 1873): 2.
[3] Thomas A. Woods, *Knights of the Plow: Oliver H. Kelly and the Origins of the Grange in Political Ideology* (Ames: Iowa State University, 1991), xv.
[4] Solon Justus Buck, The Granger Movement: A Study of Agricultural Organization and its Political, Economic, and Social Manifestations, 1870-1880 (Harvard: Harvard University Press, 1913), 102-103.

The Granges exercised growing control over state governments, where officials had respect for them as an honorable order, compared to their frequently violent urban counterparts in the labor unions. In some states, the Granges simply purchased the elevators themselves. But in Illinois, where the elevators were reserved for public use under the state constitution, farmers were forced to seek greater political control their state assembly. Since the grain elevators in Illinois were protected by the state constitution, the Grange's political leverage could only have one goal: price controls.

But from Mr. Ira Munn's point of view, regulations on grain elevators were simply the use of public power by a single interest group at his expense. Munn and his associate George Scott were known as hard-working, self-made businessmen, who had suffered and survived the recent fires that devastated Chicago, and developed a newer and safer sort of grain elevator. But now, they were charged under the Act to Regulate Public Warehouses of 1871. The act was pursuant to a clause in the Illinois state constitution, framed just the year before: Article XIII stated that "[a]ll elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses." The state assembly was granted broad power in regulating the industry, and though the constitution was focused on the quality of the grain, weights and measures, delivery procedures, etc., it said nothing about price controls. Still, the state legislature was sure that such a constitutional grant of power included the rates that Munn could charge. The law seemed especially unfair since Munn's business charged the same rate for the past nine years, without any compliant from his customers; they were always "agreed upon and established by the different elevators or warehouses in the city of Chicago," according to

the Plaintiff's amicus brief. "[T]he rates have been annually published in one or more newspapers printed in said city, in the month of January in each year, as the established rates for the year then next ensuing such publication."[5] They were certain that the sudden and recent vintage of the law indicated a truly arbitrary and unfair attack on their business.

For this reason, Mr. Munn and his associates felt justified in ignoring the legislation, and continued to charge the same amount they had for the last ten years. The grain elevator fees, which were long viewed as fair and had not changed over time, had only recently invoked the ire of local farmers; this revealed the arbitrary nature of their political influence. Their capture of the state legislature was no doubt a shock. Facing the sentence of a $10,000 fine and the possibility of losing his state license, Munn pled guilty and appealed his case to the Illinois Supreme Court, where he challenged the Act under the state's own Bill of Rights under Article II, which promises that no person would be "deprived of life, liberty or property without due process of law" -- and, most importantly, under the Fourteenth Amendment's Due Process clause of the U.S. Constitution.

The Fourteenth Amendment presented new dilemmas that most of the justices wished very much to avoid. Justice Samuel Miller expressed a serious fear in his *Slaughterhouse Cases* opinion from 1873 when he said that if the Court interpreted the Amendment too broadly, it could find itself "a perpetual censor upon all legislation of the States, on the civil rights of their own citizens."[6] It did not seem judicial involvement in state affairs was necessary anyway: there was, after all, an Enforcement Clause under Section 5

[5] Brief quoted in Munn v. Illinois, 92 U.S. 113, at 131 (1876).
[6] Slaughterhouse Cases 83 U.S. 36, at 78 (1872).

of the Amendment, which empowered Congress to pass extensive Reconstruction legislation intended specifically for the protection of former slaves.

But it was becoming apparent how the Fourteenth Amendment was a far more complex addition to the Constitution. It gave broad justifications for such congressional action by avoiding discussion of freedmen per se, and laying out the general principles of free government; it nationalized citizenship, and it granted a vague concept of "privileges and immunities" (formerly among "the several states," but now among citizens simply); most importantly, though, it restated the guarantee in several state constitutions, now directed at the states themselves, that no state would "deprive any person of life, liberty, or property, without due process of law." All of this assumed Congress' ability to exercise sound judgment about how to wisely cope with the problems of a post-Civil War America. But by stating such general normative principles in positive law, the way was left open for a great deal of judicial action in the spheres of national life that Congress and the state legislatures could not touch, particularly when it came to property and economic rights. There were still questions about the "beneficial use of property," and there was still the need to declare the proper function of police power, which could proceed only "until some case involving those privileges may make it necessary to do so," i.e., when the Court would need to intervene.[7] That, of course, was precisely what Mr. Munn and his attorneys expected the Court to do.

But the Supreme Court ruled against Munn in the *Munn v. Illinois* decision (1877). It was the first of the *Granger Cases*, which repeatedly upheld state regulations over the next thirty years before the coming of the Taft Court and the "Lochner Era." In his opinion for the Court, Chief Justice Morrison Waite justified the Illinois statute with a

[7] Ibid., at 79.

phrase that made him famous: while the elevators were private property, they nonetheless constituted "business affected with the public interest." When private business touched public life, it ceased to be "private," and could no longer receive standard protections under the state or federal Due Process guarantees. When a private citizen "devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created," Waite explained. "He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."[8]

This essay is a study on the significance of that conflict between state governments and the Constitution's Fourteenth Amendment in its earliest days – a time when the meaning of republicanism endured in the minds of various judges, even as it diminished in American society and politics. The tension between the way judges think and the way the world actually is becomes most apparent in *Munn v. Illinois*. The grain elevator law was sustained, but not without opinions that indicated an important turning point in American political thought: the case revealed nothing less than the breakdown in the definition of republicanism, or a disconnection between the means and the end of constitutional government.

Some, like Chief Justice Morrison Waite who wrote the *Munn* opinion, emphasized only the means of republican government, and assumed that the power of state governments was practically unlimited within its sphere. Others, though, who shared the views of Justice Stephen Field, held that the rights listed in the Fourteenth Amendment were so inalienable that no consideration of public necessity could ever

[8] Ibid., 126.

override them, and that it was the highest and greatest duty of the judiciary to protect those rights at all costs.

Decisions throughout the Progressive Era were left with this dichotomy. It was, of course, the latter that triumphed with the coming of the philosophy of the State in the Progressive Era, which in turn gave way to the New Deal, whose transformation of American politics is simply a fact of life in our own time. It is important, though, to examine the origins of that condition: the rise of the regulatory state grew out of serious doubt about the purpose of American constitutionalism, and the meaning of republicanism in general, in the years after the Civil War.

I. The Sovereign State of Illinois

A. The State Court Ruling

Chief Judge Sidney Breese of the Illinois Supreme Court acknowledged the challenge under the Fourteenth Amendment in his opinion, yet he dismissed it in two short paragraphs. He agreed to at least one aspect of Justice Samuel Miller's opinion in the Slaughterhouse Cases, i.e., that the Amendment was meant to "shield a certain class, who had been born and reared in slavery, from pernicious legislation, by which their newly acquired rights might be so crippled as to render them wholly worthless."[9] The only meaning the Amendment could possibly have was its short-term, immediate, Reconstruction-era goal, and treating it as anything else was an abuse of judicial power.

Breese addressed Munn's appeal to the Illinois state constitution. Like many state constitutions, it was a grant of substantive rights, and then created the political institutions designed to protect them. He looked in particular to Article IV, which in Sec.

[9] Ira Y. Munn et al. v. People of the State of Illinois, 69 Ill. 80, at 85 (1873).

22 prohibited the state legislature from "[g]ranting to any corporation, association or individual any special or exclusive privilege, immunity or franchise what-ever," a classic anti-monopoly provision. But it also granted the legislature specific regulatory power under Article XIII: "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses," it said in Section 1. But that grant of power was aimed specifically at the "amount and grade of each and every kind of grain in such warehouse" (Sec. 2), and it was "[t]he general assembly shall pass laws for the inspection of grain, for the protection of producers, shippers and receivers of grain and produce" (Sec. 7). These were all favorable regulations, but Breese lamented the fact that they fell short of explicitly allowing the state government to implement price controls. The state convention was unable to provide "some remedy against the oppression and extortions to which they were subjected by this organized combination of monopolists, already such a formidable power, with but one heart, and that palpitating for excessive gains." Still, Article XIII seemed broad enough to recognize an interest "general in its objects, operative throughout the State," and having everything to do with an "existing business closely associated with the agricultural interests of the state."[10]

The Illinois Bill of Rights began with the standard set of basics: that all men are born free and equal, with respect to certain God-given rights to "life, liberty, and the pursuit of happiness," and that "[t]o secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed" (Sec. 1); and that "[n]o person shall be deprived of life, liberty or property without due process of law" (Sec. 2). The current Bill of Rights, though, was hardly as

[10] Ibid.

fixed and enduring in Justice Breese's mind, since he had the curious fortune of occupying the bench for the last three constitutional conventions in Illinois, in 1818, 1848, and finally in 1870. Witnessing such a repeated resetting of all precedent might explain his conclusion in the Munn case: the state constitution was simply a less significant thing compared to the state legislature. It had been recalled and redesigned by multiple conventions, and it would probably be rewritten again.

There was only one distinguishing feature of a state law that went too far according to Judge Breese: when it strips something "of those attributes by which alone it is distinguished as property." A state legislature could regulate trade in property of all kinds, but they could not totally annihilate commerce in any species of property, and so condemn the property itself to extinction."[11] But plainly those who owned and operated grain elevators were not deprived of their livelihood in the least by having to limit their rates to what the state legislature thought was a fair standard. Despite the extent of the regulation, the existence of the right was still there.

It was, no doubt, a strange idea of fairness: so long as it did not destroy the property involved, there was no clear limit to what the state could do. Gone were the days of Chief Justice John Marshall's maxim, that "[a]n unlimited power to tax involves, necessarily, a power to destroy." Breese, like Marshall, thought of it in terms of degrees, knowing that "there is a limit beyond which no institution and no property can bear taxation."[12] But unlike Marshall, there was only one degree that mattered: so long as

[11] Ibid., 87. Breese had only one precedent to depend on, a certain New York prohibition case, Wynehamer v. People of New York (1856). The case held that only the destruction of intoxicating liquors was unconstitutional, while the prosecution of moon-shiners and distributors was not. It was indeed a stretch to say that a form of legislation so laden with clear police power concerns could also explain the role of grain elevators in an agrarian society.
[12] M'Culloch v. Maryland, 17 U.S. 316, at 369 (1819).

there was still even the slightest glimmer of substantive rights remaining, there could be no complaint against a regulation, at least until voters took it to the polls. At best, such a system could at least guarantee that "private property may not receive remote and consequent injury." All of this depended on the state constitution's guarantee that the "owner shall not be deprived of his property without due process of law, etc.," Breese wrote. "If, in the exercise of any one of the admitted functions of government, a person's property is rendered less valuable, can it be seriously claimed this provision in the Bill of Rights has been infringed?" Breese was certain that substantive rights were protected well enough through procedural due process; it was apparently inconceivable that an exercise of local legislative power could harm its own members, nor could Mr. Munn even remotely claim that level of harm here. The law was passed, following all necessary parliamentary procedure, through an elected Assembly and Senate, which was "the guardian of the public interest and welfare," he concluded. State legislative powers were, after all, what "[e]very sovereign power possesses, inherently," meaning that its acts were "unrestricted legislative power, where the organic law imposes no restraints."[13] Certainly such a power would seem to include the ability to break up monopolies, which held sole control over grain-storage technology, and threatened to harm the people with exorbitant fees.

B. Declining Republicanism: William K. McAllister's Dissent

Breese's colleague, Justice William K. McAllister, was as obscure as a judge as his ideas were in the judiciary at the time. He was elected to the state judiciary in 1870, when the state held its convention, and then resigned after only five years. His dissent in

[13] Ibid., 5; 8.

the Munn case, though, was the strongest approach to police power jurisprudence, and would have offered tremendous guidance, not only for the outcome of Munn and subsequent cases, but for the whole course of the Progressive Era. He began his dissent on "elementary grounds." In language that was quite remote from the rest of his fellow justices (and under fire in much of American political thought) McAllister looked to the classic philosophy of "natural rights." Those rights were "antecedent to and exist independently of the constitution." People joined civil societies and formed constitutions -- and indeed, they created state police power -- in order to protect those rights. "Therefore the extent of constitutional protection can only be determined by a correct definition of the rights it was intended to secure." The whole point of government was "'to secure these rights and the protection of property," he wrote, echoing the Declaration of Independence's claim, that it was for this reason that "governments are instituted among men,' etc." The right of property was not a set of foreign and abstract principles that McAllister sought; it was instead enduring set of precepts about human beings which not even the most radical transformations of modern life could alter. "It must be admitted that the sense of property is deeply implanted in human nature – [it] is inherent in man."[14] In this, McAllister proved to be an inheritor of the eighteenth century natural rights tradition, and it continued to determine the course of his thought in a time when many people and most judges found it antiquated and unsustainable.

McAllister did not appear to see himself as a "philosophic judge," or one more prone to abstractions than actual case-law and facts. It was not the duty of the Court to explain and then defend those rights; it was instead meant to protect the basic features of constitutional government that did that well enough on their own. While the true mark of

[14] Ira Y. Munn et al. v. People of the State of Illinois, 69 Ill. 80, at 9 (1873) (McAllister, dissenting.)

good government was its power to protect "natural" rights, the true feature of a republican government was its ability to contain dangerous factions by ensuring that legislation was not completely in favor of one class over another. "Our government is one of the people, and its functions subject to disturbance by popular excitements, by which one class of men with certain particular interests or prejudices, either political or otherwise, may come into power, displace all against whom those prejudices run, and oppress them with unfriendly legislation." There was a difference between legislation that was an exercise of one class over another, and the sort that sought to remedy "social" injustices. The former proceeds on the assumption that justice is a matter of compensating for past wrongs; it is often driven by the righteousness of the cause, as populist farmers frequently did in McAllister's era. The latter, though, seeks to recover a lost form of justice that applies equally to all -- a process that might very well require legislation that is class based for a time. Once that standard of fairness is recovered, however – once the means achieve their ends – then the task was complete. It was, of course, a fine line between these two views. The regulation in question may very well have been justified; but to allow it for the reason Justices Breese did -- that state legislative power is the supreme expression of the social contract -- would introduce a variety of new problems, not only for the Illinois Supreme Court, but for the federal judiciary as well, since the principles McAllister described were now added to the text of the United States Constitution under the Fourteenth Amendment.

II. Chief Justice Morrison Waite and Modern Constitutionalism

When he was appointed Chief Justice in 1874, an editorial in the *Maine Farmer* noted that Morrison Waite "has not that rational reputation which many of this predecessors enjoyed at the time of their appointment," since he "had but little connection with politics." But, despite his lack of experience, Waite was still "devoted to his profession, [and] enjoyed much esteem in his own State, for his integrity and sense of honor."[15] What he did have, though, was legal expertise, making him one of the new professional lawyers who would be appointed to the bench more frequently in the coming years. "His knowledge of the law extends to all branches, including admiralty and constitutional law, in both of which specialties he had the reputation [for] being very strong," the New York Times reported. No other new judge had "the same versatility and range of practice and legal experience."[16] These professional qualities are probably what moved him to take control over the Court in his two years as Chief Justice. In that time, he not only followed but made explicit his adherence to Chief Justice Roger Taney's understanding of state sovereignty; this meant passive judicial deference to state laws, blended with bold declarations that would "settle" the more troubling questions in national life. It was at once an extreme deference to politics, and at the same time, a willingness to override political decisions with judicial rules when necessary.

Waite viewed government as a social compact: people joined it and became citizens, and in doing so, gave up their rights in order to preserve purely political rights through the community itself; the freedom of the individual was nothing more than the

[15] Editorial in Maine Farmer 42, 9 (Jan. 31, 1874): 2.
[16] New York Times, January 20, 1874.

freedom of the whole. "Citizens are the members of the political community to which they belong," he wrote in U.S. v. Cruikshank (1875). There, the Court refused to apply the provisions of the Enforcement Act to the perpetrators of the Colfax Massacre in Louisiana. "They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government [sic] for the promotion of their general welfare and the protection of their individual as well as their collective rights." Governments were simply the aggregate authority of those who had submitted, and the purest expression of that was, of course, the states. Those states had in turn been the vehicles by which the Constitution was ratified, meaning that they were, and continued to be, the superior institutions. "The government thus established and defined is to some extent a government of the States in their political capacity." True, it was also "a government of the people" according to Waite. The powers over the states were "limited in number, but not in degree." Beyond the enumerated functions of the national government, it not only lacked authority on certain questions -- but "it has no existence," he wrote. "It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the ends its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction."[17] Waite did not view the Constitution as any sort of empowerment of the

[17] 92 U.S. 542, at 549-550 (1875). This echoed the state of Maryland's point in Mc'Culloch, i.e., that the Constitution was ratified through state conventions, meaning that the act of consent was not from individual citizens, but from states. Chief Justice John Marshall admitted that, from these conventions, "the constitution derives its whole authority." Still, he wrote that "[t]he government proceeds directly from the people; is 'ordained and established,' in the name of the people." Mc'Culloch, at 404. The states were merely the instruments of the popular will. The process of ratification did not do this out of any recognition for state sovereignty; it was instead the only feasible way to do such a thing, since a national popular convention was impossible. It was the opposite view, though, that Justice Taney would revive, and Justice Waite would then maintain in the early Lochner Era.

national government; it was instead a specific list of limitations on that power. Accordingly, the Fourteenth Amendment was little more than a broadening of that power in order to patch things up after the Civil War.

Justice Waite maintained this principle in Minor v. Happersett (1875), where he wrote that the most basic guarantee of the Fourteenth Amendment -- the Citizenship Clause -- is, once again, "suited to the description of one living under a republican government." He admitted that this included women, who were seeking a judicial guarantee for the right of suffrage. At the same time, though, the meaning of citizenship contained within itself no guarantee of the right to vote. "Certainly, if the courts can consider any question settled, this is one," Waite wrote, with distinctly Taney-style language. "For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage."[18] The Nineteenth Amendment, of course, would eventually override this ruling, and nationalize the woman's right to vote. But at the time, Justice Waite's opinion damaged far more than the female population. Plainly, for Waite, a "citizen" was a mere resident, or individual subject to the laws; it had nothing to do with the self-evident nature of political *participation* that had given the word its definition for eons. Perhaps state governments had their reasons for denying women the right to vote; but that did not

[18] 88 U.S. 162, at 166; 177 (1874). Also like Justice Taney, Waite was always willing to invoke the social, political, and economic conditions of the Founders' day to support his position – and never the ideas. "At common-law, with the nomenclature of which the framers of the Constitution were familiar," he wrote, citizenship did not in practice include the rights of women to vote; therefore, the Fourteenth Amendment did not offer any such guarantee itself. Compare this with Taney's words in Dred Scott v. Sanford (1856): we must look above all to "the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence, and when the Constitution of the United States was framed and adopted," he wrote. Such a view "displays it in a manner too plain to be mistaken." 60 U.S. 393, at 407. Plainly the conditions of their time were far more important than their own thoughts or words. It was, of course, the classic attempt to understand the past even better than it understands itself – which always results in an abuse of history for short-sighted purposes.

call for a nation-wide denial of what citizenship itself meant, or that it truly was a right that ought to be extended to all at some point in national development. Once again, it would require an amendment to make explicit what should have been obvious, not only by the words of the Fourteenth Amendment, but in national consciousness in general.

This had everything to do with the changing perception of republicanism in the Gilded Age. Waite wrote that the "principle of republicanism" is that government's duty to "protect all its citizens in the enjoyment of this principle, if within its power," and that this duty "was originally assumed by the States; and it still remains there." Accordingly, the "only obligation resting upon the United States is to see that the States do not deny the right." Yet that duty was purely democratic. The powers of the national government granted by the Fourteenth Amendment, as well as ensuing Reconstruction legislation, were mere anomalies of positive law; as such, Justice Waite and the Supreme Court were merely forced to interpret them in the most modest fashion. The powers of Congress were "limited to the enforcement of this guaranty," i.e., the right to peacefully assemble.[19] It was not the nature of the government, but the limits placed upon it that mattered. States, on the other hand, which were more essentially republics, had powerful levers made to serve the democratic will -- even as they lacked any clear goal. These, it seems, were the assumptions that Justice Waite held when he wrote the Munn opinion.

[19] Cruikshank, at 91-92. Justice Waite seemed particularly concerned with the definition of a republic in this case. It was not only a regime that guaranteed certain rights, but had as its central feature "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or the duties of the national government." There appeared to be little difference between a republic and a pure democracy. For him, it was little more than a democracy of a more orderly sort; even the most unjust deprivations of basic rights and the most privileged class legislation could still be called "republican," so long as it proceeded according to legislative procedures. "The very idea of a government, republican in form, implies a right on the part [sic] of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances," he wrote. Ibid., at 553.

A. The Munn v. Illinois Decision: The Means of Government without the End

It is striking how the Munn opinion, though only the second instance of a Fourteenth Amendment question arising for the Court, was approached with such a routine attitude. Waite did not give anything like Justice Miller's preface in Slaughterhouse (i.e., that "[w]e do not conceal from ourselves the great responsibility which this duty devolves upon us"), nor did he express the need for thoughtfulness and caution in answering this delicate question.[20] Instead, he wrote the opinion as if the question was long settled. It was not settled by the Slaughterhouse Cases, though: Waite did not cite the Slaughterhouse opinion, nor did he even mention Justice Miller. It seems he sought to solidify the limited scope of the Fourteenth Amendment on a completely different basis -- to essentially patch up Miller's holes through which an exception might sneak in and require the Court to strike down a state regulatory law. He would thus ensure that state authority was final, and that the protections of the Amendment would stay out of local economic affairs. There could be neither an appeal to substantive rights, nor an adjustment of state governments so as to bring them back to their intended purpose as republics. For Waite, it seems, neither of these things existed, at least from the law's point of view.[21]

Waite looked above all to a common law understanding of constitutionalism, and the organic view of government. It involved, of course, "a limitation upon the powers of the States," one that was "old as a principle of civilized government"; certain limitations appeared in Magna Charta, and had been a central feature of the state constitutions and the national Constitution when it appeared. But it was based on an understanding of the

[20] Slaughterhouse, at 67.
[21] It is possible that Waite was concerned about the cases that would soon arrive, based on challenges to local regulations of the railroads.

social contract as a whole, which excluded any claim to rights that were outside of or preceding the formation of government. "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain," Waite wrote.[22] The social compact, though, had not occurred at the national level; the meaning of United States citizenship only mattered for Americans involved in classic diversity cases or affairs overseas. The rights of the state citizen were therefore conditional, and quite subordinate to the determinations of popular legislation. This plainly led to a broad understanding of the public interest; there were a variety of instances where the pursuit and keeping of private property might injure it.

In Justice Waite's mind, preventing such public injuries was the only possible meaning of state police power. They were different things in kind, and bound to conflict. "Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good," Waite wrote. "In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, &c., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold." This was such a standard practice, and already so common in state legislation, that it "has never yet been successfully contended that such legislation came within any of the constitutional

[22] Munn, at 123.

prohibitions against interference with private property."[23] Justice Waite therefore held a distinctly organic understanding of government, much like Judge Breese on the Illinois Court. This was hardly an attempt to avoid the sort of difficulties that might come from holding the Fourteenth Amendment over state legislation, which appeared in the Slaughterhouse Cases; it was instead a wholly different view of government -- one that was not founded on the right to keep and pursue property, but one that simply tolerated its existence, and let all other affairs be dominated by the idea of "the public interest."

"Business affected with the public interest" was, of course, a terribly vague concept. By Waite's reasoning, "a business affected with a public interest becomes nothing more than one in which the public has come to have an interest," Court historian Bernard Schwartz recently quipped. "This rationale becomes a means of enabling government regulatory power to be asserted over business far beyond what was previously thought permissible."[24] Justice Waite could not perceive the grain elevators as anything but the public interest -- nor was it possible that a degree of corruption had occurred in the process of legislation. For Waite, it was legislation in which the "whole public has a direct and positive interest." Yet what the Court and the state of Illinois meant by "whole" came at great expense for the likes of Mr. Munn and others like him. It was a constructed "whole interest," one that did not depend on what was actually of benefit for all citizens, but for only a portion. In ruling this way, Justice Waite made it clear that he was quite attuned to the times: the law was in fact the "application of a long-

[23] Munn, at 124; 125 (1876). Waite invoked Chief Justice Roger Taney in this case as well, citing the License Cases, which defined police powers as "'nothing more or less than the powers of government inherent in every sovereignty, . . . that is to say, . . . the power to govern men and things.'" Ibid., 125. There were simply no rights that stood apart from state power in Taney's mind, meaning that if a right conflicted with a state regulation, it was to be treated as a subordinate thing, and deserving no remedy.
[24] Bernard Schwartz, *A History of the Supreme Court* (Oxford: Oxford University Press, 1995), 165.

known and well-established principle in social science [sic], and this statute simply extends the law so as to meet this new development of commercial progress." We should recall that Justice Miller never once referred to "progress" in his Slaughterhouse opinion, nor did he ever discuss the need for local legislation to stay attuned to the times; while the law in question was upheld, in light of the serious health and safety concerns in New Orleans, Miller never suggested that republican government must alter its inner principles in order to adapt. But Waite saw state sovereignty differently, and it was clear that "popular sovereignty" of the previous generation had now evolved into the legitimate use of public power to ensure that society could "progress." In light of these principles, he wrote, "there is no attempt to compel these [elevator] owners to grant the public an interest in their property, but to declare their obligations, if they use it in this particular manner."[25]

Indeed, the basis of political legitimacy had shifted in the Gilded Age: where it had once been natural, it was now a historical thing. Common law judges might have viewed their craft as an embodiment of eighteenth century "natural law." But now, the flexibility of that law was of greater emphasis -- not so much because of its ability to adapt to the times, but because of the sovereign power of legislators. For this reason "[a] person has no property, no vested interest, in any rule of the common law," Justice Waite concluded, emphasizing that property "is only one of the forms of municipal law, and is no more sacred than any other." The right of property, after all, did not "natural" as earlier generations believed: it was "created by the common law," meaning it "cannot be taken away without due process." But that was the only true protection. Beyond the required procedures, "law itself, as a rule of conduct, may be changed at the will, or even

[25] Munn, at 133.

at the whim, of the legislature, unless prevented by constitutional limitations." Waite was not in the least uncomfortable with the "whims" of the legislature; both the legislature and the concept of rights both sprang from the same social contract. "We know that this is a power which may be abused; but that is no argument against its existence," he wrote. With these words, Justice Waite introduced a particularly novel understanding of the purpose of government, which held that even the gravest abuses of power were still legitimate -- that corruption was equal to goodness, so long as it abided by the due process of law. It was here that he gave his most famous quip: "For protection against abuses by legislatures the people must resort to the polls, not to the courts."[26] This was, of course, a purely democratic understanding of state governments; even constitutions themselves were subject to popular vote.[27]

There were, of course, plenty of instances that such class legislation was legitimate from the point of view of classic republicanism. Perhaps it was necessary to correct the sort of monopolies that could spring up spontaneously in society -- or, in this case, perhaps the owners of grain elevators *were* charging exorbitant rates, meaning that

[26] Ibid., at 134.

[27] Justice Waite's view of rights was therefore bound by the community. But what kind of thing did he suppose rights were? His opinion in Reynolds v. United States (1879) is revealing, and reveals the extent of his modernized outlook that dominated his jurisprudence. The Mormon polygamy case, which featured a challenge to a national anti-polygamy law under the First Amendment's Free Exercise Clause was, of course, a sensible ruling on its face. Yet Waite's perception of substantive rights was clear: they were fundamentally autonomous, and reserved for the individual person who might well face tremendous regulations in all other areas of life. Waite wrote: "it is impossible to believe that the constitutional [guarantee] of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." This, of course, was a considerable echo of his *Munn* opinion. The institution of marriage was quite "affected with the public interest," and was therefore subject to local and, in this case, federal legislation. Congress was therefore within its power to enact anti-polygamy laws. "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may [do so] with practices." To say otherwise, Waite concluded, "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." Reynolds v. United States, 98 U.S. 145, at 165; 167 (1879). Yet it was clear that such rights persisted, and were still protected under the law, though this could only happen if they were reduced to a very miniscule condition, as Justice Breese also claimed: the pursuit of property could be whittled down quite far under regulatory laws; but so long as the right itself was not completely destroyed, there could be no grievance.

the legislation in question was quite justified. But Justice Waite did not see any such distinction: class legislation was *always* justified, not as the means by which a state government might recover its own ends, but so it might bring the sort of progress that elected officials thought essential for social development and the role of the state in the lives of citizens.

B. Justice Stephen Field: The End of Government Without the Means

There was substantial public dissent against the Munn ruling, far more than the Slaughterhouse Cases received. The New York Times reported that there was "little consolation" from the "legal assurance that the principle thus sanctioned by the court is in conformity with the common rule, which required that the rates charged shall bear a reasonable proportion to the services rendered. Who shall determine the reasonableness of the charge, is the question which underlies the distrust awakened by the decision."[28]

This was no doubt inspired by Justice Stephen Field's dissent in Munn. There, he declared in the first paragraph the fundamental problem: "The principle upon which the opinion of the majority proceeds is, in my judgment, subversive of the rights of private property, heretofore believed to be protected by constitutional guaranties against legislative interference, and is in conflict with the authorities cited in its support." He recounted the same points that Mr. Munn and his associates mentioned in their own brief: the warehouse and elevator had been constructed by their own efforts, at their own expense; the rates were long settled between the businessmen and the farmers; and the state Constitution gave specific protections for those elevators, which the rate-setting law plainly defied. Munn had done much to comply with the earlier state laws when he

[28] New York Times, March 29, 1877.

sought a state license. The true injustice, though, was not in this, but in the fact that Munn and his associate were deprived of their liberty of contract, which Justice Field believed was sacred, and now explicitly protected under the Fourteenth Amendment. "There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted," he wrote. "One might as well attempt to change the nature of colors, by giving them a new designation."[29] Private meant private, and public meant public. The purpose of the public sphere, and the public power of the government in particular, was to protect that end. It was not that the public had no interest in protecting others from that pursuit, according to Field. It was simply the fact that such a protection could not be allowed to infringe on that fundamental right -- and, of course, it was the duty of the Court to say so, and to strike down conflicting laws accordingly.

For Field, there seemed to be no limit at all to what the Court should do to protect the pursuit of property -- that this "equality of right" meant that "all pursuits, all professions, all avocations are open without other restrictions than such as are imposed equally upon all others of he same age, sex, and condition." The Fourteenth Amendment had simply unleashed the judiciary's authority to protect substantive rights, which had always been there. But Field said this because he saw the right to keep and pursue property in a purely nationalized way. At best, state governments existed to ensure safety and health, and, of course, to pass an unlimited array of "public morals" legislation. But when it came to property and business per se, the states could have no place -- not in restricting or even encouraging the pursuit of property. It was "the fundamental idea upon which our institutions rest," he wrote, and anything less would mean "our government

[29] Ibid., 138.

will be a republic only in name."[30]Plainly, the states fell outside Field's definition of a "republic"; they were in fact little more than mobs, while their constitutions and local legislation were only shields that protected tremendous injustices. With this in mind, he Field delivered his most famous words:

> 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.

Field could certainly describe what failed republic was, when it fell short of its ability to protect basic rights. But he did not seem to have any clear idea of what a republic was actually supposed to be, or how it might protect those rights well enough on its own, if it was simply left to legislatures to abandon bad laws, or left to the people to exercise their electoral power. In short, he could not perceive that the Fourteenth Amendment was "corrective" in its power, or there to put state legislatures back on track when they strayed from their own republican principles. Where the Amendment's protections of "life" and "liberty," "are of any value, [they] should be applied to the protection of private property," he wrote.[31] They could have no meaning beyond that absolute requirement.

There was, of course, a broad range of police power concerns, which the Constitution itself specified. States were required to give "just compensation" for whatever property it took for public purposes; it had the power to tax (assuming that all "bills for raising revenue originated in the assembly); and, of course, it had the power to

[30] Slaughterhouse, at 108 (1873).
[31] Munn, at 140-141; 142.

regulate the keeping and pursuit of property -- not because of its impact on the public, but "so far as it may be necessary for the protection of the rights of others, and to secure to them the equal use and enjoyment of their property." Again, much like "life" and "liberty," all police power concerns about "health" and "safety" were reducible to concerns about property according to Field. "The doctrine that each one must so use his own as not to injure his neighbor," he wrote, "is the rule by which every member or society must possess and enjoy his property; and all legislation essential to secure this common and equal enjoyment is a legitimate exercise of State authority." Here, Field showed his own departure from the classic perception of republicanism in the Gilded Age: he could only perceive a republic as the sort of regime whose laws protected fundamental rights, through the power of the judiciary entrusted with interpreting those laws. Judicial interpretation amounted to nothing more than limits, drawing the line over which democratic power was forbidden to pass. "Except in cases where property may be destroyed to arrest a conflagration or the ravages of pestilence, or be taken under the pressure of an immediate and overwhelming necessity to prevent a public calamity, the power of the State over the property of the citizen does not extend beyond such limits."[32] Clearly, he did not perceive the need to help farmers as an "overwhelming necessity" -- nor could he have imagined the plight of laborers in the coming industrial era as a "public calamity."

C. Field's Constitution

While Justice Waite saw an unlimited political power within state governments, Justice Field saw only the end of government -- and nothing to support it other than the

[32] Ibid., 146.

judiciary. The right to keep and pursue property was a thing to be protected at all costs, in the confidence that it would actually create the solutions to its own problems -- or, if it failed to do that, it should be protected anyway, because that was the meaning of freedom. Perhaps protecting such a right would allow "virtual" monopolies to form, and overtake otherwise fair trade by raising exorbitant rates, or, as it happened later, reduce wages and increase hours on workers beyond any humane standards of fairness. It might be a source of tremendous injustices, as liberty was allowed to overtake equality. But Field was confident that a clear protection of those fundamental rights would eventually lead to the best solutions, and that apparently even those who suffered under such conditions could still rest in the joy that their rights were protected as well.

For Justice Field, it was plain that republican governments themselves had no special role in protecting those rights. The fact that Field would find so inconceivable what earlier Americans thought self-evident -- e.g., that the "preservation of property… is a primary object of the social compact," and on *this* basis, every state constitution "was made a fundamental law" -- indicates just how different his liberalism was from that of the Founders and their Constitution.[33] Liberty of contract, or even the most radical laissez-faire principles, it seemed, were no longer rooted in the nature of man or the purpose of government. This was obvious enough in his language: all business was now "placed at the mercy of the legislature of every state."[34] There was no *correcting* those governments and recovering the purpose of state police powers because they were not truly "corrupted" as it was always understood. There was only a critical review of their activities -- which placed tremendous authority in the hands of the Court.

[33] Justice William Patterson, Vanhorne's Lessee v. Dorrance, 2 U.S. 304, at 310 (1795).
[34] Munn, at 185.

In the *American Law Review*'s special issue on the centenary of the Supreme Court, Field wrote that "as inequalities in the conditions of men become more and more marked and disturbing," it was the role of the judiciary to do what it had always done: keep those popular impulses from crushing fundamental rights, before they "encroach upon the rights or crush out the business of individuals of small means." This was sure to happen "as population in some quarters presses upon the means of subsistence, and angry menaces against order find vent in loud denunciations." Field's assessment of class animosity may have been quite correct, and it would only become worse in the next few years. But to assume, as he did, that there were no "republican remedies," as James Madison understood it, nor even regulatory solutions that might step on fundamental rights for a time, was indeed to re-define government in radical new ways. For this reason, "it becomes more and more the imperative duty of the court to enforce with a firm hand every guarantee to the constitution," he wrote. "Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement," he wrote.[35] The judiciary was indeed the whole reason for the rule of law, and therefore the jewel of the republic. Upon his retirement in 1897, which came after a stunning 37-year career, Field's farewell address to his fellow justices was reprinted in the New York Times. There, he restated the same idea, identifying the "great glory" of the American people as one thing that was central to the success of a free government: it "always and everywhere has yielded a willing obedience to them," i.e., not the laws, as those who stand by the classic definition of a republic would suppose -- but to the Court's rulings.

[35] Stephen J. Field "The Centenary of the Supreme Court of the United States," *American Law Review* 24 (May/Jun. 1890): pp. 366-367.

This fact, and this only, showed the "stability of popular institutions, and demonstrates that the people of these United States are capable of self-government."[36]

It was what Howard Jay Graham would later identify as "judicial trusteeship," which was "manifested both doctrinally and psychologically in Field's work," and which no doubt kept him on the Court for so long -- longer than any other justice, and, by all accounts, longer than his own health could handle. All the while, he held great anxiety about the conditions of American politics, and seemed painfully aware of the necessity for men like himself to stand as guardians of fundamental rights, which could easily be usurped by legislative processes and become the victims of bad legislation -- if not violence. He had a dark outlook, and a sense of "confused frustration that at times seemed to heighten anxiety and reveal a partial awareness that even the staunchest resistance to paternalistic trends might prove fruitless and self-defeating."[37] It was, no doubt, an aspect of the age: the nineteenth-century was all about the loss of confidence in fundamental principles -- even the most basic precepts of human dignity. All of the most sacred ideas that defined a civilization, or even a nation devoted to liberty, were suddenly in tremendous doubt. Progressivism would later offer a historical basis for natural right; but until that time -- and even after that time -- there was only one thing to do: insist on fundamental principles, and show their supremacy through bold assertions of judicial authority. Field found himself with precisely that duty on the Supreme Court -- and in

[36] "Justice Field's Farewell: The Senior Member of the United States Supreme Court Announces His Retirement," New York Times, October 15, 1897.
[37] Howard Jay Graham, "Justice Field and the Fourteenth Amendment," Yale Law Journal, Vol. 52, No. 4 (Sep. 1943): pp. 853-854.

this he was "obviously an anxious and troubled man, committed to policies whose ineffectiveness he sensed, yet to which he clung all the more tightly," Graham wrote.[38]

Justice Field's words make this abundantly clear. The Court, and the Court alone, "possesses the power of declaring law, and in that is found the safeguard which keeps the whole mighty fabric of Government from rushing to destruction." With this, he reminded his fellow justices that "this negative power, the power of resistance, is the only safety of a popular Government, and it is an additional assurance which the power is in such hands as yours."[39] The rights that Field was so certain about depended entirely on the judiciary for their place in public life. It was therefore the judiciary, that truly powerless branch, that would yield in the face of Franklin Roosevelt's threats in the New Deal era. By then, the belief was practically self-evident that economic rights were inherently in conflict with state regulation, and that "business affected" with the public interest" was quite simply every aspect of business aside from a very basic sort of profit-getting. Waite's justification for regulatory laws were, of course, very modest, but they nonetheless carried the germ of much broader New Deal and Great Society plans. "Since that time, it has been the doctrine that has furnished the constitutional foundation for the ever-

[38] Justice Field's approach to judicial review seems to have evolved within the course of his career, largely in response to the appearance of socialism in America, and talk of communist revolution in Europe at the time. Howard Jay Graham argues that Field's tendency to enforce laissez-faire doctrine increased in reaction to these very real threats to liberty. At a time "when Justice Field's opinions were veering more and more in the direction of conservatism, he had reason to be troubled by the trend in domestic affairs and by his colleagues' decisions," Graham writes. There had been the impeachment of President Johnson, resulting in "months of widespread demoralization in all departments of government, state and national"; there had been equal public contempt for state legislatures (which no doubt resulted in the sorts of legislation we find in Munn v. Illinois). "Finally, climaxing the circumstantial case, is the fact that a great social cataclysm – the first to be reported by cable and exploited by modern journalistic devices – may well have been one of the decisive factors in reorienting Field's outlook," Graham writes. Incidents like the Paris Commune "produced a hysteria in conservative circles in the United States which caused such current indigenous forms of radicalism as the Granger and labor movements to be attacked as conspiracies against the institution of property." "Justice Field and the Fourteenth Amendment," pp. 160; 165.

[39] "Justice Field's Farwell," Ibid.

broadening schemes of business regulation that have become so prominent a feature of the present-day society."[40]

It is worth noting that Justice Field gave no attention at all to McAllister in his Munn dissent. It was most likely because he did not share the same view of natural right: his was absolute, having everything to do with the rights themselves, and nothing at all to do with the sort of government that was designed to protect them. It placed the Supreme Court and its defense of fundamental rights at the center of the regime, rather than the Constitution, the republican state governments, and the institutions they created. This does much to explain the nature of the Lochner Era, and the meaning of the New Deal revolution that brought it to an end: insofar as Field's view prevailed in that period, it was destined to collapse.

Conclusion: Judge McAllister's Road not Taken

Justice Samuel Miller, who had written the *Slaughterhouse* opinion, silently joined the majority in Munn v. Illinois. It would appear that he abandoned his initial position presented in the Slaughterhouse Cases. But in truth, he had not changed his mind at all, at least according to his majority opinion in Davidson v. City of New Orleans (1877), handed down that same year. The case involved yet another challenge to a piece of state legislation under the Fourteenth Amendment: it sought the sort of exception that Miller believed existed, but which Justice Waite had removed. "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race," he wrote. "It is not new in the constitutional history of this country, and it was not new in the Constitution of the United

[40] Bernard Schwartz, *History of the Supreme Court*, 165.

States when it became a part of the fourteenth amendment, in the year 1866." It had been part of the "law of the land" long before the American Constitution declared that title for itself in Article IV. The due process guarantee in English common law was not directed at the British constitution (which did not exist in written form), nor at Parliament. It was simply understood as the sort of thing a republican government did by definition. This was the way state constitutions understood themselves at the time of the Founding. Those guarantees were "embodied in the constitutions of the several States, and in one shape or another have been the subject of judicial construction."[41] If the Supreme Court was going to apply the Fourteenth Amendment to the states, it would not simply strike down local legislation, but ensure that those regulations acted in such a way that fulfilled the purpose of state governments in the first place.

Justice Miller saw a new trend in the Gilded Age: for all their republican institutions – their checks and balances and frequent elections and guarantees of substantive rights – the states were not only falling short of their own principles, but were increasingly willing to reject them for the sake of very partial and short-sighted concepts of justice and the public good. There were sensible remedies to legitimate problems; but then there were unlimited regulations that would never remove state power from the private sphere. At the same time, there was a whole new basis of complaints against state regulations. Before, the remedy was based on a public movement, a weighing of alternatives, and finally a vote – always guided by an appeal to the basic precepts of justice and neutral government understood by all. But now, it involved far greater attention to the federal government, and the Supreme Court's interpretation of the Constitution. "It is not a little remarkable, that while this provision has been in the

[41] 96 U.S. 97, at 103-104.

Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century," Miller wrote, referring to the Bill of Rights, "this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion." But now, while the Fourteenth Amendment had only existed for a few years, he observed that "the docket of this court 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." The hope had been that the Amendment, and maybe handful of cases, would be a sufficient reminder of what a republican government is, and that Congress could enforce that view accordingly.

But by this time, it was thought that the national government would no longer be a temporary, adjusting, remedying thing, but a permanent and fixed presence in local affairs. This, Miller thought, could only be the result of "some strange misconception of the scope of this provision as found in the fourteenth amendment." That misconception would increase, and come to reshape political life and American self-understanding for decades to come. In *People v. Budd* (1892), there appeared to be no end to what counted as legitimate police power – not because it was pursuant or compatible to the Fourteenth Amendment in these cases, but because it was plainly superior to them. After a survey of how entrenched the Munn precedent became in the lower course, Justice Samuel Blatchford declared that there was "little reason, under our system of government, for placing a narrow and close interpretation on the police power." Expansive regulations were in the nature of republicanism, as it was always understood. No republic worthy of the name could "hamper the legislative power in dealing with the varying necessities of

society… calling for legislative intervention in the public interest." More importantly, the time had come to admit that law could resist or even direct or shape "the searching influence of public opinion, which was sure to come sooner or later to the side of law order and justice however it might have been swayed for time by passion or prejudice," i.e., prejudice in favor of *laissez-faire*, both in a minority of the public and on the Supreme Court.[42]

Other critics, though, could see what such a rule actually meant for the Supreme Court as an institution. While Chief Justice Waite laid down a rule that seemed to keep the judiciary well out of local affairs, Clifford Thorne maintained that this was an unsustainable position, given the show transition in the way people understood law: eventually, the Court would actually entrench itself deeply in state legislation, and assume the role of a legislature itself. One could not say that "business affected with the public interest" justified extensive regulations, and at the same time insist that there remained a constitutional right of property and contract, however limited. It would always be a question of degree, and such a question would always depend on the judiciary to determine what was excessive and what was not. Thorne saw the problem in his aptly titled article from 1909, "Will the Supreme Court Become the Supreme Legislature of the United States?" – particularly when it came to rate-setting laws. "The development of our law as to the power of the legislature and the courts in fixing rates to be charged by the public service corporations is practically the history of one case," i.e., *Munn*, the "Father Abraham" of judicial review in the Progressive Era. It was the greatest irony: beginning with absolute democracy somehow meant ending with absolute judicial control. On one hand, "[t]he legislature, so say the courts, has sole jurisdiction

[42] *People v. Budd,* 145 U.S. 517, at 535 (1892).

over fixing maximum rates, and its decisions 'bind the courts as well as the people. And yet these same courts declare that *they* can set aside such rates as unjust and unreasonable."[43] The Court, in other words, had become a sort of fundamental legislature. It did not deal with the immediate laws so much as the framework of all law. Such a framework was entirely necessary, given the nature of democracy. But constitutionalism had always been the thing to do that – not the judiciary.

Such a role for the judicial branch might be desirable, Thorne admitted. But such a revision of the Constitution would call for the ratification of an amendment – not a Court that would "very gradually absorb that function." The Judiciary would become the fundamental institution through "a gradual extension in the meaning of words, or narrowing their limits," and it would "slowly but surely transform, enlarge, modify, or completely destroy the meaning of almost any statue written by man."[44] In this, Thorne was prophetic about modern judicial review as we know it: the "hands-off" doctrine in *Munn*, with such radical deference to the legislature, would leave all rights in limbo, and it would fall to the Court to define and protect what rights Americans had left. It was the consequence of moving away from constitutional republicanism.

Harleigh H. Hartman observed the same phenomenon in his 1920 study on the meaning of "fair value" in public utilities, observed the new disconnection between public utilities and private industry. "Both are convinced that their interests are inherently antagonistic. The courts stand arbitrator between them." All of this, though, was in a "transitional state," i.e., it was new to find public life and the pursuit of property in conflict. It was a transition into confusion, not of dissenting political parties, but of

[43] Clifford Thorne, "Will the Supreme Court Become the Supreme Legislature of the United States?" *American Law Review*, Vol. 43 (1909): 241.
[44] Ibid., 263.

clashing orthodoxies. The attempts by state legislatures and utility commissions to define the relationship was "handicapped by the necessity of trying to prophesy, and shape their opinions to meet, the undefined course of judicial review which persistently refuses to state either the basis upon which it rests or the aims it seeks."[45] With *Munn* in particular, Hartman observed how the "private" aspect of the industry was only the income – not the facilities. As soon as they had any contact with the public sphere, they became wholly public, meaning "the private interest of profits is subordinated to the public interest." Munn indicated a radical transformation of what people meant by "the public good": "The promotion of the general economic welfare which first created private property rights and then ordained that they be given free sway to provide incentive for development, now demands that they be limited," he concluded. Liberty, as it was understood for centuries, "has ceased to promote the common good. Regulation becomes necessary."[46]

[45] Harleigh H. Hartman, *Fair Value: The Meaning and Application of the term "Fair Valuation" as used by Utility Commissions* (Boston: Houghton Mifflin Company, 1920), pp. xi-xii.
[46] Ibid., 11.