The Public Law of Public Utilities

Joshua C. Macey[†] & Brian Richardson[††]

This Article describes the constitutional history of public utility regulation to make sense of apparent puzzles and inconsistencies in modern administrative law. In chronicling this history, we first show that utilities' special constitutional right to challenge regulations on substantive-due-process grounds is based on a public-private distinction that courts have otherwise rejected. Second, we argue that modern efforts to invoke Article III to restrict agency adjudication do not reflect a consistent understanding of the public-private distinction, but instead revive the distinction in some contexts (adjudication) but not others (rulemaking). Third, we provide a new framework for understanding the Supreme Court's turn to structural arguments to check administrative agencies. On the last point: for nearly five decades prior to 1935, courts used rights-based arguments, not structural ones such as the nondelegation doctrine, to deduce the scope and content of the legislative, executive, and judicial powers. Once the Supreme Court abandoned its freedom-of-contract jurisprudence, it was a public utility case that breathed new life into the nondelegation doctrine. Public utilities were a natural battle ground for reshaping the public law of administration. Like today, private rights, delegation, and agency adjudication were all central preoccupations of this public utility moment, but the frameworks courts advanced to answer these puzzles have vanished from our modern debate. Today's administrative law thus reflects an ad hoc revival of public utility legal concepts, and it reinvents these concepts such that they bear little resemblance to their public utility genealogy.

† Associate Professor, Yale Law School.

†† Associate Professor, Cornell Law School. We are grateful to participants at the 2023 National Conference of Constitutional Law Scholars, and to participants in faculty workshops at Cornell, Duke, Notre Dame, the University of Chicago, and Yale. We also thank Will Baude, Mitch Berman, Curt Bradley, Adam Chilton, Barry Cushman, Blake Emerson, Bill Eskridge, Bridget Fahey, Alison Gocke, Tara Leigh Grove, Chris Havasy, Bruce Huber, Hajin Kim, Genevieve Lakier, Daniel Markovits, Jerry Mashaw, Jonathan Masur, Henry Monaghan, Bill Novak, Nick Parrillo, Ari Peskoe, Farah Peterson, Eric Posner, Morgan Ricks, Noah Rosenblum, Neil Siegel, Ganesh Sitaraman, David Strauss, Ernie Young, Shelley Welton, and Taisu Zhang for helpful comments.

Introduction 181
I. Public Utilities and the Birth of Modern Administration 187
A. Lochner and Its Limits 188
B. The New Deal Transformation 189
II. Businesses Affected with the Public Interest 191
A. Munn and Businesses "Affected with the Public Interest" 191
B. Substantive Due Process (Regulatory Takings) 195
III. *Lochner* Era Retrenchment 199
A. The Public Utility in the Lochner Era 199
B. Democratizing the Public-Private Distinction 203
C. Munn in the New Deal 209
IV. Judicial Retrenchment 214
A. The Public Law of Public Utilities 215
V. The Public-Private Rights Distinction Today 222
A. Public Utility Rights and Administrative Adjudication 223
B. The Shift to Structure 228
Conclusion 233

Introduction

In 1938, at the heart of the New Deal switch-in-time, Charles Fairman, a Professor at Stanford Law School, wrote to Justice Felix Frankfurter about an exciting discovery: he had found a lost manuscript that, in Fairman's view, proved that *Munn v. Illinois*, a nineteenth-century case upholding price regulations for Chicago grain elevators,[1] had secretly been ghost-written by a surprising author.[2] The progressive Justice Bradley, not the more moderate Chief Justice Waite, had outlined the majority opinion.[3] Fairman had been drawn into a New Deal-era fixation: the interpretation of *Munn* and its progeny had become a set piece in the contemporary debate over the constitutionality of the regulatory state.[4]

To understand why *Munn* became a shibboleth in debates over the constitutionality of the administrative state, it is important to understand the puzzle that *Munn* created, and the way in which the Supreme Court's attempts to resolve that puzzle left larger questions to future legislators and courts. Throughout the *Lochner* period, courts tolerated aggressive regulatory interventions of businesses that were "clothed with the public interest" under a standard established in *Munn*.[5] Contemporary observers understood this case to authorize price controls and other regulatory interventions for this new class of firms—public utilities—but uncertainty about the scope of this public-interest standard troubled courts and administrative agencies for more than half a century.[6]

In fact, more than four decades after *Munn* and nearly three decades before he was elevated to the Supreme Court, then-Professor Frankfurter described the case to his Harvard law students as laying out the core issue in discerning the limits of legislative power: "The whole struggle was to be on the point whether these cases form an exception to a rule of non-intervention or instances of a situation justifying legislative intervention."[7]

---

1. 94 U.S. 113, 113-14 (1876).

2. *See* Letter from Charles Fairman to Felix Frankfurter 2 (Aug. 10, 1938) (on file with Papers of Felix Frankfurter, Rare Books & Manuscripts Libr., Harv. L. Sch.).

3. *See id.*

4. *See, e.g.*, Walton H. Hamilton, *Affectation with a Public Interest*, 39 YALE L.J. 1089, 1089 (1930) (explaining that the *Munn* test was the "established test by which the legislative power to fix the price of commodities . . . must be measured").

5. *See Munn*, 94 U.S. at 126; *see, e.g.*, Yellow Taxicab Co. v. Gaynor, 143 N.Y.S. 279, 286-87, 303 (1913), *aff'd sub nom.* Waldorf-Astoria Hotel Co. v. City of New York, 212 N.Y. 97 (1914); Tyson & Bro.-United Theatre Ticket Offs. v. Banton, 273 U.S. 418, 429 (1927); Public Service Company Law, No. 854, art. III, §§ 2-3, 1913 Pa. Laws 1374, 1388-89; Act of Mar. 22, 1915, ch. 176, 1915 Okla. Sess. Laws 291, 291-92. The importance of the concept of "publicness" in legitimizing regulation has long historical roots in American legal history. *See* GORDON S. WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 3 (2021).

6. *See infra* Part III.

7. *Notes for a Law-School Course on Public Utilities and Trade Regulation* 217, https://hv.proquest.com/pdfs/001757/001757_021_0001/001757_021_0001_From_1_to_308.pdf [https://perma.cc/DQC6-XVHM].

According to Frankfurter, public utility law revolved around two questions—one definitional, the other prudential: "In the first place, what is a calling that the law should recognize as a public calling? Secondly, after once recognizing a calling as public, what is the manner and degree and extent of control that the law should place upon such enterprise?"[8]

These questions remained contested in the six decades leading up to the New Deal. Beyond situations in which a firm had been regulated at common law or received a special privilege from the state, there was considerable uncertainty about when firms became "affected with the public interest" by virtue of a legislative decree.[9] Then-Professor Frankfurter, in his course on regulated industries, described such firms, somewhat

8. *See id*. at 164.

9. While some of these regulatory programs invoked common-law categories or preexisting franchises, many rested on an interpretation that *Munn* swept far more commercial enterprises into the category of public utilities than the fixed set of common-law categories would suggest. *See supra* note 5 and accompanying text. Bill Novak has written the seminal historical account demonstrating that the political and economic foundations of the administrative state were built on the public utility idea. We are indebted to conversations with Bill about the public utility moment, which inspired our account of the constitutional transformation we describe here. *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA 116 (1996) [hereinafter NOVAK, PEOPLE'S WELFARE] (arguing that the "positive constructions of public rights and powers in common resources . . . laid the groundwork for a wider assertion of state power throughout the society and economy"); WILLIAM J. NOVAK, NEW DEMOCRACY 1 (2022) (explaining that public utility regulation reflected "a modern approach to positive statecraft, social legislation, economic regulation, and public administration still with us today"); William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139, 157 (Naomi R. Lamoreaux & William J. Novak eds., 2017) ("[T]he modern American administrative and regulatory state was built . . . by the expanding conception of the essentially public services provided by corporations in the dominant sectors of the American economy."); William J. Novak, *Law and the Social Control of American Capital*ism, 60 EMORY L.J. 377, 399-400 (2010) ("[P]rogressives viewed the law of public utilities as a vibrant and expansive arena for experimenting with unprecedented governmental control over business, industry, and the market."); *see also* MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS, & UTILITIES: LAW & POLICY 87-88 (2022) ("Investing this phrase ['affected (or clothed) with a public interest'] with determinate content proved challenging."); BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 162-65, 196-98 (2001) (describing sustained debates surrounding "the prospect that public utilities regulation could serve as a model for more extensive government control over property rights"); William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1620 (2014) ("Public utility . . . was . . . an example of the 'creative force of law' aimed at using government to guide certain private businesses toward public ends."); William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REGUL. 721, 724-25 (2018) (highlighting connections between the just-price doctrine and public utility regulation); K. Sabeel Rahman, *Infrastructural Regulation and the New Utilities*, 35 YALE J. ON REGUL. 911, 914 (2018) (arguing that the "public utility tradition" arose to address pressing issues of access and fairness in infrastructure regulation); Herbert Hovenkamp, *Technology, Politics and Regulated Monopoly: An American Historical Perspective*, 62 TEX. L. REV. 1263, 1291-95 (1984) (relating the public utility idea to the legal history of monopoly practices); George L. Priest, *The Origins of Utility Regulation and the 'Theories of Regulation' Debate*, 36 J.L. & ECON. 289, 296 (1993) (describing the competing economic theories underlying public utility regulation).

tautologically, as public utilities "by statute."[10] Pro-regulatory justices and progressive reformers treated this category as capacious, arguing that it was a legislative prerogative to define which firms were so affected.[11] Antiregulatory judges, by contrast, cabined legislative authority to industries that had been regulable at common law or to those in which the regulated firm had received a government privilege and thus regulation could be likened to contract.[12] Both sets of advocates attributed their opposing views to *Munn*.[13]

This Article traces constitutional debates over the scope of the public utility idea, explains how states used public utility doctrines to push back against the judiciary's preference for private ordering, and describes the relevance of these debates to modern administrative law. As is well-known, the doctrinal transformation that accompanied the Supreme Court's acceptance of the American administrative state occurred when the Court ceded to the legislature the role of determining whether a firm met *Munn*'s "clothed with the public interest" standard and was therefore amenable to regulatory intervention.[14] Rather than adjudicate a public-private divide, courts came to accept by the 1930s that legislatures, not courts, should determine which firms were affected with the public interest.[15]

---

10. *See* Class Notes for Felix Frankfurter's Course on Regulated Industries, 1914-1915, at 173 (on file with Harvard L. Sch. Libr., Gerard Carl Henderson Class Notes Collection, Box 5).

11. *See, e.g.*, Olsen v. Nebraska *ex rel.* W. Reference & Bond Ass'n, 313 U.S. 236, 245-46 (1941) (stating that "the phrase 'affected with a public interest' can mean 'no more than that an industry, for adequate reason, is subject to control for the public good'").

12. *See, e.g.*, Tyson & Bro.-United Theatre Ticket Offs. v. Banton, 273 U.S. 418, 431 (1927) ("[T]he mere declaration by the Legislature that a particular kind of property or business is affected with a public interest is not conclusive upon the question of the validity of the regulation. The matter is one which is always open to judicial inquiry."), *overruled by Olsen*, 313 U.S. at 245-46.

13. As discussed in further detail below, the crucial language that provoked this debate appears in *Munn v. Illinois*, 94 U.S. 113, 131-32 (1876).

14. *See* NOVAK, PEOPLE'S WELFARE, *supra* note 9, at 246 (describing *Munn* as "one of the great police power cases of the late nineteenth-century" in which "[a]ge-old regulatory frameworks were reexamined"); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 114-15 (1991) (describing the Court's shift during the New Deal as "a transformative amendment expressing a profound, but not total, change in American constitutional identity"); WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THEC ONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 233, 235 (1995) (arguing that 1937 "altered fundamentally the character of the Court's business, the nature of its decisions, and the alignment of its friends and foes"); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF *LOCHNER* ERA POLICE POWERS JURISPRUDENCE 201 (1993); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 198-99 (2000) (describing the traditional account of the Supreme Court's retreat in political-economy cases involving the Commerce, Due Process, and Contract Clauses); Howard Gillman, *Preferred Freedoms: The Progressive Expansion of State Power and the Rise of Modern Civil Liberties Jurisprudence*, 47 POL. RES. Q. 623, 625 (1994) (arguing that as the courts relaxed restrictions on the legislative power to regulate the economy, they enshrined individual liberties as "preferred freedoms" that would receive special judicial protection).

15. *See infra* Part III.

Academics have long theorized the New Deal Court's acceptance of state and federal bureaucracies,[16] and legions of histories explore the broader transformation in the Court's view of economic regulation during the New Deal, with competing theories about the economic, political, and social developments that motivated courts.[17] Increasingly, historians have emphasized the importance of public utility regulation to the project of rebuilding the administrative state.[18] What is less well-known is the public utility's influence on New Deal doctrinal changes and the ways the judicial settlements of this period continue to frame doctrinal debates of the present. Our historical contribution is two-fold: we seek to (a) ground these cases in the public utility tradition and (b) show that the constitutionality of the early administrative state reflected two competing constitutional visions, a rights-based theory of judicial supremacy and a democratic theory of deference to the legislature's capacity to decide when a given form of economic activity should be managed by the state. The New Deal doctrinal revolution reflected the triumph of the democratic approach.

We also explore the enduring influence of the public utility idea on modern constitutional doctrine. Although the public-private distinction is generally understood to have been discarded in the 1930s, courts have, perhaps unknowingly, reinvented and repurposed public utility doctrines and applied them to today's structural disputes. And they have done so in ways that bear only a passing resemblance to the rights jurisprudence that supported judicial review of economic regulation in the administrative state's formative years.

For much of the public utility period, challenges to agency adjudication were based on property rights—not on the entailments of Article III's judicial power.[19] Under the largely forgotten filed-rate doctrine, courts

16. *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT 47-92 (1998); Barry Cushman, *Some Varieties and Vicissitudes of* Lochner*ism*, 85 B.U. L. REV. 881, 958-81 (2005); Barry Cushman, *Lost Fidelities*, 41 WM. & MARY L. Rev. 95, 105-28 (1999).

17. *See* CUSHMAN, *supra* note 16, at 51-53.

18. *See* sources cited *supra* note 9; Blake Emerson, *Vindicating Public Rights*, 26 U. PA. J. CONST. L. (forthcoming 2024) (manuscript at 6); Jerry L. Mashaw, *Administration and "the Democracy": Administrative Law from Jackson to Lincoln*, *1829-1861*, 117 YALE L.J. 1568, 1628-29 (2008); Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1356, 1379-81 (2010); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, *1787-1801*, 115 YALE L.J. 1256, 1338-39 (2006). For a comprehensive empirical study on the role the public-interest language plays today, see Jodi Short, *In Search of the Public Interest,* 40 YALE J. ON REGUL. 759, 767-69 (2023). While scholars have shown that there was considerable regulation during the *Lochner* era and argued that the administrative state grew out of public utility regulation, the doctrinal story has not connected the public utility idea to the New Deal transformation. Instead, the doctrinal account of the constitutionality of modern regulation generally proceeds from a "switch in time" in which the Court abandoned both a substantive-due-process jurisprudence and a relatively narrow view of the Commerce Clause, to announce a global doctrine of "rational basis" review. *See infra* Section II.B.

19. *See, e.g.*, Keogh v. Chi. & N.W. Ry. Co., 260 U.S. 156, 163 (1922) (finding that a private antitrust claim must be heard by the ICC and not courts); N.Y., New Haven & Hartford R.R. v.

held that individuals pressing claims against public utilities were required to exhaust their remedies before the administrative agency before they could challenge an agency decision in court, and courts deferred to agencies' decisions about matters of major policy significance.[20] These challenges included disputes that today would implicate private rights such as contract and property claims.[21] The judiciary's constitutional role was to protect property interests while deferring to *the legislature's* determination about which forum should first adjudicate a dispute.[22] While we have no reason to think that this legal reasoning is especially persuasive, this history highlights the extent to which the public-private distinction has meant different things in different periods and that efforts to provide a coherent narrative of this distinction are based on selective readings of history.[23]

Second, this history provides important context for understanding the rise of structural separation-of-powers arguments. The nondelegation doctrine, thought to be part of the Court's broader deregulatory project,[24] is usually traced to three cases, decided between 1935 and 1936, in which the Supreme Court held that Congress could not delegate legislative power to

---

ICC, 200 U.S. 361, 391 (1906) (barring judicial review of a tort claim on the ground that the case should have been brought before the ICC); Dayton Coal & Iron Co. v. Cincinnati, New Orleans & Tex. Pac. Ry. Co., 239 U.S. 446, 451 (1915) (prohibiting judicial review of a contract dispute on the ground that the ICC had jurisdiction over the dispute).

20. *See infra* Part IV.

21. *See infra* Part IV.

22. This is arguably consistent with Caleb Nelson's view that courts must adjudicate "core" private rights, though as we show in Part IV, the definition of private rights remained in flux throughout this period and cannot be distilled into modern-day categories such as property, tort, and contract. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 562 (2007).

23. For a similar argument based on nineteenth-century jurisprudence about private land claims, see Gregory Ablavsky, *Getting Public Rights Wrong*, 74 STAN. L. REV. 277, 284-85 (2022), arguing that "[r]ecovering this history [of private land claims] does not necessarily provide a tidy typology for public rights today. But it does suggest one highly relevant and straightforward implication for current debates. Throughout the nineteenth century, the administrative adjudication of at least one form of vested rights to private property was constitutionally permissible. . . . To the extent that the Court is looking to the past to guide its jurisprudence, then, the history of private land claims demonstrates that the administrative adjudication of rights, including to property, is on firmer historical footing than current critics argue."

24. For example, John Hart Ely has pointed out that, "[c]oming along when it did, the nondelegation doctrine became identified with other[] [doctrines] that were used in the early thirties to invalidate reform legislation, such as substantive due process and a restrictive interpretation of the commerce power. . . ." JOHN HART ELY, DEMOCRACY AND DISTRUST 132 (1980); *see also* DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900-1940, at 59-60 (2014) (describing the Supreme Court's use of the nondelegation doctrine to strike down the NIRA and New York City's Live Poultry Code in *Panama Refining* and *Schechter*). According to supporters of nondelegation, by contrast, the doctrine is based on structural principles that suggest bright-line divisions between the powers the Constitution allocates to the three federal departments. *See, e.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 334-35 (2002) (arguing for the nondelegation doctrine on the basis of structural principles); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1305, 1329 (2003) (arguing for the nondelegation doctrine on the basis of history).

administrative agencies.[25] Crucially, the first nondelegation case, *Panama Refining*, was a public utility case, but it came decades after dozens of rejected nondelegation challenges brought against public utility regulation. *Panama Refining* came one year after the Court held that legislatures, not courts, held the power to create public utilities. In all three nondelegation cases, petitioners first urged the Court to strike down the regulation for interfering with the freedom of contract. The nondelegation argument was a backup, occupying only the last ten pages of petitioners' one-hundred-ten-page brief in *Panama Refining*.[26] But the Supreme Court declined to revive public utility doctrines and instead checked legislative overreach through a new structural principle—the nondelegation doctrine.

In this context, the nondelegation decisions can be understood as opening salvos in the Court's shift away from rights as a means of securing judicial review of congressional and administrative interventions. The nondelegation doctrine itself did not stick. As countless law review articles have shown, the Supreme Court quickly retreated from the nondelegation doctrine. Yet the *mode* of judicial review used in the nondelegation cases, in which the Court asks whether a branch has exercised a power reserved to another branch, remains the primary means of determining whether administrative action is constitutional. As we show, during the public utility era, most of these structural arguments were resolved by determining whether a business was affected with the public interest. Today, these issues—agency adjudication, deference, and rulemaking—are all resolved through structural inquiries about interbranch relations.

The public utility debates of the 1920s and 1930s thus highlight the extent to which the constitutional basis of modern administrative law is built on precedents taken from internally coherent but mutually exclusive theories of public utility regulation.[27] The genealogy of the public law of public utilities shows how few of our constitutional settlements in this area were necessary or inevitable and suggests that they could be remade to meet the challenges of the present.

---

25. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 389 (1935); Carter v. Carter Coal Co., 298 U.S. 238, 239 (1936). *Carter Coal* is arguably about the private nondelegation doctrine, which prohibits the delegation of legislative power to private enterprises. *See Carter Coal*, 298 U.S. at 239. A small number of earlier cases also gestured at the nondelegation doctrine. *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."); Field v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

26. *See* Reply Brief at 1-2, *Panama Refining Co.*, 293 U.S. 388 (No. 135).

27. Jud Campbell reaches a similar type of conclusion about the relationship between free-speech law in the *Lochner* era and free-speech law today. *See* Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 871 (2022); Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 259 (2017).

This Article proceeds in five parts. Part I describes conventional accounts of the origins of public utility regulation and the birth of the regulatory state. Part II describes the public-private distinction that emerged with *Munn* and which led to significant experimentation regarding when and under what circumstances courts could create administrative agencies to regulate large industries. Part III argues that the struggle over the meaning of *Munn* gave way to a pro-regulatory account of the legislative power to regulate businesses that are important to the public, but not completely. The modern story of judicial supervision of public utility regulation includes an uneven tendency toward retrenchment on the question of judicial review. Part IV explores implications for public utility regulation, and Part V ties these findings to modern debates about the legality of the administrative state.

I. Public Utilities and the Birth of Modern Administration

An immense body of scholarship has been written on the *Lochner*-era practice of striking down state laws thought to impinge on corporate property rights. The period is often thought to have been characterized by judicial activism and was famously marked by judicial decisions invalidating legislative attempts to control corporate behavior.[28] This Part describes the conventional account of *Lochner* and the historiographic account of how the New Deal reflected a wholesale rejection of *Lochner*-era substantive-due-process jurisprudence.[29]

---

28. *See* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 401 (1998) ("When the New Deal Court repudiated Lochner after 1937, it was repudiating market freedom as an ultimate constitutional value, and declaring that, henceforth, economic regulation would be treated as a utilitarian question of social engineering."); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874 (1987) ("The received wisdom is that *Lochner* was wrong because it involved 'judicial activism': an illegitimate intrusion by the courts into a realm properly reserved to the political branches of government."); David A. Strauss, *Why Was* Lochner *Wrong*, 70 U. CHI. L. REV. 373, 373 (2003) ("[*Lochner*] symbolizes the era in which the Supreme Court invalidated nearly two hundred social welfare and regulatory measures . . . ."); Nicola Giocoli, *The (Rail)Road to* Lochner*: Reproduction Cost and the Gilded Age Controversy over Rate Regulation*, 49 HIST. POL. ECON. 31, 31 (2017) ("The *Lochner* era may be summarized as the forty years during which the Supreme Court substantively applied the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution to strike down various state and federal laws that allegedly infringed constitutional rights to property and liberty of contract."); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1, 3 (1991) ("In this deviant period, known as the *Lochner* era, the Court underconstrued the scope of congressional power and overprotected private property."); *cf.* GILLMAN, *supra* note 14, at 10 ("[I]t it is my contention that the decisions and opinions that emerged from state and federal courts during the *Lochner* era represented a serious, principled effort to maintain one of the central distinctions in nineteenth-century constitutional law—the distinction between valid economic regulation, on the one hand, and invalid 'class' legislation, on the other—during a period of unprecedented class conflict.").

29. *See* Munn v. Illinois, 94 U.S. 113, 120 (1876). Scholars have shown that the *Lochner* period contained significant regulation. *See* sources cited *supra* note 9.

A. Lochner *and Its Limits*

Lochner itself involved a New York law that made it illegal for bakers to work more than sixty hours per week.[30] The Court held that legislatures could not interfere with individuals' right to buy and sell their labor—their freedom of contract—and that New York's attempt to restrict the number of hours bakers could work was one such law.[31] The *Lochner* Court invoked the Fourteenth Amendment to strike down a wide range of legislative interventions, including minimum-wage laws,[32] insurance regulations,[33] and protections for union workers.[34]

Despite judicial skepticism of economic regulation, there were a few ways for policymakers to control business behavior. One strategy, which the Supreme Court discussed in *Lochner*, was for legislatures to invoke the police power to protect public health, safeguard community morality, and protect wards of the state.[35] In *Lochner* itself, the Court acknowledged that state legislatures could exercise their police power to interfere with liberty of contract but found that the New York law was not a proper exercise of this police power, as it did not protect health or safeguard public morality.[36] Courts stressed, however, that regulators could not use the police power pretextually.[37] State legislatures could levy taxes, exercise eminent domain, and attach conditions to corporate charters,[38] though corporate charters became a less effective tool when, prior to the Civil War, states adopted general incorporation statutes.[39]

Yet none of these doctrines gave regulators authority over the rates and services of energy, railroad, or telecommunications companies.[40] Instead, regulations that fixed prices or mandated open access and nondiscriminatory service relied on *Munn v. Illinois*, discussed in the next part.[41]

---

30. Lochner v. New York, 198 U.S. 45, 57 (1905).

31. *Id.* at 64.

32. *See* Adkins v. Child.'s Hospital, 261 U.S. 525, 554 (1923).

33. *See* Allgeyer v. Louisiana, 165 U.S. 578, 593 (1897); N.Y. Life Ins. Co. v. Dodge, 246 U.S. 357, 377 (1918).

34. *See* Adair v. United States, 208 U.S. 161, 174-75 (1908); Coppage v. Kansas, 236 U.S. 1, 39 (1915).

35. *See Lochner*, 198 U.S. at 58.

36. *See id*.

37. *See id*. at 56.

38. *See* MARTIN G. GLAESER, PUBLIC UTILITIES IN AMERICAN CAPITALISM 15 (1957) (describing "regulation by means of charters granted by special legislative acts which emphasized the privileges expressly conferred").

39. *See* Henry N. Butler, *Competition in the Granting of Corporate Privileges*¸ 14 J.L. STUD. 129, 129 (1985) ("The corporate charter, which originated as an exclusive privilege to the few, by the end of the nineteenth century had become a general privilege available to all.").

40. *See* JAMES W. HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780-1970, at 69-73 (1970).

41. *See infra* Section III.B.

In *Munn*, courts accepted these more intrusive economic regulations when the business was "affected with the public interest."[42]

B. The New Deal Transformation

The constitutional basis of the modern administrative state is typically thought to reflect doctrinal innovations brought about out of practical necessity during the Great Depression. The conventional wisdom posits that this doctrinal shift occurred because the New Deal Court recognized either the political necessity or the ideological reality of the idea that modern government required a robust bureaucracy.[43] As a historical matter, the Court's acceptance of economic regulation in the 1930s may have reflected political pragmatism—"a political response to political pressures."[44]

As textual support for this new consensus, scholars often invoke the Necessary and Proper Clause, thought to provide Congress the power to use agency delegations to support the "fourth branch."[45] Others have argued that the Supreme Court developed a more "functional" appreciation of the Constitution's tripartite system.[46] Alternatively, David Strauss has justified administrative law as part of the Court's legitimate and precedential elaboration of constitutional meaning over time.[47] At a level of higher generality, some supporters of an administrative power have based their arguments on practical necessity: because the modern economy requires

---

42. Contemporary commentators drew bright-line distinctions between the police power, which protected public health, safety, and morals, and the affected-with-the-public interest standard, which promoted economic well-being. *See Notes for a Law-School Course on Public Utilities and Trade Regulation*, *supra* note 7, at 4-5.

43. *See* ACKERMAN, *supra* note 14, at 107-08; *see also* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY, at x-xi (2012) (asserting that judges can adapt elements of our "unwritten constitution" to "reflect deeply embedded American political norms," so long as these shifts do not violate the "written constitution").

44. Barry Cushman, *Rethinking the New Deal Court*, 80 VA. L. REV. 201, 205 (1994). Cushman himself was skeptical of this externalist account. *See id.* at 260 ("Until we move beyond the traditional account, our understanding of the New Deal Court will continue to seem anachronistically unsophisticated in comparison with our understandings of other eras in the Court's history."). For examples of externalists, see RICHARD HOFSTADTER, THE AGE OF REFORM: FROM BYRON TO FDR 3 (1955); LEUCHTENBURG, *supra* note 14, at 2-5; LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 3 (1996); and MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 169-75 (1992).

45. *See, e.g.*, Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488, 492-95 (1987) (elaborating a defense of delegation under the Necessary and Proper Clause); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 950 (1988) (elaborating a defense of agency adjudication on a similar basis).

46. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 579 n.18 (1984).

47. *See* David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 25 (2015) ("[P]rinciples of administrative law . . . seem to be generated by a common law process of learning from experience with the administrative state, responding to changing circumstances, and adapting the principles in a way that makes practical sense.").

an administrative state, the Constitution must be able to accommodate one—text and structure be damned.[48]

Modern skeptics of administration defend a more limited role for federal agencies. For example, when the modern Supreme Court has tried to cabin administrative discretion, it has often held that bureaucrats can adjudicate "public rights" disputes, which involve claims involving government entitlements, but not "private rights" disputes, which involve claims about the obligations between private individuals.[49] Others have invoked separation-of-powers principles to argue that the agencies must receive clear congressional authorization or insisted that agencies be granted only limited regulatory authority.[50]

Today, skeptics and defenders of the administrative state part ways on whether these innovations can be defended on the ground they are necessary accommodations to the realities of modern governance.[51] Antiregulatory Justices view the "explosive" growth of the administrative state since the New Deal to represent a transgression of constitutional ideals,[52] while defenders of a robust federal bureaucracy posit that something important shifted in the 1930s that cannot be undone. That shift may have occurred because Justices developed a more expansive understanding of the Necessary and Proper Clause, or because they were attending to unusually potent political pressures, or because they acknowledged the reality that modern life required sophisticated and capable administrators, or some combination of the three. While these accounts differ in their particulars,

48. *See, e.g.*, Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 7 (2017) ("[T]he administrative state today is constitutionally obligatory, given the broad delegations of authority to the executive branch that represent the central reality of contemporary national government.").

49. The modern focus on public rights is framed by one of the Court's more recent utilities bankruptcy cases, *Northern Pipeline v. Marathon Pipeline*, 468 U.S. 50 (1982), and the Court's revival of *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). *Northern Pipeline* stands for the proposition that

> a matter of public rights must at a minimum arise 'between the government and others.' In contrast, 'the liability of one individual to another under the law as defined,' is a matter of private rights. Our precedents clearly establish that only controversies in the former category may be removed from Art. III courts and delegated to legislative courts or administrative agencies for their determination. Private-rights disputes, on the other hand, lie at the core of the historically recognized judicial power.

468 U.S. at 69-70. *See generally* Fallon, *supra* note 45, at 950-70 (describing the public-private right distinction and its place in disputes over agency adjudication); Nelson, *supra* note 22, at 566-90 (defending a definition of public rights for which Congress may regulate the scope of judicial review).

50. *See, e.g.*, Gundy v. United States, 588 U.S. 128, 152-54 (2019) (Gorsuch, J., dissenting); *Murray's Lessee*, 59 U.S. (18 How.) at 279.

51. *See generally* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE 3-5 (2022) (canvassing "supporters" of the administrative state).

52. *See, e.g.*, West Virginia v. EPA, 597 U.S. 697, 741 (2022) (Gorsuch, J., concurring).

they all assume that a jurisprudential paradigm shift occurred in the New Deal period.

II. Businesses Affected with the Public Interest

We largely agree with historical accounts described in the previous Part but with an important caveat: the New Deal pro-regulatory jurisprudence developed out of a distinctive canon of public utility cases, which confronted the need to control railroads, energy infrastructure, and telecommunications firms half a century before the switch in time. To regulate these industries, legislatures and agencies protected utility firms from competition, subjected them to strict price controls and nondiscrimination requirements, and empowered commissions to decide disputes over such regulations. Regulators appear to have coalesced around this bundle of regulatory innovations so that they could reconcile their regulatory goals with the most famous pro-regulatory case of the prior century, *Munn v. Illinois*.[53]

A. Munn *and Businesses "Affected with the Public Interest"*

An entirely separate public law of economic regulation grew up alongside the *Lochner* Court's body of precedents invalidating state and federal regulations of interpersonal contract, which embraced a different thought about the permissibility of regulating the private ordering of big businesses. This public law of public utilities developed a distinctive theory of the permissibility regulation that provided a safe harbor from the Court's substantive-due-process jurisprudence.

In 1876, in the seven opinions that have come to be known as the "Granger cases," the Supreme Court announced that state legislatures could regulate private property that was dedicated to a "public use" or "affected with a public interest."[54] Though six of the seven Granger Cases involved railroad rates, the Court provided its most consequential analysis of rate regulation in *Munn v. Illinois*, which considered the legality of an Illinois law that imposed maximum rates on Chicago grain warehouses and elevators.[55]

---

53. Munn v. Illinois, 94 U.S. 113, 125-26 (1876).

54. *See id.*; Chi., Burlington & Quincy R.R. Co. v. Iowa, 94 U.S. 155, 161 (1876); Peik v. Chi. & Nw. Ry. Co., 94 U.S. 164, 178 (1876); Lawrence v. Chi. & Nw. Ry. Co., 94 U.S. 164, 178 (1876); Chi., Milwaukee & St. Paul R.R. Co. v. Ackley, 94 U.S. 179, 179 (1876); Winona & St. Peter R.R. Co. v. Blake, 94 U.S. 180, 180 (1876); Stone v. Wisconsin, 94 U.S. 181, 181-83 (1876).

55. *Munn*, 94 U.S. at 130-31. *Munn*, *B&Q*, and *Peik* were all held under advisement "for more than a year," and then announced on the same day, with *Munn* released first. *See* Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759, 769 (1930). One commentator estimated that before *Munn* was decided, eighty percent of professional attorneys opposed the regulation and predicted that the Supreme Court would strike it down. *See*

In *Munn*, the partnership Munn & Scott argued that the Chicago price regulation violated the Fourteenth Amendment because it took property without due process of law. After all, its grain elevators were built on its own property, held in fee simple, and lawfully exploited by its owners to a productive use. Munn's counsel noticed an important argument left open by the Court's recent opinion in *The Slaughterhouse Cases*: statutes prohibiting preexisting commerce might implicate the new Due Process Clause of the Fourteenth Amendment, which protects citizens from the deprivation of property without due process of law.[56]

While Munn & Scott admitted that Illinois possessed a "police power" to restrict private business, they argued that the Illinois legislature could not suddenly fix prices by simply declaring their private property to be a "public warehouse."[57] The police power, they pointed out, ensured "that [a businessman] not do injury thereby to his neighbors or the public."[58] But police-power regulation was altogether different from a rule that allowed legislatures to "compel owners of property . . . to . . . render their personal services, at their own expense and risk, to the public, for prices fixed by the legislature."[59] The elevator owners stressed that no legislature could "impress a public character upon private property by a mere declaration."[60] For them, the constitutional limits of legislative authority rested on a balance between private rights and the public good, and it fell to the judiciary to vindicate their private rights.

Illinois countered by arguing that new economic problems required new approaches to regulation. Illinois admitted that "judicial and legislative precedents furnish no express authority for regulating by law the charges of warehousemen for storage of goods. . . ."[61] Even though Illinois conceded that there was no common-law basis for setting grain-elevator prices charged by private owners of warehouses, it contended that the

James K. Edsall, *The Granger Cases and the Police Power*, *in* AMERICAN BAR ASSOCIATION REPORTS 288, 299 (1887); CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 576-78 (1922); *see also The Potter Act at Washington*, 9 AM. L. REV. 212, 218 (1875) (describing the law as "an unprecedented system of discrimination and unequal legislation"); David A. Wells, *How Will the United States Supreme Court Decide the Granger Railroad Cases?*, THE NATION, Oct. 29, 1874, at 283 (characterizing the law as "an attempt on the part of the sovereignty to take advantage of its power to work an act of arbitrary oppression and tyranny"). According to the petitioners, the Court's opinion had "opened a new gateway of attack on private industry, whenever its influence extends beyond the individual good, and concerns itself with the common welfare." Brief for Rehearing at 6, Munn v. Illinois, 94 U.S. 113 (1876).

56. *See* Brief for Plaintiffs in Error by Goudy at 26-27, *Munn*, 94 U.S. 113 (1876).

57. *Id.*

58. Brief for Plaintiffs in Error by Jewett at 16, *Munn*, 94 U.S. 113 (1876).

59. *Id.* at 24.

60. *Id.* at 36.

61. Brief of Defendants in Error at 40, *Munn*, 94 U.S. 113 (1876) (describing "a tendency of the managers and railway companies and proprietors of grain elevators to enter into combinations to secure a monopoly of the storage of grain").

common law must be updated: the common law represents "vital principles which adjust themselves to the exigencies of an advancing civilization."[62]

The Court agreed with Illinois. Speaking for a seven-justice majority, Chief Justice Morrison Waite wrote that the Fourteenth Amendment did not prevent Illinois from setting rates for grain elevators. Crucially, the Court held in *Munn* that the government could regulate private property that was "affected with" or "clothed with the public interest."[63] Waite's majority opinion focused on the threshold question of whether authority to regulate existed—not how government exercised the authority it had. He wrote that the "controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge, as one of the means of regulation, is implied."[64] Waite acknowledged that the state's regulatory power did not extend to "rights which are purely and exclusively private."[65] But he drew a distinction between private property and property "affected with the public interest": "When . . . one 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."[66]

Waite's understanding of public use was capacious. To illustrate the "principles upon which this power rests," and to "determine what is within and without" the principle of public use, Waite invoked "the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.'"[67]

From Lord Chief Justice Hale's treatise *De Portibus Maris* and later English decisions citing Hale, Waite drew an elaborate list of examples of private enterprises that could be regulated because they had become affected with the public interest.[68] Waite then drew upon the facts alleged in the Illinois brief to draw an analogy to the common-law antecedents: the elevators are so important to the Chicago market, and so few in number, that they "may be a 'virtual' monopoly."[69] And, reciting once more the list of professions that were "affected with the public interest," Waite found no difference between the common-law categories and the grain warehouses. "[I]f any business can be clothed 'with a public interest, and cease to be *juris privati* only,' this has been. It may not be made so by the operation of the Constitution of Illinois or this statute, but it is by the facts."[70]

---

62. *Id.* at 52.
63. *Munn*, 94 U.S. at 126.
64. *Id.* at 134.
65. *Id.* at 124.
66. *Id.* at 126.
67. *Id.*
68. *Id.* at 125-29.
69. *Id.* at 131.
70. *Id.* at 132.

In time, especially for those who would limit the reach of *Munn*, Hale's treatise on the law of ports became the principal reed on which the *Munn* theory of regulation was hung.[71] Only firms that were similar to these common-law antecedents could be regulated. Yet, in addition to specific professions recognized at common law, Waite identified two categories of "public" firms that the legislature could regulate. First, regulators could control common carriers, which referred to companies that provided standardized and nondiscriminatory service to the public.[72] In addition, state legislatures had authority to regulate the rates and services of businesses that had become monopolies.[73] Even a de facto monopoly could legitimately be subjected to state or federal regulation.[74] The central questions involved the "public-ness" of property: private property was outside the legislature's purview, while public property not.

There is also textual support in *Munn* for a democratic theory about legislative capacity to affirmatively "affect" industries "with the public interest," though Waite was ambiguous on this point. After noting the Illinois constitution's special reference to rate regulation,[75] the Court explained that "common-law regulation of trade or business may be changed by statute. . . . To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before."[76] After acknowledging that this democratic view recognizes "a power which may be abused," *Munn* held that the potential for abuse "is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."[77]

Justice Field, writing in dissent, staked out a theory of judicial review that portended *Lochner* era substantive-due-process protections. Justice Field argued that regulators had authority to control rates and services only in narrow circumstances. He said that "it is the public privilege conferred with the use of the property which creates the public interest in it."[78] On this view, monopolies that had acquired their monopoly power through ordinary market processes did not thereby become "clothed in the public interest."[79] Whereas Chief Justice Waite's opinion expanded regulatory authority beyond franchisors who had consented to their regulation, and

71. *See* Hamilton, *supra* note 4, at 1090 (describing Hale's influence on American public law via *Munn*).

72. *Munn*, 94 U.S. at 129-30; *see also* Irwin S. Rosenbaum, *The Common Carrier Public Utility Concept: A Legal-Industrial View*, J. LAND & PUB. UTIL. ECON. 155, 158-60 (1931) (describing the development of "common carrier" as a legal term of art).

73. *Munn*, 94 U.S. at 127-28.

74. *Id.* at 128.

75. *Id.* at 132.

76. *Id.* at 134.

77. *Id.*

78. *Id.* at 152 (Field, J., dissenting).

79. *See id.* at 151-52.

thus included de facto monopolies that developed without government support, Field was committed to a formal distinction between private property and public privileges. Field believed that legal authority to control monopoly abuses existed when—and only when—a regulator conferred a special privilege such as a legal right to operate a monopoly, but not when a company managed to drive its competitors out of business. Rates charged by a private grain elevator, by contrast, concerned only the "compensation which an individual may receive for the use of his own property in his private business."[80]

Justice Field discerned no limit to the majority's position that the legislature could decide which private property had become public. The majority's principle, Field worried, would mean that "all property and all business in the State are held at the mercy of a majority of its legislature."[81] Using language that has become associated with the substantive-due-process logic of *Lochner*, Field would have decided *Munn* by protecting Munn and Scott's private right to contract.

It is not clear that Field mischaracterized the majority opinion. Field drew attention to the fact that *Munn* could be read broadly to embrace a democratic vision in which the legislature was endowed with authority to determine (a) which industries should be brought under government control and (b) how that control should be exercised. Field did not think that Lord Hale's "rights" of "ports of the sea" resembled warehousemen in Chicago.[82] He also rejected the majority's use of the idea of virtual monopoly to justify the regulation. Instead, he developed a contractarian theory of regulation. In his view, "it is the public privilege conferred with the use of the property which creates the public interest in it."[83]

B. Substantive Due Process (Regulatory Takings)

Munn did not reach an important question related to its central holding: once property became "clothed with the public interest," to what extent should the judiciary probe the "reasonableness" of policymakers' determinations about how utilities should conduct business? Because *Munn* could be read to permit broad economic regulation, one of the era's central constitutional questions became a question of *degree*. After *Munn*, an open question was whether some modes of regulating "public firms" were so extensive that they amounted to a taking of private property without due process of law.

For many jurists and commentators, the property-privilege distinction Justice Field articulated in his *Munn* dissent provided the sole theoretical

80. *Id.* at 138.
81. *Id.* at 140.
82. *Id.* at 150-51.
83. *Id.* at 152.

basis for rate regulation, and it suggested the outer bounds of legislative discretion to set prices. Companies that enjoyed special privileges such as the right to exercise eminent domain or the right to a legal monopoly were the legitimate objects of government supervision.[84] Private property that did not enjoy a special privilege was immune from legislative interference—at least as long as there was no other legal basis for regulating the property.[85]

In one of the Granger Cases, Justice Field insisted, again in dissent, that there be some limit to the state's power to regulate public business enterprises.[86] According to Justice Field and his fellow dissenters, the power to regulate did not give regulators the power to destroy. Left unrestrained, rate regulation would furnish regulators with total authority to determine corporate profits.[87] According to them, even when public utility commissions were legally authorized to control rates and services, regulations that did not permit a market rate of return violated firms' substantive-due-process rights.

This reception of *Munn*, which elevated the judiciary above state and federal legislatures, soon started to overtake the democratic reception. The first step in the development of an antiregulatory gloss on *Munn* occurred over precisely the issue of whether the rates set for public utilities were "reasonable." The Supreme Court first answered this question a decade

84. On the franchise model of utility regulation and its essential connection to contract and consent, see Werner Troekson, *Regime Change and Corruption: A History of Public Utility Regulation*, *in* CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY 259, 261 (Edward L. Glaeser & Claudia Goldin eds., 2006); and Thomas v. W. Jersey R.R. Co., 101 U.S. 71, 83-84 (1879), which states that "where a corporation, like a railroad company, has granted to it by charter a franchise intended in large measure to be exercised for the public good . . . any contract which disables the corporation from performing those functions . . . is a violation of the contract with the State. . . . The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." *See also* New Orleans Gas-Light Co. v. La. Light & Heat Producing & Mfg. Co., 115 U.S. 650, 664-65 (1885) ("If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries . . . it is difficult to perceive upon what ground we can deny her authority . . . to grant a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies"); Peoria & Rock Island Ry. Co. v. Coal Val. Mining Co., 68 Ill. 489, 493-94 (1873) ("[I]t was necessary to enlist private enterprise and capital; and, to call it forth, it became necessary to confer rights, privileges and immunities, which were secured to those who might carry out the enterprise and operate the roads. . . . These being the inducements which led to the formation of these bodies, their charters granted privileges and imposed duties on them.").

85. If another source of authority existed for regulatory power, including if the regulation affected public health or if the firm was a common carrier, then Justice Field would not have objected to the exercise of legislative authority. Field's distinction between a monopoly in law and a monopoly in fact only became relevant when those options were unavailable.

86. *See* Stone v. Wisconsin, 94 U.S. 181, 184-85 (1877) (Field, J., dissenting).

87. *See* Munn v. Illinois, 94 U.S. 113, 140 (Field, J., dissenting). This concern also preoccupied academics and columnists. Just before the Court decided *Munn*, one journalist argued that rate regulation would allow legislatures to "confiscate" all of a corporation's securities. *See The Right to Confiscate*, THE NATION, Sept. 24, 1874, at 199, 200; Gilbert Grosvenor, *The Communist and the Railway*, 4 INT'L REV. 585, 598-99 (1877) (likening rate regulation to "communism").

after *Munn* in *Chicago Railroad v. Minnesota*.[88] In 1887, Minnesota empowered its public utility commission to ensure that "every unequal and unreasonable charge for [rail] service is prohibited, and declared to be unlawful."[89] The commission determined that the Chicago, Milwaukee & St. Paul Railway Company had charged unreasonable rates. The railroad sued.

The Minnesota Supreme Court adopted a pro-regulatory reading of *Munn*, which made this an easy case. In a unanimous opinion, it held that the *Munn* litigation had "resulted in a complete victory for the right of legislative control."[90] The court wrote that the legislature's judgment about the reasonableness of rates "should be not simply advisory, nor merely prima facie equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges."[91] The legislature, not the court, should determine the reasonableness of public utility rates.

The Supreme Court disagreed. In the eleven intervening years, the Court's center of gravity had changed. All but three of the original Justices who had decided *Munn* had left the Court.[92] Only Justices Field, who had dissented in *Munn*, and Bradley, who had ghost-written Chief Justice Waite's majority opinion in *Munn*, and Miller, who joined the *Munn* majority, remained.[93]

In its first line of attack, the railroad asked the newly composed Court to simply overrule *Munn*. The company acknowledged that *Munn* had "intimated" that legislatures had power to determine reasonable rates, but it also criticized *Munn* as a "surprise" that had come to affect "one-seventh . . . of the entire property of the country."[94] The railroad's brief then refuted each part of Chief Justice Waite's opinion in *Munn*. In placing so much weight on Lord Hale's treatise, the railroad argued, the Court had made too much of precedents "hardly less than two centuries old."[95] The railroad also argued that the common-law analogy between common carriers and large utilities was inapt: regulation would be "appropriate to one, destructive to the other."[96] Indeed, the railroad argued, under *Munn*, "the entire railroad property of the United States is handed over to the government and the control of the Legislatures . . . without control of the

88. 134 U.S. 418 (1890).

89. *Id.* at 426-27.

90. State *ex rel.* R.R. & Warehouse Comm'n v. Chi., Milwaukee & St. Paul Ry. Co., 37 N.W. 782, 785 (Minn. 1888).

91. *Id*. at 784.

92. *Compare* 94 U.S. iii (1876) (listing the Justices on the *Munn* Court), *with* 134 U.S. iii (1889) (listing the Justices on the *Chicago Railroad* Court).

93. *Compare* 94 U.S. iii (1876) (listing the Justices on the *Munn* Court), *with* 134 U.S. iii (1889) (listing the Justices on the *Chicago Railroad* Court).

94. Brief for Petitioners at 24, 30, Munn v. Illinois, 94 U.S. 113 (1876).

95. *Id.*

96. *Id.* at 45.

courts."[97] The railroad further argued that, while *Munn* "assumes that it is a recognized power in the Legislature in this country to fix the price,"[98] Justice Field provided sound reasons to reverse.[99]

As to the *Munn* majority's prescription that abuses in legislatures' rate regulations should be remedied at the ballot box, the railroad warned that this would turn elections into a "corrupt" spoils system and "bring improper influences and mercenary considerations into a contest which should be decided entirely on principle."[100] The judiciary, not the legislature, was the best place to determine rates. This was a striking rejoinder to the democratic appeal of Chief Justice Waite's deference to the legislature. To give legislatures the power to determine rates, the railroads contended, would create an incentive for those whose economic interests are at stake to corrupt future elections.

The railroad achieved a partial victory in a closely divided Supreme Court decision. While the *Chicago Railroad* opinion declined the invitation to reverse *Munn* altogether, the Court held that the "question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination."[101] *Chicago Railroad* thus created a justiciable limit to legislatures' authority to regulate public callings. Even when property became affected with the public interest, investors had a residual property interest that must be protected by judicial review.

Justice Bradley, the ghost writer in *Munn*, accused the *Chicago Railroad* Court of abandoning *Munn's* democratic account of the public-private distinction. He wrote that "[the majority] practically overrules *Munn v. Illinois*. . . . The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative and not a judicial one."[102] On the question whether rates are reasonable, the majority opinion now established "that the judiciary, and not the legislature, is the final arbiter in the regulation of . . . the charges of . . . public accommodations."[103]

Within the decade, the Court's membership would change even further. After Justice Bradley left the Court, Justice Harlan wrote a unanimous opinion in *Smyth v. Ames* formalizing *Chicago Railroad*'s holding

97. *Id.* at 47.
98. *Id.* at 36.
99. *Id.*
100. *Id.*
101. Chicago R.R. v. Minnesota, 134 U.S. 418, 458 (1890).
102. *Id.* at 461 (Bradley, J., dissenting).
103. *Id.* at 462-63.

that businesses were entitled to a judicial hearing on whether they had been given a "reasonable" rate by regulators.[104]

Smyth also drew *Munn* into conversation with the Court's freedom-of-contract jurisprudence by establishing substantive limits on state power to regulate rates.[105] Regulations that did not permit a market rate of return were thought to violate utilities' private property rights.[106] While regulators could encroach upon firms' property rights—at least so long as the firm met the public-interest standard—they could not prevent businesses from earning a reasonable return. Once a business had incurred obligations based on reasonable expectations about regulatory burdens, creditors and shareholders enjoyed a property interest in the firm that included a right to a reasonable return. Judicial review was necessary, on this view, because regulations could be confiscatory in the same way as direct government seizure of property.[107]

III. *Lochner* Era Retrenchment

Throughout the *Lochner* era, courts often embraced the antiregulatory theory of *Munn* but never overturned the decision altogether. Courts permitted government interference only when they were satisfied that the business could be analogized to one that had been regulated at common law, when the business had received a special government privilege, or when a court found that the firm was otherwise affected with the public interest. But generally speaking, courts cabined *Munn*'s public-private distinction by (a) becoming openly hostile to mere legislative declarations that industries were affected with the public interest; and (b) engrafting a justiciable right to a "reasonable" return onto *Munn*.

A. The Public Utility in the Lochner *Era*

By the end of the nineteenth century, it was clear that the Constitution permitted legislatures to regulate "public" businesses that enjoyed their monopoly by legislative right and those that were akin to those named as

104. *See* 169 U.S. 466, 470 (1898).

105. *Id.* at 470; David P. Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests*, *1889-1910*, 52 U. CHI. L. REV. 324, 370-75 (1985) (placing *Chicago Railroad* at the start of the Court's turn to *Lochner*ism and arguing that "[s]ubstantive due process had come of age without having been properly born").

106. *Smyth*, 169 U.S. at 549 (striking down Nebraska's rate regulation and attempting to establish a fair-value standard). The fair-value standard was overturned fifty years later, though the Court has yet to reject the idea that regulations can be confiscatory. *See* FPC v. Hope Nat. Gas Co., 320 U.S. 591, 599 (1944).

107. *Smyth* spawned a litany of Supreme Court cases considering the legality of utility rates. By one count, a majority of the statutes struck down under the Fourteenth Amendment during the *Lochner* era involved utility rates. *See* Victoria F. Nourse, *A Tale of Two* Lochners: *The Untold History of Substantive Due Process Rights and the Idea of Fundamental Rights*, 97 CALIF. L. REV. 751, 755 n.19 (2009).

public business as common law.[108] Beyond these points of agreement, however, the "public use" doctrine defied easy definition.[109] One commentator wrote that the "public use decisions" had "erected a citadel of legal dicta that has remained until the present day to obscure the fundamental question in the interpretation of a public utility franchise."[110] Professor Thomas Cooley, who later became a Justice on the Michigan Supreme Court, made a similar point, noting that "[w]e find ourselves somewhat at sea . . . when we undertake to define, in light of the judicial decisions, what constitutes a public use."[111]

Authority to regulate railroad, electric, gas, and telecommunication rates remained contingent on a judicial finding that the business was "affected with a public interest." In fact, in one of the many ironies of the *Lochner* Era, the *Munn* majority listed bakers as one of the businesses that had historically been regulated as common carriers and condescended to the idea that "such legislation came within any of the constitutional prohibitions against interference with private property."[112] *Lochner*, of course, invalidated regulations setting maximum work hours for bakers.[113]

Despite uncertainty about the scope of the public-use doctrine, discernible patterns emerged in the public utility cases. It was clear, for example, that the democratic reading of *Munn* had fallen into disfavor. By the early twentieth century, the Court insisted on a justiciable difference between an "ordinary business," and "a paramount industry, upon which the prosperity of the entire state in large measure depends."[114] The Court would not defer to the legislative judgment that an industry was "public" unless it was satisfied that the state's prosperity in a "very large and real sense depend[s] upon" the business at issue.[115] And, borrowing from the antiregulatory reading of *Munn*, the Court searched for analogies between

108. *See* Ganesh Sitaraman, *Deplatforming*, 133 YALE L.J. 497, 503-04 (2023).

109. For a contemporary review of Supreme Court decisions on the public-use doctrine, see WARREN, *supra* note 55, at 574-96 (1922). *See also* Sitaraman, *supra* note 108, at 508-28 (describing public-use standards associated with common carriers, communications systems, transportation providers, energy companies, and banks).

110. Richard J. Smith, *The Judicial Interpretation of Public Utility Franchises*, 39 YALE L.J. 957, 961-62 (1930).

111. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATE OF THE AMERICAN UNION 531 (Bos., Little, Brown. & Co. 1878).

112. Munn v. Illinois, 94 U.S. 113, 125 (1876) ("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. To this day, statutes are to be found in many of the States upon some or all these subjects; and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property." (emphasis added)).

113. *See* Lochner v. New York, 198 U.S. 45, 53 (1905).

114. New State Ice Co. v. Liebmann, 285 U.S. 262, 277 (1932).

115. *Id.* at 276.

industries regulable at common law and those that claimed to be "public."[116]

Perhaps the clearest example of the confused state of the law concerned a series of cases decided around 1920. In one, *New State Ice Company v. Liebmann*, the Supreme Court overturned an Oklahoma law limiting entry and imposing licensing requirements on the manufacture, sale, and distribution of ice.[117] The Court found that there was nothing distinctive about ice manufacturing that would "warrant its inclusion in the category of businesses charged with a public use."[118] The Court observed that, unlike the grist mill or the cotton gin, in which an individual "is compelled . . . to resort . . . to the establishment which operates in his locality," ice could be made at home and no longer required a central intermediary to produce.[119] The Court invoked the problem of monopolistic conduct as a risk *created* by state regulation, and predicted in public utility regulation a "practical tendency" to "create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public."[120] The legislature-centric reading of *Munn* appeared in a dissent to *New State Ice* but no longer commanded a majority.[121]

While the Court did not allow the Oklahoma legislature to regulate ice, it was more permissive of price regulations of movie tickets, lemons, and cotton gins. In those cases, property became affected with a public interest because a special privilege was designed to provide a good or service that was absent or inadequate in a competitive market.[122] But these cases are not a model of judicial consistency. For example, the Court was skeptical of the regulation of gasoline despite generally tolerating energy regulations.[123]

Government franchises, in particular, were often able to overcome judicial skepticism—both about the legislature's right to bestow the privilege

116. *See id*. at 277.

117. *Id.* at 279 (1932) ("There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business. . . . It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges.").

118. *Id.* at 277. The Supreme Court admonished state legislatures for declaring that a particular industry was dedicated to a public use when the Court felt that the legislature was simply trying to regulate private property. *See id*.; Charles Wolff Packing Co. v. Ct. of Indus. Rels., 262 U.S. 522, 528 (1923).

119. *Liebmann*, 285 U.S. at 276.

120. *Id*. at 278.

121. *See id.* at 283 (Brandeis, J., dissenting) (noting that "[a]s applied to public utilities, the validity under the Fourteenth Amendment of the requirement of the certificate has never been successfully questioned").

122. *See* Olmstead v. Camp, 33 Conn. 532, 539-40 (1866) ("The property taken for public use is to be used in the *public service*, to answer some public exigency, and must be appropriated for that service. The usual applications of this prerogative are, to common public roads, to canals, to turnpikes, to railroads, to ferries and basins.").

123. *See* Williams v. Standard Oil Co., 278 U.S. 235, 239 (1929).

and the accompanying right to condition the privilege on the business's willingness to submit to regulatory control.[124] For example, because the government held an indefeasible title to public highways and navigable waters, the default property-rights regime prevented private individuals from operating tolls or building bridges without a government privilege.[125] By definition, therefore, an entitlement to enter these industries provided the public with a service that was unavailable by common right.

These services were often described as the duties "appertaining to government,"[126] and these businesses' similarity to public functions accounted for some defenses of public utility regulation. As Massachusetts' public utility regulator described the state's comprehensive public utility law, "The public utility corporations in this state are given the right to organize to perform a public function which the public might otherwise undertake itself."[127] These "public functions" included "permits to use the public highways," "grants to them the privilege of taking private property by the exercise of the sovereign power of eminent domain," and "protect[ion] from adverse and unwise competition."[128] Ordinary trades, by contrast, could not simply be transformed into monopolies "under the pretense a police regulation."[129]

On this view, legislatures could transform a private business into a public one if they (a) identified a good or a service that would be obtained through the conferral of such a privilege, and (b) conditioned the privilege on the company's willingness to provide the good or service. This form of economic regulation, however, was consistent with the antiregulatory

124. *See* COOLEY, *supra* note 111, at 744-45 ("If one is permitted to take upon himself a public employment, with special privileges which only the State can confer upon him, the case is clear enough . . . ."); Cal. State Tel. Co. v. Alta Tel. Co., 22 Cal. 398, 422 (1863) ("The grant of a franchise is in the nature of a vested right of property . . . . So long as the grantee fulfills the conditions and performs the duties imposed upon him by the terms of the grant, he has a vested right which cannot be taken away, or otherwise impaired by the Government, any more than other property."), *overruled in part on other grounds by* City of San Francisco v. Spring Valley Water Works, 48 Cal. 493 (1874); *see also* Caleb Nelson, *Vested Rights*, *'Franchise,' and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1438 (2021) ("Once granted, though, many legal interests that were called 'franchises' could amount to vested rights under the nineteenth-century framework.").

125. *See, e.g.*, United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 69 (1913) ("Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable.").

126. Slaughterhouse Cases, 83 U.S. 36, 83 (1872) (Field, J., dissenting).

127. MASS. DEP'T OF PUB. UTILITIES, No. 1150, SPECIAL REPORT RELATIVE TO THE RAISING BY GAS AND ELECTRIC COMPANIES OF NEW CAPITAL AS NEEDED 7 (1927).

128. *Id.*

129. Powell v. Pennsylvania, 127 U.S. 678, 697 (1888). There was also little debate about the propriety of subjecting common carriers to regulatory control. *See, e.g.*, Prairie Oil & Gas Co. v. United States, 204 F. 798, 801 (Comm. Ct. 1913) ("Some of these pipe lines . . . are admittedly subject to public regulation, because their owners are public service corporations engaged in the business of common carriers; but many of them belong to private companies, which use them only in the conduct of their private business. The private lines in most instances are owned or controlled by the refineries to which they transport crude oil and which they exclusively serve.").

approach to *Munn*, since courts insisted on reviewing the special privilege to make sure that the regulation could be analogized to contract.

B. Democratizing the Public-Private Distinction

Despite courts' insistence on a reading of *Munn* that retained a justiciable right to a reasonable return, progressive politicians and jurists often embraced the democratic theory, appealing to *Munn* to advocate for regulations that would have otherwise been struck down as attempts to control private property. The most direct way to do this was to grant a privilege to industries that arguably did not pose the same market power concerns as railroads, energy companies, and grain elevators. When legislatures and commissions bestowed a privilege, courts sometimes, but not always,[130] tolerated regulations that might otherwise have been struck down under the Supreme Court's substantive-due-process jurisprudence to survive judicial scrutiny.[131]

To collect a few examples: private taxis were subject to regulation not because they were natural monopolies, but because legislatures had a legitimate interest in providing customers with predictable rates.[132] In 1933, Wisconsin determined that the milk industry was a public utility and gave the Department of Agriculture and Markets authority to issue orders to resolve public emergencies associated with the "supply, distribution, or sale of milk" in particular cities. [133] Oregon passed a similar law in 1931,[134] and North Dakota began using public utility regulation to protect its milk industry in 1905.[135] Some of the more surprising examples included refrigerators,[136] cotton gins,[137] and theater tickets.[138] None of these statutes is easy to square with even the most capacious view of the first two of *Munn*'s categories of businesses affected with the public interest. These state legislatures instead appealed to economic policy goals that regulators felt could be achieved only through public-= utility regulation, though there was no

130. *See* Frost v. R.R. Comm'n, 271 U.S. 583, 593-94 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

131. *See, e.g.*, Frost v. Corp. Comm'n, 278 U.S. 515, 521 (1929) ("[T]o engage in the business [of owning cotton gins] is not a matter of common right, but a privilege, the exercise of which, except in virtue of a public grant, would be in derogation of the state's power.").

132. *See* Stephenson v. Binford, 287 U.S. 251, 273-75 (1932).

133. *See* WIS. STAT., § 99.165 (1933).

134. *See* Act of Dec. 15, 1933, ch. 72, §§ 2-3, 1933 Or. Laws 2d Spec. Sess. 196, 196-198.

135. *See* Act of Mar. 16, 1905, ch. 95, §§ 1-4, 1905 N.D. Laws 173, 173-75.

136. *See* Public Service Company Law, No. 854, art. III, §§ 2-3, 1913 Pa. Laws 1374, 1376.

137. *See* Act of Mar. 22, 1915, ch. 176, §§ 1-2, 1915 Okla. Sess. Laws 291, 291.

138. *See* Tyson and Bro.-United Theatre Ticket Offs. v. Banton, 273 U.S. 418, 421 (1927).

credible claim that such industries had held themselves out to the public or were regulable at common law.[139]

Throughout the country, some policymakers understood public utility regulation as a way for legislatures to circumvent the judiciary's skepticism of legislation that interfered with freedom of contract. In 1910, for example, New York Attorney General Edward O'Malley recommended that the state regulate milk as a utility to reduce price volatility.[140] Frustrated with judicial decisions prohibiting the regulation of out-of-state milk, O'Malley said:

> [I]f the business of articles of necessity cannot be regulated in this or some other way, then a new and powerful argument for municipal ownership or regulation by commission will be furnished, and a demand will be made for the legislative authority to permit the state or municipalities to undertake the distribution of articles of necessity among their citizens.[141]

O'Malley urged the legislature to "declare milk to be a public necessity," and for a "commission or an industrial court of some kind could be provided to license corporations trafficking and dealing in such articles, with general powers to investigate, regulate and control such business and with power to fix price."[142] According to O'Malley, such a licensing regime would allow the commission to "impose duties and obligations" on farmers who had received a license to sell milk.[143]

New York Governor Alfred E. Smith made a similar recommendation in 1920.[144] Smith acknowledged that the public utility idea was an effective way for regulators to oversee an industry when other types of regulatory interventions would run afoul of the Supreme Court's substantive-due-process jurisprudence.[145] This strategy came to be seen as so unremarkable that a contemporary commentator, frustrated with the volatility of milk

139. *See* Munn v. Illinois, 94 U.S. 113, 132 (describing firms that stand in "the very 'gateway of commerce'").

140. ATT'Y GEN. EDWARD O'MALLEY, REPORT OF THE ATTORNEY-GENERAL IN THE MATTER OF THE MILK INVESTIGATION, S. 133-45, 1st Sess., at 17-19 (N.Y. 1910).

141. *The Result of the Milk Investigation as Viewed by Attorney General O'Malley in His Report*, N.Y. TRIBUNE, Apr. 25, 1910, at 15, 15.

142. *See id*. New York's difficulty regulating milk appears to have resulted from judicial decisions holding that the Commerce Clause prohibited New York milk dealers from selling out-of-state milk at low prices. *See* Comment, *Milk Regulation in New York*, 46 YALE L.J. 1359, 1364 (1937) ("Perhaps the severest blow to effectuation of the price-fixing provisions was the decision of the Supreme Court in *Baldwin v. Seelig* that New York could not constitutionally prevent a milk dealer, who had purchased milk outside the state at a price lower than that he would have been required to pay New York producers, from bringing that milk into the state and selling it either in the original containers or in bottled form.").

143. *Id.*

144 . *See* GOV. ALFRED E. SMITH, FINAL REPORT IN THE MATTER OF THE INVESTIGATION BY GEORGE GORDON BATTLE, COMMISSIONER, INTO THE DEPARTMENT OF FARMS AND MARKETS, S. 143-29, 1st Sess., at 97-100 (N.Y. 1920).

145. *See id.*

prices and milk quality controls, wrote that "[a]t a time of trouble in the milk industry we naturally consider the possible application to it of the principles of public utility regulation."[146]

Of course, this strategy was not uniformly successful. Often, as in *New State Ice*, the Court saw "pretext" or "fiat" in the legislature's finding that an industry had become a public utility.[147] The Court usually invalidated state laws that attempted to treat an industry as a utility when it was convinced that the regulated industry did not provide the public with any services that would have been unavailable in a competitive market.[148] The Oklahoma law imposing licensing restrictions on ice manufacturers was thus seen as a naked attempt to favor incumbents.[149] However, if a legislature could identify goods or services that were not being provided in a competitive market, as Oklahoma did with cotton gins, then courts (sometimes) permitted the regulation.[150]

Thus, throughout the *Lochner* era, debates about the constitutionality of regulation often focused on whether to read *Munn* capaciously, granting legislatures broad discretion to structure the federal government, or whether the case provided a limited exception to the general rule that government lacked constitutional authority to control private business. Put differently, the question was whether Justice Bradley or Justice Field was right about the public utility idea.

Nonetheless, the public-private divide that emerged in the early twentieth century struck many contemporary scholars as arbitrary.[151] It is not clear, for example, what distinguishes Oklahoma cotton ginning, which could be regulated, from Oklahoma ice making, which could not.[152] Nonetheless, it was evident to all that the Court had retreated from Justice

146. Henry S. Manley, *Constitutionality of Regulating Milk as Public Utility*, 18 CORNELL L. REV. 410, 410 (1933).

147. *See, e.g.*, Producers' Transp. Co. v. R.R. Comm'n, 251 U.S. 228, 230 (1920) ("The State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier . . . .").

148. *See, e.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 304 (1932) ("To grant any monopoly to any person as a favor is forbidden . . . . But where, as here, there is reasonable ground for the legislative conclusion that, in order to secure a necessary service at reasonable rates, it may be necessary to curtail the right to enter the calling, it is, in my opinion, consistent with the due process clause to do so . . . .").

149. *See id.* at 267. Given the ice's value for storing food, one might think that there was more of a public necessity for ice than for cotton gins.

150. *See* MASS. DEP'T OF PUB. UTILITIES, No. 1150, SPECIAL REPORT RELATIVE TO THE RAISING BY GAS AND ELECTRIC COMPANIES OF NEW CAPITAL AS NEEDED 7 (1927) ("In exchange for these unusual privileges the public of Massachusetts have assumed that they had the right to regulate the utilities . . . ."); State *ex rel.* St. Joseph & Denver City R.R. Co. v. Comm'rs of Nemaha Cnty., 7 Kan. 542, 549 (1871) (Brewer, J., dissenting).

151. *See* Smith, *supra* note 110, at 961-62.

152. *Compare* Frost v. Corp. Comm'n, 278 U.S. 515, 519-21 (1929) (asserting that the operation of cotton gins is a franchise to be granted by the state for the performance of a public service), *with Liebmann*, 285 U.S. at 277 (arguing that ice-making is essentially a private business and may not be regulated in a way that unreasonably and arbitrarily interferes with business).

Bradley's democratic theory of *Munn*. Throughout this period, Justice Brandeis maintained, usually in dissent, that "[w]hether the local conditions are such as to justify converting a private business into a public one is a matter primarily for the determination of the state legislature."[153] Yet a firm majority of the Court insisted on a judicial role in protecting corporate property rights and deciding whether a business had truly become "affected with the public interest."

By the mid-1920s, the Court moved toward a hybrid approach in which both courts and legislatures played some role in determining which businesses were affected with the public interest. According to decisions by the Court from this era, *Munn* and its progeny established three judicially administrable criteria for public utilities: (1) businesses that are the result of franchises that condition the grant of public privileges on regulation;[154] (2) "exceptional" occupations recognized "from the earliest times"; or—the crucial category—(3) "businesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation."[155] In place of the reading of *Munn* that deferred to legislative judgments about publicness, a majority of the Court now held that "under the third head that the mere declaration by a legislature that a business is affected with a public interest is not conclusive of the question whether its attempted regulation on that ground is justified. The circumstances of its alleged change . . . [is] always a subject of judicial inquiry."[156]

Against this backdrop, states continued to undertake ever more expansive regulatory programs under the banner of public utility regulation, and federal courts struggled both to parse the *publicity* of the rights at issue and to identify the proper scope of judicial review. In 1920, for example, Kansas passed a statute declaring that the "great industries" of food preparation, clothing manufacture, energy production, and common carriers were "impressed with a public interest."[157] The legislature established an "industrial court" to hear disputes over wages in those industries—a board composed of three members with power to issue compulsory orders to the newly regulated industries. A sponsor of the Kansas bill turned to the familiar language of *Munn*'s third category to justify the state law: "Sir Matthew Hale," he explained, had once written "a paragraph concerning public use of certain facilities for meeting men's needs" that had "been the law in every English speaking country ever since."[158] Kansas simply "extended

153. *Liebmann*, 285 U.S. at 284 (Brandeis, J., dissenting).

154. *See* Charles Wolff Packing Co. v. Ct. of Indus. Rels. (*Wolff Packing I*), 262 U.S. 522, 535 (1923).

155. *Id.* at 535 (citing Munn v. Illinois, 94 U.S. 113, 113 (1876)).

156. *Id.* at 536.

157. *See* JOHN HUGH BOWERS, THE KANSAS COURT OF INDUSTRIAL RELATIONS 43 (1922).

158. *See id.* at 58-59.

the principle" first to railroads, then to electric utilities, and now to the principle that "the people must also have food, clothing and fuel."[159] Kansas empowered the industrial board to set prices, compel service, and to force wage disputes into arbitration (thus depriving employees of the power to strike).

After the board ordered a corporation that slaughtered cattle to increase its wages, the corporation—the Charles Wolff Packing Company—filed suit in federal court alleging that the board's order deprived it of its liberty of contract. Chief Justice Taft wrote the majority opinion in *Wolff Packing*. He first summarized *Munn*'s three categories. While, as a general matter, the Fourteenth Amendment protected employers' and employees' freedom of contract, "[b]usinesses said to be clothed with a public interest" are an "exception" to that general rule.[160] Turning to the third, most capacious, category of *Munn*, Taft summarized the exception as standing for the idea that "[b]usinesses which though not public at their inception may be fairly said to have risen to be such and have become subject in consequence to some government regulation. They have come to hold such a peculiar relation to the public that [publicity] is superimposed upon them."[161] The third, category, Taft wrote, could not be determined by "mere" legislative declaration. Whether a business had become sufficiently public must "always [be] a subject of judicial inquiry."[162]

Chief Justice Taft ultimately avoided the question whether food production might sometimes become sufficiently "clothed with public interest" to be regulable as a utility. Indeed, he did not solve the puzzle of *Munn*'s great exception: he admitted that "[i]t is very difficult under the cases to lay down a working rule by which readily to determine when a business has become 'clothed with a public interest.'"[163] Taft's opinion instead decided that even if the meat-packing business were within the third category of *Munn*, the kinds of supervisory power given to the Kansas board were too great.[164] He wrote that the bounds of the public's "power of regulation" must be context-dependent, and the power to compel employers and employees to continue production was too intrusive given the relative unimportance of this producer.[165]

On remand, Kansas courts removed the Board's orders regarding wages, overtime, and working conditions, but retained an order fixing working hours at the meat-packing plant. Wolff Packing ran to federal

159. *Id.* at 59.
160. *Wolff Packing I*, 262 U.S. at 535.
161. *Id.* at 535.
162. *Id.* at 536.
163. *Id.* at 538.
164. *See id.* at 539.
165. *See id.* at 539-541.

court once more.[166] Justice Van Devanter described the Court's first *Wolff Packing* decision as follows:

> [T]he court recognized that, in a sense, all business is of some concern to the public, and subject to some measure of regulation, but made it plain that the extent to which regulation reasonably may go varies greatly with different classes of business and is not a matter of legislative discretion solely, but is a judicial question to be determined with due regard to the rights of the owner and employees.[167]

Wolff Packing reflected a pre-New Deal consensus that public utilities were indeed regulable notwithstanding the private property claims of the regulated industries. Courts still scrutinized legislative declarations of public interest and determined whether particular modes of regulation (price control or compulsory arbitration, for example) were justified by the public interest at issue.[168] Thus, sixty years after *Munn* was decided, the Court had reshaped its central holding to stand for the proposition that whether a business held "private" rights that are "free[] from regulation," or instead had become "one in which the public have come to have an interest" was for courts to decide.[169]

It is worth noting that, in this period, the separation-of-powers arguments that underlie today's constitutional challenges to the administrative state were frequently answered by determining whether a firm was affected with the public interest. The first thirty years of the twentieth century saw repeated challenges to what industry perceived to be unconstitutional agency adjudication and unconstitutional delegations of the legislative power. Industry argued that the legislature, in granting an agency authority to promulgate prospective rules governing private conduct, abdicated its responsibility to pass laws. As we describe in more detail below, all of these challenges failed.[170] The Supreme Court summarized the consensus view, expressed in state and federal courts, that the nondelegation doctrine simply did not apply to public utilities. In fact, courts relied on logic that would seem backward to our modern sensibilities: nondelegation challenges failed precisely because delegations regarding this area of major economic concern were needed so "that the legislative power may be effectively exercised."[171]

A second modern separation-of-powers obsession, the scope and place of judicial review of agency action, was also largely answered by determining whether a firm was a public utility. One can understand the

166. Charles Wolff Packing Co. v. Ct. of Indus. Rels., 267 U.S. 552, 561 (1925).
167. *Id.* at 567.
168. *Id.* at 567-68.
169. Charles Wolff Packing Co. v. Ct. of Indus. Rels., 262 U.S. 522, 536 (1923).
170. *See infra* Section V.B.
171. Wichita R.R. & Light Co. v. Pub. Utilities Comm'n, 260 U.S. 48, 58-59 (1922).

entire project of determining whether a business was affected with the public interest to be about whether and how the judiciary should review agency determinations. When the Court decided *Munn*, for example, it handed down a decision the same year noting that it had just decided whether "courts must decide what is reasonable, and not the legislature." It further held that "[w]here property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change."[172] When judges reviewed public utilities, their reasoning sounded in corporate property rights, not the contours of Article III. Whether a corporation's rights were private or public, and whether the industry could be regulated by agencies, turned entirely on a judicially managed inquiry into whether the business had become a public utility.[173]

C. Munn *in the New Deal*

The different receptions of *Munn* across more than sixty years of pre-New Deal public-utilities cases reflected conflicting views on whether *Munn* heralded a pro-regulatory democratic turn or announced a limited set of exceptionally important economic activities over which courts would permit regulation. During the 1920s and early 1930s—a period in which the Court decided *Wolff Packing* and *Liebmann*—scores of law review articles were devoted not only to the question whether the "public utility" standard could be rescued from judicial confusion, but also to parsing why courts had become preoccupied by Lord Hale's categories of industries "clothed" with the public interest.[174]

To follow Professor Fairman and Justice Frankfurter, as we did in the outset of this Article, in attributing *Munn*'s authorship to Justice Bradley, one could imagine that *Munn* swept as broadly as Bradley's dissent in the

172. Peik v. Chi. & N.W. Ry. Co., 94 U.S. 164, 178 (1876).

173. In fact, cases from the public utility era that are invoked to restrict administrative adjudication were cases in which courts conceded that the firm was not affected with the public interest. Instead of *Munn*, *Liebmann*, or *Wolff Packing*, the modern Supreme Court and modern commentators have focused on one peculiar case from the public utility era—*Crowell v. Benson*—as summarizing the operable distinction between public and private rights. 285 U.S. 22, 36 (1932). When it was briefed, the litigants in *Crowell* understood the public utility backdrop we have been charting in this Article. For example, the Solicitor General's *Crowell* brief argued that the appropriate place of judicial review "depends upon the nature of the field in which administrative action takes place." Brief for the Petitioner at 34, *Crowell*, 285 U.S. 22 (1932) (No. 19) (citing Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 619-20 (1927)). The first relevant context was public utility regulation: "In determining a rate under which a public utility must operate in the future, a commission is operating as the delegate of the legislature" and thus judicial review could be circumscribed. *Id.*

174. *See, e.g.*, Hamilton, supra note 4, at 1096; Manley, *supra* note 146, at 413-14 (analyzing *Munn* and *Wolff Packing* to argue that New York has constitutional authority to regulate milk as a public utility); Gustavus H. Robinson, *The Public Utility Concept in American Law*, 41 HARV. L. REV. 277, 281-82 (1927) (describing democratic and rights-based interpretations of *Munn*).

Chicago Railroad case: legislative judgments about whether utilities' property rights are "public," and its judgments about whether the reasonableness of rates should be administratively determined, are final. Bradley's ghost writing of *Munn* "explains," Fairman wrote to Frankfurter, "Bradley's attachment to the case, as expressed in his dissents in *Wabash RR. v. Illinois* and *C. M. and St. P. RR. v. Minn. . . .*"[175]

To modern eyes, Fairman's discovery about *Munn's* authorship seems antiquated, but to then-Professor Frankfurter, it was revelatory: "Your discovery regarding the intrinsic authorship of *Munn* is exciting. I am not too surprised that the governing idea should have been Bradley's . . . in the light of his dissent in the Minnesota Rate Case."[176] In discussing Fairman's forthcoming biography of Bradley, Frankfurter invited Fairman to "tell us . . . why that 'corporation lawyer' should have entertained such drastic but wise views of constitutional law against what were deemed to be the interests of property while Harlan, who thought himself a tribune of the people, gave comfort to those interests."[177] Justice Harlan, who had written *Smyth*, and Justice Bradley, who had intended *Munn* to convey a "governing idea" that permits broad regulation of public businesses, were remembered exactly contrary to their published decisions on public utilities.

During this time, a changed Supreme Court again returned to *Munn*, and, in *Nebbia v. New York*, revived Justice Bradley's pro-regulatory understanding of *Munn*.[178] *Nebbia* is usually remembered for ushering in the New Deal era in which courts retreated from substantive-due-process jurisprudence and tolerated government intrusions in corporate property rights.[179] It was also, however, the start of a crucial new chapter in the development of the public law of public utilities.

In 1933, the New York legislature followed the regulatory plan marked out by New York's governor in the early twentieth century and declared milk to be a public utility for the express purpose of granting itself authority to regulate its production and sale. In doing so, New York followed the contractarian public utility playbook. It created an agency empowered to "regulate the entire milk industry of New York state, including the production, transportation, manufacture, storage, distribution, delivery and sale," and provided that the agency's determinations "shall have the force and effect of law."[180]

Both sides briefed *Nebbia* as a public utility case. Milk producers challenged the law on the ground that milk was not affected with the public

175. *Id.*

176. Letter from Felix Frankfurter to Charles Fairman 1 (June 24, 1950) (on file with Papers of Felix Frankfurter, Rare Books & Manuscripts Libr., Harv. L. Sch.).

177. Letter from Felix Frankfurter to Charles Fairman 3 (Dec. 27, 1948) (on file with Papers of Felix Frankfurter, Rare Books & Manuscripts Libr., Harv. L. Sch.).

178. Nebbia v. New York, 291 U.S. 502, 535 (1934).

179. *See* Sunstein, *supra* note 28, at 880.

180. *See Nebbia*, 291 U.S. at 539 (McReynolds, J., dissenting).

interest.[181] New York responded by arguing that the regulation of milk could be reconciled with *Munn* and its progeny. New York did not ask the Court to issue a sweeping decision. Instead, it tried to argue that milk fit comfortably within the public utility categories established in *Munn*.

Under the framework adopted in *Liebmann*, *Wolff Packing*, and other *Lochner*-era cases, the producers argued that the Milk Control Act was unconstitutional "unless the business or property is 'affected with a public interest.'"[182] That phrase, the milk industry argued, is "indefinite," except as clarified by recent cases interpreting *Munn*: a business is affected with the public interest only if it has been "*devoted* to a public use and in its use thereby in effect *granted* to the public."[183] It is not enough to claim that a business is "large or because the public are warranted in having a feeling of concern in respect of its maintenance."[184] In the Court's recent cases, the appellants continued, "dairying and conducting grocery stores" are the best examples of "essentially private businesses, to which the traditional 'public utility' concept can not be applied."[185] Here, once more, was the restrictive account of the *Munn* idea of public utilities.

New York responded that milk distribution is "of such a nature as to justify the application to it of . . . regulation ordinarily applied to a public utility."[186] New York argued that the concept of a public utility "traces back to *Munn*," and has long permitted price regulations.[187] But New York did not advocate for the democratic version of *Munn*. Instead, it sought to distinguish the recent *Liebmann* case by arguing that the legislature's judgment was supported by substantial evidence.[188] New York appended a law review article canvassing reasons that milk had become "a common necessity"; that it had the tendency to become a "natural monopoly"; that the business uses the public highways; and that the distribution market is prone to abuse.[189]

The Court upheld New York's milk regulation in *Nebbia v. New York*. Crucially, however, it did not engage in a fact-specific inquiry about why milk had become affected with the public interest. Instead, a newly composed bench embraced the democratic vision of *Munn*. The majority conceded that milk was not a "public" business at common law, nor was it a monopoly.[190] "[T]here is no closed class or category of businesses affected

181. *See* Brief for Appellant at 9-10, 12, Nebbia v. New York, 291 U.S. 502 (1934) (No. 531).
182. *See id*.
183. *Id.* at 12.
184. *Id.*
185. *Id.* at 14.
186. Brief for Appellee at 30, Nebbia v. New York, 291 U.S. 502 (1934) (No. 531).
187. *See id.* at 43-47.
188. *See id.* at 38-43.
189. *Id.* at 40-43.
190. *Nebbia*, 291 U.S. at 531-34.

with a public interest," it wrote.[191] To be affected with the public interest "mean[s] no more than that an industry, for adequate reason, is subject to control for the public good." The role of courts is to determine that the legislature had not acted in an "arbitrary" or "discriminatory" way, but once that test is passed, a court becomes "functus officio."[192] Courts were bound to defer to the legislative determination.

Nebbia explicitly expanded the *Munn* category to permit the legislature to declare industries affected with the public interest, but in a way that appears unusual by modern lights. The Court first considered whether milk was a public utility under the rights-based, antiregulatory view of *Lochner*. It concluded that it was not: "[T]he dairy industry is not, in the accepted sense of the phrase, a public utility. We think the appellant is also right in asserting that there is in this case no suggestion of any monopoly or monopolistic practice."[193] The Court further rejected the contractarian justification for regulation, stating that "those engaged in the business are in no way dependent upon public grants or franchises for the privilege of conducting their activities."[194] *Nebbia* thus appears to collapse the utility idea altogether. In doing so, the *Nebbia* Court construed the affected-with-the-public-interest standard to simply mean that the legislature had a compelling reason to regulate. On *Nebbia*'s telling of *Munn*, the grain operators "held no franchise from the state. They owned the property upon which their elevator was situated and conducted their business as private citizens. No doubt they felt at liberty to deal with whom they pleased and on such terms as they might deem just to themselves."[195]

Despite several citations to *Munn*, the majority's direct equivocation between public utilities and "the police power" appears nowhere in the text of *Munn*, nor does it appear in Justice Bradley's gloss on the case in the *Chicago Railroad* cases. Indeed, the *Nebbia* Court construed *Munn* in a way that seemed to obliterate the category of public utility regulation altogether: everything was public utility regulation, *and* everything was police-power regulation.

Unlike Justice Bradley, however, the *Nebbia* majority would not have understood the third category of *Munn* to permit legislation wherever a legislature determines that the regulation of private ordering has become sufficiently important to the public. Rather, the *Nebbia* majority reduced all of *Munn* to a redundancy: the regulation of a public utility was no different from any other exercise of the "police power." To be "affected with the public interest" is "equivalent" to being "subject to the exercise of the

191. *Id.* at 515.
192. *Id.* at 515-16.
193. *Id.* at 513-14.
194. *Id.*
195. *Id.* at 532.

police power."[196] Until *Nebbia* reframed *Munn*,[197] the police power and the affected-with-the-public-interest standard had been understood to be distinct, but *Nebbia* treated them as synonymous.

The anachronism in *Nebbia*'s treatment of *Munn* as a police-power case makes sense in light of the receding tide of substantive-due-process jurisprudence in 1934. The removal of a right to freedom of contract leaves the legislature broadly free to regulate on *any* basis, and we may label that broad legislative discretion "police power," or "affected with the public interest," or something else. Yet to modern eyes, *Nebbia*'s collapsing of the public utility idea into legislative power writ large obscures the public utility story that preceded it. Both New York and the appellant understood themselves to be arguing about whether milk was, like so many other industries regulated for the prior decades, a public utility.

After *Nebbia*, the Court's substantive-due-process jurisprudence disappeared entirely from the constitutional law of the administrative state. As is well known, the *Nebbia* Court eventually came to broadly disclaim the substantive-due-process inquiry and instead embraced (1) a "rational basis" theory of judicial review for all statutes (utility and non-utility alike), and (2) a far more expansive theory of Congress's power to regulate local economic activity under the Interstate Commerce Clause.[198]

In fact, throughout the 1930s and 1940s, courts understood *Nebbia* to have expanded the third category of *Munn* to encompass every industry. In 1935, just a year after the Court decided *Nebbia*, it described *Munn* as establishing "that the State may control private business, even to the extent of fixing prices, when it is affected with a public interest or clothed with a public use."[199] The Court further emphasized that "[i]n *Nebbia v. People of State of New York* it was held that a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare. . . . If the laws passed have a reasonable relation to a proper purpose and are neither arbitrary nor discriminatory the requirements of due process are satisfied." A few years later, three members of the Court put the point more emphatically, explaining in a concurrence that *Nebbia* was a moment of great restoration: it had "*returned* . . . to the constitutional principles

196. *Id.* at 533.

197. *See Notes for a Law-School Course on Public Utilities and Trade Regulation*, *supra* note 7, at 217.

198. *See, e.g.*, West Coast Hotel v. Parrish, 300 U.S. 379, 392 (1937); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938); Williamson v. Lee Optical, 348 US 483, 488 (1955). We note that the pro-regulatory gloss on *Munn* appeared in two of these watershed cases. *See Parrish*, 300 U.S. at 392 (citing *Munn* for the proposition that "[t]his power under the Constitution to restrict freedom of contract has had many illustrations"); *Lee Optical*, 348 U.S. at 488 ("We emphasize again what Chief Justice Waite said in *Munn*, 'For protection against abuses by legislatures, the people must resort to the polls, not to the courts.'" (quoting Munn v. Illinois, 94 U.S. 113, 134 (1876)).

199. Reynolds v. Milk Comm'n, 179 S.E. 507, 511 (1935).

which prevailed for the first hundred years of our history."[200] The New Deal Court construed *Munn* as having declared price fixing to be a constitutional "prerogative of the legislative branch, not subject to judicial review or revision" and thus asserted that *Nebbia* corrected the mistakes of the early decades of the twentieth century.[201]

The affected-with-the-public-interest standard, and the public-private distinction *Lochner*-era courts read into *Munn* and its progeny, had thus become a historical anachronism. There was no longer a distinction between public utilities that could be subject to regulation and private firms that could not. All firms were potentially public utilities, and the distinction was a legislative choice, not a judicial one.

IV. Judicial Retrenchment

But after briefly accepting a strong democratic reading of *Munn*, the Supreme Court soon balked. In doing so, however, the Court did not revive the public-private distinction that preoccupied courts in the *Lochner* era. Instead, the Court developed altogether new ways of reinstating judicial review of economic regulations concerning public utilities. This occurred in at least three ways. First, the Court revived the substantive-due-process protections that utilities had enjoyed during *Munn*, but it did so only for the category of business enterprises that had been regulated as public utilities during the *Lochner* period. As a result, there is a special public law of public utilities that allows utilities to levy constitutional arguments that are unavailable to firms that were not thought to be affected with the public interest during the *Lochner* era. Second, the Supreme Court turned to

200. FPC v. Nat. Gas Pipeline Co., 315 U.S. 575, 599-600 (1942) (Black, J., concurring) (emphasis added).

201. *Id.* This appears to have been a common understanding of *Nebbia*. One court explained:

> [T]he right of the State under the Federal Constitution to fix minimum prices to be paid to producers and to be paid by consumers is definitely set at rest by Nebbia v. People of State of New York. That decision, founded on Munn v. Illinois, held that the right of a state to fix prices did not depend on whether the business was monopolistic in nature or enjoyed a franchise from the state, nor did it depend on whether the business was affected or clothed with a public interest in the sense that its purposes were to furnish services universally used by the public such as, transportation, light, heat, water and power. The touchstone of public interest is whether the economic occasion is such as to make it desirable or necessary for the business to be regulated for the public welfare.

Rowell v. State Bd. of Agric., 99 P.2d 1, 6 (1940) (Wolfe, J., dissenting in part). Another, again construing *Nebbia*, explained that:

> Courts ought not to pronounce any act of the Legislature unconstitutional unless it is plainly so—so plain as to leave no doubt on the subject. To doubt is to affirm its constitutionality. There is no such theory as a doubtful constitutional statute. Every presumption is in its favor, and there is no stronger presumption known to the law.

Reynolds, 179 S.E. at 510.

formal separation-of-powers arguments in lieu of judicially managed tests of the "publicity" of corporate economic power. These arguments received little purchase during the *Lochner* era but became the means by which the judiciary reestablished judicial review of government regulation. And third, the Supreme Court has revived selections of the public-private distinction, though this revival appears focused on agency adjudication and is not nearly so broad as it was at the beginning of the twentieth century.

A. The Public Law of Public Utilities

The most obvious place that the Court blinked was in the area of public utilities, such as railroad and electric companies. The Court's watershed new gloss on *Munn* in *Nebbia* was fresh when Fairman and then-Professor Frankfurter turned their attention to *Munn*'s authorship. But the fate of Justice Field's triumph in *Smyth*, which had preserved a place for judicial review of public enterprises to make sure that regulatory interventions were not excessively confiscatory, remained uncertain. A broad view of *Nebbia* would seem to replace *Smyth*'s property-rights-oriented entitlement to a "reasonable rate" of return with a democratic vision of judicial review that polices only whether rates are arbitrary or discriminatory.

Within a year of Fairman's first report of his discovery about the authorship of *Munn* to then-Professor Frankfurter, Frankfurter was appointed to the Supreme Court. Now-Justice Frankfurter wasted little time in rejecting *Smyth* in the United States Reports. In *Driscoll v. Edison Light & Power*, he chided the majority for continuing to cite *Smyth* at all.[202] "The determination of utility rates—what may fairly be exacted from the public and what is adequate to enlist enterprise—do not present questions of an essentially legal nature," he wrote. Instead, "[t]he only relevant function of law in dealing with this intersection of government and enterprise is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process."[203] As Frankfurter explained in his concurrence, Justice Bradley had long ago realized that "the real issue is whether courts or commissions and legislatures are the ultimate arbiters of utility rates."[204]

Justice Stone urged Justice Frankfurter to withdraw his concurrence in *Driscoll*—to "bide his time"—and he did so not because he disagreed with Frankfurter on the merits, but because he was worried about political expediency.[205] Stone predicted that "in the near future Smyth v. Ames will be overruled," but to raise the issue so clearly was to risk "stir[ing] new resistance on the part of some of your colleagues and to put others,

202. 307 U.S. 104, 122 (1939) (Frankfurter, J., concurring).
203. *Id.*
204. *Id.*
205. *See* Memorandum from Harlan Stone, J., to Felix Frankfurter, J. 2 (Apr. 13, 1939) (on file with Papers of Felix Frankfurter, Rare Books & Manuscripts Libr., Harv. L. Sch.).

contrary to the fact, in the attitude of supporting Smyth v. Ames."[206] Frankfurter replied that he felt bound to publish his concurrence, because citing *Smyth* approvingly would "revitalise all the miserable foolishness of *Smyth v. Ames*. . . . It will do that in the minds of the bar, alert for such things, as well as in its probable effect upon commissions and legislatures."[207] To insert the Court once more in these balancing judgments was to risk "a chilling effect upon the further progress and employment of th[e] legislative device"[208] of rate regulation.

But Justice Frankfurter could not persuade the majority in *Driscoll* to excise *Smyth*, and an oblique reference remained in the majority opinion.[209] The Court thus refrained from deciding whether public utilities' private right to a reasonable rate—a right that had changed from private to public, and back to private again—survived *Nebbia*.

Uncertainty about the place of judicial review after *Nebbia* became apparent a few years later, when, in 1938, the *federal* government decided to regulate directly wholesale natural gas markets. After declaring that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest,"[210] Congress passed the Natural Gas Act, which conferred new powers upon the Federal Power Commission (FPC).[211] Like the commissions created by states to regulate public utilities over the prior six decades, this agency was charged with setting "rates and charges"[212] for the national natural gas market, and the statute required those rates to be "just and reasonable."[213] The Natural Gas Act also provided for appellate review of the FPC's orders.[214]

This issue repeatedly came before the Court in the 1940s. The first case, *FPC v. Natural Gas Pipeline*,[215] revealed a disagreement between the Justices about the vitality of the *Smyth* and *Munn* theories of a private right to "reasonable" rates, and the second, *FPC v. Hope Natural Gas Co.*, drew them into open disagreement about the role of judicial review in public utilities cases. In *Natural Gas Pipeline*, a utility challenged the Commission's orders reducing their rates.[216] In addition to challenging Congress's power to regulate utility rates at all, the pipeline contended that the

206. *Id.*

207. Memorandum from Felix Frankfurter, J., to Harlan Stone, J. 1 (Apr. 14, 1939) (on file with Papers of Felix Frankfurter, Rare Books & Manuscripts Libr., Harv. L. Sch.).

208. *Id.* at 2.

209. *See* Driscoll v. Edison Co., 307 U.S. 104, 113-14 (1939).

210. Natural Gas Act, 15 U.S.C. § 717(a) (2024).

211. *Id.* § 717(c) (2024).

212. Natural Gas Act, ch. 556, § 4(a), 52 Stat. 821, 822 (1938).

213. *Id.*

214. *Id.* § 19(b).

215. 315 U.S. 575 (1942).

216. Here we abbreviate a complicated set of interim rate-making determinations and cost-accounting formulas. *See* Nat. Gas Co. v. FPC, 120 F.2d 625, 628 (7th Cir. 1941).

Commission's order failed to give the "reasonable rate" to which it is constitutionally entitled under *Smyth* and its progeny.[217]

When *Natural Gase Pipeline* came to the Supreme Court, Justice Harlan Stone, who had counseled Justice Frankfurter to bide his time on *Smyth*, had since become Chief Justice. Stone assigned himself the majority opinion. His opinion avoided the constitutional question whether *Smyth* gives the pipeline an entitlement to a "reasonable rate." He reasoned instead that, whether or not there remains a constitutional requirement to a "reasonable rate," the Commission's statute independently requires the agency to provide one. In answering the question of "[t]he scope of judicial review of rates prescribed by the commission," Stone reasoned that "[t]he ultimate question for our decision is whether the rate prescribed by the Commission is too low."[218]

Despite finding statutory authorization for judicial review of utility rates, Chief Justice Stone did, however, implicitly limit *Smyth* by conceding that courts should defer to the FPC regarding the proper actuarial method for setting rates.[219] In prose that could be read to endorse the narrowest vision of judicial review, Stone wrote that "[i]f the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."[220]

Four Justices concurred in *Natural Gas Pipeline*, and their opinions reveal a fight over whether the Court had now returned to the democratic view of *Munn*. Justices Black, Douglas, and Murphy all concurred to applaud the majority for finally holding, in their view, that "price fixing [is] a constitutional prerogative of the legislative branch, not subject to judicial review or revision."[221] This deference, they thought, had always been the law—for the "first hundred years of our history" until the Justices who joined the majority in *Munn* in 1876 were replaced by those Justices who buried *Munn* in *Chicago Railway* in 1890.[222]

Justice Black's concurring opinion cautioned about the dangers of preserving judicial review of rates. Indeed, Black saw in the public-utilities cases the beginning of the whole *Lochner* misadventure. "The doctrine which makes of 'due process' an unlimited grant to courts to approve or reject policies selected by legislatures in accordance with the judges' notion of reasonableness had its origin in connection with legislative attempts to fix the prices charged by public utilities. And in no field has it had more

217. *See* FPC v. Nat. Gas Pipeline, 315 U.S. 575, 583 (1942).

218. *Id*. at 585.

219. *See id.* at 586. ("The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas.").

220. *Id.*

221. *Id*. at 600 (Black, J., concurring).

222. *Id.* at. 599-600 (noting that after the *Munn* Court had been replaced, "the new Court then clearly repudiated the opinion expressed . . . in . . . Munn, in a holding which accorded with the views of Mr. Justice Field").

paralyzing effects."[223] If ratemaking involved a claim of private constitutional right, regulation would continue to be hampered by freedom of contract. *Smyth* had hamstrung regulators and courts to apply a formula for calculating "reasonable" rates that bore no relationship to economic reality and called upon courts to make decisions they were ill-suited to make.[224] In the concurring Justices' view, the removal of substantive-due-process rights now removed the *Smyth* inquiry. "[T]he Commission is now freed from the compulsion of admitting evidence on reproduction cost or of giving any weight to that element of 'fair value.'"[225] In short, in the concurring Justices' view, the democratic vision of public utility regulation in *Munn* had finally been restored.

Despite his early critique of *Smyth*, Justice Frankfurter did not join the other concurring Justices' proclamation that the pro-regulatory vision of *Munn* had finally been restored. He wrote separately because, in his view, the concurrence had "stirred" the question of the "constitutional scope of judicial review of rate orders where Congress has denied judicial review."[226] Surprisingly, Frankfurter disputed Justice Black's history of *Munn* and the Court's capitulation in *Smyth*. In his view, the entitlement to a reasonable rate, which *Smyth* constitutionalized, reflected a wider consensus that there is "a limitation to be enforced by the judiciary upon the legislative power to fix utility rates."[227] Frankfurter thought the issue of judicial review was not squarely presented and collected several examples to show that "the doctrine of judicial review" was widely accepted in rate cases.[228]

Any ambiguity about Justice Frankfurter's position on the province of judicial review over rate-making decisions was answered a few years later in *Hope* and *Bluefields.* Frankfurter's dissent in *Hope* marked a retrenchment in the public law of public utilities that is still with us.

Hope was brought by a Standard Oil affiliate in West Virginia named Hope Natural Gas.[229] After receiving complaints from state public utility commissions, the FPC determined, among other things, that Hope's costs were overstated, that Hope's claimed rate of return was "unreasonable," and that "6 1/2% was a fair rate of return."[230]

The Fourth Circuit reversed the Commission.[231] Drawing on *Smyth,* the court of appeals found the commission's order "unreasonable and confiscatory."[232] The court thought *Smyth* survived the New Deal, that utility

223. *Id.* at 601.
224. *See id.* at 604-05 (describing the administrability problems of fair-value judicial review).
225. *Id.* at 606.
226. *Id.* at 609 (Frankfurter, J., concurring).
227. *Id.*
228. *Id.*
229. FPC v. Hope Nat. Gas Co., 320 U.S. 591, 594 (1944).
230. *Id.* at 595-96, 599.
231. Hope Nat. Gas Co. v. FPC, 134 F.2d 287, 291 (4th Cir. 1943).
232. *Id*. at 292.

commissions must still give "fair value of the property," and, relatedly, that "rates must allow a fair return upon the present fair value of the property."[233]

At the Supreme Court, Chief Justice Stone assigned himself *Hope* and reversed the court of appeals. His majority opinion largely avoided the old constitutional question and ruled that "under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling."[234] Because the court of appeals had required the Commission to use a particular actuarial formal (the fair-value approach), it had misconstrued the broad terms of the legislative delegation.

Justice Frankfurter, in dissent, would have returned the Court to the judicial supremacy of *Smyth*. Citing *Chicago Railway*, Frankfurter wrote that "[w]ho ultimately determines the ways of regulation, is the decisive aspect in the public supervision of privately-owned utilities. [I]t was decided more than fifty years ago that the final say under the Constitution lies with the judiciary and not the legislature."[235] Remarkably, Frankfurter contended that Congress had "acquiesced" to the principle of judicial review announced in the *Smyth* and *Chicago Railway* cases.[236] He would have remanded the case to the Commission to require it to "the criteria by which it is guided in determining that rates are 'just and reasonable,'" and he would have required the Commission to consider the public-interest criteria elaborating in another dissenting opinion in that case.[237]

The conflict over deference to the legislature regarding the choice of how to regulate modern business that was latent in *National Pipeline* was now express. Justices Black and Murphy wrote separately to reject "patently" Justice Frankfurter's "wholly gratuitous assertion as to Constitutional law."[238] As they had written in *National Pipeline*, the doctrine of judicial review elaborated in the *Chicago Railway* and *Smyth* cases represented an erroneous aberration from the *Munn* settlement. According to them, the Court in *Chicago Railway* had been "induced" to "expand the meaning of 'due process' so as to give courts power to block efforts of the state and national governments to regulate economic affairs."[239] It was thus false, in their view, to suggest that "Congress voluntarily has acquiesced in a Constitutional principle of government that courts, rather than

233. *Id.* at 300.

234. *Hope Nat. Gas Co.*, 320 U.S. at 602. In an opinion written by Chief Justice Stone, the Court had already determined that the statute was constitutional under the Court's newly expanded Commerce Clause precedents. *See* Ill. Nat. Gas Co. v. Cent. Ill. Pub. Serv. Co., 314 U.S. 498, 509 (1942).

235. *Hope Nat. Gas Co.*, 320 U.S. at 625 (Frankfurter, J., dissenting).

236. *Id.* at 625.

237. *Id.* at 627-28.

238. *Id.* at 619 (Black & Murphy, JJ., concurring).

239. *Id.* at 619-20.

legislative bodies, possess final authority over regulation of economic affairs."[240]

The enduring fight between Justices Frankfurter and Black long after *Nebbia* and the switch in time illustrates how the vestigial place of *Lochner*, and judicial review of private rights, was engrafted onto the public law of public utilities. Today, utilities enjoy special protections that are unavailable to nonutility firms. Legislatures have constitutional authority to fix prices in most industries.[241] However, if a utility objects to the rate of return authorized by a regulator, it can bring a claim that mimics the old substantive-due-process challenge under *Smyth*.

Indeed, an energy utility can bring a substantive-due-process challenge to FERC and public-utility-commission rate orders that do not allow them a certain level of return. In energy law, the constitutional theory that enables this challenge is referred to as the regulatory compact:

> The utility business represents a compact of sorts; a monopoly on service in a particular geographical area (coupled with state-conferred rights of eminent domain or condemnation) is granted to the utility in exchange for a regime of intensive regulation. . . . Each party to the compact gets something in the bargain. As a general rule, utility investors are provided a level of stability in earnings and value less likely to be attained in the unregulated or moderately regulated sector . . . ratepayers are afforded universal, nondiscriminatory service and protection from monopolistic profits . . . .[242]

Public utilities' special regulatory treatment is thus based on the persistent analogy between public utility regulation and contract. In exchange for their service obligations, utilities are entitled as a matter of constitutional law to unique regulatory protection, including the right earn predictable returns.

The idea of a regulatory compact, and the role of judicial supervision, thus persist notwithstanding the fact that judicial deference to agency decisions has become an article of faith in other areas of administrative law. Courts have, for example, held that energy rates "almost certainly do[] not meet the requirements of *Hope Natural Gas*" where a rate-making order would mean that "the company has been shut off from long-term capital, is wholly dependent for short-term capital on a revolving credit arrangement that can be cancelled at any time, and has been unable to pay dividends for four years."[243] Writing for the D.C. Circuit, Judge Bork read *Hope* to require "a hearing at which the Commission can determine whether the rate order it issued constituted a reasonable balancing of the

240. *Id.* at 620.

241. *See, e.g.*, Emergency Price Control Act of 1942, 50 U.S.C. § 901(a) (repealed 1947).

242. Jersey Cent. Power & Light v. FERC, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring) (citations omitted).

243. *Id.* at 1180 (majority opinion).

interests the Supreme Court has designated as relevant to the setting of a just and reasonable rate."[244] Courts, on this view, must set aside orders that fail to adequately achieve an "end result," which "balance[s] . . . the investor and the consumer interests."[245] In providing a decisive concurring vote, Judge Starr agreed that a remand for a "*Hope* hearing" was necessary, in part because the utility's complaint "'sounds' in the constitutional demands of [the Takings Clause]."[246] While Judge Starr's opinion did not expressly endorse the takings argument, his invocation of that ambient idea—that utility rate regulation infringes on utilities' private rights—is quite familiar to the antiregulatory glass on *Munn*.

Indeed, Judge Starr's gloss on *Hope* clarified that substantive-due-process arguments were available to utilities that wanted to challenge onerous regulatory requirements. After canvassing "classic" takings cases that arise "when government invades and possesses property, partly or entirely," as well as those in which "elimination of a basic incident of ownership—the right to exclude unwanted visitors from property—can constitute a taking," he ultimately concluded that the property-rights concern was for FERC to address in the first instance.[247] The echo of the *Smyth* approach to utilities' private property rights was, however, unmistakable.[248] Perhaps most consequentially, electric utilities frequently invoke the regulatory compact in other contexts to increase the costs of state decarbonization goals, even if the claim is seldom litigated.[249]

As discussed in Part III, *Smyth* was designed to protect investors whose property had become affected with the public interest. Property that was affected with the public interest could be regulated, but the judiciary required regulators to permit a certain level of return to comport with the Constitution's due-process requirements. It is difficult, however, to see how *Smyth's* logic can survive the New Deal doctrinal transformation. During the New Deal, the Court announced that *all* businesses are affected with the public interest so long as the legislature has reason to find that they are. The Court tolerated price regulations under the same theory.

As a result of Judges Bork and Starr's opinions in *Jersey Central*, the question of whether and how much judicial review of rate-making

244. *Id*. at 1182.

245. *Id*. at 1176.

246. *Id*. at 1189 (Starr, J., concurring).

247. *Id.* at 1193.

248. *See* Memorandum from Ari Peskoe, Senior Fellow in Elec. L., Harvard Env't Pol'y Initiative, to Quadrennial Energy Rev. Task Force, U.S. Dep't of Energy 3 n.4 (2016), https://eelp.law.harvard.edu/wp-content/uploads/2024/10/Harvard-Environmental-Policy-Initiative-QER-Comment-There-Is-No-Regulatory-Compact.pdf [https://perma.cc/X9A8-3H7W].

249. *See, e.g.*, Rebuttal Testimony of Geoff Marke at 31-32, *In re* Empire Dist. Elec. Co., Nos. EO-2022-0040 and EO-2022-0193 (Mo. Pub. Serv. Comm'n May 13, 2022), https://efis.psc.mo.gov/Document/Display/69806 [https://perma.cc/9BEG-6GEW] ("[B]ecause of the traditional and well justified regulatory compact between a utility, its Commission, and its customers, the proper treatment of Liberty's undepreciated investments and other energy transition costs at the Asbury coal plant is to allow Liberty to recover those past investment costs via a securitized utility tariff bond.").

regulations there should be grounds itself in yet another modern gloss on *Hope* and *Munn*, and the vexed doctrinal compromise they represent. To be sure, the majority in *Jersey Central* described its "end result" test as the effect of a "doctrinal shift" away from *Smyth v. Ames*[250] that had set "aside the rigorous judicial scrutiny that had previously characterized review of rate orders."[251] Yet, the result reached in *Jersey Central* demonstrates that judicial supervision of government intrusion into private rights has once more become the watchword of the regulation of public utilities.

As we have noted, two of the Justices who joined the 1940s' judicial embrace of a democratic account of *Munn* wrote separately to criticize the dissenters' view that "courts, rather than legislative bodies, possess final authority over regulation of economic affairs."[252] We note, moreover, that the 1940s majority focused on the statutory standard of review to emphasize that "[i]t is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, *judicial* inquiry under the Act is at an end."[253] And we note, moreover, that Justice Frankfurter felt compelled to dissent in *Hope* to suggest that "it was decided more than fifty years ago that the final say under the Constitution lies with the judiciary and not the legislature."[254] Frankfurter, however, won the day. His later view of the judiciary's role in utilities cases mirrors the modern treatment of public utilities. The judicial management of utilities' private right to a reasonable return is now firmly entrenched in the judicial review of rate-making regulation.

V. The Public-Private Rights Distinction Today

Agency adjudication in the early twentieth century permitted agencies to adjudicate disputes when the *activity*—not the *right*—had become clothed in the public interest. In this period, the limits of legislative, executive, and judicial power were discerned through the public-private distinction—by asking whether judicial review was needed to protect property interests. During this time, a judicial finding of publicness disabled separation-of-powers claims.

Given this context, the Supreme Court's willingness to consider nondelegation challenges the year after it relinquished its role in policing the public-private distinction for public utilities is more pro-regulatory than it appears at first glance. The Court, after all, was experimenting with a new approach to judicial review of agency action after having eliminated the more searching approach that characterized four prior decades of public utility litigation. In a similar vein, the Court's more recent decision to

250. *Jersey Cent. Power & Light Co.*, 810 F.2d at 1175.
251. *Id.*
252. FPC v. Hope Nat. Gas Co., 320 U.S. 591, 620 (Black & Murphy, JJ., concurring) (1944).
253. *Id.* at 602 (majority opinion) (emphasis added).
254. *Id.* at 625 (Frankfurter, J., dissenting).

revive the public-private distinction for adjudication but not for rulemaking is a significant departure from the framework that was operative in the administrative state's formative years.[255]

A. Public Utility Rights and Administrative Adjudication

Federal courts scholars often assume that, until 1932 when the Court decided *Crowell v. Benson*,[256] Congress and state legislatures rarely delegated authority to adjudicate private rights to nonjudicial tribunals.[257] These accounts assume that the law recognized two separate domains: "the private sphere of individual contractual freedom [and] the public sphere of government regulation."[258] Caleb Nelson and others have argued that, with limited exceptions involving the power to tax, exercise eminent domain, and adjudicate disputes in territories and military tribunals, agencies' adjudicatory authority was limited to "public rights" cases.[259]

This conception of the judicial role treats the "appellate review" model of administrative law,[260] in which an agency makes an initial decision that is then reviewed by a court, as inconsistent with the separation of

255. For an analysis of how agency adjudication has evolved from the Administrative Procedure Act's original understanding, see Emily Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 381 (2021).

256. 285 U.S. 22 (1932).

257. *See* Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 943 (2011) ("[A]djudication on a mass scale by administrative agencies . . . typically starts with the Supreme Court's 1932 decision in *Crowell v. Benson* . . . .").

258. Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 478 (1988); *see also* Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1196-1204 (1985) ("The representational practice of the liberty of contract era assumed that the social world was divisible into 'public' and 'private' spheres of action, implicitly corresponding to the 'presence' or 'absence' of the individual's free will. Whesn conduct was 'purely' private, an expression of the autonomous free will of the affected parties, there was no basis for the imposition of legislative power.").

259. *See* Nelson, *supra* note 22, at 565; *see also* John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 153 (2019) ("Nelson found that executive adjudication was permissible with respect to public benefits and so-called public franchises, like corporate charters, but not with what respect to what he calls 'core private rights.'" (quoting Nelson, *supra* note 22, at 566-68)); William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1513-14 (2020) ("Article III's vesting of the judicial power is not about the *process* of adjudication. Rather, it refers to the substance of judicial power (which is the power to bind parties and to authorize the deprivation of private rights."); *cf*. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 646 (2004) ("[D]espite the importance of [Article III] . . . Congress has often assigned disputes that appear to fall within the scope of the federal judicial power to Article I tribunals whose judges lack salary and tenure protections.").

260. The "appellate review" model of administrative law posits that administrative decisions are reviewed by an Article III Court. In his comprehensive treatment of this question, Thomas Merrill defines the appellate review model as having "three salient features: (1) The reviewing court decides the case based exclusively on the evidentiary record generated by the trial court. . . . (2) The standard of review applied by the reviewing court varies depending on whether the issue falls within the area of superior competence of the reviewing court or the trial court. . . . (3) The trial court, which hears the witnesses and makes the record, is assumed to have superior competence to resolve questions of fact; the reviewing court is presumed to have superior competence to resolve questions of law." Merrill, *supra* note 257, at 940.

powers.[261] Because Article III vests the "judicial power of the United States" in courts made up of judges who enjoy life tenure and salary protections,[262] Article III judges must decide all "cases and controversies."[263] The only exception to this rule is for controversies involving a limited set of public rights.[264] Even the public-utilities cases discussed above are thought to reflect the "completely traditional" view that wherever the private rights of utility companies are in issue, "people continued to believe that only the 'judicial' power can authoritatively resolve claims that the government is invading core private rights."[265]

As Parts II and III have shown, however, in the early years of the administrative state, it was uncontroversial for administrative agencies to adjudicate contract and property disputes precisely because the commercial activity at issue had been deemed "public." In fact, in a number of early twentieth-century cases, the Supreme Court prohibited *judicial* review of disputes because it determined that an administrative tribunal was the proper forum for settling private-rights disputes involving a public utility.[266] For example, the Supreme Court dismissed an antitrust suit brought by a shipper against a railroad company because "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."[267] Once a company became "affected with the public interest," courts could not adjudicate contract, tort, and antitrust suits involving private companies until the agency first weighed in.[268]

This history poses a challenge for scholars who would cabin administrative adjudication to only those disputes that do not implicate "core" private rights. While it is correct that, in the early years of the administrative state, the public-private distinction was used to determine whether an agency had authority to adjudicate a dispute, it was less clear whether private rights remained "private" when asserted by a public utility. Broadly speaking, when private property became "affected with the public interest," courts did not hesitate to uphold administrative decisions that may have addressed classical claims of private right. Indeed, courts went so far

261. *See, e.g.*, Fallon, *supra* note 45, at 919 (stating that Article III means "the only federal tribunals that can be assigned to resolve justiciable controversies are 'article III courts'"); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994) ("Article III requires de novo review, of both fact and law, of all agency adjudication that is properly classified as 'judicial' activity.").

262. U.S. CONST. art. III.

263. *See* sources cited *supra* note 261.

264. *See* Nelson, *supra* note 22, at 565.

265. *See id.* at 597.

266. Keogh v. Chi. & N.W. Ry. Co., 260 U.S. 156, 163 (1922) (finding that a private antitrust claim failed because the challenge must be heard by the ICC and not the courts); N.Y., New Haven & Hartford R.R. Co. v. ICC, 200 U.S. 361, 391 (1906) (barring judicial review of a tort claim on the ground that the case should have been brought before the ICC); Dayton Coal & Iron Co. v. Cincinnati, New Orleans, & Tex. Pac. Ry. Co., 239 U.S. 446, 451 (1915) (prohibiting judicial review of a contract dispute on the ground that the ICC had jurisdiction over the dispute).

267. *Keogh*, 260 U.S. at 163.

268. *Id.*

as to explain that since ratemaking and other regulations concerning public utilities were "legislative or administrative" functions, it would violate the separation of powers for *courts* to "usurp legislative or administrative functions by setting aside a legislative or administrative order on their own conception of its wisdom."[269]

Consider, by way of example, that in 1907, the Supreme Court decided whether the newly empowered Interstate Commerce Commission (ICC) could adjudicate disputes over whether its rate regulation was "reasonable." Congress had intended to give the ICC "plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act."[270] The Court concluded that "a shipper seeking reparation predicated upon the unreasonableness of the established rate must, under the act to regulate commerce, primarily invoke redress through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule."[271]

After this ruling, the ICC soon enjoined railroads' practice of using their own "private" cars to offer preferential rates to certain coal producers. (The practice effectively subsidized the railroads' cost of fuel.) The Commission found that this practice unfairly discriminated against other coal producers, and it ordered various remedies. The railroads sought relief in court, claiming that the ICC orders "deprive[d] the company of its lawful right to freely contract for the purchase of the fuel necessary for the operation of its road."[272] The railroads cast the dispute in terms of private right. The Commission's orders required them to use private property "against their will."[273]

The Supreme Court recognized that the ICC—the first federal public utility commission—raised the question of whether agencies or courts should decide the railroads' private-rights claims. The issue, the Court explained, was whether Congress could "giv[e] effect to [the Commission's] orders concerning complaints before it without exacting that they be previously submitted to judicial authority for sanction."[274] Although the railroad had argued that its private cars were beyond regulation because "it is impossible, without destroying freedom of contract, to predicate illegal

269. State v. Great N. Ry. Co., 130 Minn. 57, 60 (1915); *see also* ICC v. Ill. Cent. R.R. Co., 215 U.S. 452, 478 (1910) (finding that the Court should not "assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute").

270. Tex. & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 438 (1907).

271. *Id*. at 448.

272. *Ill. Cent. RR. Co*., 215 U.S. at 466. The railroads also contended that the internal traffic of "private cars" was beyond Congress's power to regulate under the Interstate Commerce Clause. *See* Brief of Appellees at 16-28, ICC v. Ill. Cent. R.R. Co., 215 U.S. 452 (1910) (No. 233).

273. Brief of Appellees, *supra* note 272, at 35.

274. *Ill. Cent. RR. Co*., 215 U.S. at 470.

preferences or wrongful discriminations from the fact of purchase," the Court recast the issue in public utility terms.[275] The Court thought that the ICC was the proper forum for resolving issues involving the "power to use the equipment of the road for the purpose of moving the articles purchased in such a way as to discriminate or give preference."[276]

Although the question of whether Congress had delegated authority to the commission would implicate "the essence of judicial authority," that question does not lead "to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions . . . upon our conception as to whether the administrative power has been wisely exercised."[277] In upholding the ICC's order, the private rights of public utilities gave way to public rights. The Court had found that the balancing of claims of public and private right is properly the subject of administrative, not judicial, adjudication.

State courts followed the Supreme Court's lead. In 1915, for example, the Minnesota Supreme Court noted that although the power of a court to decide whether a utility commission's order is "reasonable" had once been controversial, the law was "now pretty well settled."[278] The court thought *Munn* and its progeny had required legislative deference and, indeed, argued that requiring the judiciary to supervise legislative prerogatives would pose its own nondelegation problem: "The Legislature never intended that the court should put itself in the place of the commission, try the matter anew as an administrative body, substituting its findings for those of the commission. A statute which so provided would be unconstitutional as a delegation to the judiciary of nonjudicial powers." Indeed, the Minnesota court continued: "The making of regulations which require a carrier to afford proper transportation facilities to the public, is legislative or administrative and not judicial in its nature."[279]

The Court of Appeals of New York rendered a similar decision regarding the state's public service commissions. Because the railroads' private rights had become affected with the public interest, the commissions could adjudicate their claims.[280] On appeal to the Supreme Court, a utility company contended that a New York utility commission had abrogated its private rights. But the Supreme Court affirmed the commission, concluding that:

> Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve and restricting the

275. *Id.* at 477.
276. *Id.*
277. *Id.* at 470.
278. State v. Great N. Ry. Co., 130 Minn. 57, 58-59 (1915).
279. *Id.* at 58-60.
280. *See also* People *ex rel.* N.Y. & Queens Gas Co. v. McCall, 219 N.Y. 84, 88 (1916).

> development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render.[281]

New York, in its brief, pointed out that the real issue was about the need for judicial review in the first place. If courts were to second-guess such commissions, that would "not only destroy the effectiveness of the administrative agencies, but also seriously to impair the confidence reposed in tribunals."[282] The brief did not mention the utilities' private rights at all.

While most public utility companies could have plausibly argued that agencies were adjudicating core private-rights claims, the Court's solicitude for administrative adjudication in the public-utilities context is less surprising than it would first appear. Courts would, as we have explained, sometimes police legislatures' public-interest declarations, but once publicness had been established, they were comfortable with agency adjudication.

This history is newly relevant as members of the current Supreme Court have indicated that they regard private rights to be outside of the jurisdiction of administrative agencies. Justice Thomas, for example, has recently argued that administrative agencies should only be permitted to adjudicate disputes involving a discrete set of "public" rights.[283] The Court has also relied on the public-private distinction in majority opinions in numerous bankruptcy cases.[284] But as this Article has shown, claims involving public *companies*, not just public *rights*, could be adjudicated by non-Article III courts, even if those companies made private rights claims.[285] Recognizing that legislatures could direct private disputes involving entire categories of businesses to non-Article III tribunals undermines the accuracy of claims that non-Article III tribunals were forbidden from adjudicating all claims of private right. Such tribunals oversaw tort and contract suits between private parties. Even though today these are thought to implicate core private rights, agencies adjudicated these disputes in the dead years of Supreme Court jurisprudence on agency jurisdiction.

The law of public utilities thus subordinated the categories of public and private right to a deferential view of the legislature's power to recognize that businesses had become public utilities. On one interpretation,

---

281. N.Y. & Queens Gas Co. v. McCall, 245 U.S. 345, 351 (1917).

282. Brief for Defendants-Appellees, N.Y. & Queens Gas Co. v. McCall, 245 U.S. 345 (1917) (No. 407).

283. *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 712-16 (2015) (Thomas, J., dissenting); B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 170-74 (2015) (Thomas, J., dissenting).

284. *See* Stern v. Marshall, 564 U.S. 462, 468 (2011); *Wellness Int'l Network*, 575 U.S. at 679-81; N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63-67 (1982) (plurality opinion); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 833 (1986).

285. Nelson has recognized that legislatures enjoyed some flexibility to determine whether a right was public or private, but he does not recognize that disputes involving rights that were affected with the public interest could be resolved by administrative agencies regardless of whether the dispute involved the franchise. *See* Nelson, *supra* note 22, at 625.

then, when *Nebbia* extended the public utility category to all businesses, the public-private distinction lost its usefulness as a mode of delimiting the bounds of agency adjudication.

B. The Shift to Structure

To understand the law of public utilities in then-Professor Felix Frankfurter's public-utilities class at Harvard required mastery of several dozen Supreme Court opinions, countless more state-court decisions, and several weeks of discussion of the legislative history of the Interstate Commerce Act. Yet, as Frankfurter noted in *Driscoll v. Edison Light & Power Co.*, "the real issue is whether courts or commissions and legislatures are the ultimate arbiters of utility rates."[286]

Indeed, utilities frequently objected to the delegation of policymaking discretion over broad swathes of economic activity. We have, so far, emphasized the democratic argument that ratemaking over public utilities was a distinctive province of the legislative branch—that is, that economic activity deemed "affected with the public interest" should be regulated by the legislature notwithstanding the private rights invoked by those who were burdened by such regulations. But quite early in the evolution of public-utilities regulation, legislatures also began to decide that it was better policy to delegate regulation of public utilities to expert commissions rather than to define policies directly.

As noted in the previous subpart, New York and Minnesota's model of public utility regulation quickly accepted a place for administrative agencies. These agencies were given broad discretion to police unreasonable rates, to combat discriminatory practices, to restrict entry, and to adjudicate disputes regarding their determinations. In the words of the Supreme Court, the rise of public utilities caused "administrative commissions, with large powers, [to be] called into existence, with an organization and with duties which peculiarly fit them for dealing with problems" that the public utilities present to modern economies.[287] Litigants who defended utility regulations argued that regulation of these businesses were constitutionally authorized because the businesses had become "affected with the public interest."[288] The regulatory question had therefore become an exclusively legislative, not judicial, prerogative.[289]

In the cases that we have described above, litigants who opposed the growth of public utility regulation usually contended that their private rights had been violated. But several litigants also contended that legislatures' use of agencies violated the separation of powers because this form

286. Driscoll v. Edison Light & Power Co., 307 U.S. 104, 122 (1939) (Frankfurter, J., concurring).
287. N.Y. & Queens Gas Co. v. McCall, 245 U.S. 345, 351 (1917).
288. *See supra* Section V.A.
289. *See supra* Section V.A.

of regulation unlawfully delegated a legislative power to an executive agency. This was a second-best litigation strategy: they argued that *if* their affairs could be regulated, the power must be wielded by the legislature directly, not by administrative delegees.

Utilities' nondelegation arguments repeatedly failed, even though the stakes of utility regulation for the national economy could not have been higher.[290] Challenges to agency regulation of public utilities almost always failed, under both state and federal law. At the turn of the century, the New York Court of Appeals summarized the nondelegation attacks on rate regulation as a "mere suggestion[s]," and collateral to other more substantial challenges to public utility regulation.[291] In Illinois, New York, and Minnesota, the rule was that "the fixing of rates is not a judicial function, and the right to review the conclusion of the Legislature or an administrative body is limited to determining whether the board acted within the scope of its authority or the order is without foundation in the evidence."[292]

At first, the Supreme Court squarely foreclosed nondelegation challenges to administration of public utilities. Justice White wrote for a unanimous Court in 1907 that it was an "elementary proposition" that railroads, because of "the public nature of the business by them carried on and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end."[293] For support, Justice White included a string citation with

290. Chicago, Milwaukee & St. Paul Ry. Co. v. State Pub. Utilities Comm'n, 108 N.E. 725, 732 (1915), *aff'd* 242 U.S. 333 (1917); *see also* State *ex rel.* R.R. & Warehouse Comm'n v. Chi., Milwaukee & St. Paul Ry. Co., 37 N.W. 782, 785-88 (Minn. 1888) ("The authority that makes the laws has large discretion in determining the means through which they shall be executed; and the performance of many duties, which they may provide for by law, they may refer to some ministerial officer, specially named for the duty."); State *ex rel.* Bd. of Transp. v. Fremont, E. & M.V. R.R. Co., 35 N.W. 118, 125 (Neb. 1887) ("Such powers were conferred for the express and declared purpose of fixing charges which shall be reasonable and just, and prohibiting unjust and unreasonable charges, and unjust discrimination. The court has no authority to limit the board in any respect in that regard."); Georgia R.R. Co. v. Smith R.R. Comm'rs, 70 Ga. 694, 694 (1883) ("The powers of the railroad commissioners are not legislative. The power to adopt rules and regulations to carry into effect a law already passed, differs from a power to enact the law."); McWhorter v. Pensacola & Atl. R.R. Co., 5 So. 129, 135 (Fla. 1888) ("There is no denial . . . that [the Act] gives discretion to the commissioners in the fixing of reasonable and just rates . . . ."); Stone v. Yazoo & Miss. Valley R.R. Co., 62 Miss. 607, 616 (1885) (holding that the law did not violate the separation of powers and instead represented an exercise of Congress's Commerce Clause authority); Atl. Express Co. v. Wilmington & W.R. R.R. Co., 16 S.E. 393 (1892 (holding that "the commission has the authority to hear and determine all matters that are embraced within that part of the said section to which we have referred"). The Supreme Court summarized the constitutional status of delegations to commissioners in 1922 as follows: "The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards to apply to the myriad details of rate schedules the regulatory police power of the state. The latter qualification is made necessary in order that the legislative power may be effectively exercised." Wichita R.R. & Light Co. v. Pub. Utilities Comm'n, 260 U.S. 48, 58-59 (1922).

291. Trustees v. Saratoga Gas, Elec., Light & Power Co., 83 N.E. 693, 694 (1908).

292. *See* sources cites *supra* note 290.

293. Atl. Coast Line R.R. Co. v. N.C. Corp. Comm'n, 206 U.S. 1, 19 (1907).

two dozen railroad cases, the first of which were *Munn* and the rest of the Granger Cases.[294]

Perhaps most surprisingly, it was a public utility case that breathed life into the modern nondelegation doctrine. Soon after *Nebbia* embraced the broadly deferential view that *Munn* allowed legislatures to determine when economic activity had become "clothed with the public interest," a group of oil refiners challenged the National Industrial Recovery Act by arguing that Congress's delegation was too broad. Crucially, the Act contemplated that the oil industry would propose draft codes of fair competition to the President, who could accept, modify, or reject them.[295] Under the new law, the State of Texas and the Department of the Interior certified a share of the "national demand" in oil that would be allocated to Texas, a Texas commissioner distributed quota allocations to the various producers within the state, and the federal government threatened those who evaded the quota with prosecution.[296]

Two refiners sued, alleging that the Act was an unconstitutional delegation of legislative power, that the Act deprived them of due process, and that the Act was beyond Congress's power to regulate interstate commerce.[297]

The refiners' first attack was against the Texas railroad commission that had certified the relevant quotas to the federal government. Initially, the refiners' attack on public utility regulation met a familiar end. Nondelegation challenges to public utility regulation were always a non-starter. A three-judge district panel cast the refiners' nondelegation challenge as a tired and oft-dismissed claim. This litigation, they wrote, was "another of the attempts we have so often had to deal with . . . against the regulation by the commission of [oil] production."[298] The court explained that the case followed the same pattern as previous nondelegation challenges:

> We were at pains in them all, we are at pains again, to make it clear that in our opinion the state, through the Legislature, has broad powers . . . to regulate and control the business of producing and handling them, with the right to broadly delegate to the commission, as statutory agents, the administration of the regulation and control it decides upon.[299]

294. *See id.* at 19 n.2; *see also Saratoga Gas, Elec. Light & Power Co.,* 83 N.E. at 695 (citing *Atlantic Coast Line* for the proposition that the nondelegation doctrine does not apply to utility rate-making commissions).

295. The government's brief in *Panama Refining* explains that in 1926, oil production from two oil reserves in Texas and Oklahoma outpaced production elsewhere. Respondent's Brief at 32, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (Nos. 135, 260) ("Production from these two fields broke the crude-oil price structure in every producing area in the country, driving prices far below the cost of production, and causing a parallel collapse of the price of refined products.").

296. *See* Respondent's Brief, *supra* note 295, at 29.

297. *See id*. at 19-20.

298. Amazon Petroleum Corp. v. R.R. Comm'n, 5 F. Supp. 633, 634 (E.D. Tex. 1934).

299. *Id* at 635.

The three-judge court emphasized that modern utility regulation had "specifically disclaimed for the courts any administrative powers, and particularly any power to substitute for the administration of the commission, our own administrative views."[300]

In a strange quirk of procedure that gave life to the nondelegation doctrine, the parties agreed that some of the refiners' claims should be severed and pursued before a single-judge district court, alongside the litigation before the three-judge panel. The lone dissenting member of the three-judge panel that had summarily dismissed the nondelegation challenge heard the severed claim alone. The judge did not countermand his colleagues' rejection of the nondelegation challenge, and instead held the federal statute unconstitutional as beyond Congress's power to regulate interstate commerce.[301]

The Fifth Circuit reversed the single-judge opinion, and once more rejected the refiners' nondelegation argument. The court held that the Act did not give "a power of legislation to the[se] various trade or industrial groups."[302] Properly understood, the delegation to the President of the power to determine a code of "fair competition" was no less intelligible than "when a Legislature orders just and reasonable rates to be established on railroads and authorizes a commission to enquire into and fix them."[303] The Fifth Circuit noted that in all reported federal decisions before this case, "[w]e have discovered no delegation which Congress has plainly made that has been refused recognition by the Supreme Court."[304] Yet again, the Act was upheld as an unremarkable example of public utility regulation.

At the Supreme Court, the government's brief responded to the refiners' nondelegation argument by noting that it stands only for the requirement that Congress provide some "intelligible principle" to guide agency discretion, and that the phrase "fair competition" used in the Act was no less "intelligible a standard" as, for example, "public necessity and convenience" or "just and reasonable"[305]—both of which were central to the prior few decades of public utility regulation. The refiners' reply brief dropped the nondelegation argument entirely and instead focused on a Commerce Clause challenge.[306]

Yet the Court's opinion in *Panama Refining* rejected the government's argument and found the Act's reference to "fair competition" to

300. *Id.*

301. *See id.* at 648. In dicta, the judge suggested the statute was an unlawful delegation of legislative power.

302. Ryan v. Amazon Petroleum, 71 F.2d 1, 7 (5th Cir. 1934).

303. *Id.*

304. *See id.* at 7 n.2.

305. *Id*. at 39.

306. *See* Petitioner's Reply Brief at 1, Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) (Nos. 135, 260).

unlawfully delegate legislative power to the executive. And the Court held the same again in *Schechter Poultry*, which involved a statute that used the phrase "fair competition" to guide agency discretion.[307]

Given their public utility context, in which the Court was moving to "restore" an expansive account of *Munn*, *Panama Refining* and *Schechter Poultry* appear to be pro-regulatory decisions. These two seminal nondelegation cases emerged because the Court had just abandoned the more direct route to challenging legislative authority to clothe business with the "public interest." Indeed, nondelegation was embraced by the Court just as public utility law no longer provided a place for utilities to pursue de novo review of agency action.

In short, in the sixty years between *Munn* and *Nebbia*, courts had developed an unevenly applied standard for public utility regulation by which courts were required to assess whether a business had become sufficiently "clothed with the public interest" to permit regulation. But once that judicial determination had been made, courts routinely upheld legislatures' broad delegations of power to utilities commissions, across many contexts involving putative claims involving "private" property rights. Once declared "public," firms were broadly subject to administrative regulation, but they could demand judicial review to ensure they had received a reasonable rate and non-arbitrary treatment by those commissions.[308]

After the Court abandoned the public-private distinction, it turned to what had previously been a moribund nondelegation doctrine to start policing the legislature's choices about the *process* of regulation. As we observed in tracing the evolution of Justice Frankfurter's views regarding judicial review of ratemaking from *Smyth* to *Hope*, the place of judicial review was adrift during this period; it cast off the judicially administered doctrine of "publicness" while reviving other doctrines. The public utility idea that had once made any regulation possible had been swallowed by a sweeping vision of legislatures' power to determine the publicity of economic affairs. Once that occurred, courts began searching, as they search today, for a middle ground between deference to legislative judgments about the public interest and the judicial inclination to insist on a place for judicial review.

The seminal nondelegation cases, themselves public utility cases, were part of a vigorous debate within the Court about the role for judicial review, coming on the heels of the momentous decision that legislatures and

307. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935). At oral argument in *Schechter Poultry*, the Solicitor General once again noted that the statutory phrase "fair competition" granted "far less administrative discretion in this Act than when fixing the standard of 'just and reasonable rates' for public utilities, or the standard of 'unfair competition' for business under the Federal Trade Commission Act, or of 'the public interest' for acquisitions of stock by railroads, which was recently sustained by the Court." Transcript of Oral Argument, Schechter Poultry v. United States, 295 U.S. 495 (1935) (Nos. 854, 864).

308. *See supra* Parts III-IV.

agencies, not courts, should determine when the government should control the affairs of businesses affected with the public interest.

Conclusion

The lost doctrinal history of public utility regulation helps contextualize the constellation of administrative-law doctrines that justify and constrain modern administrative agencies. Scholars have long assumed that the New Deal reflected a constitutional moment in which the Supreme Court made practical concessions to the fact that a twentieth-century economy required a robust bureaucracy. As we have shown, public utility cases provided a constitutional predicate for this emerging bureaucracy, and, in doing so, replaced a private-rights-based theory of judicial review of government regulation with a democratic theory that empowered legislatures and agencies to promote the public welfare.

The most committed version of the democratic theory of *Munn* was short-lived. Today's administrative law, particularly the judicially created doctrines that rein in state and federal agencies, came to life when the Court sought to recreate a place for judicial review of economic regulation. But those doctrines did not revive the public-private distinction or reanimate substantive-due-process doctrine, at least not wholesale. Instead, the modern administrative state is based on a hodgepodge of binding precedents drawn from internally coherent but mutually exclusive theories of public utility regulation. That is why we have a public law of public utilities, a public-private distinction in some areas (adjudication) but not others (rulemaking), and separation-of-powers limits on agency authority that were dismissed entirely in the administrative state's formative years. Our modern administrative law draws, unevenly, from different understandings of the relationship between legislatures, agencies, and courts. We now live with a Frankenstein's monster of ideas about what makes private concerns public.