

## The Public Utility Idea and the Origins of Modern Business Regulation

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This essay concerns one of the more remarkable innovations in the history of democratic attempts to control the American corporation. In the late nineteenth and early twentieth centuries—after the series of important changes in corporation law described in previous essays in this collection<sup>1</sup>—lawyers, economists, legislators, and democratic reformers pieced together a new regime of modern business regulation. At the center of that project was the idea of the “public utility” or “public service” corporation.

While most legal-historical accounts of government-business relations in this period trumpet the overriding significance of antitrust or antimonopoly policy,<sup>2</sup> the legal invention of the public service corporation and the public utility was to some extent even more significant for the future democratic control of the American corporation. For, in many ways, the modern American administrative and regulatory state was built directly on the legal foundation laid by the expanding conception of the essentially public services provided by corporations in the dominant sectors of the American economy: for example, transportation, communications, energy supply, water supply, and the shipping and storage of agricultural product. In law, the original architects of the administrative state, the authors of the very first casebooks, and the teachers of the first classes on administrative and regulatory law—people like Bruce Wyman, Felix Frankfurter, and, ultimately, James Landis—basically cut their teeth on the legal, political, and economic problems posed by public service corporations and public utilities per se. The public utility, the public corporation, and the modern American administrative and regulatory state, in other words, all grew up together.<sup>3</sup>

Indeed, in the end, the public utility or public service corporation became the central regulatory vehicles through which Progressive and New Deal policy makers pioneered a more capacious notion of “public interest” in politics and economics, and a more comprehensive conception of the “social

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control of American capitalism.”<sup>4</sup> Much like original notions of “utility” fueled a nineteenth-century era of governmental reform in England, fresh concepts of “public utility” and “public service” propelled new American conceptions of economic justice and social reform into the twentieth century.<sup>5</sup> Awareness of the close linkage between the public utility idea and this more expansive agenda of economic regulation and reform was expressed frequently at the time in some of the most important manifestos of the era. Henry Carter Adams turned first to Granger laws in challenging the laissez-faire presumptions of Herbert Spencer’s *Social Statics*. John Commons began his influential *Legal Foundations of Capitalism* with a prolonged analysis of *Munn v. Illinois* and business “affected with a public interest.” Louis Brandeis’s solution to the era’s banking problems in *Other People’s Money* was the idea of “Banks as Public-Service Corporations.”<sup>6</sup> Richard T. Ely’s famous “Statement” to the opening meeting of the American Economic Association mentioned both western water supply and midwestern rate discrimination as exemplary places to begin thinking in essentially public rather than private terms: “We hold that there are certain spheres of activity which do not belong to the individual, certain functions which the great co-operative society, called the state—must perform.”<sup>7</sup> This centrality of the public utility idea to the modern project of economic regulation more generally even caught the attention of the period’s best legal historian. As Willard Hurst once summarized its significance and lasting legal influence: “One major development, starting in the last quarter of the nineteenth century but coming to fullest definition in our time, has increasingly expressed discontent with the legitimacy of the market on grounds of utility—that is, that the market simply did not prove sufficiently serviceable to allow it the central place as a resource allocator which public policy was prepared to give it between 1750 and 1890. *Our prime symbol of this changed judgment was the growth of the law of public utilities.*”<sup>8</sup>

But the public utility idea was not just a legal doctrine or an intellectual program or a reform ambition. Rather, the power and historical significance of public utility comes from the way in which it burrowed its way to the very core of the American legal and political-economic system. Quite simply, public utility took over turn-of-the-century statute books, commission reports, and court records. And it dominated the period’s legal output: legislative and administrative, as well as judicial. It was the cutting edge and the avant-garde, moving conceptions of regulation beyond the constraints of the common law and state police power toward things like comprehensive

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price and rate controls, ongoing administrative and bureaucratic supervision, municipal ownership, and, ultimately, public works. It culminated in unprecedented interventions like World War I's Food Administration (initially justified by the idea that in times of war all businesses were "affected with a public interest"), World War II's Office of Price Administration and the General Maximum Price Regulation, and the Tennessee Valley Authority. And to this day it continues to hold sway in some important sectors of the economy governed by a distinctive law of "regulated" or "networked" or "utility" industries.<sup>9</sup>

The concept itself constantly expanded beyond early initiatives in special areas like transportation, communications, energy, and water supply to the regulation of things like hotels, warehouses, stockyards, ice plants, insurance, milk . . . you name it. Railroad, commission, and public utility reports—consisting of complaints, investigations, rules, cases, holdings, findings, and deliberations—proliferated, taking over huge swaths of law library space and sometimes dwarfing other legislative and judicial materials.

From the Civil War to the New Deal, the very best economists, lawyers, and policy makers were consumed by the problem of public utilities. In railroading—the original and paradigm case—state railroad commissioners had organized themselves into the National Association of Railroad Commissioners by 1889. And by 1929, the Interstate Commerce Commission had its own practitioners' bar association with almost 2,000 members and a formal registry of practitioners totaling over 8,000. Kenneth Culp Davis has estimated that the extraordinary number of activities and personnel involved in railroad administration alone in this period dwarfed the personnel and output of the entire federal court system itself.<sup>10</sup>

A shorthand but more concrete sense of the massive scale and scope of the "public service corporation" project is suggested by Bruce Wyman's two-volume, 1,500-page, 5,000-case treatise, *The Special Law Governing Public Service Corporations*, published in 1911—at the height of Progressive activism concerning the relationship of business and American democracy. Building on the earlier texts of Harvard Law School colleague Joseph Henry Beale, and anticipating Felix Frankfurter's very influential work on public utilities and interstate commerce, Wyman consolidated and summarized two generations of legal-economic regulation in response to the emergence of the large-scale business corporation in the late nineteenth century. Through the "public service" concept, he brought together three important and overlapping areas of legal-economic development in this period: (a) the early law

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of public callings and public carriers; (b) the emerging law of public utilities; and (c) new developments in the law of public works, public employment, and public contracting. “Twenty-five years ago,” Wyman noted, “the public services which were recognized were still few and the law as to them imperfectly realized.” But his massive treatise was now a testament to a “present state of the public service law” in which there was now “almost general assent to State control of the public service companies.”<sup>11</sup>

And how extensive were such public utilities and public service companies by 1911? In the first three substantive chapters, Wyman covered the following types of businesses: Ferries, Bridges, Bonded warehouses, Log driving, Tramways, Railways, Pipe lines, Transmission lines, Elevated conveyors, Lumber flumes, Mining tunnels, Gristmills, Sawmills, Drainage, Sewerage, Cemeteries, Hospitals, Booms, Sluices, Turnpikes, Street Railways, Subways, Wire conduits, Pole lines, Waterworks, Irrigation systems, Natural gas, Water powers, Grain elevators, Cotton presses, Stock yards, Freight sheds, Docks, Basins, Dry Docks, Innkeepers, Hackmen, Messenger services, Call boxes, Gas works, Fuel gas, Electric plants, Electric power, Steam heat, Refrigeration, Canals, Channels, Railroads, Railway terminals, Railway bridges, Car ferries, Railway tunnels, Union railways, Belt lines, Signal services, Telegraph lines, Wireless telegraph, Submarine cables, Telephone systems, Ticker service, Associated press, Public stores, Grain storage, Tobacco warehouses, Cold storage, Safe deposit vaults, Market places, Stock exchanges, Port lighters, Floating elevators, Tugboats, Switching engines, Parlor cars, Sleeping cars, Refrigerator cars, and Tank cars.<sup>12</sup>

So, now we come to a historical conundrum. For here we have this big, powerful, proliferating thing at the very center of American law and political economy between the Civil War and the New Deal—what Felix Frankfurter dubbed “perhaps the most significant political tendency at the turn of the century.”<sup>13</sup> And for all intents and purposes, today it has almost disappeared from sight. What was once at the forefront of law, economics, and public policy discussion has been relegated to the backbench—the dustbin—of American history. The words “public utility” no longer rouse; they are more likely a soporific. From the cutting edge of political economy, the law of public utilities has become something of a backwater concerning fewer and fewer things—electricity, gas, water—of perhaps ever receding significance. What happened?

While keeping in mind the very real possibility that reports of the death of public utility have been greatly exaggerated,<sup>14</sup> two answers to this question

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require at least preliminary mention. The first answer involves something of a success story. For the most part, the lawyers, economists, and reformers pushing the public utility idea essentially won. The overarching goal of the public utility idea was an enlarged police power—an expansive conception of state (and, ultimately, federal) regulatory power over corporations, business, and the American economy more generally. And by the time of the U.S. Supreme Court’s landmark decision in *Nebbia v. New York* in 1934 (concerning the state price regulation of milk during the Great Depression), the conception of state police power was so thoroughly expanded through the infusion of the public utility concept, that the Court no longer found it necessary to designate a specific kind of business “affected with a public interest” to justify almost any kind of economic regulatory regime seen as in the “public interest” more generally.<sup>15</sup> The public utility idea had done its main work. Through a volatile era, its unique conception of public interests in distinctly public services fended off attempts to constitutionally limit or cabin state police power and, in fact, greatly reinvigorated and expanded the range and reach of the original police power idea. Frank Goodnow was well aware of the important work done in this regard by 1916 when he summed up this transformation: “The first change in ideas . . . was made in the class of activities which are often spoken of generically as ‘public utilities.’ On the theory that the public interest was peculiarly concerned in those cases . . . the conception of regulation in the public interest came finally to be held.”<sup>16</sup>

But a failure story must be noted here as well. If the legal and constitutional story by the time of *Nebbia* was something of a victory for the proponents of an expanded notion of public interest, soon thereafter in political economy, the public utility idea beat a slow and steady retreat. Indeed, the last half century or so has witnessed a sustained effort on the part of social scientists to undermine and undo the public utility idea. Perhaps aware of the intimate connection between public utilities and the rise of the regulatory state, two generations of critics of regulation (from the left and center as well as the right)<sup>17</sup> have taken direct aim at almost every aspect of the Progressive public utility paradigm.

Most significantly, the law and economics movement has systematically dismantled central pillars of the public utility argument in a series of full-throated and field-defining critiques like Ronald Coase’s “The Federal Communications Commission” (1959), George Stigler’s “What Can Regulators Regulate?” (1962), Harold Demsetz’s “Why Regulate Utilities?” (1968), Sam Peltzman’s “Pricing in Public and Private Enterprise” (1971), and Richard

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Posner’s “Taxation by Regulation” (1971).<sup>18</sup> Consequently, most now perceive public utilities in economics (when they are noticed at all) as a peripheral area of policymaking concerning marginal things—primarily the provision of municipal services. Indeed, the “public utility” moniker is currently something of a pejorative in the academy—viewed with a mixture of scholarly derision and contempt.

Because of this peculiarly mixed record of success and failure, a full reckoning with the public utility idea first requires an exercise in historical recovery. Thus, this essay attempts to exhume something of a world we have lost—the lost world of public utility law—a world in which conceptions of public interest, public service, public goods, and public utilities were anything but marginal or maligned. Holding some common wisdom at arm’s length, the rest of this chapter attempts to recapture the genesis of the public service corporation at the turn of the twentieth century. In contrast to the anemic vision of “public utilities” in contemporary discourse, it explores the initial emergence of a legal idea of public service and public utility that was innovative, capacious, and extraordinarily efficacious. And, in contrast to an exclusive focus on antimonopoly and trustbusting—Roosevelt vs. Wilson; New Nationalism vs. New Freedom—as the dominant Progressive policy concerning corporations, this essay reinforces Willard Hurst’s intuition that the law of public utilities was the “prime symbol” of changing conceptions of the market and regulation in this period. The “public service corporation” was one of the major Progressive responses to the emerging power of the corporation in the twentieth century, and it yielded a new understanding of the relationship of the corporation and democracy in modern America with resonances for regulation, administration, legislation, and adjudication to this very day.

### A World We Have Lost?: Nineteenth-Century Antecedents

A clear picture of the emergence of the law of public utilities first requires an examination of its historical antecedents. For the public service corporation and public utilities regulation emerged at the nexus of important developments in three separate areas of law: (a) an age-old area of English common law pertaining to “public callings”; (b) the rise of the state legislative police power; and (c) the early nineteenth-century American regime of corporation regulation through the state legislative charter. The way these areas of law converged and diverged through the nineteenth century established some-

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thing of a promising channel for the emergence of a modern and synthetic understanding of public service corporations and public utilities.

### *The Common Law of Public Callings*

Long before the advent of the regulation of business through statutes and corporate charters, the common law developed ample provisions for the public control of certain kinds of economic trades, callings, occupations, and enterprises. Judges in the earliest English law reports fairly consistently singled out a set of essentially “public” or “common” callings and trades for differential legal treatment. The common surgeon, tailor, blacksmith, victualer, baker, miller, innkeeper, and, perhaps most importantly, the common carrier, were held to different public legal standards in the performance of their tasks than more ordinary private interactions.<sup>19</sup> And they were subject to a special class of common law restrictions and duties, such as a duty to provide a service once undertaken and a duty to serve all comers. The spirit of the early common law understanding is suggested by Blackstone’s summary in his *Commentaries*:

There is also in law always an implied contract with a common inn-keeper, to secure his guest’s goods in his inn; with a common carrier or bargemaster, to be answerable for the goods he carries; with a common farrier, that he shoes a horse well, without laming him; with a common taylor, or other workman, that he performs his business in a workmanlike manner: in which if they fail, an action on the case lies to recover damages for such breach of their general undertaking. But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking; but in order to charge him with damages, a special agreement is required. Also if an inn-keeper, or other victualer, hangs out a sign and opens his house for travellers, it is an implied engagement to entertain all persons who travel that way.<sup>20</sup>

Other English jurists often talked more specifically about public callings in terms evoking larger legal ideas of “public trust,” “public rights,” “public good,” and “public employment.” Once one removed economic activity from the local and private world of mere household and neighborly interaction and held one’s self out generally to doing business with “the public,” certain legal and official “public” obligations inevitably followed. As Lord Chief

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Justice John Holt put it in 1701: “Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all things that are within the reach and comprehension of such an office.”<sup>21</sup> But, more significant for the development of modern public utility law was Matthew Hale’s commentary on the calling of wharfinger in his treatise *De Portibus Maris*—what Bruce Wyman called “the most famous paragraph in the whole law relating to public service.”<sup>22</sup> As legal historians Harry Scheiber and Molly Selvin have demonstrated, Hale exerted great influence over the development of the American law of public ways: highways, waterways, rivers, ports, bridges, and roads.<sup>23</sup> And he most clearly articulated the notion of *juris publici*—rights belonging to the public at large—in certain kinds of public spaces, thoroughways, and even activities. With respect to the wharfinger, Hale first elaborated the notion of certain economic activities “affected with a public interest,” which would become so significant after the U.S. Supreme Court’s opinion in *Munn v. Illinois*:

If the king or subject have a public wharf, unto which all persons that come to that port must come and unlade or lade their goods . . . because they are the wharfs only licensed by the queen . . . or because there is no other wharf in that port, . . . in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, etc., neither can they be inhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king’s license or charter. For now the wharf and crane and other conveniences are *affected with a publick interest*, and they cease to be *juris privati* only; as if a man set out a street in new building on his own land, it is now no longer private interest, but is affected with a publick interest.<sup>24</sup>

The American reception of some of these English common law doctrines concerning public spaces and public callings was swift and certain. Securing public rights in highways, rivers, ports, and public squares through the use of such precedents was a major preoccupation of antebellum American jurists.<sup>25</sup> And from the earliest days of the Republic, certain occupations and businesses continued to be governed by special common law rules owing to their status as common or public callings. Indeed, large bodies of case law rapidly grew up around two of the most important public callings in early American law: the law of innkeepers and the law of common carriers. The significance of this jurisprudence is attested to by the leading figures drawn

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to its systematization. Joseph Angell and Isaac Redfield both contributed elaborate treatises on the law of common carriers.<sup>26</sup> And none other than Joseph Henry Beale added a 638-page tome on *The Law of Innkeepers and Hotels: Including Other Public Houses, Theatres, Sleeping Cars*. For Beale, this exploration of the law of public callings was a direct complement to his work on public carriers, public utilities, and, ultimately, railroad rate regulation more generally. As he acknowledged, “The law of innkeepers was the earliest developed and is the simplest and clearest of those topics of law which are concerned with the various public-service callings.”<sup>27</sup> The path from the ancient legal notion of common callings to the most modern forms of public utility rate regulation was quickly being established.

In short, a fairly elaborate system of common law regulation grew up in the nineteenth century around certain public economic activities that highlighted a series of special duties and public rights. From the law of bailments to an expanding law regarding common carriers and innkeepers, wharfingers, and warehouses, a burgeoning case law outlined some of the special public obligations of certain public callings—from a duty to serve all to the provision of adequate service to standards of reasonable compensation. Even before the rise of the state regulation of business through statute and charter, the common law provided surprisingly supple remedies for protecting public rights against private forms of encroachment.

#### *State Police Power and the Corporate Charter*

But the regulation of economic activity seen as having great public effect did not remain within the exclusive purview of the common law for very long. Two very different kinds of legislation simultaneously entered the regulatory mix: (a) general state police power regulations, and (b) the more specialized state statutes known as charters of incorporation. The shifting interrelationship between these two very different types of legislation is central to the most important developments in nineteenth-century business and corporate regulation. Indeed, the intersection of the laws of police power and corporation marks the birthplace of the law of public utilities.

The development of nineteenth-century legislative police power regulation of economic activities formerly controlled by the judicial administration of the common law is a topic both enormous and complex. For the purposes of this essay, some shorthand must suffice. In area after area of the economy—from ports to wharves to inns to common carriers to warehouses

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to urban marketplaces and beyond—early American states and localities began rapidly drafting ordinances and regulatory statutes that built on the economic lines and reasoning of common law precedent but pushed toward a much more comprehensive, rational, and codified system of economic regulation.<sup>28</sup> The overarching legal and political justification for this expansion of police power remained an awareness of the public rights and public interests implicated in certain kinds of economic activity as anticipated in the common law of public callings. But the protection of public rights and public interests in a blossoming market, commercial, and even industrial economy demanded new measures.

Nowhere was this shift to statute more carefully analyzed and, ultimately, rationalized than in the classic police power opinion of Massachusetts chief justice Lemuel Shaw in *Commonwealth v. Alger* (1851). Upholding the legislature’s right to establish a wharf line in Boston harbor beyond which no private structures should encroach, Shaw’s reasoned defense of the public interest moved deftly from common law to codification; from nuisance to police power; from public calling to public utility; and from the ancient wharfinger to modern land-use regulation. He first defended the authority of the legislature to pass regulatory statutes with broad implications for the entire economy: “Wherever there is a general right on the part of the public, and a general duty on the part of a land-owner or any other person to respect such right, we think it is competent for the legislature, by a specific enactment, to prescribe a precise, practical rule for declaring, establishing, and securing such right, and enforcing respect for it.” He then went on to offer one of the most eloquent defenses of police power and public rights to be found in nineteenth-century case law:

All property in this commonwealth . . . is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. . . . The power we allude to is rather the police power; the power vested in the legislature by the constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth.<sup>29</sup>

Similar (though less grandiose) legislative and judicial reasoning attended the slew of ordinances and statutes that greeted an expanding nineteenth-century American economy: regulations of lotteries, hawkers and peddlers,

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rents and leases, mines, ferries, apprentices and servants, attorneys and solicitors, the exportation of flaxseed and other goods, the inspection of lumber, staves and heading, public auctions, fisheries, flour and meal, the practice of physic and surgery, beef and pork, soal leather, inns and taverns, shipping, common carriers, etc.<sup>30</sup> Rather than leave the regulation of a growing economy to the common law practices of judges and juries (yet alone the theorized world of laissez-faire theorists), states and localities codified the rights and responsibilities of key economic actors and activities.<sup>31</sup> One of the persistent features of this legislative intervention from the beginning was explicit, and sometimes quite detailed, price administration or rate setting: from the regulation of the ancient assize of bread to the early mill acts to the precise setting of prices for ferriage and cartage to the even more explicit rate-setting practiced during the canal and early railroad eras.<sup>32</sup> As Chancellor Wentworth of New York defended the ubiquitous practice of price-setting in *Beekman v. Saratoga and Schenectady Railroad Co.* (1831): “The legislature may also from time to time, regulate the use of the franchise, and limit the amount of toll which it shall be lawful to take, in the same manner as it may regulate the amount of tolls to be taken at a ferry, or for the grinding at a mill.”<sup>33</sup> Though the initial blueprint of the common law of public callings and common carriers was still decipherable in such statutes, a new and far more capacious regulatory state was methodically supplanting older legal and economic frameworks. In *Standards of American Legislation*, Ernst Freund captured the basic thrust of this legal-to-legislative, common-law-to-police-power revolution. Freund outlined the vast “shortcomings of the common law as a system of public policy” and described the increasingly affirmative use of legislative police power, finding in such “modern regulative statutes a general endeavor to define vague restraints or prohibitions, to strike at antisocial condition, . . . and to give effect to altered concepts of right and wrong and of the public good.”<sup>34</sup>

The second important element in the construction of modern American business regulation was the development and proliferation of a distinctive kind of legislative statute—the special state charter of incorporation. The American practice of economic promotion and regulation through state corporate chartering did not develop spontaneously in a legal vacuum. Beyond the specific legislative details of any individual corporate charter, the common law of nuisance and public callings still operated and a whole series of state and local police power regulations continued to govern various kinds of economic activities. Indeed, it is only by keeping in mind all three modes of

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nineteenth-century economic regulation—the common law, state police power, and corporate chartering—that one can get a full picture of the relationship of the corporation to the larger American democracy in this era.

As Eric Hilt, Jessica Hennessey, and John Wallis describe in their essays in this volume, before general incorporation statutes achieved predominance in the United States, most corporations came into being through a special charter secured directly from the state legislature.<sup>35</sup> After 1800, chartering (not only business corporations but municipal corporations, charitable associations, churches, academies, etc.) became a preoccupation of state legislative sessions that almost matched their appetite for general police power statutes. Between 1789 and 1865, for example, Connecticut passed something like 3,000 special acts incorporating every conceivable kind of social and economic organization from “Academies” to “Work Houses.”<sup>36</sup> As Hilt, Hennessey, and Wallis suggest, two characteristics of this early special charter regime had important implications for an emerging law of public utilities. First, the special charter was a legal tool through which the legislature extracted what Ernst Freund dubbed an enhanced or “enlarged police power.”<sup>37</sup> In exchange for a host of special corporate privileges—such as monopoly power, eminent domain power, tax exemption, property grant, public financing, rights to collect tolls, etc.—legislatures carved out expanded public powers of oversight and regulation. Second, this enlarged police power prompted the frequent conclusion of early histories that these early specially chartered corporations were essentially seen as public callings or public franchises. That was exactly Willard Hurst’s conclusion when he argued that “from the 1780s well into the mid-nineteenth century the most frequent and conspicuous use of the business corporation—especially under special charters—was for one particular type of enterprise, that which we later call *public utility* and put under particular regulation because of its special impact in the community.”<sup>38</sup>

A growing case law only reinforced this original public interest / public service / public utility interpretation. In the first place, courts uniformly rejected an overly strict contract theory of the charter that some corporations argued exempted or immunized themselves from further regulatory or legislative control. The definitive discussion of this issue unsurprisingly arose in an early railroad regulation case—*Thorpe v. Rutland and Burlington Railroad Company* (1855). There, Vermont chief justice Isaac Redfield (a leading legal authority on common carriers) rejected a railroad corporation’s argument that its original 1843 charter immunized it from costly subsequent po-

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lice power regulations requiring all such railroads to fence their lines and maintain cattle guards at crossings. Citing Roger Taney in *Charles River Bridge* as well as John Marshall in *Dartmouth College*, Redfield insisted that corporate charters be strictly construed “in favor of the public” so as not to interfere with general legislative police power to regulate persons and property in the public interest.<sup>39</sup> Redfield contended that “there would be no end of illustrations upon this subject,” listing just some of the “thousand things” that the legislature regulated on all railroads, including “the supervision of the track, tending switches, running upon the time of other trains, running a road with a single track, using improper rails, not using proper precaution by way of safety beams in case of the breaking of axle-trees, the number of brakemen on a train with reference to the number of cars, employing intemperate or incompetent engineers and servants, running beyond a given rate of speed.” And he justified its imposition on corporations of all sorts: “Slaughter-houses, powder-mills, or houses for keeping powder, unhealthy manufactories . . . have always been regarded as under the control of the legislature. It seems incredible how any doubt should have arisen upon the point now before the court.”<sup>40</sup>

Just as Chief Justice Redfield was defending the reach of the conventional understanding of police power to corporations in Vermont, Chief Justice Shaw in Massachusetts was carving out a specially “enlarged” or enhanced police power in the case of corporations seen as having especially important duties to the public. Drawing on his extensive experience with legislation, adjudication, and regulation involving Massachusetts’s extensive network of mills and public infrastructure, Shaw argued in *Lumbard v. Stearns* (1849) that the Massachusetts “Act to Incorporate the Springfield Aqueduct Company” created a public service company subject to the higher obligations and regulations of a public utility.<sup>41</sup> The corporate charter was replete with special legislative provisos, including eminent domain power, an obligation to provide water to fight fires, special penalties for corrupting water, and, perhaps most significantly, a vesting of “superintending powers” in the board of health and the county commissioners. Joseph Henry Beale and Leonard Levy located the historical origins of the law of public service corporations and the state regulation of “businesses affected with a public interest” precisely in Shaw’s jurisprudence upholding the regulation of “turnpike, bridge, canal, mill, and railroad companies.” As Levy put it, “although privately financed and operated for private gain, these enterprises were all characterized by Shaw as ‘public works’ because they were established by

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public authority on consideration that the public would benefit from them.” With these cases, the much-discussed “Road to *Munn*” was thus already very much established.<sup>42</sup> However, the “Road from *Munn*,”—a much longer road that stretches through progressivism to the early onset of the New Deal—remains very much a matter of modern legal and historical debate. It marks the real explosion and proliferation of modern public utility regulation and the onset of what might be labeled “the public utility era.”

### Origins of the Public Utility Era

As the preceding discussion demonstrates, there was no single, definitive point of historical departure from which to date the exact birth of the public utility idea. From ancient English common law precedents on common carriers through the more comprehensive treatises of law writers like Matthew Hale to some of the first private companies and first public regulations established in the Americas, the older historical roots of public utilities were as variegated as they were ubiquitous. Even the more particular mechanism of administrative regulation through various kinds of boards, commissions, and agencies had broad and diverse legal-historical roots. As Jerry Mashaw and Nicholas Parrillo have now definitively established, administrative law, administrative regulation, and administrative governance long antedated the establishment of the Interstate Commerce Commission and even the development of state railroad commissions.<sup>43</sup> As Mashaw put it, “From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking.” At the local and state level too, boards of health, county commissioners, and various other administrative entities had long exercised the power to supervise, administer, and regulate callings, associations, businesses, and corporations deemed important to the people’s welfare. As early as 1832, Connecticut was in the habit of establishing a special “board of commissioners” in the charter of each and every railroad it incorporated.<sup>44</sup> And the reports, activities, and rulings of other various local and state turnpike commissioners, street and highway commissioners, canal commissioners, bank commissioners, water commissioners, and the like dot the antebellum legal and political landscape.

But though one particular point of historical origin is elusive, it is possible to detect within this complex mesh of historical laws and institutions

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certain historical trajectories or developmental trends that are central to explaining the explosive emergence of modern public utilities law at the turn of the twentieth century. In the developments outlined above, one can detect a general trend from highly particularized (and retrospective) common law adjudication on public callings to more generalized (and prospective) legislative police power statutes (frequently coupled with ad hoc administrative delegations of supervisory authority) to the regulation of particular franchises through special provisions included in state charters. Of course, this developmental tendency was anything but clear or linear. Even after the rise of regulation through state charters (and municipal franchises), state police power enactments and municipal ordinances continued to control many aspects of corporate behavior respecting public services. And, of course, individuals continued to litigate in courts seeking judicial enforcement of both legislative and common law remedies concerning the special rights, duties, and obligations of public franchises. So, by the middle of the nineteenth century, there was not so much a determinate (yet alone rational or systematic) law of public utilities as a wide proliferation of regulatory devices and measures—from sporadic court judgments enforcing common law understandings to various state and local police power statutes and ordinances to the host of highly differentiated and individualized provisions of special franchise charters. The limitations of such a regulatory regime—built on such a sprawling disarray of litigation, ordinances, statutes, franchises, and charters that varied across local, state, and federal jurisdictions—would soon become obvious to politicians, reformers, regulators, jurists, commentators, and the public at large.

Two things in particular transformed this old regime. First, with respect to business corporations in particular (as discussed in several other chapters in this volume),<sup>45</sup> the regulatory control afforded through the state charter regime quickly began to unravel through the combination of the forces of (a) general incorporation; (b) the so-called race-to-the-bottom that animated late nineteenth-century state policymaking vis-à-vis corporations; and (c) the increased nationalization and internationalization of commerce and business that quickly outran or preempted many state and local regulatory initiatives. The ad hoc, special, local, and state-by-state initiatives that characterized antebellum public policymaking vis-à-vis public utilities quickly gave way to an increasing rationalization, systematization, and thorough-going nationalization of administrative regulation. Localism and federalism proved no match for the centralization of corporation and public

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utility policy that ultimately culminated in national initiatives like the Interstate Commerce Commission (ICC), the Sherman Antitrust Act, and the Federal Trade Commission. Such institutional transformations set the stage for the rise of modern public utilities and the public utility era. As Felix Frankfurter captured this confluence of events, “The modern system of state utility regulation thus coincid[ed] with the efforts . . . to arm the federal government with powers adequate to assure interstate public services.”<sup>46</sup> Here, administrative regulation in a recognizably national and modern form proliferated, creating conditions for the rapid emergence of an administrative regulatory state and a modern economy in the United States.

Second, one particularly important and highly visible form of common carrier and public service corporation—the railroad—burst onto the American scene with an economic ferocity and a social and political chaos perhaps unmatched by any other historical force other than war. As Alfred Chandler contended, railroads remade the American economy. They were “the nation’s first big business,” marking the beginnings of modern corporate finance, modern corporate management, modern labor relations, and thus, not surprisingly, the “modern governmental regulation of business.”<sup>47</sup> Just as the scale and scope of railroads transformed the American economy, the scale and scope of railroad administration changed the face of American regulation. As Frankfurter noted, “Railroad regulation was the precursor of the far-flung system of utility control today.”<sup>48</sup> Railroads were not the first transportation companies in the United States, and railroad commissions were certainly not the first administrative agencies. But something about the size and extent of this infrastructural and regulatory intervention forever altered the relationship of the modern economy and the administrative and regulatory state. The railroads ushered in modern public utility regulation on a scale and with a national impact that was unprecedented. The railroad problem gave birth to the modern public utility idea.

### *The Public Utility Idea*

The modern concept of public utility drew on some important legal-intellectual precedents: the common law of public callings, the antebellum police power, and legislative and public service corporate chartering. Out of these early roots and traditions, however, there emerged a distinctively more modern and expansive rendering of regulation in the “public interest” at the turn of the century. Three new elements were especially salient in the trans-

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formation of public law that made public utility the entering wedge of modern administrative regulation.

First, the public utility idea drew directly on a new positive conception of statecraft and the public duties of a modern polity—particularly as it concerned the provision of “public services.” The most penetrating analysis came from Leon Duguit who argued in *Law in the Modern State* that “public service” was rapidly “replacing the old theory of sovereignty as the basis of public law.”<sup>49</sup> Drawing on recent trends in sociological jurisprudence and an increasingly functionalist and pragmatic conception of law, Duguit rooted his modern theory of the state not in its right to command, but in its social functions and public duties, wherein “public service” became “the only adequate foundation for a modern system of politics.” Ernst Freund noted a similar dominant tendency in modern governance to move beyond traditional functions like defense and order to the provision of public welfare through an array of distinctly public services.<sup>50</sup>

Public utility, then, was very much at the core of a new, pragmatic understanding of the public service functions of the state—of what John Dewey talked about in terms of “the public and its problems.” Moving beyond older conceptions of the state rooted in political theories of social contract or sovereignty and fiscal-military-ordering imperatives, Dewey outlined a more modern and pragmatic quest for a “*democratic state*” dedicated to “the utilization of government as the genuine instrumentality of an inclusive and fraternally associated *public*.” And for Dewey, the growing awareness that more and more businesses were “affected with a public interest” was a classic step forward in the development of that functionalist, democratic, and service-oriented state.<sup>51</sup> As Felix Frankfurter captured this trend in his defining essay “Public Services and the Public,” the new needs to be met in this new era were “as truly public services as the traditional governmental functions of police and justice.” And in fact, he viewed no task as more profound for modern government than its role “in securing for society those essential services which are furnished by public utilities.” Elementary examples of this trend toward public services included the evolution of education and charity from private to public affairs, as well as the development of “the postal and telegraph system” into “public service[s] of primary importance.”<sup>52</sup> To these basic examples of the public service idea, Duguit noted the modern repetition of innumerable further instances: “The time has passed when each man was his own public carrier. . . . This makes plain every day the greater necessity of organizing transportation into a public service. In the great towns we

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need tramways and a public motor service; throughout the country we need railway service. . . . Not only public lighting but also private have been similarly transformed. . . . The time is not far distant when every house will demand electric light. So soon as this becomes a primary need it will create a new subject of public service.” Duguit concluded in perfect sync with the architects of public utility law in America: “Any activity that has to be governmentally regulated and controlled because it is indispensable to the realisation and development of social solidarity is a public service so long as it is of such a nature that it cannot be assured save by governmental intervention.”<sup>53</sup>

Second, the modern public utility regime was characterized by the coming of age of the police power and administrative regulation. Though police power regulations and administrative rulemaking and adjudication had been features of American governance since the founding of the Republic, they now took on a new, enlarged, and purposive form. A new self-consciousness and inventiveness propelled discussions of police power and administrative law as the first systematic treatises and analyses of scholars like Freund, Wyman, and Frank J. Goodnow synthesized, reorganized, and, in the end, transformed the fields of inquiry.<sup>54</sup>

It was no accident that the idea of “police power” came of age in the “public utility” era. The formative treatises and articles of Ernst Freund and other commentators were testament to the convergence and simultaneous growth of police power, public utility, and an expanded conception of public interest. For Freund, the Granger cases, the law of public service corporations, public use, and public utility were the harbingers of the growth and maturity of modern police power. The increased power to regulate businesses, the corporation, and the economy through public utility was an essential part of the long process through which the police power moved beyond older common law and constitutional limitations—beyond traditional concerns of safety, order, and morals—to embrace the more ambitious and prospective mission of securing the “public welfare” generally and making “internal public policy.” Noting the almost limitless expansion of public utility in the early twentieth century (beyond natural monopolies, railroads, common carriers, inns, grain elevators, banking, insurance, etc.), Freund concluded: “If a business is affected with a public interest its charges are subject to reasonable regulation . . . , it may be required to render services without discrimination, and the amount and manner of service may be regulated in the interest of *public convenience*—an interest which does not ordinarily call the police power into action. *A great expansion of*

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*the police power* may be expected by further development and application of this doctrine.”<sup>55</sup> In precisely this confluence of legal-regulatory events and concepts, Rexford Tugwell located a new “public interest” in the economy—“the right of the government to interfere in business affairs. Under its aegis public utilities arise and the police powers are brought to bear in the field of industry.”<sup>56</sup> This fundamental enlargement of the police power is one of the signal accomplishments of the public utility era.

Administration and administrative law had a similar experience in their interaction with public utility. As Felix Frankfurter noted, gesturing to the long pre-history of administration and administrative law in America, “Administrative law has not come like a thief in the night. It [wa]s not an innovation.” But he acknowledged that the “general recognition” and “self-conscious direction” of administrative law was a product of recent times and largely a consequence of the public utility revolution. Public utility put the “public” in American “public administration.”<sup>57</sup> *The Law of Railroad Rate Regulation* was the pioneering treatise in this field authored by Beale and Wyman—a complement to their work, *Cases on Public Service Corporations*, and Wyman’s breakthrough text on *Administrative Law*.<sup>58</sup> And Frankfurter began his own important work in administrative law with his much-discussed Harvard Law School course concerning *Cases under the Interstate Commerce Act*.<sup>59</sup> Within the law of public utility, the modern idea of administrative regulation reached a clarity and coherence that eluded earlier commentators.

From these broader conceptions of public service, police power, and administration there emerged the final, culminating piece of the public utility idea, i.e., a more generalized and autonomous conception of the public interest itself as the basis for increased state and governmental regulation in that public interest. Of course, powerful concepts of general public welfare had long been a part of the ethical and philosophical history of the “utility” idea in the abstract. David Hume’s devastating critique of the formalism of social contract theory formed a backdrop to the original emergence of “utility” as a more grounded, general, and consequentialist imperative behind the associative happiness of others and all.<sup>60</sup> Jeremy Bentham’s similarly devastating critique of Blackstone credited Hume with establishing that “the foundations of all *virtue* are laid in *utility*” rather than in natural law or other legal formalisms.<sup>61</sup> The impact of Benthamite utilitarianism on the writings of the Mills, the nineteenth-century revolution in English government, and, ultimately, John Dewey’s “new liberalism,” suggest something of the deep historical roots and power of the general utility idea.<sup>62</sup>

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The modern transformation of the legal idea of public utility drew on these deep sources of inspiration, as the idea of utility helped launch another governmental revolution. The linchpin was the all-important idea of generality—moving older ideas of *salus populi*, people’s welfare, and *res publica* beyond the particular confines of customary, common law, and ancient constitutional categories toward a broader and more modern conception of general regulation in the public interest. In *The Economic Basis of Public Interest* (1922), Rexford Tugwell summed up the general arc of development: “The definition of police power in all the recent cases *brings it into the broad field of public interest*, so that the regulation of business in its economic aspects, its prices and its standards of service, flows from *the general interest of the public* just as does the right of regulation of business to secure the health, morals and safety of the community.” Here, Tugwell correctly identified the basic transformation in law, thought, and action that would ultimately undergird a much larger reform agenda for the social control of the economy: “When the market is viewed as a social mechanism rather than as a private one, and the reasons why it must be social and cannot be private are clearly envisaged, the problems of price and service control attain a new importance.”<sup>63</sup> For Tugwell, the law of public utility was the all-important vehicle for moving public and legal ideas of the common good and the public interest in the economy beyond early nineteenth-century conceptions and toward the twentieth-century ideal.

And indeed, the most important aspect to recognize about this new general construct of economic regulation in the public interest was the degree to which it was not confined to monopolies, natural or unnatural. Though many commentators, then, as well as now, acknowledged monopoly as a problem for which public utility provided a response, monopoly was just one of many other important factors driving the public utility idea.<sup>64</sup> As already suggested, Ernst Freund made clear the degree to which the public utility idea pushed the established police power beyond bounds of order, safety, health, and morals toward more general concerns of public welfare, public policy, and even public convenience. So too, it pushed well beyond the context of economic or social understandings of monopoly and trust. Bruce Wyman and other legal reformers were articulating the general and fundamental principles of a “unified body” of “law governing the public services,” beyond the charter question, beyond the corporation question, and beyond the monopoly question—and distinctly toward the Progressive conception of the regulation of business generally in the public interest. Such principles multiplied beyond the concerns or theories of classical or neo-classical eco-

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nomics and resonated much more with the goals of social and political policymaking. “Monopoly is significant as one among many social and economic situations that may be considered by the legislature in adopting its policy,” argued John Cheadle.<sup>65</sup> Rexford Tugwell began his own analysis with the monopoly question, but quickly moved on to a set of much broader public justifications, including consumer’s disadvantage and general public necessity. In the public interest/public utility model, imposition, oppression, unreasonable charges, harmful prices, or harmful standards of service were all justifiable regulatory concerns.<sup>66</sup>

In this way, the public utility idea evolved beyond so-called natural monopolies like railroads, telegraph, and utility lines, and embraced an almost endless number of economic activities where the law imposed a duty to be reasonable in dealing with the public. As legal scholar Nicholas Bagley has argued about Wyman’s concept of “virtual” or “practical” monopolies, “A business need not be monopolistic in a strict sense. An extraordinary range of market features—the costs of shopping around, bargaining inequalities, informational disadvantage, rampant fraud, collusive pricing, emergency conditions, and more—could all frustrate competition and . . . warrant state intervention” via the enlarged law of public callings and public utilities.<sup>67</sup> Conditions like necessity, exorbitant charges, arbitrary control, and consumer harm in turn triggered new affirmative legal obligations that themselves greatly expanded extant notions of public interest. Wyman’s list was just a start: “All must be served, adequate facilities must be provided, reasonable rates must be charged, and no discriminations must be made.”<sup>68</sup> Access, sufficient service and supply, cost reasonableness, and non-discrimination worked together in the law of public utility to generate a new, broad, general notion of government’s obligation to regulate for the public welfare. Felix Frankfurter was aware of the direct consequences: “Suffice it to say that through its regulation of those tremendous human and financial interests which we call public utilities, the government may in large measure determine the whole socio-economic direction of the future.”<sup>69</sup>

How right he was. As early as 1916, that other pioneer of modern American administrative law Frank Goodnow articulated the clear route from public utilities to more general public interest theories of regulation and administration. “A change is noticeable in our attitude towards these matters,” he began:

The first change in ideas which is noticeable was made in the class of activities which are often spoken of generically as “public utilities.” On

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the theory that the public interest was peculiarly concerned in those cases because the enterprises in question were based on public privileges, the conception of regulation in the public interest came finally to be held. Not only is no constitutional question any more raised as to the power of the competent organ of our government to take the necessary regulatory measures but public opinion justifies regulation of so drastic a character that it would hardly have been deemed possible even a quarter century ago. . . . The regulation which in the case of public utilities was justified on the theory that the enterprise was based upon a privilege has since been extended to enterprises which in no sense owe their existence to the possession of such privileges. The justification for the regulation is found in the mere fact that the public interest is involved. Instances of such action are to be found in the anti-trust legislation which has become so common and in the well-nigh universal legislation passed to improve labor conditions. Workingmen's compensation acts, employer's liability and minimum wage laws, compulsory conciliation acts, increase of school opportunities for both the young and the old, paid for out of the proceeds of taxation, all testify to the fact that the private rights philosophy of a century ago no longer makes the appeal it once did.<sup>70</sup>

This was the modern concept of public utility—public utility as the entering wedge of the general idea of economic and corporate regulation in the public interest. But while the intellectual and jurisprudential development of the idea of public utility was necessary to this democratic revolution in governance concerning the corporation, it was not sufficient. Indeed, the public utility era would not have occurred without more direct social, political, and legal action on the ground and in the streets. The *locus classicus* for this more direct form of mobilization was the long and arduous late nineteenth-century struggle for democratic control of railroad corporations. With the extraordinary advent of the railroad and the railroad commission, powerful new forces in politics, law, regulation, administration, and statecraft came together to remake the relationship of citizen and corporation well into the future.

### *The Rail Road to Munn*

One of the simple historical facts of the matter is that the law of public utilities and the law of administrative regulation together exploded onto the

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American scene after 1877—the date of the Supreme Court’s influential ruling in *Munn v. Illinois*. And the case of railroad regulation clearly led the way. As Frankfurter put it succinctly, “Railroad regulation was the precursor of the far-flung system of utility control today.”<sup>71</sup> Though the first railroads and various kinds of common law, statutory, and franchise regulations grew up together before the Civil War, a new intensity and comprehensiveness attended public policymaking vis-à-vis railroads in the postwar period. The end result was a revolution in modern regulatory and administrative governance—the emergence of modern business regulation.

Something of the magnitude of what was then ubiquitously referred to as “the railroad problem” was broadcast to the nation in 1869 when Charles Francis Adams opened his history of the Erie Railway in the *North American Review* with a comparison to the Barbary pirates and then closed it with an allusion to the fall of Rome. Adams talked about the railroad problem not in terms of market failure or imperfect competition but as nothing less than a national “emergency.” Allusions to war and plunder and banditry infused Adams’s narrative of endemic economic and political corruption: “The freebooters have only transferred their operations to the land, and the commerce of the world is now more severely . . . taxed through the machinery of rings and tariffs, selfish money combinations at business centres, and the unprincipled corporate control of great lines of railway, than it ever was by deprivations outside of the law.”<sup>72</sup> From E. L. Godkin, B. O. Flower, and Frank Norris to William Jennings Bryan, Robert La Follette, and Theodore Roosevelt, a steady drumbeat of rhetorical and political criticism followed Adams’s original anti-railroad expose, providing a consistent prod to governmental action well into the twentieth century.

But, even more significant for the subsequent history of corporate regulation than the muckraking enthusiasm that greeted the Gilded Age was a rising chorus of organized and popular political discontent with railroad policymaking. Across the nation, but especially in agrarian and midwestern states such as Illinois, Iowa, Wisconsin, and Minnesota, voluminous complaints about extortionate and discriminatory railroad pricing (between long hauls and short hauls and between competitive and monopolistic routes) produced intense political pressure for more aggressive forms of state action. The end result was a proliferation of new comprehensive state regulations of railroads, warehouses, and grain elevators. Given the increasing complexity and scope of both this new economic problem and new flurry of regulations, states turned to a much more powerful mechanism of regulatory oversight and enforcement—the state administrative and regulatory

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commission. The commission movement built on Adams's 1871 conclusion in "The Government and the Railroad Corporations" that "neither competition nor legislation have proved themselves effective agents for the regulation of the railroad system." And it provided the direct answer to his searching institutional and constitutional question: "What other and more effective [instrument] is there within the reach of the American people?"<sup>73</sup> With the rapid development of state railroad and warehouse commissions after the Civil War, the American regulatory state and the law of public utilities began to assume new and modern forms.

Now, of course, there was nothing especially novel about the turn to the commission *form* per se in the creation of this new regulatory enforcement regime. Various county commissioners, officers, and ad hoc boards were present and used seemingly at every moment in American governmental history. Even in terms of more formal utility commissions, Massachusetts utilized state commissions for banking as early as 1838 and for insurance in 1854. Most famously—thanks primarily to the creative labors and influence of Charles Francis Adams—Massachusetts led the way as well for railroads in devising the more comprehensive and permanent statewide Board of Railroad Commissioners that assumed general supervision of its railroads in 1869.<sup>74</sup> And though such early commissions are still too frequently dismissed as "weak" or "voluntaristic" or merely "advisory," it would be a major mistake to underestimate the original powers delegated to such bodies to investigate, publicize, and persuade; to hear complaints and petitions; to inspect railroad activities; and to make recommendations to the legislature—all powers still central to modern administrative regulation. The concentration of oversight authority in a single agency was itself a vast improvement over the haphazard and sporadic coordination possible through the earlier welter of statutory provisions, charter stipulations, legislative committee supervision, and common law adjudications. The early advisory commissions formed an invaluable administrative complement to the ongoing work of courts, prosecutors, and legislative police powers.

The successes of Adams and the Massachusetts Board of Railroad Commissioners were legendary in this regard—inducing railroad reforms by continuously bargaining in the shadow of the possibility of future legislation and regulation up to and including the threat of state ownership. And future legislation and regulation was forever coming. When the Massachusetts legislature formed the commission in 1869, it was hardly getting out of the business of direct legislative regulation as it passed almost a hundred other

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special and general railroad measures in that session alone. But the creation of the Board allowed for the establishment of a supplemental administrative and regulatory authority. The legislature granted the commissioners “general supervision of all railroads in the Commonwealth,” with a special charge to ensure “compliance of the several railroad corporations with the provisions of their charters and the laws of the Commonwealth.” This, of course, was an enormous delegation of supervisory authority, setting up an extraordinarily ambitious administrative task. The Board essentially received plenary authority to look into and make recommendations to all railroads in the state as to repairs, stock, stations, rates of fares for passengers and freight, and, for that matter, any other “change in the mode of operating its road or conducting its business.” And they were further charged with hearing complaints and petitions, making inspections and investigations, and gathering and reporting on information covering nearly all aspects of railroading in Massachusetts including accidents and returns. The *Annual Reports of the Board of Railroad Commissioners* were comprehensive and state-of-the-art compendia of information and recommendations on railroading and governance that prefigure the modern bureaucratic ethos. Beyond common law adjudication, police power legislation, and special charter provisions, the Board allowed for a consistent, ongoing, and systematic supervision of the railroad enterprise throughout the state.<sup>75</sup>

This concentration of oversight authority in a single agency was a vast improvement over the somewhat haphazard and sporadic coordination possible through the earlier welter of statutory provisions, charter stipulations, and common law adjudications. And indeed, the Board was so successful that the Massachusetts legislature did not feel the need to alter its basic structure and mission until 1913 when the Board was replaced by the Massachusetts Public Service Commission. Nor did the Massachusetts Supreme Judicial Court see fit to challenge its existence or its basic regulatory authority.<sup>76</sup>

But while the label “weak” or “advisory” is something of a misnomer given the extensive regulatory powers exercised by entities like the Massachusetts Board of Railroad Commissioners, the Board did lack one direct power that would loom large in the future direction of public utility regulation. And that was the power to set and enforce actual rates and prices. The Board was authorized to recommend rates and hear complaints about unfair or discriminatory fares, but it had no direct coercive or enforcement powers to force railroads to comply beyond the threat of proposing legislation to that effect.<sup>77</sup> Nonetheless, the Board consistently claimed success in

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its efforts to control rates in Massachusetts. As Adams testified ten years into the experiment: “The Commissioners have no power except to recommend and report. Their only appeal is to publicity. The Board is at once prosecuting officer, judge, and jury, but with no sheriff to enforce its process. This method of railroad supervision is peculiar to Massachusetts, but I do not hesitate to say that I believe it is the best and most effective method that has ever been devised.”<sup>78</sup> By the time of the formation of the national Interstate Commerce Commission, fifteen states had set up railroad commissions based on the Massachusetts model.<sup>79</sup>

But this formal limitation regarding direct administrative rate-making and law enforcement power does underscore the historical significance of the change inaugurated in 1871 when—after years of debate culminating in the railroad reforms of the state constitutional convention of 1869–1870—the Illinois legislature passed “An Act to Establish a Board of Railroad and Warehouse Commissioners.”<sup>80</sup> The statute was the immediate byproduct of new and explicit state constitutional directives that: (a) “Railways . . . are hereby declared public highways, and shall be free to all persons for the transportation of their persons and their property”; (b) “The General Assembly shall . . . pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state”; (c) “The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different roads in the State”; and (d) “The General Assembly shall pass laws for the inspection of grain, for the protection of producers, shippers, and receivers of grain and produce.”<sup>81</sup>

The original Illinois Railroad and Warehouse Commission Act was thus no ordinary piece of legislation. In addition to responding to explicit state constitutional mandates, the commission legislation was but one piece of a whole packet of incredibly detailed statutes on warehouses and railroads passed mostly in March and April, including: a revision of Illinois’s general railroad incorporation act, an act concerning railroad injuries, an act prohibiting unjust rate discriminations and extortions, an act regulating the transportation of grain by railroad corporations, an act setting maximum rates for charges on passengers, and an act for the construction of railroad stations and depots.<sup>82</sup> In short, from its constitutional convention forward, Illinois (like many other midwestern states) was undertaking a detailed and thoroughgoing account and regulation of railroad corporations and warehouse companies and establishing a new permanent commission

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to oversee and enforce this heightened regulatory regime (to investigate, to prosecute, and, in some cases—for example, concerning warehouse licenses—to directly penalize violations of Illinois law). In 1873 the Illinois legislature added a final piece of modern administrative machinery in authorizing the commission itself to develop a schedule of maximum rates for the transportation of passengers and freight on all railroad corporations that would be deemed *prima facie* “reasonable” in Illinois courts.<sup>83</sup> In pioneering the development of a state board that could also establish maximum rates and take direct enforcement action, Illinois established something novel and produced a direct precedent for the regulation of the national railway system. Iowa, Wisconsin, Minnesota, Georgia, and California soon followed Illinois’s lead. And by the time of the founding of the ICC, ten states had implemented the Illinois model.<sup>84</sup>

Though rooted in older common law traditions regarding common carriers and public callings (as well as state and local commission experience), this was a new kind of regulatory regime. Arguably for the first time,<sup>85</sup> regulatory policy displayed almost all of the characteristics that continue to define modern administrative regulation: fact-finding, data-gathering, reporting, publication, inspection, investigation, prosecution, delegation, price-setting, adjudication, rulemaking, and regulatory enforcement. Much as antebellum police power regulations attempted to improve on the *ad hoc* and *ex post* system of common law rules, here legislatures pushed further—deploying a new kind of comprehensive regulatory apparatus to more efficiently and effectively enforce formidable new state regulations of railroads, warehouses, and grain elevators. The first reports of the Illinois commission reflected this more complete regulatory and law enforcement objective. “The act to prevent unjust discrimination and extortion in the rates for the transportation of freight, is systematically violated,” the commission noted. “Many complaints have been received on that head.”<sup>86</sup> The strong midwestern state regulatory commission was a direct result of the effort to move beyond the limitations of common law and statutory modes of regulation—to self-consciously create a more modern and comprehensive regulatory administration.

Almost immediately, the Illinois commission (like those of other states) began aggressively exercising its new legislatively derived powers of investigation, regulation, administration, and even prosecution. In its first year of existence, on receiving satisfactory evidence of “unjust discrimination and extortion” of the rates on the Chicago and Alton Railroad, it instructed J. H. Rowell—the state’s attorney for McLean County—to file an information in

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the nature of a *quo warranto* to “declare the charter of that company forfeited” as being in violation of the new Illinois railroad regulation. It added that “the prosecution will be pressed with vigor.”<sup>87</sup> With respect to warehouses and grain elevators, they noted similar failures to comply with new legislation requiring official licensing and the fixing of new maximum charges for storage. Given such open violations of plain laws, the Board again instructed the state’s attorney—this time for Cook County—“to institute proceedings against said delinquent owner or manager of warehouses.” After a delay forced by the Great Chicago Fire, these latter proceedings ultimately formed the grounds for the litigation that would culminate in the U.S. Supreme Court’s pioneering decision in *Munn v. Illinois*.<sup>88</sup>

Following the legislature’s directive in 1873 further prohibiting extortion and unjust discrimination, the commission prepared a schedule of maximum rates which were held to be *prima facie* evidence of reasonableness in Illinois courts. The details of this extraordinary exercise of authority in many ways exemplify a new form of modern regulatory and administrative power that would perhaps reach something of a peak of development in the operations of the Food Administration in World War I, the National Recovery Administration in the New Deal, and the Office of Price Administration in World War II. The commission began with a formal classification of every conceivable kind of freight. The list in Table 4.1 reproduces only classified freight beginning with the letters “Ca” (the comprehensive list, of course, runs from A to Z).<sup>89</sup>

Here, the numbers 1 through 4 stood for First through Fourth Class; 1½ for once and a half First Class, and D1 for double First Class. The Commission then reproduced seventeen separate schedules for these Classes—First through Fourth and A through D, with additional schedules for Flour and Meal; Salt, Cement, Plaster and Stucco; All Grain and Mill Stuffs (except Wheat); Wheat; Lumber; Horses and Mules; Cattle and Hogs; and Sheep. The schedules listed the commission’s rates by both miles and per 100 pounds, and listed the existing comparative rates of each and every major railroad in the state. Table 4.2 shows a sampling from Schedule No. 1—Merchandise—First Class—in cents, per 100 pounds.<sup>90</sup>

Welcome to the world of modern administrative regulation. This kind of detailed exercise in direct rate-making and price-setting was the cornerstone of public utility regulation, and it would remain the paradigm example of the modern administrative state in action for the next hundred years (eclipsed only recently perhaps by the equally complex administrative pro-

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Table 4.1. Freight Classification

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| Cabbage, in small lots, crates or hhds     | 2             |
| Cabbage, car loads, same as potatoes       |               |
| Cabinet ware                               | See furniture |
| Cabinet organs                             | 1             |
| Caissons                                   | 2             |
| Cable chain                                | 4             |
| Camphene, in wood                          | 1½            |
| Candles                                    | 2             |
| Candles, 2,000 lbs. or more                | 4             |
| Canvass                                    | 1             |
| Canvass, roofing                           | 2             |
| Canes                                      | 1             |
| Cane mills                                 | 2             |
| Cannon                                     | 2             |
| Cannon, on wheels, or if flat car required | Class A       |
| Candy                                      | 1             |
| Canned goods                               | 2             |
| Canned goods, 100 boxes or over            | 3             |
| Caps, in boxes, strapped                   | 1             |
| Caps, in boxes, not strapped               | 1½            |
| Caps, in trunks                            | 1½            |
| Capstans                                   | 2             |
| Carboys and contents                       | D 1           |
| Carboys, empty                             | 1             |
| Carboys, empty, car loads                  | Class A       |
| Cards                                      | 1             |
| Card board                                 | 2             |
| Carpets and Carpeting                      | 1             |
| Carpet, hemp                               | 1             |
| Carpet lining                              | 1             |
| Carpenters' tools                          | 1             |
| Carriages and sleighs, not boxed           | 1½            |
| Carriages, well boxed                      | D 1           |
| Carriage springs, boxes and axles          | 2             |
| Car springs, rubber                        | 2             |
| Car springs, volute, boxed                 | 4             |
| Car wheels and axles                       | 4             |

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Table 4.1. (continued)

|                                 |         |
|---------------------------------|---------|
| Car wheels and axles, car loads | Class D |
| Carts in pieces                 | 1       |
| Casks, large, empty             | 1½      |
| Cassia                          | 1       |
| Cast-iron grain mills           | 2       |
| Castor oil, in glass            | 1       |
| Castor oil, in wood             | 3       |
| Cauldron kettles                | 2       |

cess of standard-setting). Into the early twentieth century, this particular activity—rate-making—would wholly consume the attention of literally countless regulators, businessmen, practitioners, judges, economists, social scientists, legal scholars, and popular commentators. Millions of pages and barrels of ink would be spent debating such extraordinarily complex things as the best means of calculating a rate of return, the nature of a “reasonable” versus an “unreasonable” rate, and the comparative interests of corporations, shareholders, and the public at large. From the very beginning, there was an acute awareness of the enormity of the economic regulatory task at hand—calculating things such as investment, cost, return, and rates in railroading.<sup>91</sup> More than a century later, Stephen G. Breyer still began his own inquiry into the difficulties and problems inhering in modern regulation with detailed examinations of cost-of-service rate-making and historically based price regulation.<sup>92</sup>

Systematic administrative and regulatory rate-making of the kind launched by the Illinois Railroad and Warehouse Commission was a new thing under the sun. And so it should come as no surprise that now the level of judicial and constitutional scrutiny of administrative action would increase as well. The strong state commissions seemed to almost expect as much, as their early reports self-consciously developed a legal-political framework with which to justify their new administrative forays. Right from the beginning, the strong state commissions proactively defended and extended their new powers with extraordinarily detailed (and largely accurate) legal histories of the both the law of common carriers as well as state legislative police power.<sup>93</sup> The briefs they developed along with state’s attorneys were some of the most comprehensive and well-informed statements concerning the law of regulation in America—anticipating nearly every piece of future state and U.S. Supreme Court doctrine. And they supple-

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Table 4.2. Routes and Rates

| Miles | Commissioners' Rates | Rockford, Rock Island, St. Louis | Peoria, Pekin, and Jacksonville |
|-------|----------------------|----------------------------------|---------------------------------|
| 1     | 13.20                | 13.20                            |                                 |
| 5     | 15.40                | 15.40                            | 13.00                           |
| 10    | 17.60                | 17.60                            | 15.00                           |
| 15    | 19.80                | 19.80                            | 16.00                           |
| 20    | 22.00                | 22.00                            | 18.50                           |
| 25    | 23.65                | 23.65                            | 19.50                           |
| 30    | 25.30                | 25.30                            | 21.00                           |
| 35    | 26.40                | 26.40                            | 23.00                           |
| 40    | 27.50                | 27.50                            | 25.00                           |
| 45    | 28.60                | 28.60                            | 27.00                           |
| 50    | 29.70                | 29.70                            | 29.00                           |
| 60    | 31.90                | 31.90                            | 32.00                           |
| 70    | 34.10                | 34.10                            | 34.00                           |
| 80    | 36.30                | 36.30                            | 38.00                           |
| 90    | 38.50                | 38.50                            |                                 |
| 100   | 40.70                | 40.50                            |                                 |
| 125   | 46.20                | 46.00                            |                                 |
| 150   | 51.15                | 51.00                            |                                 |
| 175   | 55.27                | 55.25                            |                                 |
| 200   | 59.40                | 57.30                            |                                 |
| 225   | 63.52                | 60.60                            |                                 |

mented legal precedents concerning state regulatory power with bold political-philosophical arguments about public service and the public good:

In regard to the first objection of an ‘innovation and intermeddling on the part of the state,’ we consider that nothing can justly be called an ‘innovation,’ in its offensive sense, that the public good requires. Railroads themselves are an innovation upon the modes of travel and transportation of fifty years ago, and it would be strange if the duty of the state was limited to granting them privileges without inquiring whether those privileges were abused. We conceive it to be the duty of the state to do for its citizens all that is necessary for the public good, and which it in the nature of things can do better than the private individual, as expressed by John Stuart Mill: ‘The ends of government are

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as comprehensive as the social system, and consist of all the good and all the immunity from evil which the existence of government can be made directly or indirectly to bestow.<sup>94</sup>

Given the broad expansion of state and regulatory power inherent in the administrative rate-making process, it was perhaps inevitable that this new wave of midwestern state railroad regulations would soon yield a classic constitutional controversy and an epic set of Supreme Court decisions.

It is hard to overstate the historical and economic significance of the series of cases decided together by the U.S. Supreme Court in 1877 that are still commonly (and somewhat misleadingly) referred to as the “Granger Cases.”<sup>95</sup> *Munn v. Illinois* and the six companion cases regarding railroad rate regulation in Iowa, Minnesota, and Wisconsin—with six separate majority opinions all authored by Chief Justice Morrison R. Waite, and reported together in seventy-four pages of volume 94 of the *U.S. Supreme Court Reports*—provided an early, remarkably consistent, and authoritative discussion of the fundamentals of police power and public utility regulation.<sup>96</sup> Hereafter, *Munn* and its progeny would become the new starting point for most legal and economic discussion of public utilities and the administrative regulatory state.<sup>97</sup> Indeed, it is not too much of a stretch to suggest that *Munn* launched the public utility era.

Chief Justice Waite’s opinion in *Munn v. Illinois* is famous for a reason. Like Hale in *De Portibus Maris* or Shaw in *Commonwealth v. Alger* or Redfield in *Thorpe v. Rutland*, Waite synthesized a mass of previous material and precedents and adapted it for a new age. Waite reached back into a rich tradition of established doctrines regarding highways, public callings, legislative power, state police power, regulation of corporations, and special obligations of public services and boldly advanced them past claims that the due process clause of the Fourteenth Amendment rendered such regulation constitutionally problematic. Despite the force of the still quite new constitutional amendments, Waite was able to easily sustain the broad legislative and regulatory powers at the heart of the so-called Granger laws in their entirety. In doing so, he provided a fresh and firm constitutional foundation for the new and rapidly developing law of public utilities.

The Supreme Court decisions in *Munn* and its companion railroad cases provided a sweeping, unapologetic, and foundational defense of the new powers of a rapidly emerging administrative regulatory state. The extensive activities of the state railroad commissions—particularly their striking new

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departures in rate-making and law enforcement—changed the face of regulation in America. And despite new arguments from dissenters about the Fourteenth Amendment, due process rights, and the special sanctity of corporate charters, the U.S. Supreme Court had little difficulty sustaining the new regulatory regime in its entirety—across four key states, from legislature to commission, from warehouses to railroads. Surveying some 300 years in the history of common law and state regulation of economic activity, Waite—with more than a little assistance from ambitious commission counsel—penned a veritable field guide to the common law of public rights and common carriers, the state police power, and an emerging law of public service corporations. The work of the Illinois Railroad and Warehouse Commission, *Munn*, and Chief Justice Waite thus nicely set the stage for the explosive emergence of what might be called the public utility movement. As Bruce Wyman concluded, “Any discussion of the foundations of our industrial relations must begin with that decision. . . . Upon the right understanding of this accommodation of private rights to public duties depends the true conception of our general theory of the function of state regulation.”<sup>98</sup>

### Conclusion

Given the long and strong consensus that has existed about *Munn*'s status as a canonical case concerning governmental regulation of the economy (and given the extraordinary amount of academic commentary originally focused on this particular set of decisions), it is worrisome that the prevailing legal-historical wisdom on *Munn* remains somewhat problematic. The heart of the problem is a continued interpretive tendency to see *Munn* as a constitutional endpoint rather than a new beginning. While the road *to Munn* is reasonably well understood, and for the most part agreed on, the road *from Munn* is comparatively neglected—or at least lost in the miasma of obsessive concern with the mythical resurgence of laissez-faire constitutionalism. There is a tendency to see *Munn* as something like the climax of an essentially early nineteenth-century story—a story still under the influence of characters like Lord Hale, Lemuel Shaw, and Roger Taney, and archaic-sounding concerns like common carriers, *juris privati*, *sic utere tuo*, and ferries and wharfingers. That is a mistake. For though Waite and the state railroad commissioners were well aware of the importance of precedent and the long history of Anglo-American economic regulation, they are far better understood as

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paving the way for characters like Felix Frankfurter and James Landis, and more modern-sounding concerns like public utility, administrative rule-making, and even securities regulation. *Munn* and the Illinois Railroad and Warehouse Commission were not the backward-looking last gasps of the well-regulated society, they were the forward-looking harbingers of the modern administrative and regulatory state.

Particularly problematic is the common understanding of *Munn* wherein Waite's designation of businesses "affected with a public interest" is read myopically as yet another example of the development of constitutional limitations in a Gilded Age. In depicting the ultimate triumph of laissez-faire in law, Max Lerner held that *Munn v. Illinois*, along with the *Slaughter-House Cases* (1873), stood out "in melancholy solitude as part of the 'road not taken' when two paths diverged for the Supreme Court in the constitutional wood."<sup>99</sup> Charles Fairman too noted that it was "familiar" that the key "phrase whose currency sprang from that memorable opinion"—namely, business "affected with a public interest"—"came presently to denote a rigid category that closed against various newer measures of public control." "It took the Great Depression," *Nebbia*, and the New Deal, Fairman continued the familiar line of argument, to finally get the Supreme Court back on track.<sup>100</sup> Even Harry Scheiber, who has done as much as anyone to illuminate the public regulatory power of the legal doctrines underlying Waite's opinion in *Munn*, in the end concluded that the public interest doctrine proved to be as much a restraint on the power of the state as an enabling doctrine: "The *Munn* doctrine was fated to become, in the hands of an increasingly conservative Supreme Court, an equally effective shield against public regulation for business the Court deemed strictly private."<sup>101</sup>

This narrow reading of *Munn*, together with a relative neglect of the subsequent development of public utility law, skews our reading of the legal history of corporate regulation in America. Far from being a "road not taken," *Munn* was the very superhighway down which reformers drove a truckload of far-reaching experiments in state regulation of new economic and business activity. And the ramifications went well beyond economic matters alone. The very next time the phrase "affected with a public interest" was used in the Supreme Court, it was uttered by Justice John Marshall Harlan in an attempt (for the time being unsuccessful) to widen the constitutional arena for civil rights regulation in the *Civil Rights Cases* (1883):

The doctrines of *Munn v. Illinois* have never been modified by this court, and I am justified, upon the authority of that case, in saying that

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places of public amusement, conducted under the authority of the law, are clothed with a public interest, because used in a manner to make them of public consequence and to affect the community at large. The law may therefore regulate, to some extent, the mode in which they shall be conducted, and, consequently, the public have rights in respect of such places, which may be vindicated by the law. It is consequently not a matter purely of private concern.<sup>102</sup>

Over the next fifty years, the Supreme Court with few exceptions used the phrase “affected with a public interest” to uphold a wide variety of extensive economic regulations. In *Western Turf Association v. Greenberg* (1907), the Court used the language to sustain a California statute regulating admission policies at “any opera house, theatre, melodeon, museum, circus, caravan, race-course, fair, or other place of public amusement or entertainment.”<sup>103</sup> State appellate courts used *Munn* to even greater regulatory effect.<sup>104</sup> Moreover, the Court made perfectly clear that the fact that a business or industry was not found to be legally “affected with a public interest” did not insulate that activity from ordinary police power regulations. In *Schmidinger v. Chicago* (1913) and *Holden v. Hardy* (1898), the Court upheld a detailed regulation of the sale of bread in Chicago and an eight-hour day for Utah workers in mines and smelters without ever taking up counsel’s contention that those police power regulations required a special finding of business “affected with a public interest.”<sup>105</sup>

Contrary to some well-established interpretations regarding the relationship of law and economic regulation in the late nineteenth and early twentieth centuries, *Munn v. Illinois* did not mark the beginnings of an era of constitutional limitations or classical legal thought or a weak American state capitulating to business and corporations. On the contrary, *Munn* inaugurated an extraordinary era of innovation in the social control of business, industry, and the market. It set in motion a panoply of new ideas like public utilities, rate regulation, price discrimination, fair rate of return, valuation, just price, and economic planning that dominated legal and economic policymaking to the present. It propelled an agenda of economic regulation and controls that culminated in some of the more far-reaching experiments in public and government ownership of economic enterprises in United States history.<sup>106</sup>

Felix Frankfurter, from his perspective as one of the central legal advocates for the increased social control of business in the early twentieth century, understood exactly the implications of *Munn* and early public utilities law for the economic state-building project of progressivism. In an

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extraordinary essay on “Rate Regulation” that he wrote with Henry Hart for the original *Encyclopaedia of the Social Sciences*, Frankfurter summed up the accomplishment:

The resultant contemporary separation of industry into businesses that are ‘public’ and hence susceptible to manifold forms of control, of which price supervision is one aspect, and all other businesses, which are private, is thus a break with history. But it has built itself into the structure of American thought and law; and while the line of division is a shifting one and incapable of withstanding the stress of economic dislocation, *its existence in the last half century has made possible, within a selected field, a degree of experimentation in governmental direction of economic activity of vast import and beyond any historical parallel.*<sup>107</sup>

The public interest doctrine of *Munn* did not insulate private corporations from regulation. Rather, it created a new legal field of important economic activity that could be subjected to unprecedented state control from direct price regulation to outright public ownership.

In *The Economic Basis of Public Interest*, Rexford Tugwell provided a short list of the economic activities that he could envision as essentially public services by 1922—a list in which it is still possible to see the influence of Bruce Wyman’s far more extensive categorization (with which we started this essay).<sup>108</sup> Tugwell listed fourteen public classifications that covered a vast portion of American economic life:

1. Railways and other common carriers including express services, oil and gas pipe lines and cab and jitney lines.
2. Municipal Utilities, so called, such as water, gas, electric light and power companies and street railways.
3. Turnpikes, irrigation ditches, canals, waterways and booms.
4. Hotels.
5. Telephone, telegraph and wireless lines.
6. Bridges, wharves, docks and ferries.
7. Stockyards, abattoirs and grain elevators.
8. Market places and stock exchanges.
9. Creameries.
10. Services for the distribution of news.
11. Fire businesses.
12. The business of renting houses.

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13. Banking.
14. Businesses of preparing for market and dealing in food, clothing, and fuel.

Tugwell's list of public interest services suggests that Progressives viewed the law of public utilities as a vibrant and expansive arena for experimenting with unprecedented governmental control over business, industry, and the market. While today most would restrict the idea of public utility to a couple of closely circumscribed industries (for example, water, electricity, gas), in the early twentieth century the utility idea encompassed urban transportation, railroads, motor bus and truck, telecommunications, radio, pipelines, warehouses, stockyards, ice plants, banking, insurance, milk, fuel, and packing.<sup>109</sup> As Bruce Wyman commented on the future elasticity of the public utility idea, "What branches of industry will eventually be of such public importance as to be included in the category . . . it would be rash to predict."<sup>110</sup> For Progressive legal and economic reformers, this capacious and open-ended legal concept of public utility was capable of justifying state economic controls ranging from statutory police regulation to administrative rate setting to outright public ownership of the means of production. Moreover, after *Munn* it was possible to consider a whole range of reforms appended to the basic idea of the public service corporation—from Mary Barron's notion of the "State Regulation of the Securities of Railroads and Public Service Companies" to Florence Kelley's advocacy of "The Public Regulation of Wages, Hours, and Conditions of Labor of the Employes of Public Service Corporations."<sup>111</sup> Indeed, the public utility idea was so capable of further growth as to ultimately produce one of the most ambitious administrative and regional planning initiatives of the New Deal—the Tennessee Valley Authority.

One of the main reasons for the conventional misreading of the impact of *Munn* is the tendency to focus almost exclusively on high court opinions and to overemphasize the judicial review of administrative action. Such a traditional constitutional approach overstates the negative naysaying function of the judiciary and radically underplays the myriad of positive, everyday political and governmental actions that steadily constituted the public utility era—actions catalogued in literally thousands of volumes of public utility reports that dominated the period. So, while there is no question that important judicial pronouncements like *Wabash, St. Louis & Pacific Railway Company v. Illinois* (1886), or *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota* (1890), or *Smyth v. Ames* (1898) greatly affected and sometimes

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redirected the public utility movement, they did not fundamentally inhibit it.<sup>112</sup> Instead, the main storyline of legal-political development is precisely the one outlined so well by Frankfurter and Tugwell—the story of the creation of a public utility policy and jurisprudence that would grow to dominate economic policymaking and business regulation into the New Deal and beyond. The public utility idea was one of the most important Progressive innovations in the democratic control of the American corporation.

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