SIXTH ANNUAL SALMON P. CHASE LECTURE

The Problem of General Constitutional Law: Thomas McIntyre Cooley, *Constitutional Limitations*, and the Supreme Court of the United States, 1868–1878

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Two milestones in American constitutional history occurred in 1868. The first, which we commemorate this weekend, was the publication of Thomas McIntyre Cooley's great *Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*. The second was the ratification of a Fourteenth Amendment that, among other things, ordained and established sweeping new constitutional limitations on the several state governments. Many scholars have written histories that link these two events with a third—variously described as the advent of a "new judicialism," the emergence of "laissez-faire constitutionalism," or the rise of "guardian review" to protect liberty and property during "the Lochner era." I'll confess that such histories have rarely satisfied me. In the standard literature on late-nineteenth-century constitutional development, the connections between Thomas Cooley's treatise, the Fourteenth Amendment, and the work of the Supreme Court are impossibly vague and allusive. My objective this evening is to connect the dots with greater precision.

Let's start with Cooley's book.[1] It seems to me that *Constitutional Limitations* was animated by three big ideas. First, Cooley presumed the existence in the American union of a general constitutional law consisting of principles that could be rooted neither in the text of every state's constitution nor in the reported decisions of every state's highest court. Our federalism meant that the constitutional law of Virginia would be different than the constitutional law of California. Still, Cooley's main task in *Constitutional Limitations*, as he understood it, was to set down principles of general constitutional law that bench and bar throughout the country might recognize as just and true and appropriate for their particular state.

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1. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1st ed. 1868) [hereinafter CONSTITUTIONAL LIMITATIONS].

He cited New York decisions in support of some principles and Kentucky decisions in support of others. What materialized in the course of the work, however, was a general constitutional law that judges in the several states could articulate when expounding the constitutional law of each state.[2]

Cooley's second big idea reinforced the first. He insisted that "the constitutions [of all the states] are to be construed in the light of the common law."[3] In Cooley's view, the common law gave precision to terms of art such as eminent domain, taxation, the police power, and due process—all of which served as key concepts in the general constitutional law of the American union. Consider the power of eminent domain. Jurists in every state had said that the power to take private property for public use upon payment of just compensation was inherent in every state government. Even in the absence of a textual provision barring takings without compensation, however, the exercise of the eminent domain power was subject to judicially enforced constitutional limitations derived from the common law and "the settled practice of free governments."[4] Compensation had to precede the taking. And the contemplated use for the property taken had to be a public one, not a mere private one. Cooley put it this way:

> It may be for the public benefit that all the wild lands in the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and any such appropriation must therefore be held to be forbidden by our constitutions.[5]

Time and again in *Constitutional Limitations*, Cooley proclaimed that "the courts are not the guardians of the rights of the people . . . unless those rights are secured by some constitutional provision which comes within judicial cognizance."[6] For Cooley, though, constitutional provisions encompassed much that was not textual. This was because, in his words, "constitutions are to be construed in light of the common law."[7]

Cooley's third big idea addressed the question of how judges might use common law concepts to protect the people from arbitrary invasions of liberty and property. In many instances, though certainly not all, Cooley believed that judicial review of public purposes professed by legislatures would do the job.

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2. *See* Cooley's statement of purpose in CONSTITUTIONAL LIMITATIONS, *supra* note 1 at iii–iv.
3. CONSTITUTIONAL LIMITATIONS, *supra* note 1 at 60; *see also id*. at 175 (stating that "the maxims of Magna Charta and the common law are the interpreters of constitutional grants of power").
4. *Id*. at 533.
5. *Id*. at 532–33.
6. *Id*. at 168; *see also id*. at 72–73 (discussing "unjust" statutes).
7. *Id*. at 60.

Judicial review of purported eminent domain takings provided one familiar example. The power to tax provided another. "Everything that may be done under the name of taxation is not necessarily a tax," Cooley declared, "and it may happen that an oppressive burden imposed by the government, when it comes to be carefully scrutinized, will prove, instead of a tax, to be an unlawful confiscation of property, unwarranted by any principle of constitutional government."[8] The public/private distinction provided the required standard. Taxation for public purposes was legitimate; taxation for purely private purposes was by definition illegitimate. And just as courts might review statutes that "plunder[ed] the citizen" "under the pretence" of exercising the power to tax, so courts might review police regulations to make sure that rights of liberty and property were not divested "under the pretence" of protecting the public health, public safety, public morals, or public welfare.[9] For Cooley, due process of law mandated judicial review of professed public purposes. That was how courts maintained the boundary between regulation and confiscation. It was also the stuff of substantive due process.

Cooley's three big ideas can be readily restated. He postulated a general constitutional law. He claimed that constitutions had to be interpreted in light of the common law. And he held up the public/private distinction as an indispensable method of judicial review in controversies involving eminent domain takings, taxation, and police regulations. In theory, at least, the Supreme Court might have invoked Cooley's big ideas each time a state law got challenged under the Fourteenth Amendment. The language of the amendment seemed amenable to such a view. It spoke of "the privileges or immunities of citizens of the United States" and of the "equal protection of the laws."[10] It also provided that "nor shall any State deprive any person of life, liberty, or property without due process of law,"[11] a phrase to which Cooley had devoted an entire chapter of *Constitutional Limitations*.[12] What is more, the Fourteenth Amendment spoke of the rights of all citizens, even all persons, though it was a matter of public record that the Thirty-Ninth Congress, which drafted the text, had been focused primarily on protecting the rights of the five million people who had been emancipated between 1862 and 1865. Still, there was one difficulty. Another conception of general constitutional law was abroad in the land when Cooley published his book in 1868.

Since 1810, if not before, the Court had considered a much broader array of constitutional principles in cases arising from its diversity jurisdiction (that is, civil cases with a constitutional cast that came up from federal trial courts) than it had in cases arising from challenges of state laws said to violate the Constitution of the United States (that is, federal question cases that came up on writ of error

8. *Id*. at 487.

9. CONSTITUTIONAL LIMITATIONS, *supra* note 1 at 487–88; *see also id*. at 393 (discussing "arbitrary" police regulations).

10. U.S. CONST. amend. XIV, §1.

11. *Id*.

12. CONSTITUTIONAL LIMITATIONS, *supra* note 1 at ch. 11, 351–414.

to the highest state court). *Fletcher v. Peck* was a case of the first type;[13] *Dartmouth College v. Woodward* was a case of the other type.[14] In 1878, Justice Samuel F. Miller used the phrase "general constitutional law" to describe the constitutional principles expounded by the Court in the diversity context.[15] He also declared that the American constitutional law expounded by the Court in the federal question context—a context that now included the Fourteenth Amendment—had an altogether different foundation. What is more, Justice Miller insisted that principles of "general constitutional law" had no legitimate role in the Court's construction of the Fourteenth Amendment. This claim evoked fierce resistance from Justice Stephen J. Field. So now you can sense the conflict that drives my narrative. What follows is an account of the battle between Miller and Field over the nature and scope of general constitutional law, with special attention to Cooley's other two big ideas as the battle unfolded.

Let me say a few words about our main characters before beginning the narrative. Cooley, Miller, and Field were all beneficiaries of territorial expansion and the periodic making of new states during the nineteenth century. Each was born in an old state and migrated to a new one that provided a kind of safety valve for aspiring lawyers. Cooley, the youngest of the three, was born in upstate New York in 1824 and set out for Michigan in 1843. He helped organize Michigan's Free Soil Party in 1848, joined the Republican Party in 1856, and became an increasingly influential lawyer in the years that followed. He was appointed compiler of the Michigan revised statutes in 1857, reporter of the Michigan Supreme Court in 1858, and professor of law at the University of Michigan in 1859. Five years later, Cooley was elected to the Michigan Supreme Court; he was still sitting on the Michigan bench when *Constitutional Limitations* went to press.[16]

Miller and Field were both born in 1816–Field in rural Connecticut and Miller in the bluegrass region of Kentucky. Each had become a prominent lawyer and politician—Field in California, Miller in Iowa—before his fortieth birthday. Field drafted the California code of civil procedure in 1851, was elected to the California Supreme Court in 1857, and played a major role in the creation of a Union Party that carried the state for Lincoln in 1860. Miller ran for the Iowa senate on the Republican ticket in 1856, and people called him an indefatigable Lincoln man in 1860. President Lincoln appointed Miller to the Supreme Court in 1862; Field joined him on the Court in 1863. The following year, both were there to greet Salmon P. Chase as the new Chief Justice.[17]

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13. Fletcher v. Peck, 10 U.S. 87 (1810).

14. Tr. of Dartmouth Coll. v. Woodard, 17 U.S. 518 (1819).

15. Davidson v. New Orleans, 96 U.S. 97, 105 (1878). *See generally* Michael G. Collins, *Before* Lochner*—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000).

16. ALAN R. JONES, THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY (1987) is an excellent biography. *See also* Stephen A. Siegel, *Historism in Late Nineteenth-Century Constitutional Thought*, 1990 WISC. L. REV. 1433, an indispensable study.

17. The standard biographies are: CHARLES FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862–90 (1939); PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH

It's time to put these people and ideas into play. We begin with *Pumpelly v. Green Bay Co.*, decided in 1871, where the Court concluded that the flooding of land in connection with the construction of a state-authorized dam amounted to a taking under the Wisconsin constitution.[18] The plaintiff, a resident of Michigan, owned 640 acres that had been covered with water, sand, and other debris as a result of the new construction. He sued in the Circuit Court for the District of Wisconsin, invoking a clause in the state constitution that said "the property of no person shall be taken for public use without compensation." The defendant corporation had argued that because Pumpelly still had his land, there had been no taking and that the damage should be treated like other "consequential" injuries for which state courts had often denied compensation.[19] The Supreme Court, on appeal, analyzed the constitutional question with scant attention to the decisional law of Wisconsin.[20] Instead, it looked to principles of general constitutional law, recognizing that the prohibition of takings for public use without just compensation was "so essentially part of American constitutional law that it is believed that no State is now without it."[21]

Justice Miller wrote these words for a unanimous Court. He took it for granted that constitutional texts were interpreted in light of the "just principles of the common law."[22] Miller elaborated at some length:

> It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, . . . it shall be held that if government refrains from the absolute conversion of real property for the use of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would . . . make it authority for invasion of private right under the pretext of public good, which had no warrant in the laws or practices of our ancestors.[23]

Justice Field loved this passage and quoted it six years later in *Munn v. Illinois*.[24] Cooley, too, endorsed *Pumpelly* in the third edition of *Constitutional Limitations*,

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to the Gilded Age (1997). *See also* Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations*, 61 J. AM. HIST. 970 (1975); Charles W. McCurdy, *Samuel F. Miller 1816-1890*, *in* 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1256 (L. Levy & K. Karst eds., 1986).

18. Pumpelly v. Green Bay Co., 80 U.S. 166, 166 (1871).
19. *Id.* at 177.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 177–78.
24. Munn v. Illinois, 94 U.S. 113, 144 (1877).

published in 1874.[25] We should not be surprised. Justice Miller's opinion for the Court incorporated each of Cooley's three big ideas.

Miller walked the same walk and talked the same talk in *Loan Association v. Topeka*, decided in 1874.[26] At issue was a suit brought by a Cleveland, Ohio savings bank against Topeka, Kansas for the payment of interest on bonds issued by the city government.[27] Through a vigorous promotion campaign involving a $100,000 subsidy, Topeka had lured the nation's largest manufacturer of wrought-iron bridges to the city.[28] Bonds had been sold and taxes levied to pay the subsidy.[29] But the Panic of 1873 prompted Topeka officials to repudiate the debt and cut taxes.[30] The petitioner pointed out that the Kansas legislature had expressly given the cities the power to subsidize manufacturing companies and had also given them the power to tax for that very purpose.[31] Nevertheless, the Supreme Court—again sitting in review of a diversity action—held that the statutes authorizing the deal violated the Kansas constitution.[32]

Justice Miller, speaking for an 8-1 majority, flatly stated that the people's tax dollars could not "be used for the purposes of private interest instead of public use."[33] Appropriately, he cited Cooley's *Constitutional Limitations* as authority for this principle of general constitutional law. "To lay with one hand the power of government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes," Miller declared, "is none the less robbery because it is done under the forms of law and is called taxation."[34] Miller's opinion in *Loan Association v. Topeka* sounded only one note that troubled Field. He stated that "it may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not."[35] Field disagreed. Just one year earlier, Field had filed an opinion designed to show, among other things, that distinguishing public from private was actually a cinch.[36] He and Miller didn't see eye-to-eye on that occasion, known then and ever since as the *Slaughter-House Cases*.

The *Slaughter-House Cases* posed so many intersecting questions of law, fact, and jurisdiction that the Justices had trouble disentangling them and clarifying them even after two batches of briefs and two oral arguments spanning two terms

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25. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES 542 (3d ed. 1874) [hereinafter CONSTITUTIONAL LIMITATIONS 3d ed.] .
26. Loan Association v. Topeka, 87 U.S. 655, 664 (1874).
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. Slaughter-House Cases, 83 U.S. 36, 109–111 (1873) (Field, J., dissenting).

of the Court. Maybe it will help if we set aside all the Fourteenth Amendment issues for a moment and consider the controversy as one that posed a problem of general constitutional law. The facts were these. In 1869, the Louisiana legislature passed an act to protect the public health of New Orleans, to locate stock landings and slaughterhouses, and to incorporate the Crescent City Company, at whose establishment alone the landing and slaughtering of cattle would be permitted after 1870.[37] All other stock dealers and butchers, if they were to stay in business, had to resort to the Crescent City Company's facilities.[38] And the independents were going to be at a competitive disadvantage.[39] The statute fixed the prices that the Crescent City Company could charge for the use of its facilities, and the prices fixed were well above the costs incurred by "the monopoly" in landing and slaughtering their own animals.[40] This is not to say that the act had nothing to do with public health. For many years, slaughtering had been conducted on the banks of the Mississippi River above the intake of the city water plant. But the way Louisiana went about protecting public health was, at best, unusual. New York City, Milwaukee, and San Francisco had driven all the butchers out of the city limits. Investors in the Crescent City Company, on the other hand, got an exclusive franchise.

Justice Field, speaking for himself and three colleagues, described the public health rationale for the statute a "shallow … pretence" for an "odious" monopoly.[41] He conceded that slaughterhouses had long been regarded as nuisances at common law, and he insisted that state legislatures might exclude them from densely populated cities.[42] But, in his view, the state's duty to protect public health could not "possibly justify" legislation framed "for the benefit of a single corporation."[43] Field was especially struck by the claim, set forth in a brief for Louisiana, that a state legislature might make any business "the exclusive privilege of a few … if the sovereign judges that the interests of society will be better promoted."[44] This position, said Field, had no support in the common law.[45] For generations, exclusive privileges had been limited to businesses that held "franchises of a public character appertaining to government."[46] The classic examples were hack drivers, bridge proprietors, and ferry operators. Those people could not engage in their calling by common right because they required special easements in the public streets or public rivers and, in return for the government's grant of privilege, public officials might prescribe "the conditions under which

37. *Id*. at 38 (majority opinion).
38. *Id*.
39. *Id*.
40. *Id*.
41. *Id*. at 88.
42. Slaughter-House Cases, 83 U.S. 36,87 (1873).
43. *Id*. at 88–89.
44. Brief of Counsel of Defendants in Error at 8–9*, Paul Esteben et al. v. The State of Louisiana* (1872), *sub nom*. Slaughter-House Cases, 83 U.S. 36 (1873).
45. *Slaughter-House Cases*, 83 U.S. at 88.
46. *Id*.

[the franchise] is enjoyed."[47] Railroad and other public utility corporations had assumed similar liabilities to the public by dint of exercising the eminent domain power in the acquisition of rights-of-way for track, telegraph poles, or pipes. The meat-cutting business, in contrast, was a purely private "ordinary trade."[48] As a result, Field concluded, it had to be "open without other restrictions than such are imposed equally upon all others" similarly situated.[49]

Justice Miller, speaking for the 5-4 majority, wanted no part of Field's appeal to the common law, to the public/private distinction, and to equal rights. Miller simply described the Louisiana law as a valid exercise of the police power.[50] If the means chosen to protect the public health seemed unusual, he said, the Court could do nothing about it.[51] In other words, Miller refused to think about the *Slaughter-House Cases* in terms of general constitutional law. He refused, of course, because the Fourteenth Amendment, if it were broadly construed, had momentous implications for American federalism. If white butchers could contest a Louisiana law in the Supreme Court, then every law enacted in every state might be so contested; and this would transform the Court into what Miller called "a perpetual censor upon the legislation of the states."[52] Nor was that all. If white butchers had rights under the first section of the Fourteenth Amendment, what was to stop Congress from exercising the "appropriate legislation" power conferred in section five so as to regulate the meat-cutting trade everywhere in the United States?[53] And if Congress could regulate butchers, it could surely regulate bakers and candlestick makers. To bring all fundamental rights under the umbrella of national protection, Miller proclaimed, would be "so great a departure from the structure and spirit of our institutions" and would so "fetter and degrade the state governments by subjecting them to control by Congress" that it could not be permitted "in the absence of language which expresses such a purpose too clearly to admit of doubt."[54] For Miller, principles of general constitutional law and principles of Fourteenth Amendment jurisprudence had to remain in wholly separate, vacuum-bounded categories. Preserving "the main features of the federal system" required nothing less.[55]

The war of wills between Miller and Field was less visible in the Court's next great encounter with the Fourteenth Amendment in *Munn v. Illinois*, decided in 1877.[56] It was there all the same. At issue was an Illinois statute, passed in 1871, that declared all the grain elevators in Chicago to be "public warehouses" and

47. *Id.*
48. *Id.*
49. *Id.* at 88, 110.
50. *Id.* at 62.
51. *Slaughter-House Cases*, 83 U.S. at 64–65.
52. *Id.* at 78.
53. *Id.*
54. *Id.*
55. *Id.* at 78, 82.
56. Munn v. Illinois, 94 U.S. 113 (1877).

subjected their operations to price regulation.[57] The Court upheld the statute by a vote of 7-2.[58] Morrison R. Waite, the new Chief Justice, spoke for the majority.[59] In the exercise of the police power, he asserted, "it has been customary in England from time immemorial and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold."[60] What these various occupations had in common, he added, was that lawmakers had deemed them businesses "affected with a public interest."[61] The underlying principle, which Waite claimed to find in the seventeenth-century treatises of Lord Matthew Hale, was this: "When an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulations by legislative power."[62] Chicago grain warehousemen, the Court concluded, "stand ... in the very 'gateway of commerce' and take toll from all who pass" and therefore "exercise a sort of public office" comparable to railroad corporations, hackney coachmen, and ferry operators.[63]

Justice Field dissented. In his view, the doctrine of "business affected with a public interest" as employed by the majority, required a misreading of Lord Hale's precepts.[64] According to Field, when Hale had suggested that private property might cease to be *juris privati*, that is when it ceased to be held by private right, he referred to "property the use of which was granted by the government, or in connection with which special privileges were conferred."[65] But the firm of Munn and Scott held no corporate charter and had been granted no special privileges. The firm's property, then, had never ceased to be *juris privati* and there could be no legitimate rationale for regulating its rates of charge. One additional element of Field's *Munn* dissent merits special emphasis. He professed to be astonished by the argument, made by the Illinois Supreme Court and in the accompanying briefs, that price regulation did not deprive anyone of property because the owner retained title and possession of the premises.[66] "All that is beneficial in property," Field said, "arises from its use and the fruits of the use; and whatever deprives a person of them deprives him of all that is valuable in the title

57. *Id*. at 114.
58. *Id*. at 135–136.
59. *Id*. at 123.
60. *Id*. at 125.
61. *Id*. at 125–26.
62. Sinking-Fund Cases, 99 U.S. 700, 747 (1878) (restating the affectation doctrine of *Munn*).
63. *Munn*, 94 U.S. at 131–32.
64. *Id*. at 136.
65. *Id*. at 139.
66. *Id*. at 139, 141.

and possession."[67] In support of this view, Field quoted extensively from *Pumpelly v. Green Bay Co*., crossing the line in the sand that Miller had drawn to distinguish permissible uses of "general constitutional law" (in the diversity context) from impermissible uses (in the Fourteenth Amendment context).[68]

Justice Miller tried to make the line brighter in *Davidson v. New Orleans*, a routine tax case that the Court decided unanimously in 1878.[69] In the process of upholding the tax, Miller talked about the "abundant evidence that there exists some strange misconception of the scope" of the Fourteenth Amendment's Due Process Clause.[70] Some of the evidence was manifested on the Court's docket, which had become crowded with Fourteenth Amendment challenges to state laws. But much of "the misconception," as Miller described it, had been stoked by the powerful dissents of Justice Field.[71] And Miller used *Davidson* to throw cold water on Field's quest to link Cooley's three big ideas with the Fourteenth Amendment. Miller commented first on the public/private distinction. Miller stated that "if private property be taken for public uses without compensation, it must be remembered that, when the fourteenth amendment was adopted, the provision on that subject, in immediate juxtaposition in the fifth amendment with the one we are construing, was left out, and this was taken."[72] In other words, Miller claimed that the due process principle could not possibly incorporate the Fifth Amendment requirement of just compensation. Next he commented on Field's use of *Pumpelly* in the *Munn* case. "It must also be remembered," Miller declared, that "principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a Circuit Court of the United States, as we were in *Loan Association v. Topeka*" and *Pumpelly v. Green Bay Co*., had never been accessible in federal question cases that came up on writ of error to a state court.[73] It followed as a matter of course that "principles of general constitutional law" were not accessible to the Court in cases involving the Fourteenth Amendment.

Field never replied to Miller's rebuke. He just kept doing what he'd been doing, and he got some encouragement from a welcome source. Thomas McIntyre Cooley published an article in 1878, entitled *Limits to State Control of Private Business*, that defended Field's *Munn* dissent on every contested point.[74] Cooley also set out a new argument, grounded on the relationship between constitutional history and the common law, designed to show how constitutional liberty had grown over time. "If you assume that the government may do whatever it may find precedents for in constitutional history," Cooley remarked, "you assume the existence of a practical legislative omnipotence" incompatible with the

67. *Id*. at 141.
68. *Id*. at 144–145.
69. Davidson v. New Orleans, 96 U.S. 97 (1878).
70. *Id*. at 104.
71. *Id*.
72. *Id*. at 105.
73. *Id*. at 104–05.
74. Thomas M. Cooley, *Limits to State Control of Private Business*, 1 PRINCETON REV. 233 (1878).

American constitutional order.[75] The prices of ox, sheep, hogs, geese, pigeons, and eggs had been fixed during the thirteenth-century reign of King Edward I; the prices of most things, including wages for labor, had been fixed by the Massachusetts General Court during the seventeenth century. But neither justified the regulation of grain elevators in the nineteenth century.[76] Nor did the unenforced act of Congress passed in 1820, cited as precedent by Chief Justice Waite, which authorized the District of Columbia to fix the charges of chimney sweeps.[77] "A questionable power, long disused, should be considered abandoned or recalled" by the body politic, Cooley wrote.[78] "To [say] this," he added, "is only to take notice of the steady growth of free principles which have come [to us] from common-law rules and usages, and of their gradual expansion with the general advance in … independent thought and action among the people."[79] For Cooley, constitutional liberty depended on lawmakers and judges who understood that virtually all "despotic" and "anomalous" exercises of legislative power in Anglo-American history had passed away by desuetude—that is, by the common law principle that renders a precedent invalid through its long and continued non-use.

Cooley's article may have given aid and comfort to Field; but the fact remained that, as of 1878, he stood on the losing side in the great constitutional controversies of his time. What moved Field and Cooley to the winning side was in part the resolution of the problem of general constitutional law. Justice Miller's particular conception of "general constitutional law" was gradually eclipsed by Cooley's more capacious version. Beginning in 1880, counsel for the challenger in Fourteenth Amendment cases regularly and persistently cited *Pumpelly v. Green Bay Co.* and *Loan Association v. Topeka* as appropriate authorities. Meanwhile, between 1887 and 1891, Congress enacted a series of statutes that created intermediate courts of appeal and sharply curtailed the Supreme Court's appellate jurisdiction in diversity cases. The very source of Miller's version of "general constitutional law" thus became relatively insignificant. Miller died in 1890. Seven years later, the Court did something he had said could never be done in view of the text of the Fifth Amendment, which contained a taking clause and a due process clause, and the Fourteenth Amendment, which contained only the latter. During its 1896 term the Court decided in one case that the Fourteenth Amendment incorporated the just compensation principle, thus nationalizing *Pumpelly*, and in another held that the public purpose in taxation was a due

75. *Id.* at 240.

76. *Id.* at 240–41.

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

78. Thomas M. Cooley, *Limits to State Control of Private Business*, *supra* note 74, at 270.

79. *Id.* at 269–70. *See also* THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 236 (1880) (asserting that sumptuary laws, though not uncommon in the eighteenth century, should be regarded as unconstitutional at the end of the nineteenth century).

process principle, thus nationalizing *Loan Association v. Topeka*.[80] Miller's line in the sand had been erased. In time it was forgotten. One suspects that Cooley would have grasped what happened and why it happened. The gradual demise of "general constitutional law," as Miller understood it, mimicked the demise of the anomalous price regulations that had been invoked by Chief Justice Waite in *Munn v. Illinois*. What Cooley called "modern usage," rooted in the common law and the evolving practices of the people, had buried Miller's constitutional project beneath the three big ideas expounded in *A Treatise on the Constitutional Limitations which rest upon the Legislative Power of the States of the American Union*.

80. Chicago, Burlington & Quincy R.R Co. v. City of Chicago, 166 U.S. 226 (1897); Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896). *See also* Missouri Pac. Ry. Co. v. Nebraska, 164 U.S. 403 (1896) (invoking the due process clause of the Fourteenth Amendment to strike down a statute that required railroads to allow grain elevators to be built on rights-of-way).