

EMINENT DOMAIN AND ECONOMIC DEVELOPMENT: THE MILL ACTS AND THE ORIGINS OF LAISSEZ-FAIRE CONSTITUTIONALISM

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IN *KELO v. CITY of New London* (2005), the United States Supreme Court upheld the use of the eminent domain power to take property from homeowners for the purpose of economic development. Under the Fifth Amendment, wrote Justice John Paul Stevens for the majority, eminent domain may be used only for a public purpose. But “public purpose” is a broad concept.

From upholding the Mill Acts (which authorized manufacturers dependent on power-producing dams to flood upstream lands in exchange for just compensation), to approving takings necessary for the economic development of the West through mining and irrigation . . . (*Kelo v. City of New London*)

Many state courts had long ago learned that restrictive constructions of the eminent domain power failed to meet “the diverse and always evolving needs of society,” said Stevens. Justice Clarence Thomas emphatically disagreed. The early mill acts, he noted, required grist-mill operators to serve the public for a fixed toll; the mills were analogous to common carriers. The later use of the mill acts “to grant rights to private manufacturing plants . . . was a hotly contested question in state courts throughout the 19th and into the 20th century” (*Kelo v. City of New London*).

Thomas was right; the expanded use of the mill acts caused considerable constitutional controversy. But Stevens was right, too, for the contest resulted in a clear triumph for those who advocated the use of eminent domain to promote economic development. *Kelo* will

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no doubt have important ramifications for constitutional law in the future—within weeks of the decision, critics unleashed a torrent of proposals to protect private property from takings for developmental purposes—but the dispute between Justices Stevens and Thomas regarding the mill acts also brings to mind an old controversy over the origins of *laissez-faire* constitutionalism.¹

Laissez-faire ideas appeared in the judicial opinions of some prominent jurists in the decade after the Civil War. Michigan chief justice and treatise writer Thomas M. Cooley wrote that economic development was best left to “the law of supply and demand” (*People ex rel. Detroit & Howell R.R. Co. v. Township Bd. of Salem* [1870]). Chief Justice John Forrest Dillon of Iowa, the nation’s foremost authority on municipal law, expressed his “skepticism in the healthfulness of an artificial growth caused by the unnatural stimulus of public taxation in favor of private enterprise” (*Hanson v. Vernon* [1869]). Legal reformer John Appleton, head of the Maine court, declared that the “[t]he less the State . . . directs and selects the channels of enterprise, the better” (*Opinions of the Justices* [1871]). In each of these cases, the court declared legislation unconstitutional. This importation of *laissez-faire* ideas into constitutional law has been blamed for a whole era in which courts struck down legislative attempts to regulate corporate activity through labor laws, rate regulations, and other economic measures. A recent treatise on constitutional law, after noting Cooley’s influence, asserts that “[t]he economic, social, and intellectual thought of the late nineteenth century persuaded the [Supreme] Court that it must do more to protect business interests from encroaching governmental control” (Rotunda and Nowak 2007, vol. 2, pp. 753, 756).

The protection-of-business interpretation of *laissez-faire* constitutionalism, once dominant among historians and still current in constitutional law textbooks and treatises, has been challenged by

¹*Kelo* also added fuel to the debate between “centralist” and “decentralist” libertarians. The former believe that the Supreme Court should have defined “public purpose” (or, in the Fifth Amendment’s terminology, “public use”) in such a way as to extend the federal Constitution’s protection of private property. The latter, while agreeing that the eminent-domain power should not be used for economic-development purposes, oppose any extension of federal authority; they argue that by leaving the definition of public purpose to the states, the Court at least got something right. See, for example, the exchanges at <http://blog.mises.org/blog/> (search “kelo”). Perhaps the movement for state laws and constitutional amendments to prevent the use of eminent domain for economic development purposes will resolve the quarrel in a manner satisfactory to both camps.

revisionist scholars who see the phenomenon as an attempt to preserve the political ideals of Jacksonian democracy. But whether or not *laissez-faire* constitutionalism acquired a pro-business coloration toward the end of the nineteenth century, it originated in response to overzealous antebellum promotion of economic development by government, not in reaction to the regulation of business. The tension between the promotional impulse, firmly rooted in American tradition, and the newer notion that business development was a private concern that government ought to “let alone” can be seen in the developing controversy over one of the oldest forms of promotion, the mill acts.²

Perhaps more than any other type of economic activity, milling illustrates Novak’s (1996) contention that “early Americans understood the economy as simply another part of their well-regulated society” (p. 84). According to Novak, the economy constituted a “special sphere of social activity, a sphere distinctly cognizable as an object of governance” (p. 86). Novak contends that Americans did not regard the relationship between the state and the economy as adversarial until the latter half of the nineteenth century, and even then the traditional view of the regulated, “well-ordered market” yielded only grudgingly to the idea that government and society occupied separate spheres, the one public, the other private. Novak discusses regulation to the almost total exclusion of promotion, but the well-regulated society also encouraged enterprise in the name of public welfare (pp. 239–40). It was the overly enthusiastic promotion of private business ventures that first induced some courts to try to separate aspects of the economy from the legitimate sphere of governmental activity and that gave rise to judicial *laissez-faire* constitutionalism.³

Public promotion of material progress in British North America began in the earliest days of settlement, when colonial governments offered loans, land grants, tax abatements, and like inducements to

²For reviews of the literature on *laissez-faire* constitutionalism, see Gillman (1993, pp. 3–9) and Wiecek (1998, pp. 253–77). Wiecek, who regards the revisionist interpretation as correct but incomplete, places the subject in a broader historiographical context. For constitutional law books that still follow the traditional view, see, in addition to Rotunda and Nowak (2007), Epstein and Walker (2007, pp. 601–51) and Murphy et al. (2003, pp. 1161–66).

³*Laissez-faire* constitutionalism started to appear in state constitutions in the 1840s and 1850s. See Ekirch (1977, pp. 319–23) and Gold (1985, pp. 411–23). I use the term “judicial *laissez-faire* constitutionalism” here to distinguish the constitutional law developed by the courts from the law created by the constitutional conventions.

various types of enterprises, including sawmills, fulling mills, iron works, and, above all, gristmills. Most colonies had laws regulating the tolls millers could charge for grinding grain; more than half adopted mill acts to encourage the construction of gristmills. Gristmills were, in essence, the first public utilities. But the accumulation of capital for flour production, the evolution of milling technology, and the expanded use of mill laws for other industries eventually brought into question the public nature of gristmills and the public purpose of mill acts.

Gristmills were not absolutely necessary for life in the New World, but any economic advance beyond subsistence required mechanization of such tedious and time-consuming routines of life as the grinding of grain into meal and flour. Settlers therefore generally built gristmills as soon as they had shelter. Indeed, mills sometimes came first, with communities built around them. More than just economic enterprises, gristmills were an essential part of the seventeenth-century settlers' inherited concept of community. More than 10,000 of them dotted the English countryside by the beginning of the fourteenth century (Holt 1988, p. 116). A historian of medieval mills has said that in the impoverished English society of the middle ages,

practically all of the population directed most of their efforts towards acquiring sufficient bread: corn mills alone were generally worth building because flour was the only commodity that was always, everywhere, in demand. (Holt 1988, p. 158)

The miller's importance did not enhance his popularity. Chaucer's miller, a teller of scurrilous tales, "knew well how to steal corn and take his toll of meal three times over" (Tatlock and MacKaye 1912, p. 10) and according to an English adage (Hawke 1988a, p. 147), no miller went to heaven. The miller's poor reputation came not only from documented cases of dishonesty, but also from the monopoly of the grain-grinding business exercised by feudal lords and the economic pressures placed on millers by lords who paid low wages or who farmed out the mills for a fixed amount of flour. Although the general reputation was probably undeserved, it may have carried over to the North American colonies in the seventeenth century. Towns wanted gristmills and tried to lure millers, mill sites often became economic and social centers, and flour quickly became an article of trade, which enhanced the miller's importance. But the colonists regarded mills as quasi-public institutions as well as commercial enterprises, subject to regulation for the public good. A North Carolina law expressly declared gristmills that took advantage of that colony's mill act to be public mills (Cushing

1977a, vol. 1, pp. 18–19). Other early statutes reflected complaints that millers were gouging their customers (Laws of Vir. 1978a, vol. 2, p. 301 and Cushing 1978b, p. 402), and most colonies, in line with medieval tradition, limited the tolls millers could charge to a specific fraction of the grain ground (*Laws of Mass.* 1814, p. 156; Cushing 1977a; 1977b, p. 31). Other mill regulations required that millers grind grain for all comers in turn (Cushing 1977a; *Acts and Laws of the English Colony of Rhode-Island* 1767), return the grain to their customers on demand, “well ground, without any Fraud or Deceit” (Cushing 1977a) and maintain proper weights and measures (Hening 1810, pp. 347–48; and Batchelor 1913, vol. 2, p. 265; Cushing 1977c, p. 125).

The community concept of the gristmill lingered for a long time in America. As late as 1785, when the merchant mills of Wilmington refused to grind grain for local farmers for household use, the Delaware legislature passed a law requiring them to set aside time to grind for family consumption. “Thus the assembly tenaciously held to its image of mills as public providers of a service for rural households, at a time when this image had become substantially anachronistic” (Hart 1998, pp. 469–70).

The centrality of gristmills to the colonists’ sense of community differentiated gristmills from other types of mills, including the ubiquitous sawmills. The colonists did not bring with them from England a familiarity with or dependence upon sawmills. In the colonies, however, sawmills sprang up everywhere because of the abundance of timber, the relative simplicity of saws, and the huge demand for boards, shingles, and staves, not only in America but in Europe and the West Indies. Towns sometimes offered incentives for the construction of sawmills, but profit was the primary motive for their proliferation. Nor did colonial legislatures or town councils regulate sawmills as closely as they did gristmills. The colonies adopted mill-dam and mill-regulation acts with gristmills, not sawmills, in mind.

The need to offer enticements to early gristmillers rested not only on public necessity, but also on the expense and expertise required to construct and maintain any but the simplest mills. The vertical waterwheel sat upright in a natural or man-made stream of water and therefore required gears, shafts, and other parts to connect it to the millstones. Far more complicated than the less efficient horizontal-wheel mill, the vertical-wheel mill could be made and assembled only by experienced craftsmen. The more efficient mills, with overshoot or breast wheels, also usually required a dam to build a head of water sufficient to turn the wheel, gates and sluices to control the volume and direction of the flow, and a tailrace to direct the water

back into the stream at maximum speed after turning the wheel (Howell 1975, pp. 121–24).⁴

This bare-bones description hardly does justice to the complexity of the mill, but it is enough to show that decent gristmills called for capital and expertise beyond the ability of most early settlers to provide. In the early colonial period, mill-builders and millstones had to be imported from Europe. The miller needed sufficient land on both sides of a stream to contain the mill, race, and dam. He needed a structure substantial enough to house the stones, shafts, and gears and to collect, clean, and dry the meal or flour. And he had to repair or replace virtually the entire wheel, except for the main shaft, every five to ten years (pp. 134, 144–46).

As the colonies grew, so did the demand for meal and flour. Millers adapted with larger waterwheels and various minor technological improvements. The law changed as well to meet obstacles that stood in the way of construction of more and bigger mills. In Virginia, would-be millers sometimes had trouble acquiring both sides of stream banks to construct their dams. As the legislature put it in 1667, “diverse persons” would willingly erect mills “for the grinding of corne” at “convenient places . . . if not obstructed by the perverseness of some persons not permitting others, though not willing themselves to promote so publique a good.” To remedy this situation, the lawmakers granted millers eminent-domain rights. A prospective miller who owned one bank of a stream could take an acre on the opposite bank from an owner unwilling to sell, with compensation to be determined by two commissioners appointed to appraise the land (Hening 1810, vol. 2, pp. 260–61). The Virginia law became a model for other Southern colonies. Maryland, Delaware, and North Carolina all enacted some variation of Virginia’s statute in the eighteenth century (*Laws of Del.* 1829, p. 402; Cushing 1978c, pp. 23–24; and Cushing 1977a, pp. 18–19).⁵

New England colonies faced a different problem. Perhaps because of the more concentrated population, smaller holdings, and numerous mills on different streams that could be affected by the

⁴For a comprehensive treatment of the history and workings of the vertical water wheel, see Reynolds (1983).

⁵One scholar has argued that the professed purpose of the Maryland act, to deal with landowners too young or obstinate to sell their property for the construction of mills, was a cover for the true purpose of weaning farmers and planters away from tobacco and diversifying the economy (Hart 1995, pp. 6–7). The act’s preamble itself declared that the shortage of water mills was the reason that the growing of grain was “but coldly prosecuted.”

erection of dams, milldams often flooded the property of other landowners or interfered with their milling operations. Inundated landowners sued for injunctions or damages, threatening the continued operation of the offending mills. To protect millers from repeated and ruinous suits for trespass and nuisance and from the possibility of having their mills torn down by aggrieved landowners resorting to their common-law right to abate nuisances (Horwitz 1977, pp. 47–48), the Massachusetts General Court in 1714 limited the remedy for such flooding to annual damages to be determined by a jury (*Laws of Mass.* 1814, pp. 404–05. In effect, the law gave millers eminent-domain rights by allowing them to use the property of others, without consent, in return for monetary compensation. Just as Virginia's law of 1667 became a model for the South, the Massachusetts law served as a model for New England (Batchelor 1913 vol. 2, p. 265 and *Laws of R.I.* 1767, pp. 190–92).

The continuing need for such laws, however, grew less evident as the eighteenth century wore on. The early mills were custom mills to which local farmers brought their grain to be processed, at regulated rates, into flour or meal to be taken back to the farms. The millers did not purchase the grain; they sold their services to the farmers and took a portion of the grain as pay. By the time of the Revolution, although many custom mills remained, especially in remote areas, the more populous regions had seen the rise of merchant mills, substantial business establishments that purchased grain for processing into flour and distribution to a wide market. Philadelphia and Baltimore had become a great flour-milling centers, annually exporting flour by the hundreds of thousands of barrels.

In the meantime, the propriety of governmental promotion of private enterprise had been called into question. The American Revolution destroyed “archaic ideas of personal monarchical government,” writes historian Gordon S. Wood. “In republican America government would no longer be merely private property and private interests writ large as it had been in the colonial period. Public and private spheres that earlier had been mingled were now to be separated” (Wood 1992, pp. 187–88). Public power was not to be used for the benefit of special interests or private individuals.

However, the mingling persisted. The deeply entrenched idea that government had an obligation to regulate the economy for the good of the community, instilled in the American mind through more than a century and a half of practice, could not easily be dislodged. New notions about the separation of the public and private spheres coexisted with promotionalism, as Americans continued to expect the public encouragement of economic development. State

and local governments maintained a tradition of fostering internal improvements, especially roads and canals, and even the federal government undertook a few such projects in the early nineteenth century. The disruption of trade before and during the War of 1812 also led to governmental efforts to encourage manufacturing, including, at the national level, the enactment of a protective tariff and chartering of the Second Bank of the United States in 1816 (Wood 1992, pp. 188–89, 315–25; Goodrich 1960, pp. 19–120; Bruchey 1990, pp. 199–206).

The amendment of Virginia's mill act in 1807 reflected the promotional spirit of the early nineteenth century. Some of the early mill acts, although intended to encourage the erection of gristmills, were worded broadly enough to encompass different types of establishments, while others, such as Virginia's, explicitly recited the need to foster gristmills. The Virginia amendment of 1807, however, just as explicitly extended eminent domain privileges to any "other machine or engine useful to the public" (Shepherd 1836, vol. 3, p. 297).⁶ Similarly, the governor of Massachusetts sought to extend the principles of the mill act to textile mills and other "labour saving machines" (Handlin and Handlin 1969, p. 127), and the Mississippi Territory gave eminent domain powers to all "useful water-works" (Toulmin 1823, p. 624). Utility was replacing necessity as the justification for eminent domain.

The great success of the Erie Canal, which opened in 1825, fueled the promotional spirit by inspiring state and local governments to aid private canal companies and then railroads through loans, loan guarantees, stock subscriptions, and grants of eminent domain privileges. To provide currency and credit for the booming economy, states chartered new banks by the dozen. Even as Jacksonian political economists, in the name of the people, excoriated special privileges, the people voted to fund both public and private enterprises that they hoped would bring prosperity to their cities and towns. Except for the agitation against banks and tariffs, the notion that government had no business meddling with business gained wide popular appeal only after many of the canal and railroad schemes collapsed, leaving taxpayers holding the bag (Goodrich 1960, pp. 51–120; Hurst 1956, pp. 53–70; Sharp 1970, pp. 25–31).

In the meantime, Jacksonian political economists attacked governmental favoritism toward private businesses. Identifying equality

⁶Although all kinds of mills could use the eminent domain power under the amended Virginia act, only the tolls of gristmills remained regulated. To like effect, see the Alabama act of December 9, 1820, in Toulmin (1823, p. 626).

with *laissez faire*, they challenged the traditional belief that government had a responsibility to promote economic development for the welfare of the community and argued for a separation of the public and private spheres. William Leggett, a leader of New York's radical Democrats, wrote that "[g]overnments have no right to interfere with the pursuits of individuals" by "offering encouragements and granting privileges to any particular class of industry, or any select bodies of men, inasmuch as all classes of industry and all men are equally important to the general welfare, and equally entitled to protection" (Leggett 1840, pp. 162). Once government starts such meddling, Leggett continued, it may discriminate in favor of or against the farmer, the mechanic, or the manufacturer, so that all "become the mere puppets of legislative cobbling and tinkering" (p. 163). Ultimately, the rich would prevail and government would become the instrument of wealth. Labor's protection, Leggett concluded, lay with equal rights, where all were left "to the free exercise of their talents and industry, within the limits of GENERAL LAW" (p. 166).

Leggett and like-minded men of the Jacksonian era were motivated chiefly by the evils of "special," "partial," or "class" legislation that benefited the wealthy minority, but they applied their *laissez-faire* beliefs even-handedly. For example, John Appleton, then a young lawyer in Sebec, Maine, denounced "the trades unions and machine breakers, who . . . defend the policy of shackling industry and destroying labor saving inventions," as no better than "the governing few" of mercantilist Europe who imposed "their restrictions on the trade, industry, and commerce of a country" (Gold 1990, pp. 20–21). In New York, radical Democrat Michael Hoffman reproved the Anti-Rent movement for demanding "special and class legislation," just like chartered monopolies (Henretta 1996, p. 164).⁷

Meanwhile, the business of grinding grain continued to boom. By 1805, fifty merchant mills within eighteen miles of Baltimore produced great quantities of flour, nearly one-third of it destined for the British, Brazilian, and West Indian markets (Steen 1963, pp. 32–33). Technological innovations soon made flour-milling America's leading industry and the first to be automated. For hundreds of years, men had carried heavy sacks of grain up long stairways, where the grain was dumped into chutes and then ran down to the millstones. The product that emerged from between the stones had to be shoveled into tubs, then manually lifted to a loft for raking and drying. In

⁷See also Hofstadter (1943, pp. 588–91); Burrows and Wallace (1999, pp. 606–11); and Gillman (1993, p. 42).

1790, inventor Oliver Evans patented machinery consisting of water-powered rollers, belts, buckets, and rakes that did most of the heavy labor and got more flour out of the wheat. It took a while for Evans's method to catch on, but when it did, it revolutionized flour production. In 1816, Evans's brother, on a trip through the wheat-growing regions of the mid-Atlantic states, saw Evans's machinery in use everywhere, and by 1837 there were at least 1,200 automated mills in the country. Before the Civil War, flour milling had become the leading American industry as measured by the value of its product (Storck and Teague 1952, pp. 151–52, 158–74; Sharrer 1976; and Berry 1970, pp. 387–408).

In the commercialized, increasingly competitive economy of the late eighteenth and early nineteenth centuries, in which automated five- or six-story mills with a half-dozen or more pairs of millstones produced thousands of pounds of superfine flour an hour for both domestic and foreign markets, and in which urban flour merchants reached out into the countryside to form partnerships with millers or to set up village mills of their own, incentives and privileges for custom gristmills hardly seemed necessary. In Maryland and Delaware, milling capacity reached such heights that the legislatures repealed the mill acts before the Revolution (Hart 1995, pp. 20–22; 1998, p. 460). Michigan's mill act, passed in 1824, lasted just four years, outmoded, according to Michigan judge and historian James V. Campbell, by the introduction of steam-driven mills (*Ryerson v. Brown* [1877]). In 1814, the Supreme Judicial Court of Massachusetts suggested that that state's mill act had outlived its usefulness (*Stowell v. Flagg* [1814]), and in 1827, the court noted that "[t]he encouragement of mills has always been a favorite object with the legislature, and though the reasons for it may have ceased, the favour of the legislature continues" (Wolcott 1827).⁸

Court decisions in Massachusetts (*Boston and Roxbury Mill Dam Corp. v. Newman* [1832]) and New Jersey (*Scudder v. Trenton Delaware Falls Co.*) in 1832 reflected the tension between egalitarianism and promotionalism during the Jacksonian era. In both states, corporate charters had been granted to companies for the purpose of constructing dams and facilities to generate water power on a large scale. In both cases, the companies' adversaries argued that the corporations were purely private concerns involved in speculative enterprises for private profit. (Opponents of the Massachusetts

⁸For criticisms of the mill acts, see "Restrictions Upon State Power in Relation to Private Property" (1829, pp. 95–96) and "The Law of Water Privileges" (1829, pp. 25–38).

corporation, chartered in 1814, had raised the cries of speculation, monopoly, and exclusive privilege from the start.) In both cases, the courts declared that manufacturing was a great public benefit to a city. Although the eminent domain power was “originally founded on *state necessity*,” said the New Jersey court, “the term, *public use* has been substituted.” The court conceded that the meaning of “public use” was unsettled, but it had no doubt that the creation of extensive manufacturing enterprises was “a public use and benefit.”⁹

That same year, the promotional ethos clashed with the Jacksonian crusade against special privilege in Jackson’s home state of Tennessee in a suit involving the state’s mill act. A law of 1777 permitted the taking of land for gristmills and regulated the miller’s tolls. However, an entrepreneur had secured a lower-court order permitting him to take land for saw and paper mills as well as a gristmill. The Tennessee Supreme Court declared that saw and paper mills had no public character, and it would not allow the owners of such mills to take advantage of the mill act by throwing in a gristmill as well (*Harding v. Goodlett* [1832]).

By 1832, then, there existed a tendency among legislatures and courts to expand the concept of public purpose and to sacrifice private rights in property to the economic needs or wants of the community. But there also existed an undercurrent of concern that the private rights of some (landowners) were being sacrificed, not for any legitimate public purpose, but for the private benefit of others (capitalists and entrepreneurs). The public frenzy over the financing of canals and railroads in the 1830s would turn concern into fear and contribute mightily to a change in attitude toward the concept of public purpose.

Responding to popular demand, states and municipalities invested in many poorly planned canal and railroad ventures. Fraud and speculation abounded, state debts rose alarmingly, and public enthusiasm for government-funded projects turned to disgust. At state constitutional conventions in the 1840s and 1850s, Jacksonian Democrats demanded safeguards against future unfounded extravagance. At the Ohio convention of 1850–1851, radical Democrat Henry H. Gregg asked “that debt-contracting, loan laws, and money squandering may forever be put an end to—that the whole system may be

⁹For opposition to the Massachusetts project, see the pamphlet by Austin (1818). Courts and legal commentators would complain with growing frustration into the twentieth century over the unsettled meaning of public purpose or public use. See “The Public Use Limitation on Eminent Domain: An Advance Requiem” (1949, pp. 605–06).

dug up by the roots, and no single sprout ever be permitted to shoot up again" (Gold 1985, p. 413). Ohio and other states heeded the request by putting into their constitutions provisions that prohibited their governments from aiding private businesses through loan guarantees or the purchase of stock. The people seemed to be saying that financial assistance to private enterprise did not serve a public purpose (Goodrich 1960, pp. 51–165).

The revulsion against public aid to private enterprise included rather strong suggestions that the mill acts were unconstitutional. Associate Justice Charles Larrabee of Wisconsin, a Jacksonian and former editor of the *Chicago Democrat Advocate*, may have been the first judge to find a mill act invalid, although in dissent ("Larrabee" 1936, pp. 100–01). The Wisconsin act, modeled on the Massachusetts statute, had been passed by the territorial legislature in 1840 (Quaife, ed., 1928, p. 904). Upholding the statute in *Newcomb v. Smith* in 1849, the state Supreme Court likened water mills to roads, canals, wharves, water supplies, and other projects generally accepted as public improvements. Why should they not be so regarded, asked the court, "especially in a new country, among a scattered population and where capital is limited"? (*Newcomb v. Smith* [1849]).

As a delegate to the state constitutional convention the year before, Larrabee had argued successfully against state aid for internal improvements (Quaife 1928, p. 420). Now, as a judge, he pointed out that the Massachusetts law had been intended to encourage the erection of gristmills and possibly sawmills and required a jury finding that the flooding of land was justified by "public convenience" (Newcomb 1849, p. 71, 78–79). The Wisconsin law did not specify the types of mill for which eminent domain powers could be exercised. Nor did it regulate tolls or impose other special obligations on mill owners or mandate a finding of public convenience. The statute was no different, in Larrabee's view, from one that would authorize a person to appropriate private property "for any other purpose whatever—a steam-mill—a distillery—or a corn-field" (Newcomb 1849, pp. 71, 78–79). Under it, any man could erect any kind of mill and "enjoy the lands of another, for his own private benefit" (Newcomb 1849, pp. 71, 78–79). Acknowledging that the Massachusetts court had interpreted the Bay State's mill act very broadly, Larrabee declared that Wisconsin ought not to follow the Massachusetts example. The manufacturing power and wealth of that state had become identified with the public interest and influenced the decisions of the courts, said Larrabee, but "in the young and vigorous agricultural State of Wisconsin, no such influence can, or ought to exist" (*Newcomb v. Smith* [1849], pp. 71, 78–79). He urged the legislature to

repeal the law, which it did within the year (Sanborn and Berryman 1889, vol. 2, p. 1881).

The Wisconsin legislature re-enacted the mill law in 1857 (*ibid.*). Despite a change of heart, the state Supreme Court upheld it again in 1860 (*Fisher v. Horicon Mfg.* 10 Wis. 351 [1860]). If the question were new, said the justices, they would find the statute unconstitutional. However, capital had been invested in reliance on the statute and on special acts authorizing appropriations of property. Flourishing villages dependent on waterpower had grown up on the understanding that such laws were valid under *Newcomb v. Smith*. The question had been settled and the court would not upset it.

The Supreme Judicial Court of Maine took a similar position in 1855 in a contest between two sets of sawmill owners over the use of a millpond. While Charles Larrabee regarded mill laws as “stretches of legislative authority” (*Newcomb v. Smith* [1849]). Maine judges Richard Rice, a Democrat, and John Appleton, nominally a Whig but with a pronounced *laissez-faire* bent, thought that under modern industrial conditions they “pushe[d] the power of eminent domain to the very verge of constitutional inhibition” (*Jordan v. Woodward* 40 Me. 317 [1855]). A taking of property by eminent domain, wrote Rice, had to be for some pressing public necessity. The mill acts might have been justified when mills were few and far between and capital scarce, but those justifications were now gone. With an abundance of private capital seeking investment for private gain, mills were like stores, inns, and other private businesses—useful to the public, but not public utilities. The court upheld the law, but only because of its “great antiquity” (*ibid.*) and the “long acquiescence” (*ibid.*) of Maine’s citizens in its provisions.¹⁰

The Supreme Court of Alabama, the last court to construe a mill act before the Civil War, had no such reluctance, for it was “never too late to re-establish constitutional rights” that had been silently neglected (*Sadler v. Langham* 34 Ala. 311 [1859]). The Alabama statute, based on the Mississippi Territory act of 1812, allowed a landowner on one side of a stream to condemn land on the opposite bank to erect a “mill or other machinery” (*ibid.*). The court found that grist-mills, like canals and railroads, served a public purpose, but that industrial pursuits in general did not. The statute was too broad and could not stand (*ibid.*). On the eve of the Civil War, the Supreme Court of Vermont summarized the legal status of the mill acts

¹⁰Whig John Tenney, the third member of the Maine panel, concurred only in the result. Appleton joined the new Republican party around 1855. On his political affiliation before then, see Gold (1990, pp. 21–26).

(*Williams v. School Distric No. 6*, 33 Vt. 271 [1860]). Their constitutionality had not often been questioned, and their validity had been settled only in Tennessee and Wisconsin. (The court made no mention of the recent Alabama case.) But the acts “stepped to the very verge of constitutional limit, if not beyond” (ibid.). Local conditions would ultimately determine what was a public necessity justifying their use (ibid.).

Antebellum judicial unease with mill laws clearly stemmed from the changing nature of the enterprises that sought to use them. Old-fashioned country gristmills that had to serve the public at fixed rates could reasonably be regarded as public utilities and therefore eligible recipients of eminent-domain privileges. This was especially so when they served isolated communities and might not be built otherwise. But merchant mills and other industrial enterprises did not fit the pattern; they were too big, too unregulated, and too obviously organized for private gain. The advance of private, capitalist enterprise raised questions of the “public purpose” that would justify the use of the eminent-domain power. When capital was no longer scarce, would even the gristmill qualify? And when capital investments freed mills from dependence upon running water, should anyone’s property be flooded to create waterpower?

The steam engine strongly influenced mill cases after the Civil War and it may have affected antebellum cases as well. In *Ryerson v. Brown* (1877), the Supreme Court of Michigan struck down that state’s mill act of 1873. Justices Cooley and Campbell, in separate but concurring opinions, made much of the prevalence of steampower. Many fine mill sites in Michigan remained undeveloped, Cooley wrote, because industry no longer looked to water as its chief source of power. If the demand for waterpower existed, the necessary land would usually be obtainable on reasonable terms. But both the demand for and the necessity of water as a motive force had diminished with the advent of steam. “No particular motive power is indispensable,” Cooley asserted. “At the worst the question presented in any case will be a question of different degrees of convenience or of probable profits” (ibid.).

According to Campbell, property could not be condemned for private improvements except where the improvements would not otherwise exist and where public welfare required them. Improvements that met both criteria were rare and usually consisted of avenues of transportation. The “importance of mills for grinding and sawing to enable any civilized community to prosper” could not be doubted, Campbell continued, and “if they could not be put in operation as a general thing without condemning lands for flowage,

then the propriety of authorizing this might have been recognized." Michigan's rapid growth and the difficulty of bringing steam machinery to the territory had once made the erection of water mills imperative. But the completion of the Erie Canal had rendered the importation of steam engines feasible and the mill act unnecessary, a fact recognized by the repeal of the original act in 1828. "There is no public necessity for accomplishing unnecessary results," Campbell concluded. The choice between steam and water had become one "purely of private economy," and the "occasional refusal of individuals to sell the right of flowage" could not "drive any community into distress" (*ibid.*).

There is no question that steampower had become important in the food processing industry at the time of *Ryerson v. Brown*. By 1870, perhaps 20 percent of all flour mills were steam powered (Steen 1963, p. 39; Fenichel 1966, p. 458). In the burgeoning wheat-growing and flour-milling state of Kansas, where the number of flour and grist mills trebled between 1870 and 1876, half the mills were steampowered by 1875, with the proportion growing rapidly (Douglas 1909/1910, vol. 11, pp. 96–98, 150). In 1871, Kansas judge and future United States Supreme Court Justice David Brewer, a champion of *laissez faire*, recognized that the availability of steampower had undermined the rationale for his state's mill act; he upheld the statute only out of deference to the weight of authority elsewhere (*Venard v. Cross*, 8 Kan. 248 [1871]).¹¹

Whether the technological advance represented by steam played the same role in the thinking of Charles Larrabee and like-minded antebellum judges as it did in the post-war Michigan and Kansas decisions is difficult to say. Steampower was certainly significant in the growth of the trans-Appalachian West. By the 1820s, Pittsburgh, Louisville, and Cincinnati had become leading centers for the production and use of steam engines (Pursell 1969, pp. 61–68). The first stationary steam engine in Michigan appeared shortly before the territorial legislature repealed the mill act in 1828 (Hunter 1995, p. 192). According to the first national census of steam engines in 1838, Michigan at that time had thirty-two standing steam engines (Hunter 1975, p. 192). Some must have been used for gristmills; in 1827, the Michigan territorial legislature passed a law to regulate the tolls of all gristmills, whether driven by "wind, water or steam" (Laws of Michigan 1874, vol. 2, p. 541). Many of the Michigan steam engines had been built in Detroit (Hunter 1975, p. 192). By mid-century,

¹¹On judicial deference in mill-dam cases, see Karsten (1997, pp. 325–32).

Chicago engine shops were supplying Michigan, Wisconsin, and other parts of the old Northwest (*ibid.*, p. 101).

On the other hand, despite the continuing growth of steam-power, around 1840 steam drove under 2 or 3 percent of American manufacturing establishments and an even smaller percentage of grist and flour mills (Hunter 1985, pp. 75–76). Even thirty years later, waterwheels generated almost as much horsepower as steam engines for American industry (p. 483), and water still drove the vast majority of grist and flour mills (Steen 1963, p. 39). But to westerners such as Larrabee, Cooley, and Campbell, steam engines symbolized modern, industrial, capitalist enterprise, which in their view should not be the recipient of public aid. Larrabee, who thought that a “steam-mill” could not constitutionally be given eminent-domain privileges, decried the influence Massachusetts industrialists had acquired over state policy. However, the objection to aiding private enterprise stood regardless of the power that moved the machines. The Maine sawmill owners who fought in 1855 probably relied on waterpower, which retained its importance in New England far longer than elsewhere in the United States. But those men were not sawing local logs to serve community needs; they were capitalists engaged in a leading industry in a great lumber state.

The Civil War diverted the nation’s attention from public-purpose concerns, but the debate resumed immediately afterward, thanks largely to a renewed surge of promotionalism. The demands of the war had led to more active government at every level and reinvigorated the concept of the state as a participant in economic development (Keller 1977, pp. 162–68). Despite the bitter experience of publicly financed enterprises from the late 1830s through the late 1850s, governments engaged in a reckless competition to promote economic growth and to lure private business through loans, tax exemptions, and other incentives. Where constitutional prohibitions kept states from indulging, legislatures passed the opportunities on to municipalities. A combination of popular enthusiasm and corruption led to hundreds of laws between 1866 and 1873 authorizing local governmental aid to railroad corporations and other businesses. Once again, taxpayers were left with the bills when many of the beneficiaries of municipal generosity went broke. Jurists who doubted the public purpose of all this public largesse renewed the cry of special privilege, and fickle popular opinion led to a new round of constitutional restrictions on governmental assistance to private enterprise (Keller 1977, pp. 185–87; Goodrich 1960, pp. 230–62).

Courts continued to disagree over the public purpose of the mill acts (*Camp v. Olmstead*, 33 Conn. 532 [1866]; *Miller v. Troost*, 14 Minn.

266 [1869]). Some judges, although upholding the statutes, repeated the familiar refrain that if the question were new, the acts would fall (*Miller v. Troost*, 14 Minn. 266 [1869], and *Venard v. Cross*, 8 Kan. 248 [1871]). Even the venerable old gristmill, the classic public enterprise, came under attack. In Maine, Chief Justice Appleton, denouncing “special and exclusive preferences,” wrote that gristmills were like any other business, built and operated for private gain and providing a public benefit only as an incident of their operation for profit. No public exigency, he said, justified the taking of private property, through eminent domain or taxation, for the construction of a gristmill or other capitalist endeavor (*Opinions of the Justices*, 58 Me. 593 [1871]; *Allen v. Inhabitants of Jay*, 60 Me. 124 [1872]). In cases involving gristmills, the courts of Georgia (*Loughbridge v. Harris*, 42 Ga. 500 [1871]) and (*Tyler v. Beacher*, 44 Vt. 648 [1871]). Vermont struck down their states’ mill acts. Michigan Chief Justice Cooley suggested in *Ryerson v. Brown* (1871) that gristmills, unless located in newly settled areas remote from rail lines where they might fill an urgent local need, did not fulfill a public purpose because they were not necessities. The advent of steampower further reduced the likelihood that any particular gristmill would be public in nature. Steam mills could be located anywhere; there was no need to force a riparian landowner to give up the use of his property for a water mill when a steam mill would serve as well. Cooley, fearing the influence of big business in legislative lobbies, wanted to leave the siting of milldams to private negotiations (*Ryerson v. Brown* [1871]).

There is something poignant about the suggestion that gristmills might not be public institutions. They were America’s first businesses “affected with public interest,” and within the memories of people living in 1877 had been centers of rural life. As late as 1970, a British historian of mills wrote that:

even in the Western World there are men still alive who learned and practised the same trade as Chaucer’s miller. But they are the last of the line, and . . . one cannot but reflect with sadness on the extinction of an ancient craft passed down without interruption through so many generations. (Reynolds 1970, p. 9)

As it turned out, *Ryerson v. Brown* represented the high tide of *laissez-faire* constitutionalism as far as the mill acts were concerned. Treatise writers would question the continued validity of the rationale for the mill acts (Mills 1879, p. 16; Cooley 1890, p. 657; Farmham 1904, pp. 2139–40), and at least one more mill act would be declared unconstitutional (except as applied to gristmills) (*Gaylord v. Sanitary Dist. of Chicago*, 204 Ill. 576 [1903]). But the tide against the mill acts that seemed to be building from the Wisconsin dissent of 1849 to the

Michigan decision of 1877 quickly ebbed. America's "incorrigible" promotionalism prevailed (Bruchey 1990, p. 208), the United States Supreme Court put its imprimatur on steampowered gristmills (*Town of Burlington v. Beasley*, 94 U.S. 310 [1877]) and on mill acts generally (*Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 [1885]), and by the Progressive era, courts and legislatures were collaborating in the virtual obliteration of the public-private distinction that had so exercised the *laissez-faire* jurists.

Whatever the extent of an antiregulatory *laissez-faire* constitutionalism after the 1870s—a subject of dispute among scholars (Urofsky 1983 and 1985; Kens 1991 and 1997)—it is clear that for the early *laissez-faire* jurists, *laissez faire* meant something other than protecting the interests of business. It meant above all confining government to legitimate public functions in the name of equal liberty. This task, difficult enough under the increasingly complex social and economic circumstances of the nineteenth century, was especially troublesome when it involved mill acts. Cases concerning gristmills, whether directly or incidentally, put the problem in particularly high relief because of the peculiar status of gristmills as antiquated public utilities. Despite the cogency of their arguments, the *laissez-faire* jurists could not persuade the majority of their brethren that gristmills were not entitled to public aid; nor could they prevent the extension of the mill acts to other forms of enterprise. *Laissez-faire* constitutionalism failed to undermine the deeply entrenched tradition of governmental promotion of economic development for the supposed public good.

The Supreme Court's decision in *Kelo* is the latest result of that failure. In the nineteenth century the profligacy of public aid to private enterprise provoked state constitutional conventions to prohibit governments from lending their aid and credit to individuals or corporations. *Kelo* has unleashed a comparable movement to restrict the eminent domain power through state constitutional amendments. The *laissez-faire* jurists who questioned the mill acts may yet be vindicated.

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