The purpose of this article is to resolve factual issues raised but not answered in *Munn v. Illinois*, in the hope that the commercial and political context of the litigation will illuminate the case. In *Munn*, the Supreme Court held constitutional a statute of the State of Illinois setting the maximum price that elevators located in Chicago could charge for transfer and thirty days storage of grain. The majority and minority opinions revealed a fundamental difference in their characterizations of the elevator business. Justice Waite, writing for the Court, characterized the elevators as common carriers, relying on an assortment of precedents relating to common

---

Edmund W. Kitch is Professor of Law, The University of Chicago.
Clara Ann Bowler is Research Project Specialist, Law and Economics Program, The University of Chicago.

Authors' Note: Support for our research was provided by the Law and Economics Program, The University of Chicago Law School; Donald A. Balasa, Esq., assisted in the early phases of the research.

1 94 U.S. 113 (1877), affirning 69 Ill. 80 (1873).

2 The statute, Warehouse Act of 1871, § 2, 1871 Ill. Laws at 762; § 15, id. at 769, applied to elevators located in a city with a population of at least 100,000. Chicago was then the only city in Illinois with a population over 100,000.

3 The maximum price for this service was $2 per bushel. § 15, id. at 769. The statute also set the ceiling at $1/20 per bushel for each additional fifteen days for storage. See Table 1.

© 1979 by The University of Chicago. 0-226-46431-8/79/1978-0005$02.42
carriers, millers, ferrymen, innkeepers, wharfingers, bakers, cartmen, and hackney coachmen. "Certainly," he wrote, "if any business can be clothed 'with a public interest, . . .' this has been. It may not be made so by the operation of . . . this statute, but it is by the facts." The dissent characterized the elevators simply as private businesses. Justice Field thought the elevator owners were like tailors and shoemakers. "The defendants," he wrote, "were no more public warehousemen . . . than the merchant who sells his merchandise to the public and is a public merchant, or the blacksmith who shoes horses for the public is a public blacksmith." The dissent argued, in functional terms appealing to the modern ear, that characterization of the elevator business as "affected with a public interest" made no difference, for a restriction on price was still an effective taking of the elevator property:

The doctrine of this court, that, whenever one's property is used in such a manner as to affect the community at large, it becomes by that fact clothed with a public interest . . . appear[s] to me to destroy, for all useful purposes, the efficacy of the constitutional guaranty. All that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession.

How did the elevators operate? Did the regulation, in fact, deprive the elevator owners of any value? These factual questions were posed but not answered by the opinions in Munn because the record upon which the case came to the Court afforded no basis on which to answer them.

The case was tried after the Chicago fire upon a short and un-

---

4 94 U.S. at 132.
5 Id. at 138.
6 Id. at 141.
7 "[W]e instructed the State's Attorney of the county of Cook, as early as September, 1871, to commence proceedings under the warehouse act against the delinquent warehousemen. Chas. H. Reed, Esq., pursuant to our instruction, promptly commenced an action to test the validity of the law; but owing to the great fire, October 8, 1871, and the total destruction of all the papers on file, and the consequent interruption of legal business, as also the delay produced by the absence of the counsel for defendants, the case failed to come to a final hearing until the 6th of July, 1872, and resulted in a verdict of 'guilty,' and a fine of one hundred dollars was assessed." ILLINOIS R.R. & W'Hs. COMM'N, ANNUAL REPORT 11-12 (1872) (hereinafter 1872 ANNUAL REPORT).
informative stipulation of facts, the inadequacies of which provided the opening for the elevator operators' arguments. The Court relied only on a long quotation from the elevator brief designed to show the role of the elevators in interstate commerce but used in the opinion to show the public character of the business.

I. QUESTIONS AND ANSWERS

Questions: Were the elevators in fact operated as common carriers or private businesses? Were they held open to all on uniform terms or were they operated on an individually negotiated contract basis?

Answer: The elevators were operated as adjuncts of the railroads, obligated to take all grain tendered to them by the railroads. A shipper of grain to Chicago had no effective choice of the elevator in which his grain would be placed. The elevators were every bit as much common carriers as the railroads were. They were almost all built on railroad land and operated under contracts with the railroads which governed their prices and conditions of service. They offered their services to the public at a fixed price, regularly published in the newspapers early each year.

The Munn and Scott elevator involved in the case, the "Northwestern," stood on land leased from the Northwestern Railroad. In Chicago & Northwestern R.R. v. People ex. rel. Hempstead, the Northwestern had unsuccessfully argued that the clause in the lease requiring it to prefer the Munn and Scott elevator justified its refusal to deliver to another elevator. The decision was cited and argued in the State's brief:

The judicial reports of Illinois, furnish ample evidence of the tendency of the managers of railway companies and propri-

---

8 In summary, the stipulation was that the defendants did business as the Northwestern Elevator and charged rates as agreed upon and published by the warehousemen, higher than the rate specified by the statute; that the elevator received, stored, and mixed grain in bulk without having taken out a license as required by the statute; and that Chicago had more than 100,000 inhabitants. Brief for the State of Illinois, pp. 8–10, reprinted in 7 Kurland & Casper, eds., Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 605–07 (1975) (hereinafter Landmark Briefs).

9 94 U.S. at 130–31, quoting from brief for Munn and Scott at pp. 11–12, Landmark Briefs at 493–94.

10 56 Ill. 365 (1870).

11 Brief, pp. 41–42, 7 Landmark Briefs at 638–39.
etors of grain elevators and warehouses to enter into combinations to secure a monopoly of the storage of grain, and to compel shippers from the interior to consign their grain to such warehouses in Chicago, for storage, as may suit the purposes of the managers of the railways and warehouses.

**Question:** The Court says that the elevators formed a "virtual monopoly" and implies that this supports the regulation. Were the elevators in fact a "monopoly"?

**Answer:** The elevator price in Chicago was set by concerted action of the owners and was stable for years (see table 1). The factual stipulation on which the *Munn* case was tried stated that the elevators "received, as a compensation, the rates of storage which had been, from year to year, agreed upon and established by the different elevators and warehouses in the City of Chicago." It was not a purpose of the statute to undermine this collusive pricing, for the statute explicitly provided a procedure for uniform price setting.

Whether or not this collusive pricing reflected an economic monopoly is doubtful, but it is clear that whatever competition existed did not take place on the price terms. The elevators did not compete directly with each other. Rather, competition was between different railroads, and the position of each elevator was determined by the position of the railroads with which it was affiliated. The profitability of each elevator was determined, in turn, by the rental terms under the lease from the railroad.

**Question:** Did the price set in the statute diminish the value of the elevator property?

**Answer:** The statute may have had a slight but quite minimal impact on the value of the leasehold interests of the elevator operators. The statute lowered the economic price by extending the initial storage term from twenty to thirty days, the two cent per bushel charge remaining the same. This made little difference to the elevators because almost all grain was in storage less than twenty days.

The factual stipulation in the case was silent on the subject of the impact of the rate maximum on the value of the property, or of

---

12 94 U.S. at 131, quoting brief, p. 8, 7 Landmark Briefs at 605.

13 § 15, 1871 Ill. Laws at 769. The section required the warehousemen to publish their rates for the year in the first week of January.
its reasonableness or unreasonableness. The only question before the Court was whether a legislative rate maximum, in the absence of any proof or offer of proof of its unreasonableness, was unconstitutional. The elevator argument was a simple argument about the absence of legislative power to set any price.

The railroad lessors could offset any reduction in the value of their elevator land by raising their rail rates, since the important competitive price was the sum of rail and transfer charges. The Chicago fire occurred shortly after the statute was passed, and the new statute was not even mentioned in connection with the rapid replacement of elevator facilities destroyed by the fire. Under the statute, the elevators could have converted to private operation (storing grain they had purchased) and avoided its application, but they did not.

Question: Does the background of the legislation in Munn support a view that a legislature is a responsible price-setting body? How did the legislature set the price?

Answer: The legislature changed the price term from two cents for transfer and twenty days storage to two cents for transfer and thirty days storage, a small downward shift in the price in a deflationary period. All parties active in the legislative debate had an interest in insuring adequate transfer and storage facilities at Chicago. There was no participant in the legislative process whose objective was to hobble Chicago as a transfer point. The fact that the legislation was State legislation rather than federal assured that this was so. St. Louis had a hostile interest which it had carried to the courts and Congress in a campaign to stop the railroads from crossing the Mississippi into Iowa. Although there were elevator

14 Twenty-two percent of the Chicago capacity was destroyed. Chicago Board of Trade, Annual Report 47 (1871).

15 The elevators could operate privately by purchasing the grain for storage. See note 102 infra. The warehousemen stored substantial amounts of their own grain at the time of the passage of the act. See Central Elevator Co. v. People, 174 Ill. 203 (1898).

16 The basic national policy from 1866 to 1879 was to raise the value of the dollar to that value in gold that had prevailed prior to the greenback issues of the Civil War. This policy was adopted in 1866, and the pre-Civil War parity was attained in 1879. See Friedman & Schwartz, A Monetary History of the United States 1867–1960 15–88 (1963).

17 Absent railroad bridges across the Mississippi, grain from Iowa and other points west of the river would have found the river route relatively more convenient. Charles Taylor described the efforts of St. Louis to stop the first bridge at some length: “The river towns, led by St. Louis, continued the agitation for the removal of the Rock Island
## Table 1
**Chicago Transfer and Storage Rates per Bushel of Grain, 1855–1890**

<table>
<thead>
<tr>
<th>Year</th>
<th>Rate for 20 Days in Store (c)</th>
<th>Rate for 30 Days in Store (g)</th>
<th>Source</th>
<th>Other Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>1855</td>
<td>2¢ for 15 days; winter store up to 4¢</td>
<td>?</td>
<td>Contract between Sturges &amp; Burlingame and the Ill. Central R.R. (June 14, 1855)</td>
<td>1853 Board of Trade suggested 1¢ for 30 days, 3¢ for additional 10 days. See LEE, at 58. 1849 Farmer's Ass'n suggested 1¢ for 30 days. See LEE, at 2. St. Louis warehouses were 4¢ for 30 days, but the handling charges could be as high as 7¢ per bushel. The Chicago handling expenses were only 1¢ per per bushel because of the elevator system. LEE, at 99</td>
</tr>
<tr>
<td>1857</td>
<td>1¢ for 15 days</td>
<td>?</td>
<td>LEE, at 99</td>
<td></td>
</tr>
<tr>
<td>1859–65 (spring)</td>
<td>2¢ for 20 days, 3¢ for additional 10 days; winter store up to 4¢</td>
<td>2</td>
<td>Chicago Tribune, Feb. 14, 1866; LEE, at 124</td>
<td></td>
</tr>
<tr>
<td>1865 (autumn)</td>
<td>2¢ for 10 days, 3¢ for additional 10 days; winter store up to 4¢</td>
<td>2</td>
<td>Chicago Tribune, Feb. 14, 1866; LEE, at 124</td>
<td></td>
</tr>
<tr>
<td>1866</td>
<td>2¢ for 20 days, 3¢ for additional 5 days; winter store up to 4¢</td>
<td>2</td>
<td>LEE, at 120; Chicago Tribune, Feb. 14, 1866; Daily Commercial Letter, April 6, 1866 Chicago Commercial Express, Jan. 6, 1869 at 15 (at Cornell University Library)</td>
<td>1866 combine contract with the Northwestern R.R. set maximum of 2¢ for 20 days. See LEE, at 120 The storage price on Toledo and Oswego was dropped to 1¢ in 1869. Chicago Tribune, June 8, 1869. National Board of Trade estimated an average change of 2¢ per bushel for 1869. See LEE Iowa Elevator offered to store grain at 1¢ for 20 days and 4¢ for add. 10 days. 1 TAYLOR, at 400</td>
</tr>
<tr>
<td>1868*</td>
<td>2¢ for 20 days, 3¢ for additional 5 days; winter store up to 4¢</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1870</td>
<td>2¢ for 20 days, 3¢ for additional 5 days; winter store up to 4¢; “heated grain,” 1¢ for each 5 days</td>
<td>2</td>
<td>1 TAYLOR, at 397</td>
<td></td>
</tr>
</tbody>
</table>

* The rate of transfer and storage from the canal was 1.5¢ for 10 days and .5¢ for each 10 days thereafter. This rate was the same as from rail unless the owner shipped within 10 days, in which case it was lower. The rate from teams was 3¢ for 20 days and .5¢ for each 10 days thereafter. Chicago Commercial Express, Jan. 6, 1869 at 15; Chicago Board of Trade, Annual Reports 1871–75.
<table>
<thead>
<tr>
<th>Year</th>
<th>Rate for 20 days in Store ($)</th>
<th>Rate for 30 Days in Store ($)</th>
<th>Source</th>
<th>Other Evidence</th>
</tr>
</thead>
<tbody>
<tr>
<td>1871*</td>
<td>2¢ for 20 days, 3¢ for additional 5 days</td>
<td>2</td>
<td>CHICAGO BOARD OF TRADE, ANNUAL REPORT 1870, at 44</td>
<td>1871 Ill. Laws 769 provided for a ceiling of 2¢ for 30 days and 3¢ for add. 15 days; 20 days = 2¢, 30 days = 2¢</td>
</tr>
<tr>
<td>1872-77*</td>
<td>2¢ for 20 days, 3¢ for 10 additional days</td>
<td>2</td>
<td>CHICAGO BOARD OF TRADE, ANNUAL REPORT 1871, at 47; id. 1872 at 44; id. 1873 at 56; id. 1874 at 56; id. 1875 at 55; id. 1876 at 61</td>
<td>Hough Elevator offered storage at 2¢ for 30 days, 3¢ for additional 15 days (or statutory rate) in winter 1872. (The other elevators continued to defy the statutory rate until 1878.) Chicago Tribune, Dec. 7, 1872. Armour and Dole's contract with the Chicago Burlington and Quincy R.R. (Oct. 10, 1873) referred to &quot;current&quot; rate and set a floor of 1½¢ per bushel</td>
</tr>
<tr>
<td>1878-85*</td>
<td>1½¢ for 10 days, 3¢ for additional 10 days</td>
<td>1½</td>
<td>1877 Ill. Laws 170 (Statutory rates remained the same until repealed by Act of July 11, 1955, 1955 Ill. Laws 1561). CHICAGO BOARD OF TRADE, ANNUAL REPORT, 1877 at 71; id. 1878 at 65; id. 1879 at 71; id. 1880 at 72</td>
<td>Armour and Dole's contract of Oct. 10, 1873 with the 1½¢ per bushel floor is extended to another elevator. Contract between Armour and Dole and the Chicago, R.R. (April 15, 1879). Contract between Buckingham and Ill. Central R.R. (Oct. 1, 1881) specified &quot;current lawful rate&quot; but not below 1½¢ for 10 days unless specified by law</td>
</tr>
<tr>
<td>1886</td>
<td>3¢ for 10 days, 6¢ for additional 10 days</td>
<td>1½</td>
<td>LEE, at 310.</td>
<td>Memorandum for the Chicago, B. &amp; Q. R.R. (June 23, 1886) discussed the possibility that the rate might fall below 6¢ per bushel</td>
</tr>
<tr>
<td>1888</td>
<td>6¢ for 10 days, 6¢ for additional 10 days</td>
<td>1</td>
<td>LEE, at 311.</td>
<td>...</td>
</tr>
<tr>
<td>1890</td>
<td>6¢ for 10 days, 6¢ for additional 10 days</td>
<td>1½</td>
<td>LEE, at 318 (Chicago Board of Trade agreement)</td>
<td>...</td>
</tr>
</tbody>
</table>
facilities on the Illinois side of the river in East St. Louis, the existing records do not suggest that their representatives played any role in the drive to regulate the Chicago elevators.

**Question:** What were the political interests that led to the regulation upheld in *Munn*?

**Answer:** The desire of the Chicago Board of Trade to impose an inspection system on the Chicago elevators led to the regulation in *Munn*. The price term entered the statute as a cosmetic adjunct to this program and became the focus of the case as a matter of litigation strategy. By the course of events, the elevators were forced to accede to an inspection system even before the *Munn* case was decided.

II. The Chicago Elevator System

The statute that was the subject of litigation in *Munn* must be understood in the larger context of the dominance of Chicago Railroad bridge, on the ground that it was dangerous to navigation, and in May a committee of the House of Representatives at Washington reported favorably a bill for this purpose. Whether or not, sectional prejudice inspired the committee, as charged by the “Press,” cannot be known; but the bill failed to pass. Later in the year Judge Lowe issued a temporary injunction, restraining the bridge company from making necessary repairs to the bridge, but refused to make the injunction permanent. An attempt to burn the bridge was made about the first of October. Most of the money for the war on the bridge was contributed by the St. Louis Chamber of Commerce, which announced in November that they had $5,000 in hand for this purpose, and tried unsuccessfully to induce the City Council of St. Louis to appropriate an equal sum towards the fund of $12,000.00 which they estimated would be sufficient to accomplish their purpose.

1 Charles H. Taylor, *History of the Board of Trade of the City of Chicago* 240-41 (1917) (hereinafter Taylor). (This volume is in scarce supply. A copy may be found in Regenstein Library, University of Chicago.)

18 The first grain elevator in East St. Louis was established in 1867. *History of St. Clair County, Illinois* 305 (1881).

19 Mr. Underwood, delegate from St. Clair County (which includes East St. Louis) spoke against the constitutional article. See *Debates and Proceedings of the Constitutional Convention in the State of Illinois, 1869-70* 1628 (microfiche ed.). Another delegate successfully spoke against the application of the weighing obligation in § 4 to river traffic. *Id.* at 1700.

20 The Court itself seemed uncertain of the reason for the regulation: “We also are not permitted to overlook the fact that, for some reason, the people of Illinois, when they revised their Constitution in 1870, saw fit to make it the duty of the general assembly to pass laws... [relating to grain elevators]... This indicates very clearly that during the twenty years in which this peculiar business had been assuming its present ‘immense proportions,’ something had occurred which led the whole body of the people to suppose that remedies such as are usually employed to prevent abuses by virtual monopolies might not be inappropriate here.” *94 U.S.* at 132.

21 The role of the Chicago Board of Trade in obtaining the regulation is described in Woodman, *Chicago Businessmen and the ‘Granger’ Laws, 36 Agricultural Hist. 16* (1962).
as a transfer point between western rail and lake traffic for grain destined to Atlantic ports. That dominance existed in the period 1860-80 (see table 2). In the earlier period Chicago was less important than the Mississippi river system through St. Louis and New Orleans. In the later period, Chicago was increasingly bypassed by through rail cars moving from the shipment point directly to eastern ports. But in the period relevant to Munn, the Chicago elevators were dominant. They faced competition from the river and from lake transfer at Milwaukee and Toledo but enjoyed a comparative locational advantage for most of the important grain-growing areas, particularly in Illinois and Iowa.

The elevators involved in the case are now gone but once were a prominent feature of the city, standing along the banks of the Chicago River in what is now the downtown business area. Their function was to transfer grain brought to Chicago by western railroads to lake vessels for shipment to the east, with further transfer at Buffalo to Erie canal boats to the port of New York.

The development of these transfer elevators presented problems for the legal system. The operation began simply enough. Prior to the opening of the Michigan-Illinois canal in 1848, farmers would bring their grain to Chicago in bags on carts and either sell it at or place it in a warehouse of their choice. This model of identifiable batches of grain, stored at the warehouse of the shipper's choice, hung on in the political debate long after economic reality had brought about a different system of business. That system arose from the need to gain maximum advantage from mechanized elevator facilities for the handling of grain. These required two

---

22 The evolution of transportation routes in the upper Mississippi Valley in the nineteenth century is discussed in Miller, Railroads and the Granger Laws 3-23 (1971).

23 "By 1867, however, the rail routes had captured 38 per cent of this traffic and 'the elimination of the Erie Canal as an important factor in the transportation of grain was clearly indicated.' " 2 F.T.C., Grain Trade 63 (1920).


25 Id. at 19.

26 Ibid.; 2 Pierce, A History of Chicago 82-83 (1940).

27 A detailed account of the development of the Chicago grain elevators can be found in Lee, History of the Chicago Grain Elevator Industry 1840-1890 (1938) (Ph.D. dissertation in Harvard University Library) (hereinafter Lee). Volume 1 of Taylor, note 17 supra, contains an unsystematic, but valuable, account of the development of the grain trade in Chicago. See also the discussion of grain elevators in Goldstein, Marketing: A Farmer's Problem (1928); 2 Pierce, note 26 supra, at 77-88 (1940).
<table>
<thead>
<tr>
<th>Years</th>
<th>U.S. Production Wheat, Corn &amp; Oats (Million Bushels)</th>
<th>Chicago Receipts (Million Bushels)</th>
<th>Percent Receipts Increase Over Previous Period</th>
<th>Percentage of Total U.S. Production Received in Chicago (Million Bushels)</th>
<th>U.S. Production Wheat (Million Bushels)</th>
<th>Chicago Receipts (Million Bushels)</th>
<th>Percentage of Total U.S. Production Received in Chicago</th>
</tr>
</thead>
<tbody>
<tr>
<td>1859</td>
<td>1,029</td>
<td>15</td>
<td>1.5</td>
<td>173</td>
<td>8</td>
<td>4.6</td>
<td></td>
</tr>
<tr>
<td>1866-70</td>
<td>1,270</td>
<td>52</td>
<td>4.1</td>
<td>234</td>
<td>15</td>
<td>6.4</td>
<td></td>
</tr>
<tr>
<td>1871-75</td>
<td>1,521</td>
<td>78</td>
<td>50</td>
<td>307</td>
<td>21</td>
<td>6.8</td>
<td></td>
</tr>
<tr>
<td>1876-80</td>
<td>2,434</td>
<td>105</td>
<td>4.3</td>
<td>423</td>
<td>23</td>
<td>5.4</td>
<td></td>
</tr>
<tr>
<td>1881-85</td>
<td>2,786</td>
<td>112</td>
<td>5.0</td>
<td>473</td>
<td>20</td>
<td>4.2</td>
<td></td>
</tr>
<tr>
<td>1886-90</td>
<td>3,111</td>
<td>139</td>
<td>5.4</td>
<td>476</td>
<td>17</td>
<td>3.6</td>
<td></td>
</tr>
</tbody>
</table>

Sources.—Chicago Board of Trade, Annual Report 1895, at 20; Statistical Abstract of the United States 512 (1976).

Note.—The value of wheat per bushel is higher than for other grains. For example, no. 2 spring wheat sold for $1.23½ per bushel the week of July 1, 1871; no. 2 corn sold for $2½ for bushel for the same week and oats were sold for 46½¢. Chicago Board of Trade, Annual Report 1871, at 59, 62.
things: (1) the right of the elevator owner to mix grain within the elevator to avoid the costs of maintaining separate identifiable batches; and (2) the right of the carrier to organize delivery so as to minimize its costs by reducing the unloading time. This was important for the railroads who wished to remove their cars from the physically small Chicago terminal area as quickly as possible and return them to the west.\(^{28}\)

The elevator managers or “warehousemen” obtained the right to mix grain under the terms of their warehouse receipts.\(^{29}\) Mixing meant that grain was received and delivered from the elevators by general grade, and the question whether the grain was properly graded upon receipt and delivery was a source of constant friction between the elevator men and their customers.\(^{30}\)

Prior to 1864, the railroads generally followed the practice of delivery to the consignee designated by the shipper.\(^{31}\) In that year the Northwestern, and probably other railroads, adopted a rule reserving the right to select the terminal elevator on grain to Chicago.\(^{32}\) This was met by a statute in 1865 declaring the right of the consignor to select the delivery point.\(^{33}\) The railroads persisted in their assertion of the right to select the receiving elevator.\(^{34}\) This

\(^{28}\) The Northwestern justified its preference contract of 1866 on the grounds that “the . . . switching of cars, parts of the same train, to different warehouses, and the great delay in unloading the same consequent thereon may be avoided and the cars be returned sooner to the service of the public.” Petition for Mandamus 10, Chicago & Nw. R.R. Co. v. People ex rel. Hempstead, 56 Ill. 365 (1870) (copy supplied by the Clerk of the Illinois Supreme Court). The complexities of switching from the Galena Division to the Illinois Elevator, described 56 Ill. at 374–75, persuaded the court that delivery from the Galena Division was not required. CHICAGO BOARD OF TRADE & MERCANTILE ASS’N JOINT COMMITTEE REPORT ON THE RAILWAY AND WAREHOUSE MONOPOLIES 8–9 (1866) (University of Chicago Library).

\(^{29}\) This right was affirmed by the Illinois Supreme Court in Low v. Martin, 18 Ill. 286 (1857), and by § 6 of the Warehouse Act of 1867, 1867 Ill. Laws at 178.

\(^{30}\) 2 PIERCE, note 26 supra, at 82–83; TAYLOR, at 225–449, passim.

\(^{31}\) LEE, at 137–38. The railroads had been able to influence the choice of a receiving elevator and had used it as an incentive to encourage the erection of new elevators on railroad lands. For example, an early elevator lease states that the railroad agrees to furnish the elevator operators with “all the grain business for elevating and storage which may be subject to its control and which it can properly bring to them.” Contract between the Illinois Central R.R. Co. and Solomon Surges & R. B. Buckingham (June 14, 1855) (Newberry Library, Chicago, Ill.).

\(^{32}\) Chicago & Nw. R.R. Co. v. People ex rel. Hempstead, 56 Ill. 365 (1870).

\(^{33}\) Act of Feb. 14, 1865, §1, 1865 Ill. Laws at 75.

\(^{34}\) Vincent v. Chicago & Alton R.R. Co., 49 Ill. 33 (1868).
led to more legislation and a series of Illinois Supreme Court decisions generally adverse to the position of the railroads. Nonetheless, there never was any "spot market" competition among the elevators for grain delivered by railroad.

The warehousemen in Chicago are identified in table 3. They seem to have been coordinated, and in 1866 those receiving from Northwestern, Burlington & Quincy, and Chicago & Alton secretly combined their ownership. Ira Y. Munn was the managing partner of this combine and of his own elevator. He was prominent in Board of Trade activities throughout the late fifties and sixties and served a term as president of the board in 1860.

The general members of the Chicago Board of Trade were importantly involved in the legislation leading to Munn. They acted in two capacities: as speculators in the emerging cash and futures market of the board and as commission merchants for the shippers. In the latter capacity they would hold the elevator receipt and make arrangements for the shipment by lake vessel and delivery of grain from the elevator. These two functions brought the general members of the Board of Trade into conflict with the warehousemen. The conflict preoccupied Board of Trade politics in the years following the Civil War. In their position as commission merchants,

35 "It shall be unlawful for any railroad or railway company to deliver any grain into any warehouse, other than that into which it is consigned, without consent of the owner or consignor thereof." Warehouse Act of 1867, § 22, 1867 Ill. Laws at 181.

36 Vincent v. Chicago & Alton R.R. Co., 49 Ill. 33 (1868) (§ 22 of the Warehouse Act of 1867 upheld); People ex rel. Hempstead v. Chicago & Alton R.R. Co., 55 Ill. 95 (1870) (railroad cannot be compelled to deliver grain to a warehouse beyond its line); Chicago & Nw. R.R. Co. v. People ex rel. Hempstead, 56 Ill. 365 (1870) (exclusive contracts with warehousemen have no effect against the R.R.'s duty to deliver to consignee designated by shipper); People ex rel. Harmon Spruance v. Chicago & Nw. R.R. Co., 57 Ill. 436 (1870) (railroad cannot be compelled to permit individuals to connect sidetracks extending its line for delivery of grain).

37 This was because elevator charges remained uniform throughout the period. See table 1. The exclusive contracts between the railroads and the elevator operators were only slightly modified. The railroad "hereby agrees so far as it may lawfully do to furnish during the continuance of this lease . . . to [the elevator operators] . . . for storage, delivering and shipment . . . all the grain business which may come over its Road into Chicago and be subject to its Control and which it may properly and lawfully deliver to them," Contract between the Chicago, Burlington & Quinney R.R. Co. and Armour & Dole Co. (October 10, 1873) (Newberry Library, Chicago, Ill.).

38 See table 3. The secret agreement was raised as a defense by the Northwestern in Chicago & Nw. R.R. Co. v. People ex rel. Hempstead, 56 Ill. 365, 374 (1870). A copy of the written agreement appears in the Petition for Mandamus, p. 8. The details of the combined ownership were revealed by Ira Munn at his bankruptcy trial in November 1872. His testimony is reported in the Chicago Tribune, November 26, 28, 1872.

the nonelevator members wanted a uniform system of inspection on grains entering and leaving the elevators. This they obtained from the elevator operators by agreement in 1857.\textsuperscript{40} In their position as speculators they wanted more: the power to inspect the contents of the elevators. This the warehousemen resisted, and to get it the Board of Trade turned to the State legislature. The 1871 legislation that provided interior inspection also contained the rate section litigated in \textit{Munn}.

The demand for inspection on storage and delivery is easy to understand. It was too costly for each commission merchant to inspect each of his shipments. Absent some system of inspection, the elevator operator would have an incentive to grade and measure down on storage and to grade and measure up on delivery.\textsuperscript{41} If there had been competition between the elevators, the elevator with a superior record of honesty in inspection would gain business. The integration between the railroads and the elevators weakened this competition, although the contracts between the railroads and the elevators show that the railroads were concerned about the inspection practices of their terminal elevators. This inspection system was operated by the Board of Trade until the statute of 1871, which set up a state inspection system.

The Board of Trade membership, however, also wanted inspection of the interiors of the elevators. This the warehousemen resisted. The general membership was concerned about interior inspection because of the role of the elevators in futures trading on the board. Futures contracts could be honored by delivery of a "regular" warehouse receipt for the required amount of grain. Only warehouses located in Chicago were "regular."\textsuperscript{42} Indeed, it was the

\textsuperscript{40} \textit{Id.} at 227–28, 242–43, 257.  

\textsuperscript{41} After the institution of systematic state inspection, the existence of these practices became obvious. Triolus Tyndale, the Warehouse Registrar, commented in 1874 that: "The practice of accumulating a considerable surplus of grain in the course of a year or even a less period of time, continues in certain of the elevators. These 'surpluses' are claimed by the warehousemen as their property, and sold to their own account. They say that in cases where there is a shortage instead of a surplus they have to make it good; which stands to reason. Only somehow the few shortages that occur are remarkably unimportant in amount compared to the surpluses; and since some warehouse firms, doing a very large business, never claim any surplus, it must be quite possible to avoid its occurrence to any considerable extent." \textit{ILLINOIS R.R. & W'HS. COMM'N, ANNUAL REPORT 42} (1874).  

\textsuperscript{42} It seems to have been understood throughout the period that the grain delivered on a futures contract had to be located at Chicago, but this was not codified in the rules of the Board of Trade. The first formal rules governing futures delivery were adopted in
**TABLE 3**

**WHO WERE “THE WAREHOUSE MEN”?**

<table>
<thead>
<tr>
<th>Warehouse</th>
<th>Proprietors</th>
<th>Share in Combine (1866–71)</th>
<th>Receive From</th>
<th>Capacity (Bushels) December 1870</th>
<th>Capacity (Bushels) December 1871</th>
</tr>
</thead>
<tbody>
<tr>
<td>City Elevator</td>
<td>( \frac{1}{2} ) Munn and Scott, Armour (1872)</td>
<td>125 shares City + Union</td>
<td>Chicago, Nw. R.R.; canal</td>
<td>1,250,000</td>
<td>1,200,000</td>
</tr>
<tr>
<td></td>
<td>( \frac{1}{2} ) Wheeler</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Armour</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Munger (from “old man Taylor”)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>McKay</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Smith and Dunlap*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Union Elevator</td>
<td>Same as City, ( \frac{1}{2} ) Armour (1872)</td>
<td></td>
<td>Chicago &amp; Alton R.R.; canal</td>
<td>700,000</td>
<td>700,000</td>
</tr>
<tr>
<td>Northwestern</td>
<td>Dunlap*</td>
<td>125 shares Nw. + Munn and Scott's</td>
<td>Chicago, Nw. R.R.; canal</td>
<td>600,000</td>
<td>600,000</td>
</tr>
<tr>
<td>Elevator</td>
<td>Munn and Scott</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Smith and Dunlap (1872)*</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Armour (1872)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Munn and Scott's</td>
<td>Munn and Scott, Armour (1872)</td>
<td>150 shares Galena + Wheeler and Munger + Armour</td>
<td>Canal</td>
<td>200,000</td>
<td>200,000</td>
</tr>
<tr>
<td>Galena</td>
<td>Munger, Wheeler</td>
<td></td>
<td>Chicago Nw. R.R., Galena Div. and canal</td>
<td>500,000</td>
<td>800,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wheeler and Munger</td>
<td>Munger, Wheeler</td>
<td></td>
<td>Same as Galena</td>
<td>500,000</td>
<td>Nonell</td>
</tr>
<tr>
<td>[Hiram Wheeler's]</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Munger and Armour's</td>
<td>Munger, Wheeler</td>
<td></td>
<td>Same as Galena</td>
<td>600,000</td>
<td>Nonell</td>
</tr>
<tr>
<td>Chicago B. &amp; Q.R.R.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Elevator A</td>
<td>Armour, Dole under leases from Chicago B. &amp; Q.R.R. (1860) (1862) (1864) (1873)</td>
<td></td>
<td>Chicago B. &amp; Q.R.R.</td>
<td>1,250,000</td>
<td>1,250,000</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chicago B. &amp; Q.R.R.</td>
<td>Same as Elevator A</td>
<td></td>
<td>Chicago B. &amp; Q.R.R.</td>
<td>850,000</td>
<td>850,000</td>
</tr>
<tr>
<td>Elevator B</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Total combine capacity** ................................................................. 6,450,000

**Sources:**—Edwards, [Merchants'] Chicago Census Report 1871, at 1234; Illinois R.R. & Whs. Comm'n, Annual Report 1872, at 35; Taylor, History of the Board of Trade of the City of Chicago (1917); testimony of Ira Munn as reported by Chicago Tribune, Nov. 26 & 28, 1872.

* Former managers of Chicago Northwestern R.R.

|| Destroyed by fire of September, 1871.
<table>
<thead>
<tr>
<th>Warehouse</th>
<th>Proprietors</th>
<th>Share in Combine (1866-71)</th>
<th>Receive From</th>
<th>Capacity (Bushels) December 1870</th>
<th>Capacity (Bushels) December 1871</th>
</tr>
</thead>
<tbody>
<tr>
<td>Air Line</td>
<td>Munger, Wheeler</td>
<td>None</td>
<td>?</td>
<td>None</td>
<td>800,000</td>
</tr>
<tr>
<td>Illinois</td>
<td>Hempstead†</td>
<td>None</td>
<td>Canal</td>
<td>200,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Armstrong and Munger (1872)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wheeler (1872)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Buckingham (1872)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Munn and Scott (1872) Wheeler (1872)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Central Elevator A</td>
<td>Sturges &amp; Burlingame under lease from Illinois Central R.R. (1855); Sturges &amp; Buckingham (1857); J. &amp; E. Buckingham (1866) (1870)</td>
<td>None</td>
<td>Ill. Central R.R.; canal</td>
<td>700,000</td>
<td>Under construction</td>
</tr>
<tr>
<td>Central Elevator B</td>
<td>Same as Elevator A</td>
<td>None</td>
<td>Ill. Central R.R.; canal</td>
<td>1,600,000</td>
<td>1,600,000</td>
</tr>
<tr>
<td>Rock Island Elevator A</td>
<td>Flint, Thompson (lease from Chicago Rock Island R.R.)</td>
<td>None</td>
<td>Chicago, R.I. &amp; P.R.R.; canal</td>
<td>750,000</td>
<td>750,000</td>
</tr>
<tr>
<td>Rock Island Elevator B</td>
<td>Same as Elevator A</td>
<td>None</td>
<td>Chicago, R.I. &amp; P.R.R.; canal</td>
<td>1,250,000</td>
<td>1,250,000</td>
</tr>
<tr>
<td>Iowa</td>
<td>Mather and Newberry</td>
<td>None</td>
<td>Canal</td>
<td>300,000</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Wheeler (1862)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Spruance,† Preston (1865) seized by Hugh Mayer (1872)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Burned down Aug. 1872</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lunt's Hound</td>
<td>S.P. Lunt</td>
<td>None</td>
<td>Canal</td>
<td>80,000</td>
<td>None</td>
</tr>
<tr>
<td>National</td>
<td>Vincent Nelson</td>
<td>None</td>
<td>Chicago &amp; Alton R.R.; canal</td>
<td>250,000</td>
<td>Under construction</td>
</tr>
<tr>
<td>Hough's</td>
<td>Hough§</td>
<td>None</td>
<td>?</td>
<td>None</td>
<td>Under construction</td>
</tr>
<tr>
<td><strong>Total “independent” capacity</strong></td>
<td></td>
<td></td>
<td></td>
<td><strong>5,130,000</strong></td>
<td></td>
</tr>
</tbody>
</table>

† Confrontation with Chicago Nw. R.R. over delivery 1870-72.
‡ Undercut storage rate agreement in 1870.
§ Reduced winter storage rates Nov. 1872; raised rates to “those charged by other elevators” in 1873.
concentration in Chicago of a large stock of grain in the normal course of business that gave it a comparative advantage as a trading center. But traders on the Chicago Board of Trade had to worry not only about worldwide long-run demand and supply conditions for grain, but also about short-run demand and supply conditions in Chicago. This was particularly true as the contracts approached the end of their term and the time for offsetting grain movements from other grain storage points shrank.

The history of the Board of Trade for the period recounts repeated efforts to "corner" the market. Toward the end of a contract period a group would attempt to obtain control of all the grain then in store in Chicago and to force those who held contracts obligating them to make delivery of grain to obtain the receipts necessary to satisfy their obligations at a gain to the perpetrators of the corner. Most of these attempts seemed to fail as the victims of the corner rushed to obtain supplies from Milwaukee or more distant points. These corners were a nuisance to the commission merchants because they tended to hold grain in store in Chicago and slow the rate at which grain could move through the transfer point.

Under a state statute passed at the behest of the general membership in 1867, the elevators were required to post weekly the amount of grain in store. But it was widely claimed in the Chicago Tribune and elsewhere that these reports were false and that the warehousemen issued false reports to benefit their own speculations. It was also alleged in the Tribune that the elevators issued or left outstanding receipts on grain not in store. A statute passed in 1851 had required that receipts be issued only for property actually received into store but failed to provide that receipts must be can-

1865. Taylor, at 331. Chicago Board of Trade, Rules, Regulations and By-Laws Adopted Oct. 13, 1865 (1865). The first rule mentioning "regular" warehouse receipts dates from September 25, 1875. "All deliveries upon grain contracts ... shall be made by tender of regular warehouse receipts, which receipts shall have been registered by an officer duly appointed for that purpose." General Rule XXIV, § 1, Chicago Board of Trade, Annual Report, app. at xlv (1877).

43 See discussions of "corners," in Goldstein, note 27 supra, at 127-28; and 2 Grain Trade 110 (1900). The Chicago grain "corners" of the period are described by Taylor, at 370-72 (1869), 383-84 (1869), 425-26 (1871), 452-55, 456-60 (1872).


45 1872 Annual Report at 32.

46 Warehouse Act of 1867, § 5, 1867 Ill. Laws at 178.

47 Taylor, at 398; Chicago Tribune, March 2, 1870; see also Lee, at 159-60, 170.
celled when the property was delivered out.\textsuperscript{48} By having more receipts outstanding than he had grain in store, a warehouseman could borrow money while collecting for the storage of the nonexistent grain. Both claimed improprieties were to prove true.

The key to the position of the elevators was their contracts with the railroads. Copies of a number of these contracts still exist.\textsuperscript{49} They had these features in common: (1) A lease by the railroad of land to a lessee who would agree to erect an elevator. (2) A right in the lessee to charge for storage and transfer, limited by a most favored railroad principle, itself limited by a floor. The floors were in the range of one and one quarter cents.\textsuperscript{50} (3) A commitment by the railroad to deliver the grain arriving over its line to the lessee's warehouses, as long as the lessee provided service satisfactory to the railroad. (4) A commitment by the lessee to give priority to grain tendered from the railroad. (5) Rights of inspection on the part of the railroad. (6) A rent provision, variously computed.

The extent of this contractual integration raises the question of why the railroads did not operate the elevators themselves. The earliest elevators in Chicago antedated the railroads who constructed side lines and switches to accommodate them. Some of the elevators built during the 1850s were operated directly by railroads for a short time.\textsuperscript{51} The elevators were important to the railroads because inadequate or inefficient transfer facilities would affect the railroad's operations and competitive position throughout its territory. One answer is that elevator operations were beyond railroad charter powers, and there is some contemporary dictum,\textsuperscript{52} including dictum in \textit{Munn},\textsuperscript{63} to support this view. Guy Lee concludes that the

\textsuperscript{48} Act of Jan. 28, 1851, § 1, 1851 Ill. Laws at 9.

\textsuperscript{49} See table 4.

\textsuperscript{50} Ibid.

\textsuperscript{51} Lee, at 50–51.

\textsuperscript{52} "It would obviously be impossible for the companies to unload and store this grain at their ordinary freight depots, to be there held, unmixed with other grain, subject to the order of the consignees, without incurring great additional expense, and they would hardly claim the right, under their charters, to erect elevators of their own, for the purpose of adding the business of commission merchants to that of common carriers." Vincent v. Chicago & Alton R.R. Co., 49 Ill. 33, 39 (1868). The Rock Island & LaSalle R.R. Co. was prohibited from engaging in the warehouse business in Chicago by its charter. 1851 Ill. Priv. Laws 47, 49–50. The Rock Island built and leased for operation a large elevator in 1856. Lee, at 51.

\textsuperscript{53} "The railways have found it impracticable to own such elevators, and public policy forbids the transaction of such business by the carrier." 94 U.S. at 131. This is a quote from the elevator brief designed to suggest that the railroads and the warehousemen were quite separate.
<table>
<thead>
<tr>
<th>Date</th>
<th>Railroad</th>
<th>Lessee</th>
<th>Floor on Most Favored Railroad Clause</th>
<th>Preference in Favor of Lessee</th>
<th>Preference in Favor of Railroad</th>
<th>Railroad Right to Inspect</th>
<th>Rent ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>June 14, 1855</td>
<td>Ill. Central</td>
<td>Sturges &amp; Burlingame</td>
<td>½</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
<td>5,000 per annum</td>
</tr>
<tr>
<td>August 10, 1866</td>
<td>Northwestern R.R.</td>
<td>Munn &amp; Scott</td>
<td>None</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>25,000 per annum</td>
</tr>
<tr>
<td>October 10, 1873</td>
<td>Chicago Burlington &amp; Quincy</td>
<td>Armour Dole &amp; Co. (Elevators A, B, &amp; C)</td>
<td>1½</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>9,000 per annum</td>
</tr>
<tr>
<td>April 15, 1879</td>
<td>Chicago Burlington &amp; Quincy &amp; Quincy</td>
<td>Armour Dole &amp; Co. (Elevator D)</td>
<td>1½</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>½ of Elevator earnings</td>
</tr>
<tr>
<td>October 1, 1881</td>
<td>Ill. Central</td>
<td>Ebenezer Buckingham</td>
<td>1½</td>
<td>Yes</td>
<td>Yes</td>
<td>No</td>
<td>15,000 per annum</td>
</tr>
<tr>
<td>August 1, 1886</td>
<td>Chicago Burlington &amp; Quincy</td>
<td>Dole &amp; Company</td>
<td>None*</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
<td>Elevator earnings</td>
</tr>
</tbody>
</table>

**Sources.**—The 1866 Northwestern R.R. contract is quoted in Petition for Mandamus, at 8–14, Chicago Nw. R.R. Co. v. People ex rel. Hempstead, 56 Ill. 365 (1870). Manuscript copies of the other contracts are available at the Newberry Library, Chicago, Ill.

* ½ for first ten days and ½ thereafter suggested in memorandum of June 23, 1886; no floor appears in the contract.

† 6 percent interest on capital investments in new equipment.
independent operators were able to engage in the related grain trading and merchandising activities more effectively than the railroads.54

The other question is why the railroads tolerated the formation of a combine in elevator transfer services. The answer lies, we think, in the inability of the railroads to gain the right to control the delivery point. They asserted this right in 1864, an assertion that led to a series of cases from which they won only the right to refuse delivery to elevators off their lines.55 The existence of a uniform elevator transfer price, however, effectively mooted the issue. As long as all the elevators charged the same price, the consignor had no incentive to specify a particular elevator and the railroads were left free to arrange deliveries in accordance with their operating needs. If this resulted in high profitability to the elevators, the railroads could get this back through the rental term. Whether the railroads did so cannot be determined. The sizable gap between the rate actually charged and the floor on the most favored railroad clause suggests that they did not.56 On the other hand, a favorable price term generated service competition, and the railroads may have been most concerned about the reliability and quality of the service at their terminal elevators—particularly during the busy and crucial late summer and early fall months.57

There was one episode of elevator price competition in the period. In 1870 Harmon Spruance, proprietor of the small Iowa elevator and cut off from railroad delivery by the Northwestern, of-

54 Lee, at 50–54, 205 n.63.
55 See n. 36 supra.
56 It was widely believed that the elevators were very profitable and the business laid the foundations for the major Chicago fortunes of Armour and Buckingham. Guy Lee explored the issue at length, including a review of the income tax returns from Chicago during the Civil War, which were public documents. He could reach no clear conclusion. Lee, at 124–28.
57 Another explanation, occasionally suggested at the time, was that the leases were benefits to friends of corporate management. Solomon Sturges, holder of the Illinois Central lease in the 1850s (see table 4) had a cousin in the management of the railroad. Lee, at 52. Smith and Dunlap, who had an interest in Northwestern elevators, had previously been connected with the Northwestern railroad. No further evidence of this suggestion exists. Munn, who as a ruined man at the receiver’s hearings seems to have been willing to testify freely, did not suggest the existence of such factors. Chicago Tribune, November 26, 28, 1872. The Committee Report of 1866 stated about “an alleged complicity on the part of railroad officials with the management of grain elevators,” that “on this point we can produce no proof aside” from the denials of the “gentlemen” involved. Chicago Board of Trade & Mercantile Association, note 28 supra, at 9.
ffered a rate of one cent. The railroad continued to refuse to deliver and the elevator was seized by force by Hugh "Meagher" [Maher] in March 1872, probably under the terms of his lease with Spruance. Maher was to be associated with Munn and Scott in the wheat corner in July and August of that year.

Another small elevator, the Illinois, succeeded in getting the Illinois Supreme Court in 1870 to rule that the Northwestern Railroad had to deliver to them from its Wisconsin and Milwaukee divisions. The Illinois Elevator appeal was linked to another order to deliver from the Galena division, which the Court reversed. The case was remanded, and in 1872 the Northwestern sent an engine onto the switch when the Rock Island attempted to deliver thirty cars. The Rock Island was not cowed. It sent two engines to the scene, forced the Northwestern engine off the switch, and completed the delivery. Hempstead renewed his suit, but the whole matter was settled by the sale of the Illinois Elevator to the Munn and Scott combine.

The Board of Trade, too, had an interest in a uniform storage charge. The development of standardized trading on the board required the development of uniform terms. The payment of storage charges was the obligation of the person presenting the warehouse receipt for delivery, and thus the value of the receipt would be affected by the rate of storage. If the rates of storage differed, then it would complicate calculation of the value of the "regular"

---

58 Taylor, at 400. The elevator was constructed by Maher and Newberry in 1862. They leased it to Hiram Wheeler who constructed a track from the Northwestern railroad line to the warehouse. In 1865 Wheeler abandoned the elevator and removed the switch. Spruance leased the elevator in 1869 and sued the Northwestern to allow him to construct a new switch. The Northwestern refused because of its exclusive contract with Wheeler's large elevator. The Illinois Supreme Court held that Spruance could not compel the Northwestern to permit him to build a switch because the right to make the connection was personal to Maher and Newberry, the original owners. People ex rel. Spruance v. Chicago & Nw. R.R. Co., 57 Ill. 436 (1870).

59 Hugh "Meagher" must be Hugh Maher of Maher & Newberry, the original owners. Taylor also reports that in the course of the seizure, the occupants, including a newly appointed state grain inspector, were "thrown out into the mud." Taylor, at 451.

60 Chicago & Nw. R.R. Co. v. People ex rel. Hempstead, 56 Ill. 365 (1870).

61 Taylor, at 451.

62 Under the 1865 Rules, the grain would be held for three days after delivery of the receipts to the buyer without extra storage on the warehouse receipts. Chicago Board of Trade, Act of Incorporation, Rules, Regulations and By-Laws, General Rule XII, at 15 (1865). In 1869 the grace period was increased to five days. Chicago Board of Trade, Annual Report 164 (1869).
receipts used to meet the contract obligations. A uniform rate of storage made all receipts comparable. Never once did the general membership of the Board of Trade complain about the uniformity of storage charges.63

With this background, the events leading to the legislation of 1871 can be briefly sketched. The board organized an inspection system in 1857.64 The system was at first operated by members. A full-time chief inspector was appointed in 1865.65 The elevator owners agreed to inspection on delivery from rail cars and later on delivery from canal boats. The inspection system was paid for by a fee. The definition of grades and the fairness and reliability of the inspection presented recurrent problems that need not be recounted here. The grain crop of each season had different characteristics, and adjustments were made in the grading systems to accommodate these differences.

The Board of Trade first turned to the legislature for assistance in 1867. No explanation survives as to why the board, in spite of the near unanimity of its membership, found it necessary to turn to the legislature for assistance. Proposals were repeatedly made that the Board of Trade refuse to accept for delivery on futures contracts warehouse receipts coming from elevators that did not accept the inspection and receipt registration systems desired by the board.66 We think the answer is that the Board of Trade could not conduct futures trading without the elevators, and the united front of the warehousemen made it impossible for the board, acting alone, to impose the condition. Ironically, the inspection and registration systems were actually implemented in 1873 not as the result of legal process but because the banks, concerned about the security of the receipts in the wake of the Iowa elevator fire, insisted on it.

In 1867 two bills were introduced and the Board of Trade was split. One, the Eastman bill, was supported by the general membership. The other, the Ward bill, was regarded as the "elevator" bill and was supported by some of the directors of the board.67 The Eastman bill passed, but in a weakened form. The law did require elevator owners to cancel receipts on delivery of grain, thus closing

63 Agitation for competitive rates appeared to originate with the Chicago Tribune. LEE, at 205.
64 TAYLOR, at 227–28.
65 Id. at 241–42.
66 See, e.g., id. at 398.
67 Id. at 349–52.
the loophole in the 1851 law. It required railroads to deliver to the consignee. Provisions to compel railroads to build switch connections to elevators and the lack of any enforcement mechanism were noted omissions. The bill also made no provision for interior inspection of the elevators. The bill as passed was particularly obnoxious to the Board of Trade because it contained a provision making futures trading a gambling crime. It was widely believed that these sections were inserted at the behest of the warehousemen. This provision led to a notable arrest of leading members of the board on the floor, but the matter was not carried to conviction. The provision did not affect the ongoing futures trading and the sections were repealed in 1869.

The debates of the constitutional convention of 1870 make it clear that the act of 1867 was not regarded as adequate. Numerous petitions, including one from over 700 Chicago businessmen, were received by the convention, complaining of overissues of receipts by warehousemen and short weights in delivery by railroads. During consideration of an article providing that elevators be made subject to inspection by inspectors of the Board of Trade, the owners of the grain, and the owners of the receipts, the chairman of the committee reported that:

The *Chicago Tribune* tells us that the Board of Trade and the grain dealers of Chicago tried to have grain receipts registered, tried to have some of these safeguards that we propose to put in this article adopted by the elevator owners, but that they refused . . . until the article was reported; . . . [and then] the elevator owners . . . agreed to demands of the Board of Trade, provided the article should be withdrawn.

The article was popular in the convention and, when put to a separate ratification vote, passed easily. The only objection made with any frequency was that the subject matter was legislative in character and inappropriate to a constitution. The only sustained

---

69 § 22, 1867 Ill. Laws at 181-82.
70 §§ 17, 18, 19 and 20, 1867 Ill. Laws at 181.
71 TAYLOR, at 352-53.
72 Ibid.; 1869 Ill. Laws at 410.
73 Debates, note 19 supra, at 654.
74 Id. at 1623.
75 Id. at 1622-34.
and vehement opposition came from delegate Turner of Freeport, who, somewhat colorfully, asserted that this was "the grain gamblers article" and proceeded to attack futures traders as "leeches upon commerce and the community, that suck the life blood out of the farmers and dealers in grain, without contributing anything towards the general wealth or production of the country." He claimed that the article had been prepared at the behest of speculators smarting from recent losses and urged the convention to have nothing to do with the whole business.

The constitutional article contained seven sections. The first declared all elevators where grain is stored for a compensation to be public warehouses. The second required a weekly statement of the Chicago elevators of grain in store and warehouse receipts outstanding. The third gave the holder of a receipt the power to examine the property stored. The fourth required railroads to weigh grain on shipment. The fifth required railroads to deliver to the consignee. The sixth and seventh instructed the General Assembly to pass laws to prevent the issue of fraudulent warehouse receipts and for the inspection of grain.

With the passage of the new constitution in 1870, implementing legislation was in order. The Board of Trade proposed a bill in December that left inspection in the Board of Trade but empowered its inspectors to make interior inspections. This bill was modified in the legislature to provide for State-appointed inspectors, a change which the Board of Trade found difficult to resist amid charges that its own chief inspector had been corrupted.

The elevators resisted interior inspection after the bill was passed. They refused to take out the license required by the statute on the grounds that the price provision made the statute unconstitutional. The litigation began. In August 1873, however, the Iowa elevator burned, and in the settlement process it became clear that the receipts outstanding exceeded the grain in store by 165,000 bushels—this in an elevator with total nominal capacity of 300,000 bushels. The insurance companies refused to

---

76 Id. at 1623.
77 Ill. Const. 1870, art. 13.
78 Chicago Tribune, Dec. 28, 1870.
79 Taylor, at 405-10.
80 Warehouse Act of 1871, 1871 Ill. Laws at 762.
81 Taylor, at 456-57; Chicago Tribune, Aug. 23, 1872. The proprietor of the Iowa elevator, Hugh Maher, was indicted by the local grand jury on the petition of the state inspectors. 1872 Annual Report, at 15-16, 144-45.
pay any losses beyond that on grain actually in store. This event created pressure for interior inspection and registration, particularly from the banks that had been accepting the warehouse receipts as security.82

All the warehousemen but one consented to a state investigation of the amount of grain in store.83 Munn and Scott requested a delay in the inspection of the elevator they managed in order to "collect the grain in as few bins as would be sufficient to hold it, so that the quantity could be more readily and accurately ascertained."84 The inspectors agreed, and when the inspection was made the grain was found in good order. But it shortly became known—perhaps from employees who had done the work85—that Munn and Scott had used the time to erect false bottoms in their bins to conceal the short fall between the grain in storage and receipts outstanding.86 Munn and Scott sold out to George Armour,87 who made good on the outstanding receipts.

The trouble become known when George Armour and Company cautioned against accepting Munn and Scott receipts unless they had been endorsed by Armour and Company. Munn and Scott and Maher, the operator of the Iowa elevator, were said to be involved in a large corner on wheat about the time the Iowa elevator fire occurred. The corner collapsed on August 19, speeding Munn and Scott's financial decline.88 Munn's testimony at the receiver's hearing strongly suggests that he had been in serious financial difficulty since at least 1868.89 Maher was indicted.90 Munn and Scott

82 Lee describes the use of warehouse receipts as collateral for bank loans. Lee, at 177–79; 1872 Annual Report, at 15, 41; Woodman, note 21 supra, at 24.
84 1872 Annual Report, at 16.
85 Chicago Tribune, Nov. 20, 1872.
87 Reportedly for a consideration of ten dollars. Lee, at 267; Taylor, at 460, 466. Munn and Scott remained in the litigation because the appeal was from a fine against them personally. As a practical matter, they may not have controlled the litigation after 1872.
88 Taylor, at 458.
89 Chicago Tribune, Nov. 26, 28, 1872. In March 1873, it was revealed that Munn and Scott had mortgaged their elevators to Jesse Hoyt, a New York commission merchant for $450,000 ($500,000 according to Lee). Hoyt persisted in his attempts to collect from Armour until the Munn and Scott properties were sold, by court order, to Munger and Wheeler, another big elevator firm. Chicago Tribune, March 2, 1873; Lee, at 268.
90 1872 Annual Report, at 144–45.
were expelled from the Board of Trade and later arrested when it appeared they might leave town before the receivership had been settled.\textsuperscript{91}

The matter of rates played a decidedly secondary role in the agitation about the warehouse question. At the outset of the Civil War, the closing of the Mississippi route congested the lake route and led to political agitation about prices, which may have been in part a form of covert opposition to the interests supporting the war.\textsuperscript{92} The problems seem to have greatly abated by 1863, but in 1865 the Chicago elevators posted new transfer charges which lowered the initial storage term to ten days, and then in the fall of 1865 announced a unilateral increase in the rates of storage on the grain then in store.\textsuperscript{83} The elevator men defended this increase on the grounds that the grain was in bad condition and would be difficult to carry through the winter. It created a considerable ruckus and the increase was withdrawn,\textsuperscript{84} but the event must have brought to the attention of the general membership in the board the power the elevator men held over the grain trade.

In a pamphlet addressed to the public, a committee of the Board of Trade reviewed the question of storage charges. The committee said:\textsuperscript{85}

Of the second charge—extravagant and arbitrary rates of storage adopted by the warehousemen—it is but proper to say that, with but one exception, no change has been made in the rates of storage on railroad grain for the past 10 years. . . . While we think the rates of storage of grain in this city are quite high enough, we cannot regard them as exorbitant as compared with other points, there being no extra charge for labor of shoveling, running over when necessary to preserve it, or any extras. . . . We trust, however, that elevator proprietors will, the coming season, change their time of first storage back to 20 days instead of 10 as now, even though to balance such concession, they are obliged to shorten the time on the half-cent accumulation afterward.

The rates were in fact so reduced.

\textsuperscript{81} Taylor, at 467; Chicago Tribune, Dec. 13, 1872.
\textsuperscript{92} Lee, at 136-40.
\textsuperscript{83} Chicago Tribune, Feb. 14, 1866; Well's Commercial Express and Western Produce Reporter, Oct. 30, 1865 (daily ed.).
\textsuperscript{84} Chicago Board of Trade and Mercantile Association, note 28 supra, at 8.
\textsuperscript{85} Id. at 7-8.
The law of 1867 required the warehousemen to meet and announce a price in January, the price to act as a ceiling for the whole year. This provision was similar to statutory price posting requirements applicable to ferries. Doubtless the events of 1865 had suggested the utility of limiting the power of the elevator operators to spring sudden changes on grain then in store or in transit, after the owners had already committed themselves to storage. The debates of the constitutional convention of 1869–70 are free of any mention of the rate question. The draft bill of the Board of Trade in 1870 contains a section restating the notice requirement and further providing that the rate agreed upon could not exceed two cents for transfer and twenty days storage—the rate urged by the Board of Trade Committee in 1866 and then in force. The law that passed extended the initial storage period to thirty days.

Observers agreed that the effect of this change was small. The Tribune observed on November 22, 1872, that income from the "extra storage . . . amounts to very little except during the winter months." Lee estimated that only one-twelfth of the grain remained in store beyond twenty days. Inspection of the weekly storage received and shipped tables in the Board of Trade annual reports (for years after interior inspection began) suggests that under a strict first-in, first-out basis, grain would have been in store during the summer months for about thirty days. Interpretation of the statistics is clouded by the fact that a significant part of the grain in store was owned by the elevator operator. It was recognized at the time that the rate provision of the law could be avoided if the elevators were operated as private warehouses (i.e., if the elevators were used to store grain owned by the elevator owner rather than the public), and indeed by the end of the century most Chicago elevator capacity was operated on a private basis.

96 § 5, 1867 Ill. Laws at 178.  
97 An Act to provide for the establishment of Ferries, etc., Feb. 12, 1827, § 6, Ill. Rev. Laws at 305 (1833). The function of this type of regulation is discussed in Kitch, Isaacson, & Kasper, The Regulation of Taxicabs in Chicago, 14 J. Law & Econ. 285, 305–09 (1971).  
98 Reprinted in the Chicago Tribune, Dec. 28, 1870.  
99 § 15, 1871 Ill. Laws at 769.  
100 Lee, at 126. The Illinois Central contract of 1855, note 31 supra, stated that the usual time was 15 days.  
101 Taylor, at 411.  
102 After 1885, Chicago elevator operators began to combine public warehousing with private grain buying on a large scale. The operators' grain was mixed with the public
Aside from a brief period of compliance by one elevator in 1872,\textsuperscript{103} the elevators did not comply with the statutory rate until the Supreme Court \textit{Munn} decision in 1877.\textsuperscript{104} That year the legislature lowered the statutory rate, over the feeble objection of the warehousemen.\textsuperscript{105} Chicago as a transfer point was by that time facing intense competition from through shipments. In 1876 the directors of the Illinois Central observed that:\textsuperscript{106}

Up to a recent period, Chicago held the control of the Grain Traffic. The cost of taking a bushel of grain from Chicago to New York for several successive years was from 22 to 30 cents. As water communication was cheapened, rates by rail have been reduced in greater ratio. Last season, grain was carried by water at an average of 9\textsuperscript{1/2}c per bushel from Chicago to New York. In face of this extremely low rate, nearly one half of the grain was sent direct from local stations in Illinois to the East by railroad. Chicago has ceased, for the present at least, to be the great enterpot [sic] for the grain products of the country West and South of it. Since 1872, the rates for grain to Chicago from local stations on our line have been reduced from twenty to thirty percent.

III. CONCLUSION

This research speaks to the need to develop a more complete history of the development of American economic regulation prior to the Interstate Commerce Act of 1887,\textsuperscript{107} and to problems

\textsuperscript{103} The newly constructed Hough elevator. \textit{Taylor}, at 467; Chicago Tribune, Dec. 7, 1872.

\textsuperscript{104} \textit{Taylor}, at 547.

\textsuperscript{105} 1877 Ill. Laws at 169. The warehousemen unsuccessfully lobbied for the old rate in 1874. \textit{Lee}, at 229.

\textsuperscript{106} \textit{Lee}, at 270.

\textsuperscript{107} \textit{Miller}, note 22 \textit{supra}, contains much useful material, particularly for the period 1870–80.
in the economic theory of cartels. The elevator price-fixing conspiracy is one of the rare reported cases of a stable price fix and is, interestingly enough, explainable on plausible efficiency grounds. The purpose of this essay is, however, somewhat more limited. It is to use the factual background to illuminate the Court's opinion in *Munn* and to place the case in better historical perspective.

The factual background is useful in understanding two important aspects of the opinion. The first is the significance of Chief Justice Waite's statement that "this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts." This dictum is sometimes carelessly read by the modern reader as a holding. Second is the scope of the concept "affected with a public interest."

The suggestion that the only relief for abuse is through the polls can be read as a statement intended to preclude any judicial review and thus inconsistent with later cases, particularly *Smythe v. Ames*. There is an alternative reading. As the reader can by now well understand, a major problem in the argument of the elevator case was how to persuade the Court that the power exercised by the legislature was harmful. The solution adopted in the briefs was to argue that if the power was conceded, then it might be abused by raising the price:

> If this power is sustained, the legislature may, by another act, declare that every such warehouseman may charge and receive five cents for every bushel of grain received. . . . The legislature of Illinois is to-day in the control of the producing classes, but another time it may be within the management of the warehousemen and carriers. Once admit this power and there will be no protection of the people from each other.

As the student of modern regulation knows, the hypothetical was to prove prophetic. But it must have struck the Court as odd, for

---

108 *94* U.S. at 134.


110 *169* U.S. 466 (1898). William Jennings Bryan argued this passage to the Court (*id.* at 487), but the Court ignored it. The decision affirmed a decree invalidating certain railroad rates established by the Nebraska board of transportation as a violation of the Due Process Clause.

111 Brief for Plaintiff in Error (Goudy), 22; 7 *Landmark Briefs* 504.
how could the small number of warehousemen capture the legislature from the farmers? The passage in the opinion that points to the vote as the solution can be read as a common-sense response to this argument.

The central analytic flaw in the opinion is the failure to connect the copiously cited precedents, most of them relating to common carriers, to the elevator business. This failure lays the basis for the interpretation of *Munn* offered by a commentator like Commons. He explained: 112

The majority introduced a new principle of law, as charged by the minority, in order to sustain the power of the Illinois legislature to fix the prices for handling and storage of grain, and to compel the owners to furnish service at those prices. This was, in effect, the principle that it was *economic conditions* and not a special grant of sovereignty that determined the right of the sovereign to regulate prices. The *Munn* Case was not the case of a railway depending on a public franchise, but of a private business. These warehouses, without a special grant of sovereign power, had become strategic centers for control of the prices of grain shipped from the Northwest, by the mere fact of location, character of the business, and power to withhold service. The majority, recognizing this economic fact, held that property lost its strictly private character and became “clothed with a public interest when used in a manner to make it of public consequence and affect the community at large.” Thus the fact of economic power over the public in withholding service and thus fixing prices need not proceed from a sovereign grant of a privilege, but proceeds, in this case, from the circumstance that the public had come to depend on the use of the owner’s private property, and that therefore the owner had employed his property, not merely to his own use and enjoyment, but had devoted it to use by the public. To that extent he must submit to be controlled by the public.

This way of reading the case was, of course, subsequently adopted by the Court itself in *Nebbia v. New York*, 113 and it is now accepted doctrine that all economic activity is subject to regulation because it is important, i.e., “affected with a public interest.”

---


For half a century *Munn* was not so understood, and it is difficult to believe that Waite, writing in 1877, intended to lay the constitutional foundation for pervasive economic regulation, even in dictum. But that leaves the question, why did Waite write an opinion that left unanswered the question, how were the elevators affected with a public interest?

One possible answer is that Waite simply assumed that, given the nature of the elevators, the answer was obvious. That response is unsatisfactory because the dissent and the elevator brief specifically raise the issue. Perhaps Waite thought it best to magisterially ignore the dissent. It would not be the first time that a dissent has been left to give unintended focus to a majority opinion.

Another answer is that the material at hand to establish the link between the elevators and the railroads raised difficult procedural issues. The Court might have taken judicial notice of the *Hempstead* case, but not of the facts reported there. A remand for a factual hearing on the nature of the elevator business, or a holding that the warehouses had failed to discharge some burden of proof, would have been an indecisive and highly technical outcome to decisions in the public eye and long under consideration. Silence may have seemed the wiser course.

One more answer is that Waite introduced the ambiguity, not because he foresaw the expansion of the doctrine, but because it served his rhetorical strategy in what have come to be known as the Granger cases. *Munn* was before the Court alongside cases involving statutes regulating railroad rates. Although *Munn* was before the Court at the same time and involved related issues, it was neither the difficult nor the important case. After the decision, John N. Jewett, a warehouse attorney of florid style, wrote the Court:

---

114 Brief for Plaintiff in Error (Goudy), 42–48; 7 Landmark Briefs 524–30.

115 More than a year passed between argument and decision. Miller, note 22 supra, at 187.

116 Chicago, Burlington, & Quincy R.R. v. Iowa, 94 U.S. 155 (1877); Peik v. Chicago & Nw. R.R., 94 U.S. 164 (1877); Chicago, Milwaukee, & St. Paul R.R. v. Ackley, 94 U.S. 179 (1877); Winona & St. Peter R.R. v. Blake, 94 U.S. 180 (1877); Stone v. Wisconsin, 94 U.S. 181 (1877). The decisions were all announced together and the opinions were all written by Waite. The legislation involved in *Munn* was unconnected to the Granger Movement.

117 Brief for Rehearing, 5; 7 Landmark Briefs 661.
The prominent position given by your Honors to this cause in the decision of a series of cases, involving to the last degree the existence of private rights in and over the wealth and industry of the country, whenever they come in contact with a public use or convenience, was as unexpected as it was unsought for by the plaintiffs in error and their counsel. . . . The case is thus made to assume an importance altogether disproportionate to the pecuniary interests directly involved in it.

The central issue in the railroad cases was whether the State charters had given the railroads the power to set their prices. The railroads principally relied on charter clauses giving them the power to establish the rules and regulations governing their business. Waite chose Munn as the lead opinion, and the rhetorical strategy was as follows. First, establish the proposition that the elevators, which have no charter, are subject to price regulation. That is the Munn opinion. Its length, and the extensive, arcane, and seemingly learned citations make it the focus of the decisions. Second, show that the railroads are no different. "Railroad companies," wrote Waite, "are carriers for hire . . . [and] under . . . Munn subject to legislative control as to their rates of fare and freight, unless protected by their charters." Such special protection he could not find. The reader, exhausted by the excessive length of Munn, welcomes the brief and casual railroad opinions which dispose of the more difficult issues. In this context, it suited Waite's purpose to leave ambiguous the scope of "affected with a public interest," for the implicit theme of justification for the railroad decisions was: why shouldn't the railroads be treated like everyone else?
