

prohibition against a deprivation of property without due process “has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some forms of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. . . . We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision.”⁶⁵

Four years later, in *Munn v. Illinois*,⁶⁶ the Court reviewed the regulation of rates charged for the transportation and warehousing of grain, and again refused to interpret the due process clause as invalidating substantive state legislation. Rejecting contentions that such legislation effected an unconstitutional deprivation of property by preventing the owner from earning a reasonable compensation for its use and by transferring an interest in a private enterprise to the public, Chief Justice Waite emphasized that “the great office of statutes is to remedy defects in the common law as they are developed. . . . We know that this power [of rate regulation] 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.”

In *Davidson v. New Orleans*,⁶⁷ Justice Miller also counseled against a departure from these conventional applications of due process, although he acknowledged the difficulty of arriving at a precise, all-inclusive definition of the clause. “It is not a little remarkable,” he observed, “that while this provision has been in the Constitution of the United States, as a restraint upon the authority of the Federal government, for nearly a century, and while, during all that time, the manner in which the powers of that government have been exercised has been watched with jealousy, and subjected to the most rigid criticism in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theatre of public discussion. But while it has been part of the Constitution, as a restraint upon the power of the States, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State legislatures have deprived their own citizens of life, liberty, or property

⁶⁵ 83 U.S. (16 Wall.) at 80–81.

⁶⁶ 94 U.S. 113, 134 (1877).

⁶⁷ 96 U.S. 97, 103–04 (1878).