

Review and Comment on Roy Morris Jr., *Fraud of the Century, Rutherford B. Hayes, Samuel Tilden and the Stolen Election of 1876*, Simon & Schuster, New York, 2003.

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Background

The contested recount of Florida ballots in the presidential election of 2000, and its resolution resulting from a Supreme Court decision, caused historians to look for parallels. The 1866 Senate impeachment trial of President Johnson was the only time the Chief Justice of the Supreme Court presided on a decision of whether the president shall remain in office. But the 1866 impeachment trial was not the most recent previous time that Justices of the Supreme Court took direct part in the decision of who shall be president. That took place a decade later in February 1877, when five Supreme Court Justices were part of a special, indeed extra constitutional, Electoral Commission to decide contested facts on the outcome of the election of 1876. Resolution of those disputes by the Electoral Commission effectively determined the outcome of the election, a victory for Rutherford B. Hayes, the Republican, over the Democrat candidate Samuel Tilden.

The story of the 1876 election is related in Mr. Morris book. The contest continued from the evening of the election on November 7, 1876, until only days before the inauguration on March 4 1877. Yet while Morris has given a detailed, readable and well documented account of the election, the contested electors, and the outcome, in one particular but important area, he missed an opportunity to add to the known facts. It is widely accepted, and also related by Morris, that the decisions of the Electoral Commission were determined by the vote of one member, Justice Joseph P. Bradley. It is also widely accepted, and related by Morris, that the Republican Bradley was appointed to the Commission only when the person preferred for that post, Justice David Davis, became unavailable due to his surprise election as senator from Illinois, through a sudden shift of votes by the Democratic members of the Illinois legislature. The Illinois state action occurred at almost exactly same hour that the Electoral Commission was being created by the federal Congress. While Davis was a Republican, he was believed neutral on the contested electoral issues, thus gave hope to the Democrats to win the presidential election by decisions of the Commission.

Because substitution of Bradley for Davis was so essential to the outcome, one would have hoped a new analysis of the 1876 election would also answer why Davis was removed from the Commission at that time, in that way, and by the very persons, Democrats, who were presumably to benefit by his presence. But on this, Morris adds little. Thus this review and comment on Morris' book attempts to fill that gap by relating the Electoral Commission events to what else was being decided by the Supreme Court in those very days and months. The analysis also shows that the legal foundation of the modern regulatory state may have been built on the most base form of politics.

The Historically Known Events:

The story begins when Samuel Jones Tilden, the Democratic candidate for president in 1876, woke up the day after the November 7 election with an apparent majority of the popular and plurality of electoral votes. It ends on March 4, 1877 when Rutherford B. Hayes, the Republican candidate, was inaugurated to that office. Three days earlier, on March 1, 1877, the Supreme Court upheld the conviction of Ira Y. Munn for failure to obtain a grain-storage license from the State of Illinois. In 1937, Felix Frankfurter, (who would become an Associate Justice of the Supreme Court in 1939) said of the 1877 *Munn v. Illinois* decision "Judged by any standards of ultimate importance, [the] ruling in that case places it among the dozen most important decisions in our constitutional law ..." Many modern regulatory institutions exist due to that decision. The puzzle explained here is that the election of Hayes may have been mere by-product of an effort to assure a decision favoring Illinois in that important case.

The circumstances of the Hayes-Tilden election were unique. The United States elects the president through votes of electors selected by each state. Following the 1876 election there were contested electors in four states. If all of the contested electoral seats cast votes for Hayes, he would win the election by one electoral vote, whatever the total of popular votes. Congress has the constitutional duty to resolve disputes on selection of electors, but by January, 1877 had still not been able to do so. With the inauguration set for March 4, Congress decided to end the impasse by the creating a special Electoral Commission to rule on disputed issues of fact. The Commission was to have fifteen members, five from the Senate, five from the House of Representatives, and five members of the Supreme Court. Thus members of the Supreme Court were brought into an extra-constitutional and non-judicial roll, that also made them partisan players.

The March 1, 1877 decision in *Munn v. Illinois* resolved matters that had been on the Court's calendar since 1873, reflecting disputes that rose to constitutional significance after the Civil War. It is well known that the post-war era saw the creation of the modern notion of civil rights, and the revision of constitutions of the states of the failed rebellion. But many Northern states also rewrote their constitutions to accommodate the new era, including Illinois in 1870. Protecting civil rights was not the only, or perhaps even main, concern of the authors of the Illinois revisions. After the Civil War the nation expanded west. Farm business boomed. Grain storage and transport by rail grew as well. The farmers' friend, the Granger movement, wanted cheap railroad rates and cheap grain storage for farmers, of whom there were many in Illinois. The Grange focused their media campaign on vilifying grain storage operators and railroads as evil monopolists, who overcharged for storage, conspired to raise transport fees, and sinfully indulged in price speculations on grain.

Ira Y. Munn of the Munn and Scott grain elevator of Chicago was the living embodiment of all the Grange rallied against. Munn and George L. Scott started their small grain storage business in northern Illinois in 1844. Driven by Munn's ambition and sharp practices, by 1868 the Munn and Scott elevator was one of the principal elevator businesses in Chicago. Like many modern businessmen: Munn saw and used a link between commerce, community and polity. Munn served as President of the Chicago Board of Trade in 1860, and was president of the Chicago Chamber of Commerce in 1868. These organizations advocated and practiced self-regulation of the grain business in that city. Munn's personality and business practices were a cross between Harry Truman and Larry Flynt: direct, personally conservative but on the cutting edge of practice, aggressive and innovative in business, and not afraid of controversy. His practices were not illegal, though some might violate modern antitrust laws that did not then exist. Some of his practices have become well accepted financial instruments. For example Munn was roundly criticized for trading receipts for stored grain. Today a similar practice is a common risk management tool: commodity futures contracts promising later delivery of specified grades and quantities of grain at stated locations. But at that time, and especially under the light of the Granger media campaigns and Munn's voluntary prominence in the business community, Munn's activities made good headlines and thus good political targets.

The Grange represented a large and growing class of farmers and so had a strong influence on Illinois politics. And Munn's aggressive but successful business practices meant that some in the Chicago commercial community were not his friends. Thus when Illinois revised its constitution in 1870 the farm and

commercial interests of that state found themselves in alliance: both wanted to curb Mr. Munn, and to curb the things that Munn represented to them. This alliance was successfully able to insert into the new constitution that the state could regulate businesses such as the grain elevator of Ira Y. Munn. Once the constitution was adopted, the Illinois legislature quickly passed legislation requiring a license for such businesses and establishing the price.

But the irascible Munn refused to comply. He was shortly tried and convicted by the State of Illinois for the crime of failing to obtain a state license to operate his grain elevators in Chicago. The event coincided with a critical moment in an effort by Munn to purchase contracts for grain to cover his contract positions; he was denied credit by local bankers. Thus by the time Illinois state courts heard the appeal of Munn's conviction he was also bankrupted. The Munn and Scott elevator company together with its interest in the law suit conveyed to other hands. By the early 1870's the Grange also quickly lost much of its prominence (perhaps they needed Munn more than they knew!). But the Grange had also conveyed its interest for state regulation of elevators and railroads into the hands of the legislature of the State of Illinois through the constitutional revisions.

Therefore by 1876 the principals who had created the *Munn v Illinois* case were no longer the actors on stage. Instead on one side were those who thought the state government had no proper role to thus control their property. While the interests of the alliance of farmers who wanted lower prices from railroads and elevators, and commercial interests who benefited from government control of their more successful competitors, were embodied in the newly granted powers of the legislature of the State of Illinois.

The federal appeal of *Munn v Illinois* reached the United States Supreme Court in 1876, where it was grouped for consideration along with seven other similar cases from the plains states: there were four cases from Minnesota, two from Wisconsin, and one each from Iowa and Illinois. The cases were known to the media and even discussed among the Justices as the "*Granger Cases*". The cases induced no hurry to the Justices. The first reached the Court on October 6, 1873 but argument was not heard until two years later, October 24 and 25, 1875. The *Munn* case was the last to reach the Court and the last to be heard, with arguments only in January, 1876. The Justices met next regarding the *Granger Cases* only on November 18, 1876, in internal session, reaching no decision. Following usual practice Court deliberations were not public.

Meanwhile on November 7, 1876 the now infamous Presidential election had occurred. With 185 electoral votes needed to win, Tilden had secured 184, but all of the electoral vote in three states (Louisiana, South Carolina and Florida) were contested and one vote in Oregon also came into question. If any of these electoral votes were cast for Tilden then he would win, but if all were awarded to Hayes, then he would win by one vote. When electors met in their respective state capitals on December 6, 1876 to cast their ballots, the thirty-four undisputed states cast a total of 184 votes for Tilden and 165 for Hayes, with the disputes on the remaining 20 votes still unresolved. Real and rumored deals proliferated. State delegations traded offers of land grants or funds for construction of railroads. In some states, cash purchase of the final result was openly discussed; prices were known. Morris relates these events in some detail. The title of Morris' book reflects the view that the 1876 election depended on fraud at the ballot box, compounded by similar misdeeds following the election.

Under the federal Constitution, Congress certifies the presidential electors of the states. By New Year's Day of 1877, Congress had still not been able to resolve the disputes. Thus on January 10, 1877 the congressional committees which had been meeting on the subject conceived the notion of appointing a special Electoral Commission to resolve the factual issues. The result reached by the Commission would be accepted unless rejected by both Houses of Congress. Since each party controlled one house, such rejection seemed unlikely. The Commission would have fifteen members, five each from the House, the Senate and the Supreme Court. It was agreed also that the representation would be evenly divided by party, with five Republicans and five Democrats from the Congress, and two from each party appointed from the Justices of the Supreme Court. The four appointed Justices would then select the fifth member of the Court delegation, who would be the fifteenth member of the Commission, from among the remaining Justices. With the remaining fourteen members pre-determined evenly as to political affiliation, the fifth Justice would thus have the deciding vote on the election of the president.

It was therefore important that the fifth Justice be seen as non-partisan. Associate Justice David Davis fit that role. Indeed, the concept of the Commission was built on the presumption that Davis would be elected as the fifth member from the Court. Although Davis was a Republican who had been Lincoln's campaign manager and was rewarded with the Court appointment by Lincoln, his behavior on the bench earned him wide regard as non-political. So with Davis in mind, and the March 4 inauguration of a new president and completion of the incumbent term approaching quickly, both Houses of Congress completed and approved the bill creating the Electoral Commission. The bill passed the Senate in the morning of

January 26 with the vote in the House that afternoon. President Grant signed it on January 29, 1877.

Meanwhile, however, the legislature of the State of Illinois was resolving its own deadlock. A vacancy existed in a United States Senate seat from Illinois. How to fill it? What we know they did was this: also on January 26, 1877 the Illinois legislature elected Justice David Davis to the vacant Senate seat from Illinois. This occurred when, after 39 ballots over several weeks in which Davis had received only occasional token minor Greenback party votes, the large block of Democratic votes suddenly elected him. When this news reached Washington by telegraph mid-day of the 26th, the fact of Davis' election, as well as who had supported it, shocked and surprised everyone. (We often forget that the "modern era of telecommunications" is now one and a half centuries old. The telegraph pre-dates the Civil War, and was certainly in active use for political communications by 1877. Thus as well, to the extent the analysis here requires rapid communication between legislators in Illinois and Davis in Washington, or in the case of Hayes as discussed later, between Hayes in Ohio, and politicians in Louisiana and Washington, the means readily existed.). Davis then withdrew his candidacy for the fifth Court seat on the Commission, but remained for the moment on the Court, pending the seating of the new Congress in March.

Thus with the Electoral Commission Act passed, the four Supreme Court members of the Commission found the necessity to elect another "neutral" member for the fifth Court member Commission. On January 29, 1877, the day President Grant signed the Electoral Commission Act, the four Justices elected Associate Justice Bradley as the most "neutral" candidate.

The electoral events proceeded as are documented historically, and reported by Morris, but we need to add here the events related to the *Munn* decision. The Electoral Commission began to sit on February 5. On February 7 the Commission held its first vote, on which Bradley, to wide surprise and counter to previous private disclosures, voted against the Democrats on a critical issue, and later continued to do so. By the end of the month Bradley had cast all critical votes in favor of the Republicans. On March 1 the Court announced its decision in *Munn v Illinois* and indeed all of the *Granger Cases*, upholding the statutes of the States of Illinois, Iowa, Wisconsin and Minnesota. On March 2 the final electoral ballots for President were certified, and Hayes had won. On March 4, 1877 Hayes was inaugurated President. On March 5 Senator Davis resigned the Supreme Court and on March 7 assumed his new office.

Solving the Puzzle:

So now we know the issue: what could have motivated the Democrats in Illinois elect to the Senate the main hope the national Party previously had of gaining the presidency? How could they do so at such a late stage in the process of creating the Electoral Commission in which Justice Davis was expected to play such a key role? Why would Justice Davis accept the Illinois Democrats' proposition, and was any other price paid in the process?

The known history provides no accepted answers, and Morris repeats but does not add to the record on these questions. The only answer which has been offered, that Tilden or his nephew engineered the Davis election, seems to be neither believed by historians, nor an adequate explanation. The longest published explanation of Davis election to the Senate from Illinois is that of C. vann Woodward, as follows:

“The suspicious timing of the election by the Illinois legislature has given rise to much speculation. The legislature had been deadlocked over the election since January 17, with the Republican members unable to re-elect Senator Logan, the Democrats unable to muster a majority for their candidate, and five Greenbacker Independents holding the balance of power. Davis had received a sprinkling of votes from the Independents from time to time, but suddenly the Democrats joined them and on the fortieth ballot elected Davis by a bare majority. The theory the Republican leaders in Illinois engineered this maneuver is rendered unlikely by the fact that William Henry Smith attributed the election to the manipulations of Tilden and believed that as a result Davis would favor Tilden on the Electoral Commission. Since Smith was in close touch with Republican leaders in Illinois it is unlikely that he would have confided this theory to Hayes if the Davis election was a Republican plot.”¹

Clearly vann Woodward has little faith that Tilden engineered the event. Other authors have stated it was Tilden's nephew, with similar lack of confidence. If Tilden or his nephew did so, for what gain? Surely the Illinois Democrats who elected Davis must have considered the likelihood that after such event he would not serve on, or perhaps not be elected to, a Commission which had been so carefully balanced between the

¹ Page 153-154 in C. vann Woodward *Reunion and Reaction*, Little, Brown and Company, 1951, reprinted 1966.

parties. No further explanation has been offered, in that or any other source, nor by Morris.

The juxtaposition of events of the Commission and the resolution of the *Munn v Illinois* case suggests the answer. Justice Davis' very reputation for political "neutrality" which made him a model "fifth Justice Commissioner" also made him predictable in important ways as a Justice. Court observers could not know what if anything had been decided on the *Munn* case to that date, but they could know Davis' views in earlier related actions. On July 4, 1874 Davis sat on a federal circuit court motion for injunction against enforcement of the Wisconsin Granger law regulating railroads. He denied the injunction but cautioned restraint on both sides. In other cases over the previous decade upholding in various ways the idea that railroads were "public uses", -- including *Olcott v. Supervisors of Fond du Lac County*, 1870, *Chicago Burlington and Quincy R.R. v. County of Otoe* (1870), and *Township of Pine Grove v. Talcott* (1874) -- Davis had dissented. Most prominent of Davis' views favoring liberty was his majority opinion in the 1866 case *Ex Parte Milligan*. In 1864, with the Civil War in full progress, one Lambdin P. Milligan, a private citizen, was not in the favor of the Army of the North (indeed, he had apparently participated in a plan to take over the government of the State of Indiana by force). Milligan was arrested at his home at the order of the commanding general of the military district of Indiana. He was tried by military justice, found guilty and sentenced to be hanged. Milligan's petition for *Habeas Corpus* to the Circuit Court for the federal District of Indiana stated that he was unlawfully restrained, that the military had no jurisdiction, and that other of his rights had been violated. Shortly the matter reached the Supreme Court. Were the question simply government action for the public good, one might conclude that the circumstances justified action against Milligan. But Davis' famous opinion in *Milligan* held resoundingly for Milligan's rights, and he was freed. Thus it did not seem an argument about state action justified by claims of public good, such as drove the *Munn* case, or the previous railroad cases, or *Ex Parte Milligan*, would persuade Davis to support Illinois in *Munn*.. The best prediction was that Davis would favor Munn against Illinois, and dissent if Illinois prevailed.

As well, despite his "neutral" actions as a Justice, Davis' political ambitions were certainly understood in his home state, Illinois. The deadlocked Senate election in Illinois and the evolving structure of the Electoral Commission in Washington thus posed the Democrats of Illinois a unique set of opportunities. Electing Davis to the Senate could remove a predictably unfavorable vote from the Court on the *Munn* case. Removing him in a manner that also helped move the *Munn* case quickly to a "proper" decision would be even better. Davis' potential price was easily determined and within the ability of Illinois

to pay: return Davis to politics as Senator. We do not have direct evidence of explicit negotiation, but surely the Illinois Democrats would not have taken such precipitous actions without prior knowledge that Davis would accept the election; thus, certainly, communication existed. We do know this: contrary to Davis' dissents in previous related decisions, on the March 1 1877 holding in *Munn v. Illinois* he registered no dissent.

The pending construction of the Electoral Commission actually provided the opportunity, indeed from Illinois' view perhaps the necessity, to influence not one but two Justices: Davis and his replacement on the Commission. The most likely replacement was widely believed to be Bradley, who was in fact quickly elected on January 29. Was Bradley also susceptible to influence? Or more to the point, was it credible for Illinois politicians to believe he might be? The answer to this is certainly yes. Simultaneously with the Commission and for years thereafter, newspapers, memoirs, letters, diaries, analyses and books (including Morris') related to the Electoral Commission and Bradley's role on it, discuss documented and rumored meetings between Bradley and persons seeking to influence his votes on the Commission, or claiming to have done so, or complaining of having failed to do so. Morris gives an example of one of the meetings: Bradley showed a Democratic visitor a draft of his views on a matter before the Electoral Commission, arguing the opposite of the position Bradley read and voted the following day.

Bradley's habit of drafting conflicting positions in drafts of decisions, noted by Morris, lends credibility to how discussions might have been conducted regarding the *Munn* case. Our hypothetical meeting of Bradley with a delegation from Illinois is on January 25, 1877, the same day they were surely communicating with Davis. They are curious on who might be elected to the Commission in the unlikely success of the candidacy of Davis for the Senate, and could such event slow those pesky *Granger Case* actions even more? Oh, and by the way, we think we have finally solved that problem of a banking job for your nephew in these economically difficult times. (Shortly later such job did appear). A draft note outlining arguments against *Munn* might be left on a table as Bradley replenishes the brandy supply. Or perhaps the opposite notes are left, leading to more explicit negotiation.

We do know that Bradley had suitable notes. Recall that the Court had met on November 18, 1876 regarding the *Granger Cases* but had issued no decision. When the actual decision was issued on March 1, 1877 the author was Chief Justice Waite, who was not a member of the Electoral Commission. Waite however received considerable assistance in drafting the decision from Bradley. Bradley had

provided a note to Waite on this issue on November 20, 1876, and Waite's opinion drew heavily on Bradley's note. Eventually Bradley's note was returned to him with a handwritten comment on it from Waite: "Had it not been for the within I could never have won your approbation of my own." This also implies that whatever occurred on November 18, 1876 was not a final action on the matter.

Since the circumstance implied by the notes given Waite implies that Bradley already supported Illinois, in January 1877 Bradley could easily offer his support to the hypothetical visitors, and might convey the value and the means of persuading, or removing, Davis. Removal of Davis might at least have had the practical impact of moving the date of issue of the *Munn* decision forward. Waite's action announcing the decision on March 1 meant the Court was still full with Justices who had heard the *Granger Cases* arguments. And, while Waite was not an apparent part of any deal making among the Illinois Democrats, Davis or Bradley, had he known of it or suspected, it would not have hurt the result that Waite was a Republican and close friend of Hayes.

Our potential Illinois visitors to Justice Bradley likely also knew that by offering him a seat on the Electoral Commission, they were giving a currency with real value. From the uproar at Bradley's Commission votes sustaining the Republican electors, it seems clear that the national Democrats felt betrayed by Bradley's actions on the Electoral Commission. It is indeed quite consistent with the facts that Bradley sold his Electoral Commission seat three times: once, to obtain the opportunity with the easy to make promise – easy since he had probably already done so -- of supporting Illinois in the *Munn* case; second, in promising the national Democrats his "neutrality" should they elect him to the Commission; and finally, for whatever benefit he may have gained from the national Republicans for his actual actions. Indeed, as to the second, if the Illinois Democrats also believed Bradley was "neutral" on the electoral issues, a belief which was the basis of his election to the Electoral Commission, they would have been even more secure in reaching a deal that removed Davis from the Electoral Commission.

The 1876 election of Hayes is often attributed to a "Great Compromise". Rejection of the Electoral Commission results would have required common action by both Houses of Congress, but the Democrats only controlled the House of Representatives. Democrats were feared to filibuster the Senate to prevent the electoral ballots from being finally counted. But just as there is no direct record of Davis' agreement with Illinois Democrats, except his subsequent actions, Morris notes that the apparent agreement of Hayes to the "Great Compromise" was made without direct record of a communication with or from him. The open

proponent of Hayes' moderation toward the former Confederate states as a condition for his election was in fact a Democratic congressman from Louisiana, William Levy, whom Morris presumes to have been in contact with more senior Louisiana Democrats back home, who in turn must have had the confidence of Hayes, who was then in Columbus Ohio. The essence of the "Great Compromise" was that Hayes would carry out Tilden's election promises to remove remaining federal troops from the South. Shortly after accepting office, Hayes did just that. Had the Electoral Commission found instead for Tilden there might have been no such "Great Compromise" but the troops likely removed (by Tilden) in any event.

The material change resulting from those events is thus not the "Great Compromise". It is, more likely, the Supreme Court decision against Mr. Munn. The Republicans won the election of 1876. But it was the actions of Democrats, first from Illinois in securing an agreement with Justice Davis, and then from Louisiana with Hayes, that set the final result. Had the *Munn* case held as strongly for individual rights as did the *Milligan* decision a decade before, we might today be free of much of the regulatory burden of modern government.

Further Readings:

Besides the book of Vann Woodward cited in the footnote, the facts relied on for this discussion are found in the texts of the case decisions cited, in Morris' book, and in two volumes of the Oliver Wendell Holmes Devise' *History of the Supreme Court of the United States*, especially Charles Fairman's 1987, Volume VII, *Reconstruction and Reunion 1864-88 Part Two*, at Chapter VII "Public Aid to Railroads; Eminent Domain; and Rate Regulation, the Granger Cases" pp 290 – 371, and also Charles Fairman's 1988 Supplement to Volume VII, *Five Justices and the Electoral Commission of 1877*, documenting the history and actions of the Electoral Commission.