Justice Stephen J. Field sat on the Supreme Court for 34 years – from 1863 to 1897. He outlasted eight presidents and three chief justices. His time on the Court ran from the Civil War, through the Gilded Age, and within a breath of the 20th Century. There is a lot to say about Stephen Field but today I will limit my comments to just two things. First, I would like to tell you something about Field’s experiences in California. Field was a true pioneer. As a young adult, he joined the wave of people who came to California during the Gold Rush of 1849. His experiences in the California frontier left an indelible impression. And the second thing I would like to do is explore a few ways in which his experiences in early California shaped his thinking about the law and the Constitution.

Field is usually thought of as an arch conservative, but I would like to suggest that the ideas to which he subscribed, especially his ideas about economic liberty, were actually revolutionary in the sense that they rejected tradition and gave an entirely new shape to the way we think about our government and our social order.

Let’s begin with Field’s early days in California.

I.

Some time ago, while digging through old documents in the Bancroft library, I ran across a memoir of a California pioneer named William Moses. It was really
more a story than a memoir. In fact, it was really more a tall tale. But I would like to tell it anyway.

Moses recalled that he was working a mining claim in the mountains near Marysville, California. One time, when Moses was visiting the nearest mining camp, he was tapped to sit on a jury. On one side of the dispute was an old miner who, after being stricken with scurvy, staked his claim according to traditional mining code, and went back to the mining camp for treatment. On the other side was a group of accused claim jumpers.

The trial took place in a saloon and gambling house called the Striped Tent. When it began, the justice of the peace ordered the gambling to cease and opened court at a big gambling table in the middle of the establishment. Each side presented its case, and then the gambling resumed while the jury went into another room to deliberate. It didn't take the jury long find in favor of the old miner.

But that didn't end the dispute. Hearing the verdict, the claim jumpers' lawyer leaped from his seat shouting that he would advise his clients to resist the verdict to the hilt of a knife. The jury foreman reacted by pulling a revolver out of its holster and asking the judge whether he intended to protect the jury or if the jury must protect itself. In an instant, Moses recalled, there were a least 20 revolvers and other pistols of various kinds drawn. But the thing about the incident that most impressed Moses was the judge's reaction. Let me read how Moses describes it:

The judge said he would not allow such language by the attorney and would Himself protect the Jury. And — doing what I never saw before — drew from his pocket an eight-inch Bowie knife, placing it back between his teeth. Then from his holster he drew a Navy Colt revolver, cocked it, and placed its muzzle at the lawyer's head — and hissed at him, the command, "Eat those words, or I will send
you to Hell.” The claim jumpers’ attorney meekly said “I eat my words” and everyone returned his pistol to his holster. The judge then turned to the claim jumpers and told them “If you or your lawyer are here at sunrise tomorrow morning, you will never leave this camp again. Court is Closed.”

“That justice of the peace, Moses tells us, was Stephen J. Field. Tall though the tale may or may not be, it captures the moment and perhaps the self-image of California’s pioneers. It is also not much different from accounts that Field himself tells in his memoirs.

II.
His story starts in 1849 when he left the security of his brother’s law practice in New York City and joined thousands in the rush to California’s Gold country. After landing in San Francisco, Field made his way to a settlement at the confluence of the Feather and Yuba Rivers near the northern gold fields. Field and the other settlers who first arrived in the area organized a town and named it Marysville. Since California still operated under Mexican law, they elected Field as alcalde – a Mexican office that had characteristics of both mayor and judge. He later became justice of the peace and, for a short time, was literally the only law northwest of the Yuba.

As alcalde, Field introduced American notions of procedural justice into his courtrooms. He called grand juries, impaneled juries, and appointed lawyers for defendants. Yet he also administered justice and discipline with innovation and flair that could have only taken place in an untamed environment like Gold Rush California. For example, he sometimes ordered that convicted thieves be banished or publicly whipped. He explained that, “because jails were not available, it was the only way they could be saved from lynching.” Yet Field also seemed to take some pride in it. “There is something so degrading about a public whipping, he said, that I have never known a man thus whipped to have stayed in town longer than he could help.” According to his own recollections,
Field’s brand of justice also included a strong dose of mercy. When a man was charged with stealing a cow, Field ruled that there were mitigating circumstances because the man was hungry. He ordered the thief to pay for the cow and dismissed the case. He tells stories of how he convinced a couple seeking a divorce to get back together and how his impassioned speech to a mob saved a man from a lynching.

The important point is that he was able to apply his own brand of justice. The circumstances of the frontier allowed, and perhaps even required, judges to be freewheeling in their interpretations of the law. And, at least in Field’s case, it reinforced an incredibly strong attitude of self-righteousness.

The young pioneer Field may have reveled in his freewheeling, self-righteous application of the law, but he also understood the power that resides in controlling the formal institutions of law.

One of his important accomplishments as Alcalde was setting up a system for recording deeds in Marysville. As we will see, land titles were the source of many disputes in early California. And, Field understood that a recording system lends legal formality to the transfer of property.

III.

It is impossible to overstate the chaos that was Gold Rush California. Easterners brought with them familiar social, political, and legal values. But institutions for applying them were not in place. They did not come to a land that had banks, shops, homes, courthouses, or jails. They had to build those things from scratch. Besides, the 49ers also brought a strong sense of free-spiritedness. They saw the Gold Rush as history’s greatest opportunity to break shackles and traditions that held them back. This may have produced a certain euphoria in the early days, when a man or woman could simply pack a shovel and pan and set off to the gold fields. But the euphoria did not last for long. By the mid-1850s, gold had begun to play out – at least the easy pickings that could be panned from the
streams and creeks. The free-spirited prospector was becoming a rarity. There was still plenty of room for speculation and profit in the state, but more people were pinning their hopes and dreams on farming and small business, and even more were giving up their dreams and going to work for someone else. In this new environment Californians soon became involved in bitter battles over how the wealth of this vast territory would be divided. The battles were intense and sometimes violent. They involved struggles for power and wealth -- but they often were also ideological. And Stephen Field was in the thick of it.

Following his stint as alcalde, Field quickly rose in prominence. After spending a short time in private practice he was elected to the California legislature in 1852 and then to the California Supreme Court in 1857. The Supreme Court Historical Society has published Field’s memoirs, where you will find stories that are tales right out of Western novels. Field recalls how he stared down a rival, Judge William Turner, who had threatened to “cut off his ear and shoot him down on the spot.” He challenges a fellow legislator to a duel, is saved from an attack in a saloon, and is bushwhacked while unarmed.

I am going to skip those stories today, however, and talk about one Gold Rush era dispute in which Field was not a protagonist, but, as a justice of the California Supreme Court, had the final word. The dispute led to the 1859 case called Biddle Boggs v. Merced Mining Company. The name of the case is a bit misleading because it is really a dispute between the famous explorer John Fremont and small mining companies, independent prospectors, and settlers.

To explain the Biddle Boggs dispute it is first necessary to consider the 1846 treaty of Guadalupe Hildago, which ended the war with Mexico and ceded California to the United States. As part of the agreement the United States promised that all grants of land previously made by the Mexican government were to be respected as valid to the same extent as they would have been valid if California had remained under Mexican rule.
But any land not previously granted to individuals by the Mexican government was considered to be public domain of the United States and thus available for homesteading and prospecting.

In 1844 the Mexican government gave Juan Alvarado the rights to a land grant called Las Mariposas. This was an enormous floating grant - which was common under Mexican rule. It gave Alvarado the exclusive right to carve out a 70-square-mile rancho from a much larger area estimated to be 900 square miles. That 900-square-mile area essentially rested in limbo, unavailable to anyone else until the grantee made his choice.

This particular grant did include some explicit conditions. Most striking to me was that Alvarado was forbidden from selling the property. He was also required to inhabit it within one year, survey it, place landmarks, and file a map called a deseno.

Despite the prohibition on sale, in 1847 Alvarado sold his right under the grant to Fremont. In 1852 Fremont filed a claim asking the U.S. Land Commission to recognize his rights to the land. At that time, however, neither he nor Alvarado had satisfied any of these conditions of the grant, and the sale had obviously broken one.

The floating characteristic of the grant and the tenuousness of Fremont’s claim was a recipe for conflict. The 900 square miles from which Fremont would eventually choose his land included prime agricultural lands and, more importantly, a large part of rich gold fields in the foothills of the Sierra Nevada Mountains. During the Gold Rush, people had poured into the area. They staked claims, made homesteads, built towns, started businesses, and panned the rivers and streams.
Many of these people may have been unaware of Fremont’s claim. Some may simply have chosen to ignore it. Others may have thought it was invalid. Certainly most would have thought it should be invalid. These people were raised in an era that idealized homesteading. For many of them the idea that one man had a right to tie up an area of land the size of a small state much less own a block of land the size of a county was un-American and outrageous.

The dispute over ownership of the land was settled before Field came into the picture. In 1854, in Fremont v. U.S., the United States Supreme Court ignored the formalities of Mexican law and turned to informal “Mexican customs and usages” to determine that Fremont’s claim was valid. What wasn’t settled, however, was the ownership of the rights to minerals, for under Mexican law a land grant did not include mineral rights. Unlike American law, which gave those rights to the owner of the surface, Mexican law reserved them to the state.

Independent prospectors and small mining companies, like the Merced Mining Company, which had been working the gold fields for years, insisted that the formal Mexican law regarding the grants should be followed and that this meant the minerals on Mexican land grants now belonged to the United States – and were available for prospecting and independent mining.

This is where the Biddle Boggs v. Merced Mining Company case comes in.

I want to emphasize two things about this case.

First, the case itself – that is, the conflict in the courts – does not really capture the intensity of the battle that raged around this dispute. While the case was making its way through the courts and Fremont’s ownership of the minerals was in question, Fremont employees, Merced miners, and independent prospectors were all working claims in this gold rich area. The rivalry increased in intensity until one point when a group of about 100 armed “Miners and Settlers”
surrounded Fremont men working a mine called the “Black Draft Tunnel” and refused to let them leave. The San Francisco weekly Bulletin reported that the intense siege that followed “threatened a terrible slaughter.” Fortunately, it broke up in about a week when rumors spread that the Governor was sending the state militia.

Second, it is especially significant that the legal dispute itself took place in two stages.

In the first, the majority of the California Supreme Court ruled that the only rights that passed to Fremont under the Treaty of Guadalupe Hidalgo were the rights granted under formal Mexican law. The mineral rights therefore belonged to the United States and were available to independent miners and prospectors. Justice Peter Hart Burnett wrote the opinion. Stephen Field, who had joined the court in 1857, dissented.

Fremont kept the case alive with a motion for rehearing. The motion lay dormant until the general election about a year later. In that election one of Fremont’s lead attorneys, Joseph Baldwin was elected to replace Peter Hart Burnett. The California Supreme Court was, at the time, a three-member elected body, so Fremont’s forces must have been heartened by the election. They were encouraged even more when, in September 1859, their other antagonist, Justice David Terry, killed Senator David Broderick in a duel and resigned from the Court.

Field took the lead in this newly constituted Court. He granted Fremont’s motion for rehearing and, within a year, wrote three opinions that reversed the Court’s first decision. The new Field-led court established a rule that, once the United States recognized the validity of a Mexican land grant, the rights to the minerals passed to the holder of the grant. The cases gave Fremont complete control of
about 70 square miles of California’s richest mineral wealth, most of what now is Mariposa County.

Field’s rationale for rejecting Mexican law was a masterpiece of legal tactics. He reasoned that the Mexican rule — that ownership of minerals remained with the state — was based on the archaic theory of *jura regalia* under which ownership of a nation’s valuable resources were reserved for the king. In doing so, he put his opponents in the awkward position of having to base their claim on a theory of sovereignty that Americans were likely to find distasteful.

Lawyers might have been impressed by Field’s legal skills, but California’s miners and settlers were not. To them, Field’s opinion was anti-democratic. As one complained, “American public use, custom, and opinion had not done away with Mexican Mining law. America’s written law had not repealed it. To the contrary, the people had adopted it. Yet Judge Field had ignored them.”

This complaint — that Field was legislating from the bench — was not the only reason why his critics thought the opinion was anti-democratic. Perhaps more importantly, they worried that the practical effect of the opinion posed a threat to democracy.

Many early Californians saw the California frontier as an opportunity for the homesteader, prospector, and small business owner, and they feared anything that smacked of privilege or landed aristocracy. As one critic put it, decisions like Biddle Boggs threatened democracy by concentrating power in the hands of a few. It had turned Fremont’s Las Mariposas claim into a small principality.

IV.

The Biddle Boggs case provided a rough, but useful, insight into how competing sides in California politics were shaping up, and a pretty accurate prediction of how Stephen Field would fit in.
Field left the California Supreme Court in 1863, when President Lincoln appointed him to the United States Supreme Court. But he didn’t leave California’s political scene. This was an era when Supreme Court Justices still rode circuit. As the justice assigned to the area, Field was the highest federal judicial officer in California and the Pacific Coast. In that role he remained at the center of California politics almost until his death. Looking back over that time, a theme emerges. In virtually every dispute – the squatter riots in Sacramento, battles over ownership of San Francisco’s valuable waterfront property, and any number of disputes involving the Southern Pacific Railroad – Field was lined up with an emerging business elite.

California’s miners, settlers, and laborers took notice.

When Field ran for the Democratic nomination for president in 1879 the San Francisco Examiner wrote, “In any case where the people or the state, or a private citizen, has been a party on one side, and a rich corporation the opposing party, Field has always pronounced opinion or given judgment in favor of the corporation.”

Throughout his career opponents charged Field with unethical conduct, taking bribes, or simply being in the pocket of the rich and powerful.

But you don’t need to find a nefarious plot to explain Field’s tendencies. Certainly Field did associate with California’s economic elite. He socialized with Leland Stanford and Collis P. Huntington of the Southern Pacific, Lloyd Tevis, the president of Wells Fargo, and other members of what some called “the Pacific Club set.” He was one of them and shared their sentiment. These men were the winners in the struggle to divide up the wealth of California. It was natural for them to believe that their rise to the top was a product of their foresight, intelligence, and drive: and that the entire state was better off as a result. They
thought of themselves as men of destiny. Field explains this when he tells us why he decided to go to California. “There was a smack of adventure to it,” he wrote, “the going to a country comparatively unknown and taking part in fashioning its institutions, was an attractive subject of contemplation.”

It is reasonable to conclude that Field’s view of the world and attitude toward the law were guided in part by a belief that such men of destiny should have a great deal of free play to guide the economic growth of the nation and to allow them to reap the rewards of their efforts.

Historians and legal scholars have written numerous books and articles debating Field’s philosophy or doctrine. I have referred to his “view of the world” because it indicates something less structured and formal than philosophy or doctrine. Today I would simply like to explain why I believe Field’s experiences in California – his confidence in men of destiny, men like himself – affected his decision making. And I would like to use two of his opinions, his dissents in the Slaughter House Cases and Munn v. Illinois, to illustrate.

V.
The first of these is Field’s dissent in the Slaughter House Cases.

Justice Field is typically thought of as the godfather of laissez-faire constitutionalism. Much of his legacy lies in promoting a doctrine of economic liberty that would significantly limit the government’s role to regulate the economy. The 14th Amendment’s guarantee that “no state shall deny any person of life, liberty or property without due process of law” was a key element of the doctrine, as was the theory of liberty of contract, which protected the right of individuals to enter into private agreement, free of government interference. And the embryo of liberty of contract is said to be Field’s dissent in the Slaughter House Cases.
There, Field argued that a Louisiana law requiring all New Orleans butchers to practice their trade in a central slaughterhouse interfered with the butchers’ “right to pursue a lawful calling.”

Something of the freewheeling spirit of Field’s pioneer days is reflected in the fact that he was not the least bit troubled that the constitution does not expressly guarantee such a right. He argued that the right to pursue a lawful calling was a natural and inalienable right that belonged to the citizens of all free governments. The 14th Amendment’s protection of liberty merely provided Field with the vehicle for giving it constitutional status.

But there was another, even more obvious, link to Field’s early days in California. This idea of a right to pursue a lawful calling was nothing new to Field. He had used it when his own professional life was threatened. In 1850 his rival, Judge William Turner, disbarred Field. Field argued to the California Supreme Court that he had a right to pursue a lawful calling and could not be arbitrarily deprived of that right without being given notice or a hearing. And he won.

After he became a Justice on the U.S. Supreme Court, He used the doctrine again in the 1867 case, Cummings v. Missouri. In that case he wrote an opinion overruling a law that prohibited people from practicing certain professions — unless they took an oath swearing they had never given aid to the Confederacy. He turned to it yet another time in an 1873 case where he argued that natural justice protected an attorney’s right to his practice law just the same as it protected his real and personal property.

I should point out that Field’s commitment to the right to pursue a lawful profession was not unconditional. On the same day that he dissented in the Slaughter House Cases he agreed with the majority of the Court that the State of Illinois had the right to prohibit a woman from practicing law.
Field’s dissent in the Slaughter House Cases provides a pretty explicit example of how Field’s experiences in California influenced his thinking. The link provided by his dissent in Munn v. Illinois is a little more subtle.

It begins with the observation that, if society was best guided by men of destiny, as Field believed, then collective action, including popular democracy, was at best a nuisance and at worst a dire threat.

The problem with this idea, of course, is that there is a deep tradition of collective action in American history. It is expressed not only as popular democracy but also as a broader and less well defined concept of the “rights of the people” or “rights of the community.”

Concern for the rights of the community is a significant theme of anti-bellum constitutional doctrine. The most famous expression of the principle is found in Chief Justice Taney’s opinion for the majority in the 1837 Charles River Bridge case. Responding to the Charles River Bridge company’s claim that its charter implied an exclusive right to operate a bridge, Taney observed that, “The objective of all government is to promote the happiness and prosperity of the community by which it is established.” This led him to the conclusion that “it can never be presumed that the government intended to diminish its power to accomplish that objective.”

Taney established this presumption in favor of the state in order to achieve the goal of finding a proper balance between property rights and the rights of the community. “While the rights of private property are to be sacredly guarded,” he observed, “We must never forget that the community also have rights, and that the happiness and well being of every citizen depends on their enforcement.”

This paradigm of balancing individual rights against the rights of the community – both being laudable ends – was largely replaced after the 1890s — in the era of
laissez-faire constitutionalism. And, Stephen Field was one of the earliest proponents of the change. The new paradigm emphasized the balancing of individual rights against governmental power.

It also had another element: the refusal to recognize that property rights are not absolute but rather limited by the overriding claims of the community. Mary Ann Gleandon calls it “the illusion of absoluteness.” It is unlikely that anybody believes that property rights or economic liberty are absolute. Certainly Field did not. But this phrase is wonderfully apt. It captures an attitude toward property rights that glorifies individualism and absolute dominion; and an attitude in which the rights of the community and regulation in the public interest are but begrudging exceptions.

The shift did not occur immediately after the Civil War or after the ratification of the 14th Amendment. In fact the majority of the Court expressly rejected it – at least as late as Munn v. Illinois in 1877.

Munn involved an Illinois statute that set maximum rates that could be charged for storing grain in Chicago’s giant grain elevators. One of those grain elevators, the partnership of Munn & Scott, argued that the rate law deprived them of their property without due process of law.

Although Munn’s attorneys lost their case, Chief Justice Waite’s opinion for the majority is remembered today for having given a major concession to those who favored Field’s brand of economic liberty:

In giving his reason for rejecting Munn’s claim, Chief Justice Waite said,

*Down to the time of the adoption of the 14th Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprives*
The owner of his property without due process of law. Under some circumstances they may, but not under all.

The grain elevators were subject to regulation, according to Waite, because they were “businesses affected with public interest.”

It is because of this concession that Munn is best known in constitutional history as a stepping-stone to the Court’s eventual adoption of the doctrine of Economic Due Process — the idea that the due process clause of the 14th Amendment limited a state’s ability to regulate economic matters. In this respect it was a window to the future. And Stephen Field’s dissent provided the best view.

Field’s dissent embodied the “illusion of absoluteness.” He agreed with Munn’s attorneys that, “it was not only the title and possession of property that the Constitution was intended to protect, but also the control of the uses and income.”

Field’s dissent also emphasized the need to balance individual liberty against government power. And, at the same time it reflected some of that “world view” or “habits of thought” that grew out of Field’s experiences in California: His distrust of democracy, and his underlying sense that men of business, or men of destiny, should have a great deal free play to guide the nation’s growth.

Criticizing Waite’s test, Field complained:

If this be sound law, if there be no protection, either in the principles upon which our republican government is founded, or in the protections of the Constitution against such invasion of private rights, all property and all business in the state are held at the mercy of a majority of its legislature.
What is often forgotten about Munn is that it also provides a window to the past. Chief Justice Waite’s opinion explicitly adopted the traditional view – borrowed from Contract Clause Cases like Charles River Bridge – that individual property rights are limited by the rights of the community. He said this in several ways. He observed that:

> When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations with others, he might retain.

The result, he said, is a social compact by which the whole people covenant with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.

The Chief Justice thus concluded that Government has the responsibility and authority to regulate the manner in which each person shall use his property, “when such regulation becomes necessary for the public good.”

It is only a slight exaggeration to say that Waite’s majority opinion in Munn was the last gasp for a long held legal tradition that emphasized the rights of the community as a limit on private property. By the mid 1880s the Court began to move towards Stephen Field’s reasoning and toward a doctrine that idealized the absolutist right of property. Instead of balancing property rights against the rights of the community it began to emphasize a tension between individual rights and governmental power. This was the predominant model that the Court adopted during the era of laissez faire constitutionalism from 1890 to 1937.

Even though the Court reversed course in 1937 and rejected many of the principles of economic due process, the model Field advocated has persisted.
lies at the heart of the constitutional thought of many of today’s political liberals who would balance legitimate government interest – that is, power – against an individual’s freedom of speech or right of privacy.

More interesting to me, it lies at the heart of the constitutional thought of a new breed of economic libertarians. These scholars maintain that the Constitution significantly restricts the state’s power to interfere with an individual’s liberty to use his or her property. They propose that cases involving economic regulation are a matter of balancing economic liberty against state power, and that courts should apply a presumption in favor of liberty.

Although these modern economic libertarians sometimes claim that their ideas are rooted in the framing of the Constitution, I think it is more accurate to say they are the heirs of Stephen J. Field and the ideas he advocated during the last part of the 1800s.

As I mentioned in my opening remarks, Field is often described as conservative. But he was actually a revolutionary in the sense that he rejected tradition and advocated a shift in the very way we think about the nature of our government and social order. However, in his lifetime Field had little success in getting other members of the Court to join him we still feel the impact of his ideas today.

VI.

I would like to close with one of my favorite Stephen Field quotations. After reading hundreds of Field’s opinions and countless public statements, comments to the media, and letters in scratchy, almost illegible, handwriting, I have come to recognize Field as a man who possessed many virtues.

Humility wasn’t one of them. His enormous ego is revealed in a letter he wrote to his friend Judge Matthew Deady in 1884. With characteristic confidence and self-righteousness he told Deady, “The good people of California generally are
furious the first year at my decisions, and about the third year afterwards begin to approve of them.”

Thank you, once again, for inviting me to speak today. It has been an honor and a pleasure.