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The Railroad Question Revisited: Chicago, Milwaukee and St. Paul Railway V. Minnesota and Constitutional Limits on State Regulations

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THE RAILROAD QUESTION REVISITED

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY V. MINNESOTA AND CONSTITUTIONAL LIMITS ON STATE REGULATIONS

JAMES W. ELY, JR.

Few issues more vexed Americans during the Gilded Age than the regulation of railroads. America's first big business, the railroads wielded enormous economic power and by the end of the nineteenth century represented 10 percent of national wealth.[1] Farmers and other local shippers often viewed railroads as an exploitative monopoly and blamed them for excessive and discriminatory charges. They repeatedly clamored for regulation of the freight and passenger rates fixed by railroad companies. Agricultural interests in the Great Plains states were particularly active in seeking regulatory legislation. Railroad investors and managers, on the other hand, opposed regulatory laws and defended their autonomy to determine rates. They feared that governmental control of rates would benefit shippers and farmers at the expense of the railroads by imposing unreasonably low charges. Moreover, they asserted that regulation of rates would likely impair capital investment and thus stifle railroad growth and economic development.

Sectional division was evident in the legislative response to the growth of railroads. The eastern states created advisory commissions that could make reports and recommend reforms but had no enforcement power or authority to set transportation rates.[2] Skeptical about the efficacy of competition, western farmers demanded more stringent governmental control of railroad operations. Their growing resentment was heightened when western railroads passed under the control of eastern investors. During the 1870s the Granger movement spearheaded the drive for the initial wave of more radical state railroad regulations. Many midwestern and southern state legislatures enacted so-called Granger laws to control the prices charged by railroads and related utilities, such as grain elevators and warehouses. They also established powerful commissions to supervise railroad operations and enforce regulatory laws.[3]

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In *Munn v. Illinois* (1877) the Supreme Court adopted a deferential attitude toward legislative authority to regulate economic activity. Sustaining an Illinois law that set the rate for storing grain in Chicago elevators, Chief Justice Morrison R. Waite ruled that "when private property is devoted to a public use, it is subject to public regulation." Whether this public interest doctrine applied to a particular enterprise was considered a matter for legislative judgment. Although recognizing that the owner of property "clothed with a public interest" was entitled to reasonable compensation, Chief Justice Waite further declared that the determination of such compensation was a legislative, not a judicial, task. The only protection for property owners against legislative abuse was resort to the political process. Justice Stephen J. Field vigorously dissented, warning that under the *Munn* rationale "all property and all business in the State are held at the mercy of a majority of its legislature." Asserting that grain storage was a private business, he maintained that the due process clause afforded substantive protection to owners in the use and income of their property.[4] In practice state legislatures rarely applied the *Munn* doctrine to control the charges of any major business other than railroads.

During the 1880s judicial attitudes began to change. The Supreme Court receded from the deferential approach of *Munn* and adopted a more skeptical posture toward state regulation of property and business. In *Stone v. Farmers' Loan & Trust Co.* (1886), for instance, the justices upheld a Mississippi statute that empowered a commission to regulate railroad rates, but they cautioned that such authority was not unlimited. Chief Justice Waite observed that "the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."[5] Simultaneously the Supreme Court began to formulate a substantive interpretation of the due process clause to safeguard fundamental property rights.[6] This laid the basis for the doctrine of economic due process. The court took another step away from *Munn* in *Wabash, St. Louis & Pacific Railway v. Illinois* (1886), holding that state regulation of interstate railroad rates unconstitutionally invaded federal power under the commerce clause.[7]

State courts likewise moved toward increased scrutiny of rate regulations. In *Spring Valley Water Works v. San Francisco* (1890) the Supreme Court of California invalidated a municipal ordinance fixing the rates charged by a privately-owned water company. Cautioning that "[r]egulation, as provided for in the constitution, does not mean confiscation, or a taking without just compensation," the court asserted judicial authority to review the reasonableness of regulated prices.[8]

Historians agree that *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota* (1890) was a milestone in the evolution of economic due process.[9] The decision inaugurated an era of increased judicial scrutiny of railroad and utility rate fixing and enhanced the protection of property rights. Yet this landmark ruling has received relatively little attention from scholars. In view of the renewed interest in economic rights,[10] it seems pertinent to examine the litigation that culminated in *Chicago, Milwaukee*[11] and to assess the decision's place in constitutional history.

Background of the Controversy

In the early 1870s Minnesota experimented briefly with railroad rate regulation but abandoned the system in 1875 amid fears that governmental controls discouraged capital investment. A decade later many western and southern states joined in a new wave of stringent railroad rate regulations.[12] Minnesota was no exception. Republicans dominated Minnesota politics throughout the Gilded Age, a fact that underscores the public consensus favoring regulation of railroad activities. In March of 1887 the Minnesota legislature enacted a comprehensive scheme to regulate the intrastate activities of common carriers.[13] Building upon 1885 legislation that established the Railroad and Warehouse Commission, lawmakers provided

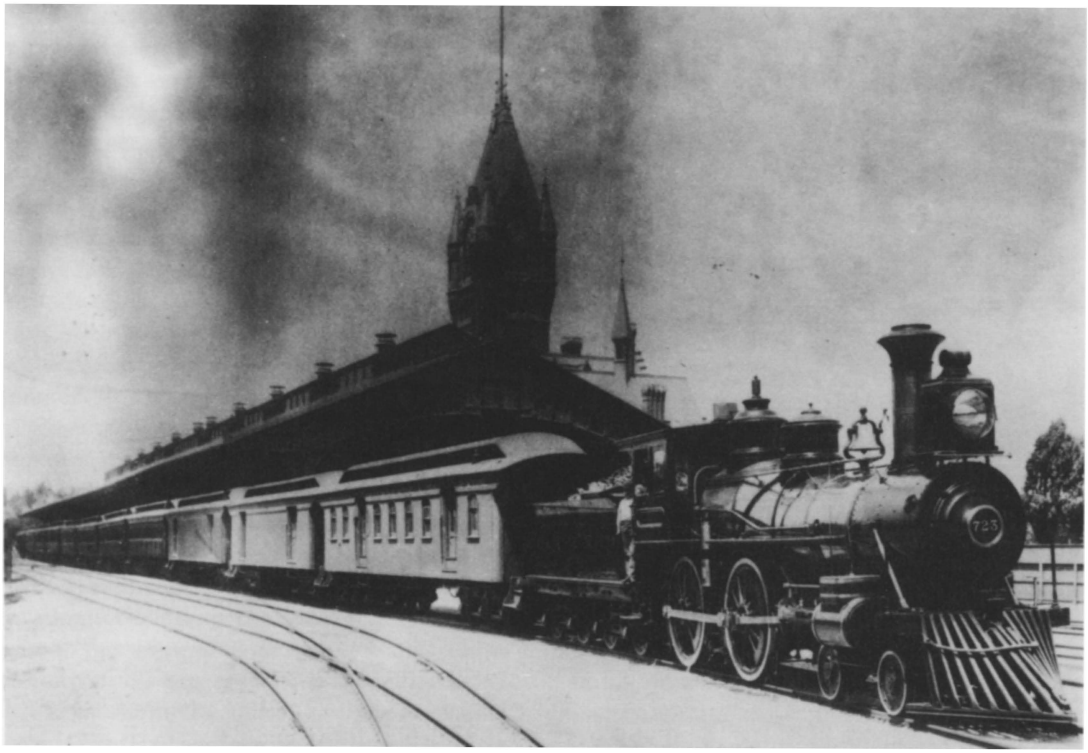

FIG. 1. *A Chicago, Milwaukee & St. Paul Railway passenger train leaving the Milwaukee Union Depot about 1890.* Photograph courtesy of the Milwaukee Public Library, Milwaukee Road Collection.

that all charges for railroad services "shall be equal and reasonable."

Carriers were required to file a schedule of rates with the commission, and the commissioners were empowered to review the reasonableness of charges. The commission could order a railroad to change any fare deemed unequal or unreasonable and could impose a recommended rate. If a railroad failed to comply with such a rate directive the commission could seek a writ of mandamus. The statute also prohibited unreasonable preferences to any shipper and outlawed rebates and the practice of charging more for transportation for a short distance than a long distance. Because at that time neither the Interstate Commerce Commission nor most state railroad commissions had the authority to fix charges, the Minnesota law went beyond the prevailing regulatory models.

Organized under Wisconsin law in 1874, the Chicago, Milwaukee & St. Paul Railway Company was the successor to numerous small railroads. By the late 1880s the company owned nearly 6000 miles of completed track, more than 1400 grain elevators, and numerous terminal facilities. The railroad's main line ran between Minneapolis and St. Paul and Chicago, and other lines extended into Iowa, Wisconsin, Nebraska, and the Dakotas. It was one of four major carriers that served the northern prairie states.[14] Operating in states strongly influenced by Granger agitation, the Chicago, Milwaukee & St. Paul Railway had long battled state fare regulations.

In June of 1887 local boards of trade complained to the Minnesota Railroad Commission that the rates charged by the Chicago, Milwaukee & St. Paul Railway for transporting milk from various points within Minnesota to St. Paul and Minneapolis were unreasonably high. The company countered that the milk rates were in fact low. After a hearing at which both the petitioners and the railroad were represented, the commission concluded that the charges for transporting milk from Owatonna and Faribault were unreasonable. The commission directed that a rate of 2 1/2 cents per gallon in ten-gallon cans be substituted for the existing rate of 3 cents per gallon. When the railroad refused to carry out the recommended reduction in milk rates, the attorney general, acting for the commission, procured a writ of mandamus from the Supreme Court of Minnesota directing the railroad to obey the order or show cause why it should not be followed. The railroad challenged the constitutionality of the rate fixing provision on three grounds: (1) that the legislative authority to set transportation rates could not be delegated to the commission, (2) that under its franchise the railroad was entitled to determine transportation rates, and (3) that the commission's order constituted "a pro tanto taking" of the railroad's property in violation of the due process clause of the Fourteenth Amendment. Counsel further argued that the statute did not provide for a hearing and that the reasonableness of rates was a judicial question.[15]

The Supreme Court of Minnesota unanimously upheld the commission's order in April of 1888. After disposing of jurisdictional issues, the court considered the nature of the commission's rate-setting powers. The court construed the statute to mean that rates recommended by the commission "should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges."[16] Consequently the court refused to review the reasonableness of rates set by the commission.

Turning to the constitutional objections, the court relied heavily on the *Munn* decision and stressed the need for legislative control of railroads. The court described railroads as "practically the public highway system of the country," and declared that "no modern civilized community could long endure that their public highway system should be in the uncontrolled, exclusive use of private owners. The only alternative was either governmental regulation or governmental ownership of the roads."[17] The court charged that railroads, "and even the eminent counsel for the respondent in this case," were reluctant to accept the legitimacy of legislative supervision. Nor were the judges sympathetic to the argument that the power to fix rates might be abused and in effect deprive the railroads of property without due process. Last the court rejected the contention that the act improperly delegated legislative power to the commission. The judges reasoned that the legislature had not conferred upon the commission power to make law but simply granted administrative discretion to carry out the regulatory purpose of the statute.

The Chicago, Milwaukee & St. Paul Railway petitioned for a reargument in part on the grounds that the court did not consider later rulings that limited the *Munn* decision. When this petition was denied the company obtained a writ of error to bring the case before the Supreme Court of the United States. Meanwhile, the order of the commission went into effect.

Supreme Court Decision

The appeal was argued before the Supreme Court on 13 and 14 January 1890. The railroad was represented by its able general counsel, John W. Cary. He was experienced in rate litigation before the Supreme Court, having previously appeared in several companion cases to *Munn*.[18] A proponent of laissez-faire constitutionalism, Cary labored to secure judicial protection for the rights of railroads against state regulation. He espoused the principle that property ownership encompassed the right to set the price for its use. Cary argued that in order to vindicate property rights the reasonableness of rates was a matter for judicial inquiry. In short, Cary was

prominent among a group of attorneys who were instrumental in promoting laissez-faire values and advocating a strong role for the courts in limiting state regulatory power.[19]

This laissez-faire philosophy guided Cary's arguments on behalf of the Chicago, Milwaukee & St. Paul Railway. He first contended that the rate-setting provisions violated the corporate charter in which the Minnesota Territory granted the railroad directors power to fix "the rate of tolls." Hence the Minnesota legislation unconstitutionally impaired the obligation of contract by interfering with the company's rights under its charter.[20]

More significantly Cary then endeavored to restrict application of the *Munn* decision. Insisting that the right to receive value for use of one's property was an essential attribute of ownership, he charged that the Minnesota court judgment "violates the natural right which belongs to every one to fix the price of his services and of his property or its use." Cary conceded that *Munn* limited a railroad to charging reasonable rates, but he denied a legislature's "right to arbitrarily and finally fix or determine such charges by positive statutes." He agreed that a legislature, under its police power, could regulate railroad operations to protect the safety of persons. Cary maintained, however, that this power did not give lawmakers the right to fix transportation charges. In an impassioned plea, Cary argued that rate regulation was unprecedented and "destructive of the rights of property and more to be feared than the insane ravings of the advocates of socialism and the commune." He charged that railroads could be compelled to provide services at an unremunerative rate, effectively confiscating their property. Thus Cary sought to reopen the broad question of legislative control of railroad fares. Contending that "[i]nvestments in railroad property are entitled to the same protection and consideration as other investments," he maintained that a reasonable rate must include "a fair return on the value of the investment or plant of the railroad."[21] Cary finished by arguing that the Chicago, Milwaukee & St. Paul Railway was engaged in interstate commerce and was not subject to the Minnesota law since passage of the Interstate Commerce Act in 1887.

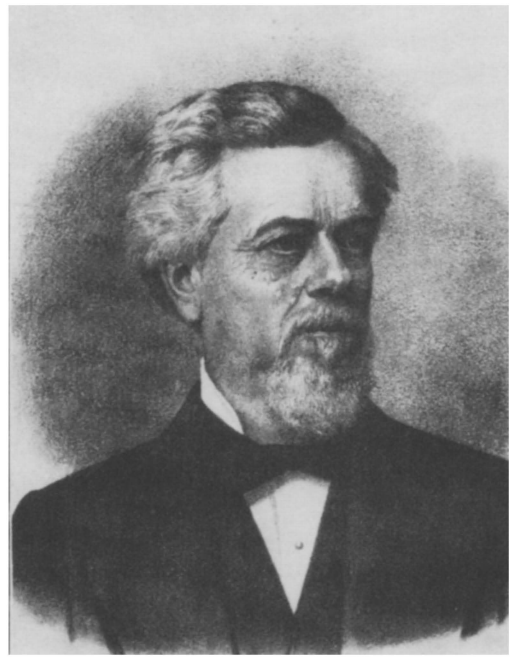

FIG. 2. *John W. Cary (1817-1895) was the principal legal advisor of the Chicago, Milwaukee & St. Paul Railway for many years and argued on behalf of the carrier in the famous* Chicago, Milwaukee *case.* Photograph courtesy of the Milwaukee Public Library, Milwaukee Road Collection.

Attorney General Moses E. Clapp defended the Minnesota rate-fixing act. As might be expected, he emphasized the "unbroken line" of Supreme Court decisions commencing with *Munn* that sustained the power of legislatures to establish rates for common carriers. He recognized that a state could not use regulatory authority to confiscate property but disputed the company's allegations that the milk rate was unreasonable. Clapp concluded by emphasizing first that state legislatures could decide what constituted a reasonable transportation rate and second that "the question of the reasonableness of the rate is a question for legislative determination, and when so determined, ceases to be the subject of judicial inquiry."[22]

On 24 March the Supreme Court in a brief opinion ruled that the rate statute, as construed by the Minnesota Supreme Court, deprived the railroad of property without due process of law.[23] Chief Justice Melville W. Fuller assigned the task of preparing the court's opinion to Justice Samuel Blatchford. One historian has suggested that this assignment was prompted by Fuller's belief that Blatchford, a consensus builder, could fashion an opinion that would hold together a precarious majority for a significant constitutional innovation.[24]

The court first rejected the railroad's contract clause argument. Justice Blatchford held that the general language in the company's charter conferring the power to collect tolls did not constitute a contract freeing the company from any legislative control. This finding simply affirmed the settled doctrine that corporate charters were strictly construed.

The justices, however, found a procedural infirmity in the Minnesota rate law. Although the precise nature of the defect was unclear from the opinion, the court was obviously disturbed about the conclusive nature of the administrative process that determined rates. Justice Blatchford pointed out that the statute did not provide for notice or a hearing before the commission or for judicial review of rates.[25] This was a somewhat curious point because, in fact, the company received both notice and a hearing. Justice Blatchford was seemingly concerned that the commission might find rates to be unreasonable *sua sponte* without any hearing.

The court then moved beyond this procedural objection and asserted the authority to review the fairness of rates imposed by state law. "The question of the reasonableness of a rate of charge for transportation by a railroad company," Justice Blatchford observed, " . . . is eminently a question for judicial investigation, requiring due process of law for its determination." He added:

> If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States.[26]

Blatchford's opinion was somewhat nebulous with respect to the scope of judicial review and did not expressly direct a judicial investigation of rates. But the ruling has generally been understood as establishing that the reasonableness of rates was subject to independent court review. Thus, the *Chicago, Milwaukee* decision contradicted a fundamental principle of *Munn* that rate setting was solely a legislative function. Moreover, it signaled the court's acceptance of the due process clause as a substantive restriction on state legislation authority.

Concurring "with some hesitation," Justice Samuel F. Miller provided a more compelling explanation of the constitutional need for judicial review of rates. He recognized that the states could exercise their authority to regulate transportation charges either by direct legislation or through a commission. But states could not apply either procedure to set a rate "which is so unreasonable as to practically destroy the value of property of persons engaged in the carrying business." It followed that there was "an ultimate remedy" for aggrieved parties in the federal courts, which had a duty to inquire into the reasonableness of rates.[27]

Speaking for the three dissenters, Justice Joseph D. Bradley complained that the decision effectively overruled *Munn* and made the courts "the final arbiter" in rate regulations. He maintained that the determination of reasonable charges was a legislative question, involving considerations of policy as well as remuneration. In his view, judicial relief was only available for fraudulent or arbitrary deprivation of property. He insisted that in this case there was no infringement of property rights "but merely a regulation as to the enjoyment of property."[28]

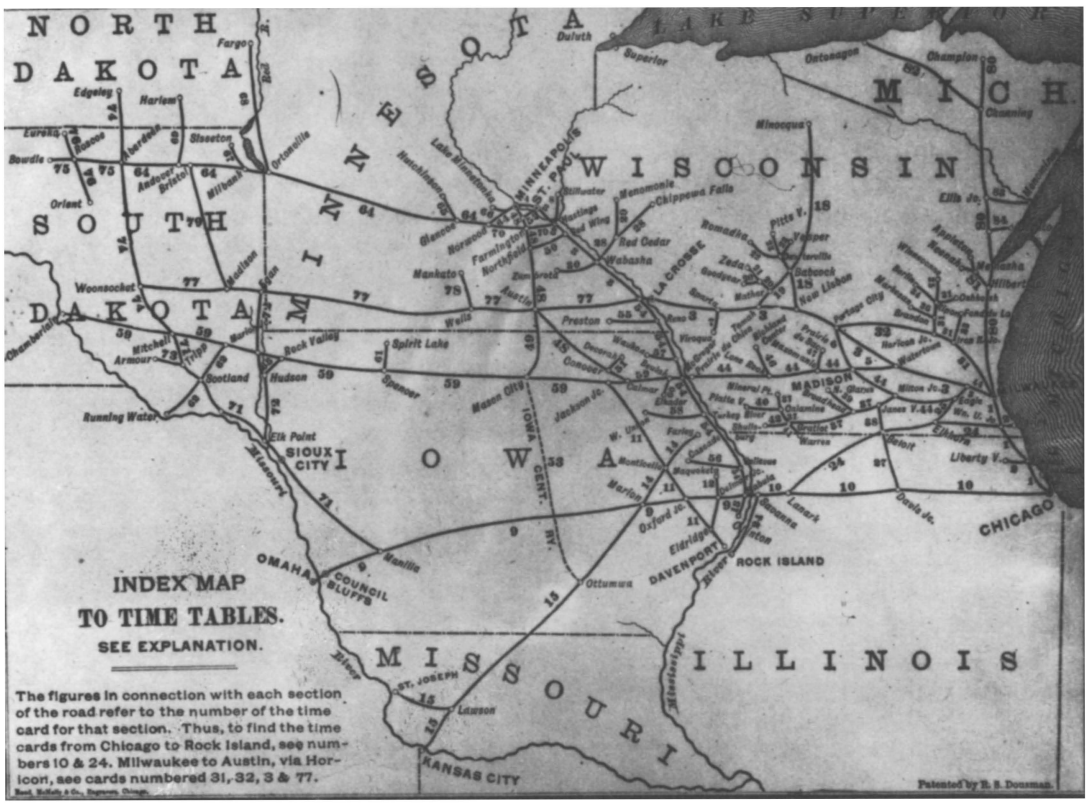

FIG. 3. *An 1894 map illustrates the extensive route of the Chicago, Milwaukee & St. Paul Railway through the upper Midwest and eastern Great Plains.* Photograph courtesy of the Milwaukee Public Library, Milwaukee Road Collection.

RESPONSE

Whatever the ambiguities of Justice Blatchford's opinion, contemporary observers were quick to perceive a sea change in the Supreme Court's attitude toward rate regulations. "It is everywhere regarded as a most important decision," the *New York Times* reported. Railroad officials were elated. An assistant general manager of the Chicago, Milwaukee & St. Paul Railway commented that "the decision is a ray of hope to railroads oppressed by confiscatory legislation." One railroad agent declared that the carriers "could now feel secure of their property." Another railroad manager added, "I think the action of the highest court in the country will call a halt on this [granger] class of legislation." The *Winona Daily Republican* quipped: "Whenever you see a railroad man smile now a days you may look to the Supreme court decision for its inspiration."[29]

Reaction in Minnesota was generally hostile. As might be expected, the Populists were particularly bitter. The executive committee of the State Farmers' Alliance unanimously adopted a series of resolutions prepared by Ignatius Donnelly severely censuring the Supreme Court. The resolutions declared that the *Chicago, Milwaukee* decision signified "the subjection of the people and the states to the unlimited control

of the railroad corporations of this country." Attacking the concept of judicial review, the resolutions appealed "from this second Dred Scott decision to the people of the nation; and we ask them to consider whether any other race would submit to have their liberties thus wheedled away from them, on technicalities, by a squad of lawyers, sitting as a supreme authority high above Congress, president and people." Last, the executive committee charged that in "our anxiety to protect the rights of property we have created a machinery which threatens to destroy the rights of man."[30]

Newspaper comment, while more restrained, was also largely negative. The *Minneapolis Tribune* maintained that "the Western Legislatures and commissions have in general been sufficiently lenient and reasonable in their demands for reduction of rates." Although agreeing that the railroads should have a right to be heard, the *Tribune* worried that the decision might allow the carriers "through tediously and cunningly delayed litigation to break down" the power of regulation. Similarly, the *Red Wing Argus* observed that the *Chicago, Milwaukee* ruling caused people to wonder "whether the legislators or the courts made the laws of the land." The *Winona Daily Republican* charged that the Supreme Court "takes the purely technical view of the question involved, and . . . looks first of all and chiefly to the interests of the roads."[31]

In contrast, the *St. Paul Dispatch* hailed the *Chicago, Milwaukee* ruling and decried the 1887 act as "the product of an unreasoning warfare upon the railroads." The *Dispatch* called upon the legislature to adopt "the more moderate policy" of the eastern states in supervising railroad operations. Likewise the *St. Paul Pioneer Press* commended the Supreme Court for fixing "an insuperable barrier against the tide of destructive agrarian and confiscatory legislation and judicial decisions which have threatened the unlimited spoliation of all railroad properties."[32]

Leading legal journals tended to look with favor on the *Chicago, Milwaukee* decision. An article in the *Albany Law Journal* defended judicial review of rates "because if otherwise, it would be giving to the Legislature the authority of deciding the constitutionality of their own acts." One commentator in the *America Law Register* construed the decision as strengthening the rights of property owners against the imposition of rates that resulted in a deprivation of property. He declared that "all lovers of individual liberty, of law and justice can properly rejoice. It is a most momentous decision." Such enthusiasm was not universal. A note in the *American Law Review* sharply criticized the ruling and emphasized the interpretative problems posed by Justice Blatchford's ambiguous opinion. The author was uncertain whether the decision turned on a narrow procedural point or established broad judicial supervision of legislative rate determinations. If it implied the latter, he decried the decision as "an overturning of the fundamental principles upon which all our American governments are founded."[33]

As the debate over *Chicago, Milwaukee* raged, Minnesota officials worked to salvage the regulatory scheme. The railroad commissioners recommended that the law be amended to include judicial review of rates. This approach was adopted by Governor William R. Merriam, a Republican, in his 1891 message to the legislature. Avoiding any criticism of the decision, he pointed out that when the regulatory statute was enacted it was generally understood that the legislature was the final arbiter as to what rates were reasonable. Governor Merriam explained that the Supreme Court

> has determined that action upon such matters is not final either in a commission or in the legislature itself. The power of the legislature to make reasonable rates for common carriers is not denied, but whether a given rate so made is reasonable is a judicial question, and must be settled as other matters of law and fact are determined, through the medium of the courts.[34]

Accordingly, he urged a statutory amendment to provide a method of judicial review.

Heeding the governor's request, lawmakers amended the 1887 rate statute. Much of the earlier measure was unchanged, but the amend-

ment stipulated that rates set by the commission should be treated only as prima facie evidence of reasonableness. The amendment also provided for notice and a full administrative hearing before the commission. Finally, the amended statute expressly established the right of a railroad to appeal commission orders to the state district courts, which had jurisdiction to examine "the whole matter in controversy."[35] These changes brought the Minnesota rate law into conformity with the constitutional requirements of *Chicago, Milwaukee*.

Assessment

Although a major victory for the railroads, the outcome in *Chicago, Milwaukee* did not inaugurate an era of laissez-faire in the transportation industry. The fears of the Populists to the contrary, the Supreme Court continued to recognize the power of state legislatures to regulate railroad and storage rates. The federal judiciary only protected carriers against unreasonable charges, and the railroads had to demonstrate their unreasonableness.[36] Still, the *Chicago, Milwaukee* ruling materially restricted state regulatory authority, and lawsuits seeking to invalidate state-imposed rates multiplied rapidly in the next decade.

Despite the Supreme Court's retreat from the *Munn* doctrine, the decision was not an abrupt departure from existing constitutional norms. Starting in 1886 the court had cautioned in several cases that states could not, consistent with due process, impose confiscatory rates on regulated industries.[37] The justices came to realize that unlimited power of regulation might be used to destroy the value of railroad property. Once the Supreme Court distinguished between rate regulation and confiscation, judicial supervision of rates followed logically. Judicial oversight simply provided a vehicle by which the justices could vindicate property rights against confiscatory legislation. If the states had unlimited power to fix charges, then constitutional protection against confiscation was illusory and regulated industries had only those rights to use property that lawmakers chose to recognize.

Why did the Supreme Court move away from the *Munn* doctrine of unfettered legislative power to control rates? Scholars have sometimes depicted *Chicago, Milwaukee* as part of a pervasive pro-business bias on the part of the justices.[38] This rationale is problematic. After all, during the Gilded Age the Supreme Court upheld many state-imposed regulations on business activity. A more compelling explanation, offered by Mary Cornelia Porter, is that the court "was less interested in rate regulation per se than in assuring that regulated utilities would continue to attract the investment capital necessary for expanding and improving services to the public."[39] The importance of investment security was clear to contemporary observers. One railroad official revealingly stressed that the *Chicago, Milwaukee* decision "will afford a very great safeguard to railroad investments." He explained that the ruling "comes at a very opportune time, for the reason that the frequent attacks in the West on railroad property by legislators and commissioners were beginning to sap the confidence of investors all over the world in the safety of investments in American railroad properties."[40] This was a crucial point because Europeans invested heavily in many western railroads, including the Chicago, Milwaukee & St. Paul Railway.[41]

Railroads long had feared that legislatively imposed rates would favor local interests and discourage long-term economic growth. An official of the Chicago, Milwaukee & St. Paul Railway explained that

> the railways have back of their adjustment of the rates the selfish interest of their own prosperity, which depends upon the prosperity of all the business on their lines, while a political commission if given this power would have nothing at stake but the political success of the influences which placed it in office.[42]

The growing intensity of rate regulation in the

Gilded Age made the court more aware of the deficiencies in the *Munn* doctrine and increasingly sympathetic to the position of the railroads. In short, experience served to undermine judicial confidence in legislative and administrative rate determinations. Gradually the justices saw *Munn* in a new light. While no doubt concerned about unwarranted intrusion on the property rights of the railroads, the court also sought to fashion uniform national standards that guarded investment capital against impairment by inadequate compensation. Further, it became apparent that out-of-state investors had no meaningful opportunity to "resort to the polls" for protection, as suggested in *Munn*. Judicial redress was the only realistic remedy against unduly low rates.

Perhaps the most significant consequence of *Chicago, Milwaukee*, however, was its far-reaching impact on the constitutional protection of property rights generally. By mandating the judicial review of imposed rates, the Supreme Court implicitly recognized that protection of property went beyond title and possession. Ownership encompassed the right to use property for economic value. This step markedly enlarged the range of property interests secured by the Constitution.[43] In addition the decision opened the door for the doctrine of economic due process. Once the Supreme Court accepted the notion that the due process clause mandated reasonableness in the context of rate controls, it was an easy step to apply this substantive restraint to economic regulations generally.[44] Soon the court was assessing regulations against a reasonableness standard and striking down measures it deemed unduly restrictive of property rights.[45]

The *Chicago, Milwaukee* ruling also had implications for the reach of the takings clause of the Fifth Amendment. The court's expressed worry that rate regulations might deprive the railroad of its property without due process portended extension of the takings clause to the states. In fact the dissenters had complained that the majority opinion proceeded on the assumption that the Constitution prohibited the states from taking private property without compensation. The dissenting justices pointed out that "there is no such clause," and that the states could make their own regulations governing the payment of just compensation.[46] Yet the majority opinion's tendency to assimilate due process protection of property with deprivation of lawful usage foreshadowed a prompt judicial move to enlarge the guarantees available to property owners under the Fifth Amendment. In *Chicago, Burlington and Quincy Railroad Company v. Chicago* (1897) the justices unanimously held that the just compensation requirement constituted an essential element of due process as guaranteed by the Fourteenth Amendment.[47] Hence, the just compensation principle became in effect the first provision of the Bill of Rights to be applied against the states.

The *Chicago, Milwaukee* ruling had a particular impact on the states of the Great Plains. Responding to farmer dissatisfaction with the management of railroads, lawmakers in the prairie jurisdictions enacted a host of laws designed to restrict passenger and freight rates and the charges of grain elevators. Consequently, enlarged judicial review of railroad charges would be felt keenly in the Great Plains. Indeed much of the rate litigation after 1890 originated from the prairie states.[48]

An unresolved question raised by *Chicago, Milwaukee*, of course, was how to distinguish a valid rate regulation from a confiscatory rate. The Supreme Court wrestled with this complex issue in a number of cases during the 1890s. Eventually, in *Smyth v. Ames* (1898), the court unanimously held that a utility was constitutionally entitled to a "fair return" upon the "fair value" of its property.[49] An attempt to protect regulated industries against confiscatory rates, the fair value rule proved difficult to administer. In the ensuing decades federal courts became heavily involved in supervising the rate-making process.[50] At the same time Congress enacted a series of statutes that imposed more stringent federal controls over railroad charges.[51]

Conclusion

Chicago, Milwaukee was a landmark case in

which the Supreme Court moved toward more vigorous protection of property rights. Historians, influenced by the Progressive school, have often criticized the decision for giving federal courts the power to review the substantive reasonableness of state-imposed rates. Charles Fairman, for example, championed the *Munn* doctrine and Justice Bradley's dissenting opinion in *Chicago, Milwaukee*. "Who can doubt," he asked, "that the Court would have done much better had it never quit the path Justice Bradley first pointed out?"[52]

This analysis, however, is open to dispute. Farmers and shippers who called for railroad rate regulations often pursued an opportunistic course that benefited their economic interests. In a sense, then, the movement for railroad regulation sought a redistribution of wealth from the carriers to consumers. State agencies frequently yielded to parochial pressures in setting rates, thereby threatening the long-term economic health of the railroads. Yet only by generating a profit could the railroads attract capital investment and continue to provide services. It followed that state rate regulations had a direct impact on national transportation policy. Herbert Hovenkamp has pointed out that "the potential for abuse, particularly for free-riding by the states, was substantial, and federal control by either legislation or judicial intervention was clearly necessary." The federal courts, he added, were "the only competent federal arm to control state free-riding and protect the integrity of the national railroad system."[53]

Although criticized for granting the federal courts authority to review the substance of rates, the justices of the Supreme Court followed sound instincts. Judicial review placed some restraint on the marked tendency of legislators and regulators to set railroad rates at unrealistically low levels, often at the behest of special interest groups. Despite the rule of *Smyth v. Ames*, governmental regulation of railroad charges steadily increased in the early decades of the twentieth century. Indeed several scholars have identified heavy-handed rate regulation and cumbersome rate-setting procedures as major factors in the decline of America's railroads.[54] Arguably the court should have reviewed rates more aggressively to protect the security of capital investment and thus encourage maintenance of an adequate rail service.

Last *Chicago, Milwaukee* has demonstrated impressive staying power. Following the constitutional revolution of 1937 the Supreme Court abandoned economic due process, retreated from meaningful review of rate fixing, and relegated property rights to a secondary position.[55] But the Supreme Court has never overruled *Chicago, Milwaukee* and continues to require judicial review of administrative decisions touching on constitutional rights. Recently the Supreme Court has even shown renewed interest in constitutional restraints on utility rate making. In *Duquesne Light Co. v. Barasch* (1989) Chief Justice William Rehnquist, speaking for the court, reiterated the long-standing rule: "The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[56] Rehnquist stressed that a rate must afford adequate compensation. Thus after one hundred years *Chicago, Milwaukee* continues to influence constitutional law and provide at least symbolic protection to property rights.

NOTES

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1. Harold U. Faulkner, *Politics, Reform, and Expansion: 1890-1900* (New York: Harper and Row, 1959), p. 75.

2. Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989), pp. 197-98; Lawrence M. Friedman, *A History of American Law*, 2nd ed. (New York: Simon and Schuster, 1985), pp. 446-47.

3. Hall, *Magic Mirror* (note 2 above), p. 198; Solon J. Buck, *The Granger Movement* (Cambridge: Harvard University Press, 1913), pp. 123-205. One authority has noted that the "real heart of the anti-

railroad, or 'granger movement' as it is usually known, came in the state regulatory laws of the Middle West." Robert Edgar Riegel, *The Story of the Western Railroads* (New York: Macmillan Company, 1926), p. 143.

4. *Munn v. Illinois*, 94 U.S. 113, 130, 140 (1877).

5. *Stone v. Farmers' Loan & Trust Co.*, 116 U.S. 307, 331 (1886). See also *Dow v. Beidelman*, 125 U.S. 680, 689 (1888) and *Chicago and North Western Railway v. Dey*, 35 F. 866 (Cir. Ct., Iowa, 1888). As early as 1884 Chief Justice Waite observed in a rate challenge: "What may be done if the municipal authorities . . . fix upon a price which is manifestly unreasonable, need not now be considered." *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354 (1884).

6. James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992), pp. 82-100.

7. *Wabash, St. Louis & Pacific Railway v. Illinois*, 118 U.S. 557 (1886).

8. See Katha G. Hartley, "*Spring Valley Water Works v. San Francisco*: Defining Economic Rights in San Francisco," *Western Legal History* 3 (1990): 287; *Spring Valley Water Works v. San Francisco*, 82 Cal. 286, 307 (1890).

9. John E. Semonche, *Charting the Future: The Supreme Court Responds to A Changing Society, 1890-1920* (Westport, Connecticut: Greenwood Press, 1978), pp. 16-20; David P. Currie, "The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910," *University of Chicago Law Review* 52 (1985): 324, 371-75. In a leading law casebook, *Constitutional Law*, 11th ed. (Westbury, New York: Foundation Press, 1985), Gerald Gunther described *Chicago, Milwaukee* as "a significant turning point," but relegated consideration of the case to a footnote, p. 447, n. 8.

10. E.g., Bernard H. Siegan, *Economic Liberties and the Constitution* (Chicago: University of Chicago Press, 1980); Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985); Note, "Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered," *Harvard Law Review* 103 (1990): 1363.

11. The different names of the Chicago, Milwaukee & St. Paul Railway over time may give rise to some confusion. The carrier was commonly known as the St. Paul Road in the late nineteenth century. Following a reorganization in 1928 the railroad was popularly called the Milwaukee Road. This article employs the title *Chicago, Milwaukee* to describe the Supreme Court case under investigation.

12. George H. Miller, *Railroads and the Granger Laws* (Madison: Wisconsin University Press, 1971), pp. 117-39; Charles Fairman, "The So-called Granger Cases, Lord Hale, and Justice Bradley," *Stanford Law Review* 5 (1953): 587, 600-606; Buck, *Granger Movement* (note 3 above), pp. 196-97. For agrarian distrust of the railroads in Minnesota see William E. Lass, *Minnesota: A Bicentennial History* (New York: W.W. Norton, 1977), pp. 164-74.

13. An Act to Regulate Common Carriers, and Creating the Railroad and Warehouse Commission of the State of Minnesota, ch. 10, Minnesota Laws of 1887.

14. August Derleth, *The Milwaukee Road: Its First Hundred Years* (New York: Creative Age Press, 1948), p. 137 and Appendix A; John F. Stover, *The Life and Decline of the American Railroad* (New York: Oxford University Press, 1970), pp. 56-57; F. Stewart Mitchell, "The Chicago, Milwaukee & St. Paul Railway and James J. Hill in Dakota Territory, 1879-1885," *North Dakota History* 47 (1980): 11. See also John W. Cary, *The Organization and History of the Chicago, Milwaukee & St. Paul Railway Company* (1893; rpt. New York: Arno Press, 1981).

15. For the factual background and arguments of counsel see Third Biennial Report of the Railroad and Warehouse Commission as to Amendments and Revisions of the Railroad Laws of Minnesota, 1890, *Minnesota Executive Documents for Fiscal Year Ending July 31, 1890*, vol. 3 (1891): 400-442.

16. *State ex rel. Railroad and Warehouse Commission v. Chicago, Milwaukee & St. Paul Railway Company*, 38 Minn. 281, 295, 37 N.W. at 784 (1888).

17. *Id.* at 296-97, 37 N.W. at 785-86.

18. *Peik v. Chicago and North-Western Railway Company*, 94 U.S. 164 (1877); *Chicago, Milwaukee & St. Paul Railroad Company v. Ackley*, 94 U.S. 179 (1877); *Stone v. Wisconsin*, 94 U.S. 181 (1877).

19. Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez Faire Came to the Supreme Court* (Princeton: Princeton University Press, 1942), pp. 70-77, 161-62; John W. Cary, "Limitations of the Legislative Power in Respect to Personal Rights and Private Property," American Bar Association Report 15 (1892): 245-86.

20. Brief for Plaintiff in Error, John W. Cary, Counsel, 14-17.

21. *Id.*, at 18, 28, 23, 72.

22. Brief for Defendant in Error, Moses E. Clapp and H. W. Childs, Attorneys, 14.

23. *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U.S. 418, 456-57. A companion case, decided the same day, arose out of a similar factual situation. The Minnesota Commission ordered a small local railroad to reduce its rate for handling and switching cars in Minneapolis. The company protested that the imposed rate was too low and provided an inadequate compensation, thus depriving the company of its property. Reversing the rate decree, the Supreme Court held that the "views

and considerations applicable to" *Chicago, Milwaukee* "apply with even greater force to the present case." *Minneapolis Eastern Railway Company v. Minnesota*, 134 U.S. 467, 482 (1890).

24. Semonche, *Charting the Future* (note 9 above), p. 19.

25. *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U.S. 418, 457 (1890).

26. *Id.*, at 458.

27. *Id.*, at 459-60. For an analysis of Justice Miller's views, see Charles Fairman, *Mr. Justice Miller and the Supreme Court, 1862-1890* (Cambridge: Harvard University Press, 1939), pp. 202-5.

28. *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U.S. 418, 466 (1890).

29. *New York Times*, 26 March 1890; quoted in *Winona Daily Republican*, 1 April 1890; quoted in *St. Paul Dispatch*, 25 March 1890; *Winona Daily Republican*, 1 April 1890.

30. Minnesota State Farmers' Alliance, Constitution and By-Laws, Declaration of Principles, Resolutions . . . (1890), 20.

31. *Minneapolis Tribune*, 26 March, 1890; *Red Wing Argus*, 3 April 1890; *Winona Daily Republican*, 26 March 1890.

32. *St. Paul Dispatch*, 25, 26 March 1890; *St. Paul Pioneer Press*, 25 March 1890.

33. Henry L. Harrington, "Legislative Interference With the Freedom of Railroad Corporation Contracts," *Albany Law Journal* 51 (1895): 246, 249; William Draper Lewis, "Can Prices Be Regulated by Law?" *American Law Register* 41 (1893): 9, 16; Note, *American Law Review* 24 (1890): 516, 522.

34. Biennial Message of Governor William R. Merriam, 14 January 1891, *Minnesota Executive Documents for Fiscal Year Ending July 31, 1890*, vol. 1 (1891): 37.

35. An Act to Amend Chapter Ten [1887] Entitled "An Act to Regulate Common Carriers, and Creating the Railroad and Warehouse Commission of the State of Minnesota," ch. 106, Minnesota Laws of 1891.

36. See Alton D. Adams, "Reasonable Rates," in William Z. Ripley, ed., *Railway Problems*, rev. ed. (Boston: Ginn and Co., 1913), pp. 604-9 (discussing *Chicago, Milwaukee* and judicial review of the reasonableness of rates). See also Cary, "Limitations on the Legislative Power" (note 19 above), pp. 284-86 for an assessment of the *Chicago, Milwaukee* decision.

37. See cases cited in note 5 above.

38. Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of the Bar and Bench, 1887-1895* (Ithaca, New York: Cornell University Press, 1960), pp. 39-45. Melvin I. Urofsky has sharply criticized the role of the federal courts in scrutinizing rates and contended that judicial review "gave railroads one more weapon to fight regulation." *A March of Liberty: A Constitutional History of the United States* (New York: Alfred A. Knopf, 1988), p. 526.

39. Mary Cornelia Porter, "That Commerce Shall Be Free: A New Look at the Old Laissez-Faire Court," *1976 Supreme Review*, pp. 135, 143.

40. Quoted in *St. Paul Dispatch*, 25 March 1890.

41. Albro Martin, *Enterprise Denied: Origins of the Decline of American Railroads, 1897-1917* (New York: Columbia University Press, 1971), pp. 133-34; Dorothy R. Adler, *British Investment in American Railways, 1834-1898* (Charlottesville: University Press of Virginia, 1970), pp. 185, 191 n, 199, 210. Riegel, *Western Railroads* (note 3 above), p. 139.

42. Burton Hanson, *Unfair Railway Agitation* (Chicago: 1905), p. 51. Another railroad executive urged competition rather than regulation to hold down rates and pointed out that "the great majority of the railways in the United States are the creation of private enterprise and capital, and that the people in their collective capacity have not been taxed in order to construct them." Sidney Dillon, "The West and the Railroads," *North American Review* 152 (1891): 443, 451.

43. Stephen A. Siegel, "Understanding the *Lochner* Era: Lessons From the Controversy Over Railroad and Utility Rate Regulations," *Virginia Law Review* 70 (1984): 187, 210-15.

44. Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, 7th ed. (New York: W.W. Norton, 1991), pp. 406-8; Urofsky, *March of Liberty* (note 38 above), p. 500.

45. See Paul Kens, *Judicial Power and Reform Politics: The Anatomy of Lochner v. New York* (Lawrence: University Press of Kansas, 1990).

46. *Chicago, Milwaukee & St. Paul Railway Company v. Minnesota*, 134 U.S. 418, 465 (1890).

47. *Chicago, Burlington and Quincy Railroad Company v. Chicago*, 166 U.S. 226 (1897).

48. E.g., *Brass v. North Dakota*, 153 U.S. 391 (1894); *Smyth v. Ames*, 169 U.S. 466 (1898).

49. *Smyth v. Ames*, 169 U.S. 466 (1898).

50. Siegel, "Understanding the *Lochner* Era" (note 43 above), pp. 215-59.

51. Stover, *Life and Decline* (note 14 above), pp. 113-16.

52. Fairman, "So-called Granger Cases" (note 12 above), p. 670.

53. Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge: Harvard University Press, 1991), p. 160.

54. Stover, *Life and Decline* (note 14 above), p. 247; Martin, *Enterprise Denied* (note 41 above), pp. 354-60. Similarly, Forrest McDonald has maintained that railroads "became the first industry to be destroyed, in the long run, by an excess of regulation." McDonald, *A Constitutional History of the United States*

(Malabar, Florida: Robert E. Krieger Publishing Co., 1982), p. 184.

55. Ely, *Guardian of Every Other Right* (note 6 above), pp. 119-34.

56. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989). See Richard J. Pierce, Jr., "Public Utility Regulatory Takings: Should the Judiciary Attempt to Police the Political Institutions?" *Georgetown Law Journal* 77 (1989): 2031.