AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 7: The Republican Era – Separation of Powers



**State of Minnesota ex rel. Railroad & Warehouse Commission v. Chicago, Milwaukee & St. Paul Railway Company, 38 Minn. 281** (1888)

*The late nineteenth century witnessed the invention of a new governmental form, the regulatory commission. The commission would soon become the model for how the federal and state governments would regulate economic actors. The regulatory commission challenged traditional understandings of the separation of powers. The multi-member commissions were designed to be independent of both the legislative and executive branch, with the commissioners often holding staggered, fixed terms of office. Boards of policy experts with their own staff of assistants, the commissions were given broad ranging powers to formulate and enforce regulations in a given policy area. The powerful commissions seemed to combine legislative, executive, and judicial functions and were charged with acting on missions that were only loosely defined, leaving the commissioners themselves with a free hand to formulate public policy. The first and most prominent of the federal regulatory commissions was the Interstate Commerce Commission, created in 1888 to regulate the routes and rates of interstate rail traffic.*

*The states had led the way in experimenting with both railroad regulation and the commission form. Railroads posed new political and economic challenges for the states in the late nineteenth century. The massive railroad building boom of the early nineteenth century had connected cities and markets in the northeast and its immediate surroundings, creating opportunities for economic growth and political fallout from failed speculative ventures. After the Civil War, railroads stretched across the continent, tying the farms of the Midwest to the distant markets on the coasts, converting small, independent communities into dependent nodes in a national commercial network. The economic disruptions were severe; the political reaction powerful and creative, giving rise of populist political movements that had little success in national politics but were a significant political force in many states.. Farm states tried various ways to control the prices that the railroads could charge to carry crops to market and manufactured goods to the countryside, and the railroads fought back in the courts.*

*In 1887, the Minnesota legislature passed a statute creating the Railroad and Warehouse Commission and requiring that railroads rates be "equal and reasonable." Railroads operating in the state were required to submit their rate schedule to the commission, and the commission was empowered to impose a new schedule of rates on a railroad if it determines that the posted rates were unequal or unreasonable. A few months later the commission ordered the Chicago, Milwaukee and St. Paul Railway Company to reduce the price it charged for transporting milk from three cents per gallon to two-and-a-half cents per gallon on a route from several rural towns to St. Paul and Minneapolis. When the company failed immediately to make the change, the commission sought a writ of mandamus from the state supreme court ordering the railroad to comply. The railroad responded by arguing that the statute unconstitutionally interfered with the company's property rights to set its own rates, delegated legislative power to the commission to set rates, and interfered with the judicial power to determine whether the railroad's rates met the statutory standard of being equal and reasonable.*

*The court upheld the act against all challenges. In the excerpt below, the state supreme court addressed the question of whether the statute had unconstitutionally delegated the lawmaking power to a body other than the state legislature and validated the commission form. This early ruling in the closely watched case proved influential in both state and federal courts that were called upon later to evaluate whether the emerging regulatory state had stripped legislatures of their primary function. The delegation question was a matter of state constitutional law, and the state supreme court was the final arbiter of state constitutional law. But the property rights question involved federal constitutional law and could be appealed to the U.S. Supreme Court, and the railroad did. On the question of whether the railroads were entitled to challenge in court the commission's findings that their rates were*

*unreasonable and concluded that by shielding the commission from judicial scrutiny and not providing the railroads an opportunity to contest the commission's findings, the U.S. Supreme Court concluded that Minnesota had violated the Fourteenth Amendment's prohibition on abridging property rights without due process (134 U.S. 418 [1890]).*



JUSTICE MITCHELL, delivered the opinion of the Court

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3. This brings us to the question of the validity of the act -- that is, the authority of the legislature to confer such powers upon this commission**.** That the legislature itself has the power to regulate railroad charges is now too well settled to require either argument or citation of authority. The history of the contest over this question is still fresh in the minds of all. Railways had become practically the public highway system of the country. The situation was anomalous, being the first instance in history where a public highway system was at the same time owned by private parties, and exclusively used by those who owned it. . . . [W]e know of no decision of any court, state or federal, in which the doctrine of the cases referred to has been modified, denied, or overruled, and it must now be accepted as a settled fundamental principle in American constitutional law. In fact, it was settled in the only way that any such question can be permanently settled, viz., in accordance with public policy and public necessity, for 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.

It is insisted, however, that while the legislature might authorize a commission to recommend rates, and might declare that the rates so recommended should be *prima facie* evidence of what is equal and reasonable, yet it is not within its power to set up a commission whose judgment or determination as to what is reasonable should be final and conclusive; that this is a judicial question, which can only be determined by the courts; that the railway company has a right to controvert before a court the reasonableness of the rates fixed by the commission**;** that, if absolute power to fix rates be given such a body, it may be abused to the extent of practical confiscation, and depriving the companies of their property without due process of law. This argument is not a new one. It is the same that was advanced 15 years ago against the right of the legislature itself to regulate rates, and, if it is sound, it would apply with equal force to either case. The power might be abused by the legislature, as well as by a commission**.** But the liability of a power to abuse is no argument against its existence; and, should the legislature directly fix rates, the railway company would no more have its day in court, or a judicial determination of their reasonableness, than if fixed by a commission**.** This argument was met and fully answered in the decision of the *Granger Cases* (1877), already referred to. Its fallacy consists in failing to distinguish a case like the present from one of mere private contract, in which the public has no interest. . . .

This brings us to the only remaining question in the case. It is contended that the power to regulate rates, -- if it exists at all, -- is legislative; and therefore the act is void, because it delegates legislative power to a commission**.** This is really the most important question in the case. The constitution of the state vests all legislative power in a legislature, consisting of a senate and house of representatives. It is, of course, one of the settled maxims in constitutional law, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body. Where the sovereign power of the state has located the authority it must remain. The department to whose judgment and wisdom this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies, and substituting their judgment and wisdom for its own. . . . The legislature only must determine what it shall be. "In enacting a law, the legislature must pass on two things: *First*, on its authority to make the enactment; *second*, on the expediency of the enactment. It cannot refer either of these questions to the decision of any one else." . . . It is not every grant of powers, involving the exercise of discretion and judgment, to executive or administrative officers, that amounts to a delegation of legislative power. The difference between the departments undoubtedly is that the legislative makes, the executive executes, and the judiciary construes, the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not unnecessarily enter. *Wayman* v. *Southard* (1825). The principle is repeatedly recognized by all courts that the legislature may authorize others to do things

which it might properly, but cannot conveniently or advantageously, do itself. . . . These powers often necessarily involve in a large degree the exercise of discretion and judgment, even to the extent of investigating and determining the facts, and acting upon and in accordance with the facts as thus found. In fact, this must be so, if the legislature is to be permitted effectually to exercise its constitutional powers. If this was not permissible, the wheels of government would often be blocked, and the sovereign state find itself helplessly entangled in the meshes of its own constitution. The statute books are full of legislation granting to officers large discretionary powers in the execution of laws, the validity of which has never been successfully assailed. We might mention as examples of this the grant of power to courts to adopt rules governing their own practice and process; the power given to boards for the control of public institutions to make contracts, fix prices, and adopt rules reasonably adapted to carry out the purposes of their creation. The power of taxation is legislative, but this does not require the legislature itself to assess the value of each man's property, or determine his share of the tax. The exercise of the police power in requiring persons who follow certain occupations to obtain a license is legislative; but nothing is more common than to delegate to certain officers or boards the power to ascertain and determine whether persons have the proper qualifications as to learning, skill, or moral character, and to grant or refuse a license according as they may find the facts to be. The difference between the power to say what the law shall be, and the power to adopt rules and regulations, or to investigate and determine the facts, in order to carry into effect a law already passed, is apparent. The true distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and the conferring an authority or discretion to be exercised under and in pursuance of the law. *Cincinnati, etc. R. Co.* v. *Commrs. Clinton County*, 1 Ohio St. 77, 88 (1852).

It seems to us that the authority and discretion conferred upon this commission is of the latter kind. The legislature enacts that all freight rates and passenger fares should be just and reasonable. It had the undoubted power to fix these rates at whatever it deemed equal and reasonable; but what are equal and reasonable rates is a question depending upon an infinite and ever-changing variety of circumstances. What may be such on one road, or for one description of traffic, may not be such on or for another. What are reasonable one month may not be so the next. For a popular legislature that meets only once in two years, and then only for 60 days, to attempt to fix rates, would result only in the most ill-advised and haphazard action, productive of the greatest inconvenience and injustice alike to the railways and the public. If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic. If experience has proved anything in the so-called railroad problem, it is that mere abstract laws against unequal or unreasonable railroad charges are of little or no avail; hence modern legislation has usually taken the form of creating boards of commissioners, intrusted with general supervision over railroads. . . . They have not delegated to the commission any authority or discretion as to what the law shall be, -- which would not be allowable, -- but have merely conferred upon it an authority and discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is entirely permissible. The legislature itself has passed upon the expediency of the law, and what it shall be. . . . Authorities precisely in point on this question are few. We are referred to no case where the grant of such authority and discretion to a board or commission has been held invalid, as a delegation of legislative power; but, on the contrary, numerous cases can be found in which the validity of acts conferring similar powers has been sustained. . . .

Our opinion is that the act is not obnoxious to the objection made. Let the writ issue as prayed for.

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