Substantive Review of Price Controls.—Ironically, private businesses, once they had been found subject to price regulation, seemed to have less protection than public entities. Thus, unlike operators of public utilities who, in return for a government grant of virtually monopolistic privileges must provide continuous service, proprietors of other businesses receive no similar special advantages and accordingly are unrestricted in their right to liquidate and close. Owners of ordinary businesses, therefore, are at liberty to escape the consequences of publicly imposed charges by dissolution, and have been found less in need of protection through judicial review. Thus, case law upholding challenges to price controls deals predominantly with governmentally imposed rates and charges for public utilities.

In 1886, Chief Justice Waite, in the *Railroad Commission Cases*,[157] warned that the "power to regulate is not a power to destroy, and . . . the State cannot . . . do that which in law amounts to a taking of property for public use without just compensation, or without due process of law." In other words, a confiscatory rate could not be imposed by government on a regulated entity. By treating "due process of law" and "just compensation" as equivalents,[158] the Court was in effect asserting that the imposition of a rate so low as to damage or diminish private property ceased to be an exercise of a state's police power and became one of eminent domain. Nevertheless, even this doctrine proved inadequate to satisfy public utilities, as it allowed courts to intervene only to prevent imposition of a confiscatory rate, *i.e.,* a rate so low as to be productive of a loss and to amount to taking of property without just compensation. The utilities sought nothing less than a judicial acknowledgment that courts could review the "reasonableness" of legislative rates.

Although as late as 1888 the Court doubted that it possessed the requisite power to challenge this doctrine,[159] it finally acceded to the wishes of the utilities in 1890 in *Chicago, M. & St. P. Railway v. Minnesota*.[160] In this case, the Court ruled that "[t]he question of the reasonableness of a rate . . . , involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company

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was disapproved in Ferguson v. Skrupa, 372 U.S. 726 (1963), and Tyson & Bro. v. Banton, 273 U.S. 418 (1927), was effectively overruled in Gold v. DiCarlo, 380 U.S. 520 (1965), without the Court's hearing argument on it.

[157] 116 U.S. 307, 331 (1886).

[158] This was contrary to its earlier holding in Davidson v. New Orleans, 96 U.S. 97 (1877).

[159] Dow v. Beidelman, 125 U.S. 680 (1888).

[160] 134 U.S. 418, 458 (1890).