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# THE HOMESTEAD ACT, PACIFIC RAILROAD ACT AND MORRILL ACT

*Professor Roger D. Billings\**

## I. INTRODUCTION

When the Civil War began, the federal government was just a minor player on the national scene. Its primary function was to operate the post office. The cabinet consisted of the Attorney General and the Secretaries of War, Navy, State, Treasury, Interior, and Post Office. The Secretary of War presided over an Army of around 16,000 men<sup>1</sup>. The chief sources of income were customs collections and sales of public lands. There was no income tax.<sup>2</sup>

When war began, the only way to raise money quickly was to borrow, and so the U.S. began to sell bonds on a massive scale.<sup>3</sup> There was not a penny to spare from the war effort, but it was still possible to have far-reaching, domestic programs without spending any of the war dollars. In 1862, President Lincoln signed into law the Pacific Railroad Act, the Homestead Act, and the Morrill Act, which promoted transportation, cultivation of land, and higher education, respectively.<sup>4</sup> Lincoln also signed laws creating the Department of Agriculture<sup>5</sup> and authorizing an Internal Revenue Commissioner. In the midst of the country's worst crisis, Lincoln presided over the greatest increase in the size of government of any president.

Lincoln was prepared, however, when he signed the bills creating these three Acts. As a youth, he benefitted from the availability of public land for his family's farm. As a young legislator in Illinois, he championed "internal improvements" such as railroads<sup>6</sup>, and later as a lawyer he defended the Illinois Central Railroad from lawsuits that could have crippled it.<sup>7</sup> Finally, having missed out on a college education himself, he sent his son to an elite Eastern

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1. LTC. JEFFREY J. GUDMENS, *STAFF RIDE HANDBOOK FOR THE BATTLE OF SHILOH, 6-7 APRIL 1862* 1-2 (Combat Studies Institute Press 2002).

2. DONALD T. PHILLIPS, *LINCOLN ON LEADERSHIP: EXECUTIVE STRATEGIES FOR TOUGH TIMES* 181 (DTP/Companion Books 1992).

3. *Id.* at 182.

4. *THE LIBRARY OF CONGRESS CIVIL WAR DESK REFERENCE* 148-149 (Margaret E. Wagner, Gary W. Gallagher, Paul Finkelman, eds., Simon & Schuster 2002).

5. MAXINE ROSALER, *THE DEPARTMENT OF AGRICULTURE* 14-15 (The Rosen Publishing Group, Inc. 2006).

6. WARD M. MCAFEE, *CITIZEN LINCOLN* 33-36 (Nova History Publications 2004).

7. OLIVIER FRAYSSÉ, *LINCOLN, LAND AND LABOR* 151-53 (Sylvia Neely, trans., University of Illinois Press 1994) (1988).

college.<sup>8</sup> When presented with the Morrill Act, Lincoln understood the need for land grant colleges that would make a college education available to the masses.

The U.S. government financed the three acts with the only currency it had: public lands. When the thirteen colonies became the United States there were millions of acres of public lands. Virginia, for example, extended all the way into an undeveloped region now known as Kentucky. Vast new territory was added through both the Louisiana Purchase of 1804 and the Mexican War that ended in 1848. Then Indian Territory West of the Mississippi became available for settlement as wagon trains headed for San Francisco after the 1848 gold rush. Meanwhile, United States land offices sold public land in the states formed out of the Northwest Territory, present-day Ohio, Indiana, Illinois, Michigan, Wisconsin and parts of Minnesota. But in 1861 there was still plenty of public land available to finance the Pacific Railroad Act, Homestead Act, and Morrill Act.

## II. THE PACIFIC RAILROAD ACTS OF 1862 AND 1864

Transportation before the Civil War moved over rivers, canals, turnpikes, and railroads. In 1825, New York City bet on the Erie Canal to keep its port prosperous.<sup>9</sup> But just two years later the upstart city of Baltimore granted a corporate charter to the Baltimore and Ohio Railroad, hoping to make its port competitive with New York.<sup>10</sup>

At first the railroads seemed like a weak alternative for canals and plank roads, but eventually railroads came to dominate the moving of goods and people.<sup>11</sup> Champions of other modes of transportation were not pleased with the rise of railroads, however. One of their last attempts to block the progress of railroads was stopped by Abraham Lincoln. In the Rock Island case,<sup>12</sup> steamboat interests argued that the mere existence of a railroad bridge was an impermissible hazard to steamboat navigation on the Mississippi. Lincoln's arguments as counsel for the railroad produced a hung jury and the railroad bridge remained.<sup>13</sup>

In 1834, the federal government began to grant rights-of-way to railroads for a width of 60-100 feet through public lands.<sup>14</sup> Rights-of-way included the right to use water, earth, stone, and timber on adjacent public land for railroad

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8. DAVID HERBERT DONALD, ABRAHAM LINCOLN: GREAT AMERICAN HISTORIANS ON OUR SIXTEENTH PRESIDENT 36 (Brian Lamb, Susan Swain, eds., Perseus Books Group 2008).

9. See CLIVE DAY, A HISTORY OF COMMERCE 506-07, 509 (Longmans, Green, and Co. 1914) (1907).

10. JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 1 (University Press of Kansas, 2001) (quoting CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS, 1800-1890 52-61 (New York, 1960)).

11. See DAY, *supra* note 9, at 514.

12. GOODRICH, *supra* note 10, at 51-61.

13. ALLEN D. SPIEGEL, A. LINCOLN, ESQUIRE 97-101 (Mercer University Press 2002)

14. Resolution of June 25, 1834, Ch. 3, 4 Stat. 744.

construction, to alter the drainage and build embankments, and to take additional land for depots and water tanks.<sup>15</sup> At about this time Lincoln tried, without success, to get funding for railroads from the Illinois legislature. He also proposed a scheme for selling public lands. The Panic of 1837, unfortunately, ended the early push for development of railroads.<sup>16</sup>

Before the Panic, land speculators, many from the East, borrowed heavily and put prices on an upward spiral. The rising wealth encouraged the Illinois General Assembly to adopt massive financing for internal improvements such as railroads and canals. To fund them, the legislature authorized a new Illinois bank to issue notes from which the state would reap the profits. The legislature also authorized the state to issue bonds which would be paid off with tax revenues. Soon, however, funds were lacking to repay notes and bonds. As revenues dried up, Lincoln promoted a stimulus plan to keep the internal improvements going; it was unsuccessful.<sup>17</sup> Insolvencies multiplied until finally the United States enacted its second bankruptcy act. This had the desired effect of helping conclude the Panic of 1842, and was promptly repealed in 1843 after it served its purpose.<sup>18</sup>

As a youth, Lincoln developed many of his ideas about internal improvements by reading the Louisville Journal, which supported Henry Clay's "American System."<sup>19</sup> Later that term was borrowed to name the so-called "Illinois System."<sup>20</sup> Clay advocated a national bank, a protective tariff, and roads and waterways for carrying goods to market. Roads, waterways, and soon railroads, were improvements Lincoln promoted unceasingly during his eight year legislative career that began in 1834. Lincoln never waived in his support for these improvements even after the Panic was in full swing.<sup>21</sup> Although he was without means himself, he demonstrated a penchant for spending public money.

In his first session of the Illinois General Assembly, Lincoln cast his votes for central government and the role he thought it should play in development of the state. He voted to spend \$500,000 for the Illinois and Michigan Canal to

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15. See Danaya C. Wright, *The Shifting Sands of Property Rights, Federal Railroad Grants, and Economic History: Hash v. the United States and the threat to Rail-Trail Conversions*, 38 Environmental Law 711, 717 (2008).

16. DONALD, *supra* note 8, at 61.

17. RICHARD CARWARDINE, *Lincoln, A LIFE OF PURPOSE AND POWER* 14 (Random House, 2003).

18. Act of Aug. 19, 1841, 5 Stat. 440-449 (1835-45) (act to establish a uniform system of bankruptcy throughout the United States); EDWARD J. BALLEISEN, *NAVIGATING FAILURE: BANKRUPTCY AND COMMERCIAL SOCIETY IN ANTEBELLUM AMERICA* 102-105 (Chapel Hill: University of North Carolina, 2001); BRIAN DIRCK, *LINCOLN THE LAWYER* 63-64 (Urbana and Chicago: University of Illinois Press, 2007).

19. See CLIFTON M. NICHOLS, *LIFE OF ABRAHAM LINCOLN* 56 (Mast, Crowell & Kirkpatrick 1896).

20. RICHARD CARWARDINE, *Lincoln, A Life of Purpose and Power* 14 (Random House, 2003).

21. See DONALD, *supra* note 8, at 61-62.

connect the Illinois River with Lake Michigan.<sup>22</sup> This would provide transportation of goods from Illinois farms via the Great Lakes and Governor DeWitt Clinton's Erie Canal all the way to the Atlantic Coast. Since President Jackson had quashed any hope of a national bank, Lincoln voted in 1835 to charter a state bank.<sup>23</sup> In a special session in 1835 to strengthen support for the canal, a flood of bills were introduced for new roads, bridges, canals, and railroads. They were for the most part not adopted, only discussed, but were a harbinger of the bills adopted in 1836 that would eventually break the bank. In that 1835 session, however, Lincoln was already active on behalf of the Whig party and managed to get the legislature to authorize incorporation of another canal, the Beardstown and Sangamon Canal.<sup>24</sup> It just so happened that this Canal would end at the proposed town of Huron which Lincoln had laid out as a surveyor and where he and his friends owned lots. The penurious Lincoln had not purchased his lots but was given them in payment for surveying the town.<sup>25</sup>

At the General Assembly session that began in 1836, Lincoln and his Whig party would join with the Democrats and Stephen A. Douglas in a massive, profligate, and nonpartisan plan of internal improvements.<sup>26</sup> The amount of debt ultimately authorized exceeded the states' annual tax revenue. Some improvements were surely justified if they were on sound financial footing. The internal improvements might have been manageable as first proposed, but Lincoln and his Whig friends from Sangamon County, called "the long nine," also wanted votes to move the state capitol from Vandalia to Springfield.<sup>27</sup> Critics alleged that in order to win votes for Springfield, "the long nine" supported projects for extra improvements in counties all over the state. David Donald found no evidence of log-rolling.<sup>28</sup> Michael Burlingame, on the other hand, wrote that, under Lincoln's direction, the long nine did promise to support internal improvements in return for endorsement of the state capitol at Springfield.<sup>29</sup>

The scale of internal improvements became unrealistic, but Lincoln seemed blissfully ignorant of the risk. He did not perceive the state's inability to finance so many improvements, for even after the panic started he advocated for continued expenditure. Gabor Boritt calls Lincoln's actions "optimistic

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22. DAVID DONALD, *LINCOLN* 59 (Simon & Shuster, 1995).

23. Act of Feb. 12, 1835, 1835 Ill. Laws 7-14 (act to incorporate the subscribers to the bank of the State of Illinois).

24. PAUL SIMON, *LINCOLN'S PREPARATION FOR GREATNESS, THE ILLINOIS LEGISLATIVE YEARS* 35 (University of Illinois Press, 1971) (1965).

25. See DOUGLAS L. WILSON, *HONOR'S VOICE: THE TRANSFORMATION OF ABRAHAM LINCOLN* 49 (Vintage Books 1999) (1998).

26. See DONALD, *supra* note 22, at 61.

27. *Id.* at 62.

28. *Id.*

29. BENJAMIN P. THOMAS, *MICHAEL BURLINGAME, ABRAHAM LINCOLN: A LIFE* 116 (The Johns Hopkins University Press, 2008).

innocence.”<sup>30</sup> When the dust settled, the 1836-37 General Assembly session had authorized Illinois to sell \$10,000,000 in bonds for a central railroad from Cairo to Galena (with six spur lines to satisfy communities not on the mainline), and an East West “Northern Cross” railroad connecting Jacksonville, Springfield, and Danville; \$400,000 was authorized to improve five rivers for navigation; \$200,000 more would be a kind of slush fund for counties not benefitting from the railroad and river money.<sup>31</sup> (Recall that the Illinois and Michigan Canal had already been authorized.)<sup>32</sup> The historian of Lincoln’s legislative years, Paul Simon, said that this General Assembly record reached an all-time low. The representatives were all born outside the state and the large majority had no legislative experience. Ten million dollars was a substantial debt for a state that at the time had a tax base of only five million dollars.<sup>33</sup>

Just as this expansive program was adopted, forces were building for a panic. Ten U.S. land offices throughout the state were busily selling public lands, often to Eastern and even foreign investors. Sales were growing fast: 354,010 acres in 1834; nearly 2,100,000 in 1835; and 3,200,000 in 1836.<sup>34</sup> Resale values were rising, borrowing was excessive, and a bubble was developing. When the bubble burst, land values fell; speculators defaulted on loans they owed on land purchases; banks were no longer receiving interest income from speculators; banks suspended paying specie to those who had bought their notes (specie was gold and silver coin); bank notes, hitherto a kind of currency, fell to less than face value; and Illinois state bonds fell to fifteen cents on the dollar. It became impossible for the state to sell more bonds to continue financing the improvements, and construction came to a halt.<sup>35</sup> Ultimately, reduced state tax revenue did not even cover the \$600,000 annual interest on \$10,000,000.<sup>36</sup>

During the 1838-39 General Assembly session the economy seemed to have stabilized, and it looked for a time as though the banks might muddle through. Lincoln joined those in the legislature who tried to keep internal improvements going, but he was in the minority. He proposed a resolution to request the U.S. Government to sell the state of Illinois the 20 million acres of remaining public lands at 25 cents an acre, for around \$5,000,000. The state would then resell the acres at \$1.25 and use the profits to continue work on the improvements. The Illinois legislature adopted the resolution, but the U.S. Congress ignored it. Thus ended Lincoln’s attempt at a stimulus package.<sup>37</sup>

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30. GABOR BORITT, *LINCOLN AND THE ECONOMIES OF THE AMERICAN DREAM* 25 (Memphis State University Press, 1978).

31. See DONALD, *supra* note 22, at 61.

32. *Id.*

33. SIMON, *supra* note 24, at 49-50.

34. JAMES E. DAVIS, *FRONTIER ILLINOIS* 207, 209 (Indiana University Press, 1998).

35. DONALD, *supra* note 22, at 61.

36. STEPHEN B. OATES, *WITH MALICE TOWARD NONE* 54 (Harper & Row, 1977).

37. SIMON, *supra* note 24, at 155-56.

In 1839, the second half of a “double dip” panic was underway. The State Bank again suspended payment of notes in specie, destroying note holders’ confidence. At a special session of the 1840 General Assembly, Lincoln did a foolish thing in an attempt to keep the Bank alive: he jumped out a window to try to deprive the legislature of a quorum.<sup>38</sup> Had he succeeded, the Bank would have been allowed temporarily to continue paying specie.<sup>39</sup> It remained for Lincoln to cash in on the back end of the panic. The law firm of Lincoln and Logan handled more bankruptcy cases in the U.S. District Court at Springfield than all but three other Illinois law firms. They handled seventy seven cases at fees of around \$10.00 apiece for the mostly uncontested bankruptcies.<sup>40</sup>

Benjamin Thomas reports that the state finally racked up \$17,000,000 in debt, ceased paying interest on it in July 1841, and only completed one project, the Illinois and Michigan Canal in 1845 with the help of English investors who, after all, had purchased most of the bonds. Governor Thomas Ford dissolved the moribund banks at the same time.<sup>41</sup> When the state stopped paying interest in 1841, work on railroads stopped and farmers began planting crops on the abandoned gradings.<sup>42</sup> Only twenty four miles of track had been built.<sup>43</sup> Construction of railroads did not begin in earnest until ten years later when legal and economic conditions were favorable.

Congress made the first of many federal land grants for building railroads when it passed an act in 1850 to give 2,595,000 acres of public land to the state of Illinois.<sup>44</sup> Illinois was to charter a corporation for the Illinois Central Railroad and to grant the land to the newly-formed corporation.<sup>45</sup> The act was the first to introduce the concept of granting the railroad alternate sections of land along the route for each completed mile of track.<sup>46</sup> The Illinois Central was built between 1852 and 1856 with hundreds of miles of track from Chicago to Cairo. Illinois Central was also Abraham Lincoln’s most important client. Some of Lincoln’s cases established early legal precedent on the responsibility of the railroad to owners of lands adjoining the track, the railroad’s relationship with passengers and shippers, the regulation of affairs between stockholders and directors, and most importantly, the railroad’s exemption from taxation by each county through which it passed.<sup>47</sup>

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38. ILLINOIS OFFICE OF SECRETARY OF STATE, BLUE BOOK OF THE STATE OF ILLINOIS 319 (Louis L. Emmerson, ed., Illinois State Journal Co. State Printers 1921).

39. BENJAMIN P. THOMAS, ABRAHAM LINCOLN: A BIOGRAPHY 78 (Alfred A. Knopf, Inc. 1976) (1952).

40. DONALD, *supra* note 22, at 97; DIRCK, *supra* note 18, at 63-64.

41. THOMAS, *supra* note 39, at 78-79.

42. *Id.*

43. MARK NEELY, JR., THE ABRAHAM LINCOLN ENCYCLOPEDIA 254 (McGraw-Hill, 1982).

44. Act of Sept. 20, 1850, 9 Stat. 466.

45. See FRAYSSÉ, *supra* note 7, at 151-153.

46. ELY, *supra* note 10, at 562.

47. AMBROSE, STEPHEN E., NOTHING LIKE IT IN THE WORLD 29 (Simon & Shuster, 2000); CHARLES LEROY BROWN, E. LANE, *Abraham Lincoln and the Illinois Central Railroad*, 36 JOURNAL

Lincoln's interest in railroads carried over into his presidency. The idea of a transcontinental railroad surfaced before the War, but northern and southern interests were deadlocked over the route it should take. A southern route would develop the Southwest rapidly and encourage the formation of slave states. A northern route would please the industrial interests of the East and at the same time discourage extension of slavery. Secretary of War Jefferson Davis insisted on a southern route<sup>48</sup>; Abraham Lincoln and Stephen A. Douglas promoted a northern route.<sup>49</sup> When the Civil War removed southern representatives and senators from Congress, the way was open for approval of a northern route. President Lincoln signed the Pacific Railroad Bill on July 1, 1862.<sup>50</sup> A second piece of legislation established a common gauge for track width so that cars could be transferred between railroad companies.<sup>51</sup> More railroad and land grants followed, notably the Northern Pacific Grant.<sup>52</sup>

The Pacific Railway Act called for two corporations to build the transcontinental railroad.<sup>53</sup> The Union Pacific would build west from the Missouri River, and the Central Pacific would build east from Sacramento. Capital stock of the Union Pacific was to be 100,000 shares at \$1,000 each, totaling \$100 million.<sup>54</sup> President Lincoln received notice that enough stock had been subscribed in September, 1863.<sup>55</sup> Still, after Union Pacific stock went on sale, only 2,000 shares were subscribed at \$1,000 each, the ten percent down payment required for the \$10,000 share price. This amounted to two million dollars raised from sale of stock compared to the estimated 100 to 200 million dollars cost of the railroad.<sup>56</sup> The Central Pacific had already been incorporated under California laws requiring capital stock of \$1,000 for each mile of a projected railroad. At first the Central Pacific was projected at only 115 miles, the distance between Sacramento and Nevada.<sup>57</sup>

Capital stock could not begin to finance the railroads. The money to build would come primarily from two other sources, namely sales of land grants and

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OF THE ILLINOIS STATE HISTORICAL SOCIETY 122-25, 133 (1943); *Illinois Central Railroad Co. v. County of McLean*, 17 Ill. 291 (1856).

48. THAMAR E. DUFWA, *TRANSCONTINENTAL RAILROAD LEGISLATION, 1835-1862* 56-57 (Arno Press 1981) (1933).

49. See CHARLES P. ROLAN, *AN AMERICAN ILLIAD: THE STORY OF THE CIVIL WAR* 91 (The University Press of Kentucky 2004) (1991); also see THOMAS, *supra* note 39, at 138-139.

50. Pacific Railway Act, ch. 120, 12 Stat. 489 (1862).

51. Act of Mar. 3, 1863, 12 Stat. 807 (act to establish the gauge of the Pacific Railroad and its branches); SARAH H. GORDON, *PASSAGE TO UNION, HOW THE RAILROADS TRANSFORMED AMERICAN LIFE, 1829-1929* 105-6 (Ivan R. Dee, Dec. 2, 1997).

52. Northern Pacific Grant, c. 217, 13 Stat. 365 (1864) (as amended, Resolution, 16 Stat. 378 (1870)).

53. Pacific Railway Act §9.

54. *Id.* at §1.

55. William B. Ogden to Lincoln, Sept. 26, 1863, Railroad Package 238, RECORDS OF THE OFFICE OF THE SECRETARY OF THE INTERIOR (National Archives).

56. AMBROSE, *supra* note 47, at 88.

57. *Id.* at 70.

bonds. The Act granted the railroads public lands in alternate sections along their routes upon completion of a specified number of miles. The railroads were granted a right-of-way 200 feet on each side of the track plus ten alternate, odd-numbered sections on both sides of the track. These so-called checkerboard sections were twenty miles wide in states and forty miles wide in territories. Excepted from the sections were mineral land (except coal and iron) and land previously conveyed, reserved, or subject to pre-emption or homestead claims.<sup>58</sup> To make up for the excepted land, the Act provided for the railroads to obtain substitute land called "indemnity lands" or "lieu lands."<sup>59</sup> In addition the Act granted the railroad the right to take timber and stone from public lands.<sup>60</sup> But public outcry over the generosity of these land grants caused Congress to cease making any more after 1871. An 1875 law provided for rights-of-way but no more land grants.<sup>61</sup>

The land grants under the 1862 Act were to be sold for cash to finance the railroads, but it was understood that it would take time to sell the land grants' acreage. For this reason the Act provided for immediate cash from government-bond sales, repayable in thirty years at six percent. The Act authorized bonds for each mile completed by the Union Pacific ("UP") and Central Pacific Railroads. The amount depended on the difficulty and cost of construction; \$16,000 (flat lands), \$32,000 (hilly terrain) and \$48,000 (mountains).<sup>62</sup> But in return the government took a first mortgage on the railroad lines. The mortgage discouraged investors and so a second Railway Act was enacted in 1864 which authorized the companies to issue their own first mortgage bonds with priority over the 1862 bonds.<sup>63</sup> This caused construction of the transcontinental railroad to begin in earnest in 1865. It was completed in 1869, in record time.

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58. Pacific Railway Act §2.

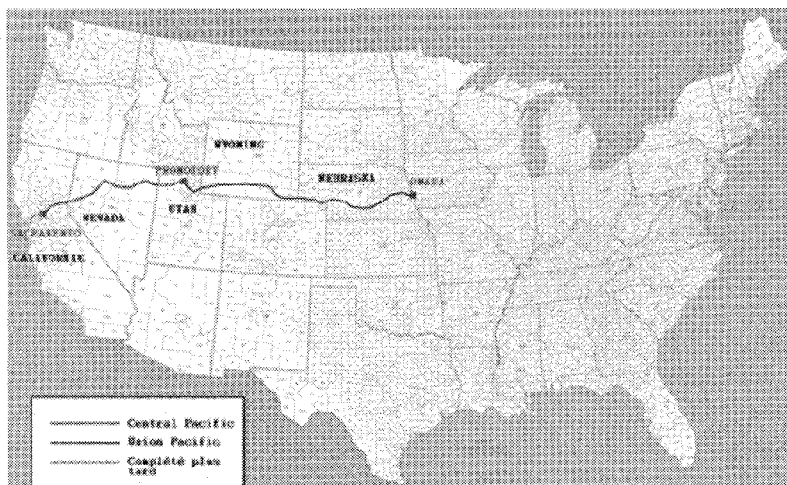
59. Robert W. Swenson, *Railroad Land Grants: A Chapter in Public Land Law*, 5 Utah Law Review 456, 456-459 (1957).

60. PAUL W. GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 364 (Zenger Publishing Co., 1968).

61. Act of Mar. 3, 1875, 18 Stat. 482 (1875) (granting railroads the right of way through public lands).

62. GATES, *supra* note 60, at 364.

63. Act of July 2, 1864, 13 Stat. 356 (1864); *see also* GATES, *supra* note 60, at 364.



For the next fifty years, railroads were the focus of all important business developments in the United States. Railroads were also behind important legal developments in such areas as real estate law, corporate law, antitrust law, tort law, labor law, environmental law, and administrative law. Much law was primarily made because railroads dominated the American economy and this brought them into conflict with homesteaders. The clash between railroads and homesteaders will be discussed in Part B.

With the Credit Mobilier scandal a case was made that railroads influenced white collar criminal law. The massive government support to build the transcontinental railroad inevitably led to corruption. Land grants and sale of bonds for each mile of track led to shoddy work. Companies sometimes followed winding or circuitous routes to earn more land grants and loans. They also saved money by using wood for culverts instead of masonry, light wrought iron rails instead of Bessemer rails, and fragile cottonwood trees instead of good timber.<sup>64</sup> In spite of these cost-saving measures UP stockholders lost money because their stock, issued at \$100 par, had sunk in value. T. C. Durant, The UP's vice president, and Congressman Oakes Ames among others, devised a way to siphon off government-supplied dollars from the UP for themselves. They created a new company called Credit Mobilier of America specifically to keep all the profits derived from building the UP in their hands.<sup>65</sup> The same stockholders that held UP stock held Credit Mobilier stock. Credit Mobilier entered into construction contracts with the UP at inflated prices. Credit Mobilier charged the UP tens of millions of dollars more than it spent on actual construction contracts. As a result, Credit Mobilier stockholders were able to

64. LARRY SCHWEIKART & MICHAEL ALLEN, *A PATRIOT'S HISTORY OF THE UNITED STATES* 382 (The Penguin Group, 2004) (quoting BURTON FOLSOM JR., *THE MYTH OF THE ROBBER BARRONS: A NEW LOOK AT THE RISE OF BIG BUSINESS IN AMERICA* 18 (Young America's Foundation, 1991)).

65. 1 *DICTIONARY OF AMERICAN BIOGRAPHY* 251 (Charles Scribners Sons, 1936).

pay themselves dividends of 348 percent in a single year. The payments to Credit Mobilier for construction contracts nearly bankrupted the UP. To keep Congress quiet, Credit Mobilier directors sold stock at nominal prices to representatives and senators, and even to Vice President Schuyler Colfax. The scandal that broke in 1872 ruined the careers of a number of Republican Congressmen.<sup>66</sup> UP stockholders were holding nearly worthless stock while some UP officers who owned Credit Mobilier stock became wealthy.<sup>67</sup> It signaled the beginning of disenchantment with the railroads, but by no means slowed their rapid development.<sup>68</sup>

Credit Mobilier was a flagrant example of conflict of interest and self-dealing. Corporate insiders were diverting corporate income of the UP to themselves while ordinary stockholders got nothing. Extensive congressional hearings were held to appease an angry public, and Congressmen were censured, but no one was convicted of a crime. For its time, the Credit Mobilier scandal was a sophisticated scam that did not appear to be illegal. Corporate law on shareholder rights and officers' breach of fiduciary duty had not yet developed.<sup>69</sup> Regulatory agencies such as the Securities and Exchange Commission were long in the future. This is not to say that what officers of Credit Mobilier did should have escaped punishment. It is a long-standing practice of Delaware courts to set aside an action that is technically legal, on grounds that it is unfair.<sup>70</sup>

An eerily similar scam came to light in December 2001 when Enron Corporation of Houston, Texas filed the then-largest bankruptcy in U.S. history.<sup>71</sup> Enron's main business was trading energy commodities such as electricity and natural gas. Like the U.P. executives, Enron executives enriched themselves by transferring money from the company to outside businesses controlled by themselves. They reaped huge profits before they were discovered, but this time, 130 years after the Credit Mobilier scandal broke, U.S. laws on corporate white collar crime were in place and Enron executives were indicted for fraud.<sup>72</sup> However, as with Credit Mobilier, white collar criminal laws did not deter the Enron executives.

Railroads labor strikes were forerunners of modern labor law. In 1894, employees of the Pullman Palace Car Company, manufacturer of railroad cars,

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66. 2 SAMUEL ELIOT MORISON, HENRY STEELE COMMAGER, AND WILLIAM E. LEUCHTENBURG, *THE GROWTH OF THE AMERICAN REPUBLIC* 72 (Oxford University Press, 4th ed. 1950).

67. LOGAN DOUGLAS TRENT, *THE CREDIT MOBILIER* 6 (Arno Press, 1981).

68. See *supra* note 26.

69. See generally, *Economy In Transcontinental Railroad*, SHMOOP [www.schmoop.com/transcontinental-railroad/economy.html](http://www.schmoop.com/transcontinental-railroad/economy.html).

70. See, e.g., *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437, 439 (Del. 1971) (“[I]nequitable action does not become permissible simply because it is legally possible.”).

71. *In re Enron Corp.*, Chapter 11, Case No. 01-16034 (Bankr. S.D.N.Y. 2001).

72. See generally, James Surowiecki, *Durant's Big Scam*, AMERICAN EXPERIENCE [www.pbs.org/wgbh/americanexperience/features/general-article/tcrr-scam/](http://www.pbs.org/wgbh/americanexperience/features/general-article/tcrr-scam/) (last visited 10/18/2011).

went on strike because of a wage reduction.<sup>73</sup> In solidarity the 150,000 members of the American Railway Union, led by Eugene V. Debs, went on strike. They blocked railroad transportation and passage of mail through Chicago. The federal circuit court in Chicago ordered an injunction; Debs was arrested for ignoring the injunction and found guilty of contempt. The U.S. Supreme Court denied his request for a writ of habeas corpus and validated the use of an injunction against strikers.<sup>74</sup> It was a cause célèbre and spurred the process of finding better legal means to handle strikes.<sup>75</sup> Abraham Lincoln's son, Robert Todd Lincoln, a lawyer like his father, was special counsel to George M. Pullman, head of the company. We do not know exactly what role he played during the strike, but he was close to Pullman.<sup>76</sup>

Tort law owes much of its development to railroads. A case in 1841 established that injuries caused by actions of railroad employees to one another could only be compensated if they occurred outside the employee's ordinary duty.<sup>77</sup> This so-called "fellow servant rule" immunized employers of all sorts from liability for employee-to-employee injuries well into the Twentieth Century. In 1852, the Supreme Court held that a railroad company was responsible for negligent actions of its employees as a matter of public policy.<sup>78</sup> The Court, however, did not decide for the tort law of individual states. Between the Supreme Court's 1852 ruling that the doctrine of respondeat superior applied to negligent actions of railroad employees<sup>79</sup>, and the 1993 decision that Federal Railroad Administration regulations preempted state common-law claims based on excessive speed,<sup>80</sup> cases on injuries to employees, passengers, and the public multiplied.<sup>81</sup>

By 1858 railroad tort law had developed to the extent that a substantial treatise was available,<sup>82</sup> and Abraham Lincoln had established a precedent that would have great consequences for railroads. In *The St. Louis, Alton & Chicago Railroad Company v. Dalby*,<sup>83</sup> Lincoln represented Joseph Dalby in an action for trespass against his person. Dalby and his wife boarded the train at the Elkhart station. The fare was three cents a mile, but the station master was out of three-cent tickets. Dalby requested and received a note stating that fact, but

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73. ALMONT LINDSEY, *THE PULLMAN STRIKE* 98-101 (The University of Chicago Press 1964) (1942).

74. *In re Debs*, 158 U.S. 564 (1895).

75. See generally, ELY, *supra* note 10, at 254-55.

76. JOHN S. GOFF, *ROBERT TODD LINCOLN: A MAN IN HIS OWN RIGHT* 217-220 (University of Oklahoma Press, 1969).

77. See *Murray v. S.C. R.R. Co.*, 26 S.C.L. 385 (S.C. Ct. App. 1841).

78. *Philadelphia & Reading R.R. Co. v. Derby*, 55 U.S. 469 (1852).

79. *Id.*

80. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993).

81. See generally, ELY, *supra* note 10, at 211-224.

82. SARAH H. GORDON, *PASSAGE TO UNION, HOW THE RAILROADS TRANSFORMED AMERICAN LIFE, 1829-1929* 67 (Ivan R. Dee, 1966) (citing ISAAC REDFIELD, *RAILROAD LAW* (1858)).

83. *The St. Louis, Alton & Chicago R.R. Co. v. Dalby*, 19 Ill. 352 (1857).

on board the train the conductor told the Dalby's they would have to pay four cents a mile, the proper amount for tickets bought on the train. Dalby refused and got into a fight with the conductor and two brakemen.<sup>84</sup>

At trial (probably not conducted by Lincoln), four witnesses testified to Dalby's injuries.<sup>85</sup> William Miller testified, for example, that ". . . one of the men had [Dalby's] head drawn over the arm of the seat, while the others were holding him, and pounded him in the face ten or a dozen licks . . . Dalby's face [was] pretty badly bruised up, his face black under the eyes . . . bled considerable [sic]."<sup>86</sup> The jury in the Logan County Circuit Court awarded Dalby a judgment of \$1,000. This was a large amount for that day, more than an average yearly income, and Lincoln's largest fee for an individual client.<sup>87</sup>

On its appeal before the supreme court of Illinois, the railroad first argued that its employees had the authority and responsibility to enforce its rules, using reasonable force if necessary.<sup>88</sup> Justice John D. Caton, writing the court's opinion, agreed with Lincoln that the employees' force was unreasonable.<sup>89</sup> Then came the second and crucial defense based on its status as a corporation: a corporation could not be sued for inflicting unlawful physical harm to a person. Justice Caton framed this as the "great question" whether a private corporation could be liable for assault and battery.<sup>90</sup> He recognized that corporations were not new but that there were few of them and they were "very little studied by the courts."<sup>91</sup> He said corporations are given powers by law and it follows that when they exercise those powers and commit a wrong they must be held responsible.<sup>92</sup>

The corporation argued, however, that it had no authority to order an unlawful act to be done and an act committed by its agent was the agent's responsibility, not the corporation's.<sup>93</sup> Justice Caton granted there was precedent in some cases holding that assault against a person could not lie against a corporation.<sup>94</sup> He then concluded, stating:

The idea that a corporation cannot be liable for a beating because it has no body to be beaten, must be founded on the assumption that no party can inflict an injury which it is not capable of receiving. We confess to a want of respect when such whimsical notions are advanced by grave

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84. *Id.* at 1-2.

85. JOHN J. DUFF, A. LINCOLN, PRAIRIE LAWYER 268-71 (Rinehart & Company, 1960).

86. DAN W. BANNISTER, LINCOLN AND THE ILLINOIS SUPREME COURT 90-91 (Dan W. Bannister, 1994) (quoting 12 The Lincoln Newsletter, no. 3).

87. *Id.*

88. *Dalby*, 19 Ill. at 5.

89. *Dalby*, 19 Ill. at 365-66.

90. *Id.* at 366.

91. *Id.*

92. *Id.*

93. *Id.* at 5.

94. *Dalby*, 19 Ill. at 373.

and learned judges. As well might it be said that a man cannot commit a rape because he cannot be the subject of one.”<sup>95</sup>

Thus ended any doubt in Illinois that a corporation was a legal person that could be sued for damages in tort.

### III. THE HOMESTEAD ACT OF 1862

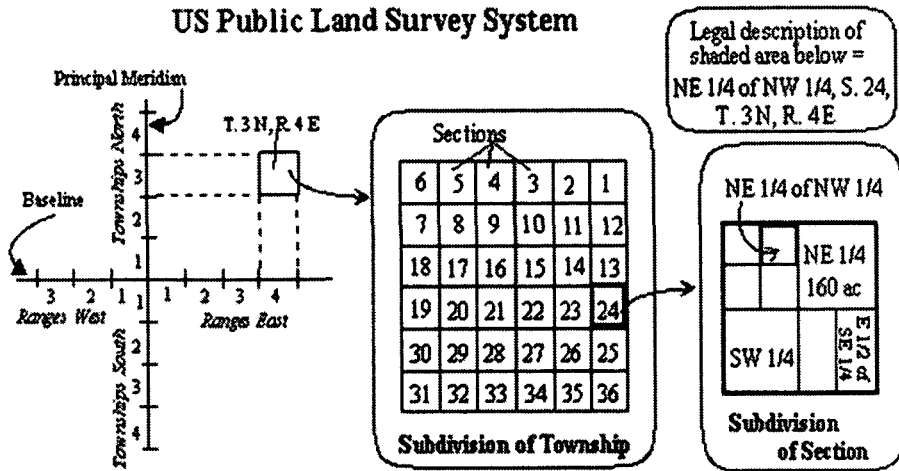
In a sense, the Homestead Act of 1862 originated in the Land Ordinance of 1785.<sup>96</sup> That ordinance changed the uncertain method of setting real estate boundaries by stepping off plots from geographical landmarks. Instead, it standardized Federal land surveys with astronomical starting points and divided territory into six-mile square townships. Each township was divided into thirty six sections of one square mile. A section was 640 acres and one fourth section was 160 acres, the size of farms offered under the Homestead Act. When public land in the West was surveyed, homesteaders could rely on the boundaries of their 160 acre homesteads.<sup>97</sup> Without this certainty, they might have had to settle their boundaries in court. Abraham Lincoln’s father left Kentucky in 1816 and moved his family to Southern Indiana because he could not afford the legal fees to quiet title to his Kentucky farm.

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95. DAN W. BANNISTER, *LINCOLN AND THE COMMON LAW* 208-9 (Human Services Press, 1992) (the description of Justice Caton’s opinion is derived mainly from Bannister’s account).

96. The Land Ordinance of 1785 is in Commager (ed.), *Documents of American History*, pp. 123-24, cited in Gates, 65 n. 60.

97. *The Homestead Act of 1862*, TEACHING WITH DOCUMENTS [www.archives.gov/education/lessons/homestead-act/](http://www.archives.gov/education/lessons/homestead-act/).



**THEORETICAL  
TOWNSHIP DIAGRAM  
SHOWING  
METHOD OF NUMBERING SECTIONS  
WITH ADJOINING SECTIONS**

36	31	32	33	34	35	36	31
3600	1200		5 Miles - 180 Chains	180 Chains		3600	3600
1	6	5	4	3	2	1	6
12	7	8	9	10	11	12	7
13	18	17	16	15	14	13	18
24	19	20	21	22	23	24	19
25	30	29	28	27	26	25	30
36	31	32	33	34	35	36	31
1	6	5	4	3	2	1	6

Before the Homestead Act settlers were already “squatting” on public land. Early in the history of the Republic, squatters were permitted to retain as much as 320 acres provided they registered at the land office and agreed in writing that whenever the land was sold they would give quiet possession of it.<sup>98</sup> Americans continued to insist on the right of preemption, the right to occupy land and pay later. Preemption was at the heart of the Homestead Act. The concept came into

98. Act of Mar. 26, 1804, 2 Stat. 289; Act of Mar. 3, 1807, 2 Stat. 445.

its own with the Preemption Act of 1830.<sup>99</sup> It permitted a “settler or occupant” on public lands who possessed and cultivated a part of his claim in 1829 to enter up to 160 acres including improvements at \$1.25 per acre. The claimant had these rights for one year from the date of the Act without having to bid for them at auction.<sup>100</sup> The Act was effective for only one year but it firmly established preemption in U.S. real estate law.<sup>101</sup> The difference between preemption before and after the Homestead Act was that the Homestead Act provided for the first time for preempted public land that was free. Prior to the Act, sale of public lands was a significant source of income for the federal government. After the Act, some federal land, particularly former Indian lands, would continue to be held for sale, but vast acreage was also available for homesteading.<sup>102</sup>

When the Homestead Act was enacted in 1862, the government bureaucracy to administer it was already in place. An Act in 1812 established the General Land office with a Commissioner who would issue patents to public lands signed by the President.<sup>103</sup> At the time, the Commissioner was charged with managing about one and a half billion acres of public land and transferring it to individuals, companies, states, and railroads for cash. The Office was a bureau in the Treasury Department until 1849 when it became part of the newly-created Interior Department. It still existed in 1946 when it was renamed The Bureau of Land Management.<sup>104</sup>

The General Land Office maintained branch offices in the states and later in the West when homesteaders began to make their claims. The offices were outposts of the federal government and their importance has been little appreciated by historians. Abraham Lincoln saw the political importance of the General Land Office, however, for in 1849 he tried unsuccessfully to get himself appointed Commissioner.<sup>105</sup> The General Land Office employed thousands with titles such as Surveyors General, deputy surveyors, registers, receivers, superintendents of public sales, and numerous clerks. After the Homestead Act’s passage it also employed investigators of sales fraud and timber stealing.<sup>106</sup>

The Homestead Act of 1862 was the same Act that President James Buchanan vetoed in 1859. Buchanan’s veto reflected Southern sentiment against the Act because southerners believed that settlers on public lands would be mostly anti-slavery. But when southerners abandoned their seats in Congress

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99. Act of May 29, 1830, 4 Stat. 420.

100. GATES, *supra* note 60, at 225.

101. *Id.*

102. Paul W. Gates, *The Homestead Law in an Incongruous Land System*, 41 Am. Hist. Rev. 4, 661-62 (Jul., 1936).

103. Act of April 25, 1812, 2 Stat. 716.

104. GATES, *supra* note 60, at 127-28.

105. DAVID HERBERT DONALD, LINCOLN 138-40 (Simon & Shuster, 1995).

106. GATES, *supra* note 60, at 127.

during the Civil War, the remaining Northerners took up the bill again and passed it easily. President Lincoln signed it into law May 20, 1862.<sup>107</sup>

The Homestead Act was followed by later variations, including the Desert Land Act<sup>108</sup>, Timber Culture Act<sup>109</sup>, and the Timber and Stone Act<sup>110</sup>. It offered “free land” to settlers and promoted migration to the West that would make the Union Pacific railroad profitable. Any U.S. citizen, or even an immigrant who declared intention to become a citizen, could file an application with a local land office of the General Land Office for 160 acres of surveyed public land. Thus, farmers from nearby Midwestern states, landless farmers from the East, immigrants just off the boat, single women, and even former slaves were eligible.

A homesteader had to be a head of household or 21 years of age, (apparently the drafters expected there would be filers younger than 21 who were heads of household), must never have borne arms against the U.S. Government (but this restriction against Confederate soldiers was soon lifted), and had to live on the land for five years, grow crops on it, and build a “12 by 14” dwelling. Here was an obvious drafting error, for those words invited some person to cheat by building a dwelling of 12 x 14 *inches*, whereas the clear meaning was 12 x 14 *feet*.<sup>111</sup> If a homesteader could afford it he or she could pay the government \$1.25 per acre after six months’ residency and trivial improvements (\$2.50 on sections reserved to the government in the zones of the railroad grants).<sup>112</sup> This privilege of buying after 6 months was known as the “commutation clause.”<sup>113</sup> An exception to the five-year residency requirement was that Union soldiers could reduce the requirement by the amount of time served in the war.<sup>114</sup>

The legal process was simple, perhaps too simple, as later fraudulent activity would reveal. First, the homesteader went to the nearest land office and filed a homestead application with a \$10 filing fee and a \$2 commission for the land agent.<sup>115</sup> The application described a 160-acre plot by its survey coordinates. The agent checked briefly for previous ownership claims and then the homesteader was ready to carry out the second step in the process: the five-year residency and cultivation requirement. The homesteader’s legal authority to occupy the land was the application and receipt from the agent called a “certificate of eligibility.” The third step came after five years and was called

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107. Act of May 20, 1862, 12 Stat. 392; PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 490-91 (Harper Collins Publishers, 1998).

108. Act of Mar. 3, 1877, 19 Stat. 377.

109. Act of June 14, 1878, 20 Stat. 113.

110. Act of June 3, 1878, 20 Stat. 89.

111. *The Homestead Act of 1862*, TEACHING WITH DOCUMENTS [www.archives.gov/education/lessons/homestead-act/](http://www.archives.gov/education/lessons/homestead-act/); FRED A. SHANNON, THE FARMER’S LAST FRONTIER 53 (Rinehart & Co., 1945).

112. See TEACHING WITH DOCUMENTS, *supra* note 111.

113. SHANNON, *supra* note 111, at 56.

114. See TEACHING WITH DOCUMENTS, *supra* note 111.

115. SHANNON, *supra* note 111, at 53.

“proving up” the claim. Two friends or neighbors of the homesteader signed an affidavit labeled, “Proof Required Under Homestead Acts, May 20, 1862 and June 21, 1866” and swore that the homesteader’s statements about building a house, making improvements and cultivating the land were true. After proving his claim the homesteader paid a final \$6 fee and the Government Land Office issued a patent.<sup>116</sup>

The patent was signed by the President, sealed with the great seal of the General Land Office, and duly recorded in the record book kept for that purpose. It became a solemn public act of the government of the United States and needed no further delivery or other authentication to make it valid. The title to the land passed to the grantee and the delivery required of a deed made by a private individual was not necessary to give effect to the granting clause of the instrument.<sup>117</sup> This patent was the equivalent of a deed of title and was often proudly displayed on the homesteader’s wall.<sup>118</sup>

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116. NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR, HOMESTEAD NATIONAL MONUMENT OF AMERICA, ABOUT THE HOMESTEAD ACT, [www.nps.gov/home/historyculture/abouthomesteadlaw](http://www.nps.gov/home/historyculture/abouthomesteadlaw) (last visited 10/13/2011).

117. *Hash v. United States*, 403 F.3d 1308, 1316 (Fed. Cir. 2005) (citing *United States v. Schurz*, 102 U.S. 378, 397 (1880)).

118. NATIONAL PARK SERVICE, U.S. DEPARTMENT OF THE INTERIOR, HOMESTEAD NATIONAL MONUMENT OF AMERICA, ABOUT THE HOMESTEAD ACT, [www.nps.gov/home/historyculture/abouthomesteadlaw](http://www.nps.gov/home/historyculture/abouthomesteadlaw) (last visited 10/13/2011).

HOMESTEAD.

APPLICATION }  
No. 1896 }

Land Office at Duluth, Minnesota

June 12, 1877.

I, Antoni Farnowski, of St. Louis Co.,  
Minnesota, do hereby apply to enter, under the provisions  
of the act of Congress approved May 20, 1862, entitled "An act to secure  
homesteads to actual settlers on the public domain," the  $S\frac{1}{2}$  of  $SE\frac{1}{4}$  and  
Lots 3; & 4 of Section - 17 - in Township - 52 N - of  
Range - 14 W - , containing - 165  $\frac{4}{100}$  acres.

Witness to signature,  
Stapton Sengier  
J. H. Presswell

Antoni <sup>his</sup> Farnowski  
mark  
Land Office at Duluth, Minnesota

June 12, 1877.

I, R. C. Mitchell, REGISTER OF THE LAND OFFICE,  
do hereby certify that the above application is for Surveyed Lands of the  
class which the applicant is legally entitled to enter under the Homestead  
act of May 20, 1862, and that there is no prior, valid, adverse right to the  
same.

R. C. Mitchell

Register.

HOMESTEAD.

[AFFIDAVIT.]

Land Office at Duluth, Minnesota

June 13, 1877.

I, Antoni Jarowski, of St. Louis Co., Minnesota, having filed my application, No. 1396, for an entry under the provisions of the act of Congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," do solemnly swear, that I have declared my intention to become a citizen of the United States, that I am a married man, and that I am over the age of 21 years, that said application, No. 1396, is made for the purpose of actual settlement and cultivation; that said entry is made for my own exclusive benefit and not directly or indirectly for the benefit or use of any other person or persons whomsoever; neither have I heretofore perfected or abandoned an entry made under this act.

Witnesses to signature  
Stephen Sengier

his  
Antoni X Jarowski  
Mark

Sworn to and subscribed this 13<sup>th</sup> day

of June, 1877, before

G. H. Presswell  
Receiver of the Land Office.

asc

HOMESTEAD.

Land Office at

*Princeton, Ky*  
*January 20<sup>th</sup> 1868.*

CERTIFICATE, }

No. 1 }

{ APPLICATION,

{ No. 1

It is hereby certified, That pursuant to the provisions of the act of Congress, approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain."

*Daniel Kruman* has  
made payment in full for *1/2 of NW 1/4 and SW 1/4 of NW 1/4* of *Section 26* of *Range five (5) E* containing *160* acres.  
in Township *fourth N*

Now, therefore, be it known, That on presentation of this Certificate to the COMMISSIONER OF THE GENERAL LAND OFFICE, the said *Daniel Kruman* shall be entitled to a Patent for the Tract of Land above described.

*Henry M. Atkinson* Register.



As with all legal procedures, homesteading was susceptible to fraud. For example, it was not difficult for a speculator who did not homestead the land to prove a claim with two false witnesses on the affidavit. This enabled speculators to become "looters of the public domain." One of them, S.A.D. Puter, wrote a book by that title from his prison cell after he was convicted for conspiracy to defraud the government.<sup>119</sup> Because he was convicted, there is reason to believe him. He described how the California Redwood Company hired men to file on land covered with dense redwood forests in the Northern part of Humboldt County. At the time, persons wishing to file claims under the Timber and Stone Act<sup>120</sup> were not required to make a personal examination of the land they wished to file on, or to go to the land office to make final proof. All that was necessary was for the filer to exhibit his first papers to show that he was a citizen of the United States, make oath to that effect, or declare his intention to become a citizen.<sup>121</sup> Mr. Puter stated:

Under these conditions, the company was enabled to run men into the land office by the hundreds. I have known agents of the company to take at one time as many as twenty-five men from "Coffee Jack's" sailor boarding house in Eureka to the county court house, where they would take out their first papers, declare their intention to become citizens of the United States, after which they would proceed direct to the land office and make their filings, all the location papers having previously been made out. Then they would appear before Fred W. Bell, a notary public, and execute an acknowledgement of a blank deed, receive a stipulated price of \$50, and return to their ships, or to the boarding house from whence they came. The description of the tract filed on was afterwards inserted and the transfer of title completed to the corporation . . . the entire body of land embraced in a number of different townships, was consummated to a Scotch syndicate."<sup>122</sup>

The General Land office noticed the rush for issuance of patents. Special Agent B.F. Bergin, described as "the fourth one sent out, and made of the right kind of stuff, and could not be purchased," reported the fraud, and the Land Office cancelled 150 to 200 entries.<sup>123</sup> Company agents were prosecuted, although "their cases were carried through the courts from one administration to the other at an enormous expense."<sup>124</sup> The happy ending was that bona fide settlers filed on the cancelled entries and eventually received patents.<sup>125</sup>

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119. S.A.D. PUTER, *LOOTERS OF THE PUBLIC DOMAIN* 7 (Da Capo Press, 1908); *See also*, FRED ALBERT SHANNON, *THE ECONOMIC HISTORY OF THE UNITED STATES*, Volume V 51-75 (Rinehart & Co., 5th vol. 1945).

120. Act of June 3, 1878, 20 Stat. 89.

121. PUTER, *supra* note 119, at 18.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

In spite of fraud, the Homestead Act brought high hopes to many settlers. An 1862 article in the magazine, *Continental Monthly*, reflected the optimism the Act engendered and reminded the reader that the Act was passed during the Civil War.

As it is a blessed thing for the poor and landless to receive, substantially as a gift, a farm from the Government, where they and their children may till their own soil, and enjoy competence, freedom, and free schools, let them never forget, that this was the act of the North, and opposed by the South. If the rebels succeed, they will hold the public domain in their States and Territories for large plantations, to be cultivated by slaves, and sink their poor whites,~ as nearly as practicable, to the level of their slaves, in accordance with their theory, that capital should own labor.<sup>126</sup>

The enthusiasm of pioneer families for homesteading is reflected in an autobiographical novel of Laura Ingalls Wilder, who wrote the *Little House on the Prairie* series. In her book, “By the Shores of Silver Lake,” she portrays her “Ma” as reluctant to go West. Her “Pa” says to her:

“Listen to reason, Caroline . . . We can get a hundred and sixty acres out west, just by living on it, and the land’s as good as this is, or better. If Uncle Sam’s willing to give us a farm in place of the one he drove us off of, in Indian Territory, I say let’s take it. The hunting’s good in the west, a man can get all the meat he wants.”<sup>127</sup>

Later, Ma tells her daughters that Pa started for the claim before sunup. She says,

“He didn’t want to go and leave us in this rush . . . but he had to. Someone else will get the homestead if he doesn’t hurry. We had no idea that people would rush in here like this, and March hardly begun.”<sup>128</sup>

When Pa returns he tells his daughters, “Well girls, I’ve bet Uncle Sam fourteen dollars against a hundred and sixty acres of land that we can make our claim for five years.”<sup>129</sup>

Without doubt, many pioneer homesteaders did succeed, and the Homestead Act was responsible for rapid settlement of the West. But those who succeeded must have been indomitable, for the odds were stacked against them. In the first place they were competing with land grants to railroads and states, the cash sale

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126. *The Homestead Bill*, 2 *CONTINENTAL MONTHLY: DEVOTED TO LITERATURE AND NATIONAL POLICY* 5, 627 [http://memory.loc.gov/cgi-bin/query/r?ammem/ncps:@field\(DOCID+@lit\(ABR1802-0002-142\)\)](http://memory.loc.gov/cgi-bin/query/r?ammem/ncps:@field(DOCID+@lit(ABR1802-0002-142))) (last visited 7/26/2011).

127. LAURA INGALLS WILDER, *BY THE SHORES OF SILVER LAKE* 4 (Harper Collins 1939) (First Harper Trophy Edition 1971).

128. *Id.* at 227.

129. *Id.* 237.

system, the Indian land policy, the acts granting warrants to ex-soldiers and their heirs, and land grants to states for colleges under the Agricultural College Act (also known as the Morrill Act).<sup>130</sup>

Other lands, too, were held for sale and not available for homesteading. For example, millions of prime acres were held by the government for sale at auction. The government acquired millions of acres from Indians as a result of the policy of concentrating them on reservations. These too were held for sale and not available to homesteaders.<sup>131</sup> Roughly 125 million acres of railroad lands, 140 million acres of state lands, 100 million acres of Indian lands, and 100 million acres of federal lands held for sale were off-limits to homesteaders.<sup>132</sup> In contrast, the total number of acres distributed by the Homestead Act was 270 million.<sup>133</sup>

The massive giveaway of public lands to railroads, and the homesteaders' claims on lands beside the railroad grants, inevitably led to real estate litigation. The problem stemmed from claims of homesteaders who settled on lands not yet surveyed but within the limits of the general route of the Northern Pacific Railroad. The Northern Pacific Railroad Company was created by an Act of Congress signed by President Lincoln on July 2, 1864.<sup>134</sup> The company fixed a general route of its road from Lake Superior to Puget Sound, including land within forty miles thereof, by filing a plat of the route with the Commissioner of the General Land office on August 20, 1873. On November 1, 1873 the Commissioner sent the following letter to the register and receiver of the land office for the district in which the railroad land was located:

Gentlemen:-The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget Sound to a connection with their main line near Lake Pend d'Oreille in Idaho territory, I have caused to be prepared a diagram which is herewith transmitted, showing the 40-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from *sale* or *entry* all the odd-numbered sections falling within these limits not already included in the withdrawal for the main-line period. The even sections are increased in price to \$2.50 per acre, subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15<sup>th</sup>, 1873, the date when the map was filed by the company with the Secretary of the

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130. GATES, *supra* note 102, at 652-81.

131. *Id.* at 660-61.

132. *Id.* at 662.

133. Data of National Park Service, U.S. Department of the Interior, Homestead National Monument of America, compiled by Historian Todd Arrington.

134. Act of July 2, 1864, 13 Stat. 356.

Interior, as required by the 6th section of the act of July 2d, 1864, organizing said company.<sup>135</sup>

Problems for homesteaders developed when they settled on lands within the forty-mile limits of the odd-numbered sections. The railroads claimed that the settlers were not entitled to occupy land along the general route. In 1886 the Supreme Court ruled unanimously in favor of the railroads.<sup>136</sup> The court sustained the action of the General Land Office in refusing a homesteader's application to enter land within the forty-mile limit, as shown by a map of general route, and it confirmed the title of the railroad company.<sup>137</sup>

Seventeen years later the Supreme Court overruled this precedent.<sup>138</sup> In 1881, three years before the definite route of the railroad was established, Henry Nelson went upon land within the general route, and continuously resided on it. The land was at that time unsurveyed and would not be surveyed until 1893. As soon as it was surveyed, Nelson attempted to enter his claim under the Homestead laws in the proper district land office. His application was rejected by the register and receiver, however, because in their opinion it conflicted with the grant of the Northern Pacific Railroad Company.<sup>139</sup>

The claims of both parties were made difficult by the poor drafting of the sections 3 and 6 of the 1864 Act. The third section stated, among other things:

That there be, and hereby is granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, *and* whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and *free* from pre-emption *or other claims or rights* at the time the line of said road is *definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, *prior to said time* [of definite location], any of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or pre-empted, or otherwise disposed of, *other lands* shall be selected by said company *in lieu thereof*, under the direction of the Secretary of the

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135. Nelson v. Northern Pacific R.R. Co., 188 U.S. 108 (1903).

136. Buttz v. N. Pac. R.R. Co., 119 U.S. 55 (1886).

137. *Id.* at 73.

138. Nelson, 188 U.S. at 108.

139. *Id.* at 113.

Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections . . .'

The 6th section said, among other things:

*And be it further enacted,* That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act.

. . . But the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.<sup>140</sup>

Section 6 said that the odd sections should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company. On the other hand, Section 3 secluded from its grant any lands "occupied by homestead settlers" at the time of the definite location of the road. When Nelson occupied the land in 1881, the railroad had only a general route; the definite location would not be established until 1884 and the land would not be surveyed until 1893.<sup>141</sup>

Mr. Justice Harlan, writing for a divided Court, said that "the railroad company acquired no vested interest in any particular section of land until after a definite location as shown by an accepted map of its line; and that until definite location the land covered by the map of general route was a 'float', that is at large."<sup>142</sup> Therefore, under the Homestead Act of 1862 Nelson could file a claim to surveyed land. When the land in question was finally surveyed in 1893, Nelson promptly filed his claim. The court held that "[His] continuous occupancy of the land, with a view, a good faith, to acquire it under the homestead laws as soon as it was surveyed, constituted, in our opinion, a claim upon the land."<sup>143</sup>

By 1871, the public reaction against large land grants caused the United States to cease granting subsidy lands to railroads. It continued, however, to grant generous rights-of-way well into the twentieth century.<sup>144</sup> The policy for

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140. Act of July 2, 1864, 13 Stat. 365.

141. *Buttz*, 119 U.S. at 70.

142. *Nelson*, 188 U.S. at 119.

143. *Id.* at 121.

144. *See generally*, *Great Northern Railway Co. v. U.S.*, 315 U.S. 262 (1942).

granting rights-of-way was embodied in the General Railroad Right-of-Way Act of 1875.<sup>145</sup> The Act granted any railroad a 200-foot right-of-way through the public lands while discontinuing the checkerboard land grants.<sup>146</sup>

Since 1920, almost half of the 270,000 miles of rail lines have gone out of use.<sup>147</sup> The National Trails System Act Amendments of 1983<sup>148</sup> preserve discontinued railway rights-of-way by banking them for possible future railroad use, and authorizing interim use as recreational trails.<sup>149</sup> Pursuant to the Act, rights-of-way that a railroad abandons after October 4, 1988, revert to the government.<sup>150</sup> Courts have ruled inconsistently that right-of-way grants conveyed fee simple absolute to the railroads, or fee simple determinable with an implied possibility of reverter upon abandonment, or an easement.<sup>151</sup> In 2005, the Federal Circuit rejected the government's ownership and control over rights of way in which successors to homesteaders claimed interest.<sup>152</sup> The case dealt with claims to an 83.1 mile stretch of right-of way in Idaho that was to be converted to a recreational trail.<sup>153</sup> The court held that many of these successors were entitled to compensation under the Fifth Amendment's Takings Clause.<sup>154</sup> Litigation continues today over grants of public land under the 1862 Homestead and Railway Acts.<sup>155</sup>

By far the most serious competitor for public lands was the railroad. Under the Pacific Railroad Act and other acts, Congress granted lands to railroads that enabled them to pass through the best lands in the very regions open to homesteading. The Railroad Act gave railroads alternating sections along their track that were held for sale. So-called "administrative withdrawals" caused more acres to be unavailable for homesteading, at least temporarily.<sup>156</sup> The General Land Office withdrew millions of acres from homesteading in advance of the route a railroad might take. The withdrawals were to protect the railroads from land speculators.<sup>157</sup> To make matters worse, the railroads delayed their

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145. Act of Mar. 3, 1875, 18 Stat. 482 (codified at 43 U.S.C. §§ 934-939, repealed in part, Pub. L. 94-579, Title VII ' 706(a), 90 Stat. 2793 (1976)).

146. *Id.*

147. *Hash v. U.S.*, 403 F.3d 1308, 1311 (2005).

148. 16 U.S.C. §§ 1241-51(1983) (codified as amended).

149. 16 U.S.C. § 1247(d) (1983).

150. 16 U.S.C. § 1248(c) (1988).

151. *See* 11 DANAYA C. WRIGHT, RAILS-TO-TRAILS: CONVERSION OF RAILROAD CORRIDORS TO RECREATIONAL TRAILS, POWELL ON REAL PROPERTY §§ 78A-43 - 78A-58 (Michael Allan Wolf ed., 2007).

152. *Hash*, 403 F.3d at 1308.

153. *Id.* at 1311.

154. *See Id.* at 1313-1323.

155. *See, e.g.*, *Yellowstone River, LLC v. Merriweather Land Fund I, LLC*, 2011 Mont. 263 (evidence was sufficient to overcome inference that U.S. intended to reserve an easement across land sections granted to railroad by Northern Pacific Act).

156. Darwin P. Roberts, *The Legal History of Federally Granted Railroad Rights-of-way and the Myth of Congress's "1871 Shift,"* 82 U. Colo. L. Rev. 85, 16-17 (2011).

157. *Id.* at 119-120.

surveys and final selections of land as long as possible in order to avoid local real estate taxes.<sup>158</sup> The Homestead Act itself limited homesteading to eighty acres within the limits of a railroad grant.<sup>159</sup> As a result, homesteaders had to settle for less fertile land far from the track so that it was costly for them to ship their products to market. The cost included not just getting crops and livestock to the railhead, but also the excessive fees the railroads charged. Homesteaders who made their claims near the projected railroad right of way found that they had to fight for their land in court.

#### IV. THE FARMERS' REVOLT AND ANTI-TRUST LAW

The 160-acre homestead often proved inadequate for farming or raising livestock. Scarcity of water west of the 100<sup>th</sup> meridian reduced yields.<sup>160</sup> Without trees, homesteaders were forced to build sod houses which they hoped would withstand hailstorms, drought, prairie fires, blizzards, and wind.<sup>161</sup> They saw the railroads as their oppressors, and their optimism turned to despair.<sup>162</sup> They began to organize themselves to oppose the railroads politically and to petition for relief through the courts and legislatures.<sup>163</sup> Their clash with railroads began a movement that changed American law and shifted regulatory power to Washington.

The farmers' revolt began in 1867 when Oliver H. Kelley and other clerks in the Bureau of Agriculture founded the Patrons of Husbandry to address the poverty and isolation of farmers.<sup>164</sup> When the panic of 1873 began, the Patrons had "Granges" (lodges) in all but four states. Soon after there were 800,000 members in 20,000 Granges. They were especially active politically in Illinois, Iowa, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and California, where they elected candidates to the legislatures and judges to the courts. Their aim was to enact state laws to regulate railroad and warehouse charges and other perceived abuses.<sup>165</sup> Early success came in Illinois where the 1870 Constitution directed the legislature to "pass laws to correct abuses and to prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads of the state."<sup>166</sup> The legislature responded. It prohibited

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158. *Id.*

159. Repealed by Act of March 3, 1879, 20 Stat. 472; Act of July 1, 1879, 21 Stat. 46; Act of June 15, 1880, 21 Stat. 238.

160. THE HOMESTEAD ACT of 1862, [www.beatricene.com/homestead/history](http://www.beatricene.com/homestead/history) (last visited 7/26/2011).

161. *Id.*

162. THOMAS CLARK ATKESON, *Semi-Centennial History of the Patrons of Husbandry* 9-10, 61-62 (Orange Judd Co. 1916).

163. *Id.* at 308-09.

164. ALLEN NEVINS & HENRY STEELE COMMAGER, *A SHORT HISTORY OF THE UNITED STATES* 370 (Alfred A. Knopf, 6th ed. 1984).

165. MORISON & COMMAGER, *supra* note 66, at 207-9.

166. Ill. Const. Art. XI, § 15 (1870).

discrimination, established a maximum rate, and created a Railway and Warehouse Commission to regulate roads, grain elevators, and warehouses.<sup>167</sup> By 1874, similar laws were enacted in Iowa, Minnesota, and Wisconsin. Critics complaining of socialism considered Wisconsin's so-called "Potter law" especially drastic.<sup>168</sup> By 1876 they had brought the issue of the laws' constitutionality before the Supreme Court, asking the Court to rule that an Illinois statute regulating grain elevator charges was a deprivation of property, without due process of law in violation of the Fourteenth Amendment.<sup>169</sup> In *Munn v. Illinois* Chief Justice Waite wrote an opinion that upheld the statute on the ground that the states' historical right of police power includes the right to regulate ferries, common carriers, inns, and so forth.<sup>170</sup> It has been called one of the most far-reaching decisions in American law.<sup>171</sup> Justice Wait wrote:

When private property is affected with a public interest it ceases to be *juris privati* only. . . . Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created.

Dismissing the allegation that rate-fixing by a legislative commission did not constitute due process of law, he wrote:

It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use . . . and that what is reasonable is judicial and not a legislative question . . . . The controlling fact [however] is the power to regulate at all. If that exists, the right to establish the maximum charge, as one of the means of regulation, is implied . . . . We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts.

In three other cases decided the same day, the Court said that Granger laws establishing maximum freight and passenger rates did not violate the interstate commerce clause.<sup>172</sup> The court said that the railroad:

is employed in state as well as interstate commerce, and until Congress acts, the State must be permitted to adopt such rules and regulations as

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167. ILLINOIS COMMERCE COMMISSION, RECORD GROUP 402.000  
<http://www.cyberdriveillinois.com/departments/archives/illstate.pdf> (last visited 1/5/2011).

168. MORISON & COMMAGER, *supra* note 66, at 116.

169. *Munn v. Illinois*, 94 U.S. 113 at 123 (1876).

170. *Id.* at 125.

171. MORISON & COMMAGER, *supra* note 66, at 116.

172. *Peik v. Chicago & Northwestern R.R.*, 94 U.S. 164 (1876); *Chicago, Burlington & Quincy R.R. v. Iowa*, 94 U.S. 155 (1876); *Winona & Saint Peter R.R. v. Blake*, 94 U.S. 180 (1876).

may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected.<sup>173</sup>

*Munn v. Illinois* advanced the cause for government regulation of business and ended the notion that businesses, or at least those with an “affected public interest,” were free to set prices and engage in whatever practices they wished. It also opened the door to federal regulation of interstate commerce a few years later.

*Munn v. Illinois* dealt a blow to champions of laissez-faire economics. These champions reorganized, however, and achieved victory ten years later in the *Wabash* case.<sup>174</sup> The Supreme Court ruled in *Wabash* that state regulation of interstate railroad rates was preempted by the interstate Commerce Clause.<sup>175</sup> Since most freight shipments were across state lines, the decision rendered most state legislation invalid. The reaction to the *Wabash* case resulted in enactment of the law that created the Interstate Commerce Commission (I.C.C.).<sup>176</sup>

The I.C.C. had power to hold hearings and issue orders to prohibit charges for interstate rail transportation that were not “reasonable and just.”<sup>177</sup> Enforcement by the I.C.C. was accomplished by petition to federal courts. The commission also prohibited rebates or preferential treatment of any shipper. This prohibition was compromised with respect to long haul-short haul rate differentials because it had to be applied “under substantially similar circumstances and conditions.” Finally, carriers had to file public rate schedules and information on financial matters and operations with the I.C.C.<sup>178</sup>

With weak enforcement authority and unclear provisions, the commission was destined to be ineffective. It lost in all its attempts to enforce its rulings through the courts, but the precedent was established that federal agencies could regulate businesses. Finally, in 1906 the Hepburn Act gave the I.C.C. power to determine a just and reasonable rate upon the filing of a complaint.<sup>179</sup> Historians have written that the I.C.C. “was the first of the many administrative boards which were to become so important as to constitute a fourth department of the government.”<sup>180</sup>

The populist attack on railroads that led to creation of the I.C.C. continued with the development of anti-trust law. An early form of business trust was called “pooling,” defined as gentlemen’s agreements between railroad directors to maintain prices, divide business, and pro-rate profits. Pooling among

173. *Peik*, 94 U.S. at 178.

174. *Wabash, St. Louis & Pacific R.R. Co. v. Illinois*, 118 U.S. 557 (1886).

175. *Id.* at 577.

176. Interstate Commerce Act, ch. 104, 24 Stat. 379 (1877).

177. *Id.* at §1.

178. JAMES W. ELY, JR., *RAILROADS AND AMERICAN LAW* 90-93 (University Press of Kansas, 2001); Interstate Commerce Act §§ 1, 3, 6, 16.

179. Hepburn Act, 34 Stat. 584 (1906). GATES, *supra* note 60, at 225-26.

180. NEVINS & COMMAGER, *supra* note 164, at 314.

railroads began in 1872<sup>181</sup> and was prohibited in The Interstate Commerce Act of 1887.<sup>182</sup> The Supreme Court in the Trans-Missouri Freight Association Case ruled that the Sherman Antitrust Act of 1890 also prohibited pooling.<sup>183</sup> Railroads stayed in the cross-hairs of the Sherman Act enforcers until the famous Northern Securities case of 1904; this was the case that made President Theodore Roosevelt famous as a “trustbuster.”<sup>184</sup> The court ruled that Northern Securities, a holding company for the Northern Pacific, Great Northern, and Chicago, Burlington, and Quincy railroads, constituted a combination in potential restraint of trade and violated the Sherman Act.<sup>185</sup> After Northern Securities, Roosevelt was emboldened to direct the attorney general to file actions against the meat-packer trust, the tobacco trust, and the Standard Oil Company. Each was successful.<sup>186</sup>

#### V. LAND-GRANT COLLEGES

President Lincoln signed the Morrill Act into law on July 2, 1862.<sup>187</sup> In a sense it was enacted to provide an alternative to classical education at the elite liberal arts colleges. Those colleges, Princeton, Columbia, Yale, Harvard, and others, emphasized the classics and learning for its own sake, following the model of Oxford and Cambridge.<sup>188</sup> Their founders were often religious denominations and their training was in what was then called the liberal arts. It was thought that attendance at elite colleges was the way to get ahead, and so Abraham Lincoln, a relatively wealthy but self-educated Illinois lawyer, sent his son, Robert Todd Lincoln, to Harvard.<sup>189</sup> The land grant colleges were to equalize opportunity for education and branch out from the liberal arts, while not altogether leaving them behind. The Act granted land to states and permitted them to use the proceeds for “the endowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts . . .”<sup>190</sup>

The mention of military tactics reflected the fact that the North was at war, but the long-range objective was to establish agriculture and engineering

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181. *Id.* at 312.

182. Interstate Commerce Act § 5.

183. *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897); Sherman Act, 15 U.S.C. §§ 1-7 (1890); *See MORISON & COMMAGER, supra* note 66, at 137, 143-44.

184. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); SCHWEIKART & ALLEN, *supra* note 64, at 474.

185. *Northern Securities*, 193 U.S. at 344.

186. NEVINS & COMMAGER, *supra* note 164, at 315.

187. Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. § 301).

188. George R. McDowell, *Land-Grant Universities and Extensions into the 21st Century: Renewing the Covenant*, WASHINGTON STATE UNIVERSITY COOPERATIVE EXTENSION CONFERENCE 16 (Oct 14-16, 2002).

189. DONALD, *supra* note 8.

190. Morrill Act § 4(8).

schools. To fund the universities, the Act granted each state 30,000 acres of public land for each senator and representative in Congress based on appointments under the census of 1860.<sup>191</sup> The land (or a substitute for land called "scrip") was to be sold and the proceeds invested in "safe" bonds for the "endowment, support and maintenance of at least one college."<sup>192</sup> If any portion of this endowment was diminished or lost then the state had to replace it so that "the capital of the fund shall remain forever undiminished."<sup>193</sup>

Eventually, every state of the union took up Congressman Morrill's offer. Some states established more than one land grant. The list reads as follows:

**Alabama**

Alabama A&M University, *Normal*

Auburn University, *Auburn*

Tuskegee University, *Tuskegee*

**Alaska**

Ilisagvik College, *Barrow*

University of Alaska, *Fairbanks*

**American Samoa**

American Samoa Community College, *Pago Pago*

**Arizona**

Diné College, *Tsaile*

University of Arizona, *Tucson*

Tohono O'Odham Community College, *Sells*

**Arkansas**

University of Arkansas, *Fayetteville*

University of Arkansas, *Pine Bluff*

**California**

D-Q University, (*Davis vicinity*)

University of California System-Oakland as Headquarters, *Oakland*

**Colorado**

Colorado State University, *Fort Collins*

**Connecticut**

University of Connecticut, *Storrs*

**Delaware**

Delaware State University, *Dover*

University of Delaware, *Newark*

**District of Columbia**

University of the District of Columbia, *Washington*

**Florida**

Florida A&M University, *Tallahassee*

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191. *Id.* at Preamble (2).

192. *Id.* at § 4(8).

193. *Id.* at § 5(9).

University of Florida, *Gainesville*

**Georgia**

Fort Valley State University, *Fort Valley*

University of Georgia, *Athens*

**Guam**

University of Guam, *Mangilao*

**Hawaii**

University of Hawaii, *Honolulu*

**Idaho**

University of Idaho, *Moscow*

**Illinois**

University of Illinois, *Urbana*

**Indiana**

Purdue University, *West Lafayette*

**Iowa**

Iowa State University, *Ames*

**Kansas**

Haskell Indian Nations University, *Lawrence*

Kansas State University, *Manhattan*

**Kentucky**

Kentucky State University, *Frankfort*

University of Kentucky, *Lexington*

**Louisiana**

Louisiana State University, *Baton Rouge*

Southern University and A&M College, *Baton Rouge*

**Maine**

University of Maine, *Orono*

**Maryland**

University of Maryland, *College Park*

University of Maryland Eastern Shore, *Princess Anne*

**Massachusetts**

University of Massachusetts, *Amherst*

**Michigan**

Bay Mills Community College, *Brimely*

Michigan State University, *East Lansing*

Saginaw Chippewa Tribal College, *Mount Pleasant*

**Micronesia**

College of Micronesia, *Kolonia, Pohnpei*

**Minnesota**

Fond du Lac Tribal & Community College, *Cloquet*

Leech Lake Tribal College, *Cass Lake*

University of Minnesota, *St. Paul*

White Earth Tribal and Community College, *Mahnomen*

**Mississippi**

Alcorn State University, *Lorman*

Mississippi State University, *Mississippi State*

**Missouri**

Lincoln University, *Jefferson City*

University of Missouri, *Columbia*

**Montana**

Blackfeet Community College, *Browning*

Chief Dull Knife College, *Lame Deer*

Fort Belknap College, *Harlem*

Fort Peck Community College, *Poplar*

Little Big Horn College, *Crow Agency*

Montana State University, *Bozeman*

Salish Kootenai College, *Pablo*

Stone Child College, *Box Elder*

**Nebraska**

Little Priest Tribal College, *Winnebago*

Nebraska Indian Community College, *Winnebago*

University of Nebraska, *Lincoln*

**Nevada**

University of Nevada, *Reno*

**New Hampshire**

University of New Hampshire, *Durham*

**New Jersey**

Rutgers University, *New Brunswick*

**New Mexico**

Navajo Technical College, *Crownpoint*

Institute of American Indian Arts, *Sante Fe*

New Mexico State University, *Las Cruces*

Southwestern Indian Polytechnic Institute, *Albuquerque*

**New York**

Cornell University, *Ithaca*

**North Carolina**

North Carolina A&T State University, *Greensboro*

North Carolina State University, *Raleigh*

**North Dakota**

Fort Berthold Community College, *New Town*

Cankdeska Cikana Community College, *Fort Totten*

North Dakota State University, *Fargo*

Sitting Bull College, *Fort Yates*

Turtle Mountain Community College, *Belcourt*

United Tribes Technical College, *Bismarck*

**Northern Marianas**

Northern Marianas College, *Saipan, CM*

**Ohio**

Ohio State University, *Columbus*

**Oklahoma**

Langston University, *Langston*

Oklahoma State University, *Stillwater*

**Oregon**

Oregon State University, *Corvallis*

**Pennsylvania**

Pennsylvania State University, *University Park*

**Puerto Rico**

University of Puerto Rico, *Mayaguez*

**Rhode Island**

University of Rhode Island, *Kingston*

**South Carolina**

Clemson University, *Clemson*

South Carolina State University, *Orangeburg*

**South Dakota**

Oglala Lakota College, *Kyle*

Si Tanka University, *Eagle Butte*

Sinte Gleska University, *Rosebud*

Sisseton Wahpeton Community College, *Sisseton*

South Dakota State University, *Brookings*

**Tennessee**

Tennessee State University, *Nashville*

University of Tennessee, *Knoxville*

**Texas**

Prairie View A&M University, *Prairie View*

Texas A&M University, *College Station*

**Utah**

Utah State University, *Logan*

**Vermont**

University of Vermont, *Burlington*

**Virgin Islands**

University of the Virgin Islands, *St. Croix*

**Virginia**

Virginia Polytechnic Institute and State University, *Blacksburg*

Virginia State University, *Petersburg*

**Washington**

Northwest Indian College, *Bellingham*

Washington State University, *Pullman*

**West Virginia**

West Virginia State University, *Institute*

West Virginia University, *Morgantown*

**Wisconsin**

College of Menominee Nation, *Keshena*

Lac Courte Oreilles Ojibwa, Community College, *Hayward*

University of Wisconsin, *Madison*

#### **Wyoming**

University of Wyoming

*Laramie, WY*

The Second Morrill Act of 1890<sup>194</sup> provided additional endowments for all land-grants on condition that there were to be no distributions to states that made distinctions of race in admissions. But it is said that “establishment and maintenance of colleges separately for white and colored students shall be held to be a compliance with the provisions of this act if the funds received in such State or Territory be equitably divided . . .”<sup>195</sup> This separate but equal provision led to the establishment of land grant colleges for blacks known as “the 1890 land-grants.”<sup>196</sup> There are also twenty nine Native American tribal colleges called the “1994 land-grants” and a number of small Hispanic-oriented land-grant institutions.<sup>197</sup>

Today, agricultural enrollments are less than ten percent of land-grant enrollments, and numerous non-land grant public universities have been founded. The contribution to a land grant’s budget from the original land-grant endowment is tiny. But remarkably, as lecturer Justin Smith Morrill reported in 2004, the 105 land-grant universities enrolled about three million students, awarded one-third of all U.S. bachelor’s degrees, one-third of all masters degree, sixty percent of all Ph.D.’s and seventy percent of all engineering degrees.<sup>198</sup>

Are land-grant universities remembered today only for historical reasons? The answer is no, because they still maintain a special relationship with the federal government. The U.S. Department of Agriculture’s Cooperative State Research Service (CSRS) administers Hatch Act<sup>199</sup> and Morrill-Nelson<sup>200</sup> funds for the Land-Grants. These funds are granted for regional scientific research. The Smith-Lever Act<sup>201</sup> established funding for a system of extension services. “Extension,” explains the National Institute of Food and Agriculture (NIFA), means that land-grant institutions “extend” their resources, solving public needs

194. Second Morrill Act, ch. 841, 26 Stat. 417 (1890) (codified as amended at 7 U.S.C. § 322).

195. *Id.* at § 1.

196. *Id.*

197. See 7 U.S.C. § 301; See also Arnold P. Appleby, *Milestones in the Legislative History of U.S. Land-Grant Universities* 13-14 (Oregon State University 2007).

198. Martin E. Jischke, President of Purdue University, *Adapting Justin Morrill’s vision of a New Century: The Imperative of Change for Land-Grant Universities*, Speech before the Association of State Universities and Land-Grant Colleges Annual Meeting, November 14, 2004, San Diego, CA (transcript available at [www.usda.gov/about/speeches/04\\_Morrill.html](http://www.usda.gov/about/speeches/04_Morrill.html) (last visited 10/18/2011)).

199. Act of Mar. 2, 1887, 24 Stat 440; 7 U.S.C. § 361a (1998).

200. Act of Mar. 4, 1907, 34 Stat. 1256.

201. Act of May 8, 1914, 38 Stat. 372 (codified at 7 U.S.C. § 341).

with college or university resources through non-formal, non-credit programs.<sup>202</sup> NIFA distributes Congressionally appropriated formula grants annually to supplement state and county funds.<sup>203</sup> Today NIFA supports 2,900 extension offices and a website with information from Land-Grant University System faculty and staff experts.<sup>204</sup>

There seem to be few legal problems growing out of the government's continuing involvement with land-grants, but there could be looming financial problems. For example, a single program, the "Expanded Food and Nutrition Education Program," announced formula grants under section 3(d) of the Smith-Lever Act to be "used to assist all states in carrying out a program of extension activities designed to employ and train professional and paraprofessional aids to engage in direct nutritional education of low-income families and in other appropriate nutrition education programs." The amount available for this single land grant program in fiscal year 2009 was \$65,709,480.<sup>205</sup>

## VI. CONCLUSION

There can be no doubt that legislation enacted during the Civil War had a major impact on the law. Critics of the Pacific Railroad and Homestead Acts point out the antitrust problems caused by railroads and how few homesteaders stuck it out to become successful farmers. It is true that many homesteaders abandoned their farms or were forced to rent from land speculators, and that railroads constantly had to defend themselves before the Supreme Court. But the Homestead and Railroad Acts together spurred much faster development of the West than would have been the case without them. In the two decades after the Civil War, production of corn, wheat, and oats more than doubled as did the number of cattle, sheep and hogs.<sup>206</sup> Of approximately four million homesteaders who filed claims under the Act, forty percent "proved up" on their claims and earned a deed.<sup>207</sup> Homesteaders settled 270 to 285 million acres or ten percent of U.S. land. Forty-five percent of Nebraska's acres were distributed under the Act.<sup>208</sup>

Homesteaders survived arid farming conditions, manipulation of available lands by fraudulent applicants, monopoly of water resources, and many other obstacles. They left over 93 million descendants whose energy makes U.S.

202. UNITED STATES DEPARTMENT OF AGRICULTURE, NATIONAL INSTITUTE OF FOOD AND AGRICULTURE EXTENSIONS, <http://nifa.usda.gov/qlinks/extension.html> (last visited Dec. 31, 2011).

203. *Id.*

204. *Id.*

205. EXPANDED FOOD AND NUTRITIONAL PROGRAM, FY 2009 FORMULA GRANT OPPORTUNITY, available at [http://www.nifa.usda.gov/business/awards/formula/2009\\_efnep\\_final\\_5\\_26\\_2009.pdf](http://www.nifa.usda.gov/business/awards/formula/2009_efnep_final_5_26_2009.pdf) (final listed in the USDA Catalogue of Federal Domestic Assistance under Part II).

206. NEVINS & COMMAGER, *supra* note 164, at 284.

207. <http://www.nps.gov/home/historyculture/homesteadinglegacies.htm> (last visited 11/5/2011).

208. *Id.*

farms the most productive in the world.<sup>209</sup> Homesteading continued for 123 years. The Federal Land Policy and Management Act of 1976 repealed the Homestead Act except in Alaska where homesteading was permitted until 1986.<sup>210</sup> Ken Deardorff, a Vietnam veteran, filed a claim for eighty acres along the Stony River in 1976 and received his deed in 1988. He is recognized as the last homesteader.<sup>211</sup>

The rapid building of the Pacific railroads gave rise to giant steel mills that produced farm machinery, rails, railroad cars and engines. The East and West coasts were connected because of engineering heroics that caused the transcontinental railroad to be finished in record time. The railroad stimulated trade by eliminating the dangerous, slow, and expensive voyages between east and west coasts around Cape Horn. Hundreds of thousands of immigrants moved West with a new spirit of optimism. Communications were revolutionized as the telegraph along the tracks connected San Francisco with New York and trains quickly delivered the mail. A minor consequence of the railroad's completion was that it put the pony express out of business. In its place, a national culture developed around a thousand new towns along the rails.

And what of the Morrill Act? It is hard to find serious criticism of it. In every state a great research university exists because of it, and that university has stimulated many imitators. Perhaps the best scholars produced at land grant universities can now solve the lingering problems that stem from The Homestead and Pacific Railroad Acts.

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209. *Id.*

210. Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1976).

211. *The Last Homesteader*, NAT'L PARK SERV. [www.nps.gov/home/historyculture/lasthanomesteader.htm](http://www.nps.gov/home/historyculture/lasthanomesteader.htm) (last visited 11/6/2011).