people. To say that the framers of the Fifteenth Amendment intended to guarantee the right to vote only in final elections is just as much a matter of conjecture as to say that they intended to protect the right to vote in primary elections as well as final elections. At the time that the Amendment was ratified the only election by the people was the general election. As the population grew and the number of officials to be chosen by the voters increased, the election machinery changed by necessity to consist of two steps, the first, a primary election in which the minor candidates are eliminated, and the second a final elimination or election between the major candidates. In many states nomination on the Democratic ticket means practically election. In other states the same is true of nomination on the Republican ticket. The framers of the Amendment used as broad and general terms as were possible. It does not seem probable that it was their intention that the right of a negro to participate in the actual election of public officials should be restricted by the unforeseen development in the later elective process.

Certiorari has been granted in this case by the Supreme Court. In view of the foregoing consideration, it is by no means certain that the decision will be affirmed.

JOSEPH FEIGENBAUM, '32.

Smyth v. Ames IN THE SUPREME COURT

The rugged and to a great extent the ruthless individualism of this country received a decided shock by the opinion of the Supreme Court in *Munn v. Illinois*,[1] upholding the right of the state legislature to regulate the rates of a company whose business was such as to be affected with a public interest. The legislature of Illinois prescribed the maximum rates which certain grain elevator companies could charge. In addition to the attack on the validity of state regulation, the company attacked the constitutionality of the rate, insisting, among other things, that it was the duty of the Supreme Court to decide whether the prescribed rates would amount to a taking of property without due process of law. To this the court answered:

> It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question.
>
> As has already been shown, the practice has been otherwise. In countries where the common law rule prevails, it has been customary from time immemorial for the legisla-

[1] (1876) 94 U. S. 113.

ture to declare what shall be a reasonable compensation under such circumstances, or, perhaps more properly speaking to fix a maximum beyond which any charge would be unreasonable.

We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by the legislatures the people must resort to the polls, not the courts.

But ten years after this decision, the Court in *Stone v. Farmers' Loan and Trust Co.*, by way of dictum, without questioning the regulatory power of a state in such instances, cast some doubt upon the statement as made in *Munn v. Illinois*. "It is not to be inferred," said the Court, "that this power of limitation or regulation is itself without limit. The power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freight, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."[2]

In *Dow v. Beidleman*,[3] the question was again raised as to the constitutional limitation of the legislature's rate-making powers, in a suit to test the validity of an Arkansas statute reducing the passenger fares. After quoting the dictum of the above case without comment, the Court went on to add, "The Court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the legislature is unreasonable." Thus it would appear as if the statement of the *Stone* case was to become rhetorical exercise.

But the dictum was soon to become law and the law as originally laid down was to become obsolete. The Legislature of Minnesota enacted a law establishing a railroad and warehouse commission,[4] whose purpose it was to fix just and reasonable rates. The court of last resort in Minnesota construed the act as conferring final authority upon the commission. But this the Supreme Court overruled, on the ground that since no provision was made for judicial review, the act was in conflict with the Constitution as depriving the railroad of due process of law and of the equal protection of the laws. Said the Court:

The question of the reasonableness of a rate of charge for the transportation by a railroad company, involving, as

---

[2] Stone v. Farmers' Loan and Trust Co. (1886) 116 U. S. 307.

[3] (1888) 125 U. S. 680.

[4] State v. Chicago, Milwaukee and St. Paul Ry. Co. (1888) 38 Minn. 281.

it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such a deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the Constitution of the United States, and in so far as it is thus deprived, while other persons are permitted to reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws.[5]

Thus the policy of judicial review was finally accepted;[6] it was evident that the ultimate burden of valuation for rate making was now to be borne by the Supreme Court. By the acceptance of such a burden the Court bit into a morsel of judicial function, which for the past thirty-five years, it has been unable to digest.

If the Court was now to determine whether utility rates were to be confiscatory or not, it meant that it would have to establish or accept some definite basis upon which such rates could be fixed. Hints as to what such basis might be were to be found in some of the earlier cases. In 1888, in *Dow v. Beidleman*,[7] the Court was asked to declare a rate of three cents per mile confiscatory as being able to pay a return of only a little more than one and one-half per cent of the original cost of the road, and a little more than two per cent of its bonded debt. However, the road had recently been reorganized, and at the trial, there was no evidence as to the cost of the bonds, or as to the amount of the capital stock as reorganized, or as to the sum paid for the road on reorganization. The Court refused to declare the rate unreasonable, on the ground that it had no evidence of the cost of the road, rejecting the idea of determining the rate on the basis of the then outstanding securities. Thus the value of the property as represented by the sums actually invested by the reorganized company is recognized as a possible basis for rate making.

The problem of valuation arose again, six years later, in

[5] Chicago, Milwaukee and St. Paul Railway Co. v. Minnesota (1890) 134 U. S. 418.

[6] Although some doubt was thrown upon the holding in the Minnesota case, *ibid.*, by the cases of Chicago and Grand Trunk Railway Co. v. Wellman (1892) 143 U. S. 339, and Budd v. New York (1892) 143 U. S. 517, still such doubt was removed in Reagan v. Farmers' Loan and Trust Co. (1894) 154 U. S. 362.

[7] N. 3 above.

Reagan v. Farmers' Loan and Trust Co.[8] The State of Texas had through its commission established a rate which failed to yield a return sufficient to pay the interest on the outstanding stocks or bonds. But here there had been no issuance of watered stock, no unwise expenditures, nor injudicious management. Under such circumstances, the Court held that the utility was entitled to at least a reasonable return on the capital invested. But as the Court further pointed out, the amount invested could not always be controlling, as for example, when there had been an extravagant expenditure of money, when there had been a waste in management of the road, or when there had been a watering of the stock. In such instances the present value of the road might be the determining factor in the fixing of the rates. But as to how this present value could be obtained, no mention is made. Two years later a similar situation arose in the case of *Covington and Lexington Turnpike v. Sanford,*[9] where the return permitted was not even sufficient to pay the operating expenses. One of the contentions of the company was that the rates were insufficient to pay more than a four per cent return on the outstanding stock. Following the previous decisions, the Court again refused to allow the amount of the outstanding stock to be taken as the base for the fixing of a rate. To do so would be to subvert the public rights to private interests.

This briefly was the situation prior to the famous case of *Smyth v. Ames.*[10] In order fully to appreciate the decision, account must be taken of the then existing economic situation. The country at the time the act was passed (1893) was in the midst of an economic depression chiefly due to the collapse of inflated values. Speculating had been on the rampage. Construction had been carried on at high prices. Finance knew of little or no regulation. By the time suit was filed in *Smyth v. Ames* prices had taken a tremendous drop and at the time of suit had reached their lowest point. It was only natural that the utilities should advocate a return based on the outstanding securities, representing the investment in the road, since a return on such sum would help make up the difference due to the drop of prices. On the other hand, Mr. Bryan, championing the people's rights believed that the rate should be as low as possible.[11] He argued, "The present value of the roads, as measured by the cost of reproduction, is the basis on which profit should be computed. . . The ordinary business man cannot avail himself of watered stock or fictitious capitalization, nor can he protect himself from falling prices. He profits and loses with rises and falls." He pointed

[8] N. 6 above.
[9] (1896) 164 U. S. 578.
[10] (1898) 169 U. S. 466.
[11] *Ibid.* 489-490.

out further that roads at the time could be duplicated at $20,000 per mile, whereas a return was sought on securities representing from $26,000 to $102,786 per mile of construction. The opinion represented neither the views of those favoring reproduction cost or of those favoring original investment. It held that neither one nor the other was inapplicable, but that to a certain extent, both were pertinent. Value could not be determined without a consideration of either. The following rule was laid down by the Court. It has been quoted in practically all of the subsequent decisions on the subject, and from it there has been no deviation, but, strange to say, it has been of little practical value in solving the problem:

> We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of production, the amount expended in permanent improvements, the amount and the market value of its stocks and bonds, the present as compared with the original cost of production, the probable earning capacity under particular rates prescribed by statute, and the sum required to meet operating expenses are all matters for consideration and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return on the value of that which it employs for the public commerce. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.

Reiterating the factors to be considered in determining the rate base, it is seen that the first and second, namely, original cost of construction, and the amount expended in personal improvements, represent the actual cost of the plant; the third, the amount and market value of its bonds and stocks, is never considered except as it may show prudent investment; the fourth is the cost of reproduction; the fifth, probable earning capacity of the property under particular rates, and the sixth, operating expenses, are not considered in fixing the rate base, though the factor of operating expenses becomes important once the rate base has been settled; the seventh, possible other matters, covers a multitude of things which the ingenuity of hundreds of highly skilled attorneys, economists and engineers have been able to think out, notably the so-called "intangibles." Says Professor

Goddard, "How unthinking then, the habit of quoting this rule when three of the seven matters are never considered in finding a rate base, and the other four are considered in greatly modified form."[12]

The rule now having been laid down by the Court, it is appropriate to study it in actual application. Following the principle of the above case, the Court in *San Diego Land and Town Co. v. National City*[13] held that the actual value of the property at the time the rates are fixed is to form the basis upon which rates are to be computed. The evidence offered as to the original cost was rejected since the costs of construction were extravagant, and also because there were no reliable books on which to judge the amount and extent of the outstanding securities. Such evidence could not be held to be indicative of value at the present time. If the company had made bad investments, the public could not be made to pay for them. Properly then, the Court rejected the contention of the utility.

San Diego Land and Town Company v. Jasper[14] was a case of a similar nature. The commission fixed the valuation at $350,000 on the basis of replacement cost. The company claimed a valuation of $1,000,000 figured at original cost. But here, too, the original cost was based chiefly upon outstanding watered stock, and again the Court refused to consider it in declaring whether or not the rate was confiscatory. It added, however, that although original cost might be considered, still in the present case, it was of no importance.

Knoxville v. Knoxville[15] introduced a new element into the rule of *Smyth v. Ames*, namely, reproduction-new-less-depreciation. Said the Court: "The cost of reproduction is one way of ascertaining the present value of a plant . . . but that test would obviously lead to incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use." In *Wilcox v. Consolidated Gas Co.*,[16] the question was whether the increased value of the property was to be considered in determining the rate base. The Court held that it was, but qualified its statement to the extent that if the increase in values becomes so great as to place an additional burden on the public, then such increase was not to be allowed. However, neither of the two cases purported to deviate from the *Smyth v. Ames* decision.

The above cases did not question the propriety of the rule of *Smyth v. Ames*, since from the time of the decision prices had been on an upward trend. This meant that at some stage an

---

[12] Goddard, *Fair Value of Public Utilities* (1924) 22 COL. L. REV. 652, 657.
[13] (1898) 174 U. S. 739.
[14] (1903) 189 U. S. 439.
[15] (1900) 212 U. S. 1.
[16] (1909) 212 U. S. 19.

equilibrium would be reached at which point the rate base would be the same for each party. However, when this equilibrium point was reached and when prices went past that point so that a return on reproduction now meant a greater return to the utilities, the positions of the parties were reversed. Nor in subsequent cases argued, did either litigant contend that it wished to overthrow the principle of *Smyth v. Ames,* but rather both professed to follow it, the only difference being in the belief as to which elements were to be given more weight.

But even now, the Court refused to make reproduction new the sole test in determining the rate base. In the *Minnesota Rate Cases*[17] the railroads attempted to include special values for their real property, which had increased tremendously in price. But such fictitious values were disallowed, the Court citing with approval *Smyth v. Ames* and stating that the ascertainment of value is not to be controlled by artificial rules nor formulas, but by a reasonable judgment having its basis in a proper consideration of all relevant facts.

In 1915 in *Des Moines Gas Co. v. City of Des Moines,*[18] the Court again adhered to *Smyth v. Ames,* taking reproduction cost less depreciation as a basis for determining the rate. However, there was really no question as to the selection of reproduction new or original investment as the dominant element in fixing the rate, since it was determined on the basis most favorable to the utility, namely reproduction new. The real issue was whether going value was to be included in a determination of the rate base, which element the Court said the commission would be presumed to have considered.

The tremendous rise in prices during the World War, the unstable value of the dollar following at its close, the fear of a rapid decline or further rise, made the finding of value a difficult problem. An attempt to solve this problem was made by fixing value on the future plateau of prices, which method was sanctioned by the Supreme Court in *Galveston Electric Ry. v. City of Galveston.*[19] In this instance the value was taken as the reproduction cost on the historical bases, *i. e.,* the estimated undepreciated cost of reproduction at the time the plant was built, exclusive of franchise value, going concern value, bond and brokerage fees, but with land estimated at its present value. To this amount the commission added 33 1/3% of that sum, which was to represent the increased price level and a prophesied future price level. The company, however, wished to add 70% above the cost of 1913 as representative of the increase, but the request was

[17] (1913) 230 U. S. 352.
[18] (1915) 238 U. S. 153.
[19] (1922) 258 U. S. 388.

denied and the commission's finding upheld; and since the original cost, the increased price level and the reproduction cost had all been taken into account, the Court concluded that a fair value had been found, or in other words, the elements of *Smyth v. Ames* had all been considered and given effect.

Three interesting cases on the question of valuation were decided by the Supreme Court in 1923, the first being that of *Southwestern Bell Telephone Co. v. Public Service Commission.*[20] Here the commission compared the original cost of three of the company's plants with the reproduction cost of the same plants as based on the reports of the company's engineers. The ratio between these two estimates was used in determining the final value of the plant *i.e.*, the final value bore the same ratio to the company's estimate of the total reproduction cost, as did the commission's value of the three plants compare to the company's value of the reproduction cost of the same plants. The result was that the value found by the commission was $20,400,000, the company's cost being 72.4 per cent above such amount. The Missouri Supreme Court[21] upheld the finding of the commission as conforming with the rule of *Smyth v. Ames,* since the commission had expressly declared that it had considered all of the evidence, including original cost, cost of reproduction and all other elements of value. The United States Supreme Court, however, reversed the ruling, stating the valuation to have been attained without any consideration of the reproduction cost element. The Court said:

> Obviously the commission undertook to value the property without according any weight to the greatly enhanced cost of material, labor, supplies, etc., over those prevailing in 1912, 1914 and 1916. As a matter of common knowledge, these increases were large. Competent witnesses estimated them as 45 to 50 per centum . . . We think the proof shows that for purposes of the present case the valuation should be at least $25,000,000.[22]

Thus it will be seen that neither original nor reproduction cost was made the dominant or single element in determining value, but that a medium was struck between the two opinions as to what value should be.

However, from the opinion of the Court, although approving the decision, Mr. Justice Brandeis, with whom Mr. Justice Holmes concurred, dissented. In a remarkable opinion, the learned Justice pointed out the defects in the rule of *Smyth v.*

---

[20] (1923) 262 U. S. 276.

[21] State v. Public Service Commission (Mo. 1921) 233 S. W. 425.

[22] N. 20 above.

Ames and in the reproduction cost theory, advocating instead, as a method of determining the rate base, that of the prudent investment theory.

Bluefield Waterworks Co. v. Public Service Commission of West Virginia[23] presented a case similar to that of the *Southwestern* case. Reproduction cost less depreciation was $900,000. Original investment undepreciated was $500,000. The rate base as fixed by the commission was $460,000. The rate fixed by the commission on such amount was held confiscatory as no weight was given to reproduction cost, consideration being given to only one matter, namely original cost.

The third case, *Georgia Railway v. Railroad Commission*,[24] presented a set of facts, so far as the rate base was concerned, practically similar to the two above, and yet, in effect a different result was reached. The commission determined the valuation by ascertaining the original cost as determined by 1914 prices and added thereto additions made at cost. The result was a valuation of $5,250,000. The company on the basis of reproduction new claimed a value of at least $9,500,000. However, the commission allowed an additional amount of $125,000 to represent land appreciations. This finding the Supreme Court upheld, Mr. Justice Brandeis writing the opinion, in which he said:

> Here the Commission gave careful consideration to the cost of reproduction; but it refused to adopt reproduction cost as the measure of value . . . The lower court recognized that it must exercise an independent judgment in passing upon the evidence; and it gave careful consideration to replacement cost. But it likewise held that there was no rule which required that in valuing the physical property there must be "slavish adherence to the cost of reproduction, less depreciation" . . . The refusal of the Commission and of the lower court to hold that, for rate-making purposes, the physical properties of a utility must be valued at the replacement cost less depreciation was clearly correct.

Obviously one can see that the only difference between this case and the *Southwestern* and *Bluefield* cases is that here $125,000 was permitted to represent a consideration of the cost of reproduction. The practical effect was to permit original cost to be the dominating element, since the amount allowed by the commission was only 1/34 of that requested by the utility. What is also striking is that in the *Southwestern* case the commission testified that it had given weight to reproduction cost,

[23] (1923) 262 U. S. 679.
[24] (1923) 262 U. S. 625.

although the Court held that it obviously did not. And yet, all three of these cases professed to follow the rule of *Smyth v. Ames;* none attempted to repudiate it.

The case in which reproduction new became almost synonymous with value was that of *McCardle v. Indianapolis Water Co.*[25] In that case the original cost of the plant was fixed at $13,000,000. The commission fixed the value of the plant at $15,000,000, and the utility, on the basis of its engineer's reports, contended for a valuation of $21,000,000. The lower court enjoined a rate fixed on the $15,000,000 valuation and held the present value to be not less than $19,000,000. To such a holding the commission appealed, contending that the district court had adopted as a measure of value the cost of reproduction new less depreciation estimated on the basis of spot prices as of Jan. 1, 1924, or gave that figure controlling weight. The company replied that the cost of reproduction less depreciation estimated on the basis of spot prices was more than $22,500,000, and that the court did not adopt such costs as a measure or give them undue weight or influence. But the Supreme Court upheld the decision of the lower court, stating,

> While some expressions of the District Judge indicate that he was of the opinion that dominant or controlling weight should be given to cost of reproduction based on spot prices, it is clear that the $19,000,000 fixed by him as the minimum value could not have been arrived at on that figure.

To this decision Justice Brandeis dissented, stating, "The lower court assumed that spot reproduction is the legal equivalent of value . . . He believed that recent decisions of the Court required him to so hold. In this belief he was clearly in error."

Here again the Court followed the rule of *Smyth v. Ames.* Comparing this case with the *Georgia Railway* case, it is difficult to see why such different results should be reached. In one an addition of $125,000 for increased value in lands was a sufficient representation of reproduction new in determining the rate base, whereas in the *McCardle* case, an addition of $2,000,000 over original cost was not a sufficient representation, but an addition of $6,000,000 was.

The Supreme Court having given such weight to reproduction cost, the question arose, how would the Court react to the Interstate Commerce Commission methods of determining value. Value up to this time had been ascertained by finding the unit costs, plus costs of additions since the time of installation, plus market value of lands. The Interstate Commerce Commission was directed according to Sec. 15a (4) (6) of the Interstate

[25] (1926) 272 U. S. 400.

Commerce Act, amended by the Transportation Act of 1920[26] in fixing a valuation on the railroads for the purposes of the recapture clause, to take into account "all of the elements of value recognized by the law of the land for rate-making purposes." Would it be necessary for the Commission to include reproduction cost in determining value? The question was answered by the case of *St. Louis and O'Fallon Railway v. United States.*[27]

The case arose as a result of the valuation placed upon the railroad by the Interstate Commerce Commission in order to determine those earnings which would be subject to the provisions of the recapture clause. The Commission ascertained the value of the road by taking the 1914 unit costs, to which were added the actual cost of additions since 1914, plus the market value of the lands. In making its report, the Commission stated that an adherence to the reproduction cost doctrine was inapplicable and unsound for railroad valuation.[28] The district court upheld the finding of the Commission, but avoided any question as to the valuation issue.[29] The Supreme Court, however, declared that because the Commission had given no weight to reproduction cost, its findings were void.[30] The Court stated that since for the purpose of rate-making the Commission must take into account "the elements of value recognized by the law of the land," and since the elements as recognized by the law of the land include among them the cost of reproduction, the failure to take such element into account renders both the valuation and the recapture order void. Once again the Court held that it was applying the law laid down by *Smyth v. Ames.* The practical effect of the *O'Fallon* decision was to nullify the recapture provision of the Transportation Act, as pointed out in the dissenting opinion of Mr. Justice Brandeis, with whom Mr. Justice Holmes and Mr. Justice Stone concurred.

The result of the above survey of cases in the Supreme Court shows that the rule as laid down in *Smyth v. Ames* thirty-four years ago is still in effect. The most serious problem is as to the advisability of further retaining it.

The first factor of significance is the ease with which the rule can be applied to any set of circumstances. The elements to be considered in their entirety are elements advocated by all of the interested groups, and for the contingencies which might arise in the future provision is made for other factors which might enter into the rate base. At the time when the case was decided

---

[26] 49 U. S. C. sec. 15 (a).
[27] (1929) 279 U. S. 461.
[28] *In re* Excess Income St. Louis and O'Fallon R. R. (1927) 124 I. C. C. 1.
[29] (C. C. A. 2, 1927) 22 F. (2d) 930.
[30] (1929) 279 U. S. 461.

prices were at their lowest ebb. An acceptance of the original cost theory would have shifted the burden created by speculative organization and injudicious expenditures upon the public. The adoption of a strict reproduction view would have been ruinous to the railroads. Hence, a balance had to be struck. However, it must be kept in mind that at this time there were no blue sky commissions to regulate the issuance of securities, so that a determination of original cost was practically impossible. Nor could the books of the firm be referred to, since they were in many instances both padded and false. To repeat, what in part, has been stated before, after *Smyth v. Ames* prices started on an upward trend so that litigation was not very extensive on the subject, for prices were tending toward an equalization point. At such point, the rates were agreeable to both parties. But when the business cycle showed a tendency to continue upward so that the equalization point would be passed, reproduction cost became higher than original cost. An excellent example of this is shown in the case of the Burlington Road, in which reproduction cost was $530,000,000, whereas original cost was $258,-000,000. And it is remarkable to note that now the positions of the parties began to change, the utilities advocating reproduction cost, the people, original investment. The almost unescapable conclusion is that the parties were not representing principles, but rather, interests.

The unstable price period caused by the World War so dissociated price from value that consideration had to be given to increased prices. And even here, the Court held that it was applying the *Smyth v. Ames* rule. There is no need to reiterate the results of the Supreme Court on valuation after the war except to say that it again professed to follow *Smyth v. Ames*. Thus it would seem, that it makes no difference as to the positions of the parties in regard to the existing economic conditions, whether they were arguing reproduction new or original cost, they could both assert with equal vigor that they were advocating or following the rule laid down in *Smyth v. Ames*. To state it another way, *Smyth v. Ames* has set no standards or guides by which the utilities or public may act. Each case amounts to nothing more than a case of the first instance, the outcome of the parties' actions being left to the determination of the courts.

But, it is argued, that it is because of this extreme flexibility and because of this ready adaptability to changing circumstances that the decision is a desirable one. The answer to such a contention lies in an examination of the rule in actual application.

The whole is equal to the sum of its parts. Without attempting to enumerate specific instances of how imaginative values have been placed into the rate base, or without pointing out the differences in opinion as to what elements are to be considered

in rate proceeding, a composite of the total results can best illustrate the differences of opinion as to what constitutes value for rate-making purposes. The table below represents the range of values as found in attempting to estimate the fair value and fair return for the New York Telephone Company:[31]

	Fair Value	Rate pct.	Fair Return
Majority of the Public Service Commission	$366,915,493	7	$25,635,000
Federal Court	397,207,925	7	27,804,555
Minority of Public Service Commission	405,502,993	8	32,480,000
Special Master's Report	518,109,584	8	41,448,777
Company claim based on Whittemore appraisal	528,753,738	8	42,300,249
Company claim based on Stone and Webster	615,000,000	8	49,200,000

While undoubtedly the Commission gave practically all of its weight to original cost, and the utility all of its consideration to reproduction cost, yet both were following the requirements of the Supreme Court decisions, the only difference being in the weight afforded each item. But what is worth noticing is that the Commission showed a difference in $38,587,500 as between itself, whereas the utility offered two values showing a discrepancy of $86,246,262.

The *Georgia Railway* case[32] affords another example. The value of the plant was estimated by the commission at $5,250,000, including reproduction cost (this resulting in an addition of only $125,000), whereas the utility claimed a valuation of $9,500,000. Here the Court allowed $125,000 as a sufficient representation of reproduction, whereas in the subsequent *McCardle* case,[33] the Court added $4,000,000 to the commission's finding to make up the reproduction element. Here too, both utility and commission were working in accordance with the Court's standards. Then, too, the Court itself is in no better position to determine reasonableness, for with but a vague standard by which to determine its action it can do no more than to assert its view of reasonableness based on the opinions placed before it. Thus reasonableness finds itself at the apex of a pyramid built up entirely on opinions.[34]

Nor can the social costs of these strained relations between utility and public be neglected. As Mr. Justice Brandeis said in

[31] New York Telephone Co. v. Prendergast (D. C. S. D. N. Y. 1929) 36 F. (2d) 54.

[32] N. 24 above.

[33] N. 25 above.

[34] See Mr. Justice Brandeis's dissent in the Southwestern Bell case, n. 20 above.

the *Southwestern Bell* case: "The most serious vice of the present rule for fixing the rate base is not the existing uncertainty, but that the method does not lead to certainty. Under it, value for rate-making purposes must ever be an unstable factor. Instability is a standing menace of renewed controversy. The direct expense to the utility of maintaining an army of experts and of counsel is appalling. The indirect cost is far greater. The attention of officials, high and low, is necessarily diverted from the constructive tasks of efficient operation and of development. The public relations of the utility to the community are apt to become more and more strained. And a victory for the utility, may in the end, prove more disastrous than defeat would have been."[35]

It is not within the scope of this paper to discuss the merits of prudent investment or of reproduction cost, but whichever view is adopted, or if rate-making is declared to be a legislative function, or if the rate be determined on the basis of index numbers, it is clear that the rule of *Smyth v. Ames* is no longer applicable. Nor is this view shared alone by those advocating original cost; those in the camp of reproduction new also favor it. As says Professor Goddard,[36] a strong advocate of the prudent investment theory, "It is time *Smyth v. Ames* went into the discard. It served as a good temporary bridge. It is no longer safe and nobody trusts his weight on it, though nearly all claim to be trusting it to carry their weight across the stream." And, as is said by Mr. Frederic G. Dorety,[37] an advocate of reproduction cost, after pointing out Mr. Justice Brandeis's reasons for reconsideration of the *Smyth v. Ames* doctrine, "The necessity for the statement in some definite principle in valuation has not been exaggerated by him."

TOBIAS LEWIN, '32.

THE APPLICATION OF THE FRONT FOOT RULE TO PROPERTY OF IRREGULAR SHAPE

The apportionment of the cost of public improvement has, for the most part, been accomplished by one of two methods. Either the benefit accruing to each specific piece of property so affected is determined and the assessment made upon that basis, or a benefit district is designated and the assessments are levied uniformly against the property owners within that district. The latter plan has been most widely used in distributing the expense of paving or resurfacing city streets, the district being laid out

[35] *Ibid.*

[36] N. 12 above.

[37] Dorety, *The Function of Reproduction Cost in Public Utility Valuation and Rate Making* (1923) 37 HAR. L. REV. 173.