

plied a sufficient number of times to demonstrate that such an expedient does not upset the machinery of the forum.³⁶ Perhaps in this last connection a distinction may arise between claims governed by the law of a sister state and claims governed by the law of a foreign country.

Constitutional Law—Court Review of Rate Base Determinations—Smyth v. Ames Overruled?—[United States].—The Federal Power Commission, pursuant to its authority under the Natural Gas Act of 1938,¹ entered an interim order that the defendant company reduce its annual operating revenues by \$3,750,000. For the purposes of this order the commission accepted the company's estimates of the reproduction cost of its properties, the value of its gas reserves, the life of its properties, and its operating income, but rejected the company's claim of \$8,500,000 for going value and part of its claim for future capital expenditures. The circuit court of appeals vacated the order because the commission had not made a separate allowance for going concern value and had amortized the cost of the properties over their entire service life and not merely over their unexpired service life from the date of regulation or entry of the commission's order.² The United States Supreme Court reversed this decision. *Held*: 1) that going value measured by the previous cost of getting business and maintaining excess capacity need not be separately included in the rate base in view of the failure to show that these items had not been recouped as expenses during the unregulated period; 2) that amortization was properly calculated upon the basis of original rather than reproduction cost, over the entire life of the properties and not merely over their unexpired life, and by the sinking fund method with interest equal to the rate of return; and 3) that, considering the decline of general business profits and the absence of hazard, a rate of return of 6½ per cent was not confiscatory. Three justices concurred on the grounds that the due process clause does not give courts power to invalidate rates as unreasonable and that under the statute the commission has "a broad area of discretion for selection of an appropriate rate base" subject to the "barest minimum" of court review. *Federal Power Com'n v. Natural Gas Pipeline Co. of America*.³

Although the three concurring justices⁴ and some commentators⁵ seem to regard this case as substantially changing court review of rate making, more cautious comment would emphasize the Federal Power Commission's third failure⁶ with the present court to obtain explicit reversal of *Smyth v. Ames*,⁷ and the fact that three justices felt obliged to concur separately. Mr. Chief Justice Stone in the majority opinion identi-

³⁶ Notes 28, 31 *supra*.

¹ 52 Stat. 821 (1938), 15 U.S.C.A. § 717 (1939).

² *Natural Gas Pipeline Co. v. FPC*, 120 F. (2d) 625 (C.C.A. 7th 1941).

³ 62 S. Ct. 736 (1942).

⁴ *Ibid.*, at 750.

⁵ See 29 *Pub. Utilities Fortnightly* 505 (1942); *N.Y. Times*, p. 31, col. 6 (March 17, 1942); *Public Utility Rate Regulation: The End of the Rule of Smyth v. Ames*, 51 *Yale L.J.* 1027 (1942). But see Hale, *Does the Ghost of Smyth v. Ames Still Walk?*, 55 *Harv. L. Rev.* 1116 (1942).

⁶ See the briefs of the Federal Power Commission in *Railroad Com'n of California v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938), in *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1939), and in the principal case.

⁷ 169 U.S. 466 (1893).

fied the statutory standard of the "lowest reasonable rate" with the lowest non-confiscatory rate; discussing the latter rate, he emphasized the freedom of rate-making bodies in the choice of formulae and the "clear showing" of confiscation which must be made to invalidate a rate order.⁸ But such statements have been made before⁹ and they seem to be made here more as a general introduction to the specific discussion than as a reversal of an old tradition.

Nor do the specific holdings and the manner of reaching them indicate a change in the Court's position. The majority seem to use an original cost rather than a reproduction cost base to find an allowance for going concern value; but this use of original cost is not new,¹⁰ and the majority emphasize that these original costs were incurred in a high cost period and continue to speak of "present value."¹¹ The majority also permit the amortization of the original cost rather than the reproduction cost of the properties; but they emphasize the limited life of the assets and refuse to rule that "there can in no circumstances be a constitutional requirement that the amortization be the reproduction value rather than the actual cost. . . ."¹² Moreover, the fact that the Court here discussed these rate regulation issues in detail indicates that it will continue to review rates for substantive due process. In historical perspective, these changes (if they are changes at all) in the application of the "fair value" rule seem far less important than others which time has proved did not foreshadow its abandonment.¹³

However, when the three justices concurring separately here¹⁴ are added to the two others who have previously indicated readiness to abandon court review on the basis of "fair value,"¹⁵ it becomes apparent that a majority of the Court will when necessary

⁸ *FPC v. Natural Gas Pipeline Co.*, 62 S. Ct. 736, 743 (1942).

⁹ Former Chief Justice Hughes has emphasized that the rate base is not determined by any formula, and that the power to invalidate rates is to be exercised only in clear cases. The *Minnesota Rate Cases*, 230 U.S. 352, 434-35, 452-53 (1913); *Los Angeles Gas & Electric Corp. v. Railroad Com'n of California*, 289 U.S. 287, 304-6, 314 (1933).

¹⁰ *Los Angeles Gas & Electric Corp. v. Railroad Com'n of California*, 289 U.S. 287, 313 et seq. (1933).

¹¹ *FPC v. Natural Gas Pipeline Co.*, 62 S. Ct. 736, 743-44 (1942).

¹² *Ibid.*, at 746.

¹³ *Los Angeles Gas & Electric Corp. v. Railroad Com'n of California*, 289 U.S. 287 (1933) (emphasizing the burden of proving confiscation and adjusting accounts to find allowances for excluded items); *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151 (1934) (giving successful operations weight in determining that rates were not confiscatory); *Dayton Power & Light Co. v. Public Utility Com'n of Ohio*, 292 U.S. 290 (1934) (rate of return under rates proposed so low as to suggest that rate base was inflated); *Railroad Com'n of California v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938) (commission is only required to consider reproduction cost and may reject it as a measure of value).

¹⁴ Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Murphy.

¹⁵ Mr. Justice Frankfurter concurred separately in *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1939), because he felt that the majority opinion, in taking a roundabout course to avoid overruling *Smyth v. Ames*, seemed to give new vitality to the "fair value" rule. In that case he said: "The only relevant function of law in dealing with . . . [rate regulation] is to secure observance of those procedural safeguards in the exercise of legislative power which are historic foundations of due process." His disagreement with the concurring justices in the principal case was perhaps only as to its appropriateness as a vehicle for overruling the old doctrine. *FPC v. Natural Gas Pipeline Co.*, 62 S. Ct. 736, 754 (1942). His opinions in the

make some change. The question suggested by the principal case is what sort of review the Court will adopt to replace that which a majority of its members are now prepared to abandon.

The first possible course would be that the Court adopt as the constitutional standard of confiscation one or more of the factors which have previously only been considered as evidence of "fair value."¹⁶ Of the two principal factors—prudent investment and reproduction cost—the former has been most favored by dissenting justices¹⁷ and the writers,¹⁸ and has been proposed by the Federal Power Commission.¹⁹ Despite the enormous improvements which would ensue from the adoption of prudent investment as the standard of confiscation, the adoption of any constitutional rate base would keep the courts in a technical field which has proved unsuited for judicial action,²⁰ would hamper the rate-fixing tribunals in their efforts to adjust rates in the public interest,²¹ and would continue to divert attention to the rate base from the more

Texas oil proration cases, *Railroad Com'n of Texas v. Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940), 311 U.S. 570 (1941), 311 U.S. 614 (1941), though indicating a willingness to leave technical questions to the administrative bodies created to handle them, are not in point because no attempt was made to show that the proration orders would prevent the owner from earning a return upon his investment. See 51 *Yale L.J.* 1027, 1033 n. 44 (1942).

Mr. Chief Justice Stone has repeatedly dissented in cases invalidating rates. *McCardle v. Indianapolis Water Co.*, 272 U.S. 400 (1926); *St. Louis & O'Fallon R. Co. v. United States*, 279 U.S. 461 (1929); *West v. Chesapeake & Potomac Telephone Co. of Baltimore*, 295 U.S. 662 (1935). In a concurring opinion in *St. Joseph Stockyards v. United States*, 298 U.S. 38, 93 (1936), Mr. Justice Cardozo and he indicated that if the scope of court review in rate cases were to be re-examined, they would not approve the old doctrine.

¹⁶ *Graham and Katz, Accounting in Law Practice* 227 (1938) lists the following measures of value which are variations of the two principal factors: 1) original cost; 2) historical cost; 3) book cost; 4) investment cost or outstanding capitalization; 5) prudent investment cost; 6) reproduction cost value; 7) split inventory value; 8) taxation value; 9) market value; and 10) purchase value. See also Mr. Justice Brandeis' dissent in *State ex rel. Southwestern Bell Telephone Co. v. Public Service Com'n of Missouri*, 262 U.S. 276, 294 n. 6 (1923).

¹⁷ Mr. Justice Brandeis, dissenting, *State ex rel. Southwestern Bell Telephone Co. v. Public Service Com'n of Missouri*, 262 U.S. 276, 289 (1923); Mr. Justice Black, dissenting, *McCarr v. Indianapolis Water Co.*, 302 U.S. 419, 423 (1938).

¹⁸ Bauer, *Public Policy Concept of Valuation for Purposes of Public Utility Rate Control*, 27 *Geo. L. J.* 403 (1939); 2 Bonbright, *Valuation of Property* 1155 (1937); Lyon and Abramson, *Government and Economic Life* 690 (1940); Hale, *Conflicting Judicial Criteria of Utility Rates—The Need for Judicial Restatement*, 38 *Col. L. Rev.* 959 (1938). Contra: *Graham, Public Utility Valuation* (1934); Dorety, *The Function of Reproduction Cost in Public Utility Valuation and Rate Making*, 37 *Harv. L. Rev.* 173 (1923).

¹⁹ See briefs cited note 6 supra.

²⁰ See Mr. Justice Brandeis, concurring, *St. Joseph Stockyards v. United States*, 298 U.S. 38, 73 (1936), on the length and complexity of rate proceedings. Court interference tends to give rate hearings the character of lawsuits with the consequent delays, expense, and distraction of purpose. Bauer and Gold, *The Electric Power Industry* c. 13 (1939).

²¹ The use of other rate bases might increase the commissions' freedom, but any constitutional rate base would hinder efforts to reduce utility prices in line with other prices during depressions, or to increase the consumption of power. See *Public Service Com'n of Wisconsin, State-Wide Investigation of the Wisconsin Telephone Co.* (1932); Fainsod, *Regulation and Efficiency*, 49 *Yale L.J.* 1191 (1940).

important tasks of regulation.²² Moreover, the adoption of an economically or logically consistent and understandable rate base²³ might result in even more court interference in the rate-making process than was possible under the "fair return upon fair value" rule.²⁴

The second course would be the abandonment of any review of the confiscatory character of the rates adopted and the confining of the judicial function in rate-making to preserving procedural due process.²⁵ Although most of the discussion has been in terms of what would be the best rate base to adopt under the first course, recent expressions by four members of the Court seem to favor the abandonment of court review. Mr. Justice Black²⁶ (and perhaps the other concurring justices in the principal case) argues that the Constitution does not deprive the states of the power to fix utility rates without interference from the federal courts and cites the early cases holding that rate regulation is exclusively a legislative function. Mr. Justice Frankfurter, on the other hand, is more impressed with the fact that rate regulation is a legislative function entrusted to the commissions and not to the courts but does not believe that the cases cited by Mr. Justice Black establish the inconsistency between judicial review and respect for legislative power.²⁷ Whatever the theory, the withdrawal of the courts from the rate-making process would remove an interference which has been said to be one of the causes of the failure of utility regulation,²⁸ and would leave commissions free upon

²² Other factors of more importance to consumers than the size of the rate base are the rate of return, the operating expenses, and the extent to which the rate schedule maximizes the use of the service. Fainsod, *op. cit. supra* note 21; Lyon and Abramson, *Government and Economic Life* 704, 707 (1940).

²³ The "present value" rule is bitterly criticized as logically inconsistent because a reduction in rates and earnings must reduce value, and because it affords no criteria for choosing among the elements of value. 2 Bonbright, *Valuation of Property* 1081 (1937); Lyon and Abramson, *Government and Economic Life* 683, 692 (1940).

²⁴ Under the "present value" rule the Court has ranged from giving the most weight to spot reproduction cost, *McCardle v. Indianapolis Water Co.*, 272 U.S. 400 (1926), to giving the most weight to prudent investment, *Lindheimer v. Illinois Bell Telephone Co.*, 292 U.S. 151 (1934). It has recently permitted commissions to reject measures of value which seem unreliable. *Railroad Com'n of California v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938). The Court has also found margins for the correction of omissions from the rate base in other excessive allowances. *Los Angeles Gas & Electric Corp. v. Railroad Com'n of California*, 289 U.S. 287 (1933); *Dayton Power & Light Co. v. Public Utility Com'n of Ohio*, 292 U.S. 290 (1934). Indeed, the "present value" base has been so vague and unworkable in practice that commissions have had a great deal of freedom in choosing their rate base. Lyon and Abramson, *Government and Economic Life* 700 (1940).

²⁵ Berkson, *Due Process Requirements of a Fair Hearing in a Rate Proceeding*, 38 *Col. L. Rev.* 978 (1938).

²⁶ Dissenting in *McCart v. Indianapolis Water Co.*, 302 U.S. 419, 423 (1938), and concurring in *United Gas Public Service Co. v. Texas*, 303 U.S. 123, 146 (1938).

²⁷ *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104, 122 (1939). Mr. Justice Frankfurter had previously emphasized the need for responsible local administration, and had suggested that court review be confined to state courts. Frankfurter, *The Public and Its Government* c. 3 (1930).

²⁸ The other cause of regulation failure is said to be poor administration. 2 Bonbright, *Valuation of Property* 1154 (1937); Bauer and Gold, *The Electric Power Industry* c. 13 (1939); Frankfurter, *op. cit. supra* note 27, at 120.

their own responsibility to develop positive programs of regulation. The adoption of this course would render unnecessary independent court scrutiny of the findings of fact in rate making cases²⁹ and would thus contribute further to the freedom of the prime rate regulating bodies. The regulating bodies would then be subject only to the restraints of their own training and responsibilities, of the economic necessity of maintaining utility credit and encouraging utility management, and of final resort to the legislature.

A third course, intermediate between the other two, would involve the retention by the courts of the power to invalidate rates for extreme instances of confiscation. This course might appeal to the Court if it did not wish either to foreclose completely review of the occasional gross errors which are made in rate regulation³⁰ or to overrule such a long-established line of precedent, but wished instead to maintain a certain amount of freedom of action. But the new liberty which this course would give commissions must be clearly announced and its bounds clearly defined or commissions haunted by the spectre of court review will hesitate to develop progressive methods of regulation. In adopting this course the Court might refuse to invalidate rates yielding a fair return upon any recognized rate base;³¹ it might also accept rates yielding no fair return upon any base where the interests of consumers³² or the public³³ require subordination of the interests of investors. Rates would then only deprive owners of their property without due process of law when no rational basis to support them could be suggested.

Whichever view is adopted, the concurring justices seem justified in their desire to clarify the law as soon as possible. It cannot be too much emphasized that the chief fault of court review in the past has been the vagueness and uncertainty of the standard applied, and the principal case does little to eliminate that uncertainty. Under present circumstances, with commissions as willing to pay lip service to the old rule as they

²⁹ *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920); *St. Joseph Stockyards v. United States*, 298 U.S. 38 (1936). Independent court review of the facts has been predicated upon the necessity of determining whether the property will be confiscated; but should the course discussed in the text be followed, the courts would review only to determine whether the utility had been granted a fair hearing, and errors of fact in determining the rate base would be irrelevant.

³⁰ E.g., refusing to allow amortization for gas fields expected to be exhausted in three years, *Columbus Gas & Fuel Co. v. Public Utility Com'n of Ohio*, 292 U.S. 398 (1934); mathematical errors, omissions from the rate base by mistake, and inconsistent methods of allocating costs, *West Ohio Gas Co. v. Public Utility Com'n of Ohio (No. 1)*, 294 U.S. 63 (1935). See Bauer and Gold, *Public Utility Valuation for Purposes of Rate Control* cc. 2-4 (1934), for a discussion of rate cases in which rates were held to be too low under any standard.

³¹ See note 16 *supra*. This view would require only a slight expansion of the discretion already given commissions in choosing measures of present value. *Railroad Com'n of California v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938).

³² See the statement of the concurring justices in the principal case. *FPC v. Natural Gas Pipeline Co.*, 62 S. Ct. 736, 753 (1942).

³³ Economists testifying before the Wisconsin Commission in the depths of the depression emphasized the necessity of reducing sticky prices to promote recovery, regardless of the injustice to the particular utility. *Public Service Com'n of Wisconsin, State-wide Investigation of the Wisconsin Telephone Co.* (1932).

are, and courts as willing to construe it liberally,³⁴ the case requiring a square overruling may be long in coming.

Constitutional Law—Deprivation of Right to Assistance of Counsel by Appointment of Attorney Representing Co-conspirator—[United States].—Glasser and Kretzke, assistant United States attorneys, were convicted of a conspiracy to defraud the government by fixing liquor tax violations.¹ At the trial, one of Kretzke's lawyers was unable to appear and Kretzke moved for a continuance, being dissatisfied with his remaining counsel. The court suggested that Stewart,² one of Glasser's attorneys, act also for Kretzke. Stewart raised the question of a possible conflict of interests,³ and Glasser also objected. The court then directed Kretzke's lawyer to stay in the case. After a conference at the defense table, Stewart indicated his willingness to represent Kretzke. Glasser, who was present, did not renew his objection. Appealing his conviction, Glasser contended that he had been denied the assistance of counsel guaranteed by the Sixth Amendment.⁴ He also contended that he had been denied a trial by an impartial jury, alleging that all the women on the panel were members of the Illinois League of Women Voters, and were biased in favor of the prosecution, having attended lectures on jury service sponsored by the league.⁵ These allegations were supported by Glasser's affidavit. The conviction was affirmed by the circuit court of appeals.⁶ On writ of certiorari the Supreme Court *held*, the trial court, by suggesting that counsel for one defendant represent a co-defendant, infringed the former's right to assistance of counsel, and it was not necessary to determine the "precise degree of prejudice" resulting therefrom. Mere acquiescence by defendant was not a waiver of the right. A jury, selected from a private organization, and partisan by training, is not representative of the community, and had a proper offer of proof of these allegations been made, a new trial of all the defendants would have been necessary, but defendant's affidavit was not a sufficient offer of proof. Judgment reversed as to Glasser, two justices dissenting. *Glasser v. United States*.⁷

³⁴ Compare the attitudes of the commissions and the Court in the two most recent previous cases which afforded opportunities to overrule *Smyth v. Ames: Railroad Com'n of California v. Pacific Gas & Electric Co.*, 302 U.S. 388 (1938), and *Driscoll v. Edison Light & Power Co.*, 307 U.S. 104 (1939). The principal case is a continuation of this mutual accommodation. The Federal Power Commission, however, is now forcing the issue by refusing to allow evidence of reproduction cost to be admitted in rate cases.

¹ Section 37, Criminal Code, Rev. Stat. § 5440 (1875), 18 U.S.C.A. § 88 (1927).

² William Scott Stewart, author of *Stewart on Trial Strategy* (1940).

³ Stewart also raised the objection that his representation of Kretzke might tend to associate Glasser with Kretzke in the minds of the jurors, but he later decided that no harm would result in this respect if the jurors were informed of the circumstances of his appointment. *R.*, at 180, 183.

⁴ "In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to have the Assistance of Counsel for his defence."

⁵ He also alleged that women otherwise qualified, but not members of the league, were systematically excluded. There were six women on the jury in the instant case.

⁶ *United States v. Glasser*, 116 F. (2d) 690 (C.C.A. 7th 1940).

⁷ 62 S. Ct. 457 (1942), noted in 28 A.B.A.J. 190 (1942), and 10 Kan. City L. Rev. 117 (1942).