in *Ben Avon* concluded that the Pennsylvania "Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment . . . ." [175] Largely on the strength of this interpretation of the applicable state statute, the Court held that, when the order of a legislature, or of a commission, prescribing a schedule of maximum future rates is challenged as confiscatory, "the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment." [176]

History of the Valuation Question.—For almost fifty years the Court wandered through a maze of conflicting formulas and factors for valuing public service corporation property, including "fair value," [177] "reproduction cost," [178] "prudent investment," [179] "depre-

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[175] 253 U.S. at 289 (the "question of confiscation" was the question whether the rates set by the Public Service Commission were so low as to constitute confiscation). Unlike previous confiscatory rate litigation, which had developed from rulings of lower federal courts in injunctive proceedings, this case reached the Supreme Court by way of appeal from a state appellate tribunal. In injunctive proceedings, evidence is freshly introduced, whereas in the cases received on appeal from state courts, the evidence is found within the record.

[176] 253 U.S. at 289. Without departing from the ruling previously enunciated in Louisville & Nashville R.R. Co. v. Garrett, 231 U.S. 298 (1913), that the failure of a state to grant a statutory right of judicial appeal from a commission's regulation does not violate due process as long as relief is obtainable by a bill in equity for injunction, the Court also held that the alternative remedy of injunction expressly provided by state law did not afford an adequate opportunity for testing a confiscatory rate order. It conceded the principle stressed by the dissenting Justices that, "[w]here a State offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review." 253 U.S. at 295.

[177] Smyth v. Ames, 169 U.S. 466, 546–47 (1898) ("fair value" necessitated consideration of original cost of construction, permanent improvements, amount and market value of bonds and stock, replacement cost, probable earning capacity, and operating expenses).

[178] Various valuation cases emphasized reproduction costs, *i.e.*, the present as compared with the original cost of construction. *See*, *e.g.*, San Diego Land Co. v. National City, 174 U.S. 739, 757 (1899); San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 443 (1903).

[179] Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n, 262 U.S. 276, 291–92, 302, 306–07 (1923) (Brandeis, J., concurring) (cost includes both operating expenses and capital charges, *i.e.*, interest for the use of capital, allowance for the risk incurred, funds to attract capital). This method would require "adoption of the amount prudently invested as the rate base and the amount of the capital charge as the measure of the rate of return." As a method of valuation, the prudent investment theory was not accorded any acceptance until the Depression of the 1930s. The sharp decline in prices that occurred during this period doubtless contributed to the loss of affection for reproduction costs. In Los Angeles Gas Co. v. Railroad