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Article Summary: Nebraska Populists enacted the Newberry Bill in 1893 to try to force railroads to lower their shipping rates for farmers. The bill caused an economic, socio-political, and legal crisis that ended when the Supreme Court declared the bill unconstitutional, deciding in favor of railroad owners in *Smyth v. Ames*.

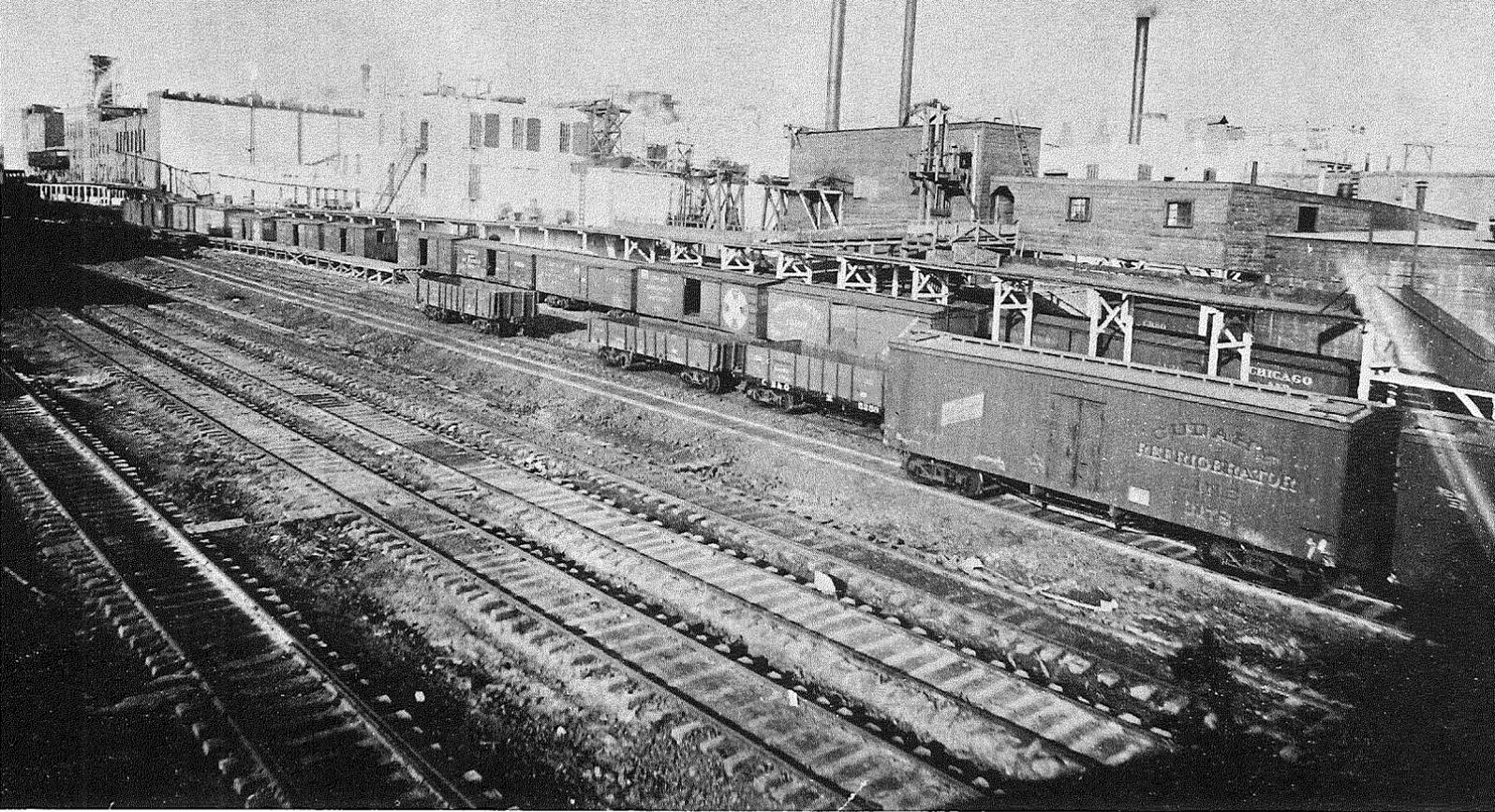
#### Cataloging Information:

Names: Constantine J Smyth, John Marshall Harlan, David J Brewer, Hamlin Garland, James M Woolworth, Arthur S Churchill, John L Webster, William Jennings Bryan, James C Carter, Fred Newberry

Experts Cited Regarding State Regulation of Railroads: Alfred H Kelly, Winfred A Harbison, Douglas C North, Lee Benson, John D Hicks, Gabriel Kolko, Robert H Wiebe, Stanley B Parsons, Frederick S Stimson, William Appleman Williams, Arnold M Paul, Clyde E Jacobs

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Photographs / Images: Cudahy Packing Company, Omaha, 1896; Fred Newberry; Arthur S Churchill; John L Webster; B F Diffenbacher; Constantine J Smyth



*Enforcement of the "Newberry Bill" would have meant lower shipping prices for farmers sending goods to such places as the Cudahy Packing Company in Omaha, pictured above in January, 1896.*

## CAN NEBRASKA OR ANY STATE REGULATE RAILROADS? SMYTH v. AMES, 1898

By ERIC MONKKONEN

The celebrated late 19th century Supreme Court case of *Smyth v. Ames* is one of those rare instances where what seems to be a purely local conflict takes on national importance. In this case the court declared unconstitutional the Newberry Bill, which Nebraska Populists had enacted in 1893. This bill was an attempt to force railroads to lower their shipping rates by almost one third, bringing them more in line with the rates of Iowa, and relieving some of the economic hardships which Nebraska farmers had been suffering. Not only did this bill have bread and butter importance, but its passage had been a symbolic victory for the Populists all over the country—finally the embattled farmers had achieved some concrete legislative action. And then, in *Smyth v. Ames*, the court in essence said that states could control railroad rates only within a limited range of options, to be set by the Supreme Court. The constitutional issues suddenly made Nebraska's problems symbolize those of a nation going through an awkward economic transition, and the solution to these problems became national policy for the next fifty years. Thus, the case of *Smyth v. Ames* was not merely the Supreme Court overturning state legislation. It represented a solution—and not necessarily a just one—to an economic, political, and legal crisis which had come to a head with the Nebraska Legislature's passage in 1893 of the bill which carried the name of its sponsor, Fred Newberry, a farmer from Aurora, Nebraska.<sup>1</sup>

We must understand that there are three distinct yet interrelated explanatory contexts within which to view the case of *Smyth v. Ames*: the economic context, the socio-political context, and the legal context. In the decade of the nineties, state regulatory agencies had begun to wield their power vigorously and somewhat inconsistently, while at the same time federal regulatory agencies like the Interstate Commerce Commission began to gain power. For corporations with national operations, the state regulation seemed to be a kind of guerilla war, and the milder, more consistent, and flexible federal control appeared to be the lesser of two evils. For the Midwestern farmer the combination of fluctuations in the international wheat market, severe drought in the early 1890's, and a depression in 1893 made the economic outlook grim. As a result, there were sporadic agrarian movements to lower and regularize the costs of those elements of the national economy which affected the farmer most—the railroads and various warehousing concerns. Known as Populists, these farmers gained power in the Nebraska Legislature and after a two-year struggle passed the Newberry Bill, which cut intra-state railroad freight rates 29.5 percent, making Nebraska's rates comparable to those of Iowa. The railroads obtained an injunction against the enforcement of the act and challenged its constitutionality under the due process clause of the Fourteenth Amendment. Thus, the case was composed of economic, political, and legal causes. But, as it came before the court, most people saw the complex issue in terms of bad or good. As one railroad president put it, "Another effect of a decision in favor of the Nebraska law would be the bad example which it would set to other states where the Populists and demagogues of other kinds are strong."<sup>2</sup>

After a U.S. Circuit Court decision by Justice David J. Brewer of Leavenworth, Kansas, who held the statute to be unconstitutional because it deprived the railroads of property (i.e., profit) without due process of law, the case was appealed to the U.S. Supreme Court by Constantine J. Smyth. Smyth, a poor Irish immigrant who had ridden the rails to Nebraska in 1876, sold Omaha newspapers, worked for the Union Pacific and studied law until he rose to be attorney general of Nebraska

from 1897 to 1901.<sup>3</sup> Both the arguments before the court and Justice John Marshall Harlan's decision revolved around two accepted legal concepts: one, the common law doctrine which requires reasonable compensation for goods and services and the right of the public to pay a reasonable rate; and the other, the due process clause of the Fourteenth Amendment—"nor shall any State deprive any person of life, liberty, or property, without due process of law"—person meaning corporation as well as human. The disagreement involved the meaning of "reasonable" and the meaning of the due process clause.

Several leading Nebraskans presented the arguments for the appellants (essentially the state of Nebraska, as represented by Smyth). The state's previous attorney general, Arthur S. Churchill, and John L. Webster, a prominent Omaha lawyer since 1869, pointed out that at common law "reasonable" compensation does not include compensation for high costs due to bad management and inefficiency.<sup>4</sup> Thus the plaintiffs should have been required to show that the railroads were prudently managed. Further, they argued that reasonable compensation should only mean that which is necessary to pay operating expenses—anything above is a legislative question. William Jennings Bryan, also for the appellants, argued essentially the same point, claiming that courts can only suspend state rates which do not pay operating expenses. He noted that profit should be computed on the base of reproduction cost, otherwise overcapitalization, stock watering, and poor investment would be rewarded.

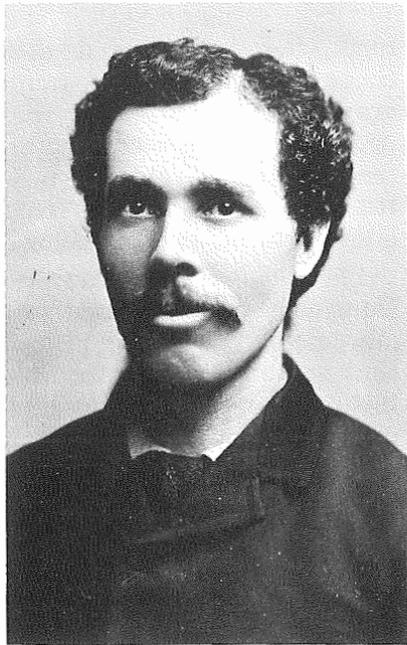
The various railroads making up the appellees (Ames in the citation was a railroad president) had both locally and nationally known legal counsel. James M. Woolworth was probably the most prominent lawyer in Nebraska; though he had tended to avoid political office, he was well known as a pioneer businessman and investor in Omaha and was probably the most important Western lawyer arguing before the Supreme Court.<sup>5</sup> Woolworth argued that there were two ways of determining whether or not the new rates would allow the railroad reasonable compensation: one, the new rates could be tried out; or, two, the effect of the rates could be retrodicted—that is, calculated for previous years. Only the second method was feasible, he claimed, because the results of the first were

unpredictable and perhaps destructive. He calculated that the Nebraska rates would not have paid operating expenses for the previous years. He further argued, citing *McCulloch v. Maryland*, that because the Union Pacific had been chartered by Congress, Nebraska was interfering with the federal government. James C. Carter, a well-known New York lawyer, also appeared for the appellees. First, he said that if no return on investment was yielded, the result would be practical destruction of property. Second, he appealed to the principles of *laissez faire* economics (and here is the paradox of *laissez faire* in the late 19th century: Adam Smith's hidden hand needed the protection of the Supreme Court). The railroad charges, he said, should be determined by "laws of free competition": "Should an unwise policy (never followed in present times) tempt the imposition of high rates, it would speedily be baffled by the appearance in the field of new roads and new competitors."<sup>6</sup>

Justice Harlan delivered the decision, upholding Brewer's Circuit Court decision. Harlan pointed out that it had been settled that a state cannot deprive a railroad of just compensation without due process; the Fourteenth Amendment protects railroads even within the states. Harlan admitted that a commission of experts might more easily determine what compensation a railroad is "entitled to receive," but he then modestly took that task upon himself: "The court cannot shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land."<sup>7</sup> He calculated, in a series of impossible-to-follow operations, the effect the proposed rate reductions would have had on the railroad in the years before the act was passed. He concluded that only four of the companies involved would have made a profit, which made the statute unconstitutional. Harlan dismissed the argument that Iowa rates for local freight were 40 percent lower than similar rates in Nebraska, citing Iowa's higher population density as the causal variable.<sup>8</sup>

Confessing that just compensation would always be an "embarrassing question," Harlan, at the end of his decision, set up standards for determining just compensation: "The basis of all calculations as to reasonableness of rates . . . must be the fair

*In 1893 Fred Newberry, farmer-state legislator from Aurora, sponsored the "Newberry Bill," which attempted to force railroads to lower shipping rates.*



value of the property being used by it [the company] for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the particular rates prescribed by the statute, and the sum required to meet operating expenses are all matters for consideration.”<sup>9</sup> These points quickly became the criteria used by the I.C.C. and other state commissions to determine all public rate charges; Harlan’s guidelines were thus used by commissions to avoid constant court cases.

*Smyth v. Ames* not only set guidelines for rate regulation, but effectively stopped further state legislation attempts at controlling railroads. The door to state regulation of railroad rates opened by the Granger decisions in 1876 had been closing ever since, and *Smyth v. Ames* locked it. In many ways the issues posed by specific application of the case were to be insignificant within the next forty to fifty years. The growth of truck transportation furnished real competition for the rail-

roads, and they suffered—their privileged position perhaps had encouraged inefficiency; ironically, Harlan's doctrine served to prop up railroads in the mid-20th century. Finally, Harlan's decision marked, according to many people, the completion of the doctrine of substantive due process, the "limitation upon the right of legislatures to regulate private property in the interests of the public welfare."<sup>10</sup>

*The Economic Context:* The well-known economic historian Douglass North has tried to explain the various farm protest movements of the late 19th century in terms of the behavior of land speculation and the international food market.<sup>11</sup> From this point of view, it appears the farmer was comparatively well off. All shipping rates were dropping, mortgage rates were dropping, prices were slowly but steadily rising, and the U.S. was the world's major supplier of grain. North hypothesizes that farmer discontent was the result of unpredictable prices due to the fluctuations of the world market; for example, during a low production drought year, the expected higher prices due to lessened supply might be offset by high production in Australia or even India, and the U.S. farmer would have low production and low prices. One cannot help but feel that North tends to minimize the farmers' problems; he considers the fact that over half the Kansas and Nebraska farms were mortgaged as insignificant, yet such a high proportion of short-term mortgages in a time of unpredictable profits and production would understandably cause the farmers to be upset.

Another point of view sees the farmers' problems as a result of a change of the national economy from an agricultural to an industrial base. The farmers had incorrectly analyzed their plight, and instead of evolving an agricultural solution, they demanded railroad regulation, cooperatives, free silver, etc. The agricultural problem, therefore, "was the culmination of a variety of complex factors"; this view then, like North's, tends to downgrade the seriousness of the farmers' problems by placing them in a larger economic context.<sup>12</sup>

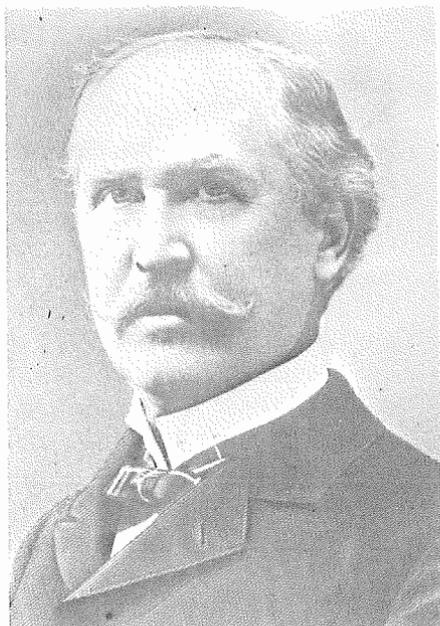
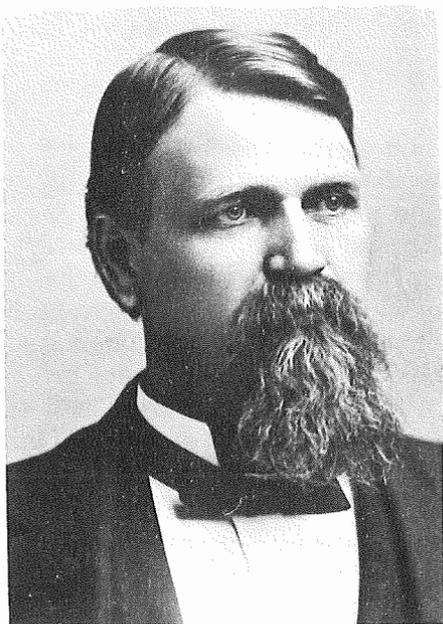
Perhaps the most meaningful discussion of the farmers' situation may be found outside of economic history. For instance, in his autobiography, *Son of the Middle Border*, Hamlin Garland tells the story of his childhood as his family

farmed, speculated a little, and moved west from Wisconsin to Iowa to South Dakota. In this story we can see his father working out the agricultural version of the American myth of success. The vicissitudes of the decades between 1870 and 1900 leave Garland's father mentally and morally crushed. By 1892 Garland's father has failed, but Hamlin Garland has become a successful writer; both are active Populist reformers, but the father has psychologically given up while the son's vital interests are not involved. The son finally buys his father's property back in Wisconsin where the family started. Garland concludes his book with: "A certain phase of American pioneering had ended. . . . [and by 1892] the day of reckoning had come."<sup>13</sup>

Unlike the economic aspects of farm problems, which have become a specialist subject, the farmers' calls for rate regulation have had continuing interest for historians, beginning in the 1870's with the Illinois Granger Laws which set maximum grain elevator rates—laws which were upheld by the Supreme Court in 1876. The regulation movements of the late 19th century are often seen as the beginning of Progressive and New Deal regulation; thus, the whole subject of regulation is linked with various reform movements of the turn of the century.

The traditional historical point of view on regulation finds railroads and corporations against government regulation. The late 19th century saw individual economic enterprise giving way to collective effort, and regulation movement was merely the farmers' response to what they incorrectly saw as the individual greed of capitalists.

By the mid-1950's historians began to portray the regulation movement as being a pro-business, pro-rationalization, and pro-predictability movement of industrial capitalism. This interpretation contrasted with the earlier version of various control attempts as being essentially anti-capitalist and anti-business. (It is interesting to note that this interpretation of regulation has not been carefully applied to the various farmer movements, a possibility worth investigating.) Lee Benson has shown how all of the major participants in the economy came to realize "that the positive use of state power was an indispensable supplement to private, self-policing agreements."<sup>14</sup> As James C. Carter's argument in *Smyth v. Ames* ironically illustrates, *laissez faire*,



*Arthur S. Churchill (left) and John L. Webster joined other prominent Nebraska attorneys, including William Jennings Bryan, in pleading the case of Nebraska shippers.*

the economic theory which insists on the freedom of economic activity from state interference, needed the Supreme Court's assistance. The railroads were regulated first, suggests Benson, because of their communication advantages. Other sectors of the economy could not compete fairly; hence, regulation was necessary. With growing government regulation "free competition fell but private enterprise remained," and the "trinity" of property, economic individualism, and the presumptive harmony between self-interest and social welfare were preserved.<sup>15</sup>

The most recent interpretive positions are similar to but stronger than the one taken by Benson. Gabriel Kolko maintains that the "intervention of the federal government not only failed to damage the interests of the railroads but was positively welcomed by them since the railroads never really had the power over the economy, or their own industry, ascribed to them."<sup>16</sup> Kolko establishes the railroads' efforts to stop cut-throat competition and dropping rates by examining the I.C.C. files; the Supreme Court, says Kolko, thought it was

pro-railroad, but actually it was out of touch with the times and took away the needed stabilizing power of the I.C.C. It was not until Woodrow Wilson's time that the I.C.C.'s function became clarified: "To protect the railroads in their function of making profit for individual capitalists so long as the railroads provided their services to the public."<sup>17</sup> Unfortunately, this analysis is directed more towards explaining progressivism than regulation. The case of *Smyth v. Ames*, as we shall see, does not fit neatly or meaningfully into Kolko's otherwise intriguing scheme.

Possibly the most useful analysis of governmental regulation of the economy is taken by Robert H. Wiebe.<sup>18</sup> In fact, Wiebe's *The Search for Order* has retained the regulation-rationalization thesis only in its title; Wiebe has moved from the problems of business in this book to all of society, which had become "distended" or coreless in the late 19th and early 20th century. Thus, as Kolko's railroad directors looked for stability and order through federal intervention, so Wiebe finds the society turning to a management-controlled solution to social problems. Essentially, Wiebe would agree with Kolko that the Supreme Court was out of touch, and both would probably see *Smyth v. Ames* as a decision important not so much for stopping local control as setting up guidelines for later I.C.C. rate regulation.

It is interesting to note that Henry Lee Higginson, a Boston banker and railroad director named in one of the suits decided in *Smyth v. Ames*, had many discussions with Theodore Roosevelt on the subject of governmental regulation. Roosevelt once wrote Higginson that he thought railroad problems were self-inflicted and said, "Unquestionably there is loose demogogic attack upon them in some of States, but not one particle of harm has come to them by Federal action." If the federal government left the railroads alone, "It would result in a tidal wave of violent State action against them throughout three-fourths of the country," Roosevelt continued.<sup>19</sup> One can only wish that we had Higginson's reply.

*The Socio-political Context:* The study of Populism seems to have always aroused partisanship in historians, perhaps indicating the continuing relevance of the issues the Populists dealt with. The classic work on Populism by John D. Hicks was published in 1931, and although he may have been a little too

uncritical of the farmers, at least his book has the virtue of taking them seriously.<sup>20</sup> Revisionists unfortunately have made the mistake of being partisan towards the other side. Even worse, the Populists were portrayed as motivated by "provincial resentment" and "status anxiety," a kind of mental illness.<sup>21</sup> Hicks does not see a simple cause to the farmers' unrest, noting the heavy rains and land boom of the 1880's, the rapid railroad expansion, and the debt into which farmers went during the expansion. Then the world market went bad, and the drought ended the boom, bringing mortgage foreclosures and economic suffering, "forming a discontented class ideally prepared for the doctrines of political and economic revolt."<sup>22</sup> The Newberry Bill controlling local freight rates was one of the real tests for the Populists, the action they had so long talked about. By the time the Supreme Court declared it unconstitutional, the farmers were prosperous again, and apparently there was little reaction to the decision.

An interesting quantitative study by Stanley B. Parsons concludes that "the farmer can hardly be blamed for his use of the conspiracy theory."<sup>23</sup> A village elite controlled local and state politics, even determining who Nebraska's national political figures were. Multiple correlation analysis shows that most Populists were wheat farmers, and because wheat farming had comparatively easy entry (i.e., it required less capital than other kinds of farming), little world market stability, and high shipping rates, it was only natural that these farmers attacked the freight rates.

Parsons' analysis fits in well with a new study of America's expansionist foreign policy during this period.<sup>24</sup> It can be argued that the farmers were very aware of their position in the international food market and were anxious for U.S. economic expansion. This thesis might be seen as a foreign policy corollary to the regulation-rationalization thesis of Kolko, Benson, and Wiebe. Thus, the farmers' behavior becomes consistent both on the domestic and international issues.

Contemporary reaction to the Newberry Bill itself was divided, as one might expect. As far as newspapers were concerned, "the opinion that the bill was unfair seemed to prevail throughout the state, if the press expressed the public

*House Chaplain  
B. F. Diffenbacher of  
Hays Springs pronounced  
anathemas on the foes of  
restrictive freight-rates  
during deliberations*



opinion.”<sup>25</sup> Of course, as Parsons pointed out, the press represented village opinion, not farmer opinion. Thomas W. Tipton’s reminiscences give some clue to the intensity of the farmers’ feelings about the bill. He discusses the Legislature of 1891, when the railroads defeated the bill, describing the “intense excitement,” and House Chaplain B. F. Diffenbacher of Hay Springs, who predicted that traitors who were against the bill would end up in a “moral volcano” complete with “lurid lava” and the “muttered thunder of hidden forces!”<sup>26</sup>

Nationally, newspaper editors breathed a sigh of relief at the court’s decision in *Smyth v. Ames*. The press actually found time to quit talking about the upcoming war on Cuba and to rejoice at the victory in the court. One midwestern newspaper called the decision “one of the most important of recent years,” seeing it as one of “extreme fairness.”<sup>27</sup> Another was even more laudatory, claiming that the “landmark” decision rested upon “fundamental equalities” and the “impregnable bulwarks” of the Constitution, preserving “orderly liberty and material and social progress.”<sup>28</sup> The *Chicago Tribune*, in discussing the decision, commented on the Populist legislation: “But they

overdid the business, and this particular law, like so many others the Populists have enacted, could not stand a judicial test."<sup>29</sup> And the *New York Tribune* quoted a member of the Joint Passenger Committee, meeting at the Waldorf-Astoria Hotel, who said, "The decision was one of the most far-reaching in the land, inasmuch as it proved that Populistic tendencies were by no means apparent in the framers of the Constitution."<sup>30</sup> The paper also quoted Chauncey Depew, president of the New-York Central Railroad, at length: "If the Supreme Court had upheld the Nebraska law," Mr. Depew added, "I feel certain that we would have had a panic, worse if anything than we have experienced."<sup>31</sup> Thus, the Supreme Court's decision, coming so long after the excited passage of the Newberry Bill, after Bryan's defeat in 1896, and in a period of better farm prices, seems almost to have been a final crow of all those who had opposed the Populists.

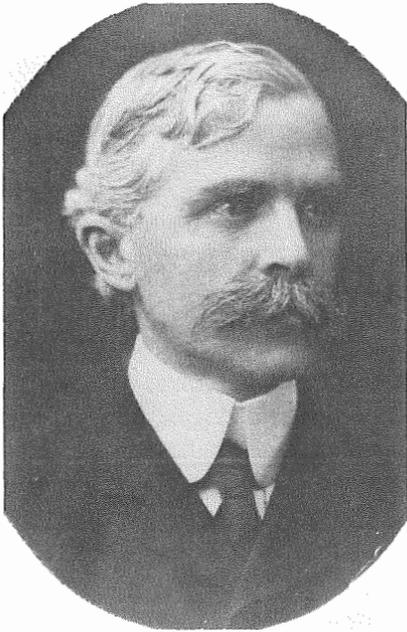
There is an interesting contemporary reaction and analysis of radical legislation representing the conservative legal point of view. In discussing the state regulation of railroads, Frederick S. Stimson introduces his subject by explaining, "Just as we found in the Middle Ages in the case of the Black Death in times of famine, so times of panic with us have always produced radical legislation."<sup>32</sup> Not only does Stimson associate the radical legislation with medieval ignorance, superstition, and panic, but he somewhat inadvertently associates the economic agrarian crisis with the plague. In other words, from this point of view, the Populists had superstitious and ignorant solutions to complex and scientifically explainable problems.

*The Legal Context:* The legal significance of *Smyth v. Ames* is to be found not so much in terms of abstract principle as for giving an established common law principle, that of "reasonableness," a modern operational meaning. And this meaning has been important because soon after the decision it functioned as the guideline for federal commission rate setting. Thus, although the social, political, and economic meanings of the case related to the power of states to regulate, the power of oppressed groups to control business through legislation, and the shape of business-government relations, the legal meaning of the case is much more specific and narrow.<sup>33</sup>

An early legal analysis which included *Smyth v. Ames* and the legal economic issues connected with it traced three stages of rate regulation under the Fourteenth Amendment.<sup>34</sup> In the first stage (*Munn v. Illinois* [1876]) reasonableness was considered a legislative question; in the second stage it was decided (*Stone v. Farmer's Loan and Trust* [1885] and *Minnesota Rate Cases* [1889]) that the Court could review rates set by states, for "the power to regulate is not a power to destroy";<sup>35</sup> and in the third stage state-set rates were considered invalid unless they yielded a reasonable return (established by the time of *Reagan* [1894]). It was felt that the difference between *Smyth v. Ames* and earlier cases was in its consideration of investments and earnings as evidence; and the Court was criticized for a poor job in its calculations based on the evidence.

By 1906 a lengthy one-volume study on the effect of law upon railroad rate regulation had appeared.<sup>36</sup> This study placed great importance on the *Minnesota Rate Cases* in which reasonableness was established as a judicial, not commission or legislative, question. And *Smyth v. Ames* is seen as a "great case" which "worked out" in "great detail" the doctrine more crudely set up in the *Minnesota Rate Cases*. Once again, the Court was criticized in its reading of the Newberry Bill and in its computation of rates. The adequacy of English and American law in a complex industrial economy is questioned because of its trend which had begun to indicate a triumph of individual interest over public welfare. The author of the study proposed a solution rejected by Nebraska's Woolworth in his argument before the Court; that is, the railroads should have to abide by commission rates, and, if there was a loss, the state should compensate the railroad and readjust the rates. In this growing criticism of the decision by legal scholars and jurists, we can begin to see the glimmer of Progressive reform. And we can also see the hindsight appreciation of the principles of the Newberry Bill.

After the early Progressive criticism of the *Smyth v. Ames* decision, legal opinion on the case seems to have been quiescent. Curiously, the case drew legal criticism again during the Depression of the 1930's, with critics claiming it was no longer relevant. One critic in 1932 focused on the application of the rate-setting guidelines established by Harlan. Not only had



*Constantine J. Smyth,  
Omaha lawyer (later  
Nebraska attorney general,  
1897-1901), carried the  
farmers' case to the  
Supreme Court.*

Harlan's guidelines been used for public transportation, but public utilities, too, had come under the same rules; however, the critic claimed that by the late 1920's, reproduction cost was no longer used except as a theoretical reference. Thus it was argued that *Smyth v. Ames* was "no longer applicable" and the whole concept should be forgotten.<sup>37</sup>

Apparently the Supreme Court paid little attention to their criticism in the law journals, for fifteen years later a persuasive argument was presented to show how commission rate making no longer really used *Smyth v. Ames*. Harlan's doctrine in *Smyth v. Ames* was declared obsolete by this critic for three other reasons: (1) a situation of transportation competition existed between rail, truck, and air freight, thus ending many railroad monopolies; (2) rate regulation through charters and contracts had grown; and (3) railroad rate regulation had become promotional, often with subsidies. The conclusion: rates should be administrative or legislative, due process should be procedural, and if rates are too high—too bad.<sup>38</sup> So fifty years after the decision had been handed down, this modern argument paralleled that of Webster and Churchill for Ames of Nebraska with no outburst of protest from the railroads.

As if the question of *Smyth v. Ames*' influence were not already murky enough, a recent textbook cites the case of *St. Louis and O'Fallen Railway Company v. United States* (1929) as an example of the Court arguing that "the law of the land" in estimating value had been established in *Smyth v. Ames*.<sup>39</sup> But, perhaps the one area in which the case's importance is uncontested is in its completing "the evolution of substantive due process," an evolution Alfréd H. Kelly and Winfred A. Harbison emphasize was the result of industrialization and urbanization, "social issues of basic consequence to America's destiny." This shift from procedural to substantive due process meant a shift from "nor shall any State deprive any person of life, liberty, or property, without due process of law" to "nor shall any State deprive any person of property." Thus Kelly and Harbison rightly call the change a "revolution in due process of law."<sup>40</sup>

Probably the best single work which gives the legal, socio-political, and economic long-range effects of *Smyth v. Ames* and all it represents is Kelly and Harbison. Their conclusion emphasizes the "Constitution-worship" of the 1920's as a result of the Court's protection of private property; but, they say, "the clock was ticking out the final moments of *laissez faire* prosperity."<sup>41</sup> Although they correctly assess the Court's position as protector of private property, Kelly and Harbison tend to overestimate the importance of *laissez faire* as an operational principle. William Appleman Williams provides a more plausible analysis, one which brings together the work of the regulation-rationalization historians (Benson, Kolko, Wiebe) and those legal historians who emphasize the conflict between *laissez faire* and traditional conservatism (Paul and Jacobs). Williams introduces the phrase *laissez-nous-faire*; he says that what seemed a "natural" economic order by the disciples of *laissez-nous-faire* had in fact been created by mercantilism. Reformers within the system, Williams feels, were doomed to failure; they could only criticize railroads from a conspiracy point of view. Like the railroaders themselves, the Populists called for non-*laissez-faire* solutions to bring back the hypothetical days of free markets. In other words, both the mercantilist and the *laissez-faire* solution to keeping markets open and growing was constant economic expansion.<sup>42</sup>

Although it is our privilege and perhaps duty to criticize Harlan's decision against Nebraska and especially his judicial rate calculating, we should no longer fall into the partisan arguments which the case has aroused in the past. With community control becoming more and more a critical issue, we should be able to understand the passion and fears on both sides of the issue which was finalized in *Smyth v. Ames*. Whether one is on the side whose established rights are being invaded and destroyed (as Harlan, the court, and the railroad owners felt they were) or on the other side which decides the time has come to seize power from those who appear to be oppressors (as the Nebraska farmers felt they were doing), we can certainly empathize with the involvement of both sides. This case represents a legal-economic aspect of the repressive attitudes of those in power in the late 19th century. While the labor unions were put down farther east, the blacks denied their civil rights, and women continually ignored in their struggle to get the vote, the Nebraska farmers lost in their attempts to control the economic environment of their state. And although railroad rates may no longer be a crucial issue, the larger questions raised in this case are still with us: can and should a group of people control their economic destiny? And if so, how?

## NOTES

1. Nebraska Legislative Council, *Nebraska Blue Book*, 1966 (Lincoln, 1966), 186.
2. Chauncey Depew, quoted in the *New York Tribune*, March 9, 1898, 14.
3. *Omaha Morning Bee*, April 15, 1924, 1.
4. *Nebraska Blue Book*, 128; *Lincoln (Nebraska) Star*, September 2, 1929, 1.
5. J. W. Savage and J. T. Bell, *History of the City of Omaha* (Omaha, 1894), 587-588.
6. *Smyth v. Ames*, 169 U.S. 508 (1898).
7. *Smyth v. Ames*, 169 U.S. 527 (1898).
8. Contrary to Harlan's reasoning, it is apparent that the Newberry Bill took population density differences into account:

Proportional Rates

	Population rr. mile	Actual	Ideal	Newberry
Nebraska	190	100	82.5	71.5
Iowa	230	60	60	60

9. *Smyth v. Ames*, 169 U.S. 546, 547 (1898).
10. Alfred H. Kelly and Winfred A. Harbison, *The American Constitution: Its Origins and Development* (New York, 1963), 520.
11. Douglass C. North, *Growth and Welfare in the American Past: A New Economic History* (Englewood Cliffs, New Jersey, 1966).
12. Theodore Saloutos, "The Agricultural Problem and Nineteenth Century Industrialism," *Agricultural History*, XXIII (July, 1948), 156-174.
13. Hamlin Garland, *Son of the Middle Border* (New York, 1914), 439.
14. Lee Benson, *Merchants, Farmers, and Railroads: Railroad Regulation and New York Politics, 1850-1887* (Cambridge, Massachusetts, 1955), vii.
15. *Ibid.*, viii.
16. Gabriel Kolko, *Railroads and Regulation, 1877-1916* (Princeton, New Jersey, 1965), 3.
17. *Ibid.*, 212.
18. Robert H. Wiebe, *The Search for Order, 1877-1920* (New York, 1967), and *Business and Reform: A Study of the Progressive Movement* (Cambridge, Massachusetts, 1962).
19. Bliss Perry, *Life and Letters of Henry Lee Higginson* (Boston, 1921), 435.
20. John D. Hicks, *The Populist Revolt: A History of the Farmer's Alliance and the People's Party* (Minneapolis, 1931).
21. Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York, 1955).
22. Hicks, *Populist Revolt*, 33.
23. Stanley B. Parsons, "Who Were the Nebraska Populists?" *Nebraska History*, XXXIV (June, 1963), 87.
24. William Appleman Williams, *Roots of the Modern American Empire* (New York, 1969).
25. Knute E. Carlson, *The Extension of the Veto Power in Nebraska* (Lincoln, 1917), 44.
26. Thomas W. Tipton, "Forty Years of Nebraska, At Home and in Congress," *Proceedings and Collections of the Nebraska Historical Society* (Lincoln, 1902) IV, Series 2, 181.
27. *St. Paul Globe*, March 8, 1898, 38.
28. *St. Paul Pioneer Press*, March 8, 1898, 8.
29. *Chicago Tribune*, March 8, 1898, 6.
30. *New York Tribune*, March 9, 1898, 14.
31. *New York Tribune*, 14.
32. Frederick J. Stimson, *Popular Law Making: A Study of the Origin, History, and Present Tendencies of Law Making By Statute* (New York, 1911), 168.
33. There are three helpful studies on general legal tendencies and influences of the period. Arnold M. Paul's *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887-1895* (Ithaca, New York, 1960) provides an interesting context. Paul sees the period as one of a conflict in the judiciary between two kinds of conservatism, the new social Darwinistic *laissez faire* and the more traditional concern with hierarchical values (with property on top) and an orderly society. The new, Spencerian, conservatism triumphed with substantive due process being first exercised in *Smyth v. Ames*; this new kind of conservatism, according to Paul, caused judicial obstruction until the New Deal. A study by Clyde E. Jacobs, *Law Writers and*

*the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedman, and John F. Dillon Upon American Constitutional Law* (Berkeley, California, 1954), also focuses on attitudinal shifts in this same period. Jacobs shows how three law writers were "responsible for the popularization within their profession of constitutional principles which encompassed the *laissez-faire* policies demanded by industrial capitalists"; thus, he documents one way the change described by Paul took place. Finally J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (Madison, Wisconsin, 1956), 28, shows how law did not just create an open society for business but positively came to the aid of business in creating open, fair markets. He shows how Taney's *Charles River Bridge* decision helped make "property an institution of growth rather than merely of security." *Smyth v. Ames*, he would probably argue, is a clear case of law creating an environment of safety for railroads.

34. Alton D. Adams, "Reasonable Rates," *Journal of Political Economy*, XII (December, 1903), 79-97.

35. Chief Justice Waite, 116 U.S. 331 (1886).

36. Harrison Standish Smalley, *Railroad Rate Control in Its Legal Aspects: A Study of the Effect of Judicial Decision Upon Public Regulation of Railroad Rates; Publications of the American Economic Association* (Princeton, 1906), VII, Series 3, n. 2.

37. Tobias Lewin, "Smyth v. Ames in the Supreme Court," *St. Louis Law Review*, XVII (1932), 163-176.

38. Frederick F. Blachly, "Smyth v. Ames in Federal State Regulation," *Virginia Law Review*, XXXIII (March, 1947), 141-177.

39. Kelly and Harbison, *American Constitution*, 719.

40. *Ibid.*, 496; There are several other discussions which attempt to clarify the changing interpretation of the due process clause, which helps clear up the confusing issue. Perhaps the clearest, if not most logical, is Charles Warren's discussion in *The Supreme Court in American History* (Boston, 1922), II: Warren says due process came to mean a state legislative proceeding which was not arbitrary, "giving a square deal." Howard Jay Graham, in his article, "Procedure to Substance—Extra-Judicial Rise of Due Process, 1830-1860," 40 *California Law Review* (1952-1953), 483-500, argues the dubious and not too helpful thesis that substantive due process first gained currency in the public mind. And Louis Henkin, "'Selective Incorporation' in the Fourteenth Amendment," 73 *Yale Review* (1963), 74-88, briefly discusses the "wild and questionable growth" of substantive due process in economic regulation.

41. Kelly and Harbison, *American Constitution*, 721.

42. William Appleman Williams, *The Contours of American History* (Cleveland, 1962), and *Roots of the Modern American Empire, passim*.