Cornell Law Review

Volume 14
Issue 1 *December 1928*

Article 1

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CORNELL LAW QUARTERLY

VOLUME XIV DECEMBER, 1928 NUMBER 1

THE PUBLIC UTILITY: A PROBLEM IN SOCIAL ENGINEERING*

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The blurring of lines in the biological sciences is adverted to in a recent report of the President of Harvard University. If there is a difficulty in dividing off botany from zoology there is similar difficulty in the social sciences.[1] As to what is law and what politics there has been discussion both judicial and juristic.[2] But on the inquiry what is "law" and what is "economics" and where lies the line between them there has been little enough discussion. To define law is no easy job[3] for the lawyers but they are perhaps no worse off in that respect than are the economists in defining their specialty.[4] Of the latter the root idea, says the Century dictionary, is thrifty management, originally of the household merely, now the thrifty management of the means of living—of the arts by which human needs and comforts are supplied. With the general process of making man's material environment subject to his purposes—an engineering problem in the physical sense—the lawyer has nothing to do. But the recognition and regulation of the relationships of men to things and to one another with respect to those things, is the essential field

*The substance of this article was delivered as a lecture at the Robert Brookings Graduate School of Economics and Government, Washington, D. C. The notes are added for this publication.

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[1]The Columbia University announcement of "Courses in the Social Sciences" includes "History," "Economics," "Geography," "Government and Public Law," "Sociology," and "Law," which last is the Law School Curriculum. *Cf.* OGBURN and GOLDENWEISER, THE SOCIAL SCIENCES AND THEIR INTERRELATIONS (1927). See the reviews of this book by Munro in (1928) 22 AM. POL. SCI. REV. 188; and by Morgan in (1928) 28 COL. L. REV. 391.

[2]Weston, *Political Questions* (1924) 38 HARV. L. REV. 296; Hedges, *Justiciable Disputes* (1928) 22 AM. JOUR. OF INT. LAW, 560.

[3]Isaacs, *The Schools of Jurisprudence* (1918) 31 HARV. L. REV. 373; See chapter on "The Nature of Law" POUND, OUTLINES OF LECTURES IN JURISPRUDENCE (3d ed. 1920) 56–78.

[4]See the heading on "Political Economy" 3 INGLIS, PALGRAVES DICTIONARY OF POLITICIAL ECONOMY (Higg's ed. 1926) 128 *et seq.*

of the law. It is in the institution, the maintenance, and the management of those relations, that the distinctions between law and economics defy detection.

Yet the problem "How shall those arrangements be made and how managed when they are made?" is a question which every society must face. It is a "social engineering" job—to use the language of the sociological jurist.[5] His point of view invites me to ask you to conceive of Society—with a big S—sitting down, *a la* Rodin's thinker, and registering, as the movies say, concentration on this idea. "I am 120,000,000 people, the United States of America; or I am 6,000,000 people, New York City. My job is to arrange for the needs of the millions. Food will have to be raised, water secured, housing and clothes provided, transportation established, distributive processes, banking, amusement, etc. provided for. The millions will discover new things to want and those will have to be dealt with. Also they will call for the establishment and maintenance of good order and for some scheme for the amicable settlement of internal disputes. For the present they will want the wherewithal to prosecute the settlement by violence of the external ones. This last means policing, courts, and war establishment. How shall I arrange to get all these things done?" If Society has had any conscious thought about this I do not know it, but society has in fact taken several differently labelled methods of securing service for the million.

It has erected a sovereign corporation out of itself, called the result "the government," and has had the government undertake to do some of the things, charging the million roundly for the job in the form of taxes. What shall be done by this agency is a form of social engineering.

The list of things done by government has gone through a vast expansion from the original undertaking to keep the peace and to substitute for private war the orderly settlement of disputes by compelled arbitration in state-maintained tribunals. That government has become an indulgent grandmother to the human incompetent is

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[5]See chapter on "An Engineering Interpretation" POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) at 152–165. Of the other schools the so-called "analytical" concerns itself with what *is*. Of why this rather than that, and of whether "this" suits the present conditions, it makes little question. The "social engineering" phrase is no part of its jargon. In the "historical school" social engineering is evolutionary, and slow time figures more than positive action seeking to modify. But the "sociological" jurist is an engineer by preference. To him the past is a lesson rather than a command; and he tests received institutions by the needs of *now*. If in his estimate of the *now* a better should be devised for *now* he sets himself the duty of doing it by conscious effort.

not an unknown remark in these piping days. To test the quality of the government-purveyed product as against that purveyed by private methods, and to compute the comparative costs would be a neat inquiry all by itself. Frank Stockton in "The Great American War Syndicate"[6] years ago showed, fancifully, how much more effectively and how much more cheaply a war could be waged by business men who bought the war "on spec" than the government could do it. The government monopoly of peddling authoritative settlement of disputes has run the cost so far up and the quality of the product so far down that the commercial interests, at least, have found arbitration among themselves preferable.[7] They have also found private policing more satisfactory—see private armored cars for banks.

One cannot talk social engineering without a reference to what society might or might not best do for itself through government; but since government is unregulated for efficiency, and for cost, either by competition or by positive interference, in any such sense as are the other methods which society takes to get things done for the millions, "social engineering" in the very largest sense, limps at the start, for plain lack of information. And that is a charitable way of stating the case.

The other method is "private enterprise"; whereby society contrives to fool certain individuals into the belief that by harnessing themselves into some treadmill they are working for themselves. But at bottom it seems pretty clear that the man who runs a department store, or makes automobiles or bakes bread for sale is under the operation of a social engineering device to get the million supplied. That private property is basically a social institution, is I believe, one of the tenets of economists nowadays; but Sir William

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[6]The story deals with the efficient and bloodless victory won promptly as per contract by a group of business men.

[7]The drift away from settlement by state-maintained agency to mere state enforcement of settlement arrived at privately, is set forth in various recent articles. See Cohen and Dayton, *The New Federal Arbitration Law* (1926) 12 VA. L. REV. 265: "A step in a movement of growing momentum," of which the "origin (is) in . . . congestion of the courts . . . and in the delay, expense, and technicality of litigation" and "which commands an unusually widespread support in the business world." Jones, *Historical Development of Commercial Arbitration in the United States* (1928) 12 MINN. L. REV. 240, where Mr. Jones traces the legislation: New York in 1920; in 1923 New Jersey; in 1925 Federal and Oregon; Massachusetts 1927; California, North Carolina, Pennsylvania, Utah, Wyoming, recently.

See also Sayre, *Development of Commercial Arbitration Law* (1928) 37 YALE L. J. 595.

Blackstone was there or thereabouts with the same idea in the seventeen fifties.[8]

In this discussion the category "private enterprise" is set off from the service undertaken by government. This separation, of "government" and "private," is based on *who* does the business. But when I come to define my terms further, I reach a nomenclature which may puzzle the non lawyer: for "private business," as distinguished from governmental, the law divides into two classes one of which it labels "public business." The epithet "public" is tacked on to distinguish the private business which *is* regulated from the private business which is not—and which might be called "private private" business. This is the jargon, but "private private" business gets much regulating of one sort or another, in these days.[9] Indeed I shall have to subdivide this public private business itself, for a "public business"[10] is not always regulated beyond price fixing; while a "public utility" is subject to a variety of duties and they are cast into uniform lines

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[8]See chapter on "The Social Theory of Private Property" ELY, PROPERTY AND WEALTH (1914) 165–199. At 206 he says: "The police power is the power of the courts to interpret the concept property, and above all private property; and to establish its metes and bounds," and "to give the concept a content at each particular period in our development which fits it to serve the general welfare."

Blackstone says: "But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of more permanent dominion and to appropriate to individuals . . . the very substance . . . otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed . . ." Thus he bases it on the social interest in security. 2 BL. COMM. c. 1, at 4.

[9]In a recent article, Bevis, *Administrative Commissions and the Administration of Justice* (1928) 2 U. CIN. L. REV. 1, at 6 *et seq.*, the author shows the amount of regulation of the "private" business. See CLARK, SOCIAL CONTROL OF BUSINESS (1926), reviewed (1927) 13 ST. LOUIS L. REV. 33.

[10]Taft, C. J., in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 Sup. Ct. 630 (1923): "To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It is not a matter of legislative discretion solely. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared. To say that a business is clothed with a public interest is not to import that the public may take over its entire management and run it at the expense of the owner. The extent to which regulation may reasonably go varies with different kinds of business." The test of how much regulation will be put up with, constitutionally, is unpredictable in advance of the very situation presented. Circumstances and conditions,—"fact situations" in the newer jargon,—make the law, and only society's needs tomorrow can determine what tomorrow's law will be.

and are enforced by similar devices. I am making my definition of "public utility" by building up a summary of these duties and these regulatory devices, and using the phrase "public utility" as an epitomising label.

Society, if it acts consciously, will first ask itself: Having choice of securing service to the million by government action directly, by simple "private" enterprise, or by this private public enterprise, which method, shall be used to secure what services? More particularly, so far as this article is concerned, what phases of the business of purveying to the million shall be committed to private public business, this mule among the draft animals? Secondly, if we select a private business to be characterized by special public duties to the million, what duties in their behalf shall be imposed? These are the primary inquiries; but, as in other engineering, the engineers had to ask whether the machinery at hand was suitable for the achievement of the job of assuring enforcement of the duties imposed. As it turned out, there *was* a necessity for new machinery in the law. The virtues of the common law court, its one-at-a-time method, the safeguards against arbitrariness which slowed its tempo, became defects. The common law court proved unable to handle the job and a new engine—the administrative commission—was introduced. But the union which understood the old machinery—the lawyers and the judges composed it—was as hostile to the new machinery as most other unions have been to innovations in their tools. Legislatures, too, have not always understood its function, as I shall later show. In the scheme of legal apparatus the commission has reached no such placement as the courts have reached; but necessity, which was its mother, works for its ultimate acceptance on comparable terms.[11]

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[11]On the necessity for utility commissions an eminent judge says: "There was a time in the history of this country when carriers and public-service corporations were so few that the legislature itself might have performed that labor; but by reason of the rapid growth of population and the great increase in the number of such corporations, it has become impracticable for the legislature to discharge that duty. Moreover, many rates may require alteration from time to time. That the most appropriate method (speaking from a practical, not necessarily constitutional, point of view) is the creation of a commission or body of experts to determine the particular rates, has been said several times in the opinions rendered by the Supreme Court of the United States in the various railroad-commission cases and in those of state courts.

It would be almost impossible for the Legislature of this state to undertake intelligent regulation of utility corporations by the Legislature itself." Cullen, C. J., in Saratoga Springs v. Saratoga Gas etc. Co., 191 N. Y. 123, 83 N. E. 693 (1908). See also Idaho Power Co. v. Blomquist, 26 Idaho, 222, 141 Pac. 1083 (1914).

So far I have been dealing with the subject fancy free and fancifully. None of the matters I have listed were actually handled in any such fashion as I have outlined. No one ever sat down and said "Go to, now, we shall consider these things with an Olympian view." For *that* the sociological jurist is too recent an arrival, even if his leadership were thoroughly accepted. As Holmes, not yet a justice of the Supreme Court, long ago put it, "The life of the law has not been logic; it has been experience." And experience builds as do the polyps whose remains form the atolls. It adds a little here, a little there; and in time an institution emerges which is rationalized after the emergence. So long as the law grew only by decision, case added to case built, in the end, a mass in which common ideas could be sorted out. Symmetry was no part of the result. Only in recent years when legislation became the growing point has there been a plan and a form projected in advance.

The first of our special questions, "What services to the million shall be secured by the hybrid private public enterprise?" Society has answered in no terms of formula. The Supreme Court of the United States, which makes the final expression, has been content to reply "We can best explain by examples,"[12] reciting the list of what *had* been decided. As a test for application to what has *not yet* been decided it offers a jingle of words which one of its members says "is little more than a fiction intended to beautify what is disagreeable to the sufferers" (*i.e.* those private enterprises which are decided to be "public"); and which another says "is too vague and illusory to carry us very far."[13] On the other hand a professor in a leading business school opens his recent book with the statement that the concept is "simple."[14]

No discussion of mine, however, or of anyone else, can omit the disparaged jingle. It dates from the famous case of *Munn v. Illinois* in 1876[15] which marks the modern development of the topic. The

[12]McKenna, J., in German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612 (1914), in holding that insurance was an enterprise "so far affected with a public interest" as to justify legislative regulation of its rates.

[13]These phrases, by Justices Holmes and Stone, are from a recent decision holding that the New York statute which limited to fifty cents the service of the theatre ticket agencies was unconstitutional: Tyson v. Banton, 273 U. S. 418, 47 Sup. Ct. 426 (1927). By a five to four vote the Supreme Court rejected the legislature's assertion that "the price . . . for admission to theatres . . . is a matter affected with a public interest."

[14]Philip Cabot of the Harvard School so opens his book PROBLEMS IN PUBLIC UTILITY MANAGEMENT (1927).

[15]94 U. S. 113 (1876). Against its fact situation the decision is readily cast into terms of social engineering.

question was whether an Illinois statute fixing rates to be charged by grain elevators was valid. Munn's elevator had been in operation long before the statute; but the court, which comes into the matter because social engineering is conceived to be a constitutional question under the Fourteenth Amendment, assured Munn that when "private property is affected with a public interest it ceases to be juris privati only"; and that "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large." These phrases are the jingle of words. As Mr. Chief Justice Taft puts it in a recent decision[16] "They (the businesses) have come to hold such a peculiar relation to the public that this (the label "clothed with a public interest")is superimposed on them. In the language of the cases the owner by devoting his business to the public use in effect grants the public an interest in that use and subjects himself to public regulation."

As the "devoting "is simply offering to do business with the million this obviously leaves entirely unexplained why Munn, the Chicago elevator man, fell under regulation while Marshall Field, the dry-goods man, did not. Obviously the decision was not with Munn or with Field. The *public*—society itself—as judge of its own interest, decides when the necessary consequence is arrived at and the community at large *is* affected. In Munn's case the facts played the deciding part. Grain production was localizing itself in the Middle West. But grain consumption is everywhere; and its movement became a major social interest. Rivers of grain flowed through Chicago and Munn's elevator was part of the neck of the grain bottle at Chicago.

What are the limitations upon Society in selecting this private "public business" method of assuring services to the million, Munn asks. His "private "status he holds precariously. That is all you can tell him. Felt needs of society overtake him when society feels the needs.[17]

Of course this switching out of the private into the public class is not as arbitrary in practice as it is in the phrase. The track upon which the thing has run has been on the analogy to the "carrier"; and in 1914, years after the Munn decision, a justice of the Supreme Court[18] could say of the "public business" group up to his day "they all have direct relation to the business or facilities of transportation

[16]Wolff Packing Co. v. Court of Industrial Relations, *supra* note 10.

[17]This comes pretty close to an epitome of legal history generally. It is a progression in the assertion of social interests at the expense of individual "rights."

[18]Lamar dissenting in German Alliance Insurance Co. v. Lewis, *supra* note 12.

or distribution—to transportation by carriers of passengers, goods, or intelligence by vehicle or wire;—to distribution of water, gas or electricity through ditch, pipe or wire; to wharfage, storage or accommodation to property before the journey begins, when it ends, or along the way. When thus enumerated, they appear to be grouped around the common carrier as the typical public business." In time, however, the analogy to the carrier grew too tenuous for use as a restraining device. Now the only safeguard for individualism, or the only hurdle for state control,—as you chance to see it—is the Supreme Court's conviction on the question whether or not the sufficient consequence to the community has been reached. If I knew what "economic" meant I would say it was one of pure economic fact.

With the Supreme Court as a checking device the "law" with respect to this phase of our social engineering is fairly workable if you are not afraid of trusting somebody with power. In the last analysis the whole matter is actually in the discretion of the court, for discretion hides in formulas meaningless until decision gives them a content for the occasion. There is an unpredictability, of course. It nettles the type of mind which wants "a strict rule of law" as a yardstick for the future and which distrusts judicial freelancing. My own reaction is a sense of admiration divided between a nation of one hundred and twenty million which sees the need for freelancing and trusts nine men with the job of exercising it; and the nine men for having exercised it with such general satisfaction to their mandators. The unwillingness of the present nine to be convinced by the "economic" facts presented in some recent cases has been subject to remark[19] but it only proves that in this matter, as in so many others in economic thinking, there is an ebb and a flow in the tide of belief in panacea.

In our political structure—that is of Federal and State components —the state is the unit of Society which, as a rule of fact, does the social engineering; and, though the development of the "public business" category out of the carrier analogy was a judicial job, it is the legislature which now tells Munn—in the generic sense—"You are a public business." The courts, up to the Supreme Court of the United States, merely review the declaration. "The circumstances of its alleged change from the status of a private business and its free-

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[19]See Brown, *Due Process of Law, Police Power, and the Supreme Court* (1927) 40 HARV. L. REV. 943. He says: "...it is somewhat of a shock to discover that in the six years since 1920 the Supreme Court has declared social and economic legislation unconstitutional under the due process clauses of either the Fifth or the Fourteenth Amendment in more cases than in the entire fifty-two years during which the Fourteenth Amendment had been in effect."

dom from regulation into one in which the public have come to have an interest are always a subject of a judicial inquiry."[20] Legislative declaration that insurance was public has been accepted; that housing was public was accepted as an "emergency measure." But declaration that coal mining, that clothing making, that meat packing, were public, failed to convince the court. Its latest refusal to be convinced had to do with amusements. It said "no" in a five to four division in which four opinions were filed. The decision can be stated only in terms of result, and the result is another illustration of unpredictability as to the content which will be given to loose formulas and of the play of the accident of judicial personnel upon institutions. One man's different reaction to the fact situation would have made new social history.

Having thus pursued my inquiry "What is a public business?" into an answer[21] which recalls Boswell's inquiry about supporting a bad case, to which Johnson replied "Sir, you do not know it to be good or bad until the Judge determines it", I ask now, if the legislative labelling "publicness" for this or that business theretofore "private", sticks with the judiciary, what obligations to Society—with a big *S*—are bound up in the label? A favorite trick of the lawyers is to battle over the label to stick on a thing and to assume, when the ticketing *is* established, that the label itself describes in epitome a set of characteristics. My definition of a "public utility", however, is built up from the characteristics, for the consequences which attach to the label "public business" are a problem in social engineering; and the "public businesses" therefore are not necessarily put under the same service duties. This Chief Justice Taft points out when he says "To say that a business is clothed with a public interest, is not to determine what regulation may be permissible in view of the private rights of the owner. The extent to which an inn or a cab system may be regulated may differ widely from that allowable as to a railroad or other common carrier. It depends on the nature of the business, on the feature which touches the public, and on the abuses reasonably to be feared."

The key to the matter is in the last part of the quotation. Society puts these or those public duties on this or that enterprise with

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[20]Taft, C. J., in Wolff Packing Co. v. Court of Industrial Relations, *supra* note 10.

[21]In an article in (1928) 41 HARV. L. REV. 277, the author devotes some thirty pages to *The Public Utility Concept in American Law*, and on the question "what is a public utility?" answers, "As to what the Supreme Court *has* passed on I can look it up: as to what it may be newly asked to pass on I shall wait and see."

reference to the needs of the million as the needs are seen. I have sought to define a "public utility" narrowly as that type of business labelled "public" upon which society imposes common and standardized duties and enforces their performance by the agency of the Commission.[22] Yet I can scarcely say that among even these businesses the same duties are enforced with the same emphasis as to all of them.

Definition is difficult. The whole field is modern. From the various topics which, in the law school curriculum, present it incidentally, it is only just being segregated into a "subject" which itself commands a place in the catalogue. The name "public utilities" dates only from 1899 (Harvard). It does not yet describe a course which all law schools teach, or which in the schools which give it the student is afraid not to take. Indeed, "public utilities" is not in the law in the sense that under that heading one may find in index and in digest all the enterprises and topics which belong to it. The searcher is driven to "administrative law", "automobiles", "carriers", "commissions", "constitutional law", "electricity", "gas", "inns", "negligence", "pipe lines", "railroads", "shipping", "street railways", "taxicabs", "telegraphs", "telephones", "water companies." Only as all these are taken together does one get the synthesising sense of a unity which underlies their apparent isolation. This discussion attempts to see it whole; to set for "public utilities" a form and content.

I should be a rash prophet indeed if I asserted that the social engineering has cast any of the public businesses in final and unalterable lines. Both *publicness* and the *incidents* of publicness represent a response by a social order to its own problems as it sees them. When the carrier was *the* public utility—before the rise of the present types—the public interest made itself felt most in respect to the duties to the person for whom service was actually undertaken. Society then emphasized the so-called insurer liability of the carrier for goods entrusted to him. Only the extremities of hard luck relieved him of responsibility for their loss. "Act of God" act of the public enemy would do. Lesser happenings would not. "Act of God," however, was so loosely defined as to leave large play for judicial

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[22]This leaves out of the strict "public utility" class of public enterprises the insurance business, the house renting business etc., where the public interest as so far sensed has merely demanded price fixing, and not also the elaborate regulatory schemes for securing service which have been worked out for those within the narrower definition.

Professor Henry Rottschaefer has lately examined *The Field of Governmental Price Control* (1926) 35 YALE L. J. 438.

discretion. This phase bulks less largely today when probably most carriage is under limited liability.

Recent public interest has lain more in the defining and the enforcement of duties conceived of as owing to those who seek to become customers, and modern "public utility law" is largely in this field. It leaves the utility's duties to those who actually become customers to be governed by principles which are general in the law and which base liability in the large, upon the magic word "negligence." The newer outlook deprives the customer and the utility alike, in dealing with each other, of contractual powers. They may agree only to be in consensual relationship—more accurately, the customer *may* agree; the option is his. The utility *must* agree. It is the utility's duty to serve him. They may not also agree, as in ordinary contract, on the terms and incidents of the relationship into which they enter, for these are set by the public authority itself. They are stated as duties upon the utility but the social interest imposes duties upon the customer not to "contract" for others.

Accepting the narrower "public utility" definition and accepting also the general statement as to the shift in emphasis just made, it becomes now appropriate to detail and to discuss the special duties to the million which the present social engineering establishes. First, Munn—using as a type name the earliest of the modern victims of the soothing phrase which Justice Holmes refers to—himself decides whether or not he will assume to serve the million at all, and in what business he will serve. Society, so far as *we* know it at any rate, has not undertaken to say to unwilling Munns "You sell transportation" or "You sell gas" etc.[23] If Munn may not, on the one hand, be dragooned into service, his offer to give it need not, on the other hand be accepted. Of course, this was always true, and still is true in the

[23]There is no case where any such thing has been tried *ab initio*, so to speak. But there are cases where one selling transportation "privately" has been protected from Society's order to sell it "publicly." Unless the *entrepreneur* himself elects to sell "publicly" he cannot be made to do so. The cases are those of persons having contracts with automobile manufacturers to carry the parts made in various factories to an assembling plant, Mich. Pub. U. Comm. v. Duke, 266 U. S. 570, 45 Sup. Ct. 191 (1925); or with motion picture houses to carry films about among them, Film Transport Co. v. Mich. P. U. Comm, 17 F. (2d) 857 (E. D. Mich., 1927); or with dairy associations to bring milk in from the farms to the creamery, Hissem v. Guran, 112 Ohio St. 59, 146 N. E. 808 (1918). California's attempt to exact "publicness" as a price for the use of the highways was defeated in Frost v. R. R. Comm., 271 U. S. 583, 46 Sup. Ct. 605 (1926).

Protection is also accorded a utility against being forced into a service-demanding area which is not part of the area to which the utility devoted its service, A. T. S. F. R. Co. v. R. R. Comm., 173 Calif. 577, 160 Pac. 828 (1916).

sense that individual customers need not buy his service. But the present view means more than that. Before he starts business at all he must now get public permission to seek customers.

The social interest in this respect was not sensed till lately. A Society grounded in the twin faiths of the blessings of competition and of individualism did not see that the planting of two blades of industrial grass in a soil which in the business sense could nourish but one, might cost the million more in money than would one, and give them little or no service from either. The parallelings in the railroad map of the country is the explanation of many railroad receiverships; and the present Congressional insistence upon consolidation is an attempt at efficiency and economy under bigness where littleness and competition once reigned. Quick expansion of population in a new country, for a time absorbed in some measure the extravagances of optimism, but the last few years have accustomed us to a birth control pigeonholed under the title of the Requirement of a Certificate of Public Convenience.[24]

The theory is stated by a judge who sees Society arranging service for the million more cheaply and getting it better by the use of one rather than of several competing plants. "An existing utility has already expended, say, $1,000,000 in the power plant and transmission lines and distribution system in a town. Another utility, coming in, must also provide a power plant and transmission lines and a distributing system. If there is to be unrestricted competition, then the later distributing system must cover the same area as that of the older one. If it costs the same money then there is an additional $1,000,000 expended in a town where a $1,000,000 system would be amply sufficient. . . . Therefore the rates paid by the people must be upon $2,000,000, instead of upon $1,000,000 if the utilities are to be given a fair return on their investments. . . . It is for the benefit of the public that the highest efficiency be obtained from a public utility and that it serve the public at the lowest cost, and such an end cannot be reached if the community is served by duplicate plants. . ., a duplication is a waste if resources and an extra tax on the people." Is not this a recognition not only of a social interest in securing service

[24]There has been a great deal of recent writing on this topic. See Hardman, *The Changing Law of Competition in Public Service—Another Word* (1928) 34 W. VA. L. Q. 123, 183. See also Lilienthal and Rosenbaum, *Motor Carrier Regulation by Certificates of Necessity and Convenience* (1926) 36 YALE L. J. 163. The same authors have dealt with *Motor Carrier Regulation Federal, State, and Municipal* (1926) 26 COL. L. REV. 954; In Illinois, (1927) 22 ILL. L. REV. 47; In Ohio, (1927) 1 U. CINN. L. REV. 288; and in Pennsylvania, (1927) 75 U. PA. L. REV. 696.

to the million cheaply, but also in not allowing the assets of current society as a whole to be wastefully invested?

All this of course applies only to businesses which as to their kind are already "public utilities." If the public utility definition were suddenly expanded to include food selling, clothing or fuel selling, as Kansas[25] sought a few years ago to expand it, we should face the urge to exclude the already incompetent Munns already in the field. A chopping off of heads would no doubt be too revolutionary to be constitutional so long as competitive conditions would bring prompt demises; but since the public utility label connotes price-fixing, which reduces competition to competition only in service, the high cost to society of the lingering deaths could supply a very neat problem of social engineering in the interest of efficient service.

However, let us assume that Munn—a corporate Munn usually nowadays—*wants* to do a public utility business and he gets his certificate, and goes into business; what has the social engineering of the present required of him? I shall list the duties first and discuss them seriatim. To the prospective customers the duties are (1) to serve all, (2) to serve without discrimination, (3) to serve with adequate facilities, (4) to continue service, (5) to serve with reasonable rates. As to the duties to the individual for whom service is actually undertaken *i.e.* as to the obligation *in* service as distinguished from the duty *to* serve, there is no single answer applicable for all the utilities. There has been variance in time with regard to the carrier whose case has been most specially treated. Until lately he has been as already stated an "insurer" of their value, of the safety of goods;[26] he is still, factually speaking, pretty close to an insurer as to the human package, the passenger.[27]

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[25]In this the decisions of the Supreme Court of the United States went against Kansas: Wolff Packing Co. v. Industrial Court, *supra* note 10; s. c., 267 U. S. 552, 45 Sup. Ct. 441 (1925); Dorchy v. Kansas, 264 U. S. 286, 44 Sup. Ct. 323 (1924). The whole matter was discussed by the writer in *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277.

[26]The modern policy lets him operate on a limited valuation. "If a common carrier gives to a shipper the choice of two rates the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice, understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property." Union Pacific R. R. v. Burke, 255 U. S. 317, 41 Sup. Ct. 283 (1921). This is the Federal rule. Some States have not allowed the modification, but seventy-five to eighty per cent of the freight movement is interstate.

[27]The language of the cases justifies no such statement as that. Except as to the assaults and wrong doings of the carrier's employees upon passengers, where

It might be supposed that when society lays these burdens on the public utility business it would need to bait the inducement to the Munns with some special reward, a higher pay, a guarantee against losses—a cost plus ten per cent.—or some such sugaring. But *no*, decidedly *no*. That he is to serve under a limitation of price is the most rigorously enforced of all the imposed duties. One wonders why Munn is willing to finance the public utility when he can put his money elsewhere; and one asks if he may not say to Society "Do it yourself; do it as a government job since you fix things so that I cannot win much and am left to shoulder all the losses." The Recapture provisions of the 1920 Transportation Act invite this reflection.[28]

To serve "all" is the first of the duties I have listed; but "all," unqualified, is misleading. Munn decides the "all" by what is called his "profession" or his "holding out." Munn's refusal of service which he has not professed has no legal significance. The applicant was not within the "all." On the other hand if the applicant asks what Munn does offer and Munn refuses, Munn's public utility status makes what is in private business of no legal significance, a legal wrong for which the customer collects damages. So far as Munn's own idea of what is his service is concerned, the business urge to do business takes care of the situation.

But there is a distinct field of social engineering in the matter. If Munn is in the grain storage business, an applicant for coal transportation is not in the "all" and is rightly refused; and if Munn is running a passenger bus line, an applicant for freight transportation is also properly refused. But let Munn get himself simply into transportation and substantially he loses control of the situation. If after he starts business his territory starts shipping live cattle, live

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the liability is close to absolute, the formula for liability is the usual one of fault, of "negligence." See Green, *High Care and Gross Negligence* (1928) 23 ILL. L. REV. 4. But the legal doctrine called *res ipsa loquitur* which makes the occurrence of an accident speak negligence and the sympathy of juries make substantial fact of my statement. A New York lawyer long since proposed a *Compensation Plan for Railway Accident Claims* on an insurance basis: see Ballantine in (1916) 29 HARV. L. REV. 705. With this the working difficulty is the fraudulent claim as the Massachusetts compulsory automobile insurance law warns. After two years experience of the latter, investigation shows that in some communities the loss ratio is $1.75 for each dollar of premiums taken in. Transcript, Editorial (July 19, 1928).

[28]It directs the Commerce Commission to establish rates by the rate groups of territories and if under these rates some roads make more return than a set percentage the excess is impounded by the government. The scheme is open to squabble at two points: what percentage to set, and, as discussed later, on what value?

cattle he must take and not only that, but under the duty to serve with adequate facilities, he must supply special cars for them; if the live cattle are milked he is in for carrying milk and in milk cars, and if live cattle turn into dead and dressed cattle he is called on for refrigerator cars. Both in the "serve all" and in the "serve with adequate facilities" aspects of his duties, Munn is subject to a social engineering which reads his duty in terms of the needs of his million and in approximation to the latest fashion in the appliances for doing the job. His "all" expands to local needs.

When the railroads of Kansas refused live cattle the Kansas court replied "it must be admitted that railroads might be created for the purpose of carrying one kind of property only, or for carrying many kinds, or for carrying all kinds of property which can be carried by railroads, including cattle, live-stock, etc." This is all Munn's way. But "In this state it must be presumed," the court continued, "that they were created for the purpose of carrying all kinds of personal property." Why? Because "As Kansas, and all the surrounding states and territories, with their boundless prairies and nutritious grasses, are destined to be great stock-growing countries, it can scarcely be supposed that the legislature in providing common carriers for the property of the public should have omitted to provide for one of the most important kinds of property, a vast source of unbounded wealth."[29]

The duty to serve adequately has brought in the dining car, the sleeping car and types of special equipment; while as to a telephone, "We must concede that it is not only the right but the duty of the public utility concern to discard inconvenient or obsolete apparatus and provide the best available.[30] For adequate facilities are relative and must be interpreted in the light of the conditions . . . and the habits and customs then prevailing." One of these habits, which has affected the railroads especially, is the present habit of thinking of them as a national unified system. Adequacy of their service therefore, builds up duties of through routes and rates, consolidation, etc., and the old idea that the carrier served only on his own route is pretty well gone. The Hoch-Smith Resolution directing the Interstate Commerce Commission to make rates with a view to conditions in industries and in parts of the country is a very frank acceptance of this view coupled with a definite urge toward social engineering.[31] Financial aspects of the adequate facilities duties I advert to later.

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[29]Kansas Pacific Co. v. Nichols, 9 Kan. 162 (1872).

[30]State ex rel. Tacoma v. Sunset Tel. & Tel. Co., 86 Wash. 309, 150 Pac. 427 (1915).

[31]See discussion of this at 24 *infra*.

To serve without discrimination was the duty first fought over; and a desperate fight it was. It still *is* as to enforcement; but I am talking of the fight to establish the theory. The battle is so recent that the last quarter century includes the chief activity in it.[32] A people whose current fetish it was to keep possible the doing of business by small units made it a major bit of social engineering to unitize service largely upon the level of the lesser calls for service, to see that a utility handled each service on the same price basis. Pre-railroad Society had seen no such importance in it[33] and it is debatable whether at common law, that is, prior to modern conditions, there was any duty at all not to discriminate. The now established doctrine, however, cuts across so many modern tendencies; those toward doing business in large units, those in which the wholesale-retail variances are made in costs; that the attempt to set charges on the unit of the service demanded by the lesser applicant and to hold it there without regard to the volume of business offered by the big one has resulted in curious compromises. In the railroad field the various shippers whose collection of items fills a car have paid more for the carload movement than the single shipper who ships by the carload lot; but the trainload customer does not pay on the trainload basis. His rate is unitized at the carload. Yet in gas and electricity etc. utilities the customer comparable to the trainload customer gets trainload rates. Possibly the final word on this matter has not been reached.

But in another result of the fight for equality there is a firm contribution and one which would not be affected by any rearrangement of the charge units. This is the scheme of filing and publishing rates, which merits more discussion than can be given to it here. Under its theory a rate once filed—and as a device for equality treatment its

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[32]See chapter "From Old to New Industry" 2 SULLIVAN, OUR TIMES—AMERICA FINDING HERSELF (1926) 254.

[33]White, C. J., in Interstate Commerce Comm. v. Delaware L. & W. R. R., 220 U. S. 235, 31 Sup. Ct. 392 (1911), "Before the act to regulate commerce it was usual, first, to give reduced rates to persons who shipped quantities of merchandise; and, second, to charge a proportionately less rate for a carload than was asked for a shipment in less than a carload. After the act, lower rates to wholesale shippers were abandoned, it having been declared that to continue them was contrary to the act. Providence Coal Case, 1 I. C. C. Rep. 107, 1 Inters. Com. Rep. 363. The giving, however, a lesser proportional rate for a carload than for a less than carload continued, the Commission having at an early date announced that such a practice was not prohibited. Thurber v. New York, C. & H. R. R. Co., 3 I. C. C. Rep. 473, 2 Inters. Com. Rep. 742. Without detailing the theory upon which this conception was based, it suffices broadly to say that it embodied the assumption that a carload was the unit of shipment."

reasonableness is no part of the problem—serves as a common denominator for all applicants who *are* on common ground.[34] It withdraws from the realm of "contract"[35] as between customer and utility all question of what the customer shall pay. Operating as a bit of mechanical jurisprudence—as a return to that period of strict law where a rule was a rule let it operate as it might—mistake, good faith and all the other devices for lubricating a rigid juristic machine with mitigating circumstances have gone by the board.[35a] In view of the evils it aimed at presumably the thing is worth what it costs. But it took a good bit of educating of both business man and lower court before it was established that a mistake by a utility's own agent in giving a rate on which a shipper or consignee made his selling figure and closed his deal did not bar the utility's collecting the higher filed rate; that a prior payment in kind or in services, or in the release of claims for personal injuries would not bar it; that a limitation of

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[34]The necessity for decision on whether the common ground exists has provided the new machinery for regulation—the commission—with its greatest exclusive field of usefulness. Brandeis, J., in Gt. Northern R. R. v. Merchants Elevator Co., 259 U. S. 285, 42 Sup. Ct. 477, "Preliminary resort to the commission is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance is commonly found only in a body of experts."

In such cases the courts refuse to hear the parties until after the commission has acted. The clue to this judicial abdication is in the last part of the quotation, and it is again an illustration of how practical considerations govern legal principles. As Chief Justice Taft remarked, in his response to the resolutions of the Bar in commemoration of Chief Justice White: "The Interstate Commerce Commission was authorized to exercise powers the conferring of which by Congress would have been, perhaps, thought in the earlier years of the Republic to violate the rule that no legislative power can be delegated. But the inevitable progress and exigencies of government and the utter inability of Congress to give the time and attention indispensable to the exercise of these powers in detail forced the modification of the rule. Similar necessity caused Congress to create other bodies with analogous relations to the existing legislative, executive, and judicial machinery of the Federal Government, and these in due course came under the examination of this court. Here was a new field of administrative law which needed a knowledge of government and an experienced understanding of our institutions safely to define and declare. The pioneer work of Chief Justice White in this field entitles him to the gratitude of his countrymen."

[35]The "freedom" was illusory in fact. Inequality in bargaining power had made the right merely abstract; the small shipper was not able to bargain with the carrier, and the carrier itself was not able to bargain with the big shipper.

[35a]The writer has discussed this more fully in *The Filed-rate Theory: A Study in Mechanical Jurisprudence* (1928) 77 U. PA. L. REV. (December).

liability duly filed bound a well-to-do woman whose valuable trunk the utility lost to a one hundred dollar recovery; or that a telegraph user could prove through a transmission error a thirty thousand dollar damage and recover a five dollar filed limitation.[36]

Consider now the financial aspects of the situation into which Munn is cast. The requirement to serve at reasonable rates is the most obvious; but the duty to serve with adequate facilities and the duty to continue service are also financial phases of the social engineering problem of hiring Munn to serve the million. When the rate fixing job was undertaken it was largely as a cure for discrimination. That all its implications were seen is doubtful. But it has unfolded questions which are now most momentous, not so much on the theory of the duty as on the meaning of "reasonable." Of this there are two phases. What is the rate which,—in the scheme of enforced service to John Smith as applicant,—the utility may charge Smith for what it does, *i.e.*, the individual rate. "Reasonable" here is a thoroughly meaningless word which I venture to believe indicates permission to the rate setting authority to use intelligent discretion. It may mean reasonable from Smith's angle, from the company's, or from the angle of the welfare of a shipping community, or of a destination community. The guiding idea seems to be that it must be reasonable from the company's angle, though Congress, in the Hoch-Smith resolution seems to have views comparable to those which the Supreme Court of the United States denied to North Dakota when it sought to make "public welfare" the touchstone for rate-making at the expense of the utilities.[37] But where the utility handles many

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[36]The cases are Boston & Maine R. R., v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526 (1914); Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S. 566, 41 Sup. Ct. 584 (1921).

[37]Northern Pacific Ry. v. No. Dakota, 236 U. S. 585, 35 Sup. Ct. 429 (1915), Hughes, J., "The state insists that the enactment of the statute may be justified as 'a declaration of public policy.' In substance, the argument is that the rate was imposed to aid in the development of a local industry, and thus to confer a benefit upon the people of the state. The importance to the community of its deposits of lignite coal, the infancy of the industry, and the advantages to be gained by increasing the consumption of this coal and making the community less dependent upon fuel supplies imported into the state, are emphasized. But, while local interests serve as a motive for enforcing reasonable rates, it would be a very different matter to say that the state may compel the carrier to maintain a rate upon a particular commodity that is less than reasonable, or—as might equally well be asserted—to carry gratuitously, in order to build up a local enterprise. That would be to go outside the carrier's undertaking, and outside the field of reasonable supervision of the conduct of its business, and would be equivalent to an appropriation of the property to public uses upon terms to which the carrier

commodities the trail of costs is so lost in bookkeeping apportionments that it seems fair to say that the courts have substantially said to the Commissions, "You do it." Beyond generalities they have pretty much left the latter to do what is very real social engineering,—justice without law—*i.e.* without detailed rules laid by court or legislature. To secure such action is why Commissions *are*.[38]

The country resounds just now with the other reasonable rate question which may be stated this way: Munn serves the million for what? He has a plant which once was uninvested money. What does he get for that money which he devoted to the job of serving the million? The answer is, an aggregation of payments by the million which must amount to a "fair return." But what is a *fair* return; and on *what* is it a return? The present quarrel is on the *what*. It is the "reasonable value of the property at the time it is being used for the public," the courts say. "Value" is the fighting word. Can it be more than cost? Can the item in dollars in the present bookkeeping be more dollars than Munn put in? In a famous case[39] fifteen years ago, Mr. Justice Hughes remarked that "the making of a just return . . . involves the recognition of its fair value if it be more than cost."

Since the world war, and under the purchase-power variance between the dollar of 1913 and that of the present-day dollar, the question has blazed into hot controversy. The Supreme Court itself sticks to the theory that the value may be more than the cost; and it ascertains value by the cost of reproduction, which may put *more*

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had in no way agreed. It does not aid the argument to urge that the state may permit the carrier to make good its loss by charges for other transportation." Yet the commuter rates—at least where the carriers have themselves initiated them—on social engineering grounds are required to be continued. "On the strength of these commutation tariffs, it is a fact of public history that thousands of persons have acquired homes in city suburbs and nearby towns in reliance upon this action of the carriers in fixing special rates and furnishing particular accommodations suitable to the traffic", Pa. R. R. v. Towers, 245 U. S. 6, 38 Sup. Ct. 2 (1917).

[38]This general process is described by Charles E. Hughes as "personal government;" and of the commissions he says, "Useful as are these instrumentalities of government they represent to a striking degree a prevalent desire to do without law." Address, June 21, 1920, quoted from Boston Transcript of that date. But, on the other hand "The Commission and the utility are not dealing with a purely legal proposition subject to inflexible rules of law, but with an ever-changing economic life . . . which, so far, courts or legislatures have not been able to control" says the court in Coplay Co. v. Pub. Serv. Comm., 271 Pa. 58, 114 Atl. 649 (1921).

[39]Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729 (1913).

dollars into the present bookkeeping or *fewer*; just now, more. Mr. Justice Brandeis dissents. The cost of reproduction, he says, is an elaborate and unverifiable fabric of guesswork for one thing, and it is up today and down tomorrow; prudent investment is a matter of historical record and it is also a constant, he says.[40] No doubt he is right on every point. But the social engineering which will induce Munn to serve the million with contentment is one that should take account of what Munn sees that he may do elsewhere with his money. Outside the public utility field he may get the profits of inflation—also the losses of deflation; and he prefers, since he fights for it, the sporting chance which the Supreme Court gives him. "Values of utility properties fluctuate and owners must bear the decline and are entitled to the increase," it says in a case where the State of Indiana had not given the ups in the present inflation.

This *Indianapolis Water Case*[41] decided that spot reproduction was a constitutionally obligatory method of reaching the "value." But it was a reading of the prohibitions laid down by the Fourteenth Amendment on *states*. On that last word hangs a tale. For in a test case involving *Federal* railway valuations, the Interstate Commerce Commission so reads its mandate as to authorize it to use its own discretion, and it has looked to the dissenting Justice, Brandeis, for its theory. Its result varies by ten to twelve billion dollars from the figures which the railroads reached under the court's theory in the *Indianapolis Water Case;* and the Supreme Court has coming to it therefore in this *O'Fallon Railway* litigation the "biggest lawsuit in history."[42]

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[40]His discussion in South Western Bell Tel. Co. v. Public Service Comm., 262 U. S. 276, 43 Sup. Ct. 544 (1923) is the classic exposition of the subject.

[41]McCardle v. Indianapolis Water Co., 272 U. S. 400, 47 Sup. Ct. 144 (1926), is much criticized. A note in (1927) 27 COL. L. REV. 721 calls it an "error which must be corrected." The other cases are collected in the writer's, *The Valuation War* (1928) 6 N. C. L. REV. 243, wherein is discussed in detail the whole topic of reasonable rates as handled in recent decisions.

[42]It has been set down for argument on Jan. 2, 1929. The record title is "Excess Income of St. Louis & O'Fallon Ry. Co." and it is strictly a recapture case under section 15a of the Commerce Act which requires that the commission shall "determine what percentage of such aggregate property value shall constitute a fair return" in which it may utilize the results of its work under section 19a, but the main purpose of section 15 is not rate making but to "adequately sustain all the carriers" and the aim was to secure the impounding of the excess over the "fair return" as a trust fund to be used by the commission in loans etc., to the carriers.

Because railways are in question;[43] because not the Fourteenth but the Fifth Amendment limiting the Federal government, is in question; because recapture and not rate making is in question, there are those who see differentiations from the *Water Case*. The amendments meant exactly the same thing when the issue was the social engineering job of declaring housing a public business.[44] As to railroads being different, inducing Munn to put his money into *them* is merely a phase of the inducement to investment which is a common problem as to all the utilities. The Commerce Commission specifically felt that its task though pigeonholed under Section 15, the recapture section of the Interstate Commerce Act, was a general job under Section 19, the Valuation Aet; and said so.

Other phases of the valuation question are the allowances for intangible values, today's allowances for investments made not for today's use but as provision for tomorrow; the figure which is used as a multiplier for the total, "the fair rate of return." Setting the "fair rate" is frank social engineering. For its theory is that Munn must get the "going rate" *i.e.* that "going" now and it is equated to other returns in the money market. The point is clear that Munn's money is lured into the public utility field in competition with the wages of money elsewhere.[45]

This total, arrived at by a "value" multiplied by "rate of return" is a thing to keep in mind in considering the extent of the utility's

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[43]On this see Goddard, *The Problem of Valuation; The Evolution of Cost of Reproduction as the Rate Base* (1928) 41 HARV. L. REV. 564, and Bonbright, *The Economic Merits of Original Cost and Reproduction Cost, ibid.* 593. At 589 Mr. Goddard argues the differences between local utilities and the railroads; and at 593 Mr. Bonbright adopts the argument.

[44]The cases arose from New York and from the District of Columbia and the decisions made no distinction: see Block v. Hirsch, 256 U. S. 135, 41 Sup. Ct. 458 (1921), and Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465 (1921).

[45]Bluefields Water Works Co. v. Public Service Comm., 262 U. S. 679, 692, 43 Sup. Ct. 675 (1923). "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment having regard to all the facts. . . equal to that generally being made at the same time and in the same general part of the country, on investments in other business nndertakings which are attended by corresponding risks and uncertainties. . . rcasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate under efficient and economical management to maintain and support its credit. . . rate of return may be reasonable at one time and become too high or low by changes affecting opportunities for investment, the money market and business generally." All these formulas are in the same opinion.

other duties. In the duty to continue service it is dominating. There is no duty to serve at a less figure, for then the public to which the interest was "dedicated" has declined the dedication. This would seem obvious enough, but the modern Munn who goes into the public utility field is a corporation. A corporation has a charter, a mystical something granted by the state which makes a legal *one*, a juristic person, out of many natural persons; and a charter nowadays recites that the many may be one for a stated number of years. In a Texas instance it has twenty-five. But the country served boomed and bloomed and "busted" within nineteen years. Had the utility "contracted" to go twenty-five years regardless of its income in the last six? The ever hopeful remnant of population, whose service demands admittedly would not finance the service they insisted on having, said yes; and the Texas courts agreed. "No," said the Federal Supreme Court;[46] if the whole enterprise does not yield the fair return, Society cannot insist on the service. Here is a case where Munn can say "The laborer is worthy of his hire. If you must have the service let the government do it. Or let it subsidize me." Whether Munn's charter is "mandatory "or is "permissive," words that are used, seems in the actual decisions to make no real difference.[47] A dead horse simply will not run.

Keeping your mind on the *whole return* on the whole enterprise, consider it now as a sort of strong back. If it is as a whole a "fair return," what may be loaded on it and how far? If one is in private business and is keen at it he knows (1) what each particular commodity produces in profit or in red ink, (2) what branch stores of the chain system are paying their way, (3) what the particular facilities he offers to his public cost and what they are worth to him in the whole volume of his business. As to red ink producers he says "off with their heads," and he does it on his accounting as to the items involved. He would be astonished if he were told he *must* go on with the losing items because on his whole volume of business he is doing well. Trimming the lean from the fat and keeping the fat is the thing for him.

How fares Munn in the public utility business? Consider first the income from this or that commodity. If a commission *sets* a rate for coal, say, which is below the cost of handling coal does the rate stand so long as the total from passengers, wheat, lumber, automobiles *and* coal, all added together, shows a fair return? May

[46]Railroad Comm. v. East Texas R. R., 264 U. S. 79, 44 Sup. Ct. 247 (1924).

[47]See Field, *The Withdrawal from Public Service of the Public Utilities Companies* (1926) 35 YALE L. J. 169.

social engineering wrapped up in the vague phrase "public welfare" require him to carry coal at the set figure? So far the United States Supreme Court has made compromises: it said *no* to such a lignite-coal rate; it said *no* to such a passenger rate;[48] but when an industrious railroad pleaded for a higher figure per mile from patrons who travelled over a mountain division than from those who travelled on the flat plains, where both original construction and current maintenance costs were less, it said *no* to that too.

In the grand division passenger versus freight the idea is graspable that neither can by public authority be made a charge on the combination, but beyond that where draw the line? Must not there be some social welfare in the formula for setting rates for low classification stuff of bulky character?[49] As it stands, Munn is left considerably in the dark as to details. But as to publicly set rates, he may keep books on at least his main divisions of traffic, and resist the rates for them if loss results. If under higher rates the traffic wont move at all the answer apparently is that it does not move, unless the utility of its own motion chooses to buy good-will by offering low rates. How far the other traffic may be charged by the carrier itself with the costs of this purchase is not clear.

The urge to make rates in terms of social welfare seems humanly inevitable as one considers transportation's "make or break" effect upon industries and localities. Shipping communities and destination communities alike are involved. Shall rates on coal be based on the imperative needs imposed by the climate of its New England destination, or based on the needs of the mining areas which mine and ship the coal? Shall California and Florida be given rates with the view to building up their citrus fruit production? Shall industries not localized by climate, as in the last sentence, get assistance in the form of freight rates toward localizing themselves here or there? Shall the New England cotton mill industry, now suffering from the rise of a similar industry in the cotton states themselves, be given

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[48]The coal case is cited *supra* note 37. In Norfolk & W. Ry. v. West Virginia, 236 U. S. 605, 35 Sup. Ct. 437 (1915) Hughes, J., remarked, "It is clear that by the reduction in rates the company is forced to carry passengers if not at or below cost, with merely a nominal reward . . . We find no basis whatever upon which the rate can be supported."

[49]This is developed in Bye, *Social Welfare in Rate Making* (1917) 32 POL. SCI. Q. 522; Dunn, *Railroad Efficiency in its Relation to an Advance in Rates* (1915) 23 JOUR. POL. ECON. 128; *Public Interest Justifying Confiscatory Rates* (1915) 13 MICH. L. REV. 676, a note discussing the case of No. P. R. R. v. N. D., 236 U. S. 585, 35 Sup. Ct. 429 (1915). See also the notes (1915) 15 COL. L. REV. 441; (1915) 28 HARV. L. REV. 683; (1915) 63 U. PA. L. REV. 551.

"adjusted compensation" by reductions on cotton freights? In this lies a colossal inquiry as to national economies in production and distribution for the million.

If the railroads were government owned, one senses the infinite amount of political scrambling for favoritism which the idea might throw into their management. How merry the game of hiding the losses in the general tax bills! If a single privately-owned and publicly-regulated road served the whole country, the same scrambling is visionable, as is the need for subsidizing the road if it were to be kept going as a private affair. Yet even as things are now in this country, we have lately had in the Hoch-Smith resolution an attempt to handle rate making for the privately-owned and multiple roads with consideration of the conditions in "the several industries" and "parts of the country."[50] So far only deplorable results have followed from this very large project in social engineering[51] largely, perhaps, because it appeared to be a new form of "pork." But it is an idea which will scarcely be dropped.

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[50]The Resolution which dates from 1925 declared that the freight rate policy should consider conditions "in the several industries" and "parts of the country," directing for farm products "the lowest possible rates." The policy injected politics and sectionalism into rate making. The commission's attempt to give it meaning has resulted in a long warfare over the marketing of soft coal as between the southern and northern fields shipping to the Great Lakes, and the commission's latest order has been upset in Anchor Coal Co. v. United States, 25 F. (2d.) 462 (S. D. W. Va. 1928). See *The Lake Cargo Coal Rate Controversy* (1928) 34 W. VA. L. Q. 202, 272.

[51]The reference is to the attempt of certain sections of the country to pack the commission with their partizans (see 69 CONG. REC. 2787, 2859, 2967, 3789 [1928]) and particularly to the Senate refusal to confirm the reappointment of Commissioner Esch. Of the latter the RAILWAY AGE tho not always friendly to the Commission says in Vol. 84 at 662: "The action is most unwise because it makes successful the worst example on record of the injection of both politics and sectionalism into federal railway regulation... On the theory which underlies the entire policy of federal regulation the commission is much more competent than Congress to decide how rates should be adjusted to make them reasonable, nondiscriminatory and adapted to causing the provision of adequate transportation. ... If it is not wise for Congress to tell the commission specifically how it should regulate rates, it is clearly much less wise for it to tell the commission how it shall regulate rates, and for the Senate to begin chopping off the heads of members of the commission when they have begun to regulate in accordance with what they understand to be the special instructions given them by Congress. What man of ability and independence of character will want to be a member of the commission if this is the way Congress is going to do? What will federal regulation become if men of ability and independence refuse to become members of the commission?"

In the duty to continue service we dealt heretofore with the problem of the deficient total income. It may arise from "bad business" pervading the whole system, as in the Texas case, and to it, the law gives a business man's answer. Assume now that good business on the main line and bad business on the branches adds to the fair return figure on the whole undertaking. A chain store grocery system would drop off the branch stores. But the public utility business' duty to continue service bars its doing *that*. The option is not Munn's; the regulation imposed upon him makes a petitioner for authority to drop the branch. As I read the cases he is *entitled* to the granting of the petition only when the bleeding at the branch is so heavy that the fair return on the whole enterprise is affected.[52] Short of general anaemia, the branch *is* a charge on the system. Let those who seek logic explain this after what I have just said as to rates. I see it again as social engineering.

So far also as the ordering of new facilities is concerned the general answer seems to be that they are a charge likewise on the total return. It is in itself a ticklish bit of social engineering to decide that the time has come to reinterpret "adequate facilities in the light of conditions existing at the time . . . and the habits and customs prevailing."[53] "Facilities for traveling which might have been considered entirely adequate and convenient fifty years ago would certainly not be so regarded now. The introduction and general use by railroad companies of parlor cars, sleeping cars, dining cars, and vestibule trains have made a public necessity of what would formerly have been considered a great luxury. But a sleeping car, for the accommodation of travelers by day can scarcely be regarded as a reasonably necessary facility for their accommodation." Of the financial aspect the Supreme Court has said, "Providing reasonably adequate facilities . . . requires an expenditure of money of course," but "the facilities have a real bearing on the rates" and "Therefore an enforced discharge of the duty . . . does not amount to a taking of property without compensation merely because it is

[52]Southern Ry. v. Hatchett, 174 Ky. 463, 192 S. W. 694 (1917). "It will thus be seen that the cases upon the subject can easily be divided into two distinct classes, presenting entirely different legal principles: (1) Those cases in which the company owning the entire railroad has become bankrupt and is without means or credit to reinstate itself; and (2) those cases in which it is proposed to abandon the unprofitable part of a road belonging to a profitable system. In the first class, the abandonment is sometimes justified and will be permitted from the very necessities of the case; in the second class of cases it is not justified and will not be permitted, in any case, except at the permission of the state."

[53]Chesapeake and Ohio Ry. v. Public Service Commission, 78 W. Va. 667, 89 S. E. 844 (1916).

attended with some expense."[54] Yet it adds that "the expense is an important element in deciding whether the requirement is within the bounds of reasonable regulation," and it is again a question of loading the strong back. "To compel (such) . . . enlargements or extension that the proprietor of a utility could not make a fair return upon the whole investment would certainly be depriving him of his property without due process of law."[55]

After this airplane view of a large subject, a thought or two may be ventured. The first is the hopelessness of making any assertions of finality. All that has been sketched is of the last fifty years at most, much of it of the last twenty-five. In no single particular is the change of living conditions in America so quickly reflected as in the attitude of Society to those industries which it conceives essential to its well being, and one recoils from declaring that living conditions are stabilized. The other thought is that Society's present attitude could not be translated into effective action without the commission as the agency for the control of public utilities which the attitude calls for. Aside from the merits of the Hoch-Smith resolution already alluded to, the legislative bullying of the best established of all our commissions which it induced is a serious blow to the whole fabric of utility regulation.

In conclusion: if there is detected here an underlying sympathy for Munn, in that Society loads him with special duties while leaving to other business men a larger measure of self seeking, there remains a thought which will go toward evening up the score. In the birth control already mentioned, Society makes a special bribe to Munn which it does not offer to those in the "private" businesses. Though it limits Munn's profits it gives him a special fenced off area in which to earn them. From it competitors are shooed away;[56] and the com-

[54]Vandevanter, J., in Chicago and N. W. Ry. v. Ochs, 249 U. S. 416, 39 Sup. Ct. 343 (1919).

[55]McCarthy, J., in Murray v. P. U. Comm., 27 Idaho, 603, 150 Pac. 47 (1913). "In order to justify the Commission in ordering enlargements, the Commission should be satisfied from the evidence: First, that the existing plant is not reasonably sufficient to render adequate service (Washington ex rel. Ore. R. & Nav. Co. v. Fairchild, 224 U. S. 510); second, that the extension or enlargement is within the scope of the original professed undertaking of the proprietor of the utility, (N. P. R. Co. v. N. D., 236 U. S. 585); third, that, after the making of the enlargements or extensions, the owner will be insured a fair return upon his whole investment (Smyth v. Ames, 169 U. S. 466–546, Ct. Rep. 418); fourth, that the particular enlargements or extensions are reasonably necessary to insure reasonably adequate service (N. P. R. R. v. N. D., *supra* note 49, and Washington ex rel. Ore. R. & Nav. Co. v. Fairchild, *supra*.)"

[56]The definition of "trespassers" is not, however, sufficiently inclusive to savs the Munn who has, we shall say, put his money into *street cars*, when bus linee

missions which grant or withhold the certificates of public convenience show an increasing regard for what might be termed the invested interest of the first in the field.[57]

This making a population tributary to the utility is the latter's compensation for the duties; enforcement of the duties safeguards the population from the rapacities of monopoly while they enjoy its efficiencies and economies. To me it seems a sensible compromise for keeping private initiative in fields wherein growth is constant and wherein no private concern under intelligent regulation is likely to "rob the people" so much as they are likely to rob themselves under public ownership.

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come; or if into canals and river boats, when railroads come. The private enterpriser of course also runs the hazard of that social engineering by which society insists on service by the better equipment; but in his day of profit making *he* is under no intake limitation in any *legal* sense and Munn is.

[57]In Illinois Power and Light Corp. v. Commerce Comm., 320 Ill. 427, 151 N. E. 236 (1926), the court upset an order of the commission which let in the invader. See the note to it in (1926) 24 MICH. L. REV. 393 on *Policy as to Competition between Utilities.*

That a railroad's later application for a certificate to supply bus service in its territory should be preferred over a prior requestfor one by a specially organized bus concern was decided in Monongahela etc. Co. v. State Road Comm., 104 W. Va. 183, 139 S. E. 744 (1927), noted (1928) 6 N. C. L. REV. 347; (1928) 76 U. PA. L. REV. 456; (1928) 34 W. VA. L. Q. 198.

Of a famous case holding that grants of privileges from the State are strictly construed the court said "That case was decided in 1837. Then 'Competition is the life of trade' was accepted as a guiding maxim of economics. That maxim has long since been rejected so far as it applies to public utilities. Uncontrolled competition is now regarded as destructive of such utilities. In 1837 the state watched with indifference one public utility stifle another. Now the state controls its public utilities, and, as an incident to its regulatory power, acknowledges a duty to protect them. As a part of that protection, the state now guards against unnecessary duplication of public utilities. Consequently, the decision in the Bridge Case is not applicable to cases like these, where regulated utilities are concerned."

"The argument of the railroads has met the approval of court and commission. 'Railroads have permanent roadbeds and trackage which require an outlay of millions of dollars and which in turn yield large revenue to the people of the state. The average bus line is incorporated for a comparatively small sum. The railroad is of vastly greater financial responsibility. This is a matter of substantial public interest, particularly in cases of accident. It is the established policy of the law in this state that a public utility be allowed to earn a fair return on its investments. It is therefore not only unjust but poor economy to grant to a much less responsible utility company the right to compete for the business of carrying passengers by paralleling its line, unless it appears that the necessary service cannot be furnished by such railroad. Appellants offer to provide whatever increase in accommodations and service is deemed essential to meet the public convenience and necessity. It is but consonant with our law regulating public utilities that they be given opportunity to do so.'"