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Public Utilities: I. The Quest for a Concept

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PUBLIC UTILITIES

I. THE QUEST FOR A CONCEPT

THOMAS P. HARDMAN

In 1876 the United States Supreme Court said, in effect, that a given business is a public utility (in price-fixing cases) only when "made so . . . by the facts." Since then the question has been bruited about, in one form or another, whether there is any universal concept—any legal yardstick—with which to measure the facts. Almost any avowed realist, after reading all the cases, would say that there is not. And of late, particularly since the very recent five-to-four decision of the United State Supreme Court in O'Gorman & Young v. Hartford Fire Insurance Company, there is considerable evidence that the legal realists are now in the saddle, for the time being at least.

Only a few years ago the common approach to this problem was (and, to a lesser degree, still is) what we may perhaps call a conceptualistic or, at least, a legalistic approach. This is to say, it was in the main a rather strictly conceived attempt to determine the question by more or less fixed "rules", formulas or concepts, particularly concepts.

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1 Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 (1876). The court, per Mr. Chief Justice Waite, said: "Business . . . may not be made so [i. e. 'public'] by the operation of the Constitution of Illinois or this statute, but it is by the facts."

2 51 S. Ct. 130 (decided Jan. 5, 1931).

3 The term "realist" is not here used in any narrow sense. A judge may use legalistic language, as Mr. Justice Holmes sometimes does, and still be a "realist", a legalist in the language which he so employs but a realist in his method of approach, in the use which he makes of the legal rules, principles, standards and/or concepts employed.

Sufficient indication as to what is meant appears in the body of the article.

4 See, particularly, the majority and minority opinions in Tyson v. Banton, 273 U. S. 418, 47 S. Ct. 426 (1927), Justice Holmes, Brandeis, Stone, Sanford vigorously dissenting on this question; Ribnik v. McBride, 277 U. S. 350, 48 S. Ct. 545 (1928), Justice Stone, Holmes and Brandeis again dissenting, Sanford concurring, in result only, "upon the controlling authority of Tyson v. Banton"; and the very recent case of O'Gorman & Young v. Hartford Fire Ins. Co., supra n. 2, in which, in the light of his previous dissents, Mr. Justice Brandeis, now speaking for a newly aligned majority including Mr. Justice Holmes and Mr. Justice Stone, apparently gives authoritative sanction to a new approach.

5 The word "rules" is herein used in the sense in which the courts generally use it, namely as including "rules", "principles" and "standards". As to the distinction between these and also as to legal "conceptions" see Found, An Introduction to the Philosophy of Law (1922) 115 et. seq.
An outstanding example of this method of approach is found in the leading text-book of the day, a text-book which still yields a wide influence, Wyman on Public Service Corporations. It is there laid down quite conceptualistically that where three types of facts co-exist, those facts constitute a public utility without the aid of legislation and without an exercise of public franchise, at least where the courts see fit to hold so, as they commonly do in effect, if not in so many words. These three essential types of facts were said to be, in short: first, a business monopolistic in nature, that is to say, the fact situation must be such that for some reason ("monopoly due to legal privilege," "natural monopoly," or "virtual monopoly"), such as exclusive franchise or scarcity of available sites, those conducting the business have the upper hand in the sense that competition cannot be relied upon to secure the public or social interest in having reasonable rates and adequate service, service without discrimination and for all within the class which the utility undertakes to serve; second, a "public profession," that is to say, a holding out to serve the public generally (or, better, a holding out to serve a permissible class of the public), not a mere undertaking to serve a few specified persons by special private agreement; and third, a business "essential" to the general welfare, that is to say, something not merely useful or advantageous according to the ideas of many, such as theatres, skating rinks, "scenic railways," but a business which according to commonly accepted standards is reasonably "necessary" in the interest of the public.

These then, according to this influential school of thought, are, broadly speaking, the contents of the concept which we call a public utility. The point is that then, or rather according to the method of approach that was dominant then, an attempt was (and

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6 See Wyman, Public Service Corporations (1911). See also, Wyman, The Law of Public Callings as a Solution of The Trust Problem (1904) 17 Harv. L. Rev. 156, 217.

7 See Wyman, op. cit. supra n. 6, c. 2.

8 Ibid. c. 3.

9 Ibid. c. 4.

10 E. g., Allmut v. Inglis, 12 East 527 (1810), the leading case.

11 E. g., Munn v. Illinois, supra n. 1; People v. Budd, 117 N. Y. 1 (1889), aff'd. 143 U. S. 517 (1892).

12 See, Wyman, op. cit. supra n. 6, § 200, et seq.


14 This extraordinary law, says Wyman, is "confined to necessary services. The law has little concern with the monopolization of unessential things." Wyman, op. cit. supra n. 7, § 117.
often still is) made to measure the fact situations with a conceptualistic or legalistic yardstick, and to say, so to speak, that in a given case the judicial process is primarily a quest to determine whether the facts fit into the concept. 15

Without specifically referring to that method Dean Pound has thrown an interesting side-light on the judicial process in this class of cases. In the common-law system, as he tell us, 16 "the chief role is played by the conception" of "a relation". Accordingly the common-law lawyer in approaching legal problems has a tendency to think of some "relation . . . and of powers, rights, duties and liabilities, not as willed by the parties but as incident to and involved in the relation".

As to this, Dean Pound, writing in 1921, says: 17

"We have established that the duties of public service companies are not contractual, as the nineteenth-century sought to make them, but are instead relational; they do not flow from agreements which the public servant may make as he chooses, they flow from the calling in which he has engaged and his consequent relation to the public. What is this in each case (and these are relatively recent developments of the law) but the common-law idea of relation, a relation of . . . public utility and patron, and of rights, duties and liabilities involved therein? It is significant that progress in our law of public service companies has taken the form of abandonment of nineteenth-century views for doctrines which may be found in the Year Books."

Another outstanding example of a more or less legalistic approach, a legalistic rather than a full-fledged conceptualistic approach however, is that of Professor Charles K. Burdick. In several able articles 18 and in a valuable casebook, 19 Professor Burdick, differing widely from the Wyman approach, seems to say, in effect, that except as to innkeeping and common carriage (which he considers historical survivals) there must be either legislation that regulates the business (or declares it to be a public service), or an "exercise of a public franchise" by those conducting such

15 Perhaps the writer should confess to having once subscribed to the Wyman method a little more fully than is done in this article. See my note, What Constitutes a Public Service, loc. cit. supra n. 13. But a lot of legal water has run under the public utility bridge since those days, now more than a decade ago.
16 POUND, THE SPIRIT OF THE COMMON LAW (1921) 21 et seq.
17 At p. 29.
18 See Burdick, The Origin of the Peculiar Duties of Public Service Companies (1911) 11 Col. L. Rev. 514, 616, 743.
19 BURDICK, CASES ON THE LAW OF PUBLIC SERVICE (2d ed. 1924).
business or a "receipt of financial aid from the state", before the business can be held to be a public utility—that public utilities exist as a result of one of these factors.

It would seem, however, that this is putting the cart before the horse, for in America one cannot constitutionally exercise such a special privilege as eminent domain or "exclusive franchise" unless he is engaged in a public service, or at least unless he exercises it for a public purpose; and legislation imposing the extraordinary affirmative duties of a public utility, including the duty to serve for a reasonable compensation, is held unconstitutional unless the business is what is commonly called a public utility.

Besides there are cases reaching sound conclusions, which will not fit that method of approach, e.g., a rather recent West Virginia case, in which the applicable legislation is hardly of the sort indicated by Burdick, and the court stresses the fact that exercise of franchise is not necessary. And in a few cases there is neither app-

29 See C. K. Burdick, The Law of the American Constitution (1922) 419, 550; Wyman, op. cit. supra n. 6, §§ 56, 80.
31 Wingrove v. Public Service Commission, 74 W. Va. 190, 81 S. E. 734 (1914). In this case a corporation organized under a charter authorizing only mining and sale of coal and the exercise of rights incidental to such business nevertheless engaged in the work of supplying (from an electrical plant installed and maintained primarily for its plant and tenement houses) electricity for lighting purposes to practically all who applied. Such applicants were not many but the community was not large and there was no general electric plant in the community. The corporation had not exercised any public franchise such as eminent domain. There was no legislation specifically regulating the enterprise as a public utility though there was general legislation giving the Public Service Commission jurisdiction over "electric lighting companies" and of course such supply business is not an historical example of common callings. Hence, without applying a steam-roller to the facts it cannot be said that this is a public utility by Burdick's legalistic test. Yet the West Virginia court held, justifiably, that it was a public utility and required the company to supply the complainants, subject, of course, to the control of the Commission over the rates charged. Said the court:

"Its [the corporation's] lack of power of eminent domain is a mere inconclusive circumstance. Many persons and firms engaged in the public service do not have it. If concerns engaged exclusively in water, light and gas service did not possess it, they would clearly be public service concerns nevertheless. Many common carriers are without power to exercise this high right. Acceptance of practically all applications for service, made by citizens of the town, is a sufficient election to engage in the business and manifestation thereof, without advertisement of the fact or solicitation of customers. Acquisition and retention of its patronage by the company constitute an occupation of a certain field in the public service, into which no other concern or person can safely enter. While it has not formally or in terms kept any one else out, others may be barred out by such occupancy. Nor can it be material that the company reserves the right to discontinue the service at any time or has
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pliable legislation nor exercise of franchise."

It would seem then that legislation and exercise of franchise are not criteria for solving the primary problem, though to be sure either legislation or exercise of franchise may play an important part—a totally different part—in determining whether a given business is a "public utility". For example, while legislation declaring that a business is a public utility cannot make it such unless, as the Supreme Court has said, it is such "by the facts", i.e., unless the fact situation is such as to justify the court in holding that the business is a public utility, nevertheless, when the fact situation leaves a reasonable doubt whether such a holding is justifiable, legislation regulating the business as a public utility should turn the scale in view of the presumption of the constitutionality of legislation. That is at least a partial explanation of the much criticized and much misunderstood Brass case in which the United States Supreme Court is said by some to have upheld a legislative regulation "converting private into public elevators", and by others to have denuded the public utility concept of the monopolistic element that was supposed to beset it." Whether the fact situation in the Brass case justified such price-fixing control is not quite clear. Thus, if one adopts the Wyman approach, it is not altogether clear whether it could be reasonably said that there was the monopolistic feature required by the Wyman theory. And so, since there is such doubt, such legislation should be upheld in view of the above mentioned presumption. In such a case, regulating legislation is, to say the least, one of the stimuli which should induce the court to decide the case as the court decided it.

This suggests a limited inquiry as to what is the function of

 guarded against obligation on its part to continue it indefinitely or at all. It is now devoting its property in part to a public function, and, in so doing, has subjected it to governmental regulation and control for the time being. 'When private property is devoted to public use, it is subject to public regulation.' Munn v. Illinois, 94 U. S. 113; Gas Co. v. Lowe and Butler, 32 W. Va. 662, 671."


Munn v. Illinois, supra n. 1.


See Hamilton, Affectation with Public Interest (1930) 39 YALE L. J. 1098.

Mr. Justice McKenna, in German Alliance Insurance Co. v. Lewis, 233 U. S. 389, 34 S. Ct. 612 (1914).
legislation in price-fixing cases—as to what is the function of legislation generally under our form of government. (1) Is applicable legislation, as such, law? Or (2) is law rather what the courts "do in fact" by virtue of such legislation and other stimuli, e. g., precedents, or (3), as Mr. Justice Holmes would apparently put it, a prophecy of what the courts will do in fact by virtue of such stimuli? 23 Realistically looked at, law is, if we must choose one of the three, either (2) or (3), for every one knows that courts frequently (and justifiably) disregard the so-called "plain meaning" of legislation and, in America, often hold such legislation void (unconstitutional). Realistically, then, such legislation is not so much the law as it is one of the various stimuli in the fact situation that induce the judges to decide a given case this way or that. Of course, if the legislation is constitutional and its correct interpretation is conceded, it is undoubtedly the duty of the judges to "follow the statute", as the phrase goes. But that only means that where the judges have decided that such situation exists, then that situation—that partially judge-made situation—is the stimulus that impels the courts to do this or that in fact. And, from this point of view, it is what the courts will so do or preferably, as Holmes puts it, a prophecy of what the courts will so do that constitutes the law.

But law, however it may be defined, is not a thing with only one aspect. And, from another point of view, law is merely a means of social control, and this legal control, in modern organized society, manifests itself in many forms, not always sharply delineated. Yet courts and commentators have commonly purported to parcel out practically all these manifestations into rather clear-cut categories.

Perhaps this tendency is nowhere better illustrated than in the time-honored custom of conceptualistically dividing all enterprises into public business on the one hand and private business on the other 24 and assuming that there is some universal "test" by which we determine whether the business falls in this conceptualistic category or that. Thus the United States Supreme Court has, in a series of recent cases, purported to declare that affectation with a "public interest" is the "established test by which the legislative power to fix prices of commodities, use of property, or services,

23 See Holmes, The Path of the Law (1897) 10 HARV. L. Rev. 457, 461: "the prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

24 See, e. g., WYMAN, op. cit., supra n. 7.
must be measured,"[20] in other words, the "test" whether the thing so in question is in the public utility "category".

Moreover, legal control may be, inter alia, either positive or negative, direct or indirect. And all business, whether so-called "public" or "private", is admittedly subject to much legal control, e. g., the police power generally. Thus, though money lending is certainly not in the traditional public utility category, yet the legal control exercised by usury statutes over that business is, as to rate regulation, substantially like the legal control exercised over so-called public utilities. And somewhat similarly as to many other legally regulated businesses.[21] Hence, will a conceptualistic approach—a public-utility concept—satisfactorily indicate the "distinctions"? Is not Mr. Justice Holmes right after all when he says that the public utility concept, "the notion that business is clothed with a public interest and has been devoted to a public use is little more than a fiction intended to beautify what is disagreeable to the sufferers"?[22]

As Mr. Justice Stone has well said in regard to price-fixing cases:[23] "The phrase 'business affected with a public interest' seems to me to be too vague and illusory to carry us very far on the way to a solution . . . ." Economically at least, the consequence of the price-fixing control exercised over so-called public utilities is not essentially different from that inflicted (in other than "public utility" cases) by anti-monopoly laws, usury statutes, zoning ordinances and numerous other kinds of legislative control.[24]

Of course, it is true that from habit or otherwise we need concepts in our reasoning processes, and that, in general, we need rules, principles, standards and concepts in solving legal problems, partly in order to minimize the personal element in the administration of justice, partly in order to make the "law" sufficiently predictable, and for other reasons. But it does not follow that the linguistic tool employed should be used almost as if it were a "solving word"—that the problem whether a service may be legally subjected to price-fixing control can be solved conceptualistically, without sacrificing some interest that should be secured. Indeed if one looks at the judicial process realistically, to make one's

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legal picture represent what the courts "do in fact," a perusal of the leading "public utility" cases of the last few decades inclines one to the more or less pragmatic view that, at least in price-fixing cases (as in due-process cases generally) this is a field where the so-called "principles of the law" are left largely inarticulate," where definition is not only dangerous but perhaps impossible, where, at least behind the language used, the judicial technique is, as Chief Justice Taft once admitted, that of pricking out the line by the gradual process of judicial inclusion and exclusion without, in fact, adhering to any fixed concept or legalistic yardstick. "We can best explain by examples", says the United States Supreme Court in a leading case."

In price-fixing cases, then, (and this article is confined primarily to price-fixing control) the leading case just referred to (perhaps better than any other case) forms a necessary background for the two recent decisions which go far toward establishing a new approach. In that case the United States Supreme Court, in a five-to-three decision, upheld legislation that regulated the rates of fire insurance companies, thereby adding the business of fire insurance to the "examples" of public utilities. Mr. Justice McKenna, who delivered the majority opinion, relied of course upon Munn v. Illinois, the American starting point of the Supreme Court on all such questions. The court's approach is important:"

"Munn v. Illinois, 94 U. S. 113, is an instructive example of legislative power exerted in the public interest. The constitution of Illinois declared all elevators or storehouses, where grain or other property was stored for a compensation, to be public warehouses, and a law was subsequently enacted fixing rates of storage. In other words, that which had been private property had from its uses become, it was declared, of public concern and the compensation to be charged for its use prescribed. The law was sustained against the contention that it deprived the owners of the warehouses of their property with-

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55 Mr. Justice Holmes in Lochner v. New York, 198 U. S. 45, 76, 255 S. Ct. 539 (1905) said (speaking of whether an act was due process or not): "'General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.' As to the inarticulate major premise in due-process cases see Kales, Due Process, The Inarticulate Major Premise and the Adamson Act (1917) 26 Yale L. J. 519.
57 German Alliance Ins. Co. v. Kansas, supra n. 27, at 233 U. S. 406.
58 At pp. 407-408.
out due process of law. We can only cite the case and state its principle, not review it at any length. The principle was expressed to be, quoting Lord Chief Justice Hale, 'that when private property is 'affected with a public interest it ceases to be juris privati' only' and it becomes 'clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large'; and, so using it, the owner 'grants to the public an interest in that use, and must submit to be controlled by the public for the common good.'

What then is this "principle" which the court finds in Munn v. Illinois? As to this the court said in the Munn case:  

"Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privati only'. This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris . . . . .

"Certainly, if any business can be clothed 'with a public interest and cease to be juris privati only', this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts."

An important point in this regard is that, while the court in the Munn case credits Lord Chief Justice Hale with stating a common-law "principle" that "when private property if affected with a public interest, it ceases to be juris privati only", Lord Hale did not state any such "principle". What he actually said was hardly stated as a principle. He said:

"The wharf and crane and other conveniences are affected with a publick interest, and they cease to be juris privati only."

But the United States Supreme Court, by misquoting Lord Hale and translating the particulars into a generic concept, thereby injected a "principle" and a conceptualistic approach that has persisted, on the lines at least, in most of the cases, at any rate apart from the two most recent adjudications which will be considered later.

However, looking largely between the lines to see what the courts "do in fact" we see that after all the judicial technique has often been rather according to an approach suggested in the

\[^{20}\text{Munn v. Illinois, supra n. 1, at pp. 125-126, 132.}\]
\[^{21}\text{See 1 Hargrave, A Collection of Tracts (1787) 77-78.}\]
\[^{22}\text{Cf. McAllister, Lord Hale and Business Affected with a Public Interest (1930) 43 Harv. L. Rev. 759.}\]
language of Lord Hale than according to the purported approach of the Supreme Court in the Munn case. To repeat, it is in fact largely, perhaps essentially, an approach "by examples", by particularization, by pricking out the line more or less pragmatically "by the gradual process of judicial inclusion and exclusion" rather than by a fully articulated legalistic method. Though the Court is constantly falling back on the so called "principle" of affectation with a public interest, as it did in the insurance case," the Court's words in that case, "We can best explain by examples"; are strongly indicative of the Court's inability or at least unwillingness to articulate any definite "principle" or other generalization.

Thus in the next important case in line, decided also in 1914, the United States Supreme Court added another "example" to the list of public utilities, namely the business of piping oil (under certain circumstances). The decision is important, partly because in one type of case the decision practically denudes the public utility concept of the "'public-profession" element that is supposed to beset it, partly because it aptly illustrates the more or less pragmatic, "'every - little - bit - added - to - what - you've - got method'" of approach which the Supreme Court sometimes uses in public utility cases. The facts, sufficiently for present purposes, were these: Certain powerful pipe line companies which had a wide-spread virtual monopoly of marketing oil by pipe lines would not take oil for others unless such others would first sell the oil to the pipe line companies. Thus the companies were in fact piping for themselves only. Hence the commonly considered essential of the public utility concept, namely "'a holding out to serve the public'"—"'devoting the property to a public use'"—(specifically a holding out to pipe for "'the public'") was lacking. Yet the United States Supreme Court, in an opinion "'arrived at largely by main strength'?", it has been said, held that under the circumstances, if the companies continued to operate, the companies must pipe for others without requiring a sale and at rates fixed by the commission.

It is true that Mr. Justice Holmes paid some lip-service to the traditional element of the concept, viz., a holding out to serve, but it is equally true that the only way one can arrive at the con-

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42 German Alliance Ins. Co. v. Kansas, supra n. 77.
45 Robinson, op. cit., supra n. 44, at 297.
elusion that there is a holding out is by applying a steam-roller to the facts in order to make them fit the concept, a sufficiently familiar method of adjudicating cases "according to law", i. e., by resorting to rules, principles, standards or concepts. But we have it on no less authority than Mr. Justice Holmes, the author of this opinion, that it is what the courts "do in fact and nothing more pretentious" that counts in the law—that law is a prophecy of that." Hence we cannot say that in fact a holding out to serve the public is always an essential content of a public utility concept. In other words, the Pipe Line Cases practically prove what Mr. Justice Holmes has since stated, that the concept is "little more than a fiction".

Beyond question, however, the conclusion arrived at is socially desirable, for in the Pipe Line Cases, as Mr. Justice Stone has since said\(^4\) of all legally sanctioned price-fixing control, there was "a situation or combination of circumstances materially restricting the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that serious economic consequences result to a very large number of members of the community . . . ."

"We need not attempt to lay down any universal rule, however," the learned justice continued, thus emphasizing the pragmatic character of the approach.

And in this connection it is important to note that in the Pipe Line Cases Mr. Justice Holmes did not attempt to lay down any "universal rule", doubtless because, as more clearly appears in later cases,\(^5\) he does not believe that such problems can be satisfactorily solved by any "universal rule" or "solving" concept such as affectation with a public interest. In fact Mr. Justice Holmes, speaking for a practically unanimous court, does not even refer to the concept, affectation with a "public interest", so non-conceptualistic in fact was his method of approach.

So far then it would seem that if in this realist world the lawyers, like most others, are willing to look at "the facts", it must be conceded that there is no universal rule, no "solving" concept, no purely legalistic approach that will determine in all cases what fact situations constitute a public utility. Must we say then that, in prophecying what the courts will do in fact, that is

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\(^{4}\) See Holmes, op. cit., supra n. 28, at 461.

\(^{5}\) In Tyson & Bro. v. Banton, supra n. 4, at 273 U. S. 446.

\(^{47}\) Ibid. at 451-452.

\(^{48}\) Particularly in Tyson & Bro. v. Banton, supra n. 4.
in "stating the law", we are in this type of cases confined largely to a prophecy based on the mode of approach, on the general judicial technique rather than on the language technique of the courts? If so the inquiry is far from an anomalous one under our common-law system; for, as Dean Pound has accurately observed, "the common law . . . is essentially a mode of judicial and juristic thinking, a mode of treating legal problems rather than a fixed body of definite rules".

Similarly in the next important cases in line, cases holding that "rate regulation" of housing, when there was a scarcity of housing due to war-time condition, was valid, the Court, per Mr. Justice Holmes, while paying lip-service to the "principle" of public interest, gives us a picture of the judicial approach that is, on the whole, far from conceptualistic:

"The regulation is put and justified only as a temporary measure . . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."

This largely "non-legal" method of adjudication has led one shrewd legal observer to declare that, from one point of view at least, "the definition of a public utility is a communique of positions won, or, if one takes the individual view-point, of those lost." And the same writer goes on to characterize this judicial technique as "the - every - little - bit - added - to - what - you've - got method," a characterization which hits the nail pretty squarely on the head.

Then followed a series of four Supreme Court cases in which the Court refused to advance the frontiers of the public utility concept. In the first of these cases, the Wolf Packing Company case, decided in 1923, Chief Justice Taft, speaking for a unanimous court, admitted an inability to articulate a comprehensive generalization by dividing public utilities into "three classes"; (1) businesses "carried on under the authority of a public grant of privileges . . . ;" (2) certain "occupations, regarded as exceptional, the public interest attaching to which, recognized from earlier

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The phrase refers to the usual notion of law as being a body of rules, principles, standards and concepts.
Robinson, op. cit., supra n. 44, at 278.
At p. 288.
Wolff Packing Co. v. Court of Industrial Relations, supra n. 36.
times, has survived the period of arbitrary laws by Parliament or colonial legislatures for regulating all trades and callings"; and (3) "businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some government regulation".

Of course the Court, as to the third "class" of utilities, apparently purports to declare a "principle" of public interest based on "monopoly," notwithstanding the fact that the Supreme Court in the insurance case had said that one of its former divisions, namely the Brass case, had "denuded it [the 'principle'] of the limiting element that was supposed to beset it—that to justify regulation of a business the business must have a monopolistic character." But in disposing of the point that directly concerns us the learned Chief Justice had to resort to particularization, saying (among other things):

"All business is subject to some kinds of public regulation, but when the public becomes so peculiarly dependent upon a particular business that one engaging therein subjects himself to a more intimate public regulation is only to be determined by the process of exclusion and inclusion and to gradual establishment of a line of distinction."

Then came the famous attempt of New York to regulate the prices to be charged by theatre ticket brokers, prohibiting a fee of more than fifty cents in excess of the price printed on the ticket. But it is not the doctrine of the majority of the court (that such business is not affected with a public interest) that throws most light on our question, though, significantly, Mr. Justice Sutherland, speaking for the majority, was forced to confess that "attempts to define" the "test" of affection with a public interest "have resulted, generally, in producing little more than paraphrases." It is rather to the more pragmatic approach of three of the four dissenting judges to which we must look for the light which in the two most recent adjudications of the Court seems to be guiding the majority.

Mr. Justice Holmes, after saying, as already mentioned, that the concept of affection with a public interest "is little more

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58 German Alliance Ins. Co. v. Lewis, supra n. 27, at 233 U. S. 410.
59 Wolff Packing Co. v. Court of Industrial Relations, supra n. 36, at 262 U. S. 538, 539. Italics ours.
60 Tyson & Bro. v. Banton, supra n. 4.
61 Ibid. at 430.
than a fiction," added realistically that "The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it."

And then, going on pragmatically, characterizing the "principle" of affectation with a public interest as a "fashionable convention," the learned justice continued:

"Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. Mugler v. Kansas, 123 U. S. 623. What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way."

Mr. Justice Brandeis concurred in this dissent. And the separate dissent of Mr. Justice Stone, concurred in by both Mr. Justice Brandeis and Mr. Justice Holmes, is even more indicative of a growing dissatisfaction with a mere "fashionable convention." A fuller reference has already been made to Mr. Justice Stone's view.

In Ribnik v. McBride, decided the following year (1928), a majority of six, pursuing the "fashionable convention" denounced by Holmes, Brandeis and Stone in the theatre ticket case, held that employment agencies were not public utilities, declaring conceptually that "an employment agency is essentially a private business."

The method of approach of Mr. Justice Stone, dissenting, concurred in by Mr. Justice Holmes and Mr. Justice Brandeis, is again quite pragmatic, involving an investigation of whether in this particular case the regulation of charges was a justifiable means of correcting abuses in a business when there was a necessity for that kind of legal control. One paragraph of the dissent will suffice to indicate the character of the new approach:

\[\text{\cite{Ibid. at 446.}}\]
\[\text{\cite{Ibid. at 446, 447.}}\]
\[\text{\cite{Supra n. 4.}}\]
\[\text{\cite{Ibid. at 357.}}\]
\[\text{\cite{Ibid. at 373-374.}}\]
"I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property. Obviously, even in the case of business affected with a public interest, other control than price regulation may be appropriate, and price regulation may be so inappropriate as to be arbitrary or unreasonable, and hence unconstitutional. To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation, is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered. In this respect I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its prices or economic return. The privilege of contract and the free use of property are as seriously cut down in the one case as in the other."

This method of approach, it should be borne in mind, was concurred in by Mr. Justice Brandeis who wrote the two recent opinions upholding somewhat similar price-fixing, opinions which are fully enlightening only if read in the light of these dissents.

This method of approach involves, of course, a virtual abandonment of the conceptualistic categories of public business and private business and with some legal heresy resolves itself into an inquiry into the social and economic facts, into the evils to be remedied and into the question whether the particular kind of legal control invoked, e.g., price-fixing, is a socially desirable means of remedying the evil.

Then came the last of the series of cases in which the Court held that kind of legal control, namely price-fixing, unconstitutional. In the Standard Oil Company case, decided in 1929, the majority of the court held that the business of selling gasoline could not be legally subjected to that kind of control, not being affected with a public interest. Mr. Justice Brandeis and Mr. Justice Stone concurred only in result, thereby dissenting from the method of approach employed by the majority. Mr. Justice Holmes dissented, without opinion, thereby indicating (among other things) his adherence to the method of approach he had previously set forth.

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*Williams v. Standard Oil Co., supra n. 21.*
Finally in 1930 came the first of the two cases that have mustered a majority of the Court, for the time being at any rate, in favor apparently of a new approach. In Tagg Brothers & Moorehead v. United States the Court held that persons buying and selling live stock at a stock-yard on commission could be required to make reasonable charges for their services. Mr. Justice Brandeis, speaking now for the Court, adroitly veils the method of approach which he had openly advocated in his dissents, doubtless in order to hold the conceptualists in line, which he did to a man. In doing so he pays some lip-service, negatively at least, to the conceptualistic "principle" of publicness. But between the lines, the opinion, read in the light of his well-known approach to such questions, is quite indicative of a new judicial technique on the part of the majority of the Court.

This new technique is more patent in the latest adjudication of the Supreme Court, decided in 1931, in which it was held that fire insurance agents could have their charges legislatively limited to a reasonable amount. The round-robin dissent of Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Sutherland and Mr. Justice Butler, proceeding in the main by the traditional conceptualistic technique, relying largely on the "principle" of publicness, serves to emphasize the realistic character of the approach employed by the majority. Yet Mr. Justice Brandeis, again speaking for the Court, indicates the method rather boldly. He says in conclusion:

"As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts

280 U. S. 420 (1930).
Ibid. at 132. Italics ours.
of which the court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the State indicates that such evils did exist." The record is barren of any allegation of fact tending of show unreasonableness.”

In each of these cases—the latest “word” and, what is even more important, the latest “act” of the Supreme Court on this question—it is perhaps impossible to find in the thing regulated any orthodox concept of a public utility. In both cases the thing regulated is not so much “property” as “labor,” the personal services of those operating the “marketing agency” and of those acting as agents for insurance companies. Accordingly in the first of these cases it was argued, quite in accordance with conceptualisitc notions of what constitutes a public utility, that there are “vital distinctions” in all legislative price-fixing “between property and the use of property, on the one hand, and personal services, on the other.”

But Mr. Justice Brandeis, speaking for the court, casts aside such distinctions. He says:"

"There is nothing in the nature of monopolistic personal services which makes it impossible to fix reasonable charges to be made therefor; and there is nothing in the Constitution which limits the Government’s power of regulation to businesses which employ substantial capital. This court did not hold in Tyson & Bro. v. Banton and Ribnik v. McBride that charges for personal services cannot be regulated. The question upon which this Court divided in those cases was whether the services there sought to be regulated were then affected with a public interest."


78 Tagg Bros. & Moorhead v. United States, supra n. 60.

79 Ibid. at 425.

80 Ibid. at 438. Italics ours.
The court then went on to point out that the persons rendering the personal services "enjoy a substantial monopoly at the Omaha Stock Yards. They had eliminated rate competition and had substituted therefor rates fixed by agreement among themselves."

In effect, therefore, these cases add "labor" (under certain circumstances) to the examples of things that may be regulated as "public utilities," at least to the extent of subjecting "labor" to price-fixing control. Whether there may be superadded the usual affirmative "public utility" duty to serve is another story. The extent of that general duty, however, is subject-matter for a separate article.

Thus the underlying theory of these latest adjudications, though not fully articulated, seems to be that the problem of price-fixing control cannot, generally speaking, be satisfactorily solved by a conceptualistic approach, and that, if important public or social interests are sufficiently pressing for legal recognition, such approach is to be abandoned (at least so far as need be) in favor of an approach in which the quest for a legalistic concept gives way to a rather social-utilitarian attempt to secure the paramount public or social interest in the particular case, to the extent, of course, that such interest outweighs individual or other interests to the contrary.

In the increasingly varying and complex fact situations in which price-fixing is and will be sought, it seems quite unjustifiable to go on forever attempting to solve the infinitely varying problems by a half empty concept which was suggested two hundred and fifty years ago by Lord Hale with no intent to make it such a test, but which the courts, particularly the United States Supreme Court, have often seized upon as the "established test," at least as to legislatively or administratively fixed rates.

Seeing, with Mr. Justice Stone and Mr. Justice Holmes, that there is in fact no such established criterion Mr. Justice Brandeis, by thus virtually avoiding the "public interest" concept and inducing a majority of the court to agree with him, has apparently given us a new picture of the judicial process employed, perhaps to be employed, in such cases.

This is an age of realism; and the general substitution of such legal realism for the more or less fictional conceptualism of periods of the past is a step in legal progress in keeping with the general progress, a step to which we may perhaps look forward,

for a time at least, with some measure of assurance. For in the last of these two cases, our new Chief Justice, Mr. Hughes, and our new associate justice, Mr. Roberts, openly joined forces with the acknowledged realists, Justices Holmes, Brandeis and Stone, and this newly aligned majority held, over the dissenting voices of the "conceptualists," that the realistic approach employed in the *Tagg* case may be extended to other types of fact situations.

In this approach the futile quest for a "solving" concept seems to be virtually abandoned for the time being at least. At any rate, if the majority of the court is still pursuing a concept, it is, apparently, a concept pregnant with a new approach.

And so the law moves along, for better or for worse. The legal quest which during most of the decade just ended was, in the United States Supreme Court at least, directed largely toward nineteenth-century *laissez faire* and legal fundamentalism is now, it would seem, facing about toward legal realism, toward a less conceptualistic and more pragmatic approach to public utility problems.

(To Be Continued.)

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The writer does not mean to suggest that all the dissenting judges in this case are, in all respects, conceptualists, but only that, so far as language goes at least, they employed, in the main, a rather conceptualistic method of approach in their round-robin dissent.