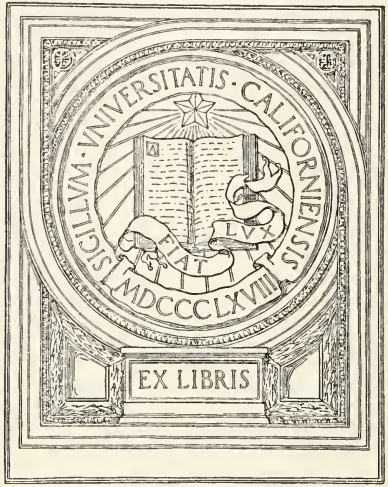
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THE ECONOMIC BASIS OF PUBLIC INTEREST

BY

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A THESIS

PRESENTED TO THE FACULTY OF THE GRADUATE SCHOOL IN
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PREFACE

It is a rather astonishing fact that so few scholars should have been interested to attack directly the definition of public interest as it is used by American courts. It is the basic statement of the right of the government to interfere in business affairs. Under its aegis public utilities arise and the police powers are brought to bear in the field of industry.

There is a complete body of literature about the police powers; there has been a vast amount of writing about public utilities; but it has not had to do with the fundamental question of the rights of the public in private business—or business our generation has supposed to be private; or the question of where it is that the rights arose by which those businesses are controlled which we have come to look upon as quasi-public. It is at once clear that if one business is in this sense private and another sufficiently public so that it may be regulated, the difference between the privacy of the one and the public nature of the other must be due to the relationship the business bears to the welfare of the public. A business can only be "public" or "quasi-public" because it affects the "public." This much inheres in the term.

May a business once unimportant to this public become important? May a business which once was allowed to go about its affairs free of regulation, suddenly become so important that regulation becomes imperative? And does the system of law we inherit permit us to make these regulations? I think the answer to all these questions is: yes!

But when does a business become so important and so dangerous that it may and must be regulated? It seems strange that, with all the effort that has centered upon problems of the police power and public utility control, that there has been so little effective curiosity as to just what qualities are necessary in a business for it to be regulated.

The definitions, moreover, have been of such a fugitive nature—as though occasionally some person, busy, perhaps, with the practical problem of utility rates, had for a moment glimpsed the wider implications of his work and given no more than a moment's attention to it—that the getting together of a body of related theory has been extraordinarily difficult. It may be, therefore, that some serious attempt, not here considered, has been made to define public interest. I can only say that the libraries have been diligently searched and a large number of authorities consulted in the attempt to make this study as nearly as possible complete—complete in the sense of having considered the theories of the scholars and of having included the important judicial dicta bearing on the definition of public interest.

The complicated nature of the legal theory involved in the regulation of business makes it difficult for the economist to understand the different bases for regulation. But broadly speaking, it may be said that any business must be affected with a public interest before it may be regulated. It is a secondary fact only that in some cases regulation must originate in the legislative bodies and in others may originate in the courts. In any case if the regulations are imposed because the business is affected with a public interest, it is very necessary that the phrase should be defined and all its implications made clear.

The proper use of the term "public utility" as the legalists use it would perhaps restrict it to such businesses as are regulated primarily under the common law duties to serve. These may be determined by the courts. Used in this way, the term would not extend to businesses which are regulated under the legislative police powers and not under the common law rule. It is clear, however, that legislative statutes may "narrow common law rule" and that public utilities may be subjected to legislative as well as common law regulations.

The distinction amounts to this: that there are certain goods and services, the business of the furnishing of which stands in such a relation to the public, that the consumers of

them may appeal to the courts, without a legislative act directing regulation, for redress. And in such businesses the courts may compel the performance of all the duties appertaining to employments of a quasi-public nature, such as: the service of all who come without discrimination; and the providing of adequate service at reasonable rates.

But also there may be legislative acts directing the regulation of businesses which would in any case be common and subject to regulation. Then the legislative act defines and narrows the common law rule; but the businesses are, nevertheless, quasi-public and public utilities.

And too, it must be added, if the distinction is to be made clear, legislative regulation may apply also to businesses which are not public utilities in the sense that they are quasi-public under common law rule. If we are to consider them as public utilities, it will be because we feel that the imposition of the obligations to perform the duties of quasi-public business makes them to all intents and purposes quasi-public.

This, to one not a lawyer, at least, seems the common sense view. And it seems to be that of Professor Freund who speaks of fire insurance as a public utility.[1]

If this point of view were adhered to, public utilities might arise under the police powers as well as under the common law, and fire insurance would be an illustration in point.

Also it should be said for completeness, that under the general police powers private business may be so regulated as to protect the health, morals, order and safety of the community; the status of such businesses as private is in no way altered. Regulation of retail grocery stores is an instance of this.

Important as it may be to know whether a particular business, if it is to be regulated at all, will have to be regulated under the common law or whether a legislative act must invoke the police powers (which act the courts will review, having in mind the principles of the common law and the due

[1] Ernst Freund: Cyclopaedia of American Government; The Police Power.

process clause of the constitution), it is still more important to the business man and the economist to discover the more basic conception of public interest which gives rise to all the varieties of regulation, to define it, to see what sorts of business may in any way be regulated under it. The problem that presents itself when we ask: *how is it to be regulated?* is the first that comes after: *what businesses may be regulated?* Both questions must have answers; but the main concern of the present work is to see what businesses may be regulated. To put it more precisely: *what are the qualities of a business and its relationship to the public that in any way affect it with a public interest so that its rates of charge or methods of service may be controlled in the interest of the public it serves?*

This is a question that the student of economics may legitimately interest himself in because it is fundamentally an economic question. The question as to whether regulation shall be of one sort or another is involved deeply with legal theory. It is not answered here in any conclusive way. And I have assumed the position which I believe to be the correct one that both kinds of regulation arise because of the basic public interest.

Some readers probably will not be sufficiently interested in the historical chapters that follow to repay the reading of them. For such readers it will be sufficient to read Chapter II, "The Economic Basis for Business Regulation," and Chapters VIII and IX, "The Tests of a Business that may be Regulated" and "The Trend of Judicial Opinion." Enough references to the historical material will be found there so that the main argument can be grasped without perusal of the chapters that intervene; and its foundations in economic and legal theory and court opinion at the same time will be made sufficiently clear for any ordinary purpose.

A selected bibliography of books, periodical articles and cases important for the present purpose will be found in an appendix.

I am greatly indebted to many persons who have aided in my search and assisted me with painstaking criticism. Fore-

most among these are Professor Clyde Lyndon King and Professor Ernest M. Patterson of the Wharton School, University of Pennsylvania. I must also express my obligation to Dr. Robert Lee Hale of the Columbia University Law School.

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CHAPTER I

THE IMPORTANCE, BEARINGS AND SCOPE OF THE PROBLEM

I. *Changes in the Status of Business under the Law*

From earliest times businesses have been controlled in the interest of the public they serve. A wide view of the history of the relations between business and the law would show cycles in the rigor of regulation it is true; but it would show no period—even at the height of the era of laissez faire economics—of complete relinquishment of legal restraints. Least of all could it be said of the present that it is a period of disbelief in governmental control of business. Even those who bitterly distrust interferences of the government with freedom of enterprise are seldom willing to suggest the giving up of all coercion and control. In the current phase of legal philosophy differences of opinion commonly concern the degree of regulation necessary; they have not to do with the question whether or no any regulation is desirable.

The first observation to be made concerning the history of the policy of regulation is that it has not been limited in all times to any one form of industry or to any one group of businesses. And the reason for this is that industries, many of them, have shifted in their relative importance to men. A maker of steel helmets and coats of mail, important enough to be regulated once, is non-existent today. And this is very nearly true of smiths, spurriers, tawers of leather, shoemakers and the like, all of whom were subject to regulation in the England of a few centuries ago, whence comes our heritage of law.

Areas of influence change as well. The village was once the field of industrial operations, say for the shoemaker; his market is national, perhaps international, now. The baker in a mediaeval town served the needs of perhaps a hundred families or thereabout. Compare with this the market range

of the modern bakery business. The realizations of these facts are influences shaping our attitudes toward the need for regulation.

But also there is the larger consideration: the tempo of progress accelerates. A motion picture cross section view of evolving industrial life, with even so small an interval as one decade between the film pictures, would leave the beholder with a bewildered sense of unrelated panoramas, so swiftly has industrial civilization advanced. Each picture would show new alignments of industrial forces, new and expanded market areas, and new consumption habits. This has its importance for the history of regulation. Controls once adequate quickly become antiquated and impracticable as differences in the social structure and in industry work themselves out.

With such changes going on in business and with changes equally great shaking out of their accustomed grooves all the old consumption habits of men, it was inevitable that the philosophy of the relationship between industry and the public it serves should have been disturbed and that the law should gradually have been modified to meet the new conditions.

Changes in the law corollary to changes in the developing industrial world might be outlined as follows:

I. Delegated control with some strict regulation down to the Industrial Revolution.

II. *Laissez-Faire*—as nearly complete as possible—in the eighteenth and nineteenth centuries.

III. Constructive regulation again beginning in the late nineteenth and early twentieth centuries.

IV. A thread of early-begun and never-abandoned control traceable in certain employments such as common carriage and innkeeping.

It is apparent to us now that great sudden increases in the size of business units and the widening of their market areas may have given the managers of industry (and indeed others of the community) a fictitious sense of the importance of their particular function as contrasted with any other social task. We know they rebelled against the mediaeval restrictions on

industry, that they had their way, and that our industrial civilization went in for a long period of *laissez faire* in which social controls of industry were reduced to the barest minimum.

But the end of competition in a *laissez-faire* régime seems to be large industrial units; and the disadvantage of mere disorganized consumers in dealing with highly organized business has become more and more apparent as the inevitable changes have worked themselves out.

Along with economic changes in the business and the market there had to come shiftings of the legal definition of the rights of the public to control if these rights were not to be lost entirely. During the period of the revolution in industry which developed our present factory and market system certain businesses were controlled; and certain businesses are controlled today. It is important to know whether these controls have followed any norm of development and whether there is a consistent following of economic changes in the law so that it may be predicted what controls will be used in the future and by what fundamental theory they are likely to be gauged.

Some aspects of the situation are clear so far as the United States is concerned; that American courts do permit the regulation of prices and rates in some cases; and that they also permit the regulation of services rendered, by the setting of standards.

When the field of price-determination is entered the problem plainly comes within the province of the economist. For one thing, it inevitably involves the choice of one theory of price determination and the disregarding of others; and for another it involves interference with marketing processes where prices are fixed. When interference is permitted here in the interest of one of the bargaining parties—the consumer—the interference disturbs all the relationships of economic life. Production is changed because the type of good or service to be created is specified; consumption is turned in other directions than it might perhaps have followed; and distribution processes are disturbed because of a limitation of return to the producer. For all these reasons it is important for the economist to understand the legal basis for regulation.

To the individual business man, too, regulation is a good deal of a puzzle and an exasperation. He desires to understand the limitations under which he works or may be forced to work in the future. He wants to know whether his business is one of those which may be interfered with or whether it is immune from interference. An understanding of the nature of public interest is thus important to him, too, in a particularly vital way because a full definition of public interest ought to state concretely the tests by which a business may be known to be liable to regulation.

II. *The Relation of the Doctrine of Public Interest to the Legislative Police Powers*

The doctrine of public interest is a part of the general police powers of the state. The general police power may be divided into two parts; that which has to do with the protection of the public health, morals, safety and order; and that which protects more strictly economic interests. Public interest is a legal concept under which these economic interests of consumers may be protected.

In the License Cases[1] Chief Justice Taney said that the police powers "are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions." And in Commonwealth v Alger[2] Chief Justice Shaw defined them thus: "We think it is a settled principle growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established

[1] 5 How. 504.
[2] 7 Cush. (Mass.) 53.

by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient. . . . The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be good for the welfare of the commonwealth, and of the subjects of the same."

Professor Freund[3] has defined the police power as one which "aims directly to secure and promote the public welfare" and says that it does so by "restraint and compulsion." And further: "The state . . . exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of abuse of these rights on the part of those who are unskilful, careless or unscrupulous."

In the *Cyclopaedia of American Government* under the heading: *Police Power* (p. 706 ff.) Professor Freund further discusses the term and the rights involved. Of the term itself he says: "The Federal Supreme Court first employed the term to indicate the otherwise undefined mass of governmental powers reserved to the states, and to the present day avoids using it with reference to the legislative power of Congress. More recent constitutional developments call, however, for a further definition of the police power. From the last quarter of the nineteenth century on, the guaranty of due process of law has been interpreted as a check upon all governmental action affecting liberty and property. All such action must be capable of justification upon some theory of Public Interest

[3] Ernst Freund: *The Police Power*, Ch. 1.

which is both rational and regardful of individual liberty and property, as rights essential to a free state. In view of this requirement the idea of the police power asserted itself by way of distinction from other governmental powers as the power which has for its immediate object the furtherance of the public welfare through restraint and compulsion exercised over private rights . . . "[4]

He then goes on to discuss the scope and limitations of the police power and says that these "are controlled by the legitimate demands of the public welfare and by the fundamental rights of the individual. The constitutions do not define the former but contain express guaranties with regard to the latter. . .

"The general guaranty of due process of law relates to life, liberty and property. Of these, the right to life is not apt to raise constitutional questions under the police power. . . . The main difficulty arises with reference to the use of property and civil liberty. The restraint of both is of the very essence of police power. Their recognition as constitutional rights can therefore mean only one of two things; that the restraint shall be reasonable and that it shall serve some legitimate purpose. . . . The reasonableness of the exercise of the police power relates both to its degree and to its incidence. As regards the latter, it means that the burden of the law should fall upon some property or person bearing a causal or otherwise intelligible relation to the conditions making the exercise of the power necessary. . . . As regards degree, the principle of reasonableness means that the burden imposed shall not be disproportionate to the benefit sought to be secured."

A definition of the relationship of the police powers to private property is to be found in Professor Ely's Property and Contract in Relation to the Distribution of Wealth."[5] "The

[4] For a complete and careful development of this idea of a Federal police power see *Studies in the Police Power of the National Government* by Robert Eugene Cushman in the Minnesota Law Review, Vol. III, Nos. 5, 6 and 7 and Vol. IV, Nos. 4 and 6. Also reprinted as a separate pamphlet.

[5] P. 206.

police power is regarded as primarily a legislative power, and it is true that legislative bodies provide in their enactments materials for the work of the courts. But the legislative power has no inherent limitations, and as in all lands, so in the United States, it goes without saying that legislatures are presumed to seek the public good only. What is peculiar in the United States is that controlling influence of courts given them by American Constitutions and within the limits of these Constitutions; this peculiarity has given rise to the modern use of the term police power. As a peculiar institution, the police power is essentially judicial, and it is as a judicial power that it requires discussion. . . . We may define it as follows: *The police power is the power of the courts to interpret the concept-property; and to establish its metes and bounds.*"

With respect to the limitations to be laid upon property at least, these definitions agree in all essentials. Another authority, however, feels that, properly stated, a definition of police power would not recognize the limitations put upon its use by the Courts. The legislatures have complete discretion. This is Professor Cheadle, who defines police power as "that general residue of governmental power, resting within the discretion of the legislative department of the government."[6] Professor Cook feels that the police power ought to be defined as "the unclassified, residuary power of government vested by the constitution of the United States in the respective states" and his definition therefore agrees with that of Professor Cheadle. He says in explanation: "If we . . . examine this residuum of governmental power more closely, we shall find that it includes the power to accomplish in part all three of the objects for which, according to Mr. Freund, all governments exist. In the first place, we find a power in each state to maintain its existence by putting down insurrection and rebellion within its limits, by laying and collecting taxes, by taking private property for public purposes, etc. At the same time, we find that this power is not a complete one, the State being

[6] J. B. Cheadle: Government Control of Business, Columbia Law Review, May, 1920, p. 574.

compelled by the constitutional provisions to rely in part for the maintenance of its existence upon the national government. Again, we find that the maintenance of right or justice, i.e., the administration of civil and criminal justice, is very largely but not wholly vested in the States. The same is true with reference to a third class of objects, viz., the promotion of the public welfare. In fact the power of the States in our system to promote the public welfare is the residuum of governmental power left after subtracting from the sum total of the States' residuary powers described above, the powers devoted to the maintenance of existence and the administration of justice. This, otherwise unclassified, residuary power of government, necessarily of indefinite though not of unlimited extent, has come to be called the police power . . . "[7]

Notwithstanding their differences, these definitions all serve to assist in placing the doctrine of public interest as a part of the general police power. The doctrine clearly falls into the class of somewhat vague "residuary powers." Definitions of the police power to be found in Court opinions also support this view. In Dunne v Ills. (94 Ills. 120) the police power was spoken of as the "law of overruling necessity." And in Noble State Bank v Haskell (219 U. S. 104) it was said: "It (the police power) may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

The foregoing should serve for a fair theoretical summary. The emerging concept, useful for the present purpose, is of very wide powers that may be invoked in defense of the public interest. But it is also desired to know specifically concerning the economic interests of the public as distinguished from protections which have to do with other phases of modern life. And it is just here that the classification of Professor Freund is invaluable. He divides the "primary interests" of the public into two parts: those having to do with safety, morals

[7] Walter Wheeler Cook: What is the Police Power? Columbia Law Review, May 1907.

and order; and those having to do with economic interests. Of the protection of safety, morals and order he says: "Under (this) head should be classed: (a) All legislation for the prevention of crime and maintenance of peace. . . . (b) All legislation for the prevention of accidents and disease. . . . (c) All legislation concerning intoxicating liquors, gambling and vice. (d) Regulations for the maintenance of order in public places and for the enforcement of peace and quiet. . . .

"This field of the police power is on the whole clear and undisputed. . . . "

And concerning the protection of economic interests he says: "These . . . obviously do not affect the public welfare so urgently as safety, morals and order. With regard to many conceivable phases of industrial regulation, the legitimacy of of the police power is seriously disputed. The principal branches of legislation falling under this head are the following: trade regulations for the prevention of fraud; the control of combinations, trusts and corporations; certain phases of labor legislation; regulation of the business of railroads, banking, insurance and other classes of business affected with a public interest . . . "

Here there is a clear statement that the phrase "affected with a public interest" which the courts use as a justification for business regulations of the type we are here interested in and which specifically gives rise to the doctrine of public interest, falls under the general rule of the police powers.

This, then, would be the meaning of such passages from court opinions as the following from The People v Budd (117 N. Y. 1): "The conceded power of legislation over common carriers is adverse to the claim that the police power does not in any case include the power to fix the price of the use of private property, and of the services connected with such use, unless there is a legal monopoly, or special governmental privileges have been bestowed." And this from Munn v Ills. (94 U. S. 113) "Under these (the police) powers the government regulates the conduct of its citizens toward one another, and the manner in which each shall use his own property,

when such regulation becomes necessary for the public good. . . ." And also of such wider definitions as are to be found in other opinions; for instance in Matter of Jacobs (33 Hun (N. Y.) 374): "The police power of the legislature is very broad and comprehensive, to promote the health, comfort, safety and welfare of society." And in Wynehamer v People (13 N. Y. 378): "The police power of the state is very broad and comprehensive, and under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other." In Ratcliffe v Union Stockyards Co. (74 Kans. 1) also, the court based the right of "legislative control" on the "broad general grounds" of "public necessity and public welfare." And Judge Pound in a recent New York case (Durham Realty Corp. v La Fetra, 230 N. Y. 429), speaking of the rent laws in New York which regulate the business of renting houses and apartments, said, "The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. . . .

"The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression. . . . "

This clearly brings business regulation under the operation of the police powers; and not only such regulations as, strictly defined, protect health, safety, morals and order, but also those which protect economic interests; and not only negative regulations under this head are included, such as the prohibition of discrimination; but also those positive regulations which are intended to prevent "oppression" such as that Judge Pound refers to. These regulations are market regulations and are intended for the protection of consumers.

What businesses are subject to these positive and continuing economic regulations is a pressing question. Concerning this Professor Freund says: "Since the Supreme Court, in sus-

taining legislative railroad and elevator rates, referred by contrast to private business which the entire people have no power to control, the question as to what kind of business may be treated as affected with a public interest is one of obvious importance, with regard to which, however, the courts leave us without any guidance. Undoubtedly it includes the business of banking and insurance and certain callings which the common law has always treated as in a sense public (carriers, innkeepers, etc.); but it is impossible to bring all these under one head and no authoritative definition has been attempted. . . . A great expansion of the police power may be expected by further development of this doctrine."[8]

This passage calls attention to the fact that whatever economic regulation there is must come from extensions of that "vague" and "undefined" legislative power, the police power. It also calls attention to the importance of any attempt at definition of the qualities of a business which make it subject to regulation.

III. *Modifications of Property Rights Involved in Regulation*

Under both divisions of the police power, the rights implied in the phrase private property are modified in the interest of the group. Under the regulations which have to do only with safety, morals and order, the modifications have to do with forces more directly affecting the welfare of the community; under the economic interest protections of the police powers, welfare is, of course, involved, but indirectly. Regulation in this case is of rates charged and standards of service maintained. These may be eventual protections of health and welfare and, indeed, must be, but scarcely in the direct sense which we understand when regulations are laid down governing the quality of milk that may be sold or the sanitary conditions of the kitchens of restaurants, since these may be directly responsible for typhoid epidemics or similar tangible public disadvantages.

[8] Cyclopaedia of American Government, p. 708 ff.

These latter are essential modifications of private property rights, however, quite as much as the modifications implied in railroad rate regulation. They say in effect to the business man: You may use your property in conducting your business as you see fit, provided that in the conduct of it you do not interfere with the rights of others. When others' rights are interfered with the public regulatory powers may be invoked to modify your rights so that they harmonize with those of others.[9]

Inherent in this view of property rights is the social utility theory of the justification of private property.

Seligman distinguishes five theories of private property, the occupation theory, the natural rights theory, the labor theory, the legal theory, and the final development, the social utility theory.[10]

This last implies that property rights have their origin and justification in the idea of the group that by permitting them the welfare of the group is enhanced. And "if social utility is the real justification, it is clear that the extent of private property rights must find its limit in social considerations."[11]

Under the social utility theory society is fully justified in making well-considered definitions of the extent to which private property rights may be used so long as these definitions are made with the sole intent of protecting the general welfare.

The precise content of property rights is involved in the discussion of their modification under the public utility theory. If these rights are to be limited they must be isolated and examined to see which of them it is necessary to modify and which may be left to the unguided disposition of the holder of the rights.

Seligman distinguishes five rights as follows, which, taken together, form the content of the term "private property" as

[9] For a discussion of the Private Property concept in the History of Economics see Gide and Rist: *History of Economic Doctrines*, passim.

[10] E. R. A. Seligman: *Principles of Economics*, p. 131 ff.

[11] *Ibid.*, p. 134. See also Bertholf v O'Reilly, 74 N. Y. 509: "All property is held subject to the power of the state to regulate or control its use, to secure the general safety of the public welfare."

it is ordinarily used: (1) Right of gift, (2) the right of use, (3) the right of bequest, (4) the right of unlimited acquisition and (5) the right of disposal by contract.[12] To these there ought to be added another which is of the very essence of the "privacy" implied in *private* property, the right to exclude others.

If these enumerated "rights" taken together form the full content of the term "private property," it will be useful to examine each of them to see how fully the individual may enjoy them. Even a casual examination indicates that no one of them may be exercised without some social restriction. The law in certain cases scrutinizes gifts; the use of property is modified by regulations under the police power; acquisition of property is limited in certain instances, as notably, under the laws forbidding conspiracy in restraint of trade; the right of bequest must be in accordance with established dower rights, and may be limited by the laws of probate and those defining dower rights etc.; and the right of disposal by contract and of the exclusion of others come definitely under the modifying power of the doctrine of public interest.

It is these last that we are interested in here. The right of disposal by contract means the right of buying and selling; it touches the whole conduct of business enterprise. And, as we shall see, there are certain services and commodities the prices of which—and by this is meant the terms of disposal by contract—may be regulated. Also under this rule of law, the exclusion of others is restricted. In common callings, there is a duty upon the business engaging in the common calling to serve all alike and to exclude no one.

This analysis should place in its proper setting the limitation on individual or corporate rights implied in the regulation of public utilities. These rights, like the others, are justified only by their usefulness to society; and when the full exercise of them runs contrary to public interest they may be freely restricted by public authority.

[12] Seligman: *Principles of Economics*, p. 136.

"The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must, when necessary, yield to the public convenience and the public disadvantage or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded, and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare."[13]

Those rights of private property which involve disposition of property by contract involve the relations between the two parties to the contract in the selling and buying of goods and services in the market. The rights of one, if exercised without restraint, might infringe upon the rights of the other. In the cases of necessities and the like, the courts will not tolerate the injury of consumers because of the opportunity for imposition by the businesses which dispose of the goods or services he buys. It is under the doctrine of public interest that these market processes may be regulated to limit the rights of sellers and protect the rights of consumers.

In discussing the present and future development of private property Professor Ely says: "We notice movements actually going on which take five directions, all of which are destined, as those responsible for these movements think, to improve the institution concerned, namely:

I. An increase in the mass of free goods.
II. A restriction of the extent of private property and corresponding extension of public property.
III. A development of the social side of private property.
IV. An extension of private property along certain lines; development of rights akin to private property.
V. Changes in the modes of acquisition of private property".[14]

[13] People ex rel Durham Realty Corp. v La Fetra, 230 N. Y. 429.

[14] R. T. Ely: *Property and Contract in their relations to the distribution of wealth.* Vol. 1, p. 340.

It is in the third of these, the development of the social side of private property that such regulations of business fit in as are permitted under the doctrine of public interest. But also the extensions of the theory contemplated under the fourth are inherent in regulations under both the public welfare and economic interest phases of the police power. What is meant is such newly recognized rights as the right to be well born, the right to cleanliness, the right to an assured income, the right of employment and the right to reputation. The protection of these is indirectly accomplished under the price and rate regulations of business.[15]

[15] R. T. Ely: *Property and Contract in their relations to the distribution of Wealth*, pp. 368 ff. See also Frank Parsons: *Legal Doctrines and Social Progress*, Ch. VII passim.

CHAPTER II

The Economic Basis for Business Regulation

I. *The Tendency to Combination*

The phrase "affected with a public interest" appears very commonly in American court opinions; out of it arise the controls of business, both quasi-public and private, that constitute the state's protection of the economic interests of the public. These forms of prescription are necessary because of economic illness. We cannot at this point discuss the symptoms which lead to the administering of one rather than another form of legal surveillance; it must be sufficient to point out that both prices and standards of service are regulated. The phrase is the statement of a business condition in which it seems necessary for the state to protect the interests of consumers.

There are those who do not concur that this economic regulation is really remedial; they justify their dissent on the grounds that business is more prosperous in competition and that the interests of consumers are sufficiently protected by it. And when it is pointed out that in many businesses competition is not present as a matter of fact, they still contend that potential competition is a sufficient safeguard; that if prices rise too high or service standards sink too low, some one will perceive these conditions and offer better service at the old price or equal service at a lower price and that this will always happen. It is a kind of law.

But it would seem plain enough that only under conditions of perfectly free competition will producers allow the actual market supply of goods and services to coincide with the supply it is possible to bring into the market.

For the present we may identify "producers" with "sellers" for the producer must also dispose of his goods and become a seller; and it is in his selling and not his producing nature that those traits are found which make it necessary to institute

controls that favor the consumers of his products. In his rôle as a seller he exhibits a set of dispositions entirely inutile—perhaps even pernicious—to him as a producer; so that the situation is covered, however disagreeable its implied ethics may be, by saying that the whole interest of sellers, as sellers only, is in the highest possible net profit. In as far as he is actuated by purely acquisitive motives it is the constant effort of the business manager to control supply so that he may control one of the elements of the price equilibrium.

If the business manager in his rôle as salesman is able to dominate his business organization so that its policy is directed toward the control of supply; and if it does actually restrict supply, even in the slightest degree, the normal result is that the price rises and profits are greater. It will be objected that there is a limit to this and that the business may find its sales so restricted by the higher price that its profits are reduced instead of augmented; this of course may happen, but it may not; and the fact that a business has the power to experiment thus with the machinery of the market is sufficient indication of the need of control. Furthermore, it is just this limitation of the supply of necessities that may cause the great harm to the public interest. It may be true that the business gained nothing from the restriction of the supply; but this fact does not absolve it from the charge of having harmed the public interest if it has reduced the supply of those things upon which people depend for their sustenance and happiness. So that even the most orthodox *laissez faire* believer, who would trust fully to the benevolence of freely competing forces and who feels that economic justice is to be expected to eventuate most often from their operation, has come to accept the real logic of saying that, when competition is not free and when supply is limited in the interest of total net profit, there is a harm to consumers.

This point is made clear by Professor Clay who remarks that the essence of competition is in "the possession of an alternative and the exercise of choice by one party to the contract of sale; monopoly is the abolition of the alternative

and power of choice."[1] And in another standard text book of economics[2] the situation just commented on is characterized by saying that the law regards competition as one of the main pillars of our present social order because it is so apparent that competing producers cannot increase profits (at the expense of consumers) by limiting supply. This same passage goes on to describe the reaction of the monopolist to his new-found power when he is freed from the restrictions of competition: "The monopolist will normally endeavor to fix his output at such a point that, given the existing state of demand, he will *secure the highest possible net returns*."[3]

John Stuart Mill, in saying that "neither law nor opinion should prevent an operation beneficial to the public from being attended with as much private advantage as is compatible with full and free competion,"[4] would, by implication, not deny that legal regulation ought to be invoked when the advantage to one party of a business transaction is not determined by "full and free competition" but by monopoly in some degree.

President Hadley remarked: "There can, I think, be no reasonable doubt that the world is far better served under this competitive system than under any other system of industrial regulation which has hitherto been tried. The effect has been so marked that modern law—the English first and the continental afterward—has gradually adjusted itself to the conception that prices should be let alone wherever competition can regulate them; that a price obtained in open market, without fraud or artificial monopoly, is *ipso facto* a fair price. . . . "[5] But here again there arises a question of fact as to the existence of the "open market." The inescapable conclusion is that a price fair to consumers cannot be reached where there is not perfect and free competition; and that when the business

[1] Henry Clay, *Economics for the General Reader*, p. 263.
[2] Ely, *Outlines of Economics*, Ch. XII.
[3] *Ibid.*, p. 201.
[4] John Stuart Mill, *Principles of Economics* (Ashley ed.), p. 709.
[5] A. T. Hadley, *Freedom and Responsibility*, p. 117.

situation which once justified the basing of legal principles on the economics of free competition has passed, the law ought to be changed to take account of the new situation.

It may be stated as a first conclusion, that, as has been reiterated again and again by economists, monopolists, by their control of the supply, may control price.[6] If competition were perfectly free such a situation could not possibly arise. But businesses important enough to be regulated are in their very nature businesses operating under conditions of decreasing costs. "The greater the extent to which plant and machinery can be used, the more concentrated the industry and the smaller the area on which a given volume of production can be turned out, the more probable is the tendency to lessening cost and increasing return."[7] This is a situation more likely to be true in such standard, stable, every-day goods and services as are likely to be designated for regulation (under the phase of the general police power which protects the economic interests of the public as contrasted with its interests in health, safety, morals, and order)[8] than in any other sort of business imaginable. And in such businesses it is important to see, the economic motive is best realized by extending sales and accepting low profits per unit in the interest of the large total profits remaining when total expenses are subtracted from total receipts.

The managers of the these classes of business do not always apprehend that their acquisitive interest may be served by rate-fixing bodies which force them against their desires into large-scale service and the taking of a small profit per unit. But such is the reality of things.[9]

[6] Taussig, *Principles of Economics*, vol. I, p. 199, for instance: "A monopolized commodity will be sold, by a person doing business for gain, on such terms as will yield the largest net revenue."

[7] *Ibid.*, p. 191.

[8] For a discussion of these phases of the police power see Ernst Freund, *The Police Power*, in the *Cyclopaedia of American Government*, p. 706 ff., also above, ch. I, sec. II.

[9] *Op. cit.*, vol. II, p. 110: "Increasing returns in the strict economic sense are a usual characteristic of these industries."

Another element to be considered, however, is the elasticity or inelasticity of demand, which, in the case of necessities such as are likely to be regulated, operates in general to strengthen the desire of business managers for higher rates, offsetting the gains to be made by the decreasing costs of larger outputs. The demand is a highly inelastic one until rates are very much reduced, when a great strengthening of demand is felt. The curve of elasticity would fall off sharply in its upper reaches in the case of any necessity but would tend to flatten out lower down in the scale. "The consumers' demand (for necessities) tends to be inelastic. But as the most imperative needs are met his demand for more of any commodity acquires a greater degree of elasticity."[10]

It might seem desirable to the business seeking only the highest possible net returns to meet only this inelastic demand of the more well-to-do customers and not to reduce rates to the point where large numbers of purchasers would be called into the market as the curve flattened out and new classes of consumers were brought in under the influence of a much reduced rate. It is just this reluctance to make sharp reductions, call in large numbers of new purchasers and accept low per unit profits which justifies regulation.

Total profits of the business need not be less with wise regulation; but they will be gained by low per unit profits rather than high per unit profits on greatly restricted sales. The public interest in the wide dissemination of the product of the business at a low price is thus served and at the same time the business need not in the least be injured. Of course, the regulating body may, by design, cut into and eliminate a part of the net return earned by reductions in price and large consequent sales, but it need not if its main purpose is only to secure the public right to lowered rates and to hold business to its duty to serve efficiently.

In businesses with a tendency to increasing returns or decreasing costs coupled with an inelastic demand for the product, combination of competing units is in the long run

[10] William E. Weld, *India's Demand for Transportation.*

inevitable, if for no other reason, simply because of the economies to be gained by operations on a large scale and the losses from plant duplication. But there is another reason, equally compelling, for the coming in of combination—the fact that combination, because combinations control supply, makes price control possible and frees the business manager from price competition.

In any case, in the business of supplying necessities to the public, combination is, in the nature of things, to be expected; and when there is combination there is a lessening of competition to the extent of the coming in of combination. If combination is purely to take advantage of large-scale economies, price will be very materially reduced by the business's own volition provided the business sees and acts upon the fact of increased net return from larger sales and smaller per-unit profits. But if, at any time, the business should stop its movement toward expansion and the continual reduction of price which brings in new purchasers, and should use the power it possesses over price, the public may well be, as the courts put it, "oppressed."[11] Where the one force causes combination the other may enter; and the full effects of the economies of large-scale business are, therefore, not necessarily passed on to consumers unless there is a consumers' control of the business.

II. *The Conflict of Interests*

The economic interest of the business manager consists in the largest possible net return on the investment of the business; the interest of consumers consists in the cheapest and widest dissemination of goods[12] possible. The conflict between these interests is apparent in the stating. But it is often said that the business manager, in seeking the highest net return for his business, at the same time, though incidentally, secures the wide and cheap dissemination of goods and services desired by the consumer. As he moves in the service of his own interest, does the producer also serve the interest of the consumer?

[11] *Ratcliffe* v. *Union Stockyards Co.*, 74 Kans. 1.

[12] Goods used in this sense includes services.

The answer to this question seems to lie in the theoretical discussion of the mechanism by which the business secures the highest net return for itself—limitation of supply. When supply is limited, the demand for the good or service must adjust itself to the supply through the price equation. A limited supply means higher prices; and higher prices mean a restriction in use. If there were free competition this could not be true. Supplies would be furnished to meet the demand at a price which covered the cost of production with a small margin of profit. And as demand expanded and production increased, the cost of production would fall and prices would be driven lower by competition. With free competition there would be no restriction of supply and no raised prices; with combination these things are possible.

With the inevitable tendency to combination under the influence of decreasing costs, it seems almost as inevitable that there should be a control of prices that harms the consumer. It is inherent in the very nature of modern business. And there is a separation, therefore, of the interests of producer and consumer—that is to say of seller and buyer. With an "open market," free bargaining and no restriction or manipulation, both parties to a bargain normally benefit because one wants what the other possesses and willingly gives up something for it which is desired (or which represents something desired) by the other party to the bargain. The only compulsion is this mutual inclination of each for the property of the other. But when markets are not open and bargaining is not free, one party to the business contract gains something at the other's expense.

Perfectly free competition and complete monopoly are equally rare phenomena; neither is descriptive of most business situations. But the tendency to decreasing costs as production is enlarged leads to combination for the purpose of effecting the economies of large scale business. In the pursuit of these economies a partial control of supply may give the business an incidental power over price. There is nothing to prevent the combination which gained its power legitimately enough

in the lowering of production expense per unit, from using it for another purpose—the restriction of supplies and the control of price—thus securing to itself gains at the expense of the actual and potential consumers of its product.

If the question should arise: why is it necessary to secure a wide and cheap dissemination of the goods and services generally thought of as necessities? it need only be stated in answer that these goods and services furnish the materials of the environment in which children grow and in which men and women live, that our conduct toward one another and toward the groups in which we live is fundamentally affected by the state of bodily and spiritual nourishment to which we have been adjusted and in which we now find ourselves. The importance of goods and services of this necessitous character can hardly be exaggerated. The problems of the conflict of interests in the market are important not alone to the persons directly concerned, but to all of us. And this is not alone because we, like others, cannot escape the common needs and desires which compel us to use the same goods and the same services as other men, but also because, even though we may not suffer because of economic disadvantage, we still cannot avoid living in the same communities with those who do and in the long run cannot escape a common responsibility for the social arrangements which make possible the exploitation of consumers by the purveyors of necessities.

When the market is viewed as a social mechanism rather than as a private one, and the reasons why it must be social and cannot be private are clearly envisaged, the problems of price and service control attain a new importance. Consider, for instance, the relationship of the price-fixing process to the income (the real income in the satisfactions got from using goods and services) of the persons in the community. One of the fundamental reasons for the stressing of that phase of economics which has to do with the apportionment of income, has to do with men's struggles to provide themselves with more generous quantities of goods and services. But this can never be successful so far as higher wages are concerned, for instance,

so long as higher wages are thought of as increasing the expenses of production and as an incentive to the managers of business to use whatever monopoly powers they possess to raise prices. The struggle is futile. No more of the satisfactions of life come out of it for the wage workers. But when the problem is attacked with the idea of restoring the consumers' power in bargaining, a beginning has been made in securing to men as consumers more generous supplies of those satisfaction-yielding goods about which, in reality, the whole industrial struggle revolves.

The controls which arise under the conception of the existence of a public interest in business transactions, are, in reality, economic weapons of the consumers, though the results are achieved through the agency of the theoretically impartial state. It is conceived by some persons that, by such interference in the interest of consumers, the state violates its rule of impartiality; but this view identifies impartiality with inactivity. To be impartial in this case the state must act. There is a separation of the interests of producers and consumers; the institution of public controls is a recognition of this conflict of tendencies and a way of protecting the right of consumers to a certain standard of living.

The courts have moved steadily in this direction. A long list of businesses formerly private have become public utilities under the common law; and the courts have shown a disposition to permit regulations of businesses by legislative statute under the police power to a greater and greater extent. There is some evidence, however, that the courts have felt themselves running counter to accepted economic opinion, which they took to be *laissez faire;* and there is some defiance in their attitudes as they have extended the scope of market interference. It may be seen, for instance, in Judge Pound's words:

"While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and the market value is a reasonable value; that people often move from one

city to another to secure better advantages; that no one is compelled to have a home in New York; that no crisis exists; that to call the legislation an exercise of the police power when it is plainly a taking of private property for private use without compensation is a mere transfer of labels which does not affect the nature of the legislation, *yet the legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds because it is unprofitable to build; that there are those who seek the uttermost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become general. It is with this condition and not with economic theory that the state has to deal in the existing emergency.*"[13]

Such constraint could only arise from the conception that economic theory has nothing to do with such facts as Judge Pound cites. It happens, however, that economic theory is broad enough to include monopoly as well as *laissez faire* and to account for its effects in the market. Economists know there is a separation of interests; and that monopoly powers may be exercised to the harm of consumers; and they know too that the application of the remedy would be more clearly understood if the economic principles really involved in regulation were more widely apprehended. It is the modern tendency toward combination, toward larger-scale business, under the compulsion of the principle of decreasing costs—and the use of the power thus gained for exploitative purposes that poses the problem of control. And the purpose of control, therefore, is to remove this possibility of exploitation. It is not, as some imagine, to interfere with the tendency toward combination which may be set down as inevitable; but merely to make sure that a power gained adventitiously by business is not used to the detriment of those whom the business serves.

III. *The Discovery of Monopoly*

The disadvantage of consumers in dealing with the purveyors of the goods and services they need gives rise to what

[13] *People ex rel Durham Realty Corp. v. La Fetra:* from a transcript of the original opinion of Judge Pound. (Italics are the author's.)

the courts call the public interest in business; this appears from the analysis of the conflict of interests in the market. And the cause of this economic harm to consumers lies in the influence of monopoly upon price. But whether there is a monopoly in a market, with its concomitants of restriction of supply and control of price, cannot be determined by investigation of less than the whole of a market situation. By this it is meant that investigations of business units as such cannot reveal the presence of monopoly unless the relations of the business to the whole of the market can be revealed. By looking at the business itself a judgment of its monopoly powers cannot be arrived at. The total need for the good or service, the total possible and actual supply of it, and the part the particular business plays in the whole process is the only possible basis for judgment.

Legal preoccupation has usually been with single business units because cases often come before the courts in that way. It is said that this or that business is a monopoly and suit is brought against it. The judicial opinion has to do with the particular business in question. This is one reason for the failure of the anti-trust acts to secure the public interest in business. It has been assumed that only if a business was big enough actually to monopolize or if a conspiracy between business units could be proved was there sufficient reason for public action; and even then action must be limited to repression.

There is a different theory altogether implied in regulation under the police power and under public utility law as it has come to be applied under the rule of the phrase "affected with a public interest." And, indeed, the way of regulation, if it is really to secure the public interest, should not be the way of dissolution and suppression of particular organizations engaged in business. The good or service should be the basis for regulation. The sovereign state should be perfectly impersonal toward the business unit. It should remember that what the public interest demands is the wide dissemination and the cheap availability of necessities. And the means of regulation to secure this public interest are to this end and not to the end of

breaking up some really serviceable business unit engaged in dealing in the good or service. The part the business plays will only be touched in following up the stream to its source. And there may be more than one source.

Confusion of the business with the function it serves has made a difference in our theory. It is the business that has been stressed; it is the function that ought to have been stressed. Production is organized fundamentally about the supplying of the needs of society; regulation is interested also in the free flow of the instruments which meet these needs. It is not, except incidentally, interested in the persons or organizations that supply them.

Suppose an investigation of the supplies of a certain necessity suspected of having been monopolized; suppose also a monopoly situation to be suspected because of strange rises in the price or sudden shortages in the supply of it; suppose further that there are found within a given market five businesses supplying it. The investigating body concerned with regulation goes to each business in turn and investigates thoroughly its processes and methods. Nothing irregular is discovered. May it therefore be concluded that there is no monopolization of the product? No restriction of supply? No control of price? There is no monopoly. But that the product is monopolized appears from the movements of the price of the product.

One definition of monopoly is: " . . . single-handed control over the total supply."[14] But this kind of monopoly has been shown by investigation not to be present. Is there another type of monopoly?

There is, for instance, this one: "Absolute monopolies are those in which, by law or ownership of all the sources of supply, the holder's control is complete. Industrial monopolies are those in which the control over the supply, while not complete, is yet effective enough to bring about a state of things different from that of competition, in which, even though there be no legal or natural restriction, the nature of the operations is such

[14] Taussig, *Principles of Economics*, vol. II, p. 107.

that competition is wholly removed, or operative only to a limited degree."[15]

Here is a definition of monopoly that may take account of our supposed situation. One of the five businesses may control such a preponderance of the supply that the others will submit tacitly to its leadership; there may be a gentlemen's understanding, wholly without conspiracy. Either of these or any one of many other ways may have been taken to gain the result.

But for the justification of regulation, if its justification lies in a harm to the public interest, there need be no conformity of the monopoly to any definition. The essential thing is the emergent effect on prices and standards of service. Monopoly begins to explain price as soon as there is any restriction of competition whatever from any cause; and when there is restriction the law of competitive price ceases to be of value as an explanation.

The harm to consumers arises out of a separation of interests and a power of sellers over prices; it begins to appear whenever there is any monopoly influence on prices. Taussig calls this "industrial" monopoly. There are reasons why this is not a really descriptive term; but they need not be discussed here. The important thing for the present purpose is to see that consumers may be harmed in their economic interest by agencies amenable to no other controls than those being imposed under the rule of their classification as "affected with a public interest."

IV. *The Power of Substitution*

It might very well be argued, and often is, that the consumer has another defense than public regulation, one much more easily brought into play and involving no expensive and bothersome interference with business—the power of substitution. If the prices of goods and services rise too high, it might be said, there are a great variety of others; and these others may even be less costly. Why not substitute?

[15] Taussig, *Principles of Economics*, vol. II, p. 107.

This may often be done, it is true; and sometimes consumers are not only as well off for the change but actually better off. Instances are plentiful. The expense of providing meat for the family table has risen greatly in recent years and foods have been substituted which have a better physiological effect and are cheaper. Meat was necessary in the diet of out-door workers; it is much less necessary in more sedentary factory occupations. Here was a case where a clear gain resulted from the substitution process. But there seems to be no guarantee that such a gain will result in every case. Nor, when artificial control of price enters, is there any indication in the price curve of the exhaustion of resources or of other basic reasons why consuming habits ought to be forced to a change. If rising prices were a sure indication that land of a less productive sort is being forced into use to supply our appetites and that it is becoming more difficult to produce because of the obstructions placed in the way by nature, then the rise in price would be doing a service in forcing many people to turn wholly or in part to other sources of satisfaction. But when price merely represents an arbitrary limitation of supply, a conscious withholding from the market, it does not measure, as it otherwise would, any decline in production advantage. It has nothing to do with the niggardliness of nature.

There seems to be no defensible reason why consumption habits should be compelled to change so that some one, or even a group of persons, may gain a profit. The power of substitution is a real weapon of man against the parsimonies of earth; but in a well-organized social group, consumers, it would seem by any canons of ethics, ought not to be left without other recourse than this against the artificial manipulations of prices which are a part of the executive scheme of modern businesses.

We may inquire what are the limitations within which consumers may invoke the power of substitution harmlessly. When dietitians agree that milk is a necessity for growing children and that there is no effective substitute known, we may presume that there would be a positive harm in the substitution for milk of other food materials. Likewise when the family

kitchen is equipped with facilities for cooking with gas, there is a harm in invoking the power of substitution against high rates for gas and turning to coal or electric ranges. It involves expensive re-equipment of the domestic plant—so expensive that a gas company might figure on a very little less use of gas with some slight increase in rates. When one is compelled to go on a journey, there is no really good substitute for the railway train which runs directly to the destination. There are reasons why substitution, though in many cases a real and effective weapon, ought not to be used as an instrument by consumers in coercing the purveyors of necessities. Certain limits designate themselves: they may be formulated somewhat as follows:

1. *The limit set by the natural productivity of the region of the market.* Society ought not, by reason of artificial limitation of supply, to be forced to substitute for the materials nature assists us most in producing, those which she assists us less in producing.

2. *The limit set by the state of the industrial arts.* Comparable with the limitations fixed by nature are those set by our state of advancement in civilization. In fact we have come so far in productive efficiency and no farther. By reason of humanly restricted supplies we ought not to have to choose things produced under such difficult conditions of technique as would add to their expense.

3. *The limit set by expert definition of what is desirable in the circumstances in which we find ourselves.* If fresh eggs are prescribed by the physician for the invalid, or milk for children by the dietitian, or a certain number of cubic feet of air space per individual by the housing expert, substitution ought not to be invoked to change the reasoned judgment of the expert in these definite social adjustments.

But if, as a part of the nature of our developing economic system, there is this control of supplies and consequent increase of prices when the consumer is under rigorous compulsion to buy, the power of substitution, however harmful in the long run, would necessarily have to be resorted to if there did not

exist as a remedy the power of the state to regulate business in the interest of the economic welfare of its citizens. The conditions we have described create a public interest in the business. The courts will recognize as valid a legislative statute fixing prices or regulating service in such a business; or, if the business can be shown to possess certain likenesses to other businesses already public utilities, it may be regulated under the common law without legislative statute, simply by a case being brought in the courts, and judicial recognition of the nature of the business being gained. This, however, is a rare modern procedure. For the most part, regulations are made by legislative authority under the economic interest phase of the police power.

V. *The Difficulties of Regulation*

It has been one objection to the regulation of business that the difficulties encountered are so great as to make the expenses of regulation greater than the savings to consumers. Whether or not this is so, there is a great deal of regulation under way; enough so that it is clearly a part of our politico-economic system. And the nature of the difficulties encountered may be analyzed.

The price-fixing body, if it is not to incur the penalties for the disregard of economic forces, must, in practice, calculate the necessary or desirable supply first and then proceed to the fixing of a price which will bring in that producer whom economists call marginal—the producer who rounds out the supply: this supposing there is more than one producer in the single market. If there be but one producer a price must be allowed which will still cover the expenses of production of the dearest portion of the supply. If all of it is produced under the same conditions, the expense of producing every unit will be the same; but if there are, for instance, a number of plants and the output of all of them is needed, it will be necessary to fix a price which will cover the expenses of production for the goods turned out by the least efficient of them. And this is a true instance in the sense that it illustrates the lack of uniformity

in conditions of production. No two plants are quite alike; no two firms operate under quite the same advantages or difficulties. But it is the least efficient plant, the firm with the greatest difficulties, which fixes the price that must be allowed. This is so because the part of the supply produced in this way is needed quite as much as the part produced under favorable conditions (and at less expense) if the full supply is to be forthcoming.

There can be only one price in a market at one time: this is an axiom of economics. And if this price is to be fixed with any idea of bringing in the needed supply, the most expensive part of its production must be allowed for.

This most expensive part is the marginal supply. It is true that there will be a profit, possibly a large one, on the infra-marginal portions produced under the more favorable conditions. But this cannot be avoided so long as industry is privately operated. And even if industry were not privately operated, this surplus would still appear, though it would not be disbursed to private individuals as dividends; there would still be a marginal portion and infra-marginal portions as long as there were different costs of production per unit of product. It might be noted in passing that this infra-marginal profit, or producers' surplus as it is sometimes called, is reachable under different types of income taxes so that, although the consumer contributes to the producers' surplus, this surplus may be tapped to assist in defraying the expenses of government, thus reducing the taxes consumers would otherwise have to pay. The producers' surplus is the social fund which supports civilization and adds to the richness of economic life, whether industry be privately or publicly owned.

The determination of the supply needed is the starting point; and this must be followed by a study of comparative producing expenses to determine just where the margin of production lies. Once this margin is discovered a price may be set which will cover the marginal expense and allow the current and customary rate of profit. This should serve to call out the needed supply. If it does not, the regulating body

will be forced to raise the profit incentive; or if this fails within reasonable limits, it may be forced to recommend to the state that it take over, and itself operate, the industry.

The determination of the needed supply involves difficult social measurements, as such regulating bodies as state utilities commissions and the Interstate Commerce Commission have had occasion to discover. There arises at the very beginning an almost insuperable difficulty. Who is to say how much of any good or service is needed? Shall the figures of past consumption be taken as a guide? Or shall new and more ideal conditions be forecast and consumption needs be estimated in the new environment? This is merely the contrast between expert judgment and mass judgment. If one's bias is toward democracy in the determination of living standards, deductions from the statistics of past consumption will be sufficient; but if one feels that most people are ill-prepared to assume the responsibility of social living, that they live unwisely and too well (or too poorly), he will not care to be guided by past experience. He will desire a new set of criteria.

So, it may be seen, there are difficulties even in the determination of what is needed, of how great a supply is desirable, quite aside from all the difficulties involved in accuracy of judgment as to what will happen when consumers are faced with new conditions. There is probably no one answer to this question, but it may be suggested that unless a regulating commission is prepared to enforce its desires upon consumers as well as upon producers, it has no other alternative than to be guided by the facts of past consumption by these same consumers. For their habits and predilections will not greatly change in any short period.

There is one large guiding principle left for it: that it must constantly endeavor to have price really represent the favor in which certain goods and services are held by nature. This principle has been referred to before. Price, under a purely competitive régime, would be representative of the advantage or disadvantage of producing; under the influence of monopoly, price ceases to represent anything of the sort. It becomes the

tool of the monopolist. Regulation will not be successful that does not perceive and hold to a system of prices which represents this natural determination.

The difficulties of regulation are therefore twofold; to see that the necessary supply is provided involves a study of consumption habits under various conditions; and to see that price does not vary greatly from the norm that it would follow naturally involves study of producing expenses under various other conditions. These two principles may conflict and may require delicate adjusting; but the controlling principle would usually be the attempt to force consumption habits as gently as possible into the channels of least cost, using price as the lever. For people will gradually abandon expensive consumption in favor of cheaper; only there is the danger that certain consumptions are more expensive not because of less aid from nature but because of manipulation of the market by monopolists. For this process of adjustment and insurance against exploitation, the regulating commission is a ready instrument. And in following this principle, although the commission may be the cause of change in consumption habits, the change will not be one which the commission merely believes to be desirable. It makes no war on the predilection and choice of people except such as is determined for it by outside forces. It does not say to people: this or that good is not desirable for you. It simply says, in effect: if you insist on using expensive goods you will have to pay a high price. Then there enters, as the defense of consumers, the power of substitution. And these are the legitimate uses of this power.

Such a commission begins its work by instituting a regular service for the reporting of prices and of volumes of trade at these prices; it thus arrives at a notion of the behavior of its constituency in given situations. When an adequate body of such statistics has been built up it has authority for its estimate of future consumption at different prices under the assumption that vagaries of taste will average out in the long run and that consumers are fairly consistent in their consuming behavior. The study of production costs has to be similarly begun by

insistence on uniform accounting methods and standardized reports. And this procedure is made difficult by the growing importance in expanding industries of the phenomenon of joint expenses and of the changing proportions of direct and indirect expenses in the whole volume of expense; but it can be accomplished by the taking of infinite pains.

The process of price regulation itself begins with the estimation of needed supplies based on consumption statistics; the regulating body must then allow a price which will bring in the whole of that supply. In doing this accurately, it will be found that the lines of the natural determination of price are being followed; and when actual expenses of production rise, prices will rise and consumption will be lessened. It might be said that a commission charged with price fixing need therefore only consider the expense of producing the supply and that the principle of the adjustment of price to natural determination will follow; but this might or might not be true. Price fixing is a human procedure and the results of departure from the natural norm though sure and costly are not immediately apparent. Consumers might very conceivably bring pressure to bear to keep down the prices of what are considered necessities. The principle for this reason has to be kept in mind as the ultimately most important; although the immediate reason for price fixing is usually reaction from the arbitrary exploitation of consumers.

The commission form of regulation has been referred to; and as a general rule it seems superior to the method of fixing prices in the statutes of legislatures because of the inflexibility of a price fixed once and for all. Inflexibility might very easily defeat the aims of price fixing. A commission with power to regulate may, from time to time, at indefinite intervals and as often as need be, readjust rates to conform to changing conditions of expense in producing or of habits of consuming; or to shiftings of particular prices relative to the general level of price movements. And all of these seem necessary to really successful regulation.

The objection to regulation so often made, that the expense of regulating is greater than the savings, has been referred to. This may very well be a valid objection unless the functions of a regulating commission are performed with care and accuracy and with a sure knowledge of the results desired. Critics will need to remember that there are bound to be ineptitudes at the beginning of any system of economic control, so vast has become the spread of modern business and so intricate have become the relationships of businesses with each other.

It is sometimes urged as a failure of democracy that it blunders into and through whole social policies without adequate study and evaluation and without any sufficiently definite conception of the results that are desired. The Sherman Anti-trust act and the Clayton act cannot be said to have been highly successful as we review their results. The regulation of businesses affected with a public interest, a method of control becoming more and more important, is another attempt to make the necessary contact of politics with industry; its protagonists feel it to be conceived, in contrast with the anti-trust acts, both more constructively and less repressively and to have a greater chance for success. But that chance ought to be discussed thoroughly and weighed well before embarkation on the policy is begun. It is, perhaps, too late for that; the policy is already in wide-spread operation. But the aims and difficulties still to be defined and met are many and more discussion is needed. The legislatures have shown a disposition to apply the rule of regulation piecemeal and haphazard in emergency situations with a remainder of half-hearted regulation after the emergency has passed, rather than any desire to consider well and extend the policy experimentally to determine its advantages and its dangers. This can hardly be said to be good statesmanship. And the courts, in betraying a defiant attitude toward what they call "economic theory," have given the impression sometimes that such regulations of modern business as they approve are contrary to accepted economic opinion. But it is economics, as a matter of fact,

that provides the theoretical basis for such regulations. The tendency to increasing returns in certain modern industries is not a new dynamic generalization; nor is it only recently that economists have discovered that competition is not always present in the market to protect consumers. When it is not present and buyers are subjected to "oppression," there exists a situation—and an economic situation—in which the state not only may legitimately interfere in the public interest, but, indeed, must interfere, if serious and widespread consequences in restricted consumption and lowered morale are not to be incurred.

CHAPTER III

Closer Definition of Public Interest Desirable

I. *The Definitions of the Decisions*

We have seen that in legal theory not all regulated businesses are public utilities; it may be that a regulated business is one which would not be subject to common law control at all as public utilities are. If it is nevertheless regulated by the legislature, however, as to rates and service standards, it must be because of a threatened public interest. Really, therefore, it is subject to regulation for the same reason that public utilities are. If there were no public interest in the calling, it is clear that there could be no justification for public control. And we have said that, for our purposes, at least, the problem of the method of regulation—whether common law or statutory—is secondary, and that the primary task is to ascertain and to define as simply as possible what businesses possess the qualities which make them subject to regulation at all. And it is clear that this resolves itself into the problem of investigating what it is that creates for the public an interest is businesses of any kind. Just what this public interest consists in is what needs to be cleared up because public interest lies behind all the kinds of regulation there are.

It might be argued that the other way of approach is better, that the kind of regulation that is sought to be instituted, is fundamental to determining whether a given business may be regulated at all. This would be true if there were any inherent differences in the purposes and methods of the different kinds of regulation; but there is not. When a business is regulated under the police powers without any question as to whether or no it is a public utility, the regulations have the same effect as public utility regulations, except that they may not go quite so far nor extend to so wide a scope. And then it is true that when a business is admittedly a public utility, most modern

regulations are instituted by legislatures. These regulations may be treated in a slightly different way by the courts, who may presume a wider latitude of power for the legislatures in the case of public utilities than in the case of private businesses, but for all that the regulations achieve the same purposes in the one case as in the other. The exploitative powers of the business are limited in the interest of the public it serves in either case. So that it becomes clear that the problem of greatest importance is not to see whether regulations of the one sort or the other are pertinent to modern business; but to see what qualities in a business give it the dignity and importance of public interest. If it has this public interest, then it is liable to regulation. As to the question of whether this regulation will be as a public utility or merely under the power of the state to protect the public welfare, there is admittedly much yet to be said. But it does seem clear that the public utility regulations, except in those kinds of business which have already been designated as public utilities, are not nearly of so great importance as the regulations of businesses possible under the police powers. This seems to be the field of extension of regulation. In the first place the courts are reluctant to extend the name outside the present categories. There will never be any question, probably, concerning the quasi-public nature of any common carrier; but when it comes to some business unknown to the English common law such as fire insurance, or to one concerning which older ages were not under pressure, such as housing, the utility label is very conservatively withheld. It may be that treatment of these modern businesses affected with a public interest in the same way that public utilities are treated, will gradually lead them to be thought of as such and eventually to be called so; but at any rate, there is a certain reserve in this respect. Legal theorists are beginning to speak of fire insurance and housing in this way, and even of the business of milk distribution and the retailing of food and clothing, but the courts are reluctant to go so far.

However it may be with the excuse given, all of the above modern services are being regulated or are talked of publicly as eminently eligible for regulation, and the reason for this eligibility has nothing to do with the kind of controls that are being thought of. They are considered as regulable because of their effect on the interests of the public, which our modern thought puts into a preferred class as against the interests of the individual firms or corporations who perform the services. It is this interest of the public, which is sought to be protected, that needs to be investigated. We need to know just what it consists in. It is only by determining what it is that we can say whether it is violated by a business, and whether regulation is needed.

That present definitions are inadequate may be inferred from the utter inability of a business man to determine from a study of decisions whether or no he is engaged in a business likely to be subjected to regulation some time in the future under the theory governing the reasoning of American courts.

Just how real this inadequacy is, becomes fully apparent when the opinions of the courts are studied.

There are certain of these decisions known as leading cases because in legal practise it has been necessary to refer to them again and again for principles. They are the precedent-making cases of their class. And we look to them for a clear definition of the qualities of a business which may be regulated.

"A business by its circumstances and nature may rise from private to be of public concern, and be subject, in consequence, to governmental regulation. . . . In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence which makes the public interest that justifies regulatory legislation." (German Alliance Ins. Co. v Lewis, 34 Sup. Ct. 612.)

"Public necessity and public welfare are the broad general grounds upon which the right of legislative control is based . . . " (Ratcliffe v Union Stockyards Co., 74 Kans. 1.)

"As to corporations which are *quasi public* in character and in behalf of which the power of eminent domain is exercised—those upon which special privileges have been conferred—there is no dispute. It is conceded by all that these are so far affected with a public interest as to be subject to reasonable control and regulation by the State. But is the enjoyment of special rights and powers conferred by the public the test as to whether a business is impressed with a public interest? Many kinds of business carried on without special franchises or privileges are treated as public in character, and have therefore been subjected to legislative regulation and control. The nature and extent of the business, the fact that it closely touches a great many people and that it may afford opportunity for imposition and oppression, as in the cases of monopoly and the like, are circumstances affecting property with a public interest." (Ratcliffe v Union Stockyards Co., 73 Kans. 1.)

"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." (Munn v Ills., 94 U. S. 113.)

" . . . that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that those elements were found in the nature and extent of the business, its relation to the commerce of the state and country, and the practical monopoly enjoyed by those engaged in it." (Budd v N. Y., 143 U. S. 517.)

"When an employment or business becomes a matter of such public interest or importance as to create a common charge or burden upon the citizen; in other words when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the executive power." (Sinking Fund Cases, 99 U. S.)

"Insurance is practically a necessity to business activity and enterprise. It is therefore different from ordinary commer-

cial transactions and is of the greatest public concern. Insurance has become clothed with a public interest and therefore subject to be controlled for the public good." (German Alliance Ins. Co. v Lewis, 34 Sup. Ct. 612.)

II. *These Definitions Seem Inadequate*

These are typical of the leading definitions. It will be seen that from them no one could readily determine exactly what qualities must be present to "clothe a business with the public interest" and make it in consequence a legitimate object of control.

There are, however, some few insistences that seem significant. (1) There is something special and individual about a business that may be regulated; (2) any kind of business may rise into this class; (3) a business seems to become in some measure public when it becomes actually or potentially dangerous to the consumers of its products, "a practical monopoly to which the citizen is compelled to resort"; (4) and when it "closely touches a great many people."

When the definitions are pondered and the meaning of their phrases carefully weighed, it becomes more and more apparent that there is no inherent confusion after all. The phrases continually stressed seem to indicate that all the writers of the opinions had very nearly identical results in mind; and yet it cannot be denied that the emerging idea is not quite clear. It lacks definiteness, concreteness. It does not enable one to infer that this business or that does or does not come within the legal rule.

And it may well be that this lack of definiteness and clarity has had its rise in the economic rather than legal nature of the facts on which the decisions are based. The facts are not legal; yet it is the legalist, not the economist, who generalizes from them and creates the rule of law.

III. *Closer Definition on an Economic Basis Desirable*

As will later be shown, the law has always held a remedy for long-continued and obvious disadvantages of the consumer

in dealing with business; and it is equally true that less long-continued but emergency situations have their legal protections for harmed consumers as well—though perhaps not through common-law regulation. Perhaps the disadvantage and the remedy for it—regulation of prices and standards—were clear to the courts; but the causes of the disadvantage, without a vision of which no clear rule could have been constructed, were not so clear. It is upon this basis that the theories of the legalists have been constructed. They have sought the causes why consumers must resort to a harmful price or standard or do without in bargaining with the sellers of necessities. It is true the courts necessarily have been interested in the point of law, the injury, rather than the economic situation out of which the injury arose. And to them, possibly, the emerging fact has been sufficient. Possibly, too, a theory, adequate to explain the definitions of the courts, can be constructed without considering the subtle and complex operation of market forces, simply by building upon the fact of a consumer harmed, a consumer forced to accept unreasonable rates or standards of service.

The courts do seem to have sought consistently for a principle and a clear line of precedent governing such cases. But the language of the decisions and the too-generalized definitions show that they have only partially found and held to it so far as their reasoning is concerned. It must be admitted that they have fallen back on rather indefinite statement when precision was needed most. The result is that there is some apparent confusion which clears up only with close scrutiny and careful interpretation of the history of regulation and its development in American court opinions. The fact that courts, like other human beings, may not always write precisely what they mean, nor mean precisely what their words seem to indicate, has made an opportunity for various interpretations of this, as of other, legal doctrines.

One of the important things to be done, therefore, is to look for the clear thread of precedent and to relate it to the economic changes which it naturally affects and is affected by. It must

always be remembered that this body of law is one which steps into the market place and interferes with processes there for the benefit of consumers as opposed to the owners of the goods and services held for sale.[1]

The changing market structure is the background of its development. This point of view will be insisted on in the development here of a new theory different, somewhat, from others formulated about its origin and development. It is economic history, especially the history of economic situations out of which the common law of business arose, that holds the key to public interest.

[1] One of the less important elements of confusion in American decisions seems to have arisen through a transforming of the 'consumer's interest' of the old common law into the 'business interest' of certain American decisions. Originally the doctrine of public interest was applied to protect individual consumers; the language of Budd v N. Y." . . . relation to the commerce of the state and country . . . ," German Alliance Ins. Co. v Lewis, "Insurance is practically a necessity to business activity and enterprise," and Cotting v Kansas City Stockyards Co., "Stockyards are situated in one of the gateways of commerce," seems to indicate that a business which is common to other businesses is more likely to be said by American courts to be affected with a public interest than is one by which individual consumers alone are disadvantaged.

There is no precedent to justify this. But the explanation of the way it came about lies in the line of common carrier decisions. Common carriers, unlike other businesses, have always been public in their nature. Formerly they were public because they had to serve individuals alike and the courts are not justified in linking up their "common" nature with the "common" service of other businesses, even though this may be the outstanding nature of their public importance at present. The consumer, individually, is at the bottom of the public interest doctrine and it is a perversion of precedent to identify individual consumer with business consumer. It is to the advantage of business organizations which use, for instance, the railroads, to have the law construed in this way. And it may be good policy. But the justification and precedent for it are not in the doctrine of public interest except by a great widening of the term.

CHAPTER IV

Theories of the Origin and Development of Business Regulation

I. *Legal Theorists Have Made Interpretations*

The failure of the courts to define completely the tests which subject a business to regulation has not escaped the notice of legal theorists and there are several distinct interpretations of origin and development which, it is claimed, help to an understanding of the theories of our American courts. No discussion can be at all complete without presenting the most important of these. The connection between the lack of precision in court definitions and an investigation of origins and development may not at once be clear. But the student of law, at least, will understand how greatly the development of legal theory is dependent upon what has gone before. The law, especially the common law, has been built up slowly, course by course, each principle dependent upon the support of those below and upholding it as well as upon the theoretical mortar in which all the principles are embedded and which gives them common meaning and homogeneity.

It will later be seen that the doctrine of public interest shows a fascinating record of the governing of the economic relations of men; and that it is quite plainly in its origin and all through its history, a rule for the definition of economic fair dealing. There have been perversions and misinterpretations, perhaps, aplenty, some of them serious and persistent; but they appear in their true colors when the whole period of the development of the doctrine is held in mind. And it is another triumph for the common law to admit that to get this principle straight we have only to get straight the meaning and intent of the original common law governing this particular relationship of men.

Legalists have these main theories of origin and development: (1) the monopoly theory, (2) the theory that all business is public under the common law, (3) the theory of delegated governmental obligation, (4) the theory of assumpsit and later legislative determination, and (5) the theory of complete legislative determination. The first implies that monopoly was the earliest test to be applied and that it is the test which now creates public utilities; the second theory is that all business is and has been always, public under the common law and that distinctions set up between businesses that are private and businesses that are public are artificial distinctions which arose through a series of mistakes and misinterpretations of common law principles; the third regards public callings as essentially governmental functions which, for convenience, private organizations are allowed to perform, but which the government cannot fail to regulate in the interest of the public; and the fourth and fifth would agree in allowing the legislature at present to completely determine social policy in respect of governmental control of business.

II. *The Monopoly Theory*

Mr. Bruce Wyman in his text book on the *Law Governing Public Service Corporations* (1911) begins with a chapter on the history and origin of the doctrine of public interest in which he says in part:

". . . In the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the recognition of public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure the public good; and it has again come to be reluctantly admitted that state control is again necessary over such lines of industry as are affected with a public interest. . . .

"There is to be found from earliest times a peculiar law governing the conduct of those engaged in a public employment. . . . "

Wyman then traces the history of the legal status of the various employments as surgeon, smith and the rest, found in the old decisions, to show that they have ceased to be reckoned as public employments as soon as competition became sufficiently general so that it was felt there was no further need for public regulation. This is to be considered further indirect proof that monopoly was the test by which they were determined to be public employments because when the monopoly in the situation was removed, they gradually drifted into private classifications and were no longer subject to control by public agencies.

He then says: "The irresistible advances of the modern competitive system gradually worked the destruction of the mediaeval organization of industry. Great, however, as was this change from the old economic theory to the new, it was gradual and was never complete. There was a swing of the pendulum. General, but not absolute, restriction of freedom of trade was the policy of the middle ages; general freedom of trade, with the restriction of certain exceptional occupations, has become the policy of modern times. A state of free competition has for several centuries now been considered to be for the best interests of society. And yet, at all times in economic history, both restriction and freedom are to be found in the law. The proportion, however, changes greatly. In one epoch there is much legal limitation, with little freedom left; in another age there is almost universal competition, with some little franchise to be found. And the rule will generally hold true that the more the natural laws of competition regulate price and service, the less the state needs interfere in these respects; but conversely when competition ceases to act efficiently state control becomes necessary. . . . [1]

[1] Upon this point see also Freund: The Police Power, p. 389: "The justification for regulating charges in some particular business would usually be that it constitutes a de jure or a de facto monopoly or enjoys special privileges; but it may also be that the commodity selected is a necessary of life, or that it is essential to the industrial welfare of the community, or that it has been immemorially the subject of regulation."

"The common law persists from age to age, and though the instance of its rules may be seen to change as old conditions pass away and new conditions rise, its fundamental principles remain. . . . Barber, surgeon, smith and tailor are no longer in common calling because the situation in modern times does not demand it; but innkeepers, ferrymen, carriers and wharfingers are still in that classification, since even in modern business the conditions require them to be so treated. With changed economic conditions in modern times new callings have come into being with such potentialities that this special law has been utilized as never before in regulating them. Indeed from the point of view of one who believes in our common law the class of public callings is capable of indefinite extension wherever new conditions bring new employments within its scope."

III. *The Theory That All Business is Public*

This theory was developed by Mr. Edward A. Adler, in two articles which appeared in the Harvard Law Review (Vols. 28 and 29). Adler feels that the English law has been vitally impaired on its commercial side by the fact that we have developed no distinct commercial codes. Common law does not look on business as a special phenomenon. "Commercial law" to us means nothing more than the law of negotiable instruments.

But in the period between the Norman invasion and the Black Death common law was active. Business was carried on at intervals in fairs and "definite market areas." A court of "pie-powder" was attached to every fair for the settlement of traders' disputes. Blackstone says of this court that 'In the zenith of its power it was the most active of all the tribunals formerly existing in England and formed a separate organic unit in the judicial system of the realm.'

The later administration of this law, however, fell into the hands of the kings' courts, because of the passing of fairs and special, localized markets. And this is largely responsible for the confusion of the law today.

The courts administering common law, instead of treating business as business, divide it into two classes, public and private. This classification is one which pervades all books, all statutes and all discussions of the subject.

This classification is theoretically unsound and based on a misconception of the cases on which it purports to rest as well as the overlooking of material evidence.

In speaking of the difficulty of the courts in defining public interest, Adler quotes German Alliance Ins. Co. v Lewis (34 Sup. Ct. 612) and says: "The case here is but an instance of the vicious circle which permeates the reasoning of most of the decisions dealing with business regulation. You may regulate a business if it is public, and it is public if it may be regulated. Or, it is public 'if all the public have a right to demand and share in it' and if the public have not this right it is not public.

"The fundamental difficulty lies in the conception that business is of two classes, public and private, and that the latter is subject to no duties to the individual and none to the state. This conception was developed and has been perpetuated largely through the law of common carriers. 'Common' in this connection was assumed to mean 'public'—public in the sense of not being subject to control by the state. It was recognized that originally there were other 'common' employments, but it was stated that they were also under peculiar public duties and this was explained on the basis of some exceptional relation to the public. . . . But no evidence of such exceptional relation has been produced."

Adler here goes on to say that under the Statute of Labourers there were, indeed, 'those who make carriage by land or water but also innkeepers, saddlers, shoemakers, goldsmiths, horsesmiths, spurriers and all manner of artificiers and laborers; and there is no differentiation at all between exceptional employments and others. All were common. He says: "There is, in fact, nothing exceptional in the occupation of carriage or peculiar to it except the fact that the relative position of carriers in society has advanced enormously in importance.

"This theory of the exceptional nature and responsibility of stated common employments naturally required an explanation of why, for example, smiths, farriers, and the like are not now engaged in a common or public employment, and this has been attempted on the basis of monopoly. . . . "

"Monopoly cannot be accepted as an explanation of the distinction between public and private callings, either at present or in the distant past, for it does not explain the distinctions within a calling or account for the difference supposed formerly to exist between such tradespeople as innkeepers and tailors and such as carpenters and brewers, and it fails to account for the present-day difference in the treatment of a city hotel, struggling under competition, and a coal company absolutely controlling the coal supply of a city or a state.

"The reason for this failure is a neglect of facts. Common carriers were not anciently contrasted with carpenters or mercers or drapers. It is a mistake to suppose that the instances of the innkeeper, victualer, taverner, smith, farrier, tailor, carrier and ferryman, are in any way exceptional as regards their public character. From the earliest times one who was engaged in an occupation as a business was described as being in a common employment, otherwise the employment was private. . . ."

"What, then, did 'common' mean? Simply—'business'—business carrier, business tailor, business barber. . . .

"Under a true interpretation of the common law all business is public, and the phrase 'Private business' is a contradiction in terms. Whatever is private is not business and whatever is business is public. . . . Every man engaged in business is engaged in a public profession and a public calling. The parties to business are the merchants on the one hand and the public on the other. The merchant or trader opens his doors into the public street and invites all who pass to enter. By public advertisement and by circularizing he solicits patronage from all who read. He extends an invitation or makes a continuing offer to all indifferently. He seeks credit,

and by so doing involves the fortunes of the community at large. He floats his securities in the public market. His good will, always a principal asset, consists entirely of the likelihood that people in general will avail themselves of the inducements which he had offered. Reason and authority alike show the soundness of this view.

"The importance of the principle in dealing with present-day problems is far-reaching, and to the fact that business as such throughout the course of its modern development has been suffered to be, as it were, without law unless it could be brought into some exceptional class is to be attributed much of the difficulty which now prevails. This distinct doctrine of the common law—the doctrine of common employment—needs to be vitalized and intelligently applied."

Adler goes on to say in his next article, that businesses have always been public in their nature so far as their relations with individuals are concerned and that American courts have erred in a peculiar way in considering some businesses private in nature and others public. He believes that we have passed through a period of economic development in the opening of a new continent, when it was perhaps not so essential to protect the individual, the consumer, against exploitation, but that the time has again arrived when an economic description of our society would very closely correspond to the situation at the time when the common law principle of public interest was being established. He says in this connection:

"It must be obvious as population increases, cities grow in size and the struggle for existence becomes more and more intense with its consequent demands for larger or more efficient units, higher types of leadership and the highest order of skill, we return to a condition that is relatively the same as that which confronted the village community and the old Trading Town. The need of emphasis upon the relation of the individual to the community and the community to the individual again becomes apparent and must be impressed upon the ministers of the common law. . . .

"At common law . . . business is public in every detail and not alone in respect to the public safety, the public health and the public morals. . . . It is not confined to the manufacturing industries as De Tocqueville thought, but is associated with business and finds illustrations in the bank and department store . . . no less than in the factory . . . . Because the courts have looked upon business as private and have otherwise approached the subject from a singularly narrow point of view, little progress has been made in the solution of the legal problems to which the phenomena give rise."

VI. *The Theory of Delegated Government Obligation*[2]

Mr. Hartleigh H. Hartman has recently developed a theory of the *raison d'etre* of public utilities. His idea, in the large, is that all such businesses are functions of the government really, and that private rights in them have only been granted because it seems more convenient to do it that way. The rights of the public may, however, be reasserted at any time. Hartman calls his theory the "Public Interest Theory" but he can hardly be allowed the title: it covers the whole range of the subject and indicates nothing specialized in the way of interpretation. As we shall see, his interpretation is very highly specialized. The liberty of renaming his theory with a descriptive phrase has been taken here.

He first attacks the monopoly theory of Wyman: "The attempt to base the decision in Munn v Illinois upon the monopoly theory is superficial, misleading, and unjustifiable. That case and its cited authority, if one will pause to go below the language of the opinions, clearly premises the regulation of public service companies on the public nature of the business which because the welfare of the community at large is at stake and the State is forced practically to guarantee the service, both as to its quality and price, assumes the character of a governmental function."

[2] Hartleigh H. Hartman: Fair Value, Chapter I.

And he goes on to say: "The construction and maintenance of transportation agencies and the provision of adequate water and lighting systems is a public duty. The power of the State to conduct the service is unquestioned. When the State waives its right to serve and an individual assumes the duty, he volunteers to do the work of the state. The basis of regulation is to be found in the governmental nature of the service."

The central argument for the theory is to be found in the statement that "Usually government ownership and operation have preceded the delegation of authority to private individuals. The quasi-private nature of the public business has developed since private wealth has been accumulated in large amounts and private needs have grown faster than government resources. . . . "

"Those attributes denominated 'public interest' in the Munn case are found in the final analysis of all public utilities. All are necessary to the public welfare to such an extent that the State, to reach its own complete development, must supply the service they render or a substitute for it. The governmental function, i.e., the guarantee of the service, with the power to operate if necessary, as opposed to the exercise of the function, has never been delegated without violation of legal principles. Expediency alone has directed the waiver of the right to serve by the state to private capital. Necessity has reserved to the State the right to regulate."

Hartman then includes a section on Judicial Recognition of Public Interest in which he goes on from the Munn v Illinois case to the case of Brass vs North Dakota (153 U. S. 391) in which it was held "in the face of able argument by counsel and a strong dissenting opinion based squarely on the theory that virtual monopoly is necessary to warrant governmental regulation, under the doctrine of the Munn case, that it is the public nature and not the monopolistic character which justifies control of a business as a public utility."

He cites Budd v N. Y. (143 U. S. 549) as sustaining the same contention. He then goes on to Cotting v Kansas City Stockyards Co. et al., in which, he says, "The court for the

first time since the Olcott Case distinguishes clearly between a private business subjected to regulation and a public business privately conducted."

". . . In reference to this class of cases (property devoted to a public use affected with a public interest), which is alone the subject of present inquiry, it must be noticed that the individual is not doing the work of the State. He is not using his property in the discharge of a purely public service. He acquires from the State none of its governmental powers. His business in all matters of purchase and sale is subject to the ordinary conditions of the market and the freedom of contract. . . . While he cannot claim immunity from all State regulation he may rightfully say that such regulation shall not operate to deprive him of the ordinary privileges of others engaged in mercantile businesses."

"The only step which remains is to hold that a business admittedly private may become affected with a public interest; by change of circumstances which render it a public calling and subject it to the more rigid regulation. The German Alliance Insurance case decided by the Supreme Court in 1913 (34 Sup. Ct. 612) definitely affirms the first proposition, and by unavoidable inference establishes the second."

And he concludes: "The decision considered with the Cotting case establishes the fact that two distinct types of industry may be regulated under the police power. The first class includes public utilities whose service is such that the government must guarantee it to the community. Such industries must serve all comers. The service is a public one which all may demand as their right. The public has a direct interest in the profit they make. The second class consists of those industries, which because of their power to alter existing conditions of production and distribution have a direct influence upon the public welfare, but which do not exercise a governmental function or render a service so essential to the public that the State must guarantee it. Such business, in the absence of statutory requirement, need not serve all consumers. It may be required to serve at reasonable rates when service

is rendered, but the public has no interest in its profits and cannot legislate for the express purpose of limiting them."

V. *The Theory of Origin in Assumpsit and Later Legislative Determination*

For the explanation of this theory the substance of three articles by Mr. Chas. K. Burdick called "The Origin of the Peculiar Duties of Public Service Corporations" which appeared in the Columbia Law Review (Vol. 11) in 1911, will be used. He says:

"The features which at early common law distinguished those engaged in public or common callings (the original public service companies) from those who were not so engaged, were the peculiar general duties laid upon the persons engaged in common callings to perform such services with care and without a special assumpsit to that effect." "How did these primary duties arise?" Burdick asks. And he believes that we should look for an answer to the early cases on the subject, interpreted in the light of conditions then existing.

"Professor Ames in his great article on 'The History of Assumpsit,' has thrown much light on the nature of the action on the case. Originally when an individual voluntarily entered dealings with another and damages ensued, through the latter's fault, there was, in the conception of the early lawyers, no tort—it was only when an assumpsit and a breach thereof were pleaded that an action on the case could at first be maintained under such circumstances. It would seem that the origin and the basis of the liability of the person engaged in a common calling for failure to serve or for lack of care in the performance of the service, is to be found in the early developed branch of the action on the case. It was because a person held himself out to serve the public generally, making that his business and in doing so assumed to serve all members of the public who would apply, and to serve them with care, that he was liable in action on the case for refusal to serve or for lack of care in the performance of the service, by which refusal or lack of care he had committed a breach of assumpsit."

Later on Burdick quotes Bacon's abridgement, tit. (Inns and Innkeepers, C. L.) to show that the reason why one engaged in a common calling is bound to serve is that he has taken 'upon himself a Publick Trust for the Benefit of the rest of his fellow Subjects,' that he has 'made a profession of Publick Employment.' This is another way of stating that he is liable on his general assumpsit.

But there is another factor which seems to be implied in the language of Justice Holt in Lane v Cotton (1701. 12 Mod. 472; s, c, 1 Ld. Raym. 546) 'There is a similarity between those who take upon themselves public offices and those who undertake public callings.'

"However," Burdick continues, "as a result of rapidly changing economic conditions, it soon became more and more usual for persons to hold themselves out . . . so that such a holding out lost any distinctive significance which it earlier had.

"In time the liability of the common tailor, common surgeon, and the like were no longer recognized while the obligations of common carriers and innkeepers still remained.

"Perhaps several other reasons may be hazarded . . . that such liability had been repeatedly imposed upon those classes, and so their liability for refusal to serve had become a familiar doctrine; as so often happens, the rule came to be stated constantly without the original reasons for it, and so the reasons were gradually forgotten. Perhaps a factor in the survival of this liability of common carriers and innkeepers was the fact that, on account of their importance, the analogy between them and public officers seemed most apparent. And undoubtedly the indefinable but frequently encountered principle of public policy played no little part in the survival of this liability, for such liability, as applied to common carriers of all classes and to innkeepers was particularly advantageous to the ever growing numbers of merchants and travellers, whom the law increasingly tended to favor, and with whom innkeepers and carriers dealt primarily. Thus survived the common law duty of common carriers and innkeepers to serve,

according to their holding out, those who might apply, though the original reason for the imposition of the duty no longer sufficient in itself to justify imposition, was forgotten, and new reasons had to be found for its justification.

"This period of universal regulation passed away, but by the time it had done so, the duty of the survivors of the class of persons engaged in common callings, to serve all applicants had lost its *assumpsit* character and had come to rest upon an arbitrary public duty justified on the grounds of public necessity—that is, when it was justified at all—and was not allowed to rest on a merely historical basis."

In his second article Burdick goes on to make the application of all this in modern society. He inquires what it is about a business that makes it eligible (1) to have the power of eminent domain of the state exercised for its benefit, (2) to receive aid directly or indirectly from taxation, which violates the due process clause except when applied to a public use, and to have conferred upon it some exclusive privilege.

He feels that the weight of court opinion would bear him out in asserting that "in the case of a great number of the so-called public service companies of the present day the peculiar duties resting upon them grow out of the exercise of public franchise or the receipt of financial aid from the state. The exercise of one of these franchises or the receipt of aid from the public results necessarily in the assumption of the duties to the public to serve all proper applicants . . . "

In the third article of his series Burdick comes into a new field. He leaves the common law and turns to statutory regulations. "The cases so far considered have dealt with the peculiar duties imposed by the common law on the so-called public service companies. But it is now clear that such duties may be imposed upon businesses by statute when such businesses would not be subject to those duties under any of the principles previously discussed."

He begins with Munn v Illinois[3] and Budd v N. Y.[4] where, he says, such discussions must start and concludes:

[3] 94 U. S. 113.
[4] 143 U. S. 517.

"This part of the present discussion brings us inevitably to this conclusion, that the legislatures of the several states, in the exercise of the police power, can impose the duties to serve all . . . upon businesses . . . which would not be under such duties as a result of any of the common law principles heretofore discussed. It is also apparent from the decisions of the Supreme Court of the United States which we have considered, that the class of public service companies may be almost indefinitely enlarged at the will of the state legislatures in the exercise of their police power."

The last part of Burdick's work is given over to a consideration of the relations between common law regulation which might be imposed by the courts without legislative action and statutory regulation which is determinable by the legislatures. He believes from an examination of the history of the common law that it does not justify courts in extending regulation and that "the only legitimate method of controlling the service and charges of such businesses is by legislative regulation." He has, of course, prepared the way for this earlier, when he examined the origin of common law doctrine and believed it to lie in the assumption of the duties to serve.

He leads us directly to consideration of another theory which may be said to begin where this leaves off—that of Cheadle—which suggests the thesis that not only is regulation dependent on legislative action but the courts must be bound by such action and any attempt to reduce the regulatory powers of the legislature is an unjustified usurpation of power.

VI. *The Theory of Complete Legislative Determination*

Mr. John B. Cheadle in his two articles on "Government Control of Business" has elaborated the theory that the legislature because it is the policy-determining branch of the government, may designate the types of business to be subjected to regulation.[5]

He divides his investigation into three parts as follows:

[5] Columbia Law Review, Vol. XI, Nos. 6, 7 and 8.

1. The theoretical basis for government regulation of business.

2. The history of such regulation under English institutions.

3. The relation of our constitution to such regulation in the light of such history and of our court decisions.

He shows why it is first of all that what we have called "natural rights" are scarcely that: but only socially permitted rights in which the individual is allowed to indulge because their exercise has not seemed sufficiently antagonistic to others to call for repressive action from the group. In a pioneer society liberties are allowed the individual which cannot be allowed when civilization is further advanced. New interests may arise which require protection and the question arises: by what method may government protect these interests?

When we speak of our government as one of laws and not of men, we mean that society must act, so far as possible, according to rule in its treatment of individuals.

These rules, however, affect differently the actions of judges and legislatures. The courts are bound by statutes and by the ascertained rules of common law: "but the legislature may by its legislation set aside such rules and establish others in their place so long as it violates no constitutional limitation or prohibition binding upon it."

The principles of the law are binding upon the judge; they are made use of in interpreting ambiguous statutes and in meeting situations in which no express rule is applicable. But "the legislature, being the policy-determining branch of the government may in its legislation depart from time honored principles and adopt new ones, either when the principle departed from is not fundamental in the life of the people or when economic or social changes have made a new principle desirable."

"The legislative body may thus lead the law while the courts should only follow in the paths of established thought of the people as to what are necessary conditions of public welfare. So the former is peculiarly fitted to recognize new claims and interests as they arise and its decisions so to do

should stand unless it clearly appears to be capricous, arbitrary or dishonest, or entirely out of harmony with any general social or economic view taken by the public.

"In theory, therefore, a legislature is bound by the principles of our national life to this extent, that they have a mandate from society to legislate for that society in accordance with its needs in the light of prevailing views as to what will advance its welfare. But as to what is in accordance with the prevailing views it is for the legislature to decide, or to choose in the case of conflict of view; it may not go entirely counter to those needs or ideas nor ignore the principles which society deems important."

In the second part of his thesis—the history of regulation under English institutions—Cheadle briefly traces regulation through mediaeval times to modern and concludes: "The policy pursued by the government, whether exercised by the royal or legislative branches, was always in accord with the economic and social views of the times, and the disappearance of control as an existing fact in the eighteenth century was but natural; for the lawmaker is only the man of his time speaking in accordance with the times and place and beliefs of his people rather than expressing his own will."

And: "Thus the absence of restrictions at the beginning of the nineteenth century was merely recognition of the theory of *laissez faire* as the doctrine of world trade and commerce. We can quite safely say, therefore, that, at least apart from American written Constitutions, it has always been lawful, so far as legal or implied constitutional restraints in Anglo-American law are concerned, for the legislature to adopt any policy of regulation of business that the economic and social thought and conditions of the time will permit. The legislative body should adapt its policies to the times and conditions in order to make them workable. That they should accord with some conceivable existing economic doctrine at the time of their enactment is, to say the least, desirable and necessary if they are to be effective, but that does not at all mean that

legislatures of today are bound by the legislative precedents of yesterday. . . ."

When he comes to a discussion of the problem of regulation under our Constitution, Cheadle reasons that the due process clause of the Constitution implies no limitation upon the powers of the legislature. Fundamental rights, so-called, are everywhere subject to control in the public interest.

Wyman's and Adler's theories are considered. Adler's theory is found useful as a "historical criterion." Like others, however, Cheadle takes issue with the monopoly theory of Wyman: "We do not quarrel with Mr. Wyman's belief that virtual monopoly is a sound basis for some interference somewhere: we do object to his assumption that as a matter of law monopoly must be the exclusive basis of interference and that the legislature is powerless to interfere with competitive business. . . ." This criticism is made specifically because he feels that competition may "because of the increasing pressure of population, the exigencies of war, or the demands of a reconstruction period" be found to be "the greatest of economic crimes."

He reviews the opinions which seem to hold that it is the court which should judge of the efficacy of legislation to meet existing evils but finds the weight of opinion to lie with the belief that this is a matter for legislative determination.

The whole argument is summed up as follows: "Our contention is that the question whether a given business may be deemed affected with the public interest and regulated by the government is a matter for determination by the legislature as the policy-determining branch of the government; that the determination may be a mere declaration of an existing fact under old policies or it may be the fixing of a new policy affecting new businesses because of urgent social and economic demands; that such determination, if made in good faith, does not, in its effect upon any business, violate the fifth or fourteenth amendments of the federal constitution; that the fact of monopoly is significant only as one among many social and economic situations that may be considered by the legis-

lature in adopting its policy; and finally, that such legislative determination should be upheld by the courts unless the latter can say that in view of all conditions, social, economic and physical, that the determination could not have been made in good faith."

CHAPTER V

Evaluations of the Proposed Theories

I. *The Monopoly Theory*

At the beginning it has to be said that Wyman, while he feels that the origin of public interest is to be explained by the existence of monopoly, has never said that police power regulation is dependent upon monopoly. What he does say is that public utilities must be monopolies, either natural or virtual. What he means by his natural and virtual categories will be seen a little later; the important thing here is to see that he depends upon monopoly for his explanation of the public interest concept as a general idea. His purpose is to explain the coming into being of public utilities; we are interested not only in public utilities but indirectly in any economic regulation of business. And this may be under the police power as well as under the common law.

But if it is true that at the basis of all regulation there is this public interest, whether the regulation be of one kind or another, it is fair to examine the monopoly theory to see whether it adequately explains the origin of public interest and the practise of American courts in construing it today, recognizing at the same time that no criticism of Wyman, for not doing what he never intended, is implied. It seems quite possible that a public utility only comes into being when a business appears to have definite analogies with businesses that have for a long time been within that category, as common carriers and the like that have for a very long time been recognized as common and public under the English common law. So that if a question should arise as to whether a business is essentially a public utility one way to find out would be to trace its similarities to businesses already so called. This is exactly what American courts have done. And it was with a view to analysing and defining the essential points of similarity

that Wyman's monopoly categories were constructed. He first concludes that monopoly is the basis for construing public interest; he then wants to determine what monopoly means and of course finds that there are a number of kinds of monopoly. The conclusion is that if a business is shown to be any of these different things it is, in all its significant features, like the businesses that are now regulated as public utilities; and being like them, it must be subject to the same treatment at the hands of the public.

This is a good way to know a business that is a public utility; but it does not help us to determine what kind of a business is likely to be regulated under the general legislative police powers in that part of them which protect economic interests; and we want to know that as well. Others who have been interested in the public interest concept have felt that Wyman's monopoly theory is a possible explanation of the whole idea and its importance is such that no one may neglect it. The question arises then: if monopoly is a fairly satisfactory explanation of the way a public utility comes into being, does it explain what businesses are subject to restriction under the police powers? In other words does it explain the whole public interest idea upon which economic regulation of business depends?

Adler felt that he had found a joint in Wyman's armor when he remarked that "monopoly . . . cannot be accepted as an explanation of the distinction between public and private callings, either in the present or in the distant past, for it does not explain the distinctions within a calling or account for the difference supposed formerly to exist between such tradespeople as innkeepers and tailors and such as carpenters and brewers, and it fails to account for the present day difference in the treatment of a city hotel, struggling under competition, and a coal company absolutely controlling the coal supply of a city or a state."[1]

It might be pointed out here again that Adler was trying to construct a theory of public interest from the point of view

[1] See above Chap. II, Sec. II.

of the whole course of the law's development, and that Wyman was primarily interested in defining the tests for a public utility. But this would not be strictly true. Wyman was also interested here in the early history of businesses called common just as Adler was. Adler's criticism seems to be a just one. But what it amounts to is that it shows that American courts in interpreting this common law concept have not been guided by Wyman's monopoly theory. It may still be that monopoly has a very great deal to do with the cases of businesses that have been called public and regulated under American opinions. Hotels may be struggling under competition at the present time, but once they were certainly monopolistic; and coal companies, although they are free from regulation at present, may presently be regulated because they are monopolies.[2]

Cases concerning them may simply not yet have arisen; certainly they did not exist in the early time from which our law principles trace. It may be implied or stated, it may be called virtual or practical, but nevertheless, the courts seem to have known well enough that the going out of competition and the coming in of monopoly have something to do with the interest of the public. Legislatures too, in their application of the police powers, have felt the same prejudice to the consumer's interest when monopoly was present. Monopoly cannot be dismissed as without importance in this matter simply because it does not explain each individual case in American history, and certainly not because some case of clear monopoly exists in a business that has not been regulated. There might conceivably be a clear monopoly in the business of supplying the public with watch cases for instance and that business might not be regulated because it was not sufficiently important to the public interest. There seems to be something else necessary to complete the explanation and we shall try later on to supply the deficiency and to explain the basis for construction in American court decisions.

[2] See State v Howat, (1921) 198 Pac. 686.

In one of the greatest of the later leading cases in the United States,[3] that making fire insurance a business subject to regulation under the police power, the court does actually use the term "monopoly" and seems to feel that monopoly is deeply involved. This case is interesting from the point of view of any criticism of the monopoly theory, because there is no question of making the business a public utility. The question was merely that of subjecting it to regulation under the economic interest phases of the police powers. As has been insisted on here Wyman never contended that monopoly must be present in order that a business should be regulated under the police power, simply that it must be present in certain forms if the business was to be made a public utility. But here the court feels that something like monopoly is necessary too for regulation under the police power. It illustrates a point we have made before that, after all, the tests for a business that may be regulated as a public utility and one that may be regulated under the economic interest phases of the police power have little essential difference.

Monopoly is almost never established as a fact in these cases, though often inferred. That it is inferred, not directly established, lends color to the theory that consumer disadvantage is in and by itself sufficient to establish public interest.

The question may be asked: why has monopoly been used as a theoretical basis for creating a public interest? A consideration of the theory of monopoly price[4] indicates that when a commodity has been successfully monopolized, the monopolist, assuming that he acts purely as an economic man, considers only the production of that amount of goods which will yield him the largest net return. The public interest, however, may in such a case, demand the production of more of these same goods than the monopolist is willing to introduce into the market. The English economist, Alfred Mar-

[3] German Alliance Ins. Co. v Lewis, 34 Sup. Ct. 612.

[4] R. T. Fly: *Monopolies and Trusts*, Chapter III. F. W. Taussig: *Principles of Economics*, Chapter 15. H. R. Seager: *Principles of Economics*, Chapter XXIII. Chapter II above for a brief discussion.

shall, puts it this way: "It has never been supposed that the monopolist in seeking his own advantage is naturally guided in that course which is most conducive to the wellbeing of society. . . . "[5]

A hypothetical case may, perhaps, make this clearer, though to be seen in its entirety the whole theory of monopoly price ought to be studied: farmers often remark that the total net returns to them are as great when there is a small crop of apples as when the yield is large. They prefer the smaller crop because there is less trouble and effort involved in handling it. As economic men they are not concerned over the city consumer who is forced to lessen his consumption of apples, or to go without some other commodity in order to buy apples in the years when the yield is small and the price consequently high.

The same principle might apply in the case of electric light service or any of the other great necessities of life. The group or corporation controlling the distribution of electric power might imaginably prefer a rate so adjusted as to yield a return equally great when there were a million users rather than two million. In a monopoly situation this can be done. And consumers are helpless. Their one defense is to do without. But the public interest is obviously concerned in extending the use of electric light. There is an immediate conflict between the interests of the monopoly and the buyers of its goods or services, between sellers and buyers.[6]

Professor S. N. Patten has pointed out that the choice of the consumer when a particular good is monopolized is not always and entirely limited to the single alternative of paying the price demanded or going without; he may use the weapon of substitution.

"The market price of an article cannot be forced above its utility to the consumer. Usually the consumer has a power of substitution through which the upward movement in price is checked long before his surplus is exhausted. The user of tea can also drink coffee or cocoa. . . . There is thus exerted on

[5] Alfred Marshall: *Principles of Economics*, p. 477.

[6] For a discussion of this concept see Ch. II above.

prices a steady downward pressure which producers cannot counteract. Even powerful trusts, finding their monopoly curtailed by the consumer's power of substitution, must be active in watching the action of consumers, or a large part of their trade profit disappears."

But Professor Patten himself has pointed out that in certain cases this power is not very real: "If the consumer has no power of substitution, prices will be high no matter how low costs are, and they will move up until the power of substitution becomes effective."[7]

A theory of public interest based on monopoly is faulty if it confines the court to investigation of the particular business unit in question; for the court is not nearly so much interested in the business itself (whether it conforms to any monopoly type) as it is in all the surrounding conditions of the market. The business is only a part of the market, only partially influential, perhaps, in fixing prices. Is a necessary commodity or service being considered? What are the social factors bearing on this? Will consumers be really harmed if electric lights or apples or any of the other many commodities and services modern markets deal in be denied them? Is there any effective substitution that can be made? These are the questions important for determining public interest.

Then too when the monopoly theory is closely examined it is seen that in reality there is no definite place in the scheme for the most conspicuous type of monopoly situation of the present.

If monopoly is made to depend on its influence in the market in controlling price or standards, Wyman's theory is true. But as a matter of fact, the "monopoly" of Wyman is not wholly a price or standard controlling idea. Apparently it must be taken to mean some person, some corporation, some definite association which probably has an existence under the law, but which at least can be termed *a monopoly*. One of the important monopoly situations now is not that kind. It consists wholly in a quiet understanding of sellers. *Its only indi-*

[7] S. N. Patten: *Theory of Prosperity*, pp. 57–62.

cation of being is its effect on prices. These rise and fall simultaneously or remain at a fixed point over a long period when it seems unreasonable to suppose the level would not have shifted, had there been no understanding of this sort. This new phenomenon is entirely without the pale of the law, but the consumer is harmed by it, nevertheless. It is only economics that explains this phenomenon; there is, however, as we have seen, a legal as well as an economic category for it—"practical monopoly." If Wyman's "virtual monopoly" had the same meaning as "practical" or "industrial" monopoly, Wyman's construction would be acceptable.

The bearing of this development here is that the court could investigate the business itself endlessly and discover nothing but apparently bitterly competing organizations. So the courts cannot depend on the investigation of the business alone. They must, as a matter of practical fact, be guided by the effect upon the consumer and that alone. On the whole they are content to be so guided.

It will be seen that a tacit monopoly control, not legally organized, can be as effective as though it were a single organization so far as the effect on prices or standards is concerned. And the theory of monopoly price is just as valid; which means that the course being pursued by the sellers may be directed toward the highest net profits, not to the service of the public. It is probably true that, whenever it has been possible, the courts have rested their decisions on actually observed monopolistic phenomena. Certainly there is a significant recurrence of the term "monopoly" in the decisions. In such a case the disadvantage of the consumer can be given some objective test—it may be measured by the extent of the monopoly profit. This, however, can be no more than partial. It measures the disadvantage of present consumers but not that social disadvantage arising from the fact that the good or service is kept out of the hands or homes of many lives that would be better off for its use. The monopoly profit, in our electric power illustration, demonstrates the possible disadvantage of present users; but not that of those potential users for whom a

lower price would have made the comfort and convenience of electric power possible.

And so it may be suggested that the elaborate construction of a monopoly theory of public interest goes too far.[8] It goes back of the essential fact to certain causes which create the conditions which the courts seek to remedy, and fails to state these causes accurately. It limits the field of consideration to the business; and often the answer is only to be found by a study of the social setting of the business, its market and the spread of its consequences, even the potential consequences if the business were differently managed.[9]

If the passage in Wyman which describes the shifting proportions of monopoly and free competition from epoch to epoch[10] could be interpreted to mean shifting of proportions of influence in the market, he would seem to be making the essential point and his explanation would have to be accepted as satisfactory though it still could not be said to be worked out in its theoretical entirety. But it cannot mean that, unless by a wide inference. What it does apparently mean is that in one age many businesses are monopolies and in another age many compete. This is not satisfactory. An explanation needs to be worked out which will have its basis in the fact

[8] In Budd v N. Y. (143 U. S. 517) the majority opinion of the court quoted the lower court with approval: " . . . that the right of the legislature to regulate the charges for service in connection with the use of property, did not depend in every case upon the question whether there was a legal monopoly or whether special governmental privileges or protection had been bestowed; that there were elements of publicity in the business of elevating grain which peculiarly affected it with a public interest; that these elements were found in the nature and extent of the business; its relation to the commerce of the State and country and the practical monopoly of those engaged in it." Does not the "practical monopoly" spoken of here, mean some monopoly power not usually thought of as *a* monopoly?

[9] Recall Hartman's comment on Munn v Ills. (Ch. IV above): " . . . under the doctrine of the Munn case it is the public nature and not the monopolistic character which justifies control . . . as a public utility." See also Ladd v Southern Cotton Press Mfg. Co. (53 Tex. 172): "We know of no authority and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici*, merely by reason of its extent."

[10] P. 47 above.

that in the price-fixing processes of the market, there is a little increase or a little decrease of seller or buyer influence with its consequences of advantage to one or the other. Public interest is a consumer's defense justified by a partial market advantage of the sellers, which enable them to somewhat limit supply and to raise prices.

II. *The Theory That All Business is Public*

This leads to a consideration of Adler's sweeping generalization that all business is unqualifiedly public and subject to regulation. Is this the answer to the question: what constitutes a public interest? And the further question: what qualities make a business liable to regulation of rates and standards of service?

The answer seems plain. The return to the old common law principles for which Adler contends would still leave an unsolved problem. If the public does have an interest in all businesses, there still remains to be determined public policy in regulation—whether the public interest requires a positive and continuing control of rates and standards. And there would seem to be no way of solving this problem without a thorough-going investigation of the particular business situation to be controlled to see whether the public is suffering from overcharges or underservice. If it is not there is no need for the expense and trouble involved in public control.

Adler's contention is clearly that any business is essentially like those we now call public utilities. An acceptance of his theory would make unnecessary any consideration of police power regulation; and the questions of regulation would be simply ones for the courts to determine.

III. *The Theory of Delegated Government Obligation*

The difficulty of constructing a theory of public interest on the basis of delegated government obligation is to be seen in Hartman's argument. He says in one place: "That (Munn v Illinois) case . . . clearly premises the regulation of public service companies on the public nature of the business, which

. . . assumes the character of a governmental function." And again: "Usually government ownership and operation have preceded the delegation of authority to private individuals." And finally: "Those attributes denominated 'public interest' in the Munn case are found in the final analysis in all public utilities. All are necessary to the public welfare to such an extent that the State, to reach its own complete development, must supply the service they render or a substitute for it."[11]

He finds himself forced to recognize later, however, when he comes to take account of Budd v N. Y. and German Alliance Ins. Co. v Lewis, that "two distinct types of industry may be regulated under the police power. The first class includes public utilities whose service is such that the government must guarantee it to the community. . . . The second class consists of those industries, which, because of their power to alter existing conditions of production and distribution have a direct influence upon the public welfare, but which do not exercise a governmental function or render a service so essential to the public that the State must guarantee it."[12]

But then, the justification for all regulation does not arise from a government obligation. Businesses of his second class perform no governmental function. They are the ones that are regulated under the police powers. But he has said that the regulations of the first class of businesses come also under the police powers.

Perhaps we have here the distinction between businesses that are public utilities and businesses that are not but still may be regulated. Are all public utilities businesses engaged in furnishing goods or services that the government is obliged to guarantee to consumers? No answer to this question can be hazarded here. But the statement of the matter as it appears in the Associated Press decision seems to substantiate this view: "Its (the Associated Press) obligation to serve the public is not one resting on contract, but grows out of the fact

[11] See above p. 53.
[12] See above p. 54.

that it is in discharge of a public duty, or a private duty which has been so conducted that a public interest has attached thereto."[13]

The assumption of governmental obligation would certainly carry with it the liability to regulation: such a business would be a public utility. But the liability to regulation cannot be shown to rest on governmental obligation alone. Such a conclusion would be attempting to force American opinions into an arbitrary theoretical pattern. Hartman does not do this; he is interested mainly in the basis for utility regulation. But we are interested here in the further regulation of businesses that are not an obligation of the government to carry on. For instance, it is not an obligation of the government to insure against fire, nor is it usually supposed to be an obligation of the government to provide houses or fuel for the population. Yet both these businesses may be regulated under recent statutes and decisions.

These are to be classified under the economic interest phases of the police power. So that while we may say that we are assisted to an understanding of the differences between the one and the other kind of regulation, we still must inquire further as to the exact nature of the public interest concept in American opinions, which concept lies alike beneath regulation of public utilities and the other class of businesses that also must be regulated.

IV. *The Theory of Origin in Assumpsit and Later Legislative Determination*

At best a theory of assumpsit can only explain the method by which the doctrine of public interest entered into common law and became a part of it. But Burdick set out to explain how the principle arose and incidentally why Wyman's theory was incorrect. This he has not done. He and Wyman are in different fields entirely in explaining origins. Burdick has made a distinct contribution to the history of the doctrine but he has not explained the situation in which there came to be

[13] Inter-Ocean Pub. Co. v Asso. Press. 184 Ill. 438.

cases of this sort. He merely shows that the law was constructed out of actions on the case. And in no sense can it be said that he accounts for the businesses that have been recently regulated. In fact he makes no theory of this; simply feeling that it is a subject for legislative determination completely. He dismisses this with the suggestion that statutory legislation is at the discretion of the legislatures, whereas it seems quite apparent that the courts are constantly testing the statutes and so creating dead lines past which the legislatures may not go in making laws for business regulation. They seriously limit the distance legislatures may travel in extending legislative regulation to new fields. An excellent example of this is the case of Holter Hardware Co. v Boyle.[14] In this case the court refused to allow the legislature to set up a commission for the regulation of prices.

Burdick's explanation that it was through disuse that those callings formerly public disappeared from that category, is very likely a true one; and it is of the utmost service, certainly, in explaining why, although the victualer and the carter were once treated alike under the law, the chain store and the business of milk distribution, two of the victualers representatives in the economy of today, are treated in a manner very different from our way of treating the railway which is today's representative of the carter of the older time. But it also explains that if the common law principle once was really there, it need only be revived, not created anew.

Burdick, however, arrived at a conclusion very different from this. He felt that none of the American cases rested on common law principles because he conceived these principles to arise out of the assumption of the obligation to serve. If the American cases rest on purely statutory grounds, the courts may not impose regulation. This power must be inherent in the legislatures. Burdick does not pursue the implications of this; but Cheadle does and his reasoning is next discussed.

[14] (263 Fed. Rep. 149). See below Chap. IX, Sec. 2.

V. *Theory of Complete Legislative Determination*

One effective argument that can be brought against Cheadle's theory of legislative determination is that he condemns the monopoly theory and feels something lacking in it; and yet he comes back to the point of saying that monopoly is one of the significant factors which a legislature would have to consider in formulating a policy. What others might have to be considered we are left to guess. On this point Cheadle is just as vague as the other critics of the monopoly theory. The difficulty seems to be in a reluctance to admit that this theory of public interest is one which affects the economic interest of producers and consumers and no other interest.[15] To speak of other possible social and economic situations as likely to give rise to regulation is to beg the question if these situations are not named; and they never are named.

Properly conceived, the regulation is one which is applied in the market place. The general welfare is affected only indirectly under its application, when, presumably, the community is better off because of greater supplies of goods or improved service of some sort and lowered prices. True, the connection between health and economic advantage is close, but there is, nevertheless, a distinction to be made.

It would be true to say that the conduct of any business unit cannot be regulated as such without an investigation of the social setting of the business—but the social setting would involve the investigation of just one point not strictly an economic one—whether the thing in question were a necessity. The other point of determination would depend on the coming in of monopoly—not complete monopoly, but any degree of lessened competition. Because only in such a case would an American court find consumers harmed. And why? Because consumers are only harmed in having to do without, or with a restricted consumption, or in having to pay a price higher than competition would fix in a really open market.

[15] Except indirectly and through the economic harm, as for instance, the danger to health from too little use of milk in the diet of children because of too high a price.

Cheadle would have been right had he made his point against monopoly on another basis—that monopoly is hard to discover, that the courts will not use it as the test, but will make a judgment of fact as to whether the consumer is harmed. This must be so; for it is exactly the course they have pursued. And they have expressly denied that legal monopoly is the only test of public interest.[16] By this it was meant that if the court were obliged to have proven to it that monopoly existed in a business, the doctrine could scarcely ever have been applied. It is relatively easy to infer monopoly, however, from market phenomena. The public is keen to scent interference with market processes, interruptions of supply and control of price. It resents being "held up." And the courts usually refuse to be drawn into the theoretical implications of this disadvantage to consumers. But it is of no use to deny that the theory is based on the existence of a monopoly situation—not the monopoly of Wyman which was to a degree static and absolute and confined to a business; but an absence of free competition of perhaps shifting proportions which considered the relations of the buyers and sellers of a specific good or service in a market. The courts call this, as we have seen, "practical monopoly."[17] It is further true that the public is apt to be right when it suspects combination because of the fact that there is a tendency to combination in industries where decreasing costs are a factor; and of the fact that inelastic demand is an incentive to the controllers of supplies to keep prices up and meet only the demand of ready buyers in the interest of highest net returns.

So far as Cheadle's contention that the legislature is the policy-determining branch of government is concerned, there is another point to be made. In theory, as a matter of long run precedent, he may be correct. Possibly there is no conceivable justification for a judicially determined legal-economic policy such as this theory of public interest is. But nevertheless if we want to know what a specific policy is, we consult

[16] Budd v N. Y. 143 U. S. 517.
[17] Sinking Fund Cases, 99 U. S.

court opinions and not legislative acts. For after all, the courts have the last say and because of their constitutional situation, we listen respectfully. Doubtless this has served on many occasions to slow up progress, but it is the fact. Courts are not too respectful to legislatures in the matter of the regulation of business, and the courts, irrespective of the presumption that the legislature is correct, make their own interpretation and judgment of the facts involved, and do modify the policies of regulation based on these judgments of facts. Perhaps such able arguments against assumptions of power by the courts as this of Cheadle or that of Adler may in time modify this procedure. But it can only be said at present that though in theory the legislatures may determine policy, in fact we must also look to the courts for guidance.

VI. *A Satisfactory Theory Not Yet Evolved*

As the theories of these legalists have been outlined they at least agree in stating or implying that there is a disadvantage of the consumer to be presumed in every instance where the courts have felt justified in permitting regulation. May it not be that this, simple as it seems, is the principle, the one of greatest importance, at least, in the minds of all the courts? It seems to be as true of American court opinions as of decisions far back at the beginning of this principle in common law.[18]

Wyman calls it monopoly; but monopoly has to be redefined as a "practical" monopoly. The one implication of monopoly, of importance for this purpose, is its effect on consumers. Monopoly does affect consumers; when a monopoly of sellers is present in the market the consumer is not on a basis of equality with the sellers. So it seems likely that the important fact to the courts has been not the monopoly itself but the effects of monopoly in the community.

We have seen that Burdick does not really come to grips with the vital problem of origin; the action on the case of which he writes arose in every instance because a consumer's economic interest had been harmed and he had sought redress under

[18] See below Ch. VI.

the common law; and Adler, although he holds that all business is public under the common law, sees the confusion into which the law has fallen. We may ask: why has the law fallen into confusion? The answer is that there is no real confusion if we do not attempt to force the principles of the decisions into an arbitrary theoretical pattern. The courts have been consistent enough. It is our theory that is at fault. We shall see whether a simple explanation founded on a consumer compelled to pay exorbitant rates or to put up with inferior service is not sufficient to include all the dicta of the law. Adler's mistake seems to be in not allowing the courts latitude of judgment in determining whether a business ought, as a matter of policy, to be considered public. He would say flatly: "all business is public," whereas the correct way to put it would be: "a business is likely to be subjected to regulation if consumers are harmed by it as to prices or standards, in ways not reachable under the other phases of the police power."

This leaves room to account not only for all the decisions but for the fact that at one time a business is public and at another time is not. In the first place our definition of necessity changes and no business can be public which does not deal in necessities. No law can regulate public taste; but law, in the end, is bound to follow public taste—consumption habits. And in the second place the consumer may be harmed in one age and not in another in his dealings with the very same business. There may be changes not only in the business which give it greater or less power in the market over prices; but also there may be changes in the social structure which create differences. Some such would be the relative ease or difficulty of the transmission of goods or intelligence; natural determination of the goods most cheaply produced with consequent changes in the norms of consumption; changes in the size or quality of populations; the prevailing state of the domestic and industrial arts—all these and more have a bearing on the question at issue. But as the question is presented to the court it contains one query as the climax: is the consumer really having to pay too high rates or to put up with

inferior service? And if he is thus harmed, it seems clear that there arises simply by reason of this, a public interest as it is legally meant, and that the implicated business is likely to become at once, when a legislative act is passed and the matter is brought to the attention of the court, subject to regulation of rates and standards of service. This is, of course, presuming the regulation to be made under the police powers. If a definite analogy with an existing public utility can be shown, the courts may be persuaded to permit regulation under the common law and without legislative act. This latter type of regulation, is however, more and more rarely applied to businesses not heretofore regulated.

CHAPTER VI

The Theory of Consumers' Disadvantage

I. *The Way of Approach*

From the foregoing it appears possible to approach the problems of the regulation of business from two quite distinct angles; from the point of view of the business and its organization and from the point of view of the commodity produced and the consumer who uses it. Who is the public? Do not the courts mean "consumers" when they say "public"? And has not the phrase "affected with a public interest" become a theory under which a large section of theoretically impartial governmental activity is directed toward the protection of purchasers in their dealings with sellers?

The approach from the point of view of the business organization is expressed by Bruce Wyman in his Control of the Market.[1] He there traces the development of monopolistic organizations in the United States down through the pool, the trust agreement, the holding company and to the final present form of gigantic integrated corporations and he says:

"From step to step in this succession there is a movement toward integration. Now that the end of economic evolution has been reached in a single corporation, the law against combinations in restraint of trade may cease to operate. Now the state may impose such special regulation upon these industrial concerns as the situation requires. The problem is, therefore, much simplified since the time of the trusts. It has been reduced to its lowest terms by the activity of the law in insisting that all combinations of every stripe should be destroyed. The question then emerges, shall these great corporations be destroyed or shall they be regulated? That, it is submitted, is the trust problem in its latest phase."

[1] Bruce Wyman: *Control of the Market*, Intro.

Wyman would make the public interest the basis for this regulation. But when the problem is approached from the other angle it is seen that under a theory intended to protect consumers, a business becomes subject to regulation, not as it reaches any fixed stage of corporate evolution, but as it "closely touches"[2] the consumers of its products.

In Live Stock Commission Co. v Live Stock Exchange (143 Ill. 210) the court said that something more than increased size or power is necessary to create a public interest and quoted with approval the opinion in Ladd v Southern Cotton Press Manufacturing Co. (53 Tex. 172): "We know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici*, merely by reason of its extent."

There are two opposing ideas here. It is well they should always be kept in mind. It is this difficulty which causes part, at least, of the seeming confusion into which our thinking about the public interest has fallen. We must forget business organization; let it be what it will; leave that to the anti-trust acts which are based on a different principle entirely—and keep a single mind on the consumer to see whether or no he is harmed in his dealings with business in the special economic sense in which harm is meant here. In this way we can hope to arrive at a satisfactory interpretation of public interest.

II. *Historical Precedent for Price Regulation*

A fresh examination of the principle of public regulation shows that throughout many centuries the public authority in England and in the colonies which inherited English law has again and again asserted its right to regulate both prices and standards for services.

In 1202 there was proclaimed the first assize of bread, following on two other important measures: Henry II's reformation of the coinage and Richard I's assize of measures.[3]

[2] Ratcliffe v Union Stockyards Co., 74 Kans. 1.

[3] Matthew Paris, Chronica Majora (Rolls Series): 480, quoted from W. J. Ashley: *English Economic History*.

After this assizes continued to be made from time to time. In the reign of Henry III there was the important assize of bread and ale[4] which carefully fixed weights and quality and the proportions of material to be used in manufacture. Penalties were attached for the breach of the assize—a fine for a simple violation and a period in the pillory for a serious deficiency in weight. Statutes of the realm also reveal a contemporary ordinance which invested "six lawful men in each town" with the supervision of weights and measures, directed them to inquire into the price of wheat on the last market day and to fix the weight of a "wastel of a farthing" in accordance with the assize. Ashley remarks that the "enforcement of the assize soon became the work of the ordinary municipal authorities"; and he goes on to say that it was ordered by a statute of Edward II that officers in cities or boroughs, who, by reason of their offices ought to keep assizes of victuals, so long as they are attendant to their offices, "shall not merchandise for victuals, neither in gross nor by retail."[5] At the end of the fourteenth century the maintenance of the assize was added to the duties of the justices of the peace.[6]

For the purpose of placing these regulatory developments in their correct setting a summary sentence from another chapter of Ashley is especially good in describing the economic institutions of the time: "It was one (period) in which, out of and along side of a *village economy*—a condition of things in which almost all the economic life of the country was concentrated in a number of agricultural groups—had grown up a *town economy* where manufactures and trade were fostered and monopolized by civic communities, becoming more and more unlike the agricultural population, yet stimulating agriculture by providing markets."

Here is one answer to the question: why was regulation necessary and regulatory powers granted and developed in regular sequence? They were embodied first in proclamations

[4] Statutes of the Realm, i, 217.

[5] Statute of York, c, 6, 12, Ed. II. in Stat. of Realm, i, 178.

[6] W. J. Ashley, Eng. Econ. Hist., loc. cit.

of the king. There is much evidence that prices and standards so promulgated were too rigid to be enforced and that a more flexible method had to be found for maintaining prices and standards at reasonable levels. This method was found. The king's regulatory powers were delegated to the municipal authorities. But soon we find that they have passed from the hands of these municipal authorities into the hands of the justices of the peace, legal rather than administrative authorities, representatives of law and legal method rather than direct representatives of the king.

There was a village economy; and along side of it a town economy. The one was agricultural, the other industrial and interested in trade. This town economy became more important and as its importance grew it increased in influence as a market center. Organized, definite market areas became the rule and soon something like a monopoly entered.[7] Royal franchises were granted, the merchant gilds came into control of trade, and it became everywhere necessary to regulate in the interest of the public. And it is notable from our point of view that everywhere this regulation was instituted because there was a serious control of the market emerging as a real interference with fair prices, or necessary standards of services.

The well being of the community was threatened. The lengths to which consumers were protected is amazing to us now. Goods prices were not the only aim of control; rates of charge for personal services were also controlled. Ashley refers to an instance of the regulation of the rates to be charged by blacksmiths for the shoeing of horses in force before the Black Death (about 1300).

Prices of other foodstuffs besides bread and ale were fixed early. In 1199 the government attempted to set a maximum price at which wine could be sold. But the price was fixed at so low a figure that the regulation could not be enforced and had afterward to be modified. Finally, according to Ashley, "twice a year the mayors or bailiffs of towns were to make an assay of wines and pour away all that was found corrupt."

[7] E. P. Cheyney; *Industrial and Social History of England.*

The great fight in the streets of Oxford between town and gown arose over the overcharging by a taverner of a scholar for a quart of wine. It resulted, we hear, in the King's granting "to the Chancellor of the University, excluding the Mayor entirely, complete supervision of the assize of bread, ale, wine and all victuals."

"The town magistrates, indeed, were not less anxious than were parliament and the Ministers to keep the trade in articles of food under due control. Besides carrying out the assizes of bread, ale, and wine, they issued ordinances regulating the prices of poultry and fish, appointing the markets at which each sort of food was to be sold, and providing for their supervision."[8]

In 1349 the King issued in the form of a proclamation what afterward became in 1351 the Statute of Labourers. The wording of this statute is extremely significant. It will be remembered that it came at a time when England had fallen into a state of economic chaos following the Black Death, and that, because of this chaotic state, legal principles, gradually forming for an indefinite time before, were probably brought quickly to a head and codified for purposes of economic relief. The statute is no different in principle from regulations that had gone before; but it is more complete and under it many cases arose the principles of whose settlement make up a large part of the common law doctrine of public interest. That there were a whole series of similar statutes in the years immediately following the issuance of the original proclamation indicates that the machinery for the relief of consumers did not readily form and give the expected aid; but that again and again in this period the state had to assert its paramountcy in the matter of the fixing of rates and rules for those commonly employed, that is, those engaged in businesses. Profiteering could not be permitted either by the artizans and artificers or by those employed in furnishing the communities with food and clothing.

This view of the beginnings of law is suggested by Sir Frederic Pollock and Frederic William Maitland in their

[8] W. J. Ashley, *Eng. Econ. Hist.* loc. cit.

History of the English Law.[9] In discussing the period 1216–72, they begin with the general remark: "Our English lawyers have no philosophy of law, nor have they pursued very far the question, "How does law come into being?" And after discussing this matter they arrive at a specific statement, significant for the present purpose: "The mass of enacted law is as yet by no means heavy . . . the assizes of the twelfth century seem to be already regarded as a part of the enacted ancient law. No one is at pains to preserve their text." That is to say that the fact that they appear to be unwritten until comparatively late does not mean that they did not exist; but that they existed in common law. The principle of the assize did not need statutory basis; no one thought of contradicting it.

That the Statute of Labourers merely reaffirmed an old principle seems to be substantiated in this same passage: "The assizes of Henry II have worked themselves into the mass of unenacted law, and their text seems already to be forgotten. On the other hand, the writer of Edward I's day, who is known to us as Britton, can represent the whole law as statutory; it all proceeds from the King's mouth. The King's justices seem to claim a certain power of improving the law, but they may not change the law. The King, without the consent of a national assembly, may issue new writs which go beyond the law but not new writs which go against the law."

So it may be said that no new principle was established in the Statute of Labourers. In a large sense it merely reaffirmed the responsibility of the public, asserted so long before in the assize of bread and ale and in the other cases cited; but it not only defined the terms and rates of pay of laborers, but also definitely called attention to the fact that there was a public interest in their employments:

"*Item;* That carpenters, masons, tilers and other workmen of houses, shall not take by the day for their work, but in the manner as they were wont . . . .

"*Item;* That cordwainers and shoemakers shall not sell boots and shoes, nor none other thing touching their mystery

[9] Sir Frederic Pollock and Frederic William Maitland: *History of the English Law.*

in any other manner than they were wont in the said XX year. . . .

"*Item;* That goldsmiths, saddlers, horsesmiths, spurriers, tanners, curriers, tawers of leather, taylors and other workmen, artificers and labourers, and all other servants not here mentioned, shall be sworn before the justices to do and use their crafts and offices in the manner as they were wont to do in the XX year (of Edward's reign) . . . .

"*Item;* . . . and that the same justices have power to enquire and make due punishment of the same ministers, labourers and workmen, and other servants; and also of hostlers, harbergers, and all those that sell victual by retail or other things not here specified. . . ."

Cases that arose under this and other proclamations and statutes were tried in various courts that changed with the changing economic systems. Cheyney describes the earliest court in which breaches of the assize were tried: "If on the other hand, the court also punished general offences, petty crimes, breaches of contract, breaches of the assize, that is to say, the established standard of amount, price of quality of bread or beer, the lord of the manor, drawing his authority to hold such a court either actually or supposedly from a grant from the king, such a court was called a *court leet.*"[10]

This *court leet* must have been a transition court for Cheyney paradoxically places it as an institution of the manor. Trade, in the period of the manor, except at the end, could have amounted to very little; and assizes did not come until toward the end of the manorial age. There was but the germ of a free market and yet there were breaches of the assize. How unimportant they were is indicated by the language. Breaches of the assizes are regarded as less important than petty crimes. They would hardly have been regarded so at the time when the fair market became really important and regulations consequently more numerous and vital.

The manorial system gradually disappeared as the town economy became more important. There were the big fairs,

[10] Cheyney: *Industrial and Social History of England*, p. 46.

markets, that formed a great part of the economic life of the towns. To these fairs were attached the courts of "Pie-powder" (a corruption of the French *pied poudre*) of which Adler spoke. It was the business of these courts to settle trade disputes; and they were thus the first purely business courts in England.

It is Burdick's theory of Assumpsit origin that explains how, all through this period, cases were coming up, being tried and settled; and how the principles embodied in the decisions were becoming a part of the common law through actions on the case.

III. *The Change to a Laissez Faire Régime*

But in time the fair and the specialized general market place waned too in importance. Methods of transport improved and markets became national, even international; and the interpretation of the body of law gradually building up passed into the hands of the King's Courts. It was here, Adler felt, much confusion arose. There is a clear line of precedent running back so far as common carriers are concerned. There has never been a time apparently when common carriers of all sorts were not subject to regulation. But as institutions changed and markets widened, machinery began to produce a bewildering array of commodities, the standards of life began to be raised in consequence of this and of the discovery of seemingly illimitable supplies of raw materials in the new continents. Stringent commercial regulations did not seem important in other fields than transport. And as theories of free competition and *laissez faire* were formulated and adopted, the principle of public interest as applied to businesses was neglected and not affirmed. When there was no disadvantage of the consumer as to the rates or standards of services for the necessities of life there was no need for regulation.

But the cycle returns and again now, as in the older economy, there enters more or less openly, a situation harmful to consumers as a class when protection in the market is needed to secure fair prices and standards; and it is to the old legal principle established at a time of similar need that we may turn for the necessary relief.

Is not this reasoning strengthened by the attitude of the United States Supreme Court, when it says: "It would be a bold thing to say that the principle (of public regulation) is fixed, inelastic, in the precedents of the past and cannot be applied though modern economic conditions may make necessary or beneficial its application"? This seems clear enough, but as if to strengthen this very emphasis, the court immediately proceeds to say: "In other words (it would be bold) to say that the government possessed at one time a greater power to recognize the public interest in a business and its regulation to promote the general welfare than government possesses today."[11]

This may be *obiter dicta* but it indicates a definite disposition of the court to stand squarely upon the old principle and to recognize the new facts. The government, representative of the public, may regulate. And that *laissez faire* was for a time a tolerated policy and regulation for a time unnecessary will not blind the court to the fact that new conditions may quite possibly make *laissez faire* undesirable and regulation necessary again.[12]

It is from the old body of law that we derive the principle of public interest and the right of regulation. In the old town economy not only were wages regulated, but the rates to be charged for services that could be called common, and also the prices of the whole list of the necessities of life. Punishment was provided too for all who, like our latter-day profit-

[11] German Alliance Ins. Co. v Lewis, 34 Sup. Ct. 612.

[12] We do not have to go very far back for precedent; nor, as a matter of fact, though it was apparently not known at the time of the Munn v Illinois decision, do we have to go back to English precedent at all: "During the Revolution, generally at the instigation of the Continental Congress, at least eight of the thirteen states passed laws fixing the price of almost every commodity on the market. These laws were evoked by what was considered the exorbitant increase in prices. Within a few years they all seem to have been repealed, partly because there was no machinery, adequate to enforce them, partly because of resentment that a few states did not take part in the movement. At the time the fifth amendment was ratified, however, at least two states had Statutes providing for the regulation of the price of bread." (Harv. Law Review, April 1920—Note p. 839).

eers, sought more for the goods they dealt in than was customary and necessary for the yielding of a fair profit.

Cheyney believes that it was the breakdown of "well-established, customary rates" of payment for services that in part made necessary the Statute of Labourers and others of its sort. And this suggests the origin of the assertion of the right of the public to regulate lies in this breakdown of regulation by custom and the necessity for resorting to legal means to take its place.

The situation is difficult to describe without using the term "disadvantage." Laborers had a certain power after the ravages of the Black Death because jobs were many and men were few who were skilled in their trades; and they refused to work for the customary wage no higher than that of ordinary times; the statute forbade them to take more. The disadvantage of persons bargaining with them for their labor was thus corrected. Merchants, because of a similar situation, could command abnormal prices for their wares; the statute forbade them to accept more "than they were wont in the said XX year." Again the disadvantage of a consumer was corrected, unequal bargaining powers rebalanced, and public authority made certain of a fair price for buyers.

What kind of a situation is the Supreme Court describing in 1913, if not one that is precisely analogous to the one that was met by the stringent provisions of the Statute of Labourers: " . . . the price of insurance is not fixed over the counters of the company by what Adam Smith would call the higgling of the market, but formed in the councils of the underwriters . . . the applicant for insurance is powerless to oppose"?[13]

Here again was a disadvantage, a consumer forced to pay an unreasonable rate; and the court found it possible to correct it by invoking the principle established in the Statute of Labourers, the paramount importance of the interest of the public in business.

[13] German Alliance Ins. Co. v Lewis, 34 Sup. Ct. 612.

IV. *The Recurrence of Regulation*

American Supreme Court opinions show the principle, come down through the centuries in the common law, applicable to modern conditions.

The German Alliance Insurance decision was an epoch making one. Part of it has just been quoted. Here is another excerpt: "In some degree the public interest is concerned in every transaction between men, the sum of the transactions constituting the activities of life. But there is something more special than this, something of more definite consequence which makes the public interest that justifies regulatory legislation." And in Ratcliffe v Union Stockyards Co.,[14] it was said: "The nature and extent of the business, *the fact that it closely touches a great many people and that it may afford opportunities for imposition and oppression* . . . are circumstances affecting property with a public interest."

This italicised passage and the passages from the German Alliance Insurance decision seem to be of the utmost importance. The American courts have held everywhere that it is the public interest in the sense of redressing an unequal balance of market forces, that they are protecting. "Opportunity for imposition and oppression"—this phrase makes public interest an economic doctrine; when this opportunity is present consumers are harmed by unequal powers in bargaining. The precedent runs far back into English law and the courts seem to show a growing disposition to adhere to the old rule. There seems to be no very good reason why they should not; as the development of large scale industry goes on more and more businesses will doubtless involuntarily rise to the dignity of governmental regulation because of the opportunities they have for the very imposition and oppression of which the court speaks so plainly. They will, in these cases, cease to be regarded by their directors as purely private enterprises and submit to regulation in the interest of the consumers with whom they bargain for the sale of their products and services.

[14] 74 Kans. 1. Italics are the author's.

Another passage from the same German Alliance Insurance decision bears directly again here: "Against that conservatism of the mind which puts to question every new act of regulatory legislation and regards the legislation as invalid or dangerous until it has become familiar, government—state and national—has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guarantee impaired."

The matter has been put quite clearly by Judge A. A. Bruce: "As our population increases and the struggle for existence grows keener and keener, the necessity for governmental regulation will become more and more apparent and its field will become more and more expanded. It is now gradually conceded that not merely the health, safety, comfort and morality of the public[15] are matters of governmental solicitude, but its convenience and welfare also; and that though the right to liberty and property cannot be interfered with unreasonably . . . where competition is suppressed either naturally or artificially, interference and regulation may be resorted to. Where, indeed, a practical monopoly is created or exists in a business, that business, if at all necessary to the public, is to that extent deemed to be affected with a public interest."[16]

These words give no encouragement to *laissez faire* believers of the present day. If they indicate anything for the future it must be a forecast of willingness by the courts to discern existing "imposition and oppression" in the market and to correct it by the method of restoring fair prices and reasonable standards of service by regulation in the public interest.

[15] Judge Bruce here refers to what Freund terms the public safety, morals and order section of the police power.

[16] A. A. Bruce: *Property and Society*, page 108.

V. *The Theory of Consumers' Disadvantage Summarized*

1. Courts permit regulation of business when a consumers' disadvantage appears. This is what is meant by the phrase "affected with a public interest."

2. This consumers' disadvantage concretely consists in a harmful rate of charge or an unreasonably poor standard of service to which the consumer is compelled to resort or do without.

3. Consumers' disadvantage cannot be inferred from the size, extent, or nature of the business but depends upon whether (1) the commodity dealt in is a necessity (2) and whether from a given market situation harm to the consumer emerges which is not reachable under the public health parts of the police power.

4. The presence of a consumer's disadvantage of the sort described creates what the courts call a "public interest" (it would be more nearly correct if it were called "consumers' interest," since "public" is equivalent to "consumers"). And the principle of public interest is one under which the courts permit the redressing of a balance of forces in the market unfavorable to consumers. The presence or absence of "public interest" is determined by the presence or absence of "consumers' disadvantage"—whether the court believes that, in the present social situation, consumers are suffering in some necessity of life from unfair rates or inferior standards of service.

5. The problem of the kind of regulation is secondary. It may be under a common law duty to serve which makes it a public utility. It may be under the legislative police powers; the latter regulations are those generally extended first under modern conditions.

CHAPTER VII

Modern Business and the Public Interest

I. *Businesses Regulated Under American Decisions*

The peculiar authority of American courts makes it possible for a judicial opinion to become the basis for a whole national policy, social, political and economic. This is especially true of the policy, still in the process of formation, of the relations of the political state to the industrial organization. Modern experience makes it quite obvious that the forces released by the coming into being of the machine age cannot be ignored safely by the government. Politics and industry cannot be thought of as unrelated social phenomena. A condition of life for a government just as for an individual is success in coping with the new economic forces of the world.

But in the United States the legislative branch of the government is not altogether free to say what it will do with this developing power. Policy has to be developed slowly; it is checked and guided by the trend of court opinion, especially that of the Supreme Court. It is highly important, therefore, to attempt to discover the theoretical conception—if there be one—which governs the courts in the distinction they make between businesses that may be regulated and those that may not.

Legalists have varied opinions. Burdick[1] and Cheadle[2] seem to feel that the legislature ought to be free from any restraint in determining a policy of the exercise of the police power. Adler[3] feels that any and all business is subject to

[1] C. K. Burdick: "The Origin of the Peculiar Duties of Public Service Corporations. Columbia Law Review, Vol. XI.

[2] J. B. Cheadle: "Government Control of Business." Columbia Law Review, Vol. XX.

[3] Edw. A. Adler: "Business Jurisprudence" and "Labor, Capital and Business at Common Law." Harvard Law Review, Vol. XXVIII and XXIX.

regulation under the common law, which leaves the legislature out of it. But another conflict rages about this common law regulation; in contrast to Adler, Hartman[4] is convinced that it may be instituted only in those businesses which perform functions essentially the government's business to perform; Burdick is equally convinced that court opinion bears him out in asserting that only where the power of the state in eminent domain has been exercised in its favor, or where the taxing power of the state has provided it with aid may a business be so regulated; and Wyman[5] thinks the essential test is whether or no monopoly exists.

There are grave differences here; but it would seem that Wyman has come nearest to a theory that actually helps to explain American court opinion; and his theory besides being one which explains why it is that regulation may be instituted under the common law is one which, with the monopoly idea refined and modified, deserves serious consideration as an explanation of the concept that underlies both forms of regulation, common law and legislative—that of the interest of the public in business.

Wyman attempted by his monopoly theory to explain what the phrase "affected with a public interest" means so far as public utility regulation is concerned. He has never said that police power regulation may not be invoked unless the business regulated is a monopoly; but we shall see if any kind of price or service regulation may be set up in a market where there is no monopoly.

He first constructed a *natural* monopoly category having its foundation in natural resources holdings, then another category of *virtual* monopolies. His natural monopolies arise because of a restriction of supply as in waterworks and irrigation systems; because of a scarcity of sites as in grain elevators and stockyards; because of the limitations of time imposed upon the consumer as in the matters of hotel service and cab transportation; or because of the difficulties of distribution as in gas works and electric light plants. The virtual monopolies

[4] H. H. Hartman: *Fair Value*, Ch. I.

[5] Bruce Wyman: *The Law of Public Service Corporations.*

arise because of some such prohibitive limitation as the cost of plant as in canals, railways or railway terminals or because the service is given on so large a scale as to create an obvious disadvantage for any new concern attempting to duplicate the service. Into such a class would fall telegraph and telephone systems.

It will be seen that into one or the other of these classes a very large number of businesses regulated both under the common law and by legislative act fit with ease and nicety—how easily may be discovered by glancing through a list of them, meanwhile keeping in mind the classifications.

1. Railways and other common carriers including express services, oil and gas pipe lines and cab and jitney lines.
2. Municipal Utilities, so called, such as water, gas, electric light and power companies and street railways.
3. Turnpikes, irrigation ditches, canals, waterways and booms.
4. Hotels.
5. Telephone, telegraph and wireless lines.
6. Bridges, wharves, docks and ferries.
7. Stockyards, abattoirs and grain elevators.
8. Market places and stock exchanges.
9. Creameries.
10. Services for the distribution of news.
11. Fire insurance businesses.
12. The business of renting houses.
13. Banking.
14. Businesses of preparing for market and dealing in food, clothing and fuel.[6]

II. *What Theory Seems to Account for American Decisions?*

It is, of course, one thing to construct classes into which decisions seem to fall but quite another to prove the theory

[6] State v Howat (1921 Kans.) 198 Pac. 686. The constitutionality of this act has not yet been passed on by the United States Supreme Court but has been favorably decided by the Supreme Court of Kansas.

underlying the construction of the classes to be the theory upon which the decisions were actually based. And it is perhaps the common-sense view that the courts have had no theory. Yet when the decisions are studied and the list of regulated businesses is examined, it does appear that there is a central thread to follow, a definite notion of what it is that creates a public interest justifying regulation.

The regulation of which we speak here is economic; it must be an economic disadvantage of the public which leads the courts to permit interferences which favor the consumers. And it is difficult to see what this disadvantage can consist in except it be too high a price or too low standards of service.

Wyman's monopoly is an essentially static concept. It refers to specific businesses that are monopolies; it approaches too strictly from the point of view of the business and its organization rather than from the point of view of the product produced and its market. It might be better if we conceived the monopoly theory differently. Re-stated, with a difference in emphasis, it may appear more useful: any business which engages in an occupation in which the consumers are hurt by having to pay too high a price or having to put up with too low standards of service, can only attain this position of doing harm through the possession of a practical monopoly. It may be subjected to regulation because it harms consumers; we know monopoly is present because consumers are harmed; this harm to consumers is apparent from the evidence of the market place.

The distinction implied here reverses the usual emphasis. We usually castigate an individual firm as monopolistic. It is more rational to forget the individual firm and say that any firm able to inflict economic disadvantage upon consumers must be monopolistic and subject to regulation. The monopoly is a secondary and a purely inferred characteristic; it is the harm to consumers that counts. So re-defined, the monopoly theory comes into harmony with our own that it is a disadvantage of consumers that makes a business regulable.

In so far as American opinions have a consistency in phrase

this consistency centers around a "special interest of the public" and a "disadvantage of the consumer," together with an "opportunity for imposition and oppression." These characteristics create a calling "clothed with a public interest" and therefore "subject to be controlled by the public for the public good."

This is the language of the decisions. In the Budd case the court could say " . . . the right of the legislature to regulate *does not depend in every case upon the question of whether there is a legal monopoly*." But also the court says in the Sinking Fund Cases: "When an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words *when it becomes a practical monopoly, to which the citizen is compelled to resort and by means of which a tribute can be exacted from the community*, it is subject to regulation by the legislative power." Add these words from the German Alliance Insurance case: "We may venture to observe that the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market; but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore, has led to the assertion that *the business of insurance is of monopolistic character and that it is illusory to speak of a liberty of contract. It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it*, that we may discover the inducement of the Kansas statute. . . . " (Italics are the author's.)

The italicised passages give the key. There may or may not be *legal* monopoly but there must be a consumer harmed by unreasonable rates or inadequate service. This situation obviously can only come about when the business possesses a power of compelling its public to yield. It may be that this power eventuates through tacit conjunction of a number of businesses; and that no one business of the group has anything like a monopoly grip on the market. What this extra-legal

power may amount to became clear in the investigation of 1920–21 into the methods of the Builders' combination in New York City and elsewhere. This is what the court was pleased to call a *practical monopoly*, a phrase which seems vague at first, but which is clearly enough explained by saying that it is in the alternative of having to pay a price set (or accept whatever service is offered) or having to do without when necessity impels one to buy, which is the essence of practical monopoly. The economists use the term "industrial monopoly"[7] in a similar sense.

The courts are clear that the consumer must not be left only with the power of refusal to use. It may be that good social policy demands the widespread use of the very instrument that is refused because of an extortionate price. This brings us to the conclusion from the words of the court that they will permit the regulation of prices and services of the necessities of life whenever it appears that prices are not being fixed by the higgling of the market, but rather in the councils of the sellers.

But this practical monopoly is a very different thing from a formal and legal monopoly. (A monopoly that is legal is one which comes under legal rule, not necessarily approved by the law, but simply recognized by it. A conspiracy to restrain trade is recognized by the law; but the restraint of conspiracy is a repressive use of legal measures.) We are discussing here a constructive control and the courts have been anxious to extend this recognition to the new type of monopoly that is not formal. And so we see that in making a rule they could not confine themselves to any one business as *a* monopoly; they had to be primarily interested in the market process and how the consumer emerged from his bargaining with the dealers in necessities. The market, not the business, is the field of investigation to determine whether or no regulation is justified. To know that there is a practical monopoly we need know nothing at all about the individual businesses engaged in the particular

[7] F. W. Taussig: *Principles of Economics*, Vol. II, p. 107.

occupation we are studying. Because a business is big and powerful, even because it is monopolistic as we usually use the term, it is not necessarily harmful, nor will the courts necessarily permit it to be regulated. But when the product it deals in becomes a necessity to all of us, or at least to many of us; when we are compelled to resort to it and when at the same time unfair rates are maintained or the service given is inadequate, it then becomes "clothed with a public interest." It may be regulated. It is the disadvantage of consumers that makes it so.

CHAPTER VIII

The Tests of a Business That May be Regulated

I. *The Necessity Test for Regulation*

Is it possible to formulate tests by which a business man or an economist may discover whether a business is one which, as the courts say, is "affected with a public interest" and in consequence liable to regulation?

Study of the opinions which have made American precedent seem to warrant the conclusion that the courts will permit the regulation of the prices and standards of service of a business under the economic interest phase of the police power when:

1. The commodity or service is virtually a necessity.

2. There is maintained a price or a standard of service resulting in harm to consumers.

These tests are so simple, as they are formulated, their significance becomes apparent only on rather careful analysis. We may first examine the necessity test.

In the dissenting opinion of Justice Lamar in the German Alliance Insurance case the following words were used: "I dissent from the decision and the reasoning upon which it is based. The case does not deal with a statute affecting the safety or morals of the public. It presents no question of monopoly in a *prime necessity of life*, but relates solely to the power of the state to fix the price of a strictly personal contract." (Italics are the author's.) And in a recent case in a District Court where the opinion was of the right of a legislature to set up a commission with power to regulate the prices of all commodities, Judge Bourquin felt impelled to include a significant phrase in what was otherwise a reactionary opinion. He said that " . . . however it might be if the enactment was limited to the prime necessities of life" it was impossible

for the court to permit a legislature to set up so powerful a body.

Justice Lamar was a conservative justice who could not agree with the majority of the Supreme Court that insurance was affected with a public interest. It is not so affected, he said, because insurance is not a "prime necessity of life." The inference is that even such a conservative person as Justice Lamar must admit the public interest to be affected when there is a control of the prices of necessities. The sequence in the more recent opinion is similar. This is of course definition by inference; but the conclusion seems inevitable.

There are other instances of a more direct character. For example in Ratcliffe v Union Stockyards Co. (74 Kans. 1) it was said: "Public necessity and public welfare are the broad general grounds upon which the right of legislative control is based." *Public necessity* and *public welfare* are the broad general grounds; the particular grounds arise from the facts under consideration. And these may shift as economic emphasis shifts. Wheat bread may be a necessity today; but in a few years the nation's diet may not include wheat bread as an item of central importance. And again another few years may give the wheaten loaf a recurring importance as the science of dietetics progresses or as methods of cultivation change. There is no standard fixed for all time which may measure the importance of any commodity to the public. All may change in value, shift in relative importance. And in effect the court has said that it reserves the right to rest its opinions on the broad general grounds of necessity at large and to decide particular cases as they arise.

Mr. Bruce Wyman in his *Law of Public Service Corporations* (p. 99) remarked in this connection: "The extraordinary activity of the law in behalf of the individual is, however, confined to *necessary* services. The law has little concern with the monopolization of unessential things. It subjects a scenic railway at an amusement park to no exceptional liabilities. It leaves a circular railway built primarily to view Niagara Gorge outside the pale of state aid. And it leaves skating

rinks and theatres to deal as they please with their public, and exclude whomsoever they choose." And what else but that there must be a necessity to justify regulation can be meant by such a passage as this: "The nature and extent of the business, *the fact that it closely touches a great many people and that it may afford an opportunity for imposition and oppression* . . . are circumstances affecting property with a public interest." (Ratcliffe v Union Stockyards Co. Italics are the author's.)

Only goods and services very nearly universally called necessities would in a strict sense closely touch a great many people. Even if it were clear that prices and standards were unreasonably controlled by the sellers it would be manifestly absurd to set up all the complicated machinery for public regulation of prices and standards of service for say, barber shops and like personal services or for cut flowers, furs, perfumes, jewelry, oil paintings, limousine automobiles, the fancier grades of food and drink, the more expensive kinds of clothing and the like which are clearly luxuries and in the purchase of which the public in general is but little interested and which, after all, yield in the aggregate but relatively few of the satisfactions of life. There are more troublesome border-line commodities: the cheaper automobiles, musical instruments of a sort, furniture, travelling supplies, books and a certain number of other classes of goods. The list of these could be greatly extended and the problem it illustrates could be made more difficult by showing the absurdity involved in designating the apple as a necessity and the orange as a luxury, coffee a necessity and cocoa a luxury, oatmeal a necessity and flaked breakfast foods luxuries—to select a few of many possible illustrations.

But who would say milk, bread, meat, fuel, working clothes and adequate shelter for each person are not necessities? There would be almost universal admission that a considerable list of commodities and services are necessities in the strictest sense of the word in the purchasing of which buyers may be injured in ways unreachable except by the exercise of the state's

powers of regulation.[1] These are the ones likely to be regulated as they were the ones regulated in the earlier time when our common law was forming. Contemplation of this power of the state caused Wyman to remark in the preface to his great work on *Public Service Corporations:* "In matters not vital to the life and well-being of mankind the laws of society may be left free to operate, without limitation by the sovereign power; but in all that has to do with the necessities of life the protection of the sovereign is extended. The modern state protects equally against physical violence and against oppression that affects the means of living."

The formulation of a definition for so indefinite and quickly changing a concept as *necessity* is dangerous. As our consumption standards change, our conception of the goods and services necessary to life and happiness change. To the conservative mind perhaps a good definition would be something like this: a necessity is a good or service it would be actually harmful for the individual or the community to be forced to do without. A somewhat wider definition would be: a good or service which enlightened social policy demands be widely disseminated. This leaves room for expert judgment and for the fixing of business policy by the rule of the wider and wiser policy of the social organization that contains it and which it should serve.

Perhaps, however, the most precise and complete definition would be one which would conceive a necessity as any good or service which contributes to a psychologically full life. What this implies is that by social rule each person is entitled to sufficient of the goods and services of the community to enable him to escape from the pressures and frustrations that seem inherent in our industrial system and that can only be corrected by a sublimation or objectification process which involves expensive equipment—as many more athletic fields and public parks, greater air spaces per person, a greater variety of food and clothing for each individual and a considerably

[1] State v Howat (198 Pac. 686) shows the trend in this direction. This opinion and the act on which it is based are discussed in Chap. IX, below.

larger allowance for amusements, self-education and experiment than we at present allow for. This widening of the definition may not be accepted at once, but it suggests the direction in which we seem to be travelling.

As a matter of plain fact specific cases of commodities and services sought to be regulated will be subjected to whatever definition of necessity lies in the mind of the court. Experience indicates this is likely to be a conservative definition. It appears that this much may be ventured with some certainty: American courts will find a public interest only in businesses concerned with necessities—with the term pretty strictly defined. And the reason is not obscure: there will be entailed no great hardships, no great and irreparable social losses if most persons do without those things which the good sense of the time cannot quite unanimously call necessary. It is not difficult to show the Supreme Court has exactly this idea of the matter. Here, for instance, is a passage from the German Alliance Insurance case: "Those (insurance) regulations (of the states) exhibit it to be the conception of the law-making bodies of the country without exception that the business of insurance so far affects the public welfare as to invoke and require governmental regulation. A conception so general cannot be without cause. The universal sense of a people cannot be accidental; its persistence saves it from the charge of unconsidered impulse and its estimate of insurance certainly has a substantial basis."

It is not far fetched to say that here the court has described plainly its own test for necessity. It is noticeable that the court does not say: "The universal sense of a people cannot be wrong." It may be wrong or right or foolish or wise, according to any standard; anyhow it cannot be accidental. Whatever people in general hold to be necessary, their Supreme Court has said it will regard likewise.

We have quoted Justice Lamar's dissenting opinion in this case; we may use it again for illustration. He argues vigorously, but not against the regulation of the prices of necessities. But he does feel that insurance ought not to be included among

the list of necessities and says, it seems, with a touch of despair: "If the price of a . . . contract indemnity can be regulated . . . then the price of everything within the circle of business transactions can be regulated." But perhaps he overemphasized his real feeling and certainly the majority of the court had in mind a discrimination between goods and services that are and those that are not necessities which Justice Lamar seems to have missed.

II. *The Consumers' Disadvantage Test for Regulation*

Given the preliminary test of necessity, the second test is whether there is an extortionate price or an inferior standard of service emerging from the complex of market forces.

Studies of the common law origin of the right to regulate prices through governmental machinery show such rights to have been insisted on from earliest times when prices and standards were unduly influenced by the sellers in a market to the prejudice of the consumers' interest. The early "assizes of bread and ale" and the Statute of Labourers are cases in point; and there are also the early colonial regulations of our own history. In all these instances regulation arose from the apparent fact that consumers were being forced to accept the alternative of paying a high price or do without; and the State appears never to have been willing to accept this alternative as a wise one. It has used its power often in favor of the consumer and against the purveyors of goods and services who were able to exploit their customers.

But this does not mean that the justification arose in every case because of a formally organized monopoly. In the older time it was easier to see that several individual small-scale victualers or tailors or smiths could by agreement establish and maintain prices; but the most casual survey of modern business shows the same process expanded and on a larger scale, at work now. The joint share holding business organization is a relatively new development; its units have increased many-fold in size and its field of operations has extended so far that it is difficult for other than a business

executive to appreciate its intentions and its power with respect to the prices of the thing it deals in. But in a general way even the layman understands the gentleman's agreement, the Gary dinner, the manufacturer's and dealer's associations, the so-called institutes, and the hundred other forms of sellers' organizations in almost every kind of business; he knows their meetings and conferences have to do with price control. He does not stop to think that a part of the function, at least, of the high-sounding "institute," is simply to provide a modern substitute for the agreement made in the older time between neighboring merchants not to undersell each other; but in a general way he understands well enough and resents his own utter helplessness which appears in the coincident phenomenon of prices consistently fixed at the same level by many ostensibly competing dealers. It would be a naïve observer at the present time who concluded that those meetings and conferences and those prices existed in the same civilization by chance and who did not suspect some wide-spread causal relation.

All this points to the conclusion that it does not require a formally organized corporation with a legal entity to control prices and standards of service. The same result is obtained by purely informal, non-legal agreements. This kind of collusion cannot be touched ordinarily under any negative scheme of restoring competition. But the consumer has something of a defense, at least, in the doctrine of public interest and the police power of the legislature. The problem is attacked, not through the offending person or corporation, but merely by ruling that any person or corporation engaging in the business of furnishing to the community certain services or commodities, becomes automatically subject to regulation.

Here again, as in the case of determining whether a good is a necessity, there is a question for the courts to decide and again it is quite largely a question of good sense and common law rule. The evidence necessary to show collusion need not be such evidence as would convict a business of conspiracy; under wise regulation a business suffers no disadvantage if it has formerly been conducted honestly and with some notion

that it serves a public function; and it is treated exactly like any competitors it may have. But when it becomes clear that the prices of bread, milk, meat, fuel, housing or other of the great common necessities are being again and again set at certain common figures by many ostensibly competing dealers throughout a market or a wider range of territory, there should be evidence enough. The consumer must pay the price or do without, must accept the standards provided or do without; and this is the very dilemma the courts will not tolerate.

A single instance of this sort of thing may be shown for illustrative purposes. The following news report from the *New York Times* of 23 March 1921 will show what is meant:

> Washington, March 22.—While the average price of good beef steers on the Chicago market from March 5 to March 19 declined from $9.95 to $9.70 a hundred pounds, during the same period the average price of good steer beef at three large Eastern markets advanced from $16.47 to $17.63, the Bureau of Markets announced today. During the same period the average price for medium beef steers dropped from $9.20 to $8.93, while the average wholesale price of medium steer beef increased from $15.43 to $16.65.

Supposing the reported facts to have been substantiated, there is a clear case of exploitation. The consumer has no alternative to buying this meat if he buys meat at all; and the principles of common law in business dealing make it plain that it is not in accord with the public interest that he should be left with no other alternative than this. And no other agency than the State could enter the market to restore an equilibrium upset by an apparent undue seller's control. The words of the Supreme Court in the German Alliance Insurance case point to this conclusion: "It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute. . . ."

But one of the interesting phases of the illustration we have used is that it also shows how it may be possible to find the disadvantage of the consumer without referring to the monopolistic character of the business. Of course it is the fact of monopoly of one kind or another that gives a business its

power over prices; but monopoly is hard to establish, although its effects may be apparent to the most casual observer. Here there is an illustration of the facts necessary to show consumer's disadvantage appearing clearly in the reports of the market. With these facts the court need not conduct a lengthy and fruitless investigation into the character of the business organization that furnishes meat; it is enough to know that prices are harmful.

Wyman felt that it was necessary for a business to correspond to some monopoly category, deduced from former monopolies declared public, for a business to be regulated as a public utility. This would be a difficult procedure in this instance and yet the need of regulation is obvious. Perhaps he is right. But there is the other kind of public regulation—the use of the legislative regulation which is certainly not dependent for its validity upon the establishment of monopoly.

Perhaps enough has been said to make plain the tests for a business that may be regulated: that it must be engaged in the furnishing of a necessity to the public and that there must be a harmful price or standard of service emerging from the market. Given these two conditions American courts will not deny the right of the legislature to regulate within reason.

These are the modern tests as it seems probable they were the early tests. No change of legal principle is involved in their formulation or acceptance. It is, rather, necessary to conceive a whole picture of an essentially dynamic and rapidly changing industrial *milieu* in which at one time this, and another time that, economic instrument is to be defined as necessitous; and in which at one time this, and at another time that, business organization possesses the power to exploit consumers. It is this quality of the instrument and this power of the purveyors of the instrument that calls for the exercise of the state's undoubted right to protect its citizens. There is no need to regulate armorers and spurriers in these present times; there is need to protect the rights of the public to the cheap availability of those old goods and services which have persisted as necessities and of the new goods and services which have risen to that dignity.

CHAPTER IX

The Trend of Judicial Opinion

I. *Recent Opinions of the Courts*

If our theory is correct, or sufficiently so, and it is something like the fact of necessity and the other fact of consumers' disadvantage which determines that a good shall be of such a sort that dealers in it may be subjected to regulation, the theory ought to find its own substantiation in events. And the particular events to which we look with greatest interest are, of course, court decisions.

Most of the material of this study has been in the course of evolution and preparation for a number of years. During that time, and even since the practical completion of most of the theory, opinions have been coming from the courts which bear directly upon the discussion. All the important cases have been police power cases. And this indicates the tendency of society to lean on this regulatory mechanism as the readiest and least equivocal of any. What is of most interest, of course, is to ask whether they show a disposition to limit regulation to necessities, as we have concluded they seemed to be doing, and whether it is a harm to the consumers of necessities that brings regulation to bear.

There are several recent decisions that apply here and are sufficiently recent to indicate the present trend of judicial thought. They are sufficiently in point and sufficiently important so that this chapter may, it is hoped with profit, be given over to something in the nature of an appendix to consider judicial opinion, later, for the most part, than that upon which the earlier chapters drew for authority. Although some of these have been used in the text where it was possible to insert them as explanations of development and others have been referred to in notes for the sake of completeness, they deserve more thorough analysis and presentation than it has been

possible to give them elsewhere. All of them come since the great leading case of 1913—the German Alliance Insurance case—which reaffirmed and solidly established the principles of the early English common law, of Munn v Illinois, and of Budd v New York, the great leading cases of our law. Of these later opinions, some are of the Supreme Court, some of District Courts and some State courts. They therefore represent a wide section of judicial opinion. One opinion of the District Court of the United States in Montana in January 1920, had to do with the constitutionality of an act of the legislature in erecting a commission with general power to fix prices. Another was the opinion in a case brought to test the constitutionality of the so-called September Housing Laws in New York State. The decision is that of the New York State Court of Appeals, handed down in March, 1921. These laws regulated the rents landlords might charge and defined the kind of service they must give in return. Two others are decisions of the Supreme Court upon a similar question, one of them specifically upholding the regulations contemplated in the September Housing Laws and protected by the decision of the New York court. Another case has to do with a Kansas act which declares that a public interest exists in the businesses of preparing for market, and dealing in, fuel, food or clothing.

The cases form interesting contrasts and comparisons on many points of theory. At first the courts appear to have contradictory opinions in deciding against the power of the legislature to regulate through a general regulating commission and in deciding that the business of letting houses may be regulated; and later in deciding that coal mining and dealing in food and clothing may be regulated. The conflict between them is not a real one at all points, however. For instance it is intimated in Holter Hardware v Boyle (the only recent opinion which refuses regulation) that if the powers of the commission to regulate prices had not extended "from the street corner vendor of popcorn and bananas to the merchant prince, from coal to diamonds, from the babe's first swaddling band and cradle to the aged man's shroud, his coffin and his grave,"

but had been limited to "necessities" the court would not have felt free to interfere. The court eloquently dissents from the doctrine of the regulation of everything; this is about what the opinion means. There is, however, a plain intimation that real necessities are subject to regulation.

But as representatives of the trend in court opinion these decisions differ as to the degree to which the extension of new regulations may be carried. They illustrate quite clearly the contrasting conservative and liberal tendencies in judicial interpretation. The case of Holter Hardware Co. v Boyle makes much of the necessity for protecting the rights of business, of preserving our "American business economics," a phrase intolerably loose in a judicial opinion,[1] but apparently meaning *laissez faire;* the case of People ex rel Durham Realty Corp. v La Fetra in New York admits that there ought to be reason in regulation, but admits little more limitation on the power of the legislature than would be admitted by such legal theorists, for instance, as Cheadle or Burdick, reserving, however, some powers of review to the courts. And the case of State v Howat in Kansas would go quite that far.

But even though the one opinion may be characterized fairly as "conservative" and the others as "liberal," in the sense that they favor extensions of the rights of legislatures to regulate, even the conservative opinion, it seems, would support squarely the contentions of the foregoing chapters. In Holter Hardware Co. v Boyle, the power of the commission to regulate is denied because the powers conferred are too broad, because regulation is not limited to necessities, and because no emerging harm to consumers is shown. These facts are otherwise in all the other cases. Specific necessities are in question; and the preliminary statements are made that there is harm to the consumers of them, that there is "oppression." The legislatures in these cases assume the power of regulation and the courts concur.

[1] But see also Judge Pound's reference to "economic theory" cited in Chapter III above.

In all these recent opinions there are passages that illumine a number of points for one who has followed the reasoning of the chapters above. There are, aside from those already commented upon, pointed references to the police power and, as well, to "economics" and "economic theory" which, to say the least, betray a lack of erudition in the most familiar generalizations of that science and quite justify the comments on the economics of the legalists in Chapter III. The theories of economics are recognized as fundamental, yet they are not understood.

Adaptations of these recent decisions follow. They represent present legal opinion six and seven years after the German Alliance Insurance case. They all show the influence of this case. That the one opinion is conservative in tone and the others liberal will only serve to emphasize the likeness of the implications of both so far as the regulation of the prices of specific necessities, in which consumers may be harmed, is concerned.[2]

II. *Holter Hardware Co. v Boyle*[3]

This is a conventional suit to restrain enforcement of state legislation which provides for a trade commission to regulate business, and when and where it pleaseth to "establish maximum prices or a reasonable margin of profit" in respect to all commodities.

Plaintiffs' principal and determinative contention is that legislative regulation of prices in ordinary mercantile business is repugnant to the due process clause of the Fourteenth Amendment. At the outset defendants note that the enactment is of August 11, 1919 (Laws Ex. Sess. 1919, C. 21), by an extraordinary legislative session to meet a drouth emergency and that it includes a declaration that it is an emergency law, immediately necessary for public health, peace and safety. They allege that it is supported by public opinion and prevailing morality, and that all this, in connection with the war and

[2] Citations of cases to be found in the original opinions are omitted.

[3] 263 Fed. Rep. 149.

its consequences in respect to production, supplies, demand, prices, and abuses, renders conclusive upon the courts the legislative judgment that the situation is one subject to the principle of legislative price regulation consistent with the Fourteenth Amendment.

If this were so, the inalienable rights guaranteed by the Constitution would be at the mercy of the legislatures. Fundamental rights are independent of legislative will, and no legislative declaration can foreclose inquiry whether or not they are infringed by legislative enactment. Emergency, opinion, morality, changes wrought by time and circumstances, often justify exercise of powers that Legislatures have; but they create no new powers. It is true that the Constitution is not a barrier to changes in state policy and law to suit new circumstances and conditions, not a barrier to new application of its principles; but it does oppose all changes that would avoid or supplant its principles with others, however calculated to suit the needs of the hour and the temper of the times. Its generic terms open always to include newly created species. Hence public opinion, prevailing morality, emergencies, may warrant denouncement as a crime today what was lawful yesterday; may do in behalf of a public welfare today what could not be done yesterday; may regulate a business or employment today that could not be yesterday.

Whether, in view of the Constitution, legislation in exercise of a state's police power (which is nothing mysterious, but only another name for the State's power of self-government) is of a newly created species, or is of a new genus, is a new application of old principles, or is creation of a new and repugnant principle, is in final determination for the courts. . . .

Legislative regulation of prices in businesses and employments that are of public interest, concern, and consequence, is consistent with the Fourteenth Amendment. Like regulation in ordinary mercantile business and ordinary employments, all of which are purely private, is repugnant to said amendment. Time and circumstances may convert some of the latter into the former—so change their character and incidents that from

purely private they are transformed into those of public interest, concern and consequence. When this occurs, they become subject to legislative price regulation, a new species of the genera of business of public interest, a new application of the old principle of regulation.

In the instant suit emergencies, public opinion, prevailing morality, war and its consequences, and legislative fiat have not transformed ordinary mercantile business into businesses of public interest. Despite them, the character and incidents of ordinary mercantile business remain unchanged. It is still open to and followed by many persons, rather than by a few, ranging from push carts, through all gradations, to mail order emporiums independent and in competition, wherein are constant new adventurers, some succeeding, some failing, and equally constant passing of the old, affording extensive choice to the purchasing public. Its transactions are independent, individual and of no material consequence to any one, save to the seller and buyer of each thereof, and upon whom alone the effects fall. It remains purely private in character and incidents. . . .

From their inception it has been assumed and accepted doctrine that by State constitutions the people reserved to themselves the power to regulate prices in ordinary business and employment, and that by the Fourteenth Amendment they suspended the power so long as the 'due process' clause endures. Their circumstances, conditions, character, disposition, ideals, and the times prompted them to accept the principle of free and unrestricted bargaining.

This construction of constitutions is virtually a rule of property and a principle of government, not to be changed by Legislatures or courts in any circumstances, but only by the people by constitutional amendment. That other Legislatures and Congress, during the war enacted like laws, demonstrates that Montana's legislature does not stand alone, but no more. It may be observed Congress proceeds under the war power, which is also subject to constitutional limitations, subject to the 'due process' clause of the Fifth Amendment.

It may be further observed that, however it might be if the enactment was limited to the prime necessities and was a war measure, it is inconceivable that its all-embracing provisions, now when war is over, save as a fiction perpetuating rather dictatorial powers, are necessary to public health, peace and safety. It ranges from the street corner vendor of popcorn and bananas to the merchant prince, from coal to diamonds, from the babe's first swaddling band and cradle to the aged man's shroud, his coffin and his grave. Trifles, necessities, luxuries—all are within its scope. As a whole, the enactment would accomplish a complete reversal of the American system of business economics that has prevailed from the nation's birth. True, there is no federal control over any state in the matter of economic theories it will pursue, provided not counter to constitutional limitations. But that involved herein goes beyond economics, and virtually invades and changes the methods if not the system of government. Who will question the wisdom of the constitution that this shall not be done, save by three-fourths of the states in concert?

Mindful of the familiar principles that control federal courts in consideration of the constitutionality of state legislation, it is believed the enactment at bar is within the inhibition of the Fourteenth Amendment. . . .

A permanent injunction will issue. Decree accordingly.

III. *People ex rel Durham Realty Corp. v La Fetra*[4]

. . . Whether or not a public emergency [which justified the "Housing Laws"] existed was a question of fact, debated and debatable, which addressed itself primarily to the legislature. That it existed; promised not to be presently self-curative, and called for action appeared from public documents and from common knowledge and observation. If the law making power on such evidence, has determined the existence of the emergency and has, in the main, dealt with it in a manner permitted by the constitutional limitations upon

[4] 230 N. Y. 429. From a transcript of the original opinion of Judge Pound.

legislative power, so far as the same affect the class of landlords who now challenge the statutes the legislation should be upheld . . . .

The proposition is fundamental that private business may not be regulated, and may not be converted into public business by legislative fiat. . . . The proposition is equally fundamental that the state may establish regulations reasonably necessary to secure the general welfare of the community by the exercise of its police power although the rights of private property are thereby curtailed and freedom of contract is abridged. The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property or limits its use when great public needs require, uncontrolled by the constitutional requirement of due process. Either the rights of property and contract must when necessary yield to the public convenience, advantage and welfare, or it must be found that the state has surrendered one of the attributes of sovereignty for which governments are founded and made itself powerless to secure to its citizens the blessings of freedom and to promote the general welfare. . . .

. . . May the legislative power, in a season of exigency, consistently with the due process clauses of the state and federal constitutions designed to protect property rights, so invade the domain of private contract as to interfere with and regulate the right of a landlord to exact what he will for his own in the way of rent for private property?

The landlord is a purveyor of a commodity; the vendor of space in which to shelter one's self and family. He has heretofore been permitted to make his own terms with his tenants, but that consideration is not conclusive. . . . While in theory it may be said that the building of houses is not a monopolistic privilege; that houses are not public utilities like railroads and that if the landlord turns one off another may take him in; that rents are fixed by economic rules and that market value is the reasonable value; that people often move from one city to another to secure better advantages; that no one is com-

pelled to have a home in New York; that no crisis exists; that to call the legislation an exercise of the police power when it is plainly a taking of private property for private use and without compensation is a mere transfer of labels which does not affect the nature of the legislation, yet the legislature has found that in practice the state of demand and supply is at present abnormal; that no one builds because it is unprofitable to build; that there are those who own who seek the uttermost farthing from those who choose to live in New York and pay for the privilege rather than go elsewhere; and that profiteering and oppression have become general. It is with this condition and not with economic theory that the state has to deal in the existing emergency. The distinction between the power of eminent domain and the police power is often fine. In the main it depends on whether the thing is destroyed or is taken over for the public use. If property rights are here invaded, in a degree, compensation therefor has been provided and possession is to be regained when such compensation remains unpaid. What is taken is the right to use one's property oppressively and it is the destruction of that right that is contemplated and not the transfer thereof to the public use. The taking is therefore analagous to the abatement of a nuisance or to the establishment of building restrictions, and it is within the police power. . . .

. . . Even in the absence of an emergency, the state may pass wholesome and proper laws to regulate the use of private property. Laws restricting the uses of property do not deal directly with the question whether a private business may be limited in its return to a reasonable rate fixed by a force external to the law of supply and demand. Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on the loan of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest and the question is whether

the subject has become important enough for the public to justify public action. . . .

The field of regulation constantly widens into new regions. The question in a broad and definite sense is one of degree. As no similar legislation has been construed by the courts, precedent is of little value and may prove misleading. Formulas and phrases in earlier decisions are not controlling. . . .

Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. Housing in normal times may be, and often is, a competitive business; landlords may in the lean years and in periods of over-supply be unable to secure a fair return on their investments. Competition will then regulate rents more effectively than legislation can. An historical justification of liberty of contract between landlord and tenant is not a demonstration that the system must survive every exigency. When it temporarily ceases to be adapted to the demands of the present it may be modified, if the best interests of society are thereby served. "An earnest conflict of serious opinion" may arise as to whether such interests have been wisely served or whether the legislation is anything more than another example of misdirected zeal in dealing with a crisis. But that argument does not address itself to the Court. "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative consideration in dealing with the matter of policy. . ."

. . . Laws directly nullifying some essential part of private contracts are rare and are not lightly to be upheld by hasty and sweeping generalizations on the common good. But no decision upholds the extreme view that the obligation of private contracts may never be directly impaired in the exercise of the legislative power.

The question comes back to what the state may do for the benefit of the community at large. Here the legislation rests on a secure foundation. . . . The struggle to meet changing conditions through new legislation constantly goes

on. The fundamental question is whether society is prepared for the change. The law of each age is ultimately what that age thinks should be the law. Decisions of the courts in conflict with legislative policy, when such decisions have been thought to be unwisely hard and stiff, have been met by constitutional amendments. . . . The reaction on the courts is that a strong opinion in any real or fancied public need has been suggested as the sufficient test. But constitutional limitations on the power of government are self-imposed restrictions upon the will of the people and qualify the despotism of the majority. Such limitations do not yield to strong opinions merely. They are incorporated in the fundamental law to restrict power. They forbid government to take from the owner without compensation whatever private right to control the use of his property the many may earnestly desire to deprive him of. Isolated expressions of the courts may suggest that whatever the legislature enacts on grounds of public policy should be sustained, but the courts may not uphold the exercise of unconstitutional and arbitrary power. What is arbitrary and what is beneficent must be decided by common sense applied to a concrete set of facts. To uphold private contracts and to enforce their obligations is a matter of high public consequence, but the legislature has a wide latitude in doing what seems in accordance with sound judgment and reasonableness in order to bring about a great good to a large class of citizens, even at some sacrifice of private rights.

The conclusion is, in the light of present theories of the police power, that the state may regulate a business, however honest in itself, if it is or may become an instrument of widespread oppression; that the business of renting homes in the city of New York is emergently such an instrument and has therefore become subject to control by the public for the common good; that the regulation of rents and the suspension of possessory remedies so far tend to accomplish the purpose as to supervene the constitutional inhibitions relied upon to defeat the laws before us.

The order appealed from should be affirmed with costs.

IV. *State v Howat*[5]

The section[6] of the Kansas Court of Industrial Relations Act which is of interest for our purposes reads as follows:

The operation of the following named and indicated employments, industries, public utilities and common carriers is hereby determined and declared to be affected with a public interest and therefore subject to supervision by the state as herein provided for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste, and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of the state and in the promotion of the general welfare, to wit: (1) The manufacture or preparation of food products whereby, in any stage of the process, substances are being converted either partially or wholly, from their natural state to a condition to be used as food for human beings; (2) the manufacture of clothing and all manner of wearing apparel in common use by the people of this state whereby, in any stage of the process, natural products are being converted, either partially or wholly, from their natural state to a condition to be used as such clothing and wearing apparel; (3) the mining or production of any substance or material in common use as fuel either for domestic, manufacturing, or transportation purposes; (4) the transportation of all food products and articles or substances entering into wearing apparel, or fuel, as aforesaid, from the place where produced to the place of manufacture or consumption; (5) all public utilities as defined by section 8329, and all common carriers as defined by section 8330 of the General Statutes of Kansas of 1915.

The decision itself, upholding this act reads as follows in that part of it which applies to the definition of public interest and the extension of the state's regulatory powers:

[5] 198 Pac. 686 (1921 Kans.)

[6] Sec. 3. a. The Kansas Court of Industrial Relations Act. Chap. 29. Special Session Laws of 1920.

The legislature was of the opinion the industries specified in section 3 of the act of 1920 are affected with a public interest, and so declared. The declaration did not make them so. Whether they are or not depends on their relation to public interest. Without presenting the facts of which the court takes judicial knowledge concerning the peculiar relation the product of the Kansas coal mines bears to the state's fuel supply, and without discussing further the peculiar conditions under which production is accomplished, the court concludes the business of producing coal bears an intimate relation to the public peace, good order, health and welfare; that such business may be regulated to the end that reasonable continuity and efficiency of production may be maintained.

The mills of Kansas stand today at the gateway of commerce more prominently than did private elevators 45 years ago. Great packing plants, belonging to what the Federal Trade Commission calls the 'Big Five,' are located in Kansas. Many smaller packing companies operate plants within the state, and the meat packing industry effectively dominates, not only a food supply, but one of the great industries of the state, the live stock industry. There are other reasons for regulation, which need not be specified because the issues in this case involve production of fuel only, but the manufacture of food products is mentioned to show the precarious ground on which the state stands in respect to its supply of the necessities of life in case of emergency.

V. *Block v Hirsh*[7] *and Marcus Brown Holding Co. v Feldman*[8]

In Block v Hirsh and in Marcus Brown Holding Co. v Feldman the right of the public to regulate rentals was specifically upheld by the Supreme Court. In Marcus Brown Holding Co. v Feldman the New York laws were specifically upheld. But in Block v Hirsh (which slightly antedates Marcus Brown Holding Co. v Feldman) a restatement of the

[7] 1921 U. S. 41 Sup. Ct. 458.
[8] 1921 U. S. 41 Sup. Ct. 465.

principles, which guide the court in determining public interest, is found:

> The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern. It is enough to refer to the decisions as to insurance . . . irrigation . . . and mining. They sufficiently illustrate what hardly would be denied. They illustrate also that the use by the public generally of each specific thing affected cannot be made the test of public interest . . . and that the public interest may extend to the use of land. They dispel the notion that what in its immediate aspect may be only a private transaction may not be raised by its class or charter, to a public affair. . . .
>
> The fact that tangible property is also visible tends to give rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hundred feet. . . . Safe pillars may be required in coal mines. . . . Billboards in cities may be regulated. . . . Watersheds in the country may be kept clear. . . . These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a

law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing. Congress has stated the unqestionable embarrassment of Government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. . . .

VI. *Recent Opinions as a Test of Theory*

If these very recent opinions are carefully studied it will be seen that the legal theorists do not appear to have been wholly justified in the laying down of principle. This, of course, might have been expected in so far as the theories were aimed at explaining the nature of the public interest that creates public utilities, for these were police power cases; but neither does any theoretical explanation fit the interpretations of the police power to be found in these cases.

We cannot be altogether sure about the monopoly theory of Wyman. The court in Holter Hardware Co. v Boyle makes it clear that it is speaking of "ordinary mercantile business" when it denies the right of regulation; and its definition of these ordinary mercantile businesses seems to be those not dealing in necessities and those "wherein are contained new adventurers, some succeeding, some failing . . . affording extensive choice to the purchasing public."

The case was otherwise with housing in New York; here the normal course of demand and supply was interrupted. But this does not mean that in the Holter Hardware case monopoly would have made a difference. The court did not say so. And in the housing laws case it was clear enough that there was included in the facts no formal monopoly. Formal monopoly seems not to be necessary to regulation under the police power then. But what was meant by a reference to demand and

supply in the housing laws case was, it seems, an inference that competition did not protect consumers. If the theory of this were to be pursued, however, it would lead to some such discussion as has been made here in Chapter II, showing that it is monopoly in some degree—perhaps to be called "practical" or "industrial" monopoly—that creates a situation in which consumers are harmed in their economic interest.

In so far the theory of consumers' disadvantage seems to be substantiated. The courts deny that monopoly must be present, but they construe public interest only when competition does not protect consumers. This is monopoly of a sort, but only by a very loose construction can it be supposed to mean the monopoly that Wyman meant; and after all Wyman was interested, in formulating the monopoly theory, in explaining something special, the public interest that creates public utilities, not the whole basis for business regulation in which we are here interested. So that while Wyman cannot be blamed for not having done something which he never meant to do, we may be blamed if we attempted to stretch his theory over a field which it was never meant to cover.

The definition of police power in all of the recent cases brings it into the broad field of public interest, so that the regulation of business in its economic aspects, its prices and its standards of service, flows from the general interest of the public just as does the right of regulation of business to secure the health, morals and safety of the community.

The case of Holter Hardware Co. v Boyle parenthetically describes the police power as "nothing mysterious, but only another name for the state's power of self government," a very wide definition indeed, and one which, if adhered to, would bring the developing industrial system within the jurisdiction of the political state in all its phases. The New York Housing Laws case defines the police power thus: "The legislative or police power is a dynamic agency, vague and undefined in its scope, which takes private property when public needs require. . . ."

The definition of police power made in Chapter I[9] would seem to be in accord with the notion of the courts.

The modification of property rights involved in regulation, which was discussed in Chapter II[10] also seems not to be out of alignment with court opinion.

But it is not nearly so important to find a theory which substantially agrees with court reasoning as to find a theory which leads to the same general conclusions as those of the courts. And the reasoning above led to the conclusion that courts would find it possible to protect consumers whenever a real interest was at stake. It is this contention which the courts have most fully justified.

"Aside from the war power, the regulation of prices, except for public utilities, is unusual, although usury statutes which forbid the taking of exorbitant interest on loans of money are common. The power of regulation exists, however, and is not limited to public uses or to property where the right to demand and receive service exists or to monopolies or to emergencies. It may embrace all cases of public interest and the question is whether the subject has become important enough for the public to justify public action." This was said in the rent laws case. The Holter Hardware Co. v Boyle decision would not go nearly so far and yet the court felt constrained to say: "Legislative regulation of prices in businesses and employments that are of public interest, concern and consequence is consistent with the Fourteenth Amendment. Like regulation in ordinary mercantile business and ordinary employments, all of which are purely private, is repugnant to said amendment. Time and circumstances may convert some of the latter into the former—so change their character and incidents that from purely private they are transformed into those of public interest. . . . When this occurs, they become subject to price regulation. . . ."

The New York Housing Laws and opinions sustaining them both in the New York Court of Appeals and in the United States Supreme Court derive their greatest significance, of

[9] Section III.
[10] Section IV.

course, from their indication of the direction in which court opinion seems to be moving. The far-reaching decision of the Kansas court (State v Howat) cannot, it is true, be made much of at the present stage. It will become truly epoch-making, however, if it is upheld by the Supreme Court. And the decision of the Supreme Court which transformed the business of renting homes from a private one into one to which public regulation may be extended, would seem a fairly definite intimation that the Court will also decide in favor of the validity of the Kansas Act. If such a decision eventuates, there will be no further doubt concerning the scope of the regulatory powers of the state. Such a decision would confirm completely the reasoning of our former chapters that it is harm to the consumers of modern necessities that gives rise to regulation. The Kansas Court of Industrial Relations Act is primarily aimed at the solution of another problem than the one under discussion here, as the title of the Act would indicate, but as is apparent from our quotation of a section of the act and from that part of the court opinion which bears on that section, the problem we are interested in is seen clearly enough by the legislature and is specifically upheld by the court.

Also it is true that the trend of opinion in general upholds the theories of Burdick and Cheadle—but only to a degree. There is a distinct tendency to permit the legislature to dictate policy; but it will be noted that the courts specifically reserve their powers. For instance in the State v Howat decision: "The legislature was of the opinion the industries specified in section 3 of the Act of 1920 are affected with a public interest, and so declared. The declaration did not make them so." The court takes cognizance of the facts and makes an independent interpretation. Nevertheless it is true as a recent writer remarks, that "The trend of decisions on constitutional questions during the past year makes it clear that the friends of the Kansas Act have less to fear from the courts than from the legislature."[11] By this it was meant to say that persons interested in the extension of the police power regulations need fear

[11] "W. R. V." in the Yale Law Journal, Vol. XXXI, No. 1, p. 78.

little from further hindrances to progress by the courts such as have, at one time or another, held up for decades the development of a logical and inevitable policy; but that they need fear greatly that the legislatures will refuse to extend the policy of regulation sufficiently for its beneficent effects to be felt.

It is true that the courts will review the facts which create a public interest but it is also true that they will give most careful consideration to the legislative declaration in this matter. And as to the policy which is to be pursued in the light of these facts, the courts undoubtedly hesitate to step in here. But it is conceivable that they might step in to say that regulations imposed were unreasonable and confiscatory. It is not true, as is thought by some writers, that this is held by the courts themselves to be an improper field for judicial inquiry. In Block v Hirsh, for instance, the question arose, as to whether regulation had gone too far. One might agree with the general theory that there ought to be complete legislative determination as to policy; but as a matter of fact it seems clear to the writer, at least, that the courts have never surrendered their right to interfere and say whether a policy may or may not be followed. They have their principles, set forth in constitution and legal precedent, and they interpret policy in the light of principle. It would be an aid to progress doubtless if they were less bound in this respect; and it does seem true that they become more free as time goes on and they again and again reinterpret constitutions so as to change their meanings and again and again find it necessary to reverse the stand of the Supreme Court of another generation. We doubtless move in the direction of freedom for legislative policy; but it is not true in fact that at this time the courts have abandoned their policy-creating powers.

In the preceding chapters we were led to the final conclusion that there might be set up two tests which would enable one to say of a business, with sufficient exactness, whether it might be included among those subject to regulation. The first of these was the necessity test, the second the test of

economic harm to consumers. The necessity test is amply substantiated. Food, clothing, fuel and shelter would be denominated anywhere as the greatest of necessities. The business of dealing in each of them has somewhere been subjected to regulation since the chapters above were written. In 1921 in Block v Hirsh we have seen the following significant conjunction of phrases: "The space in Washington is necessarily monopolized in comparatively few hands and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present."

In the foregoing phrases much that has been said above is confirmed. In the first place, what kind of a monopoly is meant? Obviously not a single-headed or simply-directed monopoly. It must be the type we have seen to be responsible for a great deal of harm to consumers—a sort of tacit adhesion of forces which harms the consumer but which is obviously not a conspiracy of any sort and, therefore, not reachable under the law, except it be a law not hitting at the businesses involved, but simply setting up rules which any business involved must conduct itself in accordance with so that consumers may not be harmed. This is a recognition on the part of the Supreme Court that it is harm to consumers that counts and that creates public interest. It is not monopoly that creates the public interest; for note that in this case monopoly is not proven, is not depended upon for the validity of the decision, but that it is the disadvantage of consumers, irrespective of its source, which determines. The court does speak of monopoly however. But how? Well, simply by way of saying that monopoly of a sort must have been present to create the consumer's disadvantage: "The space in Washington is necessarily monopolized in comparatively few hands." The decision goes right on to remark that "letting portions of it is as much a business as any other." It has been contended above, that it is not by the analysis of single business organizations that we may know whether they may be regulated, but by considering the social milieu in which they operate and seeing whether

they deal in necessities and if they do whether they are harming consumers by giving poor service or by charging too high rates when there is no satisfactory alternative for the consumer. This seems to be clearly implied in the phrase just quoted.

Next in importance in our whole quotation there is the statement concerning the necessitous character of housing. This should serve to make it plain that the prices of necessities only may be regulated under the police powers. There is only left for controversy the question of the definition of the term. Here is one element of uncertainty for our tests. This concept will change, but, it seems probable, constantly in the direction of widening its meaning and drawing more instruments into its classification as we realize more and more the increasing importance of psychologically full existences.

After its statement concerning the necessitous nature of housing the court concludes that all the elements of public interest are present and that the business may be regulated. The court in premising a necessity and in saying as it did a few lines before those quoted: "Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things," recognizes that it is harm to consumers (one consumer here being the government) which creates a public interest. There is also an obvious disposition to recognize the close relationship between economic harm and health which is, after all, only common sense, because in this case, high rents mean poor housing and the connection between health and crowded living conditions needs no comment. But we should have been willing to rest our contention merely upon economic harm resulting from too high rates, not pushing the logic that the court has used to connect the two kinds of harm, to relate economic disadvantage to health and welfare; but after all, such a reluctance is hardly necessary; the relation is too obvious. It is perhaps not so clear when it is a question of the price of railway fares or of meat as it is in the case of housing; but it is nevertheless evident and needs only to be considered to be recognized. And in view of the Supreme Court's pronounce-

ment our tests might very well be thought of as being (1) necessity and (2) danger to the public welfare which arises through an economic disadvantage of consumers in dealing with the purveyors of these necessities.

In any case, to refer to the theories of the legalists once more, it is clear that the court in this case does not feel (1) that every business is public, (2) that it is government obligation to perform the service which creates the obligation to regulate, (3) that it is the presence of monopoly which determines public interest, (4) nor that the legislative policy may be formed without the possibility of reconsideration by the court.

The first is obviously untrue; the second quite as obviously does not hold in this case. And indeed, if we can think of housing ever coming to be called a public utility through long regulative usage, it cannot be that it will become so because it is an obligation of the government to furnish all its citizens with homes. As for the third, we have considered at length the relation of monopoly to public interest and decided that although monopoly of one kind or another is the cause of economic harm to consumers, nevertheless the courts do not depend upon the establishing of its presence for the justification of regulation. Monopoly is spoken of in this decision of Block v Hirsh, as we have seen; it is spoken of in most decisions affirming public interest. But it is spoken of as a theoretical cause of disadvantage to consumers, not as the single fact which must be proved to justify the decision. This single fact is the emerging disadvantage itself which is usually clear enough—certainly in such instances as the facts on which this opinion is based.

As for the fourth theory, that of legislative determination, it seems to be specifically repudiated. In the first place the court admitted only that the facts justified "some degree of control" and later examined the regulations to see whether they went "too far." This is a reconsideration of legislative policy as well as a reconsideration of cited facts. Is it not clear that the courts reserve the right to review policy as well as facts?

These tests of ours cannot, of course, pretend to exactness in the sense that they are presently and universally true. But it is believed that they make as close a definition as can be made fairly under American law. The factors of inexactness which will occur to a business man, for example, who wants to know whether his business is subject to regulation, lie in the peculiar genius of our institutions. A business may not be subject to regulation at one time; at another it may be strictly regulated in all its phases. It may be subject to regulation in Kansas and not in New York—a true illustration, by the way; and it may be subject to one kind of regulation and not subject to other kinds. Such vagaries obviously cannot be covered simply; and they have to be taken into account. And the problem as to whether a business is subject to regulation under the common law or whether it may only be regulated under the police powers of the legislature is another factor of inaccuracy. It is the writer's belief that a few businesses—such, for instance as the retail chain-store business and the business of milk distribution—quite plainly answer to all the tests that might be set up for public utilities and, further, that they will be recognized as such by the courts if and when cases are brought against them which shall raise the question as to their status under the law. But however this may be, the notable extensions of regulation that are occurring in these years are extensions of police power regulations and not common law regulations. And where a business has developed such a nature as to be subject to common law regulation, this may never be found out—probably would not be at present—because of previous extensions to it of police power regulation which accomplish the same effect and which seem to be forthcoming more rapidly in such situations. The question may never be raised as to whether the business is quasi-public or private; and it does not greatly matter, if a private business may be regulated quite as though it were quasi-public and a public utility. Indeed, as has been suggested before, it seems likely that such a business, regulated at first under the police power, may in time, because of accustomed regulation, come to be thought of as quasi-

public. It may finally, even, pass over into the public utility category in this way. This seems to be exactly what is happening in the case of fire insurance. It is regulated, not as a public utility, but under the powers of the legislature to regulate private businesses in the public welfare; and yet it is beginning to be thought and spoken of as a public utility. The same history may eventuate for those latest businesses to be regulated under the police powers: the business of renting homes and those of preparing and dealing in fuel, food and clothing.

APPENDIX

I. Bibliography of Cases Important in Defining Public Interest, Police Power, Public Utility, etc.

Some of the cases mentioned below and many others are to be found in the cited case books on Public Utility Law. It seems necessary to mention here only the more important of them.

Adams v Tanner, 244 U. S. 590
Aldnut v Inglis, 12 East, 527
Amer. Coal Min. Co. v Special Coal & Food Comm. of Indiana et al, 268; Fed. 563
Amer. Land Co. v Zeiss, 219 U. S. 47
Amer. Union Tel. Co. v Western Union Tel. Co. 67 Ala. 26
Atkin v Kans. 191 U. S. 207
Atlantic Coast Line v Goldsboro, 232 U. S. 548, 558

Barrington v. Commercial Dock Co., 15 Wash. 170
Bertholf v O'Reilly, 74 N. Y. 509
Beer Co. v Mass., 97 U. S. 25, 33
Block v Hirsh, 41 Sup. Ct. 458
Bowditch v. Boston, 101 U. S. 16, 18–19
Bradley v Ohio River, etc. R. R. Co., 78 Fed. 387
Bradley v Lightcap, 195 U. S. 1
Brass v North Dakota ex rel Stoeser, 153 U. S. 391
Brown v Maryland, 12 Wh. 419–443 (1827)
Buchanan v Warley, 245 U. S. 60
Budd v N. Y., 143 U. S. 517
Butcher's Union Slaughterhouse Co. v Crescent City Live Stock Landing and Slaughterhouse Co., 111 U. S. 746

Cayo v Pool, 108 Ky. 124
Charleston Nat. Gas Co. v Lowe & Butler, 52 W. Va. 662
Chesapeake & Potomac Tel. Co. v Manning, 186 U. S. 238
Chicago, Burlington & Quincy R. R. Co. v Iowa, 94 U. S. 155
Chicago, Burlington & Quincy R. R. Co. v Drainage Comm. 200 U. S. 561
Chicago B. & Q. R. R. Co. v McGuire, 219 U. S. 549
Chicago, Milwaukee & St. Paul Ry. Co. v Tompkins, 176 U. S. 167
Chicago & Alton R. R. Co. v Transbarger, 238 U. S. 67, 76, 77
Copland v American De Forest Wireless Tel. Co., 136 N. C. 11
Cotting v Kans. City Stockyards Co., 82 Fed. 839
Commonwealth v. Alger, 7 Cush. (Mass.) 53
Commonwealth v Interstate Consol. St. Ry. Co. 187 Mass. 436
Conkey v Hart, 14 N. Y. 22
Covington & L. Turnpike Road Co. v Sandford, 164 U. S. 578
Culver v St. Joseph and G. I. Ry. Co. (Mo.) P. U. R. 1917–B–542, 554

Danville v Danville Water Co. 178 Ill. 299
De Camp v Hibernia Underground R. R. Co., 47 N. J. L. 43
Delaware L. & W. Ry. Co. v. Central Stockyard and Transit Co., 46 N. J. Eq. 280
Dillon v Erie R. R. Co., 19 Misc. (N. Y.) 116
Dow v Beidelman, 125 U. S. 680
Dunne v Ills., 94 Ill. 120

Ex Parte Milligan, 4 Wall. 2, 71 U. S. 2

Fonsler v Atlantic City, 70 N. J. L. 125
Fort Smith & W. R. R. Co. v Mills, 253 U. S. 206

Gibbs v Consolidated Gas Co., 130 U. S. 396
Gisborn v Hurst, 1 Salk 249
German Alliance Ins. Co. v Lewis, 34 Sup. Ct. 612, 233 U. S. 389
Goszler v Georgetown, 6 Wheat. 594; 19 U. S. 594
Georgia R. R. & Banking Co. v Smith, 128 U. S. 174
Green v Telegraph Co., 136 N. C. 489

Hahl v Laux (Tex. Civ. App.) 93 S. W. 1080
Hamilton v Warehouse Co., 251 U. S. 146
Henderson v Supervisors, 147 N. Y. 1; 41 N. E. 563
Hirsch v Block, 267 Fed. Rep. 614
Haugen v Albina Light and Water Co., 21 Ore. 411
Holden v Hardy, 169 U. S. 366
Holter Hardware Co. v Boyle, 263 Fed. Rep. 134
Hudson County Water Co. v McCarter, 209 U. S. 349, 355

Ingate v Christie, 3 Car. and K. 61
In Re Annon, 50 Hung. 413
In re Leach, 134 Ind. 665
Inter-Ocean Pub. Co. v Associated Press, 184 Ill. 438
Ives v S. Buffalo Ry. Co., 201 N. Y. 271

Ketchum v Buffalo, 14 N. Y. 356
Kettle River R. R. Co. v Eastern Ry. Co., 41 Minn. 461

Ladd v Cotton Press Co., 53 Tex. 172
Lake Shore, etc. Ry. Co. v Ohio, 173 U. S. 285
Lane v Cotton, 12 Mod. 472; s, c, 1 Ld. Raym. 546
Laurel Fork & S. H. R. R. Co. v West Va. Transp. Co., 25 W. Va. 324
Legal Tender Cases, 12 Wall. 457, 551; 79 U. S. 457
License Cases, 5 How. 504; 46 U. S. 504
Lincoln Trust Co. v Williams Bldg. Corp. 229 N. Y. 313
Live Stock Commission Co. v Live Stock Exchange, 143 Ill. 210
Los Angeles v Los Angeles Gas & Electric Corp. 251 U. S. 32
Louisville & Nashville R. R. v Mottley, 219 U. S. 467, 488
Lumbard v Stearns, 4 Cush. 61

Manigault v Springs, 199 U. S. 473, 480
Marcus Brown Holding Co. v Feldman, 41 Sup. Ct. 465

Matter of Jacobs, 33 Hun (N. Y.), 374
McArthur v Green Bay & M. Canal Co., 34 Wis. 139
Merrick v. Halsey & Co., 242 U. S. 568
Mich. Cent. R. R. Co. v Mich R. R. Comm. 236 U. S. 615
Minnesota Canal & Power Co. v Koochiching Co. 97 Minn. 429
Minnesota Canal & Power Co. v Pratt, 101 Minn. 197
Munn v Illinois, 94 U. S. 113
Mutual Loan Co. v Martell, 222 U. S. 225, 234

Nash v Page, 80 Ky. 539
N. Y. & N. E. R. R. Co. v Bristol, 151 U. S. 556
N. Y. Central R. R. Co. v White 243 U. S. 188
New Orleans Gas Light Co., v Drainage Comm. 197 U. S. 453
Noble State Bank v Haskell, 219 U. S. 104, 110, 580

Ocean Steamship Co. v Savannah L. W. & S. Co., 131 Ga. 831
Oklahoma Operating Co. v Love, 252 U. S. 331
Olcott v The Supervisors, 16 Wall. 695, 83 U. S. 678

Payne v Kans. 248 U. S. 112
Platt v Le Cocq. 150 Fed. 391
Pearsall v Great No. Ry. Co., 16 U. S. 646
Peik v Chicago N. W. Ry Co., 94 U. S. 164
Pennimans' Case, 103 U. S. 714
People v N. Y. C. & H. R. R. R. Co., 28 Hun. (N. Y.) 543
People v Beakes Dairy Co., 222 N. Y. 416
People ex rel Durham Realty Corp. v La Fetra, 230 N. Y. 429
People ex rel Rodgers v Coler, 166 N. Y. 1
Pipe Line Cases, 234 U. S. 548
Pittsburgh, C. C. & St. L. L. R. Co. v Hartford City, 82 N. E. 787
Pollock v Farmers Loan & Trust Co., 158 U. S. 601
Producers Sc. Co. v R. R. Com. 251 U. S. 228
Pullman Palace Car Co. v Lawrence, 74 Miss. 782

Railroad Commission Cases 116 U. S. 307
Rast v Van Deman, 240 U. S. 342
Ratcliffe v Union Stockyards Co., 74 Kans. 1
Rex v Collins, Palmer 372
Richman v Consolidated Gas Co. of N. Y., 186 N. Y. 209

San Antonio Traction Co. v Altgelt, 200 U. S. 304
San Diego Water Co. v City of San Diego, 118 Cal. 556
Shepard v Milwaukee Gas Light Co. 6 Wis. 526
Sinking Fund Cases 99 U. S. 700
Smyth v Ames, 169 U. S. 466
Snell v Clinton Elec. Light, Heat & Power Co. 196 Ill. 626
Southern Exp. Co. v Ashford, 126 Ala. 591
Spring Valley Water Works v Schottler, 110 U. S. 347
Spring Valley Water Works v Bartlett, 16 Fed. 615
State v Bell Tel. Co., 23 Fed. 539
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State ex rel. Wood v Consumer's Gas Co., 157 Ind. 345
State v Howat, 198 Pac. 686
State v Jacksonville Terminal Co., 41 Fla. 363
State v Nebraska Tel. Co. 17 Neb. 126
State ex rel v American & E. News Co., 43 N. J. L. 381
St. Louis Poster Advertising Co. v City of St. Louis, 249 U. S. 269
St. Louis & S. F. R. R. Co. v Mathews, 165 U. S. 1
St. Clair County v Interstate Transfer Co. 14 Blatch, 159
Stone v Farmers Loan & Trust Co., 116 U. S. 307
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Talcott v Pine Grove, 1 Flipp (U. S.) 120
Tampa Waterworks Co. v City of Tampa, 199 U. S. 241
Terre Haute & I. R. Co. v Peoria & Pekin Union Ry. Co., 182 Ill. 501
Tolliver v Blizzard, 137 S. W. 509.
Transportation Co. v Parkersburg, 107 U. S. 691
Trustees of the Village of Saratoga Springs v Saratoga Gas, Electric Light & Power Co., 191 N. Y. 123

Union Dry Goods Co. v Georgia Public Service Corp., 248 U. S. 372, 375
Union Pac. R. R. Co. v Mason City & F. D. R. R. Co. 199 U. S. 160
U. S. v Sioux City Stockyards Co. 162 Fed. 556

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