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Judicial Logic as Applied in Delimiting the Concept of Business "Affected with a Public Interest"

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JUDICIAL LOGIC AS APPLIED IN DELIMITING THE CONCEPT OF BUSINESS "AFFECTED WITH A PUBLIC INTEREST"

In a recent case[1] the Supreme Court of the United States declared invalid a Tennessee statute declaring the selling of gasoline to be a business "affected with a public interest" and fixing the prices at which that commodity could be sold. Said the Court, speaking through Mr. Justice Sutherland: "In support of the act . . . . it is urged that gasoline is of widespread use; that enormous quantities of it are sold in the state of Tennessee; that it has become necessary and indispensable in carrying on commercial activities within the state. But we are here concerned with the *character*[2] of the business, not with its size, or the extent to which the commodity is used. Gasoline is one of the ordinary commodities of trade, differing . . . in no essential respect from a variety of other articles. The decisions referred to above[3] make it perfectly clear that the business of dealing in such articles, irrespective of its extent, does not come within the phrase 'affected with a public interest.'" And so again the Supreme Court has denied the right of the legislative branch of government to invade the domain of businesses which it calls "essentially private" in nature.

Any business man, entrepreneur, social reformer, or in fact any one directly or indirectly concerned in the relation of business and government might well ask what is the basis for this governmental control, or lack of it, and what do the courts mean when they say that a particular business is or is not "affected with a public interest?" Why is it that the business of storing grain is affected with such an interest[4] while the business of preparing food[5] is not?; that companies engaged in the sale to

[1] *Williams* v. *Standard Oil Co.*, (1929) 278 U. S. 235.

[2] Italics, the writer's.

[3] The Court cited as controlling *Tyson* v. *Banton*, (1927) 273 U. S. 418; *Ribnik* v. *McBride*, (1928) 277 U. S. 350; as well as the familiar case of *Munn* v. *Illinois*, (1876) 94 U. S. 113.

[4] *Munn* v. *Illinois*, (1876) 94 U. S. 113.

[5] *Wolff Packing Co.* v. *Court of Industrial Relations*, (1922) 262 U. S. 522, 67 L. Ed. 756, 27 A. L. R. 1280.

the public of gas,[6] water,[7] and electricity[8] are placed in the "public" category while the corner grocery,[9] the doctor,[10] and the druggist[11] are left to be classified as "private." And so the questioner could go through the entire list of modern businesses which, from a practical standpoint, more or less affect the public welfare. The lawyer finds himself hard put to offer any real reason for these distinctions, and can only explain them in the terms which the courts have themselves used. He can only be certain of one thing, and that is that all business is juristically divided into two categories, one "public" and the other "private," and that the courts have placed some enterprises in the one class and some in the other. He also knows that the Supreme Court has said, with great emphasis, that a "private" business cannot be made a "public" one for the purposes of regulation by legislative fiat.[12] But when he starts to reason "why," his troubles begin.[13] The impossibility of generalizing about characteristics of enterprises "affected with a public interest" is apparent to anyone who has investigated the subject with thoroughness.[14] The cases simply won't fit into any well-defined rules, try as the courts do to formulate them,[15] and anyone who attempts a logical exposition of the law must either bend the cases to fit his own pre-conceived pattern, or else give the task up as a hopeless job.[16] Without any disrespect to text-

[6] *Rushville* v. *Rushville Natural Gas Co.*, 132 Ind. 575, 28 N. E. 853 (1892).

[7] *Spring Valley Waterworks* v. *Schottler*, (1884) 110 U. S. 347, 28 L. Ed. 173.

[8] *Snell* v. *Clinton Elec. Co.*, (1902) 196 Ill. 626.

[9] *Wolff Packing Co.* v. *Court of Industrial Relations, supra.*

[10] *Hurley* v. *Huddingfield*, 156 Ind. 416.

[11] *Liggett Co.* v. *Baldridge*, 49 Sup. Ct. 57 (1928).

[12] *Commission* v. *Duke*, (1925) 266 U. S. 570.

[13] See for excellent treatment of the "public interest" doctrine in general, Robinson, 'The Public Utility Concept in American Law," (1928) 41 Harv. L. Rev. 277; Rottschaeffer, "The Field of Governmental Price Control," (1926) 35 Yale L. J. 438; Keezer, "Some Questions Involved in the Application of the 'Public Interest' Doctrine," (1927) 25 Mich. L. Rev. 596.

[14] In Mr. Keezer's article, supra, a whole section is headed "Impossibility of Generalizing About Public Interest Enterprises."

[15] See opinion of Chief Justice Taft in *Wolff Packing Co.* v. *Court of Industrial Relations, supra,* where he lays down three general rules, which are taken up *infra.*

[16] Professor Bruce Wyman, in his two volume treatise on Public Service Corporations (1911) attempted to generalize, and largely for this reason his monumental work cannot be looked upon as authoritative in this respect.

book writers on Public Service Law, it seems apparent that a treatise which attempts to define a "public utility" or what elements go to constitute a "public interest" must be, in effect, a mere recital of decided cases— an approach similar to that of Justice McKenna[17] when he said, in holding the business of fire insurance to be "affected with a public interest" that "we can best illustrate by examples."

However, conceding the difficulty of formulating any precise rules of law in respect to the "public interest" doctrine, it might be worthwhile to examine the logical processes of the courts in "delimiting" the concept, with some hope of at least learning the judicial methods of approach. This can only be accomplished by resorting to the reasoning in the opinions of the courts themselves, and, by their language, discovering what logical methods, if any, they have used in developing a concept which has, under our constitutional form of government, taken on an enormous importance. That there are many who contend, with much force, that it is futile to attempt to analyze the methods of courts by what they themselves say cannot be denied. Such scholars admonish us to look at what the courts actually do for a true criterion, and to tear aside that veil of language known as the opinion, which is regarded as a mere rationalization used to cover up the true basis of a decision. It is doubtless true that personal, political, and economic influences, unexpressed as they necessarily must be, are a force in determining a great many judicial decisions. This applies particularly to the field of constitutional law, where policy is so closely bound up with legal doctrine.[18] But, conceding the force of this very obvious truth, it is nevertheless true that the opinions of the courts, written as they are to express the views of the judges,

[17] *German Alliance Insurance Company* v. *Lewis*, (1914) 233 U. S. 389, 34 Sup. Ct. 612, 58 L. Ed. 1011. This case is dealt with in detail *infra*.

[18] See "Personal, Political, and Economic Influences in the Decisions of Judges," by G. C. Haines (1922) 17 Ill. L. Rev. 116. Ehrlich, in his "The Science of Legal Method," p. 48. says in part:: "The administration of justice has always contained a personal element. In all ages social, political, and cultural movements have necessarily exerted an influence upon it; but whether any individual jurist yields more or less to such influences, whether he is more inclined to follow tradition or is rather disposed to introduce changes and innovations depends, of course, less on any theory of legal method than on his own personal temperament."

still constitute the chief evidence of reflective thinking, and must be the basis for any study of the application of logical methods of judicial thought. And it is this judicial logic which we propose to analyze.

And what is the starting point for such an analysis? What seem to be the chief methods of attack? Through an examination of the cases it semes apparent that the courts have adopted, in more or less restricted form, two philosophical or logical methods of approach. For lack of better descriptive terms we can call one the "functional analogy" method and the other the "physical analogy" method. As in the case of any attempt to give a title to something so vague as a philosophical method, there is much lacking in our choice of terms. But they can serve our purpose as well as any we can think of.

Under our American system of government, the doctrine of business being "affected with a public interest" is used as a criterion for sustaining public regulation. Because of the due process clauses of the Fifth and Fourteenth Amendments to the Federal Constitution the state and federal governments cannot regulate in detail a business unless it is "affected with a public interest."[19] But this principle is not applicable to all governmental regulation. For instance, under the so-called "police power" states have been permitted to regulate to a certain extent businesses and professions admitted to be essentially "private" in nature. Typical instances are regulations of physicians[20] and employment agencies[21] through the requirement of a license, regulation of working hours in industry,[22] and workmen's compensation acts.[23] One wonders just where the line can be drawn, or whether it can be drawn at all.[24] Since our study is concerned only with the "public interest" doctrine, we are not concerned with the regulation of private business. In fact, as far as regulation itself goes there have been attempts to break up business "affected with a public interest" itself into

[19] *Tyson* v. *Banton, supra; Ribnik* v. *McBride, supra.*
[20] *Dent* v. *W. Va.*, (1889) 129 U. S. 114.
[21] *Brazee* v. *Michigan*, (1917) 241 U. S. 340.
[22] *Arizona Emp. Liability Case*, 250 U. S. 400.
[23] *Muller* v. *Oregon*, 208 U. S. 412.
[24] A good exposition of this control of "private" business is found in Bevis, "Administrative Commissions and Administration of Justice," (1928) 2 Univ. of Cin. L. Rev. 1, 6 et seq; Clark, Social Control of Business (1926).

two classes—business only slightly "affected" such as insurance,[25] which justifies sume regulation, and business thoroughly saturated with "public interest" and justifying detailed regulation, such as companies furnishing gas, electricity, and water. These latter are known as "public utilities."[26] This distinction is more artificial than real, and adds a useless refinement to an already over-refined phase of the law. For the purposes of this analysis it is doubly useless, for we are not concerned with results of the "public interest" concept as with the logical methods used by the courts in its application.

The "public interest" doctrine is old,[27] and in different periods it has been used for different purposes.[28] Just as today it has its most important application in cases of public regulation, especially price-fixing,[29] so in its early history it was used to fix the application of special liabilities to business.[30] But the principle has remained the same in that it has always been invoked to force business to assume a greater responsibility toward the public, whether in the matter of liability, discrimination, or prices. So the methods of logical approach in the development of the "public interest" concept should be considered with this principle in mind.

By the "function method" of approach we mean that process of judicial logic which gives practically conclusive weight to the particular function of the business in society in determining whether or not it is "affected with a public interest." By such a process the enterprise is considered on its merits, and the courts are forced to take into account its status with reference to the economic and social welfare of the public. This includes such questions as whether the business possesses a legal or virtual monopoly, i. e., whether an appreciable section of the public "are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole;"[30] whether the com-

[25] *German Alliance Insurance Co.* v. *Lewis, supra,* note 17.

[26] For an elaboration of this distinction see Robinson, "The Public Utility as Social Engineering," (1929) 14 Corn. L. Q. 1.

[27] Adler, Business Jurisprudence, (1915) 28 H. L. R. 135.

[28] Burdick, Origin of Duties of Public Service Corporations, (1911) 11 Col. L. Rev. 515, 616, 743.

[29] The Field of Governmental Price Control, supra, note 13.

[30] Stone, J., dissenting in *Ribnik* v. *McBride, Supra.*

modity furnished by the business is a prime necessity to the general public; and whether such classification is justified on the grounds of "public necessity," which in effect embraces the two prior considerations. In other words, the "functional" approach is from the social-economic standpoint, in that the policy behind the application of the "public interest" doctrine is conditioned primarily upon such consideration. We might go so far as to say, with Professor Robinson, that the matter becomes a question of "pure economic fact."[31] In effect, the courts view the question as one in which the social or economic utility of the particular business is the criterion.

As opposed to this so-called "functional" method there is that which we have called the "physical analogy" approach. It presupposes, upon largely historical grounds, that some businesses are inherently "affected with a public interest." With this proposition as an *a priori* assumption the courts condition the application of the "public interest" doctrine to any particular business upon the basis of the physical analogy between such a business and those of the group already placed in the "public" category.[32] Such a method has little or no regard for social or economic aspects of business, but embraces an approach based upon mere logical exposition of judicial phraseology.

The purpose of this paper is to attempt to set forth the part which these two essentially different philosophical methods of approach have played in developing and delimiting the "public interest" concept. It cannot be assumed that the particular methods are in all cases well defined, for, as in the case of any juristic philosophy in action, the distinctions are at times vague and ill-defined, and in many instances confused. However, it is believed that an examination of the cases will show that there is a very practical basis for the analysis which has been postulated.

II.

Since the "physical analogy" method is predominantly historical, we must consider what we might term the origin of

[31] Robinson, "Public Utility as Social Engineering," supra.
[32] See a note in 15 Harv. L. Rev. 309 (1901).

"public service" law and of the "public interest" doctrine.[33]

The idea of business "affected with a public interest" apparently had its origin in the old common law idea of the "common" callings. In a very scholarly analysis of the early English cases it has been pointed out[34] that the term "common," which is more or less synonymous with "public," was originally applied to all businesses which held out to serve the public generally, as opposed to those in which it was the purpose to serve merely private individuals or groups. Thus, in the Year Books we find the term "common" applied to farriers, bakers, surgeons, and tailors as well as to the familiar carriers and innkeepers.[35] Such businesses had fastened upon them the duty to sell at reasonable prices, to serve all who applied, and to sell true commodities as represented.[36]

Professor Wyman has maintained, in justifying his fundamental theory of the nature of business "affected with a public interest," that the basis for denoting these medieval businesses as "common" was the presence of a monopoly, legal or virtual.[37] But this has been refuted[38] and the true basis shown to be the holding out as "open to public service"[39] *i. e.*, the profession to serve all indiscriminately.

It is true that the particular period of which we now speak was one of governmental paternalism and regulation.[40] Price control was the order of the day and no enterprise was free. However, it does not follow that this general governmental regulation of practically everything was connected with the judicial concept of "common." The application of the term "common"

[33] The division of business into two classes, one private in the sense that it is free from extra responsibility and governmental regulation, and the other public in the sense that it is not free, seems peculiar to Anglo-American law. Adler, "Business Jurisprudence," supra, Note 27; Preface, Story on Bailments (1856).

[34] Adler, "Business Jurisprudence," supra, Note 27.

[35] Op. cit., pp. 149-152, and cases there cited.

[36] Sheppard, writing in 1652 (Office of Justice of the Peace).

[37] Wyman, Public Service Corporations, Chap. I-VII; "Public Callings and the Trust Problem," (1904) 17 Harv. L. Rev. 226.

[38] Adler, "Business Jurisprudence," supra; Burdick, "Origin of Duties of Public Service Corporations," supra, Note 28.

[39] "What, then, did 'common' mean? Simply 'business'—'business' carrier, 'business' tailor, 'business' barber." Adler, supra, p. 152.

[40] The Field of Government Price Control, supra, Note 13; Freund. Police Power (1924), p. 382; Cheadle, "Governmental Control of Business," 20 Col. L. Rev. 438, 550 (1920); Gilmore, Regulation of Prices, 17 Green Bag 627 (1925).

in this period carried with it added responsibility of the business to the public, just as the application of the doctrine of "public interest" does today, with the difference being only one of emphasis as to the particular duties.[41]

Since holding out to serve the public generally placed a business in the "common" category, how, then, did the law get away from this old common law concept? It is certainly not in vogue judicially today, nor has it been for some time past.[42] With the dawn of what we might call our modern judicial era, or at least semi-modern, we find that only two members of the erstwhile "common" group retain their status, namely, carriers and innkeepers. No definite time can be said to mark the passage of the older concept, for like all legal progress, it was a matter of slow evolution.[43] Just why carriers and innkeepers who held themselves out to serve generally remained "common," and other businesses such as those of tailor, surgeon, and farrier dropped away and became essentially "private" is somewhat a matter of conjecture. Generally speaking, we might say that the *laissez faire* doctrine which was responsible for this change in attitude was due to the individualistic ideas disseminated by the classical economists, culminating in the assumption that social welfare was a by-product of economic individualism.[44] The fact that carriers and innkeepers were excepted from this sweep is explained as having been due to a variety of reasons.[45] It was said that in the cases of the carrier's trade there were peculiar internal characteristics which brought it constantly before the courts. Their liability for refusal to serve had become a familiar doctrine long after the reasons for its imposi-

[41] Burdick, supra, Note 28.

[42] Justice Holmes, in his Common Law, p. 184, says: after quoting from *Lane* v. *Cotton*, to the effect that "if a man takes upon himself a public employment he is bound to serve as far as the employment extends:" "An attempt to apply this doctrine generally at the present day would be thought monstrous. But it formed a part of a consistent scheme for holding those who followed useful callings up to the mark. . . . The scheme has given way to more liberal notions but the disjecta membra still move."

[43] Three cases, decided in the early eighteenth century, still bear out the medieval idea: *Gisborn* v. *Hurst*, 1 Salk. 249 (1710); *Lane* v. *Cotton*, 12 Mod. 472 (1701); *Coggs* v. *Bernard*, 1 Ld. Raym. 909 (1714).

[44] The Field of Governmental Price Control, supra; see generally Adam Smith, Wealth of Nations, and Ricardo, Principles of Economy and Taxation.

[45] Adler, supra, Note 27; Burdick, supra, Note 28.

tion were forgotten. The same was true of the innkeeper. Another factor suggested is the analogy of these two businesses to public offices on account of their importance.[46] Undoubtedly the indefinable but ever recurring principle of public policy played no little part, for the liabilities attached by the "commonness" of these two groups was advantageous to the ever-growing numbers of merchants and travellers, who had become the darlings of the courts.[47]

After this period of transition we find that, so long as there was a holding out to serve the public generally, carriers and innkeepers had come to be looked upon as inherently "common," and the term "common" had become more or less synonymous with the phrase "affected with a public interest." This inherentness was merely a matter of history, but it seems that the courts had lost sight of it.

From the very nature of the business of the innkeeper, it is apparent that the extension of the "public interest" concept through analogy cannot be very broad. The business of innkeeping today differs only in the matter of degree from the same business three hundred years ago, and its ramifications and variations are slight.

The modern hotel business has been held to be "affected with a public interest."[48] Although Wyman maintains[49] that the basis for regulation and imposition of special liability upon hotels rests upon the existence of a time monopoly, *i. e.* that the prospective patron will pay exhorbitant prices rather than look elsewhere for accommodations, and is therefore the result of what we have called the "functional" approach, there is no authority in the cases to show that the courts have adopted this view. Thus, in the case of State v. Norval Hotel Co.,[50] where the right of the state to regulate hotel rates was in question the

[46] Jeremy on Carriers, p. 59.

[47] Adler, supra, Note 27; Burick, supra, Note 28; Also see *Bonner* v. *Welbourne*, 7 Ga. 296 (1849), where it is said: "It is because the inns and innkeepers have to do with the travelling public—strangers—and that for brief periods, and under circumstances which render it impossible for each customer to contract for the terms of his entertainment, that the law has taken them so strictly in charge." Also see *Harrell* v. *Owens*, 1 Dev. & Vat. 273 (1835).

[48] *Nelson* v. *Johnson*, (1908) 104 Minn. 440, 116 N. W. 828; *State* v. *Norval Hotel Co.*, 133 N. E. (Ohio) 75.

[49] Public Service Corporations, Vol. I, Sec. 106.

[50] 133 N. E. (Ohio) 75.

court referred to the fact that the business of innkeeping was perhaps the oldest of the "common callings," and there rested its decision, holding that the modern hotel was "affected with a public interest." In other words, the modern hotel physically resembles the old inn as a business, and since the old inn was "affected with a public interest" the hotel is likewise "affected." A simple rationale.

Boarding houses have been held not to come within the concept because there is no holding out to serve generally. This is apparently the quality which distinguishes them from inns.[51] Except in the case of Civil Rights Statutes, which do not rest upon the "public interest" doctrine,[52] there has been no detailed regulation of restaurants attempted under the "public interest" doctrine, but the question has arisen as to the duty of a restaurant to serve all who apply. Thus postulated, it has been held that it does not come within the concept *because it does not furnish lodging.*[53] Nowhere do we find the courts passing upon the question of whether the purveyance of food to the public is equally, if not more important than furnishing lodging from an economic or social standpoint. And surely the modern restaurant possesses just as much of a time monopoly as does the modern hotel. But the courts seem too busy drawing physical analogies between restaurants and inns to bother with "functional" considerations.[54]

As we have pointed out, the extension by physical analogy of the "public interest" doctrine in respect to inns has been narrow. But exactly the converse is true in the matter of carriers, for, with the essentially broad term of carriage in itself, together with judicial subtlety, the analogical extension of the doctrine as so applied constituted the chief vehicle of advance for a long period of time. In fact, one eminent authority[55] has said that the concept of common carrier or perhaps more accurately that of "transportation," has been the chief reliance of the courts,

[51] *MacIntosh* v. *Schops*, 92 Ore. 307, 180 Pac. 593 (1919); *McClaugherty* v. *Cline*, 128 Tenn. 605, 163 S. W. 801 (1913).

[52] See *State* v. *Brown*, 112 Kan. 814, 212 Pac. 663.

[53] *Sheffer* v. *Willoughby*, 61 Ill. App. 263 (1895); *Merrill* v. *Hodson*, 88 Conn. 314, 91 Atl. 533 (1914).

[54] Courts in this country have practically abandoned the judicial enlargement of the "public interest" category, and now rely on the legislature to make the first move. Robinson, supra, Note 13.

[55] Robinson, The Public Utility Concept, supra.

especially the Supreme Court of the United States, in extending the "public interest" concept up to the case of the German Alliance Insurance Co. v. Lewis.[56] This matter will be commented upon later.

The older forms of common carriage, which were prevalent at the beginning of our so-called modern era, and which were included in the older concept have had their "public interest" taken largely for granted.[57] The actual carriage seems to have been regarded as inherently "public," the only question being as to whether there was a holding out to serve all who apply, which must be raised in any case.[58]

With the development of new inventions little difficulty was found in imposing liability and sustaining regulation of them. The question was always one of extending the *physical analogy* of carriage. The doctrine might be stated that, if there was carriage plus a necessary holding out, the enterprise was looked upon as being in the "public category. Thus, in the case of Wilmington Transportation Co. v. Railroad Commissior. of Cal.[59] the court assumed without argument that a steamship, holding itself out to serve generally, could be regulated as to rates.

With the development of railroads the problem was a comparatively simple one. Their analogy to the older common carriers could not be denied.[60] There was no attempt to reason out the matter by functional analogy except in a few instances, and in those cases it seems to be pure rationalization, for the "public" status of railroads was already well established. Chief Justice Waite, in upholding the right of a state to regulate railroad rates[61] observed: "Railroad companies are common carries for

[56] (1914) 233 U. S. 389. See also for a discussion of this point Robinson, The Public Utility as Social Engineering, 14 Corn. L. Q. 1 (1929).

[57] This includes wagons, stage coaches, truckmen, teamsters, porters and ferries. See *Friarson* v. *Frazier*, 142 Ala. 232, 37 So. 825 (1904); 63 U. of Pa. L. Rev. 718 (1915). For a general discussion see Story on Bailments, Sec. 496, and cases there cited.

[58] *Commission* v. *Duke*, *supra*, Note 12.

[59] (1915) 236 U. S. 151. As to whether a steamship is an innkeeper see *Clark* v. *Burns*, 118 Mass. 275 (1875); *Adams* v. *N. J. Co.*, 151 N. Y. 163, 45 N. E. 369 (1896). The decisions were negative.

[60] See *Thurston* v. *Union Pac. R. R. Co.*, 4 Dillon 321 (1877); *Gleana & C. U. R. R. Co.* v. *Yarwood*, 15 Ill. 468 (1854).

[61] *C. B. & Q. R. R.* v. *Iowa*, 94 U. S. 155.

hire. They are incorporated as such and given extraordinary power, in order that they may better serve the public in that capacity. They are therefore engaged in a public employment, affecting the public interest and subject to legislative control by their charters." From the language used the Chief Justice seems to be putting the right of control upon the basis of legal monopoly, although he accords great weight to the words "common carriers for hire." But the courts generally did not bother with such rationalization, being content to simply classify the railroads as common carriers and be done with it.[62] Even Chief Justice Waite himself, in his opinion in *Munn* v. *Illinois*,[63] decided at the same term of court, seems to assume that common carriers for hire are inherently affected with a public interest, regardless of charter.

Without generalizing too greatly it seems safe to say that the entire field of modern carriage has been brought within the "public interest" fold by physical analogy. Take for another good example the modern taxicab. From time immemorial the similar occupation of hackmen who held themselves out to serve had been held "public" and subject to regulation[64] and the American courts have sustained such regulation without question.[65] As to just how far this concept has governed the courts in determining the "public interest" of taxicabs, which are the modern prototype of hackmen, is not entirely apparent. The regulation of the former was upheld by the Supreme Court of the United States in a case[66] involving the question of whether the defendant taxicab company came within the operation of the District of Columbia Public Service Act. In holding that it did the Court reasoned that since it was a carrier, serving the public generally it was within the "public interest" concept. "The important thing is what it does, not what the charter says . . . ," said the Court. The public grant of privileges was held to be not determinative.

It would be useless to go into all forms of regulation of com-

[62] Keezer, Some Questions in the Application of the "Public Interest" Doctrine, 25 Mich. L. Rev. 596, 599 (1927).
[63] 94 U. S. 113 (1876).
[64] Wyman, Public Service Corportaions, Sec. 186.
[65] *Bonce* v. *Dubuque St. Ry. Co.*, 53 Iowa 278, 5 N. W. 577 (1880); *Combs v. Lakewood*, 68 N. J. Law 582 (1902).
[66] *Terminal Taxicab Co.* v. *Kutz*, 241 U. S. 252.

mon carriers as such. The whole theory of federal regulation of the transportation of passengers and property by rail or waterway, and of oil through pipe lines, is based upon the theory that the agencies so doing are common carriers.[67] Possibly the latest example of the carrier concept being extended in this manner (physical analogy) has been in the case of motor-bus transportation.[67*]

In the matter of railroads, steamships, taxicabs, pipe lines, etc., the approach by physical analogy was not so difficult. However, even when confronted with much more difficult problems the courts continued unabashed. By the end of the nineteenth century the status of telephone and telegraph companies had become very important. The courts were faced with the problem of how to sustain public control of these great enterprises, which had become practical public necessities. It would seem that the public status of these businesses could have been worked out by a "functional" approach, taking into consideration their great social and economic importance. Such companies in practically all cases exercised legal monopolies and were the beneficiaries of public grants and privileges, and the public necessity of the commodity furnished could hardly be questioned. But we find only a few courts giving these elements any consideration.[68] The great majority went off on the "physical analogy" approach. For instance, in *Hockett* v. *State*[69] the Indiana court was faced with the question of whether a regulation of rates of telephone companies could be sustained. In holding that it could be the court said: "The telephone is one of the remarkable productions of the present century . . . It may therefore be regarded, when relatively considered, as an indispensable element of commerce. The relations which it has assumed toward the public make it a common carrier of news—a common carrier in the sense that a telegraph is a common carrier—and impose upon it some well-defined obligations of a public character. All

[67] Interstate Commerce Act, c. 104, Sec. 1, 24 Stat. at L. 379. Also see the Pipe Line Cases, (1914) 234 U. S. 548, where the Supreme Court held that if the business of transporting oil through pipe lines was *in fact* common carriage, it came within the act, as subject to regulation.

[67*] *Ex parte Tindall*, 229 Pac. (Okla. 1924) 125.

[68] *Turnpike Co. v. American New Co.*, 43 N. J. L. 381 (1881); *State* v. *Citizens Tel Co.*, 61 S. C. 83 (1901).

[69] 105 Ind. 250, 5 N. E. 170 (1886).

the instruments and appliances used by the telephone company in the prosecution of its business are, consequently, in legal contemplation, devoted to a public use."

Similar reasoning was employed by Justice Brewer, later a member of the Supreme Court, in the case of *Missouri* v. *Bell Telephone Co.*[70] In deciding that the company must serve without discrimination he said: "A telephonic system is simply a system for the *transmission* of intelligence or news. It is perhaps in a limited sense and yet in a very strict sense, a common carrier. It must be equal in its dealing with all. . . ."[71]

The extension by such an analogy in the case of the telegraph and telephone has been severely criticized[72] as a basis for sustaining regulation, and it is suggested, and we think correctly, that such "public interest" should have been conditioned upon the fact that such enterprises possess legal monopolies, coupled with the consideration of the great necessity of the commodity furnished.

It would seem that the courts could have pursued the same line of attack in the case of companies furnishing gas, water, and electricity, but apparently they did not. The public interest doctrine was applied to them largely on the basis of their possession of legal grants of privileges, such as eminent domain, rights of way, etc.[73] Therefore, the approach would seem to be "functional," since the possession of these legal privileges would grant a monopoly in a necessity of life.[74]

However, the fact that the carrier analogy dominated the courts to a comparatively recent date, even in the case of gas, water, and electric companies is apparent from the dissenting opinion of Justice Lamar in the German Alliance Insurance Co.

[70] 23 Fed. 539 (1885), aff'd in 127 U. S. 180.

[71] Similar reasoning is followed in the cases of *Gardner* v. *Providence Tel. Co.*, 23 R. I. 262; *State* v. *Del. T. & T. Co.*, 47 Fed. 633 (1891).

[72] Note, 15 Harv. L. Rev. 309 (1901).

[73] *Almstead* v. *Proprietors of Morris Aqueduct*, (1885) 47 N. J. L. 311; See generally Burdick, Origin of Duties of Public Service Corporations, 11 Col. L. Rev. 616, et seq.

[74] But see the brief of counsel in *Jones* v. *City of Portland*, 245 U. S., 217, where it was argued that "If the furnishing of heat generated by an electric current, or heat produced by the combustion of gas is a public use, the one transmitted through wires over the highway, the other conveyed through pipes under the highway, why then is not the furnishing of heat in the latent form of coal or wood by transportation along highways equally a public use."

case.[75] He frowned upon the contention that the business of insurance was affected with a public interest, and strenuously argued that the "public interest" group all "have direct relation to the business or facilities of transportation or distribution—to the transportation of passengers, goods, or intelligence by vehicle or wire; to the distribution of water, gas, or electricity through ditch, pipe, or wire; to wharfage, storage, or accommodation to property before the journey begins, when it ends, or along the way. When thus enumerated, they appear to be grouped around the *common carrier as the typical 'public business.'* "[76] In the same case Justice McKenna, in writing for the majority had referred to the carrier group as "obviously" of a public nature. The case was decided almost forty years after *Munn* v. *Illinois*[77] and even then that famous case was referred to in the dissent as having been based upon physical analogy.

III.

So far it has been the purpose to show the importance of what we have called the "physical analogy" method in developing and delimiting the concept of business "affected with a public interest." Starting with *Munn* v. *Illinois*[78] the functional approach begins to grow in importance. However, it must not be supposed that the physical analogy method is thrown overboard, for it still reigns supreme within its limits. However, the fact becomes increasingly apparent that the courts begin to rely on social and economic factors in applying the concept outside of the field of pure carriage.

The facts brought to the consideration of the Court in the Munn case are too well known to necessitate any detailed exposition. The state of Illinois had declared grain elevators to be "affected with a public interest" and prescribed the maximum rates which could be charged. The statute was so framed as to be applicable only to elevators in Chicago. It was shown as a fact that in the grain elevator business in that city there was a vir-

[75] (1914) 233 U. S. 389.

[76] Op. cit.

[77] This is evidently one of the cases which Justice Lamar referred to when he refers to "wharfage. storage, or accommodation along the way." It must be admitted that there is some force to this conclusion when the language in the Munn case is considered. See *infra*.

[78] (1876) 94 U. S. 113.

tual monopoly exercised over practically all the grain raised in the Northwest. A divided Court upheld the statute. Chief Justice Waite, writing for the majority first quoted from Lord Hale[79] to the effect that when a business or property is "affected with a public interest it ceases to be *juris privati* only," which really meant nothing at all. And why were the particular elevators "affected with a public interest?" Because, due to geographical location and the limitation of grain elevator sites in Chicago, they exercised a practical monopoly of the entire grain production of the country. To use the words of the Court "they stand in the very 'gateway of commerce' and take toll from all who pass. Their business most certainly tends to a common charge and is become a thing of public interest and use . . . It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress."

It has been said[80] that the common carrier analogy still dominated the Court in this decision. This seems to be true only in a limited sense, for if we are to take the language of the opinion at its face value, the emphasis was placed upon the existence of virtual monopoly in a necessity of life, and not upon the fact that grain elevators were ancillary to common carriers. The Court here, for practically the first time, begins to talk about "social science" and "public necessity."

In *Budd* v. *New York*[81] the doctrine of the Munn case was precisely followed in a case which involved substantially the same factual set-up. But Mr. Justice Brewer, in a vigorous dissent, denied the entire Munn doctrine. It will be remembered that this judge was willing enough to apply the "public interest" doctrine to telephone and telegraph companies upon the physical analogy to common carriers.[82]

But within two years the Supreme Court rendered a most

[79] 1 Harg. L. Tracts 78, where Lord Hale was dealing principally with the question of wharves which had been dedicated to the public, an entirely different question than that which Chief Justice Waite had under consideration.

[80] Robinson, The Public Utility Concept, supra, Note 13, at p. 280.

[81] (1892) 143 U. S. 517, 36 L. Ed. 247.

[82] See p. 28 herein.

confusing decision[83] which upset the nice principles laid down in the Munn and Budd cases. The Court had before it a North Dakota statute regulating grain elevators all over the state, without regard to size or location. The defendant, an elevator operator, succeeded in showing without contradiction that there was no monopoly element whatsoever. The court was left without any functional approach, or the basis therefor, and completely reverted to the physical analogy theory. In the opinion it was said that the "facts rehearsed (the matter of monopoly) are for those who make, not those who interpret the law. . . When it is once admitted that it is competent for the legislature to control the business of elevating and storing grain . . . in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances." Four Justices dissented upon the ground that the facts did not bring the case within the rule of the Budd and Munn cases, and if one accepts the functional approach there can be no doubt that such a contention is valid. But the Court evidently wanted to sustain the regulation, and was driven to the physical analogy method of reasoning to do it, namely, that in the Munn case it was held that grain elevators were "public," and in the Brass case the subject involved was grain elevators, which had thus become "public" because of the Munn case. The only fact to be proved was the physical nature of the business, according to the Court.

Somewhat analogous is the line of attack followed in applying the "public interest" doctrine to stockyards. In *Ratcliffe* v. *Wichita Union Stockyard Co.*[84] the validity of a Kansas statute regulating stockyard rates was before the court. In upholding the application of the doctrine it was observed that "the operation of a stockyard has more of the characteristics of a public business than the carrying on of an elevator or a warehouse. It possesses the market features including considerations of sanitation and health, and also has the monopolistic features. The stockyards in question are in a commercial center, and constitute the public live stock market for a great region. . . The company has therefore a practical monopoly of a vast busi-

[83] *Brass* v. *North Dakota*, (1894) 153 U. S. 391, 38 L. Ed. 757.
[84] (1906) 74 Kan. 1, 86 Pac. 150.

ness."[85] There can be no doubt that what was uppermost in the mind of the court were important economic considerations, and that it relied exclusively upon the functional method.

But Chief Justice Taft, in deciding the constitutional question as to whether the rates of stockyards could be regulated under the Packers and Stockyards Act, did not see fit to go into such questions, and the ease with which he declared stockyards to be "affected with a public interest" makes one wonder at his subsequent opinion in the Wolff Packing Co. case.[85*] Said the Chief Justice: "The act therefore treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms in the middle west to the consumers in the east. *It assumes* that they conduct a business affected with a public use of a national character and are subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion. That has been settled since the case of *Munn* v. *Illinois*."[86] The statute *assumed* that stockyards were "affected with a public interest" and so did the Chief Justice, without consideration of the economic criteria. If it was "settled" in the Munn case, he did not state why. Apparently he was of the opinion that such enterprises as stockyards had become public utilities in their own right, which is more or less analogous to the reasoning in the Brass case in reference to grain elevators.

During the period following the Munn and Budd cases there was much judicial recognition given the functional approach. The Associated Press was found to be "affected with a public interest" by some courts[87] while in another case it was emphatically held not to be.[88] The monopoly element was held more or less determinative in all of them. In *Ladd v. Southern Cotton Press Co.*[89] cotton gins were held to be private because conditions made them "free to everyone" while in *Tallahassee Oil & Fertilizer Co.* v. *Holloway*[90] "the public interest" doc-

[85] See also *Cotting* v. *Kansas City Co.*, 183 U. S. 79; *D. L. & W. Ry. Co.* v. *Central Stockyard & Transit Co.*, 45 N. J. Eq. 50.

[85*] *Infra*, Note 95.

[86] Italics ours.

[87] *Interocean Publishing Co.* v. *Associated Press*, 184 Ill. 438 (1900).

[88] *State* v. *Associated Press*, 159 Mo. 419 (1901).

[89] 53 Texas 172 (1880).

[90] 200 Ala. 492 (1917).

trine was applied largely on the basis of the monopoly situation existing in the particular community. None of the cases seems absolutely clear as to the philosophical method of approach employed, but all lean heavily upon economic criteria, which evidences the functional approach.

However, in 1914 the Supreme Court decided what may be aptly called a landmark case when it disposed of the problem raised in *German Alliance Insurance Co.* v. *Lewis.*[91] It had before it a state regulation of the rates of fire insurance companies, which, of course, involved the question as to whether that great business could be brought within the purview of the "public interest" doctrine. The Court was now face to face with what might be called a question "of pure economic fact," for the business of insurance was a far cry from the "facilities of transportation." The physical analogy to the carrier or its allied groups was not even in the background. The Court was compelled to consider the business purely from the standpoint of its social and economic relation to the community. Justice McKenna, writing for the majority, found himself more or less "on his own," for even the Munn case was no direct authority for the problem he had before him, except in so far as it gave him a guide as to the functional method of attack. Actual monopoly in the insurance business was not proved. What the Court really decided was no more or no less than that the business was so vast and of such great importance to society as to justify the application of the "public interest" doctrine. It must be remembered that it was in this case that Justice Lamar so strenuously rebelled, holding that physical analogy to the carrier was the only true basis for such an application.[92] Even Justice McKenna had some difficulty with this matter, and he began by saying, "We can best illustrate by examples. The transportation of property—business of common carriers—is obviously of public concern and its regulation is an accepted governmental power. The transmission of intelligence is of cognate character." This would seem to indicate that if the business of insurance had had in it any elements of the business of transportation, which was so "obviously" of a "public

[91] 233 U. S. 389 (1914).
[92] See supra, p. 29 herein.

nature," Mr. Justice McKenna himself would have resorted to physical analogy. But the absence of any such analogy—in fact any analogy whatsoever to any business which had previously been placed in the "public" category—forced him into the functional approach, which he so thoroughly adopted.

With this ultimate fruition of what Chief Justice Waite called a principle of "social science" in the Munn case, the Supreme Court seemed to have definitely set out to judge the "publicness" of business on its economic and social utility alone.

The next important case to come up was the now famous *Block* v. *Hirsh*,[93] in which the Court was called upon to consider the validity of a New York statute amounting to a declaration that the business of housing was "affected with a public interest." In a five to four decision the act was upheld. It had admittedly been passed as an emergency measure to remedy post-war conditions in New York City. Mr. Justice Holmes wrote the majority opinion and, as might well be expected, he adopted the functional approach. After reviewing conditions in New York which made it apparent that the large tenant class was severely handicapped in dealing with the monopolistic landlords, he said: "Housing is a necessary of life. All the elements 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." He concluded with little more argument that it did not.

Strange to say, we find that in this case Justice McKenna was in the dissent. He had evidently become afraid of the standards which he had set up, and was recoiling from the functional criteria. It is hard to see how the business of insurance can be included within the "public interest" concept, and the business of housing in New York City excluded, if such criteria are to be determinative. But he was evidently afraid of a letting down of the bars, and of the subsequent swamping of economic individualism by public regulation. To use his own language. ". . . Houses are a necessary of life but other things are as necessary." But the same reasoning could just as well have been adopted in the German Alliance Co. case.

It is interesting in this particular to note the dissent of Justice Field in the Munn case in which he observed that "The

[93] (1921) 256 U. S. 135.

public has no greater interest in the use of buildings for the storage of grain than it has in the use of buildings for the residences of families, nor, indeed, anything like so great an interest." The majority of the Court in the Block case seemed to be of a similar opinion.

It has been said[94] that, dating time from the decision of the Munn case up to and including the year 1920, when *Block* v. *Hirsh* was decided, the policy of the Supreme Court in applying the "public interest" doctrine to business was one of "inclusion rather than exclusion." This seems to be true,[95] for after the year 1920 we find a rather definite reversal in form. The cases also seem to show a reversal of the logical mode of attack, and a reversion to the use again of the physical analogy as a substitute for the functional approach, which had evidently begun to frighten the Court.

The first intimation which we have of the Court's change of attitude came in *Wolff Packing Co.* v. *Court of Industrial Relations.*[96] The case involved the validity of the action of the Kansas Industrial Court in prescribing a wage scale in the business of a company engaged in the preparation of meat for the market. The statute creating the Court had in effect declared that the great industries affecting food, clothing, fuel, and transportation were impressed with a public interest. It was really what one writer[97] calls an attempt to make the term "public utilities" a synonym for necessaries of life.[98]

Chief Justice Taft, who spoke for the Court, rather ambitiously tried to summarize the philosophy of public regulation under the "public interest" doctrine. It is a good example of the utter confusion of the law in this respect. We can do no better than to quote him: "Business said to be clothed with a public interest justifying some public regulation may be divided into three classes:

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[94] Haughan, Vicissitudes of the Price Fixing Doctrine, 2 Dakota L. Rev. 430 (1929).

[95] *Munn* v. *Illinois*, *Budd* v. *New York*, *Brass* v. *North Dakota*, the *German Alliance* case, and *Block* v. *Hirsh*, all uphold the doctrine.

[96] (1923) 262 U. S. 522, 67 L. Ed. 756.

[97] Robinson, The Public Utility Concept, supra, Note 13.

[98] See also Humble, The Court of Industrial Relations in Kansas, 19 Mich. L. Rev. 675 (1921); Young, Industrial Courts, 5 Minn. L. Rev. 185; Rabinowitz, Kansas Industrial Court Act, 12 Calif. L. Rev. 1 (1923).

"1. Those which are carried on under the authority of a public grant of privileges which either expressly or impliedly imposes the affirmative duty of rendering public service demanded by any member of the public. Such are the railroads, other common carriers, and public utilities.

"2. Certain occupations regarded as exceptional, the public interest attaching to which, recognized from the earliest times, has survived the period of arbitrary parliamentary or colonial legislation for regulating all trades and callings. Such are those of the keepers of inns, cabs, and gristmills. . . ."

"3. Businesses which, though not public at their inception, may be fairly said to have risen to be such and have become subject in consequence to some governmental regulation. They have come to hold such a peculiar relation to the public that this is superimposed upon them. In the language of the cases, the owner by devoting his business to the public use, in effect grants the public an interest in that use and subjects himself to public regulation to the extent of that interest, although the property continues to belong to its private owner and be entitled to protection accordingly." As supporting this proposition the Chief Justice cites the Munn, Budd, and Brass cases, and the German Alliance Co. case.

Space does not permit a detailed analysis of this classification. That it is superficial is apparent—in fact, it is meaningless. It has been pointed out the railroads and other common carriers are in the "public" class largely as a result of the carry-over of medieval concepts by physical analogy. But the Court gives the public grant of privileges as determinative, and classes them with what it calls "public utilities." Just what it means by this latter is not apparent. In the second class why should the inns, cabs, and gristmills be classed as exceptional? This is simply begging the question, for why should they be so regarded? The real reason why they remained "public" has been the enslavement of the courts to the physical analogy line of attack. In the third class the group of cases gathered to support the general rule are those in which the public interest doctrine has been applied functionally, with one exception. But the Chief Justice relies on such a phrase as "*devoting* the business to the public use and *granting* the public an interest in that

use," whatever that means. It certainly does not mean holding out to serve the public generally, which is its only common sense meaning.

After laying down such general rules, he finally disposes of the case by saying that if the business of preparing food could be admitted to be "affected with a public interest" the regulation attempted by the Kansas Court would not even then be valid. However, by strong dictum he indicates that the Court would never consent to placing such a business in the "public" category. It would seem that he bases this deduction from the fact that the business of preparing food does not resemble any of the businesses previously placed within the purview of the "public interest" doctrine.

Starting with the Wolff Packing Co. case the Supreme Court seems to have definitely set its face against enlargement of the "public" classification of businesses upon economic and social considerations. Whether this is illustrative of a deeper and more fundamental philosophical change of front, as opposed to a mere change in logical methods is another question. It has been pointed out[99] that in the six years since 1920 the Supreme Court has declared social and economic legislation unconstitutional in more cases than in the entire previous fifty-two years. It is significant, however, to note that the "public interest" cases during the latter period show that the Court has abandoned social and economic criteria, and resorted once again to physical analogy.

After the Wolff Packing Co. case the Court, in 1927, was called upon to decide whether it would accept the declaration of the New York legislature that the business of reselling theater tickets was affected with a public interest justifying the fixing of prices at which such resales could be made.[100] By another five to four decision it was held that such a business, that of "ticketbrokers" as the Court called it, was "private" and, although subject to the licensing power of the state, could not be regulated as to price. The majority opinion was written by Justice Sutherland, who appears to have taken the "public interest" doctrine under his wing. The reasoning which he em-

[99] Brown, Due Process of Law, Police Power, and the Supreme Court, 40 Harv. L. Rev. 943, 944 (1927).

[100] *Tyson* v. *Banton*, (1927) 273 U. S. 418, 71 L. Ed. 718.

ployed was heavily historical and in it can be rather clearly discerned the use of physical analogy. He starts out by saying that a business is not "affected with a public interest" merely because it is large, or because the public derives benefit from it. The ritual of Justice Taft to the effect that the business must be "devoted" to the public and its use granted is quoted and approved, but no clarification of it is offered. Justice Sutherland evidently disapproved of the functional approach in the German Alliance case, for he says that it "marks the extreme limit to which this court has gone in sustaining price-fixing legislation." The Block case he disposes of as having been sustained in an emergency. He concludes with the following. "A theater or other place of entertainment does not meet this conception of Lord Hale's aphorism (the one quoted by Chief Justice Waite in the Munn case) or fall within the reasons of decisions of this Court based upon them. A theater is a private enterprise which, in its relation to the public differs obviously and widely, both in character and degree, from a grain elevator, standing at the gateway of commerce and taking toll . . . ; or stockyards, standing in like relation to the commerce and livestock; or an insurance company, engaged in a sort of common agency . . . Sales of theater tickets bear no relation to the commerce of the country . . . and certainly a place of entertainment is in no sense a public utility." A better example of reasoning by physical analogy can hardly be found, unless it is in one of his later opinions. Theaters are not like grain elevators, railroads, and insurance companies—therefore it follows, ipso facto, that they are not "affected with a public interest." If the reasoning of Justice Sutherland be accepted at its face value it is difficult to see how it will ever be possible to enlarge the list of "public" businesses outside of an amendment to the Constitution.

Justices Holmes and Stone rendered vigorous dissent. The former called the doctrine of "business affected with a public interest" a "fiction intended to beautify what is disagreeable to the sufferers." He says that "The truth seems to me to be that, subject to compensation where compensation is due, the legislature may forbid or restrict any businesses when it has sufficient force of public opinion behind it."

Justice Stone's dissent is a splendid example of the func-

tional approach. The view is taken that the prime justification for price regulation is the existence of a situation where a considerable portion of the public are at the mercy of a business or class of businesses, i. e. the existence of a monopoly, legal or virtual. After a review of the theater business in New York city, he concludes that such a situation there exists, and that the regulation should be upheld. The facts which Justice Stone referred to were not even given passing mention by Justice Sutherland.

The following year came the case of *Ribnik v. McBride*,[101] in which Justice Sutherland again spoke for the Court. The subject was the regulation by New Jersey of maximum rates chargeable by employment agencies. The statute was emphatically declared invalid, this time by a majority of six to three. The logical approach is similar to that in the Tyson case, except for the even more pronounced reliance upon physical analogy. Justice Sutherland starts out by asking the question "Has the business in question been devoted to the public use and an interest in effect been granted in that use?" With this meaningless phrase as a beginning, he cites *Tyson* v. *Banton*[102] for the authority that size, or the fact that the public derives a benefit from it, does not mean that business is 'affected with a public interest." His final reasoning should be quoted. "The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, an intermediary. While we do not say that there may be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in substantial character from the business of real estate broker, ship broker, merchandise broker, or ticket broker." He then cites the Tyson case for the authority that the business of ticket brokers is not "affected with a public interest," and says: "It is not easy to see how, without disregarding that decision, price fixing legislation in respect of other brokers of like character, can be upheld." He concludes by stating categorically that the business of an employment agency is a private one, like that of a druggist, butcher, baker, etc.

[101] (1928) 277 U. S. 250, 72 L. Ed. 913, 56 A. L. R. 1440.
[102] Supra, Note 99.

In one of the most scholarly opinions on the subject, Justice Stone again dissented. He reiterated that the chief justfication for regulation was the existence of a monopoly. The idea that the decision in the Tyson case governed the case before the Court was discredited, since the businesses were not at all similar, even though they might both be brokerage concerns. A large part of the opinion is taken up with an exhaustive survey of conditions existing in and because of employment agencies, and there can be little doubt, after a perusal of the data, that the need for regulation is in the nature of a necessity. The recognized evil practices in the business, and the social and economic effects are clearly set forth. We can certainly agree with him when he says "that there is a marked difference between the character of this business and that of real estate brokers, ship brokers, merchandise brokers, and more than all, ticket brokers." The fact that the cogent reasoning of Justice Stone did not prevail may be taken as meaning that the majority of the Supreme Court have turned their backs upon the functional approach, and have committed themselves to the outworn method of physical analogy.

So it is not surprising that we find the Court frowning upon the efforts of Tennessee to regulate the price of gasoline. No similar business had ever been declared to be "affected with a public interest," and the business bears no direct relation to the commerce of the country. Since Justice Sutherland denied the existence of a monopoly in the case, we have no definite way of knowing what the decision would have been if it had been shown. However, judging from the Court's remarks it would seem that they regard the gasoline business as inherently "private."[103]

IV.

It is difficult to attempt any very precise summary of the operation of the two conflicting judicial methods of thought as have been set forth here. Judicial philosophy at its best is not very well defined or worked out, and here we have it at its worst. However, the study does seem to show that the following conclusions are warranted:

(1) That the origin of our doctrine of business "affected

[103] Supra, page 16 herein.

with a public interest" is found in the medieval English law of common callings, and has been projected into our modern jurisprudence by means of physical analogy to the two such "common" groups which survived—the carrier and the innkeeper.

(2) Beginning with *Munn* v. *Illinois*[104] we find the courts in this country breaking away from the application of the doctrine through physical analogy to these two groups, and adopting the method of reasoning which we have called functional, or what Professor Robinson has called the criterion of economic fact.[105] This breaking away was had with difficulty and we still find traces of the carrier analogy. However, beginning with the German Alliance Co. case we have the Supreme Court relying entirely upon functional considerations, an attitude which apparently lasted until the decision in the Wolff Packing Co. case.

(3) From the time of the Wolff Packing Co. case to the present day the Supreme Court has apparently abandoned this method, and the Tyson, McBride, and Williams cases seem to show a reversion to the use of physical analogy, which now is relied on to restrict the "public interest" doctrine.

If the habits of thought of Justice Sutherland prevail, and there is no basis for the conclusion that they will not,[106] it would seem that the "public interest" doctrine will be frozen where it now stands, and will no longer be used as a medium for extending public regulation, except in the case of businesses already classified as "public."

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[104] 94 U. S. 113.
[105] The Public Utility as Social Engineering, supra, Note 26.
[106] Even Justice Stone concurred in the last decision, *Williams* v. *Standard Oil Co., supra,* Note 1, presumably out of deference to the decision of the majority in *Ribnik* v. *McBride.*