1938

Price -- By Way of Litigation

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PRICE—BY WAY OF LITIGATION

I.

It ought to be obvious that value is the most relative of things. For value is worth and worth is what men make it.

It has not always been so. A primitive people may make value a substance and hold it unchanging against all that comes to pass. Amid the slow tempo of the Middle Ages value came to inhere in a good and kept its pristine purity so long as its abode escaped physical harm. In an utopia—whether of the good old times or of things vainly hoped for—value is value and in its static verity stands foreshore against all the winds that blow. In the mind of the reasonable man, in a prevailing commonsense, in many a speculative system there is a fundamental oughtness about what a thing will fetch. Today a large domain of action takes its way as if value were a verity fashioned from an absolute that can be captured for everyday duty. Its reiterated appearance, clothed in the rhetoric of "intrinsic", "fair", and "right", attest the eternal essence which men have comfortably found in a concept whose emergent origin they ignore.

Yet a value is not just a value. Its magnitude is not proof against what is and the unknown things that will be. In the subjective universe over which every man has unquestioned sovereignty, value obeys the caprice of its master. Addison may price an ordinary heirloom at an exalted figure because of contact with generations of his ancestors; Dryden may chalk up a million dollars against unpublished manuscripts and nondescript effects; and there is no authority to challenge such personal estimates. But if for a consideration an article changes hands, such domestic appraisals wither beneath the unsentimental scrutiny of strangers. In the market—whose office it is to strike a common denominator among estimates—a myriad of values emerge into a price that bears the fitful mark of a thing relative: For a price is what it is—not in vacuo or for always—but to some person, at a given time, for a specific purpose and under definite circumstances. Persons are unlike, time moves along, purpose falls by the wayside, and circumstances change. In its very nature price is an expediency that belongs to a process; it is inseparable from the occasion and the play of judgments which have called it into being; it comes, serves its turn, yields place and leaves the stream of events a little different. It is the reflection of the current use to which a thing can be put, a record of the pecuniary magnitude with
which for the moment a culture endows an object. Price marks the accommodation of a ware of trade to its industrial habitat.

But the obvious is often the irrelevant; and it is an occasion for repentence and rejoicing, for sackcloth and hallelujahs, that James Bonbright has arrested a concept at large, robbed it of cosmic pretentiousness, and given it a local habitation among human affairs. When he brings to his argument the concretion of analysis and illustration from every domain of the law the call is for the mourner's bench and then a Roman holiday.

II.

In a concern with value the law appears in an unusual role. As the act of purchase and of sale takes its endless course, the market generally decrees the terms of the bargain. In each instance the price must be low enough to entice the purchaser to acquire, and high enough to induce the vendor to part with, the ware. But within the tolerance which their subjective appraisals allow the market is the arbiter of conflicting judgments. It has for centuries been habituated to that task; its devices, its procedures, its arrangements have emerged in the performance of its office. In the making of prices the market is at its trade.

It is only when the market is not at hand to turn the trick that the law is called upon to name the price. Jonson may negligently damage Hume's automobile, wantonly disfigure his ancestral clock or contumaciously distort his reputation. A fiction passes the injured article—or the part or aspect of it beyond repair—along to the offender in a compulsory sale; and he must compensate what he cannot make good. Or the state takes Milton's land for a public purpose, and magnitude must

1 Bonbright, The Valuation of Property (1937). It is inevitable that Bonbright's volumes should mean many things to many men. A majority may find his ideas about the relativity of value painful or even impossible going; a minority will call the bare thesis obvious—once he has said it. Here is set down the reactions of a single reader. The treatise is of most interest to persons whose minds are already somewhat steeped in the matters with which it is concerned. In this instance it has come as a precipitant to fuse into a conception of the problem a medley of ideas which for some time have been vaguely taking shape. As a result this account is far too tainted with the experience of another to be called an adequate report. It is marked, too, with the expression of a personal preference in regard to the way of rate-making. That preference must be noted—but it cannot be set down as reprehensible, for public policy cannot escape a like commitment. A fair critique demands an able, intelligent, well-stocked—and previously uninformed and unformed—mind. But in this universe of public utilities, the judicial process, and critical law reviews, such a thing cannot be. It is just as well; for this treatise will be of the greatest value to those who must grapple with the questions with which it is concerned. It is significant that, like value itself, purpose must endow these volumes with importance as variously they serve a host of readers.

2 Their estimates are themselves reflections from the continuous stream of market transactions. A seller's subjective appraisal is habitually tempered by what he expects his ware to fetch.
be given to a price in an involuntary transaction. Or—without even the fiction of a choice—Steele is a customer of a certain purveyor of electric light and power; and, by a presumption which makes the bargain go, he pays a charge which includes “a fair rate of return” for “the use of the property.” Or, by a kindred fiction, a tax which is anything but a fiction is assessed as a toll due to the state upon Burns’ equities in realty.

In all such cases the law assumes the office of evaluation. In the absence of the market it takes an amateur fling in its role. It was not for such a task that the courts developed their pleas and procedures, their principles of evidence and their ways of judgment. It is generally a value in the instance—not that of a unit of a standardized commodity in the ordinary course of trade—that has to be determined. Judge and jury—for all the talk about the inexorable rules that impel decision—are human beings attuned to personal appeal. The compulsions which in the market converge upon price to give it exactitude must in litigation appear as a record of fact. They must, to be given their effect, undergo an ordeal of admissibility and be transmuted into the alien coin of legal evidence. They appear, not as impersonal forces to level magnitudes out of line, but as arguments to be assessed by a juristic technology.

No forbidding barrier—save a dubious legal relevancy—keeps considerations of sentiment and of interest inert. Commuted into persuasive appeal, they may count even against more pertinent realities. A quality of high worth seems to mark a property which is injured even though it is strangely absent from others of its kind. The lamentable necessity of the dispossessed and the prodigal ability of the state to pay are the characteristic marks of condemnation proceedings. The trend of the value of property for rate-making purposes takes an upward curve, while the value of the same property in respect to taxation, glides gently downward. The personal litigant, whether natural or corporate, is weighted a bit in the judicial scales against a generic and diffused interest such as that of the public, the community or the body of consumers.

Legal concept, technical plea, and rule of law obtrude to deflect judgment from the result which a strict economic procedure would yield. A host of hazards beset the attempt to reduce the relevancies of price to a legal equation,3 to resolve a host of incommensurables into

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3 By this time the reader has observed the repeated use of the word “price” and has doubtless accused the writer of a negligence little short of gross. The fault, however, is at least wilful, if not wanton and malicious. A footnote is no place to argue the matter, but at least notice of intent must be served. A price, for all its complexity, is a reality; you can go to market, garner prices, and set them down on paper. A value is something less objective and more formidable; it
an exact magnitude and to reproduce in the isolated instance the judgment of a continuous process. In this endeavor counsel are at hand more intent upon serving the interests of clients than of helping an inquiry along. The resources of the profession are drawn upon to confuse as well as to clarify; and by litigants who stand to gain, delays may be invented and ingenuously protracted. As an issue goes forward it must face all the perils of a cause at law. Any one of a number of legalistic considerations may arrest or divert argument; a decision may be reached without the substantive question ever having been raised; a flaw in the ordeal may send the case back to the point of origin to begin its litigious journey anew. 4

Through all this legal maze the court must seek a "just price." Its quest must go forward without the multiplicity of deals, the mechanisms of precision and the cumulative correctives which the economic process depends upon for its exactitudes. In the open market, under the rule of competition, the decree is certain and final as respects the immediate transaction; the books are closed upon the deal and business hurries on its way. Yet the price that is made is always attended by a presumption of error. A market that is forever in session appeals to itself for a reconsideration of facts overlooked, a rediscouting of rumors about the future, a reweighing of relevancies, and a revision of pecuniary judgment. The new price, established upon review, applies to the now instant transaction; it leaves the business of the past undisturbed and the judgments of the future still open. 5 The law has no comparable techniques of neatness, dispatch, and exactness. Its way with a price is slow, cumbersome, and none too relevant. Its decisions, for all the time in the making, do not reflect all the factors in the problem. It attempts to take a judgment—when one has been ac-

4 For a single recent exhibit of the procedural issues that can be raised in a rate case—and for an example of how far speculative argument may drift from the realities of price policy—see United Gas Public Service Co. v. Texas, 58 Sup. Ct. 483 (1938).

5 The statement applies best where prices are flexible, respond quickly to market conditions, and are made under competitive arrangements. It has least application in respect to a monopoly price which is an expression of a policy which has lapsed into rigidity. As an industrial group takes control from the market, the making of price becomes an affair of the politics of industry. Accordingly its magnitude comes to reflect a political process not wholly unlike the administrative-juristic procedure from which the prices of gas and electricity emerge.
complished—back in time and to insert it at the point where the issue of value was first raised. In this alien domain the law has not been able to convert the procedure of error and appeal into even an approximate instrument of justice.

The mills of litigation grind out precisions most laboriously. A certain grist they seem unable to escape. Wrongs must have their money recompense; the damages from a breach of contract must be assessed; the wrong-doer in the twilight zone between tort and crime must make punitive compensation. But in this everyday domain a task poorly performed is being transferred to other agencies. Private insurance has broken down the line between wrong and accident. Indemnity for work-injury in the course of employment has passed to an administrative body and the disputes which attend the harms done by automobile are hard upon its heels. And into the evaluation of properties for purposes of taxation, condemnation, or rate-making the courts do not in the first instance obtrude. At so foreign a task their business is a review of evaluations made by appraiser, board of appeals, or commission. In this domain the office of the court is self-imposed; it claims jurisdiction because of a personal right invaded; its intrusion translates a problem of mathematical magnitudes into a tangle of legal issues. There is nothing inevitable about its juristic oversight; its orbit is as wide as its own decisions have made it. It is an open question whether the more exact justice which it does in the individual case is an adequate return for the delay, expense and complexity which litigation has brought into the process of price-making.

III.

In respect to rate-making the cause of action was allowed before the distant vista was open and the magnitude of the business was seen.

6 In almost every age and culture agencies other than the market have had to play at price-making. Among primitive folk departures from accepted customs frequently have their pecuniary taboos. In the English town the wrongdoer made good his breach of liberty or ordinance by way of amercement; at the close of the Middle Ages military service and feudal dues were painfully commuted into money payments. Even the institution of penance developed its pecuniary conveniences, and sins were graduated with meticulous exactitude to the degree of moral guilt and the affluence of the sinner. Among contemporary affairs the money analogue runs riot. To cite a single familiar example—even in the law school of today the understanding which the student acquires in each course is set down as a magnitude and the items are aggregated and averaged into a claim to a degree.

7 Here the concern of the law with the personal is clearly in evidence. A cause of action has been allowed to protect personal right and to do justice in the instant case. The juristic process allows little direct consideration of injustice in the aggregate; nor does it invite a juristic appraisal of the intrusion of the court in terms of the introduction of alien considerations and the multiplication and confusion of issues.
Until the Fourteenth Amendment—and for many years afterwards—the act of the state in the regulation of trade was the act of the state. It was of little federal or juristic interest. When, in the first great crusade against monopoly, a measure of control was imposed upon railroads and grain elevators, the ancient law was not disturbed. The persons, natural or corporate, to whom the Granger statutes were distasteful, had lost the legislature; they quickly fell back upon the judiciary as a second line of defense. The cause of the investor, the magnitude of the stake, and the national danger in the dearth of unrequited capital were ably and elaborately argued before the United States Supreme Court by eminent counsel and by Mr. Justice Field. But attorneys were unable to formulate an argument which would, against the accepted statement of the law, stir the bench to interference. The court replied that “where property has been clothed with a public interest, the legislature may fix a limit to that which shall in law be reasonable for its use.” And, to make the matter clear, it added, “this limit binds the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change.”

Two dissenting justices protested that “by fixing the compensation” the state can take from a man “all that is valuable in the property.” But, even to them in their righteous indignation it was “a waste of words to discuss the questions argued by counsel.”

For thirteen years longer that self-denying ordinance stood. Cases came and went; and those who took to law received at best the solace of rhetoric for their pains. The court allowed suits to be brought and thus a cause of action was established and a preliminary skirmish won. “It is not to be inferred that the power of limitation or regulation is itself without limit”; “the power to regulate is not the power to de-

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8 For Mr. Justice Field’s statement, see Stone v. Wisconsin, 94 U.S. 181, 184 (1877). For abstracts of argument of counsel, see Munn v. Illinois, 94 U.S. 113 (1877) and cases following.


10 Mr. Justice Field, with whom Mr. Justice Strong concurred, in Stone v. Wisconsin, 94 U.S. 181, 186 (1877).

11 It is of note that in every aspect of the development of the doctrine of due process, the case was entertained and the cause of action allowed sometime before the substantive commitment was made. For the right of man to his occupation see the Slaughter House Cases, 16 Wall. 36 (U.S. 1873) and Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). For the denial of a taking of “property,” Munn v. Illinois, 94 U.S. 113 (1877) and Allgeyer v. Louisiana, 165 U.S. 578 (1897). For the review of a structure of rates, Peik v. Chicago and Northwestern Ry., 94 U.S. 164 (1877) and Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418 (1890). And for the reading of civil rights into “liberty”, Gitlow v. New York, 268 U.S. 652 (1925) and Near v. Minnesota, 283 U.S. 697 (1931).
stroy”;12 “limitation is not the equivalent of confiscation.”13 Here were dicta which by the right wind of opinion might be quickened into substance. And as older members retired, young blood came into their places; and a radical court, untroubled by precedents which did not go its novel way, was ready to enlarge judicial review, shift the base of interpretation from powers to limitations and provide laissez-faire with a constitutional domicile.

The occasion was provided by a cause from Minnesota. A state commission had set railway rates on milk without a notice to the company, a public hearing or an opportunity to introduce evidence.14 Had this been a criminal action judges might easily have become outraged; and it is small wonder that such departures from customary process could be set down as against the law of the land. Thus it was procedure that opened the door to judicial review; but the cause once admitted, attention easily passed on to the essence of the controversy. The act of the legislature deprives the company of “its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive generations.” It substitutes “as an absolute finality” the action of a Railroad Commission which “cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice.” As a result, if “without judicial investigation the company is deprived of the power of charging reasonable rates” it is “deprived of the lawful use of its property and thus, in substance and effect, of the property itself.”15

An easy glide carries the court from the law adjective to the law substantive—and it is committed to the supervision of a new domain. It was the habits of the law, rather than the realities of rate-making, which decreed the formula for the adventure. The act was the act of the state; the invasion was the invasion of a personal right. It was, accordingly, the Constitution whose protection was sought; and the due

12 Note the easy and all but unconscious carry-over of a doctrine from one domain of the law to another, and note what the mind does to it in metamorphosis. “The power to tax involves the power to destroy” of Mr. Chief Justice Marshall, in McCullough v. Maryland, 4 Wheat. 316, 431 (U.S. 1819), becomes “the power to regulate is not the power to destroy” of Mr. Chief Justice Waite’s more radical colleagues; and he allows them to have their way with his rhetoric. The subtlety is that of the Lord Chancellor in W. S. Gilbert’s Iolanthe who by inserting a “not” in a perpetual decree provided the deus ex machina which allowed the action of the play to come to rest. The powers to tax and to regulate rest upon the same constitutional foundations and such a distinction between them has no constitutional warrant.
13 Mr. Chief Justice Waite, in Railroad Commission Cases, 116 U.S. 307, 331 (1877).
process clause of the Fourteenth Amendment served to get the matter before the court. In the appeal the word “property” was strategic. The whole argument had to focus, not upon the medley of considerations which must shape a price, but upon a deprivation of valuable assets.

The bother to the bench was that up to that time there was no record in the United States Reports of such a taking, no definition of property within the intendment of the protective clause and no precedent for a substantive judgment. In such a situation a borrowing of doctrine helps attorneys and jurists along their determined way. So the case was argued, as many cases before had been, as if in railways private property had been taken for public use. The owner was entitled to just compensation upon the value of his holdings; his equities were not legally subject to confiscation. This argument of the bar became canonical in the opinion of the bench; and, as in dissent Mr. Justice Bradley explained the judgment, the court had acted “as if the constitutional prohibition was that no state shall take private property for public use without just compensation—and as if it were our duty to judge that compensation.” Thus for the argument of rate cases the line of relevance was marked out. It has many times been sharpened but its direction has never been changed.

As stumbling had led to the formula of judicial review, so the courts stumbled upon so much of a principle of appraisal as they have come to possess. The accent could not tarry long upon procedure; the

16 In the Slaughter House Cases, 16 Wall. 36 (U.S. 1873), an unsuccessful argument was made, in the names of “the privileges and immunities of citizenship” and “due process of law” in behalf of the rights of man—especially to his occupation—against the chartered rights of corporations. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the argument for personal rights prevailed against a municipal ordinance. In 1886 Mr. Chief Justice Waite interrupted argument in Santa Clara County v. So. Pacific Ry., 118 U.S. 394, 396 (1886) to state orally that the court was prepared to concede without argument that a corporation was a person within the intendment of the equal protection clause of the Fourteenth Amendment. But the case was decided upon other than constitutional grounds and the concession—except in respect to entertaining a cause of action—remained a dictum. It was, accordingly, in Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 118 (1890), that for the first time business was accorded the protection of the Fourteenth Amendment.

17 In dissent, in Chicago, Milwaukee & St. Paul Ry. v. Minnesota, 134 U.S. 418, 465 (1890). It is significant that next to ex-Justice Campbell and Mr. Justice Field, Mr. Justice Bradley had most to do with quickening the due process clause into life. But, although he had been a railroad lawyer, he forsook the doctrine when it was applied to the privileges of corporations. It is likewise of note that Mr. Justice Miller, who had been most stubbornly set against reading substance into the prohibitions, in this case came over with the zeal of a new convert to stand shoulder to shoulder with Mr. Justice Field. Although he had originally developed the due process argument in behalf of the rights of man, ex-Justice Campbell was far too catholic to deny its benefits to the corporations who engaged his legal services. We find him within a few years of his initial presentation reading the privileges of corporations into its lines. Railroad Commission Cases, 116 U.S. 307 (1877).
substantive issue had presently to be faced; and it fell to historical chance to shape the issue for the courts. A crusade for regulation in the late Eighties was followed by a depression in the early Nineties; as rates were ordered lowered, railroads passed into bankruptcy; and the coincidence attended the course of the litigation by which the orders of the commissions were tested. The cases were heard in the lower courts when the hard times were at their crest; they were disposed of by the United States Supreme Court as business took the upward curve towards prosperity.\textsuperscript{18}

The appeal to the judiciary was premised upon the single issue of the confiscation of property. In cases, cast strategically in the form of bondholders against bankrupt concerns, attorneys put in legal claims for a fair return upon the totality of investment out of which the property had emerged.\textsuperscript{19} The retort was that records had not been preserved and that figures were not available; that assets had been swollen by "injudicious contracts, poor engineering, unusually high cost of material," and "rascality on the part of those engaged in construction or management"; that "many things have happened to make the investment far in excess of the actual value"; and that "the financial burden imposed upon the property by injudicious conduct should not be assumed by the public." Rates should "yield a reasonable compensation for the use of the fair and reasonable value of the property"—and "no more."\textsuperscript{20} Imprudence and dishonesty belonged to the past, engineering had undergone improvement, prices had dropped to a lower level; and one of counsel neatly chiseled the proffered standard into the proposition that "the present value of the roads, as measured by the cost of reproduction new, is the basis upon which profit should be computed." It is thus, in the cause of the consumer from the lips of "the Great Commoner"\textsuperscript{21} that "the cost of reproduction new" makes its initial bow before the highest court in the land.

It was hardly to be expected that the court should definitely resolve where it had inadvertently entertained. The issues were too multiple and tangled to be deftly stated or conclusively answered. Too many collateral considerations were present for a clean-cut attack. The introduction into the opinion of the court of financial statements and

\textsuperscript{18} Smyth v. Ames and docketed cases, 169 U.S. 466 (1898).
\textsuperscript{20} John L. Webster, with whom A. S. Churchill was on the brief. Abstract of argument in Smyth v. Ames, 169 U.S. 466, 478-486 (1898), especially pp. 479-480, where excerpts of the opinion of the lower court are quoted.
essays on the pecuniary plight of the separate properties embellishes a
text of indecision with a rhetoric of certainty. But the suits are disposed
of with somewhat of comfort for all concerned; but of progress to­
wards a definitive rule of law there is little. The rate-base must be “the
fair value of the property” used “for the convenience of the public.”
But such a value emerges from “the original cost of construction, the
amount expended in permanent improvements, the amount and market
value of its bonds and stock, the present as compared with the original
cost of construction, the probable earning capacity of the property un­
der particular rates prescribed by statute and the sum required to meet
operating expenses.” The company “is entitled to a fair return upon the
value of that which it employs for the public convenience”; the public
“is entitled to demand” that “no more be exacted” than the services
rendered are reasonably worth.” Here is a great democracy of stand­
ards, all equal before the law, and a formula for their resolution into a
balanced judgment.

So catholic a doctrine was at the command of cause and occasion;
variations could be written at will by later justices upon a theme of
Harlan. As case has followed case a medley of considerations has
crystallized into the two competing doctrines of “cost of reproduction
new” and “prudent investment.” The theories alike stem from the de­
cision in Smyth v. Ames, are fashioned from the same ideological ma­
terials and are pointed in the same way upon the value of the utility.
Alike they appeal to the market, hold price in causal bondage to expense
and furbish cost into a judicial basis for rates. Alike they came into the
law to serve the interest of regulation, commission and consumer. The
Bryan-Butler theory—which had made its judicial entree during a de­

22 All the color and circumstance of drama attends the disposition of the cases.
Mr. Justice Brewer had presided in the court below; it was his judgment that was
at issue; yet he did not disqualify himself from sitting. In the court below, an
ultra-conservative had delivered the opinion; here an ultra-liberal speaks for an
united bench—and Brewer, J. is on appeal sustained by Harlan, J. With even­
headed justice the injunction granted below is allowed to stand and the appellants
are told that because of a return to prosperity the rates judicially decreed may now
be too high and they will do well again to raise the issue de novo. Every idea,
interest, and argument presented at the bar is recognized by the court with an en­
gaging impartiality. An ignorant scholar, unversed in the judicial process, might
suspect horse-trading behind the scenes. Instead the result is a wonderful testi­
monial to the recognition by a high tribunal of every interest at stake and its
sensitiveness to every wind of doctrine. A great deal of criticism has been hurled
at Mr. Justice Harlan for the many directions which his opinion takes. The fault,
if fault there is, lies in the decision of the court which he was called upon to make
reasonable. At establishing a dialectical harmony among a group of incompatibles
he was eminently successful.

24 The Bryan is William J. Bryan. Supra note 19. The Butler is, of course, Mr. Justice Butler. See especially, McCord v. Indianapolis Water Co., 272 U.S.
400 (1926). It is engaging that two gentlemen so different in outlook and phi­
losophy should have united in the creation of the doctrine.
pression—came into dominance when prices were upon the up-grade as the perfect buttress to invested capital. The Brandeis theory—named for its leading legal proponent—has remained true to its original allegiance. Almost avowedly the intent of its advocates is to keep prices down. The theories are alike in their resort to a dialectical calculus as the way of deliberation.

The theories have been rather legal magnates tugging away at litigation than rival grooves in which a judgment might be cast. The factors in rate cases have been too numerous and turbulent to respond nimbly to the commands of either doctrine. All during the Twenties "cost of reproduction new" was in the ascendency; but it had hard going during the Great Depression and had to bow before a rising common sense. For years "prudent investment" was voiced, usually in dissent, but with a change in the times and in the personnel of the court seems destined for a more dominant influence. At the moment the course of substantive law is arrested; the rhetoric of impartiality is consciously employed; and from Olympian heights the court solemnly takes presumption, burden of proof, and inconclusive evidence—and gives the commission a little the better of it or remands cases to begin all over again their leisurely litigious journeys.

So, as the years have passed, one term or another of the magic formula of Harlan has for a time prevailed. But the procedure has not made certain the way of rate making. Nor has it imposed a legal path upon the wandering preferences of judges.

In spite of their being cast in the language of the market, the germinal idea of both is juristic rather than economic; it is justice between the parties to a bargain for the use of property. The investor is entitled to a reasonable return upon his prudent outlay—or its current value; in all fairness the consumer can be asked to pay no more.

Mr. Justice Brandeis, for the court, in Galveston Electric Co. v. Galveston, 258 U.S. 388 (1922); Georgia Ry. and Power Co. v. Railway Commission of Georgia, 262 U.S. 625 (1923); and, far more important, in dissent in Southwestern Bell Telephone Co. v. Public Service Commission of Missouri, 262 U.S. 275, 289 (1923); McCordle v. Indianapolis Water Co., 272 U.S. 400, 421 (1926); St. Louis and O'Fallon Ry. v. United States, 279 U.S. 461, 488 (1929).


For a still more recent utterance see Railroad Commission of the State of California v. Pacific Gas and Electric Co., 58 Sup. Ct. 334 (1938). Note the reiterated "we cannot say that", "we have not been referred to", "there is nothing whatever to show", "it does not follow from these statements that", "the evidence is not here", "we cannot say that", "we cannot say that" of Mr. Chief Justice Hughes' opinion.
IV.

It was not the happiest of enterprises to which the courts stood conscripted. It was begun without chart or blueprint; its vagrant procedure had to be beaten into form by adventitious event.

The work of appraisal had to go forward in an atmosphere of verbalism and dialectic. A pecuniary inquiry is played upon from all sides by emotion, interest, and legal plea. It is the utilities which have taken the offensive; the law reports are almost barren of cases brought against commissions by consumers for the reduction of rates. The technical prayer of a taking of property without due process has marked out the line of litigious combat. An alert group of experts—engineers, accountants, financiers, lawyers—have been omnipresent to commute interests that sought to be vested into legal rights which the Constitution itself must sanction. The commissions, under-staffed and with inadequate access to the facts, have had to accept statement of question and field of battle. The novel issues presented have been at serious odds with the ancient ways of the law.

At the very outset the court embarks upon a fictitious quest. Its self-appointed task is to assess a property which has been taken for public use. Yet the property has not been taken; it is left in the hands of its owners. Nor has it, except by benefit of a figure of speech, been put to a public use. The enterprise produces, markets, and vends to all who have the will and the wherewithal to purchase a necessary commodity such as gas, electric current, or water. So far its situation is no whit different from that of the concern that purveys steel, gasoline, bread, or ribbons for public use. The difference is that, to avoid the expense attending the duplication of costly equipment, the State grants to a utility an exclusive franchise. It furnishes to the enterprise the shelter of an uncontested market; and attempts through regulation to preserve for consumers something of the protection accorded them by competition in an open industry. It is this very exemption from competition which, in evangelical terms and with an unconscious judicial irony, has been blessed by the courts as a "dedication" or a "consecration" of a property to the public interest. The "consecration" has been the removal of the business from the tumultuous course of events to the monastic retreat of a closed industry. The grant of monopoly is a convenience of public policy; the consumers have had to forego the alternatives of a competitive market; the schedules of rates demand super-

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20 As long ago as Munn v. Illinois, 94 U.S. 113 (1877), the judiciary, in terms of Christian service, began to talk about property dedicated to public use. It is of interest that consecration is losing its symbolic value. See Mr. Justice Roberts in Nebbia v. New York, 291 U.S. 502 (1934).
vision against a control by one party to the bargain. Yet a legal fiction narrows realistic issues into the court’s sole concern with the value of the property.39

A series of fictions—established in negligence or by default—attends a case on its protracted course. A cost-into-price formula is a fundamental assumption of rate making; yet nowhere within the competitive order is it an expression of business fact. A return for the use of the property is only one among many expenses of production; yet others have been accorded a relative judicial neglect. The figures on costs presented by the company are usually accepted, at least with minor corrections; yet their magnitudes reside to no mean extent in the conventions of the system of accounts. At best they are the pecuniary reflections of the current state of managerial practice; all of the up-to-date and the backward, of efficiency and waste, of prudence and recklessness in technology, organization and policy are summed up in their quantitative lines. An assumption of the volume of output is basic to every cost; the current demand usually furnishes the figure; yet product sold is product sold at prevailing rates—which are the very subject of judicial scrutiny. It is assumed, with little evidence, that consumption would be as high if rates were raised; and the possibilities in lower rates are too speculative for so judicial an inquiry.

As focus is lost, the procedure becomes a legal ordeal. The resulting bothers emerge from the approach to the problem. The parties at law, instead of suiting an intellectual procedure to its character, have suited its character to their own intellectual procedure. They have smothered a problem in price policy beneath the concepts and rules, the logomachies and procedures of another craft. Engineers, economists, public officials of whatever persuasion would never have resolved the pertinent questions into so single an issue as the value of property. It was the lawyer, seizing the question with the antennae of his trade and intent upon throwing constitutional safeguards about corporate interests, who set the form. In the service of his client he sees that investment is more than—and different from—a tangible physical entity; his trade is to see that property is not taken without due process of law; his immediate task is to swell the magnitude which the law can be made

39 Repeatedly the courts have said that the States have full power to regulate the rates of public utilities and that the federal judiciary will not interfere unless the rates are clearly confiscatory. The complainant “has the burden of proof” and the Court may not interfere unless “confiscation is clearly established.” For a recent statement of the position, see Los Angeles Gas and Electric Co. v. Railroad Commission of California, 289 U.S. 287 (1933). The implications of such a narrowing of the issue have generally escaped judicial attention.
to allow.\textsuperscript{31} The intricacies of the rate structure, the considerations with which a schedule of prices must come to grips, the objectives of a public policy that finds expression in regulation—save as tokens in his litigious endeavors—are not for him. His technical vision and his industrial blindness unite to point question and to pattern procedure.

In the borrowed verbiage of the Fourteenth Amendment the function of rates is overlooked and a preservation of value comes to be of primary concern. The property comes to be treated as if it were antecedent to the use to which it is put and as if its values were casually independent of the schedule of charges. Yet it is only as an aspect of the industrial order at work that the utility is a property; its pecuniary worth is a reflection of the uses to which it is put and of the compensation for its services which the state finds allowable. An acceptance of the constitutional issue and an escape from the circle demands a quest for objective norms. For lack of an alternative the courts accept—so far as legal procedure will allow and with the qualifications which the instant case suggests—the prices established in a free and open market as criteria of legal justice. If the property existed in volume and was generally bought and sold, a ready standard of reference might be at hand. But since every property that comes into court is unique, the only recourse is to invoke a hypothetical market.

V.

Amid such a complex of factors and fictions, the courts have had to maintain an hypothesis of valuation. Among the meagerest of intellectual offerings the judges have sought a theory which at all times would serve the interests of the parties and the cause of the commonwealth. But in forty years of struggle they have not succeeded in extricating the issue from mazes of speculation; for the principles they employ are hypothetical.\textsuperscript{32} There, for cost of reproduction and prudent investment alike, the trouble begins, continues, spreads and turns back upon itself.

\textsuperscript{31} It has no conventional validity or relevance, but curiosity prompts an unorthodox question about due process in reverse. If the values which a competitive market would establish be taken as a norm, what of the property which the state, through commission and court, creates for a utility? What of values whose whole basis is in successful litigation? Is not such a creation a taking of the property of consumers? Is there not here a hypothetical cause of action under the Fourteenth Amendment? Can it be plausibly, even if not legally, argued that there is here a creation of property at the expense of others without due process of law?

\textsuperscript{32} To call a thing a fiction is not to condemn; without its make-believe no legal process could go forward. But the function of a fiction is to beat a multiple reality into a manageable integer that will invite a simple procedure or a clean-cut rule of law. The bothers here are that the problem is toppled off centre, relevant realities are dismissed and a fanciful inquiry is invited.
The principle of cost of reproduction now makes the more direct appeal to a putative market. The property, however, cannot be set down as a tangible entity to be evaluated; as an integer it is not the object of exchange; it has no market price and none can be conjured up by a technique which is persuasive. It is therefore necessary to resolve the property into its elements, to appraise each part separately and to aggregate the amounts into a valuation. The presumptions are that each element has without the property others of its kind, that for each a market quotation can be found and that the value of the element without is its value within the property. With such a group of "as if's" to give a lusty start, for a while the going is comparatively easy. Lumber, cement and engines have their technical specifications and their quoted prices; the kinds of labor which go into the apparatus of production and the several rates of remuneration can be specified; the current total expense of reproducing plant and equipment can be set down in approximate terms.

But even so simple a march of mathematics is not untroubled by question and preference. For a material there may be one market, many or none at all; the nominal price has respect to time and place, habitual discounts, the customs of the trade and other terms of the bargain; a medley of conditions impinge to introduce fictions into the quotation. The amount of labor which may go into productive equipment falls within elastic limits; the art of construction has its stage of development and its degree of efficiency. The times at which expenditures are incurred are not beyond human choice. A business will, if it can, arrange its expansion in such a way as to minimize investment. A municipality that sought directly to supply its citizens with gas or water would improve occasions to keep the capital charge down.

All of this, however, is a matter of the relative simplicities. It is not a brand-new outfit, but a hand-me-down plant, that seeks a value from the courts. A number of rival theories proclaim how depreciation is to be written off; and the march of technology has left its touch in obsolescence all over the place. Moreover, it is a business, not a phys-

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33 What a thing of variables a price really is has escaped general attention. A price is only one of the terms of the bargain and its magnitude is at the mercy of the other terms. Even as respects the simplest quotations reality may be seriously at odds with appearance. The contrast between the pecuniary exactitudes of the courts in rate cases and the crude approximations of even the most stable of quoted prices presents a paradox inviting detailed inquiry.

34 It is of interest that one of the most illuminating essays upon the rival procedures for computing depreciation is to be found in the law reports. See Mr. Justice Brandeis, in dissent, in United Railways and Electric Co. of Baltimore v. West, 290 U. S. 234 (1930). Judges have unusual opportunities for such illuminating essays; yet, in spite of the persistent need for clarity and perspective, their occurrence among the opinions of the court is rare.
ical entity, which invites judicial scrutiny. By a fiction, values which inhere in the relationship of the going concern to the community must be imputed to the property. Intangibles are specific; they belong to the particular enterprise; as a vendible, real or hypothetical, not one of them goes to market. The "good-will" may savor little of Christian well-wishing; it may rest upon nothing more substantial than the necessities of consumers who have nowhere else to go; it may be a reflection of exclusive privileges which lie within the very value the court seeks. Its sheltered, or even closed, market is usually its most prized possession; yet the creation and preservation of so valuable an asset is by act of the state.

All along the way the precisions of calculation are driven on by acts of judgment. The techniques of accountancy are purposive—or they have been frozen into ritual. Figures obey their master or they go it blind. At almost every point choice has wide discretion; and, as the physical merges into the intangible, reckoning runs into the incommensurables of policy. As item after item is passed in review, the particular question becomes merged in the general—and the end of the inquiry is its beginning. It is small wonder that, beset with such uncertainties, attorneys should raid an alien discipline, capture an index number and conscript it to help calculation over the hard places. But such a device rests upon hypothesis, is still unperfected and has never been fitted for litigious duty. In rate cases it can do no more than ring changes upon a pecuniary base already established. It allows no escape from the imponderables through which the reckoning must make its way. The cost of reproduction new is an anomaly. The property is removed from the impact of competition; yet an appeal is made to the market for an objective judgment of its worth.

Yet the doctrine of "prudent investment" can no more than its rival escape its "as if's." It makes a brave beginning by forsaking a hypo-

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25 The large discretion which attends calculation has never had adequate attention. A couple of calculations, in one of which every reasonable doubt is given to the utility and in the other to the commission, would yield startlingly varying results. A guess may be hazarded that the difference would be vastly greater than the amount usually in litigation. See Note (1930) 40 YALE L. J. 81.

27 The argument must not be allowed to run off after the will-of-the-wisp of the index number. It must be dismissed with a trio of questions—or it will usurp many pages. Why has it almost universally been invoked to raise the rate-base on the upward swing of the business cycle?—even when it did not serve to lower it when prices went down. If we grant that, in its sensitive reflection of price movement, it does well enough for short-time duty, can it be adapted to so protracted and decorous a procedure as rate-making by litigation? More generally, let the reader list all the presumptions which must be entertained if the index-number is to become a useful device in rate litigation. In the answers the question of relevance will be resolved—without going further.

27 As a practical matter the courts have directed too much attention to the theory of evaluation and far too little to the actual intellectual procedures from
theoretical current market for the actualities of investment. If records are available and a rationale can be imposed upon a tangle of accounts, the sums which have gone into the property can be drawn forth and added. But, in their absence, the will-of-the-wisp of speculation returns. Nor can make-believe be dismissed with their presence—for at any moment there may be need to go behind the returns. It is unfair to call upon consumers year after year to pay an interest charge upon all investments—wise or speculative, honest or interested—which chance to have been made. They may with reason be called upon to support only such a capital structure as prudence would have decreed.

But whose prudence? And is not prudence at a time, of an occasion and under particular circumstances? Can the requirement of prudence be forged into an abstract rule for measuring human conduct? So norms, tempered to events in the past, are called for. A standard must be applied to managerial judgments that have faded into impersonal entries; the actual prices paid as capital was invested must be checked against what in by-gone markets would have been reasonable outlays. All along the line the actual must be set over against the presumptive; and hypothesis is again harnessed to a colossal task. The theory can, from its acceptance of the value of property as the focus of inquiry, serve the public interest only obliquely.

In such a parlous adventure the law is accorded little practical help by other disciplines. Accounting is still in the stage of rule-making; the question before the court concerns, not the validity of its techniques, but the choices that shape their use.\textsuperscript{38} Statistics has not as yet—even if it can—contrived equations for deriving the values of things that do not go to market from the values of kindred things that do. The rival schools of economics respond to the competing formulas as the practice of their respective crafts dictate.\textsuperscript{39} The members who lean towards an

which the result emerges. The assumptions which underlie the accounts and calculations—in concept, device and procedure—demand a critical scrutiny as thoroughgoing as that which Mr. Justice Brandeis has directed at depreciation. The pecuniary calculus no more than the court presents "a government of law and not of men." 38

A footnote here may reinforce the one just above. In law and accounting the trade journals seem to mark different stages of development. Very similar questions may be asked about the processes of law and the procedures of accounting. Yet a critique of concept and method, an insistence upon purposive relevancy, a skeptical self-awareness which mark articles in legal periodicals has as yet little penetrated the literature of accountancy. It is still largely concerned with the invention and exposition of techniques.

\textsuperscript{39} Here the writer must take issue with Bonbright, \textit{2 op. cit. supra} note 1, at 1078 \textit{et seq}. The attitudes of the "institutional" and the "neo-classical" economists seem to me to be obvious. Neither ethical inclination nor scientific objectivity need to be invoked to explain them. Alike they proceed from the folkways of the craft as it is practiced in divergent camps.
institutional persuasion are inclined to accept the prudent investment theory as the lesser of two irrelevancies; it is only among the neo-classicists that a handful of supporters for the alternative principle are to be discovered.

To them the appeal of cost of reproduction new is professional rather than intellectual. It is not the argument as developed by the courts but the possibilities inherent in the concept which are alluring. Neo-classical economics is rather an argumentative technique than a generalized description of the industrial order. Accordingly a value to be deduced from an array of hypotheses offers an unusual opportunity for a superb dialectical display. The valuation must have its standard; and, since it is a matter of his everyday concern, the neo-classicist assigns the office of norm to the value which represents the free play of economic forces in an open market under conditions of perfect competition. Here is an ultimate reference—in fact and in fairness—between the parties to a bargain. And, as the economic cycle goes its round, the theory provides a neat and speedy adjustment of the rate-base to what the market decrees the value of the property to be. It may be true that, neither as an integer nor in its several parts, does the property go to market. No matter; the task of the theorist is to contrive a formula and to leave its application to skilled appraisers thoroughly at home with all the realities of the concrete situation. The result is an exercise in hypothetics—subtle, involved, ingenious—an exhibition of deft argumentative skill.

It is easy enough to quarrel with the neo-classicist—off his own beat. One may argue that the operation of a business is a continuous process; that its going value, even with the help of *ceteris paribus*, cannot be captured within a mechanical formula; that the procedure forsakes actuality for unverifiable speculation; that so intricate a problem will not yield to such a barrage of presumptions; that the results will bear far more likeness to the methods employed than to the phenomena studied. It is easier, still, to insist that practice cannot live up to high professions; that value cannot be made to respond so deftly to the changing decrees of the market, that the formula—as it is rewritten—is at odds with the leisurely decorum which attends the administrative process. But, however difficult and uncertain the actual appraisal, the theorist stands by his principle. The norm of "perfect competition" is the only definitive reference available for a judicial "fair value." It is the standard by which under free enterprise prices are judged; it has the support of common-sense, of "orthodox" economics and of the anti-trust laws; it is firmly entrenched within the prevailing ways of
business. Still, the relevance of so hypothetical a formulation to the concrete issues which the courts must face—and resolve—remains an open question.

The institutional economist, loath to accept "prudent investment," is unable to subscribe to the rule of cost of reproduction anew. He is quite baffled as to ways and means of evaluating a property isolated against the impinging economic order. He stresses the hypothetical terms in which the problem is posed, the hazards to an escape from circular reasoning, the breadth of the orbit of personal judgment, the unreal pricing of a thing not on the market. Nor can he, amid the stream of events that move on, accept a simple and direct correspondence between cost and price. Costs are the expenses which production has already entailed; price is the return which conditions converging in the market permit to be realized. If an establishment turns out a number of products, the causal line of cost-into-price is likely to move into reverse. Expenses which reflect market prices are habitually set down against joint products in accordance with their respective abilities to bear them. Accordingly cost is a complicated affair resting upon antecedents as diverse as the methods of accounting, the technology of production, the volume of sales and the prevailing price policy in the industry. A cost belongs to history; yet it cannot be reduced to precision until the returns are all in.

It is true that so loose a relationship is not compelling for a public utility. Its affairs are subject to regulation; and upon a concern that holds an exclusive franchise the state may impose a cost formula for price. But to do so is a commitment to a particular policy against others that cry for recognition. For, at least within a wide discretion, costs are costs only so far as commission and court make them so. In fact the real question, as with many other authorized expenses of production, is...
what cost for the use of property is allowable. At this point the inquiry
returns to the objectives the rate structure should serve; and here in
the juristic statement of the question any function for price other than
the safeguarding of investment is dismissed by presumption.

The shift of the focus of attention from the schedule of rates to
the rate-base has not been happy. As it has been applied, the theory
of the cost of reproduction new is too clearly an articulation of private
right to go unchallenged. It is too clumsily fitted to the rhythm of
business activity adequately to serve the cause of the investor. A re­
sort to prudent investment can hardly hope to capture the actualities of
the past and hail them into court for judgment; its appeal is as a prin­
ciple of future investment. But if capital—whether as outlay or in­
vestment—is to obey the rule of prudence, the quest turns away to
judicial standards of investment and a system of police which will make
them managerial realities. Prudent investment has been helped to the
fore, not by substantial merits which withstand criticism, but by the dis­
comfort which scrutiny and the depression has brought to its rival. It
is hard to make a legal rule of a principle whose favors depend upon
whether years are fat or lean. Alike the rival theories lie in the esoteric
domain of the hypothetics. The factors in a rate case are too multiple
and involved to yield more than a verbal certainty to either attack.42

Judges indulge the calculus of speculation. The value of property
awaits the judgment of the court. The rate structure, as an expression
of public policy and with its impact upon a culture, remains neglected
in the offing.

VI.

An appeal from commission to court is not a one-way street. The
utility becomes a slave to the legal formula it has invoked. The at­
titude towards its price policy is shaped by the pressures it brings to
bear. As the bench will accept an issue in rate-making only if it is con­
verted into a legalistic concern with the taking of property, so its judg­
ments become pontifical decrees to which administrative bodies must
strive to conform. Their day by day work must be done in the fear of
God and of judicial review. The commission, caught between court and
company, has little opportunity for a forthright attack upon its problem
of prices. With it, too, the worth of the investment becomes the hub of

42 Note the lament by Mr. Justice Butler over the imminent eclipse of his
formula: "I cannot refrain from protesting against the Court's refusal . . . reason­
ably to adhere to principles that have been settled. Our decisions ought to be
sufficiently definite and permanent to enable counsel usefully to advise clients. Gen­
erally speaking, at least, our decisions of yesterday ought to be the law of to-day." Railroad Commission of California v. Pacific Gas and Electric Co., 302 U. S. 388, 418 (1938).
inquiry; other considerations which should shape the rate-structure are relegated to the background, and the distorted administrative pattern is set. Current practice accords an invitation to acts of omission.

Yet, for all the solicitude, the capital charge is only one of the costs which the receipts from a public utility must meet. It is in reality the value of the use of the property that counts, and this is a dual affair of the capital account and of the rate of return. The rate of return has received scant judicial attention. In all the reports there is not one outstanding attempt to shape a standard to the distinctive conditions under which a public utility must carry on. Again and again it is said that the rate must be high enough to maintain the flow of investment—with little consideration of the concretions which make it a distinct per cent. A large number of rates which have been approved seem to be copied from business enterprise when the going is good; and among them there is more than an echo of the legal rate of interest, a maximum established for the prohibition of usury. Too frequently the courts proceed as if there was only one true rate of return which was written between the lines in the Constitution; but rarely is a comparison of circumstances essayed with enterprise not under the state's protection. A mark of distinction is the absence of the competition which other business units have to face; the property does not have to take the shock of a rivalry designed to take away its customers. It has—except for street railways—limited the risks of the utility to its own mistakes in policy and operation. In an industrial order of uncertainty its security is unique; and since its sheltered market is a creation of the state, the rate of interest needs to be tempered to actualities. In fact, save as communities decay or de-

43 The classic statement is that of Mr. Justice Sutherland, in United Railways and Electric Co. of Baltimore v. West, 280 U.S. 234, 252 (1930): "... the company itself sought from the commission a rate which it appears would produce a return of about 7.44 per cent. ... We are of opinion that to enforce rates producing less than this would be confiscatory and in violation of the due process clause of the Fourteenth Amendment."

44 Note the difficulties of the courts in writing off the values of street railways which have become obsolescent. The market exhibits no such solicitude; its impersonal ways of liquidation have little regard to the just or the unjust. A full page advertisement of a street railway company in one of our large cities recently declared: "Our property in tracks, equipment and franchise is becoming more valuable. The number of our passengers has fallen off. We must increase our rates." Here is a priceless anomaly of price.

45 It was out of the competitive order that public utilities emerged. The new for a while wears the verbal dress of the old, and the courts often voice the fiction of a competition. Here and there competition still is to be found as vestige, as exception or as threat. In a few places an "independent" telephone company remains a nuisance not yet abated. In metropolitan New York and some other highly congested centres the installation of a Diesel engine can be made to provide electric current to a large apartment house or office building and its cost will provide an effective maximum for rates. A municipal or a small local enterprise may purchase light and power from a government undertaking, such as the Tennessee Val-
pression robs customers of their ability to pay, the utility is an established, not a hazardous, enterprise and investors are pushed into the position of bond-holders. A moderate rate of return contributes as much to lower rates as to a lower valuation.

But other costs have currency; and other considerations must be allowed. Rates, as well as the uses of property, are values; rates may, with the lesser violence to the word, be called prices. From the vantage point of rates the future rather than the past is faced; there the function of price as a mediator between company and consumer is to the fore. In the rate-structure the utility comes to grips with the impinging world; in the schedule of its charges the degree of its public service is written. A long time ago, just as the courts were letting themselves in for this bothersome business, Mr. Justice Bradley insisted that a reasonable charge involved "considerations of policy as well as of remuneration." 46

The rate-structure of a utility is an aspect of public policy; it is an expression of what the community, acting through the legislature, commission and court, expects it to do. Such a direct attack presents the problem of striking an equation among ever-changing and incommensurable objectives. A scheme of prices fixed by authority must reflect the office of the utility in the economy.

The investors must be served. So long as reliance is placed in private enterprise for the supply of gas, electricity or water, the remuneration must be adequate to command the service. But, even here occasions differ; and, as compared with other considerations, the need for capital is more insistent at one time than at another. The investment market, too, has its periods of plenty and of scarcity, of high rates and of low; and a municipality might well impose upon a corporation the rule of economy which should mark its own outlays. Here, as throughout the field of business endeavor, it is the expectation of gain that is dominant; the historical fact of investment is relevant only for the promise which its record holds.

In shaping policy an equal regard must be given to the consumer. The supply of an essential commodity is the very reason for the existence of the utility. Its corporate ownership and operation is only the

instrument for getting the task performed. The interests called into being by the means chosen must not be allowed to obscure the ends sought. A question of significance is the adequacy of service. But adequacy is not to be defined in the routine terms of quality and regularity; nor is it to be limited to the supply of persons able to purchase on the current plane of rates. It must take into account potential as well as actual demand. A primary question is whether rates are low enough to allow to current customers full utilization, and whether the services are put within the reach of all income groups which should have access to them. Upon price might be imposed the public duty of insuring to gas, light, water, and power a secure place within the American standard of living.47 In fact a functional test should look to the years ahead; a rate-structure should be validated in terms of its ability to extend the use of the services among all classes of the population.

As policy a rate-structure has an even greater function. In the market the forces of competition beat upon an enterprise with compulsions to get its cost down, with prods to efficiency in organization, with spurs to technical improvement all along the line, with incentives towards winning a larger consumer acceptance, with the continuing necessity of accommodating the venture to its industrial habitat. With the passing of the open market, such impulses are dulled or even cease to operate. It accordingly becomes the task of the commission to contrive devices of efficiency as substitutes for the play of business rivalry. It is especially necessary to provide substitutes for the protections which an abandoned competition can no longer afford the consumer. Matters of consequence in other industries come to be of negligible consequence to the utilities. The creation of an atmosphere in which the value of the investment has loomed large has blurred the minds of magnates to other aspects of the pricing problem.48 An expansion of the market is

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47 It is engaging to follow the changing etymological fortunes of the concept "public utility." The word "utility", of course, comes out of economics; the "public" is the "public" of the old police power, as in "public morals", "public health", "public safety", and "public welfare". As late as the Seventies it was used as a correlative of "the common good". In his argument in the Slaughter-House Cases, 16 Wall. 36 (U.S. 1873) ex-Justice John A. Campbell insisted that the statute before the court could not be justified as a health measure because it did not "serve the public utility". The law on the subject was long in the making before it was garnered into the category of public utility. It seems high time for a restoration of the accent to the first word.

48 One of the most amazing things revealed by the National Recovery and the Agricultural Adjustment Administrations was the very different states of opinion that prevailed in various industries in respect to price policy. That in the dress industry was the result of a cut-throat competition; that in steel of a stalemate which led to a respect among gentlemen for each other's preserves. In automobiles prices had to be kept down to prevent the invasion of the industry by new capital; in milk they had to be kept up to cover extravagant methods of delivery. The fabricators of advertised articles wanted fixed prices; those of unbranded goods, free prices. It took such an experiment to reveal how large an ingredient of price is prevailing industrial idea.
accorded a negligence rarely to be found in competitive industry. The utilities—at least until the appearance of the Tennessee Valley Authority—went their way as if all who use gas, electric current, and water were being supplied and there were no new markets to conquer. The invention of devices of protection and progress would, under the most favorable circumstances, tax the intellectual resources of regulatory bodies to the very limit. Their creation has been almost enjoined by the conventional stress upon the value of property.

As policy the matter becomes price-policy. The rate-structure is an aspect of a program for the control of industry. It must be brought into accord with the other measures through which the state directs the economic order. A structure of prices that fulfills such an office is not to be plucked from the air or conjured out of any system of accounts; the legalistic value of an isolated property can throw little light upon it. It must take into account a wide range of factors which under current procedure are arrested at the frontiers of litigation. It can, no more than the price of a dress, of gasoline, or of an automobile emerge except through experimentation. The way of its making is that of trial and error.

In other domains of the law the public interest has enjoyed a lusty existence. Even when laissez-faire has found a domicile in constitutional doctrine, the police power has been at hand to dispute its primacy. But if considerations of the general welfare have lain recessive within the formula of review, they might, at the kindly touch of the judiciary, easily be restored to the dominant role. It is only the later decisions which forbid; and they have never been able to command the support of the full bench. In law a modernistic note may fail to allure where an

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49 A rather arbitrary attitude which is an aspect of the web of presumptions upon which the judicial review of the rate structure rests is presented in West Ohio Gas Co. v. Public Utilities Commission of Ohio (No. 2), 294 U. S. 79 (1935). Here the court—without indulgence in analysis or statistics—lays it down that it will not entertain the presumption that lower rates may yield a higher return.

50 It recently took the fiat of the Interstate Commerce Commission to jar complacent executives into a realization that after a period of immunity the railroads again enjoyed vigorous competition from private automobile and motor bus and truck. An order of the Interstate Commerce Commission forced them to lower passenger rates—and increase their earnings. It is significant that suit to enjoin the act of the Commission was filed but never pressed.

51 See Mr. Justice Brandeis, dissenting, St. Joseph Stockyards Co. v. United States, 298 U. S. 38, 73 (1936). See especially Mr. Justice Stone and Mr. Justice Cardozo, "concurring in the result", id. at 93, 94: "We think the opinion of Mr. Justice Brandeis states the law as it ought to be, though we appreciate the weight of precedent that has now accumulated against it. . . . The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law. . . . If the challenged doctrine is to be reconsidered, we are unwilling to approve it."
ultra conservative theme rings true. If function must find its sanction in precedent, the court of tomorrow may appeal from the status quo to the status quo ante.

VII.

Among the contributions of the Bonbright volumes, surely the most significant is the support they give to the idea that a price is relative, a theory of value organic. As a going concern an enterprise should forever newly adapt itself to its social habitat. A commitment to public service should afford no insulation against the tumult of industrial movement; it should accord no immunity against the decrees of an economic evolution which exacts the up-to-date as the price of survival. As an integer the property is not more or less—magnitude is an irrelevance—but a thing different in kind from the sum of its parts. An attempt to break down, separately appraise and compound into a grand sum total invites a superb display of a mechanistic logic tainted only by its irrelevancy. An inquiry into the putative outlays which prudently would have brought the property into being is a hazardous exercise. All along its course it must contend with records—unavailable, incomplete or shaped to another purpose—and extract the definitive from reconstructed managerial policies. It is as an element in rates that the value of property has pertinence—and rates belong to the present and exist for a purpose.

The evaluation of the property lies along a by-way of price policy.

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52 In McCart v. Indianapolis Water Co., 302 U.S. 419, 423-441 (1938). Mr. Justice Black points out the difficulties of threading the maze of issues and calculations to a definite judgment upon the constitutional issue and believes that the Court should order the cause dismissed.

53 2 BONBRIGHT, op. cit. supra note 1, at 1082, records a difference in reaction to the idea that value is value for a purpose from graduate students in law and in economics. He reports that the ethical sensibilities of the law students were wounded while the objectivity of students in economics rendered them proof against shock. It seems to me that ethics and objectivity have nothing to do with the case; it is rather a quarrel between the relative and the absolute, between a knowledge of a thing and a knowledge of the thing in terms of the questions asked about it. The issue does not separate economics from law. At present the difference in viewpoint is found within the law and separates the economists into two divergent schools. The cleavage runs through physics, history, philosophy, and theology and not even mathematics is untouched by it. The response of students in acceptance or shock is primarily a matter of intellectual habituation rather than of previous exposure to a particular content. My experience is quite at variance with that of Bonbright. I remember vividly an occasion upon Bonbright’s native heath when a critical attack by me upon the purposive character of economic concepts left my hearers rather bewildered and me quite inconfutable. In the law schools with which I am acquainted a similar talk would provoke no stronger response than “well, go on.” In all politeness it is irrelevant; but may the writer add as one who has had experience of both kinds that—while there are brilliant exceptions—as a genus the graduate student in economics is a more docile animal than his brother of the law.

64 1 BONBRIGHT, op. cit. supra note 1, passim, especially pp. 92-93, 109.
An intimate relation between the value of the property and the structure of rates—a presumption rather uncritically indulged by the courts—is a fiction. It assumes a simplicity which industrial matters lack, disregards the multiple forces which play upon earnings, and reduces the complexities of a going business to an elementary causal sequence. It insulates the property against the impact of the course of events and freezes rates of service and capital charge into a rigid ratio. It consigns to the oblivion of irrelevance the host of novelties—in technology, organization, manner of service, product—which in other lines of enterprise are the mark of adaptation and life. In short, in the name of the protection of property, it turns the price policy of a business concern which should make its way in the world into an academic exercise.

Nor is it easy to understand why a fetish should be made of protection against confiscation. It has little support in the sources from which public utility law is drawn. The openess of every trade to all who wish to take its risks had long been cardinal and the common law has no protection for a vested interest in an industry against a more efficient competitor. It is the right of access to the market, the opportunity to make good, that has been the subject of judicial solicitude. The concern has been for the trade; individuals within it are entitled to no more than their chances. In public law there is no such immunity. In the name of property, a statute may be struck down as beyond the power of the legislature; but, if it is allowed to stand, no protection is accorded against its impact upon vested values. The owner of a business must take the shorter work day, work accident indemnity, the minimum wage and social insurance with whatever grace and in whatever stride he may command. The state, by prohibition—as with lotteries and the traffic in white slaves; or by competition—as with gasoline or power—may lay on, and the injured party has no judicial recourse. It is only in the taking of property for a public use that a specific value comes under judicial attention; and here a strict logic can hardly put the analogy across; for what is being done is fixing a price in a forced sale.

Nor is a legal security for the individual concern indigenous to the order of business. In the market an enterprise makes a price at its peril; its quotations must take the impact of forces converging from near and far. There no value has a sanctity immune to disturbance; each appears as a revised edition of itself and must straightway give place. If a price becomes inflexible or abides while others change, the result is due, not to any legal right, but to assiduous endeavor of interested parties or to the erection within an industry of a buffer against
the shocks of the market. In a day assets of significance may become worthless securities or a nothingness may be lifted into a prized possession. In a year of depression an aggregate of tens of billions of dollars may be stripped from national wealth with no invasion of such a private right as the law will respect. The prevailing usages of business subject all property to the persistent threat of confiscation; and in the constitution of the economic order there is no due process clause by which the decrees of the market are made reviewable in the courts. A plethora of presumptions are needed to read into the Constitution an exemption of an individual enterprise from the ordinary risks of business and from the necessary oversight of the state. The obverse side of such an immunity is a limitation upon the right of the government to make of a utility an instrument of the commonwealth.

In rate cases the protection accorded property by the courts has been nominal rather than real. The reliance upon the valuation of property has never been demonstrated to serve well the interest whose livery it wears. Nor is there reason to conclude that in the ordinary instance a different valuation and another rate structure might not better promote the fortunes of the enterprise. Nor has it been shown that lower prices would not be attended by a much wider use of light and power. Evidence from other industries, fortified by experience under the Tennessee Valley Authority, set down lower prices as a plausible hypothesis for larger financial rewards. There must be a large potential demand which enlightened self-interest and far-sighted regulation might over a period of years quicken into being.

The invocation of the courts is an extravagant expense to all concerned. It brings into the process of price-making the devices of litigation, contrived for another purpose, alien to the task, and set to a far slower tempo. The introduction of juristic procedures into the process of price-making is an invitation to frustration. The mixing of technologies which will not mix brings uncertainty, confusion, and endless procrastination into the affairs of regulation. The agency it has created for the just and proper determination of value is a hierarchy of company, commission, lower court, and appeal tribunal; the ritual that has emerged—with its array of order, error and appeal, reversal or remand—is a paragon of indirection. It could hardly have been more de-

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55 In law the testamentary truth depends upon the presumption. The writer would never contend that the untold millions spent upon litigation to maintain the cost of reproduction new as the law of the land has not advanced the material fortunes of the utilities. But if a bolder person should proclaim it, he does not know—a speculative argument aside—what positive demonstration he could present in rebuttal. The incidence of judicial review and of theory of valuation upon the interests of the consumer invites the opposite conclusion.
liberately contrived to keep issues unsettled.\(^{56}\) An answer eventually given—after the last appeal has been made and the ultimate error corrected—is already outmoded. In these days matters industrial move with a brisk staccato; and under so cumbersome a method of fixing a price, rates are too inflexible to respond to changing conditions. They cannot, with neatness and dispatch, be made to insure a definite gross income or a certain rate of return. The prevailing arrangements have had their effect upon the utilities. The attention of management has been riveted upon the problem of the rate-base; its augmentation has become a conscious end of policy. The energy, thought, and initiative which in many another industry is directed to the elimination of waste, the advancement of technology, and the enlargement of markets is in the utilities spent in a continuous act of pecuniary creation. A concentration upon the value of the property is at variance with sound business and efficient administration.

A rate-structure is not to be insulated against the general trend of development. In other domains of industry there are a host of considerations with which price must come to grips. As time goes its way, needs change with circumstance and the terms of the equation of policy must be newly weighted to an ever-current relevancy. The rate-structure is a single facet of a public policy, driven along by many considerations and expressed in many measures. The structure of rates must itself be tempered to a general necessity and a public obligation which lie beyond its immediate concern. A task such as this can neither be shaped into a litigious formula nor fitted to the decorous process of legal justice. Like value itself, the procedure is relative; no element can be isolated for measurement against the standard. It is the delicate resolution of considerations as an entity—of which the rate structure is an expression in pecuniary magnitudes—that is the subject of judgment. Its continuous process of revision calls for a flexible, prompt and decisive agency of control which can for the occasion say the final word—and yet allow a continuing policy to be shaped to an ever new necessity.

As a matter of public concern a rate-structure cannot be a static affair. It must be suited to its function—not exist as an expression of bygone transactions and law-made values to which the course of events must bow: Its ultimate reference is not to the calculus of a market established upon presumptions but to the potential wealth which it can

call into being. It must rest upon estimate, grounded in deliberate experience, rather than upon record.

A commitment to policy is an act of prophecy. It is, in the making of rates, an aspect of a developing program. Like any other matter of policy, the answer does not come by way of fact and logic. The creation of a rate-structure demands a definition of ends. Its content must emerge from what it is expected to do. And the ends which must shape policy are to be discovered, not in the rigid terms of a judicial formula for value, but in the pulsing vitality of an industrial system that is made to serve the necessities of a people.

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