The Feudal Origins of Public Utilities and European’s Law “Services of General Economic Interest”

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European Law affords special treatment to undertakings that provide “services of general economic interest.” Article 14 of the Treaty on the Functioning of the European Union (TFEU) states, in no uncertain terms that:

“Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.” (Emphasis supplied.)

The Treaty on the European Union (TEU) and the TFEU do not define the term “services of general economic interest.” Apart from Article 14 TFEU, only TFEU Article 106 (1) mentions “public undertakings and undertakings to which Member States grant special or exclusive rights” and Article 106(2) speaks of “undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly” without defining any of these terms. The Article 106 goes on to say that these types of undertakings “shall be subject to the rules contained in the Treaties, in particular to the rules of competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.”

Although the Treaties do not define such types of undertakings, the European Commission (Commission) and the European Court of Justice (ECJ) have been left

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2 Article 106 of the TFEU Treaty. See also, Protocol (No 26) on Services of General Interest.
with the difficult task of providing legal meaning to such term.\textsuperscript{3} It is not my purpose in this short reflection to embark in the in the task of analyzing how the Commission and the ECJ have struggled to offer meaning to this term. Suffice it to say that “services of general economic interest” include, without doubt, such private and public undertakings known as public utilities.

The term “public utility” is not widely used in Europe. It is mostly used in the United States and the United Kingdom to describe private undertakings that are highly regulated by their governments and that provide such essential services to the public as telecommunications, public waters, electricity generation, transmission and commercialization, postal services and others.

For the reasons unveiled in the coming pages and for convenience, I will refer to undertakings providing “services of general economic interest” as “public utilities” during the rest of this work.

Given the partial solution to the definitional problem thus far encountered, I should stop at the point in Article 14 TFEU that arose my curiosity in the first place. Why do “services of general economic interest” occupy a “place in the shared values of the Union?” Is that place a “special” one? And if so, why? Perhaps a historical view of the origins or evolution of the concept of public utility in European history may offer part of the answer to those questions.

My aim in this work is to attempt a brief historical exploration of the type of undertaking we currently know as the public utility. I would like to see if such historical exploration throws some light in answering the questions presented above particularly given the apparent contradiction of the existence of revenue-producing monopolies that provide services of general economic interest within the EU strong competition policy. In other words, one must question ultimately why the EU which, since inception aimed at creating an internal market based on a “highly competitive


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social market economy” allows for special treatment of undertakings that are the antithesis of competition: monopolies. There may be many reasons for this, but today I am most concerned about the historical reasons for the continued existence of revenue-producing monopolies in the European legal order.

In this work, we shall see that most attempts to define public utilities are at best phenomenological, that is public utilities are defined based on certain characteristics that separate them from other kinds of economic undertakings. We shall further see that those economic and legal characteristics originated in the economic institutions arising from the feudal relationships in the early Middle Ages and that they were brought back into modernity by means of their American adoption from the English common law in the latter part of the 19th century.

Before delving into the possible historical precursors of the subject, I must commence the exposition by explaining what is the modern consensus about what is a public utility. Public utilities generally refer to those kinds of undertakings (publicly or privately-owned) that provide to the public a good or a service that in the consensus of society is of general or essential interest. Some public utilities operate as publicly-owned business in the form of revenue-producing monopolies. Most undertakings operate as privately-owned businesses to which the government affords certain exclusive rights. A taxonomy of public utilities include, but is not limited to gas distribution companies, telephone companies, electric service companies and others. The most prominent public utilities are undertakings that build and operate exclusive or semi-exclusive distribution networks in order to provide their services. Commencing in the latter part of the 19th Century, national governments have allowed these companies to operate as natural monopolies, within a defined territory partly on the justification that economies of scale do not make it economically feasible to build parallel networks for the provision of the services. In the 20th Century, public utilities de jure or de facto exerted such economic power that they faced little if no competition in the territories where they operated.

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The end of the 19th century saw the invention of the electric light bulb, the telephone, the widespread use of gas for home heating and the expansion of public transportation systems across the United States and Europe. While in the United States, the exploitation of these technologies was achieved mostly by private enterprises, the history was different in Europe, where the national states quickly recognized the importance of those new services and held unto themselves the development and exploitation of those services for the benefit of its citizens. The provisions of public utility services in Europe remained in the hands of national companies for the most part of the 20th century until the advent of the liberalization movement at the beginning of the 1990s.\(^5\)

Why the United States and Europe chose such different paths to achieve the same objectives is a matter outside the scope of this paper.\(^6\) However, suffice it to say that the federal system of government in the United States, and the lack of fiscal resources of State and Federal governments after the Civil War may have had something to do with historical preference of using private undertakings in order to achieve the network society.

These early American public utilities had several characteristics. First, they operated as private businesses that gave service to the public in the most general way. Second, given the high entry capital investment of such industries, they held legal or de facto monopoly or quasi-monopoly power. That is, they possessed the legal or market power to prevent competition for their services. Third, they tended to provide their services within fixed territories. Fourth, they had the duty of universal service: the duty to serve all members of the public for the service provided in a non-discriminatory way. Fifth, they could charge to the public prices in the forms of tariffs or rates that had to be reasonable and commensurate with the services rendered. Finally, at least under English common law, the reach of the legal monopoly of such public utilities was interpreted narrowly by courts when that monopoly was faced


with the creative destruction brought by the technological innovation from new market entrants which brought newer, better ways to provide the service.⁷

The modern conception of the public utility business and its bridge to its centuries past comes not from Europe, but from an American case decided by the United States Supreme Court in 1876. The case was *Munn v. Illinois*, 94 U. S. 113 (1876). The case was decided in the background of the end of the American Civil War and the passage of the 13th and 14th Amendments to the US Constitution. The 13th Amendment prohibited the institution of slavery in the US. The 14th amendment, among other things, prohibited States (as opposed to the Federal Government) to deprive its citizens of their liberty and property without the due process of the law. The case arose in the context of the States assertion of their power to regulate the prices of services and goods provided by private parties. At stake in *Munn* was an Illinois law that purported to establish a maximum price in the tariffs charged by owners and operators of grain elevators in the City of Chicago, Illinois. Munn asserted that the maximum price regulation was concomitant to the State of Illinois taking their private property in what is now know as a regulatory taking, without the payment of just and prompt compensation.

Chief Justice Waite, in upholding the constitutionality of the Illinois statute, forever enshrined in the American constitutional order a concept that had lay dormant for almost two hundred years in the sources of English common law: the concept of a business “affected with the public interest.” Supporting Illinois assertion of the regulation at hand, he went on to say:

"This brings us to inquire as to the principles upon which this power of regulation rests. . . . Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, i Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since."⁸

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Munn, and its holding that States can regulate prices of private business “affected with a public interest” was a deeply divided opinion and its 200 year old legal reasoning was widely debated among legal scholars for the next half century after its adoption.\(^9\) It nonetheless provided a solid constitutional rock upon which States could regulate the prices of businesses “clothed with a public interest” to this date. Soon after the Munn opinion, the United States Congress established the Interstate Commerce Commission in order to regulate, among other things, inter-State railroad tariffs. States followed the act by establishing public utility regulatory authorities currently know as Public Service Commissions (PSC). PSCs had the legislative mandate to regulate tariffs of such businesses classified as public utilities by State legislatures. State PSCs issued public utilities certificates of convenience and necessity in order to allow a private undertaking to enter into the regulated market and to grant exclusive franchises to such undertakings. They also regulated such utilities non-discriminatory duty to serve obligations to all customers in their exclusive territories and approved the utilities tariffs and rates to customers under the common law’s “just and reasonable” standards, primarily through the so-called “cost of service” rate regulation. There commences the 20\(^{th}\) century history of the regulation of public utilities.

However, the subject of this work is to look at those legal precepts “from time immemorial” that defined the category of “private property affected by the public interest” and understand some of its legal and historical characteristics.

The question is where to look for those “time immemorial” traits of modern businesses “affected with a public interest”. Fortunately, Justice Waite gave us a solid reference into English common law where to commence our search. Lord Hale, of Munn v. Illinois fame, described the common law principles effective in the operational aspects of wharfs in London circa 1690. In De Porti Maris, he said:

"2. A man for his own private advantage may in a port town set up a wharf or crane, and may take what rates he and his customers can agree for cranage,  

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wharfage, housellage, pesage; for he doth no more than is lawful for any man to do, viz, makes the most of his own. And such are coal-wharfs, and wood-wharfs, and -timber-wharfs, in the port of London and some other ports. But such wharfs can not receive customable goods against the provision of the statute of I. Eliz. cap. ii.

"3. If the king or subject have a publick wharf, unto which all persons that come to that port must come and unlade or lade their goods as for the purpose, because they are the wharfs only licensed by the queen, according to the statute of I. El. cap. ii. or because there is no other wharf in that port, as it may fall out where a port is newly erected; in that case there cannot be taken arbitrary and excessive duties for cranage, wharfage, pesage, &c. neither can they be enhanced to an immoderate rate, but the duties must be reasonable and moderate, though settled by the king's license or charter. For now the wharf and crane and other conveniences are affected with a publick interest, and they cease to be juris privati only; as if a man set out a street in new building on his own land, it is now no longer bare private interest, but it is affected with a publick interest.

"4. But in that case the, king may limit by his charter and license him to take reasonable tolls, though it be a new port or wharf, and made publick; because he is to be at the charge to maintain and repair it, and find those conveniences that are fit for it, as cranes and weights."10

Lord Hale describes the existence of two types of wharfs: those existing pursuant to a license by the Queen which we may call public, and those that were private, but that by virtue of certain circumstances became available to the public. In the latter case, Lord Hale argues for an “intermediate” status of private property, which he called property “affected with the publick interest.” 11

Moreover, Lord Hale talks of when a private wharf or crane could become one affected by the public interest in the sense that under certain circumstances, the private owner must give access to his private property to members of the public, and then he may charge not whatever his most greedy self interest could allow under such circumstances, but only “reasonable” tolls.


11 See, McAllister, supra note 9.
This intermediate conception of property rights went into a head-on collision with the *laissez faire* conception of property rights predominant in 19th century America. This may be the reason why Blackstone, the most influential commentator of English common law in America did not mention this concept in his Commentaries on the Laws of England.\textsuperscript{12}

In order to continue our search of the origins of the concept of public utility, we must look at the socio-economic system that gave birth to English common law in the Middle Ages: feudalism. In fact, this is what Dean Roscoe Pound urged us to do so in his famous lectures in the 1920s on the spirit of the common law. There, he asked us to comprehend the common law from the vantage point of its origins in the landlord-tenant relationship we now call feudalism. In a famously quoted passage he said:

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“While the strict law insisted that every man should stand upon his own feet and should play the game as a man, without squealing, the principal social and legal institution of the time in which the common law was formative, the feudal relation of lord and man, regarded men in quite another way. Here the question was not what a man had undertaken or what he had done, but what he was. The lord had rights against the tenant and the tenant had rights against the lord. The tenant owed duties of service and homage or fealty to the lord, and the lord owed duties of defense and warranty to the tenant. And these rights existed and these duties were owing simply because the one was lord and the other was tenant. The rights and duties belonged to that relation. Whenever the existence of that relation put one in the class of lord or the class of tenant, the rights and duties existed as a legal consequence. The first solvent of individualism in our law and the chief factor in fashioning its system and many of its characteristic doctrines was the analogy of this feudal relation, suggesting the juristic conception of rights, duties and liabilities arising, not from express undertaking, the terms of any transaction, voluntary wrongdoing or culpable action, but simply and solely as incidents of a relation.”\textsuperscript{13}
\end{quote}

Thus, in order to understand the medieval economic institutions that provided the legal characteristics of the modern public utility, we must understand the role of law and jurists during the early and latter Middle Ages. In his seminal work, *A History of European Law*,\textsuperscript{14} Paolo Grossi provides an illuminating and authoritative description of the medieval roots of European Law. There, he describes the medieval period as

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\textsuperscript{12} Sir William Blackstone, Commentaries on the Laws of England (vol. 4) (1765–69).
\textsuperscript{14} Paolo Grossi, A History of European Law 1 (Laurence Hooper trans., Wiley-Blackwell 2010).
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one marked by the “profound discontinuity” with the Roman Empire that preceded it. He describes the medieval era as one of incompleteness in the political order in the sense of its “inability, or unwillingness, to concern itself with controlling all forms of social behavior.” The medieval political order did not aimed at micromanaging the details of relationships between private individuals like the Roman Empire did. As such, the concept of “state” in the modern conception of it cannot be applied to the political regimes of the Middle Ages.

The collapse of the Western Roman Empire in 474 AD left a vacuum of power that was filled de facto by the structures of the Roman Church interspersed in a network of communities. In these communities, power was not centered around the figure of a Prince, but around the brute forces of the natural world. Rossi argues that the medieval civilization was reicentric, not anthropocentric like the Roman civilization that preceded it. Reicentrism he says is the belief in the central nature of the res (thing), as opposed to the centrality in the man as master of nature. The medieval legal order arose from the facts that emanated from man’s place in the natural order and the legal order’s aim was to organize such accepted fact-centric norms that are commonly known as consuetudo or customs. Customs “synthesize the convictions and values that the new legal culture of the Middle Ages placed at its foundations, with the goal of winning its battle with history and guaranteeing its continued survival.”

Early medieval law was not civil law, it was agricultural law, a field almost non-existent in Roman law and the preeminent jurist of the times was the Notary who had to effectively record the reality of the transactions appearing before him. The legal norms that emerged from such system were more concerned with the effectiveness of the norm than with their validity or compliance with an authoritative legal principle. Grossi concludes his distinction of the Roman and medieval system of property rights by stating that:

“The medieval legal system favours procedures that provide effective resolutions with regard to land, particularly where agricultural activity is involved. The Roman opposition between owner and occupier appears no to obtain in the medieval period. Many occupiers of land under licence – particularly those who seek to improve the land’s productivity in the long term – gain a status of para-ownership thanks to an unobstrusive but continuous

15 Grossi, supra Note 14, at 10.
erosion of formal property rights.” 16

The England of the early middle ages was an almost perfect laboratory for the concoction of feudalism. Thorndike tells us that:

“WITH the disruption of Charlemagne's empire and the period of renewed invasions from all sides, we are no longer able to follow the fortunes of one ruler or of several fair-sized kingdoms; but find ourselves in the complicated tangle of feudalism, with its overlapping areas, its conflicting claims and titles to land and power, its minute subdivisions of sovereignty, its thousands of lords. Feudalism in the strict sense of the word denotes the relationships which existed in the Middle Ages, especially from the ninth and tenth to the twelfth and thirteenth centuries, between the members of the fighting and landowning class. In a broader sense it also covers the life of the subjugated peasantry upon the land dominated by the warriors, and all the other economic, social, political, and intellectual results and accompaniments of feudalism in the narrower sense.” (Emphasis added.) 17

It is with this optic that we must see the recorded accounts of the economic institutions that developed the common law characteristics of the modern public utilities. We must look now at the economic life of the early Middle Ages and that bring us to most important technological advance of such times: the widespread developments of water mills 18. Levine describes with fascination the importance of such medieval invention.

“Across the northwestern European countryside the ancient technique of harnessing the power of water, wind, and the tides through the use of mills greatly enhanced productivity and extended the division of labor. Deriving from a Roman invention, the waterwheel was the most important invention of the Middle Ages insofar as it replaced human energy with another power source. Tapping this source of inanimate energy meant that, for the first time in history, a complex civilization could be built on the foundation of something other than the sweating backs of slaves and/or dependent laborers. The ancient water mill was connected to complex systems of water transfer; most have been found in the immediate vicinity of aqueducts. The medieval waterwheels were, by way of contrast, located on streams of every size, and a few were even put to work on tidal inlets. Waterwheels were used primarily for flour milling, although by 1500 some were being applied to industrial

16 Grossi, supra Note 14, at 17.
processes, sometimes on a very substantial scale. Feudal-manorial societies in the northwest of Europe enthusiastically adopted water-powered milling as a means of fiscal extraction from dependent peasants. “If the ancient world gave birth to the vertical water wheel and nurtured the earliest stages of its growth, it was the medieval West that brought it through adolescence and into adulthood.” 19

Given the anglo-centric nature of this work, I do not want to give the wrong impression that water mills was predominantly an English phenomenon. 20 The former Western Roman Empire was full of water (and wind) mills during the Middle Ages.

“The Anglo-Norman conquerors' Domesday Book of 1086 recorded 6,082 water mills in the parts of southern England they surveyed—an average of one per fifty households. By the third quarter of the thirteenth century the number of water mills in England had probably doubled, and in the fifty years after 1275, there was another increase in mill building. In the northern French county of Picardy there were 40 mills in 1080, 80 in 1125, and 245 in 1175. In all of France, there were 20,000 water mills by the early eleventh century; nearly two centuries later, the number had doubled. It is estimated that there were 250,000 mills (of all types) in thirteenth-century Europe which combined to supply something on the order of one million horsepower. One million horsepower would be equivalent to more than three million slaves.” 21

Medieval manorial tenants were not slaves, but their relationship to the landlord was so “connected” that it could offend the modern sensibilities about what we now consider slavery. “The feudal claims were coeval with the origin of the town, for in the earliest stage of its growth the townsfolk were in the position of manorial tenants, and accordingly were burdened with the onerous obligations incidental to villeinage. They owed agricultural service in the field and suit of court and suit of mill.” 22

Suit of court is an obligation similar to what we currently know as jury duty and suit of mill refers to the obligation of tenants to resort to a special mill (usually that of their Lord) to have their corn ground. The suit of mill was a formal proceeding against manorial tenants who did not use landlord mills to grind their grain. It

20 See also, Piotr Górecki, Economy, Society, and Lordship in Medieval Poland, 1100-1250 218 (Holmes & Meier) (1992).
21 Levine, supra note 17, at 168.
culminated in confiscation of the convict's grain, a fine, or both.\textsuperscript{23} In the workings of the suit of mill we can commence to allocate the distribution of rights and duties expected from the medieval service of general economic interest known as the water mill. Writing in the first part of the 19\textsuperscript{th} century, Woolrych in his \textit{Law of Waters} treatise dedicates a short chapter to the subject of water mills. There, he offers us description of the common law suit of mill with reasonable fidelity.

“In ancient times, before the necessaries and conveniences of life were supplied in such profusion as at present, it became important to the settlers in and inhabitants of different districts, that they should have free access to some mill for the purpose of grinding their corn. This easement was indispensable, because they required in the first instance, sustenance for their families; and in some cases there might have been an obligation to grind the lord's wheat for his use. Lords of manors, therefore, for the purpose of meeting this exigency, erected mills on their respective domains for the public advantage; but they fettered their gift with this condition, that the inhabitants and residents within their respective seignories should bring their corn to be ground at the mill so built up; and this custom, which thus had a reasonable commencement, was called doing suit to the mill. Consequently whether the millers, to whom the respective lords conceded these advantages, make their claim by prescription, which supposes a grant from the lords, or by custom, it seems clear, that this old practice arose originally from a sense of general convenience; and in so strong a point of view does this seem to have been considered, that a man might have claimed the suit by prescription even from the villeins of a stranger.

In process of years, however, when commerce began to spread, and new erections were prospering on every side, many of the tenants and inhabitants, whose ancestors had derived benefit from the ancient mills, began to employ their own particular workmen, and the old millers found themselves deserted by degrees by those whose duty it was to have continued their support. They were, therefore, necessitated to seek redress, and the writ of \textit{secta ad molendinum}, or \textit{secta molendini}, was the ordinary remedy which they employed upon those occasions. The enforcing of this writ, which is now superseded by the modern action on the case, brought back the inhabitants to the suit and service which they owed.

Again, on the other hand, the millers would sometimes stretch their prerogative too far; and not content with the suit of the tenants and neighbours, would endeavour to lay claim to a more extensive limit than they ought, and thus it was that they were now and then defeated upon one side or the other to try the validity of their customs; or they would even trespass on the rights of the inhabitants, and instead of confining themselves to the usual demand of having all the corn ground at their mills which would be afterwards used in the family, they strove to include within their custom all the corn sold or spent in the neighbourhood. This being an unreasonable custom, was

rejected by the Courts.
These customs are appendancies to the mills to which they belong, so that he who is seised of the mill becomes of course entitled to the suit; Thus, where the Prior of Watton brought an action for suit to his mill against the Abbott of Meuz, it was said, on the part of the plaintiff, that the suit was claimed as appendant. And by the Court, whoever is seised of the mill, shall have the suit; and if the plaintiff have no title, that will come by way of reply. It was then claimed from time immemorial, and, therefore issue was joined.\footnote{Humphrey W. Woolrych, A Treatise of the Law of Waters: including the law relating to rights in the sea, and rights concerning rivers, canals, dock companies, fisheries, mills, water-courses, etc., with a note concerning the rights of the crown to the land between high and low water mark 145-146 (T. & J.W. Johnson) (1853).}

The above passage teaches us that the suit of mill was a reasonable custom that courts would upheld if the miller could prove the title to his privilege, be it by express grant from the lord or by custom. The custom was reasonable because it was convenient: lords spent considerable amounts of money to build these mills that were accessible to the tenants and the least they could expect from tenants was that they be bound to grind their corn at the lord’s mill. The use of the mill would not be free. Tenant had to pay a fee that was called multure.\footnote{See Holt, supra note 16.} Moreover, the suit of mill was attached to the mill even if the mill’s ownership changed. In a sense, the custom was similar to what today we know as an easement or “covenant that runs with the land.” As such, the mill was not only a productive asset, it was a bundle of rights and privileges that created a separate legal real property over an above the fee simple property right of the owner of the mill (\textit{dominio}). Finally, we learn that common law courts would not expand on the original grant of the privilege when the unscrupulous millers wanted to extend his leash over new clientele. Common law courts interpreted grants of monopoly power in a restrictive way. The relationship between the landlord and the tenant could not become unreasonable. To that point, Woolrych tells us that “[t]he principle upon which these decisions have proceeded is, that lords of the manors, in the first instance, erected mills for the convenience of their tenants, and that the millers derived their title to the exclusive grinding either by prescription, which presupposes a grant from the lord, or a custom which was not considered unreasonable. When, however, they came to encroach, and endeavour to enlarge their rights, they were in their turn foiled and compelled to rest satisfied within the limits of
Monopolistic undertakings are very powerful market actors. The feudal regime evolved over the centuries, but well maintained (although technologically outdated) water mills could last for centuries also. Millers continued using the coercive power of the courts to hang on their dated exclusive privileges. The Suit of Mill “… survived, indeed, long after all other incidents of feudal dependency had disappeared; so valuable, for example, were the Dee Mills of Chester that they passed into a proverb on extravagance. The monasteries in particular clung tenaciously to their monopoly, and could never be brought freely to relinquish its profits. When the burgesses of Barnstaple made submission to the abbey, they bound themselves expressly to do suit at its mill and erect none of their own to its prejudice and hurt. Even on the eve of the dissolution the monastic establishments were drawing a considerable portion of their revenues from the mills.\textsuperscript{27}

A good business model hardly dies and a business with a grant of legal exclusive rights is perhaps the business every businessman idealizes about. Millers, with the help of clever lawyers continued using the suit of mill well into the times of Lord Hale. “Suit of mill, which had always been difficult to enforce, had faded into disuse, though with at least a fifth of mills in decay after the mid- fourteenth century many communities had easy access to only one mill. Some mills seem to have escaped from the control of lords, in particular those originally built by a lord but which had been ill-advisedly rented out (typically in the twelfth century) and had become freeholds, paying a nominal rent to a lord. New mills were built in the later middle ages by entrepreneurs. At Gaydon in Warwickshire, for example, in 1539 a millwright was contracted to a free tenant, without apparent reference to the lord of the manor, to build a new windmill for £8. Independent mills of this type would not pay a rent to the lord, but would be subject to regulation by the court leet [\textsuperscript{28}], where the miller would be fined for taking excessive tolls, which often provides the only means of

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\textsuperscript{26} Woolrych, \textit{supra note} 22, at 151,
\textsuperscript{27} Lipson, \textit{supra note} 20, at 202.
\textsuperscript{28} Court leet was an English criminal court for the punishment of small offenses. The use of the word leet, denoting a territorial and a jurisdictional area, spread throughout England in the 14th century, and the term court leet came to mean a court in which a private lord assumed, for his own profit, jurisdiction that had previously been exercised by the sheriff. (from the Classic Encyclopedia, \url{http://www.1911encyclopedia.org/Court_leet}).
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discovering their existence.29

An interesting development described by Dyer is the advent of the private entrepreneur into the business of mills that was up to that point the private club of lords and the Church. Throughout the Middle Ages and into modernity, common law courts never relinquished their jurisdiction to regulate the “reasonableness” of the prices charged by these mills to the public. One can only wonder if these common law courts held such entrepreneurs to certain standard of service. We know that manorial lords and the Church had an ingrained responsibility towards the tenants and peasants in their manor. The new class of entrepreneurs who bought these old mills did not have incentives to better up their mills: the suit of mill was a one-way street in their favor.

In this work, I have attempted to study the historical origins the modern public utility, an odd actor in our actual liberal economic system. The oddness I refer to has to do with the fact that modern public utilities are the possessors of exclusive rights that give them almost monopolistic power, which is the anathema of liberal orthodoxy. We have seen the striking similarities between the legal duties and privileges of the modern public utility and those given to water mills by the feudal custom of the suit of mill. Feudal mills were operated for the convenience of the public, they had fixed territories, monopoly power to give the service and demand the use by its clientele, could not exceed the bounds of the written or customary privileges granted to them, and had to charge reasonable prices much like modern public utilities. The legal characteristics of water mills was ignominious to other services of general economic interest in the Middles Ages such as Innkeepers and ferry systems. The legal duties and privileges afforded to water mills and similar businesses in the Middle Ages lead to the coinage of the term private property “affected by the public interest” by the English and American common law regimes, which in turn became the model for the modern system of public utility regulation.

The question remains why ordo-liberalist Europe continues to protect “services of general economic interest” with their exclusive rights and monopoly powers of clear

feudal origins whose origins were the reflection of the “incompleteness” of the political power at the time they arose? Should not nationalistic governments with their complete assertion of political powers be the sole providers of such services? Or, at least, should not the national governments formulate a modern channel for the provision of such services (such as the public-private partnerships) from a legal basis that emanates from the present constitutional order of such nations? Why have these feudal relics survived into the 21st century? As I said before, monopolies are very powerful economic (and political) actors.