PUBLIC UTILITIES AND THE EUROPEAN UNION'S "SERVICES OF GENERAL ECONOMIC INTEREST": FEUDAL ORIGINS OF THEIR MONOPOLY POWERS

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European Law affords special treatment to undertakings or firms that provide *services of general economic interest*. Article 14 of the Treaty on the Functioning of the European Union (hereinafter the "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.[1]

The Treaty on the European Union[2] (hereinafter the "TEU") and the TFEU do not define the term *services of general economic interest*. Apart from Article 14, only TFEU Article 106 (1) mentions "public undertakings and undertakings to which Member States grant special or exclusive rights"[3] and TFEU Article 106(2) speaks of "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-

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[1] Consolidated Version of the Treaty on the Functioning of the European Union, art. 14, Oct. 26, 2012, 2012 O.J. (C 326) 49, 54 [hereinafter TFEU] (emphasis added).

[2] Consolidated Version of the Treaty of the European Union, Oct. 26, 2012, 2012 O.J (C 326) 13 [hereinafter TEU].

[3] *Id.*, art. 106 (1).

producing monopoly"[4] without defining any of these terms. Later on, TFEU Article 106 goes on to state 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."[5]

Since the Treaties do not define such types of undertakings, the European Commission and the Court of Justice of the European Union (ECJ) have been left with the difficult task of providing legal meaning to such term.[6] It is not our purpose in this short reflection to embark on the task of analyzing how the Commission and the ECJ have struggled to offer meaning to this term. For purposes of this article, it suffices to say that firms providing "services of general economic interest" include, without a doubt, the 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 provide essential public services such as telecommunications, public waters, electricity generation, transmission and commercialization, postal services, among others, which are almost always highly regulated by government. For purposes of convenience, we will refer to providers of "services of general economic interest" as "public utilities" during the rest of this article.

Given that this distinction is incomplete, we should stop at the point in Article 14 TFEU that aroused our 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? If such is the case, why? 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.

Our aim in this work is to attempt a brief historical exploration of the economic and legal phenomenon we currently know as public utility. The purpose of this article is to see if such historical exploration shines some light on the questions presented above. The relevancy of such historical investigation becomes more pertinent especially when considering the apparent contradiction of the existence of revenue-producing monopolies that provide services of general economic interest within European Union (EU) competition policy. In other words, one must question ultimately why the EU, which, since its inception has aimed at creating an internal market based on a *highly competitive social market economy*, allows for special

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[4] *Id.*, art. 106 (2).

[5] *Id.*;. *See also id.*, Protocol (No. 26) on Services of General Interest.

[6] *See* Commission Decision 2005/842, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, 2005 O.J. (L 312) 67-73; Case C-320/91, Corbeau Case, 1993 E.C.R. I-2533.

treatment of undertakings that are the antithesis of competition: monopolies. There may be several reasons for this, but today we are 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 economic and legal characteristics that separate them from other kinds of economic undertakings. We shall further see that these characteristics originated in the economic institutions arising from feudal relationships in the early Middle Ages. Furthermore, we shall observe that they were brought back into modernity by means of their American adoption of the English common law in the latter part of the 19th century.

Before delving into the possible historical precursors of the subject, we must begin the exposition by explaining the modern consensus about what a public utility is.[7] Public utilities generally refer to those kinds of undertakings (publicly or privately-owned) that provide the public with goods or services that, in the consensus of society, are of general or essential interest. Some public utilities operate as publicly owned businesses in the form of revenue-producing monopolies. Most undertakings, however, operate as privately owned businesses to which the government affords certain exclusive rights. 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 such services. In the 20th Century, public utilities *de jure* or *de facto* exerted such economic power that they faced little or no competition in the territories where they operated.

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 story was different in Europe, where the national states quickly recognized the importance of those new services and took their development and exploitation upon themselves for the benefit of their citizens. The provisions of most public utility services in Europe remained in the hands of national companies for the most part of the

[7] *See* JOHN BAUER, EFFECTIVE REGULATION OF PUBLIC UTILITIES (The MacMillan Company 1925); ELIOT JONES & TRUMAN C. BIGHAM, PRINCIPLES OF PUBLIC UTILITIES (The MacMillan Company 1931).

20th century until the advent of the liberalization movement at the beginning of the 1990s.[8]

Why the United States and Europe chose such different paths to achieve the same objectives is a matter outside the scope of this paper.[9] 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 the historical preference for 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 high demand services to the public. Second, given the high entry-capital investment required by such industries, they held legal or *de facto* monopoly or quasi-monopoly power over their markets. 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 nondiscriminatory way. Fifth, they could charge the public prices in the form 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 the courts in cases where the monopoly was faced with creative destruction brought on by the technological innovations of new market entrants with newer or better ways to provide services.[10]

The modern conception of the public utility business and its bridge to its centuries-old past comes not from Europe, but from an American case decided by the United States Supreme Court in 1876. It was was *Munn v. Illinois*.[11] The case was decided within the background of the end of the American Civil War and the approval of the 13th and 14th Amendments to the United States (US) Constitution. The 13th Amendment prohibits the institution of slavery in the US. The 14th amendment, among other things, prohibits States (as opposed to the Federal Government) from depriving persons of their liberty and property without due process of 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 the establishment of a maximum price in the tariffs charged by owners and operators of grain elevators in the City of

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[8] *See* Directive 96/92/EC of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity, 1997 O.J. (L 027) 20.

[9] Marshall E. Dimock, *British and American Utilities: A Comparison*, 1 U. CHI. L. REV. 265 (1933).

[10] *See* FRED BOSSELMAN, ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT 46 (Foundation Press 3d Ed. 2010).

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

Chicago, Illinois. The plaintiffs in *Munn* asserted that the maximum price regulation was concomitant to the State of Illinois taking their private property in what is now known 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 been 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.[12]

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 following half century, after its adoption.[13] It nonetheless provided a solid constitutional rock upon which States could regulate the price of business activities *clothed with a public interest* up until this date. Soon after the *Munn* opinion, the United States Congress established the Interstate Commerce Commission in order to regulate, among other things, interstate railroad tariffs. States followed the act by establishing public utility regulatory authorities currently known as Public Service Commissions (hereinafter the PSCs). PSCs have the legislative mandate to regulate tariffs of such businesses classified as *public utilities* by State legislatures. State PSCs issued certificates of convenience and necessity to public utilities in order to allow a private firm to enter into the regulated market and to grant them exclusive franchises. They also imposed upon such utilities the nondiscriminatory duty to serve all customers in their exclusive territories and applied the common law's *just and reasonable* standards to the utilities' consumer tariffs and rates, primarily through the so-called *cost of service* rate

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[12] *Id.* at 125-26.

[13] *See* Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. R. 759 (1930); Walton H. Hamilton, *Affectation with Public Interest*, 39 YALE L.J. 1089 (1930).

regulation. There is where the 20th century history of the regulation of public utilities begins.

However, the subject of this article 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 where to commence the search within English common law. Lord Hale, cited in *Munn v. Illinois*, 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, 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.
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> 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 inhanced 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.
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> 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.[14]

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 public interest."[15] Moreover, Lord Hale talks of when a private wharf or crane could become one affected by 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.

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 William Blackstone, the most influential commentator of English common law in America, did not mention this concept in his Commentaries on the Laws of England.[16]

In order to continue the search for 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 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 feudal landlord-tenant relationship. In a famously quoted passage he said:

> 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

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[14] A Treatise in Three Parts. "PARS PRIMA. *De Jure Maris.* PARS SECUNDA. *De Portibus Mari.* PARS TERTIA. Concerning the Custom of Goods imported and exported." From a MANUSCRIPT OF LORD CHIEF JUSTICE HALE IN I HARGAVE, COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 1-248 (1787). McAllister, *supra* note 11, at 764 (quoting Hale, De Portibus Maris cc. VIII, IX 77-78).

[15] *See* McAllister, *supra* note 13.

[16] *See* McAllister, *supra* note 13, at 766. ("It is interesting to note in passing that nowhere in Blackstone's Commentaries is there a word about anything being affected with a public interest. Blackstone, we may assume, read Lord Hale's Analysis with a trained and critical eye. Consequently, it is not without significance that when Blackstone formulated the rights of things he straightway divided them into things real and things personal and rejected Lord Hale's preliminary division into rights of things that are *juris publici* and those that are *juris private*."). *See also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 1765-69 (Wayne Morrison ed., Cavendish Publishing 2001) (1765-69).

> 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 owed 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.[17]

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 the law and jurists during the early and latter Middle Ages. In his seminal work, *A History of European Law*,[18] Grossi provides an illuminating and authoritative description of the medieval roots of European Law. There, he describes the medieval period as one marked by the "profound discontinuity"[19] with the Roman Empire that preceded it. He considers the medieval era as politically incomplete, in the sense of its "inability, or unwillingness, to concern itself with controlling all forms of social behavior."[20] The medieval political order was not aimed at micromanaging the details of relationships between private individuals, like the Roman Empire did. As such, the concept of *state* in its modern conception cannot be applied to the political regimes of the Middle Ages.

The collapse of the Western Roman Empire in 474 A.D. left a vacuum of power that was filled *de facto* by the structures of the Roman Catholic Church, interspersed in a network of communities. In these communities, power was not centered around the figure of a Prince, but on 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 of man as master of nature. The medieval legal

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[17] ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 20 (Marshall Jones Co. 1921).
[18] PAOLO GROSSI, A HISTORY OF EUROPEAN LAW 1 (Laurence Hooper trans., Wiley-Blackwell 2010).
[19] *Id*.
[20] *Id*.

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 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."[21] Early medieval law was not civil law; it was agricultural law, a field almost non-existent in Roman law. 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 erosion of formal property rights. [22]

The England of the early middle ages was an almost perfect laboratory for the concoction of feudalism. For instance, 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

[21] *Id.* at 10.
[22] *Id.* at 17.

> warriors, and all the other economic, social, political, and intellectual results and accompaniments of feudalism in the narrower sense.[23]

It is through this lens that we must see the recorded accounts of the economic institutions that developed the common law characteristics of modern public utilities. We must now look at the economic life of the early Middle Ages, which will bring us to the most important technological advance of such times: the widespread development of water mills.[24] 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 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.[25]

Given the Anglo-centric nature of this work, we do not want to give the wrong impression that water mills were predominantly an English

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[23] LYNN THORNDIKE, THE HISTORY OF MEDIEVAL EUROPE 232 (James T. Shotwell ed., Houghton Mifflin 1917) (emphases added).
[24] *See* RICHARD HOLT, THE MILLS OF MEDIEVAL ENGLAND (John Wiley & Sons 1988); JOHN LANGDON, MILLS IN THE MEDIEVAL ECONOMY: ENGLAND 1300-1540 (Oxford Univ. Press 2004).
[25] DAVID LEVINE, AT THE DAWN OF MODERNITY: BIOLOGY, CULTURE, AND MATERIAL LIFE IN EUROPE AFTER THE YEAR 1000 at 167 (Univ. of Cal. Press 2001).

phenomenon.[26] 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.[27]

Medieval manorial tenants were not slaves, but their relationship to the landlord was so *connected* that it could offend 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."[28]

Suit of mill refers to the obligation of tenants to resort to a special mill (usually that of their Lord) to have their grains ground. The suit of mill was a formal proceeding against manorial tenants who did not use the landlord's mills to grind their grain. It culminated in the confiscation of the convict's grain, a fine, or both.[29] 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 19th century, Woolrych in his *Law of Waters*[30] treatise dedicates a short chapter to the subject of water mills. There, he offers a description of the common law suit of mill with reasonable fidelity:

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[26] *See also* PIOTR GÓRECKI, ECONOMY, SOCIETY, AND LORDSHIP IN MEDIEVAL POLAND 1100-1250, at 218 (Holmes & Meier 1992).

[27] LEVINE, *supra* note 25, at 168.

[28] 1 EPHRAIM LIPSON, THE ECONOMIC HISTORY OF ENGLAND 201 (Adam & Charles Black, 12th ed. 1959).

[29] *See* HOLT, *supra* note 24, at 38-40, 44- 45.

[30] 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 (T. & A. W. Johnson 1853).

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 *secta ad molendinum*, or *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.[31]

The above passage teaches us that the suit of mill was a reasonable custom that courts would uphold 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. A tenant had to pay a fee that was called multure.[32] 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 right over and above the fee simple property right of the owner of the mill (*domino*). Finally, we learn that common law courts would not expand on the original grant of the privilege when the unscrupulous millers wanted to extend their 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 their original grant.[33]

Monopolistic undertakings are very powerful market actors. The feudal regime evolved over the centuries, but well-maintained (although technologically outdated) water mills could also last many years. Millers

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[31] *Id.*, at 145-146.
[32] *See* HOLT, *supra* note 24.
[33] WOOLRYCH, *supra* note 30, at 151.

continued using the coercive power of the courts to hang on to 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 a 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.[34]

A solid *business* model does not die easily, and one with a grant of exclusive legal rights is perhaps the *most coveted* arrangement in the business world. Millers, with the help of skillful 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. Entrepreneurs built new mills in the later Middle Ages. 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,[35] where the miller would be fined for taking excessive tolls, which often provides the only means of discovering their existence.[36]

An intriguing development described by Dyer is the entry of the private entrepreneur into the business of mills, which up to that point, was

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[34] LIPSON, *supra* note 28, at 202.

[35] 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. *See* Classic Encyclopedia, http://www.1911encyclopedia.org/Court_leet.

[36] CHRISTOPHER DYER, AN AGE OF TRANSITION? ECONOMY AND SOCIETY IN ENGLAND IN THE LATER MIDDLE AGES 163 (Clarendon Press 2005).

the private domain 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 a 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 improve their mills: the suit of mill was a one-way street in their favor.

In this article, we have attempted to study the historical origins of the modern public utility, an odd actor in our actual liberal economic system. The oddness we refer to has to do with the fact that modern public utilities are the possessors of exclusive rights that give them an 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, and the responsibility and faculty to provide a specific service to their clientele, while at the same time they were able to enforce their exclusive rights to operate such services on the people in their territory. They nonetheless 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 were comparable to those of other services of general economic interest during the Middles Ages such as Innkeepers and ferry systems.[37] The legal duties and privileges afforded to water mills and similar businesses in the Middle Ages, led 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 thus remains: why does a free market of the European Union continues to protect *services of general economic interest*, even though these clearly possess feudal characteristics, which are a distinct reflection of the "incompleteness" of the political power at the time of their origin? Should nationalistic governments, with their complete assertion of political powers, not be the sole providers of such services? Or, at least, shouldn't these 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 in the 21st century? As we said before, monopolies are very powerful economic (and political) actors.

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[37] *See* Jim Rossi, *The Common Law "Duty to Serve" and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233 (1998).