

CONTROLLING PRICE CONTROLS

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How does the Constitution control price controls? The Court has developed two frameworks for adjudicating Takings Clause challenges to price controls. On the one hand, the regulatory takings framework prohibits price controls from going too far. It does so through a combination of *per se* rules and the *Penn Central* test. On the other hand, the ratemaking takings framework requires that price controls be just and reasonable. It does so through an independent reasonableness inquiry. Today, Takings Clause challenges to price controls trigger either regulatory takings or ratemaking takings.

The open question is the *metaframework*: When should courts apply which framework? Under long-dead Due Process Clause doctrine, the Court adopted a virtual monopoly metaframework: Price controls on virtual monopolies faced ratemaking takings, and price controls on non-virtual monopolies were automatically unconstitutional. But under current Takings Clause doctrine, it remains unclear when to apply which framework. The Court must choose a metaframework.

The best choice is a new virtual monopoly metaframework: Price controls on virtual monopolies face ratemaking takings, and price controls on non-virtual monopolies face regulatory takings. This is because ratemaking takings is compatible with noncompetitive markets, where its independent reasonableness inquiry is not distorted by inflated market prices, and regulatory takings is compatible with competitive markets, where the *Penn Central* test uses efficient market prices as a regulatory benchmark. In turn, the new virtual monopoly metaframework would clarify the constitutional status of myriad price controls. Thus, what is old must become new again.

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INTRODUCTION

Price controls are as old as laws themselves. In Babylon, Hammurabi set the price of medical care.¹ In Rome, Diocletian price-fixed “practically all articles and services.”² And in the United States, the federal government has oft experimented with “systematic price controls.”³ Today, price controls are alive and well. As one commentator writes: “Ratemaking, the dreariest legal expression of the dismal science, is sexy again.”⁴ Yet on some accounts, price controls are not only unwise,⁵ but unconstitutional.⁶ So we might ask: How does the Constitution control price controls?

Let’s begin with the basics. Price controls are a “system in which the government sets the prices of things.”⁷ The government sets the price of things when it conducts a “targeted intervention[]” in pricing decisions.⁸ For example, if the government wanted to lower the price of apples, it could do so directly (by setting a maximum price) or indirectly (by subsidizing apple suppliers).⁹ Though both government actions would

1. HISTORY.COM, *Code of Hammurabi* (Sep. 11, 2026), <https://www.history.com/articles/hammurabi> [<https://perma.cc/RF29-J9A2>].

2. Roland G. Kent, *The Edict of Diocletian Fixing Maximum Prices*, 69 U. PA. L. REV. 35, 35 (1920).

3. TODD N. TUCKER, ROOSEVELT INST., PRICE CONTROLS: HOW THE U.S. HAS USED THEM AND HOW THEY CAN HELP SHAPE INDUSTRIES 5 (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/11/RI_Industrial-Policy-Price-Controls_Brief-202111.pdf [<https://perma.cc/TJ7C-ZBT3>]; see also John F. Duffy & Richard M. Hynes, *Crisis Pricing*, 74 EMORY L.J. 543, 561–62 (2025) (“In the first half of the twentieth century, price controls were instituted during major wars Even into the 1970s, emergency price controls were deployed by the federal government [I]n the last half century, many states have enacted new ‘antigouging’ statutes that are designed to restrain price increases during emergencies.” (footnotes omitted)).

4. Jim Chen, *Hope a Better Rate for Me*, 17 YALE J. ON REGUL. 195, 195 (2000).

5. DANIEL F. SPULBER, REGULATION AND MARKETS 33 (1989).

6. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 277–78 (1985).

7. *Price Control*, BLACK’S LAW DICTIONARY (12th ed. 2024).

8. Note, *Price and Sovereignty*, 135 HARV. L. REV. 755, 758 (2021).

9. See Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1905 (1992) (explaining that the government

change the price of apples, only the former would directly target price.¹⁰ As such, only the former would count as a price control.

Price controls can function as floors or ceilings.¹¹ Price floors are minimum prices, and price ceilings are maximum prices.¹² But price controls are not always blunt instruments. The government can implement price controls in sophisticated ways, such as by tailoring price controls to the regulated entity, tying price controls to economic markers, or setting price controls that rise or fall over time.¹³ At a high level of generality, though, price controls either increase prices (floors) or decrease prices (ceilings).¹⁴

Enter: The Constitution. The Takings Clause provides: “nor shall private property be taken for public use, without just compensation.”¹⁵ This command sits in tension with price controls—specifically, price ceilings.¹⁶ Granted, price ceilings do not literally take property. But they may nonetheless restrict property rights, turning valuable wares into valueless junk. To prevent this, the Takings Clause imposes certain limits on price controls.¹⁷ These limits “are not generally understood.”¹⁸

The constitutional status of price controls is an urgent question. Consider price controls on housing. Such price controls—known as rent

could reduce rental rates by (1) implementing rent control or (2) constructing more apartments).

10. Thomas W. Merrill, *Constitutional Limits on Physician Price Controls*, 21 HASTINGS CONST. L.Q. 635, 664–65 (1994).

11. Tim Vipond, *Price Floors and Ceilings*, CORP. FIN. INST. (Dec. 3, 2019), <https://corporatefinanceinstitute.com/resources/economics/price-floors-price-ceilings/> [<https://perma.cc/LLV2-2K3G>].

12. *Id.*

13. *Basic Forms of Regulation*, BODY OF KNOWLEDGE ON INFRASTRUCTURE REGUL., <https://regulationbodyofknowledge.org/price-level-regulation/basic-forms-of-regulation/> [<https://perma.cc/X58M-BBB7>] (last visited July 4, 2026).

14. That is, if the price control is binding. See Mark Klock, *A Raisin in Reserve: Hoerne, Takings, and the Problem of Government Price Supports*, 2016 MICH. ST. L. REV. 713, 725 & n.83 (“To affect the market outcome the government must set a price floor that is above the equilibrium price, or set a price ceiling that is below the equilibrium price. Otherwise, the price ceiling or price floor will not be *binding* on buyers and sellers.” (quoting R. GLENN HUBBARD, ANNE GARNETT & PHIL LEWIS, *ESSENTIALS OF ECONOMICS* 130–31 (2d ed. 2013))).

15. U.S. CONST. amend. V. The Takings Clause applies against both the federal government and state governments. *Sheetz v. County of El Dorado*, 144 S. Ct. 893, 900 (2024).

16. Cf. G. Neil Skene Jr., Note, *Public Utilities—Consumers Lack Standing to Obtain Review of Reasonableness of Approved Rates*, 27 MERCER L. REV. 341, 341 (1975) (noting that the Takings Clause does not prevent the government from imposing price floors).

17. John N. Drobak, *Constitutional Limits on Price and Rent Control: The Lessons of Utility Regulation*, 64 WASH. U. L.Q. 107, 107–09 (1986).

18. *Id.* at 108.

control—have become increasingly common.¹⁹ For example, New York City regulates the rent of around one million apartments.²⁰ Hence, as Justice Clarence Thomas has noted, Takings Clause challenges to these regulations raise “an important and pressing question.”²¹ And the question has since become more important and pressing: New York City recently froze the rents of those million-odd units.²² Challenges to this rent freeze may force the Court to grapple with price controls.

Consider also price controls on pharmaceuticals. To counter exorbitant pharmaceutical prices,²³ the Inflation Reduction Act empowers the federal government to negotiate down the price of certain drugs.²⁴ In turn, drug manufacturers have challenged this program under the Takings Clause, arguing that it “constitutes a massive transfer of private property . . . dressed up as a negotiation.”²⁵ So far, most of these

19. See Paige Curtis, *Return of Rent Control? How Some US Cities Are Trying to Keep Roofs Over People’s Heads*, THE GUARDIAN (June 9, 2023, at 6:00 ET), <https://www.theguardian.com/us-news/2023/jun/09/rent-control-comeback-america-massachusetts> [https://perma.cc/37ZL-KRW8] (discussing rent control laws in various cities and states).

20. 74 *Pinehurst LLC v. New York*, 146 S. Ct. 540, 540 (mem.) (2024) (Thomas, J., respecting the denial of certiorari).

21. *Id.*

22. Ryan Mancini, *Mamdani’s Rent Freeze Passes for 1 Million Units*, THE HILL (June 25, 2026, at 22:25 ET), <https://thehill.com/homenews/state-watch/5941750-mayor-mamdani-wins-rent-freeze/amp/> [https://perma.cc/SHC7-5D6J].

23. See Arunab Mehta & Stephanie Parton, *Understanding the Inflation Reduction Act’s Impact on Prescription Drug Costs*, THE HOSPITALIST (Feb. 3, 2025), <https://www.the-hospitalist.org/hospitalist/article/38496/critical-care/understanding-the-inflation-reduction-acts/> [https://perma.cc/CEW3-7AKH] (“Prescription drug costs in the U.S. are among the highest in the world, surpassing those in other high-income nations by more than two and a half times.”).

24. *Dayton Area Chamber of Com. v. Kennedy*, 147 F.4th 626, 628 (6th Cir. 2025). Though drug manufacturers can technically opt out of these negotiations, they would then lose access to Medicare and Medicaid markets. Raj Bhargava et al., *The Constitutionality of Medicare Drug-Price Negotiation Under the Takings Clause*, 51 J.L. MED. & ETHICS 961, 963 (2023). That said, this reciprocal arrangement—the government gets to reduce prices, and the manufacturer gets to sell in government markets—might resemble a trade. And trades receive special treatment under the Takings Clause. See *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021) (explaining that trades do not violate the Takings Clause when the benefit to the owner “bears an ‘essential nexus’ and ‘rough proportionality’” to the externalities of granting the benefit to the owner (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 386, 391 (1994))).

25. Daniel Troy, *Drug Price Negotiations Pose Ruinous, Unconstitutional Dangers*, BLOOMBERG LAW (Aug. 12, 2025, at 3:30 CT), <https://news.bloomberglaw.com/us-law-week/drug-price-negotiations-pose-ruinous-unconstitutional-dangers> [https://perma.cc/WR5E-H39J].

challenges have failed on procedural grounds.²⁶ But as litigants begin to reach the merits, the murky constitutional status of price controls looms large.

And consider price controls on utilities. Price regulation is “among the paradigmatic activities” of utility regulators,²⁷ falling within their “core historic statutory legal duties.”²⁸ The federal government sets the price of “electricity and transmission in interstate commerce,”²⁹ nearly every state regulates the price of water³⁰ and gas,³¹ and some states have capped the price of internet service.³² These price ceilings, though commonplace, raise constitutional questions as well.

Indeed, price controls permeate our economy. The Federal Reserve limits “interchange fees,” which are the fees that banks charge when processing payments.³³ Cities restrict the amount that food delivery services can charge restaurants.³⁴ Insurance companies “are being told to cap prices” by both red and blue states.³⁵ Even the regulation of interest rates—from state usury laws³⁶ to federal monetary policy³⁷—sets the price

26. Andrew Twinamatsiko, *More Industry Losses in Medicare Drug Prices Litigation*, HEALTH AFFS. (Sep. 29, 2026), <https://www.healthaffairs.org/content/forefront/more-industry-losses-medicare-drug-prices-litigation>.

27. MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS & UTILITIES: LAW & POLICY 147 (2022).

28. Emma Shumway et al., *Addressing Energy Insecurity Upstream: Electric Utility Ratemaking and Rate Design as Levers for Change*, 45 ENERGY L.J. 361, 364 (2024).

29. *Id.* at 363.

30. X. Zhang, M. Gonzalez Rivas, M. Grant & M.E. Warner, *Water Pricing and Affordability in the US: Public vs. Private Ownership*, 24 WATER POL’Y 500, 502 (2022).

31. Aneil Kovvali & Joshua C. Macey, *The Corporate Governance of Public Utilities*, 40 YALE J. ON REGUL. 569, 582–83 (2023).

32. *See, e.g., N.Y. State Telecomms. Ass’n v. James*, 101 F.4th 135, 139 (2d Cir. 2024); *see also* Ivan Penn & Tracey Tully, *22% Jump in Electricity Rates Dominates New Jersey Governor’s Race*, N.Y. TIMES (Oct. 9, 2025), <https://www.nytimes.com/2025/10/09/business/new-jersey-electricity-prices-governor-election.html> (discussing the political salience of rising electricity costs).

33. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 144 S. Ct. 2440, 2448 (2024).

34. *See, e.g., DoorDash, Inc. v. City of New York*, 692 F. Supp. 3d 268, 286 (S.D.N.Y. 2023); *DoorDash, Inc. v. City of San Francisco*, No. 21-CV-5502, 2022 WL 867254, at *2 (N.D. Cal. Mar. 23, 2022).

35. Jean Eaglesham, *Runaway Insurance Costs Bring Back Talk of Price Caps*, WALL ST. J. (Oct. 20, 2025, at 5:30 ET), <https://www.wsj.com/finance/regulation/runaway-insurance-costs-bring-back-talk-of-price-caps-fe4df279>.

36. Merrill, *supra* note 10, at 639.

37. RICKS, SITARAMAN, WELTON & MENAND, *supra* note 27, at 891.

of borrowing.³⁸ Across our economy, then, the Takings Clause's treatment of price controls is incredibly important.

The Court has developed two frameworks for adjudicating Takings Clause challenges to price controls.³⁹ On the one hand, the regulatory takings framework prohibits price controls from going too far. It does so through a combination of *per se* rules and the *Penn Central* test. On the other hand, the ratemaking takings framework requires that price controls be just and reasonable.⁴⁰ It does so through an independent reasonableness inquiry. Today, Takings Clause challenges to price controls trigger either regulatory takings or ratemaking takings.

The open question is the *metaframework*: When should courts apply which framework?⁴¹ Under long-dead Due Process Clause doctrine, the Court adopted a virtual monopoly metaframework: Price controls on virtual monopolies faced ratemaking takings, and price controls on non-virtual monopolies were automatically unconstitutional. But under current Takings Clause doctrine, it remains unclear when to apply which framework. The Court must choose a metaframework.

The best choice is a new virtual monopoly metaframework: Price controls on virtual monopolies face ratemaking takings, and price controls on non-virtual monopolies face regulatory takings.⁴² This is because ratemaking takings is compatible with noncompetitive markets, where its independent reasonableness inquiry is not distorted by inflated market prices, and regulatory takings is compatible with competitive markets, where the *Penn Central* test uses efficient market prices as a regulatory benchmark.

38. CORP. FIN. INST., *Interest Rate* (Mar. 24, 2020), <https://corporatefinanceinstitute.com/resources/commercial-lending/interest-rate/> [https://perma.cc/K8BE-58XD]; see also Meridith McGraw, *Trump Calls for 10% Cap on Credit-Card Interest Rates*, WALL ST. J. (Jan. 9, 2026, at 23:05 ET), <https://www.wsj.com/finance/regulation/trump-calls-for-10-cap-on-credit-card-interest-rates-73365952> (“President Trump called for credit-card interest rates to be capped at 10% for one year Borrowers in lower- and middle-income households who carry balances would benefit the most from caps on credit-card charges.”).

39. See *infra* Part I.

40. This is a doctrine of many names. Compare Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORN. L. REV. 885, 945 (2003) (“confiscatory takings”), with Jim Chen, *The Death of the Regulatory Compact: Adjusting Prices and Expectations in the Law of Regulated Industries*, 67 OHIO ST. L.J. 1265, 1278 (2006) (“confiscatory ratemaking”), with Robin Kundis Craig, *Constitutional Contours for the Design and Implementation of Multistate Renewable Energy Programs and Projects*, 81 U. COLO. L. REV. 771, 799 (2010) (“ratemaking takings”), with Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435, 1454 (2000) (“utility ratemaking takings”).

41. See *infra* Part II.

42. See *infra* Section III.A.

In turn, the new virtual monopoly metaframework would clarify the constitutional status of myriad price controls.⁴³ Price controls on housing would face ratemaking takings in monopolistic markets and regulatory takings—under which they would violate a *per se* rule—in competitive markets. Price controls on pharmaceuticals would typically face ratemaking takings when the drugs are patented and regulatory takings when the drugs are not. And price controls on utilities would almost always face ratemaking takings. In this way, the new virtual monopoly metaframework would systematize the Takings Clause’s treatment of price controls.

This Article proceeds as follows. Part I is about options: the frameworks for adjudicating Takings Clause challenges to price controls. Part II is about problems: the Court’s unfinished journey to a metaframework. Part III is about solutions: the new virtual monopoly metaframework. As a whole, this Article explores how the Constitution has controlled—and should now control—price controls.

I. THE FRAMEWORKS

The Court has developed two frameworks for adjudicating Takings Clause challenges to price controls.⁴⁴ Section I.A discusses the regulatory takings framework, which prohibits price controls from going too far. Section I.B discusses the ratemaking takings framework, which requires that price controls be just and reasonable.

A. Regulatory Takings

Our first framework is the regulatory takings framework. The regulatory takings framework is an elaboration of Justice Oliver Wendell Holmes’s declaration: “The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”⁴⁵ But the general rule suffers from its

43. See *infra* Section III.B.

44. To be sure, commentators have devised additional frameworks. For example, under the “just compensation” framework, price controls automatically effect takings, and the constitutional question is: Does the price control justly compensate the seller? DAVID A. DANA & THOMAS W. MERRILL, *PROPERTY: TAKINGS* 171–72 (2002). As of yet, however, such frameworks have not found a foothold in Takings Clause jurisprudence.

45. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

generality.⁴⁶ To put it into practice, the Court has developed *per se* rules and the *Penn Central* test.⁴⁷ Let's take each in turn.

There are two *per se* rules.⁴⁸ One covers “physical takings”: government actions that infringe an owner’s right to exclude.⁴⁹ For example, occupations of property⁵⁰ and authorizations for others to occupy property.⁵¹ The other covers “total takings”: government actions that destroy the economic value of property.⁵² For example, regulations that render land “valueless.”⁵³ Generally speaking, spatial invasions are *per se* physical takings, and economic destructions are *per se* total takings.

Then there is the *Penn Central* test. The *Penn Central* test applies whenever the *per se* rules do not.⁵⁴ As a result, the *Penn Central* test has become the “default workhorse” of regulatory takings.⁵⁵ In its canonical formulation, the *Penn Central* test asks courts to balance three factors: (1) the regulation’s economic impact on the owner, (2) the regulation’s interference with the owner’s investment-backed expectations, and (3) the character of the regulation.⁵⁶ When properly balanced, these three factors determine whether the government has gone too far.

But the *Penn Central* factors are conceptually muddled. The first factor—economic impact—is difficult to calculate.⁵⁷ Courts must compare the lost property to the total property, but there is no method for circumscribing the total property.⁵⁸ The second factor—interference with investment-backed expectations—generates an endless feedback loop.⁵⁹ The *Penn Central* test alters investors’ expectations, which then alters the *Penn Central* test, which then alters investors’ expectations, and so on.⁶⁰ The third factor—character—is “the most mysterious of

46. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (“The rub, of course, . . . [is] how to discern how far is too far.” (internal quotation marks omitted)).

47. Lee Anne Fennell, *Escape Room: Implicit Takings After Cedar Point Nursery*, 17 DUKE J. CONST. L. & PUB. POL’Y 1, 5–7 (2022).

48. *Id.* at 6.

49. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077–78 (2021).

50. *Id.* at 2071.

51. *Id.* at 2073.

52. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

53. *Id.* at 1020.

54. Fennell, *supra* note 47, at 7.

55. *Id.* at 44.

56. *Id.* at 7.

57. Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV. 649, 651 (2012).

58. *Id.*

59. *Id.*

60. *Id.*

all.”⁶¹ Nobody knows what it means.⁶² So the *Penn Central* test is not as straightforward as it seems.

And it gets more complex. For one, courts do not know how to balance the three factors.⁶³ “[T]here is no fixed method or procedure for relating these factors to each other.”⁶⁴ For another, there may be more than three factors.⁶⁵ Commentators have identified other considerations (such as a regulation’s “ends-means fit”) that, though absent from the *Penn Central* test, frequently enter regulatory takings analyses.⁶⁶ At this point, “[a]ll one can say for certain is that the [*Penn Central* test] is *ad hoc*, meaning that a variety of factors of uncertain priority or weight are potentially relevant.”⁶⁷

As a practical matter, however, the *Penn Central* test has proven flimsy. When courts engage in a *Penn Central* analysis, they generally uphold the government action.⁶⁸ Of course, this is not *always* the case.⁶⁹ But as an empirical matter, fewer than one in twenty Takings Clause claims succeed under the *Penn Central* test.⁷⁰ And so the *Penn Central* test has come to resemble something like a blanket rule: “[T]he regulation stands.”⁷¹

This matters because, under the regulatory takings umbrella, the *Penn Central* test typically applies to price controls. After all, price controls rarely implicate spatial invasions (*per se* physical takings) or economic destructions (*per se* total takings).⁷² Therefore, courts typically

61. *Id.*

62. *Id.* at 652. Sometimes, courts use this factor to account for bad faith. *E.g.*, *Sherman v. Town of Chester*, 752 F.3d 554, 565 (2d Cir. 2014). Other times, courts use it to account for distributional fairness. *E.g.*, *Cienega Gardens v. United States*, 331 F.3d 1319, 1338–39 (Fed. Cir. 2003). And other times, courts use it to account for the public welfare. *E.g.*, *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 734 (8th Cir. 2022).

63. *DANA & MERRILL*, *supra* note 44, at 131.

64. *Id.*

65. Dana Larkin, Comment, *Dramatic Decreases in Clarity: Using the Penn Central Analysis to Solve the Tahoe-Sierra Controversy*, 40 SAN DIEGO L. REV. 1597, 1602 (2003).

66. Lunney, Jr., *supra* note 9, at 1926.

67. *DANA & MERRILL*, *supra* note 44, at 131.

68. *Id.* at 122.

69. *Id.*

70. Adam R. Pomeroy, *Penn Central After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 FED. CIR. BAR J. 677, 696 tbl.10 (2013).

71. Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 253 (2004).

72. Jim Chen, *The Nature of the Public Utility: Infrastructure, the Market, and the Law*, 98 NW. U. L. REV. 1617, 1685–86 (2004) (reviewing JOSE A. GOMEZ-IBANEZ, *REGULATING INFRASTRUCTURE: MONOPOLY, CONTRACTS, AND DISCRETION* (2003)); *cf. infra* Section III.B (explaining that price controls on housing may effect *per se* physical takings).

evaluate price controls through the lens of the *Penn Central* factors: (1) the economic impact of the price control on the seller, (2) the price control's interference with the seller's (and the seller's investors') investments, and (3) the character of the price control. Based on these three factors, courts almost invariably uphold price controls.

B. Ratemaking Takings

Our second framework is the ratemaking takings framework. The ratemaking takings framework is a remnant of long-dead Due Process Clause doctrine.⁷³ As transplanted into current Takings Clause doctrine, it consists of a unitary rule: Price controls must be just and reasonable.⁷⁴ That's because, when price controls are unjust or unreasonable, they are "confiscatory"—*i.e.*, they unconstitutionally take owners' properties.⁷⁵ The Constitution distinguishes between confiscatory rates on the one hand, and just-and-reasonable rates on the other.

The just-and-reasonable test looks only to outcomes. In the past, the Court scrutinized means—the process by which the government calculated price controls.⁷⁶ Yet the Court was ill-equipped to perform this "hopelessly hypothetical, complex, and inexact" task.⁷⁷ As a result, the Court abandoned the analysis.⁷⁸ Today, the Court evaluates only ends—the final price control.⁷⁹ So long as the final price control is reasonable, the regulation will survive.⁸⁰

To administer the just-and-reasonable test, courts engage in an independent reasonableness inquiry. According to the Court, this analysis accounts for "what is a fair rate of return given the risks under a particular rate-setting system, and . . . the amount of capital upon which the investors are entitled to earn that return."⁸¹ But over time, this inquiry has turned into a freewheeling affair.⁸² Courts, without regard to existing

73. See *infra* Section II.A.

74. *Duquesne Light Co. v. Barach*, 488 U.S. 299, 310 (1989).

75. *Id.* at 307–08.

76. *Id.* at 308.

77. *Id.* at 309 n.5.

78. *Id.* at 310.

79. *Id.*

80. *Id.*

81. *Id.*; see also DANA & MERRILL, *supra* note 44, at 171–72 (“[O]ne key benchmark is the rate of return on investment that investors expect to receive before committing funds to investments having risks commensurate with those of the regulated utility.”).

82. *Duquesne Light Co.*, 488 U.S. at 308.

market prices, must hypothesize a fair price.⁸³ Not only is this very difficult, but it is also very discretionary.

As a practical matter, however, the just-and-reasonable test has proven flimsy. The Court has not struck down a single price control under ratemaking takings in nearly a century.⁸⁴ Of course, extraneous variables may be at play as well. Perhaps regulators amend ill-conceived rates without judicial intervention.⁸⁵ Or perhaps judges are reluctant to override the decisions of expert regulators.⁸⁶ Whatever the cause, commentators agree that the just-and-reasonable test is highly deferential.⁸⁷

In this way, ratemaking takings' just-and-reasonable test is similar to regulatory takings' *Penn Central* test. To be sure, it is not easy to compare the rigor of the doctrines—we must account for differences in the relevant price controls, the regulated industries, the regulators' expertise, and so on.⁸⁸ But this has not stopped commentators from attempting to compare them.⁸⁹ And as it turns out, the doctrines “differ more in name than in substance.”⁹⁰

Still, it remains unclear how to conceptualize the relationship between ratemaking takings and regulatory takings. On one view, they are part of the same whole: Ratemaking takings is “a specialized subset of . . . regulatory takings.”⁹¹ On another view, they are entirely separate: The frameworks derive from “distinct lines of authority.”⁹² On yet another view, the relationship is in flux: Ratemaking takings is drifting into “the vortex of the Court's regulatory takings jurisprudence.”⁹³ But

83. *Id.*

84. Chen, *supra* note 40, at 1291.

85. Rose-Ackerman & Rossi, *supra* note 40, at 1454–55.

86. *Id.* at 1455.

87. See, e.g., DANA & MERRILL, *supra* note 44, at 164; Chen, *supra* note 40, at 1287; Richard A. Epstein & Paula M. Stannard, *Constitutional Ratemaking and the Affordable Care Act: A New Source of Vulnerability*, 38 AM. J.L. & MED. 243, 245 (2012).

88. Chen, *supra* note 40, at 1314.

89. See, e.g., DANA & MERRILL, *supra* note 44, at 166–67; J. GREGORY SIDAK & DANIEL F. SPULBER, DEREGULATORY TAKINGS AND THE REGULATORY CONTRACT: THE COMPETITIVE TRANSFORMATION OF NETWORK INDUSTRIES IN THE UNITED STATES 213 (1997); Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of Pruneyard v. Robins*, 64 U. CHI. L. REV. 21, 21–22 (1997).

90. Stuart Buck, *TELRIC vs. Universal Service: A Takings Violation?*, 56 FED. COMM'NS. L.J. 1, 37 (2003).

91. Richard J. Pierce, Jr., *Public Utility Regulatory Takings: Should the Judiciary Attempt to Police Political Institutions?*, 77 GEO. L.J. 2031, 2033 (1989).

92. Spulber & Yoo, *supra* note 40, at 946.

93. Richard Goldsmith, *Utility Rates and “Takings”*, 10 ENERGY L.J. 241, 257 (1989).

the Court has not explained where ratemaking takings fits into the picture.⁹⁴

II. THE METAFRAMEWORKS

The open question is the *metaframework*: When should courts apply which framework? Section II.A describes how, under long-dead Due Process Clause doctrine, the Court adopted a virtual monopoly metaframework: Price controls on virtual monopolies faced ratemaking takings, and price controls on non-virtual monopolies were automatically unconstitutional. Section II.B describes how, under current Takings Clause doctrine, it remains unclear when to apply which framework.

A. Under the Due Process Clause

Under long-dead Due Process Clause doctrine, the Court adopted a virtual monopoly metaframework: Price controls on virtual monopolies faced ratemaking takings, and price controls on non-virtual monopolies were automatically unconstitutional. Subsection II.A.1 explores the birth of this metaframework. Subsection II.A.2 explores the evolution of this metaframework. Subsection II.A.3 explores the death of this metaframework.

1. Birth

Shortly after the Civil War, price controls came to the fore. All of a sudden, states began enacting “drastic (for the times) policies of state regulation.”⁹⁵ Different states had different motivations.⁹⁶ Some were worried about large corporations’ abuse of power.⁹⁷ Others were responding to the economic depression of the 1870s.⁹⁸ And others were concerned about the dangers of industrialization.⁹⁹ But despite their different motivations, many states identified the same solution: price controls.¹⁰⁰

94. Spulber & Yoo, *supra* note 40, at 945.

95. MARTIN T. FARRIS & ROY J. SAMPSON, PUBLIC UTILITIES: REGULATION, MANAGEMENT, AND OWNERSHIP 22 (1973).

96. Stephen A. Siegel, *Understanding the Lochner Era: Lessons From the Controversy Over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 194–95 (1984).

97. *Id.* at 194 n.30.

98. *Id.*

99. *Id.*

100. *Id.* at 194.

Perhaps predictably, regulated industries challenged the constitutionality of these price controls.¹⁰¹ A series of seven such cases, known collectively as the *Granger Cases*, eventually reached the Court.¹⁰² The majority of these cases involved price controls on railroads, but one outlier case—*Munn v. Illinois*¹⁰³—involved price controls on grain warehouses.¹⁰⁴ In *Munn*, the Court settled all of the *Granger Cases*.¹⁰⁵ It took up the question: Are price controls constitutional?¹⁰⁶

The warehouses grounded their challenge in the Due Process Clause. Under the Due Process Clause, the government may not deprive any person of “life, liberty, or property, without due process of law.”¹⁰⁷ But price controls, the warehouses argued, deprived them of their property without due process of law by reducing their property’s economic value.¹⁰⁸ Thus, the warehouses concluded, the Due Process Clause shielded businesses like theirs from price controls.¹⁰⁹

Still, the warehouses acknowledged an exception. On their view, the government could still cap the prices of legal monopolies like “ferries, mills, [and] hackmen.”¹¹⁰ The warehouses justified this exception by invoking the “regulatory compact”¹¹¹: The government could burden a business with regulations (like price controls) *only if* the government granted that business a reciprocal benefit (like a legal monopoly).¹¹² But, the warehouses urged, where the government had not granted a business a legal monopoly, it could not burden a business with price controls.¹¹³

The government agreed that the Due Process Clause generally shielded businesses from price controls, but it argued for a larger

101. *Id.* at 194–95.

102. *Id.* at 194.

103. 94 U.S. 113, 130 (1876).

104. Siegel, *supra* note 96, at 195.

105. *Id.*

106. Jim Chen, *Regulatory Education and Its Reform*, 16 YALE J. ON REGUL. 145, 151 (1999) (reviewing JEFFREY L. HARRISON, THOMAS D. MORGAN & PAUL R. VERKUIL, *REGULATION AND DEREGULATION: CASES AND MATERIALS* (1997)).

107. U.S. CONST. amends. V, XIV.

108. *Munn*, 94 U.S. at 119–20.

109. *Id.*

110. *Id.* at 120.

111. William P. Barr, Henry Weissmann & John P. Frantz, *The Gild That Is Killing the Lilly: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 GEO. WASH. L. REV. 429, 442–43 (2005) (describing the regulatory compact as “a legal relationship of mutual obligation” between government and owner); *see also* EPSTEIN, *supra* note 6, at 274 (“One might ask why a railroad or utility has to submit to any form of regulation at all. . . . [T]hey have achieved their market position, and perhaps their monopoly position, by virtue of government intervention . . .”).

112. *Munn*, 94 U.S. at 122.

113. Barr, Weissmann & Frantz, *supra* note 111, at 443–44.

exception: “public employment[s].”¹¹⁴ The government was not clear about what counted as a “public employment.” Sometimes, it advanced a legal duty theory: Public employments were businesses that were legally obligated to serve all comers.¹¹⁵ Other times, it advanced an economic monopoly theory: Public employments were economic monopolies that “people must of necessity deal with . . . [and] submit to.”¹¹⁶ Without committing to either definition, the government insisted that the warehouses were regulable public employments.¹¹⁷

The Court agreed that the Due Process Clause generally shielded businesses from price controls, but it carved out an even larger exception: businesses “affected with a public interest.”¹¹⁸ The Court explained that “when private property is ‘affected with a public interest, it ceases to be *juris privati* only.’”¹¹⁹ And when private property ceases to be *juris privati* only, the owner “grants to the public an interest in [his] use, and must submit to be controlled by the public for the common good.”¹²⁰ This public control included price control.¹²¹ The government could impose price controls on any business that was affected with a public interest.

When was a business affected with a public interest? The Court declared that property becomes “clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large.”¹²² It also provided examples of occupations that were affected with a public interest: auctioneers, bakers, carmen, cartmen, chimney sweepers, draymen, ferrymen, hackmen, innkeepers, millers, wagoners, and wharfingers.¹²³ But the Court’s explanation and examples merely illustrated the breadth of the public interest exception. They did not illuminate the contours of the public interest exception.

The Court’s analysis, however, focused on the economics of the grain-warehousing market. On the one side, demand was inelastic.¹²⁴ The

114. *Munn*, 94 U.S. at 121.

115. *Id.* at 122.

116. *Id.*

117. *Id.*

118. *Id.* at 126 (quoting Matthew Hale, *De Portibus Maris*, in 1 COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND: FROM MANUSCRIPTS 77–78 (Francis Hargrave ed., 1787)).

119. *Id.* (quoting Hale, *supra* note 118, at 77–78).

120. *Id.*

121. *Id.* at 125.

122. *Id.* at 126.

123. *Id.* at 125.

124. Elasticity of demand denotes consumer sensitivity to prices. Daniel A. Crane, *Rationales for Antitrust: Economics and Other Bases*, in 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 3, 6 (Roger D. Blair & D. Daniel Sokol eds., 2015). Demand is inelastic when consumers are insensitive to prices: They would continue to purchase a product even if prices increased. *Id.*

warehouses were crucial intermediaries between grain-producing states to the west and grain-consuming states to the east.¹²⁵ On the other side, supply was concentrated.¹²⁶ Only a few businesses owned all of the region's grain warehouses.¹²⁷ Due to the combination of inelastic demand and supply-side concentration, the grain warehouses possessed market power—they could profitably raise prices above competitive levels.¹²⁸ In light of their market power, the market constituted a “virtual monopoly.”¹²⁹ It was this virtual monopoly that clothed the warehouses with a public interest.¹³⁰

This was not the English rule. Under English common law, only legal monopolies were subject to price controls.¹³¹ But the Constitution did not ratify the entirety of English common law.¹³² And at the time of the *Granger Cases*, the United States was encountering novel “business combinations that achieved [abusive] market dominance through private contracts and not through government grants of special privilege as in the past.”¹³³ Perhaps due to these novel economic conditions, the Court declined to import English common law into the Due Process Clause.¹³⁴

In doing so, the Court constitutionalized a distinctively American practice. American courts had long presumed that markets were competitive and that competitive markets yielded reasonable prices.¹³⁵

125. *Munn*, 94 U.S. at 130–31.

126. Supply-side concentration denotes the amount of competition in a market. Lawrence J. White, *Monopoly and Dominant Firms: Antitrust Economics and Policy Approaches*, in 1 THE OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 313, 323 (Roger D. Blair & D. Daniel Sokol eds., 2015). Supply is concentrated when there are fewer firms: Each firm has more control over the amount of a product that exists in a market. *Id.*

127. *Munn*, 94 U.S. at 131. Moreover, some of these businesses may have been colluding to jack-up prices. *Id.*

128. See White, *supra* note 126, at 325; see also Daniel A. Crane, *Market Power Without Market Definition*, 90 NOTRE DAME L. REV. 31, 37 (2014) (defining market power as the ability to raise prices above competitive levels); Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 166 (1904) (explaining that monopolies can cause “oppression, inconvenience, extortion[,] and injustice”).

129. *Munn*, 94 U.S. at 131 (internal quotation marks omitted).

130. *Id.* at 131–32.

131. Teddy Ray, *Off the Rails: Getting Common Carrier Doctrine Back on Its Twin Tracks*, 18 N.Y.U. J.L. & LIBERTY 1, 24–26 (2024).

132. *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829).

133. Siegel, *supra* note 96, at 201.

134. Richard De Long, *Due Process Requirements of Interim Rates and Cost Adjustment Clauses*, 8 WM. MITCHELL L. REV. 473, 476 (1982).

135. Richard A. Epstein, *History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345, 355–58 (2013).

But when markets were not competitive, courts would bar sellers from charging unreasonable prices.¹³⁶ And, more to the point, courts allowed legislatures to get ahead of the issue by imposing price controls on businesses with “functional monopoly positions.”¹³⁷ Hence, the Court’s rule aligned with the nation’s traditions.

Early American history underscores the point. “[P]rice controls were commonplace in the early [United States].”¹³⁸ During the Revolutionary War, the Continental Congress imposed price ceilings “to prevent monopoly and oppression.”¹³⁹ Meanwhile, the “prices of nearly every article in general use . . . were fixed” by most states.¹⁴⁰ And even after the Founding, price controls remained a tool “to check . . . [the] exploitation of the public.”¹⁴¹ At no point were price controls limited to legal monopolies.

After holding that the government could impose price controls on virtual monopolies, the Court had to answer a second question: What limitations applied to the government’s price controls? The warehouses insisted that, even if the Due Process Clause tolerated price controls on virtual monopolies, those price controls still had to be reasonable.¹⁴² On their view, even if the Due Process Clause permitted this kind of regulation (price controls on virtual monopolies), it did not permit this degree of regulation (unreasonable price controls).

The warehouses achieved a hollow victory. The Court agreed that the Due Process Clause required price controls to be just and reasonable.¹⁴³ In doing so, it established the ratemaking takings framework.¹⁴⁴ But the Court would defer to legislative judgments about

136. William E. McCurdy, *The Power of a Public Utility to Fix Its Rates and Charges in the Absence of Regulatory Legislation*, 38 HARV. L. REV. 202, 206–07 (1924).

137. RICKS, SITARAMAN, WELTON & MENAND, *supra* note 27, at 118; *see also Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 57 (1911) (explaining that Americans diverged from the English common law because “[t]he dread of monopoly as an emanation of governmental power, while it passed at an early date out of mind in this country, . . . did not serve to assuage the fear as to the evil consequences which might arise from the acts of individuals producing or tending to produce the consequences of monopoly”).

138. Bhargava et al., *supra* note 24, at 964.

139. Jonathan Grossman, *Wage and Price Controls During the American Revolution*, MONTHLY LAB. REV., Sep. 1973, at 3, 4.

140. Breck P. McAllister, *Price Control by Law in the United States: A Survey*, 4 L. & CONTEMP. PROBS. 273, 274 (1937).

141. *Id.* at 287; *see also* Duffy & Hynes, *supra* note 3, at 561 (“American governments have been enacting emergency price controls since the colonial era.”).

142. *See Munn v. Illinois*, 94 U.S. 113, 133 (1876).

143. *Id.* at 133–34.

144. Jim Chen, *The Second Coming of Smyth v. Ames*, 77 TEX. L. REV. 1535, 1553 (1999).

what was just and reasonable.¹⁴⁵ It explained: “For protection against abuses by legislatures the people must resort to the polls, not to the courts.”¹⁴⁶ The Court thereby developed—but then declined to enforce—a constitutional requirement that price controls be just and reasonable.

In *Munn*, the Court simultaneously developed a metaframework and a framework. The ratemaking takings framework applied when a business was affected with a public interest—*i.e.*, when a business possessed a virtual monopoly—and so the price control had to be just and reasonable. But the ratemaking takings framework did not apply when a business was not affected with a public interest—*i.e.*, when a business did not possess a virtual monopoly—and so the price control was automatically unconstitutional. Thus, the Due Process Clause metaframework was born.

2. Evolution

Eventually, the Court began to enforce ratemaking takings. At first, the Court reiterated that legislatures—not courts—must ensure that price controls are reasonable.¹⁴⁷ But in 1884, the Court wondered about “[w]hat may be done if the municipal authorities . . . fix upon a price which is manifestly unreasonable.”¹⁴⁸ By 1886, the Court recognized that the “power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation.”¹⁴⁹ By 1890, reasonableness was “eminently a question for judicial investigation.”¹⁵⁰ And by 1894, courts had a “duty to inquire whether a body of rates . . . is unjust and unreasonable.”¹⁵¹

When the Court enforced ratemaking takings, it did so stringently. In theory, the Court preserved the just-and-reasonable test.¹⁵² But fewer price controls were just and reasonable, and more price controls were unconstitutionally confiscatory.¹⁵³ This, in turn, incentivized more price control litigation.¹⁵⁴ Constitutional challenges flooded the courts, and

145. *Munn*, 94 U.S. at 133–34.

146. *Id.* at 134.

147. *Peik v. Chi. & Nw. Ry. Co.*, 94 U.S. 164, 178 (1876).

148. *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354 (1884).

149. *Stone v. Farmers' Loan & Tr. Co.*, 116 U.S. 307, 331 (1886).

150. *Chi., Milwaukee & St. Paul Ry. v. Minnesota*, 134 U.S. 418, 458 (1890).

151. *Reagan v. Farmers' Loan & Tr. Co.*, 154 U.S. 362, 397 (1894).

152. Chen, *supra* note 40, at 1278–79.

153. See Maurice H. Merrill, *On the Distinction Between a Nonconfiscatory Rate and a Just and Reasonable Rate*, 14 CORN. L.Q. 447, 450 (1929).

154. Chen, *supra* note 40, at 1282.

judicial opinions devolved into complex economic proofs.¹⁵⁵ *Munn*'s legislative supremacy had morphed into *Lochner*'s judicial imperium.¹⁵⁶

Despite its transformation of the ratemaking takings framework, the Court preserved the Due Process Clause metaframework. It interpreted *Munn* to mean that "it is within the power of the government to regulate the prices . . . [of] one who enjoys a virtual monopoly."¹⁵⁷ So price controls on virtual monopolies were subject to ratemaking takings, and price controls on other markets were automatically unconstitutional.¹⁵⁸ The challenge of the day, then, was to identify virtual monopolies.

The Court typically identified a virtual monopoly when firms possessed undue market power.¹⁵⁹ Granted, the Court was rarely clear about this principle.¹⁶⁰ And the principle itself contains much vaguery—it is fundamentally a question of degree.¹⁶¹ But the principle tracks basic economic postulates.¹⁶² When firms possess undue market power, they can raise prices far above competitive levels.¹⁶³ This can lead to price-gouging. And, on the Court's view, firms that can price-gouge should not receive protection from price controls.¹⁶⁴ Hence, the Due Process Clause metaframework discriminated between firms with and without undue market power.

Under the Due Process Clause metaframework, legal monopolies possessed undue market power. After all, the government granted them an exclusive right to sell their product, so consumers had to pay whatever

155. *Id.*

156. *Id.* at 1278.

157. *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 354 (1884).

158. *Id.*

159. As such, the term "virtual monopoly" is more rhetorical than technical. Some monopolists (and oligopolists) do not possess undue market power, perhaps due to low barriers to entry or high elasticity of demand. *See, e.g.*, Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REGUL. 111, 113 (1984) (low barriers to entry); A.P. Lerner, *The Concept of Monopoly and the Measurement of Monopoly Power*, 1 REV. ECON. STUD. 157, 166 (1934) (high elasticity of demand). And some non-monopolists (and non-oligopolists) possess undue market power, perhaps due to switching costs or information asymmetries. *See, e.g.*, Paul Klemperer, *Markets with Consumer Switching Costs*, 102 Q.J. ECON. 375, 377 (1987) (switching costs); Tibor Scitovsky, *The Benefits of Asymmetric Markets*, J. ECON. PERSPS., Winter 1990, at 135, 137 (information asymmetries). Thus, the term's doctrinal import differs from its literal meaning.

160. William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 GEO. L.J. 813, 838 (1998).

161. *Id.*

162. Richard A. Epstein, *History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345, 365–66 (2013).

163. *See* Crane, *supra* note 128, at 6.

164. *See* Shumway et al., *supra* note 28, at 365.

they charged.¹⁶⁵ As such, the Court upheld price controls on legal monopolies like gas suppliers,¹⁶⁶ railroads,¹⁶⁷ telephone lines,¹⁶⁸ water companies,¹⁶⁹ and wharves.¹⁷⁰ The Court explained that “these various occupations are necessarily to a certain extent monopolistic in their nature, and . . . in dealing with customers the parties do not stand upon an equality.”¹⁷¹ In other words, legal monopolies were virtual monopolies.

But virtual monopolies included more than just legal monopolies. Consider the grain-warehousing context. In 1892, the Court revisited the constitutionality of price controls on grain warehouses.¹⁷² The warehouses possessed no “privilege or monopoly granted to them by the [s]tate.”¹⁷³ But they did possess a “practical monopoly.”¹⁷⁴ And this practical (*i.e.*, virtual) monopoly clothed the warehouses with a public interest because “the public [retained] a deep interest that no exorbitant charges shall be exacted.”¹⁷⁵ In light of the warehouses’ virtual monopoly, the price controls faced ratemaking takings.¹⁷⁶

165. RICKS, SITARAMAN, WELTON & MENAND, *supra* note 27, at 14.

166. See, e.g., *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 223 U.S. 655, 656, 669–70 (1912); *Willcox v. Consol. Gas Co.*, 212 U.S. 19, 54 (1909).

167. See, e.g., *Columbus Ry., Power & Light Co. v. City of Columbus*, 249 U.S. 399, 409–10 (1919); *Ga. R.R. & Banking Co. v. Smith*, 128 U.S. 174, 181–82 (1888).

168. See, e.g., *Denney v. Pac. Tel. & Tel. Co.*, 276 U.S. 97, 101–02 (1928); *Home Tel. & Tel. Co. v. City of Los Angeles*, 211 U.S. 265, 278–79 (1908).

169. See, e.g., *Rogers Park Water Co. v. Fergus*, 180 U.S. 624, 629–30 (1901); *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 351–56 (1884).

170. See, e.g., *Cannon v. City of New Orleans*, 87 U.S. (20 Wall.) 577, 582 (1874); *M.L.C. No. 10*, 10 F.2d 699, 703–05 (2d Cir. 1926).

171. *Minneapolis & St. Louis R.R. Co. v. Minnesota*, 186 U.S. 257, 261 (1902).

172. *Budd v. New York*, 143 U.S. 517, 523 (1892).

173. *Id.* at 545.

174. *Id.* at 532.

175. *Id.* at 533.

176. *Id.* at 544–45. To be sure, in 1894, the Court briefly deviated from this metaframework. When resolving another constitutional challenge to price controls on grain warehousing, the Court recognized that its prior opinions had placed “great stress” on the notion of a “practical monopoly.” *Brass v. North Dakota ex rel. Stoesser*, 153 U.S. 391, 403 (1894). But the Court then dismissed the relevance of monopolistic economic conditions: “[I]f legislatures have the power to] control the business of elevating and storing grain . . . in cities of one size and in some circumstances, it follows that such power may be legally exerted over the same business when carried on in smaller cities and in other circumstances.” *Id.* There, the Court analogized based on the industry (grain warehousing), not the market (virtual monopoly).

But this reasoning was anomalous. In subsequent cases concerning price controls on stockyards, the Court returned to analogizing based on market structure: “Tested by the rule laid down in *Munn v. Illinois*, . . . stock yards are situated in one of the gateways of commerce, and . . . they furnish important facilities to all seeking transportation of cattle . . . and, therefore, must be considered as subject to governmental regulation.”

Consider also the insurance industry. In 1909, Kansas capped the price of fire insurance.¹⁷⁷ The Court then faced the question: “[I]s the business of insurance so far affected with a public interest as to justify legislative regulation of its rates?”¹⁷⁸ Well, the Court observed, “the price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market”¹⁷⁹ Instead, “the business of insurance is of monopolistic character”¹⁸⁰ Demand was inelastic because insurance was a business necessity, and supply was concentrated because only a handful of insurance firms existed.¹⁸¹ Given insurance firms’ virtual monopoly, the price controls faced ratemaking takings.¹⁸²

And consider the housing market. After World War I, New York City¹⁸³ and Washington, D.C.,¹⁸⁴ responded to housing shortfalls by implementing rent control. In New York City, “extortion in [the] most oppressive forms [had been] flagrant in rent profiteering.”¹⁸⁵ And in Washington, D.C., rental units had been “necessarily monopolized in comparatively few hands.”¹⁸⁶ In both cities, the price controls faced ratemaking takings—but only so long as the landlords possessed undue market power.¹⁸⁷ In this way, the Due Process Clause tolerated just and reasonable price controls on virtual monopolies.

On the flipside, the Due Process Clause prohibited price controls when there was no virtual monopoly. Consider the gasoline context. In

Cotting v. Kan. City Stock Yards Co., 183 U.S. 79, 85 (1901); see also *Stafford v. Wallace*, 258 U.S. 495, 515–16 (1922) (“Another evil which [Congress] sought to provide against by the act, was exorbitant charges . . . in the passage of the live stock through the stockyards That it is a business within the power of regulation . . . has been settled since the case of *Munn v. Illinois*”). The Court likened stockyards to grain warehouses based on their similar roles in their respective markets, not any supposed similarity between the cattle industry and grain industry. In this way, the Court generally focused on the market, not the industry.

177. *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 390–91 (1914).

178. *Id.* at 406.

179. *Id.* at 416.

180. *Id.* at 416–17.

181. *Id.*

182. *Id.* at 417.

183. *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242, 243–44 (1922).

184. *Block v. Hirsch*, 256 U.S. 135, 153–54 (1921).

185. *Edgar A. Levy*, 258 U.S. at 245–46.

186. *Block*, 256 U.S. at 156.

187. See *Edgar A. Levy*, 258 U.S. at 247 (“[T]he existing circumstances clothed the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them”); *Block*, 256 U.S. at 157 (“A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.”).

1927, Tennessee “fix[ed the] prices at which gasoline may be sold.”¹⁸⁸ Yet the gasoline market was competitive.¹⁸⁹ Indeed, Tennessee had “utter[ly] fail[ed] to show the existence of [a] monopoly.”¹⁹⁰ As a result, the price controls were automatically unconstitutional.¹⁹¹

Consider also the employment agency market. In 1918, New Jersey regulated the prices that employment agencies could charge.¹⁹² The Court rejected the price controls because “[a]n employment agency is essentially a private business.”¹⁹³ In dissent, then-Justice Harlan Stone explained what that meant: “[S]uch regulation is within a state’s power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers . . . are placed at such a disadvantage in the bargaining struggle.”¹⁹⁴ Reinterpreted through Justice Stone’s lens, employment agencies were “private” because the market was competitive.¹⁹⁵ Therefore, the price controls were automatically unconstitutional.¹⁹⁶

And consider the entertainment industry. In 1922, New York capped the price of theater ticket resales.¹⁹⁷ But the Court struck down the price controls because of the market’s elastic demand: When sellers raised ticket prices, “any person who did not approve could stay away.”¹⁹⁸ Consumer sensitivity to prices thereby prevented ticket sellers from accruing much market power. Given the absence of undue market power, the price controls were automatically unconstitutional.¹⁹⁹ No virtual monopoly, no price controls.

Yet the Court got tangled in its own doctrine. In a 1923 case, it explained that the Due Process Clause tolerated price controls on three different types of businesses.²⁰⁰ One, businesses that received “a public grant of privileges.”²⁰¹ These were legal monopolies like railroads,

188. *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 238 (1929).

189. *See id.* at 240.

190. *Id.*

191. *Id.* at 239–40.

192. *Ribnik v. McBride*, 277 U.S. 350, 354 (1928).

193. *Id.* at 357.

194. *Id.* at 360 (Stone, J., dissenting).

195. *Id.* at 357 (majority opinion).

196. *Id.* at 357–58.

197. *Tyson & Brother—United Theater Ticket Offs. v. Banton*, 273 U.S. 418, 427 (1927).

198. *Id.* at 442.

199. *Id.* at 442–43.

200. *Charles Wolff Packing Co. v. Ct. of Indus. Rels.*, 262 U.S. 522, 534–35 (1923).

201. *Id.* at 535.

common carriers, and public utilities.²⁰² Two, businesses that were “regarded as exceptional.”²⁰³ These were traditionally regulated businesses like inns, carriages, and grist mills.²⁰⁴ Three, businesses that held “such a peculiar relation to the public that [the public interest was] superimposed upon them.”²⁰⁵ These were virtual monopolies like grain warehouses,²⁰⁶ insurance companies,²⁰⁷ and landlords.²⁰⁸

But the Court’s taxonomy underscored the importance of virtual-monopoly status. The first type of business—legal monopolies—consisted of virtual monopolies. They were, after all, literal monopolies.²⁰⁹ The second type of business—exceptional businesses—also consisted of virtual monopolies.²¹⁰ They possessed “unique opportunities to exploit” their customers by restricting output and increasing prices.²¹¹ And the third type of business—virtual monopolies—also consisted of virtual monopolies. Obviously. So the Court’s categories turned out to be different species of virtual monopolies.

The Court’s analysis reinforced the importance of virtual-monopoly status. While evaluating price controls on food manufacturers, the Court noted that food manufacturers’ prices were “fixed by competition throughout the country . . . and the danger from local monopolistic control [was] less than ever.”²¹² Because there was no virtual monopoly, the Court expressed skepticism about the price controls.²¹³ In the end, it struck them down on other grounds.²¹⁴ But the Court nonetheless focused on the absence of a virtual monopoly.

In this way, the Court reaffirmed *Munn*’s metaframework. Though the Court intensified the ratemaking takings framework, it preserved the antecedent inquiry into whether ratemaking takings applied. Price controls on virtual monopolies faced ratemaking takings, and price controls on non-virtual monopolies were automatically unconstitutional. This was the Due Process Clause metaframework.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.* at 535 (citing *Munn v. Illinois*, 94 U.S. 113, 132 (1876)).

207. *Id.* at 535–36 (citing *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 417–18 (1914)).

208. *Id.* at 535–36 (citing *Block v. Hirsh*, 256 U.S. 135, 156–57 (1921)).

209. *See supra* notes 165–71 and accompanying text.

210. *See supra* note 159 and accompanying text.

211. Ray, *supra* note 131, at 9.

212. *Charles Wolff*, 262 U.S. at 538.

213. *Id.*

214. *Id.* at 539.

3. Death

Then came *Nebbia v. New York*.²¹⁵ In the 1930s, New York had a problem: Milk prices were too low.²¹⁶ There were too many dairy producers, and they all had to sell their milk quickly (or else it would spoil).²¹⁷ So dairy producers slashed their prices, and “[t]he situation of the families of dairy producers had become desperate.”²¹⁸ In response, New York imposed a price floor on milk.²¹⁹ But *Nebbia*, a grocer, sold milk at unlawfully low prices.²²⁰ The legal question was familiar: Did the price controls violate the Due Process Clause?²²¹

Nebbia grounded his argument in the Due Process Clause metaframework. Under the Court’s precedents, he explained, price controls were unconstitutional “save as applied to businesses affected with a public interest.”²²² And a business was affected with a public interest when it was “in its nature a monopoly.”²²³ But New York made “no suggestion of any monopoly or monopolistic practice” in the milk market.²²⁴ As a result, *Nebbia* concluded, the price control was automatically unconstitutional.²²⁵

In a surprising twist, the Court rejected *Nebbia*’s argument and upheld the price controls. Indeed, the Court repudiated decades of Due Process Clause doctrine in a single sentence: “[T]here is no closed class or category of businesses affected with a public interest.”²²⁶ As a result, it no longer mattered whether a regulated market was a virtual monopoly or perfectly competitive.²²⁷ The Due Process Clause tolerated just and reasonable price controls in *any* market.²²⁸

This was a sharp reversal. Just consider the fact that New York had imposed a price *floor*. The problem was not that sellers were exploiting customers by price-gouging, but that sellers were undercutting one another by hyper-competing. This is the opposite of a virtual monopoly—

215. 291 U.S. 502 (1934).

216. *Id.* at 515.

217. *Id.* at 516–17.

218. *Id.* at 515.

219. *Id.*

220. *Id.*

221. *Id.* at 521.

222. *Id.* at 531.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.* at 536.

227. *Id.* at 534–36.

228. Lunney, Jr., *supra* note 9, at 1922.

there was too much competition, not too little.²²⁹ And yet the Court still held that the price controls were constitutional. As such, the Court abandoned the Due Process Clause metaframework.

After it abandoned the Due Process Clause metaframework, the Court enervated the ratemaking takings framework. Now that all price controls would face ratemaking takings, the Court watered down the just-and-reasonable test: “[T]he guaranty of due process . . . demands only that the law shall not be unreasonable, arbitrary, or capricious”²³⁰ There would be no more delving into a “mass of figures and calculations.”²³¹ Instead, ratemaking takings would function as a cursory sanity check of price controls.²³²

Ratemaking takings soon melted into rational basis review, the default standard of review for Due Process Clause challenges to economic regulations.²³³ In theory, rational basis review requires that a law be rationally related to a legitimate government purpose (as opposed to unreasonable, arbitrary, or capricious).²³⁴ But in practice, rational basis review is “‘almost empty,’ ‘enormously deferential,’ and ‘meaningless.’”²³⁵ And over time, *Nebbia* became the Court’s go-to example of rational basis review.²³⁶

By abandoning the Due Process Clause metaframework and enervating the ratemaking takings framework, *Nebbia* transformed the Due Process Clause. Though most commentators date the New Deal Revolution to 1937,²³⁷ some argue that the “real revolution” occurred

229. See *supra* Section II.A.2.

230. *Nebbia*, 291 U.S. at 525.

231. *Smyth v. Ames*, 169 U.S. 466, 548 (1898).

232. See *Nebbia*, 291 U.S. at 538–39.

233. Todd W. Shaw, Note, *Rationalizing Rational Basis Review*, 112 NW. U. L. REV. 487, 492–93 (2017).

234. *Id.* at 525–26.

235. Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317, 1318–19 (2018) (first quoting Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL’Y 401, 402, 410 (2016); and then quoting Richard E. Levy, *Escaping Lochner’s Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 426 (1995)).

236. See, e.g., *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291–92 (1978); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397–98 (1937).

237. “The story of the New Deal ‘switch in time that saved nine’ is a familiar tale. Prior to 1937, the Supreme Court had broadly rejected both federal and state attempts to regulate the economy Finally, in 1937, a single justice changed his vote and a new majority of the Supreme Court initiated the modern tradition of judicial deference to economic and social welfare legislation.” Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 459–60 (2001).

three years prior, in *Nebbia*.²³⁸ To be sure, the Court ignored *Nebbia*'s sweeping language for a few years,²³⁹ and contemporaneous accounts viewed 1937 as the decisive year.²⁴⁰ But *Nebbia* nonetheless initiated a sharp break from precedent. Whether *Nebbia* was the real revolution or mere foreshadowing, it was radical all the same.

The Court went on to reaffirm *Nebbia*'s abandonment of the Due Process Clause metaframework.²⁴¹ In 1941, the Court heard a challenge to price controls on employment agencies.²⁴² The Court noted that the employment agency market may have been competitive.²⁴³ And just over a decade earlier, the Court had struck down price controls in a competitive employment agency market.²⁴⁴ But that case was no longer good law.²⁴⁵ Now, legislatures could impose price controls in all markets.²⁴⁶ The historical precondition for price controls—that a business was affected with a public interest—was “little more than a fiction.”²⁴⁷

Likewise, in 1942, the federal government implemented rent control in certain regions.²⁴⁸ Under the federal scheme, administrators could cap rents “whenever in [their] judgment that action [was] necessary or proper.”²⁴⁹ Around twenty years earlier, the Court had upheld rent control only insofar as it regulated a virtual monopoly.²⁵⁰ Now, however, the existence of a virtual monopoly was irrelevant.²⁵¹ The Court declined

238. *Id.* at 460 n.7.

239. David N. Mayer, *Substantive Due Process Rediscovered: The Rise and Fall of Liberty of Contract*, 60 MERCER L. REV. 563, 652 (2009).

240. David A. Pepper, *Against Legalism: Rebutting an Anachronistic Account of 1937*, 82 MARQ. L. REV. 63, 150 (1998).

241. *See, e.g., United States v. Rock Royal Co-op.*, 307 U.S. 533, 570 (1939) (“Recently, upon a reexamination of the grounds of state power over prices, that power was phrased by this Court to mean that ‘upon proper occasion and by appropriate measures the state may regulate a business in any of its aspects, including the prices to be charged’” (quoting *Nebbia v. New York*, 291 U.S. 502, 537 (1934))); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 394 (1940) (“Price control is one of the means available to the states and to the Congress in their respective domains for the protection and promotion of the welfare of the economy.” (citations omitted)).

242. *Olsen v. Nebraska ex rel. W. Reference & Bond Ass’n*, 313 U.S. 236, 243 (1941).

243. *Id.* at 246.

244. *See supra* notes 194–98 and accompanying text.

245. *Olsen*, 313 U.S. at 244.

246. *Id.* at 246–47.

247. *Id.* at 245 (quoting *Tyson & Brother—United Theater Ticket Offs. v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting)).

248. *Bowles v. Willingham*, 321 U.S. 503, 505–06 (1944).

249. *Id.* at 512.

250. *See supra* notes 185–89 and accompanying text.

251. *Bowles*, 321 U.S. at 519.

to even “determine what constitutional limits there [were] to price-fixing legislation.”²⁵² The Due Process Clause metaframework was no more.

The Court also reaffirmed *Nebbia*’s enervation of the ratemaking takings framework. In 1940, the federal government capped the rates that the Natural Gas Pipeline Company could charge.²⁵³ The statutory requirement that the price caps be “just and reasonable” coincided with the constitutional requirement.²⁵⁴ Yet the Court barely looked at them.²⁵⁵ It merely remarked: “If the [price control] . . . produces no arbitrary result, our inquiry is at an end.”²⁵⁶

Likewise, in 1942, the federal government capped the rates that the Hope Natural Gas Company could charge.²⁵⁷ Again, the Court emphasized its deference: “If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.”²⁵⁸ Indeed, the Court upheld the rate order without bothering to explain how it was reasonable.²⁵⁹ It had “eras[ed] nearly all traces of judicial control over . . . ratemaking.”²⁶⁰

By the 1960s, the doctrinal transformation was complete. Regarding the Due Process Clause metaframework, the Court wrote: “A legislative power to create price ceilings has . . . been ‘customary from time immemorial’”²⁶¹ The Court ignored the historical requirement that a market be affected with a public interest.²⁶² And regarding the ratemaking takings framework, the Court wrote: “Price control is ‘unconstitutional . . . if arbitrary, discriminatory, or demonstrably

252. *Id.*

253. *Fed. Power Comm’n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 580 (1942).

254. *Id.* at 585–86 (internal quotation marks omitted).

255. *See id.* at 586.

256. *Id.* Indeed, in concurrence, Justice Hugo Black argued that the Constitution did not constrain price controls at all. *Id.* at 601 (Black, J., concurring).

257. *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 595 (1944).

258. *Id.* at 602.

259. *Id.* at 645–46 (Jackson, J., dissenting).

260. Chen, *supra* note 40, at 1285.

261. *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 768 (1968) (quoting *Munn v. Illinois*, 94 U.S. 113, 133 (1876)).

262. Chen, *supra* note 40, at 1286; *see also* Ray, *supra* note 131, at 46 (“The ‘affected with a public interest’ doctrine articulated in *Munn* ‘is almost universally regarded as discredited.’” (quoting Christopher S. Yoo, *Is There a Role for Common Carriage in an Internet-Based World?*, 51 HOU. L. REV. 545, 554, 556 (2013))); Treanor, *supra* note 160, at 836 (“[T]he second category of substantive due process cases, those involving businesses ‘affected with a public interest,’ has been almost totally forgotten.”).

irrelevant to the policy the legislature is free to adopt’”²⁶³ The just-and-reasonable test had collapsed into rational basis review.

In this way, what *Munn* started, *Nebbia* ended. On one level, the Court abandoned the Due Process Clause metaframework. The Due Process Clause no longer shielded any markets—no matter how competitive—from price controls. On another level, the Court enervated the ratemaking takings framework. The Due Process Clause required bare rationality from all economic regulations, including price controls. So the Due Process Clause metaframework disappeared, and so did the ratemaking takings framework.

B. Under the Takings Clause

Under current Takings Clause doctrine, it remains unclear when to apply which framework. Subsection II.B.1 explores the Takings Clause revolution that introduced regulatory takings. Subsection II.B.2 explores the Takings Clause’s resurrection of ratemaking takings. Subsection II.B.3 explores the many attempts to reconcile these two frameworks.

1. Revolution

The revolution was the Court’s invigoration of the Takings Clause. At the Founding, the Takings Clause applied against the federal government but not the states.²⁶⁴ This remained unchanged until well into the twentieth century.²⁶⁵ As a result, the Due Process Clause—which explicitly applied against the states²⁶⁶—grounded most twentieth-century challenges to economic regulations.²⁶⁷ Yet after the New Deal, challengers sought more rigorous review. So they turned to the Takings Clause.

The key moment was a 1978 case: *Penn Central Transportation Co. v. City of New York*.²⁶⁸ There, the Court confronted New York City’s Landmarks Preservation Law.²⁶⁹ Under this law, owners of designated landmarks had to get the City’s approval “to alter the exterior

263. *In re Permian Basin Area Rate Cases*, 390 U.S. at 769–70 (quoting *Nebbia v. New York*, 291 U.S. 502, 539 (1934)).

264. *Barron v. City of Baltimore*, 32 U.S. 243, 250–51 (1833).

265. Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 853–54 (2006).

266. U.S. CONST. amend. XIV, § 1.

267. See Treanor, *supra* note 160, at 831.

268. 438 U.S. 104 (1978).

269. *Id.* at 115.

architectural features of [their] landmark.”²⁷⁰ The owners of Grand Central Terminal—a designated landmark—applied to “construct an office building atop the Terminal.”²⁷¹ When the City rejected their application, the owners challenged the law.²⁷²

The owners’ challenge straddled the Due Process Clause and the Takings Clause.²⁷³ In the lower courts, this was “a Fourteenth Amendment substantive due process case.”²⁷⁴ But the lower courts rejected the owners’ Due Process Clause claim.²⁷⁵ So in front of the Court, they turned to the Takings Clause.²⁷⁶ They argued that the Takings Clause applied against the states, and that it afforded constitutional protections against economic regulations.²⁷⁷ At the time, both arguments were “far-fetched.”²⁷⁸

But the Court bought them. It began by declaring that an 1897 case had incorporated the Takings Clause against the states.²⁷⁹ This was not true, but now Takings Clause precedents—which had constrained only the federal government—applied against the states.²⁸⁰ The Court then “collapsed a century of substantive due process precedent into Fifth Amendment Takings Clause doctrine.”²⁸¹ This muddled Takings Clause doctrine, but now Due Process Clause precedents—at least, those that the Court liked—applied through the Takings Clause.²⁸² With these two giant leaps, the Court laid the groundwork for the regulatory takings framework.

Yet the Court still had to construct the regulatory takings framework. To do so, it “plucked from relative obscurity” a 1922 case²⁸³: *Pennsylvania Coal Co. v. Mahon*.²⁸⁴ There, a coal company had challenged a mining regulation under the Due Process Clause.²⁸⁵ In an opinion striking down the regulation, Justice Holmes declared: “The general rule at least is, that while property may be regulated to a certain

270. *Id.* at 112.

271. *Id.* at 115–16.

272. *Id.* at 117.

273. *Id.* at 119.

274. Karkkainen, *supra* note 265, at 875.

275. *Id.*

276. *Id.*

277. *Id.* at 875–78.

278. *Id.* at 876–77.

279. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 (1978).

280. Karkkainen, *supra* note 265, at 851, 877–78.

281. *Id.* at 877.

282. *Id.* at 883–84.

283. *Id.* at 865.

284. 260 U.S. 393 (1922).

285. *Id.* at 412–13.

extent, if regulation goes too far it will be recognized as a taking.”²⁸⁶ In context, Justice Holmes was expounding Due Process Clause constraints on states’ police powers.²⁸⁷ But as reinterpreted by *Penn Central*, Justice Holmes was announcing Takings Clause constraints on all government action.²⁸⁸ Thus, a 1922 Due Process Clause case became “the foundation of our ‘regulatory takings’ jurisprudence.”²⁸⁹

Under Justice Holmes’s “too far” standard, the owners in *Penn Central* lost the case. According to the Court, the “too far” standard required it to engage in “essentially ad hoc, factual inquiries” that coalesced around three factors.²⁹⁰ One, “[t]he economic impact of the regulation.”²⁹¹ Two, “the extent to which the regulation has interfered with distinct investment-backed expectations.”²⁹² Three, “the character of the governmental action.”²⁹³ This three-factor analysis is, of course, the *Penn Central* test.²⁹⁴ And under the *Penn Central* test, the Landmarks Preservation Law did not go too far.²⁹⁵

Yet *Penn Central* transformed the constitutional review of economic regulations. Consider a pre-*Penn Central* case. In 1958, Hempstead enacted an ordinance restricting “dredging and pit excavating.”²⁹⁶ The ordinance forced Goldblatt to discontinue his mining business.²⁹⁷ In turn, Goldblatt challenged the ordinance’s constitutionality.²⁹⁸ But at the time, the Takings Clause did not constrain the mine-run of regulatory action, nor did it apply to the states.²⁹⁹ As such, Goldblatt argued that the ordinance violated the Due Process Clause.³⁰⁰ The Due Process Clause—

286. *Id.* at 415.

287. Karkkainen, *supra* note 265, at 873–74.

288. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127–28 (1978).

289. Treanor, *supra* note 160, at 815 (quoting *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 508 (1987) (Rehnquist, C.J., dissenting)).

290. *Penn Cent.*, 438 U.S. at 124.

291. *Id.*

292. *Id.*

293. *Id.*

294. *See supra* Section I.A.

295. *Penn Cent.*, 438 U.S. at 138.

296. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 590 (1962).

297. *Id.* at 591–92.

298. *Id.* at 592.

299. *See supra* notes 280–83 and accompanying text.

300. *Goldblatt*, 369 U.S. at 590–91. True, the Court did wonder about “[h]ow far regulation may go before it becomes a taking.” *Id.* at 594. And to a modern reader, this language invokes the Takings Clause. But on the Court’s own view, the case boiled down to a Due Process Clause analysis. *See id.* And with the benefit of hindsight, commentators have likewise characterized this as a Due Process Clause case. Karkkainen, *supra* note 265, at 856 n.152.

not the Takings Clause—was the Constitution’s defender of economic rights.

The Due Process Clause was a weak defender. The Court explained: “If this ordinance is otherwise a valid exercise of the town’s police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional.”³⁰¹ Moreover, the ordinance was presumptively a valid exercise of the town’s police powers.³⁰² Because Goldblatt could not overcome that presumption by showing that the ordinance was wholly unreasonable, his challenge failed.³⁰³ In this way, prior to *Penn Central*, constitutional challenges triggered feeble Due Process Clause scrutiny.

Now consider a post-*Penn Central* case. In 1978, Congress enabled the Environmental Protection Agency (EPA) “to use data submitted by an applicant for registration of a pesticide in evaluating the application of a subsequent applicant, and to disclose publicly some of the submitted data.”³⁰⁴ But Monsanto, an applicant for registration of a pesticide, did not want the EPA to disclose its already-submitted data—that data included its trade secrets.³⁰⁵ So Monsanto challenged the federal law.³⁰⁶ And now, the Takings Clause constrained such regulatory action.³⁰⁷ The Takings Clause—not the Due Process Clause—was the Constitution’s defender of economic rights.

The Takings Clause was a decent defender. The Court walked through the *Penn Central* test.³⁰⁸ On the first factor, Monsanto would suffer economic harm because disclosure “would destroy [Monsanto’s] competitive edge.”³⁰⁹ On the second factor, the pre-existing statutory scheme created a reasonable basis for Monsanto’s expectation of nondisclosure.³¹⁰ And on the third factor, the character of the governmental action was troublesome because trade secrets, once disclosed, cannot be made secrets again.³¹¹ As such, the EPA’s disclosure of Monsanto’s trade secrets would violate the Takings Clause.³¹² In this way, after *Penn Central*, constitutional challenges triggered moderate Takings Clause scrutiny.

301. *Goldblatt*, 369 U.S. at 592.

302. *Id.* at 594.

303. *Id.* at 594–96.

304. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 990 (1984).

305. *Id.* at 998.

306. *Id.* at 998–99.

307. *See supra* notes 280–83 and accompanying text.

308. *Ruckelshaus*, 467 U.S. at 1005.

309. *Id.* at 1012.

310. *Id.* at 1011.

311. *Id.* at 1011–12.

312. *Id.* at 1013–14.

Still, we should not overstate this revolution. Sure, the Takings Clause absorbed much Due Process Clause doctrine. But commentators have described *Penn Central* as effecting “a ‘reverse incorporation’ of *Lochner*-era substantive due process jurisprudence into modern Fifth Amendment takings law.”³¹³ That is hyperbole. Over time, the *Penn Central* test has proven flimsy, and this flimsiness has paved the way for our modern regulatory environment.³¹⁴ Though *Penn Central* transformed the constitutional scrutiny of economic regulations, the transformation was largely theoretical.

So the Court leapt from the Due Process Clause to the Takings Clause. Before *Penn Central*, constitutional claimants received feeble Due Process Clause scrutiny. But after *Penn Central*, constitutional claimants received moderate Takings Clause scrutiny. This Takings Clause scrutiny took the form of regulatory takings. Over time, regulatory takings proved flimsy. But by exposing all government action to regulatory takings, *Penn Central* launched a Takings Clause revolution.

2. Resurrection

In the 1980s, the Court resurrected ratemaking takings. The resurrection began with *Loretto v. Teleprompter Manhattan CATV Corp.*³¹⁵ There, the Court confronted a New York law that required landlords to “permit a cable television company to install its cable facilities upon [their] property.”³¹⁶ In the wake of *Penn Central*, the law had to survive regulatory takings.³¹⁷ And under regulatory takings, this “permanent physical occupation of property” was a *per se* physical taking.³¹⁸ As a result, the law violated the Takings Clause.³¹⁹

But how did the Court begin to resurrect ratemaking takings? Well, as part of its analysis, the Court asserted “that States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular.”³²⁰ To support this proposition, the Court cited

313. Karkkainen, *supra* note 265, at 888.

314. See *supra* Section I.A; see also Fennell, *supra* note 47, at 45 (“*Penn Central* is likely to remain around for the foreseeable future because it offers a handy way to deal with land use restrictions that the Court favors. . . . *Penn Central* offers a doctrinal alternative that can insulate from takings liability just about anything that comes its way.”).

315. 458 U.S. 419 (1982).

316. *Loretto*, 458 U.S. at 421.

317. *Id.* at 424–26.

318. *Id.* at 441; see *supra* notes 48–53 and accompanying text.

319. *Loretto*, 458 U.S. at 441.

320. *Id.* at 440.

a slew of Due Process Clause cases that applied ratemaking takings.³²¹ Ratemaking takings precedents thereby wormed their way into the Takings Clause.³²²

In dissent, Justice Harry Blackmun did the same thing. True, he objected to the Court's invocation of the *per se* rule: "[T]here is no set formula to determine where regulation ends and taking begins."³²³ But he did not object to the Court's invocation of ratemaking takings precedents. Indeed, he cited *Munn*—a ratemaking takings precedent—for the proposition that "new social circumstances can justify legislative modification of a property owner's common-law rights."³²⁴ By consensus, then, ratemaking takings precedents had a home in the Takings Clause.³²⁵

In 1987, the Court deployed these ratemaking takings precedents. Utility companies had been price-gouging cable companies for the right to use their utility poles, which were "virtually the only practical physical medium for the installation of television cables."³²⁶ In response, Congress authorized the Federal Communications Commission (FCC) to regulate utility companies' prices.³²⁷ Utility companies then challenged the FCC's price regulations under the Takings Clause.³²⁸ And for the first time in decades, the Court heard a constitutional challenge to price controls.³²⁹

321. *Id.* (first citing *Bowles v. Willingham*, 321 U.S. 503 (1944); then citing *Edgar A. Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); and then citing *Block v. Hirsh*, 256 U.S. 135 (1921)).

322. To be sure, in 1980, Justice Thurgood Marshall favorably cited *Munn* in a Takings Clause case. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 92–93 (1980) (Marshall, J., concurring). But Justice Marshall was discussing "the question of whether and to what extent a State may abrogate or modify common-law rights." *Id.* at 92. In context, then, Justice Marshall was opining on the relationship between the Due Process Clause—including Due Process Clause precedents such as *Munn*—and the common law. *Id.* He was not importing Due Process Clause doctrine into the Takings Clause.

323. *Loretto*, 458 U.S. at 442 (Blackmun, J., dissenting) (quoting *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962)).

324. *Id.* at 454.

325. The following year, a similar thing happened. Then-Justice William Rehnquist sought to review a Takings Clause challenge to a rent control statute. *Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 876 (1983) (Rehnquist, J., dissenting). He contended that the rent control statute effected a *per se* physical taking. *Id.* at 877. But he also took care to distinguish ratemaking takings precedents that upheld rent control laws. *Id.* at 878. On his view, then, those Due Process Clause precedents were operative Takings Clause precedents.

326. *FCC v. Fla. Power Corp.*, 480 U.S. 245, 247 (1987).

327. *Id.* at 248.

328. *Id.* at 249.

329. See *Pierce*, *supra* note 91, at 2034–35.

The Court began with regulatory takings. According to the utility companies, the Act triggered the *per se* physical takings rule.³³⁰ After all, the utility companies were selling the right to occupy their utility poles, so the price control infringed their right to exclude those who did not pay enough.³³¹ But the Court disagreed on the ground that utility companies could always exclude others by no longer selling the right to occupy their utility poles.³³² Today, that rationale would not hold water.³³³ At the time, however, it defeated the utility companies' regulatory takings claim.³³⁴

The Court then turned to ratemaking takings.³³⁵ The Court asked "whether under traditional Fifth Amendment standards the challenged FCC order effected a taking of property."³³⁶ What were these traditional Fifth Amendment standards? Well, the Court explained, "[s]o long as the rates set are not confiscatory, the Fifth Amendment does not bar their imposition."³³⁷ This was a traditional Fifth Amendment standard—but under the Due Process Clause!³³⁸ The Court nonetheless shoehorned this "constitutional calculus of reasonableness" into the Takings Clause.³³⁹ In the end, the FCC order survived the just-and-reasonable test.³⁴⁰ But the outcome was less important than the reasoning: Ratemaking takings had returned.

The version of ratemaking takings that returned was the enervated one.³⁴¹ As under the Due Process Clause, ratemaking takings prohibited price controls that were "so 'unjust' as to be confiscatory."³⁴² And as after the New Deal, price controls would rarely be confiscatory: "If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry . . . is at an end. The fact that the method employed to reach that

330. See *Fla. Power Corp.*, 480 U.S. at 249–50.

331. *Id.* at 252–53.

332. *Id.* at 251 n.6.

333. See *infra* notes 484–87 and accompanying text.

334. *Fla. Power Corp.*, 480 U.S. at 253. Because the *per se* rule did not apply, the *Penn Central* test should have. See *supra* Section I.A. But the Court did not bother applying the *Penn Central* test. See *Fla. Power Corp.*, 480 U.S. at 253.

335. This means that the price control faced *both* regulatory takings and ratemaking takings. But see *infra* notes 364, 497 and accompanying text.

336. *Fla. Power Corp.*, 480 U.S. at 253.

337. *Id.*

338. See *supra* Section II.A.1.

339. *Fla. Power Corp.*, 480 U.S. at 253 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968)).

340. *Id.* at 254.

341. See *supra* Section II.A.3.

342. *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (quoting *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 597 (1896)).

result may contain infirmities is not then important.”³⁴³ The Takings Clause revived the post-New Deal framework.

But when describing the scope of ratemaking takings, the Court hinted at the pre-New Deal metaframework. Recall that, under the Due Process Clause, ratemaking takings applied to price controls on virtual monopolies—businesses “affected with a public interest.”³⁴⁴ Now, under the Takings Clause, ratemaking takings applied to price controls on businesses “devoted to public uses.”³⁴⁵ True, this phraseology—“devoted to public uses” as opposed to “affected with a public interest”—is not a perfect match. But the Court cited *Munn* to support the proposition.³⁴⁶ In doing so, it signaled that the Takings Clause preserved elements of the Due Process Clause metaframework.³⁴⁷

The Court gave the same signal two years later in *Duquesne Light Co. v. Barasch*.³⁴⁸ There, it applied ratemaking takings to price controls on utilities because the “partly public, partly private status of utility property creates its own set of questions under the Takings Clause.”³⁴⁹ Utility property enjoyed this partly public, partly private status because its “assets [were] employed in the public interest.”³⁵⁰ Though the Court did not cite anything on this point,³⁵¹ its phraseology again tracked the Due Process Clause requirement that a business be “affected with a public interest.”³⁵² And so the Court again gestured at the Due Process Clause metaframework.

The Court also emphasized the logic underlying the Due Process Clause metaframework. It observed that “utilities are virtually always

343. *Duquesne Light Co.*, 488 U.S. at 310 (quoting *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944)).

344. See *supra* Section II.A.

345. *Fla. Power Corp.*, 480 U.S. at 253.

346. *Id.*

347. See *Jersey Cent. Power & Light Co. v. Fed. Energy Regul. Comm’n*, 810 F.2d 1168, 1190 (D.C. Cir. 1987) (Starr, J., concurring) (applying ratemaking takings where price controls functioned as “the substitute for competition”).

348. 488 U.S. 299 (1989).

349. *Duquesne Light Co.*, 488 U.S. at 307. This explanation raises some interesting interpretive questions. On its face, the Takings Clause protects only “private property.” U.S. CONST. amend. V. Yet utility property is “partly public, partly private.” *Duquesne Light Co.*, 488 U.S. at 307. Thus, we might wonder whether utility property should receive the same Takings Clause protection as private property, and whether other kinds of property are only partly private. As a doctrinal matter, however, the Court has all but erased the word “private” from the Takings Clause. See *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) (“[I]t is most reasonable to construe the reference to ‘private property’ in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States.”).

350. *Duquesne Light Co.*, 488 U.S. at 307.

351. *Id.*

352. See *supra* Section II.A.

public monopolies dealing in an essential service, and so relatively immune to the usual market risks.”³⁵³ Hence, the Court explained, price controls on utilities should receive a specialized form of constitutional review: ratemaking takings.³⁵⁴ This looks like the Due Process Clause metaframework, where immunity to the usual market risks—*i.e.*, the existence of a virtual monopoly—justified applying ratemaking takings.³⁵⁵

But indeterminacy remains. The Court frequently referred to utilities in particular, so we could infer that ratemaking takings applies only to utilities.³⁵⁶ The Court also pointed out the utilities’ “statutory duty to serve the public,” so we could infer that ratemaking takings applies only to businesses with legal duties to serve.³⁵⁷ And the Court did not explain the relevance of the utilities’ status as legal monopolies, so we could infer that ratemaking takings applies only to legal monopolies.³⁵⁸ We do not know which inferences to make, or whether to make any inferences at all.

The Court has left this indeterminacy intact. Since *Duquesne Light Co.*, the Court has neither applied ratemaking takings nor addressed the Takings Clause metaframework.³⁵⁹ This prolonged silence has prompted courts and commentators to read *Duquesne Light Co.* narrowly: “The Supreme Court has not spoken to the question of what standard should apply to price controls outside the public utility context”³⁶⁰ In turn, “courts and regulators have become confused about [the constitutional] principles” that constrain price controls.³⁶¹

Thus, the 1980s saw a doctrinal revival. First, ratemaking takings precedents made their way into Takings Clause analyses. Then, ratemaking takings precedents justified applying the ratemaking takings framework—but now under the Takings Clause. Finally, the Court suggested that the Due Process Clause metaframework determined when ratemaking takings applied. But the Court never committed to a Takings Clause metaframework.

353. *Duquesne Light Co.*, 488 U.S. at 315.

354. *Id.* at 315–16.

355. *See supra* Section II.A.

356. *Duquesne Light Co.*, 488 U.S. at 307–10.

357. *Id.* at 307.

358. *See id.* at 315.

359. Megan McLean, *Throwing Shade: The Case Against Judicial Interference with Solar Net Metering Policies*, 46 ENV’T L. REP. NEWS & ANALYSIS 10873, 10877 (2016).

360. Merrill, *supra* note 10, at 654.

361. Barr, Weissmann & Frantz, *supra* note 111, at 473.

3. Reconciliation

Courts and commentators have struggled to reconcile regulatory takings with ratemaking takings. On the one hand, the Takings Clause generally scrutinizes regulations—including price controls—through regulatory takings.³⁶² On the other hand, the Takings Clause sometimes scrutinizes price controls through ratemaking takings.³⁶³ So for any given price control, courts must choose: regulatory takings or ratemaking takings.³⁶⁴ Courts and commentators have guessed at when to apply each.

In doing so, they have offered three kinds of metaframeworks. The first kind of metaframework is formalistic: It relies on a formal categorization of the regulated parties. Consider a “utility metaframework,” where price controls on utilities face ratemaking takings, but all other price controls face regulatory takings. Courts have endorsed this metaframework by cabining ratemaking takings to “the context of private companies that . . . provide public utilities.”³⁶⁵ Commentators have also advocated this “public utility model.”³⁶⁶

Yet the utility metaframework suffers two defects. One, it is unclear what counts as a “utility.” A utility is ostensibly a “company that provides necessary services to the public,”³⁶⁷ but “to many people the superfluous is the necessary.”³⁶⁸ Two, it is unclear why we should distinguish utilities. The utility metaframework arbitrarily—or, at least,

362. See *supra* Section II.B.1.

363. See *supra* Section II.B.2.

364. Merrill, *supra* note 10, at 653. But see *supra* note 335 and accompanying text (describing a case where the Court applied both regulatory takings and ratemaking takings).

365. *335-7 LLC v. City of New York*, No. 21-823, 2023 WL 2291511, at *4 (2d Cir. Mar. 1, 2023); see also *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 477 (2002) (citing ratemaking takings precedents for the proposition that, “[a]t the dawn of modern utility regulation, . . . legislatures enacted rate schedules to fix the prices a utility could charge”).

366. Thomas W. Merrill, *The Compensation Constraint and the Scope of the Takings Clause*, 96 NOTRE DAME L. REV. 1421, 1435–36 (2021); see also Joshua C. Macey & Brian Richardson, *The Public Law of Public Utilities*, 42 YALE J. ON REGUL. 179, 195 (2025) (describing the Due Process Clause metaframework as focused on public utilities and then tying that metaframework to the Takings Clause).

367. *Public Utility*, BLACK’S LAW DICTIONARY (11th ed. 2019).

368. *Tyson & Brother—United Theatre Ticket Offs. v. Banton*, 273 U.S. 418, 447 (1927) (Holmes, J., dissenting); see also *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 147 (1944) (“Use of that term [‘utility’] in a context of generality wears an appearance of precision which proves illusory when exact application becomes necessary. Relevant authorities and considerations are numerous and equivocal, and different plausible definitions result from a mere shift of emphasis.”). Indeed, commentators still have not settled on a single definition of “utility.” See RICKS, SITARAMAN, WELTON & MENAND, *supra* note 27, at 7–8.

without explanation—singles out utilities for Takings Clause purposes.³⁶⁹ Taken together, we do not know what utilities are or why they should be treated differently.

Consider also a “quasi-common carrier metaframework,” where price controls on quasi-common carriers face ratemaking takings, but all other price controls face regulatory takings. Courts have not yet endorsed this metaframework. But commentators have nonetheless argued that quasi-common carriers constitute a historically—and therefore constitutionally—unique class.³⁷⁰

Yet the quasi-common carrier metaframework suffers two similar defects. One, it is unclear what counts as a “quasi-common carrier.” A quasi-common carrier is supposedly a business that receives “a right, privilege or power of public concern” from the government,³⁷¹ but courts struggle to distinguish them from regular common carriers or public utilities.³⁷² Two, the Court explicitly refused to distinguish quasi-common carriers under the Due Process Clause.³⁷³ It is unclear why it should reverse course under the Takings Clause. Taken together, we do not know what quasi-common carriers are or why they should be treated differently. Still, formalistic approaches offer a first kind of metaframework.

The second kind of metaframework is legalistic: It relies on a legal characteristic of the regulated parties. Consider a “legal monopoly metaframework,” where price controls on legal monopolies face ratemaking takings, but all other price controls face regulatory takings. This would mirror the English common law, which treated price controls on legal monopolies differently from other price controls.³⁷⁴ It would also align with the theory that legal monopolies are different because they have entered into a regulatory compact with the government.³⁷⁵

Yet the legal monopoly metaframework runs into two obstacles. One, the legal monopoly metaframework pervades the Due Process Clause doctrine—but in dissenting opinions.³⁷⁶ The Court has repeatedly

369. Cf. *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 419 (1914) (Lamar, J., dissenting) (advocating a Due Process Clause metaframework that hinged on the existence of a “monopoly in a prime necessity of life”).

370. Ray, *supra* note 131, at 23.

371. *Id.* (quoting Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514, 616 (1911)).

372. *Id.* at 29–30.

373. *Id.* at 46–48.

374. See *supra* notes 131–34 and accompanying text.

375. See *supra* notes 111–12 and accompanying text.

376. See *Cotting v. Godard*, 183 U.S. 79, 84 (1901) (“[T]he doctrine [of *Munn*] received the assent of a majority of [the Court’s] members, and has been reaffirmed since, although accompanied by a constant dissent.”).

rejected it. Two, the legal monopoly metaframework rests on the outdated premise that firms are immune from price controls unless the government grants them a legal monopoly.³⁷⁷ Because firms are no longer immune from price controls, there can be no regulatory compact—firms cannot give up an immunity they do not have.³⁷⁸ Thus, the legal monopoly metaframework would be unprecedented and anachronistic.

Consider also a “legal duty metaframework,” where price controls on businesses with a legal duty to serve face ratemaking takings, but all other price controls face regulatory takings. Courts have hinted at this approach, applying ratemaking takings to price controls on businesses that “are compelled to employ their property to provide services to the public.”³⁷⁹ Commentators have likewise agreed that “[t]he inability to withdraw from the regulated business” justifies applying ratemaking takings.³⁸⁰

Yet the legal duty metaframework runs into two similar obstacles. One, the Court has applied ratemaking takings when the regulated party did not have a legal duty to serve.³⁸¹ So the legal duty metaframework clashes with precedent. Two, the legal duty metaframework does not treat like owners alike. Owners who are trapped in a market due to a legal duty would receive ratemaking takings, but owners who are trapped in a market due to their capital investments would receive regulatory takings.³⁸² Thus, the legal duty metaframework would be novel and underinclusive. Still, legalistic approaches offer a second kind of metaframework.

The third kind of metaframework is economic: It relies on an economic attribute of the regulated parties. Consider a “natural monopoly metaframework,” where price controls on natural monopolies

377. *See Munn v. Illinois*, 94 U.S. 113, 146–47 (1876) (Field, J., dissenting) (“When the privilege ends, the power of regulation ceases.”).

378. *See supra* Section II.A.

379. *Garelick v. Sullivan*, 987 F.2d 913, 916 (2d Cir. 1993). Yet the court failed to apply regulatory takings—or any Takings Clause scrutiny—to other price controls: “[W]here a service provider voluntarily participates in a price-regulated program or activity, . . . there can be no taking.” *Id.* This is, of course, not the law. *See supra* Part I.

380. Drobak, *supra* note 17, at 111; *see also* Merrill, *supra* note 366, at 1437 (“[I]t would seem that the justification for applying the Takings Clause in this context is that the state has compelled the [regulated business] to dedicate its property to the provision of public service within a defined territory.”); *cf.* Bhargava et al., *supra* note 24, at 965 (“The one area where the Supreme Court has found price regulation subject to some constitutional oversight is in industries for which market participation is legally mandated” (emphasis omitted)).

381. *FCC v. Fla. Power Corp.*, 480 U.S. 245, 251 n.6 (1987).

382. Drobak, *supra* note 17, at 110–11; *see also* Merrill, *supra* note 10, at 649 (“The only purpose that adoption of the legal obligation theory would serve is a reduction in litigation costs.”).

face ratemaking takings, but all other price controls face regulatory takings. Under the Due Process Clause metaframework, the Court frequently subjected “natural monopolies like railroads and utilities” to ratemaking takings.³⁸³ And many commentators have supported a natural monopoly metaframework as a matter of economic policy.³⁸⁴

Yet the natural monopoly metaframework has little basis in law. Under the Due Process Clause doctrine, natural monopoly was “a secondary cause” of special constitutional treatment.³⁸⁵ The Court sought to prevent price-gouging,³⁸⁶ and natural monopolies were well-positioned to price-gouge.³⁸⁷ But the natural monopoly metaframework conflates natural monopoly and price-gouging, miscategorizing price-gougers that are not natural monopolies and natural monopolies that are not price-gougers. The natural monopoly metaframework would thereby introduce a new dividing line.

Consider also a “virtual monopoly metaframework,” where price controls on virtual monopolies face ratemaking takings, but all other price controls face regulatory takings. This dividing line would parallel our long-dead Due Process Clause metaframework.³⁸⁸ And many commentators have endorsed this distinction: “When a company is operating within a competitive market, the market functions to set the rates at a competitive level. Because the [monopolistic] rate-making context is completely different, the constitutional analysis should be as well.”³⁸⁹

Yet the virtual monopoly metaframework might arouse a weary sense of *deja vu*. We’ve been there, and we’ve done that.³⁹⁰ To be sure,

383. Shumway et al., *supra* note 28, at 365.

384. See, e.g., SIDAK & SPULBER, *supra* note 89, at 20; Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1399 (1998); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1664 (2020) (reviewing TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018)).

385. Ray, *supra* note 131, at 29.

386. See *supra* notes 160–64 and accompanying text.

387. See Shumway et al., *supra* note 28, at 365.

388. See *supra* Section II.A.

389. Susanne Corder, Note, *Adjusting the Benefits and Burdens of Economic Life for the Public Good: The ACA’s Medical Loss Ratio as a Constitutional Regulation of Health Insurance Companies*, 24 WM. & MARY BILL RTS. J. 213, 231 (2015); see also Chen, *supra* note 40, at 1300 (“When ‘government . . . intervene[s] in the marketplace to regulate rates or prices that are artificially inflated,’ . . . the appropriate constitutional framework is the lenient check against confiscatory ratemaking.” (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 11–12 (1988))); Eric R. Claeys, *The Telecommunications Act of 1996, the Takings Clause, and Tensions in Property Theory*, 22 YALE J. ON REGUL. 205, 225 (2005) (“Ratemaking [takings] cases focus on whether the state is ‘regulating’ the dangers of monopoly . . .”).

390. See *supra* Section II.A.

the Court abandoned the virtual monopoly metaframework in a different doctrinal context. Then, the alternative to ratemaking takings was a prohibition on price controls,³⁹¹ whereas now, the alternative to ratemaking takings is regulatory takings.³⁹² But we might nonetheless hesitate to repurpose long-dead doctrine. Still, economic approaches offer a third kind of metaframework.

Rather than choosing a metaframework, the Court could revisit its frameworks. For example, the Court could obviate the need for a metaframework by applying the same framework to all price controls.³⁹³ This might explain why, in a recent summary of its Takings Clause jurisprudence, the Court omitted ratemaking takings.³⁹⁴ Alternatively, the Court could merge regulatory takings and ratemaking takings. Indeed, some courts have already evaluated price controls under “a hybrid, or modified,” framework.³⁹⁵ In these ways, the Court could sidestep the choice of metaframework.

But *stare decisis* counsels against revisiting the frameworks.³⁹⁶ Both ratemaking takings and regulatory takings are longstanding features of our Takings Clause landscape.³⁹⁷ Discarding a framework or combining the frameworks would be disruptive.³⁹⁸ By contrast, the metaframework remains an open question in our Takings Clause jurisprudence. Choosing a metaframework would not be disruptive—there is nothing to disrupt. Thus, the Court should preserve the frameworks.

As it stands, there are many ways to reconcile regulatory takings with ratemaking takings. We could draw a boundary based on a formal identification of the regulated parties. Or based on a legal characteristic of the regulated parties. Or based on an economic attribute of the

391. See *supra* Section II.A.

392. See *supra* Section II.B.

393. See Merrill, *supra* note 366, at 1436 (arguing that ratemaking takings “could also be applied to regulatory takings issues”).

394. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005).

395. *Texaco P.R., Inc. v. Ocasio Rodriguez*, 749 F. Supp. 348, 359 (D.P.R. 1990); see also *Jersey Cent. Power & Light Co. v. Fed. Energy Regul. Comm’n*, 810 F.2d 1168, 1192–93 (D.C. Cir. 1987) (Starr, J., concurring) (applying the *Penn Central* test as part of a ratemaking takings analysis).

396. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989) (“In a judicial system such as ours, . . . judges are bound, not only by the text of code or Constitution, but also by the prior decisions of superior courts, and even by the prior decisions of their own court . . .”).

397. See *supra* Section II.B.

398. See Randy J. Kozel, *Precedent and Reliance*, 62 EMORY L.J. 1459, 1465–66 (2013) (“A related fixture in the Court’s discussions of *stare decisis* is the reliance interest of stakeholders whose lives and livelihoods are affected by judicial precedent. . . . The protection of reliance interests is commonly intertwined with values of predictability, stability, and the rule of law.”).

regulated parties. But regardless of where it is drawn, a boundary is necessary. The Court must choose a metaframework.

III. CHOOSING A METAFRAMEWORK

The best choice is a new virtual monopoly metaframework: Price controls on virtual monopolies face ratemaking takings, and price controls on non-virtual monopolies face regulatory takings. Section III.A demonstrates that ratemaking takings is compatible with noncompetitive markets, where its independent reasonableness inquiry is not distorted by inflated market prices, and regulatory takings is compatible with competitive markets, where the *Penn Central* test uses efficient market prices as a regulatory benchmark. Section III.B demonstrates that the new virtual monopoly metaframework would clarify the constitutional status of myriad price controls.

A. Structural Deduction

The Court's jurisprudence is mostly originalist.³⁹⁹ An originalist interprets the Constitution by looking to text, history, and tradition.⁴⁰⁰ In similar fashion, the Court interprets the Takings Clause by looking to "text, history, or precedent."⁴⁰¹ It's worth noting the replacement of "tradition" for "precedent." In its Takings Clause jurisprudence, the Court has especially vigorously defended its non-originalist precedents.⁴⁰² But regardless, the Court has laid out its interpretive toolkit: text, history, and precedent.

When choosing a metaframework, these three interpretive tools are unhelpful. Let's start with text. The Takings Clause commands: "nor

399. Originalism is "the idea that the Constitution's meaning [was] fixed at ratification and binds us today." Sherif Girgis, *Living Traditionalism*, 98 N.Y.U. L. REV. 1477, 1479 (2023).

400. See Andrew Willinger, *History and Tradition as Heightened Scrutiny*, 60 WAKE FOREST L. REV. 415, 418 (2025).

401. *Sheetz v. County of El Dorado*, 144 S. Ct. 893, 900 (2024).

402. Audrey K. Carver, *Originalism's Achilles Heel: The Takings Clause*, 58 REAL PROP. TR. & EST. L.J. 137, 164–65 (2023); see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 803–05 (1995) ("In fashioning a modern takings jurisprudence, the Supreme Court has essentially ignored the original understanding of the Takings Clause."). Only Justice Thomas has called for a re-evaluation of the Court's Takings Clause jurisprudence "to see whether it can be grounded in the original public meaning of the Takings Clause." *Murr v. Wisconsin*, 582 U.S. 383, 419 (2017) (Thomas, J., dissenting); see also *Bridge Aina Le'a, LLC v. Haw. Land Use Comm'n*, 141 S. Ct. 731, 731 (2021) (Thomas, J., dissenting from denial of certiorari) ("Our current regulatory takings jurisprudence leaves much to be desired.").

shall private property be taken for public use, without just compensation.”⁴⁰³ A good originalist might squeeze a lot of juice from this puny fruit.⁴⁰⁴ But there is not much text, and the text says precisely nothing about price controls—much less whether to apply regulatory takings or ratemaking takings to a given price control. As a result, the text does not point us to a metaframework.

Let’s turn to history. The Due Process Clause’s virtual monopoly metaframework constitutionalized the nation’s tradition of price-regulating virtual monopolies.⁴⁰⁵ But that history answers the wrong question. Back then, the question was about legislative power: When could legislatures impose price controls (subject to ratemaking takings)?⁴⁰⁶ But today, legislatures can always impose price controls, and the question is about judicial review: When should courts apply regulatory takings versus ratemaking takings?⁴⁰⁷ The historical contours of legislative power do not illuminate the modern contours of judicial review.

Let’s turn to precedent. The Court’s Takings Clause cases hint that the Due Process Clause metaframework governs the scope of ratemaking takings. This would mean that ratemaking takings applies to price controls on virtual monopolies.⁴⁰⁸ To the extent that we rely on the Court’s interpretive tools, this is our best answer. But the precedent is not clear on this point.⁴⁰⁹ Thus, the Court’s interpretive toolkit leaves us wanting.

Moreover, policy arguments are unavailing. Regulatory takings and ratemaking takings are substantively similar—under both frameworks, price controls typically survive.⁴¹⁰ Therefore, regardless of our metaframework, price controls will typically survive. But this stymies policy arguments, which would favor less scrutiny of good price controls and more scrutiny of bad ones.⁴¹¹ Of course, to the extent the frameworks diverge in stringency, policy arguments may inform the choice of metaframework. But for the most part, they do not.

Still, the choice of metaframework is not “a formalistic quibble.”⁴¹² In a general sense, the choice matters to litigants who attack price

403. U.S. CONST. amend. V.

404. See Carver, *supra* note 402, at 146.

405. See *supra* notes 135–41 and accompanying text.

406. See *supra* Section II.A.

407. See *supra* Section II.B.3.

408. See *supra* Section II.B.2.

409. See *supra* Section II.B.2.

410. See *supra* notes 89–90 and accompanying text.

411. See David E. Pozen & Adam M. Samaha, *Anti-Modalities*, 119 MICH. L. REV. 729, 748 (2021).

412. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964).

controls, governments that defend price controls, and judges who adjudicate those disputes. And in specific circumstances, the choice matters because the frameworks can diverge—such as when a price control would effect a *per se* taking under regulatory takings⁴¹³ but would survive under ratemaking takings.⁴¹⁴ So despite the frameworks' similarity, the metaframework remains consequential.

How can we choose a metaframework? Working with the Court's interpretive tools did not get us far. Neither did toying with the possibility of policy arguments. But those inquiries looked outside the frameworks for an answer. We may also examine the frameworks themselves. After all, they have different structures, and their structures might be better or worse suited to evaluate certain price controls. Based on the frameworks' internal logic—as well as some basic economic principles⁴¹⁵—we might deduce a metaframework.

Regulatory takings is poorly suited to evaluate price controls in noncompetitive markets. Recall that, under regulatory takings, price controls may not go too far.⁴¹⁶ To determine whether price controls go too far, courts generally deploy the *Penn Central* test.⁴¹⁷ And under the *Penn Central* test, courts evaluate price controls based on three factors: (1) the economic impact on the owner, (2) the interference with the owner's investment-backed expectations, and (3) the character of the governmental action.⁴¹⁸ Yet in noncompetitive markets, the *Penn Central* test systematically overestimates how far price controls go. Let's take each factor in turn.

First, the economic impact on the owner. Under this factor, courts compare the lost value to the original value.⁴¹⁹ So when evaluating a price control, courts compare the price reduction to the original price. But in noncompetitive markets, firms may engage in price-gouging to begin with.⁴²⁰ This leads to a perverse outcome: The more a firm price-gouges, the larger the price control's economic impact, and the stronger the firm's regulatory takings claim.⁴²¹ This factor therefore rewards *ex ante* price-gouging.

413. See *supra* notes 48–53 and accompanying text.

414. See *infra* notes 455–58 and accompanying text.

415. See Frank H. Easterbrook, *The Inevitability of Law and Economics*, 1 LEGAL EDUC. REV. 3, 3 (1989) (“Economics and law are . . . inseparable.”).

416. See *supra* Section I.A.

417. See *supra* Section I.A.

418. See *supra* Section I.A.

419. *Murr v. Wisconsin*, 582 U.S. 383, 395 (2017).

420. See *supra* notes 124–30 and accompanying text.

421. Basil L. Copeland, Jr. & Walter W. Nixon III, *Procedural Versus Substantive Economic Due Process for Public Utilities*, 12 ENERGY L.J. 81, 107 (1991).

Second, the interference with the owner's investment-backed expectations. Under this factor, courts consider expectations that "are both subjectively held and objectively reasonable."⁴²² Yet in noncompetitive markets, owners may sincerely and reasonably expect to earn supracompetitive returns. And those expectations count, even when the supracompetitive returns derive from monopolistic pricing rather than competitive enterprise. Thus, this factor is too quick to credit owners' expectations.

Third, the character of the governmental action. Under this factor, courts don't really know what to look for.⁴²³ As a result, this factor is unlikely to make much of a difference. Granted, "courts may have discretion to consider public policy in interpreting the 'character' factor," and public policy might encourage more deference to price controls in noncompetitive markets.⁴²⁴ But we cannot reliably predict how this factor will play out.⁴²⁵ On the whole, though, the *Penn Central* test is distorted by inflated market prices.

By contrast, ratemaking takings is well suited to evaluate price controls in noncompetitive markets. Recall that, under ratemaking takings, price controls must be just and reasonable.⁴²⁶ And under the just-and-reasonable test, courts engage in an independent reasonableness inquiry.⁴²⁷ Courts hypothesize a fair price without considering existing market prices.⁴²⁸ So unlike the *Penn Central* test, the just-and-reasonable test is not distorted by inflated market prices. As a result, ratemaking takings is better at evaluating price controls in noncompetitive markets.

On the flipside, regulatory takings is well suited to evaluate price controls in competitive markets. In competitive markets, prices drift toward an efficient equilibrium, and price controls create market inefficiency.⁴²⁹ The *Penn Central* test accounts for all of this inefficiency. Under the economic impact factor, courts consider the entire deviation from efficient pricing. Under the interference with investment-backed expectations factor, courts consider the full departure from competitive returns. And under the character of the governmental action factor,

422. Steven J. Eagle, *The Four-Factor Penn Central Regulatory Takings Test*, 118 PENN ST. L. REV. 601, 620 (2014).

423. Merrill, *supra* note 57, at 660–61.

424. Michael Lewyn, *Character Counts: The "Character of the Government Action" in Regulatory Takings Actions*, 40 SETON HALL L. REV. 597, 623 (2010).

425. See Merrill, *supra* note 57, at 660–61.

426. See *supra* Section I.B.

427. See *supra* Section I.B.

428. See *supra* Section I.B.

429. THOMAS J. DUESTERBERG & KENNETH GORDON, COMPETITION AND DEREGULATION IN TELECOMMUNICATIONS: THE CASE FOR A NEW PARADIGM 26 (1997).

courts might disfavor meddling with equilibrium prices. As such, the *Penn Central* test uses efficient market prices as a regulatory benchmark.

By contrast, ratemaking takings is poorly suited to evaluate price controls in competitive markets. The just-and-reasonable test asks courts to ignore existing market prices and speculate as to whether a price control is just and reasonable. But judicial intuitions about reasonableness may be far afield from market realities. They are a less reliable regulatory benchmark than efficient market prices. As a result, regulatory takings is better at evaluating price controls in competitive markets.

An example might be helpful. Imagine that a competitive firm charges \$1.00 per apple and the government imposes a price ceiling of \$0.75 per apple. Under the *Penn Central* test, the economic impact is a twenty-five percent loss, the interference with investment-backed expectations is slight, and the character of the governmental action is unclear. The strength of the claim is tied to the deviation from efficient market prices. By contrast, under the just-and-reasonable test, the court asks whether \$0.75 per apple is fair. The strength of the claim is not tied to the deviation from efficient market prices. Therefore, in competitive markets, regulatory takings better evaluates the effect of price controls.

Now imagine that a monopolist charges \$5.00 per apple and the government imposes the same price ceiling of \$0.75 per apple. Under the *Penn Central* test, the economic impact is an eighty-five percent loss, the interference with investment-backed expectations is substantial, and the character of the governmental action is unclear. The monopolist has a stronger claim than the competitive firm that charged \$1.00, but only because the monopolist was price-gouging to begin with. By contrast, under the just-and-reasonable test, the court again asks whether \$0.75 per apple is fair. The analysis is not distorted by any price-gouging in the market. Therefore, in noncompetitive markets, ratemaking takings better evaluates the effect of price controls.

Our structural analysis directs us to a new virtual monopoly metaframework: When a regulated market is noncompetitive (*i.e.*, a virtual monopoly), ratemaking takings applies, and when a regulated market is competitive (*i.e.*, not a virtual monopoly), regulatory takings applies. Like under the Due Process Clause, price controls on virtual monopolies would face ratemaking takings.⁴³⁰ Unlike under the Due Process Clause, price controls in other markets would face regulatory takings.⁴³¹ But the Takings Clause would nonetheless adopt the Due Process Clause's dividing line.

430. See *supra* Section II.A.

431. See *supra* Section II.A.

	Due Process Clause (historical)	Takings Clause (proposed)
Price control on a virtual monopoly	Ratemaking takings	Ratemaking takings
Price control on a non- virtual monopoly	Automatically unconstitutional	Regulatory takings

Figure 1. *The Virtual Monopoly Metaframeworks*

To implement the new virtual monopoly metaframework, courts could draw on antitrust concepts. After all, in the antitrust context, courts frequently determine how much market power firms wield and how much market power is too much.⁴³² This is the same inquiry that the new virtual monopoly metaframework demands.⁴³³ In this respect, the virtual monopoly metaframework does not break new ground. Antitrust concepts could help courts identify virtual monopolies.

Still, antitrust concepts are no panacea. In the antitrust context, courts often rely on proxies to measure market power.⁴³⁴ Yet these proxies—such as supply-side concentration,⁴³⁵ elasticity of demand,⁴³⁶ and profit margins⁴³⁷—do not always correlate with market power. Moreover, even if antitrust law could quantify market power, it cannot *qualify* market power.⁴³⁸ Antitrust law cannot answer, for constitutional purposes, whether a firm counts as a virtual monopoly.⁴³⁹ Thus, antitrust law offers us “a basket of broken or incomplete tools.”⁴⁴⁰

Even beyond the antitrust tools, the antitrust project suffers from a deeper problem: market definition.⁴⁴¹ Courts cannot estimate market power without defining the market, but they struggle to define markets. Consider a sole seller of red apples. In the *red apple* market, he wields

432. See Crane, *supra* note 128, at 54.

433. Granted, the implications of the inquiry are different. Under antitrust law, “mere possession of monopoly power” is no offense. *Verizon Commc’ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004). But under the new virtual monopoly metaframework, mere possession of a virtual monopoly would justify applying the ratemaking takings framework.

434. Crane, *supra* note 128, at 33–34.

435. Louis Kaplow, *On the Relevance of Market Power*, 130 HARV. L. REV. 1303, 1399 (2017).

436. Crane, *supra* note 128, at 45–46.

437. White, *supra* note 126, at 331.

438. *Id.* at 326.

439. *Id.* at 325–26.

440. Crane, *supra* note 128, at 34.

441. White, *supra* note 126, at 331.

monopoly power. In the *apple* market, he wields less market power. In the *fruit* market, he wields even less market power. And in the *food* market, he wields almost no market power. Courts have “no generally accepted market delineation paradigms” for choosing between these market definitions.⁴⁴²

Antitrust law may nonetheless prove helpful. Sure, antitrust law struggles to quantify market power. But it has developed metrics like the Lerner Index⁴⁴³ and Herfindahl-Hirschman Index⁴⁴⁴ to help estimate it. Sure, antitrust law cannot, for constitutional purposes, identify virtual monopolies. But antitrust law does, for antitrust law purposes, determine whether firms possess too much market power.⁴⁴⁵ And sure, antitrust law might struggle to define markets. But it still manages to do so all the time.⁴⁴⁶ Though we should not overestimate the usefulness of antitrust law, we should not underestimate it either.

The important point is that we have deduced a metaframework. Ratemaking takings is compatible with noncompetitive markets, where its independent reasonableness inquiry is not distorted by inflated market prices, and regulatory takings is compatible with competitive markets, where the *Penn Central* test uses efficient market prices as a regulatory benchmark. Thus, we should adopt a new virtual monopoly metaframework: Price controls on virtual monopolies face ratemaking takings, and price controls on non-virtual monopolies face regulatory takings.

442. *Id.*

443. The Lerner Index is “the standard indicator of market power.” *Id.* at 325. It measures a firm’s market power (L) as a function of its product’s price (P) and marginal cost (MC): $L = (P - MC)/P$. *Id.* at 317.

444. The Herfindahl-Hirschman Index is “a commonly accepted measure of market concentration.” *Herfindahl-Hirschman Index*, ANTITRUST DIV., U.S. DEP’T OF JUST. (Jan. 17, 2024), <https://www.justice.gov/atr/herfindahl-hirschman-index> [<https://perma.cc/T67H-V3CY>] It quantifies the amount of competition in a given market “by squaring the market share of each firm competing in the market and then summing the resulting numbers.” *Id.*

445. See, e.g., Crane, *supra* note 128, at 58–59 (“[A] variant of the Lerner Index has cropped up in the 2010 Horizontal Merger Guidelines, with potentially expansive implications for assumptions about market power.”); *Herfindahl-Hirschman Index*, *supra* note 444 (“The agencies generally consider markets in which the [Herfindahl-Hirschman Index] is between 1,000 and 1,800 points to be moderately concentrated, and consider markets in which the [Herfindahl-Hirschman Index] is in excess of 1,800 points to be highly concentrated.”).

446. See David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293, 296 (2020).

B. Practical Application

The new virtual monopoly metaframework would help courts resolve Takings Clause challenges to price controls. As it stands, courts do not know which framework applies to which price controls.⁴⁴⁷ But the new virtual monopoly metaframework would select a framework based on whether the price control regulates a virtual monopoly or not. To illustrate this, let's consider how the new virtual monopoly metaframework would apply in Takings Clause challenges to price controls on housing,⁴⁴⁸ pharmaceuticals,⁴⁴⁹ and utilities.⁴⁵⁰

Let's begin with price controls on housing. The Court has decided that rent control faces regulatory takings: "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge Such forms of regulation are analyzed . . . to determine whether a regulatory taking has occurred."⁴⁵¹ This is now well established.⁴⁵² But the Court never considered applying ratemaking takings to rent control,⁴⁵³ and some landlords are now asking it to.⁴⁵⁴ In response, the Court might revisit its choice of framework.

The choice of framework is especially important in challenges to rent control. Price controls generally survive both regulatory takings and ratemaking takings.⁴⁵⁵ But when a price control infringes an owner's right to exclude, regulatory takings treats it as a *per se* physical taking.⁴⁵⁶ In such cases, the price control would survive ratemaking takings but not regulatory takings. The choice of framework would be outcome determinative.

Rent control infringes an owner's right to exclude. When the government imposes rent control, the price-controlled "product" is the

447. See *supra* notes 15–38 and accompanying text.

448. See *supra* notes 19–22 and accompanying text.

449. See *supra* notes 24–26 and accompanying text.

450. See *supra* notes 27–32 and accompanying text.

451. *Yee v. City of Escondido*, 503 U.S. 519, 529 (1992).

452. See, e.g., *335-7 LLC v. City of New York*, No. 21-823, 2023 WL 2291511, at *4 (2d Cir. Mar. 1, 2023); *74 Pinehurst LLC v. New York*, 59 F.4th 557, 564 (2d Cir. 2023); *Heights Apartments, LLC v. Walz*, 30 F.4th 720, 734 (8th Cir. 2022); *Rancho de Calistoga v. City of Calistoga*, 800 F.3d 1083, 1090 (9th Cir. 2015); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010).

453. *Yee*, 503 U.S. at 529.

454. See *335-7 LLC v. City of New York, New York*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/335-7-llc-v-city-of-new-york-new-york/> [<https://perma.cc/UYM3-EWB3>] (last visited July 14, 2024) (presenting the question of "whether the [rent control] laws effect a confiscatory taking by depriving petitioners of a just and reasonable return").

455. See *supra* notes 89–90 and accompanying text.

456. See *supra* notes 49–51 and accompanying text.

right to occupy the owner's property. As a result, the owner must sell the right to occupy to those he would otherwise exclude. This is why Justice Blackmun described certain rent control laws as authorizing "physical invasions."⁴⁵⁷ By preventing an owner from excluding unwanted tenants, rent control effects a physical taking.⁴⁵⁸

This was not always the case. In the past, the Court held that rent control was not a physical taking.⁴⁵⁹ But that was at a time when the physical takings rule was narrower than it is today.⁴⁶⁰ The physical takings rule has expanded.⁴⁶¹ And as a result of this expansion, lower courts have recognized that "an ordinance that would require landlords to rent to individuals they would otherwise reject might be a physical-invasion taking."⁴⁶² The Court might soon recognize this as well.⁴⁶³

Consider an analogy. In *Cedar Point Nursery v. Hassid*,⁴⁶⁴ an employer invited one group (those who work for him) and sought to exclude everyone else.⁴⁶⁵ The state then empowered uninvited organizers to occupy the employer's property.⁴⁶⁶ This was a physical taking.⁴⁶⁷ Under rent control, a landlord invites one group (those who pay a certain price) and seeks to exclude everyone else. Rent control then enables

457. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 450–51 (1982) (Blackmun, J., dissenting); see also *Fresh Pond Shopping Ctr., Inc. v. Callahan*, 464 U.S. 875, 877 (1983) (Rehnquist, J., dissenting) ("[U]ntil the remaining tenant decides to leave, [the owner] will be unable to vacate and demolish the building. In my view this deprives [the owner] of the use of its property in a manner closely analogous to a permanent physical invasion . . .").

458. In the event that a rent control law allowed an owner to exclude unwanted tenants, it would not effect a *per se* physical taking. For example, imagine that a rent control law permitted a landlord to discriminate based on a tenant's ability to pay. He could then lease to the same tenants to whom he would have leased absent the rent control law, just at a lower price. In such a circumstance, the landlord would not lease to any unwanted tenants, so there would be no constitutional problem. The constitutional problem arises when a landlord *must* lease to tenants to whom he would not have leased absent the rent control law.

459. Fennell, *supra* note 47, at 15–16.

460. *Id.* at 6.

461. *Id.* at 13.

462. *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1383 (8th Cir. 2022).

463. Cf. *GHP Mgmt. Corp. v. City of Los Angeles*, 145 S. Ct. 2615, 2616 (2025) (Thomas, J., dissenting from denial of certiorari) ("I would grant review of the question whether a policy barring landlords from evicting tenants for the nonpayment of rent effects a physical taking under the Takings Clause.").

464. 141 S. Ct. 2063 (2021).

465. *Id.* at 2069–70.

466. *Id.* at 2069.

467. *Id.* at 2074.

uninvited tenants to occupy the landlord's property. This is, by the same logic, a physical taking.⁴⁶⁸

The basic idea is that the government cannot alter the conditions for entry. When an owner invites his friends to his home, the government cannot enable a stranger to join—the stranger is not a friend. When an employer invites his employees to the office, the government cannot enable an outsider to enter—the outsider does not work for him. And when a landlord invites tenants who pay \$2,000 per month to move in, the government cannot enable someone who pays \$1,500 per month to stay—he is \$500 short. Put another way, the government cannot rewrite an owner's guest list.

Most laws do not rewrite an owner's guest list. For example, the government may require that landlords provide notice before evicting tenants.⁴⁶⁹ This might make it harder for a landlord to exclude a tenant, but he can still do so. And the government may restrict what an owner can build on his land.⁴⁷⁰ This might influence who ends up on an owner's property, but he can still choose who enters. Only in rare circumstances—like when the government reduces the price of occupying an owner's property—do laws alter the conditions for entry.

Commentators disagree on three grounds. *First*, commentators disagree on the ground that landlords have opened their properties to the public.⁴⁷¹ When owners open their property to the public, they relinquish much of their right to exclude.⁴⁷² This is why government-authorized invasions of “business[es] generally open to the public” do not effect physical takings.⁴⁷³ For example, the government may prevent public accommodations from excluding unwanted guests.⁴⁷⁴ So too,

468. See *Darby Dev. Co. v. United States*, 112 F.4th 1017, 1034 (Fed. Cir. 2024) (drawing the same analogy when a law prevented landlords from evicting delinquent tenants).

469. E.g., CAL. CIV. CODE § 1946 (West 2025); N.Y. REAL PROP. LAW § 226-C (McKinney 2024).

470. Michael Allan Wolf, *Goodbye, Zoning?*, 78 VAND. L. REV. 1077, 1082–83 (2025).

471. See Abigail K. Flanigan, Note, *Rent Regulations After Cedar Point*, 123 COLUM. L. REV. 475, 501 (2023); Tom Stanley-Becker, Note, *Not a Physical Taking: Defending Rent Control Against New Constitutional Challenges*, 22 GEO. J.L. & PUB. POL'Y 1131, 1148–49 (2024).

472. Fennell, *supra* note 47, at 14.

473. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021).

474. Fennell, *supra* note 47, at 17–18. To be sure, some antidiscrimination laws regulate property that is *not* open to the public. *Id.* Those laws might nonetheless constitute “background principles” of property law that are immune from Takings Clause scrutiny. See Mary Catherine Jenkins & Juliette Turner-Jones, Note, *Original Understanding of “Background Principles” in Cedar Point Nursery v. Hassid*, 47 HARV. J.L. & PUB. POL'Y 507, 529 (2024); see also *infra* notes 495–500 and accompanying text (discussing background principles).

commentators contend, the government may prevent landlords from excluding unwanted guests.⁴⁷⁵

But landlords do not open their properties to the *public*. An owner opens his property to the public by extending a general invitation to enter.⁴⁷⁶ If an owner extends a general invitation, blacklisting a select few does not undo the invitation.⁴⁷⁷ But if an owner never extends a general invitation, he does not open his property to the public by inviting a select few to enter.⁴⁷⁸ Though landlords extend a general invitation to apply for a unit, they do not extend a general invitation to occupy a unit.⁴⁷⁹ The invitation to occupy is only ever for a select few: tenants.

Second, commentators disagree on the ground that landlords consent to rent control.⁴⁸⁰ In the 1990s, the Court held that “[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land.”⁴⁸¹ But landlords do not have to be landlords.⁴⁸² If they do not want to host tenants at the government-mandated price, they can exit the rental business.⁴⁸³ By staying in the rental business, the theory goes, landlords have consented to the regulation.

But this theory of consent is not good law.⁴⁸⁴ The Court has since emphasized that it “rejected the argument that [a physical taking] was not a taking because a landlord could avoid the requirement by ceasing to be a landlord.”⁴⁸⁵ This makes sense: Owners do not shed their Takings Clause rights at the marketplace door.⁴⁸⁶ The fact that an owner

475. Fennell, *supra* note 47, at 18.

476. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. REV. 1283, 1310 (1996).

477. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964) (roadside motel); see also *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83–84 (1980) (shopping center).

478. See *Cedar Point*, 141 S. Ct. at 2076–77 (agricultural facility); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (private marina).

479. But see Nathan S.W. Lee, Note, *Antidiscrimination Laws Are Not Takings*, 27 N.Y.U. J. LEGIS. & PUB. POL’Y 257, 274 (2024) (“[L]andlords . . . have chosen to invite individuals to apply for a lease and thus to enter the property.”).

480. See Flanigan, *supra* note 471, at 501; Stanley-Becker, *supra* note 471, at 1148.

481. *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992).

482. *Id.* at 527–28.

483. *Id.*

484. *301, 712, 2103 & 3151 LLC v. City of Minneapolis*, 27 F.4th 1377, 1383 (8th Cir. 2022).

485. *Horne v. Dep’t of Agric.*, 576 U.S. 351, 365 (2015).

486. *Id.*; cf. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”).

participates in a market does not mean that the government did not violate his rights. Nor does it mean that he consented to any such violation.

Third, commentators disagree on the ground that rent control constitutes a background principle of property law.⁴⁸⁷ The Takings Clause does not prevent the government from reimposing “longstanding background restrictions on property rights.”⁴⁸⁸ These restrictions are supposedly baked into the property to begin with.⁴⁸⁹ For example, the Takings Clause does not prevent the government from abating nuisances—even if the abatement would otherwise effect a taking—because nuisance law is a background principle of property law.⁴⁹⁰ On this view, rent control is just another background principle.⁴⁹¹

But rent control would be an odd background principle. The Court has described background principles as “traditional common law privileges to access private property.”⁴⁹² Yet rent control is not a common law privilege, and the Court has not even decided whether “a legislative enactment can be deemed a background principle.”⁴⁹³ Thus, rent control is not a background principle. And so, despite commentators’ objections, rent control effects a physical taking.

Still, the order of operations remains unclear. On one view, the *per se* rules operate within regulatory takings. The first question is whether to apply regulatory takings or ratemaking takings, and the second question—only if regulatory takings applies—is whether a *per se* rule applies. On another view, the *per se* rules function like free-floating trump cards. The first question is whether a *per se* rule applies, and the second question—only if no *per se* rule applies—is whether to apply regulatory takings or ratemaking takings.⁴⁹⁴ The Court has not picked a view.

The *per se* rules likely operate within regulatory takings. The Court “has consistently distinguished” between ratemaking takings and *per se* takings.⁴⁹⁵ This is because the *per se* rules (and the *Penn Central* test) determine whether the government has gone too far, whereas ratemaking

487. See Flanigan, *supra* note 471, at 505; Stanley-Becker, *supra* note 471, at 1149–50.

488. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021).

489. David A. Dana, “Background Principles” in the Law of Takings, 73 AM. U. L. REV. 1789, 1807–08 (2024).

490. *Id.* (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028–29 (1992)).

491. Flanigan, *supra* note 471, at 506.

492. *Cedar Point*, 141 S. Ct. at 2079.

493. *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001).

494. If the *per se* rules functioned this way, rent control would always effect a *per se* physical taking.

495. Chen, *supra* note 72, at 1685.

takings determines whether a price control is just and reasonable.⁴⁹⁶ The frameworks therefore answer different questions. When a regulation raises a ratemaking takings question (as opposed to a regulatory takings question), the *per se* rules cannot answer it.⁴⁹⁷

Consider a hypothetical. Imagine that a single landlord owned all of the housing in a city and jacked up rents, prompting the city to implement rent control. If the *per se* rules functioned as free-floating trump cards, we would first look to the *per se* rules, under which the rent control would effect a physical taking. This would contradict longstanding precedent.⁴⁹⁸ By contrast, if the *per se* rules operated within regulatory takings, we would first look to the metaframework, under which the rent control would face ratemaking takings. This would align with longstanding precedent.⁴⁹⁹ As such, the *per se* rules likely operate within regulatory takings.

The new virtual monopoly metaframework would therefore reorganize the constitutional analysis of rent control. The threshold determination—whether a virtual monopoly exists—would typically be outcome determinative. If a virtual monopoly existed, ratemaking takings would apply, and the law would likely survive. But if no virtual monopoly existed, regulatory takings would apply, and the law would effect a physical taking. Thus, rent control would likely be constitutional in noncompetitive markets but unconstitutional in competitive markets.

Next, let's turn to price controls on pharmaceuticals. Under the new virtual monopoly metaframework, price controls on patented drugs would typically face ratemaking takings. After all, the owner would possess a legal monopoly, legal monopolies are virtual monopolies, and virtual monopolies trigger ratemaking takings. To be sure, in the antitrust context, “the ownership of a patent does not burden the patent owner with a presumption that it possesses monopoly power”⁵⁰⁰ And perhaps some patented drugs are not virtual monopolies, so those price controls would face regulatory takings. But by and large, we would expect price controls on patented drugs to face ratemaking takings.

By contrast, price controls on unpatented drugs would typically face regulatory takings. Unpatented drugs are not legal monopolies, so they compete with copycat products.⁵⁰¹ This competition generally erodes

496. See *supra* Part I.

497. But see *supra* note 335 and accompanying text (describing a 1987 case where the Court applied both regulatory takings and ratemaking takings).

498. See *supra* notes 185–89 and accompanying text.

499. See *supra* notes 185–89 and accompanying text.

500. Nicholas Economides & William N. Hebert, *Patents and Antitrust: Application to Adjacent Markets*, 6 J. ON TELECOMM. & HIGH TECH. L. 455, 460 (2008).

501. *Id.* at 479–80.

pharmaceutical companies' market power.⁵⁰² Of course, pharmaceutical companies might sometimes maintain a virtual monopoly even without a patent.⁵⁰³ In those circumstances, price controls would face ratemaking takings. But in general, we would expect price controls on unpatented drugs to face regulatory takings.

Thus, the new virtual monopoly metaframework would treat different drugs differently. When a pharmaceutical market constitutes a virtual monopoly—typically, when the price-controlled drug is patented—ratemaking takings would apply. And when a pharmaceutical market does not constitute a virtual monopoly—typically, when the price-controlled drug is unpatented—regulatory takings would apply. Once again, the framework would depend on the market.

Finally, let's consider price controls on utilities. Under existing Takings Clause doctrine, price controls on utilities face ratemaking takings.⁵⁰⁴ This would remain true under almost any metaframework.⁵⁰⁵ After all, these businesses typically qualify as utilities, quasi-common carriers, legal monopolies, businesses with a legal duty to serve, natural monopolies, and virtual monopolies, all at the same time.⁵⁰⁶ So under the new virtual monopoly metaframework, price controls on utilities would still typically face ratemaking takings.⁵⁰⁷

In each case, the new virtual monopoly metaframework would guide courts to the correct framework. Price controls on housing would likely survive in monopolistic markets but not competitive markets. Price controls on pharmaceuticals would face different frameworks based on the market conditions for each drug. And price controls on utilities would generally continue to face ratemaking takings. Taken together, the new virtual monopoly metaframework would systematize the Takings Clause's treatment of price controls.

CONCLUSION

How does the Constitution control price controls? The Court has developed two frameworks for adjudicating Takings Clause challenges to

502. Benjamin E. Brown, Note, *Decreasing Prescription Drug Prices: Can Effective Policy Incentivize Cooperation Between Previously Antithetic Sectors?*, 14 IND. HEALTH L. REV. 162, 169–70 (2017).

503. Robert Pearl, *Pharma Companies: A Conglomerate of Monopolies*, FORBES (Jan. 31, 2023, at 04:30 ET), <https://www.forbes.com/sites/robertpearl/2023/01/31/pharma-companies-a-conglomerate-of-monopolies/?sh=6f99240b1ce1>.

504. See *supra* Section II.B.2.

505. See *supra* Section II.B.3.

506. RICKS, SITARAMAN, WELTON & MENAND, *supra* note 27, at 26–28.

507. Of course, in the event that a competitive utility market existed, price controls in that market would face regulatory takings.

price controls. On the one hand, the regulatory takings framework prohibits price controls from going too far. On the other hand, the ratemaking takings framework requires that price controls be just and reasonable. The open question is the *metaframework*: When should courts apply which framework? The Court must choose a metaframework.

The best choice is a new virtual monopoly metaframework: Price controls on virtual monopolies face ratemaking takings, and price controls on non-virtual monopolies face regulatory takings. This is because ratemaking takings is compatible with noncompetitive markets, where its independent reasonableness inquiry is not distorted by inflated market prices, and regulatory takings is compatible with competitive markets, where the *Penn Central* test uses efficient market prices as a regulatory benchmark. In turn, the new virtual monopoly metaframework would clarify the constitutional status of myriad price controls. Thus, what is old must become new again.

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