
PRICE AND SOVEREIGNTY

[W]e must not overlook the actual fact that dominion over things is also imperium over our fellow human beings.

— Professor Morris R. Cohen, *Property and Sovereignty*¹

In October 1978, President Carter appeared on national television to “have a frank talk” with the American people “about our most serious domestic problem” — inflation.² After years of rapidly rising prices, purchasing power had declined, productivity had suffered, and America’s ability to sell its goods abroad was faltering.³ What could be done? Carter continued:

There are two simplistic and familiar answers which are sometimes proposed — simple, familiar, and too extreme. One of these answers is to impose a complicated scheme of Federal Government wage and price controls on our entire free economic system. The other is a deliberate recession, which would throw millions of people out of work. Both of these extreme proposals would not work, and they must be rejected.⁴

Wary of extremism but desperate for a solution, Carter proposed a middle way. He offered a program that mixed fiscal austerity, sustained taxing, and moderate monetary policy — combating inflation via a multipronged program to reduce the money supply — with half-hearted, voluntary wage and price standards to stem immediate dislocation.⁵

His compromise didn’t work. So, a year later, Paul Volcker, Chairman of the Federal Reserve, initiated the “deliberate recession” Carter earlier decried. The Volcker Shock restricted the supply of money, raised interest rates, and resulted in the massive unemployment that the President feared.⁶ It also had a destructive effect on the global economy, hurting not just American workers, consumers, and firms, but also all those buyers, sellers, and borrowers who relied on the American dollar but lacked a say in American government.⁷ While the Volcker Shock would widely discredit monetary targeting as an anti-inflationary technique, it did end stagflation.⁸ And, more importantly, it set the

¹ Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 13 (1927).

² Jimmy Carter, Anti-inflation Program: Address to the Nation (Oct. 24, 1978), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1839, 1839 (1979).

³ *Id.*

⁴ *Id.* at 1840.

⁵ See *id.* at 1840–43; see also Exec. Order No. 12,092, 3 C.F.R. 249 (1979).

⁶ See GRETA R. KRIPPNER, CAPITALIZING ON CRISIS 116–20 (2011).

⁷ See Tim Barker, *Other People’s Blood*, N+1 (Spring 2019), <https://www.nplusonemag.com/issue-34/reviews/other-peoples-blood-2> [<https://perma.cc/SD75-ETKN>] (reviewing PAUL A. VOLCKER WITH CHRISTINE HARPER, KEEPING AT IT (2018)).

⁸ KRIPPNER, *supra* note 6, at 119–20.

country and the world on a new course, toward a neoliberal consensus in economics, politics, and law.⁹

What of the road not taken? In Carter's speech, the prospect of mandatory wage and price controls was presented as not just ineffective, but un-American: at odds with "our entire free economic system." Instead of freedom through competitive markets, price controls portended government-coordinated constraint, even Soviet-style planning. But, in the century preceding Carter's speech, controls were not feared, but fostered. Indeed, they were central to the American system of capitalism, offering political regulation of prices to stave off destructive periods of inflation, destabilizing drops in demand, threats of monopoly, and pervasive exploitation of workers and renters. In this way, price controls did not simply serve economic ends: they were part and parcel of new conceptions of collective power over property via price.

This Note describes the legal achievement that underlaid that political success. It argues that price controls, whatever their merits as policy, represent an unusually direct challenge to neoliberalism's central economic and political premises. Then, it shows how the Court's price control jurisprudence offers insights into what's been lost in our late neoliberal era. Against the depoliticized market and inert individualism of neoliberalism, the Court, in constitutional cases adjudicating the legality of price controls, envisioned an active democratic sovereign, capable of extensive, even extreme, power over the conditions of its own existence. Indeed, as this Note describes, in the century preceding neoliberalism's rise, price controls were consistently conceived of by the Court as the limit case for collective power over putatively private property and, by extension, the broader economy. But, while price controls remain constitutional as a policy, the conception of sovereignty they helped to create has been largely forgotten, if not wholly forgone. Thus, this Note concludes, the legal history of price controls exemplifies neoliberalism's most impressive achievement: to make the form of politics it opposes not illegal, but irrational.¹⁰

Part I offers a pocket survey of price controls, moving between political history and economic theory to show their challenge to neoliberalism. Part II presents an alternative conception of sovereignty drawn

⁹ Cf., e.g., Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1790–91 (2020) (describing the so-called "Twentieth-Century Synthesis" in law, *id.* at 1790).

¹⁰ See David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 6 (2014) (describing "arguably the most important" premise of neoliberalism as "a set of implicit bounds that . . . defines some policy options . . . as 'off-the-wall' in respectable and influential conversations, thus setting presumptive limits on political possibility"); see also WENDY BROWN, UNDOING THE DEMOS 121 (2015) (describing neoliberalism as an exemplary "political rationality" that sets "the condition of possibility and legitimacy of [governing's] instruments").

from the Supreme Court's pathbreaking price control decision, *Munn v. Illinois*.¹¹ Part III demonstrates the importance of price controls to conceptions of sovereign power by tracking the influence of *Munn*, showing how its reasoning was restrained in the *Lochner* era, expanded during the Great Depression, and unshackled in emergencies. Part IV suggests that price control jurisprudence, even if not price control policies, offers a way of reconceiving political economic sovereignty for a new era.

I. PRICE AS POWER

Price controls were once a taken-for-granted feature of sovereign power. The Code of Hammurabi, issued almost four thousand years ago, included extensive prescriptions for price.¹² In roughly 300 C.E., Diocletian, head of the Roman Empire, replaced silver coins with copper ones, struggled to rein in the resulting inflation, and ultimately issued an edict controlling prices: a lawyer's service at trial was set at roughly seventeen times the price of women's shoes.¹³ A thousand years later, King Edward I of England, aiming to stabilize a market reeling from his efforts to outlaw copycat coin, imposed preset prices on meat, game, eggs, and fish — violations of which were punishable by imprisonment.¹⁴ During the American Revolution, eight of thirteen colonies had expansive price controls in place;¹⁵ in the French Revolution, the Jacobins sought to stabilize unruly price increases and supply shortfalls by instituting the economy-wide *maximum*, which became famous throughout Europe as both a reckless intervention and a popular policy;¹⁶ amidst the Industrial Revolution, England's poor people achieved price control measures of their own, seizing goods and reselling them at reasonable rates.¹⁷

Despite their ubiquity, government-imposed price controls were curiously undertheorized by economists before the early twentieth century. In 1918, less than a year after Congress instituted national controls for

¹¹ 94 U.S. 113 (1877).

¹² See Bernard D. Reams, Jr., *Federal Economic Regulation Through Wage and Price Control Programs: 1917–1980. A Selected Bibliography*, 74 L. LIBR. J. 1, 1 (1981) (citing C. EDWARDS, *THE HAMMURABI CODE AND THE SINAITIC LEGISLATION* 67–73 (1904)).

¹³ See Roland G. Kent, *The Edict of Diocletian Fixing Maximum Prices*, 69 U. PA. L. REV. 35, 38–39 (1920) (discussing debasement and adoption of copper coinage); *id.* at 46 (translating partial price list).

¹⁴ See CHRISTINE DESAN, *MAKING MONEY* 145 (2014).

¹⁵ See Breck P. McAllister, *Lord Hale and Business Affected with a Public Interest*, 43 HARV. L. REV. 759, 767 (1930).

¹⁶ See R.B. Rose, *18th-Century Price-Riots, the French Revolution and the Jacobin Maximum*, 4 INT'L REV. SOC. HIST. 432, 444–45 (1959); see also ERIC HOBSBAWM, *THE AGE OF REVOLUTION: 1789–1848*, 68–69 (1962).

¹⁷ See E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 116–17 (1971).

food and fuel in response to the inflationary pressures of World War I,¹⁸ Harvard Economics Professor Benjamin M. Anderson declared: “There can be no doubt that practice is ahead of theory in the present situation.”¹⁹ Even as he noted that price controls were a common feature of economic history, he could find little sustained analysis in the canonical economic thinkers of earlier eras.²⁰ When discussed by foundational economists in the nineteenth century, for example, price controls were portrayed as an exception, an adjustment, or simply exogenous to the real subject of analysis.²¹ From a survey of economics textbooks, Anderson characterized the consensus as follows:

[L]egally fixed prices are either futile or harmful The difficulty of enforcing fixed prices, the danger of forcing merchants to close their shops, the danger of driving supplies away from the market, or of stopping production, have all been emphasized, and have, moreover, been abundantly illustrated from the history of such attempts.²²

Whatever the risks, targeted interventions into price — railroad rate-setting,²³ minimum wages for workers,²⁴ industry-specific protections²⁵ — became taken-for-granted policies, while the federal government’s experiments with large-scale price controls continued. By the end of World War II, the Office of Price Administration (OPA), created by the Emergency Price Control Act of 1942²⁶ (EPCA), had issued regulations controlling prices for ninety percent of commodities²⁷ and regulating rents for “practically the entire country.”²⁸ The three-year-old OPA was home to an enormous administrative apparatus, employing

¹⁸ Food and Fuel Control Act (Lever Act), Pub. L. No. 65-41, 40 Stat. 276 (1917).

¹⁹ Benjamin M. Anderson, Jr., *Value and Price Theory in Relation to Price-Fixing and War Finance*, 8 AM. ECON. REV. 239, 240 (1918).

²⁰ See *id.* at 239 (“Most economists have given scant attention to legally fixed prices.”).

²¹ See, e.g., JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 288 (J. Laurence Laughlin ed., D. Appleton & Co. 1885) (1848) (“I must give warning, once for all, that the cases I contemplate are those in which values and prices are determined by competition alone. In so far only as they are thus determined, can they be reduced to any assignable law.”); see also Anderson, *supra* note 19, at 239 (quoting Mill).

²² Anderson, *supra* note 19, at 239.

²³ See, e.g., *Ga. R.R. & Banking Co. v. Smith*, 128 U.S. 174, 179 (1888); *Chi., Burlington & Quincy R.R. Co. v. Iowa*, 94 U.S. 155, 161 (1877).

²⁴ See *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (noting widespread adoption of minimum wage laws by states); see also *Adkins v. Child’s Hosp.*, 261 U.S. 525, 570–71 (1923) (Holmes, J., dissenting) (discussing minimum wage laws in the United States, Australia, Canada, and Great Britain).

²⁵ See, e.g., *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 570 (1939); *Nebbia v. New York*, 291 U.S. 502, 521 (1934).

²⁶ Pub. L. No. 77-421, 56 Stat. 23. For a description of the evolution of the EPCA and the bureaucratic rationality of the OPA, see Leanora Schwartz Gruber, *Establishment and Maintenance of Price Regulations — A Study in Administration of a Statute*, 96 U. PA. L. REV. 503 (1948).

²⁷ See LIZABETH COHEN, *A CONSUMERS’ REPUBLIC* 65 (Vintage Books 2004) (2003).

²⁸ Don D. Humphrey, *Price Control in Outline*, 32 AM. ECON. REV. 744, 757 (1942). The author was head of the OPA’s Price Analysis and Review Branch, Research Division. *Id.* at 744.

nearly 65,000 federal workers — more than the Departments of Justice, State, and Labor combined.²⁹ And, as part of the combined federal and private enforcement regime instituted by the EPCA, civil and criminal actions for violations of price control regulations occupied ten percent of the federal docket;³⁰ the Emergency Court of Appeals — an Article III court established by the EPCA and designed to circumvent eleven separate circuits³¹ — was routinely batting down challenges to price orders with the Supreme Court’s tacit assent.³² In 1945, it was no exaggeration to say that the government controlled the economy through price setting and enforced its control in compliant courts.

That same year, Friedrich Hayek, an Austrian economics professor working in London, published a short essay called *The Use of Knowledge in Society*.³³ In it, Hayek announced a new, era-defining theory of price. He began by insisting that the economic problem of efficient allocation was fundamentally an issue of information: “[H]ow to secure the best use of resources known to any of the members of society, for ends whose relative importance only these individuals know.”³⁴ For Hayek, this reformulation represented a kind of humility: rather than asserting that preferences were disbursed but ultimately knowable, Hayek contended that no individual or agency — no “central board, which, after integrating *all* knowledge, issues its orders” — could grasp the vast array of preferences distributed in a population, particularly at times of change or flux.³⁵

But, for Hayek, this epistemic challenge was less daunting than it first appeared. The solution was already before us, hidden in plain sight — “the price system.”³⁶ He explained:

It is more than a metaphor to describe the price system as a kind of machinery for registering change, or a system of telecommunications which enables individual producers to watch merely the movement of a few pointers, as an engineer might watch the hands of a few dials, in order to adjust their activities to changes of which they may never know more than is reflected in the price movement.³⁷

²⁹ BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1946, at 207 (1946).

³⁰ See MEG JACOBS, POCKETBOOK POLITICS 202, 219 (2005).

³¹ See James R. Elkins, *The Temporary Emergency Court of Appeals: A Study in the Abdication of Judicial Responsibility*, 1978 DUKE L.J. 113, 115 n.11.

³² See Gruber, *supra* note 26, at 535 n.193 (“From January 1942 through May 31, 1947, 409 complaints were filed with the Emergency Court of Appeals. In only 60 cases were the decisions adverse to the Administrator . . .” (citing OFF. OF PRICE ADMIN., TWENTY-SECOND QUARTERLY REPORT FOR THE PERIOD ENDED MAY 31, 1947 (1947))).

³³ F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

³⁴ *Id.* at 520.

³⁵ *Id.* at 524.

³⁶ *Id.* at 525.

³⁷ *Id.* at 527.

Put another way, the price system was the sole mechanism capable of organizing and integrating a complex web of buyers and sellers. Thus, for Hayek, the possibility of a functioning economy depended entirely on the existence of an uncontrolled price system, one free from “conscious direction”³⁸ or central planning.³⁹

For all its retrospective prominence,⁴⁰ Hayek’s essay failed to immediately influence American policy. Industry- and product-specific controls continued to proliferate, and price setting remained a viable policy tool to combat economy-wide inflation.⁴¹ When President Nixon faced a new round of inflation in the 1970s, he too turned to price controls. Nixon’s program initially relied on a slender statutory basis — the Economic Stabilization Act of 1970⁴² provided that “[t]he President is authorized to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970”⁴³ — but it came to impact every aspect of the economy. As in World War II, executive authority to set prices was insulated from judicial review by an emergency court of appeals.⁴⁴ While inconsistent in purpose and scope, Nixon’s program demonstrated the continued primacy of price controls as an inflation-fighting policy.

But, in economic theory, Hayek’s commitment to unconstrained price was ascendant. In his 1976 Nobel Prize lecture, Milton Friedman decried government price setting, relying on the centrality of price in Hayek’s theory to criticize controls.⁴⁵ For Friedman, government action was both a cause and a consequence of rising prices: inflation itself was primarily the product of profligate government spending,⁴⁶ and as prices rose, governments were likely to intervene aggressively to try to stem the tide. “[T]he social and political forces unleashed by volatile inflation rates,” Friedman explained, “will lead governments to try to repress inflation . . . by explicit price and wage control, or by pressuring private

³⁸ *Id.*

³⁹ *See id.* at 520–21, 524.

⁴⁰ *See* PHILIP MIROWSKI, NEVER LET A SERIOUS CRISIS GO TO WASTE 87–88 (2013) (discussing the influence of Hayek’s theory of price).

⁴¹ *See, e.g.,* JACOBS, *supra* note 30, at 250–61 (discussing price control policies during the Korean War through the 1960s).

⁴² Pub. L. No. 91-379, §§ 202–206, 84 Stat. 796, 799–800.

⁴³ *Id.* § 202.

⁴⁴ *See generally* Elkins, *supra* note 31.

⁴⁵ *See* Milton Friedman, *Nobel Lecture: Inflation and Unemployment*, 85 J. POL. ECON. 451, 467 (1977).

⁴⁶ *Id.* at 466 (“Governments have not produced high inflation as a deliberate announced policy but as a consequence of other policies — in particular, policies of full employment and welfare-state policies raising government spending.”).

businesses or unions ‘voluntarily’ to exercise ‘restraint’”⁴⁷ Inflation’s volatility and unpredictability would ultimately render “market prices a less efficient system for coordinating economic activity.”⁴⁸ “At the extreme,” he cautioned, the market would simply break down: “[T]he system of absolute prices becomes nearly useless, and economic agents resort either to an alternative currency or to barter, with disastrous effects on productivity.”⁴⁹

While the contours of neoliberalism are notoriously contestable,⁵⁰ the epistemological power of price suggests a straightforward political project. Whatever else neoliberal policies may have required, the core commitment to disbursed knowledge demanded preserving a decentralized price system.⁵¹ For Friedman and others, eliminating government intervention into how much goods and services cost served this goal, just as privatizing public corporations and reducing regulation led to more efficient allocation of resources by accurately valuing previously protected property.⁵² But this ostensibly deregulatory agenda should not be mistaken for libertarianism by another name: the “free market” requires both active state effort and hard political limits.⁵³ Thus, neoliberalism’s commitment to protecting price requires a strong conception of property and a weak conception of politics: collective action must end where the task of maintaining the price system begins.

Viewed from this perspective, the coincident rise of a neoliberal consensus and fall of widespread price controls takes on a new significance. Price controls represent not just an inadequate solution to inflation and other social problems, they also signal the success of a conception of popular sovereignty anathema to the freedom of and through the market prized by neoliberalism. Friedman, in his most famous polemic, foreshadowed Carter’s claims a decade and a half later: “Price controls, whether legal or voluntary, if effectively enforced would eventually lead to the destruction of the free enterprise system And [they] would

⁴⁷ *Id.* at 467.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See Grewal & Purdy, *supra* note 10, at 2 (noting fear that neoliberalism “is too vague or polemical for responsible use”); Philip Mirowski, *Postface: Defining Neoliberalism*, in *THE ROAD FROM MONT PÈLERIN* 417, 426 (Philip Mirowski & Dieter Plehwe eds., 2009).

⁵¹ See Mirowski, *supra* note 50, at 435 (describing “the neoliberal *Weltanschauung*” as built atop an epistemic commitment to the market as a superior “*information processor*” manifesting its signals in price).

⁵² See MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 35 (40th anniversary ed. 2002); Friedman, *supra* note 45, at 467.

⁵³ See Grewal & Purdy, *supra* note 10, at 7.

not even be effective in preventing inflation.”⁵⁴ In the decades that followed, Friedman’s conclusions became common sense.⁵⁵ But, as the next Parts demonstrate, for much of the century prior to the coalescing of the neoliberal consensus, an alternative conception of sovereignty built atop price controls occupied a central, though contested, place in American constitutional law.

II. THE JURIDICAL JUSTIFICATION OF PRICE CONTROLS

To understand the conception of sovereignty constitutionalized by price controls, venture from the dawn of the second Gilded Age to the start of the first, and consider the Court’s pathbreaking decision in *Munn v. Illinois*.⁵⁶ In 1869, delegates from across Illinois met in Springfield to enact a new constitution.⁵⁷ Much of the debated document would look familiar to modern eyes — included were descriptions of three branches of state government⁵⁸ and a list of individual rights closely tracking federal protections.⁵⁹ But even delegates to the convention were surprised to hear that one of just fourteen articles would be devoted solely to the legal status of warehouses.⁶⁰ In what became Article XIII of the enacted Constitution, the people of the state announced that “[a]ll elevators or storehouses where grain or other property is stored for a compensation . . . are declared to be public warehouses.”⁶¹ The section — and the relatively detailed regulations within it — were the product of an antimonopolist, agrarian populism then sweeping the Midwest.⁶² As one delegate to the convention explained:

[W]arehouse men and the officers of railways . . . form the grand ring, that wrings the sweat and blood out of the producers of Illinois. There is no provision in the fundamental law standing between the unrestricted avarice

⁵⁴ FRIEDMAN, *supra* note 52, at 135; *see also* Friedman, *supra* note 45, at 468 (noting that once the price system breaks down and unemployment rises, “the political and economic system [may become] dynamically unstable and produce hyperinflation and radical political change”).

⁵⁵ *See generally* MONICA PRASAD, *THE POLITICS OF FREE MARKETS* (2006).

⁵⁶ *Munn*’s seminal status was once well recognized. *See, e.g.*, Walton H. Hamilton, *Affection with Public Interest*, 39 *YALE L.J.* 1089, 1096–97 (1930); McAllister, *supra* note 15, at 768–69; *see also* William J. Novak, *Law and the Social Control of American Capitalism*, 60 *EMORY L.J.* 377, 400–01 (2010).

⁵⁷ *See* 1 *DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS* 1 (Springfield, E.L. Merritt & Brother 1870).

⁵⁸ *See* ILL. CONST. of 1870, arts. III–IV.

⁵⁹ *See id.* art. II.

⁶⁰ *See, e.g.*, 2 *DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS*, *supra* note 57, at 1628 (statement of Mr. Buxton); *id.* at 1627–28 (statement of Mr. Tincher).

⁶¹ ILL. CONST. of 1870, art. XIII, § 1. Somewhat similar provisions addressed railroad price setting. *See id.* art. XI, § 12; *see also id.* § 15.

⁶² *See* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 424 (4th ed. 2019) (noting that many of the laws ultimately benefited businessmen and merchants, rather than farmers); RICHARD WHITE, *THE REPUBLIC FOR WHICH IT STANDS* 362 (2017).

of monopoly and the common rights of the people; but the great, laborious, patient ox, the farmer, is bitten and bled, harassed and tortured, by these rapacious, blood sucking insects. It is the bounden duty of this Convention to step between these voracious monopolies and the producers, and give them protection, in some degree, at least.⁶³

Enshrining the public nature of grain storage, other delegates emphasized, would place “warehouses . . . within the control of the Legislature,”⁶⁴ rather than subject them to the vagaries of the judge-made “common law.”⁶⁵

After the convention concluded, the Illinois General Assembly quickly took up the Constitution’s call.⁶⁶ The resulting state law required grain warehouses in cities with more than 100,000 inhabitants to charge no more than legislatively set maximum rates — between one-half and two cents per bushel depending on the quality of the grain and the length of storage — or face criminal sanction.⁶⁷ In 1872, Ira Munn and George Scott, two owners of a Chicago grain elevator, refused to comply: they charged prices agreed upon by their ostensive competitors, rather than those established by law.⁶⁸ They were indicted, found guilty, fined \$100, and appealed.⁶⁹ At the Supreme Court, their local protest spurred the articulation of starkly different conceptions of price, property, and sovereign power in federal constitutional law.

Writing for the Court, Chief Justice Waite admitted the prevailing view that price was a private prerogative.⁷⁰ But, he argued, private price setting was better understood as a sort of privilege, one that adhered only to certain types of property in particular circumstances.⁷¹ Indeed, he insisted, it was wrong to conceptualize popularly enacted price controls as a deprivation of private property under the newly enacted Fourteenth Amendment of the U.S. Constitution.⁷² Relying on Lord Chief Justice Hale’s seventeenth-century treatise *De Portibus Maris*,⁷³ Chief Justice Waite argued:

⁶³ 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ILLINOIS, *supra* note 57, at 1629 (statement of Mr. Medill).

⁶⁴ *Id.* at 1628 (statement of Mr. Merriam).

⁶⁵ *Id.* at 1626 (statement of Mr. Coolbaugh).

⁶⁶ See *Munn v. Illinois*, 94 U.S. 113, 115 (1877).

⁶⁷ *Id.* at 116–17 (quoting Act of Apr. 25, 1871, §§ 1–5, 15, 1871 Ill. Laws 762, 762–63, 769).

⁶⁸ See *id.* at 117–18; *Ira Y. Munn and George L. Scott v. The People of Illinois*, 16 AM. L. REG. 526, 526 (1877). Munn and Scott were also convicted for failing to seek a license for their operation, as required by the same state law. *Munn*, 94 U.S. at 116–19.

⁶⁹ *Munn*, 94 U.S. at 119.

⁷⁰ *Id.* at 127 (“There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it” (quoting Allnutt v. Inglis (1810) 104 Eng. Rep. 206, 210; 12 East 527, 537)).

⁷¹ See *id.* at 125.

⁷² *Id.* at 125–26.

⁷³ *Id.* at 126 (citing 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 78 (Francis Hargrave ed., 1787)). In fact, Chief Justice Waite misquoted and plainly misunderstood

When . . . one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.⁷⁴

Thus, property, though presumptively private, was potentially subject to public control whenever it was “used in a manner to make it of public consequence.”⁷⁵

In an impassioned dissent, Justice Field rejected this reformulation of property rights. Steeped in classical liberalism, he considered the legal status of property to be permanent, if not prepolitical.⁷⁶ As such, no emanation of popular will could transmogrify its nature; declaring property to be public did not render it so. He explained:

There is no magic in the language, though used by a constitutional convention, which can change a private business into a public one, or alter the character of the building in which the business is transacted. . . . One might as well attempt to change the nature of colors, by giving them a new designation.⁷⁷

And, he argued, well-established protections for property in the Due Process Clause extended beyond just “title and possession”: they must include “use, and the fruits of that use,” or “the constitutional guaranty . . . does not merit the encomiums it has received.”⁷⁸ In his view, a crabbed reading of the constitutional protection for property was akin to arguing that the protection for life extended only to “mere animal existence” and permitted “the destruction of any other organ of the body through which the soul communicates.”⁷⁹ If property were a person, he implied, price would be its sacred sense of self.

While popular efforts to control price were dangerous on their own, Justice Field was especially troubled by the vision of government that the majority’s conception of property presaged. He suspected that a rule that required a mere public interest in the use of private property to warrant control would soon be extended: “The public has no greater interest in the use of buildings for the storage of grain than it has . . . for the residence of families, . . . cotton, woollen, and silken fabrics, . . . machinery, . . . the printing and publication of books and periodicals, . . . utensils of every variety, useful and ornamental”⁸⁰ He feared that,

Lord Hale — the Court’s formulation of property and sovereignty was not grounded in any conventional precedent. See McAllister, *supra* note 15, at 759–68.

⁷⁴ *Munn*, 94 U.S. at 126.

⁷⁵ *Id.*

⁷⁶ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 146 (1992) (situating Justice Field’s conception of property in a line of liberal jurisprudence).

⁷⁷ *Munn*, 94 U.S. at 138 (Field, J., dissenting).

⁷⁸ *Id.* at 141.

⁷⁹ *Id.* at 142.

⁸⁰ *Id.* at 140–41.

under the majority's rule, "there is hardly an enterprise or business" that could not have its prices set by the legislature.⁸¹ And though, he noted, the majority did not sanction the stripping of title, its condoning of the control of price effectively made private property the subject of sovereign will: in his view, the legislation upheld by the Court was "nothing less than a bold assertion of absolute power by the State to control at its discretion the property and business of the citizen."⁸²

Still, Justice Field emphasized, he was not against regulation *per se*. He was quick to point out that "[t]he power of the State over the property of the citizen" under his interpretation of the Due Process Clause was not especially limited.⁸³ He cited well-known constitutional and common law regulation — takings with just compensation, taxes, and limits on property use to eliminate nuisances — that he considered wholly appropriate.⁸⁴ Under his version of the State's police power, Justice Field insisted, "there is no end of regulations with respect to the use of property which may not be legitimately prescribed, having for their object the peace, good order, safety, and health of the community."⁸⁵ But the power of the State to set prices could extend only to instances where it granted an explicit right or privilege;⁸⁶ the idea of an implicit public interest violated the precepts of private property.⁸⁷ Without firmly entrenched protections for an owner to "receive the fruits of his property and the just reward of his labor," he proclaimed, a society simply could not be called free.⁸⁸

If Justice Field's vision of government sprang from the sanctity of private property, Chief Justice Waite's conception descended from the acts that established the collective sovereign. As Chief Justice Waite explained: "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain."⁸⁹ "[T]he very essence of government," he continued, is the principle that property cannot be used "unnecessarily to injure another"⁹⁰ and thus can be regulated "for the public good."⁹¹ Echoing the concerns of the Illinois constitutional convention, he argued that the definition of the public good was for the

⁸¹ *Id.* at 141.

⁸² *Id.* at 148.

⁸³ *Id.* at 145.

⁸⁴ *Id.*

⁸⁵ *Id.* at 146.

⁸⁶ *Id.* at 146–47.

⁸⁷ *See id.* at 154.

⁸⁸ *Id.* at 148; *see also id.* ("[G]overnment . . . can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint." (quoting *Wilkinson v. Leland*, 27 U.S. (2 Pet.) 627, 657 (1829))).

⁸⁹ *Id.* at 124 (majority opinion).

⁹⁰ *Id.*

⁹¹ *Id.* at 125.

public to decide: “[T]he great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances.”⁹² It was of no matter that what counted as a “reasonable rate” was long controlled by common law judges; “the law itself . . . may be changed at the will, or even at the whim, of the legislature, unless prevented by constitutional limitations.”⁹³ He continued: “We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts.”⁹⁴

Less than a decade after *Munn*, Chief Justice Waite betrayed it, joining the majority in refusing to apply the Civil Rights Act of 1875 to private businesses.⁹⁵ It would fall to Justice Harlan, in his famed dissent, to remind the Court of *Munn* and to insist that “the public have rights” in private property “which may be vindicated by the law.”⁹⁶ As Justice Harlan’s reference suggests, *Munn* established the terms of debate between a narrow liberalism and a more expansive vision of sovereignty. The *Munn* majority presented a version of popular power premised on the constitutive nature of collective decisionmaking; the dissent saw politics as a means to maintain the protections owed to individuals and their possessions. Chief Justice Waite promised to make the strength of private property rights conditional on the force of the public’s interest in the property’s use; Justice Field provided hard limits to political action that protected price and profit. The Court posited the public as the primary expositor of its own interests, against the dissent’s conception of judges as the protectors of prepolitical rights. *Munn* seemed to portend a new era in popular power.

III. LIMITATIONS OF PROPERTY RIGHTS

In the decades that followed the decision, *Munn*’s discussion of price, property, and power proved to be important, but inconstant, precedent.⁹⁷ During *Munn*’s first fifty years, the decision was stripped to its constituent parts, even as price control continued to be a limit case for defining sovereign power. Then, during the Great Depression and New Deal, price control again presented itself as the policy vehicle for expanded conceptions of sovereignty. It was in periods of emergency, though, that *Munn*’s logic was unshackled, and the government’s power radically enlarged. Taken as a whole, *Munn*’s trajectory shows that

⁹² *Id.* at 134.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ See *The Civil Rights Cases*, 109 U.S. 3, 10–11 (1883).

⁹⁶ *Id.* at 42 (Harlan, J., dissenting).

⁹⁷ See Novak, *supra* note 56, at 400–04.

price control was consistently conceived by the Court as the cutting edge of sovereign control over property and, by extension, the broader economy.

A. Emergence

Almost half a century after *Munn*, Chief Justice Taft attempted to summarize the situations where the public could intervene to control prices.⁹⁸ He acknowledged that there existed an important set of “[b]usinesses which though not public at their inception . . . have come to hold such a peculiar relation to the public that [public status] is superimposed upon them.”⁹⁹ But, he averred, the line of cases finding a business to be “clothed with a public interest” did not lend itself to any neat formulation: legalistic declarations by a legislature were inadequate;¹⁰⁰ describing an industry’s importance to public welfare was insufficient.¹⁰¹ Chief Justice Taft concluded: “It is very difficult under the cases to lay down a working rule by which readily to determine when a business has become ‘clothed with a public interest.’”¹⁰² Instead, he suggested, it was up to courts, “by the process of exclusion and inclusion,” to gradually establish “a line of distinction.”¹⁰³

In this way, much of *Munn* was flipped on its head.¹⁰⁴ Chief Justice Waite’s argument for potentially broad public control of private property came to stand for the proposition that the state police power, and the corresponding federal power over interstate commerce, extended only to businesses akin to *Munn* and Scott’s Chicago warehouse — actual or effective monopolies, those staffed by workers long subject to regulation, and those exercising private control over a public necessity.¹⁰⁵ In this way, instead of the people deciding their interest, the courts determined the limits of sovereign power. In place of wide-reaching control, the Court held that, though “[t]he public may suffer from high prices or strikes in many trades,”¹⁰⁶ the power to regulate would be dependent “on the nature of the business, on the feature which touches the public.”¹⁰⁷ Each price control measure would be separately evaluated: “The extent to which regulation may reasonably go varies

⁹⁸ See *Chas. Wolff Packing Co. v. Ct. of Indus. Rels.*, 262 U.S. 522, 535–36 (1923).

⁹⁹ *Id.* at 535.

¹⁰⁰ *Id.* at 536; see *id.* at 536–37.

¹⁰¹ See *id.* at 538.

¹⁰² *Id.*

¹⁰³ *Id.* at 539.

¹⁰⁴ For a summary of *Munn*’s influence, see generally Hamilton, *supra* note 56; and McAllister, *supra* note 15.

¹⁰⁵ See Hamilton, *supra* note 56, at 1098.

¹⁰⁶ *Chas. Wolff Packing Co.*, 262 U.S. at 536.

¹⁰⁷ *Id.* at 539.

with different kinds of business. The regulation of rates to avoid monopoly is one thing. The regulation of wages is another.”¹⁰⁸

Indeed, if one certainty emerged from this period, it was that price controls were dangerous interventions that demanded heightened judicial scrutiny. Perhaps this view is most clearly exemplified by the Court’s notorious decision in *Adkins v. Children’s Hospital of the District of Columbia*.¹⁰⁹ At issue was a minimum wage law for women and children in the District of Columbia,¹¹⁰ one of many similar price-setting laws enacted across the country and world during the period.¹¹¹ Although *Adkins* is often remembered as the apex of *Lochner*-era freedom of contract cases,¹¹² the Court was eager to distinguish the State’s power to extracontractually regulate hours or conditions of work from its ability to fix the price of workers’ property in their labor.¹¹³ While labor conditions required careful review,¹¹⁴ the Court explained, there was no doubt that the State could intervene in some circumstances — to protect women from long hours,¹¹⁵ for example, or to shield vulnerable men from dangerous conditions.¹¹⁶ But, the Court insisted, the police power could under no circumstance be extended to “insure [a worker’s] subsistence, health and morals” by simply fixing wages.¹¹⁷ To show the absurdity of such a claim, the Court reminded readers that “there can be no difference between the case of selling labor and the case of selling goods”¹¹⁸: a law prohibiting the sale of food above “a fixed maximum” was self-evidently unconstitutional; a law restricting wages was a similarly “naked, arbitrary exercise of power that . . . cannot be allowed to stand under the Constitution of the United States.”¹¹⁹ In this way, the Court signaled that most price controls were simply beyond the pale of the police power, however hard that power was to define.¹²⁰

¹⁰⁸ *Id.*

¹⁰⁹ 261 U.S. 525 (1923).

¹¹⁰ *Id.* at 540.

¹¹¹ *See id.* at 567–68 (Holmes, J., dissenting).

¹¹² *See, e.g.,* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 447–49 (2011).

¹¹³ *See Adkins*, 261 U.S. at 553–54 (distinguishing regulation of hours from price-fixing legislation); *see also id.* at 554 (describing minimum wage law as “simply and exclusively a price-fixing law”).

¹¹⁴ *Id.* at 549–50 (discussing *Lochner v. New York*, 198 U.S. 45 (1905)).

¹¹⁵ *Id.* at 553; *see id.* at 552–53 (citing *Muller v. Oregon*, 208 U.S. 412 (1908)).

¹¹⁶ *Id.* at 548 (citing *Holden v. Hardy*, 169 U.S. 366 (1898)).

¹¹⁷ *Id.* at 558.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 559.

¹²⁰ *See id.* at 561–62; *see also* *Ribnik v. McBride*, 277 U.S. 350, 373 (1928) (Stone, J., dissenting) (recognizing and rejecting a sharp distinction between constitutional power to “reasonable regulation of price . . . and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property”).

B. Expansion

It was not until the Great Depression that the piecemeal power to control prices again served to expand sovereignty. In *Nebbia v. New York*,¹²¹ a slim majority of the Court upheld a 1933 New York statute that allowed a newly created Milk Control Board to fix prices for milk.¹²² As might be expected, given the limiting of *Munn* throughout the *Lochner* era, the core complaint of retailers was that such price fixing violated due process, depriving them of their property and restricting their ability to freely contract for sales.¹²³ And, as in prior cases, the Court began its analysis with a sympathetic liberal concession: “Under our form of government,” Justice Roberts explained, “the use of property and the making of contracts are normally matters of private and not of public concern. The general rule is that both shall be free of governmental interference.”¹²⁴

But, in the rest of the opinion, the Court elaborated on the radical conception of collective control of ostensibly private property offered in *Munn* and only hinted at in later decades. After cautiously noting that “neither property rights nor contract rights are absolute,”¹²⁵ the Court argued that the spheres of private control and public prerogative were not hermetically sealed: any action in either affected the other.¹²⁶ When a conflict arose, the Court argued, “subject only to constitutional restraint the private right must yield to the public need.”¹²⁷ The Court insisted that such a conclusion was supported by decades of police power precedent; it cited over a hundred decisions to bolster its claim.¹²⁸ Corraling together disparate cases where the police power triumphed over private rights, the Court noted that it had upheld laws establishing zoning,¹²⁹ prohibiting the sale of lottery tickets,¹³⁰ barring price discrimination,¹³¹ “safeguard[ing] the interests of depositors in banks,”¹³² regulating the weight of loaves of bread,¹³³ and more. Drawing on these

¹²¹ 291 U.S. 502 (1934).

¹²² *Id.* at 515 (alteration in original) (quoting Act of Apr. 10, 1933, ch. 158, 1933 N.Y. Laws 558).

¹²³ *Id.* at 521–23 (describing retailers’ due process challenge).

¹²⁴ *Id.* at 523.

¹²⁵ *Id.* (footnotes omitted).

¹²⁶ *Id.* at 524–25.

¹²⁷ *Id.* at 525.

¹²⁸ *See id.* at 525–30 & nn.14–35 (compiling a huge range of cases upholding economic regulations). The dissent, of course, cited its own plethora of cases that pointed to the opposite conclusion. *See id.* at 552 (McReynolds, J., dissenting) (“This Court . . . has emphatically declared that a State lacks power to fix prices in similar private businesses.” (citing cases)).

¹²⁹ *Id.* at 526 & n.21 (majority opinion) (citing, inter alia, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)).

¹³⁰ *Id.* at 526 n.24 (citing *Lottery Case*, 188 U.S. 321 (1903)).

¹³¹ *Id.* at 529 & nn.30–32 (collecting cases).

¹³² *Id.* at 526; *see id.* at 527 n.24 (citing *Noble State Bank v. Haskell*, 219 U.S. 104 (1911)).

¹³³ *Id.* at 527 n.24 (citing *Schmidinger v. City of Chicago*, 226 U.S. 578 (1913)).

rulings, the Court asserted that due process required only “that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.”¹³⁴

Still, the Court admitted, this conception of price control as a mere extension of the police power seemed to have been rejected in the *Lochner* era. Or, as the Court put the concern: “[E]ven though an indirect . . . restriction of the freedom of contract or a modification of charges for services or the price of commodities [may be within an admitted power], . . . direct fixation of prices [could be] a type of regulation absolutely forbidden.”¹³⁵ The Court, though, resisted the idea that price was “peculiarly sacrosanct” — nothing in the Due Process Clause suggested a difference between indirect regulation that impacted prices and direct price setting.¹³⁶ Turning the ambiguity of *Munn*’s holding into an advantage, the Court argued that any business that *might* impact the public good could be regulated via price controls. As the Court explained:

The phrase “affected with a public interest” can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. In several of the decisions of this court wherein the expressions “affected with a public interest,” and “clothed with a public use,” have been brought forward as the criteria of the validity of price control, it has been admitted that they are not susceptible of definition and form an unsatisfactory test of the constitutionality of legislation directed at business practices or prices. These decisions must rest, finally, upon the basis that the requirements of due process were not met because the laws were found arbitrary in their operation and effect.¹³⁷

Thus, the Court concluded, “there can be no doubt 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 for the products or commodities it sells.”¹³⁸ Half a decade before the Court definitively turned away from *Lochnerism*,¹³⁹ Justice Roberts used the price controls at issue in *Nebbia* as an opportunity to proclaim: “[A] state is free to adopt whatever economic policy may reasonably be deemed to promote

¹³⁴ *Id.* at 525.

¹³⁵ *Id.* at 531.

¹³⁶ *Id.* at 532.

¹³⁷ *Id.* at 536–37.

¹³⁸ *Id.* at 537.

¹³⁹ *Nebbia*, for all its forceful language, was inconsistently followed. For example, the New York law it upheld was strictly limited in its application to intrastate commerce a year later, in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521–22 (1935). Four years later, in *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533 (1939), the Court extended the price-setting power to the federal government for all industries impacting interstate commerce. *Id.* at 571 (“The power enjoyed by the states to regulate the prices for handling and selling commodities within their internal commerce rests with the Congress in the commerce between the states.” (footnote omitted)).

public welfare The courts are without authority either to declare such policy or, when it is declared by the legislature, to override it.”¹⁴⁰

The Court’s decision to uphold commodity price controls set the stage for it to sanction the ability of the legislature to establish minimum prices for labor. As in *Adkins*, the law at issue in *West Coast Hotel Co. v. Parrish*¹⁴¹ guaranteed minimum wages for women and minors.¹⁴² But, unlike in *Adkins*, the Court was quick to invoke *Munn* as an example of the limits that the government could lawfully place on charges for property.¹⁴³ And, when searching for a rule to apply, the Court turned to *Nebbia* as the primary precedent.¹⁴⁴ Now, in the Court’s telling, the police power and the public interest test for property restrictions were assimilated into an expanded arena for sovereign control. While the dissent clung to the “essential difference” between laws that regulated working conditions and those that fixed prices for labor,¹⁴⁵ the Court explained:

What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end?¹⁴⁶

C. Emergency

If *Nebbia* and its progeny suggested a new openness to sovereign control of property, it wasn’t clear that they could enable economy-wide efforts at price control — the rule announced in *Nebbia* still seemed to subject price controls to a regulation-by-regulation test.¹⁴⁷ A separate line of cases, though, suggested that the power to control prices, property, and the broader economy might expand during periods of emergency. In *Block v. Hirsh*,¹⁴⁸ for example, the Supreme Court upheld a rent control law that prevented evictions and restrained prices in the District of Columbia in the aftermath of World War I.¹⁴⁹ While portions of Justice Holmes’s majority opinion suggest a broader power to set

¹⁴⁰ *Nebbia*, 291 U.S. at 537.

¹⁴¹ 300 U.S. 379 (1937).

¹⁴² *Id.* at 386.

¹⁴³ After asserting that the “power under the Constitution to restrict freedom of contract has had many illustrations,” the Court cited a range of cases, starting with *Munn* and ending with *Nebbia*. *Id.* at 392; *see id.* at 392 n.2.

¹⁴⁴ *See id.* at 397–98.

¹⁴⁵ *Id.* at 407 (Sutherland, J., dissenting).

¹⁴⁶ *Id.* at 398 (majority opinion).

¹⁴⁷ *See Nebbia v. New York*, 291 U.S. 502, 538 (1934).

¹⁴⁸ 256 U.S. 135 (1921).

¹⁴⁹ *Id.* at 153–55.

prices akin to the one later recognized in *Nebbia*,¹⁵⁰ the decision ultimately rested on more narrow grounds: “The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.”¹⁵¹ Dissenters still decried the result as legalizing socialism.¹⁵² In the years that followed, the Court would describe *Block* and other cases that relied on emergency conditions¹⁵³ as reaching the outer limits of the state’s power to set prices and, thus, to control private property.¹⁵⁴

During World War II, in the cases evaluating the federal power to establish economy-wide price and wage controls under the EPCA, the Court again turned to the existence of an emergency to justify the scope of the sovereign power. In *Yakus v. United States*,¹⁵⁵ for example, the Court quickly dispatched with any Fifth Amendment challenge to the Price Administrator’s ability to regulate prices by reference to the war power.¹⁵⁶ Similarly, when evaluating the rent control provisions of the EPCA in *Bowles v. Willingham*,¹⁵⁷ the Court declared: “We need not determine what constitutional limits there are to price-fixing legislation. Congress was dealing here with conditions created by activities resulting from a great war effort.”¹⁵⁸ The Court continued: “A nation which can demand the lives of its men and women in the waging of that war is under no constitutional necessity of providing a system of price control on the domestic front which will assure each landlord a ‘fair return’ on his property.”¹⁵⁹

¹⁵⁰ See, e.g., *id.* at 156 (“[I]f to answer one need the legislature may limit height[,] to answer another it may limit rent.”).

¹⁵¹ *Id.* at 157 (citations omitted) (citing *Fort Smith & W.R.R. Co. v. Mills*, 253 U.S. 206 (1920); *Wilson v. New*, 243 U.S. 332, 345–46 (1917)).

¹⁵² *Id.* at 162 (McKenna, J., dissenting) (“Have conditions come, not only to the District of Columbia, embarrassing the Federal Government, but to the world as well, that are not amenable to passing palliatives, so that socialism . . . is the only permanent corrective or accommodation?”).

¹⁵³ See, e.g., *Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170, 198 (1921); *Wilson*, 243 U.S. at 348.

¹⁵⁴ See, e.g., *Chas. Wolff Packing Co. v. Ct. of Indus. Rels.*, 262 U.S. 522, 544 (1923) (describing *Wilson v. New*, 243 U.S. 332, as going “to the border line” of the interstate commerce power); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (describing *Block* and related cases as going “to the verge of the law” regulating the police power).

¹⁵⁵ 321 U.S. 414 (1944).

¹⁵⁶ See *id.* at 422–23 (“That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural features of the Act . . .”).

¹⁵⁷ 321 U.S. 503 (1944).

¹⁵⁸ *Id.* at 519 (citing *Yakus*, 321 U.S. at 414).

¹⁵⁹ *Id.*

Could this emergency logic justify economy-wide controls instituted without reference to war? The system of phased nationwide price controls adopted by President Nixon was not offered as a response to any price pressures created by the ongoing war in Vietnam, nor did it explicitly turn on the existence of an emergency.¹⁶⁰ And yet challenges to Nixon's authority to institute economy-wide price controls were hardly heard.¹⁶¹ In one influential district court case, a three-judge panel, relying on the EPCA and *Yakus*, held that no declaration of an emergency or even evidence of sharply rising prices was needed to justify economy-wide controls.¹⁶² In the end, courts deferred to the legislative and executive branches' ability to define — explicitly or implicitly — emergencies that warranted the collective control of prices.¹⁶³

As the legislative power over property via price became judicial common sense, the Court used price controls to expand government power in other domains. Consider the executive power. Under the EPCA, the Price Administrator, as head of the OPA, was empowered to “establish such maximum price or maximum prices as in his judgment w[ould] be generally fair and equitable.”¹⁶⁴ In *Yakus*, the Court rejected a challenge based on that broad grant of power, insisting that delegations were presumptively constitutional so long as courts could determine “whether [the Administrator] has kept . . . in compliance with the legislative will.”¹⁶⁵ In dissent, Justice Roberts proclaimed that the majority's rationale could only signal that any decision upholding the nondelegation doctrine was “now overruled.”¹⁶⁶ Since *Yakus*, the EPCA delegation has repeatedly been referred to by courts and commentators as the broadest grant of power by Congress to the Executive.¹⁶⁷

Or consider the power of Congress to shield price control regulations from judicial review. While federal district courts were empowered to hear most enforcement actions,¹⁶⁸ a new Emergency Court of Appeals

¹⁶⁰ See *supra* p. 760.

¹⁶¹ This is not to imply that individual provisions were not challenged. See, e.g., *Fry v. United States*, 421 U.S. 542, 545–46 (1975) (discussing application of wage-setting provisions to state and municipal employees).

¹⁶² See *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 745, 752–54 (D.D.C. 1971).

¹⁶³ See *id.*; cf. *Salsburg's Meats, Inc. v. Shultz*, 363 F. Supp. 269, 274 (E.D. Pa. 1973) (upholding the Economic Stabilization Act of 1970 as part of general power “to control wages and prices in the public interest”).

¹⁶⁴ Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 2(a), 56 Stat. 23, 24.

¹⁶⁵ *Yakus v. United States*, 321 U.S. 414, 425 (1944).

¹⁶⁶ *Id.* at 452 (Roberts, J., dissenting).

¹⁶⁷ See, e.g., *Connally*, 337 F. Supp. at 747 (referring to *Yakus* as “perhaps the broadest delegation yet sustained”); James R. Conde & Michael S. Greve, *Yakus and the Administrative State*, 42 HARV. J.L. & PUB. POL'Y 807, 810–11 (2019).

¹⁶⁸ These actions included those initiated by the Administrator to enjoin violators or order compliance, damages actions brought by consumers or the OPA, and criminal prosecutions for willful violations. See § 205, 56 Stat. at 33–35; see also RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 341–42 (7th ed. 2015).

was given exclusive jurisdiction over challenges to the price-setting regulations themselves.¹⁶⁹ The Emergency Court of Appeals' decisions, which were preceded by an agency-level finding, were reviewable only by the Supreme Court.¹⁷⁰ In connected cases, the Court upheld this unusual institutional design, albeit with important qualification.¹⁷¹ During the 1970s, the new Temporary Emergency Court of Appeals routinely upheld price regulations through review that commentators considered out of step with prevailing principles of administrative law.¹⁷² In short, price controls not only expanded sovereign control over property, but also served as the substantive scaffolding for an enormous expansion of the government's infrastructural power — its ability to bring popular will into action throughout the state.¹⁷³

IV. POLITICAL ECONOMIC SOVEREIGNTY

The wonder comes to us, What will the country do with its new freedom?
— Justice McKenna, dissenting, *Block v. Hirsh*¹⁷⁴

Today, in a moment when the neoliberal consensus appears — for the first time, however fleetingly — to be fracturing, the specter of rising prices is returning. Republicans in Congress, as well as moderate and conservative economists, have articulated their opposition to efforts to increase government spending on sustainable infrastructure, expanded healthcare, and affordable housing as a prudent response to the risks of inflation.¹⁷⁵ There are multiple conclusions that can be drawn from this backlash — that inflation fears, following Friedman, remain stubbornly linked with increased government spending; that other methods of

¹⁶⁹ § 204(a), 56 Stat. at 31–32.

¹⁷⁰ See *id.* § 204(a)–(b).

¹⁷¹ See *Yakus*, 321 U.S. at 432 (“[Congress] had in mind the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation originating in eighty-five district courts and continued by separate appeals through eleven separate courts of appeals to this Court, to say nothing of litigation conducted in state courts.” (citing S. REP. NO. 77-931, at 23–25 (1942))); see also *Lockerty v. Phillips*, 319 U.S. 182, 189 (1943).

¹⁷² See generally Elkins, *supra* note 31.

¹⁷³ See Michael Mann, *The Autonomous Power of the State: Its Origins, Mechanisms and Results*, 25 EUR. J. SOCIO. 185, 189 (1984).

¹⁷⁴ *Block v. Hirsh*, 256 U.S. 135, 168 (1921) (McKenna, J., dissenting).

¹⁷⁵ For a small sampling from one publication of authors discussing this opposition, see Neil Irwin, *How the Biden Administration Wants to Reframe the Inflation Debate*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/08/11/upshot/how-the-biden-administration-wants-to-reframe-the-inflation-debate.html> [https://perma.cc/QJE8-ZTUQ]; Paul Krugman, Opinion, *Don't Let Inflation Anxiety Undermine Our Future*, N.Y. TIMES (Aug. 12, 2021), <https://www.nytimes.com/2021/08/12/opinion/inflation-infrastructure-debt.html> [https://perma.cc/4TUL-YSKD]; and Nelson D. Schwartz & Jeanna Smialek, *Inflation Fear Lurks, Even as Officials Say Not to Worry*, N.Y. TIMES (Mar. 21, 2021), <https://www.nytimes.com/2021/03/10/business/economy/inflation-markets-federal-reserve.html> [https://perma.cc/QJ2Y-3XNM].

reducing the money supply, like increasing taxes on the highest earners, are still a step too far. But one more easily overlooked is the continued centrality of price in deciding how much power our popular sovereign has over the conditions of its own existence.

What can the Court's grappling with price controls teach us? No doubt some would see the legal sanctioning of a record of embarrassing failures, discredited economic policies, and destructive efforts to constrain the free market. Those associated with neoliberalism would contend that price controls didn't work and shouldn't be reconsidered. And, indeed, there's ample reason to question the efficacy of particular policies. The milk laws in *Nebbia*, for example, didn't help poor people afford milk — as the dissent put it, *Nebbia* was not a case that would enable “twelve million consumers to buy a necessity of life.”¹⁷⁶ Instead, those price controls propped up large producers at the expense of consumers in a time when neither could afford to be abandoned.¹⁷⁷ The economy-wide controls instituted during World War II may have allowed the United States to avoid destabilizing rises in price during the war, but they also led to record rates of inflation in the immediate aftermath.¹⁷⁸ These effects were felt hardest by those who could least avoid their costs.¹⁷⁹ In the decades after, economists debated whether this devastation was the avoidable product of decontrolling the economy too soon or the inevitable result of wrongheaded policy.¹⁸⁰

But, of course, there is no neutral metric to measure how well a policy works. For faithful neoliberals, the idea of effective price controls is paradoxical: there is no redeeming a policy that stifles the informational function of the price system. For the rest of us, a more complex calculus is required. Is a minimum wage that would lift people out of poverty worth the price of lost jobs? Is holding down exorbitant rents worth the loss in newly constructed housing? Are the disputed economic effects of widespread price controls worth their tendency to centralize political power? Should price always be free? While various forms of price control persist, the conception of sovereignty the Court's price control jurisprudence described has all but disappeared. Instead of conceiving of the economy as something always subject to sovereign control, the free

¹⁷⁶ *Nebbia v. New York*, 291 U.S. 502, 557 (1934) (McReynolds, J., dissenting).

¹⁷⁷ See *id.* at 517–20 (majority opinion) (discussing how the problem of surplus milk, in the view of the New York legislature, uniquely afflicted large distributors and threatened to put them out of business); see also *United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 549–50 (1939) (same, but discussing purpose of federal regulation).

¹⁷⁸ See JACOBS, *supra* note 30, at 226.

¹⁷⁹ See, e.g., *Negroes Get Worst End of “New” 69-Cent Dollar*, CHI. DEF., Nov. 9, 1946, at 13 (decrying end of price controls after the war).

¹⁸⁰ Compare MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES, 1867–1960*, at 557–58 (1963), with JOHN KENNETH GALBRAITH, *A THEORY OF PRICE CONTROL* 8–9 (1980).

market has been posited as the superior method of achieving just outcomes, of distributing resources, of governing.¹⁸¹ Perhaps, then, the deeper lesson of the Court's price control jurisprudence is not the ineffectiveness of particular policies, but the political irrelevancy of the form of sovereignty it imagined.

Yet the precedent that made price controls legal is still good law. Indeed, it is notable that the neoliberal consensus has not resulted in a sustained attack on rational basis review for economic regulations, even as a rightward-trending Court has increasingly relied on the First Amendment to deregulate sections of public life¹⁸² and, more recently, given new power to the Takings Clause as applied to real property.¹⁸³ Thus, the constitutionality of price control raises more fundamental questions about the scope of political debate and popular power. As Professor Morris Cohen forcefully explained almost a century ago, the question is not whether there will be control of people via property, but who will decide how that control is exercised and to what ends.¹⁸⁴ The constitutionalization of price controls indicates the extent to which the power to set prices can be held by the sovereign, rather than the boss or the baron. In supporting this largely legislative effort to bring prices under popular control, the Court underlined the extent to which central aspects of private property — their exchange value, their market worth — can bend to the public's interest. And, in providing this legal justification for price controls, the Court effectively expanded the sovereign power to control the entire economy.

If the stagflation of the 1970s does return, its impact will first be felt in the diminished purchasing power of ordinary citizens. It will be harder to afford food; rent will become more difficult to pay; basic needs will go unmet. Price controls will offer one way to lessen inflation's impacts — by directly intervening in the market, they can make necessities affordable, even if only on a temporary basis; by propping up wages, they can ensure that higher nominal costs don't result in lower purchasing power. Perhaps such an approach would spell economic calamity; perhaps it would produce perilous political backlash; perhaps it simply wouldn't work. If nothing else, it would remind Americans that even the most sacred signals of the market are well within their collective control.

¹⁸¹ See BROWN, *supra* note 10, at 115–50.

¹⁸² See generally Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241 (2020).

¹⁸³ See, e.g., Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2074 (2021); Knick v. Township of Scott, 139 S. Ct. 2162, 2179 (2019); Horne v. Dep't of Agric., 135 S. Ct. 2419, 2426 (2015); see also generally Nikolas Bowie, *The Supreme Court, 2020 Term — Comment: Antidemocracy*, 135 HARV. L. REV. 160 (2021).

¹⁸⁴ See Cohen, *supra* note 1, at 28–30.