

Essay

Just Price, Public Utility, and the Long History of Economic Regulation in America

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This Essay investigates the history of “just price” and its influence on the concept and practice of public utility regulation in the United States. It begins with a discussion of the Scholastic understanding of just price and its relationship to commutative justice, with particular attention to the problem of coercion in economic exchange. The Essay then discusses the centrality of just price to broader ideas of moral economy and to economic thought and regulation in colonial America and the early United States. The heart of the Essay shows how the idea of just price influenced public utility regulation as it took shape during the late nineteenth and early twentieth centuries. As the Essay demonstrates, received understandings of just price were fundamental to the public utility idea and were at the center of battles over the proper approach to utility valuation and rate regulation during the first half of the twentieth century. The Essay concludes with a discussion of efforts to restructure formerly regulated industries during the last quarter of the twentieth century, with particular attention to the challenges faced by the Federal Energy Regulatory Commission as it sought to ensure that prices in restructured natural gas and electricity markets were just and reasonable. Although much of the Essay’s purpose is descriptive, several larger points emerge from this study. First, the history of just price reveals that relations of reciprocity and fairness in exchange are at the very core of the public utility idea. When seen from this perspective, public utility represents an important experiment in translating abstract principles of economic justice and fair pricing into working rules for governing key systems of provisioning in a modern industrial society. Second, the history of just price reminds us that prices are more than signals; that they are also relationships and that price relationships can be coercive. At root, the economics of just price is an economics of coercion and, as such, an economics that

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resonates quite strongly with efforts by Progressive lawyers, legal realists, and institutional economists to develop an approach to law and economics (and economic regulation) that would put coercion at its center. Third, the history of just price shows that competitive markets, when functioning properly, can be powerful instruments for protecting consumers and facilitating fairness in exchange. But it also underscores the importance of taking individual markets on their own terms and recognizing that some markets, and the mechanisms of price formation at their center, are more vulnerable to disruption and manipulation than standard economic models suggest. Finally, at the most general level, the history of just price reminds us that for a very long time—far longer than the lifespan of classical and neoclassical economics—ethical and social concerns have been intimately bound up with conceptions of economy, economic life, and the provision of necessities.

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Introduction

Fair price, fair wage, fair trade, the doctrine of unconscionability, prohibitions on price gouging, just and reasonable rates for public utilities—these are just a sample of contemporary manifestations of a normative commitment to fairness in economic exchange that reaches back centuries. All of them, in one way or another, can trace their origins to the medieval doctrine of “just price.” As such, they can be viewed as recessive strains of a more general conception of economic justice that predates modern capitalism—one that views markets and economic exchange as embedded within a broader set of social institutions and norms.

The basic idea of just price holds that there should be equality or fairness in economic transactions. The doctrine has its roots in Aristotle’s conception of corrective justice and was given shape by various medieval scholars starting in the twelfth century. For every sale of goods or services, these authors held, there was a just price (typically a range) that would ensure that neither party to the exchange was able to exact unfair gains at the expense of the other. The

overarching concern was to prevent coercion or compulsion in economic relationships. When markets could not be trusted to ensure that goods and services traded at their just price, various types of regulation, formal and informal, were called upon to correct or fix prevailing prices and align them with the just price.

While the idea of just price may seem decidedly out of fashion today, especially when viewed against the formalism and sophistication of modern economic theory, notions of just price continue to operate as background norms in various discussions of economic policy. Longstanding efforts to police against the exercise of fraud, unfair advantage, and the manipulation of prices in various markets, to take the most obvious examples, all reflect a basic concern with fairness in exchange.¹ Similarly, those portions of antitrust law directed at protecting consumers from high prices grew out of older common law concerns with the impacts of engrossing, forestalling, and other forms of market interference on fair prices.² Echoes of just price can also be heard in a wide-ranging set of contemporary debates on fair pricing—from calls for a living wage to efforts to control the prices of life-saving drugs.³ Populist political movements focused on economic justice, from the right and the left, sometimes truck in an

1. See, e.g., *Basic v. Levinson*, 485 U.S. 224, 246 (1988) (quoting from the legislative history of the Securities Exchange Act of 1934, which referred to “[t]he idea of a free and open public market [that] is built upon the theory that competing judgments of buyers and sellers as to the fair price of a security brings [sic] about a situation where the market price reflects as nearly as possible a just price” (quoting H.R. REP. NO. 1383, at 11 (1984))). Few contemporary legal scholars appear to have much interest in the idea of just price and its relevance to the price system. For an exception, see Robert C. Hockett and Roy Kreitner, *Just Prices*, 27 CORNELL J.L. & PUB. POL’Y (forthcoming 2018).

2. See, e.g., Donald Dewey, *The Common Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 762-66 (1955) (discussing the common law offenses of forestalling, regrating, and engrossing as comprising one of three main lines of precedent that shaped the Sherman Act); WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ACT* 52 (1954) (noting that “the common law against forestalling and engrossing was still in force in the United States [in the late nineteenth century]; it could be made to serve purposes for which it was not originally intended, and it was made the basis for section 2 of the Sherman Act, which prohibits ‘monopolizing’”). Letwin cites an early article by Edwin Alder for support. See Edwin Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act*, 31 HARV. L. REV. 246, 258-63 (1917) (arguing that use of the term “monopolizing” in Section 2 of the Sherman Act was intended to capture the old common law offenses of engrossing, forestalling, and regrating”); see also Herbert Hovenkamp, *Reasonable Patent Exhaustion*, 35 YALE J. ON REG. 513 (2018); *Standard Oil Co. v. United States*, 221 U.S. 1, 53 (1910) (“But as the principal wrong which it was deemed would result from monopoly, that is, an enhancement of the price, was the same wrong to which it was though the prohibited engrossment would give rise, it came to pass that monopoly and engrossing were regarded as virtually one and the same thing. In other words, the prohibited act of engrossing because of its inevitable accomplishment of one of the evils deemed to be engendered by monopoly, came to be referred to as being a monopoly or constituting an attempt to monopolize.”).

3. See, e.g., Christian Michel, *What is a “Just Price”?*, 2 J. MKT. & MORALITY 182, 182 (1999) (discussing just price in context of “fair trade” and “solidarity products”); Hagop M. Kantarjian et al., *Cancer Drugs in the United States: Justum Pretium—The Just Price*, 31 J. CLINICAL ONCOLOGY 3600, 3600 (2013) (arguing that norms of just price should be used as a basis for controlling the prices of cancer drugs); David G. Pfister, *The Just Price of Cancer Drugs and the Growing Cost of Cancer Care: Oncologists Need to be Part of the Solution*, 31 J. CLINICAL ONCOLOGY 3487 (2013) (arguing the same).

inherited discourse of just price and fair exchange.⁴ And many of the foundational experiments in behavioral economics have confirmed deep-seated commitments to fair pricing—commitments that anthropologists and others suggest are shared across cultures.⁵

Likewise, certain domains of economic regulation can trace a strong connection back to the doctrine of just price—perhaps the most important of which is public utility law in the United States. Although the classical origins story of public utility regulation claims several lineages—the common law duty to serve incumbent upon innkeepers, ferries, and other so-called common callings,⁶ the granting of monopoly privileges and franchises to particular enterprises, often with concomitant powers of eminent domain;⁷ the notion that certain businesses are “affected with a public interest”⁸—the medieval

4. See generally MICHAEL KAZIN, *THE POPULIST PERSUASION: AN AMERICAN HISTORY* (2017); JOHN JUDIS, *THE POPULIST EXPLOSION: HOW THE GREAT RECESSION TRANSFORMED AMERICAN AND EUROPEAN POLITICS* (2016); CHARLES POSTEL, *THE POPULIST VISION* (2007).

5. See, e.g., Daniel Kahneman et al., *Fairness and the Assumptions of Economics*, 59 J. BUS. S285, S299 (1986) (concluding on the basis of multiple empirical studies that people care about fairness in economic transactions and are willing “to enforce fairness at some cost to themselves”); Daniel Kahneman et al., *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986) [hereinafter Kahneman, *Fairness as a Constraint on Profit Seeking*] (observing that commitments to fairness in economic transactions are often motivated by a “reference transaction, a relevant precedent that is characterized by a reference price or wage, and by a positive reference profit to the firm” and finding that “community standards of fairness” are governed by a “principle of dual entitlement” whereby “[t]ransactors have an entitlement to the terms of the reference transaction and firms are entitled to their reference profit”); Bruno S. Frey & Werner W. Pommerehne, *On the Fairness of Pricing: An Empirical Survey Among the General Population*, 20 J. ECON. BEHAV. ORG. 295, 305 (1993) (“There are good reasons to assume that individuals have a notion of a ‘just’ or ‘fair price,’ and of *changes* thereof, which it is important to take into account in positive analysis.”). There is a vast anthropological literature on norms of exchange and reciprocity in non-Western societies. See, e.g., MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (W.D. Halls trans., 1990) (1954); MARSHALL SAHLINS, *STONE AGE ECONOMICS* (1972). For more specific studies of “fair” or “just” pricing in non-Western societies, see, for example, Jennifer Alexander & Paul Alexander, *What’s a Fair Price? Price-Setting and Trading Partnerships in Javanese Markets*, 26 MAN 493, 507-08 (1991) (describing the notion of fair or just pricing in Javanese bargaining); and *id.* at 509 n.24 (surveying the anthropological literature and noting that producers and vendors in Malaysia, Sri Lanka, and Mexico “have very clear concepts of just price”). See also Jane I. Guyer, *Composites, Fictions, and Risk: Toward an Ethnography of Price*, in MARKET AND SOCIETY: THE GREAT TRANSFORMATION TODAY 204 (Chris Hann & Keith Hart eds., 2009) (noting that “throughout history, many authorities have aimed to maintain ‘customary’ or ‘just’ prices”).

6. See Charles K. Burdick, *The Origin of the Peculiar Duties of the Public Service Companies Part I*, 11 COLUM. L. REV. 514, 515 (1911) (“The features which at early common law distinguished those engaged in public or common callings (the original public service companies) from those who were not so engaged, were the peculiar general duties laid upon the persons engaged in common callings to serve all applicants for their services, and to perform such services with care without a special assumpsit to that effect. To these primary duties there are certain corollaries, namely, that the service must be reasonably adequate and rendered upon reasonable terms, and that it must be impartial.”).

7. See Charles K. Burdick, *The Origin of the Peculiar Duties of the Public Service Companies Part II*, 11 COLUM. L. REV. 616, 638 (1911) (“[I]n the case of a great number of the so-called public service companies of the present day the peculiar duties resting upon them grow out of the exercise of public franchises.”).

8. *Munn v. Illinois*, 94 U.S. 113 (1877); see also William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in CORPORATIONS AND AMERICAN DEMOCRACY 139, 157 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (discussing “a more generalized and autonomous concept of the public interest” as “the final culminating piece of the public utility idea”). In

conception of just price has sometimes been identified as the core commitment or “main stem” around which these other influences have coalesced.⁹

And yet, upon inspection, the history of just price and its relationship to public utility is somewhat hazy, consisting of assertions and general claims that tend to get repeated over time such that they become an accepted part of the origins story without critical investigation. For scholars interested in public utility and the history of economic regulation, a more careful assessment of the doctrine of just price and its influence on the public utility idea would seem to be in order.¹⁰

This Essay seeks to begin that task. As part of a larger project on the history of ways of price-making in public utility law, it investigates how the idea of just price influenced the modern concept of public utility as it emerged and took shape during the late nineteenth and early twentieth centuries and how it in turn has affected the practice of public utility regulation over the last century. The Essay draws upon a large and diverse set of secondary literatures in intellectual, economic, and legal history as well as key historical interventions by courts, economists, and legal scholars. The overall goal is to trace the historical trajectory of a particular idea: how it migrated and mutated over time, how it gained and lost normative momentum in debates over economic regulation, and how it continues to inform and color contemporary discussions of public utility regulation and the role of markets and competition in ensuring that prices are fair. Such an exercise almost inevitably carries with it a risk of reading too much into the power and influence of the idea itself, not to mention assuming a certain unwarranted stability of meaning across time. Where possible, this Essay seeks to check these tendencies by showing how the idea of just price was interpreted at different times and by attending to the specific ways in which particular actors incorporated various notions of just price into their respective agendas.

In tracing this history, the Essay does not purport to resolve longstanding debates about the one true meaning of just price. Identifying a single doctrine (or even a coherent notion) of just price that could connect Aristotle’s Ethics with the Scholastics, the everyday exchanges of medieval markets, and the emergence

particular, Novak points to REXFORD TUGWELL, *THE ECONOMIC BASIS OF PUBLIC INTEREST* (1922), as instrumental in articulating a “broader and more modern conception of general regulation in the public interest.” *Id.* at 158. As argued in Part II.A below, Tugwell’s notion of the economic basis of public interest bore a striking resemblance to earlier ideas of just price.

9. See MARTIN GLAESER, *PUBLIC UTILITIES IN AMERICAN CAPITALISM* 197 (1957).

10. See Steve N. Isser, *Just and Reasonable: The Cornerstone of Energy Regulation* (Energy Law & Econ. Working Paper, 2015), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625131 [<http://perma.cc/9KR3-DNNM>] (discussing briefly the history of just price and its influence on utility regulation). William Novak has done more than any contemporary historian to trace the origins of the public utility idea. See, e.g., Novak, *supra* note 8; William J. Novak, *Law and the Social Control of American Capitalism*, 60 *EMORY L.J.* 377 (2010). But Novak has very little to say about just price, focusing instead on the common law of “public callings,” state police power, and corporate charters as the key elements of the public utility idea. Novak, *supra* note 8, at 144-52. Part of the goal of this Essay is to complement Novak’s history with another, previously neglected, aspect of the origins story of public utility.

of public utility in the United States is, needless to say, a task of exegesis and historical inquiry that far exceeds the scope and capabilities of the current undertaking. Instead, the Essay is most interested in investigating how the idea of just price took on a life of its own during the late nineteenth and early twentieth centuries and exerted an important influence on the concept and practice of public utility regulation with its central concern of ensuring that rates would be “just and reasonable.” It is, in other words, the received understandings of just price and the ways in which they underwrote early conceptions of public utility regulation that are the primary concerns of this Essay.¹¹

Part I discusses the basic idea of just price and situates it within medieval understandings of commutative justice and more recent notions of moral economy. It seeks to canvass, albeit briefly, the main currents of the debate over the meaning of just price among medieval scholars, the centrality of just price to broader ideas of moral economy, and, perhaps most importantly, how notions of just price informed economic thought and regulation, primarily in colonial America and the United States, prior to the late nineteenth century emergence of the modern concept of public utility. The key takeaway of Part I is that although the meaning of just price has varied over time and place, there was a singular impulse at work behind the various early notions of just price: the prevention of coercion or compulsion in economic transactions.¹² Viewed in this way, just price looks less like a product of rigid Church doctrine than a flexible, pragmatic approach to regulating a wide range of economic behavior across a diverse set of conditions and circumstances.

Part II focuses specifically on how the idea of just price was incorporated into the concept of public utility as it emerged and took shape in the United States during the late nineteenth and early twentieth centuries. It traces this history from the 1870s, starting with *Munn v. Illinois*, to the middle of the twentieth century.

11. For reasons of space (and expertise), this Essay does not examine the influence of just price on the development of antitrust doctrine or, more generally, consumer protection, both of which surely deserve attention in any thorough history of just price.

12. There is a large literature, spanning multiple disciplines, addressing the problem of coercion. Contemporary philosophical debates are typically traced to Robert Nozick’s 1969 article, *Coercion*. See Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL* (Morgenbesser et al. eds., 1969). With regard to economic coercion, the Scholastics offer one of the earliest detailed treatments of the problem. In their view, economic coercion (or compulsion) referred to situations where one party to an exchange was able to take advantage of the other’s need and thereby exact unfair gains (often manifest in a higher or lower price than would have prevailed in the absence of coercion). See ODD LANGHOLM, *THE LEGACY OF SCHOLASTICISM IN ECONOMIC THOUGHT: ANTECEDENTS OF CHOICE AND POWER* 6 (1998) (describing the Scholastic understanding of economic compulsion as “compulsion by a person’s own need, utilized by another person to his advantage”). As we will see, this understanding of economic coercion resonates in important ways with that developed by John Commons and Robert Lee Hale in the early twentieth century. See *infra* Section II.A. For Commons, economic coercion involved “withholding from a person what does not belong to him but what is needed by him.” See JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 59 (1932); see also LANGHOLM, *supra*, at 187-92 (discussing concepts of economic coercion in the work of Commons and Hale and their resemblance to Scholastic understandings of economic compulsion). For a recent overview of economic coercion in political and legal theory, see Hiba Hafiz, *Beyond Liberty: Toward a History and Theory of Economic Coercion*, 83 *TENN. L. REV.* 1071 (2016).

It shows how the just price concept animated early efforts to regulate the prices charged by businesses “affected with a public interest,” how these ideas were incorporated into new legislation and the administrative practice of utility regulation during the early decades of the twentieth century, and the ways in which just price got caught up in the massive confusion created by the “fair value” rule of *Smyth v. Ames* and the fifty-year debate over the valuation of utility assets that ensued. As Part II argues, just price was at the center of *Munn*’s notion of public interest and, as such, it provided the normative core of the emerging public utility idea. As Part II also shows, however, Progressive era commitments to fair pricing and regulation in the public interest had to contend with strong countervailing forces seeking to subordinate ideas of just price to constitutional protections for private property. In this respect, the fair value rule of *Smyth v. Ames* can be seen as an effort to extend such protections into the heart of the public utility idea based on the fallacious notion that utility assets had an intrinsic, fair value. Part II concludes with a discussion of the “end result” test announced by the Supreme Court in its 1944 *Hope Natural Gas* decision—a decision that finally put an end to the fair value rule and opened the way to a more pragmatic approach to ratemaking that focused on the balance between ratepayers and investors. Such an approach, this Essay argues, was much more consistent with earlier notions of just price.

Part III discusses (briefly) the move to restructure various regulated industries during the last quarter of the twentieth century, with particular attention to those regulated by the Federal Energy Regulatory Commission (FERC). During this time, the widespread embrace of markets, combined with a sustained critique of economic regulation, worked to invert prior concerns with protecting consumers from the vagaries of the market and replace them with the view that it was the pathologies of regulation and rent-seeking by regulated firms that posed the bigger risks to consumers. As Part III shows, however, vestigial notions of just price have influenced the manner in which FERC has approached markets (and the prices that result) in its efforts to unbundle and restructure the natural gas and electricity industries. FERC’s core assumption in its restructuring efforts has been that competitive markets—what it sometimes refers to as “the forces of competition”—can be relied upon to ensure that prices for natural gas and electricity satisfy the statutory just and reasonable standard. In many respects, this assumption echoes earlier understandings of just price as the “normal competitive price”—that is, the price expected to prevail if the forces of competition are functioning as they do in “normal” markets. All of which puts a premium on the market oversight and enforcement responsibilities of regulators such as FERC—tasks that have proven to be far more challenging than expected.

Although much of this Essay’s purpose is descriptive, reflecting an effort to recover the changing understandings of just price over time and trace their influence on the public utility concept, several larger points emerge from this study. First, the history of just price reminds us that relations of reciprocity and fairness in exchange are at the very core of the public utility idea. Public utility,

in its modern incarnation, can thus be seen as one of our most important and long-lived experiments (flawed as it is) in regulating private capital and harnessing it to public ends—an experiment that has sought to translate principles of commutative justice into a set of working rules for governing key systems of provisioning in a modern industrial society.

Second, the history of just price also reminds us that prices are more than signals; that they are also relationships and that price relationships can be coercive. At root, the economics of just price is an economics of coercion, and, as such, an economics that resonates quite strongly with efforts by Progressive lawyers, legal realists, and institutional economists to develop an approach to law and economics (and economic regulation) that would put coercion at its center.

Third, the history of just price shows that competitive markets, when functioning properly, could (and can) be powerful instruments for protecting consumers and facilitating fairness in exchange. Contrary to various caricatures of Scholastic economic thought, just price was not some sort of relic of a religious past unalterably opposed to markets. The Scholastics were, in fact, quite pragmatic in their approach to market transactions, as were those who mobilized ideas of just price and moral economy during later times. But it is important to recognize in this respect that early conceptions of just price emerged out of and reflected a different understanding of markets and economic life—not the anonymous, self-regulating market of modern economic theory but a socially embedded, morally thick locus of economic exchange. Markets, in this earlier view, were concrete and particular, tied to specific times and places, rather than free-floating abstractions operating according to natural laws. Most importantly, markets were viewed as means rather than ends—tools that, under the right circumstances, could be used to protect buyers and sellers from coercive transactions.

As for the larger normative implications of all of this, it is important to emphasize that this Essay does not reflect, much less advocate, any sort of sentimental attachment to earlier conceptions of moral economy or economic justice that can or should be resurrected so as to serve as a counterweight to the problems of economic inequality and unfair exchange in our own time. Regardless of one's sympathies for earlier, more overtly normative conceptions of the economy, it would be folly to suggest that recovering the history of older ideas such as just price and excavating their contemporary influence could ever substitute for the messy and difficult political work that any effective campaign for economic justice requires. None of which is to suggest that ideas of just price or public utility or economic justice could not be refashioned and redeployed in the face of current challenges.¹³ Ideas and words matter and our public

13. See, e.g., MARK R. REIFF, *EXPLOITATION AND ECONOMIC JUSTICE IN THE LIBERAL CAPITALIST STATE* (2013). Reiff devotes a large part of his book (especially chapters 2 and 4) to the

vocabularies are obviously important tools in understanding and framing political projects.¹⁴ But seeking to understand the history of these contested concepts—to trace their genealogies in order to show something of their public lives over long expanses of time—can never be more than a modest step in such an undertaking.

I. Just Price

To the modern ear, the phrase “just price” sounds odd, even contradictory. Prices are not usually considered to have any ethical or moral content.¹⁵ Rather, they are viewed as signals—vital pieces of information—that reveal the interactions between supply and demand.¹⁶ In performing this signaling function, prices allow for the coordination of economic activity in a manner that maximizes allocative efficiency.¹⁷ The very notion that prices could or should

concept of just price—a concept that he argues should be at the center of a new theory of exploitation and an agenda for economic justice.

14. Cf. DANIEL T. RODGERS, *CONTESTED TRUTHS: KEYWORDS IN AMERICAN POLITICS SINCE INDEPENDENCE* 11 (1987) (“To unravel the histories of this handful of words is to begin to fathom the processes out of which political language is made.”).

15. See, e.g., R. G. Collingwood, *Economics as a Philosophical Science*, 35 *INT’L. J. ETHICS* 162, 174 (1926) (“It is, therefore, impossible for prices to be fixed by any reference to the idea of justice or any other moral conception. A just price, a just wage, a just rate of interest, is a contradiction in terms. The question of what a person *ought* to get in return for his goods and labor is a question absolutely devoid of meaning. The only valid questions are what he *can* get in return for his goods or labor, and whether he ought to sell them at all.”).

16. Hayek famously emphasized the role of the price system as a “mechanism for communicating information” that worked to solve the knowledge problem at the heart of modern economies. See, e.g., F.A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519, 526-27 (1945) (“We must look at the price system as such a mechanism for communicating information if we want to understand its real function The most significant fact about this system is the economy of knowledge with which it operates, or how little the individual participants need to know in order to be able to take the right action. In abbreviated form, by a kind of symbol, only the most essential information is passed on, and passed on only to those concerned. 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.”). Hayek, of course, was unsparing in his critique of neoclassical price theory, with its assumptions of perfect information and competitive equilibrium, but his understanding of prices as signals or information has had a deep, if underappreciated, effect on mainstream economics during the post-World War II period. See PHILIP MIROWSKI AND EDWARD NIK-KHAH, *THE KNOWLEDGE WE HAVE LOST IN INFORMATION: THE HISTORY OF INFORMATION IN MODERN ECONOMICS* 53 (2017) (arguing against standard histories of the economics of information as beginning with Arrow, Stigler, game theory, and the like and positing instead that one must go back to Hayek and the Mont Pelerin society to find the origins of a “self-conscious ‘economics of information’”).

17. See, e.g., MILTON FRIEDMAN, *PRICE THEORY* 10-11 (2008) (“The problem solved by a price system is an extremely complicated one, involving the coordination of the activities of tens and hundreds of millions of people all over the globe and their prompt adjustment to ever-changing conditions. The price system is an extremely subtle and complex device for solving this problem. Casual observation of the world leads to an underestimation of the complexity of both the problem and the device used to solve it, because insofar as the price system works, we are hardly conscious of its workings. The complexities are brought to our attention only when something goes wrong.”).

serve some sort of ethical purpose seems out of synch with our contemporary understanding of market economies.¹⁸

But markets do not always work as intended, and prices can sometimes depart quite significantly from what the fundamentals of supply and demand would dictate. When market distortions, manipulation, or pricing decisions cause prices to deviate from their “reference” levels, common intuitions of fair pricing are often invoked and regulation is sometimes called upon to return prices to their “normal” levels.¹⁹ And even in cases of “normally” functioning markets, particularly in the case of economic necessities and conditions of extreme scarcity, prevailing notions such as “willingness to pay” or “what the market will bear” tend to clash with prior commitments to fairness in economic relationships.²⁰

As we will see, these commitments to fairness have a long history and bear a strong resemblance to older ideas of commutative justice, just price, and moral economy—the subjects of this part. Commutative justice provided the basic philosophical framework for the development of the just price idea—a development that grew out of efforts by the Scholastics to fashion a theory of economic exchange that was rooted in their broad understanding of justice, and

18. See Marion Fourcade, *The Fly and the Cookie: Alignment and Unhinging in 21st Century Capitalism*, 15 SOCIO-ECON. REV. 661, 664 (2017) (“What economists find liberating about the price system is the fact that it seems to stand outside of morality altogether: the market does not have to be fair to be a superior force in organizing human activities, in other words to coordinate human needs in the most efficient manner possible.”). *But see* JOSEPH A. SCHUMPETER, A HISTORY OF ECONOMIC ANALYSIS 60 (Elizabeth Boody Schumpeter ed., 1954) (“Preoccupation with the ethics of pricing . . . is precisely one of the strongest motives a man can have for analyzing actual market mechanisms.”); 5 JOAN ROBINSON, *Markets in* COLLECTED ECONOMIC PAPERS OF JOAN ROBINSON 164 (1979) (“The doctrines of laissez faire were very attractive, not only to those who gained most directly from the market system. If the economy is a self-regulating mechanism and economics a system of scientific laws, moral and political problems are excluded from it. Questions of social justice do not arise, all the operations of public administration are to be strictly neutral between interested parties. Ethics can be discussed on Sunday. It is considered unsound, soft-headed and unpatriotic to bring it in to week-day business. As soon as we recognize that the market, by its very nature, is necessarily a scene of conflicting interests, every element in it (such as . . . the price of cocoa beans) becomes a moral and political problem. This is tormenting because there are no longer any ‘principles of economics’ to provide safe and simple rules for finding the correct solutions.”).

19. See Kahneman et al., *Fairness as a Constraint on Profit Seeking*, *supra* note 5, at 729-30; Frey & Pommerehne, *supra* note 5.

20. This is perhaps most apparent today in the case of price gouging for necessities in the wake of natural disasters such as hurricanes, but it also surfaces in the case of so-called surge pricing. See, e.g., Neil Irwin, *Why Surge Prices Make Us So Mad: What Springsteen, Home Depot and a Nobel Winner Know*, NY TIMES (15 October 2017), <http://www.nytimes.com/2017/10/14/upshot/why-surge-prices-make-us-so-mad-what-springsteen-home-depot-and-a-nobel-winner-know.html> [http://perma.cc/7SX3-UHA8]. The basic commitment to willingness to pay, of course, is much older. Thomas Hobbes, among others, took direct aim at ideas of commutative justice and just price, arguing that “the value of all things contracted for is measured by the appetite of the contractors and therefore the just value is that which they be contented to give.” THOMAS HOBBS, LEVIATHAN 208 (MacPherson ed., 1968). For a recent argument in defense of price gouging, see Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347, 348 (2008) (arguing that “standard cases of price gouging provide great benefit to those in desperate need, that they tend to lack the morally objectionable features often ascribed to them such as coercion and exploitation, and that attempts to prohibit the practice will harm individuals who are already vulnerable and can least afford to bear further harm”).

particularly Aristotle's notion of corrective justice. Although they varied in their interpretations of the precise meaning of just price (the term itself is surely one of the more capacious in the history of economic thought), two dominant understandings have generally been attributed to the Scholastics: a labor or cost-based approach and a market-based approach. In both cases, however, the central concern was with preventing one party to the transaction (usually the seller) from exacting unfair gains from the other (most often the buyer). This conception of just price took on considerable significance in the context of markets for grain and other necessities, particularly in times of dearth, and provided one of the most important touchstones for the idea of moral economy as developed by E.P. Thompson and others. This Part concludes, therefore, with a discussion of the relationship of just price to broader understandings of moral economy and fairness in economic relationships during the eighteenth and nineteenth centuries, with particular attention to the influence of just price on economic thought and economic regulation in colonial America and the early United States.

The overall goal of this Part is to survey the dominant interpretations of just price prior to the late nineteenth century, and to show how the idea was mobilized in different contexts as a basis for regulating prices and delineating the boundaries of fair exchange. While not structured as a standard, chronological narrative, this Part does seek to capture the long historical arc of the idea of just price from Aristotle and the Scholastics up until the late nineteenth century—all of which provides critical background for the discussion of just price and its influence on the modern concept of public utility that took shape during the late nineteenth and early twentieth centuries.

A. *Commutative Justice*

The idea of just price traces its origins to the Aristotelian concept of corrective justice, which was refashioned as commutative justice by Thomas Aquinas and other medieval scholars after the rediscovery and translation into Latin of a large number of Aristotle's writings during the twelfth and thirteenth centuries.²¹ In his *Nicomachean Ethics*, Aristotle famously identified two types

21. On the European reception of Aristotle's work during the twelfth and thirteenth centuries, see IZHAK ENGLAND, *CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES* 12 (2009) (characterizing the translation into Latin of Aristotle's *Ethics*, as well as some Arabic commentaries in the twelfth and thirteenth centuries, as "a major event in Western thought creating the central intellectual movement of scholasticism"); see also C.B. MACPHERSON, *THE RISE AND FALL OF ECONOMIC JUSTICE AND OTHER PAPERS* 5 (1985) ("The concept of economic justice gets its first clear presentation in the fourth century BC, by Aristotle . . . [I]t was only then that the idea of economic justice as a problem requiring separate attention arose. The more ancient civilizations, in which the market had not been, or even threatened to be, an autonomous organizing mechanism of production and exchange, had not needed any such concept. There is no record of any speculation, in the Bronze Age empires and kingdoms, of any such notions of economic justice."); ODD LANGHOLM, *PRICE AND VALUE IN THE ARISTOTELIAN TRADITION: A STUDY IN SCHOLASTIC ECONOMIC SOURCES* 14-16 (1979) (discussing Aristotle's notion of justice in economic exchange as understood by his medieval interpreters); DIANA

of particular justice: distributive and corrective.²² Whereas distributive justice was concerned with the allocation of goods in a community (“honor or money or any of the other things divisible among those who share in the regime”), corrective justice was concerned with transactions between individuals, both voluntary and involuntary.²³ A transaction that satisfied corrective justice according to Aristotle was one that preserved equality in the exchange, understood as an arithmetic proportion around a mean, and thereby avoided an unfair gain for either party.²⁴

While Aristotle’s notion of corrective justice has had a deep and long-standing influence across many domains, it has sometimes been interpreted narrowly as focused on remedy or restitution for harms suffered in transactions (the term itself suggests as much) rather than on a broader notion of proper dealings in exchange.²⁵ This broader understanding, it has been argued, is better reflected by Aquinas’s notion of “commutative justice.”²⁶ For Aquinas, commutative justice pertained to the full range of voluntary and involuntary

WOOD, *MEDIEVAL ECONOMIC THOUGHT* 133 (2002) (“In his *Nicomachean Ethics* (V, v) Aristotle set up a model of justice in exchange which is fundamental to the idea of the just price.”).

22. ARISTOTLE’S NICHOMACHEAN ETHICS 94-95 (Robert C. Bartlett & Susan D. Collins trans., 2011); see also D.G. Ritchie, *Aristotle’s Subdivisions of ‘Particular Justice’*, 8 *CLASSICAL REV.* 185, 185 (1894) (discussing Aristotle’s distinction between distributive and corrective justice).

23. ARISTOTLE’S NICHOMACHEAN ETHICS, *supra* note 22, at 95, 96-97.

24. *Id.* at 97; see also *id.* at 100-01 (discussing corrective justice in the context of reciprocity or equality in exchange and using the example of a farmer and shoemaker: “there will be reciprocity when terms are made equal, and the result will be that, as a farmer stands in relation to a shoemaker, so the work of the shoemaker stands in relation to that of the farmer”). As Karl Polanyi has observed, Aristotle’s notion of the economy was quite different from ours—always subordinated to the demands of community and the requirements of reciprocity in human relationships. See Karl Polanyi, *Aristotle Discovers the Economy*, in *PRIMITIVE, ARCHAIC, AND MODERN ECONOMIES* 97 (George Dalton ed., 1971) (observing that for Aristotle, “[t]he just price . . . derives from the demands of *philia* [the good will of the community] as expressed in the reciprocity which is of the essence of all human community”).

25. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 178 (2d ed. 2011) (“The real problem with Aristotle’s account is its emphasis on correction, on the *remedying* of the inequality that arises when one person injures or takes from another, or when one party fulfills his side of a bargain while the other does not. This is certainly one field of problems of justice, but even when added to the field of distributive justice it leaves untouched a wide range of problems. ‘Correction’ and ‘restitution’ are notions parasitic on some prior determination of what is to count as a crime, a tort, a binding agreement, etc.”).

26. *Id.* at 179 (“So it was that Thomas Aquinas, purporting to interpret Aristotle faithfully, silently shifted the meaning of Aristotle’s second class of particular justice, and invented a new term for it: ‘commutative justice.’ Many followers of Aquinas have understood *commutativa* as ‘pertaining to exchanges.’ But the advantage of Aquinas’s new term is precisely that, in his usage, it is limited neither to correction nor to voluntary or business transactions, but is almost as extensive as the term *commutatio* in classical Latin (= ‘change’), limited only by its contextual restriction to the field of human interaction. With this term, then, we can cover the whole field in which, problems of allocation of common stock and the like apart, the problem is to determine what dealings are proper between persons (including groups).”). Aquinas distinguishes between commutative and distributive justice in his *Summa Theologica*. See THOMAS AQUINAS, *ON LAW, MORALITY, AND POLITICS* 123-29 (William P. Baumgarth & Richard J. Regan eds., Richard J. Regan, trans., 2d ed. 2002) (discussing distributive and commutative justice as species of particular justice). *But see* LANGHOLM, *supra* note 21, at 14 (observing that “the classification of economic justice in relation to the two main kinds of particular justice [distributive and commutative] is one of the many unsettled questions of Aristotle’s exchange analysis”).

relationships between private persons, including economic exchange, and was not limited to correction or restitution for harms suffered.²⁷

With regard to economic transactions, commutative justice required that there be a rough equality in the values exchanged between buyer and seller.²⁸ Instances of compulsion or coercion, where one party was able to extract more than his or her fair share from the exchange, violated commutative justice.²⁹ The just price (*justum pretium*), accordingly, was the price that ensured equality between buyer and seller in any particular transaction. For the scholastics, as we will see, this was typically tied to the “common estimation” of the community—that is, a public assessment of what constituted a fair price for a particular good or service.³⁰

B. Medieval Markets

Determining whether any particular transaction satisfied the requirements of commutative justice was often easier said than done, and the literature on the just price doctrine reflects a range of views regarding what constituted the just price for the medieval authorities. For Max Weber and other early twentieth century scholars of medieval economic history, just price was one of the defining features of an economic ethic that was qualitatively different from that which would later take hold with the rise of capitalism.³¹ According to these scholars,

27. AQUINAS, *supra* note 26, at 124 (asserting that commutative justice applies to the relationship of one private person to another); *id.* at 126 (“But in exchanges, things are rendered to individual persons because of things received from them. And this is most apparent in buying and selling, regarding which we first notice the character of commutation. And so the things exchanged need to be equal, so that one should restore to another as much as one is enriched by what belongs to the other.”); see also Raymond de Roover, *Scholastic Economics: Survival and Lasting Influence from the Sixteenth Century to Adam Smith*, 69 Q.J. ECON. 161, 162 (1955) (“What the Doctors in the Middle Ages were really interested in was to determine the rules of justice governing social relations. Following Aquinas, they distinguished two kinds of justice: [1] distributive justice, which regulated the distribution of wealth and income, according to the place of the individual in society, and [2] commutative justice, which applied to the reciprocal dealings between individuals, that is, to the exchange of goods and services.”); FINNIS, *supra* note 25, at 178 (describing commutative justice as directed at the question of “what is fitting, fair, or just between the parties to the relationship”).

28. See, e.g., JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 200-03 (1998) (discussing Aquinas’s understanding of economic exchange as founded on the principle of equality or equivalence in the exchange); JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 13 (1991) (“[C]ommutative or rectificatory justice follows an arithmetic proportion. One person has too much and another too little. He has too much in involuntary transactions because he has taken something from the other, in voluntary transactions because things of unequal value have been exchanged. Justice is done by taking the amount necessary to restore equality from one party and giving it to the other.”).

29. See FINNIS, *supra* note 28, at 203 (“Exactng an unfair, i.e. ‘unequal,’ price, even from a ‘willing buyer, is indeed selling what is not one’s own to sell. The just price is one at which all parties to the transaction are, so far as possible, compensated proportionally for what they are giving up.”).

30. De Roover, *supra* note 27 at 164-65 (noting that San Bernardino of Sienna (1380-1444), among others, held that the just price was “determined by the ‘estimation made in common by all the citizens of a community’”).

31. MAX WEBER, *GENERAL ECONOMIC HISTORY* 358 (Frank Knight trans., 1927) [hereinafter WEBER, *GENERAL ECONOMIC HISTORY*] (observing that “medieval economic ethics excluded higgling, overpricing, and free competition, and were based on the principle of just price and the assurance

the just price of any particular good or service was tied not to what it could fetch in the market but rather to its cost of production and to the producer's station in life.³² This cost-based approach to just price, as we will see, reemerged in several early twentieth century writings on public utility.³³ More generally, it has been cited by some as the basis for the labor theory of value embraced by classical political economy. As R.H. Tawney put it in his discussion of just price, "payment may properly be demanded by the craftsmen who make the goods, or by the merchants who transport them, for both labour in their vocation and serve the common need. The unpardonable sin is that of the speculator or the middleman, who snatches private gain by the exploitation of public necessities. The true descendant of the doctrines of Aquinas is the labor theory of value. The last of the Schoolmen was Karl Marx."³⁴

By the middle of the twentieth century, new research questioned this earlier cost-based understanding of just price. The revisionist interpretation held that the medieval authorities understood the just price in most cases as the market price and that price regulation only applied in specific cases of scarcity of certain

to everyone of a chance to live"); MAX WEBER, *ECONOMY AND SOCIETY* 1188 (Guenther Roth & Claus Wittich eds., 1978) (tracing the origins of "just price" to the "primeval ethic of the neighborhood, which knows barter only as the exchange of occasional surpluses or of products of one's own labor" and where "one does not haggle for the price, but merely asks for the restitution of one's own cost (including the 'living wage') if an exchange takes place at all"); *see also Just Price*, VIII *ENCYCLOPAEDIA OF THE SOCIAL SCIENCES* (Edwin R. A. Seligman & Alvin Johnson eds., 1932) ("Because the just price was essentially not an economic but an ethical and social concept it did not necessarily coincide with the market price The social function of the doctrine was to prevent material gain from becoming the sole motive of economic activity, to extend the Christian way of life to the economic sphere and to safeguard the traditional social structure.");

32. *See* WEBER, *GENERAL ECONOMIC HISTORY*, *supra* note 31, at 138-41 (discussing the "livelihood policy" of the medieval guilds and its connection to "fair prices" for artisans so that they could maintain their station in life"); R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 53 (Verso 2015) (1926) (discussing the "characteristic doctrine" of just price as one that "insisted on the just price as the safeguard against extortion; . . . [p]rices must be such, and no more than such, as will enable each man to have the necessities of life suitable for his station"); Robinson, *supra* note 18, at 158 (describing concept of just price as "a system of valuations which enable the producers and merchants to maintain life at a level suited to their respective position in society"); *see also* RUDOLF KUALLA, *THE THEORY OF THE JUST PRICE: A HISTORICAL AND CRITICAL STUDY OF THE PROBLEM OF ECONOMIC VALUE* 42 (R. D. Hogg trans., 1940) ("Price regulation in the Middle Ages was always the function of the authorities. In the towns, in which business was concentrated, the competent authority was either the guild or a person or body under its influence. To this end, prices were fixed at levels at which they covered the producer's labour and other costs and left him a profit, it being assumed that every undertaking, operating on a certain minimum scale, should bring in enough to meet its own costs and support the master and his family. This price policy was in entire harmony with the requirements of justice, as conceived by the representatives of the Church.");

33. *See infra* Section II.A.

34. TAWNEY, *supra* note 32 at 48. Tawney's famous quip about Marx and the labor theory of value raises a larger issue, which cannot be treated in any detail here, about the relationship between the medieval conception of just price and later theories of value in economics. *See, e.g.*, Robert L. Heilbroner, *The Problem of Value in the Constitution of Economic Thought*, 50 *SOC. RES.* 253, 254 (1983) (discussing the "general problematic of value" as "the effort to tie the surface phenomena of economic life to some inner structure or order"); JOAN ROBINSON, *ECONOMIC PHILOSOPHY* 46 (1962) ("Among all the various meanings of *value*, there has been one all the time under the surface, the old concept of a Just Price.");

essential goods or in the absence of competition.³⁵ Such a view no doubt received a considerable boost from Joseph Schumpeter who, in his posthumous 1954 *History of Economic Analysis*, traced a direct line from Aristotle to Aquinas and the later Scholastics—all of whom, he argued, equated the just price with the price that prevailed in markets operating under “normal” conditions.³⁶

In making this claim, Schumpeter and others stressed the emphasis by Scholastic writers on the “public’s evaluation” or “common estimation” as the basis for determining just price.³⁷ According to these scholars, competitive markets operating under “normal” conditions provided the most obvious means of divining this common estimation.³⁸ Jacob Viner made the point explicit in his 1959 Henry Simons lecture at the University of Chicago Law School:

The scholastics maintained that it was a violation of commutative justice to sell at a higher price or to buy at a lower price than the “just price,” which they explained as the price according to “common estimation.” Until recently, this has been commonly interpreted as meaning the fixing of prices by civil authorities or by wise men, in the interest of justice and as a restraint on the avarice of merchants, and as demonstrating that the medieval church was hostile to the free market. Modern scholarship, however, has conclusively demonstrated that except for a few nominalists, the standard late-medieval meaning of “common estimation” was market price under free competition, and that some of the

35. See, e.g., John W. Baldwin, *The Medieval Theories of the Just Price*, 49 TRANS. AM. PHIL. SOC. 1, 54, 75-80 (1959) (describing the just price of the Canonists and Romanists of the thirteenth century and of Aquinas and his followers as including the current price determined in competitive conditions as well as the legal price set by the relevant authorities); Raymond De Roover, *The Concept of the Just Price: Theory and Economic Policy*, 18 J. ECON. HIST. 418, 420-21 (1958) (“[T]he generally accepted definition of the just price is wrong and rests on misinterpretation of the scholastic position on the matter. According to the majority of the doctors, the just price did not correspond to cost of production as determined by the producer’s social status, but was simply the current market price, with this important reservation: in cases of collusion or emergency, the public authorities retained the right to interfere and to impose a fair price.”); JOHN T. NOONAN, *THE SCHOLASTIC ANALYSIS OF USURY* 86 (1957) (“The just price is the market price.”).

36. JOSEPH A. SCHUMPETER, *HISTORY OF ECONOMIC ANALYSIS* 61 (1954) (arguing that Aristotle understood just prices as “normal competitive prices”); *id.* at 93 (arguing that Aquinas’s notion of just price was “strictly Aristotelian and should be interpreted exactly as we have interpreted Aristotle’s”). *But see* M.I. Finley, *Aristotle and Economic Analysis*, 47 PAST & PRESENT 3, 12-15 (1970) (criticizing the arguments of Schumpeter and others that Aristotle was engaged in economic analysis aimed at a theory of market prices rather than seeking to develop an understanding of exchange within his notion of justice). Part of the problem, according to Finney, is that Schumpeter and other economists made the mistake of seeking to understand Aristotle through the lens of modern economic institutions and ideas. *Id.* at 25. Karl Polanyi made a similar point. See Polanyi, *supra* note 24, at 95-97 (discussing Aristotle’s understanding of the economy and prices as always integrated with his broader conceptions of community and justice).

37. SCHUMPETER, *supra* note 36 at 93 (discussing the just price as “the price that consists of the public’s evaluation of the commodity (*justum pretium . . . in quadam aestimatione consistit*), which can only mean normal competitive price, or value in the sense of normal competitive price, where such a price exists”).

38. *Id.* Like Schumpeter, Jacob Viner stressed that for the scholastics, “market” meant “a competitive market, operating under normal circumstances” and that this provided the basis for common estimation. See Jacob Viner, *The Intellectual History of Laissez Faire*, 3 J.L. & ECON. 45, 53 (1960).

scholastics even used the term equivalent to “common estimation in or by the market.”³⁹

To be sure, aspects of this new interpretation likely resulted from a tendency to read history backwards and to impose modern economic concepts and categories on an earlier time.⁴⁰ But the new scholarship did have support in the primary texts, and it also recognized that even if the just price was typically the market price, it was still an “essentially normative” concept and did not reflect some sort of proto-version of *laissez faire*.⁴¹ Viner emphasized, in this respect, that it would be a mistake to interpret the scholastics “as enthusiasts for the free market.”⁴² Rather, “their acceptance of the desirability of competition rested solely on belief in its efficacy in protecting individuals from exploitation as sellers or as buyers.”⁴³ Competitive markets operating under “normal conditions,” in other words, were attractive to the Scholastics not because of their ability to deliver on modern goals of allocative efficiency but because they provided an antidote to the exercise of coercion or compulsion by buyers or sellers in economic transactions.⁴⁴

39. Viner, *supra* note 38, at 53. Viner had a longstanding interest in the intellectual history of economics that included a particular interest in medieval economics, a topic on which he was fully engaged at the time of his Simons lecture. *See, e.g.*, Fritz Machlup, *What was Left on Viner's Desk*, 80 J. POL. ECON. 353, 354-56 (1972) (describing Viner's efforts during the last decade of his life to prepare a large volume on religious thought and economic society, including a long, completed chapter on the economic doctrines of the scholastics). This chapter, along with three others, was published posthumously in a special 1978 issue of the journal, *History of Political Economy*. *See* Jacob Viner, *Chapter Two: The Economic Doctrines of the Scholastics*, 10 HIST. POL. ECON. 46 (1978).

40. *See, e.g.*, LANGHOLM, *supra* note 12, 85 (pointing out that the modern conception of an autonomous self-regulating market would have made little sense to the medieval writers).

41. Baldwin, *supra* note 35, at 8; *see also id.* (“Beginning chiefly with the twelfth and lasting until the sixteenth century the thinkers of the Middle Ages adopted the term *justum pretium*, refined its meaning, and enlarged its importance until the expression became a legal device, a moral imperative, and an economic doctrine.”).

42. Viner, *supra* note 38, at 53.

43. *Id.*

44. *But see* Stephen Worland, *Justice and Welfare Economics*, 63 REV. SOC. ECON. 369, 376-77 (2005) (“Welfare economics, then, suggests that a structure of prices, wherein each individual price conforms with commutative justice is necessary for the common good. Furthermore, it might be argued that such a price structure would provide not only an efficient allocation of resources, but also what could, in Scholastic social philosophy, be considered a just distribution of income.”); Cyril A. Zebot, *The Roots of Welfare Economics: A Review Article*, 26 REV. SOC. ECON. 168, 168 (1968) (“The scholastic doctrine of just price, . . . which was predicated on grounds of inter-personal commutative justice, has in the light of modern welfare economics received its broader meaning as the necessary conditions of the economic system to fulfill its teleological task as efficiently as possible.”). To be sure, the Scholastic case for justice in exchange rests on very different foundations than the utilitarian basis of welfare economics. That they get to the same place with respect to competitive markets may be an interesting coincidence, but their very different underlying normative commitments leads them to different places in terms of the prospects for and wisdom of various government controls and interventions in the economy. For welfare economics, in contrast to the Scholastic doctrine of just price, coercion and compulsion in economic relationships are condemned not because they interfere with the rights of individuals or run afoul of commutative justice, but rather because they reduce aggregate consumer welfare.

More recent scholarship has criticized some of the cruder versions of the “market price” interpretation of just price.⁴⁵ In pointing out the anachronisms embedded in such an understanding, these scholars have emphasized that the idea of an autonomous market economy made no sense to the medieval writers.⁴⁶ Markets were always embedded in and subordinated to a broader set of social norms and customary practices. In addition, although market prices might align with the just price under some circumstances, the all too common conditions of scarcity and small numbers of buyers and sellers meant that “normal” competitive prices were the exception rather than the rule.⁴⁷

Only in cases where competition was sufficiently robust to “combat the exploitation of economic need” would markets be counted on to ensure that prices were just.⁴⁸ In cases of relatively thin markets, with limited numbers of

45. See, e.g., Fabio Monsalve, *Scholastic Just Prices Versus Current Market Price: Is It Merely a Matter of Labelling*, 21 EUR. J. HIST. ECON. THOUGHT 4, 5 (2014) (“[T]he just price is not merely the market price because of the fundamental moral dimension of economic agents in the Scholastic world vision.”); Langholm, *supra* note 40, at 85 (“Until a few decades ago, it was not uncommon in critical studies to encounter the suggestion that the medieval scholastics simply permitted the forces of the market to run their course and accepted the resultant ‘common estimate of the market’ as the just price. More recently, this liberalistic interpretation has been challenged by a younger generation of scholars, with whose arguments, as far as they go, I fully agree.”). Langholm is arguably the most important and influential recent scholar of the doctrine of just price. In a review of Langholm’s 1979 book, *Price and Value in the Aristotelian Tradition: A Study in Scholastic Economic Sources*, John W. Baldwin, himself one of the most influential scholars of medieval theories of just price during the middle of the twentieth century, concluded that Langholm’s book, which was based on an extensive survey of previously unknown medieval sources, was “the most original and significant contribution to medieval economic theory to have appeared in the past two decades.” John W. Baldwin, *Review of Price and Value in the Aristotelian Tradition: A Study in Scholastic Economic Sources by Odd Langholm*, 55 SPECULUM 807, 809 (1980).

46. See, e.g., O.F. Hamouda & B.B. Price, *The Justice of the Just Price*, 4 EUR. J. HIST. ECON. THOUGHT 191, 208 (1997) (concluding that the medieval schoolmen’s “amalgamated discussion of price from an economic and ethical perspective was much deeper than the modern one, in the sense that it rendered contemplation of economic technicalities, which are dear to modern economists, of secondary importance, and reflected on the moral and ethical aspects of market exchange as well as the notion of ‘value’, issues whose serious discussion today are simply dismissed on economic grounds alone”); Adrian Walsh, *The Morality of the Market and the Medieval Schoolmen*, 3 POL. PHIL. ECON. 241, 247 (2004) (“The Theory of the Just Price was an attempt to provide some kind of moral constraints upon the formation of prices.”). But see JAMES DAVIS, *MEDIEVAL MARKET MORALITY: LIFE, LAW, AND ETHICS IN THE ENGLISH MARKETPLACE, 1200-1500*, at 62-63 (2012) (“[I]n essence, the just price was accepted as the market price that both vendor and purchaser were willing to accept, provided that any deceit, manipulation or coercion has been excised from the deal.”).

47. See David D. Friedman, *In Defense of Thomas Aquinas and the Just Price*, 12 HIST. POL. ECON. 234, 236 (1980) (“Both the writers in the scholastic tradition and Aristotle, their primary source, were largely concerned with exchanges involving small numbers of buyers and sellers The purpose of the doctrine of just price was to determine the price in such non-competitive situations.”); George W. Wilson, *The Economics of the Just Price*, 7 HIST. POL. ECON. 56, 73 (1975) (“The notion of the just price was rooted in the quest for stability at a time when existing social forms were changing. But it was also a product of low per capita levels of output and, as such, was a social and prescriptive device that attempted to have the needed goods and services produced and distributed in accordance with prevailing views of equity. In the absence of competitive markets, justice in exchange required some special social constraints.”).

48. LANGHOLM, *supra* note 40, at 88; see also *id.* (“The scholastic masters recognized that, by insisting on an estimate of the price level that might have established itself in the regular competitive market under normal conditions (just as a normal cost estimate), it was possible, to an

buyers and sellers, as well as in circumstances of dearth and economic necessity, the market price did not necessarily reflect the just price. The overriding concern in all cases was with protecting against the exercise of economic coercion, most often by sellers against buyers. Most of the actual scholastic cases dealing with unjust pricing thus involved situations where “strong bargaining positions [could] be obtained, so that the opposite party (most often a buyer, but sometimes a seller) [could] be subjected to economic compulsion.”⁴⁹

Looking back at this rather cursory history of the scholastic understanding of just price, it is clear that efforts to corral the doctrine into a single cost-based or market-based frame are unlikely to succeed. As the Norwegian economic historian Odd Langholm argues, moreover, these two dominant interpretations of just price tended to reflect later ideological divisions within economics rather than a thorough understanding of the medieval doctrine.⁵⁰ Based on his extensive research with primary sources, Langholm concludes that for the medieval writers the two positions may not have been as contrary as some suggested.⁵¹ Langholm also points out in this respect that Schumpeter’s view of the just price as the “normal competitive price” was more nuanced than later commentators realized and that it could also be reconciled with earlier cost-based interpretations.⁵² As discussed in more detail in the next Part, both of these understandings of just price—cost-based and market-based—have influenced public utility regulation over the course of the last century.

adequate extent, to reduce economic compulsion, because competition between sellers protects buyers and vice versa.”).

49. *Id.*

50. *Id.* at 87 (noting that the supposed opposition between a market interpretation of just price and a cost interpretation was a product of a much later ideological conflict and that for the medieval theorists “[c]ost and market were complementary and mutually supporting criteria by which to reach a reasonable estimate of price by the parties involved, or by the confessors and arbiters, when the need arose”).

51. *Id.*

52. According to Langholm, what Schumpeter recognized as the “normal competitive price” was a price that neither buyer nor seller could influence. Accordingly, it was not subject to manipulation and thus could be assumed to function as the just price. *See* LANGHOLM, *supra* note 21, at 32. Unfortunately, various historians writing at mid-century failed to appreciate the nuance of Schumpeter’s analysis and tended to read the just price as the market price without recognizing the important qualification that this was only in the context of a competitive market operating “under normal conditions.” *See id.* at 33 (taking issue with DeRoover’s and Baldwin’s interpretation of just price as market price and noting that these interpretations were a “distortion” of Schumpeter’s view). Langholm goes on to provide an interpretation of Schumpeter’s view of just price that seeks to reconcile it with alternative “cost-based” approaches to just price:

Schumpeter does not explain what he means here by normal conditions. But one would of course usually think of it as conditions under which price covers costs. If that is what Schumpeter had in mind, his whole argument could have been stated in terms of a cost theory. It would run something like this: Both parties do of course usually profit from mutual exchange, otherwise they would not exchange. But there is a certain valuation, objective in the sense that it is made by superpersonal economic forces, in terms of which goods exchanged must be equalized, namely normal cost, otherwise exchange will break down. Hence the individual buyer and seller should do nothing, even when this happens to be in their power, to keep price artificially below or above this just and normal level.

Id. at 34.

What is also clear from the intellectual history of just price—and what is important to emphasize—was the general ethical understanding of economic life that informed conceptions of just price. As a way of regulating prices, just price was grounded in a broader set of customs and norms within particular communities. The idea that the economy constituted a sphere of activity separate from social, political, and ethical relations made little sense.⁵³ During this time the market operated as a “site of justice,” as Michel Foucault put it.⁵⁴ It had not yet been transformed into a “site of truth” operating according to “natural” laws and providing a baseline against which to judge government interventions.⁵⁵ Prices, therefore, were not simply or exclusively economic phenomena; they had not yet been stripped of social and normative content, but were embedded within a more general “moral economy.”⁵⁶

53. See LANGHOLM, *supra* note 12, at 85 (“The modern mechanistic conception of the market . . . was foreign to the medieval masters. Their frame of reference was a moral universe that obliged any buyer or seller to act for the common good and agree to terms of exchange accordingly, regardless of the advantage granted him by the forces of the market. This meant that the common estimate of the just price could not refer indiscriminately to whatever price might be obtainable under existent market conditions.”); KAULLA, *supra* note 32, at 19 (describing “the problem of the just price (*justum pretium*)” as “the question how the prices of goods should be fixed in order to satisfy men’s sense of justice”); see also Karl Polanyi, *The Economy as Instituted Process*, in TRADE AND MARKET IN THE EARLY EMPIRES: ECONOMIES IN HISTORY AND THEORY 250 (Karl Polanyi et al. eds., 1957) (“The human economy . . . is embedded and enmeshed in institutions, economic and noneconomic. The inclusion of the noneconomic is vital. For religion or government may be as important to the structure and functioning of the economy as monetary institutions or the availability of tolls and machines that lighten the toil of labor.”).

54. See MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLEGE DE FRANCE, 1978-1979*, at 30-31 (Michel Senellart ed., Graham Burchell trans., 2008) (“The market, in the very general sense of the word, as it operated in the Middle Ages, and in the 16th and 17th centuries, was, in a word, essentially a site of justice . . . a place where what had to appear in exchange and be formulated in the price was justice.”). Foucault discusses three aspects of this idea of the market as a site of justice: extensive regulation of the goods brought to market, just price, and sanctions for fraud. *Id.*

55. *Id.* at 31 (observing that by the middle of the eighteenth century prior views of the market as a “site of justice” had given way to a new understanding of the market as “something that obeyed and had to obey ‘natural,’ that is to say, spontaneous mechanisms”). According to Foucault, a general view took hold during this time, marked most prominently by key works in classical political economy, that these natural mechanisms of the market should be allowed to function unimpeded so as to produce the “natural” or “normal” price. *Id.* In this understanding, the market thus becomes a “site of truth” or “veridiction” and, as such, the basis for assessing the propriety of government interventions:

[W]hat is discovered at this moment, at once in governmental practice and in reflection on this governmental practice, is that inasmuch as prices are determined in accordance with the natural mechanisms of the market they constitute a standard of truth which enables us to discern which governmental practices are correct and which are erroneous. In other words, it is the natural mechanism of the market and the formation of a natural price that enables us to falsify and verify governmental practice when, on the basis of these elements, we examine what the government does, the measures it takes, and the rules it imposes.

Id.

56. Not all professional economists embraced the abstract, disembedded notion of the price system at the heart of much of classical and neoclassical economics. See, e.g., Joan Robinson, *Some Reflections on the Philosophy of Prices*, 26 MANCHESTER SCH. ECON. & SOC. STUDS. 116, 135 (1958) (“Ever since Adam Smith economists have been looking for a simple general theory of prices to fit all cases. The foregoing is intended to show that this is a will o’ the wisp. Prices are a social phenomenon and the pricing system in any economy is geared to it social and political system.”).

C. Moral Economy

This idea of a moral economy, it should be emphasized, is not intended in a prescriptive sense. Rather, it is used here as a descriptive term to capture the pervasive role of customs, norms, and values in regulating economic behavior in various times and places. As such, the term has most often been used to describe economies that are not thoroughly dominated by market exchange, with particular attention to the role of customary practices in governing access to necessities such as grain during times of scarcity and dearth. Of course, as Marion Fourcade and other economic sociologists remind us, “all economies are moral economies” and need to be analyzed as such.⁵⁷ Some economies and economic relationships, however, are more overtly normative than others in terms of the manner in which custom, tradition, and values are mobilized in the regulation or governance of economic activity. And it is in this sense that the term moral economy is used here.

This particular notion of moral economy, including its relation to ideas of just price, was employed to great effect by E.P. Thompson in his work on food riots in eighteenth century England. As articulated by Thompson, the moral economy of the crowd incorporated the idea of just price as a customary practice of establishing fairness in market exchange and regulating the prices of food and other necessities during times of dearth.⁵⁸ Arguing against what he characterized as the “spasmodic” view of food riots and the tendency to relegate the crowd to a marginal, almost Pavlovian role in history (stimulus: hunger; response: food riot),⁵⁹ Thompson showed how food riots were in fact driven by an older, normative conception of economic exchange and the idea that necessities such

57. Marion Fourcade, *The Fly and the Cookie: Alignment and Unhinging in 21st Century Capitalism*, 15 SOCIO-ECON. REV. 661, 665 (2017) (“[A]ll economies are moral economies: all differentiate and hierarchize between good and bad, high and low, legitimate or illegitimate, and the market economy is no exception. Correlatively, holding on to the view that this rise of market culture necessarily undermines the moral terrain prevents us from truly engaging with the complexities of the relationship between the two, as well as the complexity of the social struggles at stake.”); *id.* at 662 (“The economy is morally thick, and it must be analyzed as such.”).

58. E.P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 108 (1971) (“What is remarkable about these ‘insurrections’ is, first, their discipline, and, second, the fact that they exhibit a pattern of behavior for whose origin we must look back several hundred years: which becomes more, rather than less, sophisticated in the eighteenth century; which repeats itself, seemingly spontaneously, in different parts of the country and after the passage of many quiet years. The central action in this pattern is not the sack of the granaries and the pilfering of grain or flour but the action of ‘setting the price.’”); *see also* DAVIS, *supra* note 46, at 447 (“The precepts of the moral economy accepted that just prices were those determined by supply and demand and middlemen and bakers had a right to profit. What they did not have a right to do was undertake practices that caused harm to their fellows in the search for the best profits It was not an ideology that was in conflict with the market, but it was a belligerent popular ethic that could not adapt to the new laissez-faire policies of the late eighteenth century that sought to erode traditional paternal notions.”).

59. Thompson, *supra* note 58, at 76 (discussing the “spasmodic view of popular history” that saw food riots as “compulsive, rather than self-conscious or self-activating . . . simple responses to economic stimuli”).

as grain had a just price that sometimes departed from prices set in the markets.⁶⁰ Riots, and the plausible threat of riots, thus drew on older paternalistic relationships and norms to enforce (to regulate) the price of grain during times of scarcity.⁶¹

Much of the concern here was with manipulative practices on the part of sellers. The poor were not hostile to competitive markets according to Thompson; indeed, their protests and riots were directed at episodes when markets were not working—when merchants and others seemed to be taking unfair advantage of consumers.⁶² The riots targeted these practices and sought to restore prices to what was considered the just or fair price.⁶³

Thompson's notion of moral economy, with its grounding in ideas of just price, has proved quite wide-ranging in its influence on scholars writing about other times and places.⁶⁴ Social scientists studying peasant communities around the world, for example, have employed the concepts of moral economy and just price to understand how customary practices and norms serve to regulate

60. *Id.* at 131-32 (“It is not easy for us to conceive that there may have been a time, within a smaller and more integrated community, when it appeared to be ‘unnatural’ that any man should profit from the necessities of others, and when it was assumed that, in time of dearth, prices of ‘necessities’ should remain at a customary level, even though there might be less all around.”).

61. *Id.* at 107-15 (discussing specific food riots and their role in setting the price of grain during times of scarcity); *see also id.* at 120-26 (discussing how the *threat* of riots also served to regulate the price of necessities).

62. *Id.* at 112 (“It is the restraint rather than the disorder, which is remarkable; and there can be no doubt that the actions were approved by an overwhelming popular consensus. There is a deeply-felt conviction that prices ought, in times of dearth, to be regulated, and that the profiteer put himself outside of society.”); E.P. THOMPSON, MORAL ECONOMIC REVIEWED IN CUSTOMS IN COMMON: STUDIES IN TRADITIONAL POPULAR CULTURE 304-05 (1991) (“[E]ven the most zealous food rioters . . . were inextricably committed to the market, both as producers and as consumers. How could they have existed for a month or a week without it? . . . It is with the special case of the marketing of ‘necessities’ in times of dearth that we have been concerned, and the crowd’s preferred model was precisely the ‘open market’ in which petty producers freely competed, rather than the closed market when large dealers conducted private barhains over samples in the back parlours of inns.”); *see also* KARL GUNNAR PERSSON, GRAIN MARKETS IN EUROPE, 1500-1900: INTEGRATION AND DEREGULATION 41 (1999) (arguing against those who mistakenly interpreted Thompson’s notion of moral economy as antithetical to markets and positing instead that “the moral economy and furore of the crowd was aroused by poor market performance and periodic market failures”).

63. *See* THOMPSON, *supra* note 62, at 304-05; *see also* DAVIS, *supra* note 46, at 440-47 (providing further support for Thompson’s argument that the moral economy of the English crowd in the eighteenth century drew on earlier notions of just price and Medieval market morality).

64. For general overviews of the history and spread of moral economy as an idea, *see* James G. Carrier, *Moral Economy: What’s in a Name*, 2017 ANTHROPOLOGICAL THEORY 1 (2017); Johann Simeant, *Three Bodies of Moral Economy: The Diffusion of a Concept*, 11 J. GLOBAL ETHICS 163 (2015); Norbert Gotz, “Moral Economy”: Its Conceptual History and Analytical Prospects, 11 J. GLOBAL ETHICS 147 (2015). Tim Rogan’s recent book, *THE MORAL ECONOMISTS: R. H. TAWNEY, KARL POLANYI, E. P. THOMPSON, AND THE CRITIQUE OF CAPITALISM* (2017), takes Thompson’s work as one of its key subjects in an effort to recover a more general moral critique of capitalism as a complement to what he refers to as the current “material” critique focused largely on inequality. But Rogan focuses primarily on Thompson’s earlier book, *The Making of the English Working Class*, rather than his work on the moral economy of the crowd and, as a result, ends up with an overly sentimental reading of Thompson’s notion of moral economy. As Thompson himself noted in his 1991 assessment of the moral economy literature, his earlier “anti-capitalist” use of the term in *The Making of the English Working Class* was defined more carefully and in a manner that rejected any sort of sentimental attachment to the term and the practices it was meant to capture. *See* THOMPSON, *supra* note 62, at 336-44.

economic exchange and to protect against subsistence crises.⁶⁵ As in Thompson's work, moreover, these notions of moral economy are not intended to signal any sort of sentimental or romantic attachment to "traditional" economies.⁶⁶ Quite the contrary, in fact. Moral economy and just price always operated within the context of existing power relations and class conflict, serving chiefly to regulate the provisioning of necessities in order to maintain social order.⁶⁷

The considerable body of historical research on grain markets in Europe prior to the nineteenth century, particularly in France with its *police des grains*, reinforces such a view, illustrating the role of both customary practices and formal rules in regulating exchange and ensuring a just price for necessities such as grain.⁶⁸ The ideas of just price at work in this context, moreover, were not tied to any particular doctrine or approach. They varied over time and space, representing a pragmatic response to the demands of social order and stability.⁶⁹

65. See, e.g., JAMES C. SCOTT, *THE MORAL ECONOMY OF THE PEASANT: REBELLION AND SUBSISTENCE IN SOUTHEAST ASIA* 163-65 (1976) (discussing concept of just price as a component of moral consensus regarding fair exchange and as a means of maintaining subsistence among peasant communities in Southeast Asia).

66. See MICHAEL J. WATTS, *SILENT VIOLENCE: FOOD, FAMINE, AND PEASANTRY IN NORTHERN NIGERIA* 146 (1983) ("There is no need in political economic analysis to glorify what is long gone. Equally there is no need to saddle the moral economy with the legacy of Durkheim, Rousseau, and Ruskin . . . [T]o evoke the moral economy is not to conjure up a perfectly calibrated social machinery that guaranteed survival."); see also Thompson, *supra* note 62, at 341-43 (discussing the use of moral economy by Scott, Watts, and others in the field of peasant studies).

67. See THOMPSON, *supra* note 62, at 343 (discussing moral economy in the context of a "field of force . . . and in the bargaining between unequal social forces in which the weaker still has acknowledged claims among the greater"); WATTS, *supra* note 66, at 109 ("The moral economy [of Hausa peasants in northern Nigeria] was not especially moral and the Caliphate was certainly no Rousseauian universe of peasant welfare and benevolent patrons. Rather, the moral economy was necessary to the survival of ruler and ruled, and the price was paid by prevailing power blocs for the maintenance and reproduction of the social relations of production replete with its exploitative relations and class struggles.")

68. See STEVEN L. KAPLAN, *BREAD, POLITICS AND POLITICAL ECONOMY IN THE REIGN OF LOUIS THE XV* 58-59 (1976) ("In almost every monopoly arraignment, the police accused the merchant(s) of 'illicitly,' 'illegitimately,' or 'criminally' forcing prices up When merchants drove the price above a certain level, which varied in time and space and depended upon such factors as the ordinary price and wage scale, the elasticity of demand, and the likelihood of harvest recovery, they wronged the whole society. Implicit in the notion of monopoly and stemming from the moralistic tradition was the idea of a 'just price.' Lieutenants general of police, commissaries, inspectors, grain measurers and local officials repeatedly invoked the 'just price' which they construed as their obligation to assure. Their conception was a relativistic and empirical one which sprang from no coherent theory of social or commutative justice. The just price was a price which would neither 'disgust' merchants nor 'wound' consumers. It was predicated upon an ideal of moderation which tended to vary with the circumstances. A price was thought just when merchants settled for a moderate profit and the bulk of the people, who lived in a state of chronic misery, did not suffer immoderately, that is to say, more than they did usually."); see also BERNARD HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 18-19 (2011) (noting that during the eighteenth century the *police des grains* were viewed not as sources of excessive intervention in a free market (a position that Adam Smith would later take) but as a means of enhancing liberty through their protection of a system of provisioning that was crucial to everyday life).

69. KAPLAN, *supra* note 68, at 59 ("In untroubled moments the just price was simply the current price (as the theologians had recommended), fixed by common estimation rather than imposed by merchant maneuvers or governmental fiat. In a dearth, which grotesquely distorted standards of

In discussing the regulation of the grain trade in old-regime France, for example, Steven Kaplan emphasized the special obligations that attended the provisioning of necessities:

The rules developed to govern the grain trade were based upon the tenet that grain was essentially unlike any other commodity commonly exchanged and thus must be treated differently. As an item of ‘first necessity’ and ultimately a matter of life or death for millions of consumers, grain could not be legitimately compared with goods whose exchange merely complemented subsistence or enhanced pleasure Given its special nature, those who undertook to deal in grain, the police believed, assumed solemn responsibilities toward society.⁷⁰

As Kaplan observed, “the police viewed the [grain] trade as a kind of public service.”⁷¹ Accordingly, they imposed certain restrictions on grain merchants that did not apply to others.⁷² A grain merchant “had to be satisfied with a ‘just and legitimate gain’ based upon his investment, his labor, and the energy with which he served the public rather than on the cunning with which he manipulated supply and demand factors.”⁷³ In effect, the grain trade operated as a common infrastructure for society—a key system of provisioning not unlike more modern forms of public utility—that demanded careful regulation.⁷⁴

To be sure, it was precisely these rules governing the grain trade that Adam Smith singled out for criticism in his famous digression on the corn trade in the *Wealth of Nations*.⁷⁵ As Smith argued, efforts to control the price of grain, even and especially in times of dearth, stemmed from prejudice and superstition rather than a proper understanding of political economy.⁷⁶ As for the prospect that a

moderation, the just price became much more difficult to define For many authorities the just price now became the price of social stability, the price that would still be accessible to the majority of the population. In the midst of a crisis, few administrators believed that the just price could be attained without some form of government intervention.”).

70. *Id.* 52-53.

71. *Id.* at 53.

72. *Id.* (the police “made demands and imposed restrictions upon grain traders which other merchants escaped”).

73. *Id.*

74. *Id.* (“Implicit in the police conception of the grain trade was the notion that the grain held by a merchant (or cultivator) was not perfectly and exclusively his own to dispose of as he saw fit. As the primary source of subsistence, grain was a ‘common good’ upon which society had certain claims.”).

75. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 490-510 (Edwin Cannan ed., 1937) (digression concerning the corn trade and the corn laws); see also HARCOURT, *supra* note 68, at 7 (“It was precisely this maze of ordinances that Adam Smith, in the *Wealth of Nations*, castigated as ‘such absurd regulations, as frequently aggravate the unavoidable misfortune of a dearth, into the dreadful calamity of a famine.’”).

76. SMITH, *supra* note 75, at 507 (“The laws concerning corn may everywhere be compared to the laws concerning religion. The people feel themselves so much interested in what relates either to their subsistence in this life, or to their happiness in a life to come, that government must yield to their prejudices, and, in order to preserve the public tranquility, establish the system which they approve of. It is upon this account, perhaps, that we so seldom find a reasonable system established with regard to either of these two capital objects.”).

dearth might turn into a full-fledged famine, Smith argued that prices should be allowed to rise in order to discourage consumption and call forth more production.⁷⁷ Government intervention would only make matters worse. In fact, according to Smith, government intervention was the true underlying cause of famine: “a famine has never arisen from any other cause but the violence of government attempting, by improper means, to remedy the inconveniences of a dearth.”⁷⁸ As Smith elaborated, in what surely constitutes one of the more pivotal interventions on behalf of classical political economy’s embrace of free markets:

When the government, in order to remedy the inconveniences of dearth, orders all the dealers to sell their corn at what it supposes a reasonable price, it either hinders them from bringing it to market, which may sometimes produce a famine even in the beginning of the season; or if they bring it thither, it enables the people, and thereby encourages them to consume it so fast, as must necessarily produce a famine before the end of the season. The unlimited, unrestrained freedom of the corn trade, as it is the only effectual preventative of the miseries of a famine, so it is the best palliative of the inconveniences of a dearth; for the inconveniences of a real scarcity cannot be remedied; they can only be palliated. No trade deserves more the full protection of the law, and no trade requires it so much; because no trade is so much exposed to popular odium.⁷⁹

For Adam Smith, then, the invocation of customary notions of just price as a means of regulating market prices was a product of popular prejudice. If enforced, it was virtually guaranteed to make things worse. Left to its own devices, the market would allow prices to rise and fall as supply and demand dictated, thereby serving to ration consumption and palliate the “inconveniences of dearth.”⁸⁰

77. *Id.* at 490-92.

78. *Id.* at 492-93. Two generations of research on various famines throughout history and around the world beg to differ. *See, e.g.*, AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION 160-62 (1981) (demonstrating that Smith’s notion that unimpeded markets were the best remedy for famines does not hold in the case of actual famines); MIKE DAVIS, LATE VICTORIAN HOLOCAUSTS: EL NINO FAMINES AND THE MAKING OF THE THIRD WORLD 31 (2001) (“By official dictate, India like Ireland before it had become a Utilitarian laboratory where millions of lives were wagered against dogmatic faith in omnipotent markets overcoming the ‘inconvenience of dearth.’”).

79. SMITH, *supra* note 75, at 493. More recent historical treatments of Smith have sought to recover his broader moral sensibilities, questioning the overly simplistic portrait of Smith as an uncritical evangelist for free markets. While this is not the place to engage in a debate over Smith’s larger corpus of work, suffice it to say that his remarks on the corn trade and dearth exerted a profound and highly destructive influence on government responses to food shortages and famine across the British Empire. *See* THOMPSON, *supra* note 62, at 279 (noting that “the few pages of Smith’s digression on the corn trade . . . acquired oracular authority, and in each episode of scarcity—in Britain in 1795 and 1800, in Ireland, India, and the Colonial Empire through much of the nineteenth century—these were the arguments which politicians and administrators rehearsed”); *id.*, at 282 (“These pages, then, were among the most influential writings in history, with a global influence which was sometimes baneful. Their arguments discredited or disallowed traditional protective interventions in times of dearth, could be used to justify profiteering and hoarding, and could serve as apologetics to soothe the troubled consciences of the authorities by commending inactivity as correct political economy.”).

80. SMITH, *supra* note 75, at 483.

But this idea of rationing by price obscured the “real relationship assigned by price.”⁸¹ “Rationing by price,” Thompson argued, “does not allocate resources equally among those in need; it reserves the supply to those who can pay the price and excludes those who can’t.”⁸² No matter how logical or natural Smith’s arguments appeared to be, they failed to recognize that as much as one-fourth of the English population in the eighteenth century “rubbed along on the edge of bare subsistence, and was in danger of falling below this whenever prices rose.”⁸³ While high prices might not matter to the rich and might bring only inconvenience or modest pain to the middle and working classes, they could threaten the very survival of the poor.⁸⁴ In sum, “Smithian advocacy of free trade in grain [may have] had evident virtues in the long run,” but it “had only negative relevance in times of crisis, since his remedies—such as increasing cereal production—were long-run remedies or—such as very high prices—were not remedies at all.”⁸⁵

Thompson’s critique of Smith’s views of famine and dearth, along with his efforts to recover a history of the customary norms of moral economy that were giving way in the face of *laissez faire* also underscores an important and more general shift in the meaning of price. For classical political economy, the idea of a natural, self-regulating economic order offered limited room for the earlier understanding of price as a relationship that was central to the idea of just price. Going forward, prices were increasingly shorn of broader normative content and reduced to economic facts—residual products of the anonymous forces of supply and demand at work in the market.

It is important to emphasize here (again) that for Thompson and his fellow travelers, moral economy and just price had specific meanings tied to a specific set of circumstances, namely the trade in economic necessities such as grain, especially in times of dearth. Unlike the trade in other goods and services, these systems of provisioning were too important to be left solely to the market. Price regulation, whether enforced by the crowd or by public authorities, was widely viewed as a necessary means for maintaining social stability. In these situations, at the very least, high prices were not simply market signals that would ration consumption in the short run and call forth more production over the longer term. They also constituted and determined the terms of access to basic economic necessities. This special attention to necessities, as we will see, was particularly relevant to the modern conception of public utility that began to take shape at the end of the nineteenth century, underscoring arguments in favor of regulation that would ensure access at reasonable prices.

81. THOMPSON, *supra* note 62, at 285.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 283.

Since Thompson wrote, ideas of moral economy and just price have been extended beyond the circumstances of dearth and necessities to a wide range of economic activities and relationships. Morton Horwitz, for example, draws on Thompson's work in arguing that the "equitable" conception of contract that prevailed in America prior to the commercial transformation of the nineteenth century was grounded in medieval notions of just price.⁸⁶ Similarly, P.S. Atiyah identified just price as one of the "relics of medieval thought" that influenced basic understandings of contractual exchange and markets in England during the seventeenth and eighteenth centuries.⁸⁷ Like Thompson, Atiyah stressed the role of custom and just price in regulating certain kinds of markets and protecting consumers against the abuses of monopoly.⁸⁸

Such commitments, moreover, were hardly limited to the Anglo-American tradition.⁸⁹ In her work on the French merchant courts and commercial life in eighteenth century France, for example, Amalia Kessler finds that contrary to the established view that just price no longer had any real bite by the eighteenth century, evidence from actual court records regarding a range of contract disputes demonstrated that "failure to pay a just price did indeed remain an actionable claim in the eighteenth century—at least in the Parisian merchant court."⁹⁰ Likewise, contract law in Germany prior to codification in the late nineteenth century bore the imprint of just price and the related doctrine of *laesio*

86. See Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 935 (1974) (characterizing the equitable conception of contract in eighteenth century America as a "remnant of the medieval just price theory of value"). *But see* A.W.B Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533, 536-38 (1979) (criticizing Horwitz's invocation of "just price" and his broader equitable conception of contract as overly romantic and out of synch with the prevailing view of just price as the market price). The Horwitz thesis has continued to garner a fair amount of attention and controversy. See, e.g., Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 TULSA L. REV. 915, 918-19 (2002) (summarizing the key points of the dispute between Simpson and Horwitz and referencing James Oldham's conclusion based on a survey of the controversy that the "great majority" of cases supported the Horwitz view).

87. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 61-65 (1979) (discussing medieval notions of just price and their influence on eighteenth century understandings of contractual exchange and markets).

88. *Id.* at 65 ("It is enough here to stress that if the older traditions about just prices were now (or perhaps even if they had always been) subject to market influences, it was quite clear that they did presuppose a certain type of market. They presupposed the absence of monopoly. They presupposed that the supply of foodstuffs, especially, should be open and above board; there should be no hoarding, no holding up the public to ransom in times of harvest failure. What was available for sale must indeed be made available, openly, and to customers before dealers. It was thus not so much a free market as a regulated market, and the regulation was largely in the interests of the consumers.").

89. Durkheim, of course, wrote extensively about the "morals of contractual relations" and the idea of just exchange. See EMILE DURKHEIM, *PROFESSIONAL ETHICS AND CIVIC MORALS* 211 (Cornelia Brookfield trans., 1957) ("A just contract is not simply any contract that is freely consented to, that is, without explicit coercion; it is a contract by which things and services are exchanged at the true and normal value, in short, at the just value."). For a broader historical investigation of notions of equality in exchange and their connection to ideas of just price, see James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587 (1991).

90. See AMALIA D. KESSLER, *A REVOLUTION IN COMMERCE: THE PARISIAN MERCHANT COURT AND THE RISE OF COMMERCIAL SOCIETY IN EIGHTEENTH-CENTURY FRANCE* 111 (2007).

enormis, which provided for rescission of certain contracts (notably for land) in cases of inadequate price.⁹¹

Perhaps most relevant for this Essay, the doctrine of just price also exerted a powerful influence on American economic thought and policy well into the nineteenth century. In colonial America, for example, “the bulk of the early value discussion,” according to one historian, “centres [sic] around an economic ideal inherited from medieval economic philosophy: the idea of a ‘just price.’”⁹² Likewise, the extensive price controls enacted by various authorities during the

91. See, e.g., John P. Dawson, *Economic Duress and the Fair Exchange in French and German Law*, 11 TUL. L. REV. 345, 364-76 (1937) (discussing history of just price and *laesio enormis* and their influence on French and German contract law); Friedrich Kessler, *Some Thoughts on the Evolution of the German Law of Contracts—A Comparative Study: Part I*, 22 UCLA L. REV. 1066, 1074-80 (1975) (discussing notion of contractual justice in German contract law). More generally, despite the strong historical trend away from equitable theories of contract during the nineteenth century, the residual influence of just price could (and can) still be found in various contract law doctrines intended to protect vulnerable parties from economic coercion. The doctrine of unconscionability in both civil and common law traditions, for example, has been identified as stemming from earlier notions of just price. See, e.g., Andrea Perrone, *The Just Price and Contemporary Contract Law: Some Introductory Remarks*, 2 RIVISTA INTERNAZIONALE DI SCIENZE SOCIALI 217, 218 (2014) (“Usury laws, the remedies provided for gross disparity by contract law in Continental Europe, and the doctrine of unconscionability in North American common law are clear signs of a persisting principle of equality in exchange which can be traced back to the doctrine of just price.”); Alphonse M. Squillante, *Unconscionability: French, German, Anglo-American Application*, 34 ALB. L. REV. 297, 313 (1970) (“If one analyzes the history of unconscionability he arrives at the conclusion that the history of *laesio enormis* and *just price* is indeed the history of unconscionability.”); MACPHERSON, *supra* note 21, at 14 (observing that the idea of commutative justice reappears in contemporary doctrines of unconscionability in contract law and in various strands of consumer protection legislation); see also *United States v. Bethlehem Steel*, 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting) (“Fraud and physical duress are not the only grounds upon which courts refuse to enforce contracts. The law is not so primitive that it sanctions every injustice except brute force and downright fraud. More specifically, the courts generally refuse to lend themselves to the enforcement of a ‘bargain’ in which one party has unjustly taken advantage of the economic necessities of the other. And there is great reason and justice in this rule, for necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.” (quotations omitted)). Seana Shiffrin has argued against paternalist understandings of the unconscionability doctrine that focus on the protection of the weaker party, arguing instead that courts’ (and the broader community’s) unwillingness to be complicit in the enforcement of contracts that are grossly unfair lie outside of our accommodation duties. Such a position suggests a more fundamental commitment to preserving fairness and equality in exchange—one that echoes earlier notions of just price as grounded in the community’s estimation of the contours of fair exchange. See Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFAIRS 205, 227-30, 245-50 (2000).

92. E.A.J. JOHNSON, AMERICAN ECONOMIC THOUGHT IN THE SEVENTEENTH CENTURY 123 (1932). “The concept [of just price],” Johnson continued,

stands at the root and stem of the value discussion, while from it proceed, as first exfoliations, the complaints about ‘oppression’ in prices and the demands for legislative control of markets. But the colonial discussion, lacking the uniformity of the medieval thought from which it borrowed its seed, could not retain the harmony and completeness of the medieval economic doctrine. The thoughts of practical colonists are never those of monastic theologians, and as a consequence, the medieval value legacy at the hands of the seventeenth-century Americans was modified and amplified rather than crystalized around the concept of “just price.”

Id.; see also BERNARD BAILY, THE NEW ENGLAND MERCHANTS IN THE SEVENTEENTH CENTURY 20-21 (1955) (“The soul of the merchant was constantly exposed to sin by virtue of his control of goods necessary to other people. Since proof of the diligence he applied in his calling was in the profits he made from precisely such exchanges, could a line be drawn between industry and avarice? The Puritans answered, as had the Catholics for half a millennium, that it could and they designated this line the ‘just price.’”).

colonial era were founded upon the concept, drawing as they did on the long history of governmental price controls in England that were themselves inspired by just price.⁹³

John Cotton's "rules of trading"—part of the code of laws he proposed for Massachusetts in 1639—offered what was perhaps "the most concise statement of the doctrine of 'just price.'"⁹⁴ Arguing against the notion that "a man might sell as dear as he can, and buy as cheap as he can," Cotton defined just price

as the price which would be paid by a buyer who 'knows the worth of the commodity' and whose demand for the commodity was such, that he had use for it but was under no economic compulsion to buy. The seller of goods must therefore determine a 'just price' by means of the fiction of an intelligent, uncoerced buyer.⁹⁵

The overarching concern here was not with keeping prices low but rather with preventing compulsion in economic exchange. Early colonial governments thus adopted price-fixing statutes for a wide range of goods and services, drawing directly on older notions of just price.⁹⁶ One Georgia statute from the mid-

93. See James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 681 (2008) ("Colonial lawmakers also adopted pervasive schemes of price regulation, covering the sale of a wide range of products. Such legislation harked back to the medieval notion of a just price, under which considerations of fairness and customary pricing could trump the right to charge market prices. Price controls reflected thinking molded by an economy of scarcity."). Ely goes on to note, moreover, that "[n]ot only did pricing controls reach a large variety of commodities, but price regulations persisted longer than those governing wages." *Id.*; see also JONATHAN R. T. HUGHES, *THE GOVERNMENTAL HABIT REDUX: ECONOMIC CONTROLS FROM COLONIAL TIMES TO THE PRESENT* 39 (1991) ("Two medieval concepts, the prohibition of usury and the doctrine of a just price, were imbedded in the general colonial laws The idea that a price different from the market price might be just lay behind colonial price controls. These were generally applied in special situations and ordinarily in connection with quality controls of public-service enterprises. Indeed, the absence of attempted price controls by public officials would have been novel in the colonial era."). These colonial price controls were part of a much longer history, of course. The English Assizes of Bread and Ale and the Statute of Laborers, for example, drew "heavily upon scholastic notions of the just price." See Davis, *supra* note 46, at 223 ("The most significant national regulations for price control were the assizes of bread and ale, tied to the market price and drawing heavily upon scholastic notions of the just price."); Henry Rottschaefer, *The Field of Governmental Price Control*, 35 YALE L.J. 438, 438 (1926) ("Governmental price regulation was practiced at an early stage in English legal history and constituted an important element in the economic life of the Middle Ages. It was an integral part of a social order strongly influenced by ethical conceptions of a just price capable of the same kind of objective determination as any other ethical standard."); Eugene A. Gilmore, *Governmental Regulation of Prices*, 17 GREEN BAG 627, 627 (1905) (tracing laws regulating prices in England and the United States back to the doctrine of just price).

94. JOHNSON, *supra* note 92, at 123.

95. *Id.* at 125-26; see also JOHN COTTON, AN ABSTRACT OF THE LAWS OF NEW ENGLAND 10 (Paulces Chain, London 1641) ("To the intent that all oppression in buying and selling may be avoided, it shall be lawful for the Judges in every Towne, with the consent of the free Burgesses to appoint certain select men, to set reasonable rates upon all commodities, and proportionally to limit the wages of workmen and labourers, and the rates agreed upon by them, and ratified by the Judges, to bind all the Inhabitants of the Towne. The like course to be taken by the Governor, and Assistants, for the rating of prices throughout the Country, and all to be confirmed if need be by the general Court."); BAILYN, *supra* note 92, at 21 (discussing Cotton's principles of just price).

96. Hughes, *supra* note 93, at 39.

eighteenth century even “contained the actual medieval words, enjoining merchants against ‘forestalling, engrossing, and unjust exactions.’”⁹⁷

According to the standard account, however, these early colonial price controls soon gave way to a strong counter-trend in favor of unrestrained markets.⁹⁸ The gathering strength of *laissez faire*, marked by an emerging ideology of economic individualism and the concept of a natural, self-regulating market, reinforced these trends—trends to which the *Lochner* Court would soon grant constitutional license.⁹⁹ In a world increasingly oriented toward liberty of contract and protection of private property, the idea of just price and its practical application in government price controls seemed wildly out of place.

But the advance of *laissez faire* in nineteenth century America has been shown to be a bit too clean and simple. As William Novak, in particular, has demonstrated, ideas of “public economy” and the “well-ordered market” underwrote a wide variety of economic and social regulations during this time, all of which reflected a deeper concern with directing economic activity in a manner that would enhance “the people’s welfare.”¹⁰⁰ Like Thompson’s moral economy, Novak’s public economy was rooted in “a vision of economic relations subject to the larger dictates of community and social mores.”¹⁰¹ In contrast to Thompson’s story, however, Novak stresses how these commitments to public economy in America were not “extralegal” but rather “firmly rooted in law and legislation” and directed at ensuring that markets functioned properly within a “well-regulated society.”¹⁰² As Novak has argued in more recent work, moreover, these broad notions of public economy and the people’s welfare provided the seedbed out of which the modern idea of public utility emerged in the late nineteenth and early twentieth centuries.¹⁰³

97. *Id.*

98. *See, e.g.,* JOHNSON, *supra* note 92, at 128-29 (noting the trend away from price fixing during the late colonial period); *see also id.* at 129-30 (providing a discussion of ideas of just price in early New England legislation (much of it tied to notions of cost)).

99. *Lochner v. New York*, 198 U.S. 45 (1905).

100. *See* WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* 83-88 (1996).

101. *Id.* at 112.

102. *Id.* at 87, 95-105 (discussing the emergence of public markets in nineteenth century America and their extensive regulation). Although Novak does not identify any specific references to medieval notions of just price in his survey of these early forms of market regulation, his characterization of such regulations seems very much in keeping with the basic idea. *See id.* at 96 (“American public markets, like their Roman and English predecessors, were created to ensure an adequate supply of wholesome, fairly priced food and provisions accessible to the general population To leave unregulated something as central to the general welfare as the supply of basic foodstuffs was an abdication of public responsibility. Consequently, nineteenth-century states and municipalities used their police powers to construct regulated marketplaces to protect their populations from high prices, unhealthy goods, unsanitary conditions, fraud and cheating, and the adverse effects of simple profiteering by hucksters, forestallers, middle-men, and other second hand sellers.”).

103. *See* Novak, *supra* note 8, at 158 (discussing “movement from “older ideas of *salus populi*, people’s welfare, and *res publica* beyond the particular confines of customary, common law, and ancient constitutional categories toward a broader and more modern conception of general regulation in the public interest” that found its most important legal expression in the concept of public utility).

II. Public Utility

One does not have to travel far from these conceptions of just price, moral economy, and the people's welfare to get to late nineteenth and early twentieth century conceptions of public utility in the United States. With *Munn v. Illinois*, the Supreme Court held that states could use their police powers to regulate prices charged by “businesses affected with public interest”¹⁰⁴—setting in motion a train of doctrinal and conceptual developments that culminated in the modern idea of public utility.¹⁰⁵ Throughout the course of this development, price regulation in the public interest drew upon deeper intuitions regarding just price and fair exchange. As these commitments were absorbed into public utility regulation, they were gradually formalized and subjected to the dictates of administration and technical expertise—a process that sometimes resulted in great confusion.

This Part discusses these developments. It argues that the idea of just price lay at the core of *Munn's* approval of price regulation in the public interest and that it provided the animating force behind the fundamental concern in public utility law with protecting consumers from the harm that resulted from unfair exchange. As this Part also demonstrates, however, notions of just price soon became intertwined with the difficult task of determining *how* to regulate prices—that is, how to set rates for public utilities. Here, as we will see, efforts to determine the “fair value” of a utility's assets for purposes of ratemaking focused attention on the other side of the bargain (the owners and investors in the public utility) to ensure that their property was not subject to confiscation. For more than fifty years, the so-called fair value rule, first articulated in *Smyth v. Ames* (1898), plunged utility commissions, courts, and commentators into a mind-boggling and seemingly endless series of debates over the proper approach to valuation of utility assets for setting rates. Not until the *Hope Natural Gas* case in 1944 did the Supreme Court finally correct the error it had made with the fair value rule, embracing a new test for “just and reasonable” rates that focused on the end result of the ratemaking exercise rather than the methodology employed. This Part closes with a discussion of *Hope* and its recognition that the task of rate regulation—of ensuring just and reasonable rates—was largely a technical exercise best left to administrative agencies.

A. Public Interest

The modern notion of public interest got its first airing in Justice Waite's majority opinion in *Munn v. Illinois*. Lifting a long dormant phrase from Lord Mathew Hale's seventeenth century treatise on seaports—*De Portibus Maris*—

104. *Munn v. Illinois*, 94 U.S. 113 (1877).

105. See Novak, *supra* note 8, at 170 (“[I]t is not too much of a stretch to suggest that *Munn* launched the public utility era.”).

the Court held in *Munn* that state legislatures could use their police powers to establish rates for those businesses “affected with a public interest.”¹⁰⁶ As Walton Hamilton pointed out, the phrase itself contained no test or standard for legislative price fixing.¹⁰⁷ At best, a new “doctrine of public interest” could be found “only in embryo” in the *Munn* decision.¹⁰⁸ But the basic idea of regulation in the public interest and, specifically, of fixing prices for certain businesses in order to protect the public, found its modern incarnation in *Munn*.¹⁰⁹

For the next half century, legislatures and courts struggled to define the boundaries of a category of businesses that were sufficiently “affected” or “clothed” with the public interest so as to merit regulation. Over time, the effort met with increasingly stiff resistance from various members of the Court, most notably Justice Holmes who argued that “the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers.”¹¹⁰ “The truth seems to me,” Justice Holmes continued, “that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has sufficient force of public opinion behind it.”¹¹¹ With its 1934 decision in *Nebbia v. New York*, a majority of the Supreme Court finally agreed with Holmes, holding that there was no closed category of businesses “affected with a public interest” and that legislatures were free to move forward in regulating businesses as long as they had a rational basis for doing so.¹¹²

It is a mistake, however, to see *Munn* and its progeny as primarily an exercise in taxonomy that came to an end with *Nebbia*.¹¹³ As John Commons

106. *Munn v. Illinois*, 94 U.S. 113 (1877); see also Walton Hamilton, *Affection with a Public Interest*, 39 YALE L.J. 1089, 1092-99 (1930) (discussing the history of Lord Hale’s phrase and its adoption by the Court in *Munn*).

107. Hamilton, *supra* note 106, at 1094 (“But, with whatever meaning historical scholarship may endow the phrase, it is clear that here is no ‘test’ for legislative price-fixing It is quite impossible to find in Lord Hale’s sentences a standard by which is to be measured a price regulation whose legality and economic soundness had not been questioned; or to discover there a limit to legislative discretion in a country in which even to this day Parliament decides for itself how far it may go in the control of industry.”); see also FELIX FRANKFURTER & HENRY M. HART, JR., *RATE REGULATION IN THE CRISIS OF THE REGULATORY COMMISSIONS: AN INTRODUCTION TO A CURRENT ISSUE OF PUBLIC POLICY* 5 (Paul W. MacAvoy ed., 1970) (“The words themselves are palpably empty.”).

108. Hamilton, *supra* note 106, at 1096.

109. Novak, *supra* note 8.

110. *Tyson & Brothers v. Banton*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting).

111. *Id.*

112. *Nebbia v. New York*, 291 U.S. 502, 536 (1934) (“It is clear that there is no closed class or category of businesses affected with a public interest 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.”); see also BARBARA FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 175 (1998) (“After *Nebbia*, the Court never again interfered with a legislature’s decision about *which* enterprises were regulable.”)

113. The substantial historical literature on *Munn* tends to see the opinion, and the doctrinal developments that ensued, as a conservative move by the Court to separate public and private and limit price-fixing legislation to specific categories of businesses. See, e.g., HARRY N. SCHEIBER, *THE ROAD TO MUNN: EMINENT DOMAIN AND THE CONCEPT OF PUBLIC PURPOSE IN THE STATE COURTS* 330-31 (1971) (noting that *Munn* was not so much a new beginning as it was a culmination of a line of cases

pointed out, the real significance of *Munn* lay in the Court's recognition that changing economic conditions can create new possibilities for economic coercion.¹¹⁴ The grain elevators at issue in *Munn* were not legal monopolies—they did not enjoy an exclusive franchise from the government that would have required them to submit to price regulation.¹¹⁵ But because they stood at the very gateway of the Chicago grain trade, they constituted a “virtual monopoly” that gave them the ability to exact unfair gains from their customers by charging higher prices.¹¹⁶ The Illinois legislation at issue in *Munn*, like the Granger laws in other states, was enacted to prevent such coercion by setting maximum prices.¹¹⁷

In the absence of governmental power to fix reasonable charges, the *Munn* Court found, the grain elevators would have the upper hand in bargaining with their customers: “the owner could make his rates at will, and compel the public to yield to his terms, or forego the use.”¹¹⁸ As Rexford Tugwell argued, attending to the possibility of harm to consumers, particularly in the case of necessities, thus provided a more coherent frame for understanding *Munn* and the cases that followed.¹¹⁹ Viewed in this light, the *German Alliance Insurance* case from 1914, which is sometimes cited as the Court's most expansive interpretation of the “affected with a public interest” category, makes more sense as a descendant of *Munn*. In that case, which involved a Kansas statute regulating the price of fire insurance, the Court noted that the market could not be trusted to generate fair prices:

The price of insurance is not fixed over the counters of the companies by what Adam Smith calls the higgling of the market, but formed in the councils of the underwriters, promulgated in schedules of practically controlling constancy which the applicant for insurance is powerless to oppose and which, therefore,

exploring the extent to which private property would be subordinated to the public interest). William Novak, however, has recently argued that scholars of American economic and business regulation should recognize that *Munn* was in fact the beginning of a remarkable set of experiments in economic regulation, largely centered on the modern idea of public utility. See Novak, *supra* note 10, at 401–04; Novak, *supra* note 8.

114. See COMMONS, *supra* note 12, at 34 (“The decision in *Munn v. Illinois* recognized for the first time the economic power of property, or power to withhold, growing out of economic conditions.”).

115. According to Justice Field's dissent, this was the key reason why the legislation should be struck down. See 94 U.S. at 148-49 (Field, J., dissenting).

116. *Id.* at 131-34 (majority opinion)

117. *Id.*

118. *Id.* at 134.

119. See TUGWELL, *supra* note 8, at 99 (“Because a business is big and powerful, even because it is monopolistic as we usually use the term, it is not necessarily harmful, nor will the courts necessarily permit it to be regulated. But when the product it deals in becomes a necessity to all of us, or at least to many of us; when we are compelled to resort to it and when at the same time unfair rates are maintained or the service given is inadequate, it then becomes ‘clothed with a public interest.’ It may be regulated. It is the disadvantage to consumers that makes it so.”).

has led to the assertion that the business of insurance is of monopolistic character and that “it is illusory to speak of a liberty of contract.”¹²⁰

Kansas thus chose to enact a scheme of rate regulation for fire insurance, with the overarching goal of “secur[ing] rates which shall be reasonable to the insurer and the insured.”¹²¹ The Court’s function in these cases was not to evaluate the wisdom of any particular type of regulation but rather “to determine the existence of power” and with it the possibility of economic coercion.¹²²

This general view was reaffirmed and further refined by Chief Justice Taft in the *Wolff Packing* case.¹²³ In seeking to bring some order to the ongoing inquiry as to when businesses were sufficiently “clothed with a public interest” so as to merit regulation, Chief Justice Taft identified three categories: (1) businesses “carried on under the authority of a public grant of privileges” such as railroads and the traditional public utilities; (2) certain common carriers and common callings such as inns, cabs, and grist mills, which had long been regarded as subject to regulation on behalf of the public; and (3) businesses that because of economic conditions or circumstances had assumed sufficient importance to merit regulation.¹²⁴ It was the third category of businesses that included those at issue in the *Munn* line of cases.¹²⁵ In almost all of these cases, Chief Justice Taft concluded, “the thing which gave the public interest was the indispensable nature of the service and the exorbitant charges and arbitrary control to which the public might be subjected without regulation.”¹²⁶

Three years later, in his dissent in the theatre tickets case, Justice Stone offered a concise statement of the overall approach, broadening it beyond necessities:

Statutory regulation of price is commonly directed toward the prevention of exorbitant demands of buyers or sellers. An examination of the decisions of this Court in which price regulation has been upheld will disclose that the element common to all is the existence of a situation or a combination of circumstances materially restricting the regulative force of competition, so that buyers and sellers are placed at such a disadvantage in the bargaining struggle that serious

120. *German All. Ins. Co. v. Lewis*, 233 U.S. 389, 416-17 (1914).

121. *Id.* at 417.

122. *Id.* Walton Hamilton referred to the German Alliance Insurance case as “the most paradoxical of cases . . . in the whole history of price regulation.” See Hamilton, *supra* note 106, at 1098. The Court’s decision, Hamilton argued, “makes the concern of the business to the public the heart of the matter . . . [T]he sanction goes directly back to the law of common callings and the subject is placed within the province of trade regulation where historically it belongs. The result is a general, if indefinite, invitation to the legislature to extend price control where public concern demands it.” *Id.* at 1099.

123. *Charles Wolff Packing Co. v. Ct. of Ind. Relations*, 262 U.S. 522 (1923).

124. *Id.* at 535.

125. *Id.* at 535-38.

126. *Id.* at 538.

economic consequences result to a very large number of members of the community.¹²⁷

It was this legacy of *Munn* that echoed most directly the doctrine of just price and that would prove to be most relevant for the emerging law of public utility. In certain industries at certain times, economic conditions created opportunities for coercion, manifest most often in an ability to impose higher prices on consumers. Price fixing or rate regulation thus provided a means to restore equality in exchange and ensure that the proper balance was struck between buyers and sellers.

This was particularly important in the case of the classic public utilities—water, electricity, natural gas, telephone—all of which provided economic necessities to the general public. Given their overall importance to the economy and their distinctive economic characteristics, these public utilities were widely viewed as appropriate targets for price regulation. As “the keystones of an integrated industrial structure, control of which is attended by extraordinary economic power,”¹²⁸ they deserved special scrutiny. Simply put, “because such power lends itself to abuse and tends to be concentrated in relatively few hands,” rate regulation was needed to protect the public.¹²⁹

Like the railroads, these classic public utilities were typically marked by high fixed-capital requirements, substantial economies of scale, and extensive reliance on a network infrastructure that was expensive to build and maintain.¹³⁰ Together, these characteristics led to declining average costs across the relevant demand curve, creating a situation that economists since the late nineteenth century had referred to as “natural monopoly.”¹³¹ As a result, the antitrust laws were not particularly effective in policing the exercise of market power and imposing remedies that would restore multi-firm competition.¹³² Rate regulation

127. Tyson & Bro.—U.S. Theatre Ticket Offices v. Banton, 273 U.S. 418, 451-52 (1926) (Stone, J., dissenting); see also Hale, *supra* note 159, at 416 (noting Justice Stone’s effort to broaden the “Taft test” beyond the case of necessities).

128. FRANKFURTER & HART, *supra* note 107, at 4.

129. *Id.*; see also K. SABEEL RAHMAN, DEMOCRACY AGAINST DOMINATION 74 (2017) (“The turn to public utilities as an alternative to private power was thus premised on a distinction between which industries were more socially vital—and more prone to dangerous concentrations of private power.”).

130. See, e.g., JOHN MAURICE CLARK, STUDIES IN THE ECONOMICS OF OVERHEAD COSTS 318-22 (1923) (discussing distinctive economic characteristics of utilities, including large investments in highly specialized assets and substantial “economies of size”).

131. See Adam Plaiss, *From Natural Monopoly to Public Utility: Technological Determinism and the Political Economy of Infrastructure in Progressive-Era America*, 57 TECH. & CULT. 806 (2016) (discussing the influence of the natural monopoly concept on public utility regulation); PAUL J. GARFIELD & WALLACE F. LOVEJOY, PUBLIC UTILITY ECONOMICS 15-19 (1964) (discussing the historical understandings of the natural monopoly characteristics of public utilities); see also Manuela Mosca, *On the Origins of the Concept of Natural Monopoly: Economies of Scale and Competition*, 15 EUR. J. HIST. ECON. THOUGHT 317 (2008) (tracing the history of the natural monopoly concept in economics).

132. See, e.g., Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156, 163 (1904) (observing that with respect to the “troublesome problem of

thus provided an alternative means of regulating those sectors of the economy that were seemingly beyond the full reach of the antitrust laws.¹³³ Put another way, the economic conditions prevailing in these industries meant that neither markets nor the antitrust laws could be relied upon to ensure that competition would be able to regulate prices and protect consumers.¹³⁴

Building on the experience of state railroad commissions and the Interstate Commerce Commission, state regulation of public utilities emerged around the turn of the century.¹³⁵ Beginning with New York and Wisconsin in 1907, public utility regulation by state commission spread rapidly across the country in a “veritable epidemic of laws.”¹³⁶ By 1930, every state but Delaware had a public utility statute that charged some type of administrative entity with responsibility for regulating public utilities such as water, gas, and electricity.¹³⁷ These were quintessential Progressive-era laws, built on principles of scientific management

the public utilities, . . . experience has shown that . . . many of the public works can be conducted with advantage only upon the basis of exclusive franchise” and concluding that “it is necessary for the perpetuity of competitive conditions in general, that, in the particular instances of monopolistic conditions, the state should proceed to establish a legal monopoly and then apply to that situation such strict regulation as the exigency demands”); see also STEPHEN BREYER, *REGULATION AND ITS REFORM* 158 (1982) (describing the classical view of regulation as “an alternative to antitrust, necessary when antitrust cannot successfully maintain a workably competitive marketplace of when such a marketplace is inadequate due to some other serious defect”).

133. Of course, the antitrust laws have long been held to apply to certain forms of anti-competitive behavior engaged in by regulated public utilities. See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374–75 (1972) (concluding that the Federal Power Act did not immunize Otter Tail power from regulation under the antitrust laws for its refusal to deal with municipal utilities).

134. See Hamilton, *supra* note 106, at 1107 (describing “three presumptions” of price control to be taken in order: “price is to be left to free enterprise; the antitrust laws are to be used, if need be, to keep enterprise free; and, if free enterprise cannot be made to work, resort is to be had to formal price-fixing”).

135. See John R. Commons, *The Wisconsin Public-Utilities Law*, 36 AM. MON. REV. REVIEWS 221, 221 (1907) (discussing the importance of the Wisconsin Railroad Law of 1905 in establishing “the principle of regulation through a commission appointed by the Governor” that was subsequently applied in 1907 to “other public utilities”); Marshall E. Dimock, *British and American Utilities: A Comparison*, 1 U. CHI. L. REV. 265, 266 (1933) (“[T]he regulation of railways . . . furnished the real institutional foundation for both British and American public utility regulation.”). There is a diverse literature on the origins of public utility regulation, with strong competing explanations between those advancing a public interest theory or regulation and those arguing for a public choice explanation, which held that regulated entities actively sought regulation and used it for their benefit. See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) (“[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.”); see also Jim Rossi, *Public Choice, Energy Regulation and Deregulation*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 419, 421–22 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (discussing the capture theory of regulation advanced by Stigler and others and its applicability to electricity regulation). *But see* George L. Priest, *The Origins of Utility Regulation and the “Theories of Regulation” Debate*, 36 J.L. & ECON. 289, 323 (1993) (“The search for a single theory of regulation . . . does not illuminate regulatory behavior . . . [T]he assertion that an agency has been ‘captured’ by a utility or is serving that utility’s economic interests necessarily is too crude a depiction of the regulatory relationship.”).

136. WILLIAM EUGENE MOSHER, *A QUARTER-CENTURY OF REGULATION* 35, 36 (1930).

137. See GARFIELD & LOVEJOY, *supra* note 131, at 32–33. *But see* William E. Mosher, *Defects of State Regulation*, 201 ANNALS AM. ACAD. POL. & SOC. SCI. 105 (1939) (discussing the wide variation among state public utility laws regarding scope and authority of the state commissions).

and regulation by experts.¹³⁸ Statutory mandates were typically broad and open-ended, founded on the goal of ensuring that rates were just, reasonable, and nondiscriminatory in order to strike the appropriate balance between ratepayers and investors.¹³⁹

Widely considered the strongest of the early public utility statutes, the Wisconsin law was drafted by John Commons.¹⁴⁰ Key features included mandatory universal service, protected local franchises, delegated powers of eminent domain, a cost-based “used and useful” standard for valuing assets as part of rate base, a uniform system of accounting, commission powers of investigation and adjudication, and, most importantly, a requirement that utility rates be “reasonable and just.”¹⁴¹ The overall goal was to fix rates at a level that would prevent economic coercion and balance the needs of investors and ratepayers. As the Wisconsin Supreme Court put it:

It is the duty of the Commission to prevent unreasonable exactions by the utility on the one hand, and also to protect the rights of investors from confiscation by imposition of rates which are too low on the other. The rate should be in the language of the statute ‘just and reasonable.’ In other words, not so low as to approach the line of confiscation nor so high as to be unjust and oppressive.¹⁴²

138. See, e.g., FINLA G. CRAWFORD ET AL., *ELECTRICAL UTILITIES: THE CRISIS IN PUBLIC CONTROL* 35 (William E. Mosher ed., 1929) (“When it was inaugurated, commission regulation was hailed as the introduction of ‘scientific’ methods and as the beginning of an era of control which would be definite, precise and eventually almost automatic.”).

139. See, e.g., Eugene A. Gilmore, *The Wisconsin Public Utilities Act*, 19 GREEN BAG 517, 517–18 (1907) (“The object of the [Wisconsin Public Utilities Act] is to secure adequate service from all public utilities under conditions which are fair and reasonable, not only to the public, but also to the corporations concerned . . .”).

140. Commons and others viewed public utility as one of the core concerns of institutional economics. See, e.g., COMMONS, *supra* note 12, at 327–29 (discussing the broad concept of public utility, its relation to “the public,” and its application to particular types of businesses); John R. Commons, *Institutional Economics*, 26 AM. ECON. REV. 237, 242 (1936) (“[I]nstitutional economics is the field of the public interest in private ownership . . .”). For an earlier statement on institutional economics and its attention to problems of social control in modern industrial society, see Walton H. Hamilton, *The Institutional Approach to Economic Theory*, 9 AM. ECON. REV. 309, 312–14 (1919). See also Malcolm Rutherford, *Understanding Institutional Economics: 1918–1929*, 22 J. HIST. ECON. THOUGHT 277, 299 (2000) (“Public utilities, including issues relating to the valuation of utility property and the proper basis for rate regulation, were major areas of institutionalist research.”).

141. Utility Charges to be Reasonable and Just, 1907 Wis. Sess. Laws 449 (“The charge made by any public utility . . . shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared unlawful.”); see also Commons, *supra* note 135, at 222–24 (discussing key features of the Wisconsin law); George B. Hudnall, *The Public Service Commission Law of Wisconsin*, 4 PROC. AM. POL. SCI. ASS’N. 316 (1907) (elaborating on key features of the Wisconsin law). On the importance of a uniform system of accounts as a basis for effective regulation in the Wisconsin law, see CHARLES MCCARTHY, *THE WISCONSIN IDEA* 192 (1912) (“We cannot attempt to regulate railroads or great public utilities unless our public service commission is in itself so organized that it has a thorough understanding of the intricate systems of cost accounting and efficiency used by these great economic units.”); see also Jay H. Price, Jr. et al., *Accounting Uniformity in the Regulated Industries*, 30 L. & CONTEMP. PROBS. 824, 830–36 (1965) (discussing the history of efforts to establish a uniform system of accounts as a basis for public utility regulation).

142. *Waukesha Gas & Elec. Co. v. R.R. Comm’n of Wis.*, 194 N.W. 846, 849 (Wis. 1923).

As exemplified by the Wisconsin law, these state public utility laws thus gave the notion of just price a new, more secure legal foundation—one that allowed it to reach deep into private enterprise and, by extension, the larger economy.

The new federal public utility statutes of the 1930s—most notably Part II of the Federal Power Act enacted in 1935 and the Natural Gas Act of 1938—used similar language, charging the Federal Power Commission (FPC) with responsibility to ensure that rates for wholesale sales and transmission in interstate commerce would be “just and reasonable.”¹⁴³ These statutes were intended to complement state regulation and to fill the gaps that were emerging as interstate transactions grew. Like its state counterparts, the FPC focused on setting cost-based rates and policing against discriminatory behavior in accordance with the just and reasonable standard.

Not surprisingly, these statutory developments and the substantial growth of public utility regulation that ensued during the first half of the twentieth century brought forth a massive outpouring of commentary by economists and lawyers on public utility law and ratemaking.¹⁴⁴ Prominent theorists of public utility and the “social control of business” made recourse to notions of just price in their efforts to provide historical grounding and justification for these emerging forms of economic regulation.¹⁴⁵ The standard account held that the basic commitment to fairness and regulation in the public interest that provided the normative impulse behind public utility regulation derived from medieval notions of just price.

To take one example, Martin Glaeser, a student and colleague of John Commons and the author of several leading statements on public utility regulation, noted in his 1927 treatise that “[a]ll attempts to regulate economic life owed much to the prevalence of an economic idea which may be traced to the Church Fathers, namely, the doctrine of ‘just price.’”¹⁴⁶ According to Glaeser, St. Thomas Aquinas and the “Schoolmen” considered the just price to be that

143. See Public Utility Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (giving the FPC jurisdiction over wholesale sales of electricity and transmission in interstate commerce); Natural Gas Act of 1938, Pub. L. No. 75-688, 52 Stat. 821 (giving the FPC jurisdiction over wholesale sales of natural gas and transportation in interstate commerce); see also *Fed. Power Comm'n v. Hope Nat. Gas*, 320 U.S. 591, 603 (1944) (“The rate-making process under the [Natural Gas] Act, i.e., the fixing of ‘just and reasonable’ rates, involves a balancing of the investor and the consumer interests.”).

144. See, e.g., Novak, *supra* note 8, at 168 (“Millions of pages and barrels of ink would be spent debating such extraordinarily complex things as the best means of calculating a rate of return, the nature of a ‘reasonable’ versus an ‘unreasonable’ rate, and the comparative interests of corporations, shareholders, and the public at large.”).

145. On more general invocations of just price as a basis for the “social control of business,” see JOHN MAURICE CLARK, *SOCIAL CONTROL OF BUSINESS* 23-25 (1926), which discusses the Medieval conception of “just price” as part of the historical development of social control of economic activity. See also EMERY TROXEL, *ECONOMICS OF PUBLIC UTILITIES* 4 (1947) (“The ‘just’ prices of medieval times are prior examples of social controls of business. Like the reasonable prices of public utility service, the just prices were ethically controlled prices; they were measures of what a seller ought to get rather than what the market allowed him to get.”); FRANKFURTER & HART, *supra* note 128, at 1 (“The English common law, perhaps continuing familiar church doctrine regarding the just price, gave ample recognition to the power of the state generally to control prices in the public interest.”).

146. MARTIN G. GLAESER, *OUTLINES OF PUBLIC UTILITY ECONOMICS* 157 (1927).

“price which will repay the expenses of production.”¹⁴⁷ This doctrine of “just price” was, in Glaeser’s view, the basic “ethical element” at work in modern day attempts to regulate prices—the “main stem upon which other institutional developments [in public utility regulation] were grafted.”¹⁴⁸

For Glaeser and others, the core of the just price doctrine was prevention of coercion in economic exchange, particularly in the case of necessities.¹⁴⁹ Public utility, with its basic commitment to just and reasonable rates, was thus first and foremost about ensuring that utilities would not be able to raise prices and harm consumers. This focus on protecting consumers from economic harm as a result of unequal exchange was at the heart of what Rexford Tugwell referred to as the “economic basis of public interest.”¹⁵⁰ As Tugwell argued, many of the early legal theorists writing on public utility and business regulation—Edwin Adler, John Cheadle, and Bruce Wyman among others—had been thrown off track by *Munn*’s categorical distinction between “public” and “private” businesses.¹⁵¹ It was not the type of business that mattered, Tugwell asserted, but the broader economic conditions in the market and the possibility that the business in question could exact unfair gains from consumers.¹⁵² When markets could not be trusted to ensure that prices were fair, regulation was needed.¹⁵³

Leading institutional economists, Progressive lawyers, and legal realists shared this view and several of them put economic coercion and ideas of just

147. *Id.* at 158.

148. MARTIN GLAESER, PUBLIC UTILITIES IN AMERICAN CAPITALISM 197 (1957). Glaeser’s interpretation has proved to be particularly influential on later views. *See, e.g.*, CHARLES F. PHILLIPS, JR., THE REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE 89-90 (3d ed. 1993) (citing Glaeser’s discussion of “just price” as one of the antecedents of public utility regulation).

149. *See* GLAESER, *supra* note 148, at 196 (“[T]he ‘just price’ doctrine drew attention to the coercion which may reside in economic circumstances, such as food famine where a buyer is made willing by his economic necessities. Hence, in order to draw the sting of coercion, the early Church Fathers, following St. Augustine, considered only that trading to be legitimate in which the trader paid a ‘just price’ to the producer, and in selling, added only so much to the price as was customarily sufficient for his economic support. There was to be no unjust enrichment.”).

150. TUGWELL, *supra* note 8.

151. *Id.* at 63-79 (reviewing various legal theories of public interest and public utility regulation).

152. *Id.* at 81 (“We must forget business organization; let it be what it will; leave that to the anti-trust acts which are based on a different principle entirely—and keep a single mind on the consumer to see whether or not he is harmed in his dealings with the business in the special economic sense in which harm is meant here. In this way, we can hope to arrive at a satisfactory interpretation of public interest.”).

153. *Id.* at 98 (“[C]ourts will permit the regulation of prices and services of the necessities of life wherever it appears that prices are not being fixed by the higgling of the market, but rather in the councils of the sellers.”). In short, Tugwell’s economic basis of the public interest could be seen as a modern version of just price, and it is no surprise, in this respect, that Tugwell made recourse to medieval economic practices of price fixing in accordance with the doctrine of just price, citing many of the same authorities that Glaeser cites in his 1927 treatise on public utility. *See id.* at 81-87. Although Novak emphasizes the importance of Tugwell’s conception of public interest in his recent work on the origins of the public utility idea, recognizing Tugwell’s embrace of consumer disadvantage and public necessity as bases for regulation, he does not discuss in any detail the overarching concern with fair pricing and its connections to older understandings of just price that appear to be motivating much of Tugwell’s understanding of the economic basis of the public interest. *See* Novak, *supra* note 8, at 158-59.

price at the center of their more theoretical inquiries. John Commons's notion of reasonable value, for example, explicitly evoked a commitment to older notions of just price.¹⁵⁴ For Commons, disparity in bargaining power meant that one could not assume that the prices that emerged out of market transactions reflected the "real value" of what was being exchanged.¹⁵⁵ His theory of reasonable value thus sought to reflect what would have been the price in the absence of such disparity.¹⁵⁶ But under modern economic conditions, the possibility of economic coercion, understood as the power "to withhold from others what they need," was pervasive—a fact that the Supreme Court first recognized in *Munn*.¹⁵⁷ As one of the most important experiments of regulation in the public interest, public utility thus sought to realize the goals of fair exchange and reasonable value by imposing "new duties of performance, avoidance, [and] forbearance" on the owners of the business so as to serve "the interests of those who are deemed 'the public.'"¹⁵⁸

Like Commons, Robert Lee Hale had a deep and abiding concern with coercion in economic relationships and gave particular attention to prices. As Hale pointed out, "prices and price relationships are decisive factors in economic life."¹⁵⁹ "Any power on the part of public or private groups to control prices," he went on, was "a power to control the livelihood of many others."¹⁶⁰ In an

154. Like much of his writing, Commons's discussion of reasonable value is not easy to follow. It was part of his broader theory of social valuation—grounded in notions of fairness and justice, but also of social order. Commons rejected the separation of ethics and economics, arguing for an approach that saw individuals not as "atoms of a population, but citizens of a commonwealth kept together by inducements and sanctions of scarcity." See COMMONS, *supra* note 140, at 226; see also *id.* at 225 ("One [theory of the origin of ethics] was the individualistic theory of the maximum of pleasure in a world of abundance, where the individual could not injure others by taking all he wanted. The other was a social theory of conflict of interests in a world of scarcity, where the individual may injure others if he takes all he wants. On the foundation of the latter theory ethics is a historical process developing out of the decisions of economic disputes, and there is no dualism of ethics and economics.").

155. *Id.* at 225.

156. For Commons, reasonable value should try as much as possible to accord with what he referred to as real value as opposed to the nominal values that emerge out of market transactions. And here, he makes a direct reference to Aquinas and the notion of just price:

Do we mean by real value that which is fair and reasonable as between all parties because there is no coercion or misrepresentation? If so, then nominal value is the actual price but real value is what ought to have been the price. This was the answer of the theological school whose leader was Thomas Aquinas, and it is the answer of the modern institutionalists.

Id. at 260; see also Ynge Ramstad, *John R. Commons's Reasonable Value and the Problem of Just Price*, 35 J. ECON. ISSUES 253, 2454 (2001) (arguing that Commons's theory of reasonable value "can be understood as resolving the long-neglected issue that originally stimulated inquiry into market values—the quest for principles ensuring just prices . . . [and] that at an abstract level, Reasonable Value itself is nothing other than a coherent and pragmatic, albeit secularized, solution to the problem of just price"); LANGHOLM, *supra* note 12, at 182-92 (discussing Commons's notion of reasonable value and economic coercion and their relationship to earlier understandings of just price); Kenneth H. Parsons, *John R. Commons Point of View*, 18 J. LAND & PUB. UTIL. ECON. 245, 258-60 (1942) (discussing Commons's theory of reasonable value).

157. *Id.* at 52.

158. See COMMONS, *supra* note 12, at 327.

159. Robert Lee Hale, *The Constitution and the Price System: Some Reflections on Nebbia v. New York*, 34 COLUM. L. REV. 401, 401 (1934).

160. *Id.* at 402.

economy structured by coercion, market prices, according to Hale, “result from and register the mutual pressures exerted by buyers and sellers.”¹⁶¹ “The amount of pressure which each can exert,” he continued, “is very unevenly distributed, with the result that some are economically strong, others economically weak.”¹⁶² Hale, of course, was also an expert on public utility regulation and, as Barbara Fried points out, he viewed rate-making as a test case for a broader project aimed at regulating the terms of economic exchange so as to ensure that no particular factor of production would receive an unearned surplus or rent at the expense of the others or of society as a whole.¹⁶³

But Hale’s effort to develop and apply Fabian rent theory to market-based exchange was more radical than that of Commons, Tugwell, and others.¹⁶⁴ While his basic concern with fairness in economic exchange had obvious similarities to the idea of just price (a term that Hale does not appear to have used in his published writings), Hale’s understanding of economic coercion went well beyond any bilateral conception of commutative justice.¹⁶⁵ In effect, as soon as one accepted Hale’s starting position: that pre-existing property rules and the distribution of entitlements created a baseline of coercion in any economic relationship, the very possibility of commutative justice was subsumed by distributive justice. With his rent theory of exchange, Hale thus endeavored to put the commitment to fairness in economic exchange that was at the heart of commutative justice into the service of a larger agenda aimed at ensuring that any rents resulting from economic transactions would be redistributed back to society as a whole.¹⁶⁶

Although these efforts to develop a working theory of economic coercion ultimately failed to get traction in the face of the growing formalization of neoclassical economics during the middle decades of the twentieth century, their influence on the broad notion of the public interest that underwrote much of

161. ROBERT LEE HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* 131 (1952).

162. *Id.*

163. See FRIED, *supra* note 112, chs. 4-5 (discussing Hale’s development of rent theory and its application in the context of rate regulation).

164. See, e.g., Robert Lee Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 625-26 (1943) (“The fact that transactions do not deviate from normal market values does not necessarily indicate that there is a fair relation between the respective bargaining powers of the parties. The market value of a property or a service is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others. To hold unequal bargaining power economically justified, merely because each party obtains the market value of what he sells, no more and no less, is to beg the question.”); see also FRIED, *supra* note 112.

165. *But see* FRIED, *supra* note 112, at 69 (discussing Hale’s “rent-theory version of distributive justice” and his “intuition that the problem in many so-called ‘coercion’ cases was at root a problem of just price”).

166. *Id.* at 148-49 (“[I]f there was any moral ground on which to differentiate between market exchanges, all of which [Hale] had shown to be structurally coercive, it was in the degree to which a party’s power to coerce terms favorable to itself enabled it to extract a reward in excess of sacrifice—that is, to collect economic rents. The greater the excess, the more readily a legislature should intervene to alter the terms of exchange through price controls, taxation, and the like.”).

economic regulation during the early twentieth century and, specifically, on the practice of public utility regulation persisted. At the heart of their understanding of public interest and the public utility idea, moreover, was, a working notion of just price that was flexible and pragmatic. The overriding concern with preventing coercion as a result of the particular economic conditions that prevailed in these industries was apparent in all of the early theories of public utility. When put into practice through rate regulation, the effort could be viewed as an ambitious experiment aimed at realizing the goals of commutative justice in the context of the complex industrial order taking shape in twentieth century America.¹⁶⁷

B. Fair Value

Putting these commitments to just price and the public interest into practice, however, proved more difficult than expected, and utility ratemaking would be subject to a great deal of confusion and controversy for much of the first half of the twentieth century in no small part because of efforts to translate received notions of just price into a working doctrine of “fair value” for utility assets. Twenty-one years after *Munn*, the Court decided *Smyth v. Ames*, a case that involved the question of how to properly value a railroad’s investment in its physical assets (its rate base) without running afoul of constitutional protections for private property.¹⁶⁸ The resulting rule—that the value of the rate base should be based on the “fair value” of the assets—brought the notion of just price into the world of property law and imbued it with powerful constitutional overtones.¹⁶⁹ It also created massive confusion for much of the next half century.

After *Smyth v. Ames*, the valuation question dominated the field of public utility law.¹⁷⁰ Courts and commissions, for their part, struggled mightily to give

167. See Hamilton, *supra* note 106, at 1111 (“The control of price, like authority in other industrial affairs, becomes a question of general regulation. It is to be approved or condemned, as are kindred legislative acts, by reference to the police power. The legislation may be novel, for ways of getting things done must change with the times. But the constitutional test is an established one; and the end of it all, the safeguarding of the public against unreasonable prices, goes back to ancient law.”); see also William Boyd, *Public Utility and the Low Carbon Future*, 61 UCLA L. REV. 1614, 1645-51 (2014) (discussing experimentalist understanding of public utility by Progressives, institutional economists, and legal realists).

168. *Smyth v. Ames*, 169 U.S. 466, 546-47 (1898) (holding that “the basis of all calculations as to the reasonableness of the rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public”).

169. *Id.*

170. According to James Bonbright, R. H. Whitten’s 1912 treatise, *Valuation of Public Service Corporations*, represented the first major effort to address valuation “[a]n elaborate and organized field of research.” James C. Bonbright, *Progress and Poverty in Current Literature on Valuation*, 40 Q.J. ECON. 295, 295 (1926). Any cursory review of the economic literature, the law reviews, and legal treatises reveals a large and growing amount of attention directed at the valuation question throughout the first half of the twentieth century. Bonbright’s own two-volume treatise, *Valuation of Property*, published in 1937, represented one of the most detailed and systematic efforts to put the issue

effect to the fair value rule, while lawyers, economists, and engineers engaged in spirited debate over the proper approach to the valuation of utility assets, their depreciation over time, how to calculate financing charges, the proper treatment of land values, taxes, and all manner of operating expenses. Much of the confusion, it seems, stemmed from the misconceived notion that a utility's assets had a "fair value" that could be discovered or determined through the application of particular valuation techniques.¹⁷¹ Although *Smyth v. Ames* listed a range of factors to consider in such an exercise, later decisions and a large amount of commentary pushed for an approach that valued the utility's assets at their present market value.¹⁷² Utility property, in this view, was nothing more than the exchange value of the assets, and any effort to fix the utility's rates had to take account of such value in setting such rates.¹⁷³

But as various critics pointed out, and as a moment's reflection reveals, such a standard was highly unstable, condemning the entire exercise to ongoing uncertainty.¹⁷⁴ Not only did the interpretation of "fair value" as present market

of public utility valuation into its larger context and to clear up some of the confusion created by the fair value rule.

171. See JAMES C. BONBRIGHT, VALUATION OF PROPERTY 1179 (1937) ("But in certain legal situations the valuation is meaningless unless it is thought of as a deliberate attempt by the tribunal to *fix* values rather than to *find* them. This is notably true in public utility rate making Hence a rate-making valuation, properly construed, involves a decision as to what the property ought to be allowed to be worth, not as to what the property is already in fact worth. In practice the courts have accepted many of the implications of this statement. But they have not suited the words to the action, since the revision of the words would destroy the specious but convenient analogy between the doctrine of confiscatory rates and the constitutional provisions against the taking of property without just compensation.").

172. The most sympathetic reading of *Smyth v. Ames* was that it was a pragmatic response to the general lack of information on railroad investments. Without such information, original cost could not serve as the basis for determining the value of the rate base. Courts and commissions thus turned to a range of factors, including most prominently present market value or reproduction cost. But even if one grants such a sympathetic reading, by the early twentieth century, the shoddy accounting practices of the past had been replaced with new, increasingly uniform systems of accounts and much better information on the costs associated with original investments. See BONBRIGHT, *supra* note 171, at 1097 (discussing "absence of reliable railroad accounts" as a challenge to use of prudent investment standard); see also *id.* (observing that "the persistent refusal of the Court to draw any sharp distinction between 'fair value' as a standard of proper business conduct, and 'present value' in a commercial sense, is one of the great tragedies of modern American jurisprudence").

173. See, e.g., Minn. Rate Cases, 230 U.S. 352, 454 (1913) ("As the company may not be protected in its actual investment, if the value of its property be plainly less, so the making of a just return for the use of the property involves the recognition of its fair value if it be more than its cost. The property is held in private ownership and it is that property, and not the original cost of it, which the owner may not be deprived without due process of law.").

174. The severe criticisms leveled by judges, lawyers, and others against the fair value rule are well rehearsed. Writing in dissent in a 1935 case regarding telephone rates, Justice Stone described the effort as "the most speculative undertaking imposed upon [courts] in the entire history of English jurisprudence." *West v. Chesapeake & Potomac Tel. Co.*, 295 U.S. 662, 689 (1935) (Stone, J., dissenting). The Wisconsin Supreme Court offered a similar lament in a 1923 case on rate base valuation under the Wisconsin public utilities law. See *Waukesha Gas & Elec. Co. v. R.R. Comm'n*, 194 N.W. 846, 850 (1923) (describing the effort to determine "fair value" as "one of the most complex and involved subjects with which courts are called upon to deal"); see also Gerard Henderson, *Railway Valuation and the Courts* (pt. 3), 33 HARV. L. REV. 1031, 1051 (1920) ("The whole doctrine of *Smyth v. Ames* rests upon a gigantic illusion. The fact which for twenty years the court has been vainly trying to find does not exist. 'Fair value' must be shelved among the great juristic myths of history, with the Law of Nature and the Social Contract. As a practical concept, from which practical conclusions can be drawn, it is valueless.").

value tie the whole question of valuation to the constantly shifting fortunes of the larger economy, but the very exercise of setting rates based on the fair value of the assets was hopelessly circular given that the value of the utility's assets depended on the rates that it was allowed to charge.¹⁷⁵ In effect, the rule created what Justice Frankfurter referred to as “a maze of cobwebbery”—the practical import of which was to bring courts deep into the process of ratemaking, forcing them to police the constitutionality of particular choices made regarding the valuation of utility assets.¹⁷⁶ As one economist writing in 1930 put it:

Unfortunately the fundamental problem of regulation, at least as far as business aspects are concerned, has been obscured in the entanglements that have arisen around the concept of fair value. We have been side-tracked so beautifully by medieval concepts of a just price and by juristic concepts of property and property values . . . that we have paid little attention to the finances and financial requirements of public service corporations, and to the income which they must offer their investors and prospective investors in order to maintain their credit position in competition with other enterprises.¹⁷⁷

Another economist, writing at midcentury, claimed that the question of “just price” as manifest in the fair value rule was “the root of all evils in public utility regulation.”¹⁷⁸ *Smyth v. Ames*, he argued, “settled nothing and bedeviled court and commission, public and industry, for almost half a century It became a

175. Robert Lee Hale, *The “Physical Value” Fallacy in Rate Cases*, 30 YALE L.J. 710, 716 (1921) (“[T]here are authorities who admit that the value depends upon the earnings, but insist that the vicious circle involved (in basing the earnings on the value) can be escaped merely by the simple expedient of measuring the value by replacement cost or some other ‘evidence’! Like ostriches, they imagine that by blinking the fact they can escape its consequences.”); see also *Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm’n*, 262 U.S. 276, 292 (1923) (Brandeis, J., dissenting) (“The rule of *Smyth v. Ames* sets the laborious and baffling task of finding the present value of the utility. It is impossible to find an exchange value for a utility, since utilities, unlike merchandise or land, are not commonly bought and sold in the market. Nor can the present value of the utility be determined by capitalizing its net earnings, since the earnings are determined, in large measure, by the rate which the company will be permitted to charge, and thus, the vicious circle would be encountered.”).

176. FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* 104 (1930); see also FRANKFURTER & HART, *supra* note 128, at 15 (“Beyond question successful regulation cannot be administered upon a permanently unstable and incalculable rate base.”); id. at 10-11 (“No judicial pronouncements upon matters fundamentally economic run so counter to the views of economists as do the pre-depression utterances of the Supreme Court upon present value.”).

177. D.F. Pegrum, *Legal Versus Economic Principles in Utility Valuation*, 6 J. LAND & PUB. UTIL. ECON. 127, 133 (1930).

178. See ELI WINSTON CLEMENS, *ECONOMICS AND PUBLIC UTILITIES* 140 (1950); see also E.A.J. Johnson, *Just Price in an Unjust World*, 48 INT’L J. ETHICS 165, 173 (1938) (“After seventy-five years or more of humorous references to ‘just price,’ the nineteenth-century legislators and judges began to experiment with a ‘fair return on a fair valuation.’ From the great number of books and articles written about a ‘fair return’ I can find out everything except the meaning of this attractive expression. Reading between the lines, however, I divine that a fair return is intended to approximate what would have been obtained if all the benevolent forces of an eighteenth century natural order had been realized. It is apparently an attempt to achieve by law the never beheld ‘normal competitive price’ of classical and neoclassical economics.”).

means by which economic values were created by judicial fiat and the Constitution was tied to the price level.”¹⁷⁹

But *Smyth v. Ames* could hardly be read as a faithful application of just price. If anything, the fair value rule seemed to violate basic precepts of commutative justice given the constantly shifting nature of present market value and the havoc that this created for utility rates. If strictly applied, rates would fluctuate (sometimes dramatically) depending on what was happening with the general economy, making it very difficult to police against unfair gains.¹⁸⁰

In the wake of “the price revolution” that accompanied World War I and the massive price swings that occurred in the 1920s and 1930s, the idea that fair value should be tied to market value looked increasingly untenable.¹⁸¹ Much more consistent with the older doctrine of just price, and much more defensible from a practical standpoint, was the approach advocated by Brandeis, Hale, and others to use prudent investment as the basis for determining the value of the utility’s rate base.¹⁸² By focusing on the actual amount of capital invested in the rate base and looking to conditions in the capital markets to determine the rate of return a utility needed to continue as a going concern, rates could be tied to cost-of-service in a way that ensured the proper balance between ratepayers and investors.

Seen in this way, a public utility was not simply a mass of property that could be exchanged at fair market value and, as a result, deserving of constitutional protection against “confiscatory” reductions in such value. Rather, a public utility was an investment of capital made on behalf of the public—a going concern that acted as a public servant by providing essential services

179. CLEMENS, *supra* note 178, at 140.

180. See, e.g., Hale, *supra* note 159, at 425 (“While the doctrine of the *Nebbia* case empowers a state to fix prices as a remedy for extortion, the ‘fair value’ doctrine, if applied consistently with the premises on which it is based, inhibits the exercise of that power the moment it becomes effective.”).

181. See, e.g., Martin Glaeser, *The Valuation Doctrine at the Crossroads*, 3 J. LAND & PUB. UTIL. ECON. 241, 241 (1927) (noting that the conflicts in how to assess fair value came to a head in the wake of the “price revolution” that accompanied World War I). The depression put further strain on efforts to translate fair value into a workable rule for valuation. See, e.g., David E. Lilienthal, *Regulation of Public Utilities During the Depression*, 46 HARV. L. REV. 745, 745 (1933) (“Every important issue in the field of public utility regulation, even ‘settled’ doctrine of the Supreme Court, is being tested and reexamined in the light of these epochal economic movements.”).

182. See, e.g., *Mo. ex rel. Sw. Bell Tel. Co. v. Pub. Serv. Comm’n*, 262 U.S. 276, 308-10 (1923) (Brandeis, J., concurring) (discussing advantages of prudent investment as standard for valuing rate base); Hale, *supra* note 175, at 720, 731 (arguing for the abandonment of the “replacement cost” version of the fair value rule in favor of an “actual cost” rule tied to the reasonable investment made by the utility); see also FRIED, *supra* note 112, at 186-89 (detailing the efforts of and correspondence between Hale, Brandeis, Stone, Bonbright and others to demonstrate the fallacies of the fair value rule and to move the Court toward a new standard based on prudent investment). As Hale elaborated after the Court had finally abandoned the fair value rule: “The basic assumption of the prudent investment theory is that a company should be permitted to obtain from its customers enough money to pay the costs of supplying the service.” See Robert L. Hale, *Utility Regulation in the Light of the Hope Natural Gas Case*, 44 COLUM. L. REV. 488, 509-10 (1944).

(economic necessities) at a reasonable price.¹⁸³ As Justice Brandeis put it in a 1923 concurrence that took direct aim at *Smyth v. Ames*:

The thing devoted by an investor to the public use is not specific property, tangible or intangible, but capital embarked in the enterprise. Upon the capital so invested the Federal Constitution guarantees to the utility the opportunity to earn a fair return The Constitution does not guarantee to the utility the opportunity to earn a return on the value of all items of property used by the utility, or any of them.¹⁸⁴

The utility's owners were, of course, free to withdraw their property from public use and sell it in the market.¹⁸⁵ But as long as the property was committed to the public utility, these assets took on a different character:

The investor agrees, by embarking capital in a utility, that his charges to the public shall be reasonable. His company is the substitute for the State in the performance of the public service; thus becoming a public servant. The compensation which the Constitution guarantees an opportunity to earn is the reasonable cost of conducting the business.¹⁸⁶

All that the owners were entitled to was a fair return on their capital investment. The task of rate-making, therefore, was not to discover the intrinsic "fair value" of the utility's assets as a basis for setting rates, but to decide the rate that would provide for a proper balance between ratepayers and investors.¹⁸⁷ Just price, in this context, was not an objective value or intrinsic quality waiting to be discovered. Rather, it was a price that had to be made and re-made—either in the market or through the exercise of judgment by the appropriate authorities.

C. End Result

It would take the better part of fifty years for the Supreme Court to clean up the mess it had made in *Smyth v. Ames*. After several false starts, the Court finally succeeded in abandoning the fair value rule in the 1944 *Hope Natural Gas* case, extricating the courts from reviewing the methodology of ratemaking and relegating them to the more appropriate role of policing the constitutional

183. For an early statement along these lines, see Edwin C. Goddard, *Public Utility Valuation*, 15 MICH. L. REV. 205, 222 (1917) ("A public utility is something the public needs. It may build the utility as a public enterprise or leave it to private capital. If it pursue the latter course it practically says to capital, construct and manage the utility reasonably and the public will make every effort to insure a fair return on the investment. Fancy prices and fancy profits alike are not allowed, but steady, reliable promise should attract capital. The returns should be primarily what is fair, first and foremost, to the public, and second to the public service, in every case to both, if possible.").

184. 262 U.S. 276, 290 (Brandeis, J., concurring).

185. *Id.* at 290.

186. *Id.* at 290-91.

187. See BONBRIGHT, *supra* note 171, at 1097.

boundaries of the end result.¹⁸⁸ Writing for the majority, Justice Douglas concluded that

The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. It does, however, indicate that 'fair value' is the end of the process of rate-making not the starting point The heart of the matter is that rates cannot be made to depend upon 'fair value' when the value of the going enterprise depends on earnings under whatever rates may be anticipated.¹⁸⁹

With *Hope*, the Court had finally “freed regulation from the obligation to perform the costly and meaningless rituals of *Smyth v. Ames*.”¹⁹⁰ Public utility lawyers, economists, and judges rejoiced. James Bonbright, perhaps the most prominent public utility economist of his generation, described the decision as “one of the most important pronouncements in the history of American law.”¹⁹¹

As such, it brought utility rate making into accord with contemporary currents of administrative law. Expert agencies such as the Federal Power Commission were now viewed as having primary responsibility for ensuring that rates satisfied the just and reasonable standard.¹⁹² There was no single, correct methodology—no one right way—of setting rates, and commissions would receive deference in their choice of method. For their part, courts would determine whether the “end result” of the ratemaking exercise, taken in its

188. Fed. Power Comm'n v. Hope Nat. Gas Co., 320 U.S. 591, 602 (1944) (“Under the statutory standard of ‘just and reasonable’ it is the result reached not the method employed which is controlling It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.”). The majority’s reasoning in *Hope* echoed a concurring opinion by Justices Black, Douglass, and Murphy two years earlier. See Fed. Power Comm'n v. Nat. Gas Pipeline Co., 315 U.S. 575, 603 (1942) (Black, Douglas & Murphy, JJ., concurring) (“[T]he value of a going concern in fact depends on earnings under whatever rates may be anticipated. The present fair value rule creates, but offers no solution to, the dilemma that value depends upon the rates fixed and the rates upon value We know, without attempting any valuation, that if earnings are reduced the value will be less. But that does not stay the hand of the legislature or its administrative agency in making rate reductions. As we have said, rate-making is one species of price-fixing. Price-fixing, like other forms of social legislation, may well diminish the value of the property which is regulated. But that is no obstacle to its validity.”).

189. 320 U.S. at 601.

190. Hale, *supra* note 192, at 530; see also *id.* at 496 (“It is to be hoped that the Supreme Court’s tardy but conclusive demonstration of the fair value fallacy will lead commissioners and judges of lower courts to appreciate that much that has been hitherto stated in decisions stemming from *Smyth v. Ames* is irrelevant.”).

191. James C. Bonbright, *Utility Rate Control Reconsidered in the Light of the Hope Natural Gas Case*, 38 AM. ECON. REV. 465, 465 (1948); see also *id.* (“Unless the Court again reverses itself, no longer will it impose upon legislatures or commissions, state and federal, the severe restrictions upon their power to fix rates that it had previously imposed under its doctrine in *Smyth vs. Ames*.”).

192. Justice Douglas, who authored the majority opinion in *Hope*, had already made a strong statement to this effect in his concurring opinion in the earlier Pipeline Case. See *Fed. Power Comm'n*, 315 U.S. at 608 (Black, Douglas & Murphy, JJ., concurring) (“[T]he problem of ratemaking is for the administrative experts not the courts.”).

entirety, satisfied the “just and reasonable standard.”¹⁹³ To be sure, this carried with it a duty to ensure that the resulting rates were not so low as to be confiscatory.¹⁹⁴ But in the vast majority of cases, the courts simply deferred to the commissions, no longer twisting themselves into knots trying to make the methods of valuation at the heart of ratemaking comport with received notions of property and its constitutional protections. As long as rates were within a “zone of reasonableness”—neither too high nor too low—the end result was justified. Just price and the principles of commutative justice had become an exercise in administration.

Over time, a general view took hold that rate regulation should try to set prices at a level that would mimic the prices expected in a competitive market.¹⁹⁵ The proxy used for this counter-factual exercise was cost-of-service. Just and reasonable rates, therefore, were implicitly judged against a baseline of competitive markets and the neoclassical assumption that prices in such markets reflected costs. In a first-best world, the forces of competition would ensure that prices were just and reasonable. But in industries where this was not feasible, due to the presence of natural monopoly characteristics or other barriers, price regulation should strive as much as possible to set rates at levels expected to prevail in a competitive market. Viewed in retrospect, the entire exercise seemed oddly circular: because competitive markets cannot work as intended in these industries, rate regulation is necessary, but in setting rates, every effort should be made to mimic the outcome of a competitive market. In the end, most commissions simply embraced a version of cost-of-service ratemaking that was tied to prudent investments and expenditures as well as a rate of return necessary to continue accessing the capital markets. As long as they struck an appropriate

193. *Hope*, 320 U.S. at 602.

194. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, (1989) (“Today we reaffirm these teachings of *Hope Natural Gas*: ‘[I]t is not theory but the impact of the rate order which counts. 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 result may contain infirmities is not then important.’ This language, of course, does not dispense with all of the constitutional difficulties when a utility raises a claim that the rate which it is permitted to charge is so low as to be confiscatory: whether a particular rate is ‘unjust’ or ‘unreasonable’ will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return. At the margins, these questions have constitutional overtones.” (citing *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944)); *see also* A. Lawrence Kolbe & William B. Tye, *The Duquesne Opinion: How Much “Hope” is There for Investors in Regulated Firms*, 8 YALE J. ON REG. 113 (1991) (discussing *Hope*’s test); Stephen F. Williams, *Fixing the Rate of Return After Duquesne*, 8 YALE J. ON REG. 159 (1991) (discussing the same).

195. In fact, this view had long been apparent but was displaced for decades by debates over the fair value rule. *See, e.g.,* ROBERT H. WHITTEN, VALUATION OF PUBLIC SERVICE CORPORATIONS 422 (1912) (“The aim of public regulation is to accomplish what in other industries is assumed to be accomplished automatically by free competition, that is, to limit the price charged to the normal cost of production Normal cost is ordinarily the determining factor in fixing fair, reasonable, or normal prices in the case of a regulated monopoly.”).

balance between ratepayers and investors, rates were judged to be just and reasonable.¹⁹⁶

Public utility regulation as it evolved over the course of the twentieth century thus reflected a blending of the older ideas of just price with more modern concerns with natural monopoly and the regulatory challenges posed by large, capital-intensive network industries. In the wake of *Hope*, ratemaking came to be viewed as an act of pragmatic adjustment that need not proceed according to any specific method or approach as long as the resulting rates preserved the proper balance between ratepayers and investors.¹⁹⁷ Obviously, the economic conditions and circumstances to which public utility was responding were vastly different from the simple bilateral model of economic exchange that informed the Scholastic understanding of just price. But at its core, public utility rested upon a relationship of reciprocity—a balancing of public utility and disutility—captured in the “just and reasonable” standard and the commitment to ensuring that ratepayers and investors each received the benefits of a fair exchange.¹⁹⁸ To be sure, viewing public utility as a modern incarnation of principles of commutative justice and just price might not shed any light on the practical problems of ratemaking.¹⁹⁹ But such a view did (and does) serve as an

196. See *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1191-92 (D.C. Cir. 1987) (Starr, J., concurring) (“The judiciary is not to micromanage the rate regulation process, just as we are to be restrained in reviewing the other work of administrative agencies. We are not to impose procedures that we think are wise or methodologies that we think strike a better balance than that struck by the regulators. Our limited but vital role is to ensure that the end result of a rate order reasonably balances investor and ratepayer interests.”).

197. See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) (“It follows that rate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, to make the pragmatic adjustments which may be called for by particular circumstances.”). In important respects, this reflected the earlier, pragmatic approach to ratemaking urged by various Progressive era lawyers and legal realists. See, e.g., Henderson, *supra* note 174, at 1051 (“The relation between the public utility and the community cannot be expressed in terms of a simple, quantitatively ascertainable fact, for the relation involves numerous and complex factors which depend on compromise and practical adjustment rather than on deductive logic.”); Walton H. Hamilton, *Price—By Way of Litigation*, 38 COLUM. L. REV. 1008, 1029 (1938) (“The rate-structure of an [*sic*] utility is an aspect of public policy; it is an expression of what the community, acting through the legislature, commission, and court, expects it to do.”).

198. See COMMONS, *supra* note 12, at 327 (“What is signified by this recent meaning of ‘public utility’ springs rather from the idea that, to a certain extent, the business is a peculiar public disutility and is therefore sorted out for special restraint by imposing on its owners new duties of performance, avoidance, forbearance, in the interest of those who are deemed ‘the public’. Every private business or job has, in fact, the qualities of both public utility and public disutility, depending on the current economic and human valuations. And it is in restraining the behavior believed to produce public disutility, by imposing new duties, that the opposite behavior of other persons believed to produce public utility is protected and liberated.”).

199. See, e.g., JAMES C. BONBRIGHT ET AL., *PRINCIPLES OF PUBLIC UTILITY RATES* 180-81 (2d ed. 1988) (tracing notions of fairness and balance between investors and ratepayers back to medieval conceptions of “just price” as an ethical rather than an economic concept). Bonbright goes on to discuss the “babel of confusion as to what constitutes fairness” in setting rates and notes that “the modern tendency to view fairness criteria of reasonable rates as secondary criteria, to be accepted primarily as constraints on the application of the so-called economic criteria, is a mark of progress in the development of ratemaking policies.” *Id.* at 182.

important reminder of the broader normative commitments that have animated public utility from its inception.

III. Market Discipline

Notwithstanding the importance of *Hope* in moving courts and commissions to a more coherent approach to rate regulation, the actual record of cost-of-service ratemaking over the course of the twentieth century left much to be desired. From the beginning, judges, elected officials, utility regulators, and commentators had complained about various problems with the basic approach.²⁰⁰ Commissions were often poorly staffed and badly outmatched by the utilities, a recipe in many cases for capture. Utilities, for their part, sometimes had incentives to overinvest in their rate base, with limited appetite for innovation or customer service. Rate cases lasted far too long, overwhelming commissions and reviewing courts with technical details of mind-numbing complexity. The overall result was waste, inefficiency, and poor performance.²⁰¹

Starting in the 1960s, these concerns gained renewed vigor and sophistication at the hands of a new generation of economists and lawyers, many of whom were associated with the University of Chicago.²⁰² Combining a general distrust of regulation with the tools of neoclassical price theory, these critics challenged the very foundations of public utility regulation. For starters, they argued that the theory of natural monopoly as an ongoing rationale for regulation was a mistake given that changing economic and technical conditions made the category itself inherently unstable.²⁰³ Even for those firms operating in industries with natural monopoly characteristics, moreover, it was not clear that they would be able to capture monopoly rents on a sustained basis.²⁰⁴ More

200. See Boyd, *supra* note 167, at 1649, 1654-56 (discussing these early critiques).

201. See Paul L. Joskow & Richard Schmalensee, *Incentive Regulation for Electric Utilities*, 4 YALE J. ON REG. 1, 12-13 (1986).

202. Boyd, *supra* note 167, at 1651-58 (discussing law and economics critique of rate regulation); see also David Spence, *Can Law Manage Competitive Energy Markets?*, 93 CORNELL L. REV. 765, 771-72 (2008) (discussing economic critiques of rate regulation as a basis for restructuring).

203. See, e.g., Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55, 59 (1968) (“The natural monopoly theory provides no logical basis for monopoly prices. The theory is illogical. Moreover, for the general case of public utility industries, there seems no clear evidence that the cost of colluding is significantly lower than it is for industries for which unregulated market competition seems to work. To the extent that utility regulation is based on the fear of monopoly price, *merely because one firm will serve each market*, it is not based on any deducible economic theorem.”); Richard A. Posner, *Natural Monopoly and its Regulation*, 21 STAN. L. REV. 548, 635 (1969) (“Our analysis of proposals for reforming public utility regulation confirms our preliminary conclusion that its contribution to social and economic welfare is very possibly negative. The benefits of regulation are dubious, not only because the evils of natural monopoly are exaggerated but also because the effectiveness of regulation in controlling them is highly questionable.”).

204. See Posner, *supra* note 203, at 636 (“But natural monopoly conditions are quite likely to be transient. . . . To embrace regulation because an industry is today a natural monopoly and seems likely to remain so is to gamble dangerously with the future. To impose regulation on the basis of a prophecy that the industry will remain monopolistic forever may be to make the prophecy self-fulfilling.”); *id.* at 643 (“In the long run, there may be few natural monopolies, perhaps none, such is the pace of change in consumer taste and in technology in a dynamic economy.”); see also Rob Van Horn,

fundamentally, these critics mounted a direct attack on the very idea of public interest as a rationale for regulation, offering in its place a capture model inspired by new work in public choice theory. According to economists such as George Stigler, regulated entities actively sought regulation and used it for their benefit.²⁰⁵ Public utility regulation was thus a product of rent-seeking behavior on the part of regulated firms; the idea of a general public interest was tenuous at best.²⁰⁶ Compounding the problem of captured regulators, economic models and subsequent empirical research also indicated that firms operating under regulatory constraints had an incentive to overinvest in their rate base, thus raising costs and destroying consumer welfare (the so-called Averch-Johnson effect).²⁰⁷

The general conclusion that emerged from these critiques was straightforward and devastating: regulation did more than harm than good.²⁰⁸ Even in cases of natural monopoly, it was preferable to leave the market alone rather than try to correct for market failure or remedy the abuses of market power with regulation.²⁰⁹ In fact, according to one study of electricity rates, there was no evidence that regulation actually had any demonstrable positive effect in reducing electricity prices when compared to the alternative.²¹⁰ Moreover, the pathologies of rate regulation—as manifest in the Averch-Johnson effect and the inevitability of capture—meant that even if the regulatory enterprise itself was born of noble intentions, it was sure to result in diminished social welfare.²¹¹

Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics, in THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE 217 (Phillip Mirowski & Dieter Plehwe eds., 2009) (discussing Aaron Director's formative role in the "neoliberal reorientation toward monopoly" at Chicago).

205. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971) ("[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."); see also Jim Rossi, *Public Choice, Energy Regulation and Deregulation, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 419, 421-22* (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (discussing the capture theory of regulation advanced by Stigler and others and its applicability to electricity regulation).

206. See Greg A. Jarrell, *The Demand for State Regulation of the Electric Utility Industry*, 21 J.L. & ECON. 269, 271-72 (1978) (criticizing the public interest theory of state public utility regulation and arguing instead that regulation emerged to serve the interests of utilities).

207. See Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052, 1068 (1962) (concluding that firms operating under rate-of-return constraint of price control have an incentive to substitute capital for other factors of production "in an uneconomic fashion that is difficult for the regulatory agency to detect"). Their thesis has since been memorialized as the Averch-Johnson effect.

208. See, e.g., Posner, *supra* note 203, at 625 ("[T]he social gain from public utility and common carrier regulation is quite possibly negative.").

209. Demsetz advocated subjecting monopoly franchises to competitive bidding, with the franchise awarded to the bidder offering to provide service at the lowest price. Demsetz, *supra* note 203, at 58–62. Posner advocated for removal of restrictions on entry and lifting of rate controls combined with a tax on excess profits to mitigate against monopoly rents. Posner, *supra* note 203, at 639–40.

210. See George J. Stigler & Claire Friedland, *What Can Regulators Regulate? The Case of Electricity*, 5 J.L. & ECON. 1, 8 (1962) (concluding that regulation of electric utilities had no detectable effect on the average level of electricity rates).

211. See, e.g., Paul M. Hayashi & John M. Trapani, *Rate of Return Regulation and the Regulated Firm's Choice of Capital-Labor Ratio: Further Empirical Evidence on the Averch-Johnson*

During the 1970s, as the economy groaned under the strains of stagflation and in the midst of an energy crisis brought on by successive oil price shocks, these criticisms of rate regulation gained considerable traction, providing much of the intellectual rationale for the broader agenda of deregulation that would hit full stride in the 1980s. Regulated industries—from trucking and airlines to telephone, natural gas, and electricity—were all viewed as suitable targets for deregulation. For too long government regulation had stymied the forces of competition in these sectors, creating a drag on economic growth. The best way to improve overall consumer welfare was to minimize the role of regulation and allow markets to flourish.²¹²

At a conceptual level, the market was doing an enormous amount of work for these critics, reflecting a wider valorization of markets and competition across multiple domains and the concomitant distrust of government that comprised the main thrust of an emerging neoliberalism.²¹³ Although none of the major criticisms that comprised the neoliberal critique of regulation were especially novel, and while all had their own theoretical and empirical shortcomings, their overall ideological effect was swift and dramatic. Put crudely, government was now seen as the problem, to paraphrase Ronald Reagan. Consumers thus needed protection not from the market, but from captured regulators and the rent-seeking firms that used regulation to avoid competition. And the surest means to protect consumers and enhance social welfare was to leave markets alone and allow the forces of competition to discipline firms and generate prices that would be efficient and fair.

Model, 42 S. ECON. J. 384, 397 (1976) (using a cross-section sample of electric utility firms to provide empirical support for Averch-Johnson effect that firms operating under rate of return regulation will produce with a capital-labor ratio greater than the cost minimizing one); Robert M. Spann, *Rate of Return Regulation and Efficiency in Production: An Empirical Test of the Averch-Johnson Thesis*, 5 BELL J. ECON. & MGMT. SCI. 38, 50 (1974) (reporting results of empirical study of regulated electric utilities confirming Averch-Johnson thesis that firms subject to rate of return regulation will “overcapitalize”). *But see* Paul L. Joskow & Roger C. Noll, *Regulation in Theory and Practice: An Overview*, in STUDIES IN PUBLIC REGULATION 1, 10–14 (Gary Fromm ed., 1981) (criticizing the assumptions of Averch-Johnson model and studies that purport to demonstrate empirical support for the model); JOSKOW & SCHMALENSEE, MARKETS FOR POWER: AN ANALYSIS OF ELECTRIC UTILITY DEREGULATION 86 (1988) (noting the lack of empirical support for the Averch-Johnson effect and observing that during late 1970s and early 1980s rate-of-return regulation was having the opposite effect with utilities “avoiding making socially desirable capital expenditures” because expected rates of return were below their costs of capital).

212. There is a broad literature on the efforts to deregulate and restructure these formerly regulated industries. *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1397-1403 (1998) (explaining move to deregulate substantial portions of common carrier and public utility industries during last quarter of twentieth century as driven in part by consensus regarding the virtues of markets in delivering public utility services and enhancing consumer welfare).

213. *Cf.* DANIEL T. RODGERS, AGE OF FRACTURE 47 (2011) (“By the end of the 1970s, a new idea of the market, cut free from the institutional and sociological relationships constitutive of earlier economic analysis . . . was being called upon to do unprecedented amounts of thinking.”); *see also* ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION 171-75 (2012) (discussing the market advocacy and critique of regulation advanced by Milton Friedman, George Stigler, and other members of the Chicago School).

When translated into a program of actual reform, these critiques led to the more limited conclusion that some components of those industries previously viewed as natural monopolies could be unbundled and subjected to the discipline of the market. Where possible, the thinking went, markets were better than regulation at ensuring service at lowest possible cost and shifting the risk of poor investment decisions from ratepayers to shareholders. By relaxing barriers to entry and lifting price controls, restructuring would allow competition to drive efficiency, innovation, and improved quality of service.

While deregulation (or, more appropriately, restructuring) played out differently in different industries, FERC's efforts in restructuring the natural gas and electricity industries offer particularly illustrative examples of the challenges involved in relying on markets to ensure fair or just prices. Starting with natural gas in the 1980s and moving to electricity in the 1990s, FERC used its existing statutory authority in new and creative ways to impose open access requirements on natural gas pipelines and the electricity transmission grid, while requiring the functional unbundling of the natural gas and electricity industries so as to promote competition in wholesale markets.²¹⁴ FERC also developed a system of blanket marketing certificates and market-based rate authority to give jurisdictional sellers of natural gas and electricity permission to transact freely in these markets.²¹⁵ Market screens were used to determine whether those applying for market-based rate authority had the ability to exercise market power and distort prices. By insulating markets *ex ante* from sellers with market power, FERC assumed that the forces of competition would operate without interference. Viewed in the context of *Hope*, the effort constituted a new method of setting rates that would mobilize competitive markets to ensure that the resulting prices (the "end result") would satisfy the statutory just and reasonable standard.²¹⁶

214. See, e.g., *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Order No. 636, 57 Fed. Reg. 13,267, 13,268 to 13,270 (Apr. 16, 1992) (codified at 18 C.F.R. pt. 284 (2017)) (summarizing final rules designed to establish open access regime for the natural gas pipeline industry as a basis for ensuring competitive natural gas markets); *Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, FERC Order No. 888, 61 Fed. Reg. 21, 540, 21,541-43 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385) (summarizing final rules designed to require open access nondiscriminatory service in order to promote competitive wholesale power markets).

215. See, e.g., *Regulations Regarding Blanket Marketer Sales Certificates*, FERC Order 547, 57 Fed. Reg. 57,952 (Dec. 8, 1992) (codified as amended 18 C.F.R. pt. 284.202) (establishing system of blanket marketing certificates for wholesale sales of natural gas); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity, and Ancillary Services by Public Utilities*, FERC Order 697, 72 Fed. Reg. 39,904 (July 20, 2007) (codified as amended 18 C.F.R. pt. 35) (establishing system of market-based rates for wholesale sales of electricity).

216. To date, the Ninth Circuit and the DC Circuit have agreed with FERC and upheld its argument that market-based rates satisfy the just and reasonable standard. See, e.g., *California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1013 (9th Cir. 2004) ("In a competitive market, where neither buyer nor seller has significant market power, it is rational to assume that the terms of their voluntary exchange are reasonable, and specifically to infer that the price is close to marginal cost, such that the seller makes only a normal return on its investment."); *Tejas Power Corp. v. FERC* 908 F.2d 998, 1004 (D.C. Cir. 1990). But the Supreme Court has yet to weigh in on the question. See *Morgan Stanley Capital Grp. v.*

The old approach to price making embodied in cost-of-service regulation would be replaced at least in part by new ways of price making that depended much more fundamentally on markets to ensure that prices were just and reasonable.²¹⁷ In making this move, FERC effectively resurrected an earlier understanding of just price as that which prevailed in open and competitive markets. As long as competition was robust, buyers and sellers alike would be protected against the exercise of economic coercion and prices would be fair. Only in cases of market power would FERC need to step in and assert its authority to fix prices. Otherwise, light-handed regulation aimed at ensuring that markets functioned as intended would suffice.²¹⁸

But FERC's efforts to transform itself from an agency focused on cost-of-service ratemaking to one responsible for market design and oversight proved to be easier said than done and the Commission has struggled over the last two decades to discharge its new responsibilities. Although a thorough discussion of FERC's efforts in this respect is beyond the scope of this Essay, suffice it to say that the California energy crisis of 2000-01, which greatly disrupted both gas and electricity markets throughout the western United States, illustrated how fragile these new markets were, how relatively easy they were to manipulate, and how much market design and oversight mattered.²¹⁹ For its part, FERC recognized

Pub. Util. Dist. No. 1 of Snohomish Cty., 544 U.S. 527, 538 (2008) (“We have not hitherto approved, and express no opinion today, on the lawfulness of the market-based-tariff system, which is not one of the issues before us.”); *id.* at 548 (“We reiterate that we do not address the lawfulness of FERC’s market-based rates-policy, which assuredly has its critics. But any needed revision in that policy is properly addressed in a challenge to the policy itself.”); *see also* David B. Spence & Robert Prentice, *The Transformation of American Energy Markets and the Problem of Market Power*, 53 BOS. C. L. REV. 131, 197-200 (2012) (surveying the doctrinal landscape regarding question whether market based rates satisfy the just and reasonable standard).

217. *See, e.g.*, FERC v. Elec. Power Supply Ass’n, 136 S. Ct. 760, 768 (2016) (“In this new world [of competitive wholesale power markets], FERC often forgoes the cost-based rate-setting traditionally used to prevent monopolistic pricing. The Commission instead undertakes to ensure “just and reasonable” wholesale rates by enhancing competition—attempting, as we recently explained, “to break down regulatory and economic barriers that hinder a free market in wholesale electricity.” (quoting *Morgan Stanley*, 554 U.S. at 536)).

218. *See, e.g.*, *Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 636, 57 Fed. Reg. 13267, 13297 (Apr. 16, 1992) (“[T]he Commission is instituting light-handed regulation, relying upon market forces at the wellhead or in the field to constrain unbundled pipeline sale for resale gas prices within the NGA’s ‘just and reasonable’ standard.”); *see also* United Distribution Cos. v. FERC, 83 F.3d 1105, 1122 (1996) (observing that with its natural gas restructuring effort FERC “has gradually withdrawn from direct regulation of certain industry sectors in favor of a policy of ‘light-handed regulation’ when market forces make that possible”).

219. There is a voluminous literature on the California electricity crisis. *See, e.g.*, Frank A. Wolak, *Diagnosing the California Electricity Crisis*, 16 ELECTRICITY J. 11, 20 (2003) (noting that “average market performance over the first two years of the market, from April 1998 to April 2000, was close to the average competitive benchmark price” and compared favorably to performance in the eastern ISOs); CHRISTOPHER WEARE, THE CALIFORNIA ELECTRICITY CRISIS: CAUSES AND POLICY OPTIONS 1–2 (2003) (describing the severe malfunctioning of the California electricity market beginning in the late spring of 2001); Severin Borenstein, *The Trouble With Electricity Markets: Understanding California’s Restructuring Disaster*, 16 J. ECON. PERSP. 191, 198–200 (2002) (discussing substantial increases in California wholesale power prices in summer of 2000); Paul L. Joskow, *California’s Electricity Crisis*, 17 OXFORD REV. ECON. POL’Y 365, 365, 377–78 (2001) (discussing increases in wholesale electricity

that it had been naïve in its assumption at the outset of the crisis that market forces should be allowed to run their course and that light-handed regulation was sufficient.²²⁰

Since the crisis, FERC has worked hard to enhance its market oversight capacities, paying much more attention to price formation, the exercise of market power, and the possibility of manipulation. Congress also stepped in with a suite of new rules to improve the functioning of natural gas and electricity markets and gave significant new enforcement authority to FERC.²²¹ New codes of conduct, new anti-manipulation rules, improved transparency, and expansive new civil and criminal penalty authority have provided the foundation for a much more robust approach to market oversight and enforcement.

But even with these new authorities, the Commission continues to face significant challenges in overseeing these markets. Relying on the discipline of the market to ensure that prices will be just and reasonable, it turns out, has required quite a bit of work. These markets cannot be left to their own devices, but demand active management and oversight on the part of FERC. The whole notion of a light-handed regulatory posture is belied by the multiple layers of regulation needed to ensure their proper functioning and police against the exercise of market power. Since 2007, moreover, FERC has secured more than \$760 million in civil penalties and more than \$478 million in disgorged profits in market manipulation cases in the natural gas and electricity sectors.²²² In all

prices in California); *see also* Paul L. Joskow, *The Difficult Transition to Competitive Electricity Markets in the United States*, in *ELECTRICITY DEREGULATION: CHOICES AND CHALLENGES* 1, 32 (James M. Griffin & Steven L. Puller eds., 2005) (reporting that in the wake of the California electricity crisis, no additional states had announced plans to pursue electricity restructuring and nine states that had planned to implement reforms had “delayed, canceled, or significantly scaled back their electricity competition programs”); David B. Spence, *The Politics of Electricity Restructuring: Theory vs. Practice*, 40 *WAKE FOREST L. REV.* 417, 417 (2005) (“California’s disastrous experience with restructured electricity markets has given pause to restructuring’s proponents and ammunition to restructuring’s opponents.”); Joel B. Eisen, *Regulatory Linearity, Commerce Clause Brinkmanship, and Retrenchment in Electric Utility Deregulation*, 40 *WAKE FOREST L. REV.* 545, 557–58 (2005) (“In the aftermath of competition’s disastrous failure in the early 2000s in California, states are beginning to slow, alter, or even reject progress toward restructuring, even where it had been embraced earlier.”).

220. *See, e.g., Staff White Paper on Anti-Market Manipulation Enforcement Efforts Ten Years After EPAct 2005*, FED. ENERGY REG. COMM’N 2 (2016), <http://www.ferc.gov/legal/staff-reports/2016/marketmanipulationwhitepaper.pdf> [<http://perma.cc/N6B7-X666>] [hereinafter FERC White Paper] (“During the Western Energy Crisis, the Commission’s enforcement tools lagged behind these market developments, and the [manipulation] schemes exposed a major weakness in the Commission’s ability to fulfill its core mission of ensuring just and reasonable rates and protect energy market participants and consumers.”); *see also* David B. Spence, *Naïve Energy Markets*, 92 *NOTRE DAME L. REV.* 973 (2017) (discussing mistaken assumption among proponents of deregulation that energy markets can function without significant government involvement).

221. Energy Policy Act of 2005, §§ 314-16, Pub. L. No. 109-58, 119 Stat. 594 (adding new provisions to the Natural Gas Act regarding market manipulation, penalty authority, and market transparency); *id.* §§ 1281-84 (adding new provisions to the Federal Power Act regarding market manipulation, penalty authority, and market transparency); *see also* FERC White Paper, *supra* note 220 (reviewing FERC’s use of these new authorities).

222. Total Civil Penalties assessed for all years 2007 to present: \$762,991,012. Total Disgorgement ordered for all years 2007 to present: \$478,976,028. *See All Civil Penalty Actions*, FED. ENERGY REG. COMM’N, <http://www.ferc.gov/enforcement/civil-penalties/civil-penalty-action.asp> [<http://>

of this, the key challenge confronting FERC has been (and will continue to be) whether the prices that are formed in these markets are just and reasonable—whether the market price is, in fact, the just price.

Conclusion

It is always difficult to seek to enter the moral universe of people living in faraway times and places. But any honest genealogy of public utility—and economic regulation more generally—requires at least some engagement with conceptions of economic justice that were developed in circumstances vastly different from our own. The idea of just price grew out of attempts to develop an ethical approach to economic exchange as part of a broader effort to give shape to Aristotle’s notion of corrective justice. Thomas Aquinas and the Scholastics preferred to use the term commutative justice to capture this broader meaning of equality in exchange and to focus on the elements of proper dealing in economic transactions. Just price was at the core of their economic doctrine, tied to the common estimation of the community and placed in service to their vision of a just society.

Over time, the idea of just price became a rallying cry for the crowd during times of grain shortages and a basis for price-control schemes enacted by authorities to avoid subsistence crises in the face of market disruption. Just price thus provided a standard by which the crowd and the authorities could police against the exercise of unfair advantage in market exchange. In its strong form, it operated as a powerful norm against which to evaluate various market transactions. When markets functioned well in the presence of robust competition, there was little need for intervention, and the prevailing market price was taken to be the just price. But the medieval schoolmen, like the *police des grain*, the rioting crowds, and many others since, recognized that markets don’t always work as intended. The invocation of just price as a basis for intervention in the market, especially in cases of necessities and in times of dearth, thus reflected a realistic assessment of the place of markets in people’s lives and an affirmation that markets should always be subordinated to society.

Ideas of just price show up again as an anchor for the equitable conception of contract and as a basis for the doctrines of unconscionability and economic duress. Many of the early examples of price fixing and economic regulation in England, colonial America, and the early United States also made use of just price. Most importantly for this Essay, just price provided much of the normative core of the new public interest standard articulated in the *Munn* case and elaborated during the so-called public utility era of the late nineteenth and early

perma.cc/N4MM-ES5N]; see also Staff White Paper on Anti-Market Manipulation Enforcement Efforts Ten Years After EAct 2005 FED. ENERGY REG. COMM’N (2016), <http://www.ferc.gov/legal/staff-reports/2016/marketmanipulationwhitepaper.pdf> [<http://perma.cc/G87J-7TYS>] (reviewing ten years of experience investigating and pursuing actions under the Commission’s anti-manipulation rules).

twentieth centuries—a standard that was finally codified in state and federal public utility statutes with their requirements that rates be just and reasonable.

On a more theoretical level, just price can be found lurking behind conceptions of value in classical political economy, where value is viewed as the prime mover behind prices.²²³ In a later context, echoes of just price can be heard in the work of a number of prominent Progressive era lawyers, institutional economists, and legal realists as they sought to elaborate an economics that took law, institutions, conflict, and power seriously.

Throughout this long history, the idea of just price took on a variety of meanings—embracing, at times, notions of social status; the idea that goods had an inherent, objective value; cost of production; and the prices that emerged from the operation of competitive markets operating under “normal” conditions. But what gave it bite, this Essay has argued, was the focus on economic coercion and the ways in which changing economic conditions created new possibilities for coercion. From this perspective, just price was not tied to any particular form of regulation or any particular type of economy. The basic commitment to ensure fairness—to ensure that both sides to an exchange received the benefits of a fair bargain—applied across all forms of economic organization. While not wholly dismissive of more modern notions of willingness to pay, just price did not accept that this was all that mattered in economic transactions, and thus rejected the wholesale embrace of willingness to pay as the foundation for price.

Looking back, it is hard to avoid the conclusion that just price operated largely as a metaphor capable of taking on many guises—an empty vessel into which a wide variety of normative content could be poured. In this respect, of course, it was not unlike many other prominent economic concepts—value, market, competition, etc. As Joan Robinson reminds us, however, there is sometimes much to learn from the problems that are surfaced in the efforts to grapple with such concepts.²²⁴ The very fact that they have such a hold on our thinking, of course, also demands close attention to their public lives.

Just price, in this respect, is less interesting as a stand-alone idea than in the ways it gets mobilized in struggles over economic governance and economic justice. It is in this more dynamic context that the struggles over the meaning of just price reveal certain problems in understanding and governing economic relationships. To be sure, just price has never offered a single, stable standard against which to judge economic relationships, and it is certainly not an analytical tool for understanding economic behavior. But it does remind us of the relational aspects of price, and the thick social and moral character of economic life.

Put another way, just price reminds us that price is more than just a signal; that it is also a relationship—one that is conditioned by background entitlements and the larger field of force within which buyers and sellers operate. It reminds

223. See Robinson, *supra* note 56; Heilbroner, *supra* note 34.

224. Robinson, *supra* note 56, at 26.

us that there exists alongside the thoroughly de-moralized conception of the economy that we have inherited from neoclassical economics, a thoroughly moral economy, and that markets and the mechanisms of price formation at their center are perhaps more vulnerable to disruption and manipulation than standard economic models suggest. And it reminds us that for a very long time—far longer than the lifespan of classical and neoclassical economics—ethical and social concerns were intimately bound up with conceptions of economy, economic life, and the provision of necessities.

Part of the reason, then, to trace the history of the idea of just price and its influence on economic regulation is to show how it was mobilized over time in what were, at root, struggles over key systems of provisioning for the broader economy. With its basic commitment to fairness, just price reflected the view that these systems of provisioning needed careful attention—that they could not be left exclusively to the workings of the market. When embodied in modern public utility law, this commitment represented an important experiment in translating abstract ideas of economic justice and fair pricing into working rules. And while it may be the case that the experiment has run its course and that we need to find other tools or instruments to manage contemporary economic challenges, we would do well to remember the general normative impulse at the heart of public utility as we think about the prospects and possibilities for economic justice in our own time.