The Constitutionality of Medicare Drug-Price Negotiation under the Takings Clause

Health Policy Portal

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The Inflation Reduction Act (IRA) of 2022 empowers the Centers for Medicare & Medicaid Services to negotiate the prices Medicare will pay for a small number of top-selling brand-name prescription drugs, a process that is expected to save patients and taxpayers billions of dollars every year. Yet this significant achievement is now threatened by at least 10 different lawsuits brought by the brand-name pharmaceutical industry and associated trade organizations. These cases allege a slew of constitutional violations, including that drug-price negotiation works an unconstitutional “taking” of private property. The taking argument is one of the most consequential claims brought against the IRA’s drug-price negotiation program, as it would put a great many government programs at risk, from critical healthcare programs like Medicaid to the Emergency Medical Treatment and Labor Act (EMTALA).

In this review, we evaluate the takings claim made in litigation against the IRA and conclude that it is without merit. It should fail in court and the challenged portions of the IRA should not be struck down on these grounds. We show, based on original analysis of case law, policy precedents, and other sources, first, that price negotiation and price controls by the US government have long been held constitutional under the Constitution’s Takings Clause; and second, that the fact that brand-name drugs are commonly covered by patents does not convert price negotiation on those drugs into a taking.

Keywords: Inflation Reduction Act, Medicare, Patents, Price Negotiation, Takings Clause

Abstract: In recent months, pharmaceutical manufacturers have brought legal challenges to a provision of the 2022 Inflation Reduction Act (IRA) empowering the federal government to negotiate the prices Medicare pays for certain prescription medications. One key argument made in these filings is that price negotiation is a “taking” of property and violates the Takings Clause of the US Constitution. Through original case law and health policy analysis, we show that government price negotiation and even price regulation of goods and services, including patented goods, are constitutional under the Takings Clause. Finding that the IRA violates the Takings Clause would radically upend settled constitutional law and jeopardize the US’s most important state and federal health care programs.

About This Column

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Background
As part of the Inflation Reduction Act (IRA), Congress for the first time empowered the Department of Health and Human Services (HHS) to negotiate with drug-makers the prices of a small number of drugs that the Medicare program purchases. The IRA requires the HHS Secretary, acting through the Centers for Medicare & Medicaid Services (CMS), to negotiate the prices Medicare pays for a certain set of drugs meeting a number of key criteria, such as that they are responsible for the highest Medicare Parts B and D spend-

Drug Manufacturers’ Challenges to the Medicare Drug-Price Negotiation Program
Failing to defeat the drug-price negotiation program in Congress, a host of drugmakers have brought suits to challenge the new law. They assert that the law violates a variety of constitutional provisions. A key claim is that the price negotiation program “takes” their property without just compensation in violation of the Takings Clause of the Fifth Amendment.

The Fifth Amendment prevents the government from taking private property unless for public use and just compensation when it does so. The scope of the Takings Clause has expanded over time: until the twentieth century, the Takings Clause only protected against physical appropriations of property by the government. The Supreme Court extended the reach of the Takings Clause to “regulatory takings” in Pennsylvania Coal Co. v. Mahon, holding that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” In assessing whether a regulatory taking has occurred, courts apply three factors: the economic impact of the regulation on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action.

The standard for what constitutes a “public use” for which the government may take property is broad. As such, the constitutional question at the heart of most takings claims — as here — is whether a regulation interferes with “property” in the relevant sense. In the classic scenario, where government condemns land for public use, as when building a railroad, the standard is easily satisfied. But more difficult cases arise, particularly where regulations are involved.

If property is “taken,” courts must evaluate the compensation to determine if it is “just;” if the government provides “just” compensation to the property owner, then the court will award no further remedy. Of course, judicial monitoring of just compensation may add substantial costs and complexity to government programs, especially because formulations of

The Takings Clause applies not just to real estate but to personal property — cars, crops, and more. The Takings Clause requires just compensation when regulations effect a government seizure of personal property. This much is settled doctrine.

In their lawsuits, drugmakers advance a novel argument: allowing the government to negotiate the prices of a prescription drug constitutes a taking that deprives a drugmaker of its property. As one drug-maker contends, “a Government-imposed 50% discount on forced transfers of Eliquis is no different than if the Government were to seize 50% of BMS’s inventory.” Because no drugmaker is forced to surrender its medications to the government, the drugmakers — which are not protesting the sale itself but the government’s opportunity to reduce the sale price — appear to be asking courts to confer constitutional protection to their profits.

As the following sections show, and as we have described in amicus briefs...
filed in several courts, the companies' takings arguments are unsound as a matter of law. We also show that they are dangerous; indeed, if accepted by courts, their claims would radically rewrite takings doctrine and jeopardize a range of government healthcare programs.

Government Price Negotiation and Price Regulation in the US

Price negotiation and price regulation are ubiquitous economic tools available to, and regularly used by, the federal government. The voluntariness of prescription drug market participation disqualifies a takings claim. This alone should end this argument against the IRA's Medicare drug-price negotiation program. Companies also argue that the government is coercing their participation in the program because a great deal of profit is at stake. We show that this is irrelevant to the voluntariness of the program. Finally, even if the government were to introduce an industry-wide program extending beyond Medicare, this would not “take” property in the relevant sense. In highly regulated industries that receive substantial government privileges—as the pharmaceutical industry clearly does—Congress may set regulatory conditions such as these without running afoul of the takings clause.

Government Price Negotiation Does Not Create a Takings Violation

As a purchaser of goods and services, the government regularly engages in price negotiation without raising any kind of takings issue. In 2022, the government spent $694 billion on contracts. Many of these contracts were fixed-price vehicles that do not guarantee profit. Courts have consistently held that no one is constitutionally entitled to sell to the government. Rather, the government, like any other purchaser, is allowed to select its commercial partners, adjust the terms and conditions of its sales contracts, and negotiate the prices it will pay. The federal government contracts like any other commercial party bargaining for sale, as opposed to when it seizes possessions of goods as a sovereign entity.

As a result, government contracting does not implicate the Takings Clause, even when price negotiations reduce the profit amount that a contracting party hoped to net. Prescription drugs are no different. In fact, the government already negotiates drug prices and sets parameters on the prices it will pay for drugs across several federal programs, including the Veterans Health Administration, the Medicaid program, and the 340B program (a special program through which safety net hospitals can acquire medications at prices far lower than commercial purchasers). Under each of these programs, the government contracts with a manufacturer to provide prescription drugs. Each program ensures a baseline statutory discount for drug price, with options for the federal government or seller (e.g., a hospital) to negotiate further discounts. Drugmakers do not have to supply medicines to the government. But courts have consistently, and properly, rejected similar claims.

The breadth of health care price negotiation programs already approved by courts underscores the extent of disruption that a takings holding here would engender. The IRA’s Medicare drug-price negotiation program sets up a structure similar to the existing drug purchasing programs under 340B, Medicaid, and the Veterans Health Administration. If a court were to accept drug-makers’ argument that price negotiations constitute a taking, the door would open for nearly all government contract negotiations to be challenged as takings under the Fifth Amendment. Such a holding would undermine settled contract law involving voluntary, bargained-for exchanges. This view would also upend a vast array of government contracts, not just limited to healthcare, whenever a company was displeased with a contracted-for rate. The government’s leverage to secure favorable rates for its myriad social service programs would in turn diminish.

Even as to health care alone, a loss would be devastating. A determination that price negotiations effects a taking would jeopardize altogether the viability of federal and state health care programs. Government health care programs provide a key safety net for more than one in three Americans. Due to their reach, these programs often strain state and federal budgets. In 2021, Medicare alone accounted for 21% of all US healthcare spending and 10% of the federal budget. Medicare’s costs are predicted to rise to 18% of the federal budget by 2032. Excluding administrative costs, the Medicaid program cost $728 billion in fiscal year 2021, or about 17% of national health
expenditures that year. Without negotiated discounts, the combination of exclusive rights and coverage mandates afforded by these programs would confer almost limitless pricing power to drug manufacturers.

Government price negotiation for these health care services enables federal and state health care programs to offer coverage to millions of Americans. A ruling that these programs’ statutory discounts constitute takings would imperil these programs’ continued operation. For patients, this would translate into reduced access to health care, especially for our country’s elderly and low-income populations. For courts, it would mean a flood of litigation over the level of payment necessary to compensate takings by longstanding programs.

The Medicare, Medicaid, and Veteran Health Administration programs would not be the only areas of healthcare affected. For example, the federal Emergency Medical Treatment and Labor Act (EMTALA) entitles all Americans to emergency room treatment irrespective of insurance status. This law requires hospitals with emergency departments that receive Medicare funding to accept all patients in critical condition, regardless of their ability to pay. Takings challenges to EMTALA by hospitals have failed on the grounds that property “used in a manner to make it of public consequence” was “clothed with a public interest.” The Court struck down many economic regulations, including labor laws, eventually generating the constitutional challenge that led Franklin Roosevelt to threaten to pack the court. The doctrine was abandoned in the late 1930s, paving the way for the modern rule that Congress is free to enact social and economic legislation without judicial interference. But even while the constitutional doctrine prioritizing the right to contractual freedom. Under this doctrine, the Court struck down many economic regulations, including labor laws, eventually generating the constitutional crisis that led Franklin Roosevelt to threaten to pack the court. The doctrine was abandoned in the late 1930s, paving the way for the modern rule that Congress is free to enact social and economic legislation without judicial interference. But even while the laissez faire Lochner doctrine stood, courts repeatedly upheld price regulations against challengers who claimed they interfered with the right to contractual freedom.

In the “pioneer” case of Munn v. Illinois, the Supreme Court held that property “used in a manner to make it of public consequence” was “clothed with a public interest.” The Court struck down many economic regulations, including labor laws, eventually generating the constitutional challenge that led Franklin Roosevelt to threaten to pack the court. The doctrine was abandoned in the late 1930s, paving the way for the modern rule that Congress is free to enact social and economic legislation without judicial interference. But even while the laissez faire Lochner doctrine stood, courts repeatedly upheld price regulations against challengers who claimed they interfered with the right to contractual freedom.

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Price Regulations Are Common, and Generally Not Constitutionally Suspect

Companies do not directly argue that price regulations themselves “take” property, perhaps because they are aware that, historically, price regulation was widespread and violated no constitutional rights. Still, they argue they are somehow “coerced” to accept the government’s prices. This argument is belied by the fact that price regulations have only very rarely been understood to interfere with “property” at all.

History shows us that price controls were commonplace in the early US. At least eight of the thirteen colonies adopted “expansive” price controls affecting “substantially everything in use at the time.” Price controls extended even to patented products. Borrowing from English common law and statutory obligations that a patentee would not use their exclusivity to “be mischievous to the State” by raising the prices of commodities, some colonies granted patents with “working clauses” that stipulated price as a condition.

Courts have consistently rejected claims that price controls violate constitutional rights. Early cases were litigated under the Due Process Clause. During this era, the Supreme Court constructed the so-called Lochner doctrine, a controversial constitutional doctrine prioritizing and protecting the right to contractual freedom. Under this doctrine, the Court struck down many economic regulations, including labor laws, eventually generating the constitutional crisis that led Franklin Roosevelt to threaten to pack the court. The doctrine was abandoned in the late 1930s, paving the way for the modern rule that Congress is free to enact social and economic legislation without judicial interference. But even while the laissez faire Lochner doctrine stood, courts repeatedly upheld price regulations against challengers who claimed they interfered with the right to contractual freedom.

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Congress’s price-setting authority was so well-established that the Supreme Court upheld price regulations affecting a broad range of industries and services, including essential public utilities, rent, and labor; prices that have the potential to limit or deny a seller’s profits; or reduce the value of the regulated good; price regulations that have differential effects on members of a regulated class; retroactive price regulations to recover excessive profits; and the prevention of economic waste as a permissible justification for price regulation. In 1987, the Supreme Court declared the constitutionality of state and federal price regulation to be “settled beyond dispute.”
The one area where the Supreme Court has found price regulation subject to some constitutional oversight is in industries for which market participation is legally mandated — namely, public utilities. To compensate for public utilities’ compulsory service at fixed rates, courts have exercised some judicial oversight over those rates. But even the modicum of oversight applied in the utility context is the exception, not the rule. The reason it applies at all is that utilities have a legal mandate to supply their services. In their suits, the pharmaceutical companies have not argued that they should be treated like public utilities, perhaps because courts have done relatively little to regulate rates even for utilities and have not deemed such companies entitled to any particular level of profit.

For industries that are highly regulated and sell potentially dangerous products, such as prescription drugs, Congress has great freedom to set conditions on market entry without implicating the Takings Clause. Courts have seen such regulations as not implicating property rights but rather establishing the conditions for market entry. Even a regulation covering the entire pharmaceutical market, in other words, would merely establish a legitimate condition for market entry which companies voluntarily accept in exchange for enormous privileges. A price regulation covering the entire industry would complement existing federal regulations, including the Food and Drug Administration’s review of safety and efficacy and the patent and other exclusive rights that allow drugmakers to establish high prices, that benefit the pharmaceutical industry enormously — and that generate the possibility of price gouging which the IRA seeks to combat.

Of course, the IRA does not affect the whole industry. It merely enables the government to negotiate for one portion of the market: Medicare. As such, courts need not traverse this broader issue. They can hold simply that the drug manufacturers at hand voluntarily choose to sell their drugs to Medicare, and as such cannot argue that their medicines are “taken” without their consent.

That Medicines Are Patented Does Not Alter the Takings Analysis
Some of the pharmaceutical industry’s court challenges to the IRA’s drug-price negotiation program have suggested that the fact that many brand-name drugs are protected by government-granted patents should somehow alter the takings analysis. For example, in its lawsuit, BMS declares that “patented medicines are protected by the Takings Clause.”

The fact that drugs are patent-protected does not strengthen the pharmaceutical industry’s takings claims. The IRA works no interference with constitutionally protected patent rights. No Supreme Court case has ever held that patents are private property protected by the Takings Clause. Even if a court were to conclude this, it would not help companies here, because courts see property as a bundle of rights, not all of which have to be granted together. Since Congress has never given companies the specific right to prevent the federal government from interfering with their patents, this “right” cannot now be taken away.

Patents Are Not Private Property Eligible for the Protection of the Takings Clause
The Supreme Court and the Federal Circuit have never directly addressed the question of whether patented drugs are personal property eligible for protection under the Takings Clause. The most recent Supreme Court analysis of the fundamental nature of patent rights suggests strongly — but does not hold outright — that patents are not private property in the relevant sense. In its 2018 Oil States decision, a 7-2 majority of the Supreme Court concluded that patents are not private rights, but are public rights, akin to government franchises: a right the government takes from the public and grants to a private party. As the Court explained, a patent is a “creature of statute” and thus “can confer only the rights that ‘the statute prescribes’ — the right ‘to exclude others from making, using, offering for sale, or selling the invention throughout the United States.’” The Court observed that, as creatures of statute, patents are not personal property per se; instead, “[t]he Patent Act provides that, ‘[s]ubject to the provisions of this title, patents shall have the attributes of personal property.”

All this language and reasoning in Oil States strongly suggests that patents are not private property for purposes of the Takings Clause. There is no reason for patent rights to be considered public for the purposes of Article III, but private for the Fifth Amendment. In a recent article, intellectual property law professor Robin Feldman summarizes Oil States as follows: “the Court made absolutely clear its view that there is a strict, categorical difference between land/chattels as ‘core’ private property rights and patents as public rights.” Feldman also argues more broadly, based on history, the text and structure of the Fifth Amendment, and many decades of case law, that patents simply should not be protected by the Takings Clause.

Although the Oil States majority cautioned that it was not formally deciding that “patents are not property for purposes of the Due Process Clause or the Takings Clause,” a lower court responded by taking Oil States to its logical conclusion. In 2019, shortly after Oil States, the Court of Federal Claims held in Christy, Inc. that “patents are public franchises, not private property,” and therefore that “patent rights are not cognizable property interests for Takings Clause purposes.” In so holding, the court echoed Oil States and reasoned that because “patent rights derive wholly from federal law, Congress is free to define those rights (and any attendant remedies for an intrusion on those rights) as it sees fit.”

Highlighting the Court’s discussion of the public nature of patent rights, the Court of Federal Claims concluded that the Court’s reasoning in Oil States could not “be dismissed as dicta.”
The Court of Federal Claims is so far the only court to directly tackle the question of whether patents are personal property subject to the Takings Clause. As noted above, Oil States declined to hold that patents are not protected by the Takings Clause. Although language from a nineteenth-century Supreme Court decision may appear to describe patents as constitutional property, scholars note both that this language is dicta (or non-binding commentary) and that it refers not to patents but to the distinct English property law construct of “letters-patents.” The Federal Circuit has similarly avoided answering this question directly, brought by patent holders for government use of their patents. In 1894, in Schillinger v. United States, the Supreme Court confirmed as much, holding that a patent holder could not bring a takings claim against the government in the event of government patent use. The Court explained that Congress had not waived the government’s sovereign immunity as to “claims founded upon torts.” Because a patent infringement action “is one sounding in tort[,]” Schillinger held that government patent use did not expose the government to liability.

In response, Congress enacted a limited waiver of the US government’s sovereign immunity. This law provided patent holders with a claim for “limited relief” for government patent use. The committee notes accompanying the bill clarified that the law not only covered inadvertent use by the government, but also covered the government’s intentional use of patents when such actions benefited the public. This provision only allowed patent holders to seek “reasonable and entire compensation” for government use of their patents; it foreclosed injunctive relief.

The law is now codified as 28 U.S.C. § 1498. In relevant part, it reads: “Whenever an invention described in and covered by a patent of the United States is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner’s remedy shall be by action against the United States in the United States Court of Federal Claims for the recovery of his reasonable and entire compensation for such use and manufacture.”

As a panel of the Federal Circuit noted during a subsequent discussion of Schillinger, “[h]ad Congress intended to clarify the dimensions of the patent rights as property interests under the Fifth Amendment, there would have been no need for the new and limited sovereign immunity waiver” that § 1498 effects today. Put more directly, if the Constitution ensured that patent holders were entitled to compensation when the government uses their patents, Congress would not have had to so provide.

Today, § 1498 offers a more extreme — and yet entirely constitutional — remedy to the problem of high prices than the IRA’s Medicare drug-price negotiation program. Some of the authors’ past scholarship has documented the government’s “routine[]” use of § 1498 to procure everything from “electronic passports to genetically mutated mice.” The government relies on § 1498 “not only when the patent holder is unwilling or unable to negotiate a license with the federal government and infringement is the only way for the government to use the patented technology, but also when the patent holder is willing and able to negotiate, but also when the patent holder is willing and able to negotiate.” For example, in the 1960s, the Department of Defense negotiated purchase of the antibiotic tetracy-
cline from an Italian maker instead of the US-based patent-holder, Pfizer, even though Pfizer was able to supply the government’s purchase order, because the Italian version was 72% cheaper.\textsuperscript{101} According to one source, the Department of Defense relied on § 1498 to procure approximately fifty drugs in a three-year period during the 1960s.\textsuperscript{102}

The federal government has continued to rely on this statute into the twenty-first century. During the post-9/11 anthrax scare, the Bush Administration, through then-HHS Secretary Tommy Thompson, publicly discussed bypassing Bayer’s patent to amass a stockpile of the antibiotic discussed — in practice rarely exceeds the patent holder only a reasonable royalty — in practice rarely exceeds the patent holder only a reasonable royalty — in practice rarely exceeds.\textsuperscript{109} The government typically pays § 1498, the government typically pays § 1498 to procure approximately fifty drugs in a three-year period during the 1960s.\textsuperscript{102}

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Section 1498’s real bite, in comparison to the IRA, springs from its compensation provision. Under § 1498, the government typically pays the patent holder only a reasonable royalty — in practice rarely exceeding 10% of the price of the generic\textsuperscript{107} — as compensation for its infringement.\textsuperscript{108} Importantly, the § 1498 case law does not interpret “reasonable and entire compensation” to mean the entirety of the patent holder’s lost profits. Although the precise royalty rate is a case-specific determination, the Court of Federal Claims (where all claims for compensation under § 1498 must be litigated)\textsuperscript{109} examines “mixed considerations of logic, common sense, justice, policy and precedent” when setting compensation under § 1498.\textsuperscript{110} The best measure for “reasonable and entire” compensation under § 1498 is the rate the patent holder agreed to in any prior or existing licensing agreements.\textsuperscript{111} When the Court of Federal Claims lacks evidence of prior licensing agreements, it typically applies the “willing buyer-willing seller” rule to arrive at a royalty rate.\textsuperscript{112}

Because “reasonable and entire compensation” does not mean lost profits, pharmaceutical companies would not, under § 1498, be guaranteed profits on sales to or for the federal government.\textsuperscript{113} This interpretation makes sense: because the government is not obligated to purchase from the patent holder, the patent holder has no right to any profits — neither the profits the patent holder lost nor those the contractor gained through the government invocation of §1498.

Finally, government patent use doctrine undermines pharmaceutical companies’ suggestion that the drug price negotiations coerce the sale of medications the government would otherwise be unable to procure.\textsuperscript{114} The government has legal authority to purchase other drugmakers’ copies of pharmaceutical companies’ drugs should the patent-holding companies decline to participate in the price negotiations. The government has chosen a more generous approach, negotiating prices with patent-holding companies instead. This too shows that companies’ constitutional arguments are without merit.

Conclusion

Last year, Congress took an important step to address the US drug-price crisis by bringing Medicare in line with other government health care programs that negotiate drug prices with their manufacturers. In response, drug-makers advanced the radical argument that these negotiations are constitutional taking of their profits, likening the government’s mere ability to negotiate prices to a forcible seizure of their private property. But as this article has illustrated, decades of Supreme Court precedent upholding government price negotiations and regulations — an analysis unchanged by the fact that patents cover the negotiated drugs — demonstrate the incorrectness of the drug-makers’ claims. In fact, the government is constitutionally empowered to procure patented drugs at below-market cost even without the manufacturer’s consent, a tool that would likely reduce pharmaceutical companies’ profits more than mere price negotiation.

The drug-makers’ takings challenge may well end up before the Supreme Court, and their argument has implications for far more than the IRAs price-negotiation program. Robust government healthcare programs depend on negotiated discounts to offer essential services for our most vulnerable populations, including the low-income, those with disabilities, veterans, and the elderly. A successful takings challenge to the IRAs price negotiation provisions would threaten these and other government programs involving price negotiations. Courts should reject the takings arguments as they have always done, and affirm the constitutionality of price negotiation.

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2. 42 U.S.C. § 1320f et seq.


17. 38 U.S.C. § 8126 (Veterans Health Administration); 42 U.S.C. §§ 256b (Section 340B), 1396r-8 (Medicaid).


19. The Supreme Court has left no doubt that the Federal Government enjoys authority to “pass out of the range of the Fifth Amendment” such transactions “as to compensation” (citing Kelo v. City of New London, 545 U.S. 469, 479-80 (2005) (describing legislative judgments).)

20. Honolulu Rapid Transit Co. v. Dolin, 459 F.2d 551, 553 (9th Cir. 1972) (“[T]he Supreme Court has left no doubt that the Federal Government enjoys power to conclude commercial bargains;” concluding “transaction had ‘passed out of the range of the Fifth Amendment.’”); a situation where “[p]arties ... bargain between themselves as to compensation” (citing Albrecht v. United States, 329 U.S. 599, 603-04 (1947)); Price Negotiation, 48 C.F.R. § 15.405 (2022) (outlining that the “primary concern” in government contract negotiations should be “the overall price the Government will actu]ally pay”).

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22. 38 U.S.C. § 8126(a)(4) (limiting Medicaid participation for manufacturers who do not meet requirements of Veterans Health Administration drug contract process); 42 U.S.C. §§ 1396r-8(a)(1), (a)(5)(A) (limiting Medicaid and Medicare Part B reimbursement to drug manufacturers that have a “ rebate agreement” with HHS); (c)(1) (basic rebate for single source and innovator multiple source drugs must be equal to either 23% of the average manufacturer price, or the difference between the average manufacturer price and the best price, whichever is greater).


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cficiaries cannot establish the legal com-
n compulsory need to challenge Medi-
care reimbursement rates as a taking, so
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52. See West Coast Hotel Co. v. Parrish,
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nomic Review 36 (1946); the Federal
Farm Board in 1929 to regulate agricul-
tural prices, see N.R.R. Watson, “Fed-
eral Farm Subsidies: A History of Gov-
ernmental Control, Recent Attempts at
a Free Market Approach, the Current
Backlash, and Suggestions for Future
Action,” Drake Journal of Agricultural
Law 9 (2004); the Federal Communi-
cations Commission in 1934 to regu-
late telephone and telegraph rates, see
C. I. Wheat, “The Regulation of Inter-
state Telecommunications,” Harvard Law
Review 52 (1938); and the Civil Aeron-
aunts Authority in 1938 to regulate
air fares, see W. C. Woold ridge, “The
Civil Aeronautics Board as Promoter,”

58. See generally Boyd, supra 47, supra note
2.

502, 516 (1934).

60. Id.

61. Olsen v. Nebraska, 313 U.S. 236, 245
(1941). See also Ribnik, 277 U.S. at
374 (Stone, J., dissenting) (“To say that
there is constitutional power to regu-
late a business or a particular use of
property because of the public inter-
est in the welfare of a class peculiarly
affected, and to deny such power to
regulate price for the accomplishment
of the same end, when that alone
appears to be an appropriate and effec-
tive remedy, is to make a distinction
based on no real economic difference,
and for which I can find no warrant in
the Constitution itself nor any justifica-
tion in the opinions of this court.”)

62. During World War II, for example, the
temporary Office of Price Administra-
tion set maximum prices on nearly
ninety percent of commodities and
imposed rent control over “practically
the entire country.” See Note, “Price
and Sovereignty,” Harvard Law Review
135 (2021); B. F. Graney, “Price Con-
trol and the Emergency Price Control
Act,” Notre Dame Law Review 19
(1944). Episodic price freezes affect-
ing most commodities, services, rents,
and wages would be implemented through
the 1970s as authorized by the 1950
Defense Production Act and the 1970
Economic Stabilization Act. See J. N.
Drobak, “Constitutional Limits on
Price and Rent Control: The Lessons
of Utility Regulation,” Washington Uni-
versity Law Review 64 (1986); R. H.
Field, “Economic Stabilization Under
the Defense Production Act of 1950,”

63. The Supreme Court rejected constitu-
tional challenges to the expansive rent
and commodity price controls during
World War II in Bowles v. Willing-
ham, 321 U.S. 503 (1944) and Yakus
v. United States, 321 U.S. 414, 420
(1944), respectively. Constitutional
challenges to similarly broad-reaching
price regulations in the 1950s and
1970s were rejected by lower courts
and did not reach the Supreme Court.
Drobak, supra note 53; see, e.g., United
States v. Excel Packing Co., 210 F.2d
596 (10th Cir. 1954), cert. denied, 343
U.S. 817 (1954) (rejecting challenges
to the constitutionality of the 1950
Defense Production Act).

64. See, e.g., Sunshine Anthracite Coal Co. v.
Adkins, 310 U.S. 381 (1940) (uphold-
ing maximum prices for interstate sale
of coal); German Alliance Insurance
Co. v. Lewis, 233 U.S. 398, 405-12
(1914) (rejecting plaintiff’s contention
that price controls of fire insurance
rates were a “taking of private prop-
erty”); Yakus, 321 U.S. 414 (upholding
price controls on meat).

65. See, e.g., Townend v. Yozonas, 301
U.S. 441 (1937) (upholding maximum
prices on the sales of leaf tobacco);
Seagram & Sons v. Hostetter, 384 U.S.
35 (1966) (upholding price regulations
affecting the sale of liquor).

Pipeline Co., 315 U.S. 575, 582 (1942)
(“The price of gas distributed through
pipelines for public consumption has
been too long and consistently rec-
ognized as a proper subject of regu-
lation.”); Simpson v. Shepard (U.S. Reps.
Title: Minnesota Rate Cases) 230 U.S.
352, 433 (1913) (holding, in a case in-
volving railroad rates, that “[t]he rate-
making power is a legislative power”);
Spring Valley Waterworks v. Schottler,
110 U.S. 347, 354 (1884) (holding that
“it is within the power of the
government to regulate the prices
at which water shall be sold”).

67. See Bowles, 321 U.S. at 517 (holding
that rent control did not “involve[ ] a
‘taking of property’”).

68. See West Coast Hotel Co., 300 U.S. 379
(upholding minimum-wage legis-
lation).

69. See, e.g., Hegeman Farms Corp. v. Bald-
win, 293 U.S. 163, 170 (1934) (hold-
ing that regulation of milk prices that
do not excessively affect “the seller, as
a seller of a profit ... is not enough to...
[allow] revision by the courts”)

70. See Yakus v. United States, 321 U.S.
414, 486 n.40 (1944) (“The Fifth Amend-
ment does not insure a profit to any
given individual or group not under
legal compulsion to render service.”).

71. See, e.g., Andrus v. Allard, 444 U.S. 51,
66 (1979) (“When we review regula-
tion, a reduction in the value of proper-
ty is not necessarily equated with a
‘taking’.”)

72. Permian Basin Area Rate Cases, 390
U.S. 747, 769 (1968).

73. Lichter v. United States, 334 U.S. 742,
787 (1948).

74. Cities Serv. Gas Co. v. Peerless Oil

75. FCC v. Fla. Power Corp., 480 U.S. 245,
253.

76. See Duquesne Light Co. v. Barash,
ties ... are under a state statutory
duty to serve the public.”); Hegeman
Farms Corp. v. Baldwin, 359 U.S. 188,
190 (1922) (“A public utility...has no

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68. See, e.g., Hegeman Farms, 293 U.S. at 170 (“The appellant would have us say that ... a government-regulated price must be changed whenever a particular dealer can show that ... its price] must be changed whenever a government-regulated price is maintained.”); see also id (quoting Zoltek Corp. v. United States, 442 F.3d 1345, 1352 (Fed. Cir. 2006)) (“As the Supreme Court has clearly recognized when considering Fifth Amendment taking allegations, property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Here, the patent rights are a creature of federal law.”).

69. See Market St. Ry. Co. v. R.R. Comm’n of California, 324 U.S. 548, 556 (1945) (“regulation does not assure that the regulated business make a profit”).

70. See Rudolphskau v. Monsanto Co., 467 U.S. 986 (1984) (holding that a federal law requiring relinquishment of certain alleged trade-secret information was not a taking because Monsanto received access in exchange for submitting the information and because its products were hazardous); Horne, 576 U.S. at 365-66 (interpreting Monsanto as holding that Monsanto and other companies “were not subjected to a taking because they received a valuable Government benefit’ in exchange — a license to sell dangerous chemicals.


73. Id. at 1374 (quoting Crown Die & Tool Co. v. Nye Tool & Machine Works, 261 U.S. 34, 40 (1922)).

74. Id. at 1375 (quoting Gayler v. Wilder, 51 U.S. (10 How.) 477, 494 (1851)).

75. Id. at 1374 (quoting 35 U.S.C. § 154(a) (1)).

76. Id. at 1375 (quoting 35 U.S.C. § 261 (emphasis added).


78. Id.

79. Oil States, 138 S. Ct. at 1379.


81. Id. at 658; see also id (quoting Zoltek Corp. v. United States, 442 F.3d 1345, 1352 (Fed. Cir. 2006)) (“As the Supreme Court has clearly recognized when considering Fifth Amendment taking allegations, property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. Here, the patent rights are a creature of federal law.”).

82. Id. at 659 (rejecting the argument that Oil States should be read as acknowledging that patents are property subject to the Fifth Amendment and concluding that Supreme Court’s discussion of patents and Taking Clause “merely defined the scope of the decision”).

83. Oil States, 138 S. Ct. at 1379.


86. See Christy, 971 F.3d 1332, 1335-36 (declining to expressly address the issue on appeal after the lower court concluded that patents are not private property subject to Takings Clause); Golden, 955 F.3d 981, 989 n.7 (“Despite the Claims Court’s express finding on the status of patent rights under the Fifth Amendment, we decline to consider the constitutional arguments raised by the Government to be honest to a patenteen. We have not passed out but a single one of those claims. We have not time to investigate them. This bill simply allows the Court of Claims to pass on the cases.”).

87. See Golden, 955 F.3d at 987 (describing Schillinger v. United States, 155 U.S. 163 (1894)).

88. Schillinger, 155 U.S. at 168.


91. H.R. Rep. No. 61-1288, at 2 (1910) (“[T]he government ought to have the right to appropriate any invention necessary or convenient for national defense or for beneficial public use, and that, too, without previous arrangement or negotiation with the owner.”).

92. Act of June 25, 1910, ch. 423, 36 Stat. 851, 851. In 1918, the predecessor statute to § 1498 went through a set of revisions in response to a Supreme Court decision and the United States’s decision to enter World War I. After the Supreme Court held the government’s cloak of sovereign immunity did not protect its contractors, William Cramp & Sons Ship & Engine Bldg. Co. v. Int’l Curtis Marine Turbine Co., 246 U.S. 28 (1918), then-Acting Secretary of the Navy Franklin D. Roosevelt successfully lobbied Congress to amend the law to clarify that government contractors were also immune from suit. Act of July 1, 1918, ch. 114, 40 Stat. 704, 705 (“That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same ... “) (changes from Act of 1910 italicized)).


99. Brennan et al., supra note 92. As amici document in this Article, "In 2009, the Department of Treasury used § 1498 to shield private banks from liability for using software to help detect fraud. The banks, in turn, were using software to help detect fraud committed by others acting on behalf of the federal government. Act of Oct. 31, 1942 to § 1498. Act of Oct. 31, 1951, ch. 655, 65 Stat. 710, 727.

100. Id. (emphasis added) (citations omitted).


104. See Morten & Duan, supra note 93.

105. See id.

106. Id.; Bradsher, supra note 103.


108. See Tektronix, Inc. v. United States, 552 F.2d 343, 351 (Cl. Ct. 1977), (explaining that, under § 1498, the "goal of 'complete justice' implies that only a reasonable, not an excessive, royalty should be allowed where the United States is the user — even though the patentee, as a monopolist, might be able to exact excessive gains from private users"), opinion modified on denial of reh'g, 557 F.2d 265 (Cl. Ct. 1977).


110. Liberty Ammunition, Inc. v. United States, 640 F.2d 1156, 1167 (Ct. Cl. 1980) ("Where (a) prior to the time as of which the license taken by the Government is to be valued, the patentee has licensed the infringed patent commercially and (b) the rights of such a commercial licensee are the same or substantially similar to the rights taken by the Government, the court uses, virtually without exception, the reasonable royalty method to value the license taken by the Government."), cert. denied, 454 U.S. 819 (1981).

111. Tektronix, 552 F.2d at 349 (explaining that lost profits will often amount to "excessive compensation, rather than the just compensation payable under the Fifth Amendment"); Decca, 640 F.2d at 1172 ("The reasonable royalty method is the preferred method of ascertaining the value of patent rights taken by the Government ... "); see also Donald S. Chisman, 6A Chisum On Patents § 20.03 (2023) (noting that "[t]here is some doubt whether lost profits is a permissible basis for recovery against the United States" and listing awards under § 1498 since 1930 to show that there has not been a lost profits award; Brennan et al., supra n.145, at 313 (noting that in "every modern § 1498 case, there, the measure of royalties has not been lost profits but rather a 'reasonable royalty')."