ANTITRUST REGULATION AND THE FEDERAL-STATE BALANCE: RESTORING THE ORIGINAL DESIGN

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The U.S. Constitution divides authority over commerce between states and the national government. Passed in 1890, the Sherman Act ("the Act") reflects this allocation of power, reaching only those harmful agreements that are "in restraint of . . . commerce among the several States." This Article contends that the Supreme Court erred when it radically altered the balance between state and national power over trade restraints in 1948, abruptly abandoning decades of precedent recognizing exclusive state authority over most intrastate restraints. This revised construction of the Act contravened the statute's apparent meaning, unduly expanded the reach of federal antitrust regulation, and undermined the regime of competitive federalism that had governed most intrastate restraints.

Drawing from its Commerce Clause jurisprudence of dual federalism, the Court initially employed the direct/indirect standard to allocate regulatory authority over intrastate restraints. Effects were direct if a restraint exercised market power to injure out-of-state consumers. The Sherman Act exerted Congress's exclusive authority over such restraints, because state regulation might produce self-interested results contrary to the anti-favoritism principle that animated Commerce Clause jurisprudence. States retained exclusive authority over agreements producing indirect impacts on interstate commerce, and a regime of competitive federalism generated the rules governing such restraints. Because states internalized the full impact of such

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restraints, interjurisdictional competition likely tended to produce optimal legal rules.

Echoing Wickard v. Filburn*, the Court jettisoned the direct/indirect standard in 1948, holding that the Act reaches restraints producing a "substantial effect"—even if harmless and indirect—on interstate commerce. This vast expansion of the Act undermined the regime of competitive federalism that had governed most intrastate restraints. This change also enabled application of the statute to local, state-approved restraints, empowering antitrust courts to supervise state regulatory processes, further undermining competitive federalism.*

The Court has offered three rationales for rejecting the direct/indirect standard. First, the Court has claimed that Congress meant to reach restraints beyond the authority implied by pre-1890 dual federalism jurisprudence. Second, the Court has contended that the Act properly expands whenever the commerce power expands in other contexts. Third, the Court has treated the substantial effects test as a translation of the Act justified by a changed national economy. The Court has invoked the Act's legislative history to bolster the first two contentions.

None of these rationales survives scrutiny. First, the phrase "restraint of . . . commerce among the several States" was apparently a term of art drawn from pre-1890 Commerce Clause jurisprudence. That case law employed "restraint" of interstate commerce as a synonym for state "regulation" of such commerce deemed invalid because it directly burdened interstate commerce. Given the prior construction canon, Congress's invocation of "restraint of . . . commerce" suggests that the Act should condemn only those private agreements that "directly burden" interstate commerce. The Court read the Act exactly this way in the 1890s, repeatedly holding that agreements only restrained interstate commerce if they imposed direct burdens by producing supracompetitive prices for interstate transactions. These near-contemporaneous readings, themselves probative of original meaning, avoided constitutional difficulties that would have resulted from application of the Act to restraints causing no interstate harm.

Second, assertions that Congress chose to exercise whatever power future Courts might grant are speculation. Congress has declined to exercise its entire commerce power when enacting three different post-1890 antitrust statutes. Engrafting the substantial effects test onto the Sherman Act contravened the federal-state balance canon by supplanting traditional state prerogatives over restraints threatening no interstate harm.

Third, the substantial effects test is not a faithful translation of the Sherman Act. No court or scholar has identified changed circumstances that justify such a translation. Neither integration of the national economy nor increased scale of enterprises suggests that such restraints generally produce interstate harm or that states are incapable of regulating them.

The legislative history actually bolsters this textual analysis. Several Senators endorsed pre-1890 dual federalism jurisprudence. The Senate Judiciary Committee rewrote Sherman's bill, employing the term "restraint of commerce" to narrow its reach. The House passed the Senate bill verbatim, after its Judiciary Committee also embraced dual federalism. No member of Congress suggested that the Act would expand if the Court subsequently enlarged the scope of the commerce power.

The conclusion that the Court erred in 1948 does not itself justify return to the pre-1948 allocation of authority over antitrust matters. While stare decisis is weaker in the antitrust context, mere legal error does not suffice to upset longstanding precedent. If, however, the Court attributes the 1948 revision and continued expansion of the Act to changed economic circumstances—such as increased integration of the national economy—stare decisis should yield to post-1948 developments in the theory of competitive federalism. These developments confirmed that states possess appropriate incentives to generate impartial rules with respect to restraints that produce no interstate harm.

Reviving the direct/indirect standard would reboot competitive federalism in antitrust. The resulting competition between state "laboratories of democracy" would generate various substantive and institutional solutions to antitrust problems, as states vie for producers and consumers by offering rival packages of antitrust doctrine and enforcement institutions. Restoring the pre-1948 regime would also radically shrink the category of state-approved restraints potentially subject to the Act. Moreover, cases involving such restraints that did reach the Court would look quite different from those that have informed the Court's treatment of these restraints. Instead of state regulation of local billboards and the like, such cases would involve restraints imposing substantial harm on out-of-state consumers. This new framing could force the current Court, which has less faith in regulation than its predecessors, to reconsider its approach to state-approved restraints.

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INTRODUCTION

The U.S. Constitution grants Congress limited regulatory powers, leaving the remaining authority to the states. Passed in 1890, the Sherman Antitrust Act[1] ("the Sherman Act" or "the Act") reflects this allocation of responsibility, reaching only a subset of trade restraints, while states retain authority over the rest. This Article contends that the Supreme Court erred when it radically altered the balance between state and national power over trade restraints in 1948, abandoning several decades of precedent that recognized exclusive state authority over most intrastate restraints. This change contravened the apparent intent of Congress, unduly expanded the reach of federal antitrust regulation, and undermined the regime of competitive federalism that had generated the rules governing intrastate restraints producing no interstate harm.

The Sherman Act reaches only those restraints of trade that also restrain "commerce among the several States."[2] The Supreme Court initially read this language to place meaningful limits on the scope of the Act. Drawing upon its Commerce Clause jurisprudence of dual federalism, the Court held that the Act usually did not reach intrastate restraints—that is, agreements governing transactions or transportation confined to one state. Intrastate cartels and mergers thus fell within the exclusive

1. 15 U.S.C. §§ 1–7 (2018).
2. *Id.* § 1.

jurisdiction of individual states, even if such restraints indirectly affected interstate commerce.

There was an important caveat, however. When intrastate restraints affected interstate commerce "directly," the Sherman Act reached such agreements to the exclusion of the states. Effects were direct if the restraint produced antitrust harm that crossed state lines, by exercising market power to the detriment of out-of-state consumers. For more than five decades, the Act reached only those restraints that produced interstate harm, leaving states with exclusive authority over all other restraints within their respective borders. Authority over trade restraints thus resided in mutually exclusive domains, and a regime of competitive federalism produced the rules governing those restraints within the exclusive authority of the states.

The Court abruptly changed course in 1948, greatly expanding the Act's reach and adjusting the boundaries between state and federal authority in favor of the federal government. Echoing *Wickard v. Filburn*,[3] the Court replaced the direct/indirect standard with the substantial effects test.[4] Thus, the Sherman Act now reaches local restraints producing no interstate harm.

The resulting fundamental change left states and the national government with concurrent authority over most of the nation's trade restraints, subjecting parties to regulation by two sovereigns. While mainly directed at private restraints, this vast expansion of the Act also resulted in possible application of the statute to numerous state-approved restraints that previously exceeded the statute's reach. Although the Court initially held that state-approved restraints are immune from the Act under the so-called "state action" doctrine, it subsequently conditioned this immunity on the satisfaction of certain procedural requirements. As a result, adoption of the substantial effects test rendered the statute a vehicle for second-guessing local regulatory decisions and the process employed to reach them. The new regime also raised the specter of Sherman Act preemption of state antitrust laws. Finally, the change undermined the role of competitive federalism in generating legal rules to govern local restraints that produced no interstate harm.

Reinterpretation of an unchanged statute requires some explanation. The Court has offered three distinct rationales for replacing the direct/indirect standard with the substantial effects test. First, the Court

3. 317 U.S. 111, 128–29 (1942).
4. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 234 (1948).

has claimed that the 1890 Congress did not share the 1890 Court's commitment to dual federalism and related belief that authority over trade restraints was mutually exclusive. Instead, it has said that Congress meant to reach local restraints that substantially but indirectly impact interstate commerce, without displacing concurrent state authority over such agreements. Second, the Court has claimed that Congress meant to exercise its entire commerce power, including any additional authority obtained when the commerce power expands outside the antitrust context, as it did when *Wickard* announced a novel standard expanding the scope of Congress's authority. Third, the Court has claimed that changed economic circumstances, including increased integration of the national economy and growth in the size of business enterprises, justified revising application of the Act to reach local restraints that substantially impact interstate commerce. Put another way, the 1948 revision translated the underlying principle informing the scope of the Act in light of new information and thus faithfully applied Congress's normative choices.

Each of these arguments rests upon express or implied assertions about the original meaning of the Sherman Act. This Article examines the meaning of the phrase "restraint of . . . commerce among the several States" and thus evaluates the Court's three rationales for replacing the direct/indirect standard with the substantial effects test. This examination concludes that the substantial effects test does not faithfully implement the original meaning of the Act.

All the available evidence of original statutory meaning rebuts the first rationale and confirms that the Sherman Act incorporates the direct/indirect standard to define the boundary between state and national authority over trade restraints. The Congress that wrote the Act did so against the background of a highly developed Supreme Court jurisprudence defining the scope of the commerce power and allocating regulatory authority between states and the national government. This jurisprudence read the Commerce Clause as implementing an anti-favoritism principle, empowering Congress to preempt state legislation that enriched one state's citizens at the expense of others.

While Congress rarely exercised this power by enacting legislation, the Court created a quasi-statutory regime under which congressional silence regarding "inherently national" subjects signaled Congress's will to preempt state laws regulating such activities. State legislation regulated these subjects, in turn, if it produced direct impacts on interstate commerce. Laws affecting interstate commerce only indirectly exceeded the scope of Congress's power and thus could not interfere with any

exclusive national authority. Reading the Sherman Act to reach local restraints that substantially but only indirectly affect interstate commerce would exceed the scope of the commerce power articulated in this pre-1890 jurisprudence and contravene the avoidance canon, which requires courts to read statutes so as not to exceed judicially-imposed constitutional limitations.

The avoidance canon offers no affirmative account of statutory meaning. The prior construction canon does, however. The quasi-statutory regime described above produced terms of art that illuminated the meaning of the Act. Major cases during the 1880s referred to state laws that "directly burdened" and thus regulated interstate commerce as "restraints" of that commerce, treating the terms "regulate" and "restrain" as synonymous.

The Congress that passed the Sherman Act was presumably aware of these decisions. Thus, the Act's invocation of "restraint of . . . commerce among the several States," suggested that the Act would perform the same role *vis-á-vis* private agreements that Commerce Clause jurisprudence played with respect to state legislation. Congress "presumably kn[ew] and adopt[ed] the cluster of ideas that were attached" to this term of art, including the direct/indirect standard employed when evaluating challenges to state legislation.[5] This realization suggests that the Act condemns only those "restraints of trade" that also "directly obstruct" or "directly burden" interstate commerce. Following this logic, the Act left agreements that caused no such effects unscathed, even if they otherwise restrain (intrastate) trade and produce substantial effects on interstate commerce.

The Supreme Court read the Act in exactly this manner during the 1890s. In five unanimous or near unanimous decisions, the Court construed the Act to ban only those restraints of trade that impacted interstate commerce "directly." Agreements affecting interstate commerce "indirectly"—even if they otherwise restrained trade and produced substantial intrastate harm—exceeded the scope of the Act. Congress banned agreements that directly impacted interstate commerce, the Court said, because they may impose the same harmful impact on such commerce as analogous state laws preempted by Commerce Clause jurisprudence. Intrastate restraints produced a "direct" impact on interstate commerce if they exercised market power to the detriment of consumers in other states.

The Court also offered a functional rationale for its definition of "restraint of commerce" and resulting allocation of authority between

5. Morissette v. United States, 342 U.S. 246, 263 (1952).

states and the national government. Drawing upon the anti-favoritism principle that animated its Commerce Clause jurisprudence, the Court observed that allowing states to regulate agreements that directly impacted interstate commerce would result in conflicting legislation reflecting each state's "particular interest."[6] Thus, the Court read the Act to reach only those restraints that threatened interstate harm and thereby tempted states to adopt rules governing such agreements that favored their own citizens at the expense of others. These contemporaneous constructions, which replicated the meaning suggested by the prior construction canon, are important evidence of the statute's original meaning and bolster the conclusion that the Act does not reach intrastate agreements producing substantial but indirect effects on interstate commerce.

The second rationale for the substantial effects test—that Congress meant the Sherman Act to expand with the commerce power—fares no better. To be sure, changed circumstances could result in revised applications of an unchanged direct/indirect standard, thereby altering the practical boundary between state and national authority and effectuating the intent of Congress to reach conduct that produces particular effects. But the substantial effects test is an entirely new standard unknown to the 1890 Congress, a standard that reflects different normative choices about the proper allocation of regulatory authority in the federal system. The Court has nonetheless claimed that Congress meant the scope of the Sherman Act to expand accordingly, reaching conduct that produces only indirect, but substantial, effects on interstate commerce.

However, the empirical basis for this claim is questionable, to say the least. Congress has often refused to exercise the full extent of its commerce power, leaving regulation of interstate commercial subjects to the states. Indeed, Congress has declined three different times to exercise its entire commerce power when enacting post-1890 antitrust legislation. It thus seems altogether possible that the 1890 Congress would not have exercised more expansive authority than conferred by the Court's pre-1890 Commerce Clause jurisprudence if given the opportunity to do so. Nothing in the Act's text speaks to how the 1890 Congress would have (re)drafted the Act in response to the sort of fundamental constitutional change that *Wickard* wrought.

The federal-state balance canon resolves this dilemma. Since the early 1940s, the Supreme Court has refused to read ambiguous federal statutes to reach conduct traditionally subject to exclusive state regulation. More

6. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 231–32 (1899).

recently, the Court has recognized that trade restraints are topics "traditionally regulated by the States."[7] Replacing the direct/indirect standard with the substantial effects test contravened this canon by expanding an ambiguous Sherman Act to supplant traditional state prerogatives.

The statutory analysis that compels rejection of the first two rationales for the substantial effects test also facilitates evaluation of the final claim, i.e., that the test is a valid translation of the underlying principle informing the scope of the Act. By enacting the phrase "restraint of . . . commerce among the several States," Congress apparently embraced the anti-favoritism principle animating the Court's pre-1890 Commerce Clause jurisprudence. Under this approach, intrastate agreements ran afoul of the Sherman Act if they produced harm exceeding the boundaries of a single state, with the result that state regulation of such activity would produce self-interested results.

The substantial effects test is not a faithful translation of this principle. No proponent of the test has identified any changed circumstances suggesting that agreements inducing substantial but indirect impacts on interstate commerce generally produce interstate harm. The nation's economy is certainly more integrated than in 1890, enterprises have achieved greater scale, and more agreements impact interstate commerce. However, proof that more restraints produce effects—direct or indirect—on interstate commerce does not imply that the direct/indirect standard is somehow an inadequate method for ascertaining whether the Sherman Act reaches a particular restraint or that states lack proper incentives to police such restraints. Instead of translating the Sherman Act in a new context, the substantial effects test implements an entirely new principle, contradicting Congress's normative choices.

This Article primarily employs conventional techniques of statutory interpretation—namely, the text and relevant canons of construction that shed light on that text's plain meaning to those who drafted it. But the Court has also invoked a few sentences from the Act's legislative history in support of the substantial effects test. Proponents of the substantial effects test may contend that such history constitutes the sort of clear statement that overrides the federal-state balance canon, for instance. However, this Article examines the Act's legislative history and concludes that such history actually bolsters the result of this Article's textual analysis.

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7. *See* California v. ARC Am. Corp., 490 U.S. 93, 101 & n.4 (1989).

The legislative history reveals that key members of Congress fully understood the Court's dual federalism jurisprudence and aimed to implement it. To be sure, some applications of bills Senator Sherman introduced would have exceeded the scope of the commerce power defined by the Court's precedents. However, several Senators who embraced the Court's dual federalism jurisprudence, including mutually exclusive authority over trade restraints, opposed Sherman's proposals. Over Sherman's objection, the Senate directed its Judiciary Committee to redraft Sherman's bill, narrowing its reach and producing what became the Sherman Act. The actual author of the statute's language, Senator George Edmunds, had opined that Congress lacked authority to ban formation of the sugar trust, presaging the Court's 1895 holding to this effect in *United States v. E.C. Knight Co.*[8]

The House Judiciary Committee report on the Senate measure embraced dual federalism and mutually exclusive authority over trade restraints. The Committee endorsed the bill as "carefully confined to such subjects of legislation as are clearly within the legislative authority of Congress."[9] The Committee also observed that "[n]o attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds."[10]

No member of Congress suggested that the reach of the Act would expand if the Court created a novel standard governing the scope of the commerce power. Indeed, one Senator whose remarks the Supreme Court has selectively invoked characterized the commerce power as quite narrow, opining that the Act would leave most trusts unscathed. Assertions that Congress meant the Act to expand along with entirely revised conceptions of the commerce power are speculation with no support in the legislative history.

The conclusion that the substantial effects test is an erroneous interpretation of the Sherman Act does not itself justify return to the pre-1948 allocation of authority over antitrust matters. While stare decisis has a relatively weak claim in the antitrust context, mere legal error does not suffice to upset longstanding precedent. If, on the other hand, the Court attributes the 1948 revision and continued expansion of the Act to changed economic circumstances—such as increased integration of the national economy—stare decisis should yield to post-1948 developments in the theory of competitive federalism. These developments confirm

8. 156 U.S. 1 (1895).
9. H.R. REP. NO. 51-1707, at 1 (1890).
10. *Id.*

that states possess appropriate incentives to generate impartial rules with respect to intrastate restraints that produce no interstate harm.

Abandoning the substantial effects test and retracting the scope of the Sherman Act would reboot competitive federalism in the antitrust field. The resulting competition between state "laboratories of democracy" would presumably generate a variety of substantive and institutional solutions to various antitrust problems, as states vie for producers and consumers by offering rival packages of antitrust doctrine and enforcement institutions.

Restoring the pre-1948 regime would also radically shrink the category of state-approved restraints potentially subject to the Act. Instead of state regulation of local billboards and the like, state action cases reaching the Court would involve restraints imposing substantial interstate harm. This new framing could force the current Court, less friendly to regulation than its post-New Deal predecessors, to reconsider its hands-off approach to state-approved restraints. Narrowing the Sherman Act's reach could ironically encourage more robust preemption of state-approved restraints.

Finally, the history recounted here would alter the question posed in state action cases. The Court's state action decisions emphasize that Congress did not anticipate Sherman Act preemption of state-approved restraints. However, the Court is answering an anachronistic question. The 1890 Congress would have assumed that state-approved direct restraints of interstate commerce would fall prey to the Court's regime of implied preemption, a regime later eclipsed by the Court's more permissive dormant Commerce Clause jurisprudence. Thus, the real question for a Court reconsidering the Act's treatment of state-approved restraints is how Congress would have treated such restraints absent implied preemption, and this question could produce a quite different answer.

Part I of this Article reviews the Court's pre-1948 jurisprudence regarding the scope of the Sherman Act, particularly the articulation of the direct/indirect standard and its application to intrastate restraints. Part II recounts the Supreme Court's post-New Deal expansion of the Act to reach intrastate restraints that induce substantial but fortuitous effects on interstate commerce. Part III details the three rationales the Court has offered to justify rejection of the direct/indirect standard in favor of the substantial effects test. Part IV reviews the content of the Court's Commerce Clause jurisprudence when Congress debated and passed the Sherman Act. Part V draws upon the lessons of this review and assesses the original meaning of the phrase "restraint of . . . commerce

among the several States," employing several accepted canons of construction. This Part also evaluates the contentions that the scope of the Sherman Act properly expands with the scope of the commerce power and that changed circumstances justify replacing the direct/indirect standard with the substantial effects test. Part VI reviews the legislative history of the Act. Finally, Part VII explores selected implications of the finding that the Court's adoption of the substantial effects test was unwarranted.

I. EARLY CASE LAW AND THE DIRECT/INDIRECT STANDARD: 1890–1948

Passed in 1890, the Sherman Act bans contracts "in restraint of trade or commerce among the several States."[11] Thus, a contract "in restraint of trade" does not violate the Act unless it also restrains "commerce among the several States."[12] For several decades, the Supreme Court read this latter phrase to place meaningful limits on the statute's reach, leaving states with exclusive authority over a large portion of the nation's trade restraints.[13] "Commerce," the Court said, consisted of "intercourse and traffic," including transportation and sale or barter of goods.[14] Accordingly, the statute reached agreements setting rates for interstate transportation or prices of goods exchanged across state lines.[15] However, the Act generally did not reach *intra*state restraints, i.e., agreements governing commerce confined to a single state, such as cartels in one state fixing prices charged to consumers in that same state.[16]

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11. 15 U.S.C. § 1 (2018).

12. Apex Hosiery Co. v. Leader, 310 U.S. 469, 494–95 (1940) ("[T]he phrase 'restraint of trade' . . . was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' . . . was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes.").

13. *See, e.g.*, Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Bay, 200 U.S. 179, 183–84 (1906) (holding that the Act did not reach a covenant limiting competition within waters of single state); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 247–48 (1899) (holding that the Act did not reach intrastate cartels).

14. *Addyston Pipe*, 175 U.S. at 241.

15. *Id.* (holding that the Act reaches any contract that "directly restrains not alone the manufacture, but the purchase, sale or exchange of the manufactured commodity among the several States"); United States v. Joint Traffic Ass'n, 171 U.S. 505, 569 (1898) (applying the Act to agreement governing interstate railroad rates).

16. *Cincinnati Packet Co.*, 200 U.S. at 183–84; *Addyston Pipe*, 175 U.S. at 247–48; *see also* Indus. Ass'n of S.F. v. United States, 268 U.S. 64, 80 (1925) (explaining that the challenged restraint did not limit "the freedom of the [out-of-state] manufacturer to sell and ship or of the local contractor to buy" and thus was intrastate).

Some intrastate restraints also affected interstate commerce, suggesting a possible exception to this general rule. In such cases, the Court distinguished between "direct" and "indirect" effects, holding that the statute only reached intrastate restraints producing the former.[17] The Court drew the direct/indirect standard from its Commerce Clause jurisprudence.[18] That case law articulated a vision of "dual federalism," which treated state and national authority over most economic activity as mutually exclusive.[19]

Decisions implementing this vision allocated to Congress sole authority over most interstate activity, leaving states with exclusive authority over conduct occurring only within their borders. To preserve Congress's authority, the Court invalidated state regulation of local activity that affected interstate commerce directly and thus effectively regulated such commerce, exercising power solely committed to Congress.[20] Where, however, state regulation only affected interstate commerce indirectly,

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17. *Compare* United States v. Am. Tobacco Co., 221 U.S. 106, 183–84 (1911) (finding that the Act applied to transactions creating a national monopoly and thus directly restraining interstate commerce), *and* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 68–69, 74–75 (1911) (same), *and* Swift & Co. v. United States, 196 U.S. 375, 397 (1905) (holding that the Act applied to intrastate restraints with interstate commerce as their "direct object" and "object of attack"), *with Cincinnati Packet Co.*, 200 U.S. at 183–84 (declining to extend the Act to agreement where "interference with [interstate] commerce is insignificant and incidental, and not the dominant purpose of the contract"), *and* Hopkins v. United States, 171 U.S. 578, 591–92 (1898) (declining to extend the Act to agreement that "indirectly . . . add[ed] to the price paid by a purchaser"), *and* Anderson v. United States, 171 U.S. 604, 616–18 (1898) (declining to extend the Act to activities affecting interstate commerce "in the most roundabout and indirect manner").

18. *See, e.g.*, *Addyston Pipe*, 175 U.S. at 229–30 (explaining that the Act reached agreements producing the same impact as state restraints directly affecting interstate commerce); *Anderson*, 171 U.S. at 616 (quoting Smith v. Alabama, 124 U.S. 465, 473 (1888)) ("'[T]he acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.' The same is true as to [particular contracts among firms in an industry that] . . . regulat[e] the conduct of their business among themselves and with the public.").

19. *See infra* notes 20–49 and accompanying text (describing the development and content of this jurisprudence).

20. *See, e.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886) (invalidating state regulation of intrastate railroad rates directly burdening interstate commerce); *see also* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1096–99 (2000) (describing early twentieth century antitrust decisions as exemplifying Commerce Clause jurisprudence).

such provisions remained unscathed.[21] Given the assumption of mutually exclusive regulatory domains, decisions clarifying the scope of state authority also defined the affirmative scope of congressional power.[22]

United Mine Workers v. Coronado Coal Co.[23] exemplified the Court's reliance upon the direct/indirect standard to delimit the scope of the Sherman Act.[24] There, a non-union coal company exported most of its output to other states.[25] A union sought recognition as the exclusive representative of the firm's employees and termination of non-union workers, violently closing the company's mine.[26] Lower courts condemned the conspiracy under the Sherman Act.[27] A unanimous Supreme Court reversed.[28]

The Court conceded that the conspiracy restrained trade and prevented the production and export of coal to other states.[29] The Court also found that the union consistently discouraged the existence of non-union mines because competition from such mines threatened union wages.[30] Unionization was "a means of lessening interstate competition for union operators" and "lessen[ed] the pressure of those operators for reduction of the union scale."[31] Nonetheless, the Court held that this was "a secondary or ancillary motive."[32] The main motive was to "better[] the conditions and wages of [union] workers" at the local mine.[33] While the union's success could have encouraged similar firms to maintain union shops, impacting interstate commerce, this result was "remote" and did not justify application of the Act.[34] The

21. *See, e.g.*, Kidd v. Pearson, 128 U.S. 1, 19–20 (1888) (explaining that a state's ban on alcohol production impacted interstate commerce merely indirectly, despite intent to export such alcohol, and thus exceeded the scope of the commerce power).

22. *See, e.g.*, *infra* notes 37–45 and accompanying text.

23. 259 U.S. 344 (1922).

24. *See id.* at 408–13; *see also* Cushman, *supra* note 20, at 1096–98 (discussing *Coronado Coal* as an exemplar of the Court's Commerce Clause jurisprudence).

25. *Id.* at 412.

26. *Id.*

27. *Id.* at 413.

28. *Id.*

29. *Id.* at 412.

30. *Id.* (reporting that unionization producing higher wages increased costs by seventeen to twenty cents per ton).

31. *Id.* at 408.

32. *Id.* at 408–09 ("Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce.").

33. *Id.* at 408.

34. *Id.* at 413.

Act would only reach such conduct if the union had intended to impact interstate commerce.[35] While sufficient, express proof of intent was not necessary. Instead, drawing upon its Commerce Clause jurisprudence, the Court said such an intent "must be inferred" if the agreement "necessarily [had] a direct, material and substantial effect to restrain [interstate commerce]."[36]

A direct effect would arise, the Court said, if the defendants attempted "to unionize mines whose product was important, actually or potentially, in affecting prices in interstate commerce."[37] Such a conspiracy would not "involve interstate commerce intrinsically" because the agreement would not govern any interstate transactions.[38] Still, the (intrastate) restraint would "affect[] interstate commerce so directly as to be within the federal regulatory power."[39] The Court invoked a prior case, *United States v. Patten*,[40] where the defendants' intrastate conspiracy had produced such an effect by cornering the market in cotton traded on the New York City Cotton Exchange.[41] Although the reduced cotton supply was not itself interstate commerce, the object of the conspiracy was "to obtain control of the available supply and to enhance the price to all buyers in every market of the country."[42] The "necessary effect" was to "directly . . . burden the due course of trade among the States and inflict upon the public the injuries which the [Sherman] Act was designed to prevent," i.e., to increase the price of cotton sold across state lines.[43] By contrast, the restraint before the Court could have no similar impact because the mine produced a small share of the nation's coal, so that shuttering the mine would not alter interstate coal prices.[44] Thus, the direct/indirect standard defined the affirmative limits of the "federal regulatory power" and therefore the Sherman Act.[45]

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35. *Id.* at 410–11.
36. *Id.* at 411.
37. *Id.* at 409.
38. *Id.* at 410; *see also* Indus. Ass'n of S.F. v. United States, 268 U.S. 64, 80 (1925) (explaining that the challenged restraint was intrastate because it did not limit freedom of out-of-state firms to supply local contractors).
39. *Coronado Coal*, 259 U.S. at 410.
40. 226 U.S. 525 (1913).
41. *Id.* at 536–39.
42. *Coronado Coal*, 259 U.S. at 410 (citing *Patten*, 226 U.S. 525).
43. *Id.* (citing *Patten*, 226 U.S. 525).
44. *Id.* at 412 (stating that challenged conspiracy "would have no appreciable effect upon the price of coal or non-union competition").
45. *See id.* at 410 (citing *Patten*, 226 U.S. 525).

The Court reiterated this standard several times, including in cases where targets or proponents of the restraint purchased inputs from other states. Such restraints, while local, ultimately induced a reduction in interstate purchases by the affected firms.[46] While the Court continued to invoke "intent" as an element of the test, results effectively turned on the probable economic impact of the challenged restraint, which courts ascertained after a flexible and fact-intensive analysis.[47] According to this case law, a mere reduction in interstate purchases or sales by targets or proponents of such restraints did not justify application of the Act, as such interstate impacts were "clearly incidental, indirect and remote."[48] For several decades after passage of the Sherman Act, then, the Court consistently and repeatedly allocated to states exclusive authority over intrastate restraints that produced only intrastate harm and affected interstate commerce indirectly. Congress, however, retained exclusive authority over those intrastate restraints that affected interstate commerce directly. Thus, the Act only reached those intrastate restraints that produced harmful impacts in the form of non-competitive prices for interstate transactions, injuring consumers in multiple states.[49]

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46. *See* Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 107–08 (1933) (holding that strikes aimed at local builders exceeded the commerce power and Sherman Act although they reduced interstate steel purchases); *id.* at 107 ("It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy."); Indus. Ass'n of S.F. v. United States, 268 U.S. 64, 80 (1925) (finding that the Act did not reach conspiracy to deprive local rivals of inputs because "[t]he effect upon, and interference with, interstate trade, if any, were clearly incidental, indirect and remote"); United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co., 265 U.S. 457, 471 (1924) (declining to apply Act to boycott of trunk manufacturers selling most of their output in interstate commerce).

47. *See, e.g.*, *Indus. Ass'n of S.F.*, 268 U.S. at 77–81 (assessing impact of restraint absent intent to restrain interstate commerce); Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66, 70–71 (1911) (describing direct/indirect test as fact-intensive standard); *see also infra* note 195 and accompanying text (characterizing Commerce Clause's direct/indirect test as a standard and not a rule).

48. *Indus. Ass'n of S.F.*, 268 U.S. at 80.

49. *See In re* Op. of the Justices, 99 N.E. 294, 294–95 (Mass. 1912) (concluding that state lacked authority over agreements restraining interstate commerce); James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. PA. L. REV. 495, 518 (1987) ("Federal and state jurists often declared that states could not constitutionally regulate anticompetitive activity within interstate commerce, [establishing] some significant limitations on the scope of state antitrust provisions . . . ."); *infra* notes 333–38 and accompanying text (explaining *Addyston Pipe*'s conclusion that state and federal authority over trade restraints was mutually exclusive).

States exercised their exclusive authority in various ways.[50] Some employed corporate law, invalidating certain anticompetitive practices.[51] All employed contract law, declining to enforce unreasonable restraints.[52] At least one relied upon a general law against conspiracies to injure trade.[53] Finally, beginning in the 1880s, numerous states enacted antitrust legislation governing intrastate restraints.[54] State antitrust enforcement activity exceeded that of the federal government for two decades after passage of the Sherman Act.[55] Between 1890 and 1919, Texas collected more antitrust fines than the United States.[56] State and federal courts sustained application of these statutes to local activity affecting interstate commerce indirectly.[57]

During this period, then, a robust regime of competitive federalism generated antitrust doctrine and enforcement institutions governing a large proportion of the nation's trade restraints. Because competing states internalized the costs and benefits of these rival packages of doctrine and institutions, such interjurisdictional competition presumably enhanced the quality of such regimes, improving society's welfare compared to an allocation of authority in which a single lawgiver produced legislation

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50. *See* May, *supra* note 49, at 497–507 (describing state antitrust regulation of intrastate restraints from 1880 to 1918).

51. *See, e.g.*, People v. N. River Sugar Ref. Co., 24 N.E. 834, 840 (N.Y. 1890) (holding that a corporation exceeded its charter by delegating decisions to rivals); State *ex rel.* Attorney Gen. v. Standard Oil Co., 30 N.E. 279, 286–87 (Ohio 1892); *see also* Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75, 76–85 (1990) (exploring evolution of state corporate law in response to anticompetitive mergers).

52. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 281–82 (6th Cir. 1898) (summarizing common law of contract that governed enforceability of trade restraints).

53. *See* Hooker & Woodward v. Vandewater, 4 Denio 349, 352 (N.Y. Sup. Ct. 1847) (declining to enforce price fixing agreement as contravening statute banning "act[s] injurious to trade or commerce").

54. *See* May, *supra* note 49, at 499 (reporting that thirteen states enacted antitrust legislation before 1890, twenty-seven by 1900, and thirty-five by 1915).

55. *Id.* at 499–501.

56. *Id.* at 501–02.

57. *See, e.g.*, Standard Oil Co. of Ky. v. Tennessee, 217 U.S. 413, 422 (1910) (rejecting Commerce Clause challenge to state antitrust regulation incidentally affecting interstate commerce); *In re* Op. of the Justices, 99 N.E. 294, 295 (Mass. 1912) (finding that proposed antitrust statute reached only intrastate restraints and thus did not regulate interstate commerce, even though the statute "may interfere to some extent with such commerce" by "incidentally, but not primarily, affecting" it); May, *supra* note 49, at 521 n.130 ("[S]tates were left substantial room . . . to regulate despite an effect on interstate commerce . . . .").

applicable to all the nation's trade restraints.[58] By contrast, the national government generated the doctrine and institutions governing restraints that exercised market power to the detriment of out-of-state consumers, because the interstate nature of such harm raised the prospect that state regulation of these restraints would produce self-interested results.

II. POST-NEW DEAL EXPANSION

A. Wickard, Mandeville Island Farms, *and the Substantial Effects Test*

As explained earlier, the Supreme Court drew the direct/indirect standard that determined the scope of the Sherman Act from its Commerce Clause jurisprudence, treating state and national authority over trade restraints as mutually exclusive.[59] During the 1940s, the Court rejected this framework. Most famously, in *Wickard v. Filburn*,[60] the Court rejected both dual federalism and the direct/indirect standard as valid expositions of the Commerce Clause.[61] The Court characterized the direct/indirect standard as exemplifying the "mechanical application[] of [a] legal formula[]" that obscured the relevant inquiry—namely, the "economic effect[]" of the regulated activity.[62] Decisions employing this standard to define the affirmative reach of Congress's power had erred, the Court said, by assuming that state and congressional power over activities affecting interstate commerce were mutually exclusive, with the result that Congress could not regulate activities impacting interstate commerce indirectly.[63]

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58. *See, e.g.*, Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 34 (1983) (describing conditions, including lack of interstate externalities, under which competitive federalism "causes a powerful *tendency* toward optimal legislation"); Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403, 451–59 (2004) (describing the benefits of competitive federalism in production of antitrust doctrine and asserting that state and federal antitrust law "will iterate more quickly toward the optimal set of legal rules" under this regime); *infra* note 188 and accompanying text (collecting additional authorities discussing conditions under which interjurisdictional competition induces a tendency toward optimal legislation).

59. *See supra* notes 17–19 and accompanying text.

60. 317 U.S. 111 (1942).

61. *Id.* at 120, 125.

62. *Id.* at 123–24. *But see* Alan J. Meese, Wickard *Through an Antitrust Lens*, 60 WM. & MARY L. REV. 1335, 1377–82 (2019) (explaining that the Sherman Act's direct/indirect standard focused precisely on whether challenged restraints produced the prohibited economic effect).

63. *See Wickard*, 317 U.S. at 120–21.

The Court replaced the direct/indirect standard with the "substantial effects" test.[64] Under this approach, Congress could regulate any activity that produced a "substantial economic effect" on interstate commerce, even if the effect was indirect and states possessed coextensive authority over such conduct.[65] The Court also held that Congress could reach conduct that individually produced a trivial impact on interstate commerce if the entire class of activities, when aggregated together, induced a substantial effect.[66]

Wickard was not an antitrust case but instead involved a 1938 statute expressly regulating local farm production.[67] The Sherman Act remained unchanged. Still, just six years after *Wickard*, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*,[68] the Court rejected the direct/indirect standard as an appropriate exposition of the Sherman Act.[69] The Court embraced *Wickard*'s critique of the direct/indirect standard, including the claim that the standard was mechanical and artificial, obscuring the actual economic impact of challenged restraints.[70] The Court also characterized the standard as an artifact of discredited dual federalism.[71] Just as the commerce power had come to reach any conduct that produced a substantial effect on interstate commerce, so too did the Sherman Act reach any agreement "in restraint of trade" that produced such an effect.[72]

Some language in *Mandeville Island Farms* suggested that only harmful effects counted as "substantial" for purposes of the newly minted substantial effects test.[73] However, the Court soon confirmed that harmless and incidental impacts on interstate commerce could

64. *Id.* at 125.

65. *See id.* (explaining that classification of an effect as direct or indirect has no bearing on whether the economic effect is "substantial").

66. *Id.* at 127–29.

67. *Id.* at 114–15 (discussing and applying the Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, 52 Stat. 31).

68. 334 U.S. 219 (1948).

69. *Id.* at 243–44.

70. *Id.* at 230–32 (invoking *Wickard*'s "familiar story of the progression of [Commerce Clause] decision[s]").

71. *See id.* at 229–30 (critiquing United States v. E.C. Knight Co., 156 U.S. 1 (1895), and subsequent decisions "embracing the same artificially drawn lines").

72. *See id.* at 232–34.

73. *See id.* at 234 (asking "whether the effect is sufficiently substantial and adverse to Congress'[s] paramount policy . . . to constitute a forbidden consequence").

nonetheless be "substantial."[74] *Burke v. Ford*[75] exemplifies this approach. There, Oklahoma liquor retailers challenged a horizontal agreement allocating territories among the state's liquor wholesalers.[76] The intrastate agreement could only injure the state's own retailers and consumers.[77] While wholesalers purchased liquor from out-of-state firms, the restraint did not govern such purchases.[78] There was no indication that the restraint impacted price, output, or quality in any interstate liquor market.[79]

The Court conceded that the agreement did not itself restrain interstate commerce.[80] Nonetheless, the Court invoked *Mandeville Island Farms* and a subsequent decision holding that the Sherman Act reached intrastate restraints producing a "substantial effect" on interstate commerce.[81] The Act thus reached the wholesalers' cartel because a successful conspiracy would reduce in-state liquor sales and thus wholesalers' interstate liquor purchases.[82] The Court did not assess the possible impact of that reduction on the price or overall output of interstate liquor. Nor was there any reason to believe the conspiracy could have such an impact or that Oklahoma was unable to protect consumers from its wholesalers.[83] Nonetheless, the Court

74. *See, e.g.*, United States v. Employing Lathers Ass'n, 347 U.S. 198, 200 (1954) (finding that agreement restricting entry into the Chicago lathing trade substantially affected interstate commerce because lathers purchased some supplies from other states). While the complaint asserted that the challenged restrictions on the Chicago lathing trade also "directly restrain[ed] and affect[ed] the interstate flow of lathing materials," the Court did not assert or suggest that the complaint alleged any interstate harm. *Id.*

75. 389 U.S. 320 (1967) (per curiam).

76. *Id.* at 320.

77. *See id.* at 320–22.

78. *See id.*

79. *See id.* at 320–21; *cf. supra* notes 17–45 and accompanying text (describing decisions holding that such an impact was necessary to apply Act to intrastate restraints).

80. *See Burke*, 389 U.S. at 321–22 (holding that despite the lack of direct impact on interstate commerce, the "wholesalers' market division inevitably affected interstate commerce").

81. *See id.* at 321 (citing United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219 (1948)) ("[A]ctivity which does not itself occur *in* interstate commerce comes within the scope of the Sherman Act if it substantially *affects* interstate commerce.").

82. *Id.* at 322 ("The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed . . . .").

83. *Cf. supra* notes 54–57 and accompanying text (recounting robust state antitrust enforcement at the turn of the twentieth century).

found that the surmised incidental impact on wholesalers' liquor purchases was a "substantial effect" on interstate commerce.[84] Here again, the Court invoked effects previously deemed "incidental," "indirect," "obscure," "remote," and "fortuitous" to justify application of the Act to an intrastate restraint producing only localized harm.[85]

Modern decisions have repeatedly reiterated the substantial effects test announced in *Mandeville Island Farms*.[86] Thus, the Act now reaches numerous restraints that produce harm confined to a single state—that is, restraints that do not alter the price or quality of any product sold in interstate markets.[87] To be sure, the substantial effects test captures restraints that impose interstate harm and thereby qualified as "direct" under the direct/indirect standard. However, by design, the test also captures local restraints that produce no interstate harm and impact interstate commerce only indirectly. This change has substantially increased the scope of the Sherman Act, while simultaneously leaving states with concurrent authority over restraints within their borders that also affect interstate commerce.

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84. *See Burke*, 389 U.S. at 321–22 (reasoning that prices increased and unit sales decreased due to reduced competition).

85. *See supra* notes 46–49 and accompanying text (discussing cases holding that similar effects did not justify application of the Act).

86. *See, e.g.*, Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 332–33 (1991) (holding that the Act reached a group boycott by one hospital's physicians against a single physician); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 245 (1980) (explaining that the Act reached price fixing by city's realtors because purchasers often sought out-of-state financing); Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 744 (1976) (holding that the Act reached a scheme preventing a hospital's expansion because, inter alia, the expanding hospital would have purchased additional supplies from out-of-state vendors); Goldfarb v. Va. State Bar, 421 U.S. 773, 784–85 (1975) (explaining that the Act reached an agreement setting title search fees in one county).

87. *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 501 (2015) (invalidating agreement between the state's dentists to exclude non-dentists from teeth-whitening); Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771, 773, 776–77 (1999) (evaluating challenge to agreement between state's dentists not to engage in fraudulent advertising); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 463–66 (1986) (invalidating agreement between local dentists not to provide insurers with x-rays); Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 4–5 (1984) (evaluating challenge to tying contract imposed by a single hospital in one city); Ill. Brick Co. v. Illinois, 431 U.S. 720, 726–28 (1977) (evaluating challenge to a horizontal agreement between Illinois firms manufacturing bricks for Illinois highway projects); United States v. Citizens & S. Nat'l Bank, 422 U.S. 86, 94, 110–11 (1975) (evaluating a merger between Georgia banks); United States v. Von's Grocery Co., 384 U.S. 270, 271, 274 (1966) (invalidating a merger between Los Angeles grocery stores).

B. Substantial Effects and the Collapse of Competitive Federalism

The Court's significant expansion of the Act and recognition of concurrent authority over numerous local restraints radically altered the balance between state and federal power over trade restraints. This major reallocation of regulatory authority undermined the robust regime of competitive federalism that characterized pre-1948 regulation of trade restraints.[88] Many restraints were now subject to rules produced by two sovereigns. Because the Sherman Act provided a regulatory floor, states lacked incentives to generate innovative doctrinal approaches less interventionist than Sherman Act doctrine.[89] To be sure, states remained free to impose *more* interventionist rules, condemning conduct that courts treat as perfectly reasonable under the Sherman Act. However, the prospect of aggressive state antitrust enforcement policy has led to sporadic federal judicial invalidation of state antitrust laws and calls for more such preemption.[90] Indeed, Richard Posner has called for preemption of all state antitrust regulation of conduct that affects interstate commerce.[91] Thus, state efforts to adopt intrusive antitrust regulation *vis-á-vis* local restraints necessarily take place in the shadow of possible federal reaction, further attenuating the sort of

88. *See supra* notes 17–22, 50–58 and accompanying text (explaining how pre-*Wickard* regime allocated regulatory authority over trade restraints into mutually exclusive domains, thereby supporting a robust regime of competitive federalism).

89. *See* Frank H. Easterbrook, *Federalism and Commerce*, 36 HARV. J.L. & PUB. POL'Y 935, 937 (2013) (asserting that competitive federalism can only induce optimal rules if, inter alia, states can "select any set of laws they desire"); Alan J. Meese, *Regulation of Franchisor Opportunism and Production of the Institutional Framework: Federal Monopoly or Competition Between the States?*, 23 HARV. J.L. & PUB. POL'Y 61, 85–86 (1999) (explaining how states' refusal to recognize other states' rules governing intrastate conduct can undermine incentives of latter states to generate optimal legal rules).

90. *See* Flood v. Kuhn, 407 U.S. 258, 284–85 (1972) (rejecting both the Sherman Act challenge to the baseball reserve system and the application of state antitrust laws because such laws "would conflict with federal policy" (i.e., the Court's interpretation of the Sherman Act) and burden interstate commerce); Major League Baseball v. Crist, 331 F.3d 1177, 1179 (11th Cir. 2003) (holding that Sherman Act preempted state antitrust regulation of major league baseball).

91. *See* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5, 13 (2004) (advocating such preemption); *see also* Michael E. DeBow, Testimony Before the Antitrust Modernization Comm'n, 1–2, 8 (Oct. 26, 2005) (advocating federal preemption of state antitrust laws and limitations on state officials' ability to invoke federal antitrust laws).

incentives necessary to drive robust competition between the states.[92] Perhaps because of this fear, a supermajority of states all but require their courts to read their own antitrust statutes to replicate federal law.[93]

States do retain exclusive authority over conduct producing no impact of any sort on interstate commerce, raising the prospect of continued rivalry between states to generate doctrine governing such restraints. However, the pervasive integration of the nation's economy has likely reduced the size of this category to a trivial portion of the nation's commerce, weakening states' incentives to produce a separate set of rules governing such restraints.[94] Indeed, studies of state antitrust activity conclude that most states bring few, if any, antitrust cases.[95] While competition between the states to produce certain bodies of law is alive and well,[96] competitive federalism in antitrust is on life support or worse, depriving society of the benefits of interjurisdictional rivalry.[97]

The revised allocation of regulatory authority and the prospect of preemption was particularly salient with respect to restraints that states themselves approved. Shortly after *Wickard*, the Supreme Court held that state-approved restraints usually do not violate the Sherman Act.[98] Subsequent decisions elaborating on this so-called "state action

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92. *See supra* note 89 and accompanying text (explaining how depriving states of exclusive authority over local conduct undermines incentives driving competitive federalism).

93. *See, e.g.*, Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow* Leegin*?*, 27 FRANCHISE L.J. 173, 174 (2008) (finding that thirty-six states have stated intent to "adhere strongly" or "moderately strongly" to federal antitrust precedent when implementing their own antitrust laws).

94. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 1012 (5th ed. 2016) (stating that the Sherman Act now reaches "almost any market or transaction with more than a trivial impact on interstate commerce").

95. *See* Robert M. Feinberg & Kara M. Reynolds, *The Determinants of State-Level Antitrust Activity*, 37 REV. INDUS. ORGANIZATIONS 179, 189 (2010) (explaining that seven states brought no antitrust cases between 1992 and 2006 and that many states brought no cases in most years).

96. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 6, 12, 15 (1993) (contending that competition between states for corporate charters has induced production of corporate law superior to that which a national regime would produce).

97. *Cf.* Feinberg & Reynolds, *supra* note 95, at 189 (characterizing the lack of state antitrust enforcement in recent years); *supra* note 58 and accompanying text (describing benefits of interjurisdictional competition in the production of antitrust doctrine).

98. *See* Parker v. Brown, 317 U.S. 341, 345, 352 (1943) (rejecting Sherman Act challenge to state-imposed restriction on raisin output, over ninety percent of which was exported in interstate commerce); *id.* at 351–52 (describing two exceptions to such immunity).

doctrine" conditioned immunity for state-sponsored restraints upon states' satisfaction of certain procedural requirements, including active supervision by disinterested individuals of state-endorsed private restraints.[99] Failure to satisfy these requirements resulted in Sherman Act preemption of such restraints, overriding states' regulatory choices and obscuring accountability for the adoption of anti-competitive regulation.[100] Nearly all decisions elaborating on these requirements have involved intrastate restraints that affected interstate commerce only fortuitously and were thus beyond the scope of the Act before 1948.[101] As one scholar explained, the state action doctrine is only necessary because "the Sherman Act has grown with the growth of the commerce power."[102]

The Court's recent decision in *North Carolina State Board of Dental Examiners v. FTC*[103] exemplifies the impact of the substantial effects test on Sherman Act treatment of local, state-approved restraints. The Federal Trade Commission challenged a horizontal conspiracy between dentists on the state's dental licensing board to define dentistry to include teeth whitening, thereby excluding unlicensed individuals from this occupation.[104] The Commission did not assert that the Board's

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99. *See, e.g.*, N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 503–15 (2015) (rejecting state action immunity because state did not actively supervise self-interested regulators); FTC v. Ticor Title Ins., 504 U.S. 621, 639–40 (1992) (rejecting such immunity because agency did not adequately supervise private actors authorized to fix prices); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 114 (1980) (holding that compliance with California statute requiring parties to enter minimum resale price maintenance agreements violated the Sherman Act because state failed to properly supervise and review resulting wholesale wine prices).

100. *See, e.g.*, *N.C. Dental Exam'rs*, 574 U.S. at 513–15; *Ticor Title Ins.*, 504 U.S. at 639–40; *Midcal Aluminum, Inc.*, 445 U.S. at 113–14.

101. *See, e.g.*, *N.C. Dental Exam'rs*, 574 U.S. at 500–02 (agreement between dentists providing local services); FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 219–20 (2013) (merger between local hospitals); *Ticor Title Ins. Co.*, 504 U.S. at 624–25 (price fixing by local title insurers); City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365, 367–68 (1991) (monopolization of metropolitan billboard market); Fisher v. City of Berkeley, 475 U.S. 260, 261 (1986) (municipal rent control); Bates v. State Bar of Ariz., 433 U.S. 350, 353 (1977) (ban on intrastate lawyer advertising); Cantor v. Detroit Edison Co., 428 U.S. 579, 581 (1976) (state-approved requirement that public utility's customers also purchase light bulbs from the firm); *see also* Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 644 (2006) (characterizing *Parker* as the sole Supreme Court state action decision involving restraint producing interstate harm).

102. *See* Easterbrook, *supra* note 58, at 41.

103. 574 U.S. 494 (2015).

104. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 365 (4th Cir. 2013), *aff'd*, 574 U.S. 494 (2015). While the Commission brought the case under section 5 of

conspiracy harmed those seeking teeth-whitening services outside of North Carolina.[105] The Court of Appeals determined that "the Board successfully expelled non-dentist providers from the North Carolina teeth-whitening market."[106]

Nonetheless, the Commission found that federal antitrust law reached such intrastate conduct, invoking fortuitous interstate impacts.[107] For instance, some unlicensed teeth-whiteners purchased inputs from other states, and some forwarded cease-and-desist letters to out-of-state creditors.[108] The Commission held that the agreement violated the federal antitrust laws because the state did not adequately supervise self-interested individuals regulating the practice of dentistry.[109] The Supreme Court affirmed, albeit without addressing application of federal law to this intrastate conspiracy.[110] Thus, the decision left the state free to adopt the very same harmful restraint, so long as unbiased state officials signed off.[111] Absent the post-1948 substantial effects test, the conspiracy would have exceeded the reach of the Act, leaving North Carolina and other states free to structure their regulatory processes without Supreme Court oversight.

III. THE COURT'S EXPLANATION FOR CHANGE

Repudiation of several decades of precedent requires some explanation. Unfortunately, the Supreme Court has not offered a thorough or consistent rationale for replacing the direct/indirect standard with the substantial

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the Federal Trade Commission (FTC) Act, 15 U.S.C. § 45 (2018), it invoked Sherman Act case law to justify application of the FTC Act to the challenged local restraints. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370–71.

105. *See id.*

106. *Id.*; *see also N.C. Dental Exam'rs*, 574 U.S. at 501 (offering similar characterization).

107. *See* N.C. Bd. of Dental Exam'rs, 152 F.T.C. 75, 158 (2011) (finding that the board's actions have "a substantial effect on interstate commerce").

108. *Id.* at 156 (citing Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 744 (1976)) (invoking "[p]urchases by a defendant of out-of-state goods" to support a finding that the conspiracy "substantially affects interstate commerce").

109. *See id.* at 78, 86 (citing Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980)).

110. *See N.C. Dental Exam'rs*, 574 U.S. at 515–16 (holding that "[the Sherman Act] does not authorize the States to abandon markets to the unsupervised control of active market participants," with the result that state action immunity did not protect challenged agreement).

111. *See, e.g.*, *id.* at 503–15 (explaining "active supervision" requirements necessary for application of state action immunity).

effects test. Indeed, only one decision—*Mandeville Island Farms*—has devoted more than a paragraph to explaining the vast expansion of the Act *vis-á-vis* intrastate restraints.[112]

The relevant case law recounts three different considerations that purportedly support the modern approach. First, the Court has claimed that the 1890 Congress had a broader view of its commerce power than that seemingly reflected in Commerce Clause precedents the Court invoked when it first determined the Sherman Act's reach.[113] Thus, the Court has claimed that pre-1948 Sherman Act decisions improperly invoked the jurisprudence of dual federalism in place when Congress passed the Sherman Act and incorrectly treated state and federal authority over trade restraints as mutually exclusive. Because of these mistakes, pre-1890 decisions validating state regulations with merely "indirect" impacts on interstate commerce erroneously fixed the boundary between state and federal authority, thereby limiting Congress's power and the resulting reach of the Act.[114] Early Sherman Act decisions thus thwarted the purported will of Congress to exercise the full extent of its commerce power, including concurrent authority over local restraints that impacted interstate commerce indirectly.[115] This assertion echoed *Wickard*'s critique of dual federalism as well as Depression-era academics who had claimed that pre-1890 precedents recognized congressional authority to regulate conduct affecting

112. *See* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 229–33 (1948).

113. *See id.* at 229–30; *infra* notes 115–16 and accompanying text.

114. *Mandeville Island Farms*, 334 U.S. at 229 n.8 (concluding that United States v. E.C. Knight Co., 156 U.S. 1 (1895), and progeny erroneously embraced "[Chief Justice] Marshall's idea of the mutual exclusiveness of state and national power in this area and ignor[ed] the later evolution of different conceptions in Cooley v. Board of Wardens, [53 U.S. (12 How.) 299 (1852)]"); *id.* at 229 (asserting that *E.C. Knight* invoked "mechanical distinctions with substantially nullifying effects" on the coverage of the commerce power and the Act); *id.* at 229 n.8 (criticizing *E.C. Knight* and progeny for relying upon terms of art deriving from Commerce Clause cases assessing the validity of state, not federal, statutes); United States v. Se. Underwriters Ass'n, 322 U.S. 533, 545 (1944) ("[L]egal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause.").

115. *See Mandeville Island Farms*, 334 U.S. at 229; *Se. Underwriters Ass'n*, 322 U.S. at 544–45 (rejecting decisions holding that insurance is not commerce because such decisions involved Commerce Clause challenges to state law); *id.* at 558 (contending that Congress meant to exercise the full extent of its commerce power); *see also supra* notes 86–87 and accompanying text (discussing additional decisions reaching identical conclusions).

interstate commerce.[116] To support this claim, the Court has asserted that there is no support for dual federalism in the statute's legislative history.[117]

Second, the Court has claimed that the scope of the Act expands "along with expanding notions of Congressional power."[118] Such expansion, it is said, effectuates Congress's desire to go "as far as the Constitution permits" by exercising the "utmost extent of its Constitutional power" when enacting the statute.[119] Thus, even if the Court at first properly held that Congress embraced dual federalism, mutual exclusivity, and the direct/indirect standard, the scope of the Act supposedly expands along with expansion of Congress's commerce power, in whatever context. The Court's invocation of *Wickard*'s substantial effects test—an entirely new standard governing the scope of the commerce power—in *Mandeville Island Farms* exemplifies this approach.[120] Here again, the Court has invoked legislative history in support of this contention.[121]

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116. *See* Wickard v. Filburn, 317 U.S. 111, 121–22 (1942) (contending that *E.C. Knight* incorrectly treated decisions validating state laws as establishing limits on congressional power); *see also* E.S. Corwin, *The* Schechter *Case—Landmark, or What?*, 13 N.Y.U. L.Q. REV. 151, 164–65 (1936) (contending that pre-1890 decisions recognized concurrent congressional authority over intrastate conduct affecting interstate commerce indirectly and characterizing *E.C. Knight* as the first decision to the contrary); Robert L. Stern, *That Commerce Which Concerns More States than One*, 47 HARV. L. REV. 1335, 1356 (1934) (concluding that decisions validating state authority did not limit congressional authority).

117. *See infra* notes 422–30 and accompanying text.

118. Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 329 n.8 (1991); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241 (1980) (recounting how expansion of the Sherman Act has tracked expansion of the scope of the commerce power); Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 743 n.2 (1976).

119. *Summit Health, Ltd.*, 500 U.S. at 328 n.7, 329 n.10 (quoting 20 CONG. REC. 1167 (1889)) (concluding that Congress intended the Sherman Act to reach "as far as the Constitution permits"); *Se. Underwriters Ass'n*, 322 U.S. at 558 ("Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements."); *see also* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194 (1974) (quoting *Se. Underwriters Ass'n*, 322 U.S. at 558) (same); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945) (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940)) (same).

120. *See Mandeville Island Farms*, 334 U.S. at 229–31; *see also McLain*, 444 U.S. at 241 (citing *Hosp. Bldg. Co.*, 425 U.S. at 743) (invoking *Wickard* to exemplify the breadth of the commerce power and opining that the "reach of the Sherman Act" is "correspondingly broad").

121. *See infra* notes 422–23 and accompanying text.

Third and finally, the Court has asserted that changes in technology, commercial practices, and deepening integration of the national economy have justified expanding Congress's authority under the Commerce Clause and the correlative reach of the Sherman Act.[122] The Court has invoked similar grounds for expanding the commerce power in other contexts.[123]

The first two claims are straightforward assertions about the original meaning of the statute, i.e., the legal standard that Congress chose to define the Act's reach and the appropriate evolution of that standard in response to expansion of the commerce power. Scholars can evaluate these assertions using conventional tools of statutory interpretation. The third claim takes the direct/indirect standard animating the original text as a given and justifies rejection of that standard as a response to factual changes exogenous to the Act. Adoption of the substantial effects test thus constitutes a "translation" of unchanged text in response to changes in factual context.[124] Under this approach, sometimes known as "two-step

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122. *See, e.g.*, *Summit Health, Ltd.*, 500 U.S. at 328–29 ("[A]s the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced similar expansion."); *McLain*, 444 U.S. at 241 ("During the near century of Sherman Act experience, forms and modes of business and commerce have changed along with changes in communication and travel, and innovations in methods of conducting particular businesses have altered relationships in commerce. Application of the Act reflects an adaptation to these changing circumstances."); Goldfarb v. Va. State Bar, 421 U.S. 773, 788 (1975) (applying the Act to local price fixing by lawyers because: "[i]n the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce"); *Mandeville Island Farms*, 334 U.S. at 230 (stating that the "evolving nature of our industrialism" condemned *E.C. Knight* and progeny); *cf.* Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 691 (1993) (citing these decisions for the proposition that "Congress intended to fill the void left by the states" and thereby "exercise all of the commerce power that it possessed . . . and to permit that power to grow with the times").

123. *See, e.g.*, New York v. United States, 505 U.S. 144, 158 (1992) ("The volume of interstate commerce and the range of commonly accepted objects of government regulation have, however, expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress'[s] commerce power.").

124. *See* Lawrence Lessig, *Fidelity in Translation*, 71 Tex. L. Rev. 1165, 1189 (1993) (suggesting that while one-step originalism is blind to the current context, two-step originalism considers that context and still preserves original meaning). This author recognizes that originalism is a controversial methodology. However, the Court itself

originalism," changing context may require evolved application of an unchanged text, producing results that, while inconsistent with Congress's subjective expectations, nonetheless constitute faithful application of the enactment's original meaning and the legislature's normative choices.[125]

Proponents of original meaning methodology have embraced such interpretive translation.[126] Moreover, the Sherman Act is no stranger to this approach. The foundational decision in *Standard Oil Co. of New Jersey v. United States*,[127] which announced section 1's "Rule of Reason," requires judges to implement the "public policy" of the Act by determining whether agreements create "monopoly" or "the results of monopoly."[128] Judicial assessments of particular restraints can evolve over time, reflecting "more accurate economic conceptions" regarding the impact of such agreements.[129] Courts applying section 1 have accordingly altered application of the Act in light of evolving economic theory and conditions.[130] By invoking factual changes to justify the substantial effects

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has invoked the intent of Congress and claimed that pre-1948 jurisprudence thwarted that intent.

125. *Id.* at 1184 ("If the original and current contexts differ, then the meaning of the same application in the two contexts may differ as well.").

126. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 60–62, 62 n.1 (1991) (Scalia, J., dissenting) (contending that judges should apply the normative choices inherent in the Fourth Amendment in light of modern technology, including "helicopters and telephones"); Ollman v. Evans, 750 F.2d 970, 996 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) ("We must never hesitate to apply old values to new circumstances, whether those circumstances are changes in technology or changes in the impact of traditional common law actions.").

127. 221 U.S. 1 (1911).

128. *See id.* at 61 (equating "restraint of trade" with "monopoly and the acts which produce the same result as monopoly").

129. *Id.* at 55 (approving evolving treatment of particular restraints after "development of more accurate economic conceptions and the changes in conditions of society"); *see also* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 731 (1988) (stating that the term "restraint of trade" does not refer to specific types of agreements but instead to "a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances"); *id.* at 732 ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential.").

130. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 48 (1966) (highlighting the judicial responsibility and "awesome task" of applying the Sherman Act in light of the judge's understanding of both current economic theories and "requirements of the judicial process"); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 90–91 (2003) (explaining how *Standard Oil*'s Rule of Reason requires courts to evaluate restraints in light of evolving economic theory); *id.* at 141–44 (describing evolution of various antitrust doctrines as translations); *see also* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 802–04 (1965) (stating

test, the Court has seemingly embraced the translation methodology that informs *Standard Oil*'s Rule of Reason.[131]

No Supreme Court opinion has performed a comprehensive assessment of the original public meaning of the term "restraint of . . . commerce among the several States" and thus the reach of the statute *vis-á-vis* intrastate restraints.[132] Scholarly commentary on the question is incomplete.[133] The balance of this Article fills this void, conducting a de novo assessment of the phrase's meaning using conventional tools of statutory construction—namely, the plain meaning of the text, informed by canons of construction. This assessment, in turn, facilitates evaluation of the Court's three-fold explanation for its substitution of the substantial effects test for the direct/indirect standard. The assessment of the statute's original meaning begins with an exposition of the Court's pre-1890 Commerce Clause jurisprudence, the backdrop of the congressional debate that preceded enactment of the Sherman Act. This jurisprudence, it will be seen, sheds important light on the original meaning of the Act.

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that *Standard Oil* required courts to "perform[] economic analysis to determine in which acts and agreements the evils of monopoly were present"); Lessig, *supra* note 124, at 1247–50 (same).

131. *See* Meese, *supra* note 130, at 91–92 (explaining how modern courts have adjusted antitrust doctrine in light of evolving economic theory).

132. In *United States v. South-Eastern Underwriters Ass'n*, the Court examined whether the original meaning of "commerce" included "insurance." *See* 322 U.S. 533, 538–39, 545–53 (1944). The Court (properly) assumed that the challenged agreements "restrained" the insurance trade "among the several States" and thus did not examine the meaning of these two phrases. *See id.* at 553.

133. For instance, two scholars make the normative case that the Act should only reach conduct producing harm in a geographic market exceeding one state's boundaries. *See* Johnsen & Yahya, *supra* note 58, at 446–49. They also reject the direct/indirect test as such. *See id.* at 445. They do not, however, employ conventional tools of statutory construction to assess the original meaning of "in restraint of . . . commerce among the several States" or answer the Court's justifications for the substantial effects test. They do discuss statements by Senator Sherman as probative regarding the meaning of the statute. *See id.* at 450–51; *cf. infra* Part VI (discussing the legislative history of the Act). Another scholar defends the current regime without engaging the canons of construction and other sources of meaning identified here. *See generally* Gavil, *supra* note 122.

IV. THE COMMERCE POWER IN 1890

The Commerce Clause empowers Congress to "regulate Commerce . . . among the several States."[134] *Gibbons v. Ogden*[135] offered the foundational account of the clause's meaning.[136] *Gibbons* defined "commerce" to include "the commercial intercourse between nations, and parts of nations, in all its branches."[137] Such intercourse included navigation as well as "traffic," "buying and selling," and "the interchange of commodities."[138] The power to "regulate" such commerce entailed the power "to prescribe the rule by which commerce is to be governed."[139]

Gibbons also rejected claims that the Commerce Clause empowered Congress to regulate commerce confined to one state.[140] "The genius and character of the whole government," as well as the language of the clause, established that Congress could regulate "all the external concerns of the nation," along with "those internal concerns which affect the States generally," but could not govern "those which are completely within a particular State [and] which do not affect other States."[141] Empowering Congress to regulate *intra*state commerce, the Court said, would be "inconvenient" and was "certainly unnecessary."[142] Thus, "[t]he completely internal" commerce of the state, "carried on between man and man in a State . . . . [, was] reserved for the State itself."[143]

Subsequent decisions elaborated on the rationale for the allocation of authority prescribed by *Gibbons*, articulating an anti-favoritism principle informing the Commerce Clause and thus the boundary between state and national power. Before the Constitution, the Court said, interstate commerce was in an "oppressed and degraded state," because of a "helpless, inadequate Confederation."[144] The Framers and

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134. *See* U.S. CONST. art. I, § 8, cl. 3.

135. 22 U.S. (9 Wheat.) 1 (1824).

136. Canonical decisions treat *Gibbons* as a definitive exposition of the Commerce Clause. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 553 (1995); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 251, 253–55 (1964); Wickard v. Filburn, 317 U.S. 111,120, 122 (1942); Hous., E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914).

137. *Gibbons*, 22 U.S. (9 Wheat.) at 189–90.

138. *Id.* at 189.

139. *Id.* at 196.

140. *Id.* at 194–95 (evaluating this argument).

141. *Id.* at 195.

142. *Id.* at 194.

143. *Id.* at 194–95.

144. Guy v. Baltimore, 100 U.S. 434, 439–40 (1879); *see* Welton v. Missouri, 91 U.S. 275, 280 (1875) (referring to the poor economic conditions under the Articles of

Ratifiers abandoned the Confederation, the Court said, and instituted a national government "with full power over the entire subject of [interstate] commerce."[145] The Commerce Clause ensured "a perfect equality amongst the several States as to commercial rights, and . . . prevent[ed] unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain."[146] The clause prevented states from "accomplish[ing], by indirection, what the State could not accomplish by a direct tax, *viz.*, build[ing] up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other States."[147] This oft-cited rationale[148] implied that the object of the clause was to authorize Congress to preempt partial state legislation that burdened interstate trade and enriched one state's

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Confederation that induced adoption of the Constitution); State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204, 214 (1870) ("Prior to the adoption of the Constitution the States attempted to regulate commerce . . . and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union . . . ."); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 445 (1827) (Marshall, C.J.) ("The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten."); *see also Gibbons*, 22 U.S. (9 Wheat.) at 224 (Johnson, J., concurring) (noting that states' pursuit of self-interest "began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1054 (Hiliard, Gray, & Co. 1833) ("The oppressed and degraded state of commerce . . . [under the Confederation] can scarcely be forgotten. . . . Those[] who felt the injury . . . perceived the necessity of giving the control over this important subject to a single government."); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 598–601 (1994) (describing how states imposed export and import taxes to the detriment of other states during this era).

145. *Guy*, 100 U.S. at 440.

146. Veazie v. Moor, 55 U.S. (14 How.) 568, 574 (1852).

147. *Guy*, 100 U.S. at 443.

148. *Id.* at 442 (explaining that the Commerce Clause preempts "local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States"); *see, e.g.*, County of Mobile v. Kimball, 102 U.S. 691, 697 (1880) (asserting that Commerce Clause doctrine provides "security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States"); S.S. Co. v. Portwardens, 73 U.S. (6 Wall.) 31, 33 (1867) (same); *Veazie*, 55 U.S. (14 How.) at 574; *Gibbons*, 22 U.S. (9 Wheat.) at 231 (Johnson, J., concurring) ("[The] object riding over every other in the adoption of the constitution . . . was to keep the commercial intercourse among the States free from all invidious and partial restraints."); *id.* at 225 (discussing how under the Confederation "interference of partial and separate regulations" led to "animosities . . . among the several States").

citizens at the expense of others.[149] *Gibbons* itself sustained a federal statute preempting New York's grant of a monopoly over navigation between New Jersey and New York that favored New York producers over New Jersey consumers.[150]

This anti-favoritism rationale also implied limits on the clause's reach. Regulation of intrastate commerce producing no out-of-state harm could not be "partial," discriminate against another state's citizens, or protect a state's industries from out-of-state competition. To quote *Gibbons*, federal authority over such local subjects "would be inconvenient, and is certainly unnecessary," presumably because states possessed appropriate incentives to regulate such conduct.[151]

Gibbons also suggested that the commerce power was exclusive within portions of its domain and thus would invalidate state obstructions to interstate commerce, even absent congressional legislation.[152] The Court implemented this dicta in 1851, spawning what modern courts call the "dormant Commerce Clause."[153] Without employing the term "dormant Commerce Clause," the Court constructed a doctrine of implied preemption, invalidating most state regulations of interstate commerce even absent any congressional action.[154]

The Court divided interstate commerce into two "subjects."[155] Some were "national in their character" and/or demanded a uniform system of national regulation.[156] Others, while connected to interstate commerce and thus within Congress's power, were nonetheless "local" or "mere aids to commerce," and were best suited to decentralized regulation by individual

149. *See* Cushman, *supra* note 20, at 1101–02 (explaining that this jurisprudence rested on a "free-trade" construction of the Commerce Clause).

150. *See Gibbons*, 22 U.S. (9 Wheat.) at 210–15.

151. *Id.* at 194.

152. *See id.* at 198–200.

153. *See, e.g.*, CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987); Cushman, *supra* note 20, at 1102, 1107–20. The phrase "dormant Commerce Clause" first appeared in a dissenting opinion in 1945. *See* Hill v. Florida *ex rel.* Watson, 325 U.S. 538, 547 (1945) (Frankfurter, J., dissenting). Previously, the Court had occasionally referred to the commerce power as "dormant," without referencing a "dormant Commerce Clause." *See, e.g.*, Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245, 252 (1829) (referring to "the power to regulate commerce in its dormant state").

154. *See* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 325 (1851) (explaining that Commerce Clause ipso facto invalidated some state regulation).

155. Cushman, *supra* note 20, at 1110–12, 1110 n.104.

156. *See* County of Mobile v. Kimball, 102 U.S. 691, 697 (1880) (explaining that the subjects of Commerce Clause regulation require "different plans or modes of treatment"); *Cooley*, 53 U.S. (12 How.) at 318–20.

states better attuned to the "special circumstances and localities" of the subject.[157]

The result was a quasi-statutory regime that employed two default rules to discern the implied will of Congress. Where a subject was national in character or demanded uniform regulation, the Court read congressional silence as equivalent to legislation preempting state statutes that "regulated" such subjects, because such legislation exercised a power exclusively granted to Congress.[158] The result, the Court said, was "perfect freedom of commercial intercourse between the several States,"[159] "liberty of trade,"[160] and "free and untrammelled" interstate commerce.[161] State regulation was "repugnant to such freedom," which remained the default status unless Congress authorized interference with interstate commerce.[162]

Where, however, a subject did not demand national regulation but nonetheless fell within the commerce power, state and national power were coextensive. This category had a "limited scope."[163] By default, states could regulate such subjects absent congressional legislation,

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157. *Kimball*, 102 U.S. at 697; *Cooley*, 53 U.S. (12 How.) at 319–20 (stating that regulation of harbor pilotage must take diverse forms to "meet the local necessities of navigation").

158. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 109–10 (1890) ("Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent, . . . the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce . . . is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled."); Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 482 (1888) (same); *see also* Cushman, *supra* note 20, at 1101–11 (discussing additional cases).

159. Webber v. Virginia, 103 U.S. 344, 350–51 (1880) (invalidating tax on reselling goods imported from other states).

160. *Bowman*, 125 U.S. at 498 (characterizing state laws that impermissibly regulate interstate commerce as "a breach and interruption of that liberty of trade which [C]ongress ordains as the national policy").

161. *See* Welton v. Missouri, 91 U.S. 275, 282 (1875); *see also* Brown v. Houston, 114 U.S. 622, 631 (1885) (holding that Congressional silence established that interstate commerce should be "free and untrammelled" from challenged state tax).

162. *See Bowman*, 125 U.S. at 495.

163. *See* Cushman, *supra* note 20, at 1115; *infra* notes 318–27 and accompanying text (describing *Addyston Pipe*'s determination that direct restraints of interstate commerce were an inherently national subject reserved for Congress).

provided such state legislation did not also regulate other subjects of interstate commerce that *were* inherently national.[164]

The Court defined as "national in [their] character," the subjects of "transportation, purchase, sale, and exchange of commodities" between the states.[165] Thus, states could not prevent out-of-state firms from selling products via independent retailers or traveling salespeople,[166] tax vendors that sold out-of-state goods,[167] regulate rates for interstate transportation,[168] tax the presence of interstate railroads or sleeping cars leased to railroads,[169] or require telegraph companies to hand-deliver interstate messages.[170] Regulation of these subjects presented states with opportunities to favor their own citizens at the expense of others. Congressional silence resulted in preemption of state regulation of these subjects, preventing self-interested, partial legislation.[171] By contrast, local subjects characterized by overlapping jurisdiction included harbors, buoys, bridges, or pilotage.[172]

By 1875, then, potential subjects of commercial regulation fell into three categories: (1) intrastate commerce beyond Congress's authority and thus subject to exclusive state regulation; (2) interstate commerce that was inherently national or required a uniform system of regulation

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164. *See* Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319–20 (1851) (describing coextensive state and federal power over such subjects).

165. County of Mobile v. Kimball, 102 U.S. 691, 697 (1880); Tiernan v. Rinker, 102 U.S. 123, 126 (1880).

166. *Welton*, 91 U.S. at 282 (invalidating tax on traveling vendors selling out-of-state products because "the main object of [interstate] commerce is the sale and exchange of [interstate] commodities").

167. *See, e.g.*, Robbins v. Shelby Cty. Taxing Dist., 120 U.S. 489, 498 (1887) (invalidating tax on dealers representing out-of-state manufacturers); Webber v. Virginia, 103 U.S. 344, 350 (1880) (same); *see also* Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631, 638 (1978). Professor Barry Cushman collects numerous decisions invalidating state regulation of subjects of "national character" in his excellent work *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089 (2000), from which I have taken most of these pre-1890 examples.

168. *See* Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 561–63 (1886).

169. *See* Norfolk & W. R.R. v. Pennsylvania, 136 U.S. 114, 117–18 (1890); Pickard v. Pullman S. Car Co., 117 U.S. 34, 44, 46 (1886).

170. W. Union Tel. Co. v. Pendleton, 122 U.S. 347, 358 (1887).

171. *See supra* notes 144–50 and accompanying text (explaining the anti-favoritism rationale of the Commerce Clause).

172. *See* County of Mobile v. Kimball, 102 U.S. 691, 696–99 (1880) (rejecting Commerce Clause challenge to state harbor dredging); Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 319–21 (1851) (rejecting challenge to pilotage fees).

and thus subject exclusively to congressional regulation; and (3) interstate commerce subject to concurrent state and federal regulation. This body of Commerce Clause doctrine later became known as "dual federalism."[173]

Given the Court's definitions of "commerce," "among the several States," and "inherently national," the boundaries between these three categories were reasonably clear.[174] Still, some otherwise valid state regulation of *intra*state activities, while apparently within the first category, could also affect *inter*state commerce, raising the possibility under *Gibbons* that such statutes also regulated inherently national subjects and thus fell into the second category.[175] Implementation of dual federalism required the Court to determine whether such effects constituted "regulation" of an inherently national subject. This, in turn, required the Court to determine the affirmative scope of the commerce power (i.e., the power to "regulate") over intrastate activities that affected interstate commerce and the resulting boundary between state and federal authority.

There was, however, little express federal commercial regulation during this era. Nearly all decisions opining on the scope of Congress's authority involved challenges to state legislation that allegedly regulated subjects of interstate commerce.[176] Moreover, independent territorial limitations on state authority prevented states from regulating activities beyond their borders.[177] Thus, most such challenges consisted of claims that otherwise permissible regulation of intrastate activity nonetheless also regulated inherently national subjects of *inter*state commerce.[178] Resolution of such claims required the Court to ascertain whether Congress had authority over the subject and, if so, whether the

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173. *See* Edward S. Corwin, *Congress's Power to Prohibit Commerce—A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 481 (1933) (coining this phrase).

174. No one doubted, for instance, that state regulation of interstate railway transportation was invalid.

175. *Cf.* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) (opining that Commerce Clause empowered Congress to regulate where commerce "affect[ed] other States").

176. In addition to *Gibbons*, another exception was the *Trade-Mark Cases*, which held that Congress lacked authority to regulate trademarks used only in intrastate commerce. 100 U.S. 82, 97 (1879).

177. *See* James Y. Stern, Note, *Choice of Law, the Constitution, and* Lochner, 94 VA. L. REV. 1509, 1516–19 (2008) ("Every significant attribute of legislative power available to states was territorially circumscribed [in the mid-late nineteenth century.]").

178. *Cf.* Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 482 (1888) ("[S]tate legislation, *however legitimate in its origin or object*, when it conflicts with the positive legislation of [C]ongress, or its intention, reasonably implied from its silence, in respect to the subject of [interstate] commerce . . . must fail." (emphasis added)).

challenged legislation in fact "regulated" this subject, exercising authority exclusively held by Congress.

The Court recognized that various intrastate activities affected interstate commerce.[179] Still, so long as the impact of these activities—and state regulation thereof—upon interstate commerce was "indirect," such laws did not "regulate" interstate commerce "in the constitutional sense,"[180] and the activities were beyond congressional power.[181] Where, however, such intrastate activity or the regulation thereof affected an inherently national subject of interstate commerce directly, the legislation regulated a subject exclusively reserved to Congress and was thus implicitly preempted.[182] This jurisprudence was no exercise in

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179. *See, e.g.*, Kidd v. Pearson, 128 U.S. 1, 22–23 (1888) (recognizing that a ban on manufacturing reduced interstate commerce); Smith v. Alabama, 124 U.S. 465, 481–82 (1888) (intrastate locomotive operation); Munn v. Illinois, 94 U.S. 113, 135 (1876) (grain storage fees).

180. R.R. v. Husen, 95 U.S. 465, 472 (1878).

181. *See, e.g.*, *Kidd*, 128 U.S. at 23 (quoting Hall v. DeCuir, 95 U.S. 485, 487, 488 (1878)) ("'[State] legislation . . . may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution,' unless . . . it 'imposes a direct burden upon interstate commerce,' or 'interferes directly with its freedom.'"); *Smith*, 124 U.S. at 482 (regulation of qualifications of state's locomotive engineers did not regulate interstate commerce because it affected commerce "only indirectly, incidentally, and remotely, and not so as to burden or impede [it]"); Sherlock v. Alling, 93 U.S. 99, 102–03 (1876) (explaining that Congress could only preempt state laws that "operated directly upon [interstate] commerce"); *id.* at 103 ("General legislation of this kind . . . is not open to any valid objection because it may affect persons engaged in foreign or inter-State commerce."). At least one New Deal scholar claimed that the Court's pre-1890 jurisprudence recognized co-extensive state and federal authority over conduct that indirectly affected interstate commerce. *See supra* note 116. However, decisions such as *Kidd* depended upon the assumption that Congress lacked authority over such conduct. *See* Cushman, *supra* note 20, at 1121–24 (describing *Kidd*'s rationale); *id.* at 1117 (describing conduct that Congress could not reach despite indirect impact on interstate commerce). Moreover, even if language in *Kidd* and similar decisions was technically dicta confirmed by *E.C. Knight*, it is still possible that Congress meant to embrace that dicta as its own understanding of the scope of the commerce power and thus the Sherman Act. *See infra* notes 449–63, 478 and accompanying text (recounting invocation of Commerce Clause decisions by Senators debating early versions of the Act).

182. *See* Minnesota v. Barber, 136 U.S. 313, 322 (1890) (invalidating facially-neutral meat inspection regime that "directly tends to restrict the slaughtering of animals, whose meat is to be sold [by out-of-state firms] in Minnesota for human food"); *Sherlock*, 93 U.S. at 102–03 (explaining that the Court would invalidate state regulation as contrary to the Commerce Clause where "legislation created, in the way of tax,

arid formalism[183] but instead implemented the anti-favoritism principle the Court believed animated the Commerce Clause, condemning "partial legislation" that favored a state's own products and citizens over those of other states.[184]

This case law, consistent with the Court's account of the clause's rationale, allocated legislative authority based upon the existence (or not) of what economists would call "interstate economic spillover[s]."[185] States retained authority over a category of conduct whenever they internalized the full harms and benefits of legislation over that subject.[186] This category, which exceeded Congress's reach, included activities that produced incidental but harmless impacts on other states.[187] Thus, a regime of competitive federalism generated the rules governing activities that produced no harmful interstate externalities. Presumably such competition between sovereigns produced legal rules superior to those a centralized unitary regime would have produced.[188]

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license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom").

183. *See* Cushman, *supra* note 20, at 1091–93 (identifying scholars making this argument).

184. *See* County of Mobile v. Kimball, 102 U.S. 691, 697 (1880) (explaining the need for congressional power to regulate commerce among the states because the states would otherwise enact laws benefitting their own citizens at the expense of others).

185. *See* Johnsen & Yahya, *supra* note 58, at 405–06 (applying the anti-spillover rationale to advocate a similar approach to Sherman Act jurisdiction); Richard A. Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 12–14 (1987) (explaining that the Commerce Clause empowers "Congress to regulate interstate and foreign commerce and thus to prevent states from imposing harmful externalities on other states and to internalize beneficial externalities").

186. *See* Guy v. Baltimore, 100 U.S. 434, 437, 439 (1879) (describing the limits on state authority); *Hall*, 95 U.S. at 487–88 (noting that states possess exclusive authority over common carriers operating solely within their borders); State Tonnage Tax Cases, 79 U.S. (12 Wall.) 204, 214 (1870) (explaining that states retain authority over commerce that is "completely internal and which does not extend to or affect other States"); Veazie v. Moor, 55 U.S. (14 How.) 568, 573–75 (1852) (same); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) (same).

187. *See supra* notes 48–49 and accompanying text.

188. Easterbrook, *supra* note 89, at 937 ("There is a powerful tendency toward optimal legislation to the extent four conditions hold: (1) people and resources are mobile; (2) the number of jurisdictions is substantial (no monopoly or oligopoly power); (3) jurisdictions can select any set of laws they desire; and (4) all of the consequences of one jurisdiction's laws are felt by people who live in or consent to that jurisdiction (in other words, no third party effects, often called externalities)."); *see also* Jonathan H. Adler, *Interstate Competition and the Race to the Top*, 35 HARV. J.L. & PUB. POL'Y 89, 89 (2012) (stating that "robust interjurisdictional competition facilitates the enactment of better public policy at the state level," but only when states cannot

Where states did not fully internalize the harms and benefits of an activity, the Court's jurisprudence allocated (exclusive) authority to Congress.[189] Thus, the Constitution "confide[d]" in Congress exclusive authority over interstate railway rates and intrastate rates that directly affected interstate rates because Congress's "enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rules."[190] Such regulation, the Court said, must be "of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations."[191] State regulation of such rates necessarily produced extraterritorial harms and freeriding on other states' regulatory choices.[192] The Commerce Clause thereby prevented a race to the bottom and resulting suboptimal legislation with respect to rules governing interstate commerce, while harnessing the benefits of competition between the states with respect to intrastate activity.[193] The result was a "free-trade network," with the Supreme Court acting as an "umpire" invalidating laws that favored one state's citizens over others.[194]

The direct/indirect standard was just that—a standard—and thus often entailed a fact-intensive assessment of the impact of particular

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generate externalities); LeBoeuf, *supra* note 144, at 557–65 (describing advantages of decentralized production of legal rules where no externalities are present); Posner, *supra* note 185, at 14 (describing benefits of competition between states absent externalities); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956). Some scholars have applied this logic in the antitrust context. *See* Johnsen & Yahya, *supra* note 58, at 447–49 (describing theory of competitive federalism); Easterbrook, *supra* note 58, at 33–35. *See generally* Meese, *supra* note 89.

189. *See Hall*, 95 U.S. at 489 (holding the Commerce Clause prevents states from regulating interstate commerce "regardless of the interests of others"); *Veazie*, 55 U.S. (14 How.) at 574 (noting that the Commerce Clause was aimed at combating "invidious distinctions" among the states). One scholar has attributed to the Framers an identical account of the commerce power, without discussing the Court's jurisprudence. *See* LeBoeuf, *supra* note 144, at 607.

190. Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886).

191. *Id.*

192. *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836–1937 159–64 (1991).

193. *See* LeBoeuf, *supra* note 144, at 570–92 (explaining how interstate externalities can cause a legislative race to the bottom).

194. McCurdy, *supra* note 167, at 648 (explaining that between 1875 and 1890, the Court "monitor[ed] the free-trade unit in the silence of Congress"); *see also* Cushman, *supra* note 20, at 1107 & n.96 (collecting sources showing that the Court "played a critical, instrumental role in opening a national market" by using the Commerce Clause to invalidate "parochial legislation").

legislation.[195] Application of this standard was presumably susceptible to changes in surrounding factual circumstances that influenced whether an impact was direct or indirect.[196] Indeed, in 1877, the Court opined that the power over commerce "keep[s] pace with the progress of the country, and adapt[s] [itself] to the new developments of time and circumstances."[197]

V. THE ORIGINAL MEANING OF "RESTRAINT OF . . . COMMERCE AMONG THE SEVERAL STATES" AND THE SUBSTANTIAL EFFECTS TEST

Section 1 of the Sherman Act prohibits contracts "in restraint of trade or commerce among the several States."[198] The phrase "restraint of trade" denotes the Act's substantive content—i.e., the category of agreements that produce the sort of harm the statute condemns.[199] However, agreements that produce such harm only offend section 1 if they also restrain "commerce among the several States."[200] The quoted phrase allocates authority over harmful agreements between states and the nation.[201] Drawing on Part IV's exposition of pre-1890 Commerce

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195. *See* Minnesota v. Barber, 136 U.S. 313, 322 (1890) (invalidating meat inspection regime despite facial neutrality and plausible police power purpose after a fact-intensive determination that the regime's "necessary operation . . . directly" burdened interstate commerce); *Wabash*, 118 U.S. at 571 ("The line which separates the powers of the States from this exclusive power of Congress is not always distinctly marked, and oftentimes . . . . it would be a useless task to . . . fix an arbitrary rule . . . . It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved."); Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992) (distinguishing legal standards from rules and explaining that standards entail "direct application of the background principle or policy to a fact situation" and "allow the decisionmaker to take into account all relevant factors or the totality of the circumstances"); *see also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 70 (1911) (analogizing the Rule of Reason to judicial application of the direct/indirect standard); *id.* at 60 (concluding that the Sherman Act "indubitably contemplate[ed] and requir[ed] a standard" i.e., the Rule of Reason, to determine whether agreements restrained trade).

196. *Cf.* Sullivan, *supra* note 195, at 58–59 (noting that standards do not "tie[] the decisionmaker's hand[s]" as much as rules because "the more facts one may take into account, the more likely that some of them will be different the next time").

197. Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 9 (1878).

198. 15 U.S.C. § 1 (2018).

199. *See Standard Oil*, 221 U.S. at 51–60.

200. *See supra* note 12 and accompanying text.

201. *See supra* notes 13–16 and accompanying text (summarizing the Court's interpretation of the Act as allocating mutually exclusive authority to states and the federal government over different types of trade restraints). *But see supra* notes 69–72,

Clause jurisprudence, this Part examines whether the "substantial effects" test faithfully implements the original meaning of this limiting phrase. In particular, this Part evaluates the Court's three rationales for replacing the direct/indirect standard with the substantial effects test: (1) that Congress meant to reach restraints beyond the authority implied by pre-1890 dual federalism jurisprudence; (2) that the Act properly expands whenever the commerce power expands; and (3) that changed economic circumstances justify the new test.

A. Did Congress Reject the Court's Pre-1890 Commerce Clause Jurisprudence?

The Supreme Court has sometimes claimed that the 1890 Congress rejected pre-1890 Commerce Clause jurisprudence, hoping instead to reach intrastate restraints that indirectly affected interstate commerce.[202] Analysis of this claim about the original meaning of the Act must begin with the plain language of the statute: "restraint of . . . commerce among the several States."

"Among the several States" is clear enough. Since *Gibbons*, the Court has repeatedly equated "among" with "between," precluding Congress from regulating commerce *within* a state.[203] The substantial effects test incorporates this assumption, asking as it does whether an intrastate restraint affects commerce between two or more states.[204] The meaning of "restrain," however, is less obvious. Contemporary dictionaries defined "restraint" as "[t]hat which restrains, as a law, prohibition and the like."[205] These same sources suggest several definitions of "restrain," including "limit," "hold back," "check," "hinder from unlimited enjoyment," or "curb," perhaps capturing conduct that, while intrastate, nonetheless impacts,

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88–93 and accompanying text (explaining the Court's adoption of the "substantial effects" test, thereby creating a category of restraints over which states and the federal government had overlapping jurisdiction).

202. *See* Cushman, *supra* note 20, at 1125.

203. *See supra* notes 136–38, 140 and accompanying text.

204. *See, e.g.*, Burke v. Ford, 389 U.S. 320, 321–22 (1967) (per curiam).

205. *See* WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 1128 (Chauncey A. Goodrich et al. eds., London, George Bell & Sons 1886) (defining "restraint" as "[t]hat which restrains, as a law, a prohibition, and the like; limitation; restriction"); *see also* JAMES STORMONTH, ETYMOLOGICAL AND PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE 525 (Edinburgh & London, William Blackwood & Sons 1882) (defining "restraint" as "the act of restraining; abridgment of liberty; restriction; hindrance of will; repression; that which restrains").

"influences," or "affects" interstate commerce.[206] The term could also mean "confine," "restrict," "bind fast," "repress," or "abridge."[207]

Because the plain meaning of "restraint" is ambiguous, courts and scholars would next turn to canons of construction.[208] Three canons recommend themselves here. First, there is the avoidance canon. Courts faced with different possible meanings of a statute reject the alternative that poses constitutional difficulties.[209] The canon rests upon the presumption that Congress does not intentionally pass legislation that the Supreme Court would declare unconstitutional.[210] The Court applied this canon numerous times before 1890.[211]

This canon counsels rejection of broader readings of "restraint." By 1890, the Court had repeatedly rejected claims that all state regulations of intrastate activity affecting interstate commerce thereby "regulated" such commerce "in a constitutional sense," opining that such regulations exceeded the scope of the commerce power.[212] Instead, the Court said, the commerce power only reached state regulations of intrastate activity that affected interstate commerce "directly."[213] Thus, reading the

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206. *See* WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 205, at 1128 (defining "restrain" as "to draw back again; to hold back; to check," "[t]o limit; to confine; to restrict," and "to hinder from unlimited enjoyment; to abridge."); STORMONTH, *supra* note 205, at 525 (defining "restrain" as "to hold back; to bind fast; to curb; to repress; to limit; to abridge").

207. WEBSTER'S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 205, at 1128; STORMONTH, *supra* note 205, at 525.

208. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 109–10 (2010) (describing how canons facilitate determination of original meaning of texts).

209. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381 (2005) (describing the avoidance canon as "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"); United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.").

210. *Clark*, 543 U.S. at 381.

211. *See, e.g.*, Presser v. Illinois, 116 U.S. 252, 269 (1886) ("[A] statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law."); Grenada Cty. Supervisors v. Brogden, 112 U.S. 261, 268–69 (1884) (citing THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 184–85 (Boston, Little, Brown, & Company 1880)) (same).

212. *See* Kidd v. Pearson, 128 U.S. 1, 23 (1888); *supra* notes 179–81 and accompanying text.

213. *See* Minnesota v. Barber, 136 U.S. 313, 322 (1890) (invalidating state police regulation directly obstructing interstate commerce); *Kidd*, 128 U.S. at 23 (quoting

Sherman Act to reach intrastate "restraints of trade" simply because such agreements—or state regulation of them—also produce a "substantial" fortuitous effect on interstate commerce would create "grave and doubtful constitutional questions"[214] under pre-1890 jurisprudence, and thus militates against such a reading.

The avoidance canon itself offers no affirmative account of statutory meaning and thus no alternative to the substantial effects test. However, a second canon—the prior construction canon—may provide such an account.[215] This canon provides that, when Congress employs verbal formulations that have obtained meaning in other contexts—including interpretation of related texts—courts give statutory terms that pre-existing meaning, unless context clearly indicates otherwise.[216] This prior meaning of terms thereby functions as a dictionary, clarifying ambiguous statutory language.[217] This is merely a manifestation of the term of art canon, whereby courts give terms technical meanings they have acquired in other contexts, even if such meanings contradict a statute's plain meaning.[218]

As Justice Frankfurter put it:

> Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the

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Hall v. DeCuir, 95 U.S. 485, 487, 488 (1878)) (asserting that Congress may only preempt state regulation affecting commerce that "'imposes a direct burden upon interstate commerce' or 'interferes directly with its freedom'"); *supra* note 182 and accompanying text.

214. *Del. & Hudson Co.*, 213 U.S. at 408.

215. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 322–26 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction.").

216. *See* Henry v. United States, 251 U.S. 393, 395 (1920) ("The law uses familiar legal expressions in their familiar legal sense . . . .").

217. John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2465 (2003) ("Textualism . . . recognizes that Congress may speak in legal shorthand, drawing on established legal terms that have been refined through case-by-case application."); *see also, e.g.*, Dir. v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 126–27 (1995) (applying term of art canon in light of prior interpretations of statutory term).

218. *See* SCALIA & GARNER, *supra* note 215, at 324 (citation omitted) (explaining that when a term has been "authoritatively interpreted by a high court . . . the term bears this same meaning[] [because] [t]he term has acquired . . . a technical legal sense that should be given effect in the construction of later-enacted statutes"); *see id.* (concluding that this result implements term of art canon); *id.* at 73–77 (explaining how term of art canon facilitates determination of text's ordinary meaning).

> scientific or business world, or whether it be loaded with the recondite connotations of feudalism . . . . The peculiar idiom of business or of administrative practise often modifies the meaning that ordinary speech assigns to language. And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.[219]

Courts have taken exactly this approach when discerning the meaning of "restraint of trade."[220] Most notably, in *Standard Oil*, the Court determined that the term had a well-understood meaning in statutory law, common law, and constitutional sources as referring only to "unreasonable" restraints.[221] These same sources supplied the meaning of the term "reasonable," treating as "unreasonable" agreements producing monopoly or the results of monopoly.[222] These sources supplied a dictionary the Court employed to determine the meaning of a statutory term of art.[223]

This second canon suggests an alternative meaning for the phrase "in restraint of . . . commerce among the several States" and a meaning that, unlike the substantial effects test, would have passed constitutional muster in 1890. The source of meaning is not the common law, but instead the case law comprising the pre-1890 quasi-statutory regime implementing Congress's presumed intent *vis-á-vis* state enactments affecting interstate commerce.

Unlike "commerce" and "among the several States," the term "restraint" does not appear in the Commerce Clause or, for that matter, the Constitution itself.[224] Nonetheless, one finds hints about the meaning of the term in *Gibbons* and contemporaneous materials. For instance, concurring in *Gibbons*, Justice William Johnson opined that the "one object riding over every other in the adoption of the constitution, . . . was to keep commercial intercourse among the States free *from all invidious*

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219. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947).

220. *See, e.g.*, Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 406, 408 (1911) (invoking common law to support conclusion that vertical price fixing agreements were "in restraint of trade"); United States v. Addyston Pipe & Steel Co., 85 F. 271, 279 (6th Cir. 1898) (Taft, J.) (canvassing pre-Sherman Act common law to determine section 1's meaning), *aff'd*, 175 U.S. 211 (1899).

221. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50–62, 64 (1911).

222. *Id.* at 61–64.

223. *Standard Oil* invoked other considerations as well. *See* Alan J. Meese, Standard Oil *as* Lochner*'s Trojan Horse*, 85 S. CAL. L. REV. 783, 784 (2012) (explaining that the Court read the Act to avoid banning agreements protected by liberty of contract).

224. *See* U.S. CONST. art. I, § 8, cl. 3.

and partial restraints."[225] During the same year, President James Monroe described the scope of the commerce power, asserting that, under the Articles of Confederation, "States individually had commenced a system of *restraint* on each other whereby the interests of foreign powers were promoted at their expense."[226] States victimized by such laws, he said, immediately placed "[r]estraints . . . on such [interstate] commerce."[227]

One year later, Justice Joseph Story, who had joined *Gibbons* and other Marshall Court Commerce Clause decisions,[228] offered a similar account of the evils that motivated adoption of the clause.[229] Under the Articles of Confederation, Justice Story said, states regulated interstate and international commerce "under the stimulating influence of local interests, and the desire [for] undue gain."[230] Justice Story repeated verbatim President Monroe's assertion that "states individually commenced a system of *restraint* upon each other, whereby the interests of foreign powers were promoted at their expense."[231] The "contracted policy in some of the states was soon counteracted by others," Justice Story said, and "[*r*]*estraints* were immediately laid on such commerce by the suffering states; and thus a state of affairs disorderly and unnatural grew up, the necessary tendency of which was to destroy the union itself."[232] Finally, in the *License Cases*,[233] Chief Justice Taney referred to states' intrastate regulation of alcohol consumption as "regulating and restraining the traffic" in such "ardent spirits" but sustained the measure because the traffic in question was intrastate.[234]

The first three statements equated "restraints" of interstate commerce with self-interested state legislation that injured out-of-state citizens, producing what Justice Story called "a state of affairs disorderly and

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225. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring) (emphasis added).

226. James Monroe, *Special Message to the House of Representatives Containing the Views of the President of the United States on the Subject of Internal Improvements*, THE AMERICAN PRESIDENCY PROJECT (May 4, 1822) (emphasis added), http://www.presidency.ucsb.edu/documents/special-message-the-house-representatives-containing-the-views-the-president-the-united [https://perma.cc/QH48-3WYG].

227. *Id.*

228. *See* Willson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829); Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827); *Gibbons*, 22 U.S. (9 Wheat.) at 1.

229. *See* 3 STORY, *supra* note 144, § 1062.

230. *Id.* § 1066.

231. *Id.* (emphasis added) (quoting Monroe, *supra* note 226).

232. *Id.* (emphasis added).

233. 46 U.S. (5 How.) 504 (1847).

234. *Id.* at 577.

unnatural."[235] The fourth, by Chief Justice Taney, equated "restraint" with "regulation." None equated "restraint" with mere impact on commerce.

Aside from the opinions of Justice Johnson and Chief Justice Taney, these materials may be insufficiently "legal" to satisfy the requirements for application of the prior construction canon. However, subsequent judicial decisions used the term "restraint" in the very same way. As explained earlier, from the 1850s onward, the Court repeatedly held that state enactments that "regulated" inherently national subjects of interstate commerce contravened Congress's implied will.[236] Implementation of this quasi-statutory doctrine of implied preemption required the Court to discern which state legislation "regulated" these subjects of interstate commerce. Decisions conducting this inquiry repeatedly emphasized that a mere impact on interstate commerce did not constitute "regulation . . . in the constitutional sense."[237] Thus, "regulation" was a term of art within this jurisprudence.

During the 1880s, the Court adjusted this verbal formulation, sometimes employing the term "restraint" as synonymous with "regulation." In *Brown v. Houston*,[238] for instance, the Court opined that a law taxing "every wagon-load, or car-load . . . brought into [a] city" from other states would be "*a regulation of, and restraint upon, inter-State commerce*" and thus "an encroachment upon the exclusive powers of Congress."[239] Moreover, in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*,[240] the Court declared that the Commerce Clause was intended to secure "the right of continuous transportation from one end of the country to the other" from "*restraints* which the State[s] might choose to impose upon it."[241] During the same term, in *Walling v. Michigan*,[242] the Court employed

235. 3 STORY, *supra* note 144, § 1062.

236. *See, e.g.*, Walling v. Michigan, 116 U.S. 446, 455 (1886) (explaining that state taxation of products manufactured in other states amounts to a regulation of commerce); *see also supra* notes 158–72 and accompanying text (describing this case law).

237. *See* R.R. v. Husen, 95 U.S. 465, 472 (1878) ("Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term."); *supra* notes 179–81 and accompanying text.

238. 114 U.S. 622 (1885).

239. *Id.* at 634 (emphasis added).

240. 118 U.S. 557 (1886).

241. *Id.* at 572–73 (emphasis added); *see* Bowman v. Chi. & Nw. Ry. Co., 125 U.S. 465, 494 (1888) (quoting this language with approval); *see also In re* Rahrer, 140 U.S. 545, 560 (1891) (explaining that implied exercise of the commerce power preempts state legislation functioning as a "restraint upon that perfect freedom which [Congress's] silence insured").

242. 116 U.S. 446 (1886).

a similar formulation, holding that a state's "discriminating tax . . . operating to the disadvantage of the products of other states . . . is, in effect, *a regulation in restraint of commerce among the states*, and as such is a usurpation of the [commerce] power."[243] Several inferior courts employed the same formulation before and during this period.[244]

Shortly before passage of the Sherman Act, the Supreme Court and other courts—applying a quasi-statutory regime implementing the supposed intent of Congress—had employed the phrase "restraint of commerce among the several States" to describe state legislation governing intrastate conduct that improperly "regulated" inherently national subjects of interstate commerce.[245] Such "regulation" contravened Congress's implied will that interstate commerce be "free and untrammelled."[246] These decisions were not obscure. *Wabash*, for instance, denied states the authority to regulate intrastate railroad rates that directly impacted interstate rates, thereby impelling creation of the Interstate Commerce Commission.[247] These decisions echoed previous similar usages of the

243. *Id.* at 455 (emphasis added).

244. *See* Lang v. Lynch, 38 F. 489, 490 (C.C.D.N.H. 1889) (describing plaintiff's argument that "the statute is unconstitutional[] because it is a regulation in restraint of commerce between the states"); Indiana *ex rel.* Wolf v. Pullman Palace Car Co., 16 F. 193, 199 (C.C.D. Ind. 1883) (invalidating state tax on out-of-state railroads because the tax "amounts to a restraint or regulation of commerce between the states"); Phila. & Havre de Grace Steam Tow-Boat Co. v. Phila., Wilmington & Balt. R.R., 19 F. Cas. 474, 476 (D. Md. 1856) (No. 11,085) (explaining that "no act of a state, which in any way would seek to regulate, restrain or limit" interstate commerce can pass constitutional muster unless enacted or sanctioned by Congress); People v. Raymond, 34 Cal. 492, 499–501 (1868) (invalidating state tax on carriage of passengers as a "regulation of commerce" because "[i]ts undeniable tendency is to restrain intercourse with foreign nations"); McGuire v. State, 42 Ohio St. 530, 532 (1885) (rejecting Commerce Clause challenge to state alcohol regulation because "[i]t [did] not seek to regulate or restrain the traffic in wine or any other specific property, as an article of import or export"); *id.* at 534 ("This exclusive power to regulate commerce, has reference to burdens or restraints imposed directly on the articles themselves . . . ."); *see also* Lafarier v. Grand Trunk Ry. of Can., 24 A. 848, 850 (Me. 1892) (invalidating legislation because it imposed a "meddlesome interference and restraint" on railroads and thus improperly regulated interstate commerce).

245. *See supra* notes 136–38 and accompanying text (discussing the Supreme Court's definition of commerce).

246. *See supra* notes 158–62 and accompanying text.

247. *See* Alan J. Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 IOWA L. REV. 2161, 2171 (2015) ("Congress filled the regulatory vacuum left by *Wabash* by passing the Interstate Commerce Act[, Pub. L. No. 49-104, 24 Stat. 379 (1887),] in 1887.").

term "restraint" by one President and three Supreme Court Justices.[248] Thus, the term "restraint of . . . commerce" had received a previous construction in a quasi-statutory body of law closely related to the subject of the Sherman Act—regulation of interstate commerce.

When it chose the phrase "in restraint of . . . commerce among the several States," to define the category of agreements "in restraint of trade" that were also subject to the Act, Congress "transplanted [this phrase] from another legal source": namely, the Court's Commerce Clause jurisprudence.[249] The phrase thus brought "old soil with it."[250] This "soil" presumably included the judicial standards distinguishing state enactments that impermissibly "regulated" or "restrained" interstate commerce from those that "affected" such commerce without "regulating" it "in a constitutional sense."[251] As Justice Jackson put it when explaining the rationale for this canon:

> [W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.[252]

By adopting this legal formula in a definition of private agreements, Congress presumably incorporated a distinction, well-known to the "judicial mind," between intrastate agreements that "directly" affected interstate commerce and those that merely affected such commerce "indirectly."[253] Only the former constituted impermissible regulations and thus "restraints" of interstate commerce under section 1.[254] The latter,

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248. *See supra* notes 225–34 and accompanying text (discussing pre-1850 sources equating "restrain" with "regulate").

249. *See* Frankfurter, *supra* note 219, at 537; *cf.* Alan J. Meese, *Justice Scalia and Sherman Act Textualism*, 92 NOTRE DAME L. REV. 2013, 2039–44 (2017) (canvassing some of this evidence and taking a similar approach to discerning the meaning of "restraint of trade" and thus the substantive content of the Act).

250. Frankfurter, *supra* note 219, at 537.

251. *See supra* note 158 and accompanying text (discussing decisions holding that implied exercise of the commerce power preempted state statutes that "regulated" interstate commerce).

252. *See* Morissette v. United States, 342 U.S. 246, 263 (1952).

253. *See supra* notes 179–87 and accompanying text (describing the Court's repeated invocation of the direct/indirect distinction in its pre-1890 Commerce Clause jurisprudence).

254. Proponents of the modern approach might object that this second canon replicates the avoidance canon, given this canon's reliance upon Commerce Clause precedent. However, application of the second canon does not turn on the *source* of

even if "in restraint of trade," did not impact interstate commerce in a way that constituted regulation "in a constitutional sense."[255] This meaning precludes application of the Act to intrastate restraints that merely produce a (fortuitous) substantial effect on interstate commerce.

The resulting allocation of regulatory authority would reflect the anti-favoritism principle that informed the Court's overall distribution of regulatory power between state and federal sovereigns.[256] Thus, states would retain exclusive authority over those restraints with respect to which they internalized the costs and benefits of their regulatory decisions, with competitive federalism generating doctrine governing such restraints. However, the national government would retain authority over restraints that threatened interstate harm and thus raised the prospect that state regulation of such contracts would produce self-interested or "partial" results, favoring the state's citizens at the expense of others.[257]

The third canon, contemporaneous judicial construction, also sheds additional light on the meaning of "restraint of . . . Commerce." The Supreme Court has treated near-contemporaneous post-enactment constructions of a legal text as pertinent indications of meaning.[258] The rationale for this canon is straightforward: judges sharing the legal culture of the authors of a text are more likely to understand that text's meaning than those seeking that meaning decades later. While courts should accord such precedents respect under the doctrine of stare decisis, these contemporaneous constructions are also independently probative evidence of the text's original meaning.

The Court had several occasions shortly after 1890 to determine when intrastate agreements were "in restraint of . . . commerce among

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the verbal formulation Congress has borrowed. Thus, the same results would obtain if the phrase "restraint of . . . commerce among the several States" had appeared in decisions interpreting a previous federal statute.

255. *See supra* notes 180–81 and accompanying text.

256. *See supra* notes 144–50 and accompanying text (explaining the role that the anti-favoritism principle played in the Court's allocation of power between the states and the federal government when implementing the Commerce Clause).

257. *See infra* notes 318–38 and accompanying text (describing *Addyston Pipe*'s similar rationale for applying Act to direct restraints of interstate commerce).

258. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 610–14 (2008) (treating post-enactment judicial constructions as probative evidence of constitutional meaning); Harmelin v. Michigan, 501 U.S. 957, 982, 985 (1991) (same); *see also* Marsh v. Chambers, 463 U.S. 783, 790 (1983) (quoting Wisconsin v. Pelican Ins., 127 U.S. 265, 297 (1888)) (explaining that contemporaneous construction of the Constitution by the First Congress is "weighty evidence of its true meaning").

the several States." First and most famously came *United States v. E.C. Knight Co.*, which involved a merger creating a Pennsylvania-based monopoly in the national sugar market.[259] The lead defendant's corporate charter stated that the firm was formed "for the purpose of importing, manufacturing, refining and dealing in sugars and molasses."[260] Another defendant, incorporated in New Jersey, acquired E.C. Knight and other firms, the United States said, "to prevent and counteract the effect of free competition" and "exact and procure large sums of money from the citizens of Pennsylvania and from the citizens of several States of the United States."[261]

The Court conceded that the transaction could be "in restraint of trade," and thus invalid under state law.[262] The Court acknowledged that such a monopolistic restraint could impact both domestic *and interstate* trade, because the newly-created firm would export sugar to out-of-state purchasers.[263] But did the merger restrain "commerce among the several States?"

To answer this question, the Court referred to its pre-1890 Commerce Clause jurisprudence, invoking decisions evaluating challenges to state regulation of intrastate activity.[264] These decisions established that such an impact did not justify an affirmative exercise of the commerce

259. United States v. E.C. Knight Co., 156 U.S. 1, 2 (1895).

260. *See* Bill of Complaint at 3, United States v. E.C. Knight & Co., 60 F. 306 (E.D. Pa. 1892) (No. 38).

261. *Id.* at 7–8.

262. *E.C. Knight*, 156 U.S. at 16.

263. *Id.* at 12 ("[T]he power to control the manufacture of a given thing involves in a certain sense the control of its disposition . . . .").

264. *Id.* at 13–15 (discussing Kidd v. Pearson, 128 U.S. 1 (1888); Coe v. Errol, 116 U.S. 517 (1886); and Veazie v. Moor, 55 U.S. (14 How.) 568 (1852)). Neither *Coe* nor *Veazie* expressly invoked the direct/indirect distinction, but other pre-Sherman Act decisions did. *See, e.g.*, Minnesota v. Barber, 136 U.S. 313, 322 (1890) (invalidating legislation directly restricting commerce in slaughtered animals); Smith v. Alabama, 124 U.S. 465, 473 (1888) (reviewing legislation requiring locomotive engineers to have an Alabama license); Hall v. DeCuir, 95 U.S. 485, 488–89 (1878) (holding legislation that acts upon business as it enters or leaves the state is a direct restraint); Munn v. Illinois, 94 U.S. 113, 135 (1876) (holding that Illinois's law setting maximum warehouse fees did not directly encroach upon Congress's commerce power); Sherlock v. Alling, 93 U.S. 99, 102–04 (1876) (holding that state's imposition of tort liability for accident occuring in state's territorial waters did not directly burden interstate commerce). *Kidd*, it should be noted, invoked *Hall*, *Sherlock*, *Munn*, and *Gibbons* for the proposition that state police regulations only ran afoul of the Commerce Clause if they affected interstate commerce directly. *Kidd*, 128 U.S. at 23.

power.[265] Citing *Gibbons*, the Court noted that state laws it invalidated under the Commerce Clause had "direct[ly] interfere[d]" with, and thus "regulated," interstate commerce.[266] These restrictions of production, whether by state legislation or private agreement, merely affected such commerce in "a secondary[,] and not the primary[,] sense . . . only incidentally and indirectly" and thus did not "regulate" interstate commerce.[267]

The Sherman Act "was framed" with these "well-settled principles" in mind.[268] Congress did not seek to reach monopoly as such, recognizing that intrastate production restraints merely impacted interstate commerce indirectly and fell exclusively to the states.[269] The indictment in *E.C. Knight* alleged acts "related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States."[270] There was no allegation that the defendants intended to restrain interstate commerce.[271] Thus, the Court implicitly rejected the modern claim that Congress believed it possessed coextensive authority over agreements that indirectly affected interstate commerce.[272] Instead, the Court said, Congress embraced the direct/indirect standard as defining the mutually exclusive boundary between state and federal power.[273] While Justice Harlan dissented, he embraced the direct/indirect formulation but concluded that the merger would "directly affect" interstate commerce.[274]

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265. *See E.C Knight*, 156 U.S. at 13–15 (discussing pre-1890 Commerce Clause decisions).

266. *Id.* at 15–16 ("In *Gibbons v. Ogden*, *Brown v. Maryland*, and other cases often cited, the state laws [invalidated] were instances of direct interference with or regulations of interstate or international commerce . . . .").

267. *See id.* at 12, 16 (invoking *Kidd* for the proposition that banning manufacturing within a state's borders would "not . . . directly affect external commerce," and that "state legislation which, in a great variety of ways, affected interstate commerce . . . has been frequently sustained because the interference was not direct").

268. *Id.*

269. *Id.* (holding that Congress did not intend to reach the mere possession of a monopoly by manufacturing corporations).

270. *Id.* at 17 ("The object was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce.").

271. *Id.*

272. *See supra* notes 118–19 and accompanying text (describing this contention).

273. *See E.C. Knight*, 156 U.S. at 17 (demonstrating Congress's presumed adoption of the direct/indirect standard to govern the scope of the Sherman Act).

274. *Id.* at 33 (Harlan, J., dissenting) (contending that the transaction "affects, not incidentally, but directly, the people of all the States").

The Court reiterated this approach four times before 1900. These opinions also articulated a tractable methodology for distinguishing direct from indirect restraints, defining as "direct" those restraints that exercised market power to the detriment of out-of-state consumers. In *Hopkins v. United States*,[275] for instance, the government challenged certain bylaws of a Kansas City livestock exchange.[276] Members of the livestock exchange accepted cattle on consignment from farmers in various states, resold such livestock to local purchasers, and remitted net proceeds to the original owners.[277] One bylaw fixed members' commissions and prohibited dealings with non-members.[278] Another set the salary of agents that solicited these consignments and prohibited members from transmitting market prices to potential consignors.[279]

The Court unanimously rejected the challenge, again invoking the direct/indirect distinction.[280] Charges for the interstate transportation of cattle would directly burden interstate commerce.[281] However, charges for selling such cattle on the exchange were not "directly connected with" or "part of" such commerce.[282] The Court acknowledged that agreements setting local commissions might increase "the cost of conducting an interstate commercial business."[283] Invocation of the statute based on such "indirect and incidental" impacts would, however, "enlarge application of the act far beyond the fair meaning of the language used."[284] Instead, "[t]here must be some direct and immediate effect upon interstate commerce in order to come within

275. 171 U.S. 578 (1898).
276. *Id.* at 579.
277. *Id.* at 582.
278. *Id.* at 581.
279. *Id.* at 581–82.
280. *Id.* at 597 (invoking United States v. E.C. Knight Co., 156 U.S. 1 (1895), Hooper v. California, 155 U.S. 648 (1895), Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196 (1885), County of Mobile v. Kimball, 102 U.S. 691 (1880), and Welton v. Missouri, 91 U.S. 275 (1875), as exemplifying relevant Commerce Clause principles); *see also id.* ("But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce.").
281. *Id.* at 590–91.
282. *Id.* (distinguishing defendants' commissions from "charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself").
283. *Id.* at 592.
284. *Id.* at 587, 592.

the act."[285] The Court analogized private agreements potentially governed by the Sherman Act to state legislation affecting commerce: "An agreement may in a variety of ways affect interstate commerce, *just as state legislation may*, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct."[286]

To illustrate the difference between direct and indirect impacts, the Court cited *E.C Knight*, along with decisions evaluating state-imposed fees on local facilities for compliance with the Commerce Clause.[287] While the challenged agreement certainly "enhance[d] the expense to those engaged in the business," this effect on interstate commerce was—like the effect of fees on local facilities—"indirect," and thus the contract was "not illegal as a restraint thereon."[288] Only "exorbitant [local] charges," the Court said, would sufficiently affect commerce and justify application of the Act.[289] Indeed, subsequent decisions read *Hopkins* as holding that the agreement would have violated the Act as a direct restraint if it had produced unreasonable charges.[290]

United States v. Joint Traffic Ass'n[291] reflected the same approach. Defendant railroad companies collusively set rates for interstate traffic and claimed that, if reasonable, such rates did not offend the Act.[292]

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285. *Id.* at 592.

286. *Id.* at 594 (emphasis added).

287. *Id.* (citing Sherlock v. Alling, 93 U.S. 99 (1876); United States v. E.C. Knight Co., 156 U.S. 1 (1895); Pittsburg & S. Coal Co. v. Louisiana, 156 U.S. 590 (1895); Transp. Co. v. Parkersburg, 107 U.S. 691 (1882); and Ficklen v. Shelby Cty. Taxing Dist., 145 U.S. 1 (1892)), *see also id.* at 592 (citing Sands v. Manistee River Improvement Co., 123 U.S. 288 (1887); Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); and Ky. & Ind. Bridge Co. v. Louisville & Nashville R.R., 37 F. 567 (C.C.D. Ky. 1889)).

288. *See id.* at 596.

289. *Id.* at 595–96 ("It is possible that exorbitant charges for the use of these facilities might have similar effect as . . . a charge upon commerce itself might have. In a case like that the remedy would probably be forthcoming."); *id.* at 594 (citing N.Y., Lake Erie & W. R.R. v. Pennsylvania, 158 U.S. 431 (1895) (rejecting Commerce Clause challenge to tax upon tolls charged for use of Pennsylvania tracks)) ("As their effect is either indirect or else they relate to charges for the use of facilities furnished, the agreements instanced would be valid provided the charges agreed upon were reasonable. The effect upon the commerce spoken of must be direct and proximate.").

290. *See, e.g.*, Stafford v. Wallace, 258 U.S. 495, 525 (1922); Swift & Co. v. United States, 196 U.S. 375, 397 (1905) (concluding that *Hopkins* "left open" validity of restraints producing "exorbitant charges"); *see also* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 145–46 (1998) (concluding that local state or private measures imposing supracompetitive prices on interstate commerce were deemed "direct" restraints during this period).

291. 171 U.S. 505 (1898).

292. *Id.* at 562 (describing the agreement).

They also raised a more fundamental challenge, contending that the Act, as construed in *United States v. Trans-Missouri Freight Ass'n*,[293] banned "ordinary contracts and combinations," that were "at the same time most indispensable," because all such arrangements "have the effect of somewhat restraining trade and commerce, although to a very slight extent."[294]

The Court rejected the defendants' fundamental challenge.[295] While many beneficial agreements "restrain[ed] trade in some remote and indirect degree," any assumption that the Act reached such restraints was "most violent."[296] The Court invoked *Hopkins*'s holding that the statute must have a "reasonable construction," lest any agreements be said to have "indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it."[297] Like *Hopkins*, the Court found this "reasonable construction" in Commerce Clause jurisprudence, holding that "the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce," and not those affecting such commerce "indirectly or remotely."[298] The restraint actually before the Court *did* "directly affect[]" and "of course [was] intended to affect" interstate railroad rates by "destroying competition and by maintaining rates above what competition might produce."[299] Congress had authority to ban agreements producing such "rates and charges higher than they might otherwise be under the laws of competition."[300]

The Court reiterated these principles in *Anderson v. United States*,[301] another case involving bylaws of a livestock exchange.[302] One bylaw prevented members from "recogniz[ing]" any trader not a member of

293. 166 U.S. 290 (1897).

294. *Joint Traffic Ass'n*, 171 U.S. at 566–67 (summarizing the defendants' contentions).

295. *Id.* at 569.

296. *Id.* at 568.

297. *Id.* (quoting Hopkins v. United States, 171 U.S. 578, 600 (1898)).

298. *Id.*

299. *Id.* at 569.

300. *Id.* at 571. Three Justices dissented without opinion, apparently reiterating their dissent in *Trans-Missouri Freight*, which did not question the direct/indirect distinction. *Id.* at 578 (stating that Justices Gray, Shiras, and White dissented); *see* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 343 (1897) (White, J., dissenting, joined by Field, J., Shiras, J., and Gray, J.).

301. 171 U.S. 604 (1898).

302. *Id.*

the exchange.[303] Another required all members of partnerships trading on the exchange to become members.[304] The government contended that the bylaws excluded non-members from trading cattle transported across state lines, thus restraining interstate commerce.[305]

Invoking *Hopkins*, the Court unanimously disagreed, again drawing an analogy between public and private restraints affecting interstate commerce.[306] State legislation sometimes "affect[ed] foreign or interstate commerce without being intended to operate as commercial regulations."[307] The "same is true," the Court said, with "certain kinds of agreements entered into between persons engaged in the same business."[308] Agreements for the "bona fide purpose of properly and reasonably regulating the conduct of their business among themselves . . . . would be good," even if they "indirectly and unintentionally[] affect[ed] interstate trade or commerce."[309] Otherwise, the Court said, there would scarcely be any agreement that had "interstate or foreign commerce for its subject that may not remotely be said to, in some obscure way, affect that commerce and to be therefore void."[310]

The challenged agreements impacted interstate commerce only indirectly.[311] The Association and restraints "ensure[d] a quick and certain market for the sale or purchase of the article dealt in" and "provide[d] a standard of business integrity among the members by adopting rules for just and fair dealing."[312] The agreements at issue in *Anderson* "differ[ed] radically" from agreements condemned under the Act,[313] as the latter agreements "provided for fixing the prices of the articles dealt in."[314] The *Anderson* provisions "d[id] not meddle with prices," and significant rivalry prevented competitive harm.[315] While expulsions to enforce the Association's rules excluded some rivals from

303. *Id.* at 611.
304. *Id.*
305. *Id.* at 612.
306. *Id.*
307. *Id.* at 616 (quoting Smith v. Alabama, 124 U.S. 465, 473 (1888)).
308. *Id.*
309. *Id.*
310. *Id.*
311. *Id.*
312. *Id.*
313. *Id.* at 617 (citing United States v. Jellico Mountain Coal & Coke Co., 46 F. 432 (C.C.M.D. Tenn. 1891); United States v. Coal Dealers' Ass'n of Cal., 85 F. 252 (C.C.N.D. Cal. 1898); and United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898)).
314. *Id.*
315. *Id.* (describing rivals of the Association as "mak[ing] a large competition wholly outside of the defendants").

the market, there was no intent to affect interstate commerce "in the slightest degree," and such expulsions affected interstate commerce "only most remotely and indirectly."[316] Invoking decisions sustaining state statutes against Commerce Clause challenges, the Court observed that the challenged agreement, like those statutes, placed no tax, condition, or license on "any instrument or subject of commerce."[317]

Addyston Pipe & Steel Co. v. United States[318] was the decade's last word on the subject, and the Court again drew upon its Commerce Clause jurisprudence when interpreting the Act.[319] The government challenged a cartel of six pipe manufacturers located in four states.[320] The defendants set prices above cost (including capital costs) and sold some output across state lines, while other sales were intrastate.[321] The defendants claimed that the commerce power did not reach private restraints but merely empowered Congress to preempt state-imposed restraints of interstate commerce.[322] They also claimed that banning such agreements would infringe liberty of contract and that reasonable prices did not directly restrain interstate commerce.[323]

Invoking *Gibbons* (and *E.C. Knight*), the Court opined that the clause empowered Congress "to prescribe the rules by which [interstate commerce] shall be governed."[324] Conceding that concern over state-imposed restraints motivated adoption of the clause, the Court echoed *Anderson* and *Hopkins*, analogizing private agreements to legislation and using "restrain" and "regulate" interchangeably.[325] Some contracts could "in truth" have the same "effect" on interstate commerce as preempted state enactments, i.e., could "directly obstruct[] and thus regulate[]" interstate commerce.[326] There was no reason that the commerce power would reach

316. *Id.* at 618.

317. *Id.* (citing Sherlock v. Alling, 93 U.S. 99, 102 (1876); Smith v. Alabama, 124 U. S. 465, 473 (1888); and Pittsburg & S. Coal Co. v. Louisiana, 156 U.S. 590, 598 (1895)).

318. 175 U.S. 211 (1899).

319. *Id.* at 227.

320. *Id.* at 212.

321. *Id.* at 213–25, 247–48.

322. *Id.* at 226–27.

323. *Id.* at 227–28.

324. *Id.* at 228, 241–42; *see also* United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824).

325. *See Addyston Pipe*, 175 U.S. at 229–30, 243–44.

326. *Id.* at 229–30 ("[P]rivate contracts may in truth be as far reaching in their effect upon interstate commerce as would the legislation of a single State of the same character."); *id.* at 230 ("[A]nything which directly obstructs and thus regulates

only state enactments, while leaving private agreements that "directly and substantially, and not as a mere incident, regulate interstate commerce" to state authority.[327]

The Court employed similar logic when rejecting defendants' liberty of contract argument, holding there was no liberty to enter contracts that directly restrained and thus regulated interstate commerce.[328] Instead of delegating regulatory authority to private parties, the Constitution granted such power to Congress.[329] Such agreements found no shelter in liberty of contract because "the direct results of such contracts might be the regulation of commerce among the States, possibly quite as effectually as if a State had passed a statute of like tenor as the contract."[330]

Once again, the Court drew upon its Commerce Clause jurisprudence to fix the boundaries between state and federal authority over private agreements. The Court equated private agreements that "restrained commerce among the states" with legislation that "directly" obstructed and thus "regulated" interstate commerce, therefore contravening Congress's presumed intent to preempt such legislation. The Sherman Act thereby performed the same role *vis-á-vis* private restraints—banning those that "directly restrained and regulated" interstate commerce—as the Court's Commerce Clause jurisprudence and its logic of quasi-statutory preemption performed with respect to state-imposed restraints.[331] By the

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[interstate commerce], whether it is state legislation or private contracts . . . should be subject to the power of Congress . . . .").

327. *Id.* at 229–30 ("If certain kinds of private contracts do directly . . . limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them?").

328. *Id.* at 230 (stating that such "liberty of contract" would amount to freedom from regulation "of a subject which from its general and great importance has been granted to Congress as the proper representative of the nation at large"); *see also* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 60–65 (1999) (describing *Addyston Pipe*'s determination that the challenged restraint produced supracompetitive prices analogous to burdensome state enactments); William H. Page, *Ideological Conflict and the Origins of Antirust Policy*, 66 TUL. L. REV. 1, 46–47 (1991) (asserting that both *Joint Traffic* and *Addyston Pipe* invoked "analog[ies] to governmental restrictions . . . to find the agreement[s] illegal").

329. *See Addyston Pipe*, 175 U.S. at 230.

330. *Id.*

331. *See id.* at 242 (holding that a contract "which directly operates . . . upon the sale, transportation and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent and to the same extent trenches upon the power of the national legislature and violates the

same logic, agreements that merely affected interstate commerce "indirectly" exceeded the scope of the Act.[332]

The Court also offered a functional rationale for its definition of "restraint of . . . commerce among the several States" and for allocating authority over such agreements to Congress. Echoing the concerns about state legislation serving "local or partial interests" that animated its Commerce Clause jurisprudence, the Court suggested that allocating authority over such agreements to states would produce sub-optimal results, as states took different approaches to such agreements depending upon each state's "particular interest."[333] Presumably such self-interest would manifest itself as lax regulation, perhaps even enforcement, of cartel agreements fixing prices for goods exported to other states. The result would be a regulatory policy that enriched a state's own firms at the expense of out-of-state consumers, contradicting the anti-favoritism rationale of the Commerce Clause.

The Court also observed that no state had attempted to regulate such agreements.[334] This omission indicated that states (properly) believed congressional authority over such agreements was exclusive.[335] Like rates for interstate transportation, where Congress had an "enlarged view of the interests of all the States,"[336] the category of direct restraints of interstate commerce was inherently national, i.e., "a subject which from its general and great importance has been granted to Congress as the proper representative of the nation at large."[337] The Court's invocation of these categories confirmed its belief that authority over

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statute"); *id.* at 226–27 (assuming "that the contract in question herein does directly and substantially operate as a restraint upon and as a regulation of interstate commerce," thereby violating the Act).

332. *Id.* at 228–31 (asserting that the commerce power includes authority to prohibit "private contracts which directly and substantially, and not merely indirectly, remotely, incidentally and collaterally, regulate to a greater or less degree commerce among the States").

333. *See id.* at 231; *cf. supra* notes 182–84 and accompanying text.

334. *See Addyston Pipe*, 175 U.S. at 232.

335. *Id.* ("[I]t was [probably] supposed to be a subject over which state legislatures had no jurisdiction."); Meese, *supra* note 247, at 2176–78 (explaining *Addyston Pipe*'s holding that Congress has exclusive authority over such agreements); *see also* Hadley Dean Plate Glass Co. v. Highland Glass Co., 143 F. 242, 244 (8th Cir. 1906) (citing *Addyston Pipe*, 175 U.S. at 229–33) (holding that states lacked authority over private agreements restraining interstate commerce).

336. Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886).

337. *Addyston Pipe*, 175 U.S. at 230. The Court did not cite *Wabash* despite invocation of analogous reasoning. *See id.*

such restraints was mutually exclusive and that Congress lacked power over conduct impacting interstate commerce indirectly.[338]

Having rejected defendants' constitutional argument by assuming arguendo that the cartel "directly" restrained interstate commerce, the Court proceeded to examine whether the agreement produced such an effect.[339] Consistent with *Hopkins*, *Anderson*, and *Joint Traffic Ass'n*, the Court focused on whether the restraints produced supracompetitive prices for interstate transactions.[340] The Court rejected defendants' claim that the cartel set reasonable prices, quoting verbatim three pages of findings that then-Circuit Judge William Howard Taft had assembled in his opinion for the Sixth Circuit.[341] According to Judge Taft, defendants' prices were unreasonable because they well-exceeded costs, including a reasonable return.[342] Moreover, the agreements had the "immediate" effect of destroying competition so defendants could "obtain increased prices for themselves."[343] In sum, the agreement restrained commerce directly because it set supracompetitive prices for interstate transactions, imposing economic harm on out-of-state purchasers.

This rationale also suggested limits on the reach of the Act—limits the Court also enforced. The Court reversed that portion of the Sixth Circuit's order banning agreements between the defendants setting the price of intrastate transactions.[344] The Court nowhere suggested that the Act would reach such restraints simply because they impacted interstate input purchases, for instance. Indeed, *E.C. Knight*, which the

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338. *But see supra* note 116 and accompanying text (discussing contrary position taken by some scholars and modern Court).

339. *Addyston Pipe*, 175 U.S. at 226–27 (characterizing defendants' arguments as assuming that challenged agreements "directly and substantially operate as a restraint upon and as a regulation of interstate commerce").

340. *Id.* at 240–41; *cf.* Anderson v. United States, 171 U.S. 604, 617 (1898) (holding that challenged restraint did not directly affect interstate commerce where there was no evidence of price "meddl[ing]"); Hopkins v. United States, 171 U.S. 578, 595–96 (1898) (finding restraint indirect absent exorbitant charges); United States v. Joint Traffic Ass'n, 171 U.S. 505, 569–70 (1898) (finding restraint "direct" because it produced supracompetitive prices).

341. *See Addyston Pipe*, 175 U.S. at 235–38 (quoting United States v. Addyston Pipe & Steel Co., 85 F. 271, 291–94 (6th Cir. 1898)).

342. *Id.* at 237–38 (quoting *Addyston Pipe*, 85 F. at 291–94); *id.* at 238 ("[T]he combination . . . enhance[d] prices beyond a sum which was reasonable . . . .").

343. *Id.* at 244.

344. *Id.* at 247 ("Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce.").

Court reaffirmed, precluded such a result. After all, the defendants there bought inputs from outside Pennsylvania and resold most output in other states.[345] But the Court held that a mere effect upon interstate commerce did not establish a "restraint" of such commerce.[346]

In five unanimous or near-unanimous decisions in four years, the Court repeatedly analogized private agreements potentially governed by the Sherman Act to state enactments potentially preempted by the quasi-statutory regime implementing the implied will of Congress pursuant to the Commerce Clause. This analogy naturally led the Court to read the distinction between "direct" and "indirect" effects from this regime into the Act. Just as Congress implicitly preempted state legislation that directly affected and thus regulated interstate commerce, so too did the Sherman Act interdict private restraints that produced such an effect. Conversely, the Act did not reach intrastate restraints affecting interstate commerce indirectly. This reading of the Act replicated that suggested by the prior construction canon.[347] Taken together, the Court's Commerce Clause jurisprudence and the Sherman Act created a unified regime protecting free competition in interstate commerce from public and private threats.

These decisions also articulated a consistent methodology for determining whether an impact on interstate commerce was "direct." The Court repeatedly inquired whether the challenged agreements produced supracompetitive prices for interstate transactions or transportation and thus imposed economic harm upon out-of-state citizens.[348] Application of this standard turned on facts regarding the challenged restraint, including the nature of the industry and defendants' market position.[349] Restraints that produced no such effects remained

345. *See supra* notes 259–63 and accompanying text.

346. *See* United States v. E.C. Knight Co., 156 U.S. 1, 12, 15–16 (1895); *see also* Kidd v. Pearson, 128 U.S. 1, 23 (1888) (holding that state police power regulations are constitutional so long as they do not directly affect interstate commerce).

347. *See supra* notes 215–23 and accompanying text (describing the prior construction canon and its application in specific cases).

348. *See supra* note 340 and accompanying text; *see also* Johnsen & Yahya, *supra* note 58, at 446–49 (describing a similar "geographic market power test" for discerning whether the Act reaches local restraints).

349. *See supra* note 47 and accompanying text (explaining that then-contemporary Commerce Clause jurisprudence required a fact-intensive analysis of the challenged state legislation).

within the exclusive authority of individual states.[350] Just as *Standard Oil* had drawn on various sources to determine the content of the Rule of Reason, so too did the Court draw upon Commerce Clause principles to define the term "direct."[351]

Such repeated holdings deserved respect as a matter of stare decisis—respect that *Mandeville Island Farms* did not accord them. These holdings also constitute an important indication of the original meaning of the statute. Together with the prior construction and avoidance canons, these contemporaneous constructions rebut the claim that Congress attempted to exercise concurrent power to ban agreements that produced only indirect impacts on interstate commerce. Instead, Congress apparently treated authority over trade restraints as mutually exclusive, using the direct/indirect standard to define the boundary between state and federal authority. Moreover, a restraint was only "direct" if it produced interstate competitive harm.

B. Did Congress Mean the Act to Expand in Response to Novel Commerce Clause Standards?

The modern Court has not acknowledged the Commerce Clause origins of the term "*restraint* of . . . commerce among the several States" and thus has not grappled with Congress's apparent invocation of pre-1890 Commerce Clause jurisprudence to define the reach of the Act. Proponents of the "substantial effects" test may nonetheless emphasize that Congress's choice of the constitutional phrase "restraint of . . . commerce among the several States" *strengthens* the claim that Congress meant to exercise the full extent of its commerce power when addressing harmful agreements. Even if the 1890 Congress did not intend to displace then-current Commerce Clause jurisprudence, proponents might argue, it is still entirely proper to read *Wickard*'s substantial effects test into the Act, thereby effectuating Congress's desire to exercise its entire commerce power over trade restraints. As explained earlier, the Supreme Court has invoked this reasoning.[352]

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350. *See supra* note 16 and accompanying text; *see also* Johnsen & Yahya, *supra* note 58, at 408 ("[A]ccording to competitive federalism, trade restraints that do not plausibly increase prices to consumers outside the home state should lie beyond federal reach.").

351. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 66 (1911); *see also supra* note 128 and accompanying text (describing how *Standard Oil* drew upon various sources to determine content of the Rule of Reason).

352. *See supra* notes 118–21 and accompanying text. One scholar asserts that "Congress has never volunteered that the [commerce] power should be viewed more

Few would deny that the practical reach of the Act properly expands (or contracts) if changed circumstances result in revised application of an unchanged direct/indirect standard.[353] However, the substantial effects test is an entirely new standard unknown to the enacting Congress, a standard that reflects different normative choices about the proper allocation of authority between states and the national government. Did the 1890 Congress wish to exercise the maximum extent of its commerce power under whatever standard the Supreme Court might later adopt? The text of the Sherman Act neither alludes to such an intention nor precludes this approach. Moreover, the empirical record does not compel the conclusion that Congress would reflexively exercise whatever authority the Court might subsequently provide. After all, the 1890 Congress and its predecessors rarely exercised the commerce power, even over subjects with respect to which Congress's authority was unquestioned.[354]

Even modern Congresses sometimes decline to exercise the full extent of the commerce power. For instance, Congress certainly possesses authority to preempt state corporate law governing enterprises operating in interstate commerce and require all such firms to incorporate under a federal statute.[355] However, Congress has declined to nationalize corporate law, leaving individual states—particularly Delaware—to generate rules structuring the internal governance of the nation's largest commercial enterprises.[356] Moreover, the Patient Protection and Affordable Care Act[357] required many employers to provide employees health insurance but exempted all firms with fewer

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narrowly [than the maximum] or the Act read more narrowly than its potential." *See* Gavil, *supra* note 122, at 695. As shown herein, this statement does not survive scrutiny.

353. *See infra* notes 407–17 and accompanying text (describing the Court's subsequent revision of *E.C. Knight*'s application of the direct/indirect standard).

354. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 121 (1942) ("During this period there was perhaps little occasion for the affirmative exercise of the commerce power . . . .").

355. *See* Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 2 (2008) (describing proposals to subject corporations operating in interstate commerce to national corporation law).

356. *Id.* at 25 (describing congressional consideration of proposals in the 1970s to nationalize corporate law).

357. Pub. L. No. 111-148, 124 Stat. 119 (2010).

than fifty full-time employees.[358] However, Congress plainly has the authority to require smaller firms to carry such insurance.[359]

Antitrust itself provides three instances in which Congress has declined to exercise the full extent of the commerce power as defined by the Supreme Court. In 1944, the Court ruled that insurance constitutes "commerce" within the meaning of the Commerce Clause and the Sherman Act, applying the Act to an interstate insurance cartel.[360] Congress responded with the McCarran-Ferguson Act,[361] exempting the "business of insurance" from federal antitrust law, with some exceptions.[362] The exemption still survives, despite bipartisan opposition from antitrust agencies and scholars.[363] Moreover, when Congress passed the Robinson-Patman Act[364] in 1936, it declined to exercise its entire commerce power, banning only offending conduct occurring "in" interstate commerce and not intrastate conduct that "directly affects" such commerce.[365] Finally, Congress also declined to exercise its full commerce power when it re-enacted section 7 of the Clayton Act,[366] the federal anti-merger statute, in 1950.[367] This statute applies only to mergers between firms "engaged in commerce," and

358. *See* 26 U.S.C. § 4980H (2018).

359. *See, e.g.*, Perez v. United States, 402 U.S. 146, 154–57 (1971) (holding that the Commerce Clause empowers Congress to regulate local extortion); Daniel v. Paul, 395 U.S. 298, 305 (1969) (finding that the commerce power reached a snack bar selling "four food items," including hamburgers and soft drinks, because some ingredients in three items originated in other states); Katzenbach v. McClung, 379 U.S. 294, 296, 304 (1964) (determining that the Commerce Clause authorized a ban on discrimination by restaurant with thirty-six employees because firm's local supplier purchased out-of-state meat).

360. *See* United States v. Se. Underwriters Ass'n, 322 U.S. 533, 553, 562 (1944).

361. 15 U.S.C. §§ 1011–1015 (2018).

362. *Id.* § 1011; *see* Susan Beth Farmer, *Competition and Regulation in the Insurance Sector: Reassessing the McCarran-Ferguson Act*, 89 OR. L. REV. 915, 936 (2011) (describing origins and operation of the Act).

363. *See* Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 CORNELL J.L. & PUB. POL'Y 255, 264–65 (2013) (describing enforcement agency opposition); *id.* at 330–32 (advocating exemption's repeal).

364. 15 U.S.C. § 13 (2018).

365. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 193–95 (1974) (concluding that the Robinson-Patman Act only reaches conduct "in" interstate commerce and not intrastate conduct "affecting" such commerce); Local 167, Int'l Bhd. of Teamsters v. United States, 291 U.S. 293, 297 (1934) (applying the Sherman Act to intrastate conduct that "directly . . . restrain[ed]" interstate movement of poultry).

366. 15 U.S.C. § 18 (2018).

367. *See id.*

not to those between firms subject to the commerce power because they "affect" interstate commerce.[368]

The prospect of post-*Wickard* expansion of the Sherman Act also raised novel questions beyond contemplation of the 1890 Congress. For instance, the Court coupled expansion of the commerce power with a relaxation of the pre-*Wickard* assumption that authority over most commercial activity was mutually exclusive, with the result that states and the national government now possess concurrent authority over most trade restraints.[369] Expansion of the Act thus required the Court to determine whether the statute preempted state antitrust regulation that purported to ban practices deemed reasonable under federal standards.[370] This expansion and recognition of concurrent authority also facilitated application of the Act to various state-approved restraints, thereby requiring the Court to decide whether and how federal courts would supervise local regulation under the aegis of the Sherman Act.[371] Finally, decisions such as *Wickard* expanded the commerce power along two dimensions: the substantial effects test and the aggregation test, creating the prospect of analogous expansions of the Act.[372]

Any decision to adjust the scope of the Act in light of the expanded reach of the commerce power would require—and did require—judicial resolution of these and other issues, with no guidance from the statutory text or any other source of statutory meaning. The result was judicial policymaking unmoored to any intelligible legal standard. For instance, while the Court embraced *Wickard*'s substantial effects test under the Sherman Act, it has simultaneously declined to employ the aggregation test.[373] Moreover, while the Court held that the Act usually

368. *Id.*; *see* United States v. Am. Bldg. Maint. Indus., 422 U.S. 271, 283 (1975) ("[T]he phrase 'engaged in commerce' as used in § 7 of the Clayton Act means engaged in the flow of interstate commerce, and was not intended to reach all corporations engaged in activities subject to the federal commerce power."); *id.* at 279–80 (explaining that Congress reenacted this statute in 1950 knowing it did not reach activities "affecting commerce").

369. *See infra* notes 398–401 and accompanying text.

370. *See infra* note 400 and accompanying text.

371. *See supra* notes 99–102 and accompanying text.

372. *See supra* Section II.A (describing both aspects of *Wickard*).

373. Instead, the Court has examined whether the restraint itself produces the requisite effect on interstate commerce. *See* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241 (1980) (invoking *Wickard* only for substantial effects test); Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 743 (1976) (invoking *Mandeville Island Farms* only for substantial effects test); Burke v. Ford, 389 U.S. 320, 321 (1967) (per

does not preempt state antitrust regulation of private restraints, it simultaneously held that the Act preempts some (but not all) restraints authorized by states themselves.[374] In each case, the Court has engaged in judicial lawmaking, announcing rules to govern questions that Congress did not anticipate or address in 1890. It is by no means certain that the 1890 Congress would have delegated legislative authority over such questions to unelected judges, even assuming such a capacious delegation was constitutional.[375]

In short, it is conceivable that Congress meant the Sherman Act to incorporate any commerce power standard the Supreme Court might subsequently announce, including a standard unknown in 1890. However, it seems at least equally possible that Congress would have declined to delegate such authority to future Courts. One thing is certain: the statute contains no affirmative indication regarding Congress's view of the question.

Fortunately, there is a canon of construction well-suited for resolving this ambiguity—namely, the federal-state balance canon.[376] The Court first employed this canon during the 1940s to temper vast expansions of the commerce power in various contexts, including the Federal Trade Commission Act[377] and even the Sherman Act.[378] The canon

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curiam) (same); *see also* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 197 n.12 (1974) (distinguishing case-by-case Sherman Act inquiry from instances where "Congress itself has defined the specific persons and activities that affect commerce").

374. *See* California v. ARC Am. Corp., 490 U.S. 93, 101–02 (1989) (holding that the Sherman Act generally does not preempt more intrusive state antitrust remedies for conduct condemned by state and federal law). *Compare* FTC v. Ticor Title Ins., 504 U.S. 621, 634, 638 (1992) (invalidating state-authorized price fixing because state did not adequately supervise private actors that state law authorized to determine prices), *with* Parker v. Brown, 317 U.S. 341, 350–52 (1943) (holding that the Sherman Act did not invalidate state-imposed limit on raisin output).

375. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406–09 (1928) (invalidating delegation of authority to the executive branch because Congress did not articulate an "intelligible principle" governing that delegation).

376. *See* Barrett, *supra* note 208, at 123–24 (describing different canons of statutory interpretation and noting that some, including federalism canons, serve "constitutional values").

377. 15 U.S.C. §§ 41–58 (2018).

378. *See* United States v. Five Gambling Devices, 346 U.S. 441, 450 (1953); Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940) (declining to apply the Sherman Act to a union conspiracy that closed a factory shipping goods in interstate commerce because maintaining "a proper distribution between state and national governments of police authority and of remedies for private and public . . . wrongs is of far-reaching

requires courts to avoid reading federal statutes to invade "domain[s] traditionally left to the States," unless the statute clearly requires such a significant expansion of federal power.[379]

Despite referencing the balance of authority between sovereigns, this canon only applies when ascertaining the reach of statutes regulating private parties, independent of any question of preemption.[380] The Court has invoked this canon in cases involving the regulation of firearms,[381] possession of gambling devices,[382] arson of a dwelling,[383] local unfair competition,[384] and violent strikes shuttering factories producing goods for interstate sale.[385] In each case, the Court refused to apply a federal statute to private conduct traditionally subject only to state regulation, even though the Court's Commerce Clause precedents empowered Congress to regulate such activity.[386] Describing operation of this canon in the context of commercial regulation, Justice Frankfurter explained that expansive application of federal statutes in novel circumstances would be "retrospective" and "properly deserve[] the stigma of judicial legislation."[387]

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importance [and] [a]n intention to disturb the balance is not lightly to be imputed to Congress").

379. United States v. Bass, 404 U.S. 336, 339 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."); *see also* Jones v. United States, 529 U.S. 848, 858 (2000) (quoting *Bass*, 404 U.S. at 350) (same); *Five Gambling Devices*, 346 U.S. at 450 ("[W]e must assume that the implications and limitations of our federal system constitute a major premise of all congressional legislation, though not repeatedly recited therein."); FTC v. Bunte Bros., 312 U.S. 349, 355 (1941) (declining to treat local commercial practices as "in commerce" because "[a]n inroad upon local conditions and local standards of such far-reaching import . . . ought to await a clearer mandate from Congress"); *Apex Hosiery*, 310 U.S. at 513.

380. *Cf.* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230–31 (1947) (articulating canon against preemption over subjects traditionally subject to state regulation).

381. *See Bass*, 404 U.S. at 344–45, 349.

382. *See Five Gambling Devices*, 346 U.S. at 449–51.

383. *See Jones*, 529 U.S. at 852, 858.

384. *See Bunte Bros*, 312 U.S. at 351–52; Frankfurter, *supra* note 219, at 540 (contending that federal courts must read federal statutes in light of the nation's dual system of government).

385. *See* Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940).

386. *See, e.g.*, *Jones*, 529 U.S. at 858–59 (declining to apply statute to arson of dwelling consuming out-of-state natural gas because doing so would alter federal-state balance and "arson is a paradigmatic common-law state crime").

387. *See* Frankfurter, *supra* note 219, at 540 ("[W]hen the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, [Congress is]

Development of this canon paralleled development of a related canon, namely, the presumption against preemption of state law.[388] Both canons buttress states' regulatory prerogatives over conduct the primary effects of which occur within states' borders, thereby preserving regulatory diversity in a federal system.[389] States may exercise these prerogatives in various ways. They may ban such conduct (imposing the same, more lenient, or harsher penalties as provided by federal law), allow such conduct, or even encourage it.[390]

Intrastate restraints that impact interstate commerce indirectly are certainly a "domain traditionally left to the States."[391] As explained earlier, states have been regulating intrastate restraints, including those producing substantial fortuitous effects on interstate commerce, since before 1890, employing corporate, antitrust, and contract law.[392] The Supreme Court bolstered such regulation by repeatedly declining, over five decades, to apply the Sherman Act to such conduct, granting states exclusive authority.[393] States exercised such authority with gusto, bringing numerous cases under their own antitrust laws.[394] States also *declined* to ban certain intrastate restraints that would have violated the Sherman Act if deemed restraints of *inter*state commerce.[395] The Supreme

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reasonably explicit and do[es] not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.").

388. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234–37 (1947); Ernest A. Young, *Federal Preemption and State Autonomy*, *in* FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 249, 264–66 (Richard A. Epstein & Michael S. Greve eds., 2007) (explaining how *Rice* presumption protects traditional state prerogatives).

389. *Cf.* Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1707–08 (2008) (explaining how presumption against preemption reflects the Constitution's background assumption that state law governs most disputes).

390. *Cf. Jones*, 529 U.S. at 859 (Stevens, J., concurring) (observing that congressional imposition of prison sentence more than triple that of analogous state law illustrated how federal legislation "may effectively displace a policy choice made by the State"); United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (stating that states "perform[ing] their role[s] as laboratories for experimentation" reveals "the theory and utility of our federalism"); United States v. Bass, 404 U.S. 336, 348 n.15 (1971) (observing that some states allowed firearm possession); New State Ice Co. v. Liebmann, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting).

391. *See Bass*, 404 U.S. at 339.

392. *See supra* notes 50–55 and accompanying text.

393. *See supra* notes 48–49 and accompanying text.

394. *See supra* notes 54–57 and accompanying text (discussing state antitrust enforcement in late nineteenth and early twentieth centuries).

395. For example, during the 1930s, several states adopted "fair trade" laws exempting minimum resale price maintenance from their own antitrust laws whenever the manufacturer's products faced significant inter-brand competition. *See* Dr. Miles

Court and other courts repeatedly rejected constitutional challenges to regulation of local restraints that also incidentally impacted interstate commerce, further legitimizing such regulation.[396] Indeed, in 1989, the Court recognized the "long history of state common-law and statutory remedies against monopolies and unfair business practices" and concluded that state antitrust law is "an area traditionally regulated by the States."[397]

By abruptly expanding the Act to reach intrastate restraints with fortuitous effects on interstate commerce, the Court significantly altered the allocation of regulatory responsibility between states and the nation, granting the latter authority over restraints producing only intrastate harm. To be sure, the Court simultaneously jettisoned precedents holding that jurisdiction over commercial activity was

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Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 373, 400 (1911) (condemning interstate resale price maintenance under section 1 of the Act); Ewald T. Grether, *Experience in California with Fair Trade Legislation Restricting Price Cutting*, 24 CALIF. L. REV. 640, 640 & n.2 (1936) (reporting that, as of 1935, California and nine other states, representing forty percent of the nation's population, had adopted such legislation). Congress, of course, empowered states to adopt "fair trade" legislation with respect to minimum resale price maintenance governing interstate sales between 1937 and 1975, thereby exempting such agreements from the Sherman Act. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 904–05 (2007) (recounting this history). Some states also recognized a reasonable price defense to horizontal price fixing, a defense not available under the Sherman Act. *See* Cline v. Frink Dairy Co., 274 U.S. 445, 453 (1927) (invalidating Colorado statute recognizing such a defense as unduly vague).

396. *See, e.g.*, Standard Oil Co. of Ky. v. Tennessee, 217 U.S. 413, 420–22 (1910) (rejecting equal protection challenge to state antitrust statute); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 108–09, 111 (1909) (rejecting due process challenge to state antitrust law); Nat'l Cotton Oil Co. v. Texas, 197 U.S. 115, 127–33 (1905) (rejecting due process and equal protection challenge to state antitrust statute); Smiley v. Kansas, 196 U.S. 447, 454–55, 457 (1905) (rejecting due process challenge to state antitrust statute); Standard Oil Co. of Ky. v. State *ex rel.* Attorney Gen., 65 So. 468, 470–71 (Miss. 1914) (condemning local price discrimination under state antitrust law even though product was manufactured out-of-state); Commonwealth v. Strauss, 78 N.E. 136, 136, 138–39 (Mass. 1906) (invalidating local tying agreement under state antitrust law even though tied product was manufactured out-of-state); *id.* at 139 ("This statute does not attempt directly to regulate interstate commerce . . . . Indirectly it affects it . . . where contracts are made for the sale and transportation of property in another state to a purchaser in this state."); *see also In re* Op. of the Justices, 99 N.E. 294, 294 (Mass. 1912) (explaining that proposed Massachusetts antitrust statute reached only intrastate restraints and thus did not purport to regulate interstate commerce despite indirect impact on such commerce).

397. *See* California v. ARC Am. Corp., 490 U.S. 93, 101 (1989).

mutually exclusive.[398] Thus, states remained free to regulate agreements now subject to the Sherman Act.[399] However, as noted earlier, state regulation could only replicate or exceed the scope of regulation imposed via the Sherman Act, which now provided a regulatory floor.[400] The result was a (much) smaller sphere of exclusive state authority and less regulatory diversity.[401]

This major shift occurred without any amendment of the Sherman Act and no other "clear expression" of congressional purpose.[402] Thus, in the words of Justice Frankfurter, the shift "radically readjust[ed] the balance of state and national authority" and constituted "retrospective expansion of meaning" and "judicial legislation."[403] Indeed, *Mandeville Island Farms*, the origin of the shift, did not mention the federal-state

398. *See* Meese, *supra* note 247, at 2185–86 (explaining how the post-New Deal Court validated overlapping state and federal authority over trade restraints).

399. *Id.* at 2164–66; Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 536–39 (1997) (explaining how the post-New Deal Court altered Commerce Clause jurisprudence to avoid invalidating state laws directly burdening interstate commerce); *see also ARC Am. Corp.*, 490 U.S. at 100–01 (rejecting claim that Sherman Act preempted state antitrust statute permitting indirect purchasers to recover treble damages despite the fact that such recovery is not available under the Sherman Act); Exxon Corp. v. Governor of Md., 437 U.S. 117, 130–34 (1978) (rejecting Commerce Clause and Sherman Act challenges to state ban on procompetitive vertical integration and price discrimination).

400. *See supra* notes 89–93 and accompanying text. For instance, state fair trade laws that purported to exempt most local minimum resale price maintenance from state regulation became irrelevant because the Sherman Act now reached nearly all such agreements. While Congress empowered states to exempt such agreements from the Act in 1937, Congress repealed this authorization in 1975, subjecting minimum resale price maintenance to a uniform national ban, until 2007, when the Court declared such agreements subject to fact-intensive rule of reason scrutiny. *See Leegin*, 551 U.S. at 885–87, 904–05 (overruling *Dr. Miles* and holding that courts should evaluate minimum resale price maintenance under a fact-intensive rule of reason analysis).

401. *See supra* notes 50–54 and accompanying text (identifying various state enforcement regimes prior to the Court's expansion of the scope of the Sherman Act); *cf.* Johnsen & Yahya, *supra* note 58, at 451–59 (describing benefits of competitive federalism in production of antitrust doctrine).

402. *See infra* Part VI and accompanying text (finding no indication in legislative history that Congress meant to alter the balance between state and federal authority over trade restraints); *cf.* United States v. Bass, 404 U.S. 336, 349 (1971) (articulating the requirement that Congress clearly express its purpose to "significantly change[] the federal-state balance").

403. Frankfurter, *supra* note 219, at 540.

balance canon, which the Court had applied twice earlier in the same decade in antitrust cases.[404]

C. Do Changed Economic Circumstances Justify the Substantial Effects Test?

Resolution of the first two arguments for adopting the substantial effects test paves the way for evaluation of the third: namely, that the test is a faithful translation of the underlying principle governing the scope of the Act. Any effort to translate a legal text in light of changed circumstances must begin by identifying the principle animating the relevant text and reflecting the lawgiver's normative choices. Unfortunately, no proponent of the substantial effects test has identified the underlying principle that, when properly translated, mandates adoption of this test. Thus, scholars evaluating the changed circumstances argument must attempt to identify such a principle. As explained, the best evidence of statutory meaning establishes that by adopting the term "in restraint of . . . commerce among the several States," Congress invoked a term of art referring to state statutes that "regulate interstate commerce . . . in a constitutional sense."[405] Thus, Congress meant to reach those private agreements that imposed a similar effect on interstate commerce and injured consumers in more than one state, because states would likely exercise any regulatory authority over such contracts in a self-interested or "partial" manner that favored their own citizens over others.[406]

Like its progenitor in Commerce Clause jurisprudence, the Sherman Act's direct/indirect standard was fact-intensive and flexible, allowing for evolving applications—translations—in light of exogenous changes in context.[407] This flexibility allowed the Court to adjust the reach of the Act to effectuate Congress's apparent intent to exercise exclusive authority over intrastate agreements that produced interstate harm and thus would otherwise be subject to suboptimal rules generated by states with distorted incentives.

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404. *See* FTC v. Bunte Bros., 312 U.S. 349, 350, 355 (1941) (limiting the reach of the Federal Trade Commission Act); Apex Hosiery Co. v. Leader, 310 U.S. 469, 494–95, 500–01 (1940) (limiting the scope of the Sherman Act).

405. *See supra* notes 238–44 and accompanying and immediately following text (canvassing nineteenth century case law equating "restraint" with "regulation" prior to passage of the Sherman Act).

406. *See supra* note 333 and accompanying text.

407. *Cf.* Sullivan, *supra* note 195, at 58–59 (explaining how application of a standard can vary with changing facts).

The modification of *E.C. Knight* exemplifies such a translation of an unchanged principle in light of new information. *Mandeville Island Farms* and *Wickard* characterized the decision as mechanically holding that the Act could never reach a merger between manufacturers.[408] Subsequently, in *Standard Oil*, the Court condemned a scheme including numerous mergers to monopolize the national refined oil market.[409] The Court rejected the defendants' contention that *E.C. Knight* sheltered these mergers from Sherman Act condemnation, finding that the challenged scheme not only restrained trade, but also directly affected interstate commerce.[410] Moreover, as previously described, the Court would repeatedly opine that an intrastate agreement affected interstate commerce "directly" and thus fell within the Sherman Act if the parties intended to restrain interstate commerce.[411] Plaintiffs could prove intent expressly or courts could infer it from surrounding circumstances, particularly market structure, the economic position of the parties to the agreement, and the location of the restraint's victims.[412]

The Court never identified what circumstances justified post-*E.C. Knight* applications of the Act to intrastate restraints such as mergers between manufacturers. However, it is not difficult to imagine an explanation. Recall that, in *Addyston Pipe*, the Court had articulated how states lacked appropriate incentives to regulate cartels that exercised market power to the detriment of out-of-state consumers.[413] The Court rejected the view of some that supracompetitive pricing was impossible absent predatory tactics or state-created entry barriers.[414] If

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408. *See supra* note 70 and accompanying text.

409. 221 U.S. 1, 73–77 (1911).

410. *Id.* at 68–69 (recounting the contention that *E.C. Knight* precluded application of the Act to defendants' conduct).

411. *See supra* notes 37–46 and accompanying text (summarizing this case law).

412. *See supra* notes 35–36 and accompanying text; *see also, e.g.*, United States v. Patten, 226 U.S. 525, 542–43 (1913) (finding that intrastate restraint cornering New York cotton exchange raised inference that defendants intended to directly restrain interstate commerce).

413. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 231 (1899) (explaining that states would adopt self-interested policies toward direct restraints of interstate commerce).

414. *See generally* Meese, *supra* note 328, at 30–33 (describing views of then-Judge Peckham and Thomas Cooley during the 1880s that private restraints could not maintain supracompetitive prices absent predatory tactics and/or state-created entry barriers). Peckham later authored *Addyston Pipe*, which included a finding that a private cartel produced prices above the competitive level. *See id.* at 67 ("The facts in

a private agreement between six firms could produce such interstate harm, it would seem to follow that a merger to monopoly over a product sold in interstate commerce could cause the same impact. Just as states possessed suboptimal incentives *vis-á-vis* the regulation of private restraints of interstate commerce itself, so too did they possess suboptimal incentives with respect to intrastate restraints, including mergers, that directly burdened interstate commerce by raising interstate prices.[415] Indeed, New Jersey had acted on such incentives in the late nineteenth century, adjusting its corporate law to facilitate mergers—including those in *E.C. Knight* and *Standard Oil*—that injured out-of-state consumers by creating market power over interstate markets.[416] Presumably, the *Standard Oil* Court was aware of these developments as well as pre-1910 reform efforts by soon-to-be Governor Woodrow Wilson and others.[417] Expansion of the Sherman Act to reach such restraints, perhaps contrary to the subjective expectations of the 1890 Congress, was a faithful implementation of the unchanged principle that animated and determined the scope of the statute and resulting division of authority between states and the national government.

The validity of one translation does not suggest that all proposed translations are legitimate, however. No Supreme Court justice or other proponent of the "substantial effects" test has identified any changed circumstances suggesting that all or most agreements that induce substantial impacts on interstate commerce result in interstate harm or that states otherwise lack proper incentives to regulate such agreements. To be sure, the nation's economy is more integrated than in 1890, commerce takes many different forms, and economic activity

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Addyston Pipe [showed] . . . that purely private cartels could drive prices above the competitive level without state assistance or private restraints on the behavior of third parties . . . . Peckham could no longer cling to the result he had advocated so forcefully [in the 1880s].").

415. *Cf. Patten*, 226 U.S. at 541–44 (finding that Act reached intrastate conspiracy to corner cotton sales on New York Exchange given likely impact upon price of cotton traded in interstate commerce).

416. *See* Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 J. ECON. HIST. 677, 678–79, 681 (1989) (describing New Jersey's success in the late nineteenth century at attracting incorporations by empowering such firms to merge with rivals with impunity); Hovenkamp, *supra* note 51, at 84–86 (documenting how developments in New Jersey corporate law undermined states' ability to protect their citizens from mergers creating market power).

417. *See* Grandy, *supra* note 416, at 687–89 (describing contemporary recognition that New Jersey had created a "legal externality" and resulting reform efforts).

often takes place in larger enterprises.[418] Thus, some restraints that produced no impact on interstate commerce in 1890 may now do so.[419] Still, a mere effect on such commerce does not constitute interstate harm and thereby justify federal intervention under the anti-favoritism principle that apparently animated the meaning of "restraint of . . . commerce among the several States." The Court that articulated pre-1890 Commerce Clause jurisprudence and presumably the Congress that enacted the Sherman Act were well aware that local activity could impact interstate commerce. Indeed, the whole point of the Commerce Clause was to empower Congress to prevent states from thwarting economic integration by enacting self-interested legislation—including regulation of local subjects—that burdened interstate commerce.[420] The nineteenth century Court employed the direct/indirect standard as applied to state regulation of intrastate activity to distinguish effects that gave rise to the possibility of self-interested legislation from those that did not.[421]

The Court applied the same direct/indirect standard under the Sherman Act for five decades to distinguish restraints that produced interstate harm from those that merely produced interstate effects. Proof that a greater proportion of trade restraints now impacts interstate commerce likely means there will be more occasions to apply the direct/indirect standard. Moreover, such applications may identify more restraints producing direct impacts than during the pre-*Wickard* era. Neither result, however, suggests that the direct/indirect standard and the anti-favoritism principle it implements are somehow inadequate. There is simply no indication that the substantial effects test is a superior method of identifying restraints that states are unwilling or unable to regulate in an optimal manner. Instead of applying the original principle in light of new facts, then, the substantial effects test apparently engrafts an entirely new principle onto the Sherman Act and imputes to Congress the endorsement of a standard that body never heard of, let alone embraced.

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418. *See, e.g.*, Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 328–29 (1991) ("[A]s the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced similar expansion."); *supra* note 118 (collecting additional cases).

419. *Cf.* New York v. United States, 505 U.S. 144, 158 (1992) ("As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy . . . .").

420. *See supra* Section II.A.

421. *See supra* Part I.

VI. THE LEGISLATIVE HISTORY

Application of conventional tools of statutory construction establishes that the Sherman Act reaches only those intrastate restraints that "directly" affect interstate commerce by producing harm exceeding the boundaries of a single state. The Supreme Court has looked beyond such conventional sources of meaning, however, invoking the Act's legislative history to support the modern approach.[422] Indeed, the Court's most recent pronouncement on the scope of the Act *vis-á-vis* local restraints summarized the Act's legislative history as follows: "The floor debates on the Sherman Act reveal, in Senator Sherman's words, an intent to 'g[o] as far as the Constitution permits Congress to go.'"[423]

In support of this assertion, the Court cited *United States v. South-Eastern Underwriters Ass'n*,[424] which had similarly claimed that "all the acceptable evidence" established that "Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements."[425] *South-Eastern Underwriters* had also concluded that there is "not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power."[426] This later statement and others rebuked the claim that the Court's pre-1890 Commerce Clause jurisprudence established limits on the reach of the Act.[427] *South-Eastern Underwriters* had invoked three

422. *See, e.g.*, United States v. Se. Underwriters Ass'n, 322 U.S. 533, 555–60, 558 n.46 (1944) (reviewing legislative reports and recounting statements by congressional sponsors of the Sherman Act).

423. *See Summit Health*, 500 U.S. at 328, n.7 (quoting 20 CONG. REC. 1167 (1899)); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945) (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940)) ("Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'"); *Apex Hosiery*, 310 U.S. at 493 n.15 (reaching same conclusion after review of legislative history); *see also* Gavil, *supra* note 159, at 692–93 (contending that Congress intended the Act to expand along with the commerce power); *id.* at 683–95 (reviewing legislative history, including statements by Senator Sherman, and concluding that the Senate did not embrace the Court's pre-1890 Commerce Clause jurisprudence); *id.* at 690 n.149.

424. 332 U.S. 533 (1944).

425. *Id.* at 557–58.

426. *Id.* at 557.

427. *Id.* at 556–57 ("[W]e fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power.").

snippets of legislative history to buttress these claims, each a quotation from a different participant in congressional floor debates:

(1) "The bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress."[428]

(2) "I do not wish to single out any particular trust or combination. It is not a particular trust, but the system I aim at."[429]

(3) "The provisions of this trust bill are just as broad, sweeping, and explicit as the English language can make them to express the power of Congress over this subject under the Constitution of the United States."[430]

Proponents of the substantial effects test would presumably contend that such history provides the sort of "clear statement" of Congress's desire to upset the traditional federal-state balance, for instance. The current Supreme Court is less receptive to legislative history than it was during the 1940s and 1950s, however, and may be reluctant to rely upon such history to override the apparent meaning of the statute.[431] As it turns out, there is no such conflict for the Court to resolve. Instead of supporting the "substantial effects" test, the legislative history appears to bolster the conclusions reached in Section V.A above, namely, that Congress likely embraced the Court's dual federalism jurisprudence and mutual exclusivity of state and federal authority over trade restraints. Moreover, there appears to be no evidence that Congress meant the scope of the Act to expand if the Court rejected its pre-1890 Commerce Clause jurisprudence in favor of novel standards governing the reach of the Commerce Clause.

A. The Senate

While often described as a codification of the common law, the Sherman Act had its genesis in a controversy about tariff policy. President Cleveland's 1887 Annual Message called for substantial tariff reduction.[432] He claimed that tariffs often facilitated domestic cartels' "regulation of the supply and price of commodities made and sold by members of the combination."[433]

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428. *Id.* at 588 n.46 (quoting 21 CONG. REC. 3147 (1890) (statement of Sen. George)).

429. *Id.* (quoting 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman)).

430. *Id.* (quoting 21 CONG. REC. 6314 (1890) (statement of Rep. Stewart)).

431. *See, e.g.*, Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 304 (2006) (rejecting contention that legislative history overrode meaning of statute determined by conventional textual methods).

432. *See* President Grover Cleveland, State of the Union Address (Dec. 6, 1887).

433. *Id.*

Like many Republicans, Senator Sherman[434] supported robust protective tariffs.[435] Nonetheless, he expressed support for reducing tariffs on goods with respect to which domestic "combinations [would] prevent a reduction of price by fair competition."[436] Six months later, Sherman introduced a resolution directing the Senate Finance Committee to investigate measures for controlling contracts, trusts, or other arrangements that tended to "prevent free and full competition" or "tend[ed] to foster monopoly or to artificially advance the cost to the consumer of necessary articles of human life."[437]

Five weeks later, Sherman introduced legislation to advance these objectives. The bill purported to regulate agreements impacting production and articles of "domestic growth."[438] The Committee soon reported a significantly-altered bill on September 11, 1888.[439] Apparently for constitutional reasons, the bill struck unqualified references to "production" and "articles of domestic growth."[440] Like the original bill, this version bore little resemblance to what would become the Sherman Act. The new version tethered the bill's coverage to markets involving foreign or interstate commerce, banning concerted action that limited free competition in:

(1) "importation, transportation, or sale of articles imported into the United States";

(2) "production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article [subject to an American tariff]";

(3) "production, manufacture, or sale of articles of domestic growth or production, or domestic raw material . . . which shall be transported from one State or Territory to another."[441]

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434. This Article refers to members of the 1890 Congress using their title in the first instance and omits titles in most subsequent references for brevity.

435. *See* 19 CONG. REC. 187 (1888) (expressing support for reasonable tariffs in a reply to President Cleveland's address).

436. *Id.* at 190; *see* HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 167 (1954) (noting that Senator Sherman generally supported tariffs unless such exactions fostered combinations or monopolies).

437. *See* 19 CONG. REC. 6041 (1888).

438. *See* S. 3445, 50th Cong. (1888) (as introduced Aug. 14, 1888).

439. *See* S. 3445 (as amended Sept. 11, 1888); THORELLI, *supra* note 436, at 170 (discussing introduction of revised S. 3445).

440. THORELLI, *supra* note 436, at 170 (suggesting that September 11 version of S. 3445 eliminated certain "obvious [constitutional] defects" of the initial bill).

441. S. 3445 (as amended Sept. 11, 1888).

By including "articles" competing with those subject to tariffs, the new language fulfilled Sherman's desire to prevent tariffs from encouraging anticompetitive combinations.[442] The bill expired without further action.[443]

Sherman reintroduced the bill in the 51st Congress on December 4, 1889, and the Senate referred the bill to the Finance Committee.[444] The Senate took up the bill on January 14, 1890.[445] The Senate then began debate on the bill, now denominated S. 1, which replicated the September 11, 1888 version verbatim.[446] Several Senators raised constitutional objections to Sherman's measure.

Most importantly, Senator James George, former Chief Justice of Mississippi and a member of the Judiciary Committee, argued that various applications of the bill exceeded Congress's authority.[447] The Supreme Court has quoted George in support of its broad characterization of the Act and contention that the scope of the Act expands whenever the Court expands the scope of the commerce power.[448] A review of George's speech and his colleagues' reaction illuminates the Senate's views regarding the scope of its commerce power over trade restraints.

George explained in great detail why the bill would exceed Congress's authority, invoking the Court's dual federalism jurisprudence and categories employed to implement it.[449] He correctly noted that the Court had defined commerce to "embrace purchase, sale, exchange, barter, transportation, and intercourse for the purpose of trade in all its forms."[450] "Regulation" was defined to entail "prescribing rules for carrying on that commerce; that is, regulating the doing of the things which of themselves constitute that commerce."[451] That power reached only "the very transactions between men which are commerce, interstate

442. *See supra* notes 435–37 and accompanying text.

443. *See* THORELLI, *supra* note 436, at 173.

444. *See id.* at 174.

445. *See id.* at 177.

446. *See* 21 CONG. REC. 1765 (1890) (reproducing S. 1, the then-current version of Senator Sherman's bill reported by the Finance Committee).

447. *Id.* at 1765–71. Senator George had developed similar themes in the previous year. *See* 20 CONG. REC. 1459–62 (1889) (enumerating defects in the proposed bill and arguing that the bill itself was unconstitutional).

448. *See* United States v. Se. Underwriters Ass'n, 322 U.S. 533, 558 n.46 (1944).

449. *See* 21 CONG. REC. 1768–72 (1890) (reproducing Senator George's floor speech, which argued—by reference to nineteenth century Commerce Clause jurisprudence—that Sherman's bill was unconstitutional).

450. *Id.* at 1768 (citing Welton v. Missouri, 91 U.S. 275, 280 (1875); County of Mobile v. Kimball, 102 U.S. 691, 702 (1880)).

451. *Id.*

or foreign."[452] Transactions before or after interstate commerce, while "strictly commercial," "are only domestic commerce in the State in which they take place, and are beyond the power of Congress to regulate."[453] Thus, authority to regulate commercial activity was mutually exclusive between states and the national government. Congress had no power over "manufactures or any other kind of production," which were not commerce, "nor sales, nor transportation," which *were* commerce, "purely within a State."[454]

George next critiqued the bill's three jurisdictional categories.[455] Focusing on articles which "shall be transported . . . from one State to another," he correctly explained that Supreme Court decisions left production and agriculture within exclusive jurisdiction of individual states, even if producers intended to export the resulting products and thus engage in "commerce among the States."[456] While both decisions George cited entailed Commerce Clause challenges to state laws, he regarded each as definitive expositions of the affirmative scope of congressional power, thus treating state and federal authority over such activity as mutually exclusive.[457] To be constitutional, he said, congressional "regulation must be of the act or the transaction of [interstate] commerce itself," and not activity before or after such commerce.[458] Nor did it matter if products competed "with dutiable goods."[459] If imposing tariffs on foreign manufacturers authorized Congress to ensure "free competition" between domestic firms, Congress

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452. *Id.*

453. *Id.*

454. *Id.* at 1768–69 ("The methods of these operations of industry and art are exclusively for the States to regulate."). Senator George also opined that states possessed exclusive power to punish "combinations and trusts within their respective limits." *See* 20 CONG. REC. 1460 (1889) ("[T]here is a dividing line plainly marked by the decisions of the Supreme Court of the United States, upon one side of which rests the police power of the State, and on the other the commercial power of Congress.").

455. Recall that the bill reached agreements governing: (1) imported articles, (2) articles competing with dutiable goods, and (3) those which "shall be transported for sale from one State or Territory to another." S. 3445, 50th Cong. (1888) (as amended Sept. 11, 1888); 21 CONG. REC. 1767, 1769–70 (1890).

456. 21 CONG. REC. 1767, 1769 (1890) (discussing Coe v. Errol, 116 U.S. 517 (1886), and Kidd v. Pearson, 128 U.S. 1 (1888)); *see also id.* at 1768–69 (invoking Veazie v. Moor, 55 U.S. (14 How.) 568 (1852), and Lord v. S.S. Co., 102 U.S. 541 (1881)).

457. *But see* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 236, 238 (1948) (contending that Congress rejected dual federalism and mutual exclusivity).

458. 20 CONG. REC. 1460 (1889).

459. 21 CONG. REC. 1769–70 (1890).

could create authority over any industry by imposing duties on competing foreign products, exercising "unlimited" power.[460]

Finally, George turned to concerted action reducing competition with respect to "transportation, or sale of articles imported into the United States."[461] The "plain meaning" of the bill banned restraints governing products imported into a state while no longer in their original packages and thus indistinguishable from other property in the state.[462] Numerous decisions held that states had exclusive authority over such goods, and this provision therefore exceeded Congress's power.[463]

Less than a month after George's speech, the Finance Committee introduced a new bill, with a different basis for the exercise of federal regulatory power.[464] Explaining the bill, Sherman attributed the change to George's opposition, as did at least one other Senator.[465]

The new bill eliminated references to goods on which Congress had imposed duties and goods that "shall be transported . . . from one State or Territory to another."[466] Instead, invoking the diversity jurisdiction conferred by Article III of the Constitution, the bill banned arrangements between citizens of two or more states that tended to "prevent free and full competition" or "advance the cost to the consumer" with respect to:

(1) "importation, transportation, or sale of articles imported into the United States";

(2) "articles of growth, production, or manufacture of any State or Territory of the United States [competing] with similar articles of the growth, production, or manufacture of any other State"; or

(3) "transportation or sale" of articles produced, grown or manufactured in one State, "into or within any other State."[467]

Sherman then offered a lengthy defense of the policy and constitutionality of this new bill. Echoing the dual federalism informing

460. *Id.*

461. *Id.* at 1770.

462. *Id.*

463. *Id.* (discussing License Cases, 45 U.S. (5 How.) 504 (1847), and Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827)).

464. *See id.* at 2455 (reproducing amended bill).

465. *Id.* at 2567 (stating that Senator Sherman revised the bill "to avoid somewhat the criticism of the Senator from Mississippi"); *id.* at 2463 (statement of Sen. Vest) (same).

466. *See supra* notes 455–60 and accompanying text (describing George's critique of this language in previous bill).

467. *See* 21 CONG. REC. 2455 (1890); *see also id.* at 2456, 2460 (explaining that Article III jurisdiction "embraces the whole field of the common law and of commercial law" except between citizens of the same state, which the bill was not intended to target).

Commerce Clause jurisprudence,[468] Sherman claimed that the new bill did not purport to govern "combinations within the limit of the State" but only reached those that "injuriously affect the interests of the United States."[469] In language sometimes quoted as a definitive exposition of the statute Congress ultimately enacted,[470] Sherman opined as follows:

> The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests . . . . If the combination is confined to a State[,] the State should apply the remedy; if it is interstate . . . Congress must apply the remedy.[471]

Moreover, Sherman emphasized that the bill only applied where defendants were citizens of different states. Article III, he said, empowered Congress to regulate such contracts, just as Congress could provide rules of decision in diversity cases.[472] Sherman also invoked the taxing and commerce power as providing authority to reach the conduct banned by the bill.[473]

Despite Sherman's rhetorical embrace of dual federalism, the new bill did not assuage Senator George.[474] More importantly, other Senators now criticized the bill. Senator Vest of Missouri, for instance, emphasized that Supreme Court precedent granted only limited powers to Congress and that such limits were one of the Constitution's chief virtues.[475] He praised Senator George for an "admirable dissertation upon constitutional power" in explaining why Sherman's original bill exceeded those limits.[476] This latest bill exceeded those limits, by means of "an uncertain commingling of two elements utterly incongruous and utterly inconsistent."[477] Like George, he invoked

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468. *See supra* note 173 and accompanying and immediately preceding text (describing this jurisprudence).

469. *See* 21 CONG. REC. 2456, 2460 (1890).

470. *See, e.g.*, Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 378–79 (1983); Johnsen & Yahya, *supra* note 58, at 450.

471. 21 CONG. REC. 2456–57 (1890).

472. *Id.* at 2460.

473. *Id.* at 2461.

474. *Id.* at 2560 (describing Senator Sherman's most recent bill as "utterly without warrant in the Constitution").

475. *Id.* at 2463 ("We live, very fortunately, in my judgment, under a written Constitution, and we are governed by the decisions of the Supreme Court in regard to the legislative powers vested in us.").

476. *See id.*

477. *Id.* at 2464.

"three leading cases" defining the power to regulate interstate commerce as the power to govern "commerce in articles . . . after they have gone into commerce and are *in transitu* from one State to another."[478]

Echoing Senators George and Vest, Senator Hiscock from New York contended that Senators should "resist efforts in the direction of unwise, illegal, and unconstitutional legislation."[479] Invoking the Court's dual federalism jurisprudence, including the mutual exclusivity of authority over trade restraints, he argued that the bill exceeded Congress's power in various ways.[480] With respect to imports, he said, the bill reached acts done both before importation, while the goods were outside the United States, but also after goods had "passed beyond the hands of the importer" and were subject (exclusively) to "State law" and "State taxation."[481] Thus, the bill purported to reach conduct exceeding Congress's power "[a]t both ends" and "[did] not pretend to regulate interstate commerce."[482]

Senator Hiscock also warned of the "enormities" and the "far-reaching effect[s]" if the bill became law *and if courts declared it constitutional*.[483] The result, he said, would be "for Congress to take control of every producing interest in the respective States of the Union."[484] He expressed agreement with the Court's jurisprudence, rejecting the view that the Constitution was defective because it lacked a provision empowering Congress to regulate contracts covered by the bill.[485] The

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478. *Id.* at 2465. Senator Vest was likely referring to Kidd v. Pearson, 128 U.S. 1 (1888), Coe v. Errol, 116 U.S. 517 (1886), and Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827). *See supra* note 456 and accompanying text (describing Senator George's discussion of these cases); *see also* 21 CONG. REC. 2465 (1890) (asserting that congressional authority disappeared once goods left their original package and "went into the common mass of the property of the people of the State"); *id.* (endorsing Senator George's argument "that we have no power under any clause of the Federal Constitution to legislate as to any article simply because it . . . may be at some time carried to another State").

479. 21 CONG. REC. 2467 (1890).

480. *Id.* at 2468 ("[This] is not a jurisdiction that can be possessed by a State and the General Government at the same time.").

481. *Id.* at 2467.

482. *Id.* ("At both ends it legislates with reference to commerce before the merchandise has been dispatched on its way to this country, and after it has reached here and after it has been taken out of the volume of commerce.").

483. *Id.*

484. *Id.*

485. *Id.* at 2468 (rejecting the argument "that the framers of the Constitution neglected to put something in the Constitution that . . . g[ave] Congress the proper authority in respect to this subject").

Framers had adopted the Commerce Clause to empower the "General Government [to] prevent States from practically prohibiting commerce between each other, for the purpose of regulating taxation upon property which was to go from one State to another."[486] There was no reason, he said, to expand that power.[487] Like Senator Vest, Hiscock rejected Sherman's invocation of Article III's diversity jurisdiction as a font of regulatory authority.[488] His "fundamental" objections to the bill, he said, could "not be obviated by any amendments that possibly [could] be proposed."[489]

Senator Reagan of Texas also raised constitutional objections. Congress had a "limited power" "[o]n this subject," and could not solve the trust problem unless "the several States t[ook] hold of the subject and ma[de] provisions there which [would have] cover[ed] the larger number and the greater amount of the wrongs complained of."[490] He endorsed criticisms leveled by Senators Vest and Hiscock but did not wish to occupy the Senate's time repeating them. He opined that "[a] good deal of [the bill] . . . is not within the provisions of the Constitution."[491]

Senator Reagan urged Senators who agreed with this critique to vote for his own amendment, which took the form of a substitute bill.[492] By its terms, the bill only applied to business "carried on with any foreign country, or between the States, or between any State and the District of Columbia."[493] The Senate, acting in the Committee of the Whole, adopted Reagan's entire bill, adding the language to S. 1. After this and other amendments, the bill included sixteen sections, fourteen more than Sherman's most recent bill.[494]

On March 27, 1890, the Committee of the Whole reported the proposed version of S. 1 to the full Senate.[495] Senator George Edmunds of Vermont, Chair of the Judiciary Committee, now addressed the

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486. *Id.*
487. *Id.*
488. *Id.*
489. *Id.*
490. *Id.* at 2470; *see also id.* at 2469 ("State governments . . . have jurisdiction over the great mass of transactions out of which these troubles grow.").
491. *Id.* at 2470.
492. *Id.*
493. *Id.* at 2469 (reproducing proposed amendment).
494. *See* THORELLI, *supra* note 436, at 194; *supra* notes 439–42 and accompanying text (describing the September 11 revision of the bill).
495. *See* 21 CONG. REC. 2723 (1890).

constitutional question at the urging of Senator George.[496] Senator Edmunds opined that the authority of Congress relative to trusts was "narrow," and that Congress had no power to supplant the exclusive "police regulations" of the states.[497] He also declared that the Senate should resist pressure to pass legislation that exceeded Congress's constitutional power, even if inaction left people at the mercy of "the most grinding and most stupendous of monopolies."[498] He reiterated Senator George's embrace of dual federalism and mutual exclusivity of authority over commercial activity as well as the derivative conclusion that states had exclusive jurisdiction over production.[499] He instanced the sugar trust as an example of an industry that, even if monopolized, was beyond the authority of Congress to abolish:

> [I]f every citizen of . . . Vermont . . . should implore me to pass an act of Congress to abolish the sugar trust, as the Legislature of the State of Vermont might do if it were established there, I should feel it my duty to them to say, "No, because I have not the power to do it[]" . . . .[500]

Instead, Congress merely possessed the power "for impeding and harassing and cutting up the commercial transactions between the States of these great monopolies."[501] Congress, he said, should go "[j]ust as far as we can go in regulating the transition of property from State to State," but should "[not] go any further."[502] Like Senator Hiscock, he also concurred as a matter of first principles with this allocation of power between sovereigns.[503]

Senator Platt of Connecticut grudgingly agreed with George and others, concluding that no provision in S. 1 was constitutional. In a

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496. *Id.* at 2727 (statement of Sen. George) (urging Senator Edmunds to "go into that matter fully").

497. *Id.*

498. *Id.*

499. *See id.*

500. *Id.* at 2728.

501. *Id.*

502. *Id.* at 2727–28 (endorsing ban on "the movement of the commodities of these great concerns and the arrangement of their transactions between the different States," but noting "it is quite impossible for me to support [Senator Sherman's bill]").

503. *Id.* at 2727 ("[The Constitution] did not give to the Congress of the United States, and it did not mean to give, *and it ought not to have given to it, and ought not to give to it now*, I think, the power to enter into the police regulations of the people of the United States to endeavor to conduct or to manage or to regulate their affairs as the States, in every State of the Union, have been authorized—not authorized, but left by the Constitution in their original right to do." (emphasis added)).

colloquy with Senator Hoar, Platt opined that "the particular contract . . . which might be reached under the [commerce power] must be exceedingly limited."[504]

These critiques apparently doomed Sherman's bill. Shortly after Senator Platt's remarks, Senator Walthall moved to refer the bill and various proposed amendments to the Judiciary Committee.[505] While an identical motion had failed a few days earlier, Walthall's motion narrowly passed.[506] One scholar has attributed the Senate's changed attitude to the remarks of Senator Edmunds regarding the constitutionality of Sherman's latest proposal.[507]

Instead of tinkering with the bill, the Committee, chaired by Senator Edmunds and including Senators George, Hoar, and Vest, proposed a brand new bill six days later that did not invoke the power to impose tariffs or the diversity jurisdiction as sources of regulatory authority.[508] Modern scholars agree that Edmunds drafted sections 1, 2, 3, 5, and 6 of the Act, except for seven words in section 1 drafted by Senator Evarts: "in the form of trust or otherwise."[509] A historian has quipped that the statute "known as the Sherman Antitrust Act" was more accurately called "the Edmunds Antitrust Act."[510]

The Senate considered the proposal on April 8, 1890. Edmunds reported that the Committee decided to:

> [F]rame a bill that should be clearly within our constitutional power, [and to] make its definition out of terms that were well known to the law already, and would leave it to the courts in the first instance to say how far they could carry it or its definitions as applicable to each particular case . . . .[511]

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504. *See id.* at 2568. The only exception, Senator Hoar said, was when the "combination . . . affect[s] the price which is to be paid by the person who is to acquire [products] to be delivered to him in another State." *Id.*

505. *Id.* at 2731.

506. *Id.* at 2610–11, 2731 (passing by a vote of thirty-one yeas to twenty-eight nays).

507. THORELLI, *supra* note 436, at 198–99.

508. S. 1, 51st Cong. (1890) (as amended Apr. 2, 1890); 21 CONG. REC 3145 (1890); THORELLI, *supra* note 436, at 199.

509. *See* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT, 94 & n.9 (1954); MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916: THE MARKET, THE LAW, AND POLITICS, 115 & n.59 (1988); THORELLI, *supra* note 436, at 212; Albert H. Walker, *Who Wrote the Sherman Law?*, 73 CENT. L.J. 257, 258 (1911).

510. *See* SKLAR, *supra* note 509, at 115.

511. 21 CONG. REC. 3148 (1890).

Sherman expressed his intention to vote for the bill, "not as being precisely what I want, but as the best under all the circumstances that the Senate is prepared to give."[512] However, on the same day, he opined that the measure would be "totally ineffective in dealing with combinations and Trusts."[513]

Senator George, by contrast, praised the new measure as the "best I think that can be framed under that particular power of Congress, the power over commerce, which the committee have attempted to frame a bill under."[514] There were, he said, "one or two powers of Congress . . . which the committee did not see proper to exercise,"[515] presumably referring to the power to remove tariffs protecting trust-dominated industries.[516] He also predicted that the public would be "great[ly] disappoint[ed]" because the bill "cover[ed] . . . a very narrow territory, leaving a very large number of these institutions, these trusts . . . without the purview of the bill."[517] This was "not the fault of the committee."[518] Instead, in language the Supreme Court has quoted to support *expansive* applications of the Act, George offered that: "[t]he bill has been very ingeniously and properly drawn to cover every case which comes within what is called the commercial power of Congress."[519] He added, in language the Court omitted: "*There is a great deal of this matter outside of that.*"[520] No one disputed George's description of the bill's scope.

B. The House

Legislative history from one chamber of Congress cannot unilaterally determine a statute's meaning. The Constitution mandates bicameralism and presentment, thereby requiring the interpreter to discern a meaning

512. *Id.* at 3145.

513. *See* Editorial, *Mr. Sherman Gives up Hope*, N.Y. TIMES, Apr. 8, 1890 at 4; *see also* LETWIN, *supra* note 509, at 94 ("The Judiciary Committee took the matter out of Sherman's hands, much to his regret and anger.").

514. 21 CONG. REC. 2901 (1890).

515. *Id.*

516. *Id.*; THORELLI, *supra* note 436, at 200 (concluding that Senator George had in mind "his old idea that the President be authorized to suspend the tariff on trust-controlled goods").

517. 21 CONG. REC. 3147 (1890).

518. *Id.*

519. *Id.*; *see supra* note 428 and accompanying text (discussing the Court's invocation of this sentence).

520. 21 CONG. REC. at 3147 (1890) (emphasis added); *see* United States v. Se. Underwriters Ass'n, 322 U.S. 533, 558 n.46 (1944) (selectively quoting this statement).

to which both chambers agreed.[521] Examination of the House's deliberations confirms that that chamber embraced the same approach as the Senate. House proponents of the Senate bill did not question the Court's dual federalism jurisprudence or suggest that the Sherman Act would expand whenever the Court devised a new standard governing the scope of the commerce power.

The House of Representatives considered twelve trust-related bills during the 50th Congress, but none received a vote.[522] The House referred the Senate bill to its own Judiciary Committee, which unanimously recommended adoption of the bill.[523] Like numerous Senators, the Committee's report embraced the Supreme Court's dual federalism and mutual exclusivity of authority over trade restraints: "Congress has no authority to deal, generally, with the subject [of trusts] within the States, and the States have no authority to legislate in respect of commerce between the several States."[524]

The report did not suggest any departure from the Supreme Court's pre-1890 allocation of authority over commercial activity.[525] Instead, the report stated that the bill was "carefully confined to such subjects of legislation as are clearly within the legislative authority of Congress" and that "[n]o attempt [wa]s made to invade the legislative authority of the several States or *even to occupy doubtful grounds*."[526] The Supreme Court once candidly cited this report for the proposition that the 1890 Congress "took a very narrow view of its power under the Commerce Clause."[527]

Presenting the report to the House, Congressman Culberson, a member of the Committee, opined that the "legislation occupies a new field" and that Congress's power over "questions of this character," is, with few exceptions, "extremely limited."[528] He also observed that "[t]here is no attempt to exercise any doubtful authority on this subject, but the

521. *See* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 718–19 (1997) (explaining how reliance on a committee report from a single house of Congress circumvents the requirements of bicameralism and presentment).

522. *See* 21 CONG. REC. 4100 (1890) (statement of Rep. Heard).

523. *Id.*

524. *See* H.R. REP. NO. 51–1707, at 1 (1890).

525. *See supra* Part I (describing these boundaries).

526. H.R. REP. NO. 51–1707, at 1 (emphasis added).

527. Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 743 n.2 (1976). The Court nonetheless went on to hold that the Sherman Act reached local anticompetitive conduct that produced no interstate harm because such conduct produced a substantial effect on interstate commerce. *Id.* at 744–47.

528. 21 CONG. REC. 4089 (1890).

bill is confined strictly and alone to subjects over which, confessedly, there is no question about the legislative power of Congress."[529] Both states and the Congress would have to exercise the powers they possessed in their respective mutually exclusive spheres. For Congress, this meant the power to "take charge of the *trade between the States* and [to] make unlawful *traffic* that operates in restraint of trade."[530] Echoing the Court's Commerce Clause jurisprudence, he opined that an interstate agreement between a manufacturer and dealers authorizing the latter to undersell rivals and drive them out of business was "directly in restraint of trade and commerce" and "secure[d] for the corporation a monopoly, in part, of interstate trade."[531]

Others emphasized similar themes. Congressman Ezra Taylor, the Committee's chair, opined that the bill "goes as far . . . as Congress has the power to go under the Constitution," and that states would have to supplement its provisions because Congress "can only deal with interstate transactions."[532] Congressman Elijah Morse of Massachusetts later agreed, stating that "Congress has no [power over] trusts within a State."[533] Instead, the "bill propose[d] to regulate transactions in restraint of trade between citizens of different States."[534] Congressman John Rogers concurred; he claimed to have read every bill introduced in both houses "upon the subject of trusts," and concluded that the Senate bill was the only one that "could receive [the] sanction . . . of my oath."[535] Sherman's bill, he said, "when brought under the scrutiny of the law, was completely eviscerated and destroyed."[536] The Senate bill was a "conservative measure . . . within the scope of the Constitution."[537] Amendments to expand the bill's coverage, he said, "would not hold water for a minute" if "brought to the test of adjudicated cases," with which he expressed no disagreement.[538]

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529. *Id.*
530. *Id.* at 4091 (emphasis added).
531. *Id.* at 4089.
532. *Id.* at 4098.
533. *Id.* at 5953.
534. *Id.*
535. *Id.* at 4101.
536. *Id.*
537. *Id.*
538. *Id.*

In sum, nothing in the Act's legislative history suggests that Congress disagreed with the Supreme Court's dual federalism jurisprudence. Sherman's own proposals would have reached some conduct that the Court's jurisprudence assigned to the exclusive authority of the states.[539] However, both houses of Congress apparently rejected Sherman's account of the scope of the commerce power and embraced a narrower version of the "Sherman Act" than Sherman proposed. According to Senator Edmunds, the author of section 1, the Act employed "terms that were well known to the law already," i.e., terms of art, to describe the content and scope of the Act.[540] Senator George, Senator Edmunds, and several others embraced case law that treated state and federal authority over commerce as mutually exclusive,[541] as the Supreme Court would later hold in *Addyston Pipe* and *E.C. Knight*, for instance.[542] Indeed, Senator Edmunds endorsed the (future) result in *E.C. Knight*, opining that Congress lacked authority to regulate the sugar trust, despite its monopoly over the national sugar market.[543] He also agreed with this allocation of authority.[544] The House embraced the Senate language, and its Judiciary Committee report disclaimed any intent by Congress to exercise a "doubtful" authority but instead to reach those subjects "clearly within the . . . authority of Congress."[545]

No member of Congress suggested the Act would reach local conduct such as intrastate cartels. Even Sherman stated that states possessed exclusive authority over intrastate cartels and that the Act would only reach restraints that "*injuriously* affect the interests of the United States."[546] Nor did any member suggest the scope of the Act would expand if the Court revised the principle governing the scope of the commerce power. Some members of Congress expressly embraced the Court's pre-1890 jurisprudence as a matter of first principles and thus presumably would have rejected the modern Court's more expansive account of the commerce power. Far from purporting to exercise whatever power the Supreme Court might later create,

539. *Cf. supra* notes 449–54 and accompanying text (explaining George's critique of Sherman's proposals as exceeding the scope of Congress's commerce power).

540. *See* 21 CONG. REC. 3148 (1890); *supra* note 511 and accompanying text.

541. *See supra* notes 457, 497 and accompanying text.

542. *See supra* notes 273, 335–38 and accompanying text.

543. *See supra* note 500 and accompanying text (describing Edmunds' views).

544. *See supra* note 499 and accompanying text.

545. *See* H.R. REP. NO. 51-1707, at 1 (1890); 21 CONG. REC. 4089 (1890); *supra* notes 526, 529 and accompanying text.

546. *See* 21 CONG. REC. 2456 (1890) (emphasis added).

Congress chose merely to exercise that power the Court allowed in 1890. Any claim that the 1890 Congress would have exercised the full scope of the modern commerce power, banning what Sherman himself called "combination[s] . . . confined to a [single] State" that produced no interstate harm, is sheer speculation, with no support in the legislative history.[547]

VII. IMPLICATIONS

Recognition that the Supreme Court erred when it replaced the direct/indirect standard with the substantial effects test does not thereby require the Court to return to the pre-1948 allocation of authority over antitrust matters. The doctrine of stare decisis generally has particularly strong claims in the statutory context, and, in that sense, may seem to require the Court to adhere to the substantial effects test.[548] However, the Sherman Act is no ordinary statute where stare decisis is concerned. Instead, the Court has repeatedly held that a "competing interest . . . in recognizing and adapting to changed circumstances and the lessons of accumulated experience" weakens the doctrine in the antitrust context.[549] Congress, the Court has said, expected the Court to "shape . . . the statute's broad mandate by drawing on common-law tradition."[550] As explained earlier, the Rule of Reason itself contemplates that the Court will adjust Sherman Act doctrine over time in response to changed economic conceptions or conditions.[551]

The rationale for a weakened version of stare decisis in the antitrust context implies its own limits, however. Antitrust decisions reversing prior holdings invariably invoke changed facts or economic theories, extrinsic to the Court itself and thus exogenous to the legal process.[552] The negative implication, and one consistent with the metaphor of

547. *See id.* at 2457.

548. Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).

549. State Oil Co. v. Khan, 522 U.S. 3, 20 (1997); *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899–900 (2007); Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988).

550. *Khan*, 522 U.S. at 20–21 (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978)) (rejecting the "general presumption that legislative changes should be left to Congress" in the context of the Sherman Act).

551. *See supra* note 128–29 and accompanying text.

552. *See, e.g.*, *Leegin*, 551 U.S. at 889–92 (abandoning precedent based on changed theoretical understanding of the challenged practice).

interpretive translation, is that the identification of mere legal error does not, even in the Sherman Act context, justify revision of prior decisions.[553]

Thus, the outcome of any stare decisis analysis in this context may well depend upon how the Court understands its prior decisions expanding the Act to reach intrastate restraints that pose no interstate harm. If the Court attributes the 1948 change to a revised—though perhaps erroneous—legal understanding of the meaning of the Act, stare decisis may well be insurmountable. The Court could take a different approach, however, attributing the 1948 revision to changed economic circumstances—such as increased integration of the national economy and/or larger scale of enterprises—that purportedly undermine the rationale for exclusive state authority over local restraints that produce substantial effects on interstate commerce and justify national regulation.[554] If the Court adopts this latter rationale for its rejection of the direct/indirect standard, stare decisis should yield to post-1948 developments in the theory of competitive federalism confirming that states possess appropriate incentives to generate impartial rules with respect to intrastate restraints producing substantial but indirect effects on interstate commerce.[555] The result would be a return to the direct/indirect standard for allocating authority over trade restraints between states and the national government.

Abandoning the substantial effects test and retracting the scope of the Sherman Act would reboot competitive federalism in the antitrust field. States would again be free to adopt unique antitrust doctrine applicable to restraints that occur within their borders and produce no external harm. States would reap the benefits of doctrinal innovations, with no prospect that federal courts applying the Sherman Act will undermine state-specific policies.[556] The resulting competition between the states acting as "laboratories of democracy"[557] would presumably generate a wider variety of possible solutions—both substantive and institutional—to various antitrust problems, as states vie for producers

553. *See supra* notes 124–25 and accompanying text (discussing translation methodology).

554. *See, e.g.*, Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 328–29 (1991); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 241 (1980); *see also* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 230 (1948) (stating that the "evolving nature of our industrialism" condemned *E.C. Knight* and its progeny).

555. *See supra* Section II.B.

556. Meese, *supra* note 89, at 85–86.

557. *See supra* note 390 and accompanying text (collecting authorities characterizing states as laboratories of democracy).

and consumers by offering rival packages of antitrust doctrine and enforcement institutions.[558] This decentralized process of articulating antitrust doctrine and policy would generate both experience and data about the impact of various rules and institutions, thereby informing lawmakers and state courts considering possible reforms. Federal courts, too, could learn from these results, drawing upon the "accumulated experience" of various states when fashioning Sherman Act doctrine.[559]

Retraction of the scope of the Sherman Act would also radically alter the prominence and role of the state action doctrine, first articulated in 1943 in *Parker v. Brown*.[560] As noted earlier, the vast majority of cases where parties raise the state action defense involve police power regulations restraining local commerce without producing any interstate harm.[561] No doubt the resulting framing of the legal question as a clash between the Sherman Act and historic police power regulation has deterred the Court from invoking the Act as a source of general authority to evaluate the "reasonableness" of garden variety state regulations, especially during the 1940s, when faith in the motives and capacity of regulators was at its apogee.[562] Indeed, scholars and jurists have attributed *Parker* to just such an anti-*Lochnerian* impulse.[563]

Restoration of the pre-1948 direct/indirect standard would place such local regulations beyond the reach of the Sherman Act altogether, eliminating the need for any state action analysis with respect to such restraints.[564] The Supreme Court's state action docket would shrink accordingly. Moreover, state action cases that did reach the Court would

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558. *See supra* note 92 and accompanying text (explaining how the substantial effects test and coextensive authority over trade restraints discourage effective rivalry between the states).

559. *See supra* note 188 (collecting authorities detailing conditions necessary for competitive federalism to produce trend toward optimal legislation).

560. 317 U.S. 341 (1943).

561. *See supra* note 101 and accompanying text.

562. *See* Hovenkamp, *supra* note 101, at 633–34 (attributing *Parker* in part to the Court's pro-regulatory bias).

563. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 500 (1987) ("Having only just determined not to use the Constitution [to supervise state legislation under the due process clause], the Court was not about to resurrect [Lochner v. New York, 198 U.S. 45 (1905),] in the garb of the Sherman Act."); Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on* Parker v. Brown, 75 COLUM. L. REV. 328, 336–37 (1975) (contending that judicial aversion to the *Lochner* era's scrutiny of economic regulation informed the Court's state action doctrine).

564. *See* Meese, *supra* note 247, at 2191–92.

differ significantly from those that have thus far informed the Court's treatment of state-imposed restraints. Instead of state regulations of local billboards, dentistry, and intrastate lawyer advertising, such cases would, like *Parker*, involve state restraints imposing substantial harm on out-of-state consumers.[565] This new framing could force the current Court, less friendly to regulation than the *Parker* Court, to reconsider its hands-off approach to state-approved restraints. Reducing the scope of the Sherman Act could ironically result in more robust preemption of state-approved restraints than ever accomplished under the post-1948 regime.

Finally, the history recounted here would also alter the nature of the question posed. The *Parker* Court emphasized the absence of any indication that Congress anticipated preempting state-approved restraints of interstate commerce.[566] However, the question that produced this answer was an anachronism. The Congress that enacted the Sherman Act would have assumed that state-approved direct restraints of interstate commerce would fall prey to the Court's quasi-statutory regime of implied preemption.[567] Today, of course, the Court refuses to interdict such restraints under what is now known as the dormant Commerce Clause. Thus, the real question for a court reconsidering the Sherman Act's treatment of state-approved restraints is how Congress would have treated such restraints absent implied preemption, and this question could produce a quite different answer.

565. *Id.*
566. Parker v. Brown, 317 U.S. 341, 350–51 (1943).
567. *See supra* note 154 and accompanying text.