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Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Herbert Hovenkamp

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I. INTRODUCTION

Professor Hovenkamp has made important and insightful contributions to the literature on antitrust federalism, antitrust history, and the influence of evolving theories of political economy on antitrust doctrine and constitutional law. This Essay builds upon these contributions, particularly as they relate to the appropriate federal antitrust response to state regulation that unreasonably restrains interstate commerce. Under modern constitutional law, states may restrain interstate commerce by imposing restrictions on price or banning reasonable, wealth-creating restraints. Congress could preempt such restraints, but the Supreme Court has repeatedly held that the Sherman Act does not nullify such legislative interference with free competition. The Court has justified these results by invoking considerations of "federalism" and "state sovereignty." Thus, the Court has imputed to Congress a refusal to exercise the full scope of its commerce power out of deference to state regulatory prerogatives.

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As Professor Hovenkamp has explained, however, such congressional intent is entirely fictional. During the 1890s, the constitutional regime of "dual federalism" enforced by judicial interpretations of the Commerce Clause prevented the overlap between federal and state regulation that makes preemption possible. This Essay elaborates upon this (correct) conclusion, clarifying the nature of dual federalism during antitrust's formative era. The Essay also suggests that due process protection for liberty of contract prevented states from banning reasonable private restraints of intrastate commerce, restraints that facilitated the operation of interstate markets. The Congress that passed the Sherman Act would have assumed that states had no authority to regulate commerce subject to the Sherman Act or reasonable intrastate restraints beyond the scope of Congress's power.

Of course, the constitutional framework in place during antitrust's formative era collapsed in 1937, when the Supreme Court abandoned liberty of contract and ceased placing meaningful limits on Congress's commerce power. At the same time (and this is less well-known), the Court "unshackled" the states, weakening the Dormant Commerce Clause and allowing states to impose restraints on interstate commerce that pre-1937 case law would have condemned.

The simultaneous expansion of Congress's commerce power and relaxation of Dormant Commerce Clause standards created overlapping regulatory authority and thus opened the door to Sherman Act preemption of state restraints. Professor Hovenkamp has signaled openness to such preemption, at least where state restraints produce interstate spillovers. This Essay briefly reviews the strong case for such preemption as well as the counterarguments against it. The Essay also offers an alternative approach that would void restraints that produce meaningful spillovers, avoid Sherman Act preemption of much state law, and eliminate much of the overlap between state and federal jurisdiction that gives rise to the federalism concerns that preemption opponents invoke.

Part II of this Essay reviews modern doctrines governing the Sherman Act's treatment of state-imposed restraints. Part III discusses the constitutional landscape that Congress faced when it passed the Sherman Act in 1890, particularly dual federalism and liberty of contract. This Part also examines how these principles informed antitrust doctrine during antitrust's formative era. Part IV details the collapse of this constitutional regime during the 1930s. Part V frames the interpretive questions posed by this collapse and articulates the competing arguments for and against Sherman Act preemption. This Part then offers an alternative approach that would nullify state restraints that produce significant spillovers, while minimizing federalism concerns.

II. THE STATUS OF STATE-IMPOSED RESTRAINTS UNDER THE SHERMAN ACT

The Sherman Act forbids contracts and other arrangements that unreasonably restrain "trade or commerce among the several [s]tates."[1] The classic example is a railroad cartel that charges non-competitive rates for the interstate transportation of goods or passengers.[2] What, though, if states themselves interfere with free competition and restrain trade? Such interference can take three forms. First, states can authorize private parties to engage in anticompetitive conduct themselves by, for example, legalizing horizontal price fixing or mergers that result in monopoly.[3] Second, states can compel private parties to restrain trade, by, for instance, requiring firms to charge prices above the competitive level. Third, states can ban conduct within interstate commerce that federal courts have previously determined to be reasonable and thus lawful under the Sherman Act. A contemporary example of this third category is state bans on minimum resale-price maintenance ("rpm"), despite the Supreme Court's holding that the practice often creates wealth and is analyzed under the Rule of Reason.[4]

The Sherman Act condemns restraints in the first category, despite ostensible state approval, unless the state "actively supervises" the resulting prices or other conduct.[5] In *Parker v. Brown*, the Supreme Court evaluated the second type of restraint: California's coercive restriction on farmers' raisin output.[6] Over 90% of the state's raisin crop was exported from the state, and a private cartel producing the same result would have violated the Sherman Act.[7] Nonetheless, the Supreme Court unanimously held that the Sherman Act does not preempt such legislation, rejecting the contrary argument by the

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1. 15 U.S.C. § 1 (2012).

2. *See, e.g.*, United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898).

3. *Cf.* N. Sec. Co. v. United States, 193 U.S. 197, 332–33 (1904) (rejecting an argument that state-law validity of a merger immunized a transaction from Sherman Act attack).

4. *Compare* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890–92, 899 (2007) (rejecting a per se rule banning minimum rpm because the practice often produces competitive benefits), *with* California v. Bioelements, Inc., No. 10011659 (Cal. Super. Ct. Jan. 11, 2011), *available at* http://oag.ca.gov/system/files/attachments/press_releases/n2028_bioelements_final_judgment.pdf (issuing a consent decree banning minimum rpm under state law). State statutes authorizing indirect purchaser suits to enforce state antitrust laws provide another example. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 817 (4th ed. 2010) (characterizing these statutes as "[t]he most difficult preemption challenge facing state antitrust in recent years").

5. *See, e.g.*, Fed. Trade Comm'n v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (condemning state-authorized price fixing where states did not "actively supervise" resulting prices). Where states do "actively supervise" pricing, the Court treats the resulting prices as though the state itself imposed them. *Id.* at 634–35. In such cases, the restraint in question falls into the second category discussed in the text.

6. Parker v. Brown, 317 U.S. 341, 344 (1943).

7. *Id.* at 345, 350 (assuming such restrictions "would violate the Sherman Act if [they] were organized and made effective solely by virtue of a [private] contract").

United States, as amicus curiae.[8] Invoking the Constitution's "dual system," in which states are "sovereign," the Court declined to impute to Congress an intent to ban the restraint, which "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command," even though that "command" restrained interstate commerce as much as analogous and illegal private conduct.[9] Nearly five decades later, the Court reiterated that *Parker* rested upon: "principles of federalism and state sovereignty," and held that the Sherman Act did not ban anticompetitive restraints imposed "as an act of government."[10]

Subsequently the Court applied similar logic to the third category of state-imposed restraints, namely, bans on private wealth-creating conduct.[11] In *Exxon Corp. v. Governor of Maryland*, the Court rejected antitrust preemption of Maryland's ban on vertical integration and procompetitive price discrimination by gasoline refiners, both of which were lawful under federal antitrust law.[12] The Court conceded that the bans had an "anticompetitive effect" and interfered with "economic liberty," the latter of which, the Court said, was the central policy of the Sherman Act.[13] Nonetheless, the Court opined that antitrust preemption would "effectively destroy" states' ability to regulate economic activity.[14] In so holding, the Court implicitly equated "regulation" with coercive interference with wealth-creating activity.

In *California v. ARC America*, the Court rejected Sherman Act preemption of state antitrust regulation, namely, a provision allowing indirect purchasers to recover damages from state antitrust violations.[15] The Court emphasized

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8. *See* Brief for the United States as Amicus Curiae at 91, Parker v. Brown, 317 U.S. 341 (1943) (No. 46), 1942 WL 54242; HOVENKAMP, *supra* note 4, at 796 (discussing the relationship between preemption and the state action doctrine articulated in *Parker*).

9. *Parker*, 317 U.S. at 351 ("In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."); *see also id.* at 350–51 (assuming that Congress may preempt such state restrictions).

10. City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 370 (1991); *see also id.* ("*Parker* emphasized the role of sovereign *States* in a federal system.").

11. *See generally* Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism:* Parker *and* ARC America Corp., 68 ANTITRUST L.J. 29 (2000) (persuasively equating state-imposed restraints and state bans on conduct lawful under the Sherman Act).

12. Exxon Corp. v. Governor of Md., 437 U.S. 117, 133–34 (1978).

13. *Id.* at 133.

14. *Id.* ("[I]f an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed.").

15. California v. ARC Am. Corp., 490 U.S. 93, 105–06 (1989).

that state antitrust laws predated the Sherman Act; Congress was aware of these laws but did not mean to displace them when it passed the Act.[16]

There appears to be a scholarly consensus that *Parker*, *Exxon*, and *ARC America* were correctly decided. Professor Hovenkamp, for instance, has asserted that: "nothing in the federal *antitrust* laws even hints that Congress intended to preempt state and local economic law simply because that law interferes with competitive markets."[17] Other scholars agree that courts should read the Sherman Act in light of federalism considerations, imputing to the 51st Congress a preference for federalism over national policy favoring free interstate markets.[18] With rare exception, these scholars (properly) agree with Professor Hovenkamp that Congress *could* preempt state-imposed cartels restraining interstate commerce.[19] Nonetheless, they agree that Congress did not choose to do so.

There is similar agreement that the Sherman Act does not preempt state regulation, including antitrust regulation, banning conduct deemed reasonable under the Sherman Act. Here again Professor Hovenkamp is in the vanguard, asserting that: "the legislative history of the Sherman Act is replete with statements that the Act was designed to supplement rather than to abrogate existing state antitrust enforcement."[20] Other scholars agree, invoking the same federalism considerations that supposedly convinced Congress not to preempt state-imposed cartels.[21]

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16. *Id.* at 101 & n.4. *But see* Flood v. Kuhn, 407 U.S. 258, 284–85 (1972) (invoking the Sherman Act and the Dormant Commerce Clause as preempting state antitrust regulation of baseball's reserve system).

17. HOVENKAMP, *supra* note 4, at 793; *see id.* at 797 ("But no one has ever made a serious argument that Congress intended to use the Sherman Act to displace all forms of state and local regulation of prices and entry."); *see also* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23, 40–41 (1983) (finding no indication that Congress believed the Sherman Act would preempt state legislation).

18. *See, e.g.*, Burns, *supra* note 11, at 41; William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U. L. REV. 1099, 1136–37 (1981).

19. *See* HOVENKAMP, *supra* note 4, at 793 ("[T]he federal government undoubtedly has the power to preempt much . . . state and local regulation."). Contrary to the views of one scholar, modern Eleventh Amendment jurisprudence would not prevent Congress from preempting state restraints. *See* Burns, *supra* note 11, at 38–39. *But see* Verizon Md. Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 648 (2002) (authorizing suit against state officials seeking injunctive relief against state regulation purportedly preempted by federal law). *See generally Ex parte* Young, 209 U.S. 123 (1908).

20. Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 378 (1983) (finding that no member of Congress expressed an intent to preempt state law); *see also* HOVENKAMP, *supra* note 4, at 815–16 (stating, with apparent approval, that "[t]he Supreme Court has consistently held that nothing in the federal antitrust laws or any other body of federal law indicates that Congress intended to displace state antitrust law"). *But see* HOVENKAMP, *supra* note 4, at 816 (identifying rare instances in which preemption might be appropriate).

21. Burns, *supra* note 11, at 30–31 (citing HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 723 (2nd ed. 1999)) (contending that *Parker*'s rationale justifies distinct state antitrust regulation "insofar as those laws do not require a violation of federal law").

It seems that some antitrust scholars would prefer a different result, however. Professor Hovenkamp, for instance, has explained that state restraints can both enrich local producers and also create interstate spillovers that harm consumers located in other states.[22] The *Parker* case, he explains, provides an example: local raisin producers reaped the benefits of the restraint, while out-of-state consumers paid higher prices and purchased reduced output.[23] As Professor Hovenkamp has said, the principle of federalism, properly understood, does not countenance state legislation enriching in-state producers at the expense of out-of-state consumers.[24] Thus, despite his belief that *Parker* accurately ascertained congressional intent, Professor Hovenkamp seems open to some limitation of the state-action doctrine that accounts for such spillovers.[25] This endorsement seems unenthusiastic, however. For, in addition to opining that *Parker* was correctly decided, Professor Hovenkamp has questioned the workability of a state-action immunity analysis that accounts for interstate spillovers, given that so many state-imposed restraints have some impact, no matter how small, on out-of-state consumers.[26] He also suggests that state-imposed restraints that produce "overwhelming" spillovers would likely offend Dormant Commerce Clause jurisprudence.[27]

Like Professor Hovenkamp, I too am uncomfortable with the *Parker*, *Exxon*, and *ARC America* trio. As others have noted, *Parker* arose when serious people believed that state-enforced cartelization or monopolization could

22. Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 643–45 (2006) (describing the problem of interstate spillovers in a regime that allows local regulation of interstate commerce); *id.* at 640 ("[C]ourts must develop a coherent doctrine with which to address spillovers."); *see also* Herbert Hovenkamp & John A. Mackerron III, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719, 770–71 (1985).

23. Parker v. Brown, 317 U.S. 341, 367 (1943) ("The program . . . undoubtedly affected the [interstate] commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent."); Hovenkamp & Mackerron, *supra* note 22, at 769 ("[A]lthough all the beneficiaries of the regulation were within the jurisdiction of the regulating sovereign, almost all of its victims, those forced to pay a higher price because of the restrictions on output, were located outside. The statute effectively legalized a cartel of California raisin growers selling their raisins to customers located outside California.").

24. Hovenkamp, *supra* note 22, at 644 ("It is one thing to approve an anticompetitive state regulatory scheme when the burden falls substantially on that state's own residents. But federalism does not require federal authority to permit states to export anticompetitive regulatory schemes. Under the current formulation of the state action exemption, extraterritorial impact of state regulatory schemes is not even regarded as relevant.").

25. *Id.* at 640 ("[C]ourts must develop a coherent doctrine with which to address spillovers."); *id.* at 645 ("A coherent doctrine of spillovers and its inclusion as a state action immunity requirement will therefore require some new directions in case development.").

26. *Id.* at 645–47.

27. *Id.* at 646 ("[O]ne can imagine egregious situations in which the impact of state regulation falls almost entirely on out-of-state interests, but then it seems the [D]ormant Commerce Clause would be sufficient to handle the problem." (citations omitted)).

help stabilize the macro economy—a claim that only politicians make today.[28] All three decisions countenance some regulation by political entities that do not internalize the full costs of their actions.[29] The predictable result will be too many state-imposed restraints and too much state antitrust regulation. Such overregulation, of course, will distort the allocation of resources and reduce national wealth. Moreover, to the extent that such regulation reduces price flexibility, *Parker* and its progeny interfere with the process of natural economic adjustment and thus exacerbate recessions.[30] Far from destroying the ability of states to engage in regulation, reversal of such decisions would simply confine states to "reasonable" regulation, just as the Sherman Act confines private parties to reasonable restraints of trade.[31] Federal preemption of state-imposed cartels, for instance, would leave states perfectly free to combat externalities, produce public goods, and redistribute income via taxing and spending.[32]

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28. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 306–11 (1932) (Brandeis, J., dissenting) (describing contemporary arguments that too much competition brought on the Depression and that state control of production was the appropriate remedy); John T. Delacourt & Todd J. Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government*, 72 ANTITRUST L.J. 1075, 1077 (2005) (noting that *Parker* reflected a "mindset . . . extremely skeptical of markets, favoring instead government industrial policy"); *see also* Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 CORNELL J.L. & PUB. POL'Y 255, 320–23 (2013) (describing arguments by proponents of the NIRA—including the United States—and other forms of state-sanctioned cartelization that such regulation would raise wages, enhance "purchasing power" and thus stimulate the macroeconomy); *id.* at 313 (describing California's contention in *Parker* that the plight of the state's raisin growers was worse than that of Depression-era coal and milk industries).

29. I do not mean to suggest that every state-imposed restraint that Congress could preempt under modern Commerce Clause jurisprudence imposes costs on citizens in other states. Given the Supreme Court's refusal to enforce meaningful limits on the commerce power, many state-imposed restraints that Congress could preempt under current law have little if any impact on other states. For instance, state-imposed restraints that create barriers to entry into the occupation of teeth whitening, while obviously anticompetitive, do not injure out-of-state consumers. *Cf.* N.C. State Bd. of Dental Examiners v. Fed. Trade Comm'n, 135 S. Ct. 1101 (2015) (holding that state board of dental examiners had committed unfair trade practice by conspiring to exclude rivals from intrastate market for teeth whitening). Thus, under the original conception of the commerce power, such restraints would exceed the authority of Congress. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824) (opining that commerce power does not empower Congress to regulate "those [activities] which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself"). *But cf.* Hovenkamp, *supra* note 22, at 645–46 ("[*E*]*very* state and local regulation has some spillover. For example, out-of-state visitors may have to use the trash disposal, taxicab, hospital, or ambulance services that are subject to a challenged restraint." (citations omitted)).

30. *See infra* notes 192–96 and accompanying text.

31. *Cf.* George W. Wickersham, *The Police Power, A Product of the Rule of Reason*, 27 HARV. L. REV. 297, 297–98 (1914) (invoking *Standard Oil*'s Rule of Reason as exemplifying appropriate method for discerning whether legislation falls within the police power).

32. *See* Brief for the United States as Amicus Curiae, *supra* note 8, at 63–64 (contending that restraint evaluated in *Parker* violated the Sherman Act, but that "Congress . . . did not intend to

At the same time, I, like Professor Hovenkamp, must take care lest I expand the scope of the Sherman Act beyond its original meaning, improperly using the Act as a license to void state legislation I deem counterproductive. The remainder of this Essay will examine that original meaning with respect to state-imposed restraints in the second and third categories outlined above, drawing upon the important work Professor Hovenkamp has already done. We will see that Professor Hovenkamp is absolutely correct that Congress did not subjectively intend to ban state-imposed restraints when it passed the Sherman Act. Thus, it initially appears that Sherman Act preemption must depend upon a particularly dynamic approach to reading statutes, an approach that likely exceeds the authority of the courts. He is also correct, however, that *Parker*'s "correct" conclusion rests upon a "fictional reading of the legislative history of the antitrust laws." Simply put, the constitutional landscape extant when Congress passed the Sherman Act excluded the overlapping regulatory authority that gives rise to the possibility of preemption.[33] That landscape also included meaningful limits on the scope of federal power as well as Dormant Commerce Clause doctrine that was more interventionist than that found in modern Supreme Court case law, including *Parker* itself. That doctrine would have preempted state restraints of interstate commerce producing interstate spillovers and thus voided *Parker*-type restraints. The same doctrine also preempted state regulation of private restraints of interstate commerce. Finally, due process protection for liberty of contract precluded states from banning many indirect restraints of interstate or intrastate commerce.

III. DUAL FEDERALISM AND LIBERTY OF CONTRACT IN 1890

As explained previously, courts and scholars agree that Congress did not intend the Sherman Act to preempt state restraints. At one level, this consensus is irrefutable, at least if one equates "intent" with "knowledge." Congress "knew" that the Sherman Act would not displace state regulation, no matter how injurious to interstate commerce. Thus, Congress did not "intend" to displace such state-imposed restraints. At the same time, Congress's subjective understanding of how the Sherman Act would operate has nothing to do with the actual question posed in *Parker*, for instance. To understand why, we must reconstruct the source of this subjective understanding, again drawing upon and supplementing work Professor Hovenkamp has already done.

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deprive the states of their normal 'police' powers over business and industry" (footnote omitted)); *see also infra* notes 108–12 and accompanying text (discussing scope of the police power during the *Lochner* era). For instance, Sherman Act preemption of the *Parker* restraints would not prevent California from taxing its own citizens and showering the proceeds on its raisin producers.

33. *See* HOVENKAMP, *supra* note 4, at 797 ("The 'state action' doctrine itself rests on a fictional reading of the legislative history of the antitrust laws.").

Simply put, the 51st Congress would have assumed that the Constitution obviated possible conflicts between federal antitrust law and state restraints. As understood at the time, the "dual sovereignty" that *Parker* and its modern proponents invoke actually precluded such a conflict. For one thing, Congress lacked authority to regulate *intra*state commerce, thus leaving states with exclusive authority over a substantial portion of economic conduct (subject of course to the 14th Amendment and the Contracts Clause, for instance). At the same time, what power Congress did possess was generally exclusive (subject to an exception discussed below), whether or not Congress chose to exercise it. The so-called "Dormant" Commerce Clause preempted state regulation that burdened interstate commerce "directly" or that dealt with a subject that, by its "general nature, affect[ed] the commercial interests of all the States."[34] The subject of such regulations, the Court said, was "national" by "its essential character [and] belong[ed] exclusively to the Federal government."[35] This category, the Court said, consisted of the regulation "of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities."[36] These classes of regulation, the Court said, "admit and require uniformity."[37] Absent such preemption, the Court said, "[t]here would . . . be no 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."[38] Of course, the Court's reference to uniform regulation was not entirely candid. By definition, the Dormant Commerce Clause only preempts state regulation when Congress has *not* acted. Instead of imposing uniform regulation, then, such preemption merely cleared the way for operation of the free market supported, of course, by various local forms of police power regulation and reasonable private contracts overcoming market failure.

State regulation that merely restrained commerce "indirectly" or not at all generally fell outside congressional power and thus survived Dormant Commerce Clause review.[39] The classic example involved exercises of the police power, including regulation of cartel pricing or other practices

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34. Hinson v. Lott, 75 U.S. (8 Wall.) 148, 152 (1868); *see also* Cnty. of Mobile v. Kimball, 102 U.S. 691, 697 (1880).

35. *Hinson*, 75 U.S. at 152 ("[T]here is a class of legislation . . . which, from its essential character, is National, and which must . . . belong exclusively to the Federal government."); *see also* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1110–11 (2000) ("The Court consistently maintained that regulations touching a 'national' matter or burdening interstate commerce 'directly' were unconstitutional." (citations omitted)).

36. *Kimball*, 102 U.S. at 697.

37. *Id.*

38. *Id.*

39. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 135 (1876) (holding that state regulation of rates for storage of grain in elevators did not offend the Dormant Commerce Clause even though most such grain was intended for export to other states or foreign countries and the regulation "may indirectly operate upon commerce outside [the state's] immediate jurisdiction").

producing market failures.[40] Such regulation, which fit comfortably within the 19th century's classical, *laissez faire* economic paradigm, could facilitate or "aid" interstate commerce.[41]

The Dormant Commerce Clause did not void every state commercial regulation falling within Congress's jurisdiction, however.[42] Instead, the Court recognized that Congress had the authority to regulate some subjects that were not, by their nature, inherently national and thus did not require uniform regulation. If, however, Congress declined to act with respect to such subjects, state regulation governing such subjects nonetheless survived, so long as such regulation did not burden interstate commerce "directly." The result was a category of overlapping jurisdiction in which states could regulate interstate commerce as an initial matter, unless Congress affirmatively acted to displace such regulation.[43] Examples of subjects states could regulate unless Congress asserted its authority included inspection and quarantine laws directed at interstate travel,[44] dredging and improvement of harbors,[45] and requirements that vessels entering a harbor after an interstate voyage employ a local pilot.[46] Granting states power over such subjects in the first instance allowed each jurisdiction to draw on local knowledge and generate regulations tailored to local conditions.[47] Thus, state law provided background rules supporting interstate commerce, subject to congressional override.

Three decisions illustrate this dual federalism. The first is *Gibbons v. Ogden*. There, the Supreme Court evaluated New York's conferral of a monopoly over the operation of steamships in New York waters, including those arriving from other states, and ultimately held that a federal licensing

40. *See id.* at 125–34 (sustaining regulation of rates for storage of grain as a valid exercise of police power).

41. *See Kimball*, 102 U.S. at 697; HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836–1937, at 169–204 (1991); *see also infra* notes 110–12 and accompanying text (explaining how, during this era, courts equated police power regulation with the power to combat market failure); *cf. Munn*, 94 U.S. at 133–34.

42. *See* Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1864 (2007).

43. Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, 318 (1851); *see also Munn*, 94 U.S. at 135 (rejecting Dormant Commerce Clause challenge to price regulation of grain elevators, but also suggesting that Congress may act "in reference to their inter-state relations").

44. Morgan's Steamship Co. v. La. Bd. of Health, 118 U.S. 455, 465–67 (1886).

45. *See generally Kimball*, 102 U.S. 691.

46. *Cooley*, 53 U.S. at 318.

47. *See Morgan's Steamship Co.*, 118 U.S. at 465 ("[Q]uarantine laws belong to that class of state legislation . . . which [is] valid until displaced or contravened by some legislation of Congress. The matter is one in which the rules that should govern it may in many respects be different in different localities, and for that reason be better understood and more wisely established by the local authorities."); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 203–04 (1824) (explaining that inspection laws promote interstate commerce and thus do not interfere with Congress's commerce power).

statute preempted the ban.[48] The Court also suggested that the dormant implication of the Commerce Clause preempted such state-conferred monopolies over interstate commerce, absent congressional legislation.[49] More than five decades later, in *Kidd v. Pearson*, the Court entertained a Dormant Commerce Clause challenge to Iowa's ban on the manufacture of alcohol, including alcohol intended for export.[50] The Court invoked the distinction—"popular to the common mind . . . between manufactur[ing] and commerce"[51] holding that the ban, while affecting interstate commerce, did not burden such commerce "directly."[52] Thus, states possessed exclusive authority over manufacturing. By contrast, in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, the Court evaluated Illinois' regulation of the intrastate component of rates for interstate transportation.[53] Invoking *Gibbons*' conclusion about the scope of Congress's power and analogizing rail transportation to the steamship business over which New York had conferred monopoly, the Court held that the Commerce Clause preempted such regulation, even absent congressional action.[54] The Constitution, the Court said, confided such authority in Congress alone, because that body's "enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rules."[55] Such regulation was thus "of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations."[56]

The Congress that considered and passed the Sherman Act was aware of *Gibbons*, *Kidd*, and *Wabash*, and there is no indication that it had a different conception of the commerce power. Indeed, Congress filled the regulatory vacuum left by *Wabash* by passing the Interstate Commerce Act in 1887.[57] Moreover, *Kidd* fueled concerns that Sherman's initial draft—which banned

48. *Gibbons*, 22 U.S. at 218–22. *See generally* Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398 (2004).

49. *Gibbons*, 22 U.S. at 204–09; *see also* Williams, *supra* note 48.

50. Kidd v. Pearson, 128 U.S. 1, 15 (1888).

51. *Id.* at 20.

52. *Id.* at 23 ("[L]egislation [by a State] 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, under the guise of police regulations, it imposes a direct burden upon interstate commerce, or interferes directly with its freedom." (citations omitted) (internal quotation marks omitted)).

53. Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886); *see also* HOVENKAMP, *supra* note 41, at 161–63 (discussing *Wabash*).

54. *Wabash*, 118 U.S. at 573 ("The argument on this subject[, the reach of Congress's power,] can never be better stated than it is by Chief Justice Marshall." (citing *Gibbons*, 22 U.S. at 195–96)).

55. *Id.* at 577.

56. *Id.*; *see also* HOVENKAMP, *supra* note 41, at 159–64 (discussing "extraterritorial effect" of state rate regulation and resulting "free riding" by states that imposed such regulation).

57. *See* Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887); *see also* WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 120–22 (2010) (reporting that outcry over *Wabash* led to the Interstate Commerce Act).

restraints of "production[] or manufacture"—exceeded Congress's authority.[58] The Senate therefore referred the bill to the Judiciary Committee, where Senators more conversant with constitutional principles would radically overhaul Sherman's initial draft.[59] In the final version, the Committee omitted references to production or manufacture, and banned instead contracts in "restraint of trade or commerce among the several States."[60] This final language empowered courts to determine the reach of the Act, based upon the judiciary's view of the scope of the commerce power. The Supreme Court, in turn, would subsequently hold that, when it passed the Sherman Act, Congress meant to exercise the full extent of its Commerce Clause power.[61] This assumption set the stage for continued expansion of the Sherman Act as the commerce power expanded over time.

Not surprisingly, the Supreme Court invoked its dual federalism jurisprudence when first interpreting the Sherman Act. In *E.C. Knight*, for instance, the Court evaluated a merger that created a monopoly over the production of sugar in the United States.[62] The Court reiterated *Kidd* and related decisions holding that states possessed exclusive authority to regulate manufacturing.[63] While control over production influenced commerce and was necessary to its existence, such control only affected commerce "incidentally and indirectly."[64] Thus, the Court confirmed that states retained exclusive authority over manufacturing, mining, and agriculture—including the authority to impose antitrust regulation or rules of corporate governance

58. *See* MARTIN J. SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 1890–1916: THE MARKET, THE LAW, AND POLITICS 107 (1988) (reporting the language of Sherman's original bill); *id.* at 113–14 (reporting opposition to Sherman's bill on Commerce Clause grounds); *id.* at 113 (noting that *Kidd* made concerns over the scope of Congress's authority "particularly salient"); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 171–73 (1995) (reporting 1889 remarks by Senator George invoking *Kidd* and other Commerce Clause decisions contending that Sherman's original bill exceeded the commerce power); *id.* at 175 (reporting a similar 1890 speech by Senator George).

59. SKLAR, *supra* note 58, at 114–115.

60. *See* 15 U.S.C. § 1 (2012); *see also* SKLAR, *supra* note 58, at 114–17; THORELLI, *supra* note 58, at 197–99 (concluding that constitutional objections to the bill induced the reference to the Judiciary Committee).

61. *See, e.g.*, Hosp. Bldg. Co. v. Trs. of Rex Hosp., 425 U.S. 738, 743 n.2 (1976); United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945); Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940).

62. United States v. E.C. Knight Co., 156 U.S. 1, 2–8 (1895).

63. *Id.* at 13–16; *id.* at 15–16 ("In *Gibbons v Ogden*, *Brown v Maryland,* and other cases often cited, the state laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce, yet in *Kidd v Pearson* the [ban on manufacturing] was held not to directly affect external commerce . . . ."); Coe v. Errol, 116 U.S. 517, 525 (1886); Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 448–49 (1827); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 37–39 (1824).

64. *E.C. Knight Co.*, 156 U.S. at 12 ("The power to regulate commerce is the power to prescribe the rule by which commerce shall be governed, and is a power independent of the power to suppress monopoly.").

prohibiting monopolistic transactions.[65] "It was in the light of well-settled principles that the act of July 2, 1890, was framed," the Court said.[66]

A few years later, in *United States v. Joint Traffic Ass'n*, the Court invoked categories from its dual federalism jurisprudence to reject the claim that the Sherman Act banned "ordinary contracts and combinations," such as the formation of a partnership in interstate commerce "between two persons previously engaged in the same line of business," and thus infringed liberty of contract.[67] While the Act purported to ban *all* restraints of commerce among the several states, the Court gave the statute a "reasonable construction."[68] The Court thus held that Congress only meant to ban *direct* restraints of interstate commerce, and not those agreements or other practices (like the formation of a partnership) whose impact on interstate commerce was "indirect" or "remote."[69]

As read by *E.C. Knight* and *Joint Traffic*, then, the Sherman Act performed the same function with respect to direct private restraints that the Dormant Commerce Clause performed *vis-à-vis* direct public restraints, namely, it banned them. The Act also left indirect private restraints unscathed, just as the Dormant Commerce Clause left indirect public restraints unscathed. Whether a public or private restraint was "direct" or "indirect" was a question of substance and not of form, turning upon the Court's assessment of the restraint's impact on interstate commerce. Thus, a private restraint that replicated a public restraint deemed direct could nonetheless be "indirect" if its impact on commerce was less pronounced.[70]

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65. *See, e.g.*, Charles W. McCurdy, *The* Knight Sugar *Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 BUS. HIST. REV. 304 (1979); *see also* HOVENKAMP, *supra* note 41, at 262–63 (contending that states relied upon the law of trade restraints, not corporate law, to impose such regulation).

66. *E.C. Knight Co.*, 156 U.S. at 16.

67. United States v. Joint Traffic Ass'n, 171 U.S. 505, 566–67 (1898). *See generally* William D. Guthrie, *Constitutionality of the Sherman Anti-Trust Act of 1890, as Interpreted by the United States Supreme Court in the Case of the Trans-Missouri Traffic Association*, 11 HARV. L. REV. 80 (1897) (articulating this argument).

68. *See Joint Traffic Ass'n*, 171 U.S. at 568 ("[T]he act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." (quoting Hopkins v. United States, 171 U.S. 578, 600 (1898))).

69. *Id.* at 566 (noting that the Sherman Act does not outlaw "ordinary contracts and combinations" protected by liberty of contract); *see also* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 53–54 (1999) (explaining how *Joint Traffic*'s narrow construction of the Sherman Act protected agreements sheltered by liberty of contract and saved the statute from invalidation).

70. *See, e.g.*, *Hopkins*, 171 U.S. at 587–88, 592–94, 596 (declaring a challenged restraint indirect even though an analogous restraint imposed by the state legislature would abridge liberty of contract and restrain interstate commerce directly); *id.* at 602–03; *see also* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 229–30 (1899) (noting that the Commerce Clause authorizes Congress to regulate some private contracts because "[t]he private contracts *may* in

In *Addyston Pipe & Steel Co. v. United States*, the Court invoked *Wabash*-like reasoning and confirmed that states lacked authority to regulate contracts directly restraining interstate commerce.[71] The United States challenged a multi-state cartel that set prices more than 30% above cost, plus a reasonable rate of return, for pipe made in one state and sold in another.[72] Defendants contended that the Commerce Clause only empowered Congress to preempt state-imposed restraints, leaving private restraints to the exclusive jurisdiction of the states.[73]

The Supreme Court disagreed, holding that the Commerce Clause empowered Congress to ban certain private agreements. After all, the Court said, "private 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."[74] Where that effect was to directly and substantially restrain interstate commerce, such contracts were "an attempt to regulate a subject which, for the purpose of regulation, has been, with some exceptions . . . *exclusively* granted to Congress . . . ."[75] The Commerce Clause empowered Congress to ban such agreements, just as it empowered Congress to preempt state enactments that directly restrained interstate commerce.[76]

The Court also predicted that acceptance of the defendants' claim that states possessed exclusive jurisdiction over such agreements would mean that: "the legislation of the different States might and probably would differ in regard to the matter, according to what each State might regard as its own particular interest."[77] Echoing the logic of *Wabash*, then, the Court opined that Congress was better positioned than individual states to legislate regarding agreements directly restraining interstate commerce. In modern parlance, competition between the states would produce a race to the bottom, as states that did not internalize the full impact of restraints would pursue their "interest" by enforcing or at least declining to ban such agreements, exporting harm to other states.[78] Congress, however, was "the proper

truth be as far reaching in their effect upon interstate commerce as would the [state] legislation . . . of the same character" (emphasis added)).

71. *Addyston Pipe*, 175 U.S. at 232–35.

72. *See* United States v. Addyston Pipe & Steel Co., 85 F. 271, 293 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

73. *See generally id.* at 278–79.

74. *Addyston Pipe*, 175 U.S. at 229–30 (emphases added).

75. *Id.* at 231 (citations omitted).

76. *Id.* at 229 ("If certain kinds of private contracts do directly, as already stated, 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?"); *id.* at 231 ("Congress should have jurisdiction as much in the one case as in the other.").

77. *Id.* at 231.

78. *See, e.g.*, Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886).

representative of the nation at large,"[79] and there was a "great importance of having but one source for the law which regulates [interstate] commerce throughout the length and breadth of the land . . . ."[80] Presumably Congress would consider the *nation*'s welfare when legislating on the subject and thus produce a uniform rule that reconciled various competing interests.[81]

The Court hastened to add that Congress lacked authority to regulate agreements whose impact was felt "wholly within [a state's] own borders . . . ."[82] The commerce power, the Court said, did not reach "commerce which is wholly within a State," with the result that the Sherman Act did not govern "combinations or agreements so far as they relate to a restraint of such [intrastate] trade or commerce."[83] Thus, the Court narrowed the Sixth Circuit's decree so as not to prevent firms from combining with respect "to contracts for selling pipe in their own State," even if a member of the combination from another state won the contract and made an interstate sale.[84]

The Court's holding that Congress could ban only *direct* restraints of *inter*state commerce replicated the distinction, drawn in *Gibbons*, between interstate commerce and commerce internal to one state.[85] Moreover, the Court's assertion that states lacked the proper incentives to regulate agreements in the former category followed naturally from the logic of *Wabash*. Indeed, the logic predated (barely) the ratification of the Constitution. At the Pennsylvania ratifying convention, James Wilson explained the rationale for the scope and limits of Federal Power:

> Whatever object of government is confined, in its operation and effects, within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States.[86]

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79. *Addyston Pipe*, 175 U.S. at 230.

80. *Id.* at 233.

81. *See Wabash*, 118 U.S. at 577; *see also* N. Sec. Co. v. United States, 193 U.S. 197, 345 (1904) ("No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce . . . .").

82. *Addyston Pipe*, 175 U.S. at 233.

83. *Id.* at 247.

84. *Id.* at 247–48.

85. *See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

86. *See* The Debates in the Convention of the State of Pennsylvania, on the Adoption of the Federal Constitution (Nov. 21, 1787) (statement of James Wilson), *reprinted in* 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 415, 424 (2d ed. 1996).

Thus, the impact of some direct restraints fell only upon the citizens of a single state, such that regulation of such restraints "belong[ed] to the government of that state."[87] However, the impact of some other direct restraints fell "beyond the bounds of a particular state" and thus "belong[ed] to the government of the United States."[88] Indirect restraints, even those of interstate commerce, also fell outside the scope of Congress's power, presumably because the Court believed that states possessed appropriate incentives to generate optimal rules governing such agreements. Indeed, both before and after *Addyston Pipe*, the Court unanimously rejected Sherman Act challenges to *indirect* contractual restraints of interstate commerce, leaving regulation of such agreements to individual states.[89] Such regulation, however, was subject to the strictures of liberty of contract.[90]

It should be noted that Wilson, *Gibbons*, *Wabash*, and *Addyston Pipe* articulated a principle, a principle that did not decide concrete cases in the abstract. Instead, courts were obliged to apply this principle in light of the facts, including background legal rules, bearing upon the impact of the regulated conduct. Such facts could change over time, as the national economy became more integrated, thereby changing the boundaries between state and federal power.[91]

To be sure, *Addyston Pipe* applied a statute exercising Congress's commerce power. The Court did not hold that the Dormant Commerce Clause itself, which preempts *state* legislation, preempted the *private* agreements before the Court. Still, the Court made it plain that the power to regulate direct private restraints of interstate commerce resided exclusively with Congress. This was no surprise, given precedent holding that the interstate "transportation, purchase, sale, and exchange of commodities" was a subject exclusively reserved to Congress.[92] Direct private restraints of such commerce, the Court said, regulated a subject "which, for the purpose of regulation, has been, with some exceptions . . . exclusively granted to

87. *Id.*

88. *Id.*

89. See Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Bay, 200 U.S. 179, 184 (1906) (declining to condemn covenant not to compete in the transportation of freight and passengers along the Ohio River because any impact on interstate commerce was merely incidental and did not reflect "the dominant purpose of the contract"); Anderson v. United States, 171 U.S. 604 (1898); Hopkins v. United States, 171 U.S. 578 (1898).

90. Allgeyer v. Louisiana, 165 U.S. 578 (1897); *see also infra* notes 109–36 and accompanying text.

91. *See* Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 137–42 (1995) (explaining how increased integration of the national economy naturally resulted in more expansive congressional authority as more "local" activities produced interstate impacts); *see also* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993) [hereinafter Lessig, *Fidelity in Translation*].

92. *See* Cnty. of Mobile v. Kimball, 102 U.S. 691, 697 (1880).

Congress."[93] None of the exceptions—for local quarantine laws, pilotage laws, and the like—applied, however.[94] The importance of uniformity in this context, the Court said, "cannot, in our opinion, be overestimated."[95] Finally, the Court attributed the absence of state legislation on the subject to a belief that "it was supposed to be a subject over which state legislatures had no jurisdiction."[96] In fact, even before *Addyston Pipe*, at least one federal court held that state antitrust regulation of interstate commerce contravened the Dormant Commerce Clause.[97] After *Addyston Pipe*, the Eighth Circuit held that state antitrust regulation of contracts that directly related to interstate commerce "imping[ed] upon the exclusive authority of Congress to regulate commerce among the several states."[98] In support of this holding, the court cited that portion of the *Addyston Pipe* opinion that explained why Congress possessed exclusive regulatory authority over the contracts before the Court.[99]

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93. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 231 (1899) (citations omitted); *see also id.* at 232 ("The reason why no state legislation upon the subject has been enacted has probably been because it was supposed to be a subject over which state legislatures had no jurisdiction.").

94. The Court cited four cases for the proposition that there were exceptions to Congress's exclusive jurisdiction over interstate commerce. *Id.* at 231 (citing W. Union Tel. Co. v. James, 162 U.S. 650, 660–61 (1896); Bowman v. Chi. & N.W. Ry. Co., 125 U.S. 465, 488 (1888); Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 465 (1886); *Kimball*, 102 U.S. at 697). In *Kimball*, the Court held that state legislation to improve Mobile harbor, while falling within the jurisdiction of Congress, also fell into the category of "subjects local in their nature, or intended as mere aids to commerce," and thus did not offend the Dormant Commerce Clause. *Kimball*, 102 U.S. at 697. *Morgan's Steamship Co.* reached the same conclusion about Louisiana's system of quarantine laws that applied to vessels arriving in New Orleans. *Morgan's S.S. Co.*, 118 U.S. at 465. *Bowman* invalidated an Iowa statute prohibiting the importation of "intoxicating liquors." *Bowman*, 125 U.S. at 474, 500. Finally, *James* sustained Georgia's imposition of liability upon telegraph companies that failed to employ due diligence to ensure the timely delivery of telegraphed messages. *James*, 162 U.S. at 661.

None of these decisions suggested that states possess concurrent jurisdiction to ban or authorize direct restraints of interstate commerce. In *Kimball*, for instance, the Court emphasized Congress's exclusive power over "all that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities." *Kimball*, 102 U.S. at 697. Regarding such conduct, the Court said, "there can of necessity be only one system or plan of regulations." *Id.* "There would otherwise be no security against conflicting regulations of different States, *each discriminating in favor of its own products and citizens* . . . ." *Id.* (emphasis added). In such cases, Congress's "non-action . . . is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free." *Id.*

95. *Addyston Pipe*, 175 U.S. at 233.

96. *Id.* at 232.

97. *In re* Grice, 79 F. 627, 639 (N.D. Tex. 1897), *rev'd on other grounds sub nom.* Baker v. Grice, 169 U.S. 284 (1898).

98. Hadley Dean Plate Glass Co. v. Highland Glass Co., 143 F. 242, 244 (8th Cir. 1906) (citations omitted); *see also* State v. Fullerton Lumber Co., 152 N.W. 708, 711–12 (S.D. 1915) (stating that state antitrust law only applied when challenged restraints "affect trade or commerce wholly within the state").

99. *See Hadley Dean Plate Glass*, 143 F. at 244 (citing, among other cases, *Addyston Pipe*, 175 U.S. at 229–33).

Several other courts agreed.[100] Finally, during the first third of the 20th century, the Court repeatedly invalidated state price regulation of interstate commerce under the Dormant Commerce Clause.[101]

The dual federalism of 1890 plainly prevented Congress from banning restraints, whether direct or indirect, of *intra*state commerce. Moreover, the same dual federalism prevented states from imposing or banning direct restraints of *inter*state commerce.[102] What, though, about regulation of indirect restraints of interstate commerce? If Congress had no authority over such private restraints in the first place, as the Court held in *E.C. Knight* and *Joint Traffic*, then state regulation could not offend the Dormant Commerce Clause.[103] Moreover, countless decisions affirmed the ability of states to *impose* indirect restraints on interstate commerce via police-power regulation.[104] Indeed, *E.C. Knight* expressly stated that regulation of monopolistic control of

100. *See* Hovenkamp, *supra* note 20, at 376 n.5; 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 & n.117 (1987) (collecting numerous authorities for the proposition that "[f]ederal and state jurists often declared that the states could not constitutionally regulate anticompetitive activity within interstate commerce, and some significant limitations on the scope of state antitrust provisions were established on this basis" (citation omitted)); *see, e.g.*, State v. Va.–Carolina Chem. Co., 51 S.E. 455, 461 (S.C. 1905) ("[T]his clause [of the state antitrust statute] is an attempt by the state to exercise a prerogative of Congress to regulate interstate commerce. No act of Congress has invested the state with authority to interfere with this subject of commerce.").

101. *See* Pub. Utils. Comm'n v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927) (invalidating a state regulation of the price of electricity, which regulated party exported to other states); Missouri *ex rel* Barrett v. Kan. Natural Gas Co., 265 U.S. 298, 308–10 (1924) (invalidating state regulation of the price of natural gas, which regulated parties exported to other states); Lemke v. Farmers' Grain Co., 258 U.S. 50, 61 (1922) (striking down a regulation of the price of grain, which regulated parties exported to other states).

102. *See* HOVENKAMP, *supra* note 4, at 797–98 ("The [*Parker*] Court found that when Congress passed the Sherman Act in 1890 it never intended the statute to undermine the regulatory power of state and local governments. But the prevailing view of federal power under the Commerce Clause in 1890 was that Congress could not have done this even had it wished to. Under that view, which the Supreme Court confirmed in its . . . *E. C. Knight* decision, the federal government had no power to regulate markets that were perceived to be purely intrastate. By the same token, extraterritorial . . . regulation was unconstitutional. Under this regime of 'dual federalism,' any form of regulation that was within the regulatory power of state and local government[s] was outside the reach of the federal antitrust laws. Small wonder that the Supreme Court could find no evidence that the Sherman Act's framers intended to control state and local regulation."); Hovenkamp & Mackerron, *supra* note 22, at 727 ("In *Parker* the Court effectively read *Wickard* into the legislative history of the antitrust laws and then decided that Congress had not intended to reach intrastate conduct mandated by the state itself.").

103. *See generally* McCurdy, *supra* note 65, at 304. Indeed, some scholars have pointed out that federal regulatory efforts were few and far between in the 19th century, with the result that rejection of such challenges confirmed state regulatory authority and bolstered regulation. *See, e.g.*, Cushman, *supra* note 35, at 1121 ("[T]he principal function of locating such activities in the local sphere and holding that they affected interstate commerce only indirectly was not to frustrate federal regulation, but instead to insulate state and local regulatory and taxing initiatives from [D]ormant Commerce Clause attack." (footnote omitted)).

104. *See supra* notes 40–48 and accompanying text.

production that "indirectly" affected interstate commerce was a matter of "internal police."[105] It would thus seem that the dual federalism of the 1890s left states perfectly free to regulate and even ban indirect restraints of interstate commerce.[106] If so, the 51st Congress may well have anticipated that states would have the authority to ban perfectly reasonable, wealth-creating restraints, just as some modern states have attempted to ban, say, minimum rpm as unlawful per se.[107]

There is, however, another relevant source of federal law, namely, the Due Process Clause of the Fourteenth Amendment. Both before and after 1890, state courts held that this clause protects economic liberty, including the liberty to contract, against regulation that exceeded the police power.[108] Unlike legislative restraints, private restraints are (generally) voluntary contracts. In 1887, Supreme Court dicta signaled that regulation of economic activity had limits.[109] Professor Hovenkamp has persuasively argued that the Court took a Pigouvian approach to defining the scope of the police power, sustaining only those abridgments of liberty or property that combatted externalities or other forms of market failure.[110] A ban on private "direct restraints" of intrastate commerce or prohibition of a merger resulting in a monopoly (an indirect but harmful restraint) would certainly satisfy this test.[111] However, a ban on indirect restraints that produced no harm would not.[112]

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105. United States v. E.C. Knight Co., 156 U.S. 1, 12–13 (1895).

106. *Id.* at 13 ("It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed . . . ."); *see also* Kidd v. Pearson, 128 U.S. 1, 24 (1888).

107. *See supra* note 4 and accompanying text.

108. *See* Frorer v. People, 31 N.E. 395 (Ill. 1892); People v. Gillson, 17 N.E. 343 (N.Y. 1888) (Peckham, J.) (voiding a ban on a retailer's practice of giving away free products to induce sales); Godcharles v. Wigeman, 6 A. 354 (Pa. 1886); People v. Marx, 2 N.E. 29 (N.Y. 1885) (voiding a ban on the sale of oleomargarine); *In re* Jacobs, 98 N.Y. 98 (1885) (voiding a ban on cigar manufacture in tenement houses) (voiding an anti-scrip law as infringing upon the laborer's right to contract for satisfactory compensation); DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM 16–20 (2011) (collecting and discussing these and other decisions).

109. *See* Mugler v. Kansas, 123 U.S. 623, 661 (1887) ("There are, of necessity, limits beyond which [police power] legislation cannot rightfully go.").

110. HOVENKAMP, *supra* note 41, at 200–01; *id.* at 201 (stating that the Court only sustained such regulation when it found "a 'substantial divergence between the public interest and private right'—a legal concept similar to Pigou's 'divergence between social and private net product'").

111. *See E.C. Knight Co.*, 156 U.S. at 13–14 (finding that regulation of monopolies fell within the police power); Meese, *supra* note 69, at 75–80 (discussing decisions sustaining state bans on horizontal price fixing as police power regulation); *cf.* Munn v. Illinois, 94 U.S. 113, 131 (1876) (sustaining regulation of price set by nine firms owning grain elevators that agreed on prices and published the resulting prices in local newspapers, because "all the elevating facilities [in the region were] a 'virtual' monopoly").

112. *See infra notes* 119–23 and accompanying text (recounting holding in *Standard Oil* and *American Tobacco* that ban on harmless restraints would offend liberty of contract).

Thus, while state regulation of indirect restraints of interstate commerce could not offend the Dormant Commerce Clause, many such restraints found protection in liberty of contract. Indeed, in *Joint Traffic*, the defendants claimed that the Sherman Act abridged liberty of contract precisely because, as read in *Trans-Missouri Freight*, the Act purportedly banned various everyday contracts and combinations, including covenants ancillary to the sale of a business, the formation of partnerships, mergers, and covenants ancillary to the formation of partnerships.[113] The Court rejected this claim, holding that the statute should receive a "reasonable construction" and did not reach these contracts precisely because they only restrained trade, if at all, indirectly.[114] The implication seemed clear: Banning all such contracts, what Peckham called "ordinary contracts and combinations," could exceed the police power, abridging liberty of contract.[115] Moreover, because the Fourteenth Amendment limited *all* state action, such protection extended to indirect restraints of *intra*state commerce as well.[116] Indeed, just two years before passage of the Sherman Act, Peckham had authored an opinion for the New York Court of Appeals voiding, as abridging "fundamental and valuable rights" the state's effort to criminalize a retailer's practice of giving away a tea cup and saucer with the purchase of coffee.[117]

The Court confirmed this reading of liberty of contract in *Standard Oil Co. v. United States*, holding that a ban on *every* contract restraining trade would destroy contractual liberty and undermine wealth-creating trade.[118] Thus, the Court said, the Sherman Act bans only *unreasonable* restraints of trade, defined as agreements that produce monopoly or the consequences of monopoly: prices, output, or quality departing from the competitive level.[119] This Rule of Reason empowered courts to invalidate both "direct" restraints of interstate commerce as well as that small subset of "indirect" restraints that produced harm, e.g., a merger that resulted in a monopoly restraining interstate

113. United States v. Joint Traffic Ass'n, 171 U.S. 505, 566 (1898); *see also* United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 332–43 (1897).

114. *Joint Traffic Ass'n*, 171 U.S. at 568.

115. *Id.* at 566 (referring to such agreements as "ordinary contracts and combinations"); *see also id.* at 572 (confirming that the decision in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897), which held that the Fourteenth Amendment protected liberty of contract, applied equally to the Fifth Amendment and thus limited the authority of Congress).

116. The practices that Peckham protected in *Gillson*, for instance, did not affect interstate commerce, whether directly or indirectly.

117. People v. Gillson, 17 N.E. 343, 399 (N.Y. 1888) (Peckham, J.).

118. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63 (1911); *see also* Alan J. Meese, Standard Oil *as* Lochner*'s Trojan Horse*, 85 S. CAL. L. REV. 783, 787–90 (2012) (explaining that *Standard Oil* read the Sherman Act narrowly so as not to infringe liberty of contract).

119. *Standard Oil*, 221 U.S. at 60–61; *see also* Alan J. Meese, *Price Theory, Competition and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 84–89 (describing *Standard Oil*'s adoption of the Rule of Reason); *id.* at 88–89 (recounting decision's conclusion that only agreements producing higher prices, reduced output or lower quality are unreasonable).

commerce.[120] Indeed, in *American Tobacco*, the same Court emphasized that the statute did not ban "normal and usual contracts essential to individual freedom."[121] The Court also noted a connection between the protection of such agreements on the one hand, and robust interstate commerce on the other. That is, the Court opined that a ban on such agreements, presumably from any source, would "render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect."[122] In the same way, of course, the Court had previously opined that state police-power regulation restraining commerce *indirectly* overcame externalities and other market failures and thus *aided* interstate commerce. In this sense, then, both private and state-imposed indirect restraints served the same overall economic purpose: overcoming market failures and improving upon the results that atomistic markets might produce.[123] Taken together, the Fourteenth Amendment and Dormant Commerce Clause protected one such category (private restraints), while declining to preempt the other (indirect public restraints). While both types of restraints were beyond the reach of Congress's commerce power, both also helped support and facilitate interstate commerce, thereby ensuring a well-functioning national market.

To summarize, Professor Hovenkamp and others correctly conclude that Congress did not subjectively anticipate Sherman Act preemption of state-imposed restraints. However, as Professor Hovenkamp has explained, this does not mean that Congress anticipated that states could authorize interstate cartels or monopolies or ban indirect restraints. On the contrary, a Congress well attuned to the precedents of the day would have understood that it lacked authority to preempt state regulation of any restraints, direct or indirect, of *intra*state commerce. Moreover, the same Congress would have understood that state imposition or regulation of direct restraints of *inter*state commerce would violate the Dormant Commerce Clause. Finally, Congress would have understood that judicial protection for liberty of contract by state and federal

120. Meese, *supra* note 118, at 796–97 (explaining that *Standard Oil*'s Rule of Reason allowed courts to reach indirect restraints that produced anticompetitive harm).

121. United States v. Am. Tobacco Co., 221 U.S. 106, 180–81 (1911). *Standard Oil* held that "the words restraint of trade should be given a meaning which would not destroy the individual right to contract." *Id.* at 180.

122. *Id.*; *see also* Whitwell v. Cont'l Tobacco Co., 125 F. 454, 460–61 (8th Cir. 1903) (holding a ban on liberty to set prices would destroy competition more surely than any private restraint and that "[t]he exercise of [such] rights is essential to the very existence of free competition" and thus does not "constitute any . . . restraint upon interstate trade").

123. *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 381–82 (1966) (explaining how restraints ancillary to the formation of a partnership could prevent market failure that would result from atomistic rivalry between partners); *see also* United States v. Addyston Pipe & Steel Co., 85 F. 271, 281–82 (1898) (Taft, J.) (explaining that the common law "encouraged" such restraints because they induced partners to focus their efforts on the partnership).

courts would have significantly limited states' ability to ban indirect restraints of interstate or intrastate commerce, thereby leaving parties free to adopt agreements that facilitated interstate commerce.

In short, as understood during antitrust's formative era, the Constitution simply took state regulation of *inter*state commerce and prohibition of reasonable restraints of *any* commerce "off the table." Sherman Act preemption of such state regulation would have been redundant, analogous to (hypothetical) federal legislation banning state statutes impairing the obligation of contracts involving interstate commerce.[124] This constitutional framework left states free to ban direct restraints of *intra*state commerce and a subset—probably a small subset—of indirect restraints of intrastate and interstate commerce namely, those that produced harm in the form of higher prices or lower output.[125]

Put affirmatively, Congress anticipated that the Sherman Act would ban private restraints, period, and thus not preempt state legislation that imposed unreasonable restraints or banned reasonable ones. However, contrary to the assertions of *Parker*, its progeny, and many of its proponents, this limitation on the Sherman Act did not reflect any congressional concern for "state sovereignty" or "federalism values." To paraphrase Professor Hovenkamp, any such congressional concern is entirely fictitious.[126] Instead, Congress would have assumed that, federalism or not, the Constitution ousted states from adopting such regulations. Modern invocations of federalism and dual sovereignty are simply *ex post* rationalizations of judicial refusal to preempt unreasonable state-imposed restraints.

IV. THE FALL OF DUAL FEDERALISM AND LIBERTY OF CONTRACT

The formative era's constitutional foundations crumbled abruptly during the 1930s.[127] First, the Court famously abandoned numerous decisions protecting liberty of contract.[128] Second, and as famously, the Supreme Court

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124. Of course, federal legislation enforcing constitutional provisions is not unheard of. *See* Civil Rights Act of 1964 § 202, 42 U.S.C. § 2002a-1 (2012) (forbidding discrimination "required by any law, statute, ordinance, regulation, rule or order of a State or any agency or political subdivision thereof").

125. In this connection it should be noted that much state regulation that indirectly restrained interstate commerce, such as the dredging of harbors or the inspection of vessels screening for diseased passengers, did not burden liberty of contract.

126. HOVENKAMP, *supra* note 4, at 797.

127. *See* Meese, *supra* note 28, at 296–320 (recounting various Supreme Court decisions abandoning liberty of contract, removing meaningful limits on Congress's commerce power, and weakening Dormant Commerce Clause standards).

128. *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 398–99 (1937) (overruling Adkins v. Children's Hosp., 261 U.S. 525 (1923)); Nebbia v. New York, 291 U.S. 502, 533–39 (1934). *Nebbia*, it should be noted, rejected the definition of industries "affected with a public interest" the Court had unanimously adopted just over a decade earlier. *Nebbia*, 291 U.S. at 509–10; *see also* Charles Wolff Packing Co. v. Court of Indus. Relations of Kan., 262 U.S. 522, 535–42 (1923).

removed meaningful limits on Congress's commerce power, allowing Congress to regulate what the Court had previously treated as intrastate commerce.[129] No doubt some such expansion was natural and inevitable, given the integration of the nation's economy, aided by evolving legal institutions (such as more flexible incorporation statutes) and technology. Moreover, evolving technology and legal institutions also created opportunities for firms, either individually or collectively, to realize economies of scale that gave rise to barriers to entry, a concept foreign to many jurists in the 1880s and 1890s.[130] These changes rendered it more likely that "object[s] of government" once deemed purely local *could* exceed the bounds of a particular state, with the result that states would exercise exclusive authority over such objects "in their particular interest," thereby resulting in suboptimal legislation.[131] If so, fidelity to the principle of political economy that animated the scope of the commerce power required the Court to recognize a broader reach of that power.[132] In the antitrust context, these changes could justify application of the Sherman Act to activities, such as manufacturing, once thought to be within the exclusive control of states,

129. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111, 125 (1942) (stating that commerce power extends to activity with a substantial effect on interstate commerce, even if effect is merely "indirect"); United States v. Darby, 312 U.S. 100, 123–24 (1941) (explaining that Congress may ban unfair labor practices by firms producing for interstate commerce regardless of volume of production); Nat'l Labor Relations Bd. v. Friedman–Harry Marks Clothing Co., 301 U.S. 58, 75 (1937) (sustaining ban on labor practices at a single clothing factory in unconcentrated market); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–43 (1937).

130. *Cf.* United States v. E.C. Knight Co., 156 U.S. 1, 10–11 (1895) (declining to opine on whether "because others were theoretically left free to go into the business . . . therefore no objectionable restraint was imposed"); People *ex rel.* Annan v. Walsh, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting) (asserting that cartels could not maintain prices above the competitive level without state aid because such prices would immediately attract new entry). As Professor Hovenkamp has explained:

> Within the classical paradigm, monopoly prices could never be earned in any industry unless people were artificially restrained from entering. . . . A mere agreement among sellers to fix prices was of little concern, provided that neither the price fixers nor the state forbade others from entering the field. If the cartel members sought to charge monopoly prices, new competition would immediately frustrate their attempt.

See HOVENKAMP, *supra* note 41, at 282–83; *see also* Meese, *supra* note 69, at 66-67 (explaining how Justice Peckham's *Addyston Pipe* opinion reflected revised understanding of the possible impact of private horizontal price fixing).

131. *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 229–33 (1899); Wabash, St Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 577 (1886); The Debates in the Convention of the State of Pennsylvania, *supra* note 86, at 424; s*ee also Jones & Laughlin Steel Corp.*, 301 U.S. at 41–43 (rejecting defendant's claim that a work stoppage at one of the nation's largest steel companies would have only an "indirect" effect on interstate commerce); *id.* at 41 (stating that such an effect would be "immediate" and perhaps "catastrophic").

132. *See* Lessig, *Fidelity in Translation*, *supra* note 91, at 1224–28.

given the assumption that Congress meant to exercise all of the power it exercised when it passed the Act.[133]

However, the post-1937 revolution in Commerce Clause jurisprudence did more than apply a permanent principle in light of new circumstances.[134] Instead, the Court simply declined to place economically sensible limits on Congress's power. As a result, the Court repeatedly upheld federal legislation dealing with purely local matters, in which the object of legislation did *not*, even in the modern era, extend beyond any particular state.[135] In so doing, the Court often deferred to congressional determinations that the regulated activity, when aggregated with other similar activities, had a "substantial effect" on interstate commerce.[136] In the antitrust context, where Congress had made no such findings, the Court nonetheless extended the Sherman Act to cover purely local restraints with attenuated connections to interstate commerce, reasoning that Congress had meant to exercise the full extent of its commerce authority when it passed the Act.[137] If taken to its logical conclusion, such an approach would confer Sherman Act jurisdiction over *any* private restraint, no matter how local, because any such restraint, when combined with others, would have a substantial effect on interstate commerce.[138] Still, the Court has never followed this logic to its ultimate conclusion, but has instead required a case-by-case assessment to ascertain *some* connection between the defendants' activities (albeit not the restraint itself) and interstate commerce.[139]

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133. *See* HOVENKAMP, *supra* note 41, at 259–60 (describing how states lacked appropriate incentives to develop corporate law preventing anticompetitive mergers).

134. *See generally* Lessig, *Fidelity in Translation*, *supra* note 91.

135. *See, e.g.*, NLRB v. Friedman–Harry Marks Clothing Co., 301 U.S. 58, 75 (1936) (sustaining a ban on unfair labor practices at one clothing factory in an unconcentrated market).

136. *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942); United States v. Darby, 312 U.S. 100, 119–20 (1941).

137. Goldfarb v. Va. State Bar, 421 U.S. 773, 792–93 (1975) (applying the Sherman Act to price fixing for title searches in one county); Burke v. Ford, 389 U.S. 320, 321–22 (1967) (applying the Sherman Act to statewide collusion between Oklahoma's liquor wholesalers). The "objects" of such regulation were confined to Virginia and Oklahoma, respectively, with the result that the interests of individual states aligned with the national interest. Therefore, the logic of *Addyston Pipe*, *Wabash*, and *Gibbons* did not justify federal regulation. *See* Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403 (2004) (contending that it is inappropriate to rely upon aggregation test to establish Sherman Act jurisdiction given absence of congressional findings necessary to justify such an approach).

138. *See generally* Johnsen & Yahya, *supra* note 137, at 444–45 (explaining that Court's post-1937 aggregation test could confer Sherman Act jurisdiction over restraints with a "trivial" impact if taken to logical conclusion); Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 682 n.113 (1993) (stating that application of *Wickard* in the Sherman Act context may result in overlap between state and federal antitrust regulatory authority).

139. *See* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242–45 (1980) (finding Sherman Act jurisdiction when the defendants' activities, and not the restraint itself, had

Third, and less famously, the Court relaxed Dormant Commerce Clause limits on state regulation of interstate commerce, "unshackling" states to regulate commerce that would otherwise have fallen exclusively within Congress's now much-expanded jurisdiction.[140] The post-1937 Dormant Commerce Clause test banned only those state enactments that: (1) expressly discriminated against out-of-state commerce; or (2) while facially neutral, nonetheless substantially burdened interstate commerce without a rational basis.[141] State statutes that are neutral on their face have almost always survived such scrutiny.

The decision in *Parker*, issued in 1943, exemplified such relaxation. It is well known that the Court rejected a Sherman Act challenge to California's coercive reduction in raisin output, 90–95% of which was exported to other states or foreign countries.[142] But the petitioner also claimed that California's scheme contravened the Dormant Commerce Clause, a position seconded by the Solicitor General and famed trustbuster Thurman Arnold, then heading the Antitrust Division.[143] Before 1937, this argument would have failed because Congress lacked the authority to regulate agriculture.[144] However, the recent vast expansion of congressional authority under the aegis of the Commerce Clause placed California's pro-rate scheme squarely within Congress's jurisdiction.[145] Congressional power over such restraints flowed

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a substantial effect on interstate commerce); *cf.* United States v. Or. State Med. Soc'y, 343 U.S. 326, 338–40 (1952) (finding an agreement between Oregon physicians governing prepaid medical care did not restrain interstate commerce); United States v. Yellow Cab Co., 332 U.S. 218, 230 (1947) (finding that collusion on taxi fares between Chicago homes and railroad stations was "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act").

140. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 521 (1997) (reporting that, in 1938, the New Deal Supreme Court "announced a radical reconsideration of the Court's dormant commerce clause jurisprudence" (citing S.C. State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177 (1938))).

141. *See* United Haulers Ass'n, v. Oneida–Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 338–47 (2007); Pike v. Bruce Church, Inc., 397 U.S. 137, 146 (1970); *S.C. State Highway Dep't*, 303 U.S. at 191–96 (sustaining facially neutral regulation of trucks after identifying a rational basis); Gardbaum, *supra* note 139, at 521–32 (recounting in detail these doctrinal developments).

142. *See supra* notes 6–9 and accompanying text.

143. *See* Brief for the United States as Amicus Curiae, *supra* note 8, at 53–91; *id.* at 65 ("A state legislative program eliminating competition on such a scale is irreconcilable with the very essence of the Sherman Act, the preservation of commercial competition in interstate industries.").

144. *See* United States v. Butler, 297 U.S. 1, 68–75 (1936) (voiding agricultural tax as an attempted regulation of agriculture reserved to the authority of the states under the Tenth Amendment); United States v. E.C. Knight Co., 156 U.S. 1, 11–18 (1895); Kidd v. Pearson, 128 U.S. 1, 24–26 (1888).

145. *See* Wickard v. Filburn, 317 U.S. 111 (1942) (sustaining regulation of purely local agriculture). For instance, in *United States v. Borden Co.*, 308 U.S. 188 (1939), the United States successfully challenged collusion between dairies in Illinois and neighboring states setting the price of milk shipped to Chicago. *See* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 435–36 (1966) (describing this enforcement action). Under *Addyston Pipe*, the

naturally from the principles of political economy that informed *Gibbons*, *Wabash*, and *Addyston Pipe*. Given California's monopoly on raisins, new entry could not prevent the restrictions from "directly" restraining interstate commerce.[146] Moreover, as Professor Hovenkamp has explained, the impact of the state-imposed *Parker* restrictions "spilled over" to other states, with consumers in such jurisdictions bearing nearly all the harm flowing from California's restraints.[147] Thus, such restrictions exemplified a case where a state enacted legislation that pursued "its own particular interest[,]"[148] and where the resulting legislation "affect[ed] the commercial interests of all the [s]tates . . . ."[149] Thus, despite (overruled) precedents depriving Congress of authority to regulate agriculture, these new circumstances established that the "essential character" of legislation coercively setting raisin output below the competitive level was "[n]ational," and thus "must . . . belong exclusively to the Federal government."[150] Nonetheless, the *Parker* Court ignored numerous precedents (including *Addyston Pipe*) that seemed to ban such state price and output regulation, which restrained interstate commercial activity, and rejected the plaintiff's Dormant Commerce Clause challenge.[151]

V. APPLYING THE SHERMAN ACT TO STATE RESTRAINTS IN A POST-1937 WORLD

Combined with the Court's refusal to enforce meaningful limits on the scope of Congress's commerce power, this unshackling resulted in a vast increase in the overlap between the power of states and Congress to regulate commercial activity.[152] This overlap, combined with the Court's expansive reading of the Sherman Act, raised two interpretive questions courts did not face before 1937. First, does the Sherman Act preempt unreasonable state restraints of interstate commerce, such as state legislation setting minimum prices or maximum output, as in *Parker*? Second, does the Sherman Act preempt state bans of otherwise reasonable private conduct that qualifies as

participation of the Illinois defendants was beyond the scope of federal antitrust regulation. *See supra* notes 82–86 and accompanying text.

146. *Cf. E.C. Knight Co.*, 156 U.S. at 10–11 (declining to opine on whether ease of entry rendered challenged merger to monopoly innocuous).

147. *See* Easterbrook, *supra* note 17, at 39 ("More than 90 percent of the monopoly overcharge produced by the prorate program (a mechanism for reducing the supply of raisins) thus fell on nonresidents of California."); Hovenkamp, *supra* note 22, at 644–45; Hovenkamp & Mackerron, *supra* note 22, at 769.

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

149. Hinson v. Lott, 75 U.S. 148, 152 (1868).

150. *Id.*; *see also Addyston Pipe*, 175 U.S. at 234.

151. The Court also ignored various decisions invalidating state price regulation of products exported to other states. *See supra* note 101 (collecting such cases); *see also* Meese, *supra* note 28, at 317 n.445 (explaining that decisions *Parker* invoked in support of its Dormant Commerce Clause holding were inapposite).

152. *See* Gardbaum, *supra* note 140, at 510–32; *see also supra* notes 42–47 and accompanying text (discussing examples of overlapping authority pursuant to *Cooley* and its progeny).

interstate commerce? The conventional answer, that Congress declined to impose either form of preemption *because of* "federalism" and "state sovereignty," is simply incorrect, as Professor Hovenkamp has explained. Congress made no such choice.

Thus, the post-1937 interpretive question for antitrust courts can be framed as follows: Given the lack of any conscious decision by Congress regarding the treatment of public restraints, should the Sherman Act nonetheless preempt such restraints? In my view, the case for such preemption is much stronger than the Court (and to a lesser extent, Professor Hovenkamp) has admitted.[153] As *Standard Oil* explained, the Sherman Act empowers courts to fashion a common law of antitrust in light of evolving understandings of the impact of various restraints.[154] Even Justice Scalia, known for his formal, textual approach to statutory interpretation, has assured us that the Sherman Act adopted the common law "along with its dynamic potential."[155] As Chief Justice White said in *Standard Oil*, such flexibility ensured that parties could not evade the "public policy" contained in the Act by adopting harmful practices unknown at common law or practices that, while once deemed benign, are now considered harmful.[156] Moreover, the Supreme Court has repeatedly held that Congress meant to exercise *all* of its constitutional power when it passed the Sherman Act, with the result that the statute now reaches conduct Congress could not reach in 1890.[157] That is why a merger between manufacturers, what the Court called an "indirect restraint" in 1895, can now give rise to a federal case, even if the merger achieves far less than a monopoly.[158] Technology and legal institutions have changed, empowering firms to employ such transactions to control markets and directly restrain interstate commerce. Finally, the Court has told us that the Sherman Act is a "charter of freedom," indeed, "the Magna Carta of free enterprise."[159] No doubt focus on economic liberty has sometimes led the Court astray, as when the Court found that voluntary private restraints that

153. So far as I know, no Justice has ever voted to overrule *Parker*, which itself was unanimous.

154. Meese, *supra* note 119, at 89–92.

155. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890." (citations omitted)); *see also* HOVENKAMP, *supra* note 4, at 69 ("One of the great myths about American antitrust policy is that courts first began to adopt an 'economic approach' to antitrust problems in the relatively recent past. . . . [However,] [a]ntitrust has always been closely tied to prevailing economic doctrine." (footnote omitted)).

156. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60–61 (1911).

157. *See supra* notes 61 & 137 and accompanying text.

158. *See, e.g.*, Fed. Trade Comm'n v. H.J. Heinz & Co., 246 F.3d 708 (D.C. Cir. 2001) (sustaining FTC's challenge to transaction that produced firm with less than 35% of the market).

159. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); s*ee also* Exxon Corp. v. Governor of Md., 437 U.S. 117, 133 (1978) (referring to the Sherman Act as a "charter of economic liberty" (quoting N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958)) (internal quotation marks omitted)).

create wealth *abridged* the liberty of the parties who entered them and defended them vigorously in court.[160] Still, even Justices protective of economic liberty during the *Lochner* era recognized that the Sherman Act protected private firms and individuals *from* certain contracts and thus protected "the freedom of trade" from private restraints.[161] This "super statute" implements the nation's fundamental commitment that "competition rule[s] the marts of trade,"[162] and it is not repealed lightly, expressly or implicitly.[163]

State-imposed direct restraints of interstate commerce were unlawful and thus unknown in that sense when Congress passed the Sherman Act. They also produce the very same harms—sometimes greater harms—than private restraints. The *Parker* restraints reduced output and increased prices and thus produced *more* harm than many unlawful private restraints, some of which courts condemn regardless of harm.[164] The scheme also restrained the actual liberty of the state's raisin growers, unlike the typical private cartel, as membership in the latter is purely voluntary.

In short, state restraints, backed by the threat of jail, fine, or both, do more violence to economic liberty than most, if not all, private restraints. They can also produce more economic harm than many private restraints the Sherman Act condemns. If the Sherman Act reflects a national policy favoring "free competition," economic liberty and the resulting allocation of resources, state restraints that export harm to other states thwart that policy every bit as much as, say, an exemption from the Act at the behest of special interests, something courts are loathe to find.[165] If Congress really did mean the scope of the Sherman Act to expand over time to reach restraints that were

160. *Topco*, of course, exemplified this sort of error. *See* Alan J. Meese, *Antitrust, Regulatory Harm and Economic Liberty*, 99 IOWA L. REV. BULL. 115, 121–22 (2014).

161. *See* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of the rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."); *Standard Oil*, 221 U.S. at 55–56 (explaining that English common law declined to enforce unreasonable restraints in part because of their impact on "the rights of individuals").

162. Times–Picayune Publ'g Co. v. United States, 345 U.S. 594, 605 (1953); *see also* William N. Eskridge Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1231–37 (2001) (discussing the Sherman Act's status as a "super statute" of quasi-constitutional dimensions).

163. *See* Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231 (1979) (emphasizing that courts construe implicit and explicit exemptions from the Sherman Act narrowly).

164. Naked horizontal price fixing, for instance, is unlawful per se regardless of the market position of the parties. Moreover, many ties deemed unlawful per se may actually produce net economic benefits. *See* Alan J. Meese, *Tying Meets the New Institutional Economics: Farewell to the Chimera of Forcing*, 146 U. PA. L. REV. 1, 61–66 (1997).

165. Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 671–72 (7th Cir. 1992) (stating that "courts read [special interest] exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades" (citing, e.g., *Grp. Life & Health Ins.*, 440 U.S. at 231; Nat'l Broilier Mktg. Ass'n v. United States, 436 U.S. 816, 827–29 (1978))).

unknown or beyond its authority in 1890, then surely the Act must preempt state restraints, now that legal developments, some external to the Act, make such preemption possible.[166] That, at least, is what the Roosevelt Administration, including Thurman Arnold, thought in 1943.[167]

Considerations of federalism do not necessarily point in the other direction. The same Court that invokes federalism in support of *Parker* has expanded the Sherman Act to reach conduct that is far more "local" than California's raisin cartel.[168] Any coherent "federalism" or "state sovereignty" that justifies *Parker*, *ARC America*, and *Exxon* includes more than the license to coerce market actors to reduce output or increase prices. Properly understood, such federalism also includes the ability *not* to pass an antitrust statute in the first place, or to pass one that allows defendants to assert a reasonable price defense, for instance.[169] Yet, the same jurisprudence that allows states to impose cartels on multi-million dollar industries exporting their (diminished) output to other states also bans purely local price fixing by private parties with no interstate effect, regardless of the antitrust policy of the state in question. Instead of privileging "federalism," then, decisions such as *Parker*, *Exxon*, and *ARC America* privilege "regulation" over liberty and efficiency.[170] A mere preference for more regulation does not rebut the legal case for preemption sketched above.

There are, of course, arguments militating against such preemption. The persuasiveness of these contentions will turn on the reader's approach to reading statutes and reaction to the current scope of the Sherman Act *vis-à-vis* purely local conduct. As an initial matter, the Sherman Act penalizes "persons" who enter "contracts," "combinations," or "conspiracies," or who "monopolize," "attempt to monopolize," or "conspire to monopolize."[171] States are not "persons" who can "monopolize," and a statute authorizing a state agency to restrict output is certainly not an "agreement," even if

166. *See* Lessig, *Fidelity in Translation*, *supra* note 91, 1214–33 (explaining how change in legal presuppositions can justify changed application of an otherwise unchanged provision).

167. *See* Brief for the United States as Amicus Curiae, *supra* note 8, at 61–62 (noting Congress plainly had the authority "to supersede all state legislation in a field it intends to occupy" and had "'exercised all the power it possessed'" when passing the Sherman Act (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1941))); *id.* at 65 ("A state legislative program eliminating competition on such a scale is irreconcilable with the very essence of the Sherman Act, the preservation of commercial competition in interstate industries."); *id.* at 66 ("The Sherman Act may thus be regarded as a [c]ongressional affirmation of the constitutional doctrine that national interstate commercial interests are not to be subjected to restrictive state legislation.").

168. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 792–93 (1975) (applying Sherman Act to price fixing for title searches in one county).

169. *See* Easterbrook, *supra* note 17, at 30, 40 (contending that *Parker*'s respect for federalism is selective at best).

170. *Exxon*'s expressed fear that Sherman Act preemption would prevent states from imposing unreasonable and wealth-destroying "economic regulation" exemplifies the pro-regulation bias of the Court's antitrust federalism jurisprudence.

171. 15 U.S.C. § 1 (2012).

incumbent producers advocate and welcome the measure.[172] True, such measures can produce the same (or worse) effects as private restraints, but then so can sabotage or slander, neither of which are *ipso facto* antitrust violations.[173] Congress does not pass "purposes," but instead enacts statutory language—language that signals the means Congress chose to further its purpose as well as those means it rejected. Pursuit of such purpose "at all costs" can thus thwart, not execute, Congress's intent.[174]

Moreover, given the Sherman Act's current application to conduct with no meaningful interstate impact, antitrust preemption of state interference with free competition would result in (federal) judicial supervision of purely local regulations. Zoning ordinances, taxicab regulation, occupational licensing—all could give rise to antitrust regulation assessing, say, the reasonableness of a municipality's decision, fully authorized by the state, to suppress billboards (and thus advertising) so as to maintain a bucolic atmosphere and attract tourists.[175] Classical liberals like this author might applaud the results of such litigation—more economic liberty and more wealth. But devotees of an original meaning approach to constitutional interpretation—again like this author—would not applaud the overexpansion of federal power necessary to achieve them.[176]

There is, I believe, a way out of this thicket. In particular, the following solution would: (1) void restraints such as those sustained in *Parker*; (2) avoid Sherman Act preemption of state restraints; and (3) minimize the sort of federal-state tension that *Parker*'s proponents invoke as a rationale for adhering to the decision.

First, the Court should restrict the scope of the Sherman Act so as to implement the principle that Congress embraced in 1890, applied in light of

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172. *See generally* Copperweld v. Independence Tube Corp., 467 U.S. 752 (1984) (emphasizing that section 1 of the Sherman Act only reaches concerted action between otherwise independent economic entities).

173. Hunt v. Crumboch, 325 U.S. 821, 826 (1945) ("[The Sherman] Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.").

174. Rodriguez v. United States, 480 U.S. 522, 525–26 (1987) ("[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."); *see also* United States v. Sisson, 399 U.S. 267, 297 (1970) (A statute "is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes").

175. Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 368 (1991); *cf.* Bates v. State Bar of Ariz., 433 U.S. 350, 359–60 (1977) (relying on *Parker* to reject Sherman Act challenge to state's ban on lawyer advertising); Hovenkamp & Mackerrron, *supra* note 22, at 746–47 (cataloguing various forms of local economic regulation that have given rise to federal antitrust suits).

176. *See* Summit Health Ltd. v. Pinhas, 500 U.S. 322, 343 (1991) (Scalia, J., dissenting) (decrying expansive reading of the Sherman Act that made "routine business torts" the basis for Sherman Act claims thus "destroying a sensible statutory allocation of federal-state responsibility and contributing to the trivialization of the federal courts").

modern economic and legal conditions, governing the (limited) scope of the commerce power. Thus, the Court should ban only those practices that actually restrain interstate commerce and thus impose distinct harm on consumers in more than one state.[177] Such an approach would limit Sherman Act jurisdiction to those instances in which the "object of government extends, in its operation or effects, beyond the bounds of a particular state," with the result that states cannot be trusted to generate optimal rules governing such conduct.[178] While the Act should reach cartels and monopolies that export their products to other states (like the Sugar Trust exonerated in *E.C. Knight*), it should not reach price fixing by lawyers in a single county, bans on lawyer advertising in a single state, or the exclusion of a single physician from a single department of a single hospital.[179] Instead, individual states, which internalize the full impact of such restraints will thus, in competition with one another, generate optimal rules governing such conduct.[180] While antitrust purists may not endorse the results that each jurisdiction might produce, true federalism requires its proponents to take the bitter with the sweet.

Limiting the scope of the Sherman Act along the lines just suggested would, despite the post-1937 unshackling of the states, eliminate most of the tension between federal antitrust law, on the one hand, and state and local regulation on the other.[181] Downsizing the scope of the Act in this manner would also deflate much of the "federalism" concerns that drive support for

177. *See* Johnsen & Yahya, *supra* note 137 (advocating restriction of Sherman Act jurisdiction to those restraints that impact a geographic market that extends beyond a single state); *see also* Easterbrook, *supra* note 17, at 41 (contending that such a limitation on the scope of the Sherman Act would reduce the tension between state regulation and the Sherman Act); *cf.* McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 242–46 (1980) (finding Sherman Act jurisdiction when the defendants' activities, and not the restraint itself, had a substantial effect on interstate commerce).

178. *See* The Debates in the Convention of the State of Pennsylvania, *supra* note 86, at 424; Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 228 (1889); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 574 (1886); *see also* Johnsen & Yahya, *supra* note 137 (resting such an approach upon considerations of "competitive federalism").

179. *See generally* Johnsen & Yahya, *supra* note 137. It should not matter in cases such as *Goldfarb* that individuals who had not yet moved into the state were the nominal purchasers of the cartelized services. *See* Easterbrook, *supra* note 17, at 48 ("The cost of attorneys' services [i.e., the cost of title searches in *Goldfarb*] is simply one component of the price of buying a new house. Real estate and attorneys' time are complementary inputs into housing. If the minimum fee schedules caused the price of attorneys' time to rise, they also caused the price of real estate to fall. The overcharge ultimately was paid by the Virginia residents who attempted to sell real estate.").

180. Easterbrook, *supra* note 17, at 41 (limiting the scope of the Sherman Act to what Congress originally contemplated "would obviate most of the need for accommodation and, incidentally, produce the sort of inter-jurisdictional competition I discuss in this essay"); Johnsen & Yahya, *supra* note 137, at 458 (advocating reduced scope for Sherman Act jurisdiction so as to facilitate competition between states generating statewide antitrust policies).

181. *See* Easterbrook, *supra* note 17, at 41 ("The need for accommodation between state and federal law arises only because the Sherman Act has grown with the growth of the commerce power." (citations omitted)).

Parker. Zoning, lawyer advertising, and regulation of trash collection would all reside beyond the scope of section 1, and the title-search lawyers of Fairfax County could fix fees until their hearts content so far as the Sherman Act is concerned.[182] In the same way, North Carolina dentists could induce state regulators to exclude non-dentists from the purely local practice of teeth whitening.[183] Thus, instead of defending the regulation of billboards or garbage collection from federal intrusion, opponents of preemption would have to defend state raisin cartels and per se bans on reasonable interstate resale price maintenance.[184]

Second, the Court could, at least for now, reiterate that the Sherman Act does not, of its own force, preempt state-imposed restraints. The contrary conclusion, while friendly to liberty, might stretch the meaning of "person," "contract," and "monopolize" too far, ascribing to Congress an important choice that body never made. In any event, as we shall see in a moment, there is an alternate means of achieving the same result that does not require courts to stretch the statute's original meaning.

Third and finally, the Court could take up and consider Professor Hovenkamp's suggestion that the Dormant Commerce Clause interdict those restraints that impose significant spillovers on consumers in other states.[185] To do so, of course, the Court would have to reconsider *Parker*'s less famous holding that a pro-rate scheme that visits nearly all of its costs on consumers in other states is nonetheless consistent with the Dormant Commerce Clause because growers sold to intermediaries and some local consumers purchased raisins as well.[186]

One hopes that the Court reconsidering *Parker*'s Dormant Commerce Clause holding would begin (and hopefully end) with *Gibbons*, *Wabash*, and *Addyston Pipe*. The *Gibbons* decision opined—to be fair, did not hold—that New York's imposition of monopoly over steam navigation in its home waters violated the Dormant Commerce Clause to the extent that the monopoly excluded other steamship owners from carrying passengers and goods between New York and other states. It did not seem to matter to the *Gibbons* court that the monopoly also excluded New Yorkers from intrastate steamship

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182. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 788–93 (1975) (banning agreement on the price for title searches by lawyers in Fairfax County, Virginia).

183. *See generally* Johnsen & Yahya, *supra* note 137.

184. *Cf.* Dr. Miles v. John D. Park & Sons, 220 U.S. 373 (1911) (finding that nationwide minimum rpm scheme directly restrained interstate trade and thus fell within jurisdiction of the Sherman Act).

185. *See* Hovenkamp, *supra* note 22, at 646 (opining that the Dormant Commerce Clause can police "egregious situations in which the impact of state regulation falls almost entirely on out-of-state interests"). Unlike Professor Hovenkamp, I would not limit Dormant Commerce Clause intervention to "egregious" situations but instead to situations in which spillovers are substantial or significant.

186. *See* Parker v. Brown, 317 U.S. 341, 360, 367 (1943) (emphasizing that California's scheme did not "discriminate" against interstate commerce).

travel in New York waters or that some victims of the monopoly were almost certainly New Yorkers who wanted to travel to New Jersey almost as badly as New Jersey residents wanted to travel to New York. In other words, the *Gibbons* monopoly was entirely neutral and did not "discriminate" in the least against citizens from other states. Nonetheless, the Great Chief Justice apparently believed that the resulting exclusion of some vessels from interstate commerce was unconstitutional, regardless whether Congress acted.[187] Moreover, taken together, *Wabash* and *Addyston Pipe* establish that regulations of commerce whose effects spill over from one state to another are best left—in fact, must be left—to the national government or, failing congressional action, the market itself.[188] Indeed, just five years before *Parker*, the Court conceded "that there is scope for [the Dormant Commerce Clause's] like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state."[189] California's pro-rate scheme did exactly that, conferring benefits on California farmers at the expense of citizens in other states, and the Court should overrule *Parker*'s Dormant Commerce Clause holding accordingly.[190]

There is an additional reason to abandon *Parker*'s shelter for state-imposed cartels. Thus far I have applied the *Wabash* and *Addyston Pipe* standard for allocating governmental authority from a "microeconomic" perspective, asking which jurisdiction—federal or state—is better positioned to generate (and decline to generate) rules that lead to an efficient allocation of resources. But we now know something the *Wabash* and *Addyston Pipe* Courts did not know, namely, that restrictions on price and output can have (negative) macroeconomic effects as well. In particular, price floors and output ceilings thwart the process of natural economic adjustment that can moderate downturns and speed economic recovery.[191] According to some,

187. It should also be noted that the monopoly grant excluded New York entrepreneurs as well as those from New Jersey and was thus neutral in this sense as well. One could, however, argue that the *Gibbons* monopoly was discriminatory because the New York legislature would not have made such an award to a non-New York resident. However, the Court's assertion that the monopoly violated the Dormant Commerce Clause does not seem to turn on the residence of the monopoly's recipient.

188. *See supra* notes 53–56, 72–85, 92–101 and accompanying text.

189. S.C. State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 185–86 (1938) (citations omitted).

190. If Congress believes that state-by-state cartelization of such industries is advisable, it can affirmatively authorize such cartelization by statute. Indeed, *Parker* relied in part upon the fact that Congress had itself authorized similar programs for various agricultural products. *Parker*, 317 U.S. at 367–68. However, the decision's Dormant Commerce Clause holding has apparently not been limited to instances in which Congress has implicitly approved the challenged state restraint.

191. *See* N. GREGORY MANKIW, MACROECONOMICS 271–76 (7th ed. 2010); F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 363–65 (2d ed. 1980); Christina D. Romer, *The Nation in Depression*, 7 J. ECON. PERSP. 19, 25 (1993) ("In the conventional textbook model a fall in wages and prices raises real balances, lowers interest rates, and thus stimulates

inflexible prices can also reduce the effectiveness of monetary policy as an anti-recessionary policy instrument.[192] Thus, aggressive antitrust policy and other policies that assure free competition can do more than ensure an efficient allocation of society's resources and thus maximize wealth. Such policies can also help stabilize the macro-economy. No state internalizes the full impact of its economic policies upon the state of (national) aggregate demand and supply.

Nothing, it seems, is more "inherently national" than macroeconomic stabilization policy.[193] The *Parker* Court wrote in an era in which many believed that state-enforced cartelization would bolster, not hamper, economic recovery.[194] Modern economic science reaches the opposite conclusion, teaching that such restraints hamper recovery. Just three years after *Parker*, Congress committed the national government to the promotion of "free competitive enterprise" as part of a larger agenda of price stability and full employment.[195] Both developments bolster the case for overruling *Parker* and its progeny.

The approach just sketched would largely, but not entirely, replicate the institutional framework that Congress believed it was supporting when it passed the Sherman Act in 1890. The Sherman Act (and only the Sherman Act) would reach those restraints that produce meaningful interstate spillovers. States would be free to regulate (or not) restraints of intra-state commerce but not entitled to impose direct restraints on interstate commerce. The ratio between the federal and state regulatory domains would be larger than in 1890, given the changed nature of American industry and the background rules (e.g., corporate law) that support it. Still, the division of regulatory authority and resulting (modern) dual federalism would implement the (immutable) principle of political economy that animated the formative era's dual federalism.

VI. CONCLUSION

The Supreme Court has repeatedly held that the Sherman Act does not preempt state-imposed restraints of interstate commerce, even when such restraints visit substantial harm on consumers in other states. Like several scholars, the Court has invoked considerations of "federalism" and "state sovereignty" to justify this narrow reading of the Act. Thus, the Court has

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investment. The rise in investment serves to counteract at least some of the fall in demand."). *See generally* A.C. Pigou, *The Classical Stationary State*, 53 ECON. J. 343 (1943) (elaborating this argument).

192. *See* Henry C. Simons, *Economic Stability and Antitrust Policy*, 11 U. CHI. L. REV. 338, 343 (1944).

193. *See* U.S. CONST. art. I, § 10, cl. 1 (preventing states from coining money, emitting letters of credit or making anything other than gold or silver coin legal tender for the payment of debts).

194. *See* Meese, *supra* note 28, at 312–15.

195. *See* Employment Act of 1946, ch. 33, 60 Stat. 23, 15 U.S.C. §§ 1021–1026 (2012) (committing national government to "promote free competitive enterprise" and full employment, full production, and price stability).

imputed to the 1890 Congress a decision to allow individual states to impose restraints that do greater harm to the nation's economic welfare than many analogous private restraints that squarely violate the Act.

As Professor Hovenkamp has shown, any such congressional intent is entirely fictitious. In 1890, the Supreme Court enforced a constitutional regime of dual federalism, under which state and national regulatory authority was for all relevant purposes mutually exclusive. For instance, the Court enforced meaningful limits on Congress's commerce power, leaving states with exclusive authority over purely intrastate commerce. At the same time, the Court held that the so-called Dormant Commerce Clause prevented states from enacting laws that imposed direct restraints on interstate commerce. Such dual federalism and the resulting boundaries between state and federal power reflected a basic principle of political economy, namely, that states should possess exclusive jurisdiction over conduct that did not impact other states, while Congress should retain sole authority over that conduct which affected more than one state. Thus, the 1890 Congress had no reason to consider whether the Sherman Act would ban unreasonable state-imposed restraints of interstate commerce. Moreover, the Due Process Clause of the Fourteenth Amendment prevented states from imposing unreasonable restraints of intrastate commerce.

The constitutional framework in place in 1890 collapsed in the late 1930s, creating a regime of overlapping state and federal powers in which states are free to impose wealth-destroying restraints of interstate commerce, so long as such restraints do not expressly discriminate against interstate commerce. These fundamental changes in the constitutional landscape force courts to consider whether the Sherman Act preempts state-imposed restraints that produce the same economic harm as private restrains that violate the Act. This Essay contends that the case for such preemption is stronger than many have recognized, given the long-recognized authority of courts to alter the scope of the Sherman Act in response to changed circumstances. At the same time, the Essay proposes an approach that is less radical than Sherman Act preemption of all state-imposed restraints currently within Congress's jurisdiction. Instead, the Essay proposes that the Court restrict the scope of the Sherman Act so that the statute reaches only that conduct which produces harm in more than one state. Such an approach would restore the original federal–state balance where antitrust regulation is concerned and eliminate many potential conflicts between the Sherman Act and purely local regulation. At the same time, the Court should revitalize Dormant Commerce Clause jurisprudence so as to invalidate those state-imposed restraints that impose significant harm on consumers in other states. Like the proposed reduction in the scope of the Sherman Act, such revitalization will help restore the allocation of regulatory authority extant when Congress passed the Sherman Act.