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# Federalism, Free Competition, and Sherman Act Preemption of State Restraints

Alan J. Meese

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# FEDERALISM, FREE COMPETITION, AND SHERMAN ACT PREEMPTION OF STATE RESTRAINTS

**Alan J. Meese**†

**ABSTRACT**

*The Sherman Act establishes free competition as the rule governing interstate trade. Banning private restraints cannot ensure that competitive markets allocate the nation's resources. State laws can pose identical threats to free markets, posing an obstacle to achieving Congress's goal to protect free competition.*

*The Sherman Act would thus override anticompetitive state laws under ordinary preemption standards. Nonetheless, the Supreme Court rejected such preemption in Parker v. Brown, creating the "state action doctrine." Parker and its progeny hold that state-imposed restraints are immune from Sherman Act preemption, even if they impose significant harm on out-of-state consumers. Parker's progeny also immunizes "hybrid" restraints—private agreements that states encourage or supervise.*

*Both the Supreme Court and numerous scholars have invoked federalism and state sovereignty to justify Parker's state action doctrine. Some suggest that preemption would violate the Constitution. Others contend that these values manifest themselves as canons of construction that illuminate the statute's original meaning. According to these scholars, the Act should not intrude upon traditional state prerogatives unless Congress plainly intended this result.*

*This article demonstrates that federalism and state sovereignty do not rebut the strong case for Sherman Act preemption of state-created restraints. Such preemption would be a garden-variety exercise of*

† Ball Professor of Law, William & Mary Law School and Co-Director, William & Mary Center for the Study of Law and Markets. Professor John Duffy provided valuable comments on a previous draft.

*Congress's commerce power. Moreover, Sherman Act preemption would not interfere with any constitutionally recognized attribute of state sovereignty.*

*Turning to canons of construction, the article concludes that such preemption is so plainly constitutional that the avoidance canon is inapposite. The federal-state balance and anti-preemption canons do protect traditional state regulatory spheres from inadvertent national intrusion. Neither supports Parker itself, which sustained a regime that directly burdened interstate commerce and injured out-of-state consumers. Application of these canons instead reveals that the Court's invocation of federalism is selective at best. Indeed, the Court's rejection of the federal-state balance canon and resulting application of the Act to local private restraints that produce no interstate harm created the very conflict between the Sherman Act and local regulation that the state action doctrine purports to resolve.*

*Consistent application of federalism principles bolsters the case for preemption, albeit within a much smaller sphere than the Sherman Act currently operates. Such considerations counsel retraction of the scope of the Act and concomitant allocation to states of exclusive authority over restraints that produce only intrastate harm. The resulting allocation of authority over trade restraints would nearly eliminate conflicts between local regulation and the Sherman Act and restore the uniform rule of free competition that best replicates the regulatory framework the 1890 Congress anticipated. Proponents of Parker who see states as laboratories for economic experimentation should welcome such reform, which would ironically result in less preemption of state-created restraints and strengthen the institution of competitive federalism.*

## INTRODUCTION

THE Constitution empowers Congress to "regulate commerce among the several States."[1] For nearly two centuries, the Supreme Court has defined this authority as the power to "prescribe the rule by which commerce is to be governed."[2] The Sherman Act exemplifies such regulation, banning contracts and combinations in restraint of interstate commerce as well as conduct that "monopolizes" any "part" of such commerce.[3] Over a century ago, the Supreme Court explained that the Act ensures "the free movement . . . of trade in the channels of interstate commerce" by protecting the "fundamental right of freedom of trade" from unreasonable restraints.[4] Such national regulation, the Court has said, establishes the rule of free competition to govern interstate commerce and prevents public harm such as reduced output, higher prices and inferior quality.

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1 U.S. CONST. art. I, § 8, cl. 3.
2 Gibbons v. Ogden, 22 U.S. 1, 196 (1824).
3 15 U.S.C. §§ 1-2 (1890).
4 United States v. American Tobacco Co., 221 U.S. 106, 180 (1911).

The quintessential unlawful restraint of trade is an agreement between marketplace rivals that reduces output and increases prices. However, banning such private agreements cannot itself ensure that free competition governs interstate commerce. State laws can also obstruct "free movement" of trade and restrain such commerce. Absent some limits on such state-imposed restraints, a Sherman Act that bans only private conduct cannot ensure that free competition is the rule for interstate trade.

When Congress passed the Sherman Act in 1890, the Commerce Clause itself supplied such limits. Numerous decisions in the 1870s and 1880s created a quasi-statutory regime of implied preemption that protected interstate commerce from state legislation that interfered with free interstate trade.[5] These decisions held that Congressional silence with respect to inherently national subjects of interstate commerce indicated Congress's will that such subjects be immune from state regulation and thus "free and untrammeled."[6] According to this jurisprudence, state regulations of intrastate conduct that directly burdened or obstructed interstate commerce improperly *regulated* such commerce, exercising power exclusively granted to Congress.

During the 1890s, the Court read the direct/indirect standard into the Sherman Act, holding that the Act banned only those contracts "in restraint of trade" that also directly burdened interstate commerce. Thus, the Court said, the Act performed the same role with respect to private agreements as the doctrine of implied preemption played with respect to state legislation. Together these two regimes protected free interstate competition from all threats, public and private. Indeed, the Court had no occasion to consider whether the Sherman Act invalidated state-imposed restraints, precisely because the Court's Commerce Clause jurisprudence did exactly that. At the same time, both regimes—Commerce Clause and Sherman Act—left states exclusive authority over local activities that produced no interstate harm and thus only affected interstate commerce indirectly. Competitive federalism generated the rules governing such intrastate commerce.

In *Wickard v. Filburn*, however, the Court jettisoned the direct/indirect standard and vastly expanded the scope of the commerce power.[7] Congress, the Court held, could reach any activity that induces a "substantial economic effect" on interstate commerce, even if the activity impacts interstate

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5 *See infra* 196-206 and accompanying text (describing this jurisprudence).

6 *See e.g.*, Leisy v. Hardin, 135 U.S. 100, 109-110 (1890).

7 317 U.S. 111 (1942).

commerce indirectly and thus produces no interstate harm.[8] The Court soon read the "substantial effects" test into the Sherman Act, holding that the Act reaches local restraints that produce only intrastate harm, if such restraints substantially affect interstate commerce.[9]

This expansion of the commerce power created the potential for employing the doctrine of quasi-statutory implied preemption to interdict state legislation that produced exclusively intrastate harm but indirectly affected interstate commerce. However, the Court coupled this expansion with a concurrent relaxation of the Commerce Clause constraint on anticompetitive state regulation. The resulting case law left states free to impose restraints that directly impacted interstate commerce and injured out-of-state consumers.

Not surprisingly, parties injured by state-imposed restraints invoked the Sherman Act in an effort to interdict such wealth-destroying legislation. They seemed to have a strong case. After all, ordinary preemption doctrine invalidates state laws that "pose an obstacle to the accomplishment and execution of the full objectives of Congress."[10] Because state-imposed restraints interfered with the Congressional goal of ensuring free competition in interstate commerce, such statutes seemed ripe for preemption.

The Supreme Court considered such arguments in *Parker v. Brown*.[11] The plaintiff claimed that the Sherman Act preempted California's scheme to reduce the state's raisin output and increase the price of interstate raisin sales.[12] The Court unanimously rejected the preemption argument, holding that the Act does not invalidate restraints imposed by individual states.[13] Such state action, the Court said, was immune from the Sherman Act, regardless of the nature of the restraints or magnitude of their impact on out-of-state consumers.[14] The Court also rejected the plaintiff's Commerce Clause challenge, despite the scheme's obvious direct impact on interstate commerce.[15] As a result, states were now free, as they were not before *Parker*, to thwart the central policy of the Sherman Act.

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8 *Id.*

9 Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S 219, 229-39 (1948)

10 Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

11 317 U.S. 341, 344 (1943).

12 *Id.* at 348-49.

13 *Id.* at 352.

14 *Id.* at 351-52.

15 *Id.* at 359-68 (rejecting Commerce Clause challenge); *see also infra* notes 203, 214 and accompanying text (explaining how challenged arrangement directly burdened interstate commerce).

The Court has deployed similar logic to immunize certain restraints imposed by private parties and municipalities acting pursuant to state authorization. Under current law, states may immunize private restraints if they clearly articulate their intent to displace competition and, in addition, actively supervise the outcome, particularly price and output, of such restraints.[16] The resulting restraints—sometimes called "hybrid restraints"—are private conduct that would, but for such immunity, violate the Sherman Act. Of course, most private restraints enjoy no such immunity, either because states make no effort to provide it or ban such restraints themselves under their own antitrust laws. Municipal restraints also avoid preemption so long as a state satisfies the "clear articulation" requirement.

The Court has repeatedly and unanimously claimed that considerations of "federalism and state sovereignty" justify state action immunity and thus counsel against Sherman Act preemption of state-imposed or state-authorized restraints. Numerous scholars agree. In particular, the Court and its academic defenders claim that applying the Act to state-imposed restraints would unduly interfere with states' ability to serve as laboratories of democracy, choosing how to regulate their own economies, contrary to the principles of federalism. The vast post-*Wickard* reach of the Sherman Act reinforces this argument, by facilitating application of the Act to local restraints—including those imposed by state governments— that produce no interstate harm. Indeed, aside from *Parker* itself, all state action controversies that have reached the Supreme Court, including the Court's most recent pronouncement on the topic, involve local restraints that produce harm confined to a single state.[17] Thus, some have claimed that, given the expansive scope of the Sherman Act, application of the Act to state-imposed restraints would implicitly resurrect the *Lochner* era, during which the Court invalidated state legislation that unduly restricted private economic autonomy. The state action doctrine, it is said, leaves regulatory choices over local economic activity where they belong, with the people's elected representatives instead of federal judges.

Although the Court decided *Parke*r more than seven decades ago, the "federalism and state sovereignty" rationale for state action immunity remains under-theorized. Some academic articulations of this rationale invoke the Constitution itself, suggesting that preemption of state-imposed restraints

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16 *See infra* notes 121-31 and accompanying text (describing case law articulating this standard).

17 *See* N.C. Bd. of Dental Exam'rs v. FTC, 574 U.S. 494 (2015) (evaluating state-imposed restraints governing sale of teeth whitening services in a single state); *infra* notes 139-40 and accompanying text (discussing *North Carolina Dental*).

would be unconstitutional. Other articulations by the Court and scholars vaguely invoke "federalism," "state sovereignty," or both, without claiming that the Constitution prevents Sherman Act preemption of state-imposed restraints. Some scholars have suggested that *Parker* reflects the application of a federalism canon, albeit without identifying any particular canon. Thus, objective evaluation of *Parker*'s state action defense requires scholars to identify the doctrinal vehicles through which federalism and state sovereignty might influence the meaning of the Act and to determine whether *Parker* and its progeny constitute faithful application of such principles.

This article evaluates and rejects the claim that considerations of federalism and state sovereignty somehow rebut the strong case for Sherman Act preemption of state-imposed restraints. Instead, consistent application of federalism principles *bolsters* the case for preemption of state-imposed restraints, like those in *Parker,* that directly burden interstate commerce and impose interstate harm. At the same time, considerations of federalism also counsel retraction of the scope of the Act and concomitant allocation to the states of exclusive authority over restraints that produce only intrastate harm. The resulting allocation of authority over trade restraints would nearly eliminate the potential conflicts between local regulation and the Sherman Act, conflicts that many claim justify the state action doctrine.

The article identifies two broad categories of arguments that supposedly support the state action doctrine. First, *Parker*'s proponents could claim that one or more constitutional doctrines that protect federalism or state sovereignty somehow prohibit outright Sherman Act preemption of state-imposed restraints. Second, these proponents could argue that such considerations find expression in one or more canons of statutory construction and thereby militate against reading the Sherman Act to preempt such restraints, despite Congress's admitted authority to do so.

The article evaluates the arguments in each category and finds all such arguments wanting. Beginning with the first category, the article demonstrates that no doctrine of constitutional law requires *Parker*'s state action doctrine. Indeed, the Supreme Court has repeatedly concluded that the Framers and Ratifiers adopted the Commerce Clause precisely because of their experience with state-imposed restraints that unduly burdened interstate commerce and imposed harm on out-of-state citizens. According to this historical account, the Clause was designed to empower Congress to prohibit such parochial state legislation, thereby removing barriers to a well-functioning national market and establishing free trade as the rule governing interstate commercial activity.

While affirmative statutory preemption was relatively rare during the Nineteenth and early Twentieth Centuries, the Supreme Court read the Commerce Clause to authorize implied preemption of otherwise valid state legislation that directly burdens interstate commerce. Moreover, as the scope of the power has expanded over the past several decades, Congress has repeatedly exercised this authority to preempt state laws regulating local matters in numerous settings. To be sure, independent considerations of state sovereignty can constrain Congress's exercise of the commerce power. However, Sherman Act preemption of state-imposed restraints does not interfere with a state's organization or regulation of itself, officers, or employees and thus does not interfere with any cognizable aspect of state sovereignty protected by the Tenth Amendment, Eleventh Amendment, or inferred from the structure of the Constitution. Thus, preemption of state-imposed restraints like those challenged in *Parker* is a garden-variety exercise of Congress's commerce power.

To evaluate arguments in the second category, the article identifies three canons of statutory construction that could serve as vehicles for implementing concerns regarding federalism and state sovereignty: (1) the avoidance canon; (2) the federal-state balance canon, and (3) the anti-preemption canon. None of these canons, it is shown, supports *Parker*'s state action doctrine.

The article concludes that Sherman Act preemption of state-imposed restraints is so plainly constitutional that the avoidance canon is simply inapposite. The article then applies the federal-state balance and anti-preemption canons. Both canons protect traditional state regulatory spheres from inadvertent national intrusion, whether by regulation of local private conduct or preemption of state exercise of historic police powers. Far from bolstering the state action doctrine, the application of these two canons reveals that *Parker*'s invocation of federalism and state sovereignty is selective, purporting to solve a problem that the Court itself created. Consistent application of these canons and the federalism principles that inform them actually strengthens the case for Sherman Act preemption, albeit within a much narrower sphere than the Sherman Act currently operates.

The federal-state balance canon addresses statutory regulation of private conduct and thus does not speak directly to state action cases such as *Parker*, where a state itself displaced free competition.[18] The canon could, however, apply to hybrid restraints, private agreements encouraged or enforced by the

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[18] *See infra* notes 121-34 and accompanying text (describing three categories of state action cases).

state. Academic and judicial proponents of the state action doctrine have expressed concern about possible Sherman Act preemption of state and municipal regulation, including hybrid restraints, of local activities that produce no interstate harm. Such federal oversight, they say, would deprive state and local governments of their status as laboratories of democracy that try out novel solutions, such as hybrid restraints, to local problems. Application of the federal-state balance canon to prevent preemption of laws authorizing such restraints would apparently vindicate these concerns.

However, such concerns have much wider application than Sherman Act treatment of state-imposed or state-encouraged restraints. If states are to be sovereign laboratories that experiment with novel solutions to economic problems, they must also retain discretion regarding how to regulate *all* private restraints—not just hybrid restraints—that produce no interstate harm. Indeed, principled application of the federal-state balance canon would have required the Court to reject the post-*Wickard* expansion of the Sherman Act to reach *all* private restraints that produce no interstate harm. The Court instead ignored this canon, vastly expanding the reach of the Act *vis a vis* private restraints the state has not authorized.

This expansion raised the prospect of Sherman Act preemption of local regulation, including regulation authorizing hybrid restraints. *Parker* and its progeny thwarted such preemption, protecting—to this extent anyway—traditional state regulatory prerogatives. Consistent application of the federal-state balance canon offers a different and more principled solution, namely, restoration of the pre-*Wickard* boundary between state and federal power over trade restraints and retraction of the scope of the Sherman Act. Such revision of the boundaries between state and federal authority over such activity would nearly eliminate the potential clash between the Sherman Act and local regulation that purportedly induced *Parker* and its progeny to announce and maintain the state action doctrine. States would remain free to act as laboratories with respect to such restraints, unmolested by the Sherman Act.

Restoration of the original federal-state balance in the antitrust context would not eliminate the prospect of Sherman Act preemption of state-imposed or state-encouraged restraints. States could authorize hybrid restraints that directly burden interstate commerce, thereby injuring out-of-state consumers. However, Sherman Act invalidation of such restraints would in fact *protect* the original federal-state balance, by interdicting the sort of direct burdens on interstate commerce preempted by the Court's pre-*Wickard* Commerce Clause jurisprudence.

The anti-preemption canon fares no better as a justification for the state action doctrine. To be sure, this canon establishes a presumption against

applying federal statutes in a manner that supersedes the exercise of "historic police powers" over "an area traditionally regulated by the states." However, this canon would not protect the scheme in *Parker* itself. The scheme in no way exercised historic police powers but instead regulated a domain—interstate commerce—over which Congress traditionally possessed exclusive authority. California's regulation of the price of interstate raisin sales produced substantial interstate harm and thus would not have survived the doctrine of implied preemption in place when Congress enacted the Sherman Act. Preemption of the *Parker* scheme would have *restored* the traditional federal-state balance, by invalidating self-interested legislation that directly burdened interstate commerce and imposed substantial harm on out-of-state citizens.

What, though, about *Parker*-like regulation that produces only *intra*state harm? Sherman Act preemption of such restraints would certainly interfere with the exercise of historic police powers. Here again, however, application of the anti-preemption canon would solve a problem the Court itself created when it ignored the federal-state balance canon and applied the Sherman Act to private restraints that produced no interstate harm. As noted above, however, principled application of federalism concerns as reflected in the federal-state balance canon would preclude application of the Sherman Act to such restraints—public or private. Restoration of the Sherman Act to its original and more limited scope would eliminate the putative conflict between federal antitrust law and local regulation producing no interstate harm and thus obviate any need to apply the anti-preemption canon.

Application of both federalism canons reveals that federalism in this context should be an all-or-nothing proposition. Consistent regard for federalism requires uniform treatment of private contracts "in restraint of trade" and state-imposed restraints that produce the same results. There are two possible forms of consistent treatment: (1) invalidation of all such local restraints, public or private, "across the board," or (2) reducing the scope of the Sherman Act, so that the Act only reaches those restraints—public or private—that produce interstate harm.

Recognition that the Court's Sherman Act jurisprudence reflects inconsistent regard for federalism does not itself reveal which consistent approach the Court should take. The article ends by identifying several considerations suggesting that the Court should resolve the modern inconsistency in favor of federalism. Consistent reduction in the scope of the Sherman Act would produce a regime governing interstate commerce that best replicates the regulatory framework that the 1890 Congress—jealous to protect free competition from all threats—anticipated. Proponents of *Parker*

who see states as laboratories for economic experimentation should welcome such reform, which, ironically, would result in less preemption of state-created restraints than current law.

Part I of this article reviews the content and scope of the Sherman Act during the pre-*Wickard* era, when the Supreme Court enforced meaningful limits on the scope of the commerce power and the Sherman Act. Part II describes the facts and holding of *Parker* as well as subsequent decisions elaborating on the scope of state action immunity. This part also details the considerations of federalism and state sovereignty that both the Court and academic proponents of *Parker* have invoked. Part III reviews the federalism-based objections to Sherman Act preemption that several scholars have raised. Part IV evaluates and rejects the constitutional arguments against such preemption. Part V evaluates and rejects claims that certain canons of statutory construction counsel in favor of *Parker*'s state action immunity. This part concludes that *Parker* and its progeny rest on a selective respect for federalism and concludes that a principled Sherman Act jurisprudence would consistently enforce or ignore federalism considerations. Part VI briefly contends that the Court should resolve modern doctrinal inconsistency in favor of federalism and reform the scope of the Sherman Act accordingly.

## I. THE COMMERCE POWER AND THE SHERMAN ACT: 1890-PRESENT

Passed in 1890, Section 1 of the Sherman Act forbids "contract[s], combination[s] . . . and conspiracy[ies] in restraint of trade or commerce among the several States . . ."[19] Section 2 prohibits monopolization of any "part of the trade or commerce among the several States."[20] Each Sherman Act controversy thus requires courts to resolve two questions. Under Section 1, courts must ask: (1) Is the challenged agreement "in restraint of trade" *and* (2) does the agreement also restrain "commerce among the several States."[21] Under Section 2, courts must ask: (1) does the challenged conduct "monopolize" a relevant market *and* (2) is that monopolized market "part of the trade or commerce among the several States."[22]

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19 15 U.S.C. § 1 (1890).

20 15 U.S.C. § 2 (1890).

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

22 *Cf.* United States v. E.C. Knight, 156 U.S. 1, 7, 17 (1895) (holding that merger to monopoly did not contravene Section 2 because monopolizing the relevant market only affected interstate commerce "indirectly").

The Sherman Act was an exercise of the commerce power, and Congress drafted the Act against the backdrop of a well-developed jurisprudence defining the scope and nature of that authority.[23] While Congress rarely exercised this power before 1890, the Supreme Court had enforced what became known as the "dormant" Commerce Clause.[24] The Court constructed a quasi-statutory framework that invalidated all state legislation that regulated "inherently national" subjects of interstate commerce, even absent Congressional action.[25] These decisions inferred from Congressional silence that Congress intended that such subjects be "free and untrammeled" from state regulation.[26]

State legislation "regulated" such commerce and thus exercised an exclusive power of Congress if it imposed a "direct burden" on such commerce.[27] Impacts were "direct" if they imposed economic harm on citizens in other states, raising the prospect that state regulation would produce self-interested results.[28] Legislation that impacted such commerce only "indirectly" exceeded the scope of the commerce power and thus survived this regime.[29] The result was the allocation of regulatory authority into mutually exclusive spheres, enforced by a doctrine of implied preemption that invalidated state enactments exercising authority reserved for Congress.[30]

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23 *Id.* at 11-16 (holding that Congress designed the Sherman Act in light of the Court's Commerce Clause jurisprudence).

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

25 *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1092 (2000).

26 *See infra* note 190 and accompanying text.

27 Cushman, *supra* note 25, at 1101-14; *see also* Minnesota v. Barber, 136 U.S. 313, 329-30 (1890) (invalidating state law banning sale of meat not inspected in the state before slaughter); Leisy v. Hardin, 135 U.S. 100, 109 (1890); Bowman v. Chicago & N. W. Ry. Co., 125 U.S. 465, 482 (1888); *infra* notes 204-06 and accompanying text) (describing development of Commerce Clause doctrine distinguishing direct from indirect impacts on interstate commerce).

28 *Barber*, 136 U.S. at 322; *Bowman*, 125 U.S. at 481-82; Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557 (1886).

29 *See* Cushman, *supra* note 25, at 1101-14; *see also* Kidd v. Pearson, 128 U.S. 1, 22-23 (1888) (holding that Commerce Clause does not invalidate state laws impacting interstate trade "indirectly").

30 *See infra* notes 194-210.

The Court's earliest Sherman Act decisions drew upon this jurisprudence to answer both questions necessary to resolve Sherman Act controversies.[31] Agreements were "in restraint of trade" if they directly impacted commerce by producing supracompetitive prices.[32] Such agreements only restrained "commerce among the several States" if these direct impacts injured out-of-state consumers.[33] Indeed, in *Addyston Pipe & Steel Co. v. United States*, the Court opined that the Commerce Clause authorized Congress to regulate private agreements producing such direct effects because these restraints produced the same impact on interstate commerce as analogous state-imposed restraints deemed invalid under the Court's Commerce Clause precedents.[34]

In 1911, the Court famously reformulated its interpretation of "restraint of trade," in *Standard Oil v. United States*.[35] There the Court held that the Sherman Act only reaches agreements or conduct that restrain trade "unreasonably."[36] Soon thereafter, the Court announced that this same standard governed Section 2 analysis.[37] Although a different verbal formulation, this Rule of Reason, like the direct/indirect standard, focused on the propensity of a restraint or conduct to produce monopoly or the consequences of monopoly, namely, higher prices, reduced output, or inferior quality.[38] However, the Court retained the direct/indirect standard for

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31 *See* United States v. E.C. Knight, 156 U.S. 1, 11-18 (1895) (holding that Act did not reach mergers to monopoly as such mergers were indirect restraints within the exclusive jurisdiction of the states).

32 *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235-38 (1899) (invoking findings that restraints produced anticompetitive prices to support holding that impact was direct); *see also* United States v. Joint Traffic Association, 171 U.S. 505, 569-73 (1898) (holding that agreements "directly" impacted commerce because state-conferred advantages protected incumbent railroads from competition); United States v. Hopkins, 171 U.S. 578, 595-96 (1898) (holding that challenged restraints were indirect because they did not produce "exorbitant charges" for interstate transactions).

33 *See Addyston Pipe*, 175 U.S. at 235, 247 (holding that Congress could not reach commerce "wholly within a state," and thus lacked authority over intrastate cartels); *see also* Alan J. Meese, *Antitrust Regulation and the Federal-State Balance: Restoring the Original Design,* 70 AM. U. L. REV. 75, 123-35 (2020) (discussing how *Addyston Pipe* and other decisions defined "restraint of commerce among the several States" to include only those agreements that produced interstate harm).

34 *Addyston Pipe*, 175 U.S. at 229-30 (explaining that "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.").

35 Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 49-69 (1911).

36 *Id.* at 62 (articulating Rule of Reason under Section 1).

37 *See* United States v. Am. Tobacco Co., 221 U.S. 106, 177-84 (1911).

38 *See Standard Oil*, 221 U.S. at 61 (defining "restraint of trade" as "undue restraint of the course of trade" which brings about monopoly or "the same result as monopoly"); *id.* at

answering the second question posed in Sherman Act controversies, that is, whether a contract in restraint of trade or monopolistic conduct also restrained "commerce among the several States" or monopolized any "part" of "trade or commerce among the several States."[39] Thus, the Act reached only those unreasonable restraints or monopolistic conduct that also directly burdened interstate commerce by exercising market power to the detriment of out-of-state consumers.[40]

By 1911, then, the Rule of Reason, combined with the direct/standard governing the Act's scope, protected "the free movement of trade . . . in the channels of interstate commerce"[41] or, as the Court soon put it, "free competition in interstate commerce," from private restraints.[42] At the same time, the Court's quasi-statutory Commerce Clause jurisprudence invalidated state legislation that imposed "direct burdens" on interstate commerce.[43] This coherent legal regime protected free interstate trade from threats posed by the self-interested public and private actors.[44] Implementation of each regime required the Court to ask the same economic question when applying the direct/indirect standard, *viz.*, did the challenged private conduct or legislation directly obstruct or burden interstate commerce. This regime left states and private parties free to adopt regulations or restraints that imposed

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52 (listing "evils" of monopoly as: (1) the power to fix prices; (2) the power to limit output and; (3) reduced quality of the monopolized product); *see also* Alan J. Meese, *Price Theory, Competition and the Rule of Reason*, 2003 ILL. L. REV. 77, 87-89 (describing this aspect of *Standard Oil*'s Rule of Reason).

39 *See* Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933) (strikes aimed at local builders exceeded commerce power and Sherman Act even though they reduced steel purchases from other states); Indus. Ass'n of S.F. v. United States, 268 U.S. 64, 80 (1925) (challenged restraint was intrastate because it did not limit "the freedom of the [out-of-state] manufacturer to sell and ship or of the local contractor to buy."); United Leather Workers v. Herkert & Meisel Trunk Co., 265 U.S. 457, 464-72 (1924) (declining to apply Act to union boycott of trunk manufacturers selling most of their output in interstate commerce); United States v. Patten, 226 U.S. 525, 541-44 (1913) (finding that intrastate restraint cornering New York cotton exchange directly impacted interstate cotton prices); Meese, *supra* note 33, at 88-91 (collecting and discussing additional cases).

40 *See* Meese, *supra* note 33, at 86-88.

41 *See Am. Tobacco Co.*, 221 U.S. at 180.

42 *See* Am. Column Lumber Co. v. United States, 257 U.S. 377, 400-401 (1921) (collecting decisions holding that "the purpose of the statute is to maintain free competition in interstate commerce[.]").

43 *See infra* notes 203-05 and accompanying text.

44 *See* Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 CORNELL J.L. & PUB. POL'Y 255, 266-75, 279-80 (2013) (explaining how combination of Commerce Clause doctrine and Sherman Act ensured that "free competition" governed interstate commerce).

indirect burdens on such commerce, as such provisions posed no threat to out-of-state consumers.

This unified competition-protecting regime survived into the 1930s, invalidating private and public direct burdens on interstate commerce.[45] Indeed, the Court had no occasion to consider whether the Sherman Act preempted state legislation that directly burdened interstate commerce precisely because the Court's quasi-statutory Commerce Clause jurisprudence itself preempted such restraints, rendering any Sherman Act involvement superfluous.

The Court adjusted application of the direct/indirect standard over time in light of changed facts that suggested the existence of interstate harm that prior Courts had not perceived.[46] For instance, early decisions, such as *United States v. E.C. Knight*, held that the Sherman Act did not reach intrastate monopolies, even if such firms sold products across state lines.[47] However, beginning with *Standard Oil*, the Court read the Act (and the commerce power) to reach activities that, while nominally local, "directly" *affected* interstate commerce by exercising market power to the detriment of out-of-state consumers, narrowing *E.C. Knight* accordingly.[48] While the effective reach of the commerce power and the Sherman Act changed, the interstate harm principle that governed the boundary between state and national power—and the concomitant economic inquiry—remained fixed and unchanging.[49] A robust regime of competitive federalism generated regulatory policy, including antitrust policy, governing economic activity that

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45 *See, e.g.*, Baldwin v. G.A.F. Seelig Inc., 294 U.S. 511 (1935) (invalidating state statute banning importation from other states of low-priced milk as a "direct burden" on interstate commerce); Local 167, Int'l Brotherhood of Teamsters v. United States, 291 U.S. 293, 297 (1934) (holding that local conspiracy among marketmen to raise the price of chickens shipped in interstate commerce directly burdened such commerce and violated the Sherman Act); Levering & Garrigues Co. v. Morrin,, 289 U.S. 103, 105-08 (1933) (Sherman Act did not reach strikes impacting local firms purchasing steel from out-of-state producers).

46 *See* Meese, *supra* note 33, at 144-47.

47 156 U.S. 1, 11-18 (1895).

48 *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 59-60 (1911) (rejecting defendants' claim that the Act did not reach mergers between manufacturers that advanced a scheme to monopolize interstate commerce); United States v. Am. Tobacco Co., 221 U.S. 106, 184 (1911) (holding that the combination of the tobacco companies was a "restraint of trade within the [first] section, and an attempt to monopolize or a monopolization within the [second] section of the anti-trust act"); United States v. Patten, 226 U.S. 525, 541-44 (1913) (finding that intrastate restraint cornering New York cotton exchange directly burdened interstate commerce); *see also* Meese, *supra* note 33, at 88-90, 144-147 (recounting development of this case law).

49 Meese, *supra* note 33, at 113-14, 144-47.

produced no interstate harms and thus fell within the exclusive authority of states.

This coherent regime and resulting allocation of regulatory power did not survive the 1940s. In *Wickard v. Filburn*, the Supreme Court famously jettisoned the direct/indirect test as the standard governing the scope of the commerce power, claiming that the standard was mechanical, formalistic and unduly restricted the authority of Congress.[50] Instead, the Court said: the Commerce Clause empowered Congress to reach any activity that produced a "substantial economic effect" on interstate commerce, even if the effect was incidental or indirect.[51] This novel standard empowered Congress to regulate conduct that produced no interstate harm and thus could not prompt legislation favoring a state's citizens over those of other states.[52] *Wickard* also implied that state and federal power over local activity was coextensive and thus not mutually exclusive, as the Court had previously maintained for several decades.[53]

*Wickard* was not an antitrust case. However, before the decade was out, in *Mandeville Island Farms v. American Crystal Sugar*, the Court engrafted *Wickard*'s substantial effects test onto the Sherman Act, overruling five decades of precedent.[54] As a result, the Act reached any restraint of trade that induced a "substantial effect" on interstate commerce, even if the restraint's harms were confined to a single state. The Court has applied the Act to intrastate conspiracies between liquor wholesalers,[55] a monopolistic scheme to prevent expansion of a single hospital,[56] an agreement between lawyers setting title search fees in one county,[57] and a trade association's conspiracy to restrict entry by subcontractors working on local building projects.[58]

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50 317 U.S. 111, 125 (1942) (conduct "may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'").

51 *Id.*

52 *See* Meese, *supra* note 33, at 93-95.

53 *See infra* notes 193-210 and accompanying text.

54 Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S 219, 229-39 (1948); Meese, *supra* note 33, at 93-95 (describing *Mandeville Island Farms*' embrace of substantial effects test).

55 *See* Burke v. Ford, 389 U.S. 320, 322 (1967) (challenged intrastate agreement between state's liquor wholesalers produced substantial effects on interstate commerce because defendants would purchase more out-of-state liquor "if free competition prevailed").

56 *See* Hosp. Bldg. Co. v. Trs. Rex Hosp. Trustees, 425 U.S. 738, 743-44 (1976) (Act reached scheme to prevent 49 bed hospital from expanding because, *inter alia*, an expanded hospital would purchase additional supplies from out-of-state vendors).

57 *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 783-86 (1975) (Sherman Act reached agreement fixing prices for title searches in a single county). To be sure, some home buyers in *Goldfarb* were from other states. However, as then-Professor Easterbrook

Most recently, the Court affirmed the Federal Trade Commission's condemnation of an agreement excluding some individuals from the practice of teeth whitening in one state.[59] The Commission had found that the challenged conduct substantially impacted interstate commerce because some affected firms purchased out-of-state equipment and supplies.[60] Numerous other decisions have also involved restraints that produced harmless but fortuitous interstate effects.[61]

*Mandeville Island Farms* read a novel principle into the Act, a principle that authorized application of the statute to restraints that threatened no interstate harm. While initially developed to govern private restraints, *Mandeville Island Farms'* substantial effects test created broad potential to interdict state-imposed restraints of local trade previously deemed beyond the commerce power.[62]

## II. *PARKER* AND ITS PROGENY

*Parker v. Brown* evaluated the post-*Wickard* claim that the Sherman Act preempted anti-competitive state regulation. This part describes the facts and holding of *Parker* as well as subsequent decisions expanding the scope of state action immunity and elaborating upon its rationale. The part ends by detailing the considerations of federalism and state sovereignty that both the Court and academic proponents of *Parker* have invoked.

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explained, Virginia residents bore the overcharge. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23, 48 (1983) ("[T]he overcharge [in *Goldfarb*] is paid by residents of Virginia. This is so even for . . . housing purchases by persons seeking to move into Virginia . . . . The cost of attorneys' services 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.").

58 *See* United States v. Employing Lathing Div., 347 U.S. 198 (1954) (Sherman Act reached conspiracy to restrict entry into vocation of lathing for Chicago building projects because lathers used supplies imported from out-of-state).

59 N.C. Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 504-15 (2015).

60 *In re* N.C. Bd. of Dental Exam'rs, No. 9343 (2011) at 37 ("The ALJ found that the [defendant's] acts have a substantial effect on interstate commerce."); *id.* at 60-61 (ALJ decision) (invoking "[p]urchases by defendants of out-of-state goods" to support finding that conspiracy "substantially affects interstate commerce.") (citing *Rex Hospital*).

61 *See supra* notes 55-58 (collecting additional decisions applying Sherman Act to intrastate conduct producing no interstate harm).

62 *See* Rebecca Haw Allensworth, *The New Antitrust Federalism,* 102 VA. L. REV. 1387, 1394 (2016) (after *Wickard* "the boundaries of the Sherman Act grew to reach any state regulation that had even a small effect on interstate trade.").

### A. *Parker v. Brown*

Decided shortly after *Wickard* but before *Mandeville Island Farms*, *Parker v. Brown* considered a challenge to California's "Agricultural Prorate Act," as applied to the state's raisin industry.[63] The Court properly described the Act as an effort to "restrict competition among growers and maintain prices in the distribution of their commodities to packers[.]"[64] The statute empowered a State Agricultural Prorate Commission to propose to growers so-called "pro-rate marketing plans" limiting output and thus raising the prices of agricultural commodities. Proposals became law if 65 percent of growers owning 51 percent or more of acreage devoted to a particular crop voted to approve it.

California farms produced 100 percent of the nation's raisin output, and imports accounted for one-sixth of one percent of national raisin consumption.[65] Growers generally sold their output to local "packers," who packaged the raisins and sold 90-95 percent to out-of-state purchasers.[66] In 1940, the Commission proposed and producers adopted a raisin pro-rate plan. The plan required the state's growers to deliver 70 percent of their output of "standard raisins" to a "program committee" which could only sell raisins at "prevailing market prices" or hold them off the market indefinitely.[67] Growers were free to sell the remaining crop through "ordinary commercial channels" at whatever price they wished, albeit only after purchasing a "marketing certificate" authorizing such sales.[68] The Act imposed civil penalties, fines and/or imprisonment for violation.[69] Thus, the Act coercively replaced the pre-existing regime of free competition between private individuals with market outcomes determined by the State.

A dissenting farmer who was both a grower and a packer challenged the program under the Commerce Clause and the Sherman Act.[70] The plaintiff

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63 317 U.S. 341, 346-48 (1943) (describing the Act); *see also* H.R. 754, 50th Reg. Sess. (Ca. 1933).

64 *See Parker*, 317 U.S. at 346 (describing the purpose of the statute in this manner).

65 *See* Brief for the United States as Amicus Curiae at 4 n.5, Parker v. Brown, 317 U.S. 341 (1943) (No. 46).

66 *Parker*, 317 U.S. at 345.

67 *Id.* at 347-48.

68 *Id.*

69 *See id.* (describing criminal and civil penalties imposed for violation of the Act).

70 *See* Amended Complaint ("Complaint") for Injunction at ¶ VI, Brown v. Parker, No. 78 Civ. (December 28, 1940), (identifying plaintiff as both a grower and a packer); *id.* at ¶ I (stating that the action "arise[s] under Article I, Section 8, Cl. 3 and Title 15 Sections 1 through 33 of the United Stated Code."). The complaint also alleged that various farmers had delivered "approximately 100,000 tons of raisins to the defendant zone" under the

sought to enjoin officials from enforcing the Act against him, thereby allowing him to continue setting whatever price and output maximized his profits in a free market.[71] He argued that such equitable relief was necessary because the Act's "unusual, oppressive and unreasonable" criminal penalties deterred him from waiting to be prosecuted under state law before invoking the Commerce Clause and Sherman Act as "defensive tactics," *i.e.*, as affirmative defenses.[72] In short, the plaintiff invoked two possible sources of federal preemption: the Sherman Act and the Commerce Clause.[73]

Writing before *Wickard*, a three-judge district court enjoined the Act.[74] The court held that the Prorate Act, while regulating local activity, directly burdened interstate commerce and thus contravened the quasi-statutory regime of implied preemption derived from the Commerce Clause.[75] The court invoked with approval various decisions implementing the pre-*Wickard* regime dividing authority over commercial subjects between states and the national government.[76] Given the court's Commerce Clause holding, it did not address the Sherman Act.[77]

California appealed to the Supreme Court, which, after oral argument, ordered re-argument and additional briefing, including from the United States

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program and that the "defendants were withholding said raisins from interstate commerce *in restraint of trade and for the purpose of maintaining monopoly prices.*" *See* Complaint at ¶ XII (emphasis added).

71 *Id.* ¶ VI (alleging that pro-rate scheme would prevent plaintiff from complying with preexisting agreements to ship raisins in interstate commerce and from entering new agreements, reducing his profits).

72 *See* Complaint ¶ VIII (alleging "that plaintiff is deprived by reason of said act and program of his right to dispose of his raisins in interstate commerce").

73 *See supra* text accompanying notes 62-64; *cf.* PHILLIP E. AREEDA & HERBERT HOVENKAMP, I ANTITRUST LAW ¶ 217d, at 404 (4th ed. 2013) ("*Parker* was necessarily, although perhaps implicitly, a holding that the state statute was consistent with the federal statute and therefore was not preempted by it.") (emphasis in original).

74 Brown v. Parker, 39 F. Supp. 895 (S.D. Cal. 1941).

75 *See id.*; *see also infra* notes 196-206 and accompanying text (describing pre-*Wickard* Commerce Clause doctrine preempting state statutes imposing direct burdens on interstate commerce).

76 *See, e.g.*, *Parker*, 39 F. Supp. at 899 (invoking United Leather Workers v. Herkert, 265 U.S. 547 (1924) (Sherman Act); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922) (Commerce Clause); Simpson v. Shepard, 230 U.S. 352, 399 (1913) (Commerce Clause)); *id.* at 899 ("The grant in the Constitution of its own force, that is, without action by Congress, established the essential immunity of interstate commercial intercourse from the direct control of the states with respect to those subjects embraced within the grant which are of such a nature as to demand that, if regulated at all, their regulation should be prescribed by a single authority.") (quoting The Minnesota Rate Cases, 230 U.S. 352, 399 (1913)).

77 *See supra* notes 45-46 and accompanying text (explaining how quasi-statutory Commerce Clause regime rendered Sherman Act oversight of state-imposed restraints superfluous).

as Amicus Curiae, on the possible application of the Sherman Act.[78] In a brief co-authored by antitrust hawk Thurmond Arnold, the United States argued that both the Sherman Act and the quasi-statutory regime derived from the Commerce Clause preempted California's scheme. The whole point of the Act, the government said, was to ensure that "competition, not combination, should be the law of trade."[79] The "end sought," the government continued, was "the prevention of restraints of free competition in business and commercial transactions, which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers of goods or services."[80] While the Sherman Act did not expressly refer to state enactments, the Court's precedents established that a federal statute preempted any state law "that stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[81]

Invoking pre-*Wickard* antitrust decisions applying the direct/indirect standard, the government contended that California's regulation of local activity, in fact, monopolized the national raisin market and thus increased (*i.e.* regulated) the price of raisins sold in interstate commerce.[82] There was "no doubt," the government said that "the plan involved in this case controls the market price," which increased thirty percent one year after the adoption of the scheme.[83] It did not matter that the growers sold their output to California packers.[84] Sherman Act precedent established that agreements to "restrain or control the supply . . . entering and moving in interstate commerce" were "a 'direct violation'" of the Act.[85] Because the plan reduced output and increased the prices paid by packers, the scheme would "undoubtedly directly affect and restrain the supply and price of raisins in interstate commerce."[86] The pro-rate plan was "inconsistent with the policy embodied in the Sherman Act" and thus preempted.[87]

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78 *See* Cantor v. Detroit Edison, 428 U.S. 579, 587-89 (1976) (describing this procedural history).

79 Brief of the United States as Amicus Curiae at 54, Parker v. Brown, 317 U.S. 341 (1943) (No. 46) (quoting Fashion Originators Guild v. FTC 312 U.S. 457, 465 (1941)).

80 *Id.* (quoting Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 (1940)).

81 *Id.* at 52 (quoting Hines v. Davidovitz, 312 U.S. 52, 67 (1941)).

82 *Id.* at 55 ("There could hardly be, we submit, a clearer case of monopolization of interstate and foreign commerce than exercise of control over the marketing of the nation's entire supply of a commodity.").

83 *Id.* at 57.

84 *Id.* at 58.

85 *Id.* at 57 (quoting Coronado Coal Co. v. United Mine Workers, 268 U.S. 295, 310 (1925)).

86 *Id.* at 58 (citing Local 167 v. United States, 291 U.S. 293 (1934); United States v. Patten, 226 U.S. 525 (1913)); *see also* AREEDA & HOVENKAMP, *supra* note 73, ¶ 217d, at 404

The government's Commerce Clause argument echoed similar themes. "Inherently national subjects" of interstate commerce, the government said, were subject to exclusive congressional control.[88] The Court's precedents "regarded as a matter of great consequence whether the burden of a statute fell primarily upon persons outside of the regulating state."[89] "If anything was of national commercial importance," the government continued, "the supply and price level of a commodity moving in interstate commerce falls into that category."[90] Moreover, the program plainly regulated that subject, granting to a state agency the power to "monopolize the entire national supply of raisins, determine the quantity to be shipped in interstate commerce, and to control the interstate price structure."[91] The benefits of the scheme "accrued to California Producers," with the result that "the action of the state is not likely to be subjected to the normal political restraints upon legislation."[92] The program did not merely govern a matter of local concern but instead "determine[d] the quantity of raisins which may go to market—and the market is the national interstate market."[93] Based on these and other considerations, the government concluded, "the California raisin program is unconstitutional."[94]

A unanimous Court rejected both challenges. The Court properly assumed that the Sherman Act would condemn such a program if adopted and enforced solely by private agreement.[95] While the scheme limited the output of "local" crops, the resulting harm fell almost entirely on out-of-state

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("[T]he effect was to displace the competitive market in raisins for the benefit of California producers at the expense of consumers throughout the country.").

87 Brief for the United States as Amicus Curiae at 54, Parker v. Brown, 317 U.S. 341 (1943) (No. 46).

88 *Id.* at 74-76.

89 *Id.* at 79.

90 *Id.* at 80.

91 *Id.*

92 *Id.* at 81.

93 *Id.* at 83.

94 *Id.*

95 *Id.* at 350 ("We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons."). *Cf.* United States v. Socony-Vacuum & Oil Co., 310 U.S. 150 (1940) (condemning agreement between refiners designed to stabilize price of retail gasoline by coordinating spot market purchases); United States v. Am. Linseed Oil Co., 262 U.S. 371, 389 (1923) (condemning "agreement which took away [defendants'] freedom of action [and] subjected [defendants] to an autocratic Bureau, which became organizer and general manager [of the industry].").

citizens. These direct and predictable interstate harms justified application of the Act to nominally "local" conduct, even under pre-*Wickard* precedents.[96]

Beginning with the Sherman Act, the Court conceded for the sake of argument that Congress could preempt state-imposed restraints like California's plan.[97] In particular, the Court noted with approval several decisions holding that Congressional legislation had occupied a "legislative field" and thus "suspended" state laws.[98] Suspension, of course, was synonymous with preemption, and such decisions exemplified what the Court now calls "field preemption."[99] The Court did not mention decisions invoked by the United States recognizing "conflict preemption," which invalidated state laws creating obstacles to the accomplishment of federal objectives.[100]

Still, the Court found that the Sherman Act did not "suspend" California's pro-rate plan. The plan was not, the Court said, a private agreement but "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."[101] Neither the Act's language nor its legislative history, the Court said, evinced any purpose "to restrain a state or its officers or agents from activities directed by its legislature."[102]

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96 *See supra* notes 31-34, 39-40 and accompanying text (describing pre-*Wickard* Sherman Act case law defining boundaries between state and federal authority over trade restraints).

97 *See* Parker v. Brown, 317 U.S. 341, 350 (1943).

98 *Id.* There were, of course, numerous additional decisions holding that Congress had implicitly preempted state legislation regulating local activities that nonetheless directly impacted interstate commerce. *See infra* notes 203-06 and accompanying text.

99 *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 782 n.39 (1994) (distinguishing field preemption from other forms of preemption); *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (discussing various forms of preemption, including field preemption).

100 *See* Brief for the United States as Amicus Curiae at 52, Parker v. Brown, 317 U.S. 341 (1943) (No. 46) (citing Hines v. Davidovitz, 312 U.S. at 67 and Savage v. Jones, 226 U.S. 501 (1912)); *see also* Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 82 (2006) (asserting that *Parker* "ignored *Davidovitz* and the preemption standard it articulated").

101 *See Parker*, 317 U.S. at 350.

102 *Id.* at 350-51; *id.* at 351 ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."); *id.* ("That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations abundantly appears from its legislative history.") (citing Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 n.15 (1940); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898); Standard Oil Co. v. United States, 221 U.S. 1, 54-58 (1911). Neither *Apex Hosiery*, *Addyston Pipe* nor *Standard Oil* addressed the application of the Sherman Act to state-imposed restraints. Indeed, *Standard Oil* opined that state-imposed monopoly of interstate commerce was absent from the United States because of "the structure of our Government." *See Standard Oil*, 221 U.S. at 54, 57. While the Court did not identify which aspect of that

The Court expressly invoked federalism considerations to support this conclusion, contending that the Constitution's division of sovereignty between national and state governments counseled against application of the Sherman Act to such restraints:

> 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.[103]

The statute's legislative history contained no indication that the Act would apply to such state action, the Court said, and the main sponsor of the bill, Senator Sherman, had asserted that it "prevented only 'business combinations.'"[104]

Having rejected the Sherman Act challenge, the Court went on to reverse the lower court's Commerce Clause holding that invalidated the scheme.[105] The Court conceded that California's regulation of "matters of local concern" was "so related to interstate commerce that it also operated as a regulation of that commerce," that is, the interstate sale of raisins.[106] Under pre-1890 (and pre-*Wickard*) case law, this conclusion that a state was regulating the price of interstate transactions or transportation sufficed to invalidate the scheme.[107] However, Congress had not, the Court said, exercised its commerce power (given the Court's Sherman Act holding!), with the result that the Court

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structure prevented such monopolies, the most obvious possibility was the Court's quasi-statutory jurisprudence holding that the Constitution granted Congress exclusive authority over inherently national subjects of interstate commerce. *See infra* notes 196-210 and accompanying text.

103 *See Parker*, 317 U.S. 341, 351 (1943).

104 *Id.*

105 *Id.* at 359-68.

106 *Id.* at 362.

107 *See infra* notes 204-06 and accompanying text; *see also* Rhode Island v. Attleboro Elec. Co., 273 U.S. 83 (1927) (invalidating state regulation of the price of electricity exported to other states); Missouri v. Kan. Nat. Gas Co., 265 U.S. 298 (1924) (invalidating regulation of the price of natural gas exported to other states); Balt. & Ohio Sw. R.R. v. Settle, 260 U.S. 166 (1922) (invalidating regulation of interstate rail rates); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922) (invalidating regulation of the price of grain exported to other states after sale to local elevators); United Fuel Gas Co. v. Hallanan, 257 U.S. 277 (1921) (invalidating state regulation of natural gas prices even though regulated party resold such gas to intrastate parties before export to other states); Swift & Co. v. United States, 196 U.S. 375 (1905) (finding that Sherman Act reached conspiracy between meatpackers to reduce purchase prices for local beef because such practices directly impacted interstate commerce, their "object of attack").

should "reconcile[]" Congressional and state power.[108] Such "reconciliation," the Court said, required "the accommodation of competing demands of state and national interests involved."[109]

Analogizing to *Wickard*, the Court rejected the direct/indirect standard for assessing the validity of the restraints, signaling that even direct restraints of interstate commerce could survive Commerce Clause scrutiny.[110] The inquiry was not, the Court said, whether the restraint was "direct," (as it assuredly was), but instead whether "the matter is one which may appropriately be regulated in the interest of safety, health and well-being of local communities and, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress."[111] Because of the activity's "local character," the Court said, there might be a "wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and *without materially obstructing the free flow of commerce*."[112] The Court did not explain why the impact of California's self-interested control over the nation's entire raisin supply was "[im]material."[113] Nor did it mention various decisions invalidating state regulation of the price and output of products subsequently sold across state lines because they "directly impacted" such commerce.[114]

The Court confined its Sherman Act holding to state-imposed restraints on market actors. Such restraints coercively restricted the rights of individuals to engage in the sort of free competition the Sherman Act

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108 *Parker*, 317 U.S. at 362.

109 *Id.*

110 *See id.* at 362-63 ("Such regulations by the state are to be sustained not because they are 'indirect,' rather than 'direct,' no[r] because they control interstate activities in such a manner as only to affect commerce, rather than to command its operations." (citation omitted)).

111 *Id.*

112 *Id.* (emphasis added) (citing The Minnesota Rate Cases, 230 U.S. 352, 398-412 (1913) and California v. Thompson, 313 U.S. 109, 113 (1941)). Neither decision cited was particularly apposite. *Minnesota Rate Cases* involved regulation of rates for *intra*state travel, regulations that impacted interstate travel only "indirectly." *See id.* at 410-11. *Thompson* involved licensure of transportation agents whose participation in interstate commerce was incidental to their primary *intra*state business. By contrast, the output restrictions in *Parker* directly impacted interstate commerce and injured out-of-state purchasers.

113 *See* Meese, *supra* note 44, at 316-19 (critiquing *Parker* on this ground); Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 482, 528-30 (1997) (describing how *Parker* exemplified relaxation of Commerce Clause restrictions on state regulation of interstate commerce during the 1940s).

114 *See supra* note 107 (collecting cases).

ensures.[115] By contrast, the Court said, a state could not "give immunity to those [private parties] who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[116] Nor, *Parker* said, could a state participate in otherwise unlawful agreements or combinations with private parties.[117] The Court thereby conceded that the Act *would* preempt some state laws, presumably because such state endorsed conduct or conduct of the state itself would nonetheless conflict with federal law.[118]

Thus was born antitrust's "state action doctrine," whereby state-imposed restraints of interstate commerce are "immune" from the Sherman Act, regardless of their economic effects.[119] *Parker* has remained good law without question for more than seven decades, despite the Court's flexible approach to *stare decisis* in the antitrust context.[120]

### B. *Parker*'s Progeny: Hybrid and Municipal Restraints

While *Parker* purported only to immunize restraints imposed by "a state or its officers or agents," subsequent decisions expanded the doctrine. These cases protected restraints that private parties adopted pursuant to otherwise valid state regulatory programs, reasoning that the threat of private antitrust liability would deter parties from participating in such schemes.[121] Indeed,

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115 *See supra* notes 41-42 and accompanying text (discussing early decisions reading Sherman Act in this manner).

116 *See* Parker v. Brown, 317 U.S. 341, 351 (1943).

117 *Id.* at 450 (citing Union Pac. R.R. Co. v. United States, 313 U.S. 450 (1941)).

118 *See* Milton Handler, *The Current Attack on the* Parker v. Brown *State Action Doctrine*, 76 COLUM. L. REV. 1, 15 (1976) (endorsing *Parker*'s holding but conceding that purported state approval of such agreements "would violate the very concept of preemption and federal supremacy"); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (describing and applying conflict preemption standards).

119 AREEDA & HOVENKAMP, *supra* note 73, ¶ 221a, p. 76 (defining "state action immunity"); State Oil v. Khan, 522 U.S. 3 (1997) (Sherman Act authorized Court to generate antitrust doctrine in a common law fashion despite considerations of *stare decisis*). While *Parker* invoked Olsen v. Smith, 195 U.S. 332 (1904), the latter involved state regulation of pilotage, a subject over which Congress and the states possessed overlapping jurisdiction. *See* Cooley v. Bd. of Wardens, 53 U.S. 299 (1852). Thus, the Court's Commerce Clause doctrine of implied preemption was inapposite. If anything, *Olsen* confirms the symmetry between the Sherman Act and the doctrine of implied preemption.

120 *See, e.g.*, City of Columbia v. Omni Outdoor Advert., 499 U.S. 365 (1990) (invoking *Parker* to reject challenge to local regulations limiting entry into billboard market); Fisher v. City of Berkeley, 475 U.S. 260 (1985) (rejecting Sherman Act challenge to California rent control statute despite finding that regulation produced same effect as private collusive rent ceilings).

121 *See* FTC v. Ticor, 504 U.S. 621, 633 (1992) ("The principle of freedom of action for the States adopted to preserve the federal system explains the later evolution and application

some such regimes require all parties in a particular industry to adhere to prices set by a subset of the industry's firms.[122] For instance, a statute might require liquor dealers to set retail prices equal to wholesale prices plus a specified mark up.[123] Some scholars have dubbed such agreements "hybrid restraints," whereby "the government empowers private firms to make choices, or to exercise discretion, as to the nature or level of consumer injury."[124] Such restraints "cede[] to private actors 'a degree of private regulatory power' that results in a restraint of trade"[125] States can immunize such private restraints from the Sherman Act, and thus escape preemption, if: (1) the legislature clearly articulates a policy to restrict competition and (2) the state "actively supervises" the outcomes (*e.g.* price and output) of resulting restraints.[126] The liquor regulation just described would satisfy the first part of this test because the state has expressly supplanted competition. Thus, the scheme's validity would depend upon how closely the state scrutinized resulting prices.[127]

Such "hybrid" restraints are a small subset of the universe of unreasonable private restraints. Indeed, states' own antitrust laws generally ban unreasonable private restraints.[128] When it comes to private restraints, hybrid restraints are the exception and not the rule.

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of the *Parker* doctrine"); Patrick v. Burget, 486 U.S. 94, 99-100 (1988) ("[T]he Court subsequently recognized that *Parker's* federalism rationale demanded that the state action exemption also apply in certain suits against private parties. If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them.") (citing S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985)).

122 *See Ticor*, 504 U.S. at 625-31 (describing such a regulatory scheme).

123 *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (describing such a scheme).

124 *See* John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. REG. 269, 286 (2003).

125 *Id.* at 286 (quoting *Fisher*, 475 U.S. at 268 (citing Rice v. Norman Williams Co., 458 U.S. 654, 666 (1982) (Stevens, J., concurring))).

126 *Ticor*, 504 U.S. at 625 (evaluating private defendants' assertion that state action doctrine sheltered collective rate setting from antitrust regulation); *S. Rate Conference, Inc.*, 471 U.S. at 55-66 (rejecting federal antitrust suit against state-authorized private rate-setting).

127 *See Duffy*, 479 U.S. at 344-45 (invalidating such a scheme because the state "neither establishe[d] prices nor review[ed] the reasonableness of the price schedules."); Allensworth, *supra* note 62, at 1410, 1413-14 (demonstrating that modern state-action doctrine draws on administrative law principles).

128 *See infra* notes 288-89 and accompanying text; *see also e.g.*, Richard A. Duncan & Alison K. Guernsey, *Waiting for the Other Shoe to Drop: Will State Courts Follow Leegin?*, 27 FRANCHISE L.J. 173, 174 (2008) (finding that thirty-six states have stated intent to "adhere strongly" or "moderately strongly" to federal antitrust precedent when implementing their own antitrust laws).

The Court has applied a similar regime to restraints imposed by municipalities, holding that such entities do not possess the sovereignty possessed by states.[129] Restraints imposed by municipalities are fully subject to the Sherman Act, unless the state has clearly articulated a policy displacing competition.[130] There is, however, no "active supervision" requirement for such restraints.[131]

Thus, *Parker* and its progeny recognize three distinct types of state-created restraints that thwart free competition but may still escape Sherman Act preemption. First, there are cases like *Parker* itself, where states coercively displace free competition, expressly setting price or output. Such restraints are without exception immune from the Act, and thus escape preemption. Second, there are hybrid restraints, where the state authorizes or compels private actors to engage in anticompetitive behavior.[132] These restraints are immune from the Act if the state satisfies the elements of clear articulation and active supervision. Third there are those cases where a municipality coercively displaces free competition.[133] Such restraints are immune if the state satisfies the "clear articulation" requirement.[134]

Failure to establish the prerequisites of state action immunity for hybrid or municipal restraints results in two legal consequences: (1) Sherman Act liability for private parties who comply with such restraints and (2) preemption of state or local enactments that authorize or compel such agreements.[135] It will be useful to distinguish between these categories of

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129 *See* City of Columbia v. Omni Outdoor Advert., 499 U.S. 365 (1990); Cmty. Commc'ns v. City of Boulder, 455 U.S. 40, 53 (1982) (rejecting state action immunity for municipality where state had not clearly articulated policy to thwart competition).

130 *See City of Columbia*, 499 U.S. at 371-72.

131 *See* Town of Hallie v. Eau Claire, 471 U.S. 34, 46-47 (1985); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 1002 (2016).

132 *See, e.g.*, Cal. Liquor Retail Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

133 *See, e.g., City of Columbia*, 499 U.S. 365; *City of Boulder*, 455 U.S. 40.

134 *See* HOVENKAMP, *supra* note 131, at 1000-01 (explaining the clear articulation requirement as applied to municipal restraints).

135 *See Midcal*, 445 U.S. at 102-06 (holding that Sherman Act banned minimum resale price agreements authorized by state law because state did not actively supervise resulting prices); Rice v. Norman Williams, 458 U.S. 654, 659-660 (1982) (explaining that *Midcal* found that Sherman Act preempted California statute requiring price fixing); HOVENKAMP, *supra* note 131, at 978 (describing *Midcal* as a case of preemption); FTC v. Ticor, 504 U.S. 621, 637-40 (1992) (holding that state action doctrine did not protect defendants from liability under the Federal Trade Commission Act because states did not "actively supervise" resulting prices); *see also* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (describing and applying standards governing so-called conflict preemption); *id.* (explaining that such a conflict arises if compliance with state law requires the party to violate federal law); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344-45 (1987)

state action immunity when evaluating the arguments against preemption of state interference with free competition.

### C. The Federalism and State Sovereignty Rationales for the State Action Doctrine

The Court has repeatedly reiterated the federalism and state sovereignty rationales for *Parker* and its progeny, invoking *Parker*'s reference to our "dual system."[136] If anything the Court has increased the emphasis on these rationales for the doctrine; modern decisions identify no other normative justification. It is no surprise that jurists supportive of these values in other contexts have invoked such considerations.[137] However, jurists *hostile* to such values in other contexts have also endorsed *Parker* and its progeny on identical grounds.[138]

Numerous scholars have endorsed *Parker*'s understanding of the Sherman Act.[139] These scholars echo *Parker*'s invocation of the nation's "dual system"

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(invalidating state-imposed minimum rpm at the behest of plaintiff who feared prosecution for violating state act).

136 *See* FTC v. Phoebe Putney, 568 U.S. 216, 236 (2013) ("*Parker* and its progeny are premised on an understanding that respect for the States' coordinate role in government counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to regulate their economies and provide services to their citizens."); *Ticor*, 504 U.S. at 633 ("Our decision [in *Parker*] was grounded in principles of federalism."); *City of Columbia*, 499 U.S. at 370 (*Parker* rests upon "principles of federalism and state sovereignty"); *id.* ("*Parker* emphasized the role of sovereign States in a federal system."); Patrick v. Burget, 486 U.S. 94, 99 (1988) (noting that *Parker* "relied on principles of federalism and state sovereignty."); *Duffy*, 479 U.S. at 343 ("Parker v. Brown rests on principles of federalism and state sovereignty."); *Town of Hallie*, 471 U.S. at 38 ("In *Parker*, relying on principles of federalism and state sovereignty, the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature."); *City of Boulder*, 455 U.S. at 53 ("The *Parker* state action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution."); *MidCal*, 445 U.S. at 103 (*quoting* "dual system" language); City of Lafayette v. Louisiana Power & Light, 435 U.S. 389, 400 (1978) (same).

137 *See, e.g.*, *Ticor*, 504 U.S. at 633 (Kennedy, J.); *City of Columbia*, 499 U.S. at 370 (Scalia, J.).

138 *Phoebe Putney*, 568 U.S. at 236 (Sotomayor, J.); *City of Boulder*, 455 U.S. at 53 (Brennan, J.).

139 *See, e.g.*, William H. Page & John E. Lopatka, *Parker v. Brown, the Eleventh Amendment, and Anticompetitive State Regulation,* 60 WM. L. REV. 1465, 1472 (2019); James R. Saywell, *The Six Sides of Federalism in* North Carolina Board of Dental Examiners v. FTC, 76 OHIO ST. L. J. FURTHERMORE 1, 4-9 (2015); Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 ANTITRUST L. J. 29, 38 (2000); Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L. J. 486 (1987); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption*, 61 B.U.L. Rev. 1099, 1101 (1981); Handler, *supra*

and contend that Sherman Act preemption of state-created restraints would trench unduly upon what they characterize as "constitutional" values of state sovereignty and federalism.[140] Several have also elaborated upon *Parker*'s rationale, contending that the Constitution contemplates that states should be entitled to "regulate their own economies."[141]

Several such scholars argue that post-*Wickard* expansion of the Act to reach local restraints producing no interstate harm bolsters the case for immunity.[142] Reversal of *Parker*, they say, would ensure federal antitrust

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note 118, at 19-20; Paul R. Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975).

140 *See* Page & Lopatka, *supra* note 139, at 1468-69; Saywell, *supra* note 139, at 4-9; Burns, *supra* note 139, at 38-39 (invoking Supreme Court decisions recognizing the "fundamental dual-government structure of the Federal Constitution" to justify *Parker*); *id.* (contending that the "dual structure of the federal Constitution . . . 'requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation [sic].'") (quoting Alden v. Maine, 527 U.S. 706, 709 (1999)); *id.* at 38 ("When applied to antitrust, these [recent federalism] rulings make crystal clear that, as a practical matter, antitrust federalism is here to stay. Even if Congress tried to override or limit the *Parker* shield, such an attempt likely would fail."); Page, *supra* note 139, at 1102-1107 (describing and endorsing "constitutional basis of the *Parker* doctrine"); *id.* at 1128-30 (contending that "active supervision" requirement for hybrid restraints contravenes *Parker*'s constitutional foundation); James F. Blumstein & Terry Calvani, *State Action as a Shield and a Sword in a Medical Services Antitrust Context: Parker v. Brown in Constitutional Perspective*, 1978 DUKE L. J. 389, 419-24 n.193 (grounding state action doctrine in Tenth Amendment case law); Mark L. Davidson & Robert D. Butters, Parker *and* Usery: *Portended Constitutional Limits on the Federal Interdiction of Anticompetitive State Action,* 31 VAND. L. REV. 575, 597-604 (1978) (same); Handler, *supra* note 118, at 7 n.35 (contending that preemption of state-imposed restraints would "breach[] the basic tenets of the federalism upon which rests our constitutional form of government."); *id.* at 15 (contending that Sherman Act scrutiny of such restraints "is plainly at war with the fundamental principles of American federalism"); *see also* Brief Amicus Curiae for the Am. Dental Ass'n, N.C. Bd. of Dental Exam'rs v. FTC, 574 U.S. 494 (2015) (No. 13-534) (criticizing preemption of state's anticompetitive regulation as "trampling upon the sovereignty of the states in our federal system"); Allensworth, *supra* note 62, at 1402-04 (discussing academic literature contending that *Parker* rests on constitutional limits on Congress's authority to override state regulation).

141 *See* Page, *supra* note 139, at 1106 ("Federalism considerations suggest that states should presumptively enjoy the freedom to establish regulatory programs that are applicable within their own borders without prior resort to Congress for approval by parties not directly affected."); Handler, *supra* note 118, at 15 (contending that repudiation of *Parker* would "shackl[e] [] states' power to regulate their own economies"); Garland, *supra* note 139, at 499-501 (contending that *Parker* reflects appropriate respect for outcome of states' political processes).

142 *See, e.g.*, Page, *supra* note 139, at 1107; Handler, *supra* note 118, at 17 (noting that, "[w]ith the broadened conception of interstate commerce which now prevails, virtually every business, no matter how local, spills over, to some extent at least, into activities that can be said to affect commerce."); *see also supra* notes 54-61 and accompanying text (describing

scrutiny of innumerable garden-variety police power regulations, many governing purely local subjects, because such regulations restrain activity with fortuitous but substantial impacts on interstate commerce.[143] Federal judicial scrutiny of local regulation would, it is said, replicate the supervision of state economic regulation under the Due Process Clause during the *Lochner* era.[144] These fears have a strong empirical basis. Aside from *Parker* itself, every Supreme Court decision applying the state action doctrine has involved regulation of local activity that produced only intrastate harm.[145]

According to several proponents of *Parker*, a well-functioning federal system requires states to serve as laboratories of democracy that experiment with various approaches to local economic problems.[146] The modern theory

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various post-*Wickard* decisions applying the Sherman Act to intrastate restraints producing no interstate harm).

143 *See, e.g.*, Page, *supra* note 139, at 1107 ("To give full preemptive effect to the Sherman Act would go far beyond a prohibition on parochial legislation; given the virtually unlimited jurisdictional reach of the Sherman Act, it would effectively forbid all state regulation of price and entry. For example, professional licensing, a primarily local activity, would certainly be held to affect commerce enough to confer federal jurisdiction."); Handler, *supra* note 118, at 15 n.71 (contending that reversal of *Parker* would authorize Sherman Act scrutiny of state statutes "regulat[ing] price and entry in such diverse fields as insurance, taxicabs, railroads, sale of prescription drugs, bank branching, buses, milk, sign posting and agricultural products"); *see also* Rebecca Haw Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 CAL. L. REV. 1557, 1582-600 (2017) (advocating intensified Sherman Act scrutiny of state occupational licensing regimes). None of these scholars questions the authority of Congress over analogous private restraints of interstate commerce.

144 *See* Lochner v. New York, 198 U.S. 45 (1905); Garland, *supra* note 139, at 499-500 (contending that *Parker* properly rejected Sherman Act scrutiny and thus avoided *Lochner*-like interference in state regulatory choices); Page, *supra* note 139, at 1105 ("This presumption [of Congressional intent] amounted to a prudential limitation on the scope of the Sherman Act based upon the Justices' experience in the closely analogous due process cases."); Handler, *supra* note 118, at 7 ("It is ironic that the liberals of today would substitute Parker v. Brown for the due process clause of the fourteenth amendment as the vehicle for throttling state legislation by compelling all regulation outside the area of natural monopolies to conform to the competitive model"); Verkuil, *supra* note 139, at 334 n.36 ("[i]f these laws are randomly upset by judicial enforcement of the Sherman Act, the values of federalism contained in *Parker* … would have to be flatly rejected and the lessons of the 1930's all but forgotten."); *see also* Note, *Antitrust Federalism, Preemption and Judge-Made Law*, 133 HARV. L. REV. 2557, 2569-77 (2020) (contending that Sherman Act preemption of state antitrust regulation would reflect judicial policymaking and thus lack democratic legitimacy).

145 *See infra* note 305 (collecting authorities).

146 *See* Saywell, *supra* note 139, at 7-8 (invoking laboratory metaphor to contend for relaxed definition of active supervision and broader *Parker* immunity); Burns, *supra* note 139, at 44 (contending that antitrust federalism, including *Parker,* protects the existence of "fifty state laboratories, in which ideas can be implemented and tested."); Handler, *supra* note 118, at 5-6 & n.26 ("To stay experimentation in things social and economic is a grave

of competitive federalism predicts that, under certain conditions, rivalry between such sovereigns can produce optimal legislation.[147] Preemption, by contrast, would displace these laboratories as sources of novel economic policies responsive to local needs.

Indeed, some have argued that, properly understood, federalism and state sovereignty require *more robust* immunity from Sherman Act preemption. Some, for instance, have criticized the requirement that states "actively supervise" private parties' implementation of anticompetitive agreements.[148] Others contend that restraints imposed by municipalities should enjoy absolute immunity.[149] These scholars contend that states should remain free to allocate authority between their respective subdivisions as they see fit, without satisfying procedural requirements imposed under the aegis of the Sherman Act.[150] If *Parker* rests on respect for "federalism and state sovereignty," they say, the Court should respect the otherwise constitutional process that states employ to authorize localities and private parties to impose anticompetitive restraints.[151] These arguments would immunize any restraint on competition that a state or its subdivision authorizes under a state's own

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responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.") (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); *see also* Note, *supra* note 144, at 2561-62 (arguing that respect for states' role as laboratories militates in favor of respecting diverse state antitrust regimes).

147 Frank H. Easterbrook, *Federalism and Commerce*, 36 HARV. J. L & PUB. POL. 935, 937 (2013) ("There is a . . . tendency toward optimal legislation to the extent four conditions hold: (1) people and resources are mobile; (2) the number of jurisdictions is substantial (no monopoly or oligopoly power); (3) jurisdictions can select any set of laws they desire; and (4) all of the consequences of one jurisdiction's laws are felt by people who live in or consent to that jurisdiction (in other words, no third-party effects, often called externalities.")).

148 *See* Saywell, *supra* note 139, at 6 ("The federal government must respect [state] sovereignty—not redefine it by requiring active supervision of a state's own agencies."); Page, *supra* note 139, at *passim* (criticizing this requirement as inconsistent with federalism); Handler, *supra* note 118, at 9 n.45 and 18 (criticizing proposals that would condition immunity on sufficient "state supervision").

149 *See* Garland, *supra* note 139, at 502.

150 *Id.* ("Based on a technical, and debatable, conception of federalism, the Court declined to treat cities as equivalent to states for purposes of the Sherman Act. Consequently, the Court effectively treated federal antitrust law as a species of state administrative law . . . The flaw in this approach is that the Sherman Act contains no warrant for policing cities' pursuit of their parochial—but still public—interests; that is a matter for state law and state courts.").

151 *Id.* at 502-03; *id.* at 495 n.57 (critiquing suggestion in *Town of Hallie* that states must "active[ly] supervis[e]" municipal regulation effectuating clearly-articulated state policy).

constitutional processes and shield such authorization from Sherman Act preemption.[152]

*Parker*'s proponents recognize that anticompetitive state legislation may sometimes impose economic harm on other states.[153] Some contend that dormant Commerce Clause jurisprudence will interdict such enactments, obviating any need for Sherman Act intervention, while leaving states free to regulate local activity nominally within the scope of the Act.[154] Any succor from the Commerce Clause appears illusory, however. *Parker* itself rejected the plaintiff's dormant Commerce Clause challenge, even though nearly all the harm produced by the challenged program fell on out-of-state consumers.[155] None of these scholars has questioned that holding or identified any decision invalidating *Parker*-type restraints. Given *Parker*'s deferential Commerce Clause review of state-imposed restraints, the Sherman Act is the only plausible source of preemption.[156] Thus, these scholars effectively contend that each state's internal democratic processes should constitute the sole remedy for such wealth-destroying regulation, even when out-of-state voters bear most of the resulting harm.[157]

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152 *See* Allensworth, *supra* note 62, at 1404 (summarizing contentions by some scholars that federalism requires Sherman Act to "respect decisions made by a state within the bounds of its autonomy—no matter what processes the state used to make them.").

153 *See, e.g.*, Page, *supra* note 139, at 1106-07.

154 *Id.* ("Considerations of federalism suggest that courts should defer to state regulation even when the regulation affects interstate commerce within the meaning of these sweeping precedents. Such an approach leaves the [C]ommerce [C]lause as a sufficient check against protectionist schemes.").

155 *See supra* notes 105-14 and accompanying text; *see also* Meese, *supra* note 44, at 269, 317-18 (describing *Parker*'s repudiation of previous dormant Commerce Clause precedent); Gardbaum, *supra* note 113, at 528-30 (describing how *Parker* exemplified judicial relaxation of Commerce Clause restrictions on state regulation of interstate commerce).

156 *See generally* Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U. OF S. F. L. REV. 627, 643-45 (2006) (explaining how state action doctrine ignores interstate harm).

157 *See, e.g.*, Saywell, *supra* note 139, at 7-8 (contending that Sherman Act preemption of squelches local experimentation and innovation a deprives states of their position as laboratories); Page, *supra* note 139, at 1107 ("Deference to considered state economic choices thus constitutes the touchstone of the *Parker* doctrine. This approach draws doctrinal support from the Madisonian model of representative government and dictates judicial restraint as long as the 'process of representation' affords interested parties an opportunity to influence the formulation of policy."); Handler, *supra* note 118, at 19 ("[T]here are democratic processes by which unwarranted laxity of the states can be rectified."); *id.* at 20 ("I would not substitute preemption for substantive due process to achieve a federal censorship of state legislation; I would turn to the states as the forum for the correction of the mischief[.]").

## III. FEDERALISM-BASED OBJECTIONS TO SHERMAN ACT PREEMPTION

As the United States explained in its *Parker* brief, state-imposed restraints of interstate commerce pose obstacles to achieving the central policy of the Sherman Act, namely, reliance upon free competition to allocate the nation's economic resources.[158] To be sure, California's scheme imposed significant economic harm on out-of-state citizens, unlike nearly all other state-created restraints.[159] However, *Mandeville Island Farms* expanded the object of the Act to include protecting free competition from local restraints producing no interstate harm. Straight-forward application of the Court's preemption doctrine would thus seem to establish that the Sherman Act preempts all state-created unreasonable restraints—regardless of interstate harm—that produce a substantial effect on interstate commerce, because they pose obstacles to achieving this objective.[160]

However, some scholars and the Court contend that principles of constitutional federalism and state sovereignty bolster if not require *Parker*'s rejection of Sherman Act preemption.[161] Invocation of "federalism," or "state sovereignty," does not resolve concrete cases. Presumably such considerations must manifest themselves within some doctrinal frameworks, and not as a judicial talking point. The Sherman Act, after all, is a statute, and only the Constitution can restrict its reach.

Still, despite repeated claims that considerations of federalism and state sovereignty justify *Parker*'s state action doctrine, neither the Court nor most of *Parker*'s academic proponents have specified the nature of their federalism or state sovereignty concerns with doctrinal precision.[162] At best, some proponents have invoked the Tenth and Eleventh Amendments as possible

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158 *See supra* notes 79-80, 87 and accompanying text; *see also* Times-Picayune Co. v. United States, 345 U.S. 594, 605 (1953) ("Basic to the faith that a free economy best promotes the public weal is that goods must stand the cold test of competition; that the public, acting through the market's impersonal judgment, shall allocate the Nation's resources, and thus direct the course its economic development will take.").

159 *See infra* note 305 and accompanying text (explaining that nearly all restraints sheltered by state action doctrine produce only intrastate harm).

160 *See supra* notes 223-24 and accompanying text (collecting and discussing various authorities enforcing "obstacle preemption").

161 *See supra* notes 134-57 and accompanying text (discussing these contentions).

162 *See, e.g.*, Handler, *supra* note 118, at *passim* (endorsing *Parker* without identifying any constitutional doctrine militating against preemption); *id.* at 7 n.35 (contending that preemption of state economic regulation would "breach[] basic tenets of federalism upon which rests our constitutional form of government is based.").

sources of such immunity, usually without elaboration.[163] As a result, academic evaluation of the supposed federalism and state sovereignty rationales for *Parker's* rejection of preemption requires identification of possible doctrinal bases for such concerns, one or more of which could help justify *Parker* and its progeny.

Such concerns could manifest themselves in two broad categories. First, federal preemption of state-imposed restraints could be outright unconstitutional.[164] Second, preemption of such restraints could contradict one or more canons of construction that courts employ to discern the original meaning of ambiguous texts. The remainder of this article will identify and then evaluate the possible arguments in these two categories that may conceivably militate against Sherman Act preemption of state-imposed restraints. As will be seen, evaluation of arguments in the first category will help inform evaluation of arguments that one or more canons of statutory construction justify *Parker*'s interpretation of the Sherman Act.

## IV. POSSIBLE CONSTITUTIONAL OBJECTIONS TO PREEMPTION

The words "federalism" and "state sovereignty" do not appear in the text of the Constitution. Nonetheless, there appear to be two possible constitutional arguments against Sherman Act preemption of state-imposed restraints. First, a state could claim that such preemption exceeds the scope of Congress's enumerated powers, including the power to regulate interstate commerce.[165] Second, a state or private party could claim that, despite acting within its enumerated powers, Congress has nonetheless interfered with some attribute of state sovereignty protected by the Tenth Amendment, Eleventh

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163 *See, e.g.*, Page & Lopatka, *supra* note 139, at 1468 (the Court has derived the *Parker* doctrine "from the principle of sovereign immunity"); Burns, *supra* note 139, at 38 (invoking Supreme Court's then-recent Eleventh Amendment jurisprudence as supporting *Parker*); Page, *supra* note 139, at 1105 n.36 (suggesting that *Parker* could be interpreted as resting upon "the eleventh amendment or, perhaps, . . . the tenth amendment."); Davidson & Butters, *supra* note 140, at 597-604 (contending that Tenth Amendment case law justifies *Parker*'s state action doctrine).

164 *See* Burns, *supra* note 139, at 38 (asserting that the Tenth and Eleventh amendments prevent Congress from expressly preempting local state legislation otherwise subject to the commerce power); Davidson & Butters, *supra* note 140, at 597-604.

165 *See, e.g.*, Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (Congress lacks authority under the Commerce Clause to require individuals to purchase health insurance); United States v. Lopez, 514 U.S. 549 (1995) (invalidating ban on possession of guns near schools as exceeding Congress's commerce power); Schechter Poultry v. United States, 295 U.S. 495 (1935) (invalidating Congressional regulation of local wages and hours as exceeding the commerce power).

Amendment or inferred from the overall structure of the Constitution.[166] This section will thus consider the validity of these two objections. Assessing the strength of the first constitutional objection will require an exegesis of the history and meaning of the Commerce Clause. This exegesis will also inform evaluations of the second such objection and facilitate application of canons of construction discussed later in the article.

## A. Does the Commerce Clause Authorize Preemption of State Laws?

Article I, Section 8 empowers Congress to "regulate Commerce . . . among the several States . . ."[167] The Sherman Act constitutes an exercise of this power. If the Commerce Clause does not authorize preemption of state laws, *Parker*'s state action doctrine would simply implement this limitation on Congress's authority. Indeed, *Parker* and its progeny would be insufficiently protective of states' prerogatives, insofar as these decisions recognize the possibility of preemption in some circumstances.[168] This subpart evaluates whether the Commerce Clause authorizes Congress to preempt state laws that impose restraints on interstate commerce. The subpart begins by assessing the pre-*Wickard* constitutional status of such preemption and then moves on to the post-*Wickard* era, when the Court's vast expansion of the commerce power created new opportunities for the exercise of power to preempt such state laws.

### *1. Pre-*Wickard *Preemption*

When evaluating this first possible federalism objection, it is useful to begin with a truism. Parties need only invoke state action immunity if the Sherman Act otherwise reaches the restraint. As explained earlier, the Act only bans agreements that are "in restraint of trade" and, in addition, restrain "commerce among the several States."[169] No one doubts that the commerce

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166 *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (invalidating federal statute purporting to commandeer state officials to execute federal law); New York v. United States, 505 U.S. 144 (1992) (invalidating federal statute purporting to require states to enact legislation taking title to radioactive waste). *See also infra* notes 227-36 and accompanying text (discussing National League of Cities v. Usery, 426 U.S. 833 (1976)); Saywell, *supra* note 139, at 6 (invoking *Printz* as a source of the sort of state sovereignty protected by *Parker*).

167 U.S. CONST. art. I, § 8, cl. 3.

168 *See supra* note 135 and accompanying text (collecting decisions recognizing preemption of state laws authorizing such restraints).

169 *See supra* notes 19-22 and accompanying text; 15 U.S.C. § 1.

power reaches private restraints. Thus, state action immunity only comes into play in cases when Congress admittedly has the authority to regulate and prohibit a contract between private parties that restrains trade and interstate commerce in the same manner as the challenged state-created restraint.[170]

Thus, any claim that application of the Sherman Act to state-created restraints exceeds the scope of the Commerce Power necessarily depends upon a constitutional distinction between banning purely private restraints and employing the same power to preempt state laws that impose or authorize analogous restraints. Under this approach, the former application of the Act would be perfectly constitutional, even as applied to purely local restraints that indirectly "affect" interstate commerce, while the latter would simply exceed the scope of the commerce power, even if the restraints impose direct burdens on interstate commerce and injure out-of-state consumers.

As a textual matter, such a distinction has some superficial plausibility. After all, the Commerce Clause merely empowers Congress to regulate "*commerce* among the states." Beginning with *Gibbons v. Ogden*, the Court has defined commerce as an activity between private parties.[171] It might thus seem that the Clause merely empowers Congress to regulate private transactions and transportation. Such authority does not, one might argue, include the authority to preempt state *laws*—the quintessential manifestation of sovereignty—restricting such commerce.

However, such an argument contradicts both the long-standing Commerce Clause jurisprudence that defines commerce as private activity and the Court's uniform account of the rationale for granting Congress power over interstate commerce. Indeed, *Parker*'s own progeny implicitly rejects any constitutional distinction between regulation of private conduct and preemption of state-created restraints. Despite repeated invocations of

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170 *See* Parker v. Brown, 317 U.S. 341, 350 (1943) (assuming *arguendo* that Act would reach analogous private conduct); Goldfarb v. Va. State Bar, 421 U.S. 773, 783-86 (1975) (rejecting contention that challenged agreement lacked requisite impact on interstate commerce); *id.* at 788-92 (rejecting defendants' invocation of state action defense); *cf.* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 229-30 (1899) (opining that state enactments and private agreements can produce the same impact on interstate commerce).

171 *See* Kidd v. Pearson, 128 U.S. 1, 20-21 (1888) ("Commerce with foreign nations and among the states, strictly considered, consists in intercourse and traffic, including in those terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities") (quoting County of Mobile v. Kimball, 102 U.S. 691, 702 (1881)); Gibbons v. Ogden, 22 U.S. 1, 189-90 (1824) (defining commerce to include buying and selling as well as navigation).

federalism and state sovereignty, the Court has invalidated hybrid or municipal restraints that, while authorized or even required under state law, nonetheless fail to satisfy the sort of procedural requirements necessary to confer *Parker* immunity.[172] In particular, the Court has held that such statutes and the conduct they require or authorize "conflict" with the Sherman Act because compliance would require parties to enter agreements that violate the Act.[173] Of course, some proponents of *Parker* have criticized even this limited preemption, contending that a state actor's otherwise valid decision to supplant competition should immunize any resulting conduct from Sherman Act condemnation.[174]

While *Gibbons* defined "commerce" in private terms, it also defined "regulate" as the power to "prescribe *the rule* by which commerce is to be governed."[175] This definition implied an alternative source of rules, namely, individual states.[176] The power to regulate, then, entailed the power (if necessary) to displace contrary state laws to ensure that the rule chosen by Congress prevailed.

*Gibbons* itself read the Clause exactly this way. There Gibbons, who wished to transport passengers between New York and New Jersey, had registered his vessel under the 1793 Federal Coasting Act.[177] Ogden attempted to bar Gibbons from this market, invoking a New York statute that conferred a monopoly over the operation of steam-propelled vessels in

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172 *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 632-40 (1992) (invalidating state imposition of collectively-determined rates approved by state-licensed rate bureaus because state did not actively supervise such rates); N.C. Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 503-15 (2015) (invalidating agreement between state officials to subject teeth whitening to various regulatory requirements); Cmty. Commc'ns v. City of Boulder, 455 U.S. 40, 51-57 (1982) (invalidating restraint imposed by municipality despite state law authorization); 324 Liquor Corp. v. Duffy, 479 U.S. 345, 346-52 (1987); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc., 445 U.S. 97, 102-06 (1980); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (holding that Sherman Act invalidated a minimum resale price maintenance contract authorized by Louisiana law).

173 *See* Rice v. Norman Williams, 458 U.S. 654, 659-660 (1982) (articulating and applying this test to evaluate Sherman Act challenge to state-imposed restraint); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000) (articulating general standards governing conflict preemption); Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (same).

174 *See supra* notes 148-152 and accompanying text.

175 *Gibbons*, 22 U.S. at 196 ("What is this power? It is the power to regulate, that is, to prescribe *the rule* by which commerce is to be governed.") (emphasis added).

176 *See* Hous. E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914) ("Shreveport Rate Cases") ("Congress is empowered to regulate—that is, *to provide the law for the government of interstate commerce*, to enact 'all appropriate legislation' for its 'protection and advancement.'" (emphasis added)); *id.* at 350-360 (finding that the Interstate Commerce Act preempted intrastate rates that directly burdened interstate commerce).

177 *See* Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1406-09 (2004).

New York waters.[178] Gibbons challenged the monopoly as contrary to the Coasting Act and the Commerce Clause.

The Court invalidated New York's monopoly. According to the Court, the Coasting Act "transfer[ed] to [Gibbons] all the right which the grantor [that is, Congress] can transfer."[179] This "right" included the "right of trade" between the states, including the transportation of passengers across state lines, superseding New York's monopoly, which, the Court said, was "in direct collision with" the state enactment.[180] That is, the statute prescribed that, so long as vessels possessed such a license, the rule of free trade established by Congress—and not state-imposed monopoly—governed commerce in the form of interstate navigation.[181] In modern terms, the Coasting Act preempted New York's grant of an exclusive license.[182]

*Gibbons* also went out of its way to reject claims that Congress had the power to regulate *intra*state commerce. Such authority, the Court said, was "likely inconvenient" and "certainly unnecessary."[183] This division of authority, *Gibbons* said, reflected the "genius and character of the whole government."[184]

The Court has treated *Gibbons* as a definitive exposition of the Commerce Clause.[185] Moreover, the Court's consistent account of the rationale for the commerce power confirms *Gibbons*' interpretation, including that Congress may preempt state-imposed restraints.[186] This account begins before the Constitution, when under a "helpless, inadequate Confederation," states interfered with free interstate trade by protecting their industries from out-of-

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178 *Id.*

179 *Gibbons*, 22 U.S. at 213-14.

180 *Id.* at 214-15, 221.

181 *Id.* at 210 (framing the inquiry as whether "in [its] application to this case [the New York statute conferring the monopoly], come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him."); *see also* Williams, *supra* note 177, at 1418 (*Gibbons* concluded that "there was no doubt that the New York statute creating the . . . steamboat monopoly conflicted with the [Federal Act].").

182 Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 266-67 (2000).

183 *See Gibbons*, 22 U.S. at 194.

184 *Id.* at 195.

185 *See, e.g.*, Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 534 (2012); Perez v. United States, 402 U.S. 146, 150-51 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 251, 253-55, 271-72 (1964); Wickard v. Filburn, 317 U.S. 111, 120-21 (1942); Hous. E. & W. Tex. Ry. Co. v. United States, 234 U.S. 342, 351 (1914) ("Shreveport Rate Cases"); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 228 (1899); Kidd v. Pearson, 128 U.S. 1, 16-18 (1888).

186 *See supra* notes 179-82 and accompanying text.

state competition or taxing commerce transiting the state.[187] These restrictions, like the *Parker* scheme, imposed harm on out-of-state citizens, what economists call "interjurisdictional spillovers."[188]

Such legislation left interstate commerce in an "oppressed and degraded state."[189] These shortcomings induced the adoption of the Constitution, which created "a national government . . . with full power over the entire subject of [interstate] commerce."[190] During the Nineteenth Century, then, the Court repeatedly stated that the original point of the commerce power was to protect commerce from the sort of self-interested state legislation that had oppressed private commerce prior to adoption of the Constitution.[191]

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187 *See* Guy v. Baltimore, 100 U.S. 434, 440 (1879); *see also* Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555, 598-601 (1994) (describing how states imposed import taxes exploiting other states under the Articles of Confederation).

188 *See* LeBoeuf, *supra* note 187, at 598-601.

189 *See Guy*, 100 U.S. at 440 ("But State legislation such as that indicated in the cases which have been cited, if maintained by this court, would ultimately bring our commerce to that '*oppressed and degraded state*,' existing at the adoption of the present Constitution, when the helpless, inadequate Confederation was abandoned and a national government instituted, with full power over the entire subject of commerce, except that wholly internal to the States. . . ." (emphasis supplied)); Brown v. Maryland, 25 U.S. 419, 445 (1825) ("The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten."); Meese, *supra* note 33, at 105-06 (collecting additional authorities).

190 *See Guy*, 100 U.S. at 440; Brandon Denning, *Confederation Era Discrimination Against Interstate Commerce and the Legitimacy of Dormant Commerce Clause Doctrine*, 94 KY. L.J. 37, 55-56 (2005-2006) (recounting this history); Gibbons v. Ogden, 22 U.S. 1, 224 (1824) (Johnson, J., concurring) ("[Under the Articles] that selfish principle . . . . guided by inexperience and jealousy, began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States, and fatal to their commercial interests abroad. This was the immediate cause, that led to the forming of a convention.").

191 *Guy*, 100 U.S. at 442 (asserting that Commerce Clause invalidates "local regulations, having for their object to secure exclusive benefits to the citizens and products of particular States."); *id.* at 443 (Commerce Clause prevents states from "accomplish[ing], by indirection, what the State could not accomplish by a direct tax, *viz.*, build up its domestic commerce by means of unequal and oppressive burdens upon the industry and business of other states."); County of Mobile v. Kimball, 102 U.S. 691, 697 (1881) (absent the commerce power "[t]here would otherwise 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. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the States was to insure uniformity of regulation against conflicting and discriminating State legislation."); *Gibbons*, 22 U.S. at 231 (Johnson, J., concurring) (overriding object in "the adoption of the Constitution" was to "keep the commercial intercourse among the States free from all invidious and partial restraints."); *see also* Meese, *supra* note 33, at 105-06 (collecting additional authorities).

Thus, the Court read the Clause as empowering Congress to establish free trade as the rule governing interstate commerce.[192]

For over a century, Congress rarely exercised this affirmative authority to preempt state laws: the federal statute applied in *Gibbons* was a noteworthy exception. However, *dicta* in *Gibbons* had also suggested that state legislation interfering with interstate commerce was void for that reason alone, regardless of whether Congress had acted.[193] Later that century the Court confirmed that the Commerce Clause empowered Congress to preempt state laws. The resulting regime divided interstate commercial subjects within the commerce power into two categories. First, certain subjects were "national in their character" and "admit and require a uniformity of regulation."[194] Second, a much smaller group were local "aids to commerce."[195]

By default, states could regulate those (local) subjects in the second category absent Congressional legislation.[196] By contrast, Congress's authority to regulate inherently national subjects was exclusive. The Court employed a doctrine of implied preemption to enforce these exclusivity and concomitant limits on state power. Under this regime, Congress's *failure* to exercise its power—that is, Congressional silence—over these subjects established its intention that interstate commerce be "free and untrammeled."[197] By implication, Congress could grant states such authority and sometimes did.[198]

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192 *See* Charles McCurdy, *American Law and Marketing Structure of the Large Corporation*, 38 J. ECON. HIST. 631, 648 (1978) ("The Supreme Court's commerce clause decisions of the 1875-1890 period . . . firmly established the Supreme Court's role as the umpire of the nation's free-trade network."); *id.* at 648 (concluding that, during the late Nineteenth century, the Court "monitor[ed] the free-trade unit in the silence of Congress[.]"); Cushman, *supra* note 25, at 1107 ("The Court's use of the dormant Commerce Clause to vitiate such parochial legislation played a critical, instrumental role in opening a national market.").

193 *See Gibbons*, 22 U.S. at 198-200.

194 *See, e.g., Kimball*, 102 U.S. at 697 ("The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities."); Cooley v. Bd. of Wardens of Port of Phila., 53 U.S. 299 (1852).

195 *See Kimball*, 102 U.S. at 697; Cushman, *supra* note 25, at 1115 (describing this category as of "limited scope").

196 *Cooley*, 53 U.S. at 319-20 (explaining that state and federal power over such subjects was coextensive).

197 *See, e.g.,* Leisy v. Hardin, 135 U.S. 100, 109-10 (1890) ("Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale, and exchange of commodities, is national in its character and must be governed by *a uniform system*, so long as Congress does not pass any law to regulate it, or *allowing the states to do so*, it thereby indicates its will

This "dormant Commerce Clause" jurisprudence assumed that congressional exercise of its commerce power, whether actual or presumed from silence, preempted contrary state legislation.[199] Allowing states to regulate such subjects, the Court said, would result in legislation favoring a state's own citizens and industries, as states would likely legislate to further "their own particular interests."[200] Congress, by contrast, would consider the interests of the Nation and thus adopt "just and equitable rules" governing such subjects.[201]

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that such commerce shall be free and untrammeled.") (emphases added); Walling v. Michigan, 116 U.S. 446, 455 (1886) ("We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammeled, and that any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom.").

198 *See* Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1877-79 (2007) (discussing decisions sustaining federal statutes granting states authority to regulate inherently national commercial subjects).

199 *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 128 (1978) (determining whether dormant Commerce Clause "preempts" state regulation of certain marketing practices); *id.* (characterizing Wabash, St. Louis & Pac, Ry. Co. v. Illinois, 118 U.S. 557 (1886) as holding that "the commerce clause itself preempts an entire field from state regulation"); Gardbaum, *supra* note 99, at 796 (describing the quasi-statutory Commerce Clause holding in Welton v. Missouri, 91 U.S. 275 (1875) as affirming "a general power of preemption"); Ernest A. Young, *The Ordinary Diet of the Law: The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 265-66 (explaining that Nineteenth Century dormant Commerce Clause jurisprudence preempted certain state regulations); Bowman v. Chi. & N. Ry., 125 U.S. at 482 ("[S]tate legislation, however legitimate in its origin or object, when it conflicts with the positive legislation of Congress, *or its intention reasonably implied from its silence*, in respect to the subject of [interstate or foreign] commerce must fail.") (emphasis supplied).

200 *See* Guy v. Baltimore, 100 U.S. at 442 (Commerce Clause prevented states from imposing "unequal and oppressive burdens upon the industry and business of other States" to protect their own industries.); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 232 (1899) (opining that Congress possessed exclusive authority over direct restraints of interstate commerce); *id.* at 231 ("If . . . state legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts between individuals or corporations, then 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."); Hadley Dean Plate Glass Co. v. Highland Glass Co., 143 F. 242, 244 (8th Cir. 1906) (invoking *Addyston Pipe* to hold that the Commerce Clause preempts state antitrust regulation of interstate commerce).

201 *See, e.g.*, *Wabash*, 118 U.S. at 577 (concluding that Congress's "enlarged view of the interests of all the states, and of the railroads concerned, better fits it to establish just and equitable rules" regarding rates for interstate transportation).

Independent territorial restrictions on legislative authority prevented states from regulating activity beyond their borders.[202] Still, some intrastate legislation could nonetheless affect interstate commerce. If such effects were merely indirect, the state law did not "regulate interstate commerce in a constitutional sense."[203] If the effects were "direct," however, such legislation, despite its local object, nonetheless regulated interstate commerce.[204] Applying this regime of implied preemption, the Court invalidated numerous state statutes that governed local activities if they directly impacted and thus regulated interstate commerce.[205] These decisions implemented the Court's account of the rationale for the Commerce Clause, by creating a national market unfettered by self-interested state legislation that interfered with the freedom to conduct interstate trade.[206]

The historical rationale for preemption—whether by express legislation or implied by Congressional silence—limited the reach of the commerce power. Unless an activity or state regulation thereof produced interstate harm, national regulation was unwarranted. The Court's Nineteenth Century case law thus assigned regulatory authority to that sovereign best positioned to exercise authority in a manner that would improve public welfare.[207] Thus, states possessed exclusive authority to regulate those activities and conduct

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

203 Smith v. Alabama, 124 U.S. 465, 474-75 (1888) (rejecting Commerce Clause challenge to state regulation of locomotive engineers because such provisions only impacted interstate commerce "indirectly"); Kidd v. Pearson, 128 U.S. at 23 (holding that state legislation only regulates interstate commerce if it imposes "a *direct burden upon interstate commerce or directly interferes with its freedom*"); *id.* at 19-26 (upholding ban on producing alcohol for export because ban did not directly burden interstate commerce); R.R. Co. v. Husen, 95 U.S. 465, 472 (1878) ("Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term.").

204 *See, e.g.*, Minnesota v. Barber, 136 U.S. 313 (1890) (invalidating state law banning sale of meat not inspected in the state before slaughter because the regulation directly burdened interstate commerce).

205 *See, e.g., Barber*, 136 U.S. at 322-23; *Wabash*, 118 U.S. at 567-77.

206 *See, e.g., Wabash*, 118 U.S. at 577 (holding that state regulation of nominally local rates directly burdened interstate transportation); H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 538 (1949) (opining that Commerce Clause created a "federal free trade unit"); *id.* ("[The] Commerce Clause [ensures] that every farmer and every craftsman shall . . . have free access to every market in the Nation[.] . . . Likewise, every consumer may look to free competition from every producing area in the Nation to protect him from exploitation by any."); *see also supra* notes 187-92 and accompanying text.

207 Meese, *supra* note 33, at 112-14.

the harmful effects of which did not exceed their individual borders.[208] Congress, however, possessed exclusive authority over conduct that produced harmful effects in two or more states, thereby raising the possibility that state regulation of the same subject would favor a state's own citizens at the expense of others.[209] The resulting allocation of regulatory objects between states and Congress was not necessarily static. Instead, changed circumstances could justify new exercises of the commerce power to implement the unchanged interstate harm principle that informed application of the direct/indirect standard.[210]

Thus, when Congress passed the Sherman Act, preemption of state-imposed restraints of interstate trade would have been perfectly constitutional, although the Commerce Clause only authorized Congress to reach restraints that produced actual interstate harm. The result was near-mutually exclusive regulatory jurisdiction. The Court maintained this approach for five decades after passage of the Sherman Act, employing the direct/indirect standard to define the boundary between state and national authority.

### *2. Post-*Wickard *Preemption*

In *Wickard*, however, the Court granted Congress the authority to regulate purely local activities previously within the exclusive jurisdiction of the states.[211] The scope of the Sherman Act soon expanded accordingly, reaching local restraints that produced only intrastate harm and indirect impacts on interstate commerce.[212] The Court simultaneously adjusted its Commerce Clause jurisprudence, allowing substantial state regulation of interstate commerce.[213] Under this new relaxed standard, state legislation that did not expressly discriminate against citizens of other states almost always

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208 *See, e.g.*, Chi., Burlington & Quincy R.R. Co. v. Iowa, 97 U.S. 155 (1876) (states possess exclusive authority over intrastate railway rates); Veazie v. Moor, 55 U.S. 568 (1852) (states possess exclusive authority over intrastate navigation).

209 *See Wabash*, at *passim* (holding that Congress possesses exclusive authority over interstate railroad rates).

210 Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1 (1877) (holding that 1866 "Act to aid in the construction of telegraph lines" preempted Florida law conferring monopoly on incumbent firm that had constructed wires before enactment of the statute.); *id.* at 9 (opining that commerce power "keep[s] pace with the progress of the country and adapt[s] [itself] to the new developments of time and circumstances.").

211 *See supra* notes 50-53 and accompanying text (discussing *Wickard*).

212 *See supra* notes 54-61 and accompanying text (describing these developments).

213 Gardbaum, *supra* note 113, at 520-32 (describing relaxation of Commerce Clause scrutiny during this era).

survived dormant Commerce Clause scrutiny.[214] While sometimes justified as necessary to shield local regulation from scrutiny under a greatly expanded commerce power, the shift was more fundamental than that, protecting even legislation like that in *Parker* that imposed substantial interstate harm.[215] The result was a significant increase in the overlap between state and federal regulatory authority.[216]

This resulting overlap presented additional opportunities for preemption of state legislation.[217] Congress has repeatedly availed itself of such opportunities. For instance, the National Labor Relations Act preempts state regulation of labor relations, even though labor unrest has numerous local effects.[218] The Airline Deregulation Act of 1978 preempts state regulation of fraudulent advertising related to airline fares.[219] The Employment Retirement Income Security Act of 1974 preempts state regulation of certain pension plans.[220] The Telecommunications Act of 1996 expressly prevents states from blocking entry by firms that "provide any interstate or intrastate telecommunications service."[221] Indeed, this Act's preemption of state-

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214 *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (articulating test that courts employ to assess non-discriminatory laws that burden interstate commerce); *see also* Alexandra B. Klass & Jim Rossi, *Revitalizing Dormant Commerce Clause Review for Interstate Coordination*, 100 MINN. L. REV. 129, 158 (2015) (noting that "it has been more than 25 years since the Supreme Court has invalidated a state law based on *Pike* balancing").

215 *See* Gardbaum, *supra* note 113, at 530-32 (recounting these developments).

216 Young, *supra* note 199, at 264-65.

217 *Id.* at 265-66 (explaining that rise in concurrent state and federal authority resulted in sharp increase in affirmative statutory preemption of state law). This is not to say that affirmative statutory preemption was unknown between *Gibbons* and *Wickard*. *See, e.g.*, Napier v. Atl. Coast Rail Line, 272 U.S. 605 (1926) (national "Boiler Inspection Act" preempted state regulation of safety features of locomotives subject to the Interstate Commerce Commission); Adams Express Co. v. Croninger, 226 U.S. 491 (1913) (preemption of state law governing liability for damage to goods carried in interstate commerce); *Shreveport Rate Cases*, 234 U.S. at 350-60 (holding that the 1887 Interstate Commerce Act preempted state regulations of railroad rates that directly affected interstate commerce); Pensacola Tel. Co. v. W. Union Tel. Co., 96 U.S. 1, 8-13 (1877) (holding that 1866 Act authorizing construction of telegraph lines pre-empted conflicting Florida enactment).

218 Garner v. Teamsters Union, 346 U.S. 485 (1953).

219 *See* Morales v. Trans World Airlines, 504 U.S. 374 (1992) (finding that Airline Deregulation Act of 1978 preempted state regulation of advertising related to airline fares).

220 FMC Corp. v. Holliday, 498 U.S. 52 (1990); Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981).

221 *See* 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.").

imposed monopolies or cartels simply replicates the sort of Congressional action sustained unanimously in *Gibbons*.[222]

While some statutes contain express preemption provisions, others, like the statute sustained in *Gibbons*, do not and thus exemplify implied preemption.[223] Among those that constitute implicit preemption, some exemplify field preemption, while others exemplify conflict preemption, of which so-called "obstacle preemption" is a subset.[224] In short, according to nearly two centuries of unbroken Supreme Court precedent, the Commerce Clause plainly authorizes Congress to preempt state-imposed restraints of commerce among the several states.

### B. Limits on Otherwise Valid Congressional Interference with State Sovereignty

Because Congress has ample authority to preempt state-imposed restraints of interstate commerce, any constitutional objection must arise despite this affirmative power. The Court's frequent invocation of "state sovereignty" separate from "federalism" suggests as much.[225] Moreover,

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222 *See* PETER HUBER, MICHAEL KELLOG & JOHN THORNE, FEDERAL TELECOMMUNICATIONS LAW 256 (2d ed. 1999) ("In keeping with the 1996 Act's goal of encouraging competition through the opening of local markets, Section 253 of the Act preempts in sweeping terms state and local barriers to entry."); 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).

223 *Compare Morales*, 504 U.S. at 383-91 (applying express preemption clause), *and Holliday*, 498 U.S. at 56-65 (same) *with* Southland Corp. v. Keating, 465 U.S. at 10-17 (finding that statute preempted state law despite enactment's failure to mention states or state courts), *and* Garner v. Teamsters Union, 346 U.S. 485, 488-501 (1953) (holding that structure and coverage of statute required preemption despite failure to mention states or state law); *see also* Telecommunications Act of 1996, 47 U.S.C. § 253(a) (expressly preempting state-created barriers to providing local telephone service).

224 *See, e.g.*, Crosby v. Nat'l Foreign Trade Council, 530 U.S. at 372-73 (explaining that state law creating obstacle to objectives of federal statute conflicts with federal law and is thus preempted); *id.* at 373-380 (holding that state ban on trade was an "obstacle to the accomplishment of Congress's full objectives under the federal Act" and thus preempted); Geier v. Am. Honda Motor Co., 529 U.S. at 873-886 (finding that federal auto safety statute preempted state tort law that created an "obstacle" to achieving statute's purposes); *Southland*, 465 U.S. at 10 (finding preemption because state statute "directly conflicted" with federal law).

225 *See supra* note 136 (collecting numerous decisions stating that state action immunity rests upon considerations of "Federalism and State Sovereignty").

some scholars have invoked the Tenth or Eleventh Amendment as support for *Parker*.[226]

The Supreme Court has occasionally recognized that legislation within the modern scope of Congress's commerce power may nonetheless be unconstitutional because it intrudes upon state sovereignty. Perhaps the most robust application of this principle occurred in *National League of Cities v. Usery*.[227] Indeed, some proponents of *Parker* have invoked the decision to support of state action immunity.[228]

*Usery* evaluated Congressional imposition of minimum wages and overtime rules upon states and localities. Defending the imposition, the United States claimed that such regulation was indistinguishable from federal preemption of state economic regulation of private activity.[229] The Court rejected this analogy, drawing a sharp distinction between federal statutes that preempted state regulation of private conduct, on the one hand, and those regulating the states themselves, on the other.[230] The former, the Court said, fell squarely within Congress's power, notwithstanding the Tenth Amendment and state sovereignty, while the latter might not, depending upon the nature of the sovereignty interests involved.[231] Invoking the Tenth Amendment and related precedents, the Court held that Congress could not interfere with "functions essential to separate and independent existence," of the states.[232] The Court cited, as an example of such interference, Congressional legislation that determined where a state should locate its

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226 *See supra* notes 163-64 and accompanying text (collecting academic authorities contending that *Parker* rests on Tenth and/or Eleventh Amendment).

227 426 U.S. 833, 855 (1976).

228 *E.g.*, Davidson & Butters, *supra* note 140, at 597-604; Blumstein & Calvani, *supra* note 140, at 419-24.

229 *Usery*, 426 U.S. at 844-45 (recounting this argument).

230 *Id.* at 845 ("It is one thing to recognize the authority of Congress to enact laws regulating individual businesses necessarily subject to the dual sovereignty of the government of the Nation and of the State in which they reside. It is quite another to uphold a similar exercise of congressional authority directed, not to private citizens, but to the States as States. We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.").

231 *Id.* at 845-46 (quoting Coyle v. Oklahoma, 215 U.S. 559, 580 (1911)) (rejecting Secretary of Labor's claim that both forms of preemption were constitutionally indistinguishable).

232 *Id.* at 845. *See also id.* at 842-43 (invoking the Tenth Amendment as supportive of such state sovereignty; *id.* at 855 ("Congress may not exercise that power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made.").

capital.[233] Applying this standard, the Court held that Congress could not impose minimum wages and overtime rules on state governments. According to the Court, such legislation would:

> significantly alter or displace the States' abilities to structure employer-employee relationships in such areas as fire prevention, police protection, sanitation, public health, and parks and recreation. These activities are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services.[234]

In short, despite its recognition of robust state sovereignty, *Usery* simultaneously affirmed Congress's undoubted power to preempt state laws that interfere with free competition.

Of course, the Supreme Court rejected that portion of *Usery* that *did* protect state sovereignty about a decade later, in *Garcia v. San Antonio Metropolitan Transportation Authority*.[235] In particular, *Garcia* rejected the existence of general sovereignty-based limits on the commerce power.[236] Still, the Court has continued to recognize and protect some aspects of state sovereignty from otherwise valid exercises of the commerce power.

In *New York v. United States*, for instance, the Court invalidated a federal statute that purported to compel states to enact legislation requiring states to "take title" to radioactive waste generated by commercial nuclear facilities.[237] In so doing, the Court drew a distinction between such legislation, which offended the Tenth Amendment,[238] and laws that preempted existing state legislation regulating the private disposal of such waste.[239] The latter, the Court said, was squarely within Congress's power over interstate commerce, notwithstanding any sovereignty-based limitations derived from the Tenth Amendment.[240] Moreover, in *Printz v. United States*, the Court held that Congress could not commandeer state officials to execute federal law, even though the law to be enforced was a valid exercise of Congress's commerce

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233 *Id.* at 845.

234 *Id.* at 851.

235 469 U.S. 528 (1985).

236 *Id.* at 547-55.

237 505 U.S. 144, 151-54 (1992).

238 *Id.* at 156-66.

239 *Id.* at 159-60 ("Regulation of the resulting interstate market in waste disposal is therefore well within Congress' authority under the Commerce Clause. . . . [U]nder the Supremacy Clause Congress could, if it wished, pre-empt state radioactive waste regulation.").

240 *Id.* at 160.

power.[241] Finally, in *Gregory v. Ashcroft*, the Court read the Federal Age Discrimination Act so as not to preempt a state constitution's requirement that the state's supreme court justices retire at age 70.[242] A contrary result, the Court said, "would upset the usual constitutional balance of federal and state powers."[243] While nominally a case about statutory meaning, the decision assumed that the Tenth Amendment limited the extent to which Congress could interfere with a State's regulation of its own officials.[244]

Unlike *Usery*—which the Court overruled in *Garcia*—*Printz*, *New York* and *Gregory* are still good law.[245] None of these decisions, either alone or together with others, bolsters *Parker*'s rejection of Sherman Act preemption, however. Nor, if it were good law, would *Usery* and its more robust account of state sovereignty. Each of these decisions invalidated legislation that interfered with the manner in which a State conducted its own activities (including legislation), compensated its own workforce, or defined public offices. None involved possible preemption of state regulation of private economic activity such as that involved in *Parker* or its progeny. Even *Usery* expressly recognized the legitimacy of such preemption, without suggesting that it would interfere with state sovereignty.[246] In short, there is an obvious conceptual distinction between laws that preempt state statutes that restrain private parties and those that purport to interfere with the state's regulation or treatment of its own officials. The latter potentially interfere with the functioning of the state itself, while the former merely remove state-created coercive barriers to private economic activity, just as the Framers and Ratifiers anticipated Congress would do when exercising the commerce power.[247] There is thus no "sovereignty" barrier that prevents Congress from dictating that free competition instead of state-imposed restraint shall be the rule governing interstate commercial activity.

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241 521 U.S. 898, 935 (1997).

242 501 U.S. 452, 473 (1991).

243 *Id.* at 460.

244 *Id.* at 461-63.

245 *See* Saywell, *supra* note 139, at 6 (invoking *Printz* and *Gregory* in support of robust state action immunity).

246 *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 840 (1976) ("Congressional power over areas of private endeavor, even when its exercise may pre-empt express state-law determinations contrary to the result which has commended itself to the collective wisdom of Congress, has been held to be limited only by the requirement that 'the means chosen by [Congress] must be reasonably adapted to the end permitted by the Constitution.'") (quoting Heart of Atlanta Motel v. United States, 379 U.S. 241, 262 (1964)).

247 *See supra* notes 191-192, 205-207 and accompanying text.

## V. FEDERALISM AS INTERPRETIVE CANON

Some of *Parker*'s proponents might emphasize that *Parker* itself did not hold that preemption of state-imposed restraints would be unconstitutional. Instead, they might say, the Court invoked the nation's "dual system of government" merely as an interpretive canon that resolved a purported statutory ambiguity regarding the Sherman Act's application to state-imposed restraints. Indeed, the leading treatise on Antitrust Law characterizes *Parker* as having applied an unspecified federalism canon.[248] Viewed in this way *Parker*'s invocation of our "dual system of government" is unremarkable and no different from reliance upon the rule of lenity or the presumption against extra-territoriality when construing an ambiguous statute.[249]

Neither the Court nor any of *Parker*'s academic proponents has invoked any particular canon in defense of *Parker*.[250] A review of the academic literature describing various canons potentially related to federalism and state sovereignty reveals three such canons with possible application to the *Parker* question: (1) the avoidance canon,[251] (2) the federal-state balance canon,[252] and (3) the anti-preemption canon.[253] This article will address the potential application of each canon in turn.

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248 *See* AREEDA & HOVENKAMP, *supra* note 73, ¶ 221b, at 220 ("[*Parker*'s] rule of construction was deemed necessary to protect the states' coordinate role in government."); *see also, e.g.*, Note, *supra* note 144, at 2558 (linking state action immunity to the anti-preemption canon); Page & Lopatka, *supra* note 139, at 1472 ("[Federalism] functions as a background norm that requires a limiting construction of the Sherman Act."); *cf.* ESKRIDGE *et al.*, LEGISLATION & REGULATION 1207 (characterizing *Parker* as reflecting a "presumption against application of the Sherman Act to activities authorized by the states") (citing City of Columbia v. Omni Outdoor Advert., 499 U.S. 365, 370 (1990)).

249 *See* United States v. Santos, 553 U.S. 507, 514 (2008) (explaining and applying Rule of Lenity); EEOC v. Arab Am. Oil Co., 499 U.S. 244, 255-59 (1991) (applying the presumption against extraterritoriality).

250 At least one amicus brief has contended that *Parker* rested upon a "plain statement rule" requiring Congress to state clearly its intention to "alter the usual constitutional balance between States and the Federal Government." *See* Brief of the Am. Hosp. and Ga. Hosp. Ass'n as Amicus Curiae in Support of Respondents at 3, FTC v. Phoebe-Putney Health Sys., Inc., 568 U.S. 216 (2013) (No. 11-1160) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (internal citation omitted)). This article addresses the application *vel non* of the federal-state balance canon, *infra.*

251 *See infra* notes 254-60 and accompanying text (describing this canon).

252 *See infra* notes 266-77 and accompanying text (describing this canon).

253 *See infra* notes 307-17 and accompanying text (describing this canon). This author reviewed the following sources in an attempt to identify potentially relevant canons related to federalism and state sovereignty: ESKIRDGE ET. AL, *supra* note 248, at 1205-08 (reporting 15 different federalism-related canons); ANTONIN SCALIA & BRYAN A.

### A. The Avoidance Canon

The avoidance canon requires courts to, where possible, interpret statutes to avoid constitutional difficulties.[254] Courts generally articulate the canon as follows: where a statute will bear two interpretations, one of which would raise serious doubts as to the statute's constitutionality, courts will choose the meaning that raises no such doubt.[255] The canon reflects a presumption that Congress does not mean to enact statutes that run afoul of the Constitution, as understood by the Court and reflected in its precedents.[256]

The avoidance canon does not support the result in *Parker* or the state action doctrine in general. Successful invocation of the canon requires more than a mere assertion that a particular reading renders a statute constitutionally suspect.[257] Nor is it enough that such arguments have "some force."[258] Instead, any such doubt must be "substantial,"[259] or substantial enough that the contested reading would "raise the sort of 'grave and doubtful constitutional questions' that lead [the Court] to assume Congress did not intend" the contested meaning.[260]

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GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. REV. 109, 117-18 (2010).

254 *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381 (2005) (describing avoidance canon as "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."); United States *ex rel.* Attorney General v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) (opining that, when "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."); Knights Templars' Indemnity Co. v. Jarman, 187 U.S. 197, 205 (1902) (describing "cardinal rule" whereby if "the language of an act will bear two interpretations equally obvious, that one which is clearly in accordance with the provisions of the constitution is to be preferred.").

255 *See* Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.").

256 *See, e.g.*, *Martinez*, 543 U.S. at 381.

257 SCALIA & GARNER, *supra* note 253, at 250 ("At most, the mere assertion of unconstitutionality by one of the litigants is not enough. The doubt must be 'substantial.'").

258 *See* Rust v. Sullivan, 501 U.S. 173, 191 (1991) (declining to apply the avoidance canon even though the Court "[did] not think that the constitutional arguments made by petitioners in these cases are without some force").

259 *See, e.g.*, SCALIA & GARNER, *supra* note 253, at 250.

260 *See Rust*, 501 U.S. at 191 (quoting United States v. Del. & Hudson Co., 213 U.S. 366,408 (1909)); *see also* Jones v. United States, 529 U.S. 848, 857 (2000) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (quoting Delaware & Hudson, 213 U.S at 408); Debartolo Corp. v. Gulf Coast

As explained previously, preemption of state legislation that interferes with free competition and restrains interstate commerce does not raise any constitutional question, let alone a serious one.[261] Indeed, the Supreme Court has recognized and approved the exercise of this power for nearly two centuries, beginning with *Gibbons*.[262] Moreover, recognition of this authority is well-grounded in the Court's account of the original meaning of and rationale for the Constitution's Commerce Clause.[263] The power to regulate — which *Gibbons* defined as the power to prescribe the rule by which interstate commerce is governed — necessarily includes the authority to displace state laws that unreasonably restrain such commerce and interfere with free competition and the free movement of interstate trade.[264] Such legislation simply ensures that the *rule* of free competition governs interstate commerce.[265]

### B. The Federal-State Balance Canon

Courts will not read a statute to alter the traditional federal-state balance unless Congress has clearly required such a significant expansion of federal power.[266] While often employed with respect to criminal statutes, the canon

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Trading Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise *serious constitutional problems*, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (emphasis added)); NLRB v. Catholic Bishops of Chi., 440 U.S. 490, 499-501 (1979) (asking whether the proposed application of the statute "would give rise to *serious constitutional questions*" (emphasis added)); Int'l Ass'n of Machinists v. Street, 367 U.S. 740 (1961) (citing Crowell v. Benson, 285 U.S. 22, 62 (1932)) ("Federal statutes are to be so construed as to avoid *serious doubt of their constitutionality*." (emphasis added)).

261 *See supra* notes 167-247 and accompanying text.

262 *See supra* notes 177-82 and accompanying text.

263 *See supra* notes 186-192 and accompanying text (discussing rationale for Founders' decision to grant Congress authority to regulate interstate commerce).

264 *See supra* notes 175-82 and accompanying text; Gibbons v. Ogden, 22 U.S. 1, 196 (1824) (defining "regulate" in this manner).

265 *See* United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911) (Congress enacted Sherman Act to "protect the free movement of trade in the channels of interstate commerce").

266 *See, e.g.*, United States v. Bass, 404 U.S. 336, 349 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance."); *see also* Jones v. United States, 529 U.S. 848, 858 (2000) ("We have cautioned, as well, that 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." (quoting *Bass*, 404 U.S. at 349)); United States v. Five Gambling Devices, 346 U.S. 441, 450 (1953) ("We must assume that the implications and limitations of our federal system constitute a major premise of all congressional legislation, though not repeatedly recited therein.");

also applies in the civil context.[267] Justice Frankfurter once described the application of the canon in the regulatory context. As he put it, the canon rests on the assumption that Congress does not "take over such local radiations in the vast networks of our national economic enterprise and thereby radically [readjust] the balance of state and national authority" without being "reasonably explicit."[268] Moreover, despite referring to the balance of authority between two sovereigns, this canon nominally applies only when ascertaining the reach of federal statutes that purport to regulate private parties, independent of any question of preemption.[269]

The Court has invoked this canon in cases involving the putative federal regulation of firearm possession,[270] possession of gambling devices,[271] and arson of a private dwelling.[272] Prior to *Wickard* and *Mandeville Island Farms*, the Court also applied the canon in two decisions limiting the scope of the Sherman Act and the Federal Trade Commission Act, respectively.[273] In all of these cases, the Court rejected invitations to read a federal statute broadly so as to ban private conduct historically within the regulatory jurisdiction of states.[274] Thus, the canon helps protect states' regulatory prerogatives over

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Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940) ("The maintenance in our federal system of a proper distribution between state and national governments of police authority and of remedies private and public for public wrongs is of far-reaching importance. An intention to disturb the balance is not lightly to be imputed to Congress.").

267 *See, e.g.*, *Apex Hosiery*, 310 U.S. at 513 (applying canon when discerning the meaning of the Sherman Act in civil context); FTC v. Bunte Brothers, 312 U.S. 349, 355 (1941) (applying canon when discerning the meaning of the Federal Trade Commission Act, a civil statute). Of course, the Sherman Act also includes criminal penalties. *See* 15 U.S.C. §§ 1-2.

268 *See* Felix Frankfurter, *Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 540 (1948).

269 *See supra* note 266 (collecting several decisions employing this canon to thwart application of federal statutes to private activity).

270 *See Bass*, 404 U.S. at 349.

271 *See Five Gambling Devices*, 346 U.S. at 450.

272 *See Jones*, 529 U.S. at 858 (quoting *Bass*, 404 U.S. at 349).

273 Apex Hosiery Co. v. Leader, 310 U.S. 469, 513 (1940) (invoking canon to reject application of the Sherman Act to violent union interference with operation of factory that produced goods exported to other states); FTC v. Bunte Brothers, 312 U.S. 349, 355 (1941) (declining to treat local commercial practices as "in commerce" because "an inroad upon local conditions and local standards of such far reaching import . . . ought to await a clearer mandate from Congress.").

274 *See, e.g.*, United States v. Bass, 404 U.S. 336, 349-50 (1971) (rejecting contention that federal statute banned any possession of a firearm, regardless of connection to interstate commerce).

conduct producing effects primarily felt within their own borders.[275] States may exercise these prerogatives in various ways. They may ban such conduct themselves, imposing the same, harsher or more lenient penalties as those imposed in the federal statute, allow such conduct or even subsidize it.[276] In this way, the canon helps protect the sort of regulatory diversity ordinarily associated with a well-functioning federal system.[277]

Because this canon addresses statutory regulation of private conduct, it would not speak directly to the first category of state action cases, *viz*, those involving possible preemption of state regulation of private activity, as in *Parker*.[278] However, the canon could apply to in the second category, namely, so-called "hybrid restraints" *i.e.*, private restraints authorized or required by states and thus allegedly immune from the Sherman Act.[279] For instance, application of the canon could immunize parties' compliance with state-compelled private price fixing, so long as the state adequately supervised the resulting prices.[280]

At first glance this canon seems to bolster state action immunity with respect to such restraints. After all, many state-authorized restraints are entirely local, involving activities that exceeded the scope of the commerce power for most of our nation's history.[281] Application of the Act to these restraints and the private parties that enter them would preempt hybrid state laws purporting to authorize such conduct and impose a uniform federal

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275 *Cf.* Handler, *supra* note 118, at 17 ("The preemption approach would in effect oust the states of regulatory jurisdiction over the economic affairs of their inhabitants to be superseded by antitrust or other federal regulatory systems.").

276 *See also Jones*, 529 U.S. at 859 (Stevens, J., concurring) ("The fact that petitioner received a sentence of 35 years in prison when the maximum penalty for the comparable state offense was only 10 years, illustrates how a criminal law like this may effectively displace a policy choice made by the State."); *cf. Bass*, 404 U.S. at 348 n.15 (observing that some states did not outlaw firearm possession as such).

277 United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (contending that ability of states to "perform their roles as laboratories for experimentation to devise various solutions where the best solution is far from clear" reveals "the theory and utility of our federalism.") (citing San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 49-50 (1973)); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). *Cf.* Handler, *supra* note 118, at 5-6 & n.26 (contending that *Parker* and its progeny properly prevent the federal courts from interfering with states' diverse responses to regulatory questions).

278 *See supra* notes 125-27 and accompanying text (describing three categories of state action cases).

279 *See, e.g.*, S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985*)*.

280 *Id.* at 65.

281 *See, e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (state-authorized price fixing by title insurance companies).

policy upon numerous regulatory subjects historically left to individual states. This enforced uniformity would prevent states from acting as "laboratories of democracy" and thus experimenting with novel approaches to economic problems.[282] Surely, a one-size-fits-all federal regulatory framework forced upon local economies and preventing such experimentation would upset the traditional allocation of regulatory authority between states and the national government.

Closer inspection reveals that the federal-state balance canon has no role to play in this context. As noted earlier, hybrid restraints are only a small subset of private restraints potentially subject to the Sherman Act.[283] The Court has already crossed this bridge, ignoring concerns about the federal-state balance in the primary setting in which the Sherman Act applies; namely, private commercial restraints not authorized by the state. Indeed, expansion of the Act in these settings raised the prospect of preemption of local regulation.[284] Thus, the Court has itself created the conflict between the Sherman Act and regulation of local subjects that supposedly gives rise to the need for state action immunity. Sudden application of the canon to immunize that small subset of private restraints that states have properly authorized would constitute a selective invocation of federalism concerns.

To be sure, the Court initially read the Sherman Act to accord great respect to the traditional federal-state balance as defined by the Court's pre-*Wickard* Commerce Clause jurisprudence.[285] Under this case law, both the commerce power and the Sherman Act only reached those restraints—whether public or private—that imposed significant interstate harm.[286] Moreover, Sherman Act jurisdiction over such restraints was exclusive, the Court said, because states with authority over such restraints would legislate "according to what each state might regard as its own particular interest," producing conflicting and suboptimal regulation.[287] This jurisprudence left

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282 *See* Saywell, *supra* note 139, at 7-8 (contending that Sherman Act preemption of state-imposed or state-authorized restraints squelches local experimentation and innovation); *supra* note 157 (collecting other authorities contending that Sherman Act preemption of state-imposed or state-authorized restraints will prevent such experimentation).

283 *See supra* notes 121-28 and accompanying text.

284 *See supra* note 62 and accompanying text.

285 *See supra* notes 31-33, 39-40 and accompanying text (describing pre-*Wickard* Sherman Act case law holding that the Act only reached restraints of trade that also directly burdened interstate commerce).

286 *See* Meese, *supra* note 33, at 86-92 (describing the content and evolution of this case law).

287 *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 231-32 (1899); *see also* Hadley-Dean Plate Glass Co. v. Highland Glass Co., 143 F. 242, 244 (8th Cir. 1906) (holding that state lacked authority over private agreements restraining interstate commerce) (citing *Addyston Pipe*, 175 U.S. at 246); James May, *Antitrust Practice and Procedure*

individual states with exclusive jurisdiction over *intra*state restraints that may have affected commerce but produced no interstate harm.[288] Indeed, during the Sherman Act's early years, state antitrust statutes accounted for more prosecutions and fines than the Sherman Act.[289]

All this changed in the 1940s, however, as the Court expanded the reach of the Sherman Act by engrafting *Wickard*'s substantial effects test onto the statute.[290] As explained earlier, the Court has repeatedly applied the Act to private restraints that produce no interstate harm and thus would have fallen within exclusive state authority under the principle that previously animated the Court's Commerce Clause and Sherman Act jurisprudence.[291] Each of these restraints may have produced significant antitrust harm, such as higher prices, and thus "restrained trade." In each case, however, the harm was confined to a single state, even if the restraint also produced unrelated benign effects in other states. Thus, states possessed optimal incentives to legislate with respect to such conduct, and the Court did not suggest otherwise.[292]

*Mandeville Island Farms* and its progeny applied the Sherman Act to local private restraints producing no interstate harm. This significant expansion of the Act assuredly upset the pre-*Wickard* "federal-state balance" that had characterized the scope of the Act for over five decades, by banning restraints over which individual states had possessed exclusive regulatory authority.[293] Recall here the admonition by *Parker*'s proponents that states should function as laboratories of democracy when making economic policy, unencumbered

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*in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law: 1880–1918*, 135 U. PENN. L. REV. 495, 518 & n.117 (1987) (collecting decisions holding that states lacked authority over private restraints of interstate commerce); *supra* notes 199-201 and accompanying text.

288 *See Addyston Pipe*, 175 U.S. at 247 ("Although the jurisdiction of Congress over commerce among the states is full and complete, it is not questioned that it has none over that which is wholly within a state, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce.").

289 *See* May, *supra* note 287, at 500-02.

290 *See, e.g.*, Mandeville Island Farms v. Am. Crystal Sugar, 334 U.S 219 (1948).

291 *See supra* notes 54-61 and accompanying text (collecting and discussing such decisions).

292 *Cf. supra* notes 207-08 and accompanying text (describing how courts assumed that states possessed proper incentives to regulate intrastate conduct that merely impacted interstate commerce indirectly).

293 *See, e.g.*, State *ex rel.* Attorney Gen. v. Ark. Lumber Co., 260 Mo. 212 (1913) (sustaining challenge to cartel limiting output of lumber within the state); State *ex rel.* Crow v. Fireman's Fund Ins. Co., 52 S.W. 595 (Mo. 1899) (rejecting liberty of contract challenge to state ban on collusion between fire insurance companies); *see also* May, *supra* note 287, at 497-507 (describing state antitrust regulation of intra-state restraints during this period); *supra* notes 29-30; 39-40 204 and accompanying text (describing case law holding that the commerce power does not reach conduct that produces effects confined to a single state).

by the specter of Sherman Act preemption.[294] The Supreme Court has itself opined that the sort of sovereignty that gives rise to *Parker* immunity, including the authority to shelter private restraints, protects each state's "freedom of action" with respect to economic affairs.[295]

If states are to be sovereign laboratories that experiment with novel solutions to economic problems, such "freedom of action" surely includes discretion *not* to ban conduct within a polity's borders that produces no interstate harm, even if the Sherman Act condemns analogous *inter*state restraints. The Court has implied as much when implementing the federal-state balance canon in other contexts, narrowing federal statutes so as not to ban conduct states have also left unscathed.[296] Indeed, the theory of competitive federalism that implements the "laboratories" metaphor holds that interjurisdictional rivalry can only produce optimal laws if, *inter alia*, states retain complete flexibility in lawmaking.[297]

In the antitrust context, for instance, such experimentation could include *per se* legality for certain forms of local conduct that the Sherman Act would ban as unlawful *per se* or subject to Rule of Reason analysis.[298] It could also include a reasonable price defense for naked horizontal price fixing[299] or Rule of Reason analysis for restraints deemed unlawful *per se* under the Sherman

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294 *See* Handler, supra note 118, at 5-6 & n.26; *supra* note 261 and accompanying text (collecting other scholarly authorities to same effect).

295 *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 633 (1992).

296 *See* United States v. Bass, 404 U.S. 336, 348, n.15 (1971) (finding it noteworthy that some states do not ban firearm possession at all). *Cf.* Jones v. United States, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (emphasizing that application of federal arson statute to local activities would displace state policy choices because federal penalties vastly exceeded state punishment).

297 *See* Easterbrook, *supra* note 147, at 937 (noting that competitive federalism can only induce optimal rules if, *inter alia*, states can "select any set of laws they desire").

298 *Cf.* Alan J. Meese, *Intrabrand Restraints and the Theory of the Firm*, 83 N.C. L. REV. 5 (2004) (contending that intrabrand restraints such as minimum rpm and exclusive territories should be lawful *per se*); Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981) (arguing that maximum resale price maintenance should be lawful *per se*); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007) (holding that courts should analyze minimum resale price maintenance under the Rule of Reason); State Oil v. Khan, 522 U.S. 3 (1997) (rejecting argument that maximum resale price maintenance should be lawful *per se* and instead holding that courts should subject such conduct to the Rule of Reason).

299 *See, e.g.*, Skrainka v. Scharringhausen, 8 Mo. App. 522 (1880) (enforcing horizontal price fixing agreement because it did not set unreasonable prices). *Cf.* FTC v. Superior Court Trial Lawyers, 493 U.S. 411 (1990) (rejecting reasonable price defense for naked horizontal price fixing).

Act.[300] Finally, states could adopt identical substantive rules as those established under the Sherman Act while imposing less draconian remedies.[301] A Court truly concerned with the federal-state balance would read the Act to encourage such experimentation, so long as the activities subject to potential regulation produce no interstate harm.[302] The Court's post-*Wickard* jurisprudence governing the reach of the Sherman Act with respect to private restraints contradicts these principles and upsets the federal-state balance.[303]

None of the post-*Wickard* decisions applying the expanded Sherman Act to local restraints producing no interstate harm has mentioned the "federal-state balance" canon, let alone explained why such an expansive application

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300 For instance, states could decide that those tying contracts currently deemed unlawful *per se* under the Sherman Act should instead be analyzed under the Rule of Reason. *Compare* Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1985) (tying contracts imposed by firms with market power are unlawful *per se*) *with id.* at 33-42 (O'Connor, J., concurring) (contending that courts should analyze all tying contracts under the Rule of Reason).

301 Violation of the Sherman Act, of course, is a felony, and parties injured can obtain damages triple the harm they suffered. *Cf. Jones*, 529 U.S. at 859 (Stevens, J., concurring) (contending that application of federal arson statute to arson of a single dwelling "effectively displace[d] a policy choice made by the State" because resulting federal prison sentence was more than triple the maximum penalty for violating comparable state law).

302 *See* D. Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. L. 403 (2004).

303 To be sure, the federal-state balance canon is just that, a canon. It does not bar Congress from exercising its recognized authority to upset that balance, so long as it speaks with sufficient clarity. However, the Supreme Court has not explained why the Sherman Act satisfies this clear statement requirement with respect to local private restraints that produce no interstate harm. At most, the Court has opined that Congress meant to exercise the full extent of its commerce power when it passed the Act. *See* Summit Health v. Pinhas, 500 U.S. 322, 328 & n.7 (1991) (concluding that the Congress that passed the Sherman Act intended to "g[o] as far as the Constitution permits Congress to go"); Gulf v. Copp Paving, 419 U.S. 186, 194-95 (1974) (Congress "wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements. . . .") (*dicta*). However, as I have explained elsewhere, there is no indication that the 1890 Congress believed that its powers over interstate commerce exceeded the authority described in the Court's pre-1890 Commerce Clause jurisprudence. *See* Meese, *supra* note 33, at 136-44. Thus, the "utmost extent" of Congress's constitutional power in 1890 did not include the authority to regulate intrastate restraints that produced only incidental impacts on interstate commerce. *See supra* notes 29-30, 204 and accompanying text. Nor is there any reason to think that Congress meant to grant federal courts the authority to expand the scope of the Sherman Act whenever the Supreme Court replaced one Commerce Clause standard with another. *See* Meese, *supra* note 33, at 78-86. Thus, stipulation that Congress exercised all the power it possessed when it passed the Sherman Act is entirely consistent with an approach to the Act that maintains the traditional federal-state balance exemplified and implemented by the Court's pre-*Wickard* Sherman Act jurisprudence. Application of the federal-state balance canon would seem to bolster the pre-*Wickard* approach, not undermine it.

of the Act survives this principle. There is no apparent basis for sudden invocation of the canon simply because a private restraint falls into that small category of restraints blessed by the state. If federal-state balance concerns are to inform the Court's reading of the Sherman Act with respect to private restraints, such concerns should apply whether or not the state has approved or encouraged a restraint.

Indeed, restoring the Act to its original and more limited scope *vis a vis all* private restraints, whether purely private or hybrid, would attenuate the main concerns that motivate *Parker*'s proponents and perhaps even the Court itself. Recall that some proponents contend that state action immunity prevents the sort of discredited judicial supervision of local regulation associated with the *Lochner* era.[304] However, nearly all Supreme Court decisions evaluating assertions of state action immunity involve restraints that produce no interstate harm.[305] Thus, contracting the scope of the Act so as to reach only those restraints that produce interstate harm would nearly eliminate potential conflicts between Sherman Act regulation, on the one hand, and state regulation of local economic activity, on the other. Indeed, one leading scholar correctly observed more than three decades ago that restoring the original narrower reach of the Act would all but eliminate the need for the sort of accommodation between state and federal regulation that *Parker* and its progeny represent.[306]

Put another way, the Court's post-*Wickard* decision to replace the direct/indirect standard with the substantial effects test itself created the very

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304 *Cf.* Handler, *supra* note 118, at 7 (contending that reversal of *Parker* would empower federal courts to replicate *Lochner's* economic due process jurisprudence under the aegis of the Sherman Act); *supra* notes 143-45 and accompanying text (collecting additional authorities invoking identical considerations).

305 *See, e.g.*, N.C. Bd. of Dental Exam'rs v. FTC, 574 U.S. 494 (2015) (challenging a conspiracy to exclude some teeth whiteners from a single state's dental market); City of Columbia v. Omni Outdoor Advert., Inc., 499 U.S. 365 (1991) (challenging a single city's regulation of billboards); Fisher v. City of Berkeley, 475 U.S. 260 (1986) (challenging a single city's rent control); Bates v. Arizona, 433 U.S. 350 (1977); Cantor v. Detroit Edison, 428 U.S. 579 (1976) (challenging a utility's requirement that a subset of state's consumers purchase light bulbs from the defendant); Goldfarb v. Va. State Bar, 421 U.S. 773 (1975) (challenging an agreement fixing prices for title searches in a single county). Professor Hovenkamp has suggested that *Parker* is the only Supreme Court state action decision that involved a regime producing interstate harm. *See* Hovenkamp, *supra* note 156, at 644-45.

306 *See* Easterbrook, *supra* note 57, at 41 (noting that "[t]he need for accommodation between state and federal law arises only because the Sherman Act has grown with the growth of the commerce power. The problem post-dates the statute," and explaining that narrowing the scope of the Sherman Act "to what Congress might have contemplated in 1890 . . . would obviate most of the need for accommodation" between state regulation and the Sherman Act).

federalism problem—a putative conflict between local regulation and the Sherman Act—that immunity for properly-authorized hybrid restraints purports to solve. Instead of militating against preemption as such, the *Lochner*esque concerns about federal intrusion into state regulation of local activity may just as well support *consistent* application of the federal-state balance canon, restoration of the direct/indirect standard and thus retraction of the scope of the Sherman Act across the board. Restoration of the traditional allocation of antitrust authority would largely eliminate the innumerable potential conflicts between local regulation and the Sherman Act. Failing such restoration, however, there is no apparent rationale for the sort of selective invocation of the federal-state balance canon that results in the application of the Act to local but unauthorized private restraints but simultaneous immunity for hybrid (but still private) restraints with an identical impact, simply because the state imposed or authorized them.

In sum, there are two principled approaches to the federal-state balance in this context: (1) apply the canon consistently, retracting the general scope of the Act or (2) ignore the canon consistently and thus invalidate state-authorized restraints that interfere with free competition and thwart the objective of the Sherman Act. That is, the Supreme Court should either ignore such concerns in both contexts or give them equal weight across the board, reducing the reach of the Sherman Act accordingly. The current approach—immunity only for those local private restraints that states have imposed or approved—purports to solve a problem of the Court's own creation by invoking a haphazard and ill-conceived vision of federalism.

### C. The Anti-Preemption Canon

The Supreme Court has repeatedly held that federal law will not preempt state regulation in fields over which states have traditionally exercised regulatory authority unless Congress makes its intent to do so "clear and manifest."[307] If applicable, this canon would seem to protect state-imposed

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[307] Lorrilard Tobacco Co. v. Reilly, 533 U. S. 525, 541–542 (2001) ("Because 'federal law is said to bar state action in [a] fiel[d] of traditional state regulation,' namely, advertising, we 'wor[k] on the assumption that the historic police powers of the States [a]re not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress'" (citation omitted)); Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005) ("'[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.' In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention ' "clear and manifest." '") (citation omitted) (quoting N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers

restraints such as those sustained in *Parker* from Sherman Act preemption. After reviewing the rationale and content of this canon, this subpart applies the canon in two settings: (1) state-imposed restraints that, like those in *Parker*, directly burden interstate commerce and (2) state-imposed restraints that impact interstate commerce only indirectly.

*1. Rationale and Content of the Anti-Preemption Canon*

There was little need for such a canon before *Wickard*, when the Court placed meaningful limits on the commerce power, and state and federal authority over nearly all commercial activity was mutually exclusive.[308] However, the Court's relaxation of limits on the commerce power, coupled with less intrusive applications of the dormant Commerce Clause, created concurrent state and national authority over most of the nation's commercial activity.[309] The resulting vast overlap in state and federal authority induced the Court to develop detailed rules governing preemption, including this canon, shortly after *Wickard*.[310]

As the Court put it more recently: "When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[311] This logic even applies when the federal statute includes an express preemption clause.[312]

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Ins. Co., 514 U.S. 645, 655 (1995) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))); *see also* Young, *supra* note 199, at 265-69 (describing development of this canon); Note, *supra* note 144, at 2558 (linking state action immunity to the anti-preemption canon).

308 *See generally supra* notes 196-210 and accompanying text (describing pre-*Wickard* regime of dual federalism and resulting lack of overlap between state and federal powers).

309 *See supra* notes 211-17 and accompanying text (describing this doctrinal evolution and the resulting vast expansion in overlap between state and federal regulatory power); Young, *supra* note 199, at 265 ("In the nineteenth century, most cases that might raise preemption issues today would have been decided under the doctrine of dual federalism—that is, by determining whether a given exertion of regulatory authority fell within an area delegated to federal authority or the sphere reserved to the states.").

310 *See Rice*, 331 U.S. at 230, 236 (1947) (announcing and applying this canon; *see also* Young, *supra* note 199, at 265-66 (explaining how such increased overlap between state and federal power induced more detailed preemption doctrine).

311 *See* Altria Grp. Inc. v. Good, 555 U.S. 70, 77 (2008) (quoting *Rice*, 331 U.S. at 230).

312 *Id.* at 77 ("[W]hen the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'") (quoting *Bates*, 544 U.S. at 449).

Both the Supreme Court and leading scholars have characterized this canon and preemption jurisprudence more generally as part of a larger effort to safeguard the overall federal-state balance.[313] Indeed, the Supreme Court has said that the canon applies whenever a statute disturbs this balance.[314] Proponents of the presumption have also defended this canon as an appropriate response to other developments in federalism doctrine. Noting the Court's failure to enforce meaningful limits on Congress's commerce power,[315] these scholars explain that this presumption helps protect the original allocation of state and national authority, by requiring Congress to overcome the legislative inertia necessary to speak clearly before preempting the sort of state legislation the canon protects.[316] In this way, it is said, the canon functions as a "procedural [safeguard] of federalism."[317]

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313 *See, e.g.*, United States v. Locke, 529 U.S. 89, 106 (2000) (applying preemption doctrine so as to preserve "the established federal-state balance in matters of maritime commerce"); Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (requiring Congress to make its intention to preempt state law "unmistakably clear in the language of the statute" where such preemption "would upset the usual constitutional balance of federal and state powers") (citation omitted); *id.* at 461 (implementing presumption against preemption by requiring a "clear statement" before finding that law "affect[s] the federal-state balance") (citation omitted); Hillsborough Cty. v. Automated Med. Labs., 471 U.S. 707, 717-18 (1985) (rejecting proposed preemption as "inconsistent with the federal-state balance embodied in this Court's Supremacy Clause jurisprudence"); Jones v. United States, 529 U.S. 848, 859 (2000) (Stevens, J., concurring) (noting "kinship between our well-established presumption against federal pre-emption of state law" and the federal-state balance canon); Young, *supra* note 199, at 265 (asserting that the presumption against preemption protects the "federal-state balance" and "operationalizes the political and procedural safeguards of federalism"); BRADFORD R. CLARK, PROCESS-BASED PREEMPTION, IN PREEMPTION CHOICE: THE THEORY, LAW AND REALITY OF FEDERALISM'S CORE QUESTIONS 192, 199-201 (William W. Buzbee ed., Cambridge University Press 2009); William N. Eskridge, *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1485 (2008) ("[T]he larger project of preemption jurisprudence is to develop area-specific precepts for calibrating the state-federal balance.").

314 *See Gregory*, 501 U.S. at 460-61.

315 Young, *supra* note 199, at 261-64.

316 *Id.* at 257 ("Preemption cases significantly shape our federal balance, and preemption *doctrine* has been critically influenced by broader changes in constitutional law."); *id.* at 265-71 (describing development of canon as a reaction to expansion of federal authority and possibility that proliferating federal legislation would inadvertently supplant state regulation).

317 *Id.* at 265 ("By requiring Congress to speak clearly in order to preempt state law, *Rice* ensures notice to legislative advocates of state interest that preemption is contemplated in proposed legislation, and it imposes an additional procedural hurdle to legislation that undermines state prerogatives. Like other 'clear statement rules' disfavoring legislation that alters the federal-state balance, the *Rice* presumption operationalizes the political and procedural safeguards of federalism."); *see* Bradford R. Clark, *The Procedural Safeguards of Federalism*, 83 NOTRE DAME L. REV. 1681, 1702, 1709 (2008) (describing various canons

*Parker*, of course, preceded the Court's earliest articulation of the anti-preemption canon and thus did not invoke it. Moreover, so far as this author is aware, none of *Parker*'s progeny has invoked this canon, perhaps because these decisions almost always frame the question as involving possible immunity from the Sherman Act instead of potential preemption. However, the Court *has* invoked the canon to buttress its rejection of preemption in a different antitrust context. In *California v. ARC America*, several states invoked their antitrust laws to redress injuries they had suffered as "indirect purchasers" from an interstate cartel.[318] Recent Supreme Court precedent barred indirect purchasers from seeking recovery under the Sherman Act, holding that only direct purchasers could obtain antitrust damages.[319] The various states' own antitrust laws, however, expressly authorized such suits, raising the prospect of parallel actions brought in state and federal court, the former by direct and indirect purchasers and the latter by direct purchasers only.[320]

The defendants sought Sherman Act preemption of state-law indirect purchaser suits. Allowing such suits, they said, would frustrate the policy considerations that induced the Supreme Court to declare such actions off limits under the Sherman Act.[321] After articulating the general standards governing preemption, the Court proceeded to increase the defendants' burden of establishing preemption before proceeding to its analysis. According to the Court:

> In this case, *in addition*, appellees must overcome the presumption against finding preemption of state law *in areas traditionally regulated by the States*. When Congress legislates in a field traditionally occupied by the States, we start with the

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of statutory construction that constitute such safeguards); *id.* at 1707 (endorsing the presumption against preemption because "[i]f state law is background law and the federal government can make 'the supreme Law of the Land' only by employing procedures that favor small states, then courts are right to apply doctrines that guard against over-preemption of state law. The traditional presumption against preemption performs this function by ensuring compliance with constitutionally prescribed lawmaking procedures. If a federal statute does not expressly preempt state law, then a judicial decision to preempt risks circumventing the procedural safeguards of federalism built into the Constitution.").

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

319 Ill. Brick Co. v. Illinois, 431 U.S. 720, 734-35 (1977) (holding that private recovery under the antitrust laws is generally limited to direct purchasers).

320 *See ARC Am. Corp.*, 490 U.S. at 98 & n.3 (describing state antitrust laws authorizing indirect purchaser suits).

321 *Id.* at 99 (describing defendants' argument to this effect); *Ill. Brick*, 431 U.S. at 730-36 (identifying rationales for barring indirect purchaser actions).

> assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.[322]

Applying this standard to the question before it, the Court purported to identify "a long history of state common law and statutory remedies against monopolies and unfair business practices," concluding that "it is plain that this is an area traditionally regulated by the States."[323] The Court found no "clear purpose" of Congress to thwart indirect purchaser actions brought under state statutes, even though such actions attacked identical conduct to that banned by the Sherman Act.[324]

### *2. Application of the Anti-Preemption Canon in* Parker

Of course, the statute in *Parker* did not purport to constitute antitrust regulation. Instead, *Parker* and its progeny have shielded various regulations that *displaced* free competition, the goal of antitrust. Still, application of the anti-preemption canon does not turn on the competitive impact of the challenged state enactment and could theoretically protect anticompetitive state legislation from Sherman Act preemption.[325]

However, some reflection reveals that the anti-preemption canon has no place with respect to restraints such as those that *Parker* sustained. While the *Parker* restraints regulated local activity, they differed from state legislation sheltered by the anti-preemption canon in one critical respect: California's scheme to reduce national raisin output produced substantial interstate harm by regulating the price of interstate raisin sales, affecting interstate commerce "directly" and thus regulating such commerce "in a constitutional sense."[326] Such regulation fell within the exclusive authority of Congress under the pre-*Wickard* understanding of the Commerce power.[327] Thus, California's scheme

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322 *ARC Am. Corp.*, 490 U.S. at 101 (emphases added) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

323 *See id.* ("Given the long history of state common law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States."); *id.* at 102 ("Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.").

324 *Id.* at 105 (finding no "clear purpose" by Congress to preempt state law simply because it imposed higher damages than the Sherman Act).

325 *See generally* Burns, *supra* note 139, at 31-38 (explaining that similar pro-federalism logic explains both *ARC America* and *Parker*).

326 *See supra* notes 202-06 and accompanying text.

327 *See supra* notes 41-49, 196-210 and accompanying text (describing Nineteenth Century understanding of the appropriate scope of the commerce power and evolution of that

did not constitute exercise of "historic police powers" over "an area traditionally regulated by the states."[328] Instead, this scheme purported to "regulate" interstate commerce, contrary to the presumed intent of Congress, which the Court "traditionally" enforced *via* its quasi-statutory Commerce Clause jurisprudence.[329] Far from supporting any presumption *against* preemption of California's scheme to constrict national raisin output, this case law in fact *exemplified* preemption of analogous state schemes.[330] Such preemption, of course, performed the same function *vis a vis* state-imposed restraints as did the Sherman Act *vis a vis* private restraints.[331] Thus, the anti-preemption canon simply has no place with respect to legislation such as that evaluated in *Parker*.[332]

### *3. Application of the Anti-Preemption Canon to Truly Local Restraints*

What, though, about the sort of legislation that state action doctrine usually protects, namely, state regulation of local activity such as billboards, dentistry, liquor prices and the like? Unlike the regulatory scheme in *Parker*,

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authority to reach intrastate activities such as manufacturing and agriculture and regulations thereof that directly burdened interstate commerce).

328 *See ARC America*, 490 U.S. at 101.

329 In the same way, it should be noted, pre-*Wickard* Commerce Clause jurisprudence preempted state antitrust regulation of conduct that imposed direct burdens on interstate commerce. *See* May, *supra* note 287, at 518 ("Federal and state jurists often declared that the states could not constitutionally regulate anticompetitive activity within interstate commerce, . . . [establishing] some significant limitations on the scope of state antitrust provisions. . . . ") (alteration in original); *id.* at n.117 (collecting decisions).

330 *Cf.* Exxon Corp. v. Governor of Md., 437 U.S. 117, 128 (characterizing Dormant Commerce Clause as potentially "preempting" state laws that interfered with the free flow of interstate commerce); *supra* notes 196-99 and accompanying text (collecting other authorities to this effect).

331 *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 230 (1899) (explaining that Congress had the power to ban private restraints that produced the same economic impact as state-imposed restraints); United States v. Am. Tobacco Co., 221 U.S. 106, 180 (1911) (Congress enacted the Sherman Act to protect free movement of trade in the channels of interstate commerce).

332 *See* United States v. Locke, 529 U.S. 89, 106-09 (2000) (rejecting anti-preemption canon where state law purported to exercise authority traditionally exercised by the national government). *Compare* Alan J. Meese, *Federalism and State Restraints of Interstate Commerce*, 100 IOWA L. REV. 2161, 2166 (2015) ("[T]he principle of federalism, properly understood, does not countenance state legislation enriching in-state producers at the expense of out-of-state consumers.") (citing Hovenkamp, *Federalism and Antitrust Reform*, 40 U. OF S. F. L. REV. at 644)), *with* Squire, *supra* note 100, at 119-122 (advocating more robust preemption standard but endorsing *Parker* because California scheme sought "fair" prices instead of monopoly), *and id.* at 121 n.196 (recognizing that proposed standard was "under-inclusive" because "most buyers of California raisins lived outside the state").

such regulations produce no interstate harm. Such legislation was beyond Congressional authority before *Wickard* and thus survived the Court's pre-*Wickard* doctrine of quasi-statutory implied preemption. This regulation of local subjects *does* exercise "historic police powers in areas traditionally regulated by the states," with the result that the anti-preemption canon would seem to counsel against Sherman Act preemption.[333]

As noted earlier, some proponents of state action immunity have invoked the post-*Wickard* expansion of the Sherman Act to bolster their claim that, but for the state action doctrine, applying the Act to state-imposed restraints would grant federal courts undue authority over state regulation of local activities.[334] This argument certainly has some force as a normative matter. Moreover, the observation may help explain the Court's reluctance to apply the Sherman Act to state-imposed restraints, given that so many such restraints implicate purely local commerce.[335] Application of the Act to such restraints would in many cases entail judicial inquiry into the reasonableness of state police power regulation that apparently interferes with free competition.[336]

There is, however, no warrant for application of the anti-preemption canon in this context. To be sure, there is no indication that Congress contemplated or anticipated preemption of local state-imposed restraints that impact interstate commerce indirectly and produce no interstate harm, let alone any evidence that Congress clearly meant to do so. This does not establish, however, that Congress declined to preempt state-imposed restraints as such.

The ultimate touchstone of any such analysis is the meaning that Congress attributed to the relevant statutory terms.[337] It seems doubtful that Congress meant to accord state-imposed restraints as such some special immunity from preemption otherwise dictated by the Court's jurisprudence. The 1890 Congress presumably knew that the Supreme Court's quasi-statutory regime derived from the Commerce Clause preempted state-

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

334 *See supra* notes 142-145 and accompanying text.

335 *See supra* note 305 and accompanying text (explaining that most decisions on *Parker* immunity involve local restraints); *cf.* Easterbrook, *supra* note 57, at 41 (noting that vast majority of state-imposed restraints exceed scope of the Sherman Act as originally understood).

336 *See* Verkuil, *supra* note 139, at 334 (contending that application of Sherman Act to local regulations would replicate *Lochner*-era supervision of local regulation under the Due Process Clause).

337 *See* John Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 82-84 (2006) (explaining how textualists employ canons to "impute meaning to a statute").

imposed restraints—such as those later assessed in *Parker*—that regulated interstate commerce. This jurisprudence, the Court said, implemented Congress's presumed intent that the national market remain free of such obstructions to interstate trade.[338] Nothing in the Sherman Act indicates that Congress meant to authorize such restraints and thus rebut this presumption.[339] Thus, if Congress did not anticipate banning state-imposed indirect restraints, it was because it did not anticipate banning *any* indirect restraints. Moreover, the immunity that local state-imposed restraints enjoyed was not immunity from preemption *qua* preemption, but instead immunity from the application of the Sherman Act to indirect restraints in the first place. Such restraints—whether public or private—simply exceeded the scope of the commerce power and therefore any imagined scope of the Sherman Act.

Here again, application of the anti-preemption canon to shield local state-imposed restraints solves a putative problem that the Court itself created when it ignored the federal-state balance canon and applied the Sherman Act to local private restraints producing no interstate harm. To be sure, immunizing state-imposed restraints to *that extent* effectuates Congress's subjective intent, but only accidentally and selectively. Under current law, at least this result co-exists with two others that contradict that very same intent: (1) preemption of hybrid, indirect restraints that states have approved but without satisfying state action doctrine's procedural requirements and (2) invalidation of innumerable private restraints that also produce no interstate harm. As explained earlier, the presumption against preemption is simply one manifestation of a broader judicial commitment to maintaining the federal-state balance.[340] The principle of federalism that informs the anti-preemption canon—protection of traditional state regulatory spheres from inadvertent national interference—requires the same presumption against applying the Sherman Act to both hybrid and private restraints that produce no interstate harm.

As was the case with the federal-state balance canon, it would seem that federalism should be an all-or-nothing proposition. That is, there is no apparent rationale for ignoring the federal-state balance canon when it comes to private restraints and thus radically transforming the statutory objective imputed to Congress, while simultaneously invoking the anti-preemption

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338 *See supra* notes 196-98 and accompanying text.

339 *See supra* note 198 and accompanying text (collecting authorities establishing that Congress could authorize states to regulate interstate commerce).

340 *See supra* notes 313-17 and accompanying text.

canon to protect state-imposed restraints from the very same fate. Consistent regard for federalism requires consistent treatment of contracts "in restraint of trade" and state-imposed restraints that produce the same results. There are two possible ways to achieve such consistency: (1) invalidation of all such local restraints, public or private, "across the board,"[341] or (2) reducing the scope of the Sherman Act, so that the Act only reaches those restraints that produce interstate harm.

## VI. WHICH CONSISTENCY?

Recognition that the Court's Sherman Act jurisprudence reflects inconsistent regard for federalism does not itself reveal which consistent approach the Court should take. Nor does the invocation of the generalized value of federalism. Finally, considerations of *stare decisis* do not militate in favor of either approach, as either approach would require the Court to overrule numerous decisions.[342]

Several considerations suggest that the Court should resolve the modern inconsistency in favor of federalism. The resulting regime would restore the pre-*Wickard* allocation of regulatory authority over trade restraints between states and the national government. The Sherman Act would thus reach only those restraints, including state-imposed restraints, that directly burden interstate commerce. Instead of interfering with valid state prerogatives, preemption in this narrow context would fortify the traditional federal-state balance by restoring Congress's exclusive authority over conduct or regulation thereof that produces interstate harm.

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341 One scholar advocated something like this former approach, without considering reduction in the scope of the Act across the Board so as not to reach local restraints. *See* Squire, *supra* note 100, at 111-29 (advocating somewhat more robust preemption than recognized under current law but endorsing *Parker*).

342 For instance, consistent protection of the traditional federal-state balance would require the Court to overrule *Mandeville Island Farms* and the numerous other decisions applying the Sherman Act to local restraints that merely "substantially affect" interstate commerce. On the other hand, consistent rejection of federalism canons would require the Court to overrule *Parker* and other decisions that have conferred state action immunity on state-imposed restraints. It should be noted that the Court's inconsistent invocation of federalism considerations weakens any claim that *stare decisis* requires adherence to *Parker* and its progeny. *See* Continental T.V. v. GTE Sylvania Inc., 433 U.S. 36, 53-57 (1977) (inconsistent treatment of similar phenomena justifies reconsideration of Sherman Act precedent); *cf.* Squire, *supra* note 100, at 100 (contending that other aspects of state action doctrine are "recipes for confusion and indeterminacy" and thus not deserving of *stare decisis* protection).

The resulting increase in exclusive state authority would reinforce and extend states' historic role as "laboratories of democracy" that generate innovative and diverse solutions to varied local economic problems. Such "freedom of action" over local economic matters would include the power to adopt less intrusive regulation—indeed, no regulation at all—of private conduct currently governed by a one-size-fits-all national floor imposed under the Sherman Act. Such complete flexibility in regulatory options would help satisfy the conditions necessary for effective interjurisdictional rivalry and resulting legislative choices.[343]

Indeed, proponents of *Parker* should applaud such a restoration of the traditional federal-state balance in the antitrust context. These scholars decry Sherman Act preemption of state regulation of local economic subjects. To be sure, the sort of restoration advocated here would result in some preemption of restraints, such as those in *Parker*, that produce interstate economic harm. However, the same restoration would eliminate preemption of what is probably a far larger category of restraints, namely, those hybrid restraints that states impose without satisfying the requisite procedural requirements.[344] All and all, then, a consistent vindication of federalism would result in fewer conflicts between state law and the Sherman Act and less preemption than the current regime.

Finally, and perhaps most importantly, consistent retraction of the scope of the Sherman Act would most closely replicate the regulatory regime that the enacting Congress anticipated. When Congress passed the Sherman Act, a quasi-statutory regime imputed to Congress the intent to preempt state legislation that, like the *Parker* restraints, directly burdened interstate commerce. The Supreme Court initially (and properly) read the Sherman Act to accomplish the same objective (but no more), with respect to private restraints. Post-*Wickard*, the Court abandoned the regime of implied preemption that had been in place alongside the Sherman Act for over fifty years, leaving states free to impose direct burdens on interstate commerce. Restoring the direct/indirect standard to govern the scope of the Sherman Act and rejecting state action immunity for state-imposed restraints that directly burden interstate commerce would thus respect the 1890 Congress's normative choice, reflected in the regime of implied preemption and the Sherman Act, to guarantee that interstate commerce is "free and untrammeled," regardless of the source of the threat to free competition.

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343 *See* Easterbrook, *supra* note 147, at 937 (describing conditions necessary to effective competitive federalism including that states can "select any set of laws they desire").

344 *See supra* notes 121-27 and accompanying text.