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## Wickard Through an Antitrust Lens

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WICKARD THROUGH AN ANTITRUST LENS

ALAN J. MEESE\*

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## INTRODUCTION

Discussions of antitrust and the Constitution generally focus on how the latter informs or controls the former. This is not surprising; antitrust regulation is a creature of statute,<sup>1</sup> and a vague statute susceptible to flexible interpretations. Moreover, the Constitution is the paramount law, and statutory regimes must yield to it and not the other way around.<sup>2</sup> No court ever says: we are construing the relevant constitutional provision so as to be consistent with the statute before us. So it should be no surprise that scholars have identified various ways in which constitutional doctrines or considerations have influenced and informed the ever-evolving jurisprudence that implements the Sherman Act's unchanged text.

The Court's jurisprudence regarding the reach of the Sherman Act vis-à-vis local conduct exemplifies such one-sided interaction between Constitution and statute. Initially, and famously, the Court read the Act in light of the Court's Commerce Clause precedents, holding that the Act did not reach a merger to monopoly because such intrastate activity only impacted interstate commerce "indirectly."<sup>3</sup> The Court continued to invoke and apply the "direct/indirect" formula in the Sherman Act context into the mid-1930s.<sup>4</sup> Of course, the Court adjusted its Commerce Clause jurisprudence during the New Deal, vastly expanding the scope of congressional power vis-à-vis purely local conduct. Most notably, in *Wickard v. Filburn*, the Court held that Congress could reach any conduct that produced "a substantial economic effect on interstate commerce,"<sup>5</sup> even if that effect was indirect within the meaning of prior Commerce Clause caselaw. Just six years later, and almost as if on cue, the Court imported the substantial effects test from *Wickard* into its antitrust federalism jurisprudence.<sup>6</sup> In so doing, the Court repudiated five decades of contrary precedent, despite the absence of any statutory change. Since that time, the Court has repeatedly applied

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1. Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (2012).

2. See U.S. CONST. art. VI, § 2.

3. See *United States v. E. C. Knight Co.*, 156 U.S. 1, 17-18 (1895).

4. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 365 (1933).

5. 317 U.S. 111, 125 (1942).

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

the Act to local conduct producing purely intrastate harms, so long as such conduct produced the requisite substantial effect.<sup>7</sup> In some such cases the Court invoked *Wickard* in support of this approach.<sup>8</sup> The Court also claimed that developments in the nation's economy justified the vast expansion of the commerce power—and the correlative expansion of the scope of the Sherman Act.<sup>9</sup>

This Article offers what one might call an alternative history of the relationship between *Wickard v. Filburn* and the Sherman Act. Thus, the Article “flips the script” and asks what would have happened if *Wickard* had looked to Sherman Act precedents for guidance and not vice-versa. While counter-intuitive at first, such an inquiry sheds important and surprising light upon the massive constitutional (and, under the Sherman Act, statutory) change that *Wickard* wrought. In particular, the Court's pre-*Wickard* experience with application of the direct/indirect test in the antitrust context contradicts and/or undermines several assumptions that purportedly drove *Wickard's* decision to repudiate the direct/indirect standard and replace it with the far more generous (to Congress) substantial effects test. Moreover, and ironically, a thorough understanding of the Court's pre-New Deal antitrust federalism decisions helps generate a more enduring and plausible rationale for the result in *Wickard*, a rationale that does no violence to the constitutional order that *Wickard* inherited.

Part I of this Article recounts the Supreme Court's own account of the relationship between *Wickard* and the Sherman Act. Part II describes the scope of the commerce power before *Wickard*, particularly the direct/indirect test that was in place when Congress passed the Sherman Act and which the Court employed to evaluate whether the commerce power reached purely local conduct. Part III describes the Court's pre-*Wickard* approach to the reach of the Sherman Act, which, as will be seen, was a straightforward application of the Court's pre-1890, indeed pre-New Deal, Commerce Clause jurisprudence. Part IV describes *Wickard* and, in particular, the Court's rationale for repudiating five decades of Commerce Clause jurisprudence in favor of the substantial effects test. This

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7. See *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 241 (1980).

8. See *e.g.*, *id.*

9. *Id.*

Part also explains how, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, the Court embraced both *Wickard's* substantial effects test under the aegis of the Sherman Act as well as *Wickard's* rationale for repudiating the longstanding direct/indirect test in the first place.<sup>10</sup> Part V flips the script and examines what the *Wickard* Court could have learned from the antitrust jurisprudence that *Mandeville Island Farms* repudiated. Part VI explains how the pre-*Wickard* antitrust decisions provide a more defensible foundation for the result in *Wickard*, if not its rationale.

### I. WICKARD AND THE SHERMAN ACT: THE DOMINANT JUDICIAL NARRATIVE

The dominant narrative within the courts regarding the interaction between *Wickard* and the Sherman Act goes something like this: when Congress passed the Sherman Act, it sought to exercise the full extent of its commerce power, using the language of the Commerce Clause to describe the reach of the Act.<sup>11</sup> However, in several early decisions, particularly *United States v. E. C. Knight Co.*,<sup>12</sup> the Court thwarted Congress's intent.<sup>13</sup> That is, the Court

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10. See generally 334 U.S. 219 (1948).

11. Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1 (2012); see also *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 328 n.7 (1991) (concluding that in enacting the Sherman Act, Congress intended to "g[o] as far as the Constitution permits Congress to go" (alteration in original) (quoting 20 CONG. REC. 1167 (1889))); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 298 (1945) ("[W]ith reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'" (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940))). Ironically, the Court first announced this nostrum in 1932, when it still imposed very meaningful constraints on the scope of the Act, in a case involving the reach of the Act vis-à-vis conduct in the District of Columbia. See *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435 (1932); see also *infra* notes 177-78 and accompanying text (describing limits on the scope of the Act in 1932).

12. 156 U.S. 1 (1895).

13. See *Mandeville Island Farms*, 334 U.S. at 230 ("The *Knights* decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products."); *id.* at 229 (asserting that *E. C. Knight* "applied ... mechanical distinctions with substantially nullifying effects for coverage both of the [Commerce] power and of the Act"); *Wickard v. Filburn*, 317 U.S. 111, 121-22, 122 n.20 (1942) (stating that in initial Sherman Act decisions, "the Court adhered to its earlier

erred by reading the Act in light of the division of authority between state and federal sovereigns described in the Court's pre-1890 Commerce Clause jurisprudence.<sup>14</sup> The cases creating this jurisprudence arose in the context of claims by regulated parties that state laws were invalid because they in fact regulated interstate commerce.<sup>15</sup> Thus, it is said, such decisions announced unduly narrow accounts of the reach of federal power, so as to avoid claims that states were exercising authority exclusively delegated to Congress, and thereby validate state authority over essentially intrastate activity.<sup>16</sup> *E. C. Knight*, it is said, improperly treated these precedents as demarking the boundaries of *affirmative* federal power that Congress sought to exercise by statute via the Sherman Act.<sup>17</sup>

To be sure, subsequent decisions backtracked some from *E. C. Knight*'s categorical holding that the Act could never reach manufacturing (and by implication agriculture and mining).<sup>18</sup> However, despite continuing integration of the national economy and the growing role of truly national enterprises, and despite decisions outside the antitrust context—most notably *The Shreveport Rate Case*—that purportedly read the commerce power more generously,<sup>19</sup> the Court continued to invoke the pre-1890 mechanical

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pronouncements, and allowed but little scope to the power of Congress”).

14. See, e.g., *Kidd v. Pearson*, 128 U.S. 1, 24 (1888) (holding that states possess exclusive authority over manufacturing).

15. See *id.* at 22-23.

16. See *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 542-45 (1944) (finding that numerous decisions holding that insurance was not interstate commerce were poor “guides to determining Congressional power under the Commerce Clause”); *Wickard*, 317 U.S. at 121 (asserting that nearly all pre-1942 decisions announcing narrow conceptions of federal power arose in the context of challenges to state laws); *id.* (“For nearly a century, however, decisions of this Court under the Commerce Clause dealt rarely with questions of what Congress might do in the exercise of its granted power under the Clause, and almost entirely with the permissibility of state activity which it was claimed discriminated against or burdened interstate commerce. During this period ... the influence of the Clause on American life and law was a negative one, resulting almost wholly from its operation as a restraint upon the powers of the states. In discussion and decision the point of reference, instead of being what was ‘necessary and proper’ to the exercise by Congress of its granted power, was often some concept of sovereignty thought to be implicit in the status of statehood.”).

17. See, e.g., *Wickard*, 317 U.S. at 121-22.

18. See *Mandeville Island Farms*, 334 U.S. at 231-32 (recognizing that *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911) and *Am. Tobacco Co. v. United States*, 221 U.S. 106 (1911) recognized a broader reach for the Act than *E. C. Knight*).

19. See *id.* at 231-34 (invoking *The Shreveport Rate Case* doctrine as exemplar of “a great turning point in the construction of the commerce clause” but noting that “the transition ...

direct/indirect test when determining whether the Act reached a challenged restraint.<sup>20</sup> As a result, the pre-New Deal Court repeatedly held that the Act did not reach various forms of anticompetitive conduct that, while local, nonetheless affected interstate commerce, and thus should have fallen within the scope of Congress's commerce power as properly understood in *The Shreveport Rate Case* and similar decisions.<sup>21</sup>

Fortunately, the story goes, other developments in Commerce Clause jurisprudence finally caught up with antitrust's unduly narrow approach to the Sherman Act. This is where *Wickard* enters the story. *Wickard*, of course, was not an antitrust case.<sup>22</sup> But it did involve economic regulation of output as part of an effort to raise prices.<sup>23</sup> Moreover, the regulated party in the case invoked the direct/indirect standard, contending that, at most, his activities had only an "indirect" effect on interstate commerce.<sup>24</sup> A dissenting

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was neither smooth nor immediately complete, particularly for applying the Sherman Act.... [because] [t]he old ideas persisted in specific applications as late as the 1930's"; see also *Wickard*, 317 U.S. at 123-24 (invoking similar account of the role of *The Shreveport Rate Case*); *Hous. E. & W. Tex. R. Co. v. United States*, 234 U.S. 342 (1914) [hereinafter *The Shreveport Rate Case*].

20. See *Mandeville Island Farms*, 334 U.S. at 229 (asserting that "the first decision under the Sherman Act [*E. C. Knight*] applied those mechanical distinctions" between production and manufacturing, on the one hand, and commerce on the other); *id.* (contending that defendants' argument rested upon "[t]he artificial and mechanical separation of 'production' and 'manufacturing' from 'commerce,' without regard to their economic continuity"); *Wickard*, 317 U.S. at 124 (characterizing the direct/indirect test as requiring "the mechanical application of legal formulas"); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 509 (1940) (characterizing the direct/indirect test as entailing a "mechanical ... application of these cryptic phrases").

21. See *Mandeville Island Farms*, 334 U.S. at 228-38; *S.-E. Underwriters Ass'n*, 322 U.S. at 543-47.

22. See *Wickard*, 317 U.S. at 115-16.

23. See *id.*

24. See Brief for Appellee at 11, *Wickard v. Filburn*, 317 U.S. 111 (1942) (No. 59) ("It is also clear that where federal control is sought to be exercised over activities which separately considered are intrastate, it must appear that there is a close and substantial relation to interstate commerce in order to justify the federal intervention for its protection. However difficult in application, this principle is essential to the maintenance of our Constitutional system. The subject of federal power is still 'commerce,' and not all commerce but commerce with foreign nations and among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains. 'Activities local in their immediacy do not become interstate and national because of distant repercussions.' To express this essential distinction, 'direct' has been contrasted with 'indirect,' and what is 'remote' or 'distant' with what is 'close' and 'substantial.'" (quoting

judge in the lower court, invoking the same standard, disagreed, contending that, when combined with similar activities by other regulated parties, the plaintiff's activities in fact directly impacted interstate commerce.<sup>25</sup>

*Wickard* did not resolve this disagreement between the regulated party and the dissent below. Instead, the Court took the opportunity to jettison the direct/indirect test altogether as a “mechanical” exercise that obscured focus on the real question—namely, whether the activity that Congress sought to regulate “exerts a substantial economic effect upon interstate commerce.”<sup>26</sup> This question was asked and answered “irrespective of whether such effect is what might at some earlier time have been defined as ‘direct’ or ‘indirect.’”<sup>27</sup> While the plaintiff's own activities did not exert such an effect, the Court said similar activities, when aggregated with one another, did have a substantial effect, bringing the plaintiff's activities within Congress's authority.<sup>28</sup> This approach, the Court said, implemented the breathtaking scope of the commerce power recognized in *Gibbons v. Ogden*<sup>29</sup> and never surpassed since.<sup>30</sup>

By illustrating the putative shortcomings of the direct/indirect test more generally, *Wickard* paved the way for banishing the putative test from antitrust jurisprudence as well. Just six years after *Wickard*, the Court unanimously jettisoned fifty years of Sherman Act precedent, invoking *Wickard* several times and opining that the direct/indirect test was a “mechanical” and “artificial” relic

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Santa Cruz Fruit Packing Co. v. NLRB, 303 U.S. 453, 466-67 (1938) (Hughes, C.J.) (Internal citations omitted).

25. See *Filburn v. Helke*, 43 F. Supp. 1017, 1022 (S.D. Ohio 1942) (Allen, J., dissenting) (“It is true that Congress has no power to regulate intrastate transactions which affect commerce only indirectly. But where it is claimed that the local activity sought to be regulated does not directly affect commerce, decision should not be made by examination of the effect of isolated individual activity, but must include due regard to the total effect of the attempted regulation.” (citations omitted)).

26. *Wickard*, 317 U.S. at 124-25.

27. *Id.*

28. See *id.* at 127-28 (“That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”).

29. 22 U.S. (9 Wheat.) 1 (1824).

30. See *Wickard*, 317 U.S. at 120 (“At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded.” (citing *Gibbons*, 22 U.S. (9 Wheat.) at 194-95)).



of a preindustrial age.<sup>31</sup> Modern economic conditions, as *Wickard* taught, required the Sherman Act to reach any conduct that produced a “substantial effect” on interstate commerce, regardless of whether that effect was direct or indirect.<sup>32</sup> The reach of the Sherman Act was once again yoked to the scope of the commerce power.

The Court has repeatedly applied this test in subsequent cases, and the Act now reaches purely local restraints that produce no interstate harm, direct or indirect, with the result that the Act reaches just about all commercial conduct.<sup>33</sup> But this vast reach, the story continued, simply implemented Congress’s desire to exercise the complete scope of its commerce power, including any post-Sherman Act expansion of the commerce power, vis-à-vis anticompetitive conduct.<sup>34</sup> Moreover, wide-ranging changes in the

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

32. See *id.* at 234 (“[T]he vital question becomes whether the effect is sufficiently substantial and adverse to Congress’ paramount policy declared in the Act’s terms to constitute a forbidden consequence.”).

33. See *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 332-33 (1991) (holding that the Sherman Act reached group boycott by physicians in a single hospital directed against a single physician who practiced in a single department); *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 246 (1980) (holding that the Sherman Act reached horizontal price fixing agreement between realtors in single city); *id.* at 241 (“The broad authority of Congress under the Commerce Clause has, of course, long been interpreted to extend beyond activities actually *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce.” (citing *Wickard v. Filburn*, 317 U.S. 111 (1942))); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 740-41 (1976) (holding that the Sherman Act reached conduct designed to thwart expansion of a single hospital in a single city because the hospital planning to expand purchased some inputs from out-of-state firms); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 784-85 (1975) (holding that the Sherman Act reached conspiracy between a single county’s lawyers to fix fees for title searches within the county because some purchasers obtained financing from lenders in other states); *Burke v. Ford*, 389 U.S. 320, 321-22 (1967) (per curiam) (holding that the Sherman Act reached horizontal agreements between a single state’s liquor wholesalers to divide markets for retail sales simply because wholesalers purchased liquor from suppliers in other states); see also HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY* 1012 (5th ed. 2016) (explaining that under *Wickard*’s substantial effects test, the Sherman Act has “reached almost any market or transaction with more than a trivial impact on interstate commerce”).

34. See *Summit Health*, 500 U.S. at 328 n.7 (concluding that Congress intended to “g[o] as far as the Constitution permits Congress to go” (alteration in original) (quoting 20 CONG. REC. 1167 (1889))); *United States v. S.-E. Underwriters Ass’n*, 322 U.S. 533, 558 (1944) (“Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements.”); see also *Summit Health*, 500 U.S. at 329 n.8 (“The Court’s decisions have long ‘permitted the reach of the Sherman Act to expand along with expanding notions of congressional power.’” (quoting *Hosp. Bldg. Co.*, 425 U.S. at 743 n.2)).

nation's economy had altered the relationships between local activities and interstate commerce, thereby justifying federal control of activities previously within the exclusive jurisdiction of the states.<sup>35</sup> At the same time, the Court has not embraced the aggregation test, instead requiring plaintiffs to establish that the challenged restraint itself has the requisite impact upon interstate commerce.<sup>36</sup>

It should be no surprise that jurisprudence regarding the scope of the Sherman Act would reflect the influence of developments in Commerce Clause doctrine. Legal doctrines, particularly those that address similar or overlapping subject matters, are sometimes symbiotic, reflecting mutual influence upon each other and/or common background influences. For instance, experience applying a particular standard in one doctrinal context can help inform or influence the application of a similar standard in a different context. Moreover, exogenous changes in the nation's economic circumstances or institutions could induce adjustments in two or more doctrinal contexts, to the extent distinct doctrinal categories share common normative premises and thus respond in similar ways to particular factual changes. Thus, Barry Cushman has persuasively argued that the Court developed and applied similar conceptual categories to implement both its Commerce Clause and Due Process jurisprudence, with developments in one doctrinal category

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35. See, e.g., *Summit Health*, 500 U.S. at 328-29 (“[A]s the dimensions and complexity of our economy have grown, the federal power over commerce, and the concomitant coverage of the Sherman Act, have experienced similar expansion.”); *McLain*, 444 U.S. at 241 (“During the near century of Sherman Act experience, forms and modes of business and commerce have changed along with changes in communication and travel, and innovations in methods of conducting particular businesses have altered relationships in commerce. *Application of the Act reflects an adaptation to these changing circumstances.*”(emphasis added)).

36. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 194-95, 197 n.12 (1974) (explaining that the language of the Sherman Act implies an individual judicial assessment of the impact of challenged restraints on interstate commerce and thus does not define a class of activities susceptible to application of the aggregation test). *Mandeville Island Farms* is an exception, having embraced *Wickard* for both the substantial effects test and, in a sentence, for the aggregation test. See *Mandeville Island Farms*, 334 U.S. at 236 (“[I]t is enough that the individual activity when multiplied into a general practice is subject to federal control.”). However, subsequent decisions cited *Wickard* or *Mandeville Island Farms* only for the substantial effects test. See, e.g., *McLain*, 444 U.S. at 241; *Hosp. Bldg. Co.*, 425 U.S. at 743; *Burke*, 389 U.S. at 321 (per curiam); *United States v. Employing Plasterers Ass’n of Chi.*, 347 U.S. 186, 189 (1954).

influencing those in the other and vice versa.<sup>37</sup> I subsequently explained how the Supreme Court drew upon its Commerce Clause jurisprudence to define the category of activities subject to the Sherman Act and exclusive state regulation.<sup>38</sup> Changed circumstances could thus, one might think, exert a common influence upon both doctrinal categories. But of course, dialogue is a two way street. If Sherman Act doctrine can learn from Commerce Clause jurisprudence, then perhaps Sherman Act doctrine can teach the Commerce Clause a thing or two. Indeed, a little reflection will show that the *Wickard* Court missed a golden opportunity to draw upon the wisdom and experience of Sherman Act jurisprudence, which the Court all but ignored before reformulating Commerce Clause doctrine. A Court better attuned to the large body of caselaw applying the direct/indirect test to implement the Sherman Act would have found no need to jettison the test in favor of the broader substantial effects test.

## II. THE COMMERCE POWER BEFORE *WICKARD*

The Commerce Clause empowers Congress to “regulate commerce ... among the several States.”<sup>39</sup> *Wickard* invoked *Gibbons v. Ogden* as the foundational and definitive exposition of the scope and content of the commerce power.<sup>40</sup> *Gibbons* unanimously defined commerce in largely transactional terms, to include “the commercial intercourse between nations, and parts of nations, in all its branches.”<sup>41</sup> Such intercourse included “navigation,” as well as “traffic,” “buying and selling,” and “the interchange of commodities.”<sup>42</sup>

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37. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* 143-48 (1998).

38. 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, 270-75 (2013); *id.* at 271, n. 71; see also Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 90 (1999) (explaining how courts defined restraints as “direct” if they produced the same sort of harm that rendered restraints subject to regulation under the police power).

39. See U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

40. See *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (“At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded.” (citing *Gibbons v. Ogden*, 22 U.S. 1 (9 Wheat.) (1824))).

41. See 22 U.S. (9 Wheat.) at 189-90.

42. *Id.* at 189.

*Gibbons* also rejected claims that “among” meant “within,” thereby rejecting claims that Congress had the authority to regulate commerce confined to a single state.<sup>43</sup> “The genius and character of the whole government,” as well as the language of the clause, the Court said, compelled the conclusion that “among” was instead synonymous with “between,” thereby leaving intrastate activity within the exclusive jurisdiction of the states.<sup>44</sup> More precisely, these two considerations established that Congress could regulate “all the external concerns of the nation,” as well as “those internal concerns which affect the States generally,” but could not govern “those [concerns] which are completely within a particular State, [and] which do not affect other States.”<sup>45</sup> Congressional authority over *intrastate* commerce, the Court said, would be “inconvenient,” and was “certainly unnecessary.”<sup>46</sup> Thus, “[t]he completely internal commerce of a State,” such as that “carried on between man and man in a State ... may be considered as reserved for the State itself.”<sup>47</sup>

Having defined “commerce” and “among the several States,” the Court defined “regulate,” as the authority to “prescribe the rule by which commerce is to be governed.”<sup>48</sup> Throughout the nineteenth century and into the twentieth, courts treated *Gibbons’s* definitions of “commerce,” “among,” and “regulate” as definitive expositions of the language of the Clause.<sup>49</sup>

*Gibbons* also suggested that the federal commerce power was exclusive within portions of its domain and thus would, even absent congressional legislation, invalidate state obstructions to interstate commerce, insofar as such state-imposed obstructions would constitute state “regulation” of a subject exclusively allocated

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43. *See id.* at 194-95.

44. *See id.*

45. *Id.* at 195.

46. *Id.* at 194.

47. *Id.* at 194-95

48. *Id.* at 190-91, 194, 196.

49. *See, e.g., The Shreveport Rate Case*, 234 U.S. 342, 351 (1914) (invoking *Gibbons’s* definition of “regulate” and the rationale governing the division of authority between states and the national government); *The Emp’rs Liab. Cases*, 207 U.S. 463, 492-93 (1908) (invoking *Gibbons’s* definition of “regulate” to account for the division between State and Federal authority); *County of Mobile v. Kimball*, 102 U.S. 691, 696-97 (1880) (invoking *Gibbons’s* definition of interstate commerce).

to Congress.<sup>50</sup> The Court officially implemented this dicta in 1851, in *Cooley v. Board of Wardens*, constructing a doctrine of implied preemption invalidating most state regulations of interstate commerce, even absent any congressional action.<sup>51</sup> In particular, the Court divided state regulations of interstate commerce into two categories, depending upon the “subject” of the regulation.<sup>52</sup> Some subjects were “national in their character” and/or demanded a uniform system of national regulation.<sup>53</sup> Others, while involving or connected to interstate commerce, were nonetheless “local, or ... mere aids to commerce” and best suited to decentralized regulation by individual states better attuned to the “special circumstances” of the subject.<sup>54</sup>

Where a subject was national in its character or demanded uniform national regulation, the Court read congressional silence as expressing the national legislature’s will that interstate commerce be free from state restraints.<sup>55</sup> Thus, the Court read congressional

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50. *Gibbons*, 22 U.S. (9 Wheat.) at 199-203; see also Norman R. Williams, *Gibbons*, 79 N.Y.U. L. REV. 1398, 1399 (2004) (describing the historical setting of *Gibbons* and the distinction between the decision’s holding and dicta).

51. 53 U.S. (12 How.) 299, 325 (1851) (explaining that the Commerce Clause *ipso facto* invalidated some state regulation).

52. See Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1099, 1114-15 (2000).

53. See, e.g., *Kimball*, 102 U.S. at 697 (“The subjects, [of Commerce Clause regulation] ... 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.”); see also *Cooley*, 53 U.S. (12 How.) at 318-20.

54. *Kimball*, 102 U.S. at 697; see also *Cooley*, 53 U.S. (12 How.) at 319-320 (regulation of harbor pilotage “imperatively demand[ed] that diversity [of opinion], which alone can meet the local necessities of navigation”).

55. See, e.g., *Leisy v. Hardin*, 135 U.S. 100, 109-10 (1890) (“Whenever, however, a particular power of the general government is one which must necessarily be exercised by it, and Congress remains silent ... the only legitimate conclusion is that the general government intended that power should not be affirmatively exercised, and the action of the States cannot be permitted to effect that which would be incompatible with such intention. Hence, inasmuch as interstate commerce, 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 so to do, it thereby indicates its will that such commerce shall be free and untrammelled.”); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 482 (1888) (“[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] commerce ... must fail.”); see

inaction as the equivalent of federal legislation, preempting state regulation of such subjects, and thereby ensuring uniform regulation.<sup>56</sup>

By 1875, potential subjects of commerce regulation fell into three categories: (1) commerce that was purely intrastate, beyond Congress's authority, and thus subject to exclusive state regulation; (2) interstate commerce that required a uniform rule and/or one national system of regulation, and thus was subject exclusively to congressional regulation; and (3) interstate commerce subject to concurrent state and federal regulation.<sup>57</sup> This body of Commerce Clause doctrine later became known as "dual federalism."<sup>58</sup>

Implementation of dual federalism required a theory of the affirmative scope of the commerce power and resulting boundary between state and federal authority. After all, state legislation could not regulate interstate commerce and thus potentially succumb to implied congressional preemption unless Congress had authority over the subject in the first place.<sup>59</sup> Because of the paucity of express affirmative federal commercial regulation during this era, nearly all decisions defining the affirmative scope of Congress's authority, and thus the boundary between state and federal power, involved claims that state legislation ran afoul of the Commerce Clause.<sup>60</sup> Given independent territorial restraints on state legislative authority,<sup>61</sup> all or nearly all such cases involved state legislation governing private activity that took place entirely within a given state, which challengers claimed nonetheless regulated subjects of interstate commerce exclusively reserved for Congress.<sup>62</sup> In the

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also Cushman, *supra* note 52, at 1101-10 (collecting and discussing additional cases).

56. Cushman, *supra* note 52, at 1103-08.

57. See *supra* notes 43-46, 49-55 and accompanying text.

58. See E.S. Corwin, *Standpoint in Constitutional Law, The Schechter Case, Landmark, or What?*, 13 N.Y.U. L.Q. REV. 151, 181 (1936) (coining term).

59. See *Leisy*, 135 U.S. at 109-10 (concluding that Congress's silence with respect to inherently national commercial subjects evinced its intent that such commerce should remain "free and untrammelled").

60. See *infra* notes 61-66 and accompanying texts.

61. See James Y. Stern, Note, *Choice of Law, The Constitution, and Lochner*, 94 VA. L. REV. 1509, 1516-1519 (2008) ("Every significant attribute of legislative power available to states was territorially circumscribed [in the mid-late nineteenth century].").

62. See Cushman, *supra* note 52, at 1101 ("In the late nineteenth and early twentieth centuries, the central question in constitutional federalism was not the extent to which the Commerce Clause empowered Congress to regulate local activities. It was instead the degree



course of adjudicating these claims, the Court held that various intrastate activities exceeded the scope of the commerce power, that states had exclusive authority over such activities, and that the challenged state legislation did not regulate interstate commerce.<sup>63</sup> These activities included intrastate ferries,<sup>64</sup> rates for the storage of grain shipped from numerous locations to Chicago before shipment to other states,<sup>65</sup> rates for intrastate railroad travel,<sup>66</sup> qualifications for intrastate operation of locomotives,<sup>67</sup> and intrastate manufacture of alcohol intended for export to other states.<sup>68</sup> Given the *Gibbons* framework, the implication, of course, was that federal authority over such conduct was not “necessary” and would be “inconvenient.”<sup>69</sup>

These decisions did not depend upon any assumption that the impact of such intrastate activities was hermetically sealed within a state. Instead, the Court repeatedly recognized and assumed that intrastate activity subject to exclusive state regulation would sometimes “affect[]” interstate commerce.<sup>70</sup> This raised the possibility that Congress *could* regulate such conduct given *Gibbons*’s sugges-

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to which the ‘negative implications’ of that clause limited the regulatory authority of state and local governments.”).

63. See *infra* notes 64-68 and accompanying text.

64. See, e.g., *Veazie v. Moor*, 55 U.S. (14 How.) 568, 573-75 (1852) (holding that intrastate navigation exceeded Congress’s authority, with the result that the Commerce Clause did not preempt a state grant of an exclusive franchise to a steamship operator that had improved a portion of a local river).

65. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 135 (1876) (rejecting the claim that state regulation of grain elevator rates violated the Commerce Clause because such regulation only impacted interstate commerce indirectly).

66. See, e.g., *Peik v. Chi. & Nw. Ry.*, 94 U.S. 164, 177-78 (1876) (affirming the state’s exclusive authority to regulate intrastate railroad rates); *Chi., Burlington & Quincy R.R. v. Iowa*, 94 U.S. 155, 163 (1876) (“This road, like the warehouse in [*Munn*], is situated within the limits of a single State. Its business is carried on there, and its regulation is a matter of domestic concern.”).

67. See, e.g., *Smith v. Alabama*, 124 U.S. 465, 480, 482 (1888) (rejecting a Commerce Clause challenge to state imposition of qualification for operating intrastate locomotive).

68. See, e.g., *Kidd v. Pearson*, 128 U.S. 1, 22-23, 25-26 (1888) (rejecting a Commerce Clause challenge to state’s ban on the intrastate production of alcohol intended for interstate shipment).

69. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

70. See, e.g., *Kidd*, 128 U.S. at 22-23 (recognizing that a ban on manufacturing reduced interstate commerce); *Smith*, 124 U.S. at 482 (recognizing that intrastate locomotive operation could impact interstate commerce); *Munn*, 94 U.S. at 135 (recognizing that regulation of rates for grain storage impacted interstate commerce).

tion that Congress could regulate commercial activity that “affect[ed] other States.”<sup>71</sup> Still, the Court avoided this possible implication of *Gibbons* by adopting a distinction between “direct” and “indirect” effects. So long as the impact of such activities, and the regulation thereof, upon interstate commerce was “indirect,” such activities remained within the exclusive authority of the states.<sup>72</sup> Where, however, such intrastate activity or the regulation thereof affected interstate commerce “directly,” the legislation in question improperly regulated a subject reserved to Congress and was thus preempted.<sup>73</sup> States, therefore, possessed exclusive authority over manufacturing, mining, and agriculture, even when such activities affected interstate commerce, because any such impact was indirect.<sup>74</sup> According to one leading legal historian, “[a]ffirmative

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71. See *Gibbons*, 22 U.S. (9 Wheat.) at 195.

72. See *Kidd*, 128 U.S. at 23 (“[L]egislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution, unless ... it ‘imposes a direct burden upon interstate commerce,’ or ‘interferes directly with its freedom.’” (second alteration in original) (quoting *Hall v. DeCuir*, 95 U.S. 485, 487, 488 (1877))); *Smith*, 124 U.S. at 482 (concluding that regulation of qualifications of a state’s locomotive engineers was not a regulation of interstate commerce because it affected commerce “only indirectly, incidentally, and remotely, and not so as to burden or impede [it]”); *Sherlock v. Alling*, 93 U.S. 99, 102 (1876) (explaining that Congress could only preempt state laws that “operated directly upon [interstate] commerce”); *id.* at 103 (“General legislation of this kind ... is not open to any valid objection because it may affect persons engaged in ... inter-State commerce.”); *McCready v. Virginia*, 94 U.S. 391, 396 (1876) (sustaining the exclusion of non-Virginians from planting oysters in a state stream because “[c]ommerce has nothing to do with land while producing, but only with the product after it has become the subject of trade”); *Munn*, 94 U.S. at 135 (finding that regulation of rates for storage of grain, some of which was destined for interstate shipment, only impacted interstate commerce “indirectly”); see also *R.R. Co. v. Husen*, 95 U.S. 465, 472 (1877) (“Many acts of a State may, indeed, affect commerce, without amounting to a regulation of it, in the constitutional sense of the term.”); *Cushman*, *supra* note 52, at 1090.

73. See *Minnesota v. Barber*, 136 U.S. 313, 322 (1890) (holding that a facially neutral state meat inspection regime was an impermissible regulation of interstate commerce because it “directly tend[ed] to restrict the slaughtering of animals, whose meat [was] to be sold in Minnesota for human food, to those engaged in such business in that State”); *Hall*, 95 U.S. at 488 (“State legislation which seeks to impose a direct burden upon inter-state commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.”); see also *Sherlock*, 93 U.S. at 102-03 (explaining that the Court would invalidate state regulation as contrary to the Commerce Clause where “the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom”).

74. See, e.g., *Kidd*, 128 U.S. at 20, 22-24 (distinguishing “manufactur[ing]” from “commerce” and holding that Congress lacked power over the former because banning production would only impact interstate commerce indirectly).



Commerce Clause doctrine during this period, then, was the flip side of the Court's dormant Commerce Clause jurisprudence."<sup>75</sup>

Critics characterized the resulting jurisprudence as unduly wooden and formalistic at best, and a form of activism designed to narrow the reach of federal power at worst.<sup>76</sup> A more charitable interpretation exists, however. The Court at least viewed its Commerce Clause jurisprudence as an effort to implement the underlying structural rationale for adopting the Commerce Clause in the first place.<sup>77</sup> Under the "helpless, inadequate" Articles of Confederation, the Court said, self-interested states had adopted various protectionist measures that burdened interstate and international trade, thereby leaving commerce in an "oppressed and degraded state."<sup>78</sup>

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75. Cushman, *supra* note 52, at 1126.

76. *See id.* at 1093 (reviewing various canonical scholarly treatments and concluding that "[t]he conventional presentation [in textbooks] of the Court's Commerce Clause decisions thus suggests that the Justices were at best jurisprudentially disoriented and at worst cynically opportunistic"); *see also* EDWARD S. CORWIN, *THE COMMERCE POWER VERSUS STATES RIGHTS* 156 (1936) ("[T]he term 'indirect' in this context is a mere *device*, a *formula* pulled out of the judicial hat.").

77. *See* *Guy v. Baltimore*, 100 U.S. 434, 440 (1879) ("[I]t will always be true, as a matter of historical fact, that [the Federal Government] had its immediate origin in the necessities of commerce; and for its immediate object ... establishing a uniform and steady system.").

78. *See id.* (explaining that protectionist state legislation was invalidated, "and a national government instituted, with full power over the entire subject of commerce, except that wholly internal to the States"); *Welton v. Missouri*, 91 U.S. 275, 280 (1875) ("The depressed condition of commerce and the obstacles to its growth previous to the adoption of the Constitution, from the want of some single controlling authority, has been frequently referred to by this court."); *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 214 (1870) ("Prior to adoption of the Constitution the States attempted to regulate commerce ... and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union."); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827) ("The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten."); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 224 (1824) (Johnson, J., concurring) (explaining that the states' pursuit of self-interest "began to show itself in iniquitous laws and impolitic measures, from which grew up a conflict of commercial regulations, destructive to the harmony of the States"); 2 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1054 (Boston, Hilliard, Gray & Co. 1833) ("The oppressed and degraded state of commerce [under the Articles of Confederation], can scarcely be forgotten.... Those, who felt the injury arising from this state of things, and those, who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government."); Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 *SAN DIEGO L. REV.* 555, 598-601 (1994) (describing how some states imposed import taxes that exploited other states).

The Framers and Ratifiers abandoned the Confederation, the Court said, and instituted “a national government ... with full power over the entire subject of [interstate] commerce.”<sup>79</sup> Such power prevented states from adopting legislation that advantaged their own citizens at the expense of others.<sup>80</sup> The Commerce Clause was designed to ensure “a perfect equality amongst the several States as to commercial rights, and to prevent unjust and invidious distinctions, which local jealousies or local and partial interests might be disposed to introduce and maintain.”<sup>81</sup> As I demonstrate elsewhere in more detail, this principle helped inform and explain the Court’s adoption and implementation of the direct/indirect taxonomy.<sup>82</sup> In particular, the Court apparently treated a regulation’s impact as “direct” if the regulation harmed consumers in other states, thereby suggesting that the regulation in question had protectionist origins, benefiting the state’s citizens at the expense of others.<sup>83</sup> Only Congress, the Court said, with its “enlarged view of the interests of all the States,” possessed the proper incentives to regulate such subjects, because such regulation must be “of a general and national character, and cannot be safely and wisely remitted to local rules and local regulations.”<sup>84</sup> The Clause thus prevented a race to the bottom and resulting suboptimal legislation with respect to interstate commerce.<sup>85</sup> The result was a “free-trade network,” with the Supreme Court acting as an “umpire” invalidating protectionist laws.<sup>86</sup>

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

80. See LeBoeuf, *supra* note 78, at 598-601 (describing how states imposed import taxes to the disadvantage of other states prior to the ratification of the Constitution).

81. See *Veazie v. Moor*, 55 U.S. (14 How.) 568, 574 (1852).

82. See Alan J. Meese, *The Sherman Act and Intrastate Restraints: A Case Study in Illegitimate Doctrinal Evolution* (unpublished manuscript) (on file with the author); see also Cushman, *supra* note 52, at 1101-06 (describing the Court’s Commerce Clause jurisprudence during the late nineteenth and early twentieth century as “[p]romoting free trade while preserving the powers to tax and regulate”); *id.* at 1101 (“As the national economy became increasingly integrated in the years following the Civil War, the Court began a conscious and increasingly aggressive campaign to break down local barriers to interstate trade through a ‘free-trade’ construction of the dormant Commerce Clause.”).

83. See Meese, *supra* note 82.

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

85. See LeBoeuf, *supra* note 78, at 574-92 (explaining how interstate externalities can result in a legislative race to the bottom).

86. See Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875-1890*, 38 J. ECON. HIST. 631, 648 (1978) (“The Supreme Court’s commerce

The direct/indirect test was not an artifact of the nineteenth century. Courts repeatedly embraced the taxonomy for the first one-third of the twentieth century as well, employing the test to police the boundaries between state and federal authority.<sup>87</sup> The test did its most famous work during the Great Depression, in *A. L. A. Schechter Poultry Corp. v. United States*.<sup>88</sup> In that case, the United States indicted four small businessmen for competing too much, contrary to the New York Live Poultry Code, which President Roosevelt had promulgated under the National Industrial Recovery Act.<sup>89</sup> The defendants violated code provisions setting maximum hours and minimum wages, requiring defendants to report their weekly prices to the code authority, and preventing the defendants from selling less than half a coop of chickens or allowing customers to select individual chickens.<sup>90</sup> The defendants claimed that these regulations of purely local activity exceeded the scope of the commerce power.<sup>91</sup> The government responded that such restrictions

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clause decisions of the 1875-1890 period ... firmly established [its] role as the umpire of the nation's free-trade network.”); *id.* (explaining that during the late nineteenth century, the Supreme Court “monitor[ed] the free-trade unit in the silence of Congress”); *see also* Cushman, *supra* note 52, 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.”); *id.* at 1107 n.96 (collecting sources to the same effect).

87. *See, e.g.*, *Stafford v. Wallace*, 258 U.S. 495, 520-21 (1922) (sustaining federal regulation of deceptive practices at stockyards because such practices, when combined with other similar practices, would “probably ... be used in conspiracies against interstate commerce or constitute a direct and undue burden on it”) (emphasis added); *The Shreveport Rate Case*, 234 U.S. 342, 354 (1914) (holding that Congress possessed authority to preempt state regulation of intrastate railroad rates that “directly interfer[ed]” with interstate rates); *The Minnesota Rate Cases*, 230 U.S. 352, 431-33 (1913) (rejecting a challenge to Minnesota’s regulation of intrastate railway rates because the impact of such rates on interstate commerce was merely indirect and thus beyond congressional power); *id.* at 410-11 (describing the general rule that state regulation of local activity that indirectly impacts interstate commerce exceeds the scope of the commerce power); *see also* Cushman, *supra* note 52, at 1101-08 (collecting numerous decisions invalidating state regulation of local activity because such regulations burdened interstate commerce directly and thus regulated interstate commerce contrary to the presumed intent of Congress); *id.* at 1116-24 (collecting numerous decisions sustaining state legislation because such laws merely impacted interstate commerce “indirectly”).

88. 295 U.S. 495 (1935).

89. *See id.* 519 nn.1-2 (describing the sixty-count indictment of the defendants).

90. *See id.* at 527-28 (describing various alleged violations of which defendants were convicted). The code required the defendants and their rivals to engage in block booking of chickens. *See id.* at 524-25.

91. *See id.* at 542.

on putative local activity were necessary to stimulate an economic recovery from the Great Depression.<sup>92</sup> Simply letting free markets set prices and terms of employment encouraged firms to seek competitive advantage by reducing wages and prices and increasing hours, after which other firms would follow suit.<sup>93</sup> By preventing such unfair competition, the Poultry Code, along with codes governing other industries, purportedly “eliminat[ed] ... the wastes and excesses of competition which the depression had intensified[,] and ... establish[ed] ... a level below which wage cutting should not proceed.”<sup>94</sup> The result was removal of obstructions of commerce and thus “a necessary stimulus to start in motion the cumulative forces making for expanding commercial activity.”<sup>95</sup>

The Court rejected this contention via a straightforward application of the direct/indirect test. It was true, the Court said, that the defendants bought chickens raised in other states and shipped them to New York City before defendants slaughtered and sold them.<sup>96</sup> However, the code provisions defendants violated had nothing to do with the interstate shipment of chickens, but instead governed the prices of local activities (slaughtering and selling chickens) and wages and hours of employees performing this local activity.<sup>97</sup> While such activities certainly had some impact on interstate commerce, they were not the sort of effects that gave rise to the existence of federal regulatory authority.<sup>98</sup>

To support its analysis, the Court invoked a series of anti-trust decisions that had repeatedly employed the direct/indirect

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92. See Meese, *supra* note 38, at 320 (describing the government’s claim that such regulation would enhance the “purchasing power” of employees and thus induce consumption and resulting economic recovery).

93. See Brief for the United States at 47-48, *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (No. 854); *id.* at 53-54; *id.* at 87 (“As prices and wages are cut by individual employers or groups of employers, others in self-preservation are compelled to do the same. The process tends to repeat itself at constantly lower and lower levels.”).

94. *Id.* at 90.

95. *Id.* at 91; *id.* (“A reduction in hours of labor ... distributes wage payments among a larger number of workers ... increas[ing] the proportion of such payments promptly spent.”); *id.* at 86-87 (“The justification under the commerce clause for particular provisions in the codes may be based in part upon their relation to the revival of business and commerce.”); see also Meese, *supra* note 38, at 301-02.

96. See *Schechter*, 295 U.S. at 520-21.

97. See *id.* at 550-51.

98. See *id.* at 551.

distinction when determining the reach of the Sherman Act, noting that many had involved labor disputes.<sup>99</sup> While these decisions nominally implemented statutory language, the Court said, “the distinction between direct and indirect effects” was “a fundamental one, essential to the maintenance of our constitutional system.”<sup>100</sup> Failure to recognize this distinction and treatment of the impact of defendants’ wages and prices as direct would “destroy” the distinction between intrastate and interstate commerce, a distinction the Commerce Clause itself created.<sup>101</sup>

Similar logic, the Court said, required the Court to invalidate the Code’s regulation of local marketing practices, such as the requirement that defendants sell entire coops of chickens, the ban on selling unhealthy chickens, and of sales “not in accord with ordinances of the City of New York,” and the requirement to report prices to code authorities.<sup>102</sup> Any impact that such practices might have “upon interstate commerce was only indirect.”<sup>103</sup> The Court also distinguished such an effect from the effect of certain trade restraints within the poultry industry the Court had treated as “direct” under the Sherman Act.<sup>104</sup>

The Court reiterated this approach a year later, in *Carter v. Carter Coal*, where it invalidated a federal statute that sought to impose minimum wages on mines that shipped coal in interstate commerce.<sup>105</sup> The United States sought to distinguish *Schechter* on the grounds that the chickens there “had come to rest” before the code provisions applied to the defendants’ slaughtering business.<sup>106</sup> By contrast, the regulated coal mines shipped their products in interstate commerce.<sup>107</sup> Invoking *Schechter*, the Court held that this

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99. *See id.* at 547-48.

100. *Id.* at 548.

101. *See id.* at 550.

102. *Id.*

103. *Id.*

104. In particular, the Court distinguished *Local 167, International Brotherhood of Teamsters v. United States*, 291 U.S. 293, 299-300 (1934), on the grounds that the challenged conduct there, also involving the live poultry industry, “substantially and directly ... restrain[ed] and burden[ed] the untrammelled shipment and movement of the poultry’ while unquestionably ... in interstate commerce.” *See Schechter*, 295 U.S. at 544-45 (quoting *Local 167*, 291 U.S. at 299-300).

105. 298 U.S. 238, 316 (1936).

106. *See id.* at 309.

107. *See id.* at 260.

was a distinction without a difference, and that the regulations in question reached local practices that impacted interstate commerce only indirectly.<sup>108</sup> The magnitude of the coal industry's operations were beside the point, the Court said.<sup>109</sup> What mattered instead was the nature of the impact.<sup>110</sup> Only states, the Court said, could reach such local conduct.<sup>111</sup> Chief Justice Hughes concurred with the Court's holding that Congress lacked the authority to regulate the wages and hours of miners, because such activity only impacted interstate commerce indirectly.<sup>112</sup>

### III. THE SHERMAN ACT AS AN EXPRESSION OF THE COURT'S COMMERCE CLAUSE JURISPRUDENCE

The Sherman Act prohibits contracts “in restraint of trade or commerce among the several States.”<sup>113</sup> The Supreme Court first gave meaning to this language in *United States v. E. C. Knight*.<sup>114</sup> There, a firm incorporated in New Jersey took advantage of recent changes in New Jersey law and purchased the shares of several Philadelphia sugar refiners, thereby obtaining a 98 percent share of

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108. *See id.* at 307-08 (“The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about.”).

109. *See id.*

110. *Id.* (“Whether the effect of a given activity or condition is direct or indirect is not always easy to determine. The word ‘direct’ implies that the activity or condition invoked or blamed shall operate proximately—not mediately, remotely, or collaterally—to produce the effect. It connotes the absence of an efficient intervening agency or condition. And the extent of the effect bears no logical relation to its character. The distinction between a direct and an indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about. If the production by one man of a single ton of coal intended for interstate sale and shipment, and actually so sold and shipped, affects interstate commerce indirectly, the effect does not become direct by multiplying the tonnage, or increasing the number of men employed, or adding to the expense or complexities of the business, or by all combined.”).

111. *See id.* at 308-09.

112. *See id.* at 317 (Hughes, C.J., concurring). In the parlance then-Justice Hughes had previously employed in *The Shreveport Rate Case*, low wages or long hours could not cause an “injury” to interstate commerce. *See infra* notes 294-96 and accompanying text.

113. 15 U.S.C. § 1 (2012) (emphasis added). Section 2 prohibits monopolization and “attempt[s] to monopolize ... any part of the trade or commerce among the several States.” *Id.* § 2.

114. *See* 156 U.S. 1, 9 (1895).

the nation's sugar production.<sup>115</sup> Most of newly created firm's output would be consumed by citizens of other states.<sup>116</sup> The United States challenged the transaction as contrary to the Sherman Act, alleging that the defendant had "monopolized the manufacture and sale of refined sugar in the United States, and controlled the price of sugar," and that the defendant would thereby "exact and secure large sums of money from the State of Pennsylvania, and from the other States of the United States, and from all other purchasers."<sup>117</sup>

The Court did not take issue with the government's allegations that the transaction would confer a "practical monopoly" upon defendants that would thus empower defendants to exact a "tribute" from consumers in various states.<sup>118</sup> But did the merger "restrain[] ... commerce among the several States"<sup>119</sup> or "monopolize" part of that commerce within the meaning of the Sherman Act?<sup>120</sup> To answer this question the Court referred to its pre-1890 Commerce Clause jurisprudence,<sup>121</sup> which of course had been "on the books" when Congress passed the Act. Most notably, the Court invoked decisions evaluating Commerce Clause challenges to state regulation of intrastate activity.<sup>122</sup> According to the Court, the outcome of

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115. See *id.* at 3 (noting that the nation's only remaining independent sugar refinery, "Revere of Boston," "produced annually about two per cent of the total amount of sugar refined"); see also Christopher Grandy, *New Jersey Corporate Chartermongering, 1875-1929*, 49 J. ECON. HIST. 677, 681 (1989) (describing various amendments to New Jersey corporate law from 1888 to 1893 allowing New Jersey corporations to hold stock in other companies and to merge with rivals).

116. See *E. C. Knight*, 156 U.S. at 17.

117. *Id.* at 2-4.

118. See *id.* at 10-11 (declining to consider whether the transaction would produce efficiencies that would result in lower prices, or whether the prospect of entry by former shareholders of rivals would undermine any restraint).

119. 15 U.S.C. § 1 (2012).

120. *Id.* § 2.

121. See *E. C. Knight*, 156 U.S. at 13-15.

122. See *id.* (discussing *Kidd v. Pearson*, 128 U.S. 1 (1888), *Coe v. Errol*, 116 U.S. 517 (1886), and *Veazie v. Moor*, 55 U.S. (14 How.) 568 (1852)). It should be noted that neither *Coe* nor *Veazie* expressly invoked the direct/indirect distinction. But several other decisions announced before the Sherman Act did invoke the distinction and relied upon it as the basis for the decision. See, e.g., *Minnesota v. Barber*, 136 U.S. 313, 322 (1890); *Smith v. Alabama*, 124 U.S. 465, 474 (1888); *Hall v. DeCuir*, 95 U.S. 485, 488 (1887); *Munn v. Illinois*, 94 U.S. 113, 135 (1876); *Sherlock v. Alling*, 93 U.S. 99, 102 (1876). *Kidd*, it should be noted, had invoked *Hall*, *Sherlock*, *Munn*, and *Gibbons* for the proposition that police regulations only ran afoul of the Commerce Clause if they affected interstate commerce directly. See *Kidd*, 128 U.S. at 23.



such decisions, including *Gibbons* itself, had rested upon the distinction between “direct” and “indirect” impacts on interstate commerce, invalidating only that state legislation that produced the former.<sup>123</sup>

Congress, the Court said, had adopted the Sherman Act in light of these “well-settled principles,” with the result that the Act did not reach intrastate activities, such as mergers between manufacturers that produced only indirect effects on interstate commerce.<sup>124</sup> Instead, states possessed exclusive jurisdiction over such conduct as part of their more general power “to protect the lives, health, and property of [their] citizens, and to preserve good order and the public morals.”<sup>125</sup>

This result, the Court said, required dismissal of the indictment.<sup>126</sup> Given this “view which we take of the case,” the Court said, there was no need to discuss the views of “political economists, [that] aggregations of capital may reduce prices,” or whether “no objectionable restraint was imposed” because “the original stockholders of the Philadelphia refineries after becoming stockholders of the [defendant] might go into competition with themselves, or, parting with that stock, might set up again for themselves.”<sup>127</sup> The Court suggested a possible exception to its holding, however, noting that the United States had not alleged that the defendants, in forming the new firm, intended to restrain interstate commerce.<sup>128</sup> The

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123. See *E. C. Knight*, 156 U.S. at 15-16 (“In *Gibbons v. Ogden*, *Brown v. Maryland*, and other cases often cited, the state laws, which were held inoperative, were instances of direct interference with, or regulations of, interstate or international commerce, yet in *Kidd v. Pearson* the refusal of a State to allow articles to be manufactured within her borders even for export was held not to directly affect external commerce, and state legislation which, in a great variety of ways, affected interstate commerce and persons engaged in it, has been frequently sustained because the interference was not direct.”); *id.* at 15 (citing *Veazie* to exemplify proper understanding of the commerce power); see also *supra* notes 62-68, and accompanying text.

124. See *E. C. Knight*, 156 U.S. at 16 (“It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such.”).

125. See *id.* at 11 (“The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with.”); see also Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304, 305 (1979).

126. See *E. C. Knight*, 156 U.S. at 16-18.

127. See *id.* at 10-11.

128. *Id.* at 17 (“There was nothing in the proofs to indicate any intention to put a restraint



implication, of course, was that proof of such intent may have produced a different result, although the Court did not explain exactly what such intent would entail.

Justice Harlan issued a lengthy and vigorous dissent.<sup>129</sup> He did not take issue with the direct/indirect distinction, which he himself had invoked or implicitly endorsed in previous decisions.<sup>130</sup> Invoking *Gibbons's* assertion that Congress could regulate “those internal concerns which affect the States generally,”<sup>131</sup> Harlan contended that the challenged merger and resulting monopoly “affects, not incidentally, but directly, the people of all the States,”<sup>132</sup> because it had the “object and effect of controlling not simply the manufacture but the price of refined sugar throughout the whole of the United States.”<sup>133</sup> Harlan also contended that the merging parties necessarily intended such an anticompetitive result.<sup>134</sup>

Rhetorically and analytically at least, *E. C. Knight* set the tone for the Court’s jurisprudence on Sherman Act federalism for the next four decades. In three 1898 decisions, the Court thrice reiterated *E. C. Knight’s* invocation of the Court’s pre-Sherman Act Commerce Clause jurisprudence, particularly the direct/indirect

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upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.”).

129. *See id.* at 18-46 (Harlan, J., dissenting).

130. *See, e.g.,* *Minnesota v. Barber*, 136 U.S. 313, 328 (1890) (Harlan, J.) (invalidating a state regulation that directly obstructed interstate commerce). Justice Harlan also joined or endorsed other decisions invoking the direct/indirect distinction without comment. *See, e.g., E. C. Knight*, 156 U.S. at 33 (Harlan, J., dissenting) (invoking *Sherlock v. Alling*, 93 U.S. 99 (1876) for the proposition that state legislation that only impacts interstate commerce indirectly exceeds the scope of Congress’s authority); *see also, e.g., Kidd v. Pearson*, 128 U.S. 1, 23 (1888) (joined by Harlan, J.) (stating that only state legislation which impacts interstate commerce “directly” regulates interstate commerce); *Smith v. Alabama*, 124 U.S. 465, 474 (1888) (joined by Harlan, J.) (same).

131. *E. C. Knight*, 156 U.S. at 21 (Harlan, J. dissenting) (emphasis omitted) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824)).

132. *See id.* at 33 (“Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not incidentally, but directly, the people of all the States.”).

133. *Id.*; *see also id.* at 25 (emphasis omitted) (“But a general restraint of trade has often resulted from combinations formed for the purpose of controlling prices by destroying the opportunity of buyers and sellers to deal with each other upon the basis of fair, open, free competition.”).

134. *See id.* at 43-44.

distinction, as the proper articulation of the boundary between state and federal regulatory power and thus the reach of the Sherman Act.<sup>135</sup> In 1899, the Court again drew upon its Commerce Clause jurisprudence to address the claim that the clause did not authorize Congress to reach private agreements.<sup>136</sup> The Court unanimously ruled that the Commerce Clause authorized Congress to reach private agreements, because such agreements could have the very same economic impact on interstate commerce as analogous state laws, that is, could impact such commerce “directly” and thus “regulate” such commerce.<sup>137</sup> Elaborating on the rationale for this division of authority between states and the national government, the Court echoed the antiprotectionism and free trade principle that animated its pre-1890 Commerce Clause jurisprudence.<sup>138</sup> If states

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135. See *Hopkins v. United States*, 171 U.S. 578, 594 (1898) (citing several decisions evaluating challenges to state legislation, as well as *E. C. Knight* for the proposition that the Sherman Act does not reach agreements that impact interstate commerce indirectly); *id.* (“An agreement may in a variety of ways affect interstate commerce, *just as state legislation may*, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct.... An agreement among the owners of such facilities, to charge not less than a minimum rate for their use, cannot be condemned as illegal under the act of Congress.” (emphasis added)); *Anderson v. United States*, 171 U.S. 604, 616 (1898) (“There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations.’ The same is true as to certain kinds of agreements entered into between persons engaged in the same business for the direct and *bona fide* purpose of properly and reasonably regulating the conduct of their business among themselves and with the public.” (quoting *Smith v. Alabama*, 124 U.S. 465, 473 (1888))); *United States v. Joint Traffic Ass’n*, 171 U.S. 505, 568 (1898) (“In *Hopkins v. United States*, decided at this term, we say that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce, and that to treat the act as condemning all agreements under which, as a result, the cost of conducting an interstate commercial business may be increased, would enlarge the application of the act far beyond the fair meaning of the language used. The effect upon interstate commerce must not be indirect or incidental only.” (citations omitted)).

136. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 229-30 (1899).

137. See *id.* (“If certain kinds of private contracts do directly, as already stated, limit or restrain, and hence regulate interstate commerce, why should not the power of Congress reach those contracts just the same as if the legislation of some State had enacted the provisions contained in them? The 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.”); *id.* at 230 (rejecting the claim that liberty of contract protected such agreements “because the direct results of such contracts might be the regulation of commerce among the States, possibly quite as effectually as if a State had passed a statute of like tenor as the contract”).

138. See *supra* notes 77-84 and accompanying text.

possessed authority over such agreements, the Court said, they would adopt different and conflicting measures, depending upon each state's "particular interest."<sup>139</sup> Because of its "general and great importance," the Court continued, the subject of interstate commerce "has been granted to Congress as the proper representative of the nation at large."<sup>140</sup> The Sherman Act, the Court said, thus reached all private agreements that impacted interstate commerce directly, including the cartel agreement before the Court, which set unreasonable prices for the interstate sales of pipe.<sup>141</sup> The Court distinguished *E. C. Knight*, which had involved manufacturing.<sup>142</sup> The cartel agreement before the Court in *Addyston Pipe*, by contrast, restricted competition with respect to interstate commercial transactions, which *Gibbons* and its progeny had considered part of interstate commerce.<sup>143</sup> The Court also reiterated that the Act did not reach agreements that merely restrained intrastate commerce, even if those agreements produced prices for intrastate

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139. *See Addyston Pipe*, 175 U.S. at 231 ("If it should be held that Congress has no power and the 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.").

140. *See id.* at 230.

141. *See id.* at 235-38 (rejecting defendants' argument that the agreement's impact was indirect because it set reasonable prices).

142. *See id.* at 240 ("[*E. C. Knight*] was decided upon the principle that a combination simply to control manufacture was not a violation of the act of Congress, because such a contract or combination did not directly control or affect interstate commerce.").

143. *See id.* at 240-41 ("The direct and immediate result of the combination was therefore necessarily a restraint upon interstate commerce in respect of articles manufactured by any of the parties to it to be transported beyond the State in which they were made. The defendants by reason of this combination and agreement could only send their goods out of the State in which they were manufactured for sale and delivery in another State, upon the terms and pursuant to the provisions of such combination."); *id.* at 246 ("Any combination among dealers in that kind of commodity, which in its direct and immediate effect, forecloses all competition and enhances the purchase price for which such commodity would otherwise be delivered at its destination in another State, would in our opinion be one in restraint of trade or commerce among the States.").

transactions above the competitive level.<sup>144</sup> States, the Court said, had exclusive authority over such agreements.<sup>145</sup>

From 1895 until 1933 (at least), in decision after decision, the Court employed the direct/indirect formulation when determining whether a contract in restraint of trade also restrained commerce among the several states.<sup>146</sup> Thus, a conspiracy to shut down a factory or mine was generally considered an indirect restraint, even when the factory or mine's owner sold its output in other states and/or purchased inputs from firms in other states.<sup>147</sup> So was a conspiracy to shut down local construction that employed inputs purchased from other states.<sup>148</sup> The same was true for a defendant's refusal to accept advertisements placed by a plaintiff's advertising agency as part of an alleged effort to monopolize the magazine advertising market, even though the defendant distributed its magazines in several states.<sup>149</sup>

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144. *Id.* at 247 (“Although the jurisdiction of Congress over commerce among the States is full and complete, it is not questioned that it has none over that which is wholly within a State, and therefore none over combinations or agreements so far as they relate to a restraint of such trade or commerce.... The combination herein described covers both commerce which is wholly within a State and also that which is interstate.”).

145. *See id.*

146. *See Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 108 (1933) (holding that strikes aimed at local builders exceeded the commerce power and the Sherman Act even though such strikes reduced the purchase of steel from other states); *Indus. Ass'n of S.F. v. United States*, 268 U.S. 64, 82 (1925) (holding that the Act did not reach a conspiracy between employers and dealers to deprive local union-friendly firms of inputs); *United Leather Workers Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 467 (1924); *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 408 (1922); *United States v. Patten*, 226 U.S. 525, 542 (1913); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 66-67 (1911); *Swift & Co. v. United States*, 196 U.S. 375, 381-82 (1905); *Addyston Pipe*, 175 U.S. at 228; *Hopkins v. United States*, 171 U.S. 578, 586 (1898); *Anderson v. United States*, 171 U.S. 604, 615 (1898); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 560-61 (1898); *see also* 15 U.S.C. § 1 (2012).

147. *Leather Workers*, 265 U.S. at 464, 471 (finding that the Act did not reach a conspiracy to shut down several factories that purchased inputs from out-of-state suppliers and sold most of their output to purchasers in other states); *Coronado Coal*, 259 U.S. at 407-08 (holding that the Act did not reach a conspiracy to shut down a mine that exported most of its output to other states).

148. *See Levering*, 289 U.S. at 107 (holding that the Act did not reach strikes aimed at local builders even though such strikes reduced the purchase of steel from other states); *id.* (“Restraint of interstate commerce was not an object of the [local] conspiracy.... It is this exclusively local aim, and not the fortuitous and incidental effect upon interstate commerce, which gives character to the conspiracy.”); *Indus. Ass'n of S.F.*, 268 U.S. at 80 (same).

149. *Blumenstock Bros. Advert. Agency v. Curtis Publ'g Co.*, 252 U.S. 436, 444 (1920) (“[T]here is no ground for claiming that the transactions which are the basis of the present

By contrast, the Act *did* reach a conspiracy to corner the sales of cotton on the New York exchange, admittedly intrastate conduct, because such a conspiracy predictably monopolized the national market for cotton and thus raised the prices of interstate cotton sales, a proper object of federal commercial regulation.<sup>150</sup> The Act also reached a conspiracy between union members to prevent the use of the plaintiffs' stone, produced in nonunion Indiana quarries, on building projects in several other states.<sup>151</sup> The restraints "had for their primary aim restraint of the interstate sale and shipment of the commodity.... [and] [i]nterstate commerce was the direct object of attack," in an effort to protect other forms of stone produced in unionized settings from competition.<sup>152</sup> Such restraints, the Court said, resulted in "the gravely probable disadvantage of producers, purchasers and the public."<sup>153</sup> Finally, the Act reached a conspiracy between Chicago meatpackers to depress the price at which they purchased meat from ranchers in other states, because, while entailing local acts, interstate commerce was the "direct object" of attack "for the sake of which the several specific acts and courses of conduct [were] done and adopted."<sup>154</sup>

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suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the groundwork for such contentions as are undertaken to be here maintained under ... the Sherman Anti-Trust Act.").

150. *Patten*, 226 U.S. at 540-42 (finding that intrastate restraint effectively monopolized the national market for cotton, and thereby raising the inference that defendants intended to directly restrain interstate commerce).

151. *See Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n of N.A.*, 274 U.S. 37, 54-55 (1927).

152. *Id.* at 46; *see id.* at 54 (finding that the Act reached the challenged restraint because the defendants had "adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country" (emphasis added)).

153. *Id.* at 54.

154. *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905) ("Although the combination alleged embraces restraint and monopoly of trade within a single State, its effect upon commerce among the States is not accidental, secondary, remote or merely probable. On the allegations of the bill the latter commerce no less, perhaps even more, than commerce within a single State is an object of attack. Moreover, it is a direct object, it is that for the sake of which the several specific acts and courses of conduct are done and adopted. Therefore the case is not like *United States v. E. C. Knight* ... where the subject matter of the combination was manufacture and the direct object monopoly of manufacture within a State." (internal citations omitted)); *see also Anderson v. Shipowners Ass'n of the Pac. Coast*, 272 U.S. 359, 363 (1926) (finding that the Sherman Act reached a horizontal agreement setting wages and other

Application of this test was often fact-intensive, sometimes requiring the Court to assess the market positions of the parties and resulting impact of these positions on the price of interstate sales.<sup>155</sup> Taken together, and as demonstrated in greater detail elsewhere, these decisions reflect an effort to distinguish restraints that harmed consumers in more than one state from those that produced harms confined to a single state.<sup>156</sup>

But what about *E. C. Knight*, the grandfather of the Sherman Act's direct/indirect test? Surely the challenged conduct there, as Justice Harlan explained, injured consumers in more than one

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working conditions of seamen operating vessels on interstate voyages because restraint of interstate commerce was "the necessary and direct consequence of the combination and the acts of the associations under it" (citing *Patten*, 226 U.S. at 543)); *United States v. Brims*, 272 U.S. 549, 552-53 (1926) (finding that the Sherman Act reached conspiracy among union members and contractors to exclude millwork manufactured in other states from Chicago construction sites, because "the so-called outside competition was cut down and thereby interstate commerce directly and materially impeded").

155. See *Stone Cutters' Ass'n*, 274 U.S. at 54 (finding that the restraint directly impacted interstate commerce because among other things it impacted "a very large proportion of the building limestone production of the entire country"); *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 412-13 (1922) (finding that the defendants could not have intended to affect the price of interstate coal transactions because the mine targeted by the restraint produced 5000 tons of coal per week, compared to "a national production of from [10,000,000] to [15,000,000] tons a week," and a regional production of "150,000 tons a week," with the result that the restraint "would have no appreciable effect upon the price of coal or non-union competition"); *id.* at 412 ("The saving in the price per ton of coal under non-union conditions was said by plaintiffs' witnesses to be from [seventeen] to [twenty] cents, but surely no one would say that such saving on 5,000 tons would have a substantial effect on prices of coal in interstate commerce."); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 238 (1899) (holding that the challenged agreement affected interstate commerce directly after rejecting defendants' argument that the agreement set reasonable prices); *id.* at 235-38 (four-page fact-intensive analysis of defendants' claim that the agreement set reasonable prices); *Anderson v. United States*, 171 U.S. 604, 617 (1898) (finding that restraint only impacted interstate commerce indirectly in part because the Association imposing the restraint faced competition from numerous rivals that prevented the restraint from raising prices above the competitive level); *Hopkins v. United States*, 171 U.S. 578, 595-96 (1898) (finding that the challenged restraint only impacted interstate commerce indirectly because the charges it set were not "exorbitant").

156. Compare *Patten*, 226 U.S. at 542, with *Indus. Ass'n of S.F. v. United States*, 268 U.S. 64, 80 (1925) (finding that the challenged restraint was intrastate because it did not limit "the freedom of the outside manufacturer to sell and ship or of the local contractor to buy"). For additional application of this distinction, see also *Addyston Pipe*, 175 U.S. at 246 (Act applied to agreement that "enhances the purchase price for which such commodity would otherwise be delivered at its destination in another State"); *id.* at 247-48 (Act does not apply to agreement enhancing the purchase price for which product would be delivered in the same state). See generally Meese, *supra* note 82.



state, indeed, in most if not all the states of the union!<sup>157</sup> And yet, eight members of the Court held that the merger to monopoly would only affect interstate commerce indirectly.<sup>158</sup> If the genesis of the direct/indirect test was so fatally flawed, how can one be confident that the test reflected a bona fide effort to allocate to Congress the amount of authority “necessary,” as *Gibbons* would have said, thereby implementing the “genius and character of the whole government” and protecting interstate commerce from harmful restraints?<sup>159</sup> Indeed, *Wickard* and its antitrust progeny focused significant fire on *E. C. Knight* in their efforts to discredit the direct/indirect test.<sup>160</sup>

This critique, however, assumes that *E. C. Knight*'s holding that restraints on production could never directly obstruct interstate commerce remained good law throughout the period in question.<sup>161</sup> It did not—at least not as an exposition of the Sherman Act. To be sure, the Court continued to employ the direct/indirect test and never formally overruled *E. C. Knight* in total. It did, however, reach results that were inconsistent with that decision and more consistent with the application of the direct/indirect formula by Justice Harlan's *E. C. Knight* dissent.<sup>162</sup> Indeed, *Standard Oil Co. of New Jersey v. United States*, which famously announced Section 1's Rule of Reason, expressly rejected the defendant's claim, based upon *E. C. Knight*, that the Sherman Act did not reach monopolizing conduct that took the form of mergers or other production-related decisions occurring within a single state.<sup>163</sup> *American Tobacco*,

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157. See *United States v. E. C. Knight Co.*, 156 U.S. 1, 18 (1895) (Harlan, J., dissenting).

158. See *id.* at 16-18 (majority opinion).

159. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824).

160. See *infra* notes 192-214 and accompanying text.

161. See *infra* notes 192-214 and accompanying text.

162. See *supra* notes 129-33 and accompanying text.

163. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 68-69 (1911) (“But all the structure upon which this argument proceeds is based upon the decision in *E. C. Knight Co.* The view, however, which the argument takes of that case and the arguments based upon that view have been so repeatedly pressed upon this court in connection with the interpretation and enforcement of the Anti-Trust Act, and have been so necessarily and expressly decided to be unsound as to cause the contentions to be plainly foreclosed and to require no express notice” (citations omitted)); see also Brief for Appellants at 38-46, *Standard Oil*, 221 U.S. 1 (No. 398) (“The Sherman Act has no application to the transfer to, or acquisition by, the Standard Oil Company of New Jersey of the stocks of the various manufacturing and producing corporations, for the reason that such transfer and acquisition were not acts of

decided two weeks after *Standard Oil*, similarly rejected such an argument, albeit without mentioning *E. C. Knight*.<sup>164</sup> Moreover, in *United States v. Patten*, the Court applied the Act to a scheme to corner the market for cotton bought and sold on the New York Cotton Exchange.<sup>165</sup> The Court held that the challenged restraint would, if effective, raise the national price of “cotton, a product of the Southern States, largely used and consumed in the Northern States ... therefore inflict[ing] upon the public the injuries which the Anti-trust Act is designed to prevent.”<sup>166</sup>

In short, while the Court retained *E. C. Knight*'s direct/indirect formulation, the Justices adjusted application of the test so as to reach results contrary to that decision. While the Court did not provide a detailed articulation of the rationale for departing from *E. C. Knight*'s result, one might speculate that two interrelated

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interstate or foreign commerce, nor direct and immediate in their effect on interstate and foreign commerce, nor within the power of Congress to regulate interstate and foreign commerce.”); *id.* at 41-46 (repeatedly invoking *E. C. Knight* in support of this argument); *id.* at 41 (“The case of [*E. C. Knight*] is a conclusive authority that the acquisition of the stocks of the manufacturing and production corporations is not a transaction subject to national control or regulation or within the Sherman Act.”); *id.* at 45 (contending that the defendants’ purchases of rivals “and the transaction involved in the *Knigh*t case cannot be differentiated. One cannot be within the commercial power of Congress and the other not; one cannot be subject to the Sherman Act and the other not”).

164. See *United States v. Am. Tobacco Co.*, 221 U.S. 106, 150-51 (1911) (recounting defendant’s argument regarding “their right under state charters by virtue of which they existed to own and possess the property which they held and further averred that they were engaged in manufacturing and that any combination amongst them related only to that subject, and therefore was not within the Anti-trust Act”); *id.* at 183-84 (“We do not, for the sake of brevity, moreover, stop to examine and discuss the various propositions urged in the argument at bar for the purpose of demonstrating that the subject matter of the combination which we find to exist and the combination itself, are not within the scope of the Anti-trust Act because when rightly considered they are merely matters of intrastate commerce and therefore subject alone to state control. We have done this because the want of merit in all the arguments advanced on such subjects is so completely established by the prior decisions of this court, as pointed out in the *Standard Oil Case*, as not to require restatement.”).

165. 226 U.S. 525, 542 (1913).

166. *Id.* at 542-43 (“The commodity to be cornered was cotton, a product of the Southern States, largely used and consumed in the Northern States. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by the many manufacturers of cotton fabrics in the Northern States .... [T]he conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country. Bearing in mind that such was the nature, object and scope of the conspiracy, we regard it as altogether plain that by its necessary operation it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-trust Act is designed to prevent.”).



factors explain the change. First, the Court had a different understanding of the economic consequences of the sort of intrastate transactions initially sheltered by *E. C. Knight's* seemingly categorical rule exempting manufacturing from the Act.<sup>167</sup> That is, the Court apparently came to understand that, say, a merger to monopoly could confer upon the parties the power to increase prices well above the competitive level, contrary to the predictions of the classical economic paradigm that was ascendant when Congress passed the Sherman Act.<sup>168</sup> Thus, while *E. C. Knight* itself declined to opine on whether the defendant could maintain a monopoly absent state or contractual barriers to entry, subsequent decisions of the Court answered this question, expressly or implicitly, in the affirmative.<sup>169</sup> Second, and relatedly, the Justices presumably understood, as they had explained in *Addyston Pipe*, that states lacked proper incentives to develop optimal rules governing conduct that produced harms exceeding the boundaries of the regulating state.<sup>170</sup> Indeed, by the

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167. See *supra* notes 124-25 and accompanying text.

168. See Meese, *supra* note 38, at 15-23; see also HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 282-83 (1991) ("Within the classical paradigm, monopoly prices could never be earned in any industry unless people were artificially restrained from entering.... A mere agreement among sellers to fix prices was of little concern, provided that neither the price fixers nor the state forbade others from entering the field. If the cartel members sought to charge monopoly prices, new competition would immediately frustrate their attempt."); Thomas Cooley, *Limits to State Control of Private Business*, 54 PRINCETON REV. 233, 259 (1878) (concluding that combinations to raise prices could only be successful if "accomplished through means which are no part of any regular business"); *id.* at 260 (arguing that firms could only achieve a true monopoly by means of "sovereign grant, ... combination, or ... violence and terror").

169. See, e.g., *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 235-38 (1899) (finding that the defendants collectively possessed more than a majority of the relevant region's productive capacity and that the cartel set prices well above the reasonable level); see also George Gunton, *The Economic and Social Aspect of Trusts*, 3 POL. SCI. Q. 385, 403 (1888) ("If the gates for the admission of new competitive capital are always open, the economic effect is substantially the same as if the new competitor were already there."); Meese, *supra* note 38, at 66-67 (explaining how Justice Peckham, the author of *Addyston Pipe*, came to realize that private firms could raise prices above the competitive level without state aid and without predatory tactics); cf. *People ex rel Annan v. Walsh*, 22 N.E. 682, 693 (N.Y. 1889) (Peckham, J., dissenting), *aff'd*, 143 U.S. 517 (1892) (contending that the cartel of floating grain elevators could not maintain prices above the competitive level because high prices at "just that moment" would attract new entry that would drive prices back down to the competitive level).

170. See *Addyston Pipe*, 175 U.S. at 235-42; see also *N. Sec. Co. v. United States*, 193 U.S. 197, 330 (1904); Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: A Historical Perspective*, 59 ANTITRUST L.J. 75, 78-91 (1990) (documenting how developments in state corporate law, particularly New Jersey, undermined the ability of

early twentieth century, and before *Standard Oil*, politicians and legal commentators recognized that state corporate law, particularly New Jersey law (where the acquiring firm in *E. C. Knight* was incorporated), facilitated the formation of monopolies or near monopolies that exercised market power to the detriment of consumers in states other than the state of incorporation.<sup>171</sup> Just seven years before *Standard Oil*, the Court rejected the claim that the lawful creation of a holding company under New Jersey law was immune from attack under the Sherman Act.<sup>172</sup> In short, *E. C. Knight*'s progeny embraced the same standard that *E. C. Knight* inherited from pre-1890 Commerce Clause jurisprudence, a standard based upon the antiprotectionism principle.<sup>173</sup> But these post-*E. C. Knight* decisions applied this standard in light of new information that counseled results different from the result reached in *E. C. Knight*.<sup>174</sup>

The Sherman Act's manifestation of the direct/indirect test survived into the 1930s.<sup>175</sup> While nominally interpretations of a statute, subject to congressional revision, Sherman Act decisions eventually were seen as articulations of the constitutional boundary between state and federal authority over economic activity.<sup>176</sup>

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individual states to protect their citizens from exercises of market power created by mergers); McCurdy, *supra* note 125 (explaining how economic incentives deterred states from excluding from their territories firms incorporated in other states).

171. See Grandy, *supra* note 115, at 678-84, 687, 691 (describing New Jersey's success in the late nineteenth century at attracting incorporations with large industrial concerns by empowering such firms to merge with rivals with impunity, thereby creating a "legal externality" vis-à-vis other states); *id.* at 684-85 (describing contemporary recognition that "New Jersey's policy undermined the antitrust laws of other states" and within New Jersey); Joseph F. Mahoney, *Backsliding Convert: Woodrow Wilson and the "Seven Sisters,"* 18 AM. Q. 71, 72-73 (1966) (recounting then-Governor Woodrow Wilson's 1910 campaign promise to reform New Jersey corporate law if reelected); *id.* at 73-78 (describing the evolution and adoption of seven bills that imposed new antitrust rules on corporate entities and a prospective ban on holding companies); see also Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 16-17 (2008) (describing various calls from 1900 to 1917 for nationalization of corporate law vis-à-vis firms engaged in interstate commerce).

172. See *N. Sec. Co.*, 193 U.S. at 345.

173. See *supra* notes 134-46 and accompanying text.

174. See Bruce Johnsen & Moin A. Yahya, *The Evolution of Sherman Act Jurisdiction: A Roadmap for Competitive Federalism*, 7 U. PA. J. CONST. LAW 403, 445 (2004) (contending that a focus on interstate spillovers supports the conclusion that *Standard Oil* properly abandoned the result reached in *E. C. Knight*); Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1224-28 (1993).

175. See *infra* notes 178-82 and accompanying text.

176. See *infra* notes 178-82 and accompanying text.

Indeed, and as explained earlier, the Court sometimes drew upon this body of law and the results it produced when determining the appropriate reach of the commerce power in other contexts.<sup>177</sup> Perhaps most famously, in *A. L. A. Schechter Poultry Corp. v. United States*, the Court invoked numerous such decisions as illustrating the repeated application of the direct/indirect test and the resulting limits on the scope of the commerce power.<sup>178</sup> Just two years later, in *NLRB v. Jones & Laughlin Steel Corp.*,<sup>179</sup> the Court again invoked several Sherman Act precedents, this time for the proposition that the Sherman Act can reach conduct perpetrated by or involving employees engaged in production, so long as that conduct produced the appropriate (direct) impact on interstate commerce.<sup>180</sup> Such constitutionalization of the Sherman Act caselaw did not begin with *Schechter*. More than a decade earlier, the Court derived the proper line between state and federal authority over intrastate activities in stockyards from three antitrust decisions.<sup>181</sup> Even before that, the

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177. See *supra* notes 99-100 and accompanying text.

178. 295 U.S. 495, 543-48 (1935).

179. 301 U.S. 1 (1937).

180. See *id.* at 38-39 (invoking numerous decisions, including *Levering Garrigues v. Morrin*, 289 U.S. 103 (1933); *Indus. Ass'n of S.F. v. United States*, 268 U.S. 64 (1925); *Coronado Coal Co. v. United Mine Workers of Am.*, 268 U.S. 295 (1925); *United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457 (1924); *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344 (1922); *United States v. Am. Tobacco Co.*, 221 U.S. 106 (1911); and *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911)).

181. Thus, in *Stafford v. Wallace*, the petitioner invoked *Hopkins v. United States* and *Anderson v. United States* in support of its argument that Congress lacked the authority to regulate the practices of middle men in the cattle market because the activities of such individuals produced only indirect effects on interstate commerce. *Stafford v. Wallace*, 258 U.S. 495, 516, 523-24 (1922). The Court rejected this argument by invoking a different antitrust case, *Swift & Co. v. United States*, explaining that the Court there had found that various intrastate practices had in fact produced a direct and harmful effect on interstate commerce. See *id.* at 523-24 (citing *Swift*, 196 U.S. 375 (1905)). In the same way, the Court said: "[t]he act finds and imports this injurious direct effect of such agencies upon interstate commerce just as the intent of the conspiracy charged in the indictment in the *Swift Case* tied together the parts of the scheme there attacked and imported their direct effect upon interstate commerce." *Id.* at 525. The Court also noted the suggestion in *Hopkins* that restraints producing exorbitant charges for local services could still directly burden interstate commerce and thus violate the Act. *Id.* ("Again, if the result of the combination of commission men in the *Hopkins Case* had been to impose exorbitant charges on the passage of the live stock through the stockyards from one State to another, the case would have been different, as the court suggests. The effect on interstate commerce in such a case would have been direct. Similarly, in the *Anderson Case*, if the combination of dealers had been directed to collusion with the commission men to secure sales at unduly low prices to the dealers and to double

Court, in an antitrust decision, had invoked Commerce Clause precedents to exemplify the distinction between direct and indirect restraints of interstate commerce when determining whether the Act reached local conduct.<sup>182</sup>

#### IV. WICKARD AND THE SUBSTANTIAL EFFECTS TEST

Congress told Roscoe Filburn he could only plant wheat on 11.1 acres of his land and grow 20.1 bushels of wheat per acre.<sup>183</sup> He instead planted 23 acres and harvested 239 additional bushels of wheat from the illegal 11.9 acres.<sup>184</sup> There was no indication that he planned to sell the grain in interstate commerce.<sup>185</sup> He sued to avoid the resulting penalty, claiming that the Commerce Clause did not authorize Congress to regulate the production of grain not destined for interstate commerce.<sup>186</sup> Invoking *Schechter* and a subsequent decision relying on *Schechter*, Filburn claimed that his production decisions only affected interstate commerce indirectly or remotely and thus exceeded the scope of Congress's regulatory power.<sup>187</sup> A dissenting judge below claimed that Filburn's production, when combined with that of others, did directly affect commerce.<sup>188</sup> But

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commissions, or to practice any other fraud or oppression calculated to decrease the price received by the shipper and increase the price to the purchaser in the passage of live stock through the stockyards in interstate commerce, this would have been a direct burden on such commerce and within the Anti-Trust Act."); *Hopkins v. United States*, 171 U.S. 578, 595-96 (1898) ("It is possible that exorbitant charges for the use of these facilities might have similar effect as a burden on commerce that a charge up on commerce itself might have. In a case such as that the remedy would probably be forthcoming."). Thus, the Court relied upon the direct/indirect test, as articulated and applied by three different antitrust decisions, to define the scope of congressional power over local activity.

182. See *Blumenstock Bros. Advert. Agency v. Curtis Publ'g Co.*, 252 U.S. 436, 442-43 (1920) (invoking *Int'l Text-book Co. v. Pigg*, 217 U.S. 91 (1910); *Ware & Leland v. Mobile County*, 209 U.S. 405 (1908); *Hopkins*, 171 U.S. at 579; and *Ficklin v. Shelby Cty. Taxing Dist.*, 145 U.S. 1 (1892)).

183. *Wickard v. Filburn*, 317 U.S. 111, 114 (1942).

184. *Id.*

185. See *id.* ("The intended disposition of the crop here involved has not been expressly stated.")

186. See *id.* at 113-14.

187. See Brief for Appellee on Re-Argument at 10-12, *Wickard*, 317 U.S. 111 (No. 59).

188. See *Filburn v. Helke*, 43 F. Supp. 1017, 1022 (S.D. Ohio 1942) (Allen, J., dissenting) ("It is true that Congress has no power to regulate intrastate transactions which affect commerce only indirectly. But where it is claimed that the local activity sought to be regulated does not directly affect commerce, decision should not be made by examination of the effect

Filburn's argument seemed to be on solid ground, given the innumerable previous Supreme Court decisions that employed the direct/indirect test to determine whether various intrastate activities such as production, mining, agriculture, construction, and transportation exceeded the scope of Congress's regulatory power.<sup>189</sup> *Stare decisis*, it seemed, had a powerful claim.

The Court rejected Filburn's challenge.<sup>190</sup> It did not question Filburn's assertion that his production decisions only impacted interstate commerce indirectly as *Schechter* and other decisions would have applied the test.<sup>191</sup> Instead, the Court took the opportunity to engage in a lengthy historical exegesis and multifaceted critique of the large body of precedent that had employed the direct/indirect test when determining the reach of the commerce power, particularly as it applied in the context of production.<sup>192</sup> The Court described the test applied in the context of production as "a few dicta and decisions of this Court, which might be understood" as holding that "production" and related activities exceeded the scope of the commerce power, unless there were "special circumstances," because their effects upon interstate commerce were indirect "as [a] matter of law."<sup>193</sup> The "special circumstances" the Court noted, were those that gave rise to a conclusion that the impact of the regulated conduct was "direct."<sup>194</sup>

The Court began by observing that the test had its origins in decisions passing on claims that state statutes burdened or discriminated against interstate commerce.<sup>195</sup> These decisions, the Court said, had ignored the Necessary and Proper clause and

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of isolated individual activity, but must include due regard to the total effect of the attempted regulation." (citations omitted)).

189. See *supra* notes 64-74 and accompanying text.

190. *Wickard*, 317 U.S. at 127-29.

191. See *id.* at 119-20.

192. *Id.* at 120-25.

193. *Id.* at 119-20.

194. See *id.* at 120 & n.16 (quoting language from *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), as exemplifying the rule that Congress had authority to regulate production "only if by virtue of special circumstances [the activity's] effects upon interstate commerce were 'direct'"). It should be noted that any rule with respect to production was simply a subset of the Court's approach to intrastate activities more generally, whether intrastate grain storage, see *Munn v. Illinois*, 94 U.S. 113, 130-35 (1876), or intrastate operation of a locomotive, see *Smith v. Alabama*, 124 U.S. 465, 477, 480-82 (1888).

195. See *Wickard*, 317 U.S. at 121.

instead treated the question as invoking “some concept of sovereignty thought to be implicit in the status of statehood.”<sup>196</sup> As a result, the Court claimed, “[c]ertain activities such as ‘production,’ ‘manufacturing,’ and ‘mining’ were occasionally said to be within the province of state governments and beyond the power of Congress under the Commerce Clause.”<sup>197</sup>

The Court then instanced the 1887 Interstate Commerce Act as “[the] first important federal resort to the commerce power” which “was followed in 1890 by the Sherman Anti-Trust Act.”<sup>198</sup> These and other statutes “ushered in new phases of adjudication.”<sup>199</sup> Still, despite the “affirmative” nature of the Sherman Act, “the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress.”<sup>200</sup> *E. C. Knight* was the chief exemplar of this era, according to the Court, but not the only one.<sup>201</sup> The Court also instanced *Hopkins v. United States* and *Anderson v. United States*, both decided in 1898.<sup>202</sup> These three decisions “played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.”<sup>203</sup> It should be noted that these five cases were decided between 1908 and 1936, with three of the five decided in 1935 and 1936.<sup>204</sup>

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196. *Id.*

197. *Id.* (citing *Veazie v. Moor*, 55 U.S. 568, 573-74 (1852), and *Kidd v. Pearson*, 128 U.S. 1, 20-22 (1888)). The Court did not consider the possibility that such pronouncements simply implemented a more general principle that intrastate activities of all types, of which production and manufacturing were merely a subset, were beyond the power of Congress. *See, e.g., Smith*, 124 U.S. at 479-80 (intrastate operation of locomotives); *Coe v. Errol*, 116 U.S. 517, 525-29 (1886) (logs awaiting possible shipment across state lines); *Munn*, 94 U.S. at 135 (storage of grain not yet identified for interstate shipment); *Sherlock v. Alling*, 93 U.S. 99, 102 (1876) (intrastate operation of steamships). As explained below, the Court’s pre-New Deal antitrust jurisprudence applied the direct/indirect test to the more general category of intrastate conduct, of which production and agriculture were simply a part. *See infra* notes 298-303 and accompanying text.

198. *Wickard*, 317 U.S. at 121.

199. *Id.*

200. *Id.* at 121-22.

201. *See id.*

202. *Id.* at 121-22 & n.20.

203. *Id.* at 122 & n.21 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Emp’rs’ Liability Cases*, 207 U.S. 463 (1908)).

204. *See supra* note 203 (collecting citations of these decisions).



After claiming that only five twentieth-century decisions (most under the influence of *E. C. Knight*) had employed the direct/indirect test to limit the reach of congressional power, the Court in *Wickard* asserted that other decisions during the very same period employed an entirely different test.<sup>205</sup> More precisely, the Court said, other decisions had brought “forth broader interpretations of the Commerce Clause destined to supersede the earlier ones, and to bring about a return to the principles first enunciated by Chief Justice Marshall in *Gibbons*.”<sup>206</sup> These decisions supposedly included Sherman Act decisions such as *Standard Oil Co. of New Jersey v. United States*, *Swift & Co. v. United States*, and *United States v. Patten*.<sup>207</sup> The Court grudgingly conceded that several of these decisions had invoked and applied the direct/indirect test, but claimed that these decisions did so merely to “stat[e], rather than ... reach[,], a result.”<sup>208</sup>

The most important decision was the so-called *The Shreveport Rate Case*.<sup>209</sup> There, the Court sustained the exercise of federal power to preempt state regulation of intrastate railroad rates that interfered with interstate commerce, specifically, rail transportation from Louisiana to Texas.<sup>210</sup> *Wickard* characterized the holding in the decision as allowing federal intervention in

matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate

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205. See *Wickard*, 317 U.S. at 122-24.

206. *Id.* at 122.

207. See *id.* at 122-23 (discussing *Swift*, 196 U.S. 375 (1904), and citing *Standard Oil*, 221 U.S. 1 (1911) and *Patten*, 226 U.S. 525 (1913)).

208. *Id.* (“In some cases sustaining the exercise of federal power over intrastate matters the term ‘direct’ was used for the purpose of stating, rather than of reaching, a result.” (citing *United Leather Workers Int’l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 471 (1925))). *Herkert*, it should be noted, did not sustain the exercise of federal power but instead held that the challenged restraint merely impacted interstate commerce “indirect[ly].” 265 U.S. at 471-72.

209. See *Wickard*, 317 U.S. at 123-24; see also *The Shreveport Rate Case*, 234 U.S. 342 (1914).

210. See *The Shreveport Rate Case*, 234 U.S. at 350-55.

commerce may be conducted upon fair terms and without molestation or hindrance.<sup>211</sup>

According to *Wickard*, this language constituted a departure from the direct/indirect test, insofar as it exemplified “[t]he Court’s recognition of the relevance of the economic effects in the application of the Commerce Clause.”<sup>212</sup> The Court thus implied that the direct/indirect formula prevented recognition of such effects in some cases, thereby thwarting the objective of the commerce power. This recognition, in turn, “made the mechanical application of legal formulas no longer feasible.”<sup>213</sup> In particular, the acceptance by *The Shreveport Rate Case* and other decisions of “an economic measure of the reach of the power granted to Congress” foreclosed reliance upon inquiry into whether the regulated activity was “production,” or whether the economic effects were “indirect.”<sup>214</sup>

The Court then announced an entirely new test,<sup>215</sup> thereby effectively overruling various decisions that had employed the direct/indirect formulation to determine the reach of the Commerce Clause. Instead, to determine whether Congress could reach a given activity, the relevant question was whether the activity “exerts a *substantial economic effect* on interstate commerce” regardless of whether such an effect “might at some earlier time have been defined as ‘direct’ or ‘indirect.’”<sup>216</sup> Despite its invocation of *Gibbons*, the Court did not explain why it was “necessary” that Congress possess authority over any and all conduct that produced a substantial economic effect on interstate commerce, regardless of whether that effect gave rise to the possibility that states would adopt protectionist policies with respect to such conduct.<sup>217</sup> Nor did the Court explain why such authority would not be “inconvenient.”<sup>218</sup>

Of course, *Wickard* did not purport to interpret the Sherman Act, but instead applied a statute passed in 1938 and amended shortly

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211. See *Wickard*, 317 U.S. at 123 (quoting *The Shreveport Rate Case*, 234 U.S. at 351).

212. *Id.* at 123-24.

213. *Id.* at 124.

214. *Id.* at 124.

215. See *id.* at 125.

216. See *id.* (emphasis added).

217. Cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (explaining that federal authority over intrastate conduct would not be “necessary” and would also be “inconvenient”).

218. Cf. *id.* at 194.



thereafter.<sup>219</sup> One could thus imagine an alternative jurisprudential history in which, despite the massive constitutional change in *Wickard*, the Court retained the direct/indirect formulation for purposes of implementing the Sherman Act—subject of course to congressional revision given the newfound power granted by *Wickard*. However, just six years after *Wickard*, in *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, the Court emphatically rejected the direct/indirect test.<sup>220</sup> There, the Court treated the formulation as an archaic artifact of *E. C. Knight* and its by-now-discredited dual federalism.<sup>221</sup> The Court embraced *Wickard*'s historical account of the evolution of Commerce Clause doctrine, including the fixation on *E. C. Knight* and the portrayal of *The Shreveport Rate Case* as a major break from *E. C. Knight* and the nineteenth century Commerce Clause jurisprudence of which it was a part.<sup>222</sup> Just as the commerce power reached any conduct that produced a substantial economic effect on interstate commerce, so too did the Sherman Act reach any agreement in restraint of trade that produced a substantial effect on interstate commerce.<sup>223</sup> Subsequent decisions repeatedly applied this substantial effects test, holding that the Act reaches intrastate conduct that produces incidental and fortuitous effects on interstate commerce, so long as they are “substantial.”<sup>224</sup>

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219. See *Wickard*, 317 U.S. at 117 n.10, 128-29.

220. See 334 U.S. 219, 234 (1948).

221. See *id.* at 234.

222. See *id.* at 230-32 (“We do not stop to review again in detail the familiar story of the progression of decision to that end, perhaps not told elsewhere more succinctly or pertinently than in *Wickard v. Filburn*.”).

223. See *id.* at 234.

224. See, e.g., *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 329, 333 (1991) (holding that the Sherman Act reached a group boycott by physicians in a single hospital that was directed against a single physician who practiced in a single department); *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 234, 242 (1980) (holding that the Sherman Act reached horizontal price fixing agreement between realtors in single city); *id.* at 241 (“The broad authority of Congress under the Commerce Clause has, of course, long been interpreted to extend beyond activities actually *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce.”); *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 739-41 (1976) (holding that the Sherman Act reached conduct designed to thwart expansion of a single hospital in a single city because the hospital planning to expand purchased some inputs from out-of-state firms); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 778, 793 (1975) (holding that the Sherman Act reached conspiracy between a single county’s lawyers to fix fees for title searches within the county because some

V. FLIPPING THE SCRIPT: WHAT *WICKARD* MIGHT HAVE LEARNED

As detailed above, modern antitrust decisions draw directly upon *Wickard*'s substantial effects test when determining the reach of the Sherman Act vis-à-vis local conduct. These modern antitrust decisions repeatedly apply the Sherman Act to conduct that produces no interstate harm and thus only an indirect effect on interstate commerce. The genesis of this body of decisions, *Mandeville Island Farms*, embraced various elements of *Wickard*'s critique of the direct/indirect test and claimed that the nation's ever increasing economic integration and industrial development justified the jettisoning of the direct/indirect test.

But what if, instead, *Wickard* had followed the lead of *Schechter* and *Jones & Laughlin Steel* and treated the large body of precedent regarding the reach of the Sherman Act as a source of knowledge and guidance instead of a source of inconvenient legal authority? What might *Wickard*, and by extension *Mandeville Island Farms*, have learned from the various antitrust decisions that employed the direct/indirect test for several decades?

First, recall that *Wickard* characterized the direct/indirect test as a formula employed primarily in the context of challenges to state legislation on the grounds that local legislation nonetheless constituted an impermissible regulation of interstate commerce.<sup>225</sup> This was a common refrain among New Deal-era Justices, seeking to downplay the precedential importance of the large stock of precedent repeatedly holding that particular conduct or activity was not interstate commerce.<sup>226</sup> Indeed, the Court claimed that only five post-*E. C. Knight* decisions had invalidated congressional statutes as exceeding the scope of the commerce power, a small fraction of the caselaw that had adjudicated Commerce Clause challenges

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purchasers obtained financing from lenders in other states); *Burke v. Ford*, 389 U.S. 320, 321-22 (1967) (per curiam) (holding that the Sherman Act reached horizontal agreements between a single state's liquor wholesalers to divide markets for retail sales simply because wholesalers purchased liquor from suppliers in other states).

225. See *Wickard v. Filburn*, 317 U.S. 111, 121 (1942).

226. See, e.g., *United States v. S.-E. Underwriters Ass'n*, 322 U.S. 533, 543-44 (1944) (distinguishing numerous decisions holding that insurance does not constitute interstate commerce on the grounds that such decisions entailed challenges to state legislation).

during this period.<sup>227</sup> Three such decisions were wedged into a two year period (1935-36)<sup>228</sup> and thus sometimes characterized as ideological reactions to novel New Deal legislation. Thus, the Court said, the vast majority of decisions employing the direct/indirect formulation were simply beside the point.<sup>229</sup> That small subset of decisions that *had* invalidated an affirmative exercise of the commerce power, the Court said, were under the undue sway of *E. C. Knight*, with its too-narrow conception of Congress's authority.<sup>230</sup>

A more careful Court and one more attuned to Sherman Act jurisprudence would have taken a different tack. To begin with, only one of the five decisions invoked by *Wickard*—*Carter v. Carter Coal Co.*—even cited *E. C. Knight*.<sup>231</sup> The other four decisions did not.<sup>232</sup> More importantly, *Wickard*'s pronouncement depended upon a gerrymandered dataset that artificially minimized the stock of contrary precedent.<sup>233</sup> After all, every Sherman Act decision presenting a federalism question involved an assertion that the Act reached particular conduct, often conduct that was entirely intrastate.<sup>234</sup> Thus, each such controversy required the Court to opine about the proper division between federal and state authority vis-à-vis such conduct. Moreover, each of these decisions involved application of the direct/indirect test to resolve this question, quite often against the party

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227. See *Wickard*, 317 U.S. at 122 & n.21.

228. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935).

229. See *Wickard*, 317 U.S. at 122.

230. See *id.* (“These earlier pronouncements [in *E. C. Knight*, *Hopkins*, and *Anderson*] also played an important part in several of the five cases in which this Court later held that Acts of Congress under the Commerce Clause were in excess of its power.”); *id.* at 122 n.21 (citing five such cases).

231. *Carter Coal*, 298 U.S. at 270.

232. Nor did any of these decisions cite *Hopkins* or *Anderson*.

233. See *supra* notes 226-28 and accompanying text.

234. To be sure, most such assertions were by private parties invoking the Sherman Act in private litigation, as was *Mandeville Island Farms* for that matter. See, e.g., *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 383-84 (1922). However, this procedural posture did not alter the fundamental question before the Court in each case, namely, whether the Commerce Clause authorized the asserted exercise of federal power. Moreover, the Court employed the same direct/indirect test in cases where the United States was the plaintiff. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 247-48 (1899) (rejecting application of the Sherman Act to local conduct as sought by the United States); *Hopkins v. United States*, 171 U.S. 578, 591-604 (1898) (same); *Anderson v. United States*, 171 U.S. 604, 619-20 (1898) (same).

seeking federal regulation.<sup>235</sup> Indeed, during this period, and after *E. C. Knight*, the Court refused to apply the Sherman Act to local conduct at least eight different times over a four decade period, thereby reaching a result different from that which *Wickard's* substantial effects test and its antitrust progeny would have generated.<sup>236</sup> Moreover, at least as many decisions employed the direct/indirect test to validate a proposed application of the Act to challenged conduct.<sup>237</sup> As a result, the body of decisions declining to apply a federal statute to conduct generating a substantial economic effect was more than double the size that *Wickard* reported, and also more evenly distributed as a temporal matter, with most such decisions arising under the federal statute governing the largest portion of the nation's economy, namely, the Sherman Act.<sup>238</sup> Thus, the direct/indirect test would seem to have had a much more robust pedigree and wider application than *Wickard* claimed. As such, the body of law had a greater claim to respect under stare decisis and was, moreover, a more robust source of information about the actual implementation of the direct/indirect test than the *Wickard* Court seemed to assume.

This brings us to *Wickard's* second critique of pre-New Deal Commerce Clause jurisprudence—one based upon a supposed lack of fit between actual results and the objective of the Commerce Clause, particularly as articulated in *Gibbons*.<sup>239</sup> Even large bodies of precedent are subject to revision if adherence to such decisions contravenes other important values of the legal system. One such value, of course, is nonarbitrary decision making—in particular, ensuring that economically similar conduct is treated the same

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235. See *supra* notes 146-56 and accompanying text.

236. See *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 108 (1933); *Indus. Ass'n of S.F. v. United States*, 268 U.S. 64, 84 (1925); *United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 471-72 (1924); *Coronado Coal*, 259 U.S. at 413; *Blumenstock Bros. Advert. Agency v. Curtis Publ'g Co.*, 252 U.S. 436, 444 (1920); *Addyston Pipe & Steel*, 175 U.S. at 247-48; *Hopkins*, 171 U.S. at 591-92; *Anderson*, 171 U.S. at 619-620.

237. See, e.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n of N. Am.*, 274 U.S. 37, 46-55 (1927); *United States v. Brims*, 272 U.S. 549, 552 (1926); *Anderson v. Shipowners Ass'n of the Pac. Coast*, 272 U.S. 359, 364-65 (1926); *Coronado Coal*, 268 U.S. at 310; *United States v. Patten*, 226 U.S. 525, 543 (1913)).

238. See *supra* notes 231-37 and accompanying text.

239. See *Wickard v. Filburn*, 317 U.S. 111, 123-24 (1942).

way.<sup>240</sup> *Wickard*, of course, claimed that the direct/indirect test was “mechanical” and obscured the actual economic impact of local conduct, thereby producing results that turned on formalistic distinctions and were inconsistent with the purpose of the Commerce Clause.<sup>241</sup> If true, *Wickard*’s indictment of the direct/indirect test could justify repudiating the test and adopting the substantial effects test instead.

Here again *Wickard*’s critique was based upon a small and non-representative subset of the decisions assessing whether local conduct that Congress sought to regulate impacted interstate commerce directly or indirectly. For one thing, the antitrust decisions at least were in no way “mechanical,” “artificial,” cryptic, or otherwise insensitive to the actual economic effects of the conduct potentially subject to regulation.<sup>242</sup> Nor did these decisions simply employ “direct” or “indirect” as labels to announce results determined by other (unspecified) means, as *Wickard* claimed, thereby reaching results inconsistent with the objective of the Commerce Clause.<sup>243</sup> On the

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240. See *Con’t T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57 (1977) (concluding that one of two doctrinal categories that treated economically identical conduct differently must be abandoned, despite *stare decisis*); see also *Eastman Kodak Co. v. Image Tech. Servs., Inc.* 504 U.S. 451, 466-67 (1992) (“Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law.”).

241. *Wickard*, 317 U.S. at 123-24.

242. Cf. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 230 (1948) (referring to *E. C. Knight* “and succeeding [unnamed] decisions embracing the same artificially drawn lines” that supposedly “produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal”).

243. It should be noted that, so far as this author is aware, no scholar or jurist has articulated a defensible alternative methodology or principle that animated the implementation of the direct/indirect test during this period. While some have asserted that the Court was sympathetic to big business and unsympathetic to labor, the Court’s application of the direct/indirect formulation often led to *rejection* of suits brought by businesses beset by successful union conspiracies to restrain trade and shut down plaintiff’s businesses. See, e.g., *United Leather Workers’ Int’l Union v. Herkert & Meisel Trunk Co.*, 265 U.S. 457, 571 (1924); Barry Cushman, *The Secret Lives of the Four Horsemen*, 83 VA. L. REV. 559, 559, 567-69 (1997) (instancing *Herkert & Meisel Trunk Co.*, *Coronado Coal*, and *Levering & Garrigues Co.* as decisions in which the Court’s more “conservative” members rejected application of the Sherman Act to labor union conspiracies that injured private business because such application exceeded the scope of the Commerce Clause). Moreover, in *Anderson v. Shipowners Ass’n of the Pac. Coast*, 272 U.S. 359, 364-65 (1926), the Court found that the Sherman Act reached a horizontal agreement setting wages and other working conditions of seamen operating vessels on interstate voyages, thereby applying the Act to business interests at the behest of a labor union.

contrary, each such decision reflected a fact-intensive effort to determine the real, one might say “actual,” impact of the conduct in question.<sup>244</sup> Often this analysis entailed explicit or implicit assessment of the relevant market and the defendants’ market shares, of the sort sometimes employed to assess whether the agreement was in fact “in restraint of trade” in the first place.<sup>245</sup> In each case, the Court sought to determine whether the restraint of trade itself visited harms on citizens in other states or, instead, merely produced harms that were confined to a single state. The results seem to reflect a successful effort in this regard. Thus, decisions such as *United States v. Patten*,<sup>246</sup> *Standard Oil Co. of New Jersey v. United States*,<sup>247</sup> and *United States v. American Tobacco Co.*<sup>248</sup> all found that the Act applied to intrastate conduct such as mergers and the purchase of property, given the apparent harmful impact of such conduct on citizens in more than one state. Decisions such as

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244. See *Wickard*, 317 U.S. at 120 (“[N]omenclature such as ‘production’ and ‘indirect’ foreclos[ed] consideration of the *actual effects* of the activity in question upon interstate commerce” (emphasis added)).

245. Cf. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 239-41 (1918) (finding restraint imposed by the Chicago Board of Trade to be reasonable in part because putative victims of the restraint, grain dealers in neighboring states, could sell their grain on other exchanges in the midwest).

246. 226 U.S. 525, 542 (1913) (explaining that cotton was a product of the “Southern states” and that most cotton moved in interstate commerce and was thus “obtained from time to time by ... manufacturers of cotton fabrics in the Northern States”); *id.* at 538-39 (recounting the allegation that, as a result of defendants’ conspiracy “an abnormal demand was to be created on the part of such sellers [on the New York Exchange] who would pay excessive prices to obtain cotton for delivery upon their contracts” and that “[t]he excessive prices prevailing upon the New York Exchange would cause similar prices to exist upon other cotton markets”); *id.* at 542-43 (finding that defendants’ conspiracy, if successful, would “corner” the market for cotton sold on the New York Cotton Exchange and necessarily raise the price of cotton trading in other markets as well, thereby “it would directly and materially impede and burden the due course of trade and commerce among the States and therefore inflict upon the public the injuries which the Anti-trust Act is designed to prevent”).

247. 221 U.S. 1, 32-33 (1911) (finding that the defendant employed various challenged practices, including mergers and intrastate pricing, to obtain a monopoly over items manufactured and sold in interstate commerce).

248. 221 U.S. 106, 183-84 (1911).



*Coronado Coal*,<sup>249</sup> *Addyston Pipe & Steel Co. v. United States*,<sup>250</sup> *Industrial Ass'n of San Francisco v. United States*,<sup>251</sup> and others found that any harmful effects of the challenged intrastate conduct were confined to a single state where the challenged conduct took place.<sup>252</sup> In short, the Court appeared to employ the direct/indirect test so as to allocate to the national government only those activities producing interstate harms, harms that rendered federal authority necessary because only Congress had the sort of "enlarged view of the interests of all the States"<sup>253</sup> necessary to inform such regulation, thereby leaving states with exclusive authority over that conduct over which, according to *Gibbons*, federal authority would be "inconvenient."<sup>254</sup>

Moreover, it should be clear by now that these decisions were not unthinking applications of some inflexible and frozen-in-time rule, such as an outmoded distinction between production and manufacturing on the one hand, and trading and transportation (the latter two both forms of "commerce") on the other, impervious to accommodation because of changing national circumstances.<sup>255</sup> Nor did these decisions or the standard they invoked in any way hamper or undermine appropriate antitrust regulation in the twentieth century's rapidly changing economy.<sup>256</sup> As a flexible standard, like the

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249. See *United Mine Workers of Am. v. Coronado Coal Co.*, 259 U.S. 344, 412 (1922) (finding that the plaintiff's mine that was shut down by violent union conspiracy produced a minuscule share of the region's and nation's coal with the result that the conspiracy would "have no appreciable effect upon the price of coal or non-union competition," such that the defendants did not intend to impact the interstate price of coal).

250. 175 U.S. 211, 247-48 (1899) (finding that the commerce power and the Sherman Act did not reach "defendants as might reside and carry on business in the same State where the pipe provided for in any particular contract was to be delivered" because "the sale, transportation and delivery of the pipe by them under that contract would be a transaction wholly within the state, and the statute would not be applicable to them in that case"); *id.* at 248 (modifying the decree so as not to reach intrastate portion of the conspiracy).

251. 268 U.S. 64, 82 (1925).

252. Of course, *Addyston Pipe & Steel Co.* also held that the Act *did* apply to agreements setting unreasonable prices for actual interstate transactions. See 175 U.S. at 235-37.

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

254. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

255. Cf. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 233 (1948) (characterizing pre-New Deal precedents in this manner).

256. Cf. *McLain v. Real Estate Bd. of New Orleans*, 444 U.S. 232, 241 (1980) ("During the near century of Sherman Act experience, forms and modes of business and commerce have changed along with changes in communication and travel, and innovations in methods of conducting particular businesses have altered relationships in commerce. *Application of the*



Sherman Act's Rule of Reason itself, the direct/indirect test was sensitive to changed circumstances, both legal and factual, that might bear upon whether the impact of a practice was, in fact, direct or indirect. Indeed, responding to the claim that application of a fact-intensive rule of reason was inconsistent with the judicial role, the *Standard Oil* Court invoked caselaw that evaluated whether an otherwise valid enactment was in fact invalid because of its "direct effect upon interstate commerce."<sup>257</sup> As a result, a practice that purportedly produced (or was perceived to produce) merely an indirect effect on interstate commerce in the late nineteenth century could be deemed to produce a direct effect forty years later. Thus, like the Rule of Reason itself, the direct/indirect standard contained dynamic potential and was thus fully capable of accommodating significant changes in the nation's economic circumstances and/or legal institutions that might impact whether particular conduct or activity was properly subject to state or national regulation.<sup>258</sup>

To be sure, the results of the direct/indirect test allocated to the states exclusive regulatory authority over a significant portion of the nation's economic activities. With respect to such restraints, then, an institutional framework of competitive federalism generated the (state-by-state) rules governing alleged trade restraints, in

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*Act reflects an adaptation to these changing circumstances.*" (emphasis added)); *id.* (concluding that the Sherman Act "reach[es] other activities that, while wholly local in nature, nevertheless substantially affect interstate commerce"); *Mandeville Island Farms*, 334 U.S. at 230 (contending that "the evolving nature of our industrialism foredoomed to reversal" pre-*Wickard* antitrust federalism jurisprudence).

257. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 70 (1911) ("Consider the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce.").

258. *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-32 (1988) ("The term 'restraint of trade' in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted.... The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890." (emphasis added)); Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 91-92 (explaining that logic and rationale of *Standard Oil's* rule of reason requires courts to "translate" public policy of the statute in light of evolving economic theory that informs courts' understanding of the impact of challenged restraints).

the same way that competitive federalism designs the rules of corporate law today.<sup>259</sup> Most, if not all, of these intrastate activities produced “substantial effects” on interstate commerce as the Supreme Court has understood that term for the past several decades.<sup>260</sup> Still, this Author is aware of no evidence that national authority over such restraints was “necessary” within the meaning of *Gibbons*, that is, that states were incapable of interdicting activity that produced harm confined to their jurisdiction if they so chose.<sup>261</sup>

Indeed, during the early part of the twentieth century, some states levelled greater aggregate penalties on antitrust offenders than did the United States.<sup>262</sup> Of course, states were entirely free to adopt different normative policies vis-à-vis such intrastate activity from those the United States pursued vis-à-vis interstate commerce, and some states did.<sup>263</sup> Nonetheless, or perhaps even because of such

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259. See Johnsen & Yahya, *supra* note 174, at 448 (“The sole concern for Sherman Act jurisdiction under [competitive federalism] is whether the defendants’ conduct in one state creates market power that spills across state lines in the form of higher prices. For those trade restraints whose price effects are confined to the defendants’ home state, that state’s antitrust regulators have sufficient incentive and resources to adequately address the problem. Political competition between states will result in optimal, though not necessarily uniform, antitrust policy with due regard for experimentation to address novel business practices tailored to local conditions.”); Alan J. Meese, *Regulation of Franchisor Opportunism and Production of the Institutional Framework: Federal Monopoly or Competition Between The States?*, 23 HARV. J.L. & PUB. POL’Y 61, 78-87 (1999) (contending that competition between the states will generate efficient background rules governing franchise relationships thereby obviating the need for federal antitrust scrutiny of alleged opportunism).

260. *Cf. Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 744 (1976) (finding that the Sherman Act reached an alleged effort to block expansion of a single hospital because such expansion would increase “purchases of out-of-state medicines and supplies,” “revenues from out-of-state insurance companies,” and also “management fees that petitioner pays to its out-of-state parent corporation”); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 784-85 (1975) (finding that the Sherman Act reached an agreement setting title search fees in single county because some undetermined number of purchasers were moving in from other states).

261. See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 497-507 (1987) (describing state antitrust regulation of intrastate restraints during this period).

262. See *id.* at 501-02 (reporting that Texas, for instance, levied a larger magnitude of antitrust fines than the United States between 1890 and 1925, and that Missouri levied nearly the same amount in fines as the United States).

263. For instance, in the early 1930s, several states adopted legislation that immunized intrastate minimum resale price fixing agreements from attack under state antitrust laws. See, e.g., Ewald T. Grether, *Experience in California with Fair Trade Legislation Restricting*

regulatory diversity,<sup>264</sup> the economy, according to some studies anyway, operated at an extremely high rate of efficiency during this period, with the maximum social loss resulting from a misallocation of resources standing at about 0.1 percent of the nation's gross domestic product.<sup>265</sup> At least some of this misallocation was apparently due to lax federal enforcement of the Sherman and Clayton Acts.<sup>266</sup> In short, the direct/indirect formulation and the principle it implemented were both entirely capable of the sort of evolutionary dynamism necessary to ensure a proper allocation of regulatory authority over potentially anticompetitive conduct between states

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*Price Cutting*, 24 CALIF. L. REV. 640, 640 n.2 (1936) (reporting that, as of 1935, nine other states, in addition to California, representing 40 percent of the nation's population, had adopted fair trade legislation); *see also* *Cline v. Frink Dairy Co.*, 274 U.S. 445, 453-57 (1927) (evaluating Colorado antitrust statute that allowed cartelists to assert a reasonable price defense); *cf.* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 400 (1911) (banning minimum resale price maintenance under Section 1 of the Sherman Act). While in *Cline* the Court invalidated the reasonable price defense as void for vagueness under the due process clause, it did not doubt that Colorado had exclusive jurisdiction over the agreements governed by the statute. *See* 274 U.S. at 453-57.

264. Many states adopted legislation during the 1930s that immunized intrastate minimum resale price maintenance in industries characterized by significant interbrand competition. *See* Grether, *supra* note 263, at 640 n.2. Congress recognized these efforts in the 1937 Miller-Tydings Act, which allowed states to provide such immunity to agreements in interstate commerce and otherwise subject to the Sherman Act. *See* Pub. L. No. 75-314, 50 Stat. 693 (1937). At one time, forty-six of the nation's then forty-eight states were such "Fair Trade" states. *See* AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS 9 (1975). It turns out that these states were right to reject the Supreme Court's (national) hostility to such agreements, given that these agreements usually produced no harm or increased welfare. *See* Alan J. Meese, *Assorted Anti-Leegin Canards: Why Resistance is Misguided and Futile*, 40 FLA. ST. U. L. REV. 907, 936 (2013); *see also* D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, The Rule of Reason, and Per Se Legality*, 79 ANTITRUST L.J. 1003, 1007 (2013).

265. *See* Arnold C. Harberger, *Monopoly and Resource Allocation*, 44 AM. ECON. REV. 77, 84 (1954) ("Thus we come to our final conclusion. Elimination of resource misallocations in American manufacturing in the late twenties would bring with it an improvement in consumer welfare of just a little more than a tenth of a per cent. In present values [that is, in 1954 dollars], this welfare gain would amount to about \$2.00 per capita."); *see also* David Schwartzman, *The Burden of Monopoly*, 68 J. POL. ECON. 627, 630 (1960) (reaching a nearly identical result as Harberger).

266. Thus, during the period studied by Professor Harberger (1924-1928), the Department of Justice and Federal Trade Commission relaxed enforcement policies vis-à-vis horizontal practices adopted by trade associations. *See* ROBERT F. HIMMELBERG, THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION 57-65 (1993) (discussing relaxation of such enforcement efforts from 1925-1928 in the form of comfort letters which the Department provided to important trade associations (approving collusive facilitating practices), and in the form of FTC "trade practice conferences" (adopting "codes of fair practice")).

and the national government, thereby implementing the objective of the Commerce Clause. Had *Wickard* better appreciated the Sherman Act federalism caselaw in general, and the ins and outs of the direct/indirect test in particular, it would have understood that the substantial effects test added no value in this respect and instead conferred upon Congress authority that was “unnecessary” and “inconvenient.”<sup>267</sup>

But *Wickard* leveled a third critique as well. That is, even if internally coherent in the Sherman Act context, and even if consistent with certain other decisions, such as *Schechter*, the antitrust decisions could still contradict a parallel set of decisions determining the scope of the commerce power in other contexts, thereby leaving Congress, the states, and private parties potentially subject to legislation by both sovereigns, to speculate about which set of standards would govern a new category of legislation. If Commerce Clause doctrine did in fact consist of two coexisting sets of standards, a responsible Supreme Court would eventually be forced to choose one over the other, so that a unified standard governed all assessments of the scope of congressional authority over commerce.

Both *Wickard* and *Mandeville Island Farms* claimed that the antitrust cases and other decisions, which applied the direct/indirect distinction in a manner that limited Congress’s power, coexisted with a parallel set of decisions.<sup>268</sup> Most notably, *The Shreveport Rate Case* and its progeny, it is said, consistently took a more expansive approach to congressional authority and consistently validated the exercise of congressional power, unlike the other line of decisions, which continued to find their inspiration in *E. C. Knight*.<sup>269</sup> If this is so, then respect for the rule of law at least required the rejection of one such standard and application of the other to all Commerce Clause questions. No doubt the *Wickard* Court believed it was doing exactly that, and *Mandeville Island Farms* simply parroted *Wickard*’s reasoning.

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267. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824).

268. See *Wickard v. Filburn*, 317 U.S. 111, 123 (1942); see also *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 231 (1948).

269. See *supra* notes 200-22 and accompanying text.

Here again, *Wickard* and *Mandeville Island Farms* were simply wrong about the caselaw they inherited. The antitrust federalism precedents did not constitute a retrograde throwback to decisions such as *E. C. Knight*—throwbacks that somehow coexisted with purportedly more reasonable decisions, such as *The Shreveport Rate Case*—until *Wickard* and then *Mandeville Island Farms* finally excised the old growth and set things right.<sup>270</sup> The Court's pre-New Deal antitrust federalism decisions rarely cited *E. C. Knight*, and then only for the purpose of distinguishing or narrowing the decision so as to allow the Sherman Act to reach intrastate transactions that led to interstate harm.<sup>271</sup> Moreover, the Court also reached decisions inconsistent with *E. C. Knight*, albeit without expressly distinguishing the decision, by applying the Act to activities seemingly beyond the scope of *E. C. Knight's* rule.<sup>272</sup>

Put another way, the Court's antitrust federalism jurisprudence and its adherence to the direct/indirect formulation did not, contrary to *Wickard's* apparent assumption, require the Court to carry the baggage of *E. C. Knight*, preclude understanding of actual economic effects of conduct Congress sought to regulate, or prevent the national government from exercising a necessary power over conduct states could not be trusted to regulate. On the contrary, the Court repeatedly sustained the exercise of federal power vis-à-vis challenged restraints that produced harm exceeding the boundaries of a particular state.<sup>273</sup>

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270. See *Mandeville Island Farms*, 334 U.S. at 231-33 (characterizing *The Shreveport Rate Case* as announcing a more expansive approach to the commerce power not reflected in antitrust decisions); *Wickard*, 317 U.S. at 123-24.

271. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 68-69 (rejecting defendants' argument that *E. C. Knight* precluded application of the Sherman Act to mergers and other intrastate conduct that produced a monopoly); see also *United States v. Am. Tobacco Co.*, 221 U.S. 106, 183-84 (1911) (rejecting defendants' argument that the challenged combination was "merely [a] matter[] of intrastate commerce and therefore subject alone to state control"); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 238-40 (1899) (distinguishing *E. C. Knight*).

272. See *Coronado Coal Co. v. United Mine Workers of Am.*, 268 U.S. 295, 310 (1925) (finding that the Sherman Act applied to apparently intrastate conduct because the defendants possessed the requisite intent to restrain interstate commerce); *United States v. Patten*, 226 U.S. 525, 540-44 (1913) (finding that the Act reached a conspiracy to "corner" the New York market for cotton because such intrastate activity would induce interstate price increases).

273. See *supra* notes 162-66 and accompanying text.

Nor did the Court's antitrust federalism jurisprudence somehow preclude or contradict decisions such as *The Shreveport Rate Case*. On the contrary, *The Shreveport Rate Case*, authored by the same Justice Hughes that would later author *Schechter* and invoke the antitrust federalism decisions with approval, appears to have been a straightforward application of the antiprotectionism principle that informed the Court's pre-1890 jurisprudence and drove application of the direct/indirect formulation.<sup>274</sup> Justice Hughes began *The Shreveport Rate Case* opinion by repeating the rationale for the adoption of the Commerce Clause articulated by the Court's pre-1890 Commerce Clause jurisprudence, citing *Gibbons* and three other pre-1890 decisions:

Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring "uniformity of regulation against conflicting and discriminating state legislation." By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control.<sup>275</sup>

The power to regulate such commerce, the Court said, included the power to "to provide the law for the government of interstate commerce."<sup>276</sup> This power, in turn, included the authority to govern intrastate activities if such activities "molest[ed]," "hind[ered]," "retard[ed]," "cripple[d]," "destroy[ed]" or "injur[ed]" interstate commerce.<sup>277</sup> The state regulation of intrastate railway rates had

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274. See *supra* notes 77-86 and accompanying text.

275. *The Shreveport Rate Case*, 234 U.S. 342, 350-51 (1914) (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 224 (1822); *Brown v. Maryland*, 25 U.S. 419, 446 (1827); *County of Mobile v. Kimball*, 102 U.S. 691, 696-97 (1881); *Smith v. Alabama*, 124 U.S. 465 (1888); *Second Emprs' Liab. Cases*, 223 U.S. 1, 24, 53 (1912); *The Minnesota Rate Cases*, 230 U.S. 352, 398, 399 (1913)).

276. *Id.* at 351.

277. See *id.* at 353 (invoking prior cases as holding that the Commerce Clause included power to "prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations to the injury of interstate commerce" (emphasis added)); *id.* at 354 ("The use of the instrument of interstate commerce in a



done exactly that, setting intrastate rates for carriage between Dallas and Galveston, for instance, which were far lower than rates for interstate carriage between Dallas and Shreveport, Louisiana, which the Interstate Commerce Commission had approved as reasonable.<sup>278</sup> These artificially low intrastate rates disadvantaged and injured commerce between Shreveport and other states, to the advantage of Texas ports and Texas enterprises.<sup>279</sup>

The state's regulation of intrastate rates, the Court said, created conditions in which "one person or locality is unduly favored as against another under substantially similar conditions of traffic."<sup>280</sup> That this result was "an evil," the Court said, "is undeniable."<sup>281</sup> Moreover, Congress's authority to correct the evil was "equally clear," given that the "evil consists in the action of an interstate carrier in unreasonably discriminating against interstate traffic over its line."<sup>282</sup> The Court added that "[t]he use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention."<sup>283</sup> The power to deal with the relation between intrastate and interstate rates lay "exclusively with Congress."<sup>284</sup> A state's attempt to do so "directly

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discriminatory manner so as to *inflict injury upon that commerce*, or some part thereof, furnishes abundant ground for Federal intervention." (emphasis added)).

278. See *id.* at 346. For instance, "[t]he first class rate from Houston to Lufkin, Texas, 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to the same point, 112.5 miles, was 69 cents." *Id.* Both Houston and Shreveport were ports, with the result that the artificially low intrastate rates advantaged Texas ports and business when compared to Shreveport and businesses in other states. See Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 *YALE L.J.* 1017, 1069 (1988) ("But the Texas Railroad Commission, which set Texas rates, followed its own policy of encouraging the economic growth of Texas cities. It attempted to compensate for the low interstate rates accorded to Shreveport by making rates within Texas much lower than the interstate rates from Shreveport to the same Texas points." (citations omitted)).

279. See *The Shreveport Rate Case*, 234 U.S. at 354 ("The use of the instrument of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof, furnishes abundant ground for Federal intervention."); Hovenkamp, *supra* note 278, at 1069 ("The effect of this scheme was to give Houston and Dallas an advantage over Shreveport with respect to shipments originating in or destined for other Texas points.").

280. *The Shreveport Rate Case*, 234 U.S. at 354.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*



interfer[ed] with [interstate rates],” unless the state simply copied the interstate rate set by federal authorities—something Texas had refused to do.<sup>285</sup> At least one previous decision had invalidated state rate regulation for this very reason, on the grounds that the interstate rate “was directly controlled by state law.”<sup>286</sup> Thus, Congress had ample authority to preempt the Texas rates.

It should be obvious that *The Shreveport Rate Case* in no way presaged *Wickard* or its substantial economic effects test, at least as that test has played out in *Mandeville Island Farms* and its progeny. On the contrary, both in principle and application, *The Shreveport Rate Case* seems to have had far more in common with the Court’s early twentieth century antitrust federalism caselaw.<sup>287</sup> After all, *The Shreveport Rate Case* began by invoking the same principle—avoiding interstate protectionist legislation that produced interstate spillovers—that drove application of the direct/indirect distinction in antitrust and other contexts.<sup>288</sup> Moreover, the Court applied this principle to the facts before it in a straightforward manner, explaining how the preempted state regulations advantaged local industry by forcing interstate carriers to charge rates that discriminated against interstate commerce.<sup>289</sup>

This, of course, was the very sort of partial and discriminating legislation that harmed consumers in more than one state that pre-1890 decisions identified as the paradigmatic targets of the commerce power.<sup>290</sup> Even before passage of the Sherman Act, the Court had invoked similar reasoning to invalidate state regulation of intrastate railroad rates—even absent Congressional action—on the grounds that only Congress, as representative of *all* the states, was competent to regulate such rates, so as to avoid the results of possibly parochial legislation.<sup>291</sup> Less than a decade after passage of

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285. *Id.* (“It is manifest that the State cannot fix the relation of the carrier’s interstate and intrastate charges without directly interfering with the former, unless it simply follows the standard set by Federal authority.”).

286. *See id.* at 354-55 (quoting *The Minnesota Rate Cases*, 230 U.S. 352, 429 (1913)).

287. *See supra* notes 135-46 and accompanying text.

288. *See supra* notes 114-56 and accompanying text.

289. *See The Shreveport Rate Case*, 234 U.S. at 346.

290. *See supra* notes 79-86 and accompanying text.

291. *See Wabash & St. Louis & Pac. Ry. v. Illinois*, 118 U.S. 557, 570-72 (1886); *see also* Hovenkamp, *supra* note 278, at 1063-64 (describing the *Wabash* Court’s concern that state regulation of the intrastate portion of an interstate rail trip would burden interstate

the Sherman Act, the Court embraced the same rationale when holding that Congress necessarily possessed the authority to ban private agreements that directly burdened interstate commerce.<sup>292</sup> Moreover, *The Shreveport Rate Case* Court in no way suggested that Congress had the authority to preempt state legislation simply because an enactment produced *any* economic effect on interstate commerce that a court might deem “substantial.”<sup>293</sup> Instead, the existence of “a close and substantial relation” between the intrastate activity regulated and interstate commerce was merely a *necessary* condition for congressional authority.<sup>294</sup> Thus, *The Shreveport Rate Case* Court sustained the exercise of congressional authority because, in addition, the challenged enactment produced an “evil” in the form of “discrimination” and thus an “injury” to interstate commerce, thereby empowering Congress to prevent conduct that “hind[er]ed” or “retard[ed]” commerce.<sup>295</sup> Failure to recognize this power of preemption would allow states such as Texas to “*directly* control[]” the rates for interstate transportation and thus regulate interstate commerce, contrary to the rationale for adopting the Commerce Clause.<sup>296</sup> An indirect economic *effect*, unrelated to any economic *harm*, did not suffice to confer authority on Congress to regulate purely local activity.<sup>297</sup>

All in all, then, the Court’s antitrust federalism jurisprudence was entirely consistent with decisions such as *The Shreveport Rate Case*, both in principle and execution. Thus, the pre-New Deal embrace and implementation of the direct/indirect test was far more widespread and consistent than the *Wickard* Court let on. A

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commerce); *id.* at 1059 (explaining that the potential for abuse, particularly for “freeriding by the states,” was “substantial,” and that “federal control by either legislation or judicial intervention was clearly necessary”).

292. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 230-31 (1899) (explaining that Congress possessed exclusive authority over private agreements that directly burdened interstate commerce because each state would regulate such agreements in its “own particular interest”); see also Alan J. Meese, *State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 IOWA L. REV. 2161, 2176-78 (2015) (explaining *Addyston Pipe*’s holding that Congress has exclusive authority over private agreements directly restraining interstate commerce).

293. See *The Shreveport Rate Case*, 234 U.S. at 355.

294. See *id.* at 351.

295. *Id.* at 351-55.

296. See *id.* at 354-55.

297. See *id.* at 355.

contrary conclusion would impute a surprising amount of judicial inconsistency to the author of *The Shreveport Rate Case*, then-Justice Hughes.<sup>298</sup> It was Hughes, after all, who would later author both *Schechter* and *Jones & Laughlin Steel*.<sup>299</sup> Both decisions invoked the direct/indirect distinction in general and the Sherman Act manifestation of this formulation in particular with approval.<sup>300</sup> Both also cited the *The Shreveport Rate Case* as a proper exemplar of the scope of the commerce power within the same overall framework that generated the direct/indirect test.<sup>301</sup> Both described *The Shreveport Rate Case* as authorizing congressional regulation when necessary to ensure “freedom of interstate traffic from interference or unjust discrimination and to promote efficiency.”<sup>302</sup>

In short, as of 1940, *The Shreveport Rate Case*, *Schechter*, *Jones & Laughlin Steel* and the numerous antitrust decisions discussed earlier were all part of a unified, mainstream body of Commerce Clause jurisprudence that employed the direct/indirect test so as to distinguish conduct properly susceptible to state regulation from that which Congress alone was competent to regulate, with the

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298. *See id.* at 345.

299. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 22 (1937); A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 519 (1935).

300. *See supra* notes 178-80 and accompanying text.

301. *See Jones & Laughlin Steel*, 301 U.S. at 38; *Schechter*, 295 U.S. at 544.

302. *See Jones & Laughlin Steel*, 301 U.S. at 37-38 (“That intrastate activities, by reason of close and intimate relation to interstate commerce, may fall within federal control is demonstrated in the case of carriers who are engaged in both interstate and intrastate transportation. There federal control has been found essential to secure the freedom of interstate traffic from interference or unjust discrimination and to promote the efficiency of the interstate service.” (citing *The Shreveport Rate Case*, 234 U.S. at 351-52)); *Schechter*, 295 U.S. at 544 (“We have held that, in dealing with common carriers engaged in both interstate and intrastate commerce, the dominant authority of Congress necessarily embraces the right to control their intrastate operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to secure the freedom of that traffic from interference or unjust discrimination and to promote the efficiency of the interstate service.” (citing *The Shreveport Rate Case*, 234 U.S. at 351-52)); *see also* Carter v. Carter Coal Co., 298 U.S. 238, 328-29 (1936) (Cardozo, J., dissenting) (“A survey of the cases shows that the words have been interpreted with suppleness of adaptation and flexibility of meaning. The power is as broad as the need that evokes it. One of the most common and typical instances of a relation characterized as direct has been that between interstate and intrastate rates for carriers by rail where the local rates are so low as to divert business unreasonably from interstate competitors. In such circumstances Congress has the power to protect the business of its carriers against disintegrating encroachments.” (citing *The Shreveport Rate Case*, 234 U.S. at 351-52)).

result that the application of federal power was “necessary” within the meaning of *Gibbons*.<sup>303</sup> While some conduct that produced a substantial economic effect on interstate commerce also directly impacted interstate commerce, thereby justifying the exercise of federal authority, other such conduct merely impacted interstate commerce indirectly, no matter how substantial the effect. And, as the Court explained in *Carter v. Carter Coal Co.*, the magnitude of the effect did not control the outcome of the direct/indirect test.<sup>304</sup> Instead, the nature of the effect controlled.<sup>305</sup> Thus, *Wickard* was the outlier: its substantial effects test (including as applied in the modern antitrust context) was a radical break with both the principle and execution of pre-New Deal Commerce Clause jurisprudence—*The Shreveport Rate Case* included—and the principle on which such jurisprudence rested.

#### VI. A PARTIAL REHABILITATION OF *WICKARD*

Consideration of the Court's antitrust federalism decisions reveals that *Wickard's* critique of pre-*Wickard* Commerce Clause jurisprudence rests upon a distorted and misleading account of numerous decisions employing the direct/indirect test when determining whether the Commerce Clause authorized Congress to reach local conduct. A proper understanding of the Court's antitrust decisions would have undermined various assumptions that drove *Wickard's* rejection of the direct/indirect formulation in favor of the substantial effects test, a rationale and result that the Court would mimic in *Mandeville Island Farms* a few years later.<sup>306</sup>

At the same time, and somewhat ironically, these same decisions provide a more defensible foundation for the result in *Wickard* itself, albeit not the substantial effects test as such. Recall that the statute before the Court in *Wickard* sought to regulate the price of grain, a commodity traded across state lines for prices obtained in a national market.<sup>307</sup> More precisely, the statute sought to ensure so-called

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303. See *supra* notes 173-80 and accompanying text.

304. See *Carter Coal*, 298 U.S. at 307-08.

305. See *id.* at 307-08.

306. See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 234-35 (1948).

307. See *Wickard v. Filburn*, 317 U.S. 111, 115-16 (1942).

“parity prices” for various agricultural commodities, so as to ensure farmers a reasonable profit.<sup>308</sup> There was no doubt that Congress possessed the authority to regulate the price of interstate grain transactions or, for instance, prevent rival sellers from fixing the price of interstate grain sales.<sup>309</sup> However, such regulations cannot change the laws of supply and demand; and dictating a high price could conceivably induce farmers to plant more grain than they would otherwise plant, thereby producing a surplus of grain, economic waste, and probable circumvention of the federally determined price. Of course, individual states would be free to regulate grain production within their borders, thereby mitigating such concerns.<sup>310</sup> However, given the valid national objective of maintaining super-competitive prices in the national market, and given that most grain produced in a given state is likely exported to others, no individual state would fully internalize the price-increasing or price-reducing impact of its regulatory decisions vis-à-vis the production of grain within its own borders.<sup>311</sup> Thus, each state would rationally free ride on the hoped-for regulatory decisions of others,<sup>312</sup> in the same way that individual cartel members might free ride upon

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308. See Agricultural Adjustment Act, Pub. L. No. 108-357, 52 stat. 31 (1938); see also *Wickard*, 317 U.S. at 115-16 (describing statutory scheme and objectives).

309. See, e.g., *Lemke v. Farmers Grain Co.*, 258 U.S. 50, 54-55 (1922) (invalidating state regulation of the price of grain exported to other states); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 227-28, 234-35 (1899) (holding that the Sherman Act properly reaches horizontal agreement setting unreasonable prices for interstate sales); *Munn v. Illinois*, 94 U.S. 113, 135 (1876) (holding that states may regulate the price of storing grain that may later be shipped in interstate commerce “until Congress acts in reference to their inter-state relations”); see also *Carter Coal*, 298 U.S. at 319-20 (Hughes, C.J., concurring) (concluding that the commerce power includes the authority to regulate the price of interstate sales subject only to due process protections).

310. See *Kidd v. Pearson*, 128 U.S. 1, 25-26 (1888) (sustaining the state’s authority to ban the production of alcohol within its borders); *McCready v. Virginia*, 94 U.S. 391, 396 (1876) (sustaining the exclusion of non-Virginians from planting oysters in state stream because states possessed exclusive authority over agricultural production).

311. Of course, before 1934, outright regulation of grain prices could have run afoul of the Due Process Clause of the Fifth Amendment. See, e.g., *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 239 (1929); *Ribnik v. McBride*, 277 U.S. 350, 354-55 (1928); *Tyson & Bro. v. Banton*, 273 U.S. 418, 428 (1927). Compare *Nebbia v. New York*, 291 U.S. 502, 538-39 (1934) (sustaining state authority to regulate milk prices against Fourteenth Amendment due process challenge), with *Carter Coal*, 298 U.S. at 319 (Hughes, C.J., concurring) (“We are not at liberty to deny to the Congress, with respect to interstate commerce, a power commensurate with that enjoyed by the States in the regulation of their internal commerce.”).

312. See Hovenkamp, *supra* note 278, at 1059.

hoped-for output reductions and price increases by others.<sup>313</sup> Thus, the production of wheat, while an intrastate activity, was one of those “internal concerns which affect the States generally.”<sup>314</sup> As a result, only Congress, with its “enlarged view of the interests of all the States” is competent to regulate such production.<sup>315</sup> Thus, *Wickard* did not have to discard the direct/indirect test in order to sustain the regulation before it.<sup>316</sup>

This is not to say that the direct/indirect test, properly implemented, will always achieve the same results as the modern substantial effects test implemented by *Wickard*'s progeny, including under the Sherman Act. Instead, the two tests will only achieve the same results when the nature of the substantial economic effect is such that states lack appropriate incentives to regulate the underlying conduct producing the effect. When, on the other hand, the effect conveys no such implication, for instance, if the harm from the restraint (as opposed to an incidental effect) is confined to a single state, the interstate impact will be deemed indirect, even if the effect would be deemed substantial under *Wickard* and its progeny.<sup>317</sup> Recognizing federal authority over such agreements merely because they produce a substantial indirect effect on interstate commerce would be, in the words of John Marshall, “unnecessary.”<sup>318</sup>

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313. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 94-96 (1971).

314. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194-95 (1824). Of course, this result depends upon adoption of the aggregation approach that *Wickard* also employed. Such an innovation, if it was an innovation, was necessary to sustain federal authority under either the direct/indirect test or the substantial effects test.

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

316. Cf. *Filburn v. Helke*, 43 F. Supp. 1017, 1022-23 (S.D. Ohio 1942) (Allen, J., dissenting) (finding that the impact of the regulated party's conduct was direct when aggregated with other conduct of the same type).

317. See *Johnsen & Yahya*, *supra* note 174, at 448 (explaining that states possess proper incentives to regulate cartels and other unreasonable restraints that produce harms confined to a single state).

318. *Gibbons*, 22 U.S. (9 Wheat.) at 194.