SHERMAN'S MARCH (IN)TO THE SEA

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TABLE OF CONTENTS

I. INTRODUCTION

For the uninitiated, a Sherman Act case is an oddity worthy of "Ripley's Believe It or Not." The text of the statute is simple enough—it unqualifiedly illegalizes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ."[1] The scope of this simple text, however, has been perverted beyond recognition by the cadre of highly skilled lawyers and economists who specialize in antitrust litigation and the courts that entertain their arguments. From Congress's ban on "restraint[s] of trade," the courts have created *per se* rules against price-fixing,[2] tying,[3] horizontal boycotts,[4] and market allocation agreements,[5] while the less restrictive "rule of reason"[6] applies to covenants not to compete,[7] group bidding arrangements,[8] and collective advertising restrictions.[9] The line between these two rules is far from clear[10] or stable,[11] although it ostensibly reflects the fuzzy common law that the Sherman Act federalized.[12]

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1. 15 U.S.C. § 1 (2000).

2. *See*, *e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982).

3. Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

4. *See*, *e.g.*, Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941); Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 9-10 (1979); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984).

5. United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972).

6. Under the rule of reason, the courts opened the door for an exhaustive inquiry into all circumstances that might conceivably explain the economic effects of the restraint at issue, including the nature of competition in the relevant market, the share of that market held by each of the competitors therein, and the parties' reasons for implementing the restraint. The open-ended formulation of the rule of reason was first described by the Supreme Court in Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918), and has been repeated in several more recent Supreme Court decisions. *See*, *e.g.*, Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988) (describing the rule of reason approach); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 n.15 (1977) (same).

7. Cincinnati Packet v. Bay, 200 U.S. 179, 184 (1906); Shawnee Compress Co. v. Anderson, 209 U.S. 423 (1908).

8. Nat'l Soc'y of Prof. Eng'rs v. United States, 435 U.S. 679 (1978).

9. California Dental Ass'n v. FTC, 526 U.S. 756 (1999).

10. *See*, *e.g.*, *id.* at 779 ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se' … and 'rule of reason' tend to make them appear."); NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 104 n.26 (1984) ("[T]here is often no bright line separating per se from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "per se" condemnation is justified.). *See also* Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623, 1627 (2005) (lamenting that "no discernible principle can be found" in antitrust law in general and section 2 cases in particular).

11. *See*, *e.g.*, Nw. Wholesale Stationers v. Pac. Stationary, 472 U.S. 284 (1985) (applying the rule of reason to a price-fixing arrangement); FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986) (same); Rothery Storage & Van Co. v. Atlas Van Lines, 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.) (same); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (applying the rule of reason to a tying claim). *See also* Part II.D., *infra*.

12. *See* United States v. Addyston Pipe & Steel, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899). Some scholars have praised then-Judge Taft's *Addyston Pipe* opinion for

Shortly after Congress passed the Sherman Act in 1890, its interpreters began tinkering with the statute's meaning, in violation of every conceivable canon of statutory interpretation. And therein lies the puzzle: While jurists[13] and theoreticians[14] of all political stripes have decried "judicial activism," which (broadly conceived) includes the usurpation of lawmaking power by an unelected judiciary, no one has noticed[15]—much less decried—the judicial lawmaking that defines the field of federal antitrust law. Those exercised by judges who would rewrite relatively minor statutes with relatively minor effects[16] nonetheless turn a blind eye toward—or, in some cases, *celebrate*[17]—judges who assume common-lawmaking powers[18] over the massive engines of American commerce via the

recognizing that the common law had always adopted a distinction between "naked" and "ancillary" restraints, condemning the former automatically, but subjecting the latter to further analysis for reasonableness. *See*, *e.g.*, ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 26-30 (1978). Regardless of the exact scope of the common law in 1890, it is indisputable that the Sherman Act purported to codify it. *See id.* at 61; Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 759 (1955); John C. Peppin, *Price-Fixing Agreements Under the Sherman Anti-Trust Law*, 28 CALIF. L. REV. 297, 305-51 (1940).

13. *See*, *e.g.*, Romer v. Evans, 517 U.S. 620, 643 (1996) (Scalia, J., dissenting); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 979-1002 (1992) (Scalia, J., concurring in part and dissenting in part); City of Chicago v. Morales 527 U.S. 41, 81 (1999) (Scalia, J., dissenting); Seminole Tribe of Fla. v. Fla., 517 U.S. 44, 100 (1996) (Souter, J., dissenting); Kimel v. Fla. Bd. of Regents 528 U.S. 62, 98-99 (2000) (Stevens, J., dissenting) ("The kind of judicial activism manifested in cases like *Seminole Tribe*, Alden v. Maine [, 527 U.S. 706 (1999)], Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999), and College Savings Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd., 527 U.S. 666 (1999), represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises.").

14. The Court's federalism decisions have provided ample fodder for scholarly accusations of "judicial activism" from across the ideological spectrum. *See*, *e.g.*, Saikrishna Prakash, *Are the Judicial Safeguards of Federalism the Ultimate Form of Conservative Judicial Activism?*, 73 U. COLO. L. REV. 1363 (2002); JAMIN B. RASKIN, OVERRULING DEMOCRACY: THE SUPREME COURT VS. THE AMERICAN PEOPLE 4 (2003) ("I]n fits of judicial activism evocative of the infamous *Lochner* era, the Court's majority reaches out to strike down progressive rights-expanding legislation at both the federal and state levels. Its justifications vary but the Court often invokes the vacillating and inscrutable requirements of 'federalism,' a word that appears nowhere in the Constitution but that has often proved handy for negating federal protection of the rights of the people.").

15. For a notable exception, which proves the general rule of popular obliviousness, see United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953) (Wyzanski, J.) (in "the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law," an authority so broad that "the only comparable examples" are "the economic role they formerly exercised under the fourteenth amendment, and the role they now exercise in the area of civil liberties"), *aff'd per curiam*, 347 U.S. 521 (1954). *See also infra* note 28.

16. *See*, *e.g.*, Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 590-95 (1998) (Scalia, J., dissenting).

17. *See*, *e.g.*, BORK, *supra* note 12, at 72 (delighting in the fact that "[t]he process of antitrust lawmaking has largely been confided to the judiciary").

18. The Court has also asserted common-law powers through the National Labor Relations Act, 49 Stat. 449 (1935), *see* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 450-51 (1957), the Federal Employers' Liability Act, 34 Stat. 232 (1908) (FELA), *see* Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 145 (2003), the Employee Retirement Income Security Act of 1974,

antitrust laws.[19]

For almost seventy years,[20] there has been no doubt that federal courts lack the constitutional power to promulgate substantive rules of decision in common-law cases (such as contract- or tort-based suits between private parties for money damages).[21] However, when it comes to antitrust law, everyone appears to be in equally broad agreement to the contrary.[22] The conventional wisdom appears to be that while federal courts lack the constitutional power to alter the common-law meanings of a "contract" and its "breach,"[23] they nonetheless possess the power to define—and redefine—the terms of a "[reasonable] contract"[24] under the Sherman Act.

Although rarely enunciated, the conventional wisdom's justification comes in one of two somewhat contradictory flavors. First, some defenders of the status quo assume that because Sherman Act cases are justiciable under federal question jurisdiction,[25] they are immune from *Erie*'s bar on federal common lawmaking in diversity suits.[26] Second, other apologists assume that the antitrust

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Pub. L. No. 93-406, 88 Stat. 829 (ERISA), *see* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 56 (1987), and the Federal Water Pollution Control Act, 62 Stat. 1155 (1948), *superseded by* 33 U.S.C. § 1251 (2000), *see* Illinois v. City of Milwaukee, 406 U.S. 91 (1972). Nevertheless, this Article focuses exclusively on the Sherman Act.

19. In *Finley*, the Court upheld a provision of the National Foundation on the Arts and the Humanities Act of 1965. *See* 524 U.S. at 572-73. At stake was less than $100 million in 1998 dollars (from GAO). By sharp contrast, America's gross domestic product—a measure of the goods and services produced and consumed by our nation's businesses—was $8.747 trillion in 1998 (from BEA). Far from fretting about judges' antitrust powers, even staunch conservatives celebrate it. *See supra* note 17.

20. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

21. *See*, *e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279 (1989) ("Although petitioners and their *amici* would like us to craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages, or makes reference to statutory penalties for similar conduct, these are matters of state, not federal, common law."); *but see* Boyle v. United Techs. Corp., 487 U.S. 500 (1988).

22. *See* California Dental Ass'n v. FTC, 526 U.S. 756, 780 (1999) (describing the "quasi-common-law realm of antitrust"); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its applications in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 544 (1983) ("The statute books are full of laws, of which the Sherman Act is a good example, that effectively authorize courts to create new lines of law."); William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982) ("Congress adopted what is in essence enabling legislation that has permitted a common-law refinement of antitrust law through an evolution guided by only the most general statutory directions.").

23. *See*, *e.g.*, Miree v. DeKalb County, 433 U.S. 25, 28-33 (1977).

24. As explained further below, the courts judicially amended section 1 of the Sherman Act to include the word "reasonable." *See infra* notes 60-70 and accompanying text. The resultant "rule of reason" has been a defining characteristic of modern antitrust law. *See infra* notes 94-118 and accompanying text.

25. *See* 28 U.S.C. § 1331.

26. *See* Part IV.B., *infra*.

statutes are not statutes at all,[27] and they are therefore exempt from the ordinary strictures of statutory interpretation.[28]

I disagree on both counts. This Article argues that the common-law[29] monstrosity that federal courts have created atop the Sherman Act's unadorned text[30] is unconstitutional for two related reasons, both of which are rooted in the separation of powers. First, it violates the "horizontal" separation of powers by shifting lawmaking power from Congress to the federal courts. Second, it violates the "vertical" separation of powers by authorizing federal judges to preempt state law without a constitutional basis for doing so.[31]

Before delving into both theses, the next Part describes our "living" Sherman Act and traces the evolutionary path from its common-law roots to its modern-day meaning. As Part II illustrates, federal courts have unjustifiably "interpreted" (read: "rewritten") the Sherman Act to codify the common-law principle that judges may make substantive antitrust rules. Part III then argues that even if the statute means what federal courts say it does—that is, even if the Sherman Act delegates common-lawmaking powers to federal judges—it is an

27. According to Eskridge and Ferejohn, the Sherman Act is a "super-statute." *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1234 (2001) ("The interpretative history of the Sherman Act provides a classic illustration of the gravitational force a super-statute exercises on the law . . . . To begin with, a super-statute will generally be applied in a purposive rather than simple text-bounded or originalist way. It will generate a dynamic common law implementing its great principle and adapting the statute to meet the challenges posed to that principle by a complex society. . . . Although the Burger and Rehnquist Courts have emphasized plain meanings and common law backgrounds in statutory cases more than their predecessors, they have nonetheless construed the Sherman Act in the purposive, evolutive way the New Deal and Warren Courts did.").

28. *See*, *e.g.*, Daniel A. Farber & Brett H. McDonnell, *"Is There a Text in This Class?" The Conflict between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 620 (2005) ("Antitrust cases generally discuss precedent and economic policy. They rarely include more than a passing citation to the statutory text."). Farber and McDonnell themselves are notable exceptions. *See id.* at 631-57 (applying standard tools of statutory interpretation to the antitrust laws); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813-18 (1993) (Scalia, J., dissenting) (same).

29. It bears emphasizing that this Article takes no beef with the *administrative* dimensions of antitrust law. *See* Baxter, *supra* note 22, at 673-82 (describing the role of the Executive Branch in antitrust law enforcement). The sole focus here is the *common-law* dimension of antitrust law—*viz.*, the judicial formulation of substantive rules to govern contract-based controversies between private parties for money damages. *See* 15 U.S.C. § 15(a) (providing a private right of action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws").

30. The Court's antitrust doctrines have been likened to its atextual "substantive" Due Process jurisprudence. *See* David E. Bernstein, *Lochner*'s Legacy*'s Legacy*, 82 TEX. L. REV. 1, 24 (2003) (describing antitrust as "*Lochnerian*"); Edward S. Corwin, *The Anti-Trust Acts and the Constitution*, 18 VA. L. REV. 355, 369 (1931-32) (decrying antitrust doctrine as "judicial legislation").

31. It bears emphasizing that the Sherman Act's deleterious effects on the *vertical* separation of powers are problematic only to the extent the Act also violates the *horizontal* separation of powers. That is, if it were true that the statute raised no horizontal concerns, it would be no different from a valid delegation of preemptive power to federal judges (such as the Fourth Amendment). The vertical-separation-of-powers problem arises from the fact that the Sherman Act is a *statute* and *not* a part of the Constitution. *See infra* notes 172-227 and accompanying text.

unconstitutional violation of the "horizontal" and "vertical" separation of powers. Part IV rebuts a common justification for the federal antitrust regime by arguing that even if Congress has broad discretion to delegate its powers to administrative agencies, the Constitution places greater restrictions on the delegation of lawmaking power to the federal courts. That is, even if the all-but-defunct "nondelegation doctrine"[32] blurs the line between Congress and the President, the line between Congress and the *courts* must be brighter. Part V concludes.

II. THE SCOPE OF THE SHERMAN ACT

To understand Sherman's march into the sea of unconstitutionality,[33] one must first understand from whence he began. Accordingly, this Part describes the common-law origins of the Act and traces the trajectory of the Court's antitrust jurisprudence from 1890 until today. In doing so, it emphasizes the rise of the "Chicago School" of antitrust and argues that a law-and-economics approach to the Sherman Act is fundamentally inconsistent with the concurrent rise of the "textualist" school of statutory interpretation.

This Part concludes that the modern-day scope of the Sherman Act is illegitimate. Instead of remaining faithful to the *content* of the common law on restraints of trade (which the Act arguably codified), the courts have interpreted the Act to codify the *principle* of the common law (*i.e.*, the notion that judges can and should create substantive rules without legislative guidance). The problem is that the Act says nothing at all about the common law, much less does it deputize the federal courts with common-lawmaking powers. The judicial implication of those powers is responsible for unmooring the Sherman Act from its statutory foundations and setting it adrift in a squally sea of illegitimacy.

A. Common Law

Prior to the passage of the Sherman Act, competition between business firms was governed by state common law.[34] However, in the latter half of the nineteenth century, a wave of industrial mergers swept across the nation. In response to this "Great Merger Movement,"[35] federal policymakers were equal parts confused and panicked:

> At the time, many observers believed that the mergers were a natural consequence of the ongoing industrial

32. *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001).

33. "Sherman's March to the Sea" is the term commonly used to refer to Union General William Sherman's rapacious ride through Georgia in early winter of 1864. The March began when General Sherman's troops left the captured city of Atlanta, Georgia, on November 15, 1864, and it ended with the capture and destruction of the port of Savannah on December 22 of that year. *See* DAVID J. EICHER, THE LONGEST NIGHT: A MILITARY HISTORY OF THE CIVIL WAR 760-84 (2001).

34. *See*, *e.g.*, WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 18-46 (1965). The historical background of the Sherman Act is canvassed in detail in the leading treatise on the topic. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶¶ 101-104 (2d ed. 2004).

35. The term was popularized by Naomi Lamoreaux. *See* NAOMI LAMOREAUX, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS (1985).

> developments. Many also believed that the mergers were themselves shaping the direction and pace of industrial developments and feared the social and political consequences. But there was widespread confusion and disagreement at the time, both about the causes of the Great Merger Movement and about the appropriate ways for government to respond.[36]

The legislative byproduct of Congress's confused panic was the Sherman Act,[37] which imposes a blanket ban on "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ."[38]

The American oracle of the common law, Oliver Wendell Holmes, Jr.,[39] provided one of the earliest[40] and best interpretations of the scope of the Sherman Act.[41] In *Northern Securities*, Justice Holmes explained that, at common law, contracts or combinations "in restraint of trade" had nothing to do with "competition" (at least as classical and neoclassical economists define the latter term[42]). The common law defined "contracts in restraint of trade" as "contracts

36. Donald J. Smythe, *The Supreme Court and the Trusts: Antitrust and the Foundations of Modern American Business Regulation from* Knight *to* Swift, 39 U.C. DAVIS L. REV. 85, 87 (2005).

37. As with all statutes, the "legislative intent" underlying the Sherman Act is unclear. *Compare* BORK, *supra* note 12, at 66 (arguing the Sherman Act's legislative history suggests its sole purpose was the promotion of consumer welfare), *with* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Economic Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (criticizing Bork), *and* Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of Intramarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 905 n.150 (2000) (same). *See also infra* notes 169, 200.

38. 15 U.S.C. § 1 (2000).

39. *See*, *e.g.*, OLIVER WENDELL HOLMES, JR., THE COMMON LAW (1881; 1984).

40. The Court's first opportunity to review the Sherman Act came in 1895, when the Court upheld the Act as a valid exercise of Congress's powers under the Commerce Clause. *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895). The Court did not have an opportunity to consider the scope of the Act until two decisions in 1897 and 1898, both of which centered on a debate over the statute's common law origins. In United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897), Justice Peckham, writing for a five-to-four majority, held that the Sherman Act prohibited *every* restraint of trade. *Id.* at 312, 328. Under Justice Peckham's interpretation of the common law, a coalition of eighteen railroads could not jointly fix their rates and other terms of service, even if that agreement was "reasonable." *Id.* at 328-32. Justice White, relying on his own reading of the common law, dissented and argued that only "unreasonable" restraints should be unlawful. *Id.* at 351-52, 355 (White, J., dissenting). The following year, in United States v. Joint-Traffic Association, 171 U.S. 505 (1898), the Court examined another railroad price-fixing agreement, and Justice Peckham again wrote for a five-to-four majority. In *Joint-Traffic*, however, Justice Peckham refined his earlier views, holding that while "every" restraint of trade was unlawful, restraint of trade under the Sherman Act was *not* coextensive with restraint of trade under common law. *Id.* at 568. Justice White again dissented, but this time he did not file an opinion.

41. *See* N. Sec. Co. v. United States, 193 U.S. 197, 403 (1904) ("*Northern Securities*") (Holmes, J., dissenting). As one of the co-authors of the leading antitrust treatise has argued, "Holmes assumed that the framers of the Sherman Act intended neither more nor less than to enact and, thus, federalize the common law." Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1032 (1989) [hereinafter Hovenkamp, *Classical Theory*].

42. *See*, *e.g.*, Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386-405 (1937);

with a stranger to the contractor's business . . . which wholly or partially restrict the freedom of the contractor in carrying on that business as otherwise he would," and the trade restrained "was the contractor's own."[43] "Combinations or conspiracies in restraint of trade," Holmes continued, "were combinations to keep strangers to the agreement out of the business." The objection to them was not "to their effect upon the parties making the contract," but rather "to their intended effect upon strangers to the firm and their supposed consequent effect upon the public at large." As such, they "were regarded as contrary to public policy because they monopolized, or attempted to monopolize some portion of the trade or commerce of the realm."[44] Labor boycotts often were cited by the courts as examples of combinations or conspiracies in restraint of trade.[45]

Holmes argued that the Sherman Act's words "in the form of trust or otherwise," referred not to price-fixing agreements, but rather to "exclusionary practices" directed by the large combination against its competitors. Congress' concern was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared.[46] For Holmes, then, the mere voluntary elimination of competition among firms by mutual agreement was not covered by the common law on restraints of trade: "It is lawful to abolish competition by any form of union,"[47] provided that the union was indeed voluntary.

Regardless of the other merits or demerits of his position in *Northern Securities*, Holmes was certainly correct about this much: The common law on restraints of trade cared little (if at all) about "competition."[48] The real focus of the common law was state sovereignty: Each "State regulates its internal affairs, supports those who become public charges, and is interested in the industries of its citizens."[49] Thus, at common law, a "restraint" was subject to stricter scrutiny if it applied to all of England[50] (or all of an American State),[51] as opposed to those

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RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW (1990); MICHAEL C. JENSEN, A THEORY OF THE FIRM: GOVERNANCE, RESIDUAL CLAIMS, AND ORGANIZATIONAL FORMS (1991). *Cf.* HAROLD DEMSETZ, THE EMERGING THEORY OF THE FIRM (1992); JAMES G. MARCH & RICHARD MICHAEL CYERT, A BEHAVIORAL THEORY OF THE FIRM (1992).

43. *Northern Securities*, 193 U.S. at 404 (Holmes, J., dissenting).

44. *Id.* (Holmes, J., dissenting).

45. *See* Herbert Hovenkamp, *Labor Conspiracies in American Law*, 1880-1930, 66 TEX. L. REV. 919, 922-26 (1988).

46. *Northern Securities*, 193 U.S. at 404 (Holmes, J., dissenting).

47. *Id.* at 406 (Holmes, J., dissenting).

48. *See* FREDERICK H. COOKE, THE LAW OF COMBINATIONS, MONOPOLIES AND LABOR UNIONS 310 (1898; 2d ed. 1909); *see also* 2 ARTHUR J. EDDY, THE LAW OF COMBINATIONS 673-74 (1901); WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 96 (1965); HANS J. THORELLI, THE FEDERAL ANTITRUST POLICY 181-84 (1954); William Letwin, *The English Common Law Concerning Monopolies*, 21 U. CHI. L. REV. 355 (1954); Donald J. Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759 (1955); Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 36-38 (1966); Hovenkamp, *Classical Theory*, *supra* note 41, at 1032-35.

49. Union Strawboard Co. v. Bonfield, 61 N.E. 1038, 1040 (Ill. 1901).

50. *See*, *e.g.*, Prugnell v. Gosse, 82 Eng. Rep. 919 (K.B. 1648).

that applied only to smaller areas; the distinction had nothing to do with market realities and everything to do with state sovereignty and territorial jurisdiction. This conceptual disconnect between "competition" and "restraints of trade" prompted early arguments that courts should abandon the economically "inefficient" common law.[52]

B. Early Cases

While Justice Holmes played the proverbial Dutch boy with his finger in the dike,[53] the lower courts were busy expanding antitrust beyond its common-law roots.[54] Some—such as the influential courts in New York—stood at the vanguard in expanding antitrust to embrace classical theories of economics.[55] Others—such as the more conservative courts in Ohio—followed Holmes and refused to condemn cartels or mergers unless the defendants also had made contracts in restraint of trade at common law.[56] Alas, however, even the Ohioans soon strayed: In 1898, the state's favorite son, then-Judge William Howard Taft, issued an opinion in *United States v. Addyston Pipe & Steel Co.*,[57] which

> fuse[d] the neoclassical model of competition with the

51. *See* Skrainka v. Sharringhausen, 8 Mo. App. 526, 527 (1880); Dunlop v. Gregory, 10 N.Y. 241, 244 (1851); Lawrence & King v. Kidder & Sweet, 20 Barb. 641, 647-51 (N.Y. App. Div. 1851); Lange v. Werk, 2 Ohio St. 520, 531 (1853).

52. *See* Albert M. Kales, *Contracts to Refrain From Doing Business or From Entering or Carrying on an Occupation*, 31 HARV. L. REV. 193, 202 (1917) (criticizing the common law on restraints of trade and arguing antitrust policy should be focused on market economics).

53. *See* MARY MAPES DODGE, HANS BRINKER, OR THE SILVER SKATES 110-12 (1865; 2003). The first crack in the Sherman Act's wall came in 1898 when the Court began expanding the statute beyond its common law origins. *See supra* note 40.

54. *See* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 81 (1999) ("[M]any of these [early antitrust] decisions reached results different from those counseled by traditional articulations of the classical paradigm, and, for that matter, the common law."). At least one scholar has condemned these early Sherman Act cases as "*Lochnerian*." *See* Bernstein, *supra* note 30, at 24.

55. *See*, *e.g.*, United States v. Joint Traffic Ass'n, 76 F. 895 (C.C.S.D.N.Y. 1896), *aff'd mem.*, 89 F. 1020 (2d Cir. 1897), *rev'd*, 171 U.S. 505 (1898); *see also* People v. Sheldon, 34 N.E. 785 (N.Y. 1893) (holding voluntary price-fixing agreement among coal dealers was not merely unenforceable in an action brought by one of the parties, but was an indictable criminal conspiracy); De Witt Wire-Cloth v. New Jersey Wire-Cloth Co., 14 N.Y.S. 277, 278 (Com. Pl. N.Y. 1891) (concluding "[t]he people have a right to the necessaries and conveniences of life at a price determined by the relation of supply and demand, and the law forbids any agreement or combination whereby that price is removed beyond the salutary influence of legitimate competition"). Other lower federal courts agreed with the New York courts' expansive interpretations of the Act. *See*, *e.g.*, United States v. Trans-Missouri Freight Ass'n, 58 F. 58 (8th Cir. 1893), *rev'd*, 166 U.S. 290 (1897); United States v. Nelson, 52 F. 646 (D. Minn. 1892); *see also* James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 300-09 (1989) (describing judges' use of prevailing economic and political theories in their early interpretations of the Sherman Act).

56. *See*, *e.g.*, United States v. Greenhut (In re Corning), 51 F. 205, 211 (N.D. Ohio 1892) (noting defendants acquired their position "without any attempt at any time, by contract, to control the production of the other distilleries, or the prices at which they should sell, or without any contract with such distillers in any way restraining trade. The indictment, therefore, in my judgment, wholly fails to charge a crime . . . ."); In re Greene, 52 F. 104 (C.C.S.D. Ohio 1892).

57. 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

> legal doctrine of combinations in restraint of trade. In the process Judge Taft created the illusion that the law of combinations in restraint of trade had always been concerned with 'competition,' neoclassically defined. The result was a thoroughly neoclassical Sherman Act.[58]

Addyston Pipe, which has been praised for its appreciation of modern economic realities that are not always coterminous with the stodgy common law,[59] suggested that the former must trump over the latter when they conflict. Antitrust has not been the same since.

In *Chattanooga Foundry v. Atlanta*—decided two short years after *Northern Securities*—the common law lost its last Dutch defender. Speaking for the Court, Justice Holmes held that the Sherman Act did more than merely federalize the common law.[60] The statute also changed the status of contracts, combinations, and conspiracies in restraint of trade from merely unenforceable to affirmatively illegal, and it afforded a private right of action to all parties who were forced to pay higher prices as a result of defendants' anticompetitive behavior.[61] Holmes based his conclusion entirely on the text of the Sherman Act because the common law did not permit damages actions by purchasers from cartels.[62] But the damage was done; everyone—including Justice Holmes—now recognized that the antitrust statutes' humble origins in the common law were simply a jumping-off point for court-ordered policymaking.[63] The only question was the shape the courts' policy choices would take.

At first, the Court embraced a standardless, *ad hoc*, everything-and-the-kitchen-sink standard for analyzing "restraints of trade." In its *Standard Oil*

58. Hovenkamp, *Classical Theory*, *supra* note 41, at 1044.

59. *See*, *e.g.*, BORK, *supra* note 12, at 26-30.

60. 203 U.S. 390, 391 (1906).

61. *Id.* (noting § 7 empowers anyone to sue for damages in federal court if they have "been compelled to pay more for the goods it purchased by reason of the fact that the seller was a party to an illegal combination").

62. *See*, *e.g.*, Seeligson v. Taylor Compress Co., 56 Tex. 219, 227 (1882); Ladd v. S. Cotton Press & Mfg. Co., 53 Tex. 172, 190 (1880). Justice Holmes additionally noted that one purpose of the combination was to prevent other pipe producers from selling to the plaintiff. These competitors clearly would have a cause of action under common-law principles. In addition, however, § 7 of the Sherman Act gave an action to any person "injured in his business or property," and consumers who paid a monopoly overcharge to a cartel clearly were injured. *Northern Securities*, 193 U.S. at 405 (Holmes, J., dissenting).

63. It is somewhat shocking how far the Court in general and Justice Holmes in particular moved in the decade following *Northern Securities*. Notwithstanding the fact that federal courts do not have the power to create common law crimes, *see* United States v. Hudson & Goodwin, 11 U.S. (7 Cranch.) 32 (1812), the Court (in an opinion by Justice Holmes) rejected a constitutional challenge to the common law powers of federal courts to impose criminal penalties for antitrust violations. *See* Nash v. United States, 229 U.S. 373, 377 (1913) (concluding the Sherman Act is not unconstitutionally void for vagueness because "apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor.").

decision,[64] the Court (per Chief Justice White) held that the statutory ban on "restraints of trade" should be read only to bar "*undue* restraints."[65] The good news was that Chief Justice White attempted to remain faithful to accepted principles of statutory construction and the common-law meaning of the Sherman Act's terms.[66] The bad news, however, was that Chief Justice White provided no guidance on what makes a restraint "undue."[67]

The news went from bad to worse when the Court drained *Standard Oil*'s holding of any meaning it might have had. In *Chicago Board of Trade*,[68] the Court (per Justice Brandeis) promulgated the so-called "rule of reason":

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[69]

As others have argued, "Brandeis's formulation reads smoothly at first glance, [but] it cannot withstand close analysis. Its words, like White's in *Standard Oil*, are empty."[70] In the wake of *Chicago Board of Trade*, the great project of antitrust

64. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

65. *Id.* at 52, 59-60.

66. *Id.* at 49-51, 59-68 (statutory construction), 51-59 (discussing the common law). *See also* BORK, *supra* note 12, at 35-36 (praising the *Standard Oil* Court for being Congress's faithful agent).

67. *See* Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 299 (1986) [hereinafter Arthur, *Sea of Doubt*] (in *Standard Oil*, White embraced "an ad hoc, fact-bound evaluation of the purpose behind each challenged restraint and its probable or actual effects").

68. Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

69. *Id.* at 238.

70. Arthur, *Sea of Doubt*, *supra* note 67, at 303. *See also* HERBERT HOVENKAMP, FEDERAL ANTITRUST LAW 252 (2d ed. 1999) ("Brandeis' statement of the rule of reason . . . has been one of the most damaging in antitrust" because it "has suggested to many courts that . . . nearly everything is relevant"); Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 346-47 (2000) (arguing Justice Brandeis's formulation of the rule of reason provides no practical guidance on separating lawful from unlawful "restraints"); Robert Pitofsky, *The* Sylvania *Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 COLUM. L. REV. 1, 11 (1978) (same); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 14-15 (1977) (same).

law became the search for a guiding principle—a unified theory that could give content to Brandeis's otherwise vacuous standard. In short order, a cadre of elite economists recognized the demand for their ideas, and they began supplying competing formulations for "efficient" policy prescriptions.[71]

C. Chicago School

Antitrust economists at the turn of the Twentieth Century were progressive classicists[72]: They rejected sanguine assumptions about the efficacy of competition as a check upon concentration, and they exhibited unmitigated antipathy toward monopoly.[73] By the 1950s, antitrust orthodoxy began to coalesce around the scholarship of Harvard economist Joe S. Bain, who based his relatively prointerventionist theories on three important economic premises, which collectively came to connote the "Harvard School" of antitrust. The first was that economies of scale were not substantial in most markets and dictated truly anticompetitive concentration levels in only a small number of industries.[74] As a result, many industries contained larger firms and were more concentrated than necessary to achieve optimal productive efficiency.[75] The second was that barriers to entry by new firms were very large and could easily be manipulated by dominant firms.[76] The third was that the noncompetitive performance (pricing above marginal cost) associated with oligopoly began to occur at relatively low concentration levels. According to the Harvard Schoolers, the purpose of antitrust law should be to remedy "kinked demand curves," "cutthroat competition," "monopoly leveraging," and other "market failures."[77] The Warren Court generally embraced Bain's economic lessons,[78] and as a result, antitrust decisions

71. *See generally* Posner, *supra* note 70, at 1-20 (describing economists' competing efforts to give content to the rule of reason).

72. The then-progressive American Economic Association was founded in 1885. Influenced by German economic thought, its leaders criticized the *laissez-faire* assumptions and policy preferences of conventional economic theory, advocating instead an activist state responsive to the social ills of industrial society. Important members included Richard Ely, John Bates Clark, and Simon Patten. *See* THOMAS L. HASKELL, THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE 168-89 (1977).

73. *See* Baxter, *supra* note 22, at 666; Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 136-40 (1984).

74. *See*, *e.g.*, Joe S. Bain, *Economies of Scale, Concentration, and the Condition of Entry in Twenty Manufacturing Industries*, 44 AM. ECON. REV. 15, 38 (1954).

75. *See* JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES 53-113 (1956); Joe S. Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing*, 1936-40, 65 Q. J. ECON. 293 (1951); *see also* George J. Stigler, *Monopoly and Oligopoly by Merger*, AM. ECON. REV., May 1950, at 23

76. *See* BAIN, *supra* note 75, at 1-42. Bain identified product differentiation as one of the most common ways that incumbent firms could manipulate the market to make entry more difficult. *Id.* at 114-43.

77. *See*, *e.g.*, Donald Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 HARV. L. REV. 50 (1958); CARL KAYSEN & DONALD TURNER, ANTITRUST POLICY (1959); *see also* Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L.J. 1511, 1542-47 (1984) (describing Harvard School theories of antitrust law).

78. *See* Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 218-19 (1985).

between 1950-1970 reflected an aggressive role for the courts in policing the structure and behavior of American industry.[79]

The so-called "Chicago School"—which emerged as the principal critic of the Warren Court's antitrust doctrines[80]—emphasized *laissez-faire* economics and the concept of economic efficiency in support of its policy views.[81] According to the Chicago Schoolers, the purpose of antitrust law should be the maximization of aggregate consumer welfare, defined as optimal satisfaction of consumer preferences.[82] Courts should not apply the law's proscriptions unless the challenged conduct harms consumer welfare thus defined.[83] Where concentrated production yields efficiencies that on balance exceed welfare loss caused by absence of competition, courts should not intervene.[84]

Notwithstanding some inconclusive early battles,[85] there can be no doubt

79. *See*, *e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962); United States v. Von's Grocery Co., 384 U.S. 270 (1966); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

80. *See* William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1228-43 (1989).

81. The "Chicago School" is generally traced to Aaron Director and his students. *See* Aaron Director & Edward Levi, *Law and the Future: Trade Regulation*, 51 NW. U.L. REV. 281 (1956); Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Ward S. Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); John S. McGee, *Predatory Price Cutting: The* Standard Oil (N.J.) *Case*, 1 J.L. & ECON. 137 (1958); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960); RICHARD A. POSNER, ANTITRUST LAW (1976); Page, *supra* note 80, at 1229-30 n.44; Sam Peltzman, *Aaron Director's Influence on Antitrust Policy*, 48 J.L. & ECON. 313 (2005). For an anthology, see THE COMPETITIVE ECONOMY: SELECTED READINGS (Y. Brozen ed. 1974).

82. *See*, *e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-28 (1979); BORK, *supra* note 12, at 90-160; Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); Oliver E. Williamson, *Economies as an Antitrust Defense Revisited*, 125 U. PA. L. REV. 699 (1977); Baxter, *supra* note 22, at 693 ("the only legitimate objective that can be distilled from the fundamental congressional goals of antitrust law is the enhancement of consumer welfare through increased market and firm efficiency").

83. *See* Hovenkamp, *supra* note 78, at 226-29 (describing the Chicago School's neoclassical policy proscriptions).

84. Conceding the impossibility of qualifying welfare gain and loss in any actual case, Bork states that a "[p]assably accurate measurement of the actual situation is not even a theoretical possibility. . . ." BORK, *supra* note 12, at 125; *see also* Alvin A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CALIF. L. REV. 1580, 1660-96 (1983) (arguing the trade-off calculation is an "impractical," "nightmarish task" of "enormous cost and hopeless complexity"). Instead, Bork argues that many practices that were condemned by antitrust law in the 1970s posed no potential for output restriction and therefore presented no trade-off question. BORK, *supra* note 12, at 128. The trade-off question arises primarily in the horizontal merger situation, for which Bork proposes a market share analysis. *See id.* at 217-24.

85. Over the lifetime of the Sherman Act, many courts have questioned whether the Sherman Act's paramount purpose was the maximization of consumer welfare. *See*, *e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 322-23 (1896) (Peckham, J.) ("In business or trading combinations they may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small

who won the war for antitrust's soul: By the 1980s, Chicago was king.[86] Chicago Schoolers justifiably celebrated as the pages of the *U.S. Reports* and American law reviews became increasingly indistinguishable from those of an econometrician's manual.[87] To be sure, from a policy perspective, the shape of antitrust doctrine profited mightily.[88] But economics' triumph brought with it an

dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital."); United States v. Aluminum Co. of Am., 148 F.2d 416, 428-29 (2d Cir. 1945) (L. Hand, J.) ("We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress Senator Sherman himself . . . showed that among the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them. . . . Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other."); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (Warren, C.J.) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); United States v. Von's Grocery Co., 384 U.S. 270, 274 (1966) (Black, J.) ("From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly—that is the concentration of economic power in the hands of a few. On the basis of this fear, Congress in 1890, when many of the Nation's industries were already concentrated into what it deemed too few hands, passed the Sherman Act in an attempt to prevent further concentration and to preserve competition among a large number of sellers.").

86. *See* John E. Lopatka & William H. Page, *Economic Authority and The Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 631-42 (2005); Andrew I. Gavil, *A First Look at the Powell Papers:* Sylvania *and the Process of Change in the Supreme Court*, ANTITRUST, Fall 2002, at 8, 9-11; Baxter, *supra* note 22, at 692-702. Some scholars date the tipping point to 1977, when the Supreme Court overturned the per se rule against vertical, non-price restraints established ten years earlier. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), *overruling*, United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967). *See also infra* notes 115-116 and accompanying text.

87. *See* Frank H. Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 57 (1984) (celebrating the fact that the latest Supreme Court opinions "read like short treatises on microeconomic analysis"); *see also* John E. Lopatka & William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 CORNELL L. REV. 617, 631-50 (2005) (chronicling the effects of economics in general and econometrics in particular in antitrust litigation); *see* also Daniel L. Rubinfeld, *Econometrics in the Courtroom*, 85 COLUM. L. REV. 1048, 1087-90 (1985); Daniel L. Rubinfeld & Peter O. Steiner, *Quantitative Methods in Antitrust Litigation*, 46 L. & CONTEMP. PROBS. 69, 88-104 (1983).

88. For example, in *Brown Shoe*, the government (and the Supreme Court) condemned a merger between two shoe companies that commanded a mere 8 percent share in their 29 overlapping markets. *See* 370 U.S. at 371 (Harlan, J., concurring in part and dissenting in part). As an economic proposition, it is absurd to attribute market power to either firm or to scuttle their merger on the basis of anticompetitive fears. *See* John L. Peterman, *The* Brown Shoe *Case*, 18 J.L. & ECON. 81-146 (1975). By contrast, the government condemned the merger between Staples and Office Depot, *see* FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997), but the rationale for doing so—from an economic perspective—was infinitely more rigorous (and defensible). *See* Andrew S. Oldham, *The MedSouth Joint (Ad)venture: The Antitrust Implications of Virtual Health Care Networks*, 14 ANNALS OF HEALTH L. 125, 127 (2005); Robert H. Lande, *Resurrecting*

unanticipated and unwelcome friend—namely, judge-made instability. As the following section illustrates, the Court's antitrust lawmaking-*cum*-jurisprudence has flip-flopped drastically over time, and those changes are hard (if not impossible) to square with the strong form of *stare decisis* that interpretations of statutes generally command.

D. Instability

The federal courts have blazed a zigzagging path of jurisprudential destruction from the Sherman Act's common-law roots through the statute's early cases and to the modern Chicago School. Generally, the doctrine of *stare decisis* applies with especially strong force to the Court's interpretation of statutes.[89] The rationale is simple: The Court's erroneous interpretation of a statute can be overturned with a mere amendment to the United States Code, which is significantly less onerous than amending the Constitution.[90] Given the importance of stability to the rule of law,[91] the federal courts are therefore generally unwilling[92] to revisit their interpretation of a statute unless and until Congress amends it.

Alas, as in so many other areas, the Sherman Act plays by its own rules. The federal courts have repeatedly tweaked the Sherman Act, despite Congress's silence.[93] For example, in *Standard Oil Co. v. United States*,[94] Chief Justice White held that a company had violated the Sherman Act because it had engaged in a variety of predatory practices against competitors.[95] By 1945, however, in *United States v. Aluminum Co. of America*,[96] Judge Hand held that Alcoa had violated section 2 of the Sherman Act, even though it was not accused of predatory

Incipiency: From Von's Grocery *to Consumer Choice*, 68 ANTITRUST L.J. 875, 889-90 (2001).

89. *See*, *e.g.*, Rasul v. Bush, 542 U.S. 466, 493 (2004) (Scalia, J., dissenting) (describing the Court's "almost categorical rule of stare decisis in statutory cases"); Patterson v. McLean Credit Union, 491 U.S. 164, 172-173 (1989) (stare decisis has "special force" in statutory interpretation).

90. *Cf.* Clark v. Martinez, 543 U.S. 371, 403 (2005) (Thomas, J., dissenting) (criticizing the Court's decision to afford stare decisis effect to its prior interpretation of the immigration laws because its prior decision was "a statutory case in name only").

91. *See*, *e.g.*, Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 100 n.3 (1990) (White, J., concurring) ("*Stare decisis* is of fundamental importance to the rule of law, because, among other things, it promotes stability and protects expectations. Although always an important guiding principle, it has special force in cases such as this one that involve statutory interpretation because Congress is in a position to overrule our decision if it so chooses." (internal quotation marks and citations omitted)); John C. Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212 (1985) ("The rule of law signifies the constraint of arbitrariness in the exercise of government power. . . . [I]t means that the agencies of official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, *relatively stable*, and generally applicable statements of proscribed conduct." (emphasis added)).

92. There are exceptions. *See infra* note 374.

93. Since 1890, Congress has amended the Sherman Act six times, but none of those amendments affected the substance of judge-made antitrust law. *See infra* note 297 (explaining legislative amendments to the Act).

94. 221 U.S. 106 (1911).

95. *Id.* at 75-76.

96. 148 F.2d 416 (2d Cir. 1945).

conduct.[97] Thirty years later, the tide once again had shifted, and the law required a showing of anticompetitive conduct as a prerequisite to a successful monopolization claim.[98]

The Court's "predatory pricing" decisions exhibit similar shakiness.[99] Under the old, much-maligned *Utah Pie* doctrine,[100] the Court held that a defendant may be liable for predatory pricing if the plaintiff can show (i) the defendant subjectively intended to "wag[e] competitive warfare,"[101] and (ii) market prices fell.[102] Under *Utah Pie*, it was irrelevant that lower prices are good for consumers, and the Court similarly disregarded evidence that predatory pricing had little (if any) discernible effect on market shares.[103] After the Chicago School's apoplectic animadversions reached a fevered pitch,[104] the Supreme Court in 1993 overruled *Utah Pie*[105]: In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[106] "the Supreme Court adopted a stringent recoupment test that severely limits findings of predatory pricing." Under *Brooke*, a plaintiff can recover only if he can show (i) the defendant objectively priced his goods or services below their average variable costs,[107] and (ii) the defendant had a "dangerous probability [] of recouping its investment in below-cost prices."[108]

97. *Id.* at 430-31.

98. *See*, *e.g.*, United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

99. The Court has traditionally promulgated its predatory pricing rules under the Robinson-Patman Act, 49 Stat. 1526. *See*, *e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). However, the rules apply equally under the Sherman Act. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 726d (2004) ("Although dealing only with predation claims brought under the Robinson-Patman Act, the Court made clear that its analysis applied equally to Sherman Act claims." (citing *Brooke*, 509 U.S. at 221-22)).

100. *See* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). The roots of the *Utah Pie* doctrine can be traced at least as far back as the 1940s. *See* Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945).

101. *Utah Pie*, 386 U.S. at 697.

102. *See id.* at 699-700.

103. *See id.* at 692 & n.7.

104. *See*, *e.g.*, 3 PHILIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 720c (1978); BORK, *supra* note 12, at 386-87; RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 193-94 (1976); Ward S. Bowman, *Restraint of Trade by the Supreme Court: The* Utah Pie *Case*, 77 YALE L.J. 70 (1967).

105. *See* AREEDA & HOVENKAMP, ANTITRUST LAW, *supra* note 99, ¶ 726d2 ("*Brooke* effectively overruled the Supreme Court's earlier *Utah Pie* decision, which had based liability on occasional prices below full cost, weak evidence of animus against the plaintiff, and a declining price structure. Although the Court purported to adhere to that decision, the facts of that case would certainly yield summary judgment for a defendant today." (footnotes omitted)); Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1445 n.16 (9th Cir.), *cert. denied*, 516 U.S. 987 (1995) (describing *Brooke* as "implicitly overruling *Utah Pie*"); Donald J. Boudreaux, Kenneth G. Elzinga, & David E. Mills, *The Supreme Court's Predation Odyssey: From Fruit Pies to Cigarettes*, 4 SUP. CT. ECON. REV. 57, 58 (1995) ("Although the [*Brooke*] Court did not openly admit to undoing *Utah Pie*, undo *Utah Pie* it did.").

106. 509 U.S. 209 (1993).

107. *See id.* at 222 & n.1.

108. *Brooke*, 509 U.S. at 224.

Chicago Schoolers understandably danced atop *Utah Pie*'s grave,[109] but no one paused to consider the drawbacks of the Court's *volte face*. Amongst the uncounted costs: The Court's capricious change of tune taught the lower federal courts to create novel and unfounded theories of antitrust predation.[110]

The area of mergers provides yet another illustration of the Court's jurisprudential waffling. In 1962, the Supreme Court indicated it would refuse to sanction a horizontal acquisition of as much as 5% in a market characterized by minimal or no entry barriers.[111] Four years later the Court appeared to have lowered the threshold market share to no greater than 4.5%.[112] That same year the Court struck down a horizontal merger between two grocery chains in which the surviving firm had only 1.4% of the grocery stores and 7.5% of the grocery sales in a relevant market characterized by a significant trend toward concentration and an increase of acquisitions of small companies by large chains.[113] Later, however, the Court abandoned its almost religious devotion to market-share analysis and found lawful a horizontal merger that would have been presumptively illegal under prior cases because the defendant had demonstrated that the acquisition threatened no substantial lessening of competition.[114]

Perhaps the Court's most drastic antitrust flip-flop came in the area of vertical restraints. In 1967, the Court held that non-price vertical restraints (such as territorial sales restrictions) were *per se* unlawful.[115] Ten short years later, the Court changed course and held such restraints must be analyzed under the rule of reason.[116] The most prominent antitrust scholars cheered the Court's lurching reversal, *stare decisis* be damned.[117] Recently the Court has expanded its precedent-busting fondness for the rule of reason in the context of horizontal restraints, as well.[118]

Some have suggested that the "evolving nature of antitrust law" is functionally desirable,[119] that it is "exactly what the framers of the antitrust laws intended,"[120] and that it is necessary for the government's efficient regulation of

109. *See*, *e.g.*, Tom Campbell & Nirit Sandman, *A New Test for Predation: Targeting*, 52 UCLA L. REV. 365, 369 n.13 (2004) (delighting in the fact that *Utah Pie* is "a thoroughly discredited decision"); Aaron S. Edlin, *Stopping Above-Cost Predatory Pricing*, 111 YALE L.J. 941, 941 (2002) (describing *Brooke* as "a great victory for the Chicago School of antitrust").

110. *See*, *e.g.*, Confederated Tribes of Siletz Indians v. Weyerhaeuser Co., 411 F.3d 1030 (9th Cir. 2005) (creating a cause of action under the Sherman Act for "predatory buying"), *cert. granted sub nom.*, Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co. (No. 05-381) (June 26, 2006).

111. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

112. *See* United States v. Pabst Brewing Co., 384 U.S. 546, 550 (1966).

113. *See* United States v. Von's Grocery Co., 384 U.S. 270 (1966).

114. *See* United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974).

115. *See* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967).

116. *See* Cont'l T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); *see also* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979).

117. *See*, *e.g.*, Posner, *supra* note 70, at 5.

118. *See* Illinois Tool Works Inc. v. Indep. Ink, Inc., 126 S. Ct. 1281 (2006) (holding all tying cases subject to the rule of reason); Texaco Inc. v. Dagher, 126 S. Ct. 1276 (2006) (holding a joint-venture agreement subject to the rule of reason).

119. *See*, *e.g.*, Baxter, *supra* note 22, at 670.

120. *Id.*; *see also* Bork, *supra* note 48, at 7-14 (legislative history of Sherman Act confirms

the markets.[121] All of those things might be true. But even if they are, we should not ignore the extent to which an unstable judge-made legal regime undermines the rule of law that our Constitution is supposed to protect.[122] Rising from the chaotic ashes of the Articles of Confederation,[123] Article I was designed to instill some much-needed stability to the legislative process. As Madison noted in *The Federalist*, legislative instability tends to "damp[] every useful undertaking," and "no great improvement . . . can go forward, which requires the auspices of a steady system of national policy."[124] Moreover, legislative flip-flops diminish popular "attachment and reverence" towards the political system.[125] Thus, even if our "living" Sherman Act generates good policy outcomes, functional desirability does not necessarily make it consistent with the Constitution's formalities and the rule of law.

The Court's flip-flopping in its Sherman Act cases stands in stark contrast to the strong form of *stare decisis* that traditionally applies to questions of statutory interpretation. The starkness—and oddness—of this flip-flopping is particularly peculiar in light of the fact that "[t]he classic illustration of th[e] heightened deference [to precedent in statutory interpretation cases] is the line of Supreme Court cases addressing the question whether the Sherman Act . . . applies to organized baseball."[126] In 1922, the Supreme Court held that the antitrust laws do not apply to baseball because it is a purely intrastate affair.[127] Over the next thirty years, baseball grew far beyond its erstwhile intrastate boundaries, and the Court's understanding of the Commerce Clause expanded by leaps and bounds.[128] Nonetheless, when the Court considered baseball's antitrust exemption again in 1953, it reaffirmed its earlier conclusion on the strength of statutory stare decisis.[129] The Court insisted that any change in statutory precedent—even in the antitrust context—ought to come from Congress, not the courts.[130]

By the time the Court confronted the issue again in 1972, baseball's antitrust exemption was a downright anomaly.[131] By then, the Court had

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that Congress intended solely to empower the courts to maximize consumer welfare).

121. *See* Baxter, *supra* note 22, at 670-71.

122. Others have recognized that antitrust law is adrift in an unsettled "sea of doubt." *See* Arthur, *Sea of Doubt*, *supra* note 67, at 292-93.

123. *See* GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC 405 (1969) (noting that laws enacted under the Articles of Confederation were "altered—realtered—made better—made worse; and kept in such a fluctuating position that people in civil commission scarce kn[e]w what is law").

124. THE FEDERALIST NO. 62, at 421-22 (J. Madison) (Edward M. Earle ed. 1938).

125. *Id.* at 422.

126. Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 319 (2005).

127. Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200, 208-09 (1922).

128. *See*, *e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (holding a farmer is subject to federal regulation under the Commerce Clause when he harvests 12 acres of his own wheat on his own farm and uses it to feed his own family and livestock).

129. Toolson v. New York Yankees, Inc., 346 U.S. 356, 357 (1953).

130. *Id.*

131. *See* Flood v. Kuhn, 407 U.S. 258, 282 (1972) ("With its reserve system enjoying

interpreted the Sherman Act to apply to boxing, football, and basketball.[132] Only baseball remained outside the ambit of federal competition law. Nonetheless, the Supreme Court remained steadfast and reaffirmed baseball's antitrust exemption. While constitutional or common law cases can be overturned on the basis of an intervening change in circumstances,[133] the baseball exemption involved a *statute*. And to paraphrase Justice Stewart from a different context, a statute is different.[134]

This example from our nation's pastime only further illustrates how confused American antitrust is. From all outward appearances, the Court long ago stopped interpreting the Sherman Act as a *statute* and started treating it as a license to make substantive common-law rules.[135] Yet sometimes—as baseball's antitrust exemption illustrates—the Court is all too ready to pay deference to its "statutory" precedents. The result: a Sherman Act whose scope and meaning are as dubious as its constitutionality.

E. Lay of the Land

The Sherman Act we have today is the product of a theoretical battle that was premised entirely on competing definitions of *functional desirability*. On one side, the Warren Court and Harvard School argued that certain non-economic considerations (such as the need to protect small business as an end in-and-of-itself) should play an important part in antitrust law.[136] On the other side, the Chicago School and its legions of economists argued that consumer welfare and economic efficiency should be the touchstones of the Sherman and Clayton Acts.[137] Neither side of the debate premised its arguments on *formal* considerations—such as the text of the Sherman Act or the structural principles that give shape to our Constitution and our Republic.[138]

On one level, this result should be unsurprising: Chicago won its victory over Harvard at a time when the formal niceties of a statute were mere

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exemption from the federal antitrust laws, baseball is, in a very distinct sense, an exception and an anomaly," which "others might regard [] as 'unrealistic, inconsistent, or illogical' . . . .").

132. *See* Barrett, *supra* note 126, at 320 & n.12.

133. *See*, *e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992) (discussing judge-made changes to a constitutional holding); United States v. Reliable Transfer Co., 421 U.S. 397, 403 (1975) (discussing judge-made changes to a common-law holding).

134. *Cf.* Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). The solution to this schizophrenia is as simple as it is superficially radical: The federal courts ought to forswear further tinkering with the machinery of the "living" Sherman Act. *Cf.* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from the denial of *certiorari*).

135. *See supra* notes 60-63 and accompanying text.

136. *See*, *e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1058-60 (1979).

137. *See*, *e.g.*, BORK, *supra* note 12, at 17-21.

138. *See*, *e.g.*, Arthur, *Sea of Doubt*, *supra* note 67, at 318-19 ("Current debate focuses on whether the proper goal of Sherman Act cases is economic efficiency alone or a balance of efficiency and political values."); Pitofsky, *supra* note 136, at 1051 (lamenting that there "has never been a period comparable to the last decade … when antitrust economists and lawyers have had such success in persuading the courts to adopt an exclusively economic approach to antitrust questions").

afterthoughts, if they commanded any interpretational force at all.[139] In the broader world of statutory interpretation, however, much has changed since the late 1970s and early 1980s.[140] Today, textualism is ascendant—though by no means dominant or triumphant[141]—in both the courtroom and the classroom.[142] Ironically enough, textualism finds its intellectual headquarters at Harvard Law School,[143] and some Chicago Schoolers have begun to recognize that federal judges cannot legitimately fill statutory gaps or rewrite legislative directives.[144]

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139. *See* Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992).

140. The world of statutory interpretation began to look very different in the late 1980s and early 1990s. *See*, *e.g.*, Friedrich v. City of Chicago, 888 F.2d 511 (7th Cir. 1989) (Posner, J.), *cert. granted and judgment vacated*, 499 U.S. 933 (1991). In *Friedrich*, the issue was whether certain expert fees were recoverable under 42 U.S.C. § 1988. Writing amidst a division in the circuits, Judge Posner opted for an inquiry based on legislative intent and purpose, and concluded: "When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation . . . for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words." 888 F.2d at 514. The Supreme Court reversed and remanded "for further consideration in light of West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991)." In *West Virginia University Hospitals*, Justice Scalia repudiated Posner's functionalist approach as "profoundly mistak[ing] our role." 499 U.S. at 100. According to Justice Scalia, federal judges are obliged to enforce unambiguous statutory language, lest they "usurp" Congress's lawmaking function. For Scalia, "[t]he record of statutory usage demonstrates convincingly that attorney's fees and expert fees are regarded as separate elements of litigation cost" because, although some statutes, "like § 1988, refer only to 'attorney's fees,' . . . many others explicitly shift expert witness fees as well as attorney's fees." *Id.* at 88.

141. *See*, *e.g.*, WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION (1994); William N. Eskridge, Jr., *Norms, Empiricism, and Canons of Statutory Interpretation*, 66 U. CHI. L. REV. 671 (1999); William N. Eskridge, Jr., *Textualism, the Unknown Ideal*, 96 MICH. L. REV. 1509 (1998); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); *but see* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 2 (2006) ("Textualism has outlived its utility as an intellectual movement. Although textualism has only lately earned the respect that it deserves, textualism's recent successes ironically are leading to its own demise. Textualists have been so successful discrediting strong purposivism . . . that they no longer can identify, let alone conquer, any remaining territory between textualism's adherents and nonadherents.").

142. *Compare* Richard A. Posner*, Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. CHI. L .REV. 800 (1983) (noting that theories of statutory interpretation changed very little—if at all—in the first 80 years of the twentieth century), *with* ESKRIDGE, *supra* note 141, at 1 (noting that in the fourth quarter of the twentieth century, "theories of statutory interpretation have blossomed like dandelions in spring"), *and* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005) (noting that the textualism burst onto the scene in the fourth quarter of the twentieth century).

143. *See*, *e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003); John F. Manning, *Deriving Rules of Interpretation from the Constitution*, 101 COLUM. L. REV. 1648 (2001); John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 89-102 (2001) [hereinafter Manning, *Equity of the Statute*]; John F. Manning, *Textualism As a Nondelegation Doctrine*, 97 COLUM. L. REV. 673 (1997); Adrian Vermeule, *Three Strategies of Interpretation*, 42 SAN DIEGO L. REV. 607 (2005); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of* Holy Trinity Church, 50 STAN. L. REV. 1833, 1841 (1998).

144. *Compare*, *e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL

But a funny thing happened on the way from Harvard to Chicago and back again: The scholars and jurists responsible for shaping and advancing our understanding of the law left antitrust in the Windy City. Thus, while textualists and their archenemies—the "intentionalists"[145]—are currently engaging in a spirited debate over other areas of statutory interpretation,[146] they often remain in agreement over the Sherman Act.[147]

This stasis is unacceptable—like a monopoly, a theory that faces no competition fast grows fat and lazy. As this Part has illustrated, the Sherman Act says *nothing* about the federal courts' common-lawmaking powers, much less does it justify the jurisprudential roller-coaster ride that has whipsawed antitrust law over the last hundred years. The conventional wisdom blithely turns a blind eye to these sources of illegitimacy.

What's worse, conventional sages have never paused to consider the constitutional problems that would arise *if* the Sherman Act really said what the federal courts say it does. Again, this unthinking acquiescence is unacceptable. In the next two Parts, I attempt to reinvigorate the debate over the proper scope of the statute by illustrating that its settled meaning (to the extent it has one[148]) raises separation of powers and federalism concerns.

III. SEPARATION OF POWERS

The previous Part attempted to illustrate that the federal courts have—in true common-law style—expanded, tweaked, and redesigned the scope and shape of antitrust law in the years following the passage of the Sherman Act. From the simple statutory ban on "restraints of trade," the Court quickly began fashioning newfangled doctrines, rules, and implied terms, which unmoored the Act from its

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SEDUCTION OF THE LAW 133-60 (1990) (arguing that a statute's text—as opposed to its legislative history—should be the touchstone of a judge's interpretational enterprise), *with* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 47-48 (1966) (arguing that economics should be the alpha and omega of a judge's interpretation of the antitrust statutes). *Compare also* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 1 (1984) (arguing judges should interpret the Sherman Act to "perfect the operation of competitive markets"), *with* Easterbrook, *Statutes' Domains*, *supra* note 22, at 539 (arguing judges cannot legitimately interpret a statute by looking beyond its text). Of course, some Chicago Schoolers remain steadfast economic functionalists. *See*, *e.g.*, Richard A. Posner, *The Evolution of Economic Thinking about Legislation and Its Interpretation by Courts*, *in* THEORY AND PRACTICE OF LEGISLATION: ESSAYS IN LEGISPRUDENCE 53-66 (Luc J. Wintgens ed. 2005).

145. *See generally* Nelson, *supra* note 142 (describing "intentionalism" and the textualist critique of it); Manning, *The Absurdity Doctrine*, *supra* note 143, at 2390 (same).

146. *Compare* United States v. Marshall, 908 F.2d 1312, 1314 (7th Cir. 1990) (en banc) (Easterbrook, J.) (applying a textualist approach and holding that blotter paper treated with LSD was a "mixture or substance containing a detectable amount" of LSD under 21 U.S.C. § 841(b)(1)(A)(v) and (B)(v)), *with id.* at 1331 (Posner, J.) (rejecting textualism and reaching the opposite result), *aff'd sub nom.*, Chapman v. United States, 500 U.S. 453 (1991) (Rehnquist, C.J.).

147. *See*, *e.g.*, In re Brand Name Prescription Drugs Antitrust Litig., 288 F.3d 1028 (7th Cir. 2002) (unanimous result in an antitrust case before Judges Posner and Easterbrook); JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 179 F.3d 1073 (7th Cir. 1999) (same); United States v. Heffernan, 43 F.3d 1144 (7th Cir. 1994) (same). *See also infra* notes 167-168.

148. *See*, *e.g.*, Kauper, *supra* note 10, at 1640-44 (lamenting the fact that very little, if anything, is clear or settled in the Court's Sherman Act jurisprudence).

common-law roots. However, even if the Sherman Act means what its modern "interpreters" say it means, its problems are not over: This Part argues that Congress's delegation—and the courts' enthusiastic acceptance—of common-lawmaking powers raises serious constitutional concerns along two dimensions.[149]

First, it undermines the "horizontal" separation of powers by blurring the line between Article I and Article III.[150] Second (and relatedly[151]), it undermines the "vertical" separation of powers by intemperately displacing state law. Each argument is explained in turn.

A. Horizontal Separation of Powers

The first problem with the Sherman Act is its dangerous straddling of the line between Articles I and III of the Constitution. Although some scholars deny the legislation-like characteristics of judge-made antitrust law,[152] it is difficult to deny that the meaning of the Sherman Act has changed—and drastically so[153]—without ever being amended via Article I. This section argues that Article I—not Article III—is the constitutionally required repository for antitrust lawmaking power.

1. Antitrust in Article III: Where It Is

Our antitrust laws are parsimoniously framed in sweepingly broad terms: What the Sherman and Clayton Acts lack in length they more than make up for in sheer scope. This combination of brevity and breadth—which is more often found in the Bill of Rights[154] than the United States Code—led to the coining of the "constitutional Sherman Act,"[155] and the description of that statute as

149. The "delegation interpretation" of the Sherman Act is a cornerstone of modern antitrust. *See*, *e.g.*, Baxter, *supra* note 22, at 663 ("By adopting a common-law approach [in the Sherman Act], Congress in effect delegated most of its lawmaking power to the judicial branch."); Einer Elhague, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2044 (2002) ("To be sure, sometimes it will be clear that what the legislature means or preferred was to delegate the matter for ongoing judicial resolution. The antitrust statutes, for example, are commonly understood to involve such a delegation to the courts."); 1 PHILIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 63, ¶ 103 (1997) ("[T]he Sherman Act effectively vested the federal courts with a power to make competition policy analogous to that of common law courts . . . .").

150. *See* GORDON SILVERSTEIN, IMBALANCE OF POWERS: CONSTITUTIONAL INTERPRETATION AND THE MAKING OF AMERICAN FOREIGN POLICY 22 (1997) (distinguishing "horizontal" and "vertical" separation of powers), Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1791-95 (2005) (same).

151. *See supra* note 31 (emphasizing that the horizontal and vertical separation-of-powers problems associated with the Sherman Act are not independent of one another).

152. *See*, *e.g.*, Farber & McDonnell, *supra* note 28, at 658 ("There is simply no reason to view the antitrust laws as a grant of legislative power to the courts."); *cf.* Arthur, *Sea of Doubt*, *supra* note 67, at 270 (arguing the Fifty-First Congress—which passed the Sherman Act—"did not authorize the federal judiciary to make the basic policy choices in antitrust").

153. *See supra* notes 89-**Error! Bookmark not defined.** and accompanying text.

154. *See*, *e.g.*, U.S. CONST. amend. IV (barring "unreasonable searches and seizures").

155. *See* Appalachian Coal, Inc. v. United States, 288 U.S. 344, 360 (1933) (describing the antitrust laws as having a "generality and adaptability comparable to that found to be desirable in constitutional provisions"). *See also infra* note 172 (discussing scholarly debates over the

(alternatively) the "Magna Carta of free enterprise"[156] or our "charter of economic liberty."[157] Just as the courts have created substantive and remedial rules for, say, the Fourth Amendment's prohibition on "unreasonable searches and seizures,"[158] so too have the courts taken it upon themselves to flesh out the meaning of the federal antitrust laws by creating a doctrinal corpus that has no root in the text or structure of the statutes themselves.

For example, Robert Bork argues that Congress left the courts free to "frame subsidiary rules" to its own specific prohibitions, so long as those rules were "confined by the policy of advancing consumer welfare."[159] This delegation "calls for those rules, and only those rules, that can be justified in terms of price theory."[160] These rules are not immutable. Rather, they "are alterable as economic analysis progresses." In fact, the courts "are free to revise not only prior judge-made rules but, it would seem, rules contemplated by Congress." Consequently, the Sherman Act, "in terms of 'law' . . . tells judges very little," but imposes on the judge "the awesome task of continually creating and recreating the Sherman Act out of his understanding of economics and his conception of the requirements of the judicial process."[161]

More specifically, Bork argues that the "whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[162] Bork employs Chicago school price theory to translate this proposition into specific rules. He would proscribe horizontal mergers that create very large market shares and naked cartel restraints,[163] but he would permit "agreements on prices, territories, refusals to deal, and other suppressions of rivalry that are ancillary . . . to an integration of productive economic activity," including all distributional restraints.[164]

All this from a simple statutory ban on "contract[s], combination[s], . . . or conspirac[ies] in restraint of trade"! Of course, it is true that Congress chose to frame the antitrust laws in sweepingly broad terms, and a textualist might argue that courts may not legitimately restrict the scope of the text that passed through bicameralism and presentment.[165] But it is equally true that the "faithful agent" theory of statutory interpretation neither requires nor countenances the judicial creation of new common law simply on the basis of a broad statutory text.[166]

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propriety *vel non* of the "constitutional Sherman Act").

156. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

157. N. Pac. R. Co. v. United States, 356 U.S. 1, 4 (1958).

158. *See*, *e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914); *but see* Hudson v. Michigan, 126 S. Ct. 2159 (2006).

159. BORK, *supra* note 12, at 20.

160. Bork, *supra* note 144, at 24.

161. *Id.* at 48.

162. BORK, *supra* note 12, at 91.

163. *Id.* at 405-06.

164. *Id.* at 406.

165. *See* John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 247-51 [hereinafter Manning, *Nondelegation as Avoidance*].

166. As explained further below, an argument can be made that federal courts lack common-lawmaking powers, even in the presence of an *express* congressional delegation. *See infra* Part

What's puzzling about the Sherman Act is that its most devoted theorists debate the economically efficient way to give meaning to its vacuous language,[167] while simultaneously arguing that judges should refuse to fill gaps that Congress leaves in other statutes.[168]

2. Antitrust in Article I: Where It Belongs

The better view is that Congress cannot deputize the federal courts—and federal judges cannot accept a congressional commission—to make standardless policy judgments,[169] regardless of whether the case pertains to competition law. As Professors Farber and McDonnell have noted, the Sherman Act is a statute just like any other, and it should be interpreted accordingly.[170] The much-derided rationale from *Church of the Holy Trinity v. United States*[171] is no more justified in cases involving would-be competitors than it is in cases involving would-be pastors.

Equally unjustified is that for all the ink spilled over the propriety *vel non* of the "constitutional Sherman Act,"[172] no one has paused to ponder the

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IV.B. *A fortiori*, the federal courts should not *imply* federal common-lawmaking powers, as they have in the context of the Sherman Act. *See supra* notes 57-70 and accompanying text.

167. *See*, *e.g.*, Frank H. Easterbrook, *Monopolization: Past, Present, Future*, 61 ANTITRUST L.J. 99 (1992); Frank H. Easterbrook, *Antitrust 1889*, 29 WASHBURN L.J. 150 (1990); Frank H. Easterbrook, *Comparative Advantage in Antitrust Law*, 75 CALIF. L. REV. 983 (1987); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986); Frank H. Easterbrook, *On Identifying Exclusionary Conduct*, 61 NOTRE DAME L. REV. 972 (1986); Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & ECON. 445 (1985); Easterbrook, *supra* note 144; Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 154 (1984); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & ECON. 23 (1983); Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

168. *See* Easterbrook, *Statutes' Domains*, supra note 22, at 545-47.

169. Robert Bork criticizes many Warren Court precedents—such as Brown Shoe Co. v. United States, 370 U.S. 294 (1962)—for "enforcing [the Court's] own social preferences, not Congress's." BORK, *supra* note 12, at 65. The irony, of course, is that Congress itself never embodied its "social preferences" in an antitrust statute. Instead, Congress simply delegated to the courts the power to choose one "social preference" over another, along with some invariably vacuous—and easily manipulable—statements in the antitrust statutes' legislative history. *Compare Brown Shoe*, 370 U.S. at 311-23 (relying on the legislative history of the antitrust acts to conclude Congress intended for courts to value decentralization and small business over economic efficiency when reviewing proposed mergers), *with* BORK, *supra* note 12, at 61-66 (drawing the opposite conclusion from the same legislative history).

170. *See* Farber & McDonnell, *supra* note 28, at 657-60.

171. 143 U.S. 457 (1892). In the Alien Contract Labor Act of 1885, 23 Stat. 332, Congress broadly prohibited the importation of "labor or service of any kind." But the title of the act, its legislative history, and the circumstances surrounding its enactment suggested that Congress had done so for the apparent purpose of preventing "the influx of this cheap, unskilled labor." *Holy Trinity*, 143 U.S. at 465. In light of this background purpose, the Court felt justified in clipping back the Act's broad prohibition to exclude professionals ("brain toilers") from its sweep. *Id.* at 464; *see also id.* at 459 (noting that judicial efforts to conform a broad text to its purpose are "not the substitution of the will of the judge for that of the legislator"). Textualists have lambasted the Court's statutory interpretation. *See*, *e.g.*, Manning, *Equity of the Statute*, *supra* note 143, at 10-15.

172. *Compare* Baxter, *supra* note 22, at 663, 666 (extolling the virtues of the fact that the Sherman Act is "broadly phrased—almost constitutional in quality," which "permits the law to adapt to new learning without the trauma of refashioning more general rules that afflict statutory law. The need for a process of incremental change was particularly acute in antitrust at the turn of

consequences of the obvious fact that the antitrust laws—unlike, say, the Fourth Amendment—*are not enshrined in the Constitution*. For example, Bork recognizes that Congress's delegation of antitrust lawmaking authority to the federal courts creates potential separation of powers concerns.[173] But Bork allays those concerns by pointing out that federal courts are responsible for policymaking in many areas of constitutional law:

> In constitutional law the trade-off choice [between competing values or policies] is given to courts, but in areas where the legislature is not forbidden to make the choice, we think of such trade-offs as the very essence of politics. We then typically reserve the choice for legislative determination and require the terms of the treaty—between rival interests, between manufacturers and consumers, laborers and consumers, farmers and consumers, or high-income groups and low-income groups—to be written down, with the resultant of the value trade-offs specified in tariff statutes, labor-management relation laws, farm programs, and internal revenue codes. Value trade-offs in antitrust litigation are of the same nature.[174]

Incredibly, neither Bork nor anyone after him pauses to explain why antitrust policymaking is different from trade, labor, agriculture, or tax policymaking—why the latter four must be vested in the legislature while the first is the proper province of the courts. Instead, Bork simply asserts that courts can maintain the separation of powers and "maintain[] the integrity of the legislative process" by simply adjudicating antitrust cases with a singular adherence "to the goal of [maximizing] consumer welfare."[175]

This *non sequitur* begs more questions than it answers. How does a single-minded focus on consumer welfare alleviate an otherwise objectionable separation-of-powers transgression? And even if a focus on consumer welfare could turn water into wine, from whence does this talismanic principle come? Unarguably, it is nowhere to be found in the statutory text or structure. And unarguably, it would give unendingly expansive meaning to the "canon of constitutional avoidance"[176] to uphold the constitutionality of a statute by

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the century, when there was great pressure to control perceived abuses by business but little understanding of what the government could and ought to do to promote competition and free enterprise"), *with* Arthur, *Sea of Doubt*, *supra* note 67, at 292 (urging courts to "abandon[] the current constitutional approach to the Sherman Act").

173. *See* BORK, *supra* note 12, at 79 ("The problem may be stated as one of determining which types of [policymaking] trade-off decisions belong in legislatures and which in courts.").

174. *Id.* at 79-80.

175. *Id.* at 81.

176. *See* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 348 (1936) (Brandeis, J., concurring) ("When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). *See also* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1575-80 (2000) (describing the canon).

plucking from the policymaking ether a principle (however economically efficient it may be) that is entirely unrelated to well-accepted canons of statutory interpretation.[177]

Not so, one might say. For example, it is well known that the Internal Revenue Code[178]—like the constitutional amendment that authorizes it[179]—defines "income" circularly, and it has fallen to courts to define that concept based on considerations of tax policy.[180] And it could be argued that this example suggests there is nothing unusual or illegitimate about standardless judicial decisionmaking in the context of interpreting a vacuous statutory mandate. How is the Sherman Act different from the Tax Code?

To ask the question is almost to answer it: It is difficult to imagine two more different statutes. In sharp contrast to the Sherman Act—which has *never* been substantively amended[181]—Congress *constantly* tinkers with the Code. In the 107th Congress alone, the legislature enacted 350 pages of tax legislation,[182] and the Tax Code is now four times longer than the Bible.[183] Over the last hundred years, the Code has accumulated hundreds of complicated and intricately cross-referenced sections, and it is these substantive sections—not the vacuous general definition of "income"—that form the interpretive basis for almost all the federal courts' tax decisions. And even if Congress never amended the Code, at least the tax laws are rooted in a *constitutional* amendment, which the courts might interpret (like it interprets all constitutional provisions) in a common-law style.[184] The Sherman Act does not enjoy similar congressional attention, nor can it claim a similar constitutional foundation.

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177. The Court has frequently cabined the canon of avoidance by admonishing courts not to "'press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.'" Salinas v. United States, 522 U.S. 52, 60 (1997) (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 57, n.9 (1996)). *See also* George Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (Cardozo, J.) ("'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' But avoidance of a difficulty will not be pressed to the point of disingenuous evasion." (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916))).

178. *See* 26 U.S.C. § 61 (defining "income" as "all income from whatever source derived").

179. *See* U.S. CONST. amend. XVI (empowering Congress "to lay and collect taxes on incomes, from whatever source derived").

180. *Compare*, *e.g.*, Eisner v. Macomber, 252 U.S. 189 (1920), *with* Comm'r v. Glenshaw Glass Co., 348 U.S. 426 (1955).

181. *See infra* note 297.

182. *See General Explanation of Tax Legislation Enacted in the 107th Congress*, Jan. 24, 2003, *available at* http://bookstore.gpo.gov/actions/GetPublication?stocknumber=052-070-07358-6 (visited June 19, 2006).

183. *See* 150 CONG. REC. H3648, H3653 (daily ed. June 2, 2004) (Statement of Rep. Smith) ("Today the Federal Tax Code has 400 percent more words than the Bible and accompanying the law are a staggering 2.5 million pages of regulations. As a result, it now takes a person filing a 1040 form a full 13 hours and 27 minutes to do their taxes.").

184. To be sure, the Sixteenth Amendment vests tax-levying power in Congress—not the courts. *See* U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."). The broader point, however, is that federal courts' common-law reasoning is on firmer ground in the interpretation of constitutional—as opposed to the statutory—provisions.

Fair enough, one might concede. But Congress often gives the federal courts wide-ranging discretion to decide specific cases. For example, the Sentencing Reform Act ("SRA")[185] illustrates that there is nothing inherently problematic with Congress's decision to charge the judiciary with reviewing specific facts for "reasonableness,"[186] even if the courts' interpretations of that statutory mandate are tinged with (if not infected by) arbitrariness.[187] While critics assail the SRA for various reasons,[188] no one thinks a sentencing judge's discretion arises from an unconstitutional delegation of lawmaking power.

Again, however, the analogy does not hold up. First, the Sherman Act—unlike the SRA—says nothing about "reasonableness." The inclusion of that term within the former—unlike the latter—is the byproduct of judicial implication, not congressional legislation.[189] Second, federal courts have *inherent* power to determine the "reasonableness" of a sentence without a congressional delegation.[190] While no one would argue that federal courts could create antitrust law without the Sherman Act, "judges in this country have long exercised discretion" in sentencing, even without the SRA.[191] Third, the SRA imposes *statutory limits* on sentencing judges' discretion. That is, federal judges' discretion is statutorily cabined in the context of sentencing, while it remains *carte blanche* in the context of antitrust. Fourth and finally, even without statutory limits, courts routinely recognize that the *Constitution* imposes limits on judges' sentencing discretion.[192] That is, the legal community uniformly recognizes that the Sixth Amendment, the Eighth Amendment, and the Due Process Clauses prevent federal courts from imposing whatever sentences they deem just, fair, or efficient. Unfortunately, no one seems to recognize that the Constitution also restricts the courts' powers to fashion antitrust law willy-nilly.

Other examples might be fathomable, and it might be true that the Sherman Act is not *sui generis*.[193] But the main point is not the uniqueness of

185. Pub. L. No. 98-473, 98 Stat. 1987 (1984).

186. *See*, *e.g.*, 18 U.S.C. § 3742(e)(3).

187. *See*, *e.g.*, United States v. Booker, 543 U.S. 220, 262 (2005) ("'Reasonableness' standards are not foreign to sentencing law. The [Sentencing Reform Act of 1984] has long required their use in important sentencing circumstances-both on review of departures and on review of sentences imposed where there was no applicable Guideline." (citations omitted)).

188. *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361, 413-27 (1989) (Scalia, J., dissenting).

189. *See supra* notes 60-70 and accompanying text.

190. *See* United States v. Booker, 543 U.S. 220, 235-36 (2005) (maj. op. of Stevens, J.); *see also id.* at 326-31 (Breyer, J., dissenting). The courts' inherent power to determine the reasonableness *vel non* of a particular sentence can be inferred from the fact that prior to the imposition of the Sentencing Guidelines, sentencing judges enjoyed the "traditional judicial authority to increase sentences to take account of any unusual blameworthiness in the manner employed in committing a crime." *Id.* at 235 (maj. op. of Stevens, J.).

191. Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (emphasis in original).

192. *See*, *e.g.*, *Booker*, 543 U.S. at 233-37 (maj. op. of Stevens, J.); Ring v. Arizona, 536 U.S. 584, 588-89 (2002); *Apprendi*, 530 U.S. at 476; Jones v. United States, 526 U.S. 227, 244 (1999).

193. *See supra* note 18 and sources cited therein. However, the Sherman Act's vacuity is remarkable, even when compared to other antitrust statutes. For example, section 7 of the Clayton Antitrust Act, 38 Stat. 731 (1914), 15 U.S.C. § 18, provides a detailed statutory standard for

judge-made antitrust law. Rather, the point is that—regardless of the propriety of other statutes—the Sherman Act invites naked judicial lawmaking, pure and simple, and no one seems to notice (much less care). For at least the last 300 years, it has been clear that the legislature cannot delegate its legislative power to anyone or anything. As John Locke put it:

> The power of the *legislative* being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.[194]

While the Supreme Court has agreed,[195] it has nonetheless held that "the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches."[196] "In determining what [Congress] may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the government co-ordination."[197] Thus, so long as Congress "shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[198]

Arguably, Bork's consumer-welfare standard would qualify as an "intelligible principle."[199] The problem, of course, is that *Congress* did not "lay

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evaluating mergers and acquisitions, and both the Department of Justice and the Federal Trade Commission have issued even more detailed "enforcement guidelines" to provide administrative guidance on the meaning of § 18. *See*, *e.g.*, Horizontal Merger Guidelines (Apr. 2, 1992; rev. Apr. 8, 1997), *available at* www.usdoj.gov/atr/public/guidelines/hmg.htm (last visited July 27, 2006); Commentary on the Horizontal Merger Guidelines (Mar. 2006), *available at* www.usdoj.gov/atr/public/guidelines/215247.htm (last visited July 27, 2006). Similarly, the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. §§ 41-58, contains detailed statutory provisions, along with a delegation of lawmaking authority to an "independent" administrative agency (as opposed to a court), *see*, *e.g.*, *id.* § 45. And for all of the hue and cry over the shortcomings of the Robinson-Patman Act, 38 Stat. 730 (1914), *see*, *e.g.*, BORK, *supra* note 12, at 394-401, its provisions and provisos are (at the very least) more detailed than those contained in the the Sherman Act. *Compare*, *e.g.*, 15 U.S.C. § 1 (Sherman's blanket ban on "restraints of trade"), *with id.* § 13 (Robinson-Patman's nuanced ban on certain kinds of "price discrimination").

194. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 75 (C.B. Macpherson ed., 1980) (emphases in original).

195. *See*, *e.g.*, Field v. Clark, 143 U.S. 649, 692 (1892).

196. Mistretta v. United States, 488 U.S. 361, 372 (1989)

197. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

198. *Id.* at 409.

199. However, it bears emphasizing that *Hampton* enunciated the "intelligible principle" standard in the context of a congressional delegation to the President—not the courts. As explained further below, the nondelegation doctrine operates very differently in the executive and judicial contexts. *See* Part IV, *infra*.

[it] down by legislative act."[200] The story of modern antitrust law is the story of the *courts'* efforts to settle on an intelligible principle of their own choosing.[201] The fact that the courts have flip-flopped in their efforts to find that principle—despite the unchanged text of the statute[202]—highlights the fact that they are exercising raw lawmaking powers.

To be sure, the courts exercise naked lawmaking powers in certain other contexts, and sometimes they do so at the behest of a congressional delegation. For example, Congress can statutorily authorize courts to adopt rules of procedure,[203] or to prescribe by rule the manner in which their officers shall execute their judgments.[204] However, notwithstanding some assumptions to the contrary,[205] the judicial power to make substantive rules of antitrust law is not a logical corollary of the courts' power to regulate their internal affairs.

Take the example of the Federal Rules of Civil Procedure.[206] Prior to

200. To be sure, the legislative history of the antitrust laws is replete with evidence of "intelligible principles." *See*, *e.g.*, Bork, *supra* note 48, at 11 (arguing that evidence from the legislative history establishes "conclusively that the legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer [total] welfare and the economic criteria which that value premise implies"). The problem is that the principle Bork finds has many contradictory friends. *See*, *e.g.*, Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989) ("Bork's analysis of the legislative history was strained, heavily governed by his own ideological agenda. . . . Not a single statement in the legislative history comes close to stating the conclusions that Bork drew."); Hovenkamp, *supra* note 78, at 250 ("Bork's work has been called into question by subsequent scholarship showing that in 1890 Congress had no real concept of efficiency and was really concerned with protecting consumers from unfavorable wealth transfers."); Louis Kaplow, *Antitrust, Law & Economics, and the Courts*, L. & CONTEMP. PROBS., Autumn 1987, 181, 206-12 (discussing and criticizing Bork's strong consumer welfare claim); Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 359 (1993) ("Congress appeared to reject consumer welfare. If anything, Congress seemed more concerned with producer, rather than consumer, welfare."); Alan J. Meese, *Price Theory and Vertical Restraints: A Misunderstood Relation*, 45 UCLA L. REV. 143, 155-58 (1997) (detailing the "populist" critique to Bork's consumer welfare claim); Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 DUKE L.J. 263, 282 n.72 ("Too much has already been expended in demonstrating that Bork's account is mistaken."). *See also supra* note 169.

201. *See*, *e.g.*, Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225, 225 (2006) (describing the evolution of modern antitrust law in terms of the judicial struggle to settle on consumer welfare as the guiding principle of antitrust law, given that "[t]he open-textured nature of the [Sherman] Act—not unlike a general principle of common law—vests the judiciary with considerable responsibility . . . to choose among competing values").

202. *See supra* notes 94-**Error! Bookmark not defined.** and accompanying text.

203. *See* Sibbach v. Wilson & Co., 312 U.S. 1, 22 (1941).

204. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-46 (1825).

205. Justice Scalia lumps antitrust together with the power to make procedural rules. *See* Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[T]he courts could be given the power to say precisely what constitutes a 'restraint of trade,' or to adopt rules of procedure, or to prescribe by rule the manner in which their officers shall execute their judgments, because that 'lawmaking' was ancillary to their exercise of judicial powers." (internal citations omitted)).

206. For a history of the congressional-judicial dialectic over the Federal Rules of Civil Procedure, see Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677 (2000).

1934,[207] both American and English courts routinely promulgated rules of civil procedure without congressional delegation or authorization.[208] Given that fact, some have argued that the courts have inherent authority to fashion their own procedural rules.[209] Moreover, this inherent power seems to flow directly from the separation of powers ordained by the Constitution: Because Congress *could* create the lower federal courts and define their subject matter jurisdiction without also fashioning procedural rules,[210] Article III's vestment of "[t]he judicial Power"[211] implies a default power to run the courts as courts, even without congressional input. Nonetheless, in the 1970s, Congress attempted to reinvigorate its rulemaking prerogative,[212] thus prompting some scholars to argue that courts do not have inherent rulemaking authority, absent a prior congressional delegation.[213] And the bottom line, according to the leading treatise-writers, is that "there is no consensus of opinion on this rather fundamental issue."[214]

But at least there is *a debate* over courts' powers to make their own procedural rules.[215] In antitrust, by contrast, the legal community seems content simply to sit idly by as courts make law, unforced to justify the practice. That unquestioning acquiescence is particularly indefensible given the world of difference between judicial-rulemaking-*cum*-self-governance (such as the creation

207. *See* Rules Enabling Act of 1934, *codified at* 28 U.S.C. § 2072.

208. *See*, *e.g.*, George Grayson Tyler, *Origin of the Rule-Making Power and Its Exercise by Legislatures*, 22 A.B.A. J. 772, 772-74 (1936); *see also* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 1001 at 2 (2002); *id.*, § 1002 at 10 ("The first Congress, in the first Judiciary Act of 1789, recognized the power of each court to make all necessary rules for the conduct of its business . . . ." (footnoted omitted)).

209. *See*, *e.g.*, Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 601-03 (1926). Some went even further. *See*, *e.g.*, John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276 (1928) (arguing that the authority to regulate practice and procedure is inherently and exclusively part of the judicial power and can be exercised even in the face of conflicting legislative enactments).

210. *See* U.S. CONST. art. III, § 1; *id.* § 2, cl. 2.

211. *Id.* § 1.

212. *See* Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1169 (1996).

213. *See*, *e.g.*, Jack B. Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976); Jack H. Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

214. WRIGHT & MILLER, *supra* note 208, at 3.

215. Especially in the wake of Congress's attempts to assert rulemaking primacy in the 1970s, *see supra* note 212 and accompanying text, scholars devoted unprecedented attention to the propriety of judicial rulemaking in the procedural context. *See*, *e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 888-89 (1999); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1119-26 (1982); Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281, 299-302 (1989); Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991); Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283 (1993); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 712-29 (1995); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1464-83 (1994); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 609-10, 616-18 (1998).

of procedures for managing the courts' own day-to-day affairs)[216] and judicial rulemaking in run-of-the-mill cases (such as the creation of a standalone antitrust regime).

Imagine the staggering implications of the alternative rule. Without a limit on the courts' powers to make the substantive rules they interpret, the legislature could simply illegalize all stock-and-bond transactions and allow the courts to create the securities laws by making whatever exceptions they deem desirable. Or the legislature could illegalize all pollution and allow courts to create the environmental laws by making whatever exceptions fit their fancy. Or the legislature could illegalize insolvency and allow the courts to create the bankruptcy code by making whatever exceptions they thought prudent. As fantastical[217] as each of these examples seems, it is altogether unclear why our Congress *cannot* do the foregoing while it *can* illegalize "[e]very contract, combination . . . or conspiracy, in restraint of trade,"[218] and then allow the courts to create the antitrust laws by making whatever exceptions the economists esteem efficient. And it is doubly unclear how or why the courts can function as antitrust lawmakers without *any* statutorily designated principle (be it efficiency or any other) to guide their discretion. As Justice Scalia has emphasized:

> It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature. Our Members

216. Some have argued that Congress has delegated—and the courts have accepted—similar common-lawmaking powers over the creation of evidentiary rules. *See*, *e.g.*, Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. L. REV. 585, 590 (2006). It is noteworthy, however, that unlike the Federal Rules of Civil Procedure, the Federal Rules of Evidence passed through bicameralism and presentment. *See* Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926. And even though federal courts have used their common-lawmaking powers to tweak the evidentiary rules at their margins, *see*, *e.g.*, Jaffee v. Redmond, 518 U.S. 1, 12-13 (1996), the content of the Federal Rules of Evidence are plainly more statutory than judge-made. *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 4512 at 414 (1996) ("Because the Federal Rules of Evidence were enacted directly by Congress, their validity *vis-à-vis* state law and the principles of the Erie doctrine stands on ground even more firm than that of the Federal Rules of Civil Procedure. The Evidence Rules are not subject to the Rules of Decision Act or (unlike the Rules of Civil Procedure) to the Rules Enabling Act. Their validity is governed solely by the Constitution, but since all of the Rules of Evidence can be viewed rationally as rules of procedure (the constitutional standard announced in Hanna v. Plumer), they all clearly are constitutional." (footnotes omitted)). Moreover, to the extent they raise constitutional questions, at least the propriety of the Rules of Evidence—unlike the rules of antitrust—is hotly debated. *See*, *e.g.*, Eileen A. Scallen, *Analyzing "The Politics of [Evidence] Rulemaking*," 53 HASTINGS L.J. 843, 871-73 (2002).

217. Justice Scalia, for one, has decried the fairytale-like nature of judicial lawmaking that parades as statutory interpretation. *See*, *e.g.*, Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 857 (1990) (Scalia, J., concurring) ("A rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion, giving judges power to expand or contract the effect of legislative action. We should turn this frog back to a prince as soon as possible.").

218. 15 U.S.C. § 1.

> of Congress could not, even if they wished, vote all power to the [courts] and adjourn *sine die*.[219]

Perhaps it would present a closer question if the Sherman Act were enshrined as the Twenty-Eighth Amendment to the Constitution. If it were, then an argument could be made that the *Constitution*—as opposed to *Congress*—had delegated antitrust lawmaking power to the courts. Even then, however, it bears emphasizing that the Sherman Act's text—unlike, say, the Fourth Amendment's—does not empower the courts to make common-law determinations about the "reasonableness" of anything.[220] Of course, for better or worse,[221] our actual Constitution does not include the Sherman Act.

What our Constitution *does* include are limits on Congress's ability to delegate its lawmaking powers. To be sure, the Constitution endows Congress with *some* flexibility to choose the means for accomplishing its desired ends. Most notably, the Necessary and Proper Clause[222] empowers Congress to enact laws in effectuation of its enumerated powers that are not within its authority to enact in isolation.[223] However, the flexibility afforded by the Necessary and Proper Clause is far from limitless: Even when Congress's end is constitutional and legitimate (*e.g.*, federal regulation of the effects on interstate commerce caused by anticompetitive conduct), its chosen means must be "appropriate" and "plainly adapted" to that end.[224] Moreover, Congress's means may not be otherwise "prohibited" and must be "consistent with the letter and spirit of the constitution."[225] To the extent the letter and spirit of Article I and Article III mean anything, Congress must make the substantive laws that the courts interpret.

Doubtlessly some readers will object that that ship sailed long ago: In an administrative state that condones anything short of a "Goodness and Niceness Commission,"[226] it might seem a little late in the day to insist that legislative power must be vested in the legislature alone. However, as Part IV will argue, it is a mistake to assume that the nondelegation doctrine is equally toothless in both the executive and judicial contexts—important differences require its vigorous application to prevent judge-made antitrust law, *even if* it is all-but-belly-up in administrative law.[227] Before exploring those differences, however, the next section explores an independent basis for the unconstitutionality of the Sherman

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219. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

220. *See supra* notes 60-71 and accompanying text.

221. Chicago-Schoolers might decry this reality. *See*, *e.g.*, BORK, *supra* note 12, at 72 (celebrating judicial lawmaking in antitrust); *see also supra* note 87 and sources cited therein (same).

222. U.S. CONST. art. I, § 8, cl. 18.

223. *See* McCulloch v. Maryland, 4 Wheat. 316, 421-22 (1819).

224. *Id.* at 421.

225. *Id.* These phrases are not merely hortatory: For example, cases such as Printz v. United States, 521 U.S. 898 (1997), and New York v. United States, 505 U.S. 144 (1992), hold that a law is not "proper for carrying into Execution the Commerce Clause" "[w]hen [it] violates [a constitutional] principle of state sovereignty." *Printz*, 521 U.S. at 923-24; *see also New York*, 505 U.S. at 166.

226. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239-41 (1994).

227. *See*, *e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001).

Act.

B. Vertical Separation of Powers

In addition to blurring the line between Article I and Article III, judge-made antitrust law undermines the "vertical" separation of powers that would otherwise insulate state law from federal encroachment. The Constitution's Supremacy Clause empowers judges to preempt state law only when interpreting the Constitution, laws, and treaties of the United States.[228] Conspicuously absent from the Supremacy Clause is any mention of the preeminence (and hence preemptive power) of federal-judge-made rules of decision.[229] Nevertheless, federal courts routinely preempt a panoply of state consumer-protection statutes.[230] That preemptive practice—at least when it comes to *statutory* delegations of common-lawmaking power[231]—is unconstitutional.

1. Legislative Roots of Statutory Preemption

Any discussion of preemption must begin with the recognition that the Constitution's finely balanced provisions contain an inherent bias against new lawmaking.[232] The Framers understood that Article I's safeguards would inhibit

228. *See* U.S. CONST. art. VI, cl. 2.

229. One might counterargue that federal common law is just as much a "law" as federal statutory law for purposes of the Supremacy Clause, which gives preemptive force to "[t]his Constitution, and the *Laws* of the United States which shall be *made* in Pursuance thereof . . . ." *Id.* (emphases added). *Cf.* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-81 (1938) (holding state common law is just as much a "law" as state statutory law). However, two arguments suggest that federal common law does not preempt state law. First, "[t]o the extent that we can distinguish between the courts' role as interpreters of law and their role as makers of law, . . . the *non obstante* provision of the Supremacy Clause applies only to the former role." Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 295 (2000) (footnote omitted). Second, the Constitution uses "*Law*" to refer to *lawmaking* only within the context of Article I. *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999) (arguing that "a contested word or phrase that appears in the Constitution [should be read and understood] in light of another passage in the Constitution featuring the same (or a very similar) word or phrase"). To the extent the Constitution uniformly refers to *statutes* as the only "Laws of the United States . . . made in Pursuance [of the Constitution]," the Supremacy Clause can be read not to accord preemptive effect to federal common law. *See also* Nelson, *supra*, at 248-49 (suggesting that the Supremacy Clause uses "Laws" as a synonym for "valid federal statutes").

230. *See*, *e.g.*, Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 222-33 (2d Cir. 2004); TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001); Canterbury Liquors & Pantry v. Sullivan, 16 F.Supp.2d 41 (D. Mass.), *appeal dismissed sub nom.*, Sea Shore Corp. v. Sullivan, 158 F.3d 51 (1st Cir. 1998); Hertz Corp. v. City of New York, 1 F.3d 121 (2d Cir. 1993).

231. By contrast, where the *Constitution* delegates common-lawmaking powers to the federal courts, federal common law may carry preemptive force. For example, in admiralty law—which the Constitution places within the federal courts' common-lawmaking powers, *see infra* note 364—the Court has held that federal-judge-made maritime law preempts contrary state law. *See*, *e.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205, 217-18 (1917). *But see* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999) [hereinafter Young, *Preemption at Sea*] (criticizing *Jensen*); Ernest A. Young, *The Last Brooding Omnipresence:* Erie Railroad Co. v. Tompkins *and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349, 1349-51 (1999) (same).

232. *See*, *e.g.*, INS v. Chadha, 462 U.S. 919, 945-51 (1983); William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 957-58. The process of bicameralism,

the passage of *all* proposed laws, both good and bad, but believed this price was worth paying: "The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones."[233] As Stephen Calabresi and Kevin Rhodes have observed:

> The genius of the American Constitution lies in its use of structural devices to preserve individual liberty. Checks and balances, separation of powers, and federalism all combine to create opportunities for ambition to counteract ambition so that the private interest of every individual may be a sentinel over the public rights. By thus fragmenting power and institutionalizing conflict, the new political science of the eighteenth century sought to oblige a government by men and over men to control itself.[234]

Given Article I's structural impediments to lawmaking, and given the fact that the federal government has limited (or "interstitial") lawmaking powers,[235] the states are at least partially responsible for enforcing and/or defining many areas of substantive law.[236] Despite long-running debates over the judicial enforceability *vel non* of the Constitution's federalism "rule,"[237] there is little (if

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U.S. CONST. art. I, § 7, cl. 2, not only "assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings," *Chadha*, 462 U.S. at 951, but it also decreases the likelihood that the legislative power will be exercised at all. *See* MARIAN D. IRISH & JAMES W. PROTHRO, THE POLITICS OF AMERICAN DEMOCRACY 402 (2d ed. 1962). Moreover, the different representational bases of the two Houses (especially the equal representation of the states in the Senate) operate to require the support of a "supermajority" of the public to overcome opposition to new legislation. Mayton, *supra*, at 956; THE FEDERALIST, *supra* note 124, No. 62, at 402 (J. Madison) (equal representation of states in Senate provides "an additional impediment . . . against improper acts of legislation"); *see also* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT 232-48 (1962). Finally, the provision that permits Congress to overcome the President's veto only by a two-thirds vote of both Houses further discourages the passage of measures which inspire significant opposition, especially in view of the fact that the President is selected by yet a third constituency, the nation as a whole. Mayton, *supra*, at 954 & n.21; THE FEDERALIST, *supra* note 124, No. 73 at 476-78 (A. Hamilton) (usefulness of presidential veto in blocking unwise legislation).

233. THE FEDERALIST, *supra* note 124, No. 73, at 478; *see also Chadha*, 462 U.S. at 951 (The "Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions" and "protect the whole people from improvident laws."); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 245 n.102 (1986).

234. Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155-56 (1992) (internal quotation marks and citations omitted).

235. *See*, *e.g.*, Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, 476 U.S. 877, 895-96 (1986) ("This Court has long recognized that federal law has a 'generally interstitial character,' in the sense that Congress generally enacts legislation against the background of existing state law." (quoting Richards v. United States, 369 U.S. 1, 7 (1962))).

236. The spheres of exclusive federal jurisdiction are limited. For example, the federal government has the exclusive power to coin money, U.S. CONST. art. I, § 8, cl. 5, § 10, cl. 1, the exclusive power to grant letters of marque and reprisal, *id.* § 8, cl. 11, § 10, cl. 1, and the exclusive power to enter into treaties, *id.* art. II, § 2, cl. 2, § 10, cl. 1.

237. As Professor Charles Black has noted:

any) debate that the Constitution's structure provides a finely tuned balance between federal and state interests. An unduly aggressive use of the Supremacy Clause[238] would upset the Constitution's equilibrium.[239]

The Court's preemption jurisprudence reflects the Constitution's balancing act. Preemption comes in two flavors—"express" and "implied."[240] The former pertains to statutes that explicitly withdraw specified powers from the states, thus preserving exclusive lawmaking power for the federal government. When considering the preemption of state law, courts generally apply a "presumption against preemption,"[241] which may morph into a "clear statement rule" when the states' traditional powers to legislate for the general health, safety, and welfare are at stake.[242] Nevertheless, "[i]t is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms."[243]

In the absence of an express preemption clause, the Court sometimes is willing to conclude that a federal statute nonetheless impliedly withdraws state

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> Here is one of the most important questions conceivable, with respect to the legal basis of federalism. Is there an implied limitation on the federal powers, to the effect that they shall not be used to deal with some matters under state authority? The prevalent modern answer is negative. But the grave corollary is that federalism has no basis in firm constitutional law. The federal powers . . . can be used to coerce any result, however "local," unless such an implied limitation exists, and the concept of a legally defined federalism, judicially umpired, has then no substance.
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> * * *
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> The issue here is not whether our federal system, with state quasi-sovereignty, has any basis. It has a basis in the political structure of the national government. . . . The issue, rather, is whether the federal system has any legal substance, any core of constitutional right that courts will enforce.

CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 25, 29 (rev. ed. 1970); *see also* New York v. United States, 505 U.S. 144, 149 (1992) (describing the underlying basis for "the proper division of authority between the Federal Government and the States" as "perhaps our oldest question of constitutional law"); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 652-81 (1993) (exploring the originalist foundations for *New York*).

238. U.S. CONST. art. VI, cl. 2.

239. *See*, *e.g.*, KENNETH STARR ET AL., THE LAW OF PREEMPTION 47, 56 (1991) (arguing that "preemption diminishes the state sphere that federalism teaches us to protect").

240. *See*, *e.g.*, Nelson, *Preemption*, *supra* note 229, at 226-27.

241. *But see* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2117 (2000) (the presumption against preemption as a means for balancing federal and state power is a "solution[, which] seems to me to graft confusion on error. Properly applying the Supremacy Clause improves doctrinal coherence and permits the proper protection of uniquely federal interests.").

242. *Compare* Cipollone v. Liggett Group, 505 U.S. 504, 516, 518 (1992), *with* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).

243. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983).

lawmaking power over a particular field. The Court has indicated that a federal regulatory scheme may be "so pervasive" as to imply "that Congress left no room for the States to supplement it."[244] Likewise, the "federal interest" in the field that a federal statute addresses may be "so dominant" that federal law "will be assumed to preclude enforcement of state laws on the same subject."[245] While the Court has been loath to imply field preemption,[246] so-called "conflict preemption" is often implied whenever compliance with both the state and federal law is "a physical impossibility," or state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[247]

The preemptive force of federal law is held at bay by three categories of instruments. Judicial review is the most visible. In the early 1990s, the Rehnquist Court began a "federalist revival"[248] by reinvigorating the theretofore defunct Tenth Amendment in *New York v. United States*.[249] *New York* was soon followed by a series of remarkable decisions imposing limits on federal power in areas as divergent as: the reach of the Commerce Clause,[250] the means available to enforce the Fourteenth Amendment,[251] Congress's authority to require state executive officials to enforce federal law,[252] and the scope of state sovereign immunity.[253]

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244. English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990); *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

245. *Rice*, 331 U.S. at 230; *see also* Hines v. Davidowitz, 312 U.S. 52 (1941).

246. *See*, *e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 617 (1997) (Thomas, J., dissenting) ("[O]ur recent cases have frequently rejected field pre-emption in the absence of statutory language expressly requiring it.").

247. Boggs v. Boggs, 520 U.S. 833, 844 (1997); *see also* Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995); Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605 (1991); *English*, 496 U.S. at 79; California v. ARC Am. Corp., 490 U.S. 93, 100-01 (1989); Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300 (1988); CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 79 (1987); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281 (1987); Hillsborough County v. Automated Med. Lab., 471 U.S. 707, 713 (1985); Brown v. Hotel & Restaurant Employees Int'l Union Local 54, 468 U.S. 491, 501 (1984); Michigan Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984); Exxon Corp. v. Eagerton, 462 U.S. 176, 182 (1983); *Pacific Gas*, 461 U.S. at 204; Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982); Edgar v. MITE Corp., 457 U.S. 624, 631 (1982); Ray v. Atl. Richfield Co., 435 U.S. 151, 158 (1978).

248. Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2213 (1998).

249. 505 U.S. 144 (1992).

250. *See* United States v. Lopez, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act on the ground that it exceeded congressional authority under the Commerce Clause); United States v. Morrison, 529 U.S. 598 (striking down part of the Violence Against Women Act on the ground that it exceeded congressional authority under the Commerce Clause). *But see* Gonzales v. Raich, 545 U.S. 1 (2005) (upholding the Controlled Substances Act as an appropriate exercise of congressional authority under the Commerce Clause).

251. *See* City of Boerne v. Flores, 521 U.S. 507 (1997) (striking down the Religious Freedom Restoration Act as exceeding congressional authority under Section Five of the Fourteenth Amendment).

252. *See* Printz v. United States, 521 U.S. 898 (1997) (striking down the Brady Handgun Violence Prevention Act on the ground that Congress cannot "commandeer" state executive officials to carry out a federal mandate).

253. *See* Alden v. Maine, 527 U.S. 706 (1999) (holding that Congress cannot compel state

A related—but "softer"[254]—category of tools for preserving state law includes the canons of statutory construction, including the presumption against preemption and the clear statement rule.[255] Compared to cases like *Lopez* and *Morrison*—which caused quite a stir[256]—"statutory interpretation is a more incremental, and less rigid, form of judicial decisionmaking than constitutional interpretation. Hence, canonical construction implements important values with less disruption to the political and legislative processes."[257] Thus, the presumption against preemption (like its stronger cousin, the clear statement rule) is not an inexorable command: Congress remains free to preempt state law, but the legislature must plainly state its desire to do so. Requiring a clear statement of congressional intent to invoke the mighty power of the Supremacy Clause has the effect of ensuring that legislators take seriously the scope of their actions, and forestalls injudicious preemption by increasing the costs of compromise.[258] If full-blown, *Marbury*-style judicial review is a sledgehammer, the presumption against preemption is a scalpel: The latter is more delicate and more widely used (albeit less conspicuously).[259]

A third—and arguably the most important[260]—means for preserving state law are the political safeguards of federalism.[261] States' interests are represented

courts to entertain federal claims against the state); Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress cannot override state sovereign immunity through the Commerce Clause); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (holding that Congress cannot override state sovereign immunity through the ADEA). *But see* Tenn. v. Lane, 541 U.S. 509 (2004) (holding Congress may override state sovereign immunity through Title II of the Americans with Disabilities Act); Nev. Dept. of Human Res. v. Hibbs, 538 U.S. 721 (2003) (holding Congress may override state sovereign immunity through the Family and Medical Leave Act).

254. *See* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1552 (2000).

255. *See* Gregory v. Ashcroft, 501 U.S. 452, 460-61 (1991).

256. *See*, *e.g.*, Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 80-81 (2001) (listing *Lopez* and *Morrison* amongst those cases in which the Court "dissed" Congress).

257. Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and Its Consequences*, 45 VAND. L. REV. 743, 744 (1992).

258. *See* William T. Mayton, *The Possibilities of Collective Choice: Arrow's Theorem, Article I, and the Delegation of Legislative Power to Administrative Agencies*, 1986 DUKE L.J. 948, 957-58 (noting that Congress defrays the costs of legislating by agreeing not to agree—*i.e.*, by leaving a statute ambiguous or undefined). The presumption against preemption has the effect of *forcing* Congress to agree if it wants to exercise preemptive power.

259. *See* J. Harvie Wilkinson III, *Toward a Jurisprudence of Presumptions*, 67 N.Y.U. L. REV. 907, 920 (1992) ("Ever since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), courts have had the power to declare a legislative act unconstitutional. Along with that power has come the recognition that, in a democratic society, the power should be most infrequently exercised.").

260. Scholars continue to debate the importance *vel non* of the political safeguards of federalism. *Compare* Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) (Given the strength and importance of the political safeguards of federalism, "the current Supreme Court's aggressive encroachment on this system is as unnecessary as it is misguided."), *with* John Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1357, 1313 (1997) ("The political safeguards argument is an ahistorical one," and "the available historical evidence demonstrates that questions of state and federal power were to receive the fullest—if not the primary—attention of the Supreme Court.").

261. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States*

in Congress—most palpably in the Senate—and the President is elected by state delegations. Thus, as long as a law must pass through bicameralism and presentment, there will be numerous "veto gates"[262] that advocates for states' interests will be able to use to thwart otherwise preemptive legislation.[263] The Supreme Court relied on the "political safeguards of federalism" as the basis for its opinion in *Garcia v. San Antonio Metropolitan Transit Authority*,[264] which renounced judicial responsibility for substantively policing even acts of Congress that directly regulate state political institutions.[265] In *Garcia*, the Court effectively jettisoned judicial review as a tool for protecting state sovereignty because "[t]he [federal] political process ensures that laws that unduly burden the States will not be promulgated."[266] *Garcia*'s "'no substantive review' position is still the rule with respect to most questions of federal power vis-à-vis the states."[267]

The Supreme Court's Sherman Act jurisprudence runs roughshod over both the second and third categories of preemption-prevention tools. As a matter of statutory interpretation, it goes without saying that the Court's "interpretation" of the Sherman Act is completely divorced from its text.[268] As a result, the Court has little (if any) need for standard tools of interpretation, such as the canons of construction, presumptions against preemption, or clear statement rules. And as the next section explores in greater depth, it is difficult to imagine a regime more unmoored from the political safeguards of federalism than one in which unelected and unaccountable judges make substantive rules that carry the preemptive force of federal law.

2. Preemptive Power Unmoored

The Supremacy Clause states that the Constitution itself, treaties, and federal statutes have preemptive effect.[269] By so doing, the Clause also allocates preemptive powers between the governmental branches: Federal courts have the

in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954).

262. *See* Mathew McCubbins, Roger Noll & Barry Weingast ("McNollgast"), *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 L. & CONTEMP. PROBS. 3 (1994).

263. *See* JAMES MACGREGOR BURNS, THE DEADLOCK OF DEMOCRACY: FOUR PARTY POLITICS IN AMERICA 16, 19-23 (1963); RICHARD HOFSTADTER, THE AMERICAN POLITICAL TRADITION: AND THE MEN WHO MADE IT 8-9 (1948); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 43-45 (1985).

264. 469 U.S. 528 (1985).

265. *See id.* at 550-51 & n.11.

266. *Id.* at 556.

267. Kramer, *supra* note 260, at 217.

268. *See*, *e.g.*, Michael A. Carrier, *Resolving the Patent-Antitrust Paradox Through Tripartite Innovation*, 56 VAND. L. REV. 1047, 1056 (2003) (noting "the traditional tools of statutory interpretation—the text and legislative history of the Sherman Act—offer little guidance on" its meaning); Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1120 n.173 (2003) ("Rather than follow the literal text of the Sherman Act, the courts have instead treated it as a command from Congress to develop a federal 'common law' of antitrust." (citing HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 52 (2d ed. 1999))). *See also supra* note 22.

269. *See* U.S. CONST. art. VI, cl. 2. *See also supra* note 229 and sources cited therein (suggesting that the Supremacy Clause uses the term "*Laws*" as a synonym for "*statutes*").

power of preemption when interpreting the Constitution; the President (plus two-thirds of the Senate) has the power of preemption in undertaking treaties; and the President plus a majority of Congress, or two-thirds of Congress acting alone, has the power of preemption when enacting statutes. Absent from this scheme is any suggestion that the courts acting alone (*e.g.*, by promulgating common-law rules[270]) have preemptive powers. By providing specific prescriptions for displacing state law, the Constitution contains a strong negative implication that it does not contain additional allocations of preemptive power *sub silentio*.[271]

Thus, "[t]he preemptive power is, fundamentally, a *legislative* power."[272] When executive officials attempt to expand their preemptive authority—*e.g.*, through unilateral Presidential decisionmaking, unconstrained by the separation of powers that impedes the enactment of statutes—courts are justifiably hesitant to infer the preemption of state law.[273] There are some contexts—such as foreign affairs—in which Presidential preemption is rooted in the Chief Executive's constitutional obligations.[274] However, the modern administrative state's wide swath sweeps far beyond the specific powers entrusted to the President.[275] As a result, some have feared that expansive administrative agendas have undermined federalism by loosening the constitutional constraints on federal lawmaking.[276]

But even if executive preemption is constitutionally permissible, it is a long leap from there to *judge*-made preemption: The latter is the antithesis of the *political* safeguards of federalism.[277] To be sure, in some cases the Constitution's

270. Of course, even those rules that resemble common lawmaking carry preemptive effect when they are promulgated pursuant to a *constitutional* delegation. *See*, *e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961). *See also supra* note 231.

271. If anything, the text of the Clause affirmatively suggests that federal common law does not carry preemptive effect. The Clause provides that "the Judges in every State shall be bound" by federal statutes and the federal Constitution, and as Adler and Dorf point out, this provision applies with equal force to federal and state judges. *See* Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1113 n.27 (2003) ("The Clause's reference to state judges makes clear that they, along with federal actors, are bound by federal law. The Clause takes for granted that federal actors, including federal judges, are bound by" the Constitution and federal statutes.). To the extent federal and state judges are "*bound*" by the Constitution and federal statutes, they are not "*free*" to expand them via common-lawmaking.

272. Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 907 (2004) (emphasis added).

273. *See*, *e.g.*, Hillsborough County v. Automated Med. Lab., 471 U.S. 707, 717-18 (1985) (suggesting that courts will demand more clarity from agencies than from Congress before preempting state law).

274. *See*, *e.g.*, Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (striking down California's Holocaust Victim Insurance Relief Act as inconsistent with the President's foreign affairs powers).

275. *See*, *e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005) (preempting California's Compassionate Use Act as inconsistent with executive regulations under the federal Controlled Substances Act).

276. *See* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1327 (2001).

277. Scholars have long recognized that Congress has an incentive to dodge as much political responsibility as possible through delegation of its responsibilities to administrative

plain text,[278] structure,[279] or original meaning[280] requires judicial preemption. But in the absence of a *constitutional* obligation to preempt state law, the federal courts must leave preemption to the politically accountable branches.[281]

The courts' constitutional obligation to exercise judicial review is the only legitimate justification for court-ordered preemption of state law. Since *Marbury v. Madison*,[282] it has been clear that "[t]he judicial Power"[283] to decide "cases or controversies"[284] requires federal courts to choose the applicable rule of decision amongst multiple possible sources of law. Where those sources conflict, the Supremacy Clause[285] establishes the preeminence of the Constitution over federal law and the preeminence of federal law over state law.[286] Thus, "[t]he Supremacy Clause builds into the Constitution's structure the principle that superior law supplies criteria of validity for inferior law."[287] As part of "the law-finding process"[288] inherent in "[t]he judicial Power," the courts must displace an inferior source of law if they find a superior source controlling.

The "law-finding process" looks very different depending on whether courts are interpreting constitutional or statutory law. When it comes to the Constitution—the apogee of the legal hierarchy—the "law" includes not just the document's words but also its "tacit postulates," without which "the Constitution is denied force and often meaning."[289] Thus, the 534 volumes of the *U.S. Reports* are largely devoted to fleshing out what the Framers necessarily left unsaid when composing our admirably brief national charter:

> A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of

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agencies. *See* Morris Fiorina, *Group Concentration and the Delegation of Legislative Authority*, *in* REGULATORY POLICY AND THE SOCIAL SCIENCES 175 (Roger Noll ed., 1985); MORRIS P. FIORINA, CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT (2d ed. 1989); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993). Presumably a similar dynamic encourages delegation to judges.

278. *See* U.S. CONST. art. I, § 10.

279. *See*, *e.g.*, Zschernig v. Miller, 389 U.S. 429, 440-41 (1968) (displacing state law under dormant foreign affairs doctrine).

280. *See*, *e.g.*, Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571-72 (1997) (displacing state law under the dormant Commerce Clause doctrine); *but see id.* at 610 (Thomas, J., dissenting) (arguing "the morass of our negative Commerce Clause case law" cannot be squared with the Constitution's original meaning).

281. Of course, the Sherman Act is not a constitutional provision. *See supra* notes 169-225 and accompanying text.

282. 5 U.S. (1 Cranch) 137 (1803).

283. U.S. CONST. art III, § 1.

284. *Id.* art. III, § 2, cl. 1.

285. *Id.* art VI, cl. 2.

286. Chief Justice Marshall put it thusly: "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty." *Marbury*, 5 U.S. at 178. *See also* John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333, 344-51 (1998).

287. Harrison, *supra* note 286, at 365.

288. *Id.*

289. Nevada v. Hall, 440 U.S. 410, 433 (1979) (Rehnquist, J., dissenting).

> all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.[290]

As a result, judge-made doctrines, rules, and standards that are promulgated by necessity in *constitutional* cases stand alongside the Constitution itself as a source of "law,"[291] with all of the preemptive power that label conveys. Therein lies the foundation for the oft-cited claim that the Constitution means what the courts say it does.[292]

Statutes and statutory cases are very different. For example, statutes are easier to pass, they are easier to change, they are longer, and (as evidenced by the Internal Revenue Code) they are often so prolix that they can "scarcely be embraced by the human mind." The upshot of these and other differences between the Constitution and statutes is that there is no legitimate need for judge-made statutory law.[293] And as a result, a statute generates preemptive effect if and only if the terms of the statute itself command it.[294] Therein lies the foundation for the oft-cited "presumption against preemption."

Of course, the line between statutory interpretation and common lawmaking can be a fuzzy one.[295] But antitrust is not a close question. Over the

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290. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819). This was the preface to the famous line: "In considering this question, then, we must never forget, that it is a *constitution* we are expounding." *Id.* (emphasis in original).

291. *Cf.* Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann, ed., 1997) (arguing laws should be interpreted pursuant to "the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*").

292. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); City of Boerne v. Flores, 521 U.S. 507 (1997).

293. *See generally* Manning, *Equity of the Statute*, *supra* note 143.

294. This is not meant to suggest that statutory preemption is always expressly spelled out in the text of the statute. As explained above, statutory preemption comes in two flavors—"express" and "implied." *See supra* notes 240-247 and accompanying text. The point is simply that both kinds of preemption are rooted in the statutes themselves—not judge-made rules.

295. *Compare* George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 IND. L.J. 263, 266 (1989) (concluding that "all forms of judicial lawmaking by federal courts—whether presented as constitutional adjudication, statutory interpretation or federal common law—are essentially the same and should be placed under the general rubric of federal common law."), *and* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 889-90 (1986) (concluding that there is no meaningful difference "between the creation of federal common law and the ordinary interpretation of federal enactments"), *with* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) ("'Federal common law,' as I use the term, means any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense."), *and* Peter K. Westen & Jeffrey S. Lehman, *Is There Life for* Erie

last century, the Court has pulled sudden switcheroos[296] on its rules for monopolization, mergers, and vertical integration—despite the fact that the Sherman Act's text has remained unchanged.[297] In the context of doing so, the Court has used the statute's static text to justify preemption in some cases[298] and (unpredictably[299]) not others.[300] Whatever it means to "interpret" a statute, surely we can agree that statutory interpretation ends—and substantive rulemaking begins—when the court creates numerous, diametrically opposed rules without ever receiving statutory guidance from Congress.

IV. NONDELEGATION

Confronted with evidence that antitrust courts routinely exercise unguided discretion in their formulation of substantive rules under the Sherman Act, one might reasonably argue: So what?[301] Given that administrative agencies have

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After the Death of Diversity?, 78 MICH. L. REV. 311, 332 (1980) ("The difference between 'common law' and 'statutory interpretation' is a difference in emphasis rather than a difference in kind."). *See also infra* note 368 and accompanying text.

296. *Cf.* Env'l Integrity Proj. v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) (describing the "surprise switcheroo" doctrine).

297. Since its passage in 1890, the Sherman Act has been amended six times. Four of those amendments involved simple changes to the criminal penalties associated with Sherman Act violations. *See*; 69 Stat. 282 (1955); Pub. L. No. 93-528, 88 Stat. 1708 (1974); Pub. L. No. 101-588, 104 Stat. 2880 (1990); Pub. L. No. 108-237, 118 Stat. 668 (2004). Only one amendment affected the substance of the Sherman Act, and it was not made in response to a judicial interpretation of the statute. *See* 50 Stat. 693 (1937) (adding two provisos to § 1). Moreover, Congress deleted the amendment—restoring the Sherman Act to its unaltered form—in 1975. *See* Pub. L. No. 94-145, 89 Stat. 801 (1975) (deleting both provisos). The Court's flip-flopping interpretations of the statute, *see supra* notes 94-**Error! Bookmark not defined.** and accompanying text, cannot be explained on the basis of this relatively minor—and short-lived—change.

298. *See*, *e.g.*, FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (preempting creation of "state action immunity" under state law); Patrick v. Burget, 486 U.S. 94 (1988) (same); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 341 (1987) (preempting New York liquor pricing law); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980) (preempting California scheme for wine pricing); Goldfarb v. Virginia State Bar, 421 U.S. 773, 792-93 (1975) (preempting Virginia bar association's rule for minimum-fee schedules); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951) (preempting Louisiana resale price maintenance law); *see also* TFWS, Inc. v. Schaefer, 242 F.3d 198, 208 (4th Cir. 2001) (preempting state price-and-hold law).

299. Others have recognized that the Court inconsistently invokes the Sherman Act as a vehicle for preempting state law. *See* Gregory J. Werden & Thomas A. Balmer, *Conflicts Between State Law and the Sherman Act*, 44 U. PITT. L. REV. 1 (1982).

300. *See*, *e.g.*, Fisher v. City of Berkeley, 475 U.S. 260, 270 (1986) (holding city rent control ordinance not preempted by the Sherman Act); Exxon Corp. v. Governor of Md., 437 U.S. 117, 133-34 (1978) (holding that a Maryland statute regulating price reductions made by petroleum producers to retail gas stations was not preempted by the Sherman Act or the Robinson-Patman Act); Parker v. Brown, 317 U.S. 341, 352 (1943) (holding the Sherman Act does not preempt the California Agricultural Prorate Act, which created a cartel-like state administrative framework for orchestrating price and commodity distribution controls in the California raisin market); Puerto Rico v. Shell Co., 302 U.S. 253, 259- 60, 263 (1937) (holding that the Sherman Act does not preempt Puerto Rico's antitrust statute).

301. For example, Professor Manning seems to argue that the only problematic delegations

virtually *carte blanche* discretion to make substantive rules with little or no legislative guidance,[302] and given that Congress's delegation of antitrust powers to the courts is analytically analogous to its delegations to administrative agencies,[303] one might argue, the courts should enjoy a similarly blank check when it comes to antitrust rulemaking, right?[304] Wrong. As this Part illustrates, even if the nondelegation doctrine is toothless in the context of administrative law, it should apply with uncommon bite in the judicial context.

A. Executive Nondelegation

Notwithstanding some prominent skeptics,[305] many scholars recognize that the nondelegation doctrine has deep historical roots in American legal traditions, dating back at least as far as John Locke:

> The power of the Legislative being derived from the

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of lawmaking power are those that take the form of legislative history. *See* Manning, *Textualism As a Nondelegation Doctrine*, *supra* note 143, at 675. Manning argues that floor statements and committee reports—which do not surmount the constitutional hurdles of bicameralism and presentment—amount to unconstitutional attempts to delegate congressional lawmaking powers to individual Members, committees, or staffers. Other delegations of congressional power, however, are not problematic: "Delegation to agencies or courts—unlike self-delegation to congressional committees or sponsors—leaves intact an important structural check on Congress's power. When Congress delegates lawmaking authority to an agency or court, it cedes some of its own control over statutory meaning to a distinct branch that, by constitutional design, is independent of Congress. This feature of the constitutional structure imposes substantial agency costs whenever Congress delegates a question to a court or an agency, rather than clearly resolving the matter itself." *Id.* at 711.

302. *See*, *e.g.*, Richard W. Murphy, *Separation of Powers and the Horizontal Force of Precedent*, 78 NOTRE DAME L. REV. 1075, 1117 (2003) ("The Supreme Court has come close to giving Congress carte blanche to grant as much discretion as it chooses as a matter of policy to the other departments." (citing, *inter alia*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474-75 (2001))); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 370-72 (2002) (describing the moribund state of nondelegation doctrine at the Supreme Court).

303. *See* Manning, *Textualism As a Nondelegation Doctrine*, *supra* note 143, at 676; BORK, *supra* note 12, at 63 ("Congress recognized that it was delegating broad rule-making power to the courts," and the legislative history of the Sherman Act provides ample evidence of congressional "intent" to guide the courts' rulemaking powers by the "intelligible principle" of maximizing "consumer welfare"); *cf.* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1731-32 (2002) (arguing courts and scholars should abandon the nondelegation doctrine because courts have upheld the broad delegations inherent in the Sherman Act, which is at least as broad as any delegation Congress makes to an administrative agency).

304. Posner and Vermeule forcefully argue that the nondelegation doctrine "lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory." Posner & Vermeule, *supra* note 303, at 1722. *See also* Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331 (2003). For purposes of this Article, suffice it to say that I—like Professors Lawson, Alexander and Prakash—have faith in the constitutional heritage and meaningfulness of the nondelegation doctrine. *See* Gary Lawson, *Discretion as Delegation: The Proper Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Lawson, *Delegation and Original Meaning*, *supra* note 302.

305. *See*, *e.g.*, Posner & Vermeule, *supra* note 303; Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004).

> People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.[306]

Locke's premise is most clearly embodied in Article I's Vesting Clause, which provides "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[307] The Court has held that one corollary of the text and structure of the Vesting Clause is that "Congress may not constitutionally delegate its legislative power to another branch of Government" (lest it be "vested" outside of the "Congress of the United States").[308] However, after making two cameos during the Marshall Court,[309] the doctrine fell into desuetude until the rise of the administrative state necessitated its reinvigoration.

The story of post-New Deal America has been aptly entitled "the rise and rise of the administrative state."[310] The "alphabet soup" of administrative agencies created in the wake of the Great Depression,[311] along with the general enlargement of the federal government during and after World War II, combined to effectuate an unprecedented expansion in the scope and complexity of federal responsibilities. As Congress loaded its legislative plate with new priorities, it (by necessity) pushed more and more of its important policy judgments outside the confines of Article I:

> With the New Deal, . . . the giveaway of what had been seen as legislative authority (or something close) became massive. . . . At least as important as the scope of modern delegation, however, is to whom the power has been delegated. If there has been any net beneficiary of Congress's abdication of authority, it has been the President. . . . [A] substantial measure of power that under the nondelegation doctrine would by definition have resided in Congress has since fallen to the

306. John Locke, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 267, § 141 at 363 (Peter Laslett, ed. 1988). *See also* Bank One Chicago, N.A. v. Midwest Bank & Trust Co., 516 U.S. 264, 280 (1996) (Scalia, J., concurring) ("It has always been assumed that legislative powers are nondelegable—or, as John Locke put it, that legislative power consists of the power 'to make laws, . . . not to make legislators.'"); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 672-73 (1980) (Rehnquist, J., concurring) (quoting Locke).

307. U.S. CONST. art. I, § 1.

308. Touby v. United States, 500 U.S. 160, 165 (1991).

309. *See* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42-49 (1825) (upholding delegation to courts to adopt rules of process); The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1813) (upholding delegation to President to revive trading privileges with certain countries upon a finding that they had ceased to interfere with neutral commerce).

310. *See* Lawson, *The Rise and Rise of the Administrative State*, *supra* note 226.

311. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 286 n.4 (1979) ("The term 'alphabet soup' gained currency in the early days of the New Deal as a description of the proliferation of new [government] agencies.").

President.[312]

At the beginning of the New Deal, the Supreme Court allowed Congress to delegate its legislative powers if it provided the delegatee with an "intelligible principle" to guide its lawmaking.[313] Two provisions of the National Industrial Recovery Act of 1933[314] flunked the "intelligible principle" test.[315] Since 1935, however, the courts have not struck down a single statute on nondelegation grounds.[316] Recognizing the practical necessity of large delegations of power to executive agencies,[317] modern courts have all but abandoned the nondelegation doctrine.[318] As a result, today's version of the United States Code is replete with vacuous statutes that empower agencies to make laws "in the public interest,"[319]

312. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1820-21 (1996).

313. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 404-09 (1928).

314. Pub. L. No. 73-67, 48 Stat. 195.

315. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 541-42 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935). *See also* Carter v. Carter Coal, 298 U.S. 238 (1936) (invalidating the labor provisions of the Bituminous Coal Conservation and Recovery Act as an unconstitutional delegation to private parties).

316. Posner and Vermeule argue that *Schechter Poultry* and *Panama Refining* are the exceptions that prove the nonexistence of the nondelegation doctrine. *See* Posner & Vermeule, *supra* note 303, at 1722-23 ("The Court's invocation of the [nondelegation doctrine] to invalidate two statutes in 1935 was nothing more than a local aberration, no more to be taken as constitutionally fundamental than, say, the original package doctrine, the doctrine of irrebuttable presumptions, or any of a myriad other constitutional eccentricities that few now bother remembering."). Notwithstanding the *sui generis* nature of *Schechter Poultry* and *Panama Refining*, the Court does occasionally invoke delegation concerns in the course of statutory interpretation. *See*, *e.g.*, Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst. (Benzene), 448 U.S. 607, 646 (1980) (plurality opinion) (holding that an OSHA statute, if interpreted broadly, would be a sweeping and unconstitutional delegation of power).

317. *See* Lawson, *supra* note 226, at 1241. Professor Jaffe has argued that en gross delegations of legislative power to administrative agencies are the "dynamo of the modern social services state." Louis L. Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 561, 592 (1947). *See also* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1, 60-61 (1983) (describing modern legislators' willingness to punt difficult policy choices to administrative agencies in a kind of "regulatory lottery"; Congressmen often agree on the need to take action but disagree over the means through which to take it).

318. *See* Synar v. United States, 626 F. Supp. 1374, 1384 (1986) ("[W]hile the delegation doctrine may be moribund, it has not yet been officially interred by the Court."), *aff'd sub. nom.*, Bowsher v. Synar, 478 U.S. 714, 721 (1986); Mistretta v. United States, 488 U.S. 361, 374 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that otherwise might be unconstitutional."); *see also* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001). The modern nondelegation doctrine operates only indirectly, much like a Damoclean sword (the sharpness of which can be debated). *See* Manning, *Nondelegation as Avoidance*, *supra* note 165, at 223 ("The nondelegation doctrine . . . now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions."); Merrill, *supra* note 305, at 2103-04 ("The only arguable imprint of the nondelegation doctrine in recent years has been as a canon of interpretation supporting narrow constructions of statutes so as to 'avoid' the constitutional question of excessive delegation. But even this use of the doctrine is fading and has recently come under attack as pointless or counterproductive.").

319. 15 U.S.C. § 78j(b).

or out of "public convenience, interest, or necessity."[320]

B. Judicial Nondelegation

At first blush, the Sherman Act is no different. Its sparse text offers little to guide its implementers' discretion. Congress could hardly afford the time or resources to legislatively promulgate the rules that its delegatee has promulgated. And the courts have blessed the entire lawmaking arrangement. Thus, it seems that if it is permissible for Congress to delegate to administrative agencies, it is equally permissible for Congress to delegate to courts.[321]

Upon closer reflection, however, the issue is much more complicated. Even if courts have abandoned the nondelegation doctrine in the context of administrative law, a similar abdication is more problematic in the antitrust context for at least four reasons.

1. The Differences

First, it turns the rationale underlying the Supreme Court's *American Trucking* decision on its head to jettison the nondelegation doctrine in the judicial context. The source of legitimacy for administrative lawmaking is rooted in the fact that agencies—unlike courts—remain (at least somewhat) accountable to the political branches.[322] Congress keeps tabs on agencies by conducting oversight and appropriations hearings, while the President appoints officers and sets their regulatory agendas. Courts, by contrast, operate unchecked by similar political mechanisms. Therefore, the argument runs, the unaccountable courts ought not use the nondelegation doctrine to supplant the decisions made by agencies because the latter are more democratically legitimate policymakers than are the former.

It does not follow, however, that courts are therefore equally commodious receptacles for Congress's lawmaking functions. Quite to the contrary, the motive force behind jettisoning the executive nondelegation doctrine—namely, the political unaccountability of the federal courts—suggests that an Article III judge should be the *last* person to qualify as an antitrust policymaker. Thus, far from flowing as a natural consequence of the moribund nondelegation doctrine, judicial lawmaking in the antitrust context is undermined by *American Trucking*.

Second, even after *American Trucking*, courts retain numerous tools for enforcing the nondelegation doctrine (albeit indirectly) in the administrative context. For example, the scope of an administrative agency's lawmaking authority is only as broad its statutory mandate, and courts review *de novo* an agency's assertion of jurisdiction.[323] Thus, a "hard" step one under the classic

320. 47 U.S.C. § 307(a).

321. Professor Manning has suggested as much. *See* Manning, *The Absurdity Doctrine*, *supra* note 143, at 2444-45 n.212 ("Conventional delegations presuppose that agencies and courts will exercise their independent policymaking discretion within the boundaries set by the delegation." (citing, *inter alia*, the Sherman Act)).

322. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984) (justifying deference to an agency's interpretation of an ambiguous statute on the fact that courts are "not part of either political branch of the Government").

323. *See id.* at 842-43 ("step one").

Chevron paradigm can have the effect of limiting an otherwise broad delegation from Congress to an administrative agency.[324] In addition, the federal courts retain broader powers of judicial review over agencies' actions, both under the Administrative Procedure Act and the Due Process Clause.[325] Similar failsafes do not apply in the context of judge-made antirust law,[326] wherein the courts promulgate the rules, and no other branch of government provides an independent check or balance on the courts' powers.[327] As a result, courts' unquestioning willingness to accept congressional delegations of antitrust lawmaking powers constitutes an unmitigated abdication of constitutional responsibility.

Some have defended the courts' antitrust lawmaking efforts as a matter of practical necessity: If Congress were forced to make tough policy choices regarding the scope and applicability of our competition laws, it would have time and energy for little (if anything) else.[328] However, such statements must make the Framers turn somersaults in their graves. As James Madison noted, the entire point of our Constitution's first Article is to curb "the facility and excess of lawmaking[, which] seem to be the diseases to which our governments are most liable."[329] Of course, impediments to lawmaking may mean fewer laws will be made. But, as the Framers understood, the "injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."[330] Circumventing Article I through delegation—be it to the courts or an administrative agency—is inimical to the Constitution, regardless of whether doing so makes lawmaking more "efficient":

> [T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is

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324. *See* Jonathan T. Molot, *Reexamining* Marbury *in the Administrative State: A Structural and Institutional Defense of Judicial Power over Statutory Interpretation*, 96 NW. U. L. REV. 1239, 1244 (2002) (In recent years, "the Court has reinforced . . . its historical control over interpretation by intensifying its review within the *Chevron* framework and by narrowing the scope of *Chevron* deference."); *see also* Manning, *Textualism As a Nondelegation Doctrine*, *supra* note 143, at 713-15. Two cases that are frequently cited as examples of the "hard" step one under *Chevron* are FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000), and MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994).

325. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 592-93 (1985).

326. One failsafe that does apply in the Sherman Act context is the canon of "prescriptive comity," under which the Court construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004) (limiting the territorial scope of American judge-made antitrust law).

327. Of course, Congress *could* exercise supervisory power over the courts antitrust lawmaking by amending the Sherman Act to overrule the courts' decisions. However, Congress has not done so. *See supra* note 297. And in the face of congressional silence, the courts have nonetheless changed their antitrust rules drastically. *See* Part II.D., *supra*.

328. *See*, *e.g.*, Baxter, *supra* note 22, at 665.

329. THE FEDERALIST, *supra* note 124, No. 62, at 417 (J. Madison). *See also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 447 (J. Elliot ed. 1836) (statement by James Wilson before the Pennsylvania convention) (arguing Article I was designed to instill a "circumspection in forming the laws," so as to avoid an inaccurate and undigested code of laws").

330. THE FEDERALIST, *supra* note 124, No. 73, at 496.

> contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.[331]

Third, regardless of whether one subscribes to the "unitary executive" theory,[332] it is an undeniably long leap from *Humphrey's Executor*[333] to judicial lawmaking. As Justice Scalia has noted, *Humphrey's Executor* is "the case that marks the birth of what has come to be known academically as the independent regulatory agency, and derogatorily as the headless fourth branch of government."[334] Yet for all the hue and cry over *Humphrey's Executor*[335] and its extension to the federal courts in some contexts,[336] no one seems to have noticed the more-important wrongness of our antitrust laws: Mr. Humphrey's claim for back pay seems quaint and relatively unimportant when compared to congressional authorization for the court-ordered regulation of every nook and cranny in the entire American economy.

Moreover, even if it is true that Congress may insulate a "quasi-executive" officer from executive control,[337] it does not necessarily follow that Congress may vest its lawmaking powers in a purely judicial officer who is subject to neither executive nor legislative control. As the Court has explained, the Appointments Clause[338] is "designed to preserve political accountability relative to important

331. INS v. Chadha, 462 U.S. 919, 944 (1983); *see also* Myers v. United States, 272 U.S. 52, 293 (1926) (Holmes J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."); Robert J. Pushaw, Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 754 n.78 (2001) ("Although having the judges who make procedural rules interpret and apply them may promote efficiency, such concentration of power in the same hands may also lead to tyranny, as the Framers well understood.").

332. *See*, *e.g.*, Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Calabresi & Rhodes, *supra* note 234.

333. Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

334. Antonin Scalia, *Historical Anomalies in Administrative Law*, SUP. CT. HIST. SOC'Y Y.B. 103, 106 (1985); *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 609-16 (1984).

335. *See*, *e.g.*, Scalia, *supra* note 334; *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 921 (1991) (Scalia, J., dissenting) (arguing that *Humphrey's Executor* helped to create a "headless Fourth Branch" of government, and expressing the view that "adjusting the remainder of the Constitution to compensate for *Humphrey's Executor* is a fruitless endeavor"); Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1, 88 (2004) ("All in all, *Humphrey's Executor* was a shocking and poorly reasoned [decision]. . . . The most likely explanation is that *Humphrey's Executor* represents another example of the hostility towards the Roosevelt Administration exhibited by many Supreme Court decisions of that period.").

336. *See*, *e.g.*, Mistretta v. United States, 488 U.S. 361, 425 (1989) (Scalia, J., dissenting) ("Today's decision may aptly be described as the *Humphrey's Executor* of the Judicial Branch, and I think we will live to regret it.").

337. Professor Manning has argued that *Humphrey's Executor* does not stand for such a broad proposition. *See* John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1302-08 (1999).

338. U.S. CONST. art. II, § 2, cl. 2.

government assignments."[339] Thus, far from condoning judicial (*i.e.*, unaccountable) rulemaking, the Clause's original meaning repudiates it.

Fourth, and perhaps most importantly, there is no *general* federal common law.[340] Ever since 1938,[341] the Court has recognized that federal judges' lawmaking powers are limited to certain "interstitial areas of federal interest."[342] As the Court emphatically held in *Erie*, the *Constitution* precludes federal courts from fashioning common-law rules that preempt state law absent a *constitutional* command to do so[343]:

> If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the *unconstitutionality* of the course pursued [under *Swift v. Tyson*[344]] has now been made clear, and compels us to do so.
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> [N]otwithstanding the great names which may be cited in favor of the [*Swift*] doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the *constitution* of the United States, which recognizes and preserves the autonomy and independence of the states,—independence in their legislative and independence in their judicial departments.[345]

Erie's constitutional holding[346] was based (in part) on an earlier dissent

339. Edmond v. United States, 520 U.S. 651, 663 (1997).

340. *See*, *e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004) (noting the "Court has thought it was in order to create federal common law rules in *interstitial* areas of particular federal interest" (emphasis added)); RICHARD FALLON, DANIEL MELTZER, & DAVID SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. 7 (5th ed. 2003); Henry Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405-22 (1964).

341. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

342. *Sosa*, 542 U.S. at 726 (citing United States v. Kimbell Foods, Inc., 440 U.S. 715, 726-727 (1979)).

343. Of course, in cases of *statutory* preemption, it is Congress—not the federal courts—that creates the preemptive rule. *See*, *e.g.*, Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63 (2002) (holding petitioner's common-law tort claims are not preempted by a federal statute because the "task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of *Congress'* pre-emptive intent" (emphasis added)); Barnett Bank of Marion County, N.A. v. Nelson, 517 U.S. 25, 30 (1996) (holding the preemptive effect of a federal statute is a question "of *congressional* intent. Did *Congress*, in enacting the Federal Statute, intend to exercise *its constitutionally delegated* authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law." (emphases added)).

344. 41 U.S. 1 (1842).

345. *Erie*, 304 U.S. at 77-79 (footnote omitted; emphases added); *see also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 202 (1956) ("Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases.").

346. Ever since 1938, debate has raged between commentators and scholars over whether

authored by (ironically enough) Justice Holmes. In *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*,[347] the Court held that federal courts disregard state contract law in a diversity suit. Justice Holmes dissented, emphasizing the "fallacy" of the *Swift* doctrine, which "has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."[348] The same Justice who decried the Sherman Act's unmooring from its common-law roots[349] thus also decried the federal courts' usurpation of state courts' rights to fashion contract law. While Justice Holmes lost the battle over the Sherman Act's scope,[350] his opinion on the federal courts' common-lawmaking powers (or the lack thereof) was vindicated in *Erie*.[351]

2. The Upshot

The upshot of the foregoing distinctions between judicial and executive delegations is eerily simple: The Constitution places meaningful restraints on the lawmaking powers of the federal courts, even if it places few or none on administrative agencies. To be sure, Article III courts after *Erie* retain *pockets* of common-lawmaking powers.[352] These pockets include "such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[353] But whatever bits of common-lawmaking authority Article III protects,[354] surely it does not protect the general

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Erie is *really* a "constitutional holding." *See*, *e.g.*, CHARLES A. WRIGHT & MARY KAY KANE, FEDERAL COURTS § 56 & nn. 15-16 (6th ed. 2002) (collecting sources); ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3 & n.146 (3d ed. 1999) (same). Given the fact that resolving this dispute is beyond the scope of this Article, and given the Supreme Court's emphatic insistence that *Swift*'s "unconstitutionality" compelled *Erie*'s outcome, 304 U.S. at 77, this Article proceeds under the assumption that the Court meant what it said.

347. 276 U.S. 518 (1928).

348. *Id.* at 533 (Holmes, J., dissenting).

349. *See supra* notes 39-53, and accompanying text.

350. *See supra* notes 54-70, and accompanying text.

351. *See Erie*, 304 U.S. at 79-80 (quoting and adopting Holmes's dissent from *Black & White*).

352. *See* Friendly, *supra* note 340, at 421-22 (arguing *Erie* prohibited *general* federal common law while preserving *specialized* federal common law).

353. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (footnotes omitted); *see also* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973) (rights and obligations of the United States); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (same); Illinois v. Milwaukee, 406 U.S. 91 (1972) (interstate dispute); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (international dispute); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (interstate dispute); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979) (admiralty); Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) (same).

354. It is undeniably difficult to ascertain the precise boundaries of the federal courts' common lawmaking powers. *See* Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 826 (2005) ("In operation, the doctrine of federal common law is a ramshackle one. The boundaries of the enclaves in which it may operate are uncertain, its propriety is disputed, and the distinction between it and statutory and constitutional interpretation is elusive.").

power to make substantive rules of commercial law. The contrary conclusion would render *Erie*'s constitutional holding a nullity.

Nor can *Erie*'s constitutional holding retain vitality under the theory that federal antitrust is not *general* federal common law. For example, one might argue that where Congress has deputized the federal courts with common-lawmaking power over a limited area of law—such as antitrust—the courts' faithful exercise of that power is not "general" lawmaking.[355] Rather, it is *specific*.[356]

Again, however, such a reading of *Erie* renders its "constitutional" holding a dead letter. If the constitutional bar on *courts' power* to make federal common law is coextensive with the limits on the *legislature's power* to pass statutes, then Article III did very little (if any) work in *Erie*. That is, if the only thing limiting the creation of, say, federal tort law is Congress's power under Article I to statutorily task the federal courts with making it, then *Erie*'s limit on "general" federal common law is as meaningless as the Commerce Clause.[357]

Precisely, some scholars say. For example, Louise Weinberg argues that *Erie*'s limits pertain to the power of the federal *government* in general—not the power of the federal *courts* in particular:

> No one with a basic grasp of the essentials of empowerment would question that *Erie* was constitutionally required. *Erie*'s holding in chief was about the fundamental empowerment of the nation, not of its courts. *Erie* held, precisely, that the nation lacks power to make state law. State law is reserved to the states. The power of the nation is to make federal law only. . . . Nothing in that holding qualifies national power to make federal law.[358]

Thus, Weinberg argues, there is nothing in *Erie* (or the Constitution) that precludes federal courts from exercising common-lawmaking powers, so long as the federal government has "an identified national interest" in formulating a federal rule.[359] The contrary view is simply the byproduct of an unthinking adherence to "the spurious state law imperative":

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355. *Cf.* Posner & Vermeule, *supra* note 303, at 1157.

356. It is undeniably true that the Supreme Court has suggested that federal courts have the power to promulgate substantive common-law rules, given "express congressional authorization to devise a body of law directly." Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004). However, it is equally true that the Sherman Act is *not* an express common-lawmaking delegation, *see supra* notes 57-67 and accompanying text, and even if it were, it would not change the axiomatic proposition that Congress cannot statutorily amend the Constitution, *see*, *e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997). Thus, to the extent *Erie*'s constitutional holding turned on the meaning of Article III, the Sherman Act could not change it even if it purported to do so (which it does not).

357. *See*, *e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005); Wickard v. Filburn, 317 U.S. 111 (1942).

358. Louise Weinberg, *Federal Common Law*, 83 NW. L. REV. 805, 811-12 (1989).

359. *Id.* at 814; *see also id.* at 827 ("Courts are not limited to enumerated 'enclaves' of federal lawmaking power.").

> Writers have a romantic attachment to Professors Hart and Wechsler's observation that federal law is "interstitial," operating against a broad background of common-law understandings. A similar nostalgia is bestowed upon Justice Harlan's almost equally famous vision, cribbed from Hart and Wechsler, that state law governs us in our "primary" relations. Writers under this spell like to posit a presumption in favor of state law. . . . But this romantic vision seems out of focus. It is fanciful today to say that federal law governs "interstitially."[360]

However, while it might be true that federal law is no longer "interstitial," it does not necessarily follow that federal *courts* are constitutionally empowered to make that law. As others have explained, each of the "enclaves" of legitimate federal common law stem from constitutional prohibitions on state lawmaking[361]: In certain cases—namely, those affecting the rights and obligations of the United States (typically, but not always, when the United States is a party), interstate controversies, international relations, and admiralty[362]—federal law provides the *exclusive* rule of decision.[363] State law cannot apply within these "enclaves" because the text, structure, or original meaning of the Constitution expressly or impliedly makes each the province of federal law alone.[364] As Tidmarsh and Murray have explained, "states have such a strong self-interest in [an "enclave"-related] controversy . . . that state law cannot be expected to provide a sufficiently detached, reliable, and neutral rule of decision for a controversy."[365] Thus, in the absence of federal statutory law to govern the outcome in one of these discrete "enclaves," the Constitution requires federal courts to fill the gap with federal

360. *Id.* at 818 (footnotes omitted).

361. *See* Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024 (1967). *See also supra* notes 277-281 and accompanying text.

362. *See supra* note 353 and accompanying text.

363. *See* Hill, *supra* note 361, at 1026.

364. *Id.* at 1031-68. For example, federal common-lawmaking power over admiralty can be inferred from the fact that the Admiralty Clause, U.S. CONST. art. III, § 2, grants the federal courts jurisdiction over all admiralty cases, but Article I does not give Congress the power to make admiralty law beyond its power to "make Rules concerning Captures on Land and Water," *id.* art. I, § 8, cl. 11. Thus, if there is to be federal admiralty law, the courts have reasoned, it must come from the courts themselves. *See*, *e.g.*, Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95-96 (1981) ("We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law."); Halcyon Lines v. Haenn Ship Ceiling & Ref. Corp., 342 U.S. 282, 285 (1952) ("To some extent courts exercising jurisdiction in maritime affairs have felt freer than common-law courts in fashioning rules."); *see also* Young, *Preemption at Sea*, *supra* note 231, at 279-88. Similarly, constitutional preemption in international relations cases can be inferred from the perceived weakness of the government under the Articles of Confederation in matters of foreign policy, *see* THE FEDERALIST, *supra* note 124, No. 15 (A. Hamilton), the presidential power to command the armed forces, to negotiate treaties, and to appoint ambassadors, *see* U.S. CONST. art. II, § 2, cl. 1-2, and the congressional power to declare war, ratify treaties, and provide advice and consent on ambassadors, *see id.* art. II, § 2, cl. 2; *id.*, art. I, § 8, cl. 11. *See also* Tidmarsh & Murray, *supra* note 216, at 624.

365. Tidmarsh & Murray, *supra* note 364, at 588.

common law.[366]

Were it not for more than a century of federal common lawmaking under the Sherman Act, it might go without saying that antitrust does not fit into one of the constitutionally designated "enclaves." Apparently oblivious to that fact, the federal courts have proceeded apace and created antitrust law without any theoretical justification for doing so. Indeed, even those who argue that the "enclave" theory underestimates the federal courts' common-lawmaking powers—such as Professors Field and Weinberg—recognize that a need for national "uniformity" is the principal prerequisite for federal common law.[367] And it seems difficult to argue that there is a greater need for "uniformity" in antitrust than in myriad other areas (such as telecommunications, securities, or environmental law) that are nonetheless *not* governed by federal common law.

Of course, one might argue that *every* federal statute—even those, like the Sherman Act, that contain nary a reference to common lawmaking—authorizes the federal courts to make common law; whether the courts exercise that power is simply a matter of discretion.[368] However, that argument cannot be squared with the original meaning of "[t]he judicial power,"[369] which others have persuasively shown *not* to include the prerogative to make common law on the basis of a statutory delegation.[370] The better view is that federal common-lawmaking

366. *See* Hill, *supra* note 363, at 1025.

367. *See* Field, *supra* note 295, at 953; Weinberg, *supra* note 358, at 851.

368. This seems to be the angle adopted by Professor Weinberg. *See* Weinberg, *supra* note 358, at 807 ("To my mind there is no useful theoretical dividing line that would let us say with confidence, 'On this side we have the common law, and on that we have statutory interpretation.' In all cases along the continuum, courts obviously glean what they can from legislative action or inaction. It is a waste of time to try to isolate the former as somehow 'legitimate' in a way that the latter is not." (footnote omitted)).

369. *See* U.S. CONST. art. III, § 1.

370. *See* John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1653-80 (2001); Manning, *Equity of the Statute*, *supra* note 143, at 36-52 (discussing blurring of judicial and legislative powers in English common law tradition); *id.* at 58-70 (discussing differences in United States constitutional structure); *id.* at 85-102 (tracing early judicial shift away from English interpretive assumptions). As Justice Scalia has noted, common lawmaking is fundamentally inconsistent with the role of a federal judge:

> We live in an age of legislation, and most new law is statutory law. . . . This is particularly true in the federal courts, where, with a qualification so small it does not bear mentioning, there is no such thing as common law. Every issue of law I resolve as a federal judge is an interpretation of text—the text of a regulation, or of a statute, or of the Constitution. . . . The vast majority of what I do is to interpret the meaning of federal statutes and of federal agency regulations. Thus, the subject of statutory interpretation deserves study and attention in its own right, as the principal business of lawyers and judges. It will not do to treat the enterprise as simply an inconvenient modern add-on to the judges' primary role of common-law lawmaking. Indeed, attacking the enterprise with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.

Scalia, *supra* note 291, at 13-14.

powers come only from *constitutional* delegations: Because the Constitution created the structure and functions of our three-branch government, and because nothing in the Constitution's text, structure, or original meaning suggests that antitrust is a proper province for federal common law, the Sherman Act (as it is currently understood) is unconstitutional.

There is a delicious irony in the fact that the Court's last decision to strike down a statute under the nondelegation doctrine came in *Schechter Poultry*.[371] In that case, the Court held the promulgation of codes of unfair competition is exclusively a *legislative* function, and it cannot be delegated to an administrative agency. Funnily enough, it cannot be delegated to courts, either.

V. CONCLUSION

This Article has argued that the federal antitrust regime is unconstitutional. What began as a codification of the common law in 1890 has mutated into a judge-made monstrosity that Senator Sherman and his fellow framers could not recognize. Through this common-lawmaking enterprise, the federal courts have abandoned their obligations of statutory interpretation and usurped the legislative prerogative to make substantive rules of decision, thus imperiling the separation of powers and principles of federalism. The Constitution does not and cannot countenance such a result.

While jettisoning the Sherman Act may superficially seem like a quixotic quest, further reflection reveals that it is neither unimportant nor radical. First, the importance: To the extent one cares about the words Congress uses in its statutory enactments, the federal courts' interpretations of open-ended statutes (like the Sherman Act) inhere a dire threat. Some jurists—such as Justice Jackson—have justified broad federal common-lawmaking powers thusly:

> The federal courts have no general common law . . . . But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not resort to all of the source materials of the common law or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law.[372]

If Justice Jackson is to be believed, textualists run the risk of winning the statutory-interpretation battle and losing the war. That is, forcing federal judges to pay lip-service to the law's language is a meaningless restraint if those judges remain free to import whatever extra-textual results they wish under the auspices of "common lawmaking."[373]

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371. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

372. D'Oench, Duhme & Co. v. Fed. Deposit Ins. Corp., 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

373. As explained above, textualists reject this impulse in areas other than antitrust. *See supra* notes 136-147 and accompanying text. *See also* Easterbrook, *Statutes' Domains*, *supra* note 22, at 539 ("To delve into the structure, purpose, and legislative history of the original statute is to engage in a sort of creation. It is to fill in blanks. And without some warrant—other than the existence of the blank—for a court to fill it in, the court has no authority to decide in favor of the

Second, the modesty: Notwithstanding the import of the Sherman Act, little in the antitrust world would change if and when the federal statute lost its bite.[374] All fifty states have "mini-Sherman Acts," each of which provides significant protections for consumers.[375] And, of course, even without private rights of action to enforce the Sherman Act,[376] Congress would retain the power to define the administrative dimensions of antitrust. Moreover, Congress could statutorily adopt whatever substantive antitrust rules it likes (consistent, of course, with constitutional limits such as the Commerce Clause[377]). The one thing Congress cannot do, however, is to *delegate* that (common-) lawmaking power to federal courts—and the courts are not free to accept it. Under the Sherman Act, as with all federal statutes, the content of the law must come from the law-givers, not its interpreters.

party invoking the blank-containing statute.").

374. This Article has argued that the courts should cabin the scope of the Sherman Act on constitutional basis. However, it also bears emphasizing that the courts could cabin its scope on a *statutory* basis without offending the canons of interpretation. The ordinarily strong form of statutory *stare decisis* does not apply where—as here, *see* Part II.D., *supra*—the precedents create uncertainty by failing to set forth a workable and predictable legal rule. *See* Swift & Co. v. Wickham, 382 U.S. 111, 115-16 (1965), *overruling*, Kesler v. Dept. of Pub. Safety, 369 U.S. 153 (1962). *But see* Lauren Vicki Stark, *The Unworkable Unworkability Test*, 80 N.Y.U. L. REV. 1665 (2005) (arguing courts should jettison the unworkability factor for overruling prior decisions). And the doctrine of stare decisis does not apply where—as here, *see* Part III, *supra*—the prior construction is inconsistent with the Constitution. *See*, *e.g.*, United States v. Booker, 125 S. Ct. 738, 753 (2005), *overruling*, United States v. Dunnigan, 507 U.S. 87 (1993); Lawrence C. Marshall, *"Let Congress Do It": The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 179 (1989).

375. On states' antitrust policies, see ABA ANTITRUST SECTION, STATE ANTITRUST PRACTICE AND STATUTES (3d ed. 2004).

376. Section 4 of the Clayton Act provides a private right of action to enforce the Sherman Act. *See* 15 U.S.C. § 15(a) (providing a private right of action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws").

377. It should be noted, however, that the "limiting" effect of the Commerce Clause is open to debate. *See*, *e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).