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JUSTICE SCALIA AND SHERMAN ACT TEXTUALISM

*Alan J. Meese**

INTRODUCTION

Section 1 of the Sherman Act prohibits contracts “in restraint of trade or commerce among the several States.”¹ How should a proponent of an “original public meaning” approach to statutory interpretation go about determining whether a challenged agreement is, in fact, “in restraint of trade”? The most straightforward approach, it would seem, would be to read “in restraint of trade” as a common-law term of art invoking a rich body of contract law, generated largely by state courts, in place in 1890 when Congress passed the Act. This body of law defined with some precision the types of contracts that courts declined to enforce. By employing this term, it might be said, Congress presumably invoked that body of law and compelled federal courts to ban those restraints, but only those restraints, that common-law courts would have declined to enforce in 1890. Conceptually, then, judicial enforcement of the Sherman Act could be a straightforward exercise in legal research, familiar in some respects to the approach that originalists have taken in other statutory contexts.²

But Justice Scalia took a different approach to the Sherman Act. Most notably, in *Business Electronics Corp. v. Sharp Electronics Corp.*, the Justice rejected the claim that the Sherman Act simply banned a fixed list of agreements deemed unenforceable in 1890.³ Instead, he said, section 1 of the Act

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1 Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)).

2 Cf. *Moskal v. United States*, 498 U.S. 103, 121–26 (1990) (Scalia, J., dissenting) (invoking pre-statutory interpretations of a statutory term of art as establishing the meaning of the contested term); see also *infra* notes 86–101 and accompanying text (discussing other examples).

3 485 U.S. 717, 732 (1988).

bans agreements that produce a “particular economic consequence.”⁴ That consequence was the exercise of market power to the detriment of consumers.⁵ Moreover, he said, both the actual and perceived impact of identical agreements can differ “in varying times and circumstances.”⁶ Thus agreements deemed “in restraint of trade” (by common-law courts) and thus contrary to the Sherman Act in 1890 can become perfectly lawful in 1990, despite the lack of any intervening change in the statutory text. Under this approach, adjudication under the Sherman Act is less an exercise in historical research than an opportunity for microeconomic analysis, drawing upon recent law review articles instead of nineteenth-century state reports. Indeed, the account of the meaning of the Sherman Act sketched and applied in *Business Electronics* replicated that advocated by leading members of the Chicago School of antitrust analysis, particularly Robert Bork and Frank Easterbrook. Both jurists, and the Chicago School in general, have read the Sherman Act to articulate a standard, “consumer welfare,” delegating to courts authority to employ economic analysis to determine whether a challenged agreement reduces such welfare and thus violates the Sherman Act.

Some scholars claim that Justice Scalia’s Chicago-style antitrust jurisprudence contradicted his professed commitment to reading statutes according to their original public meaning. At least as practiced by the Justice, they say, an original public meaning approach would require courts to treat the term “in restraint of trade” as invoking a set of fixed common-law rules, not the sort of economic standard the Justice endorsed in *Business Electronics*. These rules, they say, did not reflect concern for consumer welfare but instead values such as fairness and individual autonomy and thus often diverged from the result that application of an economic standard would produce. These same scholars contend that the original public meaning approach necessarily precludes the sort of dynamic approach Justice Scalia endorsed in *Business Electronics*. That is, despite section 1’s invocation of the common law, judges generating section 1 jurisprudence must ignore advances in economic theory, even if such advances entirely undermine the economic premises of particular common-law rules. Indeed, some such scholars contend that Justice Scalia’s approach to section 1 exemplifies the approach that jurists take to so-called “super statutes” as opposed to mere “ordinary legislation” and thus departs from his professed method of statutory interpretation.

This Essay offers a defense of Justice Scalia’s approach to the Sherman Act. For one thing, the approach broke little new ground, either in general or as applied in cases such as *Business Electronics*. Instead, such an approach was a faithful implementation of *Standard Oil Co. of New Jersey v. United States*, which announced section 1’s “Rule of Reason.”⁷ After its own lengthy exegesis of the common law, *Standard Oil* announced that the term “restraint of

4 *Id.* at 731.

5 See *infra* notes 48–50 and accompanying text (explaining that *Business Electronics* treated such an exercise of market power as the sole cognizable antitrust harm).

6 *Bus. Elecs.*, 485 U.S. at 731.

7 221 U.S. 1, 61–62 (1911).

trade” does not refer to a set of fixed rules, but instead directs courts to apply a “*standard of reason*” when evaluating challenged restraints.⁸ That is, courts should ask whether a challenged agreement produces monopoly or the consequences of monopoly, namely, higher prices, reduced output, and/or reduced quality. A broader reading, the Court said, would ban contracts and combinations protected by liberty of contract.⁹ Moreover, in making this assessment, *Standard Oil* said, courts should recognize that “economic conceptions” change over time, and apply the latest conception when evaluating the impact of a restraint.¹⁰

Of course, Justice Scalia was sometimes willing to abandon longstanding precedent if he believed that that precedent deviated significantly from a correct reading of the relevant legal text. Thus, *stare decisis* is not a categorical defense to claims that the Justice deviated from his stated approach to interpretation in the Sherman Act context. This Essay therefore attempts to test various scholars’ claims that an original public meaning approach to the Sherman Act produces statutory meaning different from that announced in *Business Electronics* and, for that matter, *Standard Oil*. The Essay rejects the Supreme Court’s apparent claim that the absurdity canon supports *Standard Oil*’s reading of section 1, as the statutory text does not satisfy Justice Scalia’s standard for declaring a term “absurd.” Nor would most modern proponents of original meaning embrace *Standard Oil*’s invocation of liberty of contract as a rationale for reading the statute narrowly.

This leaves the common law as the last possible support for *Standard Oil*’s Rule of Reason. Modern scholars, as already noted, (implicitly) claim that *Standard Oil* misread the common law, mistakenly imputing to that jurisprudence a purely economic standard. However, evaluation of the claim that *Business Electronics* takes a nontextual approach does not require us to adjudicate this dispute about the meaning of the common law. As this Essay shows, the common law was not the only body of law relevant to the meaning of the term “restraint of trade or commerce” when Congress passed the Sherman Act in 1890. Instead, the term “restraint of . . . commerce among the several states” appeared several times in the Court’s Commerce Clause jurisprudence during the 1880s.¹¹ That is, the Court employed this term as a synonym for (state) “regulation” of commerce among the several states, regulation that Congress had implicitly preempted according to what we now call the Court’s “dormant Commerce Clause” jurisprudence. According to that well-developed body of law, a state statute was such a restraint or regulation of commerce among the several states if it “directly” burdened or “directly obstructed” interstate commerce. Regulations that imposed so-called “indirect restraints” of such commerce, by contrast, fell within states’ exclusive authority to impose. By enforcing this distinction, the Court created a regime of free trade among the states, thereby preventing states from

8 *Id.* at 60 (emphasis added).

9 *See id.*

10 *Id.* at 55.

11 *See infra* Part I.

interfering with the competitive allocation of resources and exploiting consumers.

The Court's pre-Sherman Act Commerce Clause jurisprudence and its distinction between direct and indirect restraints provides a potent source of meaning for the term "restraint of trade or commerce." Congress, of course, possessed no general authority to generate a common law governing private contracts in 1890. Instead, the Sherman Act was, on its face, an exercise of the power to regulate "[c]ommerce . . . among the several States,"¹² a power that consisted of the authority to preempt "regulations" or "restraints" of interstate commerce. The Court's dormant Commerce Clause jurisprudence, which defined that category of state-imposed restraints that Congress had implicitly preempted, therefore provided a ready definition of the term "restraint of trade or commerce among the several states," and a definition that implements the then-extant limits on congressional power. That is, the term "restraint of trade or commerce" could refer to those contracts or agreements that "directly" obstruct or burden trade and thus, like analogous state statutes, impermissibly regulate commerce and fall within Congress's authority for that reason. This definition, of course, would exclude so-called "indirect" burdens or obstructions from the reach of the Act, leaving such agreements exclusively within the jurisdiction of the states, even if such agreements were otherwise unenforceable according to the common law of 1890.

Of course, identification of one possible source of meaning does not thereby exclude other possibilities. Instead, such identification merely requires the interpreter to choose between the competing sources identified. Such a choice is relatively straightforward in this context, however. After all, the "direct/indirect" taxonomy was not merely linguistic. It also communicated a distinction of constitutional dimension, denying Congress authority over agreements that merely restrained trade indirectly. Beginning with this premise, reading the Act to invoke the common law of contracts would be awkward at best. At worst, reading the Act to incorporate the common law of contracts, even those connected in one way or another to interstate commerce, is an anachronism, as Congress would have no authority over those agreements that restrained commerce "indirectly." Thus, reading the term "contract[s] . . . in restraint of trade" to codify the common law of contracts would purport to ban entire categories of agreement over which Congress possessed no authority in the first place.

The Supreme Court took just this approach in no fewer than five early decisions interpreting the Act during the 1890s.¹³ While some have claimed that the Court invoked the common law, the Justices in fact read the direct/indirect distinction into the Act, expressly holding that section 1 only bans

12 U.S. CONST. art. 1, § 8, cl. 3.

13 See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *Hopkins v. United States*, 171 U.S. 578 (1898); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

restraints that “direct[ly] and immediate[ly]” regulate, and thus restrain trade or commerce among the several states.¹⁴ Moreover, when deciding whether a restraint was direct or indirect, the Court employed a standards-like approach, examining the nature of the industry and the economic purposes of the restraint.¹⁵

I. SECTION 1’S EVOLVING RULE OF REASON

Passed in 1890, section 1 of the Sherman Act prohibits “contract[s], combination[s] . . . or conspirac[ies], in restraint of trade or commerce among the several States.”¹⁶ Section 2 prohibits “monopoliz[ation]” of “any part of the trade or commerce among the several States.”¹⁷ During the Act’s first two decades, the Supreme Court read the Act in an apparently formalistic fashion, holding that the Act prohibited only “direct” restraints of interstate commerce, while leaving so-called “indirect” restraints unscathed.¹⁸ In 1911, however, the Court shifted course, at least rhetorically. In *Standard Oil Co. of New Jersey v. United States*, the Court embarked upon a lengthy exegesis of the history of judicial and legislative treatment of trade restraints.¹⁹ This history, the Court said, established that Congress meant courts to employ “the standard of reason” when determining whether an agreement is “in restraint of trade” within the meaning of the Act.²⁰ Application of the statute to “every case within its literal language,” the Court said, “would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce.”²¹ By giving the statute a “reasonable construction,” then, the Court avoided applications of the stat-

14 See, e.g., *Addyston Pipe & Steel Co.*, 175 U.S. at 234; *Hopkins*, 171 U.S. at 592; see also *infra* notes 162–68 and accompanying text (collecting and discussing additional citations).

15 See *infra* notes 169–79 and accompanying text.

16 Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)).

17 Sherman Act § 2, 26 Stat. at 209.

18 See *Hopkins*, 171 U.S. at 581, 594 (holding that the Act did not ban rules promulgated by a cattleman’s association because such restraints were “indirect”); *Joint Traffic Ass’n*, 171 U.S. 505 (holding that the Act prohibited horizontal price fixing between interstate railroads that had received special benefits and privileges from various states); *id.* at 568–69 (opining that the Act did not prohibit so-called “indirect” restraints of interstate commerce); *E.C. Knight Co.*, 156 U.S. at 16–17 (holding that a merger creating a national sugar monopoly was merely an indirect restraint and thus beyond the scope of the Act).

19 221 U.S. 1, 49–62 (1911).

20 *Id.* at 60 (“Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.”); *id.* at 64 (referring to the statute as “clearly fixing a standard”).

21 *Id.* at 63; see also *United States v. Am. Tobacco Co.*, 221 U.S. 106, 180 (1911) (“[*Standard Oil* held] that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render diffi-

ute that would infringe upon liberty of contract, which the Court had recognized in then-recent decisions such as *Lochner v. New York*²² and *Adair v. United States*.²³

Such a “Rule of Reason,” of course, requires courts to determine the content of the “standard of reason” to be applied. *Standard Oil* itself suggested that the common law’s Rule of Reason required courts to ask whether a restraint produces “monopoly” or “the consequences of monopoly,” which the Court defined as higher prices, reduced output, or lower quality.²⁴ The Court also endorsed a flexible approach to ascertaining the economic impact of restraints and thus their status under the Rule of Reason, discussing with approval common-law decisions that had refashioned doctrine in light of “more accurate economic conceptions.”²⁵ In the end, the Court said, the Rule of Reason required judges to employ “the light of reason” to determine whether a challenged agreement offended the “public policy embodied in the statute,” a process that, while applying a fixed normative standard, could produce different doctrinal results as “economic conceptions” evolved over time.²⁶

cult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.”).

22 198 U.S. 45 (1905).

23 208 U.S. 161 (1908); see also RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888–1992: HISTORY, RHETORIC, LAW* 58 (1996) (“*Standard Oil* . . . can be understood as closing *Lochner’s* circle of individual liberty.”); Alan J. Meese, *Standard Oil as Lochner’s Trojan Horse*, 85 S. CAL. L. REV. 783, 787–801 (2012) (explaining that *Standard Oil’s* Rule of Reason implemented *Lochner*-like protection for liberty of contract).

24 *Standard Oil*, 221 U.S. at 56–57 (explaining the development of common law equating “restraint of trade” with “contracts or acts which it was considered had a monopolistic tendency, especially those which were thought to unduly diminish competition and hence to enhance prices—in other words, to monopolize”); *id.* at 61 (referring to “the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade”); *id.* at 52 (describing consequences of monopoly as: “1. The power which the monopoly gave to the one who enjoyed it to fix the price and thereby injure the public; 2. The power which it engendered of enabling a limitation on production; and, 3. The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production and sale”); see also Alan J. Meese, *Price Theory, Competition, and the Rule of Reason*, 2003 U. ILL. L. REV. 77, 83–89 (describing *Standard Oil’s* focus on price, output, and quality). See generally Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 801–05 (1965) (discussing *Standard Oil’s* Rule of Reason).

25 *Standard Oil*, 221 U.S. at 55, 58; see also HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 69 (4th ed. 2011) (explaining that pre-Sherman Act common law reflected “rules of classical political economy concerning the nature of competition and the efficiency consequences of various anticompetitive practices”).

26 *Standard Oil*, 221 U.S. at 64; see also *id.* at 58–60 (discussing with approval American common law and legislation that “depend[ed] . . . upon the economic conceptions which

Subsequently the Court changed course, however, suggesting at various times during the twentieth century that courts should include certain noneconomic considerations, such as autonomy and fairness, in the “standard of reason” as well.²⁷ This normative shift, combined with economic theory suspicious of departures from atomistic competition, produced the so-called “inhospitality tradition” of antitrust, pursuant to which courts condemned numerous nonstandard agreements that produced no harm and often produced significant benefits.²⁸ While nominally applications of *Standard Oil’s* Rule of Reason,²⁹ these decisions substituted an entirely different criterion of reasonableness, condemning many agreements simply because they restricted rivalry and departed from atomistic competition.³⁰

The Chicago School began to challenge this interventionist orthodoxy in the 1950s. This challenge had three components: normative, scientific, and jurisprudential. As a normative matter, Chicagoans expressed a prefer-

obtained at the time when the legislation was adopted or judicial decision was rendered” with the result that “contracts or acts were at one time deemed to be of such a character as to justify the inference of wrongful intent which were at another period thought not to be of that character”).

27 See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 606–08 (1972) (banning ancillary horizontal restraints between modest market participants despite finding that such restraints produced no harm and improved interbrand competition); *id.* at 610 (holding that the Sherman Act is the “Magna Carta of free enterprise”); *Albrecht v. Herald Co.*, 390 U.S. 145, 151–53 (1968) (banning maximum resale price maintenance as unlawful per se despite the practice’s tendency to reduce consumer prices because, *inter alia*, the practice interfered with the “freedom of traders”), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 210, 214 (1959) (rejecting the lower court’s holding that impact on price, output, or quality was a *sine qua non* of a section 1 violation); *id.* at 213 (declaring a group boycott unlawful per se because it interfered with the plaintiff’s “freedom to buy appliances in an open competitive market and [drove] it out of business as a dealer in the defendants’ products”); *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 239–41 (1918) (announcing a multifactor rule of reason test requiring courts to consider, *inter alia*, the impact of the challenged restraint on the length of the work day for the parties that imposed the restraint).

28 See Frank H. Easterbrook, *Is There A Ratchet in Antitrust Law?*, 60 TEX. L. REV. 705, 715 (1982) (describing the so-called “inhospitality tradition” of antitrust, whereby “courts . . . str[uck] down business practices that were not clearly procompetitive. In this tradition an inference of monopolization followed from the courts’ inability to grasp how a practice might be consistent with substantial competition. The tradition took hold when many practices were genuine mysteries to economists, and monopolistic explanations of mysteries were congenial. The same tradition emphasized competition in the spot market.”); Meese, *supra* note 24, at 124 n.245 (describing the origin of the term “inhospitality tradition”).

29 See, e.g., *Klor’s, Inc.*, 359 U.S. at 211 (invoking *Standard Oil* with approval as a “landmark case” and purporting to apply it).

30 See, e.g., *id.* at 210 (finding a practice unlawful per se despite the absence of any allegation that the contract impacted “the price, quantity, or quality offered the public . . . [or] that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality” (quoting *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 255 F.2d 214, 230 (9th Cir. 1958))).

ence for wealth maximization as the exclusive goal of antitrust regulation.³¹ As a scientific matter, Chicago critiqued numerous economic assumptions that drove inhospitality caselaw, assumptions that produced hostility toward nonstandard contracts, that is, agreements that departed from atomistic competition.³² Finally, as a jurisprudential matter, Chicagoans claimed that the Sherman Act itself required courts to implement Chicago's preferred normative standard,³³ and also authorized courts to adjust antitrust doctrine over time in response to changes in economic theory.³⁴ Most famously, of course, Robert Bork argued that the legislative history of the Sherman Act established that Congress meant to ban only those restraints that reduced "consumer welfare," which Bork equated with "consumer want satisfaction" or total welfare.³⁵ Among other things, Bork contended that congressional debates articulated and endorsed a fictitious version of the common law con-

31 See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978). As I have explained elsewhere, the so-called Harvard School of antitrust analysis embraced the same "total welfare" normative premise derived from neoclassical economics, beginning in the 1950s. See Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659 (2010). However, the Harvard School's reliance upon neoclassical price theory to interpret the impact of various nonstandard agreements led it to condemn numerous agreements that economists now interpret as beneficial or benign. See, e.g., Meese, *supra* note 24, at 122–23 (describing such reliance on price theory by leading members of the Harvard School during the 1950s and 1960s).

32 See, e.g., BORK, *supra* note 31, at 365–81 (tying); Bork, *supra* note 24; Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984); Victor P. Goldberg, *The Law and Economics of Vertical Restrictions: A Relational Perspective*, 58 TEX. L. REV. 91 (1979); Howard P. Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960); see also Alan J. Meese, *Robert Bork's Forgotten Role in the Transaction Cost Revolution*, 79 ANTITRUST L.J. 953 (2014).

33 See, e.g., BORK, *supra* note 31, at 72–73; RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 212–17 (1976); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) (contending that the Sherman Act bans only those restraints that reduce overall "consumer welfare" or "consumer want satisfaction").

34 See, e.g., Bork, *supra* note 33, at 48 ("Courts charged by Congress with the maximization of consumer welfare are free to revise not only prior judge-made rules but, it would seem, rules contemplated by Congress. The Sherman Act defines the class of situations to which it may be applied, but it does not freeze into statutory commands the rules of legality about predation, mergers, and so forth, that many congressmen contemplated. Sherman and others clearly believed that they were legislating a policy and delegating to the courts the elaboration of subsidiary rules. Nothing in the legislative history or in the language of the statute suggests that courts are required to hold any specific type of agreement or behavior unlawful regardless of its probable impact upon consumers. In terms of the 'law,' therefore, the Sherman Act tells judges very little. A judge who feels compelled to a particular result regardless of the teachings of economic theory deceives himself and abdicates his delegated responsibility. That responsibility is nothing less than 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.").

35 *Id.* at 7 ("[T]he policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction.").

cerned solely with consumer welfare as Bork defined it.³⁶ Courts implementing this command, he said, should not feel bound by “prior judge-made rules” or even “rules contemplated by Congress.”³⁷ Instead, he said, courts should accept “the awesome task of continually creating and recreating the Sherman Act out of [their] understanding of economics and [their] conception of the requirements of the judicial process.”³⁸ Other Chicagoans expressed their agreement with Bork’s assessment of the meaning of the Sherman Act as well as Bork’s contention that the Act authorized courts to adjust antitrust doctrine in light of modern economic theory.³⁹

The Chicago School has won the day with respect to most antitrust questions. While some have characterized this victory as a triumph of economics or ideology over law, Chicago seems simply to have resurrected *Standard Oil*’s version of the Rule of Reason, with its exclusive emphasis on the economic effects of challenged restraints and its admonition that courts ascertain those effects “in the light of reason” sensitive to changed economic conceptions.⁴⁰ Indeed, even before his famous examination of the Sherman Act’s legislative history, Robert Bork concluded that *Standard Oil* articulated a Rule of Reason containing a “dynamic principle” and focused on banning restraints that produced monopoly or the consequences thereof.⁴¹

36 See *id.* at 36–37 (“Sherman and the others also repeatedly stated what the common law was. The fact that their statements did not accurately mirror that confused body of precedent does not obscure what they intended to convey. It is clear from the debates that ‘the common law’ relevant to the Sherman Act is an artificial construct, made up for the occasion out of a careful selection of recent decisions from a variety of jurisdictions plus a liberal admixture of the senators’ own policy prescriptions. It is to this ‘common law,’ holding full sway nowhere but in the debates of the Fifty-first Congress, that one must look to understand the Sherman Act.”); see also *id.* at 36 (“The common law of restraints of trade . . . has been a variable growth, composed of diverse and even contradictory strains, many of them obviously irrelevant to the concerns of the Sherman Act.”); Robert H. Bork, *Ancillary Restraints and the Sherman Act*, 15 A.B.A. ANTITRUST SEC. 211, 212–14 (1959) (contending that the common law enforced some ancillary restraints that restricted rivalry with no offsetting benefits and thus harmed consumers).

37 Bork, *supra* note 33, at 48.

38 *Id.*

39 See, e.g., Easterbook, *supra* note 28, at 706 (“The Sherman and Clayton Acts authorized the Supreme Court to invent and enforce a law of restraint of trade in the common law fashion. The Court has consistently drawn on the common law tradition. The common law evolves as circumstances change and learning grows.” (footnotes omitted)).

40 See *supra* notes 19–26 and accompanying text.

41 See Bork, *supra* note 24, at 804 (concluding that *Standard Oil* announced “a rule of reason keyed to the avoidance of the consequences of monopoly and had placed upon the courts the duty of performing economic analysis to determine in which acts and agreements the evils of monopoly were present”); *id.* at 805 (“It should be stressed that White’s test was phrased wholly in economic terms, giving no evidence of concern for possibly competing values. A corollary of this value choice is that the law should develop according to the progress of economic thought. The law is, therefore, neither made inflexible by controlling precedent nor required to change only through abrupt shifts of basic doctrine. Thus a court could alter the law without repudiating the theory underlying prior decisions by explaining that those decisions had misconceived the economic effect of particular

II. JUSTICE SCALIA'S EMBRACE OF THE CHICAGO SCHOOL

Justice Scalia embraced the Chicago/*Standard Oil* approach to antitrust questions. His opinions in *Business Electronics Corp. v. Sharp Electronics Corp.*,⁴² *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,⁴³ and *Eastman Kodak Co. v. Image Technical Services, Inc.*,⁴⁴ all embraced the assumption that the Sherman Act banned only those restraints or other conduct that produced overall economic harm.⁴⁵ Each decision also employed Chicago-style reasoning to reach doctrinal results propounded or endorsed by leading Chicago figures.⁴⁶ *Business Electronics* in particular embraced Chicago's normative, scientific, and jurisprudential facets. For instance, in language reminiscent of *Standard Oil's* reference to evolving economic conceptions, the Justice expressly opined that antitrust courts could approve agreements that 1890 courts condemned, claiming that the Sherman Act adopted the common law governing trade restraints "along with its dynamic potential."⁴⁷ As a result, he said, courts should ask whether challenged restraints produce "a particular economic consequence," and not, he said, whether such agreements were enforceable or not when Congress passed the Act.⁴⁸ Moreover,

agreements or practices."); *id.* at 802 (explaining that in *Standard Oil* "a dynamic principle was built into the rule of reason so that the law could change as economic understanding progressed"). Bork did not, it should be noted, mention *Standard Oil's* invocation of liberty of contract. See Meese, *supra* note 23, at 800–01 (discussing Bork's failure to mention *Standard Oil's* invocation of liberty of contract).

42 485 U.S. 717 (1988).

43 540 U.S. 398 (2004).

44 504 U.S. 451 (1992).

45 Indeed, in *Trinko*, the Justice went so far as to conclude that the possession of monopoly power in the short run did not, absent some anticompetitive conduct, violate section 2. See *Trinko*, 540 U.S. at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct."). In so doing, the Justice mimicked the statement in *Standard Oil* that the Sherman Act does not prohibit "monopoly in the concrete" but only that monopoly obtained by misuse of the right to contract. See 221 U.S. 1, 62 (1911) (noting "the omission of any direct prohibition against monopoly in the concrete," and concluding that a monopoly would not survive in the long run unless a "right to make unlawful contracts having a monopolistic tendency were permitted").

46 See, e.g., *Eastman Kodak*, 504 U.S. at 486–90 (Scalia, J., dissenting).

47 See *Bus. Elecs.*, 485 U.S. at 732 ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890." (citing, *inter alia*, BORK, *supra* note 31, at 37)); see also Bork, *supra* note 33, at 48 (opining that the Sherman Act authorized courts "to revise not only prior judge-made rules but, it would seem, rules contemplated by Congress").

48 See *Bus. Elecs.*, 485 U.S. at 731 ("The term 'restraint of trade' in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in

and again like *Standard Oil*, he opined that the only relevant consequence that could require condemnation under the Rule of Reason was purely economic, namely, the exercise of market power detrimental to consumers.⁴⁹ Finally, relying on the (scientific) work of Robert Bork and Richard Posner, he concluded that agreements whereby manufacturers ensured “the efficient marketing of their products,” by combating retailer free riding, did not produce that prohibited consequence but instead furthered interbrand competition, “the primary concern of the antitrust law[s].”⁵⁰

In addition to those antitrust opinions he authored himself, the Justice joined several opinions that embraced a similar approach, including opinions that invoked the Justice’s opinion in *Business Electronics*. For instance, the Justice joined Justice O’Connor’s unanimous opinion in *State Oil Co. v. Khan*, which overturned the per se rule against maximum resale price maintenance announced in 1968.⁵¹ In *Khan* the Court unanimously embraced modern economic critiques of the per se ban on maximum resale price maintenance.⁵² The Court cited *Business Electronics* for the proposition that analysis of vertical restraints should be guided by the assumption that interbrand competition is the primary concern of the antitrust laws.⁵³ Invoking the views of Robert Bork, Frank Easterbrook, Richard Posner, and others sympathetic to the Chicago School, the Court concluded that the ban prevented efficient marketing practices that furthered interbrand competition.⁵⁴ It was not enough that *Albrecht*’s per se rule was incorrect, however. Instead, the Court had to decide whether considerations of stare decisis nonetheless required retention of the rule. The Court conceded that stare decisis generally had a stronger claim in the statutory context and in cases involving property and contract rights.⁵⁵ Still, the Court concluded that such considerations were less potent in the antitrust context, because “Congress ‘expected the courts to give shape to the statute’s broad mandate by drawing

varying times and circumstances. The changing content of the term ‘restraint of trade’ was well recognized at the time the Sherman Act was enacted.”)

49 See *id.* at 725–26 (treating potential to facilitate cartelizing as the only potential harm from vertical restraints); cf. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (White, J., concurring in the judgment) (contending that a restraint’s restriction of dealer autonomy was a cognizable antitrust harm); *id.* at 67 (approving previous decisions purportedly protecting the “freedom of the businessman to dispose of his own goods as he sees fit”); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (concluding that a restraint’s supposed impact on the “freedom” of individual traders was a cognizable antitrust harm), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997).

50 See *Bus. Elecs.*, 485 U.S. at 724–25 (stating that “interbrand competition [is] ‘the primary concern of antitrust law’” (quoting *Continental T.V.*, 433 U.S. at 52 n.19)); *id.* at 726 (reiterating that promotion of interbrand competition is the primary consideration of the antitrust laws).

51 522 U.S. at 18. *Khan*, of course, overruled *Albrecht*, 390 U.S. 145.

52 See *Khan*, 522 U.S. at 15–22.

53 *Id.* at 15 (citing *Bus. Elecs.*, 485 U.S. at 717, 726).

54 See *id.* at 15–16 (citing, *inter alia*, BORK, *supra* note 31, at 281–82; Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 887–90 (1981)).

55 See *id.* at 15–22.

on common-law tradition.’”⁵⁶ Quoting *Business Electronics*, the Court opined that the Sherman Act “invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”⁵⁷ The Court also repeated *Business Electronics*’ assertion that “‘different sorts of agreements’ may amount to restraints of trade ‘in varying times and circumstances.’”⁵⁸

Perhaps most notably, the Justice joined the Court’s 2007 majority opinion in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, supplying one of the five votes for that hotly contested decision.⁵⁹ *Leegin*, of course, overruled *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, repudiating the Sherman Act’s ban on minimum resale price maintenance that had stood for ninety-six years.⁶⁰ While Justice Scalia did not write separately in *Leegin*, his voice was nonetheless evident throughout the opinion. Indeed, Justice Kennedy’s majority opinion cited or quoted *Business Electronics* over ten times,⁶¹ including for the propositions that: (1) the Sherman Act authorizes courts to adjust antitrust doctrine in a common-law fashion in light of changed economic conceptions and (2) the standard governing such adjustment is one of economic efficiency.⁶² Moreover, the Justice endorsed *Leegin*’s description of the Sherman Act as authorizing courts to create a common law of antitrust in his recent treatise on legal interpretation.⁶³

56 See *id.* at 20–21 (quoting Nat’l Soc’y of Prof’l Eng’rs v. United States, 435 U.S. 679, 688 (1978)).

57 See *id.* at 21 (“As we have explained, the term ‘restraint of trade,’ as used in § 1, also ‘invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.’” (quoting *Bus. Elecs.*, 485 U.S. at 732)).

58 See *id.* at 21 (quoting *Bus. Elecs.*, 485 U.S. at 731–32).

59 551 U.S. 877, 880 (2007); *id.* at 908–29 (Breyer, J., dissenting) (questioning the Court’s assessment of the potential harms and benefits of minimum rpm and contending that considerations of stare decisis required adherence to the longstanding per se rule against minimum rpm).

60 *Id.* at 882 (majority opinion).

61 See *id.* at 886–905.

62 See, e.g., *id.* at 888 (“[T]he Sherman Act’s use of ‘restraint of trade’ ‘invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890.’” (quoting *Bus. Elecs.*, 485 U.S. at 732)); *id.* at 894 (proposing that per se condemnation is only appropriate where the challenged agreement “always or almost always tend[s] to restrict competition and decrease output” (quoting *Bus. Elecs.*, 485 U.S. at 723)); *id.* at 887–900 (citing *Business Electronics* several times when discussing various positive and negative economic effects of minimum resale price maintenance).

63 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 96 (2012) (“[I]t is possible, though rare, for a statute to leave a matter to future common-law development by the courts—either expressly or (where the statute deals with a traditional field of common-law jurisprudence) by implication. An example of the latter is the Sherman Act, whose reference to ‘restraint of trade’ has always been taken to refer to activity (so denominated) that the common law made unlawful—and to authorize continuing development of that common law by federal courts.” (citing *Leegin*, 551 U.S. at 888)).

Unlike Robert Bork, the Justice did not invoke the Sherman Act's legislative history in support of the approach he articulated in *Business Electronics*.⁶⁴ After all, Justice Scalia's textualism excludes such reliance on such legislative history as a guide to the meaning of the Act.⁶⁵ Indeed, efforts by Bork and others to derive meaning from the legislative history of the Act exemplify some of the shortcomings of such exercises that the Justice identified.⁶⁶ As a textualist, the Justice also disclaimed any status as a common-law judge.⁶⁷ At

64 See Bork, *supra* note 33, at 11. But see Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 844 (2014) ("Subjective congressional intent, as manifested in legislative history, mattered far less than leading criticisms of Bork suggest. Bork's arguments about the purposes of the antitrust laws were primarily grounded in a conventional suite of interpretive methodologies, including textual analysis, a 'whole code' reading of the antitrust laws, critical analysis of leading judicial expositors, and arguments about judicial restraint. With the emergence of textualism and 'objective' approaches to statutory interpretation and the continued discussion about the value and meaning of judicial restraint, Bork's arguments should be understood as significantly broader than the legislative history claims that have figured almost exclusively in the criticisms of his arguments in favor reading the antitrust laws to advance a consumer welfare objective."). It is perhaps noteworthy that Bork acknowledged that Justice Scalia was "particularly helpful" with the final chapter of *The Antitrust Paradox*. See BORK, *supra* note 31, at xvi. That chapter included several pages examining "Social Policy and the Lawmaking Process," including the process of judicial exposition of the meaning of the Sherman Act. See *id.* at 408–18.

65 See ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 29–37 (Amy Gutmann ed., 1997).

66 See, e.g., *id.*; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998). For instance, like many who invoke the Act's legislative history, Bork invokes various floor statements by senators, including Senator Sherman, critiquing or praising various bills introduced by Sherman. Bork also invokes various common-law decisions discussed by Sherman as exemplifying a "highly artificial version of the common law" that exemplifies the operative principle contained in the Act. Bork, *supra* note 33, at 13.

None of Sherman's proposals ever became law, however. Instead, the Senate re-assigned jurisdiction over Sherman's bill to the Judiciary Committee, which rewrote the bill in its entirety. See WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* 94 (Random House 1965) (1954) ("The Judiciary Committee took the matter out of Sherman's hands, much to his regret and anger."); HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 198–99 (1955). Sherman both excoriated the new bill and signaled his support on the same day. See LETWIN, *supra*, at 94. Bork recognized this potential disconnect but contended that the bill that ultimately passed reflected the very same policy as the various versions that Sherman introduced. See Bork, *supra* note 33, at 15–17; see also LETWIN, *supra*, at 94 (contending that the final statutory language was "in broad outline the same as Sherman's original bill"). Other scholars disagree after reviewing the very same legislative history Bork reviewed. See, e.g., PERITZ, *supra* note 23, at 20–26 (concluding that the final amendment narrowed the scope of the Act compared to prior drafts); MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890–1916*, at 89–91 (1988) (same).

67 See SCALIA, *supra* note 65, at 14 ("[A]ttacking the enterprise [of statutory interpretation] with the Mr. Fix-it mentality of the common-law judge is a sure recipe for incompetence and usurpation.").

first glance, these interpretive commitments are difficult to square with the Justice's jurisprudential embrace of Chicago antitrust or for that matter *Standard Oil's* Rule of Reason. The Chicago School, after all, is just that, a school of antitrust thought. Moreover, the Sherman Act is a statute, and one passed long before there was a Chicago School. The text of the Act does not mention efficiency, competition, prices, output, or any synonyms of these terms. Nor does it purport to authorize judges or any other officials to adjust the meaning of "in restraint of trade" in response to changing economic theory or anything else. If, as the Justice passionately argued, federal judges must abjure both legislative history and a common-law approach to reading and applying statutes, how can they engraft onto the Sherman Act concepts such as "allocative efficiency" and "free riding"? Moreover, how can such judges condemn restraints deemed perfectly lawful by the Congress that passed the Act or validate those the 1890 Congress would have condemned? To put a finer point on things, how does the "ordinary public meaning" of the term "in restraint of trade" in 1890 empower unelected judges to transform the Chicago School of antitrust analysis—or any other school for that matter—into federal law?

Some scholars have noticed what they believe to be a disconnect between Justice Scalia's professed method of statutory interpretation and his embrace of Chicago's antitrust prescriptions.⁶⁸ Most notably, Daniel Farber and Brett McDonnell contend that it is simply not possible to reconcile "modern antitrust," including *Business Electronics*, with Justice Scalia's professed commitment to a "textual" method of interpretation. In particular, these scholars contend that the term "in restraint of trade" was, in 1890, a legal term of art laden with meaning developed by common-law courts, including the Supreme Court itself.⁶⁹ Justice Scalia's brand of textualism, they say, would require the Court to read the phrase "in restraint of trade" to incorporate that meaning, banning those contracts deemed unenforceable at common law when Congress passed the Sherman Act.⁷⁰ Embrace of the Chicago School approach, they say, contradicts this result. To be precise, these scholars assert that the common law of 1890 did not embrace efficiency or even the welfare of purchasers as the exclusive animating principle in such cases.⁷¹ Instead, they claim that the "common law's goals were fairness and economic independence" and that the common law "was frequently indiffer-

68 See 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 (2005); see also Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1250 (1993) (suggesting that *Business Electronics'* endorsement of "consumer welfare" as the animating principle of antitrust is, as a historical matter, "on weak ground").

69 See Farber & McDonnell, *supra* note 68, at 660; see also, e.g., *Fowle v. Park*, 131 U.S. 88 (1889) (exercising diversity jurisdiction over an action alleging breach of contract); *Gibbs v. Consol. Gas Co. of Balt.*, 130 U.S. 396 (1889) (same); *Or. Steam Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64, 66 (1873) (exercising appellate jurisdiction over a territorial court's adjudication of a contract dispute).

70 See Farber & McDonnell, *supra* note 68, at 640.

71 See *id.* at 633–35.

ent to whether the restraint of trade involved any significant portion of the market.”⁷² These scholars also contend that the Justice’s brand of textualism would probably preclude courts from taking a dynamic approach to this common law, thereby freezing into place whatever rules governing trade restraints were extant in 1890.⁷³ If dynamism *is* appropriate, they say, federal courts should defer to the common law developed by state courts instead of developing such law themselves.⁷⁴ Justice Scalia’s approach to the contrary, they say, confers absolute discretion on courts and exemplifies “judicial activism,”⁷⁵ and “raw pursuit of policy outcomes.”⁷⁶

Farber and McDonnell are not lonely voices. Indeed, they invoke previous claims to the same effect by William Eskridge and John Ferejohn.⁷⁷ These scholars contend that courts have treated the Sherman Act as one of a handful of “super statutes” of quasi-constitutional dimension that differ in various ways from run of the mill “ordinary legislation.”⁷⁸ Super statutes, it is said, differ from ordinary legislation in a variety of ways, not the least of which is the approach courts take to interpreting them. While courts often apply textual methods to discern the meaning of ordinary legislation, they purportedly approach super statutes in a purposive manner, reading such

72 See *id.* at 632; see also, e.g., Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-Examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 369 (1993) (“[I]n the common law agreements or combinations in restraint of trade had a meaning for state courts that cannot be reconciled with the consumer-welfare hypothesis. As a number of authors make clear, the application of this term nearly always referred to limiting or prohibiting someone from engaging in a particular trade or business. The common law distinguished between lawful and unlawful restraints of trade by the extent or reasonableness of the restraint. On the one hand, the potential purchaser of a business might balk if the seller could immediately start another, competing enterprise. On the other hand, the courts would not sanction a permanent restraint on an individual’s ability to earn a living. The common law clearly applied the term ‘restraint of trade’ to relations among producers.” (footnotes omitted)); see also Bork, *supra* note 36 (contending that common-law courts sometimes enforced agreements that protected producers and injured consumer welfare, and arguing that the Sherman Act condemns such agreements regardless of their status at common law). See generally Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019 (1989) (discussing the evolution of common law in response to changes in economic theory).

73 See Farber & McDonnell, *supra* note 68, at 632; see also Lessig, *supra* note 68, at 1248, 1248 n.316 (noting that the Justice had not reconciled the dynamic approach taken in *Business Electronics* with purportedly more static approaches taken in other cases (citing *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) (stating, interpreting the Due Process Clause, that “[i]t is precisely the historical practices that *define* what is ‘due’”); and then citing *California v. Hodari D.*, 499 U.S. 621 (1991) (Scalia, J.) (interpreting the Fourth Amendment using traditional common-law definitions of “seizure”)).

74 See Farber & McDonnell, *supra* note 68, at 632.

75 *Id.* at 621.

76 See *id.* at 661.

77 See *id.* at 622–23.

78 See William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

enactments broadly so as to give full effect to the principles contained therein.⁷⁹ Such readings, they say, will “generate a dynamic common law implementing [the statute’s] great principle.”⁸⁰ Justice Scalia’s approach to the Sherman Act, they say, particularly his opinion in *Business Electronics*, exemplifies such a purposive approach. As they put it:

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. Indeed, the boldest statement of this methodology came from archtextualist Antonin Scalia, who, after presenting an intricate economic analysis of a challenged vertical restraint [in *Business Electronics*], had this to say about the statute.⁸¹

Eskridge and Ferejohn then quote *Business Electronics* for the proposition that the Sherman Act bans agreements with “particular economic consequence[s], which may be produced by quite different sorts of agreements in varying times” and “adopted [the common law] along with its dynamic potential.”⁸² Like Farber and McDonnell, then, Eskridge and Ferejohn assume that a normal originalist approach would treat the Sherman Act as “ordinary legislation” focused on the “plain meaning” or “common law background” of the Act and produce a different approach from that articulated in *Business Electronics*.⁸³ Other scholars have agreed that Justice Scalia’s account of the Sherman Act deviates from his professed textualist method of interpretation.⁸⁴ Indeed, none other than Richard Posner has claimed that *Leegin*,

79 Compare *id.* at 1234 (“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.”), and *id.* at 1249 (stating that super statutes “are to be construed liberally and purposively, interpreters should apply words broadly and evolutively”), with *id.* at 1249 (“For *ordinary statutes*, which are to be construed in a regular way, interpreters should apply words in the normal range used by ordinary speakers of the language.”).

80 *Id.* at 1234.

81 *Id.* (emphasis added).

82 See *id.* at 1234–35 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731–32 (1988)).

83 See *id.* at 1249 (“For *ordinary statutes*, which are to be construed in a regular way, interpreters should apply words in the normal range used by ordinary speakers of the language.”).

84 See, e.g., Lessig, *supra* note 68, at 1250 (suggesting that *Business Electronics*’ embrace of consumer welfare as the operative Sherman Act standard was “on weak [historical] ground”); Miranda McGowan, *Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 *Miss. L.J.* 129, 134 (2008) (contending that Justice Scalia “entirely suspends textualism” when interpreting the Sherman Act); see also Max Huffman, *A Reluctant Standard-Bearer for the Chicago School*, *CPI ANTITRUST CHRON.*, Summer 2016, at 3 (“[A]ntitrust is a decidedly poor exemplar for Justice Scalia’s textualist interpretive philosophy. Textualism in the antitrust arena produces perverse results. Early antitrust cases, relying on text more than they did the purposes of the law, sometimes seemed to hold that any commercial contracts might present antitrust problems

which Justice Scalia joined without comment and subsequently endorsed, contradicts the common law of 1890, which simply banned “restraints on alienation,” with the result that the Justice’s (dynamic) determination to the contrary contradicts his professed method of interpretation.⁸⁵

These scholars are certainly correct that common-law terms of art can supply statutory meaning when courts employ an originalist interpretative methodology. Justice Scalia himself embraced this canon on more than one occasion, both on and off the bench. For instance, dissenting in *Moskal v. United States*, he chided the Court for reading a statutory term of art in a way that contravened the term’s well-established common-law meaning.⁸⁶ In so doing, the Justice invoked previous decisions and commentary by Justices Jackson and Frankfurter:

The Court acknowledges, as it must, the doctrine that when a statute employs a term with a specialized legal meaning relevant to the matter at hand, that meaning governs. As Justice Jackson explained for the Court in *Morissette v. United States*, 342 U.S. 246, 263 (1952):

“[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such a case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as departure from them.”

Or as Justice Frankfurter more poetically put it: “[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it.”

We have such an obvious transplant before us here.⁸⁷

Moreover, in *California v. Hodari D.*, the Justice invoked the common law to define the meaning of the term “seizure” as employed in the Fourth Amendment, even though the resulting definition was broader and more protective of criminal defendants than the plain meaning of the term.⁸⁸ Indeed, when discerning the content of the common law, the Justice invoked

because they ‘restrained trade,’ in however limited a manner. No serious thinker makes a practice of applying textualist interpretive philosophy to antitrust law.” (footnotes omitted)).

85 See Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism>.

86 See *Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting).

87 *Id.* (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947)).

88 499 U.S. 621 (1990); *id.* at 626 n.2 (“We have consulted the common law to explain the meaning of seizure—and, contrary to the dissent’s portrayal, to expand rather than contract that meaning (since one would not normally think that the mere touching of a person would suffice).”).

sources published more than a century after ratification of the constitutional provision in question.⁸⁹

The Justice repeated his support for this canon more than two decades later, in his treatise on interpretation.⁹⁰ That treatise endorsed “[t]he age-old principle . . . that words undefined in a statute are to be interpreted and applied according to their common-law meanings.”⁹¹ In so doing, he quoted, *inter alia*, Justice Harlan’s statement that “in the absence of anything to the contrary it is fair to assume that Congress used that word in the statute in its common-law sense.”⁹²

These remarks would only seem to bolster contentions by Farber, McDonnell, and others that the Justice’s professed approach to statutory interpretation requires judges to give statutory terms of art their common-law meaning. As applied to the Sherman Act, it would seem, this canon of construction would require courts to read the term “contracts or combinations in restraint of trade” to invoke the most relevant common law in place when Congress passed the Act, namely, that portion of the common law of contracts governing judicial enforcement of agreements that allegedly constituted contracts or combinations “in restraint of trade.” Such agreements, of course, included covenants not to compete that accompanied the sale of a business,⁹³ covenants ancillary to the formation of a partnership,⁹⁴ agreements between rivals to limit production or prices,⁹⁵ covenants ancillary to an employment relationship,⁹⁶ agreements that dealers would charge minimum prices,⁹⁷ and covenants ancillary to the sale of a chattel that prevent the purchaser from using the chattel in competition with the seller.⁹⁸ Some of these agreements constituted “combinations,” while others constituted con-

89 See *id.* at 626–27 (quoting Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940)).

90 See SCALIA & GARNER, *supra* note 63, at 320–21; see also John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006) (describing and endorsing Justice Scalia’s application of this canon in *Moskal* as a valid method of implementing textualism).

91 See SCALIA & GARNER, *supra* note 63, at 320.

92 See *id.* n.5 (quoting, with approval, *Gilbert v. United States*, 370 U.S. 650, 655 (1962) (Harlan, J.) (“[I]t is therefore important to inquire . . . into the common-law meaning of forgery at the time the 1823 statute was enacted. For in the absence of anything to the contrary it is fair to assume that Congress used that word in the statute in its common-law sense.”)).

93 See, e.g., *Alger v. Thacher*, 36 Mass. (19 Pick.) 51 (1837).

94 See, e.g., *Matthews v. Associated Press of N.Y.*, 32 N.E. 981, 983 (N.Y. 1893) (Peckham, J.) (“A business partnership could provide that none of its members should attend to any business other than that of the partnership, and that each partner who came in must agree not to do any other business and must give up all such business as he had theretofore done.”).

95 See, e.g., *Skrainka v. Scharringhausen*, 8 Mo. App. 522 (Mo. Ct. App. 1880).

96 See *Addyston Pipe & Steel Co. v. United States*, 85 F. 271, 281, 290–91 (6th Cir. 1898).

97 See, e.g., *Fowle v. Park*, 131 U.S. 88 (1889).

98 See, e.g., *Or. Steam Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64 (1873).

tracts.⁹⁹ Moreover, even if the resulting common law is dynamic, the Justice's methodology would merely authorize judges to apply a fixed standard in light of exogenous changes in society, the economy, and economic theory.¹⁰⁰ If Farber and McDonnell (and others) are correct that the common law of 1890 rejected efficiency in favor of fairness and individual autonomy, for instance, then the Justice's conclusion that section 1 only bans restraints with particular economic consequences, i.e., the exercise of market power to the detriment of consumers, would seem to contradict his professed interpretive methodology.¹⁰¹

Not so fast. The Justice's *Business Electronics* opinion itself purported to embrace the common law of trade restraints.¹⁰² Thus, the Farber/McDonnell critique thus far depends critically upon the Farber/McDonnell account of the common law, a purely historical question. It should be noted that others have also examined the original meaning of the Act from a textualist perspective and obtained different results. For instance, Robert Lande, whose scholarship regarding the original meaning of the Sherman Act is among the most influential, has conducted a "traditional and textual analysis of the goals of antitrust," including an analysis of certain common-law cases.¹⁰³ Lande concludes that the Sherman Act bans only those contracts and other practices that "restrict [] output and therefore raise [] prices."¹⁰⁴ To be sure, Lande's exegesis of the caselaw is far from complete. Still, he discusses more common-law cases than Farber and McDonnell, who rely entirely upon secondary sources.

99 See, e.g., Hovenkamp, *supra* note 72 (discussing the evolution of common law in response to changes in economic theory).

100 See *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 59–71 (1991) (Scalia, J., dissenting) (relying on the common law of search and seizure to determine the unchanging standard that courts should apply when determining the appropriate length of detention before a magistrate determines that there is probable cause to detain an arrestee); *id.* at 6 n.1 (explaining that proper application of this unchanging principle can evolve as technology changes); see also Lessig, *supra* note 68, at 1247–50 (asserting that the changed application of the Sherman Act in response to evolving economic theory exemplified faithful application of the original meaning of the Act).

101 See Farber & McDonnell, *supra* note 68, at 633.

102 *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) ("The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.").

103 See Robert H. Lande, *A Traditional and Textual Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice*, 81 *FORDHAM L. REV.* 2349, 2351 (2013) (describing interpretive methodology as entailing analysis of "key terms as they were used in contemporary dictionaries, legal treatises, common law cases, and the earliest U.S. antitrust cases"); *id.* at 2370, 2374–75 (discussing cases).

104 *Id.* at 2372 ("In summary, section 1 of the Sherman Act's prohibition against contracts, combinations, or conspiracies 'in restraint of trade' was not directed at business arrangements that are inefficient. Rather, a 'restraint of trade' usually means a practice that restricts output and therefore raises prices."). Unfortunately, Lande did not expressly respond to the contrary arguments made by Farber, McDonnell, Eskridge, and Ferejohn.

Perhaps more importantly, in *Standard Oil v. United States*, the Supreme Court conducted a textual analysis, including a lengthy exegesis of the common law.¹⁰⁵ That common law, the Court determined, came to equate “monopoly” with practices, including contracts in restraint of trade that, while not resulting in domination of an entire market, still produced the consequences of monopoly, particularly the enhancement of prices.¹⁰⁶ Like Professor Lande, the Court determined that, instead of banning a fixed set of agreements, the statute articulates a standard implementing the “public policy of the act” banning only those restraints that produce monopoly or the consequences of monopoly, particularly higher prices and reduced output.¹⁰⁷ Moreover, as explained earlier, the *Standard Oil* Court concluded that courts applying this “standard of reason” should recognize that “economic conceptions” change over time and apply the latest conception when evaluating the impact of a restraint.¹⁰⁸ Justice Scalia cited *Standard Oil* in support of his claim that the Sherman Act adopted the common law along with its dynamic potential.¹⁰⁹

Neither Farber and McDonnell nor Eskridge and Ferejohn mentions *Standard Oil* or its conclusion that the common law in place when Congress passed the Sherman Act articulated a dynamic standard that focused on the economic consequences of monopoly. Nor, of course, does either explain why the Court should overrule this century-old decision. Finally, it is perhaps worthy of note that the Supreme Court’s earliest expositions of the Sherman Act either expressly rejected the common law as the source of the Sherman Act’s meaning or ignored it altogether.¹¹⁰ These decisions occurred during

105 221 U.S. 1 (1911).

106 *Id.* at 54–59 (describing the evolution of English common law leading to the tendency to equate “monopoly” with practices resulting in the consequences of monopoly, including contracts in restraint of trade); *id.* at 58 (describing the public policy of English and American common law as condemning agreements “tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy”); *id.* at 52 (describing the evils produced by monopoly as higher prices, reduced production, and reduced quality).

107 See *supra* notes 104–06 and accompanying text; *infra* note 108 and accompanying text.

108 See *Standard Oil*, 221 U.S. at 55.

109 See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (citing *Standard Oil*, 221 U.S. at 51–60).

110 See *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 327 (1897) (rejecting the defendants’ argument that the statute banned only “those restraints and monopolies which the common law regarded as unlawful”); *id.* at 325, 327–29 (explaining that the “plain and ordinary meaning” of “contracts in restraint of trade” included both reasonable and unreasonable restraints and that the statute banned both, regardless of whether such contracts were enforceable at common law); see also *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (declaring a horizontal cartel that set unreasonable prices an unlawful direct restraint of trade without reference to the common law); *United States v. Joint Traffic Ass’n*, 171 U.S. 505, 566 (1898) (holding that the statute banned only direct restraints of trade and thus did not reach “ordinary contracts and combinations” such as covenants ancillary to the sale of a business); *Hopkins v. United States*, 171 U.S. 578 (1898) (same).

an era in which the Court generally took a textualist approach to statutory interpretation. Given the disparate results of what all purport to be efforts to derive the meaning of the Sherman Act via a textualist approach, this Essay makes yet another effort at a textual analysis of section 1, employing Justice Scalia's expressed methodology for interpreting statutes.¹¹¹

III. A TEXTUALIST ANALYSIS OF SECTION 1 OF THE SHERMAN ACT

Section 1 of the Sherman Act prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States.”¹¹² Webster’s 1886 *Complete Dictionary of the English Language* defines “restraint” as “[t]hat which restrains, as a law, a prohibition, and the like; limitation; restriction.”¹¹³ The same source defines “restrain” as “[t]o limit; to confine; to restrict.”¹¹⁴ Stormonth’s *Dictionary of the English Language* defines “restraint” as: “the act of restraining; abridgment of liberty; restriction; hindrance of will; repression; that which restrains.”¹¹⁵ The same source defines “restrain” as: “to hold back; to bind fast; to curb; to repress; to limit;

It should also be noted that Judge Posner’s critique of *Leegin* contradicts the common law of minimum rpm articulated by the Supreme Court one year before passage of the Sherman Act, in *Fowle v. Park*, 131 U.S. 88 (1889) (sustaining minimum resale price maintenance as an enforceable agreement); see also *Garst v. Harris*, 58 N.E. 174 (Mass. 1900) (Holmes, C.J.) (invoking *Fowle* as authority for the enforceability of a minimum rpm agreement).

111 Of course, stare decisis may itself require judicial adherence to *Standard Oil*. However, because the Justice expressed a willingness to overrule prior interpretations of a statute, a de novo textual analysis of the Sherman Act would seem appropriate. Cf. *Johnson v. Transp. Agency*, 480 U.S. 616, 669–77 (1987) (Scalia, J., dissenting) (contending that the Court should overrule *Steelworkers v. Weber*, 443 U.S. 193 (1979)).

112 See 15 U.S.C. § 1 (2012) (emphasis added).

113 See *Restraint*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 1128 (Chauncey A. Goodrich et al. eds., London, George Bell & Sons 1886).

114 *Id.* Webster’s also included alternate meanings for “restraint” and “restrain.” For instance, the first entry for “restraint” defines the term as: “The act or exercise of restraining, or of holding back or hindering from motion, in any manner; hinderance of the will, or of any action, physical, moral, or mental,” *id.*, and the first entry for “restrain” is as follows: “To draw back again; to hold back; to check; to hold from acting, proceeding, or advancing, either by physical or moral force, or by any interposing obstacle;—to repress or suppress; to keep down,” *id.* Given the context, that is, “restraint of trade or commerce,” it would appear that the definition quoted in the text is that which most likely reflects how an “ordinary member of Congress” might define the term. See *Smith v. United States*, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting) (“The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used.”); *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) (contending that the task of the judge is to read “the words of [a statutory] text as any ordinary Member of Congress would have read them and apply the meaning so determined” (citation omitted)); SCALIA & GARNER, *supra* note 63, at 418 (“Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense.”).

115 See *Restraint*, JAMES STORMONTH, ETYMOLOGICAL AND PRONOUNCING DICTIONARY OF THE ENGLISH LANGUAGE 525 (Edinburgh, William Blackwood & Sons 7th ed. rev. 1882); see

to abridge.”¹¹⁶ Justice Scalia’s coauthored treatise on interpretation endorsed both sources as “reflect[ing] meanings given at the current time” and “among the most useful and authoritative for the English language generally and for law.”¹¹⁷

A straightforward application of these definitions could sweep quite broadly. For instance, a definition could require prohibition of *every* contract that “limits,” “confines,” or “restricts” commerce or “abridges liberty.” Numerous garden-variety commercial arrangements would seem to offend such a ban. For instance, a covenant ancillary to the sale of a business whereby a seller agrees not to sell its wares within a certain geographic area would literally “confine” commerce and certainly “limit,” “curb,” and “restrict” it.¹¹⁸ Moreover, an agreement by the purchaser of a chattel, say, a steamship, not to use the vessel in competition against the seller “abridges the liberty” of the buyer and again “confines,” “curbs,” “restricts,” or “limits” commerce.¹¹⁹

For over a century, beginning with the *Standard Oil* decision, the Supreme Court has avoided the consequences of such a plain meaning approach by reading section 1 so as to ban only “unreasonable” restraints, often employing a variant of the absurdity canon.¹²⁰ In particular, the Court

also SCALIA & GARNER, *supra* note 63, at 419, 421 (listing this source among “authoritative” dictionaries of the period).

116 See *Restrain*, STORMONTH, *supra* note 115, at 525.

117 See SCALIA & GARNER, *supra* note 63, at 419, 421 (approving Webster’s 1882 edition “or other editions during the period” 1851–1900 as “reflect[ing] meanings current at a given time” and among “the most useful and authoritative for the English language generally and for law”).

118 See *Diamond Match Co. v. Roeber*, 13 N.E. 419 (N.Y. 1887) (enforcing a covenant by the seller of a manufacturing business not to compete with the purchaser in the entire continental United States except the state of Nevada and territory of Montana). The seller purportedly breached the covenant by working for a competing manufacturer of matches and opening his own retail store that sold matches in the territory governed by the agreement. See *id.* at 479. At the time, of course, numerous decisions of the Supreme Court defined “commerce” as the buying and selling of products as well as “traffic,” navigation, and other travel. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 35 (1824). Thus, the contract purported to limit the defendant’s right to engage in commerce, albeit intrastate.

119 *Or. Steam Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64, 65 (1873) (enforcing such a restraint preventing the purchaser from operating vessels on “several routes of travel on the rivers, bays, and waters of . . . California” (emphasis omitted)); see also *Hopkins v. United States*, 171 U.S. 578 (1898) (recounting the contention by the United States that a private agreement not to send telegrams to possible sellers infringed upon the liberty of the parties to the agreement because imposition of a similar ban by a state would be unconstitutional); cf. *Gibbons*, 22 (9 Wheat.) U.S. 1 (concluding that navigation between two or more states is interstate commerce).

120 See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 54 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 180 (1911) (characterizing *Standard Oil* as affording the statute a “reasonable construction” so as to give the statute a “meaning which would not . . . render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect”); *id.* (stating that the contrary interpretation would “destroy[] all liberty of contract and all

has repeatedly noted that all contracts restrain trade to some degree, with the result that a “plain meaning” approach to section 1 would ban all commercial agreements and grind commerce to a halt.¹²¹ Congress could not have intended this result, the Court says, with the result that the statute should only ban restraints that the Court deems unreasonable.¹²² In its earlier incarnation, this approach also served to avoid the sort of broad reading of the Act that the *Lochner*-era Court believed would violate liberty of contract.¹²³ At times, albeit not recently, the Court has invoked legislative history to support this conclusion.¹²⁴

substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve”).

121 See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687–88 (1978) (“The statute says that ‘every’ contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted; restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.” (footnotes omitted) (citing *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1917) (Brandeis, J.)); see also *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (“While § 1 could be interpreted to proscribe all contracts, the Court has never ‘taken a literal approach to [its] language.’ Rather, the Court has repeated time and again that § 1 ‘outlaw[s] only unreasonable restraints.’” (citations omitted) (first citing *Bd. of Trade of Chi.*, 246 U.S. at 238; then quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); and then quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997))); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 606 (1972) (“On its face, § 1 of the Sherman Act appears to bar any combination of entrepreneurs so long as it is ‘in restraint of trade.’ Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors of each other. Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it.”).

122 *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 342–43 (1982) (“Section 1 of the Sherman Act of 1890 literally prohibits *every* agreement ‘in restraint of trade.’ . . . [W]e [have] recognized that Congress could not have intended a literal interpretation of the word ‘every’ [] since [*Standard Oil*] [and thus] have analyzed most restraints under the so-called ‘rule of reason.’” (footnotes omitted) (citations omitted)); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (“Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which ‘unreasonably’ restrain competition.” (citations omitted)).

123 See *Standard Oil*, 221 U.S. at 63; *Am. Tobacco Co.*, 221 U.S. at 180 (“[*Standard Oil* held that] the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.”); see also Meese, *supra* note 23 (explaining that *Standard Oil*'s Rule of Reason implemented *Lochner*-like protection for liberty of contract).

124 See, e.g., *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688 (“Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it

While some proponents of textualism have cast doubt upon the absurdity canon,¹²⁵ Justice Scalia endorsed the canon, or at least what he called a “narrow version” of it.¹²⁶ According to the Justice, two conditions must coincide to justify application of the canon. First, the absurdity “must consist of a disposition that no reasonable person could intend.”¹²⁷ More precisely, and quoting Joseph Story, “the absurdity and injustice of applying the provision to the case [must] be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.”¹²⁸ Mere oddity or anomaly does not suffice.¹²⁹ Second, the absurdity must be “reparable by changing or supplying a particular word or phrase whose inclusion or omission was obviously a technical or ministerial error.”¹³⁰ Satisfaction of these two conditions, the Justice said, establishes that the apparent anomaly was a drafting error, an error that changing or applying a particular word corrects.¹³¹

Application of the absurdity doctrine as articulated by the Justice does not provide a convincing textualist account of the meaning of section 1. For instance, even if one assumes that application of the plain language would produce “monstrous” results that no reasonable person would accept, there is still the separate question of what word or phrase a Court should insert or redact so as to ensure a nonabsurd meaning. In *Standard Oil*, of course, the Court basically inserted the phrase “unreasonable” to precede the word “restraint,” with the result that the statute banned “every contract or combination in *unreasonable* restraint of trade.”¹³² However, “unreasonable” is not

expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.”).

125 See, e.g., John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).

126 See SCALIA & GARNER, *supra* note 63, at 234–39 (discussing the canon with approval); SCALIA, *supra* note 65 (same); Antonin Scalia & John F. Manning, *A Dialogue on Statutory and Constitutional Interpretation*, 80 GEO. WASH. L. REV. 1610, 1614 (2012) (expressing support for the narrow version of the absurdity canon as a means of “giving the text the meaning that any reasonable person would give it”); *id.* (“You can call it the absurdity doctrine, if you like, so long as you define it as narrowly as I have.”); *cf.* SCALIA, *supra* note 65, at 18–23 (criticizing *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), a classic application of the absurdity canon).

127 SCALIA & GARNER, *supra* note 63, at 237.

128 *Id.* (quoting 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 427, at 303 (Boston, Little, Brown & Co. 3d ed. 1858)).

129 *Id.*; see also *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 414 n.13 (2010) (“The possible existence of a few outlier instances does not prove [that an] interpretation is absurd. Congress may well have accepted such anomalies as the price of a uniform system of federal procedure.”).

130 SCALIA & GARNER, *supra* note 63, at 238.

131 SCALIA, *supra* note 65, at 20 (characterizing the doctrine as “*lapsus linguae* (slip of the tongue), and what our modern cases call ‘scrivener’s error,’ where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made”).

132 See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60, 64 (1911); see also *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679 (1978) (endorsing *Standard Oil’s* approach on this score).

the only word or phrase the insertion of which would remove any absurdity. One could, instead, insert the word “unfair” (as Farber and McDonnell might do) or, as the Supreme Court would do in the 1890s, “direct.”¹³³ Moreover, as suggested by some of the discussion below, the Court could have struck “of trade or,” thus leaving the operative portion of the statute to read “in restraint of commerce among the several states.”¹³⁴

In any event, even if the word “reasonable” were the only possible insertion, such insertion would still beg the question of the content of the standard imposed. As various Supreme Court decisions confirm, *Standard Oil’s* equation of “unreasonableness” with “the exercise of market power to the detriment of consumers,” is not the only method for defining the term.¹³⁵ One could also equate unreasonableness with “unfairness,” “excessiveness,” or undue interference with the autonomy of traders.¹³⁶ Moreover, even *Standard Oil’s* apparent focus on market power is potentially ambiguous. After all, the exercise of such power produces two potential harms: injury to those individuals who continue to purchase the relevant product compared to the results of a competitive market—a wealth transfer—and the reduction in output and consequent reallocation of resources to less valuable uses.¹³⁷ The choice between these two accounts of the harm produced by the exercise of market power itself has implications for antitrust doctrine.¹³⁸

In any event, there is a more fundamental roadblock to application of the absurdity canon in this context. For, as others have explained, textualists need only apply this doctrine as a last resort; that is, when other canons of construction and interpretive methods fail to produce a nonabsurd meaning.¹³⁹ As John Manning has said, “modern textualism screens out many

133 See *Hopkins v. United States*, 171 U.S. 578, 599–602 (1898) (holding that the Act must have a “reasonable construction” and thus did not reach practices that merely restrained commerce “indirectly”); *United States v. Joint Traffic Ass’n*, 171 U.S. 505, 568 (1898) (holding that the Act must have a reasonable construction and that the statute only reaches direct restraints); *infra* notes 153–69 and accompanying text (discussing 1880s Commerce Clause jurisprudence invalidating state laws imposing direct burdens on interstate commerce even absent congressional action).

134 See *infra* notes 145–69 and accompanying text.

135 See, e.g., *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972) (banning as unreasonable per se ancillary restraints between small market participants despite a judicial finding that such restraints enhanced interbrand competition without harming consumers, because such restraints reduce the autonomy of traders); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *overruled by State Oil Co. v. Khan*, 522 U.S. 3 (1997) (banning as unreasonable per se maximum resale price maintenance, which reduced consumer prices because, *inter alia*, the restraint interfered with the “freedom” of traders to set whatever price they wished, including prices that exercised market power to the detriment of consumers).

136 Cf. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.).

137 See Lande, *supra* note 103, at 2381–83 (describing these two possible harms).

138 See Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471 (2012).

139 See, e.g., Manning, *supra* note 125, at 2464–65 (explaining how reliance upon terms of art can “mitigat[e] the rigors of literalism” and thereby obviate the need for reliance upon the absurdity canon).

absurdities at the threshold by accounting for the contextual nuances of language, especially the particular nuances and conventions that the subcommunity of legal speakers has developed to facilitate effective legal communication.”¹⁴⁰ The approach, of course, is consistent with the Court’s more general willingness, endorsed by Justice Scalia, to prefer technical meanings to the ordinary or plain meaning of a statutory provision.¹⁴¹ If, absurdity canon to one side, methods of ascertaining contextual nuances of language produce a more plausible meaning than the “ordinary or plain meaning” of a provision, then courts must instead ask whether *that* (nonordinary) meaning is absurd.

Reliance on the common-law term of art canon is one such mechanism for identifying such contextual linguistic nuances and thus discovering meanings that are less absurd, or not absurd at all, compared to the statute’s plain meaning.¹⁴² Thus, proponents of the approach advanced by Farber and McDonnell might contend that any absurdity is illusory, given the availability of common-law precedents to supply meaning to the term “restraint of trade.” Assuming that the common law of 1890 was not absurd, and would not be absurd if incorporated as the operative standard of the Sherman Act, the absurdity canon seems of little use when interpreting section 1.¹⁴³

This is not to say that a more nuanced interpretation and resulting rejection of the absurdity canon necessarily means that section 1 takes its meaning from the common law. After all, the common law of 1890 may not be the only potential source of meaning distinct from ordinary meaning. Some reflection suggests that this is likely not the case; that is, that there is another possible source of such meaning. Moreover, the existence of this source helps explain why, contrary to the conclusions of some scholars, the Court did not embrace the 1890 common law of trade restraints when it first gave meaning to the Act.¹⁴⁴

To help identify this alternative source of meaning one must return to the source of Congress’s authority to regulate contracts and combinations. Unlike the states, after all, the Congress of 1890 had no general authority over private contracts.¹⁴⁵ The Sherman Act was, instead, an exercise of the

140 *Id.* at 2458.

141 See SCALIA & GARNER, *supra* note 63, at 73.

142 See Manning, *supra* note 125, at 2464–65 (explaining how reliance on the common-law canon can identify nonabsurd statutory meaning and thus avoid reliance upon the absurdity canon).

143 See Farber & McDonnell, *supra* note 68, at 640.

144 See HOVENKAMP, *supra* note 25, at 61–65 (asserting that federal courts initially turned to the common law to provide meaning to the Act); see also *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 278–91 (6th Cir. 1898) (Taft, J.) (examining common law of trade restraints when assessing the defendant’s claim that horizontal restraints setting reasonable prices do not violate the Sherman Act). It should be noted that even Taft did not hold that section 1 of the Sherman Act and the common law were coextensive. Instead, he simply assumed this to be the case for the sake of argument. *Id.*

145 See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (holding that Congress lacked authority over the completely internal commerce of a state).

power to regulate “commerce among the several states.”¹⁴⁶ During the nineteenth century, Congress rarely exercised this power via explicit legislation. *Gibbons v. Ogden*, of course, involved an exception.¹⁴⁷ There the Court held that Congress had employed the commerce power to preempt a New York statute purporting to grant a monopoly over travel by steamship in New York waters, even when such vessels carried passengers travelling from one state to another.¹⁴⁸ The Court determined that such interstate travel was “commerce,” adopting a definition that seemed to exclude much private business activity.¹⁴⁹ The Court also recognized that, even with respect to such commerce, Congress’s power was not unlimited and did not extend to all activities that constituted “commerce.” Instead, the Court said, the power only reached commercial transactions between citizens in two or more states or intrastate transactions that affected or concerned more than one state.¹⁵⁰ Because *Gibbons* wished to navigate between two or more states, the Court held that the Act transferred to him “all the right which the grantor [that is, Congress] can transfer,”¹⁵¹ a right that included the right to conduct trade between the states.¹⁵²

Despite the relative absence of affirmative national legislation, there was, by 1890, a large body of law governing the scope and nature of Congress’s power over state-imposed regulations of interstate commerce. Consistent with dicta from *Gibbons*, the Court held that certain state-imposed restraints

146 Sherman Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (2012)).

147 See *Gibbons*, 22 U.S. (9 Wheat.) at 2.

148 See *id.* at 211–22 (holding that the federal statute regulating the coasting trade preempted New York’s grant of a monopoly over interstate steam-powered navigation).

149 In particular, the Court defined commerce as “traffic,” in the form of “buying and selling, or the interchange of commodities” as well as “intercourse” between nations or states, with the latter including navigation. See *id.* at 189–90 (“The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter.”). This definition, of course, excluded manufacturing, mining, and agriculture, as the Court would later and repeatedly hold. See, e.g., *Kidd v. Pearson*, 128 U.S. 1 (1888).

150 See *Gibbons*, 22 U.S. (9 Wheat.) at 194 (“It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.”).

151 *Id.* at 213–14.

152 See *id.*

were preempted even in the absence of affirmative congressional action.¹⁵³ Thus, where a subject related to interstate commerce was “inherently national” or by its nature required a uniform system of regulation, the Court reasoned that congressional silence with respect to the subject evinced the national legislature’s intent and purpose that commerce remain “free and untrammelled,”¹⁵⁴ with the result that state regulation of such subjects was invalid.¹⁵⁵ This category consisted of “that portion of commerce with foreign countries or between the States which consists in the transportation, purchase, sale, and exchange of commodities.”¹⁵⁶ Examples of such improper state action included state regulation of interstate railroad rates and differential state taxation of goods because of their out-of-state origin.¹⁵⁷ According to the Court, this body of law protected interstate markets from “invidious,” “partial,” or “discriminating” legislation of the sort that had afflicted the nation under the Articles of Confederation, given states’ suboptimal incentives to regulate activities that produced significant interstate spillovers.¹⁵⁸ Achievement of these purposes, the Court said, required it to read

153 See *id.* at 163; *id.* at 227 (Johnson, J., concurring) (concluding that the authority to regulate interstate commerce “must be exclusive; it can reside but in one potentate; and hence, the grant of this power carries with it the whole subject, leaving nothing for the State to act upon”).

154 *Welton v. Missouri*, 91 U.S. 275, 282 (1876) (holding that silence by Congress established that interstate commerce that the state attempted to tax should be “free and untrammelled” instead); see also *Cty. of Mobile v. Kimball*, 102 U.S. 691, 697 (1881) (“Here there can of necessity be only one system or plan of regulations, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free.”).

155 See *Cooley v. Bd. of Wardens of the Port of Phila.*, 53 U.S. 299 (1851); see also Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1101–07 (2000). Where, on the other hand, the subject in question was susceptible of various possible solutions drawing upon unique knowledge of local conditions, states were free to regulate, subject to Congress’s authority to preempt such regulation. See *id.* at 1108–20 (synthesizing the caselaw articulating and applying this standard).

156 *Kimball*, 102 U.S. at 697; see also Cushman, *supra* note 155, at 1101–07.

157 See *Robbins v. Shelby Cty. Taxing Dist.*, 120 U.S. 489, 498 (1887) (invalidating a state tax imposed on dealers representing out-of-state manufacturers of paper goods); *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (voiding a state regulation of interstate railroad rates); *Webber v. Virginia*, 103 U.S. 344 (1881) (invalidating a tax on the occupation of importing and reselling goods from other states); *Welton*, 91 U.S. at 282 (voiding a tax on dealers of goods manufactured in other states); see also *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 445 (1827); Charles W. McCurdy, *American Law and Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631 (1978) (describing these developments in Commerce Clause jurisprudence from the mid- to late nineteenth century).

158 See, e.g., *Guy v. Baltimore*, 100 U.S. 434, 440 (1880) (“But State legislation such as that indicated in the cases which have been cited, if maintained by this court, would ultimately bring our commerce to that ‘oppressed and degraded state,’ existing at the adoption of the present Constitution, when the helpless, inadequate Confederation was abandoned and a national government instituted, with full power over the entire subject of

congressional powers, including the commerce power, so as to “keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.”¹⁵⁹

Importantly, the resulting caselaw did not preempt any and all state enactments that affected interstate commerce.¹⁶⁰ Instead, the Court recognized that various state enactments can affect interstate commerce without constituting a regulation of it in a constitutional sense.¹⁶¹ State enactments only constituted impermissible legislation and thus regulated commerce “in the constitutional sense” if they “impose[d] a direct burden upon interstate commerce” or “interfere[d] directly with its freedom.”¹⁶² By contrast, state legislation imposing so-called “indirect” impacts or burdens on interstate commerce was entirely permissible, as Congress possessed no authority over legislation producing such incidental effects.¹⁶³ As a result, congressional silence could not evince an intent to preempt such state enactments. Legislation producing “indirect” impacts on interstate commerce beyond the reach of Congress included bans on manufacturing, even if the resulting products were destined for export,¹⁶⁴ regulation of rates charged for the storage of

commerce, except that wholly internal to the States composing the Union.”); *State Tonnage Tax Cases*, 79 U.S. (12 Wall.) 204, 214 (1871) (“Prior to the adoption of the Constitution the States attempted to regulate commerce, and they also levied duties on imports and exports and duties of tonnage, and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union under the present Constitution.”); *see also Wabash*, 118 U.S. at 577 (concluding that Congress had exclusive constitutional authority over interstate railway rates because its “enlarged view of the interests of all the States, and of the railroads concerned, better fits it to establish just and equitable rules”).

159 *Pensacola Tel. Co. v. W. Union Tel. Co.* 96 U.S. 1, 9 (1878) (“The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.”); *see also Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 70 (1911) (invoking the test for determining whether a challenged statute imposes a direct effect on interstate commerce as an example of fact-intensive analysis consistent with the proper judicial role).

160 *Cf. Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824) (holding that the commerce power did not reach intrastate transactions that did not affect more than one state).

161 *Cf. Kidd v. Pearson*, 128 U.S. 1, 23 (1888); *see also Cushman*, *supra* note 155, at 1108–26.

162 *Kidd*, 128 U.S. at 20, 23 (internal quotation marks omitted) (“‘As has been often said, “legislation [by a State] may in a great variety of ways affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution,” unless, under the guise of police regulations, it ‘imposes a *direct burden upon interstate commerce*,’ or ‘*interferes directly with its freedom*.’” (emphasis added) (quoting *Hall v. DeCuir*, 95 U.S. 485, 487, 488 (1878))); *see also Sherlock v. Alling*, 93 U.S. 99, 102 (1876) (explaining that the dormant Commerce Clause only preempted those state laws that “operated directly upon [interstate] commerce”); *id.* at 103 (explaining that, in prior decisions invalidating state laws, “the legislation created, in the way of tax, license, or condition, a direct burden upon commerce, or in some way directly interfered with its freedom”).

163 *See Kidd*, 128 U.S. at 24.

164 *Id.* at 8–9.

grain, even though most such grain was destined for export,¹⁶⁵ and general legislation imposing tort liability for negligence.¹⁶⁶ The result, the Court said, was a unified national market. As one leading historian has put it, these decisions reflected the Court's status as umpire of the nation's "free trade network."¹⁶⁷ In this way, the Court's Commerce Clause jurisprudence encouraged a competitive allocation of resources and prevented states from employing protectionist policies to exploit consumers.¹⁶⁸

This caselaw generated "practical lines"—not fixed rules—distinguishing between state legislation that Congress implicitly preempted and that which exceeded the scope of Congress's power.¹⁶⁹ Put another way, this portion of the Court's Commerce Clause jurisprudence entailed a flexible standard, not "arbitrary rules."¹⁷⁰ According to these precedents, Congress possessed ple-

165 See *Munn v. Illinois*, 94 U.S. 113, 134–35 (1876) (holding that a regulation of prices charged for storing grain exceeded the scope of the commerce power and thus survived "even though in so doing [the regulation] may indirectly operate upon commerce outside its immediate jurisdiction"); *id.* at 135 ("Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their inter-state relations, the State may exercise all the powers of government over them.").

166 See *Smith v. Alabama*, 124 U.S. 465, 473 (1888) ("There are many cases, however, where the acknowledged powers of a State may be exerted and applied in such a manner as to affect foreign or interstate commerce without being intended to operate as commercial regulations."); *Sherlock*, 93 U.S. at 103 ("General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or inter-State commerce.").

167 See McCurdy, *supra* note 157, at 648 ("The Supreme Court's commerce clause decisions of the 1875–1890 period were of immediate importance to large-scale manufacturers and had an enduring influence on American economic growth, for they firmly established the Supreme Court's role as the umpire of the nation's free-trade network."); *id.* (concluding that, during the late nineteenth century, the Supreme Court established itself "to monitor the free-trade unit in the silence of Congress"); see also Cushman, *supra* note 155, at 1107 ("The Court's use of the dormant Commerce Clause to vitiate such parochial legislation played a critical, instrumental role in opening a national market.").

168 See Alan J. Meese, *Competition Policy and the Great Depression: Lessons Learned and a New Way Forward*, 23 CORNELL J.L. & PUB. POL'Y 255, 267–70 (2013) (explaining how the Court's Commerce Clause jurisprudence during this era helped ensure "a competitive allocation of resources"); see also *Cook v. Pennsylvania*, 97 U.S. 566, 574 (1878) (opining that the framers adopted the Commerce Clause to ensure "the freest interchange of commodities among the people of the different states").

169 See Cushman, *supra* note 155, at 1110; *id.* at 1113–14 ("The 'practical lines' to be drawn in order to prevent the dormant Commerce Clause from prohibiting all state regulation were the distinctions between the 'local' and the 'national,' and between 'direct' and 'indirect' effects." (quoting *Diamond Glue Co. v. U.S. Glue Co.*, 187 U.S. 611, 616 (1903) (Holmes, J.))); see also *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (explaining that the determination whether a state law "directly" or "indirectly" burdened commerce was fact-intensive and analogous to application of the "standard of reason" the Court read into the Act).

170 See *Wabash, St. Louis & Pac. Ry. Co. v. Illinois*, 118 U.S. 557, 571 (1886) ("The line which separates the powers of the states from this exclusive power of congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case

nary authority over conduct or legislation that directly burdened or obstructed interstate commerce but no authority over conduct that merely restrained such conduct indirectly. Moreover, regardless of whether Congress acted, courts imputed to Congress an intent to preempt state legislation that directly obstructed or directly burdened interstate commerce.¹⁷¹

Perhaps most importantly for this analysis, these doctrinal concepts produced terms of art that courts invoked when implementing this Commerce Clause jurisprudence. The term “commerce,” for instance, conveyed a particular definition that plainly (to the Court anyway) excluded and included particular activities.¹⁷² Ditto for “burden,” “obstruct,” “direct,” “indirect,” and “incidental.”¹⁷³ Moreover, and most importantly, major cases employed the term “restrain” or “restraint” as synonyms for the term “regulate” or “regulation” and thus employed the term “restrain” to refer to state legislation that directly burdened or obstructed interstate commerce and thus did not survive implied preemption under the dormant Commerce Clause. In *Brown v. Houston*, for instance, the Court opined that a state law that taxed “every wagon load, or car load of produce and merchandise brought into [a] city” from other states would be “a regulation of, and restraint upon inter-State commerce, so far as the tax should be imposed on articles brought from other States” and thus “an encroachment upon the exclusive powers of Congress.”¹⁷⁴ Moreover, in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, the Court opined that “the right of continuous transportation from one end of the country to the other is essential . . . to . . . freedom of commerce” and

belongs. . . . Under such circumstances, *it would be a useless task to undertake to fix an arbitrary rule by which the line must, in all cases, be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved . . .*” (emphasis added) (quoting *Hall v. DeCuir*, 95 U.S. 485, 487, 488 (1878)); see also *Minnesota v. Barber*, 136 U.S. 313, 322 (1890) (invalidating a state meat inspection regime despite its facial neutrality and plausible police power purpose, after a fact-intensive determination that the regime’s “necessary operation . . . directly tends to restrict the slaughtering of animals whose meat is to be sold in Minnesota for human food to those engaged in such business in that state.”).

171 To be sure, some private restraints of interstate commerce were unenforceable according to the common law that federal courts applied when entertaining contract cases arising under the diversity jurisdiction.

172 See, e.g., *Kidd v. Pearson*, 128 U.S. 1, 20 (1888) (“No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce.”).

173 See, e.g., *id.* at 23 (“[L]egislation [by a State] may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution,’ unless, under the guise of police regulations, it ‘imposes a direct burden upon interstate commerce,’ or ‘interferes directly with its freedom.’” (second alteration in original) (some internal quotation marks omitted) (quoting *Hall v. DeCuir*, 95 U.S. 485, 487, 488 (1878))).

174 *Brown v. Houston*, 114 U.S. 622, 634 (1885) (emphasis added).

that the “commerce clause was intended to secure” this right from “*restraints* which the State might choose to impose upon it.”¹⁷⁵ The state of Illinois’s regulation of interstate railway rates, the Court said, constituted just such a restraint and was void.¹⁷⁶ During the same term, in *Walling v. Michigan*, the Court employed a similar formulation, holding that a state’s

discriminating tax . . . operating to the disadvantage of the products of other States . . . is, in effect, a regulation *in restraint of commerce among the States*, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.¹⁷⁷

These opinions were not the first to characterize improper state interference with interstate commerce as “restraints” thereof. Concurring in *Gibbons v. Ogden*, Justice Johnson opined that the “one object riding over every other in the adoption of the constitution . . . was to keep the commercial intercourse among the States free from all invidious and partial restraints.”¹⁷⁸ Subsequent decisions would cite Justice Johnson’s opinion as authority for the proposition that congressional authority over subjects that required uniform national regulation was exclusive.¹⁷⁹ Finally, it should be noted that both Joseph Story and James Monroe employed the term “restraint” to refer to protectionist measures employed by the states under the Articles of Confederation.¹⁸⁰

Thus, when Congress deliberated over the Sherman Act, it did so against the background of an extensive body of caselaw that delineated the scope and limits of Congress’s power. That caselaw employed the phrase “in restraint of commerce among the states” to refer to state legislation that

175 *Wabash*, 118 at 572–73 (emphasis added); *see also* *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 494 (1888) (quoting this language from *Wabash* with approval).

176 *See Wabash*, 118 U.S. at 577.

177 *Walling v. Michigan*, 116 U.S. 446, 455 (1886) (emphasis added).

178 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (Johnson, J., concurring).

179 *The Passenger Cases*, 48 U.S. 283, 395 (1849) (McLean, J., concurring) (quoting Justice Johnson’s opinion for the proposition that Congress possesses exclusive power to regulate interstate commerce).

180 *See* 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 11 (Melville M. Bigelow ed., Boston, Little, Brown & Co. 5th ed. 1891) (“The experience of the American States during the confederation abundantly establishes that such arrangements could be, and would be made under the stimulating influence of local interests, and the desire of undue gain. Instead of acting as a nation in regard to foreign powers, the States individually commenced a system of restraint upon each other, whereby the interests of foreign powers were promoted at their expense. When one State imposed high duties on the goods or vessels of a foreign power to countervail the regulations of such powers, the next adjoining States imposed lighter duties to invite those articles into their port, that they might be transferred thence into the other States, securing the duties to themselves. This contracted policy in some of the States was soon counteracted by others. Restraints were immediately laid on such commerce by the suffering States; and thus a state of affairs disorderly and unnatural grew up, the necessary tendency of which was to destroy the Union itself.” (footnotes omitted)); James Monroe, Special Message to the House of Representatives Containing the Views of the President of the United States on the Subject of Internal Improvements (May 4, 1822) (same).

improperly “regulated” interstate commerce because it imposed a “direct burden” on such commerce. The term “direct burden,” in turn, referred not to a set of fixed rules, but instead to a standard that courts would apply on a case-by-case basis.¹⁸¹

The same Court imputed to Congress a will to invalidate such (state-imposed) restraints. The resulting regime, however, left private restraints that might produce the very same effects entirely unscathed. The Sherman Act, of course, filled this gap, banning (private) contracts and combinations that, like preempted state legislation, imposed “restraints” on commerce among the several states. Thus, the rich body of law policing the boundaries between state-imposed “direct” and “indirect” obstructions or restraints of interstate commerce—and thus encouraging free trade and a competitive allocation of resources—provides an alternative source of meaning for the term “restraint of trade.”¹⁸²

Of course, these precedents provide only a potential source of meaning, thereby begging some method of choosing between this source and the common law. A little consideration, however, suggests that the constitutional precedents should have priority. After all, such precedents placed significant limits on the scope of congressional power, limits that would seem to preclude wholesale incorporation of the common law into section 1 of the Act. Consider in this respect a classic agreement governed by the common law, namely, an employee’s agreement with an initial employer not to work for a competing employer after leaving initial employment.¹⁸³ If overbroad, such an agreement could certainly be “in restraint of trade” and thus unenforceable at common law.¹⁸⁴ Moreover, such an agreement could hypothetically affect interstate commerce in some way. However, it is difficult to see how such an agreement could “directly burden” or “directly obstruct” such commerce that consisted of (1) buying and selling across state lines and (2) travelling from one state to another.¹⁸⁵ At the least, any such effect would surely be “indirect” or incidental in the same way that banning an entire

181 Indeed, in *Standard Oil*, the Court analogized the “direct burden” test to the “standard of reason” it announced to implement section 1. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 70 (1911) (likening application of the “standard of reason” to “the power which must be exercised in every case where the courts are called upon to determine whether particular acts are invalid which are, abstractly speaking, in and of themselves valid, but which are asserted to be invalid because of their direct effect upon interstate commerce”).

182 See, e.g., *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 717–18 (1995) (Scalia, J., dissenting) (invoking pre-statutory interpretations of a statutory term of art as establishing the meaning of the contested term); *Moskal v. United States*, 498 U.S. 103, 121–26 (1990) (Scalia, J., dissenting) (same).

183 See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (Taft, J.) (describing this as one of five classic ancillary restraints).

184 *Id.* at 282–83 (stating that at common law “if the restraint exceeds the necessity presented by the main purpose of the contract, it is void”).

185 See *supra* notes 93–99 and accompanying text.

industry would be indirect, even if the industry exported most of its products to other states.¹⁸⁶

Or, consider the classic example of the covenant ancillary to the sale of a business, say, a bakery.¹⁸⁷ The sale itself, of course, while perhaps commerce, would not cross state lines, even if the business in question exported some or all of its output to other states. To be sure, the agreement not to compete, that is, not to set up a new establishment that made the same product, could affect interstate commerce, at least if the new establishment would itself have exported its product to other states by transacting with parties in other states.¹⁸⁸ Here again, however, any such effect would be subordinate to the main transaction—the sale of the business—and thus indirect or incidental.¹⁸⁹ Finally, consider the formation of a partnership and accompanying covenant that requires a partner to give up any other ownership interests and devote his or her complete efforts to the venture, that is, refrain from “moonlighting” in competition with the venture.¹⁹⁰ One suspects that, during the 1880s, the vast majority of such agreements governed purely intrastate operations, such as a small law firm operating in a single city. Nonetheless, one can imagine a partnership that engaged in interstate commerce, say, a partnership that owned steamships that carried passengers across state lines.¹⁹¹ Agreements by partners not to compete with such ventures would, therefore, prevent rivalry that would otherwise take place.

Still, any such impact on interstate commerce would likely be indirect. After all, such covenants would simply implement the underlying partnership. While the creation of the venture could itself reduce competition, any such reduction was, according to William Howard Taft, “only an *incident* to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community.”¹⁹² Restraints preventing partners from moonlighting in competition with the venture ensured that the partners devoted their entire effort to the venture, enhancing the efficiency of the business, and were thus merely “ancillary” to the underlying venture.¹⁹³ Thus, it would seem, any resulting impact on interstate commerce would be “incidental” or “indirect.”

186 See *Kidd v. Pearson*, 128 U.S. 1, 15 (1888) (finding that Iowa’s ban on the manufacture of alcohol, even for export, did not directly restrain commerce among the states).

187 See *Mitchel v. Reynolds* (1711) 24 Eng. Rep. 347; 1 P. WMS. 181 (Eng.).

188 If, however, the new establishment simply sold its output to a distributor in the same state, who in turn resold the product to purchasers in other states, the new establishment would not be participating in interstate commerce but would instead fall into the category of “manufacturing.”

189 See *Ancillary*, WEBSTER’S COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 113, at 51 (defining “ancillary” as “subordinate to”).

190 See *Addyston Pipe & Steel Co.*, 85 F. at 281.

191 Cf. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

192 *Addyston Pipe & Steel Co.*, 85 F. at 280 (emphasis added).

193 *Id.* (“Restrictions in the articles of partnership upon the business activity of the members, with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged.”).

The fact that the various restraints mentioned above would likely exceed the commerce power has important implications for the choice between the common law and Commerce Clause precedents as a source of statutory meaning. That is, to invoke the botanical metaphor that Justice Scalia borrowed from Justice Frankfurter in *Moskal v. United States*, the scope of congressional power over private commercial activity, even if exercised to its fullest extent, provided improper soil for transplantation of the common law governing contracts in restraint of trade under the aegis of the commerce power.¹⁹⁴ Many if not most such contracts, even those involving interstate commerce, would simply fall outside the scope of the commerce power as courts understood it, thereby rendering the common law governing contracts in restraint of trade an inapt source of meaning for section 1.

One need not speculate about how nineteenth-century jurists might choose between these different sources of meaning, that is, common law and the Commerce Clause. In *United States v. E.C. Knight Co.*, for instance, the Court held that a merger creating a monopoly over the nation's sugar production did not violate the Sherman Act, even though most such sugar was exported across state lines and thus, after production, became the subject of interstate commerce.¹⁹⁵ After reviewing the Court's caselaw distinguishing between direct and indirect state-imposed burdens on interstate commerce, the Court concluded that Congress had adopted the Sherman Act "in the light of well-settled principles."¹⁹⁶ These principles, the Court said, denied Congress the power to regulate mergers, which, the Court said, could only impact commerce among the states "indirectly," even if such a transaction resulted in monopoly.¹⁹⁷ Moreover, the Court noted that incorporation of the common law governing contracts and combinations as the Sherman Act standard governing mergers would result in rules that exceeded Congress's power even more than would a ban on monopoly or preemption of a state manufacturing ban. That common law, the Court said, banned certain transactions regardless of whether they produced a monopoly, so long as the resulting agreements or transactions "tend[] to that end" by "depriv[ing]

194 See *Moskal v. United States*, 498 U.S. 103, 121 (1990) (Scalia, J., dissenting) ("[A]s Justice Frankfurter more poetically put it: '[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings its soil with it.'" (second alteration in original) (quoting Frankfurter, *supra* note 87, at 537)).

195 156 U.S. 1 (1895).

196 See *id.* at 16 ("It was in the light of well-settled principles that the act of July 2, 1890, was framed. Congress did not attempt thereby to assert the power to deal with monopoly directly as such . . .").

197 *Id.* ("Contracts, combinations, or conspiracies to control domestic enterprise in manufacture, agriculture, mining, production in all its forms, or to raise or lower prices or wages, might unquestionably tend to restrain external as well as domestic trade, but the restraint would be an indirect result, however inevitable and whatever its extent, and such result would not necessarily determine the object of the contract, combination, or conspiracy.").

the public of the advantages which flow from free competition.”¹⁹⁸ “Slight reflection,” the Court said, would show that the extension of “national power” to such transactions whenever they also (indirectly) affected commerce among the states would leave comparatively little of business operations and affairs to state control, thereby confirming that Congress lacked power over such restraints.¹⁹⁹ In short, the Court rejected the common law as the operative standard governing such transactions because codification of such standards with respect to such transactions exceeded the scope of Congress’s constitutional authority.

Two years later, in *United States v. Trans-Missouri Freight Ass’n*, the Court again addressed the interaction of the Sherman Act and the common law.²⁰⁰ There the United States challenged a horizontal cartel among competing railroads that carried goods and persons across state lines. The defendants emphasized that the title of the Sherman Act described the statute as an act “to protect trade and commerce against *unlawful* restraints and monopolies.”²⁰¹ As a result, they said, the Court should look to the common law to determine whether a restraint was “unlawful.”²⁰² They also contended that the statute could not mean what it said and ban “every” “restraint of trade,” because such an interpretation would create severe financial hardship and bankruptcy for the railroads.²⁰³ This consideration, they said, fortified the case for reading the Act only to ban those “unreasonable” restraints con-

198 *Id.* (“Again, all the authorities agree that, in order to vitiate a contract or combination it is not essential that its result should be a complete monopoly, it is sufficient if it really tends to that end and to deprive the public of the advantages which flow from free competition. Slight reflection will show that if the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries, whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for state control.”).

199 *Id.*

200 166 U.S. 290 (1897).

201 *Id.* at 327 (emphasis added) (internal quotation marks omitted).

202 *Id.* (“We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a Federal statute in order to be dealt with in a Federal court. It is said that when terms which are known to the common law are used in a Federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is ‘to protect trade and commerce against unlawful restraints and monopolies,’ it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the Federal statute.”).

203 *Id.* at 340 (“In other words, we are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed Congress intended the natural import of the language it used. This we cannot and ought not to do. That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect.”).

demned at common law and not those, like the defendants' association, that purportedly set reasonable prices.²⁰⁴

The Court rejected this interpretive strategy, holding instead that the statute itself contained the proper definition of "unlawful" and that the plain language, and not the common law, controlled.²⁰⁵ Thus, the Court said, the statute banned *all* contracts and combinations that restrained trade, regardless of whether such agreements were reasonable or enforceable at common law.²⁰⁶ While the Court acknowledged that this interpretation might result in a "disaster" for the railroads and undermine the goals of the Act, the prospect of this result was not so obvious as "to permit [the Court] to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect."²⁰⁷ Thus, the Court rejected the common law as a source of meaning and found that application of the Act to ban the defendants' price fixing did not produce results sufficiently absurd to require the Court to depart from what it considered the statute's plain language.²⁰⁸

204 *Id.* at 327–28.

205 *Id.* at 327 ("We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text.").

206 *Id.* at 334 ("The plaintiffs are, however, under no obligation in order to maintain this action to show that by the common law all agreements among competing railroad companies to keep up rates to such as are reasonable were void as in restraint of trade or commerce."); *id.* at 328 ("When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.").

207 *Id.* at 340 ("That impolicy is not so clear, nor are the reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and to thus materially alter its meaning and effect. It may be that the policy evidenced by the passage of the act itself will, if carried out, result in disaster to the roads and in a failure to secure the advantages sought from such legislation. . . . Large numbers do not agree that the view taken by defendants is sound or true in substance, and Congress may and very probably did share in that belief in passing the Act. The public policy of the Government is to be found in its statutes . . .").

208 By contrast, four dissenting Justices concluded that the term "restraint of trade" should bear its common-law meaning and thus ban only restraints that set unreasonable prices. *See id.* at 353 (White, J., dissenting, joined by Field, Gray, and Shiras, JJ.) ("Premitting the consideration of the title, it cannot be denied that the words 'restraint of trade' used in the act in question had long prior to the adoption of that act been construed as not embracing reasonable contracts. The well-settled rule is that where technical words are used in an act, and their meaning has previously been conclusively settled, by long usage and judicial construction, the use of the words without an indication of an intention to give them a new significance is an adoption of the generally accepted meaning affixed to the words at the time the act was passed.").

The Court declined to apply the common law again in *United States v. Joint Traffic Ass'n*, another challenge to a railroad cartel.²⁰⁹ There the defendants claimed that the broad “plain language” approach taken by the *Trans-Missouri Freight* decision would ban all sorts of “ordinary contracts and combinations,” including covenants not to compete, mergers, and partnerships, and thus abridge liberty of contract.²¹⁰ Instead of turning to the common law, the Court responded by holding that the statute only banned those contracts and combinations “whose direct and immediate effect is a restraint upon interstate commerce” and did not reach those whose effect was “indirect or incidental only.”²¹¹ In so holding the Court invoked *Hopkins v. United States*, announced on the same day.²¹² There the Court unanimously held that an agreement between members of a cattle exchange on commissions charged for the sale of livestock shipped from out of state had merely an indirect impact on interstate commerce and thus exceeded the scope of the Sherman Act.²¹³ Application of the direct-indirect standard likely would have produced a different result, the Court said, if the agreement set rates that were “exorbitant,” in which case the challenged agreement “might have similar effect as a burden on commerce that a charge upon commerce itself

209 171 U.S. 505 (1898).

210 See *id.* at 566–68 (“As examples of the kinds of contracts which are rendered illegal by this construction of the act, the learned counsel suggest all organizations of mechanics engaged in the same business for the purpose of limiting the number of persons employed in the business, or of maintaining wages; the formation of a corporation to carry on any particular line of business by those already engaged therein; a contract of partnership or of employment between two persons previously engaged in the same line of business; the appointment by two producers of the same person to sell their goods on commission; the purchase by one wholesale merchant of the product of two producers; the lease or purchase by a farmer, manufacturer or merchant of an additional farm, manufactory or shop; the withdrawal from business of any farmer, merchant or manufacturer; a sale of the good will of a business with an agreement not to destroy its value by engaging in similar business; and a covenant in a deed restricting the use of real estate. It is added that the effect of most business contracts or combinations is to restrain trade in some degree.”).

211 *Id.* at 568 (citing *Hopkins v. United States*, 171 U.S. 578, 592 (1898)).

212 171 U.S. 578.

213 *Id.* at 595–96 (analogizing members’ commissions to charges for use of the facilities themselves, and holding that such charges would impact interstate commerce only “indirect[ly] and remote[ly]” unless “exorbitant”); see also *id.* at 594 (“An agreement may in a variety of ways affect interstate commerce, just as state legislation may, and yet, like it, be entirely valid, because the interference produced by the agreement or by the legislation is not direct.”).

might have.”²¹⁴ In such a case, the Court said, “[a] remedy would probably be forthcoming” under the direct-indirect standard.²¹⁵

These decisions, holding that the Sherman Act only reaches contracts and combinations with direct effects on interstate commerce, regardless of the status of such restraints at common law, constitute contemporaneous constructions and thus significant evidence of the meaning of the Act.²¹⁶ Moreover, they also suggest that the term “restraint of trade” was a “standard,” and not a rule, and one that referred to the tendency of a contract or combination to interfere with open national markets, thwart the competitive allocation of resources, and injure consumers. Indeed, just nine years after Congress passed the Act, the Supreme Court unanimously characterized the statute in exactly this way, namely, as banning private agreements that had the same impact on interstate commerce as state statutes that imposed direct burdens on such commerce and thus were impermissible regulations of commerce among the states.²¹⁷ States, the Court said, lacked the proper incentives to regulate such agreements, which Congress had banned in an effort to protect the national market from such self-interested regulation.²¹⁸ This rationale implies an economic standard and one that focuses on the sort of anticonsumer exercise of market power produced by the sort of “partial” and “discriminatory” legislation that the Commerce Clause empowered Congress to ban.²¹⁹ By enacting a ban on (private) “restraint[s] of trade or commerce,” then, Congress presumably meant to incorporate the standard contained in the Court’s Commerce Clause jurisprudence, namely, the

214 *Id.* at 595. The Court would subsequently hold that it would have considered the agreement in *Hopkins* a direct restraint if it had produced unreasonable charges. *See* *Swift & Co. v. United States*, 196 U.S. 375, 397 (1905); *see also* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* 145–46 (1998) (“[I]f the result of the combination of commission men in the *Hopkins Case* had been to impose exorbitant charges on the passage of the live stock through the stockyards from one State to another, the case would have been different The effect on interstate commerce in such a case would have been direct.” (quoting *Staford v. Wallace*, 258 U.S. 495, 525 (1922))); *id.* at 144–48 (concluding that conduct imposing supracompetitive prices on interstate commerce was deemed a “direct” restraint on such commerce during this period).

215 *See Hopkins*, 171 U.S. at 596.

216 *See, e.g., Harmelin v. Michigan*, 501 U.S. 957 (1991) (Scalia, J.) (invoking contemporaneous constructions of state constitutional provisions as evidence of the original meaning of the Eighth Amendment).

217 *See Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 234–35 (1899).

218 *Id.* at 231–32.

219 This was also the standard that common-law courts applied to combinations, that is, cartels such as the one condemned in *Addyston Pipe*. *See generally* Hovenkamp, *supra* note 72 (concluding that, before 1890, common-law courts often enforced horizontal price agreements setting reasonable prices); *see also generally* Skrainka v. Scharringhausen, 8 Mo. App. 522 (Mo. Ct. App. 1880) (enforcing a horizontal price fixing agreement that set reasonable prices). This body of law was in fact transplantable to an exercise of the commerce power vis-à-vis such direct restraints of interstate commerce.

distinction between direct and indirect burdens on interstate commerce.²²⁰ Like the “common law” described by Justice Scalia in *Business Electronics Corp. v. Sharp Electronics Corp.*, this standard distinguishes restraints based upon their economic consequences, banning those that interfere with free trade by reducing rivalry and exercising market power to the detriment of consumers.²²¹ Application of such a standard, of course, requires courts to evaluate the impact of challenged restraints in light of evolving economic conceptions, reading the statute dynamically so as to faithfully implement the standard Congress enacted.

220 See John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 421–23 (2005) (contending that some statutory texts articulate a level of generality more consistent with a standard than a rule).

221 See *supra* notes 47–50 and accompanying text. The discernment and application of such a standard does not, as Farber and McDonnell contend, entail judges “impos[ing] their own views of public policy, free from constraint.” See Farber & McDonnell, *supra* note 68, at 650. Instead, as *Standard Oil* explained, the standard follows from the judicial duty “to apply and enforce the public policy embodied in the statute,” 221 U.S. 1, 64 (1911), a policy discerned by means of ordinary methods of statutory construction.