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ARTICLES

COMPETITION POLICY AND THE GREAT DEPRESSION: LESSONS LEARNED AND A NEW WAY FORWARD

*Alan J. Meese**

The recent Great Recession has shaken the nation's faith in free markets and inspired various forms of actual or proposed regulatory intervention displacing free competition. Proponents of such intervention often claim that such interference with free-market outcomes will help foster economic recovery and thus macroeconomic stability by, for instance, enhancing the "purchasing power" of workers or reducing consumer prices. Such arguments for increased economic centralization echo those made during the Great Depression, when proponents of regulatory intervention claimed that such interference with economic liberty and free competition, including suspension of the antitrust laws, was necessary to foster economic recovery. Indeed, this view has even left its mark on constitutional law, with several modern Supreme Court justices claiming that protection for economic liberty and free competition deepened and prolonged the Depression, thereby justifying judicial repudiation of liberty of contract and requiring an expansive reading of Congress's Commerce power.

Using the Great Depression as a case study, the Article examines the link between free competition—and generally applicable regulation that ensures such competition—and macroeconomic stability. The results of this study shed important light on claims that protection for economic liberty and free competition exacerbated the Depression as well as modern arguments that coercive interference with free-market outcomes can speed the ongoing recovery from the recent Great Recession.

Many equate "competition policy" with antitrust law. However, this Article widens the focus beyond antitrust. This wider focus reveals that, at least before the Depression, there were two other important sources of competition policy. Thus, while antitrust regulation, particularly the Sherman Act, protected free competition from undue private restraint, the Dormant Commerce Clause and Due Process Clauses pro-

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hibited undue state and federal restraints on economic liberty and thus free competition. As of 1929, then, these three sources of law combined to create and enforce a unified and doctrinally symbiotic commitment to free competition as the norm governing American economic life.

Unfortunately, relaxation of antitrust's anti-collusion standards in the late 1920s and early 1930s paved the way for the 1933 National Industrial Recovery Act (NIRA), FDR's stimulus plan. In particular, the NIRA fostered collective wage and price setting and banned forms of normal competition, thereby protecting incumbent firms from more efficient rivals. Antitrust's surprising embrace of collusive practices also presaged judicial repudiation of due process protection for economic liberty in Nebbia v. New York*, 291 U.S. 502 (1934), repudiation which the Supreme Court confirmed in the late 1930s.*

While the Court unanimously overturned the NIRA in Schechter Poultry v. United States*, 295 U.S. 495 (1935) Congress and many states, apparently emboldened by* Nebbia*, responded by enacting various statutes interfering with free competition, some of which survive to this day. In particular, the 1935 National Labor Relations Act (NLRA) mandated collective bargaining with labor cartels known as unions, thereby displacing free competition in wage setting, while the 1938 Fair Labor Standards Act further displaced such competition by imposing minimum wages. Shortly thereafter, the Supreme Court invoked* Nebbia*-like reasoning when holding that neither the antitrust laws nor the dormant Commerce Clause prevents states from organizing and enforcing cartels that would otherwise unreasonably restrain interstate commerce and thus violate the Sherman Act. See* Parker v. Brown*, 317 U.S. 341 (1943). This "state action" exemption applied, the Court said, even though California producers exported nearly all their raisins to other states. As a result, the rest of the nation bore the brunt of such collusive output reduction.*

By the mid-1940s the pre-Depression commitment to free-market competition was a thing of the past. While the antitrust laws still banned private restraints interfering with free competition, states and the federal government were entirely free to displace free-market outcomes by statute, or for that matter, exempt private conduct from antitrust regulation. While proponents advocated the NIRA and other coercive interference with free markets as recovery measures, both theory and empirical evidence establish that these policies, including cartelization of labor via collective bargaining mandated by the NLRA, in fact deepened and lengthened the Depression. If history is any guide, then, free competition did not cause the recent Great Recession and displacing free competition will only slow recovery.

This paper ends by sketching various lessons from the New Deal experience and advocating a return to the pre-Depression commitment to free-market competition. While important, antitrust regulation of private markets cannot ensure the primacy of such competition if states and the national government are left free to exempt large sectors from such regulation and impose price and output restrictions that would be felonies if imposed by private parties. Restoration of free competition as the national norm requires a new symbiosis, whereby state and federal efforts to displace market outcomes are tested by the same skepticism as similar efforts by private parties. Antitrust experts can assist in developing this new symbiosis by devoting more intellectual energy to expanding the domain of antitrust by, for instance, advocating the elimination of various exemptions, particularly Parker*'s state action exemption that currently shelters state-created cartels from the Sherman Act.*

This is not to say that competition should be completely unrestrained by private contract or regulation. Even before the New Deal, courts properly upheld numerous examples of police power regulation that interfered with contractual liberty while counteracting market failure by combating externalities and monopoly pricing. Contractual restrictions on freedom of action, even those that appear "exclusionary," can have similar beneficial effects, furthering free competition and enhancing economic welfare. Like other proposals to interfere with free competition, recent calls for antitrust to ban certain wealth creating restraints simply because they reduce short run rivalry and raise prices in a particular market are therefore misguided.

INTRODUCTION 258
I. THE GREAT RECESSION AND REDUCED FAITH IN MARKETS 263
II. STATUTORY AND CONSTITUTIONAL COMPETITION POLICIES BEFORE THE DEPRESSION 266
A. *The Commerce Clause* 267
B. *Antitrust Regulation* 270
C. *The Due Process Clauses as (Residual) Competition Policy* 275
1. Price Regulation 275
2. Entry Restrictions 277
3. Regulation of Wages and Working Conditions 278
III. THE RETREAT OF ANTITRUST AND THE GREAT DEPRESSION 280
A. *Trade Associations Ascendant and Antitrust in Retreat* 280
B. *The Depression* 282

1. Causes and Remedies 283
2. Mixed Signals from the Supreme Court 287
IV. FDR'S STIMULUS PLAN: THE NIRA 289
V. *NEBBIA* AND THE RETREAT OF ECONOMIC DUE PROCESS .. 296
VI. *SCHECHTER POULTRY* AND THE NIRA'S DEMISE.......... 300
VII. THE NIRA REDUX: POST-*SCHECHTER* INTERFERENCE WITH FREE COMPETITION 304
A. Antitrust Unleashed and Free Competition Restored 304
B. Nebbia *Confirmed: The Death of Economic Due Process* 306
C. Schechter*'s Limited Influence* 306
D. Congress Unbound 308
E. Approving Anticompetitive State Restraints on Interstate Commerce 311
VIII. CARTELIZATION AS (POOR) STABILIZATION POLICY 320
IX. LESSONS LEARNED AND A NEW WAY FORWARD.......... 326
CONCLUSION... 335

INTRODUCTION

The recent "Great Recession" has predictably induced a debate about its cause and how to prevent future downturns. Independent of macroeconomic events, the nation continues to debate the proper role of government, and the appropriate division of responsibilities between states and the national government, in constructing the background regulatory framework necessary to maximize society's welfare. Many contend that the national government should play a more robust regulatory role, further displacing free-market competition as the chief method of allocating the nation's material and human resources.[1] The outcome of this debate will help determine the nation's economic course over the next few decades.

Indeed, additional interference with free competition has already taken place and more is under consideration. The national government intervened in the free market with billions in taxpayer dollars to save both General Motors and Chrysler from the results of normal free-market discipline and the ordinary functioning of the bankruptcy process.[2] Moreover, during the health care debate, Congress narrowly rejected President Obama's proposal that the national government enter the health insurance business via a "public option" in competition with private

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[1] *See infra* notes 21–39 and accompanying text.

[2] *See generally* Todd Zywicki, *The Auto Bailout and the Rule of Law*, NAT'L AFF., Spring 2011, at 66, 68; *available at* http://www.nationalaffairs.com/publications/detail/the-auto-bailout-and-the-rule-of-law (discussing auto bailouts in great detail).

providers.[3] Congress has also recently reaffirmed the nation's policy of encouraging cartelization between health insurance companies and refused to remove other barriers to competition in health care markets, thereby facilitating economic concentration and higher prices.[4]

At the same time, many advocate in favor of strengthening the ability of unions—labor cartels—to bargain collectively over employee compensation.[5] Such concerted negotiation over wages, which is exempt from antitrust regulation, would be felonious if undertaken by suppliers of non-labor inputs or, for that matter, by salaried employees not permitted to engage in collective bargaining.[6] Many also propose to further displace the role of competition in setting wages, by raising the national minimum wage, while several states are raising their own minimum wages.[7] Finally, some officials, invoking the partial suspension of the antitrust laws during the Great Depression as a cautionary tale, contend that more aggressive antitrust enforcement will increase private market competition and accelerate economic recovery, even if such enforcement displaces normal, free-market competition by banning once-lawful conduct that creates wealth.[8]

Current economic circumstances and resulting public debate are reminiscent of the Great Depression, during which deplorable macroeconomic conditions set the stage for a fundamental realignment of the respective role that private markets, states, and the national government play in allocating and distributing resources.[9] This Article therefore employs the Depression, as well as the New Deal and its aftermath, as a case study to shed light on the role that free-market competition—and generally applicable regulation in the form of antitrust law that fosters such competition—can and should play in furthering our nation's economic progress and promoting macroeconomic stability. In addition, this paper widens its focus beyond antitrust law and considers other policies that can support or thwart free competition. This broader focus reveals that there were two other important sources of competition policy

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[3] *See* Robert Pear & Jackie Calmes, *Senators Reject Pair of Public Option Proposals*, N.Y. TIMES (Sept. 30, 2009), *available at* http://www.nytimes.com/2009/09/30/health/policy/30health.html?_r=0.

[4] *See infra* notes 26–29 and accompanying text.

[5] *See infra* notes 32–33 and accompanying text.

[6] *See infra* notes 81–84 and accompanying text. *See also* 15 U.S.C. § 1 (2006) (declaring all violations of Section 1 of the Sherman Act felonies).

[7] *See* Blake Ellis, *Minimum Wage Increases for Workers in Eight States*, CNN MONEY (Dec. 23, 2011), http://money.cnn.com/2011/12/23/news/economy/minimum_wage_increases (outlining minimum wage increases over the federal minimum in Arizona, Colorado, Florida, Montana, Ohio, Oregon, Vermont, and Washington).

[8] *See* Christine Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era 4 (May 12, 2009).

[9] *See* discussion *infra* Parts III.B–VII.

before the Depression, both of which the New Deal Supreme Court would repudiate, to the detriment of economic welfare.[10] That is, both the "dormant" Commerce Clause and the Due Process Clauses of the Fifth and Fourteenth Amendments, taken together, placed significant limits on the ability of states and the national government coercively to displace free-market competition with monopoly or horizontal cartels.[11] When coupled with the Sherman Act, which banned private cartels and inefficient private monopolies,[12] these provisions manifested and enforced a robust, coherent regulatory policy which privileged decentralized private markets and the results they produced over centralized public or private control. The result was "free competition," that is, the allocation of resources by private markets characterized by free entry and unfettered by unreasonable public or private restraints.

This unity within these three bodies of law and resulting support for free competition was not accidental, as the three sources of competition policy were symbiotic, with concepts from one set of doctrines informing other doctrines and vice versa. For instance, the Sherman Act banned as unreasonable "direct restraints," beyond the protection of liberty of contract, private agreements producing the same impact as state regulations that "directly" restrained interstate commerce and thus ran afoul of the dormant Commerce Clause.[13] Moreover, while the Sherman Act banned private price fixing, the Due Process Clauses banned price fixing by states and the national government.[14] If properly implemented, such a framework could facilitate an allocation of resources that maximized the nation's potential output and economic welfare.

Unfortunately for the nation's economic welfare, this unity was not to last. Even before the Depression, enforcement agencies and courts began to relax antitrust's anti-collusion norms, and this relaxation continued after 1929. This relaxation presaged the 1933 National Industrial Recovery Act and similar recovery measures at the state and federal level designed to combat the Depression by coercively raising wages and prices. While the Supreme Court invalidated the NIRA in *Schechter Poultry v. United States*, the Court also rejected a liberty of contract challenge to state price-fixing in a purely private business in *Nebbia v. New York*, thereby signaling the end of meaningful due process protection for economic liberty. Congress and the states accepted *Nebbia*'s invitation to displace free-market wage and price setting with minimum wages, collective bargaining and outright price controls. The Supreme Court facili-

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[10] *See infra* notes 277–307 and 354–55, 400–457 and accompanying text.

[11] *See infra* notes 41–64, 104–37 and accompanying text.

[12] *See infra* notes 65–103 and accompanying text.

[13] *See infra* notes 65–80 and accompanying text.

[14] *See infra* notes 104–22 and accompanying text.

tated these efforts by removing commerce clause restrictions on both Congressional and state authority to regulate economic activity, thereby empowering both sovereigns to impose overlapping restraints that would not have survived the pre-New Deal legal regime. By the mid-1940s, the pre-Depression commitment to free competition was a thing of the past.

Proponents of the NIRA, minimum wages, forced collective bargaining and similar measures claimed that these policies would stimulate economic recovery and foster macroeconomic stabilization. Moreover, some modern jurists and academics contend that pre-New Deal limits on congressional power and protection for liberty of contract somehow prevented effective macroeconomic recovery measures. However, both theory and empirical evidence rebut these claims and establish that interference with free-market wage and price setting actually deepened and lengthened the Great Depression, by thwarting the normal process of economic adjustment. Modern policymakers would do well to heed these lessons and resist additional interference with free competition purportedly designed in response to the latest downturn.

Part I of this Article recounts the recent Great Recession, from which the nation is still recovering, as well as resulting efforts further to displace free-market determinations of wages, prices, and output. Part II begins the case study of the Great Depression and various regulatory responses by examining three sources of competition policy that were in effect before 1929: (1) the Due Process Clauses of the Fifth and Fourteenth Amendments; (2) the Commerce Clause, with its affirmative and dormant components; and (3) the antitrust laws. Taken together, all three bodies of law protected free-market competition and the wealth-maximizing economic results it produced from undue private, state, and national interference.

Part III details the relaxation of antitrust's hostility to private sector collusion during the late 1920s, including the Department of Justice's hands-off approach to horizontal cooperation and the Federal Trade Commission's (FTC) approval of various "codes of fair competition" that stifled rivalry. This Part also describes the onset of the Depression and recounts then-contemporary thinking about possible causes of the downturn and cures for it. Finally, Part III also discusses the *Appalachian Coals* decision, in which the Supreme Court declined to condemn a joint selling arrangement between dozens of coal producers that seemed to contravene then-current antitrust doctrine, validating a massive private restraint on free-market competition.

Part IV examines the NIRA, which extended the logic of the FTC codes and *Appalachian Coals*, encouraging industries collectively to raise wages and prices and immunizing numerous collusive practices that reduced economic welfare from antitrust attack. Part V examines the

Court's 1934 decision in *Nebbia v. New York*, which in sustaining New York's imposition of cartel pricing on milk retailers, signaled retreat from pre-Depression due process precedents protecting free-market pricing and output from undue state and national interference. Part VI recounts the demise of the NIRA, which the Supreme Court unanimously declared unconstitutional in *Schechter Poultry v. United States* in 1935. Part VII examines the limited and short-lived influence of *Schechter*. To be sure, the decision restored antitrust regulation over the private sector, and the Supreme Court soon reversed the "hands off" approach to horizontal restraints exemplified by *Appalachian Coals,* restoring free competition as antitrust's organizing principle. However, the Court soon abandoned *Schechter*'s Commerce Clause holding, leaving Congress perfectly free to impose market restrictions on an industry-by-industry basis, thereby avoiding *Schechter*'s non-delegation limitations. Congress took full advantage of these developments, as well as *Nebbia*'s rejection of economic liberty, imposing direct price and output regulation of various industries while simultaneously requiring firms with modest connections to interstate commerce to recognize and support labor cartels known as unions. This Part also recounts how the New Deal Court in *Parker v. Brown* unanimously removed dormant Commerce Clause limitations on NIRA-like coercive restrictions on price and output adopted by individual states. No longer bound by due process constraints, states now had carte blanche to directly burden and distort interstate commerce. In so doing, the Court credited reasoning, first embraced in *Nebbia*, to the effect that state-mandated cartelization could serve legitimate interests, thus blunting arguments by the United States that the restriction was indistinguishable from private cartelization.

Part VIII evaluates the New Deal assumption, embraced by some scholars and modern Supreme Court Justices, that state-enforced cartelization of industry and labor helped reverse the Depression. Basic economic theory suggests the opposite, i.e., that departure from free competition tended to thwart economic recovery by preventing labor and product markets from reaching equilibrium, thereby interfering with the full employment of resources. Recent empirical work confirms this theoretical prediction and establishes that the NIRA and related measures both deepened and lengthened the Depression. Part IX lays out several lessons the nation should have learned from the interplay between competition policy and the Great Depression, and offers proposals for expanding the role of free competition in the American economy.

I. THE GREAT RECESSION AND REDUCED FAITH IN MARKETS

Dubbed the "Great Recession," the most recent economic downturn began in mid-2008.[15] That year, real gross domestic product (GDP) fell at an annual rate of 2% in the third quarter before falling at an annual rate of over 8% in the fourth quarter.[16] The downturn continued into the first half of 2009, with GDP falling at annual rates of 5.4% and less than 1% in the first and second quarters, respectively.[17] A weak recovery began in the third quarter of 2009, with GDP rising, though sometimes quite modestly, in each of the next fourteen quarters.[18] The slow recovery stalled, at least momentarily, with GDP rising only 0.1% in the fourth quarter of 2012.[19]

The national government responded to the Great Recession with conventional tools of macroeconomic stabilization: a "stimulus package" of deficit spending and expansionary monetary policy.[20] The deep recession and slow recovery also caused many to question the role that free markets should play in allocating the nation's resources.[21] This widespread skepticism helped give rise to various attempts—some of which were successful—to reduce the role of free competition in our nation's economy. Indeed, shortly after taking office, President Obama finished the bailout started by President Bush of two of the nation's largest automobile companies by purchasing General Motors and subsidizing the sale of Chrysler to Fiat, Italy's largest automaker.[22] By saving firms whose products many consumers had rejected, the United States thwarted the discipline that free markets generally impose on poorly-managed firms and thus distorted market outcomes.[23] Moreover, during the debate

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[15] *See Gross Domestic Product: Percent Change From Preceding Period*, BUREAU OF ECON. ANALYSIS, http://www.bea.gov/national/xls/gdpchg.xls (last updated Feb. 28, 2014).

[16] *Id.*

[17] *Id.*

[18] *See id.* For instance, GDP actually fell at an annual rate of 1.3% in the first quarter of 2011 and rose at an annual rate of 1.4% in the third quarter of that year. *Id.* Moreover, GDP rose at annual rates of 1.2% and 0.1%, respectively, in the second and fourth quarters of 2012. *Id.* Finally, GDP rose at an annual rate of 1.1% in the first quarter of 2013. *Id.*

[19] *Id.*

[20] *See* Alan J. Meese, *Section 2 and the Great Recession: Why Less (Enforcement) Might Mean More (GDP)*, 80 FORDHAM L. REV. 1668–71 (2012) [hereinafter Meese, *Section 2 and the Great Recession*] (detailing fiscal and monetary responses by the Bush and Obama Administrations to the economic downturn).

[21] *See* RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION 186 (2009); *see also* Daniel Crane, *Obama's Antitrust Agenda*, 32 REGULATION 16, 16 (2009) ("[T]he economic crisis has dealt a sharp blow to laissez faire ideology and reinvigorated political support for regulatory solutions.").

[22] Todd Zywicki, *The Auto Bailout and the Rule of Law*, NATIONAL AFFAIRS, Spring 2011, at 66, 68 (discussing auto bailouts in great detail).

[23] *See id.* at 70–71 (explaining how firms' failure in the marketplace brought on financial distress and how, absent bailouts, both firms would have likely emerged from bankruptcy reorganization as more effective rivals).

over health care reform, President Obama proposed a so-called "Public Option," whereby the national government would enter the business of providing health insurance, competing directly with private insurance companies.[24] Proponents of this approach claimed that a nationalized insurance company would grow so large that it could use bargaining power to drive down the price of health care, thereby underpricing private insurers and dominating the market.[25]

During the same debate, Congress refused to take various steps that would have injected additional competition into health care markets. For instance, Congress rejected calls to repeal the antitrust exemption enjoyed by private insurance companies under the 1945 McCarran-Ferguson Act.[26] Congress also refused to disturb the same Act's authorization for states to exclude out-of-state insurance companies from their own markets, exclusion that would otherwise offend the dormant Commerce Clause.[27] Finally, Congress declined to preempt so-called "certificate of need laws," which prevent new hospitals from entering the market without the approval of an administrative agency required to seek the opinions of incumbent hospitals eager to avoid competition.[28] This conscious inaction helped fortify concentrated markets and ensure lower output and higher prices than free competition would have produced.[29]

Not all actual or attempted interference with free markets was industry-specific. For instance, shortly after her confirmation, President Obama's first head of the Antitrust Division of the Department of Justice promised a more aggressive pursuit of monopolies. In particular she advocated an unprecedented test for liability that would ban some wealth-creating conduct, thereby preventing large firms from realizing some efficiencies and displacing the results of ordinary free-market com-

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[24] Jonathan Weisman & Janet Adamy, *Obama to Endorse Public Plan in Speech*, WALL ST. J. (Sept. 9, 2009), http://online.wsj.com/news/articles/SB125240777810092069.

[25] *See* Robert B. Reich, *Why We Need A Public Health Care Plan*, WALL ST. J. (June 24, 2009), http://online.wsj.com/article/SB124580516633344953.html.

[26] Competitive Health Insurance Reform Act of 2011, H.R.1150, 112th Cong. § 4 (2011) (proposed but rejected legislation that would end McCarran-Ferguson antitrust immunity).

[27] *See* Susan Farmer, *Competition and Regulation in the Insurance Sector: Reassessing the McCarran-Ferguson Act,* 90 OR. L. REV. 915, 936 (2011) (describing origins and operation of the Act).

[28] FTC & DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION, Ch. 8, 1–5 (2004) (criticizing the anticompetitive impact of so-called "certificate of need" laws).

[29] *See id.*; *see also* AM. MED. ASS'N, COMPETITION IN HEALTH INSURANCE: A COMPREHENSIVE STUDY OF US MARKETS (2011) (finding that 83% of 368 metropolitan health insurance markets are highly concentrated); *Health System Management Project,* DEP'T. OF HEALTH & HUMAN SERVS. (Apr. 23, 2012), https://healthmeasures.aspe.hhs.gov/measure/62 (finding that 80% of the nation's metropolitan areas have highly concentrated health care markets); J.C. Robinson, *Hospital Market Concentration, Pricing, and Profitability in Orthopedic Surgery and Interventional Cardiology*, 17 AM. J. MANAG. CARE 241, 241 (2011) (finding that increased hospital concentration resulted in higher prices for studied services).

petition.[30] Moreover, some states have recently banned minimum resale price maintenance (minimum RPM), a practice the Supreme Court has (properly) held often creates wealth.[31] The Obama Administration has also sought to expand the prerogatives of organized labor, hoping to strengthen the hands of unions that already exist and encourage the formation of others.[32] The result, of course, would be more collusion between employees and thus wages above the level set by free competition.[33] Finally, both the President and some members of Congress have proposed raising the federal minimum wage, thereby coercively fixing wages higher than free-market levels.[34] Several states have followed suit, setting minimum wages above the federal minimum.[35]

Many such interventions would serve distributional purposes by, for instance, redistributing income from employers to employees in the case of minimum wages, or from monopolists to consumers in the case of

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[30] Christine Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era 4 (May 12, 2009); *see also* Meese, *Section 2 and the Great Recession*, *supra* note 20, at 1671–78 (explaining how standard articulated by Ms. Varney would ban wealth-creating restraints treated as beneficial competition under current Supreme Court precedent).

[31] *See, e.g.*, California v. Bioelements, Inc., Cal. Super. Ct., Riverside Cty., No. 10011659 (2011) (consent decree banning minimum RPM under state law); New York et al. v. Herman Miller, Inc., 2008-2 Trade Cases (CCH) ¶ 76,454 (S.D.N.Y. March 21, 2008) (same); *cf.* Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 551 U.S. 877, 880 (2007) (rejecting per se ban on minimum RPM because the practice often increases economic welfare).

[32] *See generally* U.S. CHAMBER OF COMMERCE, THE NATIONAL LABOR RELATIONS BOARD IN THE OBAMA ADMINISTRATION: WHAT CHANGES TO EXPECT (2009) (detailing various pending initiatives by President Obama's NLRB to strengthen the position of unions at the expense of management); *see also, e.g.*, Notification of Employee Rights Under The National Labor Relations Act, 76 Fed. Reg. 80,138 (Dec. 30, 2011) (amending prior NLRB regulations to speed the process of conducting union representation elections by minimizing pre-election challenges). The Administration also supported failed legislation that would have expanded the prerogatives of organized labor. *See* Public Safety Employer-Employee Cooperation Act, S. 3194, 111th Cong. (2010) (proposed legislation requiring states to recognize collective bargaining representatives of public safety employees); Employee Free Choice Act, H.R. 1409, 111th Cong. § 2 (2009) (proposed legislation allowing organization of a union without a secret ballot if a majority of employees express a written preference for such organization).

[33] GEORGE J. STIGLER, THE THEORY OF PRICE 279 (4th ed. 1987) ("The labor union is for the labor market the equivalent of the cartel for the product market.").

[34] *See* President Barack Obama, 2013 State of the Union Address (Feb. 12, 2013) (advocating increased minimum wage); Original Living American Wage Act, H.R. 229, 113th Cong. (2013) (proposed legislation requiring minimum wage high enough to guarantee an income equal to 15% above the poverty level for a family of two); Catching Up to 1968 Act of 2012, H.R. 5901, 112th Cong. § 2 (2012) (proposed legislation raising federal minimum wage to $10.00 per hour).

[35] *See* Ray Long et al., *Quinn Wants Minimum Wage Hike, Assault Weapons Ban*, CHI. TRIB. (Feb. 6, 2013), http://articles.chicagotribune.com/2013-02-06/news/chi-quinn-to-call-for-minimum-wage-increase-to-10-an-hour-20130206_1_assault-weapons-minimum-wage-pat-quinn-today (detailing proposed increase in Illinois minimum wage to $10 per hour from a minimum already above the federal minimum); Ellis, *supra* note 7 (outlining minimum wage increases over the federal minimum in Arizona, Colorado, Florida, Montana, Ohio, Oregon, Vermont, and Washington).

tougher antitrust enforcement. However, proponents of these measures have also claimed that such intervention can spur economic recovery. For example, former President Bush claimed that bailouts of GM and Chrysler helped prevent the unemployment rate from rising to 21%.[36] Moreover, the first head of President Obama's Antitrust Division argued that more aggressive antitrust enforcement, including bans on efficient conduct, would have helped prevent the Great Recession and also aided the recovery by spurring more rivalry and thus lower prices.[37] Finally, proponents of higher minimum wages and collective bargaining claim that such interference with free-market wage setting will increase the "purchasing power" of low-income employees, stimulating consumption and GDP.[38] Indeed, in his 2013 State of the Union Address, President Obama claimed that an increased minimum wage would raise incomes for millions of Americans and be good for business because "it would mean customers with more money in their pockets."[39]

II. STATUTORY AND CONSTITUTIONAL COMPETITION POLICIES BEFORE THE DEPRESSION

As Ronald Coase has explained, socially useful competition depends upon background rules created by the state and private parties.[40] By the late 1920s, there were three such generally applicable federal sources of competition policy: (1) the Commerce Clause—both affirmative and negative—of the Federal Constitution; (2) antitrust laws, partic-

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36 *See* David Shepardson, *Bush Defends Auto Bailouts*, DETROIT NEWS, Feb. 7, 2012, at A13.

37 *See* Meese, *Section 2 and the Great Recession*, *supra* note 20, at 1643–44 (discussing the Obama Administration's suggestion that lax antitrust enforcement helped cause the economic crisis).

38 *See* FISCAL POLICY INST., A WELCOME BOOST FOR NEW YORK: THE CASE FOR RAISING THE MINIMUM WAGE 1 (2012) (contending that higher minimum wage would increase purchasing power and create 25,000 jobs in the state); Robert Reich, *The Limping Middle Class,* N.Y. Times (Sept. 3, 2011), http://www.nytimes.com/2011/09/04/opinion/sunday/jobs-will-follow-a-strengthening-of-the-middle-class.html?pagewanted=all&_r=0 (contending that higher minimum wages and stronger unions will enhance consumers' purchasing power and thus encourage economic growth); Ellis, *supra* note 7 (reporting claims that higher minimum wages will stimulate local economies). *See also infra* note 381 and accompanying text noting findings in National Labor Relations Act that collective bargaining will enhance purchasing power of unionized employees.

39 President Barack Obama, 2013 State of the Union Address (Feb. 12, 2013); *see* John W. Schoen, *Obama's Latest Stimulus Plan: Raise the Minimum Wage*, NBC NEWS (Feb. 13, 2013, 8:33AM), http://www.nbcnews.com/business/obamas-latest-stimulus-plan-raise-minimum-wage-1C8350755 (reporting Administration's claim that raising the minimum wage to $9 per hour "would help boost economic growth in the form of higher consumer spending").

40 R.H. Coase, *The Institutional Structure of Production*, 82 AM. ECON. REV. 713, 717–18 (1992) (explaining that the background structure of legal entitlements can affect the nature of economic activity and thus the allocation of resources); R.H. COASE, THE FIRM, THE MARKET AND THE LAW, 8–9 (1988) (stating that "competitive" markets often require privately-created background rules).

ularly the Sherman Act; and (3) the Due Process Clauses of the Fifth and Fourteenth Amendments. This Part reviews the content of these three sources as of 1929, showing that these bodies of law were not hermetically sealed from one another, but were instead symbiotic, with factual premises and resulting developments in one area of the law often influencing seemingly separate doctrines. Taken together, these three sources of law constructed a unified and internally coherent framework that protected wealth-creating free-market competition from interference by state, federal, and private restraints. This framework allowed only that interference with private ordering necessary to combat market failures such as externalities or cartel pricing.

A. *The Commerce Clause*

The Commerce Clause empowers Congress to "regulate commerce among the several states," thereby authorizing legislation removing state-created obstructions of interstate commerce, including monopolies and cartels.[41] *Gibbons v. Ogden,* for instance, approved Congressional preemption of New York's creation of an interstate steamship monopoly.[42] This power is not unlimited, as *Gibbons* opined that Congress's authority does not extend to purely intrastate activities.[43] Applying this principle, the Supreme Court consistently held, before the Depression, that Congress could not regulate manufacturing, mining, or agriculture—including the wages and working conditions of factory employees or miners.[44]

Gibbons also suggested that state-created monopolies or other obstructions of interstate commerce themselves violated the Clause, even without congressional action.[45] Thus the Court has wielded the "negative" or "dormant" Commerce Clause against the states for more than 150 years.[46] The result was an American "Common Market" and com-

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[41] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 227–28 (1899) (assuming that the Framers adopted the Commerce Clause primarily to empower Congress to remove state-created obstructions to interstate commerce).

[42] *See* Gibbons v. Ogden, 22 U.S. 1 (1824).

[43] *Id.* at 194–195.

[44] *See* Hammer v. Dagenhart, 247 U.S. 251, 251 (1918) (invalidating Congressional ban on interstate sale of products manufactured with child labor); E.C. Knight v. United States, 156 U.S. 1, 1 (1895) (denying Congress the ability to prohibit sugar manufacturers from merging into a monopoly); Kidd v. Pearson, 128 U.S. 1, 24 (1888) (holding that states possess exclusive authority to ban production of alcohol intended for export).

[45] *Gibbons,* 22 U.S. at 197–209; *see also* Norman Williams, Gibbons, 79 N.Y.U. L. REV. 1398, 1416–17, 1495 (2004) (describing historical setting of *Gibbons* and distinguishing between the decision's holding and its dicta).

[46] *See* Bethlehem Motors Corp. v. Flynt, 256 U.S. 421, 421 (1921) (voiding requirement that non-domestic automobile dealers pay licensing tax quintuple that paid by similar in-state dealers); Walling v. Mich., 116 U.S. 446, 454 (1886) (voiding state tax discriminating against liquor from other states); Welton v. Mo., 91 U.S. 275 (1876) (overturning state statute requiring license to sell products made in other states).

petitive allocation of resources, absent valid federal regulation to the contrary.[47]

The Court's dormant Commerce Clause jurisprudence did not void every state commercial regulation falling within Congress's jurisdiction. Early on, the Court recognized that Congress could not practically regulate each aspect of interstate commerce within its authority, with the result that states could impose regulations that indirectly restrain such commerce.[48] Thus, state law still provided background rules—inspection, quarantine, health laws, and the like—supporting interstate commerce.[49] Such quintessential police regulation, which fit comfortably within the nineteenth century's classical, laissez-faire economic paradigm, could eliminate inefficient externalities, overcome market failure, and thereby facilitate commerce.[50]

The paradigmatic case *affirming* such regulation was *Cooley v. Board of Wardens*, which sustained a Pennsylvania statute requiring ships sailing into Philadelphia to employ a local pilot or pay half the cost of such a pilot into a fund for families of deceased or disabled pilots.[51] While Congress possessed the authority to preempt such legislation, the Supreme Court nonetheless upheld the statute because it dealt with a subject that, given its nature, demanded "different systems of regulation, drawn from local knowledge and experience, and conformed to local wants."[52]

Where, on the other hand, the subject matter of regulation was "inherently national," requiring a uniform national rule, or where state legislation burdened interstate commerce "directly," such legislation was *ipso facto* void, regardless of whether Congress had acted.[53] Thus, the Court

[47] *See* Norman Williams, *Foundations of the American Common Market*, 84 NOTRE DAME L. REV. 409, 409 (2006). *See also infra* Part II.C (explaining how the Fifth Amendment's Due Process Clause restricted Congress's authority to displace competitive wage and price determinations).

[48] *See Gibbons*, 22 U.S. at 203–04.

[49] *Id.* (explaining that inspection laws promote interstate commerce and thus do not interfere with Congress's commerce power).

[50] *See* Alan J. Meese, *Liberty and Antitrust in the Formative Era*, 79 B.U. L. REV. 1, 15–23 (1999) [hereinafter Meese, *Liberty and Antitrust*] (describing nineteenth century's "classical paradigm," which endorsed police power regulation to combat externalities and other sources of market failure). *See also infra* note 420 and accompanying text (explaining how, during this era, courts equated police power regulation with the power to combat market failure).

[51] *See* Cooley v. Bd. of Wardens, 53 U.S. 299 (1851).

[52] *Id.* at 315–17, 320 (concluding that the Commerce Clause empowers Congress to regulate the qualifications, compensation and duties of pilots).

[53] *See* Barry Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. CHI. L. REV. 1089, 1110–11 (2000) [hereinafter Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*] (discussing how the Court consistently maintained that regulations touching a "national" matter or burdening interstate commerce "directly" were unconstitutional); *see also Hinson v. Lott,* 75 U.S. 148, 152 (1868) ("[T[here is a class of

invalidated state bans on importing tobacco, alcohol, and margarine,[54] as well as laws burdening interstate commerce under the guise of health and safety regulation, many of which blatantly protected states' domestic industries from out-of-state competition.[55] The Court justified these results in free-market terms, reasoning that the founders adopted the Commerce Clause to ensure "the freest interchange of commodities among the people of the different States."[56]

In the same vein, the Court repeatedly voided state regulation of rates and other facets of interstate transportation, including the speed, schedules, stops, and numbers of cars on interstate trains.[57] The Court also voided state price regulation of goods transported across state lines, particularly exports to other states.[58] Thus, in 1927, the Court voided Rhode Island's regulation of the price of electricity generated within the state and shipped to Massachusetts.[59] In so doing, the Court relied upon a 1924 decision voiding Kansas's effort to regulate the price of natural gas exported to other states.[60] It did not matter that the electricity was delivered at the state line, where title to the current passed to a different company, which then distributed the product in Massachusetts, or that less than 3% of the generating company's output left the state.[61] What

legislation . . . which, from its essential character, is National, and which must . . . belong exclusively to the Federal government.").

[54] *See, e.g.*, Kirmeyer v. Kan., 236 U.S. 568, 569 (1916) (invalidating prohibition on cross-border liquor transport); Adams Express Co. v. Ky., 214 U.S. 218, 218 (1909); Schollenberger v. Pa., 171 U.S. 1, 1 (1898) (invalidating ban on sale, in original package, of oleomargarine).

[55] *See, e.g.*, Brimmer v. Rebman, 138 U.S. 78, 78 (1891) (invalidating statute requiring re-inspection of meat originally inspected over 100 miles from point of sale); Voight v. Wright, 141 U.S. 62, 62 (1891) (voiding law requiring inspection of flour imported from other states); Minn. v. Barber, 136 U.S. 313 (1890) (voiding statute requiring inspection of meat twenty-four hours before slaughter); Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, *supra* note 53, at 1101–08 (collecting additional decisions voiding state laws deemed contrary to the Commerce Clause).

[56] *See* Cook v. Pennsylvania, 97 U.S. 566, 574 (1878) (voiding discriminatory tax on sale of goods in original packages imported from other states).

[57] *See* Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, *supra* note 53, at 1104; *see also* Balt. & Ohio Sw. R.R. v. Settle, 260 U.S. 166, 166 (1922) (voiding regulation of interstate rail rates); McNeill v. S. Ry. Co., 202 U.S. 543, 560 (1906) (invalidating requirement that interstate railroads deliver railcars to particular siding); Ill. Cent. Ry. v. Illinois, 163 U.S. 142, 435 (1896) (invalidating law prescribing location of interstate train stops); Wabash, St. Louis & Pac. Ry. Co. v. Illinois, 118 U.S. 557, 558 (1886).

[58] *See* Missouri v. Kansas Natural Gas Co., 265 U.S. 298, 298 (1924) (voiding regulation of the price of natural gas exported to other states); Lemke v. Farmers Grain Co., 258 U.S. 50, 52 (1922) (invalidating regulation of the price of grain exported to other states).

[59] *See* Rhode Island v. Attleboro Steam & Elec. Co., 273 U.S. 83, 83 (1927) (voiding state regulation of the price of electricity exported to other states).

[60] *Id.* at 89 ("[T]his case is controlled by the *Kansas Gas Company* case.").

[61] *Id.* at 90 ("Nor does it matter that the business of the Narragansett Company [is] chiefly local"); *id.* at 86 (reporting that "one thirty-fifth" of the regulated firm's electricity output was exported).

mattered, instead, was that price fixing directly burdened the interstate distribution of that small fraction of output that *was* exported.[62] States could not regulate such prices "in the guise of protection to their respective local interests."[63]

Just before the Depression, then, ample authority prevented states from interfering with free-market pricing and resource allocation with respect to interstate commerce. At the same time, states were free to impose indirect restraints that counteracted market failures and facilitated interstate commercial activity. Moreover, the dormant Commerce Clause did not prevent states from regulating local commerce, including manufacturing, mining, agriculture, or the wages and working conditions of employees engaged in these pursuits, as regulating these activities was thought to exceed congressional authority.[64]

B. *Antitrust Regulation*

Passed in 1890, Section 1 of the Sherman Act banned "contracts, combinations, and conspiracies" in restraint of interstate commerce.[65] Section 2 banned "monopolization," and attempts to monopolize, any "part of" such commerce.[66] Because the dormant Commerce Clause displaced anticompetitive *state* restraints or regulation of interstate commerce, the statute only applied, as a practical matter, to private conduct.[67] Moreover, the Act necessarily left intrastate restraints to state antitrust laws. As a result, jurisdiction over the sort of restraints governed by the Sherman Act and its state counterparts was mutually exclusive.[68]

Section 1 restricted concerted action and thus contractual freedom, while Section 2 restricted unilateral conduct and thus the disposition of property as well.[69] Moreover, the Act could have swept broadly, given that all contracts restrain trade in some sense. In *Joint Traffic Association v. United States*, however, Justice Peckham imposed a "reasonable construction" on the statute, lest it ban various "ordinary contracts and

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[62] *Id.* at 90.

[63] *Id.*

[64] *See supra* note 44 collecting authorities. *See also infra* Part II.C (describing due process limitations on such local regulation).

[65] 15 U.S.C. §1 (1890).

[66] 15 U.S.C. §2 (1890).

[67] *See* Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L. J. 375, 379 (1982) ("The Senator's paradigm was simple: if a restraint on trade was located entirely within a state, it was out of Congressional reach. On the other hand, if a combination or conspiracy was located in more than one state, then the entire combination was beyond the jurisdictional power of the state . . . .").

[68] *Id.*; E.C. Knight v. United States, 156 U.S. 1, 12–17 (1895).

[69] *See* Copperweld v. Independence Tube, 467 U.S. 752 (1984) (articulating antitrust's distinction between unilateral and concerted action).

combinations" sheltered by liberty of contract.[70] Borrowing from Commerce Clause jurisprudence, he construed the statute to ban only "direct" restraints on interstate commerce, analogous to the sort of state-imposed direct restraints that contravened the dormant Commerce Clause.[71] Restraints were "direct," if, like the railroad cartel before the Court, they reduced horizontal rivalry and increased prices above the competitive level, without offsetting economic benefits.[72] Moreover, in *Northern Securities v. United States*, the controlling fifth vote, Justice Brewer, read the Act in light of the "inalienable right" to own and invest property, concluding that the Act did not destroy "minor contracts in partial restraint of trade," but instead banned only "unreasonable" restraints.[73] Just seven years later, the Court, in *Standard Oil v. United States*, endorsed this "rule of reason," holding that Section 1 did not ban all contracts that literally "restrained trade," but instead banned only those agreements beyond the protection of liberty of contract because they restrained trade or competition "unduly."[74] This result left "normal" contracts that increased trade and were necessary to effective competition

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[70] Joint Traffic Ass'n v. United States, 171 U.S. 505, 567–68 (1898) (holding that the Sherman Act does not outlaw "ordinary contracts and combinations" protected by liberty of contract). The Court noted: "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." *Id.* at 568.

[71] *Id.* at 567–68; Meese, *Liberty and Antitrust*, *supra* note 50, at 53–57 (explaining that formative era antitrust jurisprudence drew upon liberty of contract principles in defining distinction between direct and indirect restraints); *see also* Cooley v. Bd. of Wardens, 53 U.S. 299 (1851) (emphasizing that dormant Commerce Clause does not preempt indirect regulations of interstate commerce); BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION, 143–44 (1998) [hereinafter CUSHMAN, RETHINKING THE NEW DEAL COURT] (contending that late nineteenth century Commerce Clause jurisprudence reflected influence of conceptual categories developed in the liberty of contract context). Professor Cushman's formidable work highlighting the relationship between liberty of contract and Commerce Clause jurisprudence helped inspire this project's examination of the interrelation between the doctrinal categories relevant to competition policy during the period studied.

[72] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235–45 (1899) (holding that cartel between pipe manufacturers set unreasonable prices and therefore directly restrained trade); *Joint Traffic*, 171 U.S. at 569–74 (holding that cartel between competing railroads directly restrained trade where firms received public franchises and the power of eminent domain); *see also* Meese, *Liberty and Antitrust*, *supra* note 50, at 43–67.

[73] *See* Northern Securities Co. v. United States, 193 U.S. 197, 361 (1904) (Brewer, J., concurring) ("Freedom of action [in the investment of property] is among the inalienable rights of every citizen."); *id.* (Sherman Act does not ban reasonable partial restraints of trade); *see also id.* at 403 (Holmes, J., dissenting) (Congress cannot regulate commercial activity based upon "a remote result of the exercise of an ordinary incident of property and personal freedom"). In his dissent, Justice Holmes noted that the plurality's opinion would "make eternal the *bellum omnium contra omnes* and disintegrate society so far as it could into individual atoms." *Id.* at 411.

[74] *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 60–62 (1911).

unscathed.[75] Prior decisions, the Court said, had applied this "standard of reason," albeit implicitly, to distinguish between "direct" and "indirect" restraints.[76] As a result, the Court said, restraints previously condemned as "direct" would now be condemned as "unreasonable."[77] The Court applied similar principles to Section 2, stating that interpreting Section 2 too literally could potentially "render difficult, if not impossible, any movement of trade in the channels of interstate commerce."[78] Restraints on trade or competition were "undue," the Court said, if they produced "the consequences of monopoly," which the Court defined as an exercise of market power resulting in above-market prices, below-market output and sub-optimal quality.[79] Such reduced output, of course, resulted in a misallocation of resources and a market failure, thereby justifying regulation under the classical paradigm.[80]

The quintessential "undue restraint" contravening the rule of reason was a multi-state cartel with sufficient market power to impose unreasonable prices, what courts had previously condemned as "direct restraints."[81] In the three decades preceding the Depression, the Supreme Court repeatedly declared such departures from normal competition vio-

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[75] *Id.* at 62 (Section 1 "prevent[s] undue restraints of every kind" on the assumption that the "individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly."); American Tobacco Co. v. United States, 221 U.S. 106, 180 (1911) (*Standard Oil* held that "the term restraint of trade . . . should be given a meaning which would not destroy the individual right to contract . . . ."). Various scholars contend that *Standard Oil*'s liberty-protecting construction of the Sherman Act constituted a departure from the standard announced in earlier decisions such as *Joint Traffic* and *Trans-Missouri Freight*; *see, e.g.*, RUDOLPH PERITZ, COMPETITION POLICY IN AMERICA 50–58 (1996); MARTIN SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 117–50 (1988); Edward Corwin, *The Antitrust Acts And The Constitution,* 18 VA. L. REV. 355, 368–70 (1932). As I have shown elsewhere, however, these scholars read too much into *Joint Traffic* and *Trans-Missouri Freight*, the rationales of which were limited to instances in which states granted privileges to colluding parties, e.g., special grants of land and delegations of the power of eminent domain. *See* Meese, *Liberty and Antitrust*, *supra* note 50, at 43–56; *see also* Alan J. Meese, *Standard Oil as Lochner's Trojan Horse*, 85 S. CAL. L. REV. 783 (2012).

[76] *See Standard Oil*, 221 U.S. at 66–68.

[77] *Id.* (approving results in *Joint Traffic* and *Trans-Missouri Freight*, both of which had condemned railroad cartels as "direct" restraints).

[78] *American Tobacco*, 221 U.S. at 180–81 ("[T]he words 'restraint of trade' did not embrace all those normal and usual contracts essential to individual freedom, and the right to make which was necessary in order that the course of trade might be free . . . .").

[79] *Standard Oil*, 221 U.S. at 57, 64 (prohibition on restraints of trade was aimed at conduct "producing or tending to produce the consequences of monopoly"). *Standard Oil* listed the "evils" of monopoly as: (1) the power to fix prices; (2) the power to limit output and (3) reduced product quality. *Id.* at 52.

[80] *See* Alan J. Meese, *Price Theory, Competition and the Rule of Reason,* 2003 U. ILL. L. REV. 77, 86–87 n.42 [hereinafter Meese, *Price Theory, Competition*] (explaining that classical economists understood this impact of monopoly pricing); *see also* Meese, *Liberty and Antitrust*, *supra* note 50, at 15–23 (explaining classical economic paradigm equating the police power with authority to combat externalities and resulting market failure).

[81] *See, e.g.*, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 235–40 (1899).

lations of Section 1 of the Sherman Act.[82] The Court applied a similar rule to vertical price fixing, which, it claimed, had the same economic impact as horizontal price fixing.[83] This ban on direct or undue restraints initially included labor activity.[84] As a result, the ban could reach strikes—concerted action by rivals in pursuit of higher wages—that had the requisite effect on interstate commerce.[85] However, the 1914 Clayton Act exempted labor unions from the antitrust laws, leaving unions free to form cartels limiting labor output and increasing wages.[86] Analogous conduct by independent contractors still violates the Sherman Act.[87]

During the early 1920s the Court went further, banning what scholars call "facilitating practices,"[88] namely, sophisticated information sharing programs mediated by trade associations.[89] Such practices included "open competition plans," designed to facilitate "[c]o-operative competition," not "[c]ut-throat competition," the latter of which supposedly was "blind, vicious, and unreasoning."[90] Often managed by independent consultants,[91] such plans required participants to file prices and price changes with a central agent, who would distribute such information to

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[82] *See* United States v. Trenton Potteries, 273 U.S. 392, 394–98 (1927) (banning price fixing agreement between "members of a combination controlling a substantial part of an industry . . . ."); *see also* Swift and Co. v. United States, 196 U.S. 375, 391 (1905) (finding that government stated valid Sherman Act claim by alleging that dominant firms fixed purchasing prices below what would have obtained if "bidding really was competitive"); *Addyston Pipe*, 175 U.S. at 235–38 (condemning as "direct" restraint that raised prices above the competitive level); United States v. Trans-Missouri Freight Association 166 U.S. 290, 332–43 (1897) (invoking railroads' status as "public corporations" that received special benefits from the state to justify ban on collusive agreements).

[83] *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911) (*citing*, *inter alia*, United States v. Addyston Pipe and Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd* 175 U.S. 211 (1899)).

[84] *See* Loewe v. Lawlor, 208 U.S. 274 (1908).

[85] *See* C.J. Primm, *Labor Unions and the Antitrust Laws: A Review of the Decisions*, 18 J. POL. ECON. 129, 133 (1910) (concluding after review of 1890s case law that strike for higher wages violated Section 1).

[86] *See* Clayton Antitrust Act, Pub. L. 63–212, 38 Stat. 730 (1914); Amalgamated Meat Cutters v. Jewel Tea Co., 381 U.S. 676 (1965) (articulating the scope of this exemption).

[87] FTC v. Superior Court Trial Lawyers, 493 U.S. 411 (1990) (banning boycott by court-appointed lawyers seeking increased compensation).

[88] *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 30 (1984).

[89] *See infra* notes 92–93 and accompanying text.

[90] *See* Am. Column & Lumber Co. v. United States, 257 U.S. 377, 393–94 (1921) (reproducing trade association materials asserting that competition "may stimulate trade to abnormal activity"); *see also* United States v. Am. Linseed Oil Co., 262 U.S. 371, 380 (1923) (replicating promotional materials opining that the Association's activities "'will promote better and more safe, sane, and stable conditions'"); ARTHUR JEROME EDDY, THE NEW COMPETITION (William S. Hein & Co. 1986) (1914) (endorsing "New Competition" involving cooperation between industry participants designed to eliminate destructive competition); BUTLER D. SHAFFER, IN RESTRAINT OF TRADE: THE BUSINESS CAMPAIGN AGAINST COMPETITION, 1918–1938 51–71 (1997) (describing rise of trade associations during the 1920s and their quest to replace atomistic competition with the "new competition" advocated by Arthur Eddy).

[91] *See* PERITZ, *supra* note 75, at 76.

venture participants, usually in advance of when new prices were to take effect.[92] In some cases participants agreed to comply with filed prices, unless deviations *increased* prices.[93] Such plans even empowered central agents to subpoena information from participants suspected of providing false data or otherwise departing from the agreement.[94] Associations would monitor industry conditions, make predictions about future developments, recommend credit terms, and chastise members for deviation from Association edicts.[95] Failure to comply with such arrangements resulted in fines or expulsion.[96]

In the early 1920s, the Court condemned such plans, first in *American Column & Lumber Co. v. United States*[97] and then in *United States v. American Linseed Oil Co.*[98] In *American Linseed Oil*, Justice McReynolds, a proponent of contractual liberty who had headed President Wilson's Antitrust Division,[99] reiterated *Standard Oil's* safe harbor for normal contracts protected by the Due Process Clause.[100] However, these defendants had entered "a new form of combination . . . resorting to methods which are not normal," abandoning their "freedom of action," by subjecting their decisions to an "autocratic bureau" whose "necessary tendency is to suppress competition."[101] Thus, just as the dormant Commerce Clause prevented states from imposing anticompetitive restraints on interstate commerce, so too did the Sherman Act prevent the imposition of such restraints by private parties. At the same time, the Act left

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92 *See Am. Column & Lumber Co.*, 257 U.S. at 394–95 (noting instrument required participants to file a "*daily* report of all sales actually made, with the name and address of the purchaser . . . with exact copies of the invoices, all special agreements as to terms, grade, etc." (emphasis in the original)); *id.* at 395 ("Members must file at the beginning of each month price-lists showing prices f. o. b. shipping point. . . . New prices must be filed with the Association as soon as made."); *see also Am. Linseed Oil Co.*, 262 U.S. at 382–83 (describing participants' obligations to supply price lists and daily price reports, discounts and competitive intelligence); *id*. at 382 (requiring participants immediately to report "all quotations . . . giving better terms to the contemplated purchaser than those quoted").

93 *See Am. Linseed Oil Co.*, 262 U.S. at 389 (stating that participants agreed to follow price schedules "unless more onerous [prices] were obtained").

94 *See id.* at 381–82.

95 *Id*. at 386–87.

96 *Id.* at 382 (requiring participants to forfeit deposit and other "benefits and rights under this agreement").

97 257 U.S. 377.

98 262 U.S. 371.

99 *See* California v. Am. Stores Co., 495 U.S. 271, 285 n.11 (1990) (noting McReynolds's service as "President Wilson's chief antitrust enforcement office"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (McReynolds, J.) ("Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract . . .").

100 *See Am. Linseed Oil Co.*, 262 U.S. at 388 (noting that the Sherman Act did not ban "normal and useful contracts," "normal methods" of competition, or "destroy the individual right to contract" (quoting United States v. Am. Tobacco Co., 221 U.S. 106, 179–80 (1911))); *Am. Tobacco Co.*, 221 U.S. at 179.

101 *Am. Linseed Oil Co.*, 262 U.S. at 389.

private parties perfectly free to enter "normal" contracts that, while limiting private autonomy, overcame market failure and increased trade.[102] Such agreements were analogous to the sort of "indirect" restraints of interstate commerce that states could impose to advance health and safety without offending the dormant Commerce Clause.[103]

C. The Due Process Clauses as (Residual) Competition Policy

Neither the Commerce Clause nor the Sherman Act could prevent Congress from imposing anti-competitive restrictions on interstate commerce or states from imposing anti-competitive restrictions on *intra*state commerce. As explained below, the Due Process Clauses of the Fifth and Fourteenth Amendments filled these gaps, limiting the ability of Congress and the states to displace free-market competition when regulating in their respective spheres. In particular, this version of "substantive due process" constrained: (1) price regulation; (2) entry regulation; and (3) regulation of wages, hours and union status of employees.

1. Price Regulation

By 1929, the Supreme Court had repeatedly held that regulatory interference with free-market pricing presumptively violated the Due Process Clause of the Fifth or Fourteenth Amendment, whichever applied.[104] Such "regulation"—which the Court deemed "price fixing"—deprived firms of profitable yet harmless uses of their property.[105] Thus, such regulations did not combat market failure and therefore exceeded the police power.[106] Regulation of gasoline prices,[107] the price of theater tickets sold in secondary markets,[108] and employment agency fees all failed this test.[109]

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[102] *See* FTC v. Sinclair Refining Co., 261 U.S. 463, 475 (1923) (noting antitrust regulation did not reach normal method of doing business); Standard Oil Co. v. United States, 221 U.S. 1 *passim* (1911) (same); *see also* Meese, *Price Theory, Competition*, *supra* note 80, at 83–89 (explaining how the rule of reason articulated in *Standard Oil* does not prohibit normal agreements that increase trade), 134–41 (explaining how various non-standard agreements overcome market failure, enhance wealth, and thus are properly deemed reasonable).

[103] *See supra* notes 48–49, 74 and accompanying text.

[104] *See* Ribnik v. McBride, 277 U.S. 350, 356 (1928) (noting that "freedom of contract was the general rule and restraint the exception" (citing Adkins v. Children's Hospital of D.C., 261 U.S. 525, 546 (1923))). *See also* DAVID BERNSTEIN, REHABILITATING *Lochner*: Defending Individual Rights Against Progressive Reform 8-38 (2011) (tracing rise of liberty of contract in the Supreme Court).

[105] *See* Williams v. Standard Oil, 278 U.S. 235, 239 (1929).

[106] *See* HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 200–01 (1991) (arguing that the Supreme Court only sustained abridgements of contractual liberty designed to combat market failure).

[107] Williams v. Standard Oil Co., 278 U.S. 235 (1929).

[108] Tyson & Brother v. Banton, 273 U.S. 418 (1927).

[109] Ribnik v. McBride, 277 U.S. 350 (1928).

An exception "proved the rule," as government was free to regulate prices of industries "affected with a public interest."[110] While the contours of this category were vague, certain principles emerged.[111] First, firms that received state privileges conferring competitive advantages fell into this category.[112] For instance, states granted railroads large parcels of land and the power of eminent domain.[113] This latter power allowed recipients to purchase strategically-located land at fair market value, avoiding extortionate prices and excessive bargaining costs that would otherwise result from bilateral monopoly and conferring a competitive advantage over rivals without this state-granted authority.[114]

Other factors militating in favor of such a determination included a firm's status as a natural monopoly,[115] barriers to entry,[116] and the existence or opportunity for collusion.[117] Each such factor suggested the prospect of market failure resulting in reduced output and higher prices, thereby justifying regulation.[118] In one notable decision, Chief Justice Taft explained for a unanimous Court that, absent state-granted privilege or ancient custom of regulation, a business was only affected with a pub-

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[110] Munn v. Illinois, 94 U.S. 113 (1876).

[111] *See* Charles Wolff Packing Co. v. Kansas Court of Indus. Relations, 262 U.S. 522, 535–42 (1923) (elaborating principles determining whether industries are affected with a public interest).

[112] *Id.* at 535.

[113] *See* United States v. Trans-Missouri Freight, 166 U.S. 290, 332–33 (1897) ("[R]ailways . . . are granted valuable franchises and privileges, among which [is] the right to take the private property of the citizen *in invitum,* [and many are] donees of large tracts of public lands.").

[114] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 56 (1992) (explaining how delegating eminent domain power to railroads can overcome bilateral monopoly and resulting transaction costs); *see also* United States v. Joint Traffic Ass'n, 171 U.S. 505, 568–72 (explaining that grants of land and eminent domain rendered horizontal rate-making by interstate railroads "direct restraints" subject to congressional regulation); Thomas M. Cooley, *State Regulation of Corporate Profits*, 137 N. AM. REV. 205, 209 (1883) ("[L]egislative permission to build and operate a railroad is commonly a necessary requisite [to successful operation]."); Thomas Cooley, *Limitations to State Control of Private Business*, I Princeton Review (n.s.) 233, 249–55 (1879) (conferral of eminent domain authorized price regulation); *but cf.* CUSHMAN, RETHINKING THE NEW DEAL COURT, *supra* note 71, at 143–44 (explaining link between determination that industry is "affected with a public interest," and determination that firm's activity "directly restrains commerce").

[115] Budd v. New York, 143 U.S. 517 (1892).

[116] New State Ice Co. v. Liebmann, 285 U.S. 262, 276 (1932) (distinguishing ice manufacturing from industries affected with a public interest because sellers did not threaten consumers with "exorbitant charges and arbitrary control"); *Wolff Packing*, 262 U.S. at 538.

[117] *New State Ice*, 285 U.S. at 276 (explaining that mills were "affected with a public interest" because "[t]he individual grower of the raw product is generally financially unable to set up a plant for himself[,] [so that] he faces the practical danger of being placed at the mercy of the operator in respect of exorbitant charges . . ."); *Wolff Packing,* 262 U.S. at 538; *Budd,* 143 U.S. at 537–38 (affirming price regulation of "virtual monopolies"); *Munn*, 94 U.S. at 131 (sustaining price regulation in concentrated market with barriers to entry and collusion).

[118] *See supra* note 79 and accompanying text (explaining that propensity of direct restraints to reduce output and enhance prices justified regulation under the Sherman Act).

lic interest and thus subject to price or wage regulation if "without regulation," the public was, because of the "indispensable nature of the service" subject to "exorbitant charges and arbitrary control."[119]

Thus, coercive interference with market-determined prices was unconstitutional unless market conditions were such that regulated entities could impose anti-competitive prices and thus directly restrain trade, thereby empowering states to thwart such restraints, just as the dormant Commerce Clause and Sherman Act prevented direct restraints by states and private parties.[120] Though somewhat expansive in the late nineteenth century, the category of industries "affected with a public interest" narrowed considerably by the late 1920s.[121] In both periods, however, most firms fell outside this category and were thus immune from such regulation.[122] As a result, free competition, and not public restraints, almost always determined prices and output in the nation's various industries during this period.

2. Entry Restrictions

The Due Process Clause also restricted state control of entry into otherwise lawful businesses. Exercising their police powers, states could regulate activities that produced externalities and harmed third parties, i.e., operation of laundries fueled by open fires in windy conditions.[123] States could not, however, ban harmless businesses.[124] Nor could they confer monopoly as a means of protecting public health and safety, if other enterprises could abide by the same health and safety regulations

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119 *Wolff Packing*, 262 U.S. at 538.

120 *See* Tyson Bros v. Banton, 273 U.S. 418 (1927); *Wolff Packing*, 262 U.S. at 536–44; *see also Budd*, 143 U.S. at 532–34 (affirming "sound and just" views of the New York Court of Appeals that "no general power resided in the legislature to regulate private business . . . fix the price of commodities or services, or interfere with freedom of contract" and that only "special conditions and circumstances" justify price regulation).

121 *See* Brass v. North Dakota, 153 U.S. 391 (1894) (sustaining price regulation of hundreds of grain elevators); Barry Cushman, *Continuity and Change in Commerce Clause Jurisprudence*, 55 ARK. L. REV. 1009, 1017–18 (2003) [hereinafter Cushman, *Continuity and Change in Commerce Clause Jurisprudence*].

122 Cushman, *Continuity and Change in Commerce Clause Jurisprudence*, *supra* note 121, at 1017–18 (concluding that very few businesses were deemed "affected with a public interest" during this period).

123 *See* Soon Hing v. Crowley, 113 U.S. 703, 708 (1885) (upholding local ban on nighttime laundry operations requiring continuous fires in neighborhoods "subject to high winds" and consisting of "wooden buildings" because "regulations of such a strict character should be adopted to prevent the possibility of fires"); *see also* HOVENKAMP, *supra* note 106, at 200–03 (describing Court's externality-based substantive due process doctrine).

124 Meyer v. Nebraska, 262 U.S. 390 (1923) (voiding ban on teaching German in private schools); Adams v. Tanner, 244 U.S. 590 (1917) (voiding ban on employment agencies); People v. Marx, 99 N.Y. 377 (1885) (voiding ban on sale of oleomargarine); *In re* Jacobs, 98 N.Y. 98 (1885) (voiding ban on cigar manufacture in tenement houses and emphasizing that the absence of an externality, such as tobacco odor, "did not extend to any of the other rooms of the tenement house").

governing the monopolist.[125] As with price regulation, the doctrine contained rarely met exceptions for industries "affected with a public interest."[126] In nearly all industries, then, individuals were free to enter as they pleased, so long as they adhered to valid police power regulations.[127]

3. Regulation of Wages and Working Conditions

State efforts to regulate input prices, notably wages and hours, fared little better than barriers to entry.[128] Unless wages or working conditions threatened the health or welfare of employees or the public, such regulation exceeded the police power, offending the Due Process Clause. Thus, the Court would void, inter alia, legislation setting maximum hours for bakers,[129] minimum wages for women,[130] and a law allowing administrative determination of wages paid meatpackers.[131] The Justices also voided bans on "yellow dog contracts"—agreements by employees not to join a union.[132] The Court rejected arguments that legislatures could alter bargains to ensure an "equitable" distribution of the fruits of economic activity.[133] Employers, the Court said, were no more responsible for ameliorating the plight of employees than a grocer was responsible for feeding poor customers.[134]

There were, of course, exceptions. For instance, the Court endorsed maximum hours for women performing standing work in laundries, because such regulation protected the health of third parties, viz., the wo-

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[125] New State Ice Co. v. Liebmann, 285 U.S. 262, 279 (industries not affected with a public interest are subject to regulations "prescribed for the protection of the public *and applied with appropriate impartiality*") (emphasis added); Butchers Union Co. v. Crescent City Co., 111 U.S. 746, 756, 758 (1884) (Field, J., concurring) (police power does not justify imposing monopoly when other firms can abide by generally-applicable regulations); *id.* at 761–62 (Bradley, J., concurring) (same).

[126] *See New State Ice*, 285 U.S. at 272–79.

[127] *Id.* at 278.

[128] *See* Lochner v. New York, 198 U.S. 45 (1905); Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[129] *See Lochner*, 198 U.S. at 58–62.

[130] *See* Adkins v. Children's Hosp., 261 U.S. 525 (1923).

[131] *See* Charles Wolff Packing Co. v. Kansas Court of Indus. Relations, 262 U.S. 522 (1923).

[132] *See* Coppage v. Kansas, 236 U.S. 1 (1915) (voiding state ban on such contracts); Adair v. United States, 208 U.S. 161 (1908) (voiding Congressional ban on such contracts in railroad industry).

[133] *Coppage*, 236 U.S. at 17 ("[I]t is from the nature of things impossible to uphold freedom of contract and the right of private property without recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.").

[134] *See* Adkins, 261 U.S. at 558–59 ("[T]he employer, by paying [a wage equal to services rendered] has neither caused nor contributed to her poverty. . . . In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker, or the grocer to buy food, he is morally entitled to obtain the worth of his money. . . . [H]e is not justified in demanding more simply because he needs more.").

men's future children and, thus, "the well-being of the [human] race."[135] Miners were properly distinguished from bakers, because there were "reasonable grounds" to believe that long hours interfered with miners' health.[136] As with price and entry restrictions, these exceptions "proved that rule," allowing states or Congress to displace free-market results, but only in cases in which economic conditions would produce market failure absent state correction. Thus, one scholar has concluded that the Supreme Court "read into substantive due process doctrine a theory of externalities" and thus only sustained regulation when it found a "substantial divergence between 'the public interest and private right[,]' " i.e., a market failure.[137]

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On the eve of the Depression, then, three sources of law—the Commerce Clause, the Sherman Act, and the Due Process Clause—were in a mutually-reinforcing equilibrium. Taken together, these bodies of law evinced a coherent regulatory philosophy regarding the appropriate relationship between the free market and the State. The Commerce Clause prevented states from "directly restraining" interstate commerce by creating export cartels or monopolies that thwarted free competition, while leaving them free to impose "indirect" police power regulations that could facilitate such commerce. The Sherman Act banned unreasonable, direct restraints on competition imposed by private parties, particularly price fixing, leaving "normal" wealth-creating agreements protected by liberty of contract unscathed. The Fourteenth Amendment's Due Process Clause precluded local regulations, including price regulation—which courts termed "price fixing"—that fell outside the police power and unduly interfered with private contracts and thus competitive market outcomes. Finally, while the Commerce Clause empowered Congress to regulate interstate commerce, that power was not plenary, but instead subject to the same due process limits that constrained the states.

This mutually-reinforcing equilibrium did not result in unbridled competition akin to that found in the state of nature or theoretical economic models. Instead, all three bodies of law approved public or private restraints on private autonomy that were necessary to prevent otherwise unbridled markets from producing social harm in the form of externalities or other forms of market failure such as monopoly or cartelization. The result was thus free competition, that is, the allocation of resources by private markets characterized by free entry and unfettered

[135] *See* Muller v. Oregon, 208 U.S. 412, 422 (1908) ("The limitations . . . are not imposed solely for her benefit, but also largely for the benefit of all. . . . The two sexes differ in . . . the influence of vigorous health upon the future well-being of the race . . . .").

[136] *See* Holden v. Hardy, 169 U.S. 366, 398 (1898).

[137] *See* HOVENKAMP, *supra* note 106, at 201.

by unreasonable public or private restraints.[138] If faithfully applied, this unified framework and resulting free-market competition could encourage an allocation of society's labor, capital and technology that maximized society's wealth.[139] This allocation of resources would also maximize the value of society's potential output and, thus, facilitate economic growth.[140] Finally, as explained later in this Article, flexible wages and prices could help attenuate recessions and hasten macroeconomic recovery.[141]

III. THE RETREAT OF ANTITRUST AND THE GREAT DEPRESSION

The unified market-affirming regime described above was not destined to last long and began to unravel even before the Depression, with antitrust (de)regulation leading the way. This part examines how antitrust regulation began to retreat shortly before the Depression, setting the stage for future departures from the free market. This part also examines the Depression and recounts then-contemporary thinking about possible causes of the downturn and cures for it. This part also recounts how the Supreme Court sent mixed signals during the early 1930s about its continuing commitment to the pre-Depression framework that had protected free competition from undue private and public restraints.

A. *Trade Associations Ascendant and Antitrust in Retreat*

As explained earlier, the Supreme Court condemned so-called "open price plans" during the early 1920s, thwarting industry efforts to facilitate horizontal collusion.[142] However, business interests soon found a sympathetic ear in Herbert Hoover, the Secretary of Commerce from 1921 until 1928. An engineer by training, Hoover embraced the "New Competition" and its principles of "scientific management," whereby

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[138] *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 62 (1911) (explaining Sherman Act's assumption that freedom to compete free of undue regulation would maximize output and minimize prices so long as firms did not employ unreasonable restraints); George W. Wickersham, *The Police Power, A Product of the Rule of Reason*, 27 HARV. L. REV. 297 (1914).

[139] *See* A.C. PIGOU, THE ECONOMICS OF WELFARE 172–203 (1932) (outlining various sources of externality and regulatory responses to increase national dividend); Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59 pt. 2 AM. ECON. REV. 105 (1969) [hereinafter Williamson, *Allocative Efficiency*] (sketching contours of wealth-maximizing antitrust regime).

[140] *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 519, 692 (1998) [hereainafter MANKIW, PRINCIPLES OF ECONOMICS] (explaining how improvement in utilization of resources can enhance economy's overall productivity and how technological improvement can increase nation's potential output).

[141] *See infra* notes 486–508 and accompanying text (discussing theory and evidence establishing that flexible wages and price facilitate economic recovery while inflexible wages and prices slow recovery).

[142] *See* American Column Lumber v. United States, 257 U.S. 377, 393 (1921).

firms eliminated waste, enhanced productivity, and thus raised living standards by paying higher wages.[143] Hoover opposed regulation that attempted to curtail "New Competition" and endorsed self-regulation by trade associations, with the government disseminating information to facilitate private collective action.[144] While Hoover opposed legislation narrowing antitrust laws,[145] his repeated lobbying caused the Department of Justice to author comfort letters sheltering from prosecution businesses that adopted open price plans contravening the Court's decisions in *American Column Lumber* and *American Linseed Oil*.[146]

Moreover, even before 1920, the Federal Trade Commission began convening "trade practice conferences," that is, industry-by-industry trade association gatherings.[147] Participants agreed on "codes of fair competition," which the Commission would then consider and approve, sometimes with amendments.[148] Violations of some such rules were "unfair methods of competition" contrary to the Federal Trade Commission Act and "rules" in a second category were advisory.[149] During the late 1920s, a business-friendly majority of the Commission encouraged these conferences, holding fifty in fiscal year 1929, more than in several

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143 *See* ROBERT F. HIMMELBERG, THE ORIGINS OF THE NATIONAL RECOVERY ADMINISTRATION 10, 14–18, 20–21, 26–29 (1993); WILLIAM J. BARBER, FROM NEW ERA TO NEW DEAL: HERBERT HOOVER, THE ECONOMISTS, AND AMERICAN ECONOMIC POLICY, 1921–1933, at 5 (1985).

144 Herbert Hoover, *Introduction* to LIONEL EDIE, THE STABILIZATION OF BUSINESS v, vii; *id.* at viii ("For the government to attempt to regulate such matters is inconceivable, but the government can collect and disseminate information that would be helpful to business."); BARBER, *supra* note 143, at 8–13 (describing Hoover's support for trade associations and the "indicative planning" approach); SHAFFER, *supra* note 90, at 52 ("The trade association movement had many promoters, but there were none more enthusiastic in their support than Herbert Hoover."); HIMMELBERG, *supra* note 143, at 10–11 (detailing Hoover's views on trade associations).

145 *See* HIMMELBERG, *supra* note 143, at 31–33. Hoover's resistance to partial repeal of the antitrust laws was partly strategic. That is, he feared that such repeal would produce cartelization, inflated prices, and public demands for direct regulation or nationalization of industry, a result Hoover opposed. *See id.* at 68–69. Hoover thus echoed William Howard Taft, who believed the nation faced a choice between competition enforced by the antitrust laws and Socialism. *See* SKLAR, *supra* note 75, at 378 (quoting Taft as stating "If [competition] is impossible then let us go to Socialism for there is no way in between.").

146 HIMMELBERG, *supra* note 143, at 43–72; *id.* at 57–59 (describing these comfort letters).

147 THOMAS BLAISDELL, THE FEDERAL TRADE COMMISSION: AN EXPERIMENT IN CONTROL OF BUSINESS, 93–94 (1932) (reporting that this practice started in 1919).

148 *Id.* at 92–102 (describing this process); *see also* ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE YEAR ENDED JUNE 30, 1928, at 5–16 (describing this procedure and various industries that participated); *id.* at 5 ("The work of this division has increased enormously during the past fiscal year."); ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE YEAR ENDED JUNE 30, 1930, at 37 (reporting fifty-seven conferences held during fiscal year).

149 *See* SHAFFER, *supra* note 90, at 83–84 (documenting Commission's policy of enforcing Group 1 rules against violators including those who had dissented from rules when conference was held).

prior years combined.[150] Such conferences governed industries as varied as barn equipment, beauty and barber supply, cheese assemblers, and fertilizer.[151]

Many of the resulting codes banned either or both below-cost pricing and price discrimination, regardless of whether such prices produced anticompetitive results.[152] Others adopted miscellaneous provisions limiting rivalry in various ways. For instance, the Commission approved a code proposed by the Virginia Petroleum Industry prohibiting gasoline stations from holding lotteries or giving products away on "opening days, special sale days, or other occasions."[153] Other codes prohibited the extension of consumer credit, eliminating a form of discounting.[154] One contemporary commentator concluded that "the interests of the consumer have received remarkably little consideration."[155]

B. *The Depression*

Hoover became President in March of 1929. The Standard & Poor's (S&P) composite stock index peaked at 254 in September and unemployment hovered around 3%.[156] By late October of that year, however, the S&P index had fallen to 162, national output was falling, and unemployment was climbing.[157] By 1932, output had fallen 28% from its 1929 peak, the S&P Index stood around fifty; unemployment had risen to 23.6% and would climb to almost 25% by 1933.[158]

Hoover responded aggressively to the downturn by taking numerous concrete steps, some of which, in hindsight, were counterproductive.[159]

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[150] *See* HIMMELBERG, *supra* note 143, at 62–64; *see also* ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION FOR THE YEAR ENDED JUNE 30, 1929, at 30 [hereinafter 1929 FTC ANNUAL REPORT] (recounting expansion of trade conference staff to handle additional work); BLAISDELL, *supra* note 147, at 93–94 ("[B]etween 1919 and 1929 there were eighty-three trade practice conferences . . . . [S]ixty were held between July 1, 1927, and November 15, 1929.").

[151] *See* 1929 FTC ANNUAL REPORT, *supra* note 150, at 34–38.

[152] *See* HIMMELBERG, *supra* note 143, at 63 (stating that, as of 1928, such codes "routinely" banned below-cost pricing and price discrimination without any additional requirement that such activities actually injure consumers); *but see* BLAISDELL, *supra* note 147, at 97 (stating that the FTC amended bans on below cost pricing in 1930 to require "intent and effect of injuring a competitor"). Of course, the mere fact that a price cut injures a competitor does not thereby establish injury to economic welfare. *See* A. A. Poultry v. Rose Acre Farms, 881 F. 2d 1396, 1403–04 (7th Cir. 1989).

[153] *See* F.T.C, TRADE PRACTICE CONFERENCES 81 (July 1, 1929).

[154] *See* BLAISDELL, *supra* note 147, at 98–102.

[155] *Id.* at 102.

[156] *See* RUDIGER DORNBUSCH & STANLEY FISCHER, MACROECONOMICS 308–09 (1981); MILTON FRIEDMAN & ANNA SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES 299–308 (1963) (discussing these economic events, including stock market crash).

[157] *See* FRIEDMAN & SCHWARTZ, *supra* note 156, at 304–06.

[158] *Id.* at 304; DORNBUSCH & FISCHER, *supra* note 156, at 309.

[159] HERBERT STEIN, THE FISCAL REVOLUTION IN AMERICA: POLICY IN PURSUIT OF REALITY 16–26 (2nd ed. 1996) (detailing numerous steps Hoover took to counteract the downturn);

He encouraged states and localities to accelerate public works and cajoled industry to resist wage reductions.[160] In his State of the Union address, Hoover reported:

> I have, therefore, instituted systematic, voluntary measures of cooperation with the business institutions and with state and local authorities to make certain that fundamental businesses of the country shall continue as usual, that wages and therefore consuming power shall not be reduced, and that a special effort shall be made to expand construction work in order to assist in equalizing other deficits in employment.[161]

He continued that the "enlarged sense of cooperation and responsibility which has grown in the business world during the past few years" had facilitated his efforts.[162] He signed a temporary tax cut, but also signed the Smoot-Hawley Act, raising tariffs on over 890 items.[163] Moreover, in 1932, Hoover signed legislation *increasing* taxes to bolster the nation's credit and strengthen the dollar.[164] Meanwhile, the Federal Reserve let the nation's money supply plummet, inaction that, combined with higher taxes, exacerbated the economic contraction.[165]

1. Causes and Remedies

Despite Hoover's efforts, the downturn worsened and Americans argued over the causes of the deepening depression. Some blamed a purported *lack* of competition, viz., widespread collusion between businesses and workers during the 1920s. Such collusion, it was said, raised consumer prices, reducing "real" income. Lower real income, in turn, reduced "purchasing power," as consumers were unable to afford the output of increasingly productive industries.[166] While oligopolists and their shareholders enjoyed hefty profits, wealthy individuals, it was said, saved a larger proportion of their income than the masses.[167] Instead of purchasing new consumer goods, such savings reduced interest rates and encouraged additional investment in plant and equipment, fur-

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id. at 16 ("Hoover's initial response to the stock market crash . . . was prompt, active, and strictly according to the book."). *See also infra* notes 164–65 and accompanying text.

[160] STEIN, *supra* note 159, at 16–17.

[161] *Id.* at 17.

[162] *Id.*

[163] BARBER, *supra* note 143, at 91, 95.

[164] STEIN, *supra* note 159, at 32–33.

[165] N. GREGORY MANKIW, MACROECONOMICS 331–32 (7th ed. 2010) [hereinafter MANKIW, MACROECONOMICS] (describing fiscal and monetary policy mistakes exacerbating the 1929 downturn).

[166] ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 12–13 (1966).

[167] *See* STEIN, *supra* note 159, at 48–49.

ther enhancing productivity and exacerbating excess capacity and the resulting surplus.[168] Moreover, once the downturn started, some argued, rigid prices thwarted the process of natural economic adjustment that would have restarted the economy.[169]

Others argued that *too much* competition helped cause and prolong the Depression. These advocates claimed that unbridled rivalry between farmers, small businesses, and workers kept profits, farm prices, and wages low, thereby reducing consumers' purchasing power.[170] Some even argued that excessive competition prevented firms from realizing a fair return on investment and destroyed the incentive to invest, diverting retained earnings into private savings.[171]

Each diagnosis suggested a different remedy. If collusion caused or prolonged the Depression, the remedy was aggressive regulation to ensure atomistic competition. Indeed, University of Chicago economist Henry Simons suggested just such a program in 1934.[172] Simons's prescription entailed vigorous enforcement of the Sherman Act, including strict limits on trade associations and labor unions, the latter of which Simons would not have exempted from antitrust regulation.[173] Simons

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[168] *Id.*

[169] *See* HENRY SIMONS, *A Positive Program for Laissez Faire: Some Proposals for a Liberal Economic Policy* (1934), *reprinted* in ECONOMIC POLICY FOR A FREE SOCIETY 40, 53 (1948) ("A major factor in the cycle phenomenon is the quite unequal flexibility of different sets of prices and, more explicitly, the stickiness of prices which, for the bulk of industry, determine out of pocket operating (marginal) costs . . . . Decisively important in the whole situation is the exceeding inflexibility of wages—the explanation for which would require attention to many factors [including] effective labor organization."). Simons also believed that incompetent monetary policy was partly to blame. *See id.* at 54 ("We should characterize as insane a governmental policy of alternatively expanding rapidly and contracting precipitously the quantity of paper currency in circulation."). Simons argued that flexible prices made monetary policy more effective by ensuring accurate signals to economic actors about the scarcity of resources. *See* Henry Simons, *Economic Stability and Antitrust Policy*, 11 U. CHI. L. REV. 338, 343 (1944) (contending that price stabilization in some industries during a depression "means drawing off a larger share of spending to the particular enterprises, and thus, deepening the depression in other areas of the economy."). The phrase "natural economic adjustment" refers to the classical macroeconomic paradigm and its assertion that falling prices would *ceteris paribus* increase the real money supply thus enhancing aggregate demand. *See infra* notes 486–89 and accompanying text; *see generally* A.C. Pigou, *The Classical Stationary State*, 53 ECON. J. 343 (1943) (elaborating this argument).

[170] WILLIAM LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL: 1932–1940, at 36 (1963) (reporting that FDR "accepted the underconsumptionist explanation of the cause of the depression" and that Roosevelt's economists "agreed that the crisis centered in a failure of purchasing power but espoused structural reform rather than deficit spending").

[171] *See* HAWLEY, *supra* note 166, at 26–27.

[172] *See* Simons, *supra* note 169 *passim*; *see also* Robert Van Horn, *Chicago's Shifting Attitude Toward Concentrations of Business Power* (1934–62), 34 SEATTLE U. L. REV. 1527, 1528–34 (2011) (describing Simons's views).

[173] SIMONS, *supra* note 169, at 56–62; *id.* at 60 ("Given real competition among employers, one might wisely advocate application to labor organizations of the general prohibitions on restraint of trade.").

also proposed federal legislation to charter all corporations engaged in interstate commerce, limiting the size of such firms to that necessary to assure pricing flexibility, sacrificing efficiencies if necessary.[174]

If, on the other hand, the root cause of the Depression was too much competition, there were other possible remedies. First, some advocated actual or quasi-nationalization, whereby a federal instrumentality would own or direct the major means of production, particularly heavy industry and the commanding heights of the financial system.[175] In this way, it was said, the federal government could modulate excessive swings from bust to boom and back again.[176] Moreover, nationalization could achieve economies of scale not possible in a competitive system and would allow consumers and workers to share the benefits of efficiencies by preventing exploitation of economic power.[177]

The business community did not object to planning; just to the identity of the planners.[178] Even before the Depression, business leaders were calling for revised antitrust laws that would allow cooperation the Supreme Court had condemned as unreasonable.[179] Gerard Swope, President of General Electric, proposed such state-authorized cartelization to combat the economic downturn in a 1931 speech addressing the National Association of Manufacturers.[180] Before Congress, Swope argued that private enterprises could improve working conditions and provide social insurance to workers by passing on the cost of such programs to consumers.[181] Others echoed Swope's call for state-backed cartelization, im-

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[174] *Id.* at 58 (advocating "[t]ransfer to the federal government of the exclusive power to charter ordinary, private corporations, and subsequent annulment of all charters granted by the states"); *id.* at 60 (size of firms should be "even more narrowly limited [that that necessary to realize economies of scale], if ever necessary to the maintenance of freedom of enterprise").

[175] HAWLEY, *supra* note 166, at 13–14.

[176] *Id.*

[177] *Id.* (summarizing views of those who believed that "concentrations of economic power . . . were necessary for efficient mass production, technical progress and reasonable security; and while the abuse of this power was largely responsible for the depression [or so they thought], the idea that it could be dispersed was both impractical and dangerous. The only real answer lay in systematic organization and planning.").

[178] Henry Simons trenchantly identified the common economic assumptions that motivated the planners on the far left and far right. *See* Simons, *supra* note 169, at 338 ("[T]he layman readily (too readily) concludes that competitive conditions mean instability, and that the remedy lies in removing competition in favor of some other instrumentality of control . . . . Such vulgar economic analysis is the main stock-in-trade, not only of our radicals and revolutionaries on the left but of monopolists and cartelizers on the extreme right as well—not to mention the more ingenious advocates of 'planned economy.'").

[179] *See infra* notes 134–40 and accompanying text.

[180] BARBER, *supra* note 143, at 121 (describing Swope's address).

[181] *See* HIMMELBERG, *supra* note 143, at 131 (noting Swope's "frequent presentations before Congressional Committees"); *id.* at 135 (describing Swope's argument that his plan would empower businesses collectively to stabilize employment and provide employees social insurance).

posed coercively on dissenting firms.[182] Some members of Congress even proposed legislation to codify the FTC's authority to impose codes of fair competition.[183] Early versions of this proposed legislation banned below-cost pricing and price discrimination as unfair practices, regardless of any impact on competition or economic welfare.[184]

Although he believed that state-facilitated cooperation was superior to atomistic competition, Hoover resisted calls for amending the antitrust laws, instead advocating narrow legislation facilitating collective action in natural resource industries.[185] Indeed, Hoover's response to Swope's plan for horizontal price stabilization was swift and negative:

> There is no stabilization of prices without price-fixing, and this feature at once becomes the organization of gigantic trusts such as have never been dreamed of in the world. This is the creation of a series of complete monopolies over the American people. It means the repeal of the entire Sherman and Clayton Acts, and all other restrictions on combinations and monopoly. In fact, if such a thing were ever done, it means the decay of American industry from the day this scheme is born, because one cannot stabilize prices without protecting obsolete plants and inferior managements.[186]

Moreover, Hoover's Antitrust Division challenged trade association activities the Coolidge Administration had approved and encouraged the FTC to revisit "codes of fair competition" banning below-cost pricing and price discrimination.[187] Finally, despite Hoover's sympathy for collusive resource conservation, his Antitrust Division challenged the Appalachian Coals joint venture between 137 coal producers in four states that funneled members' output through an exclusive sales agency.[188] By 1932, despite the severe economic downturn, relaxation of antitrust regulation did not appear in the cards.

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[182] *See* SHAFFER, *supra* note 90, at 93–98 (describing additional support for state-enforced cartelization).

[183] *See* HIMMELBERG, *supra* note 143, at 134.

[184] *Id.* (describing bill proposed by Senator Nye banning below-cost pricing regardless of competitive effect).

[185] *Id.* at 151–52; see also *supra* notes 135–38 and accompanying text describing Hoover's view on the relationship between wasteful competition and antitrust law.

[186] *See* BARBER, *supra* note 143, 121–22 (quoting Hoover's memorandum).

[187] *See* HIMMELBERG, *supra* note 143, at 104–05 (describing the Department of Justice's litigation against the Sugar Institute and other associations whose activities the Coolidge administration had approved); *id.* at 90–97 (describing Department's challenges to activities previously approved by FTC's trade practice conferences).

[188] Appalachian Coals v. United States, 288 U.S. 344 (1933). *See also infra* notes 191–205 and accompanying text.

2. Mixed Signals from the Supreme Court

Early in the Depression, then, Hoover had reinvigorated antitrust enforcement and rejected nationalization and regulation. However, the Supreme Court's reaction to new restrictions on free competition was decidedly mixed, signaling a possible retreat from the unified and internally consistent free-market framework in place before the Depression. On the one hand, the Court reiterated its opposition to state control of entry. Thus, in 1932, the Court considered Oklahoma's requirement that firms wishing to enter the ice making business obtain a certificate of public convenience and necessity.[189] Both Oklahoma and Justice Brandeis contended that states should be free to experiment with such planning as a means of preventing destructive competition and counteracting the economic downturn.[190] Brandeis noted that easy entry engendered price wars and that business had made "unremitting efforts . . . to protect markets and prices from competition."[191] Many agreed, Brandeis said, "that that there must be some form of economic control" to rebalance production and consumption.[192] Citing the Swope plan and others, he continued that "[m]en of wide business experience" believed that such rebalancing required the government to demand that firms obtain state approval before entering a market.[193]

Nonetheless, the Court held that limits on entry into ice making exceeded the police power because they encouraged monopoly and did not protect consumers from impure ice or extortion, or conserve natural resources.[194] There was, the Court said, "no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that

[189] New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

[190] *Id.* at 298–311 (Brandeis, J. dissenting).

[191] *Id.* at 292–93 ("[T]he relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition.").

[192] *Id.* at 292–93, 308.

[193] *Id.* at 307–08 & n.53 ("Economists are searching for the causes of this disorder . . . . Increasingly, doubt is expressed whether it is economically wise that men should be permitted to add to the producing facilities of an industry which is already suffering from over-capacity . . . . [Some] assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation in capital, our industries have become capable of producing between 30 percent and 100 percent more than was consumed even in days of vaunted prosperity and that the present capacity will, for a long time, exceed the needs of business . . . . And some thoughtful men of wide business experience insist that all projects for proration and stabilization must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a pre-requisite to embarking new capital in an industry in which capacity already exceeds the production schedules.").

[194] *See New State Ice*, 285 U.S. at 279 ("The control here asserted does not protect against monopoly but tends to foster it . . . . There is nothing in the product . . . on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject, of course, to reasonable regulations prescribed for the protection of the public and applied with appropriate impartiality.").

there are enough dairymen in the business."[195] Such arbitrary interference with basic liberties could not be saved "merely by calling them experimental."[196]

Just a year later, the Court considered the Hoover administration's challenge to the *Appalachian Coals* venture described above.[197] The government had convinced the lower court that the venture was the economic equivalent of cartels and "open price plans" previously condemned as direct, unreasonable restraints.[198] The Supreme Court reversed, however, relying in part on arguments that would be deemed legitimate today. The venture was not a naked cartel, the Court said, but instead involved contractual integration between the parties that encouraged research, advertising, and streamlined distribution.[199] Moreover, the parties faced competition from new fuels and coal in adjacent regions.[200] As a result, the Court said, the defendants did not have the sort of market position present in earlier decisions that had condemned horizontal restraints; a complete merger between the defendants, while eliminating rivalry, likely would have passed antitrust muster.[201] There was no reason to treat less complete integration more harshly.[202]

However, the Court also embraced arguments that would, today, confirm that a challenged arrangement entailed an anticompetitive departure from normal competition.[203] For instance, the Court treated the defendants' desire to eliminate "destructive practices" as redeeming virtues that could help justify the restraint.[204] The Court also suggested that its analysis turned in part on the deteriorating macroeconomic conditions

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[195] *Id.*

[196] *Id.*

[197] *See supra* note 188 and accompanying text.

[198] *See* United States v. Appalachian Coals Co., 1 F. Supp. 339 (W.D. Va. 1932) (enjoining venture's operation); *id.* at 345–49 (invoking United States v. Trans-Missouri Freight Association 166 U.S. 290 (1897), Joint Traffic Ass'n v. United States, 171 U.S. 505 (1898), Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921), United States v. Am. Linseed Oil Co., 262 U.S. 371 (1923), and United States v. Trenton Potteries, 273 U.S. 392 (1927) in support of decision enjoining the venture).

[199] *See* Appalachian Coals v. United States, 288 U.S. 344, 359–68, 376–78 (1933).

[200] *Id.* at 361 ("Coal has been losing markets to oil, natural gas and water power."); *cf.* United States v. General Dynamics, 415 U.S. 491, 499 (1974) (affirming district court's approval of merger in part because coal faced "stiffer competition from oil and natural gas").

[201] *See Appalachian Coals*, 288 U.S. at 376–77.

[202] *Id.* at 377 ("Nothing in theory or experience indicates that the selection of a common selling agency to represent a number of producers should be deemed to be more abnormal than [a merger] bringing various independent units into one ownership. Either may be prompted by business exigencies."); *cf.* B.M.I. v. C.B.S., 441 U.S. 1, 8–9 (1979) (formation and operation of partnerships literally fixes prices but is properly analyzed under the rule of reason).

[203] *Cf.* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 693 (1978) (holding that defendants' argument assumed that restraint would exercise market power and thus confirmed that challenged practice should be condemned).

[204] *See Appalachian Coals*, 288 U.S. at 366–67.

afflicting local communities.[205] These conditions, the Court said, had inspired formation of the venture, because "the limits of official authority were apparent."[206] Presumably these limits derived from either or both the Due Process Clause and the dormant Commerce Clause, the latter of which would have prevented individual states from regulating the output of the multi-state venture's members.[207] That venture, in turn, merely ameliorated "injurious practices," which the Court said "demanded correction."[208] According to the Court, the statute did not prevent defendants from "making an honest effort to remove abuses, to make competition fairer, and thus to promote the essential interests of commerce."[209] Thus, "[t]he interests of producers and consumers were interlinked," because "when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."[210] Absent proof that the venture produced unreasonable prices—impossible since it had never gone into operation—no injunction would issue.[211] Justice McReynolds, who had condemned open price plans as involving "methods which are not normal," issued a lone dissent.[212]

Early in the Depression, then, the Court had resisted efforts to combat economic downturn by coercive interference with free entry and free competition. At the same time, however, the same Justices, recognizing the "limits to official authority" they themselves had imposed under the aegis of the Due Process and Commerce Clauses, approved private restraints that unduly restrained free competition, thereby producing the same monopolistic results as state-imposed barriers to entry.[213] Cracks had begun to occur in the mutually-enforcing structure that had, to that point anyway, consistently sheltered free-market competition from undue state, federal, or private interference.

IV. FDR'S STIMULUS PLAN: THE NIRA

President Roosevelt took office in March, 1933, the same month that the Court announced the *Appalachian Coals* decision. The Executive and Legislative Branches immediately began work on legislation to

205 *Id.* at 364–65.

206 *Id.*

207 *See supra* notes 57–63 and accompanying text (explaining how pre-Depression dormant Commerce Clause jurisprudence prevented states from placing direct burdens on interstate commerce, including prices of interstate sales).

208 *Appalachian Coals*, 288 U.S. at 364–65.

209 *Id.*

210 *Id.*

211 *Id.*

212 *Id.* at 378 (McReynolds, J. dissenting).

213 *Id.* at 364–65.

stimulate the economy. In April the Senate passed legislation banning the interstate sale of any product manufactured by a firm whose employees worked over thirty hours per week.[214] FDR's own Secretary of Labor, Frances Perkins, supported this approach, so long as a federal board fixed minimum wages to enhance "purchasing power."[215]

Industry and its congressional allies vigorously opposed the control included in the Senate bill, and FDR doubted it would survive constitutional attack.[216] Business leaders argued that industries should themselves determine wages, hours, and output via "industrial self-government."[217] Such "self-government," of course, would require relaxation of the Sherman Act, even beyond that implied by *Appalachian Coals*, something the Chamber of Commerce, National Association of Manufacturers, and the American Bar Association were now advocating with renewed vigor.[218]

Responding to these considerations, Congress passed, and FDR signed, the National Industrial Recovery Act (NIRA) in June, 1933. The NIRA's "declaration of policy" diagnosed the problem to be addressed as "widespread unemployment and disorganization of industry," which "burdens interstate and foreign commerce, affects public welfare, and undermines the standard of living of the American people."[219] Thus, the Act articulated several purposes:

> 1) Remove obstructions to the free flow of interstate commerce;
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> 2) Promote the organization of industry for the purpose of cooperative action among trade groups;
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> 3) Induce united labor action;
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> 4) Eliminate unfair competitive practices;
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> 5) Promote the fullest possible utilization of the productive capacity of industries;
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> 6) Avoid undue restriction of production (except as may be temporarily required);

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[214] *See* HIMMELBERG, *supra* note 143, at 191–92.

[215] *Id.* at 190–92 (detailing support by Perkins and others for such measures).

[216] HAWLEY, *supra* note 166, at 22 ("Roosevelt [believed the bill was] seriously defective. It was far too rigid, likely to be held unconstitutional, and said nothing about minimum wages.").

[217] *Id.* at 22–23.

[218] *Id.* (summarizing arguments that "The antitrust laws should be relaxed so as to allow employers to enter into voluntary trade association agreements covering such things as hours, wages and 'destructive competition.' Such agreements should then be approved by an appropriate government agency, and [then] forced upon recalcitrant industrial minorities . . . .").

[219] *See* National Industrial Recovery Act (NIRA) of 1933, 15 U.S.C. § 701 (1934), *invalidated by* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

> 7) Increase consumption of industrial and agricultural products *by increasing purchasing power*;
>
> 8) Reduce unemployment;
>
> 9) Improve labor standards; and
>
> 10) Otherwise rehabilitate industry and conserve natural resources.[220]

The NIRA took two steps toward these objectives. First, Title II authorized $400 million for public works.[221] Second, Title I authorized the creation of "Codes of Fair Competition," via a process reminiscent of the trade practice conferences orchestrated by the FTC during the 1920s.[222] Moreover, in considering the merits of proposed codes, the President or his designee was to consider numerous criteria, including whether such codes:

> 1) Promoted monopolies;
>
> 2) Eliminated or oppressed small enterprises; or
>
> 3) Discriminated against small enterprises.[223]

The statute also redundantly commanded that "such codes shall not permit monopolies or monopolistic practices."[224]

The language proscribing "monopolies *or monopolistic practices*" was less friendly to competition than it may initially have appeared. The initial House bill did not prohibit monopolies.[225] The Senate bill, however, prohibited any code "'permit[ting] combinations in restraint of trade, price fixing, or other monopolistic practices . . . .'"[226] Industry, however, argued that this language would defeat the legislation's purpose by preventing cooperation to stabilize prices and enhance purchasing power.[227] As a result, the House demanded the watered-down prohibition on "monopolies or monopolistic practices."[228] To remove any doubt, the Act also exempted from antitrust scrutiny "any code, agreement, or license approved, prescribed, or issued and in effect under this title."[229]

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220 *See* 15 U.S.C. Ch. 15, § 702 (1934) ("Declaration of Policy") (emphasis added).

221 *See* 15 U.S.C. Ch. 14, §§ 601–617 (1934).

222 *See supra* notes 147–55 and accompanying text.

223 *See* 15 U.S.C. § 703 (a).

224 *See id.*

225 *See* HAWLEY, *supra* note 166, at 29–30.

226 *Id.*

227 *Id.* ("Business protests made it clear that [the Senate] was striking at the heart of the measure, that businessmen were set upon establishing 'fair, just, and reasonable price levels,' in consideration of decreased working hours and increased wages.").

228 *Id*. at 30–31.

229 *See* 15 U.S.C. § 705 (1934).

Thus, Congress rejected atomization and nationalization, in favor of self-regulation approved as "reasonable" in *Appalachian Coals* and becoming fashionable in Europe.[230] *Appalachian Coals*, of course, was not the only American antecedent; the FTC had approved "Codes of Fair Competition" under its trade practice procedure, and the Department of Justice had, during the Coolidge Administration, declined to challenge unlawful "open price plans."[231] The Act also contemplated that resulting codes would expressly guarantee fair wages and reduced working hours, require participating industries to bargain collectively with labor, and ban "yellow dog" contracts, which forbid employees from joining a union.[232] Indeed, provisions boosting labor prerogatives and income were seen as working hand-in-hand with industry cartelization. Without such cartelization, it was said, destructive and cutthroat competition would result in "chiseling" on prices and thus wages.[233] By bolstering collective industrial action, then, the Act supposedly facilitated wage increases and work-spreading practices necessary to enhance labor's purchasing power and spark economic recovery.[234]

Less than two years after FDR signed the law, 550 approved codes were in operation.[235] Industries funneled proposals through their trade associations, which drew upon the institutional expertise they had developed while devising and enforcing provisions that tempered "cut-throat" competition during the 1920s.[236] The resulting codes were a full-scale assault on free competition, coercively interfering with market-based re-

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[230] *See* SHAFFER, *supra* note 90, at 98–104.

[231] *See supra* notes 146–55 and accompanying text.

[232] *See* 15 U.S.C. Ch. 15, § 707(a) (1934); *see also* Michael L. Wachter, *Labor Unions, A Corporatist Institution in a Competitive World*, 155 U. PENN. L. REV. 581, 601–04 (2007) (describing NIRA's support for collective bargaining).

[233] *See* HIMMELBERG, *supra* note 143, at 202–05 (detailing business support for self-regulation of prices, wages, and production); *id.* at 204 ("[B]usiness leaders . . . were able to persuade [Senator] Wagner that elimination of 'cutthroat competition' and improvement of wages and hours through industry-wide agreements would, together with public works, be an adequate recovery mechanism.").

[234] Herbert Stein summarized the NIRA's economic logic as follows:

> [T]he thought was that in the twenties too small a share of the national income had gone to workers and farmers — the consuming classes — and too large a share had gone to savers. As a result investment had run for a long time at a rate that could not be sustained by the rate of consumption, and had then collapsed, causing the Depression. The NRA and the AAA were to raise and sustain the share of workers and farmers and thereby raise and sustain [overall] consumption.

STEIN, *supra* note 159, at 48–49. *See also* HIMMELBERG, *supra* note 143, at 202–05 ("The labor provisions, on the grounds that they would increase 'purchasing power,' made it somewhat possible to regard the N.I.R.A. as a recovery measure, as did the antitrust suspension, upon the supposition that unfair and ruthless competition was causing continuing deflation of prices and wages and making revival impossible.").

[235] HIMMELBERG, *supra* note 143, at 211.

[236] *See supra* notes 88–96 and accompanying text; PERITZ, *supra* note 75, at 78 ("[The NIRA] would take trade associations as its institutional framework.").

source allocation in two broad ways. First, the codes fixed prices or imposed horizontal collusion. Thirty-eight codes set minimum prices.[237] Another 188 included "emergency price fixing provisions," defining "emergency" as "destructive price cutting" endangering maintenance of the code.[238] Four hundred twenty-two included "open price" provisions, requiring firms to file prices publicly with code authorities.[239] Of these, 297 mandated waiting periods between the filing of new prices and their effective dates.[240] Ninety-five limited output, by capping the number of hours plants could operate each week, limiting construction, preventing firms from shifting from one sort of output to another, prohibiting new plants, or discouraging new routes.[241]

Code provisions facilitated horizontal collusion in other ways as well. Eighty mandated resale price maintenance (minimum RPM), which can facilitate upstream collusion.[242] Three hundred fifty-two banned below-cost sales, regardless of any injury to competition or even rivals, thereby replicating provisions produced by the FTC's "trade practice conferences."[243] One hundred codes prohibited "destructive price cutting," defined as cuts "impair[ing] code wages and working conditions," regardless of the prices' relationship to costs.[244] Various codes banned or limited package sales, which could facilitate secret discounting.[245] Others limited the extension of consumer credit, another method of circumventing cartel agreement; a similar provision had emerged from FTC trade practice conferences.[246] Thus, a leading historian concluded that "[t]he philosophy of government-supported cartels was clearly outdistancing the concepts of enforcing competition."[247]

Second, in addition to cartelization and facilitating practices, which presumably benefited all firms in a market, many codes contained provisions that likely raised the cost of small rivals and erected barriers to

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237 *See* LEVERETT S. LYON ET AL., THE NATIONAL RECOVERY ADMINISTRATION 579 (1935).

238 *Id.* at 605–08 & n.18.

239 *Id.* at 610–11; *see also* HAWLEY, *supra* note 166, at 59–60 (describing these provisions).

240 LYON ET AL., *supra* note 237, at 610–11.

241 *See id.* at 624–29, 636, 634–35 (table detailing various provisions).

242 *See* HAWLEY, *supra* note 166, at 58–59 (reporting that eighty codes mandated minimum RPM); Continental T.V. v. GTE Sylvania, 433 U.S. 36, 51, n.18 (1977) (stating that "industry-wide" minimum RPM can facilitate upstream horizontal collusion).

243 *See* LYON ET AL., *supra* note 237, at 585–86; *supra* note 152 and accompanying text. Some codes both prohibited below-cost sales and authorized emergency price fixing. *See id.* at 605–08.

244 *See* LYON ET AL., *supra* note 237, at 603–05.

245 *Id.* at 690–93.

246 *Id.* at 691–92; *but cf.* Catalano v. Target Stores, 446 U.S. 643 (1980) (banning agreement not to extend certain credit terms); *see also supra* note 152 and accompanying text (describing such provisions in codes approved by FTC-sponsored trade practice conferences).

247 *See* HAWLEY, *supra* note 166, at 62.

entry by others, further undermining free competition and mandating the sort of inefficiencies Hoover had feared when opposing the Swope plan.[248] As noted earlier, the statute itself required participating firms to allow collective bargaining.[249] Moreover, all codes displaced free competition in labor markets, mandating minimum wages.[250] In addition, all but the fur trapping code set maximum hours.[251] Other codes eliminated late shifts for women, required holiday overtime, or mandated work sharing.[252] Each such provision interfered with marketplace determinations of wages and hours by raising the former and reducing the latter and thereby distorting firms' input choices and mandating inefficient production processes. Such mandated inefficiencies likely placed disproportionate burdens on smaller firms engaged in labor-intensive production.[253] For instance, while minimum wages increase production costs for all firms, they fall disproportionately on labor-intensive firms, i.e., those using more "person hours" (and less capital) per unit of output than other firms.[254] Thus, minimum wage codes can increase output for capital-intensive firms while decreasing output for labor-intensive firms.[255]

Maximum hour laws can have a similar effect, as illustrated by the facts of *Lochner v. New York*, which overturned legislation setting maximum hours for bakers as inconsistent with contractual liberty.[256] New York bakeries nominally subject to the law employed two very different production technologies. About 90% were small, "mom and pop" operations, differing little from their eighteenth century counterparts.[257]

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[248] *Id.* at 83 ("Small firms often existed only because they offered lower prices to offset preferences for advertised brands, prices sometimes made possible by lower wages . . . . It was in the interest of larger firms, therefore, to eliminate price and wage differentials and wipe out the special advantages that made them possible . . . . The majority of the codes moved in this direction."); *see generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

[249] *See* 15 U.S.C. § 707 (1934).

[250] *See* LYON ET AL., *supra* note 237, at 317–42 (detailing minimum wage provisions).

[251] *Id.* at 367, n.a; *see also id.* at 365–91 (discussing various maximum hour provisions).

[252] *Id.* at 387–91.

[253] *See* Oliver E. Williamson, *Wage Rates as Barriers to Entry: The Pennington Case in Perspective*, 82 Q. J. ECON. 85, 91–98 (1968) [hereinafter Williamson, *Wage Rates as Barriers to Entry*] (explaining how imposition of minimum wages industry-wide can disadvantage smaller, labor-intensive firms).

[254] *Id.*

[255] *See* Thomas G. Krattenmaker & Steven C. Salop, *Raising Rivals' Costs*, 96 YALE L.J. at 230, n.73 (invoking Williamson's work on how minimum wages can raise costs of small firms to support claim that firms can employ private contracts to impose disproportionate input costs on rivals).

[256] Lochner v. New York, 198 U.S. 45 (1905).

[257] *See* BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 116–17 (1983); *see also id.* at 116 (reporting that in 1905 there were 3,164 bakeries in New York, of which 2,870 were sole proprietorships, 228 were partnerships and sixty-four were corporations).

Larger, corporate bakeries employed modern ovens and premises, i.e., more capital-intensive production.[258] Their employees rarely worked over sixty hours per week.[259] Smaller bakeries countered these advantages with longer hours; employees sometimes slept on the premises and worked twelve-hour shifts, six days per week.[260] By imposing a sixty-hour limit on weekly working hours, New York impelled small employers to hire additional employees to cover resulting shortfalls. This requirement presumably increased the fixed costs of hiring and training, for instance, and could raise labor costs in other ways as well.[261] Presumably maximum hour provisions in NIRA codes had similar effects in some industries, disadvantaging small, labor-intensive enterprises compared to capital-intensive establishments.

Finally, consider the NIRA's ban on "yellow dog" contracts, which contravened two Supreme Court decisions.[262] One historian has reported that, during the 1920s, "users of yellow dog contracts were typically nonunion firms in competitive industries divided into union and nonunion sectors."[263] Such firms were generally sole-proprietorships, operating at smaller scale than corporations.[264] If so, one might surmise that the results of collective bargaining fell disproportionately on the sole-proprietorships that employed such contracts and resisted unionization.[265] Like small bakeries in *Lochner*, many such firms presumably employed labor-intensive production processes.[266] Thus, in the jargon of modern antitrust theory, some yellow dog contracts were "predatory counter-strategies," countering efforts of unions, perhaps in concert with larger employers, in order to impose higher labor costs.[267]

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[258] *Id.* at 116–17.

[259] *Id.* (citing 1896 New York report finding that workday in large bakeries approached the statutory maximum).

[260] *Id.* (reporting average work week for New York bakers of 72.67 hours, compared to about sixty hours per week for employees of corporate bakeries).

[261] *Id.* at 117 (suggesting that maximum hour requirement forced employers to hire second group of workers, but at higher hourly wages, to induce them to accept fewer hours per week employment).

[262] *See* Coppage v. Kansas, 236 U.S. 1 (1915) (voiding state ban on such contracts); Adair v. United States, 208 U.S. 161 (1908) (voiding congressional ban on such contracts in railroad industry).

[263] *See* Daniel Ernst, *The Yellow Dog Contract and Liberal Reform, 1917–1932*, 30 LAB. HIST. 251, 256 (1989).

[264] *Id.* at 255 ("According to one study [of firms imposing such contracts] most employed fewer than 250 workers, and of the 14 firms in a second study, only four employed more than 1000; eight employed between 100 and 320, and the remainder employed fewer than 30.").

[265] *See* Williamson, *Wage Rates as Barriers to Entry*, *supra* note 253, at 91–98.

[266] *See supra* notes 256–61 and accompanying text (explaining how small bakeries burdened by regulations challenged in *Lochner* likely employed labor-intensive production processes and thus suffered disproportionately from such regulations).

[267] *See* Williamson, *Wage Rates as Barriers to Entry*, *supra* note 265, at 91–92, 98; *see generally* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion:*

In the end, then, the NIRA was, at best, a "mixed blessing" for small business and, at worst, an unmitigated evil. Most prosecutions for purported code violations targeted small firms,[268] and FDR faced a growing chorus of complaints that NIRA codes stacked the economic deck against small business.[269] The fierce resistance by many small businesses to various cost-raising code provisions, as well as the support of larger firms for such provisions, bolsters this interpretation.

The NIRA was not the only early New Deal recovery measure. The Agricultural Adjustment Act, for instance, regulated the prices and output of farmers, who had experienced low prices while paying dearly for manufactured goods.[270] The Bituminous Coal Act established the National Bituminous Coal Commission, with authority to approve agreements controlling coal output, and also to impose collectively-bargained wages upon mining companies.[271] Like the NIRA, both statutes sought to control prices and output to enhance the "purchasing power" of farmers and miners.[272]

V. *NEBBIA* AND THE RETREAT OF ECONOMIC DUE PROCESS

The NIRA and similar state and federal statutes sought coercively to displace wages and prices set by free-market competition.[273] However, pre-Depression due process precedents barred state-enforced cartelization outside industries "affected by a public interest."[274] Indeed, as explained earlier, in 1932, the Court reaffirmed the basic framework for analyzing economic regulation in *New State Ice. Co. v. Liebmann*.[275]

Raising Rivals' Costs to Achieve Power Over Price, 96 YALE L.J. 209, 268–72 (1986) (discussing "predatory counter-strategies" against raising rivals' costs scheme); *see also* United Mine Workers v. Pennington, 381 U.S. 657, 661–69 (1965) (holding that such a conspiracy would exceed labor's antitrust immunity and violate the Sherman Act).

268 RUDOLF J. R. PERITZ, COMPETITION POLICY IN AMERICA: HISTORY RHETORIC, LAW 126 (Oxford Univ. Press rev. ed. 1996) (reporting that of nineteen NIRA district court cases fourteen involved gas stations, auto dealerships, laundries and dry cleaners, and lumber yards).

269 *See* Hawley, *supra* note 166, at 82–83.

270 *See* Agric. Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31; HAWLEY, *supra* note 166, at 191–92 (describing farmers' support for the same Act).

271 *See* Brief for Government Officers, Respondents in No. 636 and Petitioners in No. 651 at 3–10, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Nos. 636, 651) (describing history and purposes of the Act).

272 *See, e.g.*, Brief for the United States at 203–60, United States v. Butler, 297 U.S. 1 (1936) (No. 401); HAWLEY, *supra* note 166, at 192 ("[Support for the AAA] stressed the theory that recovery could not be achieved until the balance of market power between agriculture and industry had been restored . . . .").

273 See *infra* notes 279–83 and accompanying text (discussing New York's imposition of a retail milk cartel); notes 403–31 and accompanying text (discussing California's imposition of a raisin cartel).

274 *See supra* notes 104–14 and accompanying text.

275 *See supra* notes 189–96 and accompanying text.

However, just nine months after passage of the NIRA, the Court signaled a softening of its protection for economic liberty, in what was, from one angle, an antitrust case. *Nebbia v. New York* involved a challenge to regulation like that imposed by numerous NIRA codes, namely, state-imposed minimum resale price maintenance in the milk industry.[276] A grocer sold milk for the state-fixed price of nine cents per quart, but included a five-cent loaf of bread for free to a consumer who purchased two quarts.[277] This was the sort of package sale—evading a cartel price by discounting a tied product—that the FTC had occasionally prohibited via its trade practice conferences and which dozens of NIRA codes would ban.[278]

The defendant, indicted for selling cheap and nutritious food, claimed that the statute deprived him of contractual liberty without due process because the retail milk business was not "affected by a public interest."[279] This argument seemed well-grounded in recent decisions in which the Court had repeatedly opined that the police power did not authorize price regulation of ordinary trades, including dairy farming.[280] Nor could it have escaped the Court that a similar arrangement by private parties governing interstate commerce would have violated the Sherman Act as a direct, unreasonable restraint of trade.[281] Indeed, just four years later Thurmond Arnold's antitrust division would secure an indictment against farmers' cooperatives, union leaders, city officials, and distributors in the Midwest for fixing milk prices.[282] Arnold claimed that the

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[276] 291 U.S. 502 (1934); *see supra* notes 235–38 and accompanying text (discussing such resale price fixing in NIRA codes).

[277] *Id.* at 515.

[278] *See supra* text accompanying notes 235–38.

[279] *See* Brief for Nebbia at 10–18, 291 U.S. 502 (1934) (No. 531).

[280] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 279 (1932) (stating that the state cannot control entry into ice making or number of cows owned by dairymen); Williams v. Standard Oil Co. of La., 278 U.S. 235, 240 (1929) (stating that the state cannot set price of gasoline, "one of the ordinary commodities of trade"); Ribnik v. McBride, 277 U.S. 350, 357 (1928) ("[An employment agency] deals with the public, but so do the druggist, the butcher, the baker, [and] the grocer . . . . [A]nything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are . . . . [I]n none of them is the interest that 'public interest' which the law contemplates as the basis for legislative price control."); Charles Wolff Packing Co. v. Kan. Court of Indus. Relations, 262 U.S. 522, 537 (1923) ("[T]he business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner [are not] clothed with such a public interest that the price of his product or his wages could be fixed by state regulation."). *See also* Brief for Nebbia, at 10–18 (invoking these and other decisions in support of due process attack against the regulation).

[281] *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 409 (1911) (declaring minimum RPM a direct restraint offending Section 1).

[282] *See* HAWLEY, *supra* note 166, at 435.

investigation and indictment reduced Chicago milk prices from thirteen to nine cents a quart.[283]

The state defended its milk cartel as an "emergency measure" designed to ensure a fair return for dairy farmers, thereby protecting the longer-term viability of the industry.[284] The scheme had been successful, the state argued, increasing milk prices 30% in one year.[285] The state conceded that the free competition protected by the Court's due process decisions was generally desirable, but still claimed that the dairy industry was a public utility, analogous to electricity generation and water supply.[286] As such, the state continued, milk production was affected by a public interest and subject to price regulation.[287] In support of this argument that free competition was sometimes undesirable, the state quoted, inter alia, *Appalachian Coals v. United States*,[288] a decision that had validated (private) interference with normal competition for the proposition that "[r]ealities must dominate the judgment" and that "it is necessary to consider the economic conditions peculiar to the industry, the practices which have obtained and other matters practically affecting the public interest."[289]

In a 5–4 decision, a bitterly divided Court upheld New York's retail milk cartel.[290] The Court conceded that the milk industry was not a "public utility," that New York dairymen had received no special privileges, and that there was "no suggestion of any monopoly or monopolistic practice" (aside from those New York imposed).[291] Still, the Court rejected petitioner's well-grounded claim that industries "affected with a public interest" necessarily fell into one of these categories.[292] Instead, the Court said, past conclusions that an industry was "affected with a public interest" were simply restatements of the conclusion that a chal-

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283 *Id.* at 435–36. *See generally* United States v. Borden, 308 U.S. 188 (1939) (reversing decision dismissing indictment of milk producers).

284 *See* Brief for Appellee at 11–22, Nebbia v. New York, 291 U.S. 502 (1933) (No. 531) (summarizing evidence purporting to show that legislation would overcome milk industry emergency).

285 *Id.* at 28.

286 *Id.* at 37 ("Undoubtedly self-regulation of business through free competition is a goal worthy of considerable sacrifice, but it is not always the preponderant value.").

287 *Id.* at 38.

288 288 U.S. 344 (1933).

289 *See* Brief for Appellee, *supra* note 284, at 38 ("Public utilities are businesses in which free competition works out badly, and accordingly they are controlled upon a different principle.").

290 *See* Nebbia v. New York, 291 U.S. 502 (1934).

291 *Id.* at 531 (conceding these points).

292 *Id.* at 532–36; *cf.* Charles Wolff Packing Company v. Court of Indus. Relations of Kan., 262 U.S. 522, 535–42 (1923) (unanimously articulating principles, repudiated by *Nebbia*, defining the category of industries "affected by a public interest" and therefore amenable to price and/or wage regulation).

lenged regulation fell within the police power.[293] To support its claim, the Court claimed that the seminal case of *Munn v. Illinois*,[294] where the Court sustained price regulation, did not involve monopolistic practices.[295] *Munn,* however, had expressly invoked the defendants' participation in an open and notorious cartel to support its conclusion that the defendants' "virtual monopoly" was affected with a public interest.[296] Given the *Nebbia* majority's rejection of precedent, efforts to analogize the dairy industry to public utilities and firms engaged in monopolistic practices were beside the point.[297] The only pertinent question, the Court said, was whether New York's price regulation "may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."[298]

The Court acknowledged that states and the national government generally encouraged free competition, and that antitrust regulation ensuring such competition had survived liberty of contract challenges.[299] Nonetheless, the Court said, the Constitution was entirely agnostic between free competition, and low prices, on the one hand, and state-created cartels, and high prices, on the other.[300] According to the Court:

> [A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. . . . Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.[301]

293 *See Nebbia*, 291 U.S. at 536 ("The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good.").

294 94 U.S. 113 (1877).

295 *Nebbia*, 291 U.S. at 532–33 ("Their enterprise could not fairly be called a monopoly, although it was referred to in the decision as a 'virtual monopoly.'").

296 *See Munn*, 94 U.S. at 131 (finding that the nine firms owning the regulated elevators agreed on prices and published the resulting prices in local newspapers, with the result that "all the elevating facilities" in the region were a "virtual monopoly"). *See also* Munn v. Illinois, 69 Ill. 80, 93 (Ill. 1873), *aff'd* 94 U.S. 113 (1877) (characterizing defendants as "an organized combination of monopolists"); *id.* at 89 (describing the defendants as "an organized body of monopolists, possessing sufficient strength . . . to impose their own terms upon the producers and the shippers of these cereals . . . .").

297 *See Nebbia*, 291 U.S. at 531–37.

298 *Id.* at 537.

299 *Id.* at 538.

300 *Id.* at 537–38.

301 *Id.* at 537 (quoting Northern Sec. Co. v. United States, 193 U.S. 197, 337 (1904)). *Northern Sec. Co.* noted that Congress could *allow* monopoly, not that Congress could coercively impose it. *See Northern Sec. Co.*, 193 U.S. at 336.

Thus, the Court said that states could coercively eliminate competition whenever they believed competition did not safeguard consumer interests, produced waste harming the public, threatened eventually to cut off the supply of a public necessity, or portended destruction of the industry.[302] Such power, the Court said, included the power to fix prices, particularly when "the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other."[303] The Court did not explain how fixing retail prices would impact milk prices upstream.[304] Nor did the Court consider the possibility that normal competition would eliminate inefficient producers and stabilize prices over time or explain why malnourished families should pay a premium to protect inefficient producers.[305] Simply put, the *Nebbia* Court's disingenuous treatment of prior decisions and absence of reasoned explanation signaled a retreat from the Court's prior protection for contractual liberty and thus free-market competition.[306] Just as *Appalachian Coals* had validated unreasonable private restraints on free competition, *Nebbia* approved state-imposed restraints that could have similar effects.

VI. *SCHECHTER POULTRY* AND THE NIRA'S DEMISE

Four New York small businessmen were prosecuted for competing too much, thus violating the NIRA's "Live Poultry Code."[307] The defendants and their two corporations were convicted on eighteen counts, including:[308]

> 1) Allowing customers to select individual chickens from a coop or half coop, i.e., failing to "bundle" desirable with undesirable chickens;
>
> 2) Failure to report prices to code authorities weekly;
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> 3) Failure to abide by minimum wage and maximum hour provisions;

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[302] *See Nebbia*, 291 U.S. at 538.

[303] *Id.* at 538–39.

[304] *Id.* at 556–57 (McReynolds, J., dissenting) (noting the absence of such an explanation).

[305] *Id.* at 557–58 (McReynolds, J., dissenting) ("[The statute] takes away the liberty of 12,000,000 consumers to buy a necessity of life in an open market. It imposes direct and arbitrary burdens upon those already seriously impoverished with the alleged immediate design of affording special benefits to others . . . . A superabundance; but no child can purchase from a willing storekeeper below the figure appointed by three men at headquarters!").

[306] *See* CUSHMAN, RETHINKING THE NEW DEAL COURT, *supra* note 71, at 78–83 (contending that *Nebbia* marked a turning point in Court's economic liberty jurisprudence).

[307] *See* A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 519 (1935).

[308] *Id.* at 527–28.

4) Selling a butcher one unfit chicken.[309]

The businessmen appealed their convictions, leveling three challenges to the statute, one facial and two as-applied.[310] The facial attack invoked the non-delegation doctrine, challenging the statute's delegation of the power to the President to approve and transform proposed codes into law. The petitioners argued that the statute gave the President carte blanche to define unfair trade practices, without providing an "intelligible principle" to guide his regulatory discretion.[311]

In the alternative, petitioners also claimed the application of the Act to them exceeded Congress's commerce power. The Live Poultry Code governed "every person" in the industry, regardless of connection to interstate commerce.[312] Moreover, the Government conceded that the statute applied to acts only slightly impacting interstate commerce.[313] Other codes regulated barber shops, bowling and billiards, and burlesque theatres.[314] Substantial precedent, petitioners correctly explained, established that production—and wages and hours of manufacturing employees—only affected commerce "indirectly," such that regulation of wages and hours exceeded congressional authority.[315]

Most relevant for competition policy, petitioners argued that the Live Poultry Code's provisions, which displaced free-market determination of wages and hours, abridged contractual liberty without due process.[316] Freedom of contract was the general rule[317] and neither Congress nor the Executive Branch had found that the poultry industry was clothed with a public interest or established any "peculiar necessity" for regulation.[318]

The United States responded that this delegation was similar to that approved in other contexts.[319] Moreover, the government claimed that interference with free-market determination of wages and hours would prevent a downward spiral of wage rates that would otherwise occur as

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[309] *Id.* at 528.

[310] *See* Ayotte v. Planned Parenthood of N.H., 546 U.S. 320, 329–31 (2006) (articulating distinction between as applied and facial challenges).

[311] *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 405–07 (1928) (articulating non-delegation doctrine).

[312] *See* Brief for Petitioners at 72–74, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Nos. 854, 856).

[313] *Id.* at 73–74 (quoting statements in Government's brief to this effect).

[314] *Id.* at 80–82.

[315] *See* Brief for Petitioners, *supra* note 312, at 102–03; 110–17 (quoting and citing Kidd v. Pearson, 128 U.S. 1 (1888), E.C. Knight v. United States, 156 U.S. 1 (1895), and similar decisions).

[316] *See* Brief for Petitioners, *supra* note 312, at 147.

[317] *Id.* at 147–48 (citing Adair v. United States, 208 U.S. 161, 178 (1908)).

[318] *See* Brief for Petitioners, *supra* note 312, at 148.

[319] *See* Brief for the United States at 118–136, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Nos. 854, 856).

firms sought to obtain a competitive advantage.[320] According to the United States, stemming this spiral would remove obstructions of commerce and provide the "stimulus to start in motion the cumulative forces making for expanding commercial activity."[321]

The Government invoked recent relaxation of antitrust regulation and concomitant departure from free-market norms to support its claim that regulation could stimulate the macro economy. The Government claimed that "*fair* competition," not free competition, was a "familiar concept . . . recognized . . . in the formulation of codes of fair competition in [FTC] trade practice conferences."[322] The Government quoted *Appalachian Coals* for the proposition that price fixing ultimately benefits consumers by ensuring fair returns for businesses.[323] In a nod to the 1920s trade association movement, the Government suggested that industrial concentration and "well-organized industry with well-organized labor support may maintain fair prices and fair wages," without any relaxation of the antitrust laws.[324] Still, the NIRA was necessary because a well-organized industry maintaining reasonable prices would "steadily lose its market," i.e., as "low wages in [less organized] industries reduced general purchasing power."[325] Moreover, particular industries might find it difficult to organize, because "a minority would have taken advantage of the situation and blocked the possibility of voluntary cooperative action."[326] Invoking *Nebbia*, the government claimed that no category of activity was automatically beyond the scope of Congress's Commerce Power.[327] Thus, the government's defense of the NIRA as-

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[320] *Id.* at 47–57, 53–54, 87, 90 ("As prices and wages are cut by individual employers or groups of employers, others in self-preservation are compelled to do the same. The process tends to repeat itself at constantly lower and lower levels.").

[321] *Id.* at 91 ("A reduction in hours of labor . . . distributes wage payments among a larger number of workers [increasing] the proportion of such payments promptly spent."); *id.* at 86 ("The justification under the commerce clause for particular provisions in the codes may be based in part upon their relation to the revival of business and commerce.").

[322] *Id.* at 121 (citing FTC, Trade Practice Conference (1933)).

[323] *Id.* at 91–92. In particular, the government contended as follows:

> The interrelation of the various phases of our commercial system, particularly marked in a time of severe stress, has been clearly recognized by this Court. *Appalachian Coals*, 288 U.S. at 372: "The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry." The problem, in short, was not confined to production or distribution or consumption, but was concerned with the interrelation of all these aspects. . . .

Id.

[324] *See id.* at 93.

[325] *Id.*

[326] *Id.*

[327] *Id.* at 75; *id.* at vi (citing *Nebbia* favorably five times).

sumed that economy-wide cartelization would counteract the Depression, consistent with the rationale of *Appalachian Coals*.[328]

The Court reversed the Schechters' convictions on two separate grounds. First, the Court declared Title II unconstitutional on its face, because it delegated excessive legislative authority to the President.[329] The "fair competition" imposed by the codes, the Court said, was more than the antithesis of "unfair competition" banned by the common law or the FTC Act.[330] The statute empowered the President to adopt, "wise and beneficent measures for the government of trades and industries in order to bring about rehabilitation, correction, and development."[331] However, unlike previous delegations, "the statute contained no standards aside from the statement of the general aims of rehabilitation, correction and expansion."[332]

The Court also struck down the NIRA "as applied" to the defendants. Although the defendants imported the poultry from other states, the challenged code did not govern the interstate transportation of poultry.[333] Thus, defendants' local resale of poultry was not in the "current" of interstate commerce.[334] Nor did these activities substantially affect interstate commerce. While defendants' wages and hours affected their prices, income and thus the income of their rivals, the same was also true for defendants' "number of employees, rents, advertising, methods of doing business, etc."[335] Whatever effect either or both the defendants' wages and hours might have on interstate commerce was merely indirect and local, within the exclusive jurisdiction of states.[336] Recognition of such authority, the Court said, would empower Congress, at its discretion, to regulate purely local matters.[337] While recognizing that it was not "the province of the Court to consider the economic advantages or disadvantages of such a centralized system," the Justices held that "the Federal Constitution does not provide for it."[338] Shortly thereafter, the Court invalidated the wage-fixing provisions of the Bituminous Coal Act, holding that such regulation exceeded Congress's power, because the mining and sale of coal had only an indirect effect on interstate com-

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[328] *Id.* at 91–92; *see also id*. at 4 (citing Appalachian Coals v. United States, 288 U.S. 344 (1933), with approval); Brief of Government Officers in No. 636 at vi (five favorable citations of *Appalachian Coals*), Carter v. Carter Coal, 298 U.S. 238 (1936) (Nos. 636, 651).

[329] *See* Schechter Poultry v. United States, 295 U.S. 495, 529–42 (1935).

[330] *Id.* at 534.

[331] *Id.* at 535.

[332] *Id.* at 541.

[333] *Id.* at 520–21.

[334] *Id.*

[335] *Id.* at 548–49.

[336] *Id.* at 549–50.

[337] *Id.* at 546.

[338] *Id.* at 549.

merce.[339] Here again the government's invocation of *Nebbia* and *Appalachian Coals* fell on deaf ears.[340] Earlier the same term the Court also invalidated portions of the Agricultural Adjustment Act.[341]

VII. THE NIRA REDUX: POST-*SCHECHTER* INTERFERENCE WITH FREE COMPETITION

Schechter, of course, meant revival of the Sherman Act for industries previously operating under NIRA codes. Indeed, under the leadership of Thurman Arnold, the Antitrust Division reinvigorated enforcement, previously undermined by trade practice conferences, *Appalachian Coals*, the NIRA, and lax enforcement during the Coolidge Administration. This revival of "free competition" as the principle animating the antitrust statutes seemingly paved the way for restoration of free competition "across the board" as the principle governing the nation's regulatory policy. Nonetheless, and despite antitrust's example to the contrary, state and national efforts to displace free competition with regulatory dictates thrived, albeit in different guises. Through it all, the Supreme Court has stood idly by, and some modern Justices have even criticized their predecessors' protection of free markets from anticompetitive state interference.

A. *Antitrust Unleashed and Free Competition Restored*

Within three years of *Schechter*, FDR had appointed zealous trustbuster Thurman Arnold to run the Antitrust Division of the Department of Justice.[342] The number of cases brought by the United States increased seven-fold, including cases against firms that simply adhered to code provisions that *Schechter* had rendered defunct.[343] Moreover, by 1940, the Supreme Court had announced that "free competition," and not "reasonable prices" was the central object of the Sherman Act, thereby

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[339] *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[340] *See* Brief for Government Officers Respondents in No. 636, and Petitioners in No. 651 at vi–vii, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (Nos. 636, 651) (table of authorities) (noting fourteen favorable citations of *Nebbia*).

[341] United States v. Butler, 297 U.S. 1 (1936) (voiding Agricultural Adjustment Act's processing tax as contrary to the Tenth Amendment).

[342] SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 78–110 (2005) (describing Arnold's tenure at the Antitrust Division); *see also* John D. Harkrider, *Lessons from the Great Depression,* 23 ANTITRUST, no. 2, Spring 2009, at 6, 8–9 (discussing post-NIRA antitrust enforcement by the Roosevelt Administration).

[343] *See* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366 (1970); Daniel Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, *in* ANTITRUST STORIES 91, 91 (D. A. Crane & E. M. Fox eds., 2007).

repudiating the logic of *Appalachian Coals* and the FTC's trade practice conferences.[344]

Indeed, over the next few decades the enforcement agencies and the Court equated "free competition" with "atomistic rivalry," unconstrained by non-standard contracts.[345] Tying contracts, maximum resale price maintenance, exclusive dealing arrangements, vertically-imposed exclusive territories, and restraints ancillary to the formation of legitimate ventures—all became unlawful per se or nearly so.[346] Explaining this approach, the Court asserted that "unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress."[347] Thus, the Court expanded antitrust regulation of private parties in an effort to make the economy more "competitive," equating "competition" with atomization.[348] In so doing, the Court banned restraints that often overcame market failures and thus *enhanced* economic welfare, at least according to modern economic theory.[349] Indeed, banning such restraints sometimes protected inefficient firms from those that had devised more efficient ways of doing business.[350] At the time, however, the Court's approach was consistent with then-prevailing economic theory, which offered no beneficial explanation for non-standard agreements and thus interpreted such arrangements as efforts to protect or obtain market power.[351] Society would have to await the evolution of "more accurate economic conceptions" before courts would reverse course and validate non-standard agreements that create wealth.[352]

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344 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 223 (1940) (banning horizontal price fixing regardless of reasonableness by rejecting a "reasonable price" defense as "wholly alien to a system of free competition" and condemning defendants' practices because they thwarted "determination of . . . prices by free competition alone").

345 *See* Meese, *Price Theory, Competition*, *supra* note 80, at 127–34.

346 *Id.* at 124–30 (discussing various decisions during this period). More extreme examples include: United States v. Topco Assocs., 405 U.S. 596 (1972) (per se ban on exclusive territories ancillary to beneficial joint venture); Albrecht v. Herald Co., 390 U.S. 145 (1968) (per se ban on vertically imposed maximum retail price maintenance (RPM)); FTC v. Brown Shoe Co., 384 U.S. 316 (1966) (banning quasi-exclusive dealing agreement binding 1% of all national shoe retailers).

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

348 *See* Meese, *Price Theory, Competition*, *supra* note 80, at 127–34.

349 *See id.* at 134–44.

350 *See generally Topco*, 405 U.S. 596 (banning exclusive territories imposed ancillary to joint venture among independent grocery chains despite the trial court's undisputed finding that the venture produced no harm and facilitated interbrand rivalry between members of the venture and much larger grocery chains).

351 *See* Meese, *Price Theory, Competition*, *supra* note 80, at 115–23.

352 *See* Standard Oil Co. v. United States, 221 U.S. 1, 55, 58–59 (1911) (indicating that courts should revise antitrust doctrine in light of evolving "economic conceptions").

B. Nebbia *Confirmed: The Death of Economic Due Process*

While post-*Schechter* antitrust decisions protected free competition from private interference, the Court refused to safeguard such competition from state infringement. Just two years after *Schechter*, the Court, in *West Coast Hotel v. Parrish*, overruled binding precedent to sustain a minimum wage law, confirming *Nebbia*'s implicit repudiation of previous decisions protecting economic liberty.[353] Soon thereafter the Court would reconfirm the death of due process protection for economic liberty, sustaining federal legislation that destroyed interstate commerce in a wholesome product because the national government invoked a "rational basis" for the legislation.[354] Police power limitations that had once protected free competition from unjustified coercive interference had disappeared.

C. Schechter*'s Limited Influence*

Aside from its revitalization of the antitrust laws, *Schechter*'s victory for free-market competition was narrow and short-lived. The decision did not eliminate industry's appetite, irrespective of economic conditions, for protection from rivalry.[355] Moreover, neither of the decision's rationales, nor Thurman Arnold's prosecutorial zeal, could prevent anti-competitive regulation as such.[356] For instance, the "non-delegation" holding did not prevent Congress or states from imposing anti-competitive regulations via legislation, or, at the state level, delegations to an executive.[357] The non-delegation doctrine, to the extent it has survived,[358] merely controls *how* the national government goes about imposing anti-competitive restrictions and not *whether* it may do so.

Schechter's Commerce Clause holding had an application both narrower and broader than the non-delegation rationale. On the one hand, the holding did not preclude regulation that directly restrained the normal

353 *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), *overruling* Adkins v. Children's Hospital, 261 U.S. 525 (1923); BERNSTEIN, REHABILITATING *Lochner*, *supra* note 104, at 70–71 (recounting death of liberty of contract in *West Coast Hotel*).

354 *See* United States v. Carolene Products Co., 304 U.S. 144 (1938) (sustaining ban on the interstate shipment of "filled milk" against due process and equal protection attacks); *see also* Geoffrey P. Miller, *The True Story of* Carolene Products, 1987 SUP. CT. REV. 397, 398–99 (finding purported justification for the challenged regulation "patently bogus").

355 Recall in this connection that private industry was adopting cartel-facilitating "open price plans" and lobbying against antitrust challenges to such plans during the 1920s, when unemployment approached 3%. *See supra* notes 88, 142–56 and accompanying text.

356 *See supra* note 342 (collecting authorities discussing Arnold's tenure at the Antitrust Division).

357 The Constitution, of course, does not impose a "non-delegation doctrine" on the states.

358 *See* Yakus v. United States, 321 U.S. 414, 420, 423 (1944) (upholding delegation to the "Office of Price Administration" to set "fair and equitable" prices).

flow of interstate commerce.[359] The decision did not, therefore, prevent Congress from imposing cartels in, say, the interstate sale of pipe, interstate transportation, or interstate purchase and/or sale of agricultural products.[360] Moreover, *Schechter* did not prevent states from creating purely local cartels, subject only to due process limitations. At the same time, the Commerce Clause holding placed restrictions upon Congress itself, and thus was not subject to a legislative fix. Thus, while *Nebbia* and its progeny liberated Congress from any due process constraints, *Schechter* seemingly limited the scope of Congress's Commerce Clause authority to impose unreasonable restraints in the first place. While states retained plenary authority to regulate *intra*state commerce, the threat that citizens might migrate to other states presumably deterred states from enacting some wealth-reducing legislation.[361]

However, the Court soon abandoned any meaningful limits on Congress's Commerce power. Just two years after *Schechter*, in *NLRB v. Jones & Laughlin Steel Corp.*,[362] the Court jettisoned a fundamental tenet of *Schechter* and pre-Depression Commerce Clause jurisprudence, namely, the distinction between manufacturing, subject only to regulation by individual states, and actual commerce between the states.[363] In particular, *Jones & Laughlin Steel* held that Congress could prevent a firm whose output was consumed in other states from interfering with the formation of a union, reasoning that Congress could encourage union formation to minimize industrial strife.[364] Moreover, while the decision involved a giant multi-state steel company, the Court simultaneously sustained Congress's authority to regulate the employment practices of one of the Nation's several hundred clothing companies—with a single factory—ostensibly "for the reasons stated in [*Jones & Laughlin Steel*]."[365] This breakdown of the distinction between manufacturing and commerce vastly expanded federal power over economic activity and, for instance,

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[359] *See* Swift & Co. v. United States, 196 U.S. 375, 397–98 (1905) (Sherman Act reached purchasers' collusion that depressed livestock prices in the stream of commerce to and from Chicago); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899) (Sherman Act banned multi-state cartel's collusion setting prices of pipe manufactured in one state and delivered in another).

[360] *See Addyston Pipe & Steel Co.*, 175 U.S. 211; United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); *Swift & Co.*, 196 U.S. at 397–398.

[361] *See, e.g.*, Crandall v. Nevada, 73 U.S. 35 (1868) (states may not penalize a citizen's departure from the state); Richard A. Epstein, *Exit Rights under Federalism*, 55 LAW & CONTEMP. PROBS. 147, 149 (1992).

[362] 301 U.S. 1 (1937).

[363] See *supra* note 315 and accompanying text collecting decisions announcing this distinction. *See also* A.L.A Schechter Poultry Corp. v. United States, 295 U.S. 495 at 542–44, 548–50 (relying upon this same distinction).

[364] *See Jones & Laughlin Steel Corp.*, 301 U.S. at 34–41.

[365] *See* NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937).

encouraged the formation of union labor cartels throughout the nation, thereby displacing free-market competition in wage setting.[366]

D. Congress Unbound

Congress embraced the sort of unprecedented power that *Nebbia*, *West Coast Hotel* and *Jones & Laughlin Steel* recognized. Even before 1937, the Motor Carrier Act of 1935 required a license from the Interstate Commerce Commission to carry goods or provide bus service in interstate commerce; the Commission would also issue binding tariffs and review applications to start or abandon routes.[367] While the Commission had exercised similar authority over railroads since its formation in 1887, its new authority over trucks and busses contravened pre-*Nebbia* case law limiting such regulation to industries "affected with a public interest," a category excluding these unconcentrated industries characterized by easy entry and whose participants had not historically received special privileges.[368] Moreover, to buttress this anti-competitive regulation, the 1948 Reed-Bullwinkle Act provided antitrust immunity for horizontal price fixing by carriers who were members of "rate bureaus" if the Commission approved such agreements.[369]

In 1938, Congress passed the Civil Aeronautics Act, creating a "Civil Aeronautics Authority" empowered to regulate air fares and evaluate carriers' applications to initiate new routes.[370] Moreover, the Robinson-Patman Act of 1935—still intact—prohibited price discrimination that was not justified by (narrowly-defined) cost considerations.[371] National securities exchanges fixed commissions governing the purchase and sale of securities and found shelter in the implied immunity the Securities Exchange Act of 1934 provided.[372] The 1937 Miller-Tydings

[366] *See* United States v. Darby Lumber Co., 312 U.S. 100, 123 (1941) (indicating that Congress may ban unfair labor practices by firms producing for interstate commerce regardless of volume of production); *see also* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 504 (1997) ("[C]ontrary to the very recent decisions in *Schechter Poultry* and *Carter Coal*, a bare majority of the same Court now [in *Jones & Laughlin Steel*] upheld the power of Congress to regulate the terms and conditions of employment in manufacturing.").

[367] Pub. L. No. 74-255, §§ 206(a), 217(a), 49 Stat. 543 (1935).

[368] *Cf.* United States v. Trans-Missouri Freight, 166 U.S. 290, 335 (invoking railroads' "public character" and "privileges and franchises" including delegated eminent domain power, as justifying congressional decision to ban horizontal restraints regardless of the reasonableness of the rate set).

[369] *See* ch. 491, sec. 5, § 5(a), 62 Stat. 472 (1948); *see also* N. Am. Van Lines, Inc. v. ICC, 666 F.2d 1087, 1095 n.3 (7th Cir. 1982) (describing the three-decade evolution of this legislation).

[370] Pub. L. No. 75-76, 52 Stat. 973 (1938).

[371] Pub. L. No. 74-692, 49 Stat. 1526 (1935) (codified at 15 U.S.C. § 13).

[372] *See* Gordon v. NYSE, 422 U.S. 659, 691 (1975) (holding that collusive commission setting was immune from antitrust attack given implied repeal of the Sherman Act).

Act empowered states to immunize minimum resale price maintenance from Sherman Act scrutiny, whenever goods governed by such agreements faced "free and open competition" from other products, even if the restraint was unreasonable.[373] Congress expanded the exemption in 1952, empowering manufacturers and retailers to enforce such agreements against recalcitrant retailers who declined to participate.[374]

Again in 1937, Congress enacted the Agricultural Marketing Agreement Act, empowering the Secretary of Agriculture to enforce "marketing agreements and orders" limiting output and raising prices in various agricultural sectors.[375] In 1938, the Fair Labor Standards Act (FLSA) set minimum wages for any business that manufactured goods for interstate shipment.[376] In 1945, Congress enacted the McCarran-Ferguson Act exempting the "business of insurance" from federal antitrust laws, after the Supreme Court condemned price fixing in the interstate sale of insurance.[377] The same statute empowered states to exclude from their territories insurance companies based in other states, a result otherwise contrary to the dormant Commerce Clause.[378] Finally, both before and after the New Deal, Congress enacted antitrust exemptions for activities as disparate as financial aid, medical school resident matching, soft drink distribution, and sports broadcasting.[379]

Then there was the NLRA, expressly designed to increase the "purchasing power" of labor, sustained and applied expansively in *Jones*

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[373] *See* District of Columbia Revenue Act of 1937, ch. 690, 50 Stat. 693 (1937); *see also* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 378–79 (1977) (summarizing history and rationale of Miller-Tydings Act).

[374] *See* Federal Trade Commission Act, ch. 745, 66 Stat. 632 (1952); SULLIVAN, *supra* note 373, at 378–39 (describing Act's rationale).

[375] Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, ch. 296, 50 Stat. 246 (1937).

[376] Fair Labor Standards Act of 1938, Pub. L. No. 75-718, ch. 676, 52 Stat. 1060 (1938).

[377] *See* 15 U.S.C. § 1011 (2006) *et seq*; *see also* United States v. S.-E. Underwriters Ass'n., 322 U.S. 533, 553–56 (1944). The exemption applies only when a state regulates the company asserting the exemption, regardless of the regulation's stringency. *See* 15 U.S.C. § 1012(b) (2006); FTC v. Nat'l Casualty Co., 357 U.S. 560 (1958) (mere adoption of legislative provisions without meaningful enforcement exempts companies from federal antitrust regulation); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 732 (2005) [hereinafter HOVENKAMP, FEDERAL ANTITRUST POLICY] (reaching the same conclusion). Moreover, the statute does not immunize "acts of boycott, coercion or intimidation."); *see* 15 U.S.C. § 1013(b) (2006).

[378] *See* 15 U.S.C. § 1011, § 1012(a) (2006); W & S Life Ins. Co. v. State Bd. of Equalization of California, 451 U.S. 648, 652–55 (1981) (McCarran-Ferguson Act empowers states to discriminate against out-of-state insurance companies even though this result would otherwise offend the dormant Commerce Clause); U.S. CONST. art. I, § 8, cl. 3.

[379] *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 378 (2007) (collecting these and other antitrust exemptions).

& Laughlin Steel.[380] While Congress had previously exempted collective bargaining from the antitrust laws,[381] the NLRA went further and displaced free-market competition in wage setting by forcing private sector firms to bargain with unions.[382] The number of workers represented by labor cartels soon more than doubled, to nearly 30% of the workforce by 1940.[383] "Strike days" also doubled, to 28 million, between 1936 and 1937, an odd result under a statute justified as an effort to reduce work stoppages.[384] Like other anti-competitive statutory schemes, the NLRA would co-exist with ever more intrusive antitrust regulation imposing atomistic competition on private businesses, thereby highlighting the new and stark divergence between the legal regimes governing public "regulation" and private restraints, respectively.[385] When Thurman Arnold unsuccessfully sought to limit labor overreaching by attacking secondary boycotts that undermined free competition even further, one labor leader called him "the greatest enemy of . . . American labor" and FDR replaced him shortly thereafter.[386]

Each of these statutes displaced free competition in one or more markets. Some simply revived NIRA-like codes on an industry-by-industry basis. Airlines, for instance, had labored under a code requiring prior approval before operation of a new route,[387] while another code required approval of new bus and truck routes and tariffs.[388] Moreover, the Robinson-Patman Act revived a modified anti-price discrimination regime previously found in the FTC's trade practice conference codes and then under the NIRA codes.[389] Finally, the NLRA simply extended the NIRA's requirement that firms bargain collectively with employees,

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380 *See* National Labor Relations Act, Pub. L. No. 74-198, c.372, § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2006)); *id.* § 151 (finding that absence of collective bargaining reduces purchasing power).

381 *See supra* note 86 and accompanying text.

382 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937) (describing statute's requirement that companies bargain with employees' elected representatives).

383 *See* Harold Cole & Lee Ohanian*, New Deal Policies and the Persistence of the Great Depression*, 112 J. POL. ECON. 779, 785 (2004).

384 *Id. See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41–43 (1937).

385 *See supra* notes 367, 369–79 and accompanying text.

386 WALLER, *supra* note 342, at 105.

387 *See* LYON ET AL., *supra* note 237, at 634–35.

388 *Id.* (routes); *see also* WILLIAM H. WAGNER, A LEGISLATIVE HISTORY OF THE MOTOR CARRIER ACT, 1935 (1935) (explaining that a NIRA Code had imposed a "loose form of Federal regulation" on motor carriers).

389 *See supra* notes 148, 218, 371 and accompanying text. As explained earlier, anti-price discrimination rules adopted by the FTC's trade practice conferences generally dispensed with any requirement that discrimination injure competition. *See supra* notes 148, 152 and accompanying text. By contrast, the Robinson-Patman Act required proof that discrimination substantially lessened competition. *But see* Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967) (injury to rival established requisite harm to competition), *overruled by* Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

while the FLSA, like most NIRA codes, imposed minimum wages.[390] Both the NLRA and FLSA, of course, coercively displaced the wages otherwise set by free competition.

E. Approving Anticompetitive State Restraints on Interstate Commerce

One might have taken comfort from the fact that, with respect to interstate commerce, a category that expanded significantly in 1937, Congress, but not individual states, was empowered to displace competition according to then-current precedent. For, unlike individual states, Congress (and the President), would represent the entire country, and thus hopefully consider all the costs and benefits of proposed legislation. This, after all, was the rationale for authorizing Congress to regulate interstate commerce, articulated by James Wilson, for instance.[391] Indeed, a unanimous Court had invoked this rationale in 1899, in *Addyston Pipe and Steel Co. v. United States*, holding that Congress could reach private price fixing agreements that directly restrain interstate trade.[392] The Court apparently assumed, consistent with the legislative history of the Sherman Act, that Congress's power over direct restraints of interstate commerce was exclusive.[393] If Congress did not possess such authority, the Court said, such power would devolve to individual states, which might regulate cartels according to their "particular interest."[394] In fact, *Gibbons v. Ogden*, which *Addyston Pipe* invoked, suggested that the Commerce Clause had a "dormant" component that *ipso facto* prevents states from imposing anticompetitive restrictions on interstate commerce,

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[390] *See supra* notes 376, 382 and accompanying text.

[391] According to Wilson:

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

James Wilson, Speech in the Pennsylvania Ratifying Convention (Nov. 21, 1787), *reprinted in* DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 424 (Jonathon Elliot ed., 2d ed., Philadelphia, J.B. Lippincott 1888).

[392] 175 U.S. 211 (1899).

[393] *See* Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L. J. 375, 379 (1982) (recounting Sherman's belief that state and national jurisdiction over intrastate and interstate restraints was mutually exclusive).

[394] The Court said:

> If . . . Congress has no power and the state legislatures have full and complete authority to thus far regulate interstate commerce by means of their control over private contracts . . . then the legislation of the different states might and probably would be different . . . according to what each state might regard as its own particular interest.

Addyston Pipe, 175 U.S. at 231–32.

there a state-imposed monopoly over interstate steamship travel.[395] Moreover, shortly before the Depression, the Court had invalidated state price fixing of exports.[396]

Indeed, the Court's expansion of Congress's commerce power placed formerly intrastate commerce squarely within Congress's jurisdiction, a fact that the Supreme Court confirmed in Sherman Act decisions banning private intrastate cartels.[397] Thus, it seemed that, regardless of whether Congress acted, the dormant Commerce Clause would thwart analogous *state* efforts to displace free-market outcomes by creating monopolies or cartels selling output in what was now deemed interstate commerce. If "direct restraints" of interstate shipping traffic or electricity exported from one state to another offended the dormant Commerce Clause, why not "direct restraints" of other commerce now deemed interstate and thus within Congress's jurisdiction?[398]

Unfortunately, this pro-competitive potential was never realized. Congress, as already seen, often displaced normal competition with anti-consumer "regulations."[399] Less well-known, however, is the propensity of the post-1937 Supreme Court to remove substantive and procedural limitations on states' authority to regulate interstate commerce.[400] For instance, the Court radically altered the standards governing state restraints on such commerce, including restraints displacing competition in favor of monopoly and cartelization.[401] *Parker v. Brown*, a case rarely discussed by constitutional scholars but well-known in the antitrust community, exemplified this reallocation of authority between states and the national government.[402]

In *Parker*, the Court considered the validity of a raisin cartel, imposed pursuant to California's 1933 Agricultural Prorate Act.[403] Califor-

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395 22 U.S. 1 (1824) (holding that federal statute preempted a state-imposed monopoly over interstate steamship travel); *id.* at 197-209 (opining in *dicta* that the Commerce Clause preempts such state enactments even absent federal legislation); *see also Addyston Pipe*, 175 U.S. at 227–28 (invoking *Gibbons*' account of the commerce power).

396 *See* cases cited *supra* note 82 and accompanying text discussing and collecting cases to this effect; *see also* Pub. Util. Comm'n of R. I. v. Attleboro Steam and Electric Co., 273 U.S. 83 (1927) (voiding state regulation of the price of exported electricity).

397 *See, e.g.*, United States v. Employing Plasterers Association, 347 U.S. 186 (1954) ("That wholly local business restraints can produce the effects condemned by the Sherman Act is no longer open to question."); Mandeville Island Farms v. American Crystal Sugar, 334 U.S. 219 (1948) (finding that local beet buyers' cartel violated Section 1).

398 *See Gibbons v. Ogden*, 22 U.S. 1 (1824). *See also supra* notes 57–63 and accompanying text (recounting various decisions banning, under the dormant Commerce Clause, anticompetitive state regulation of interstate commerce).

399 *See supra* notes 367–90 and accompanying text.

400 *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 289 (1997).

401 *See id.* at 506–32.

402 *See* 317 U.S. 341 (1943).

403 *See id.* at 344.

nia was the nation's only producer of raisins, 95% of which were exported to other states or foreign countries.[404] The cartel thus provided a classic exemplar of the *Addyston Pipe* Court's prediction that states left free to regulate interstate commerce would do so according to their interest.[405]

A dissenting producer challenged the cartel.[406] A due process challenge would have been futile, given the Court's evisceration, beginning with *Nebbia*, of such doctrinal protection for economic liberty.[407] Instead, the petitioner invoked another source of market-protective law, arguing that California's cartel contravened the dormant Commerce Clause and the Sherman Act.[408]

California argued vigorously that forced cartelization of the raisin market was necessary to prevent "ruinous competition" and thereby ensure producers fair returns.[409] To bolster its argument, the state devoted over a page of its brief to a quote from *Appalachian Coals*, contending that the situation facing raisin growers was gravely aggravated by comparison.[410] The state also quoted *Nebbia* for the proposition that spreading the "surplus burden" among various producers was an "essential prerequisite to stabilization."[411]

The Court ordered additional briefing and reargument, inviting the United States to submit a brief as amicus curiae.[412] The resulting brief, co-authored by Thurman Arnold, then leading an aggressive revival of antitrust enforcement, treated the Sherman Act and the dormant Commerce Clause as symbiotic, with each banning similar conduct. According to Arnold, California's raisin cartel violated both the dormant Commerce Clause and the Sherman Act, the latter of which, he said, enforced the former.[413] The brief argued that there could "hardly be a clearer case of monopolization of interstate and foreign commerce," and that it was "beyond dispute" that "the Sherman Act condemns this kind

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404 *See id.* at 345.

405 *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 231–32 (1899).

406 *Parker*, 317 U.S. at 348–50.

407 CUSHMAN, RETHINKING THE NEW DEAL COURT, *supra* note 71, at 78–83 and accompanying text.

408 *See Parker*, 317 U.S. at 349–50.

409 *See, e.g.*, Brief for Appellants at 24, Parker v. Brown, 317 U.S. 341 (1943) (No. 46) ("The ruinous effect of surpluses on price levels is well known."); *id.* at 26 ("The mere knowledge that these accumulated surpluses exists beyond question makes a buyer's market and depresses prices to ruinous levels.").

410 *See id.* at 24–25.

411 *Id.* at 28.

412 *See Parker*, 317 U.S. at 357.

413 *See* Brief for the United States in *Parker*, at 53–91, 317 U.S. 341 (1943) (No. 46).

of a price fixing arrangement."[414] Congress plainly had the authority "to supersede all state legislation in a field it intends to occupy,"[415] and had "exercised all the power it possessed" when passing the Sherman Act.[416] The government also invoked earlier holdings that states could not *authorize* private parties to engage in conduct that would otherwise violate the Act.[417] The United States concluded that there was no reason to believe that Congress had, despite the Sherman Act's general language, empowered states to authorize the very cartels the Act condemned.[418] The only exception, the government said, might apply where a challenged statute was truly a police regulation, a "true conservation measure," and not a cartel masquerading as one.[419] California's scheme, by contrast, "eliminat[ed] competition on a scale irreconcilable with the very essence of the Sherman Act, the preservation of commercial competition."[420]

The government noted that "the test . . . for determining the compatibility of state laws with the Sherman Act is very similar to that which [the] Court has invoked" to determine whether a state's displacement of competition violated the dormant Commerce Clause.[421] Thus, the brief continued, "[t]he Sherman Act may thus be regarded as a Congressional affirmation of the constitutional doctrine that national interstate commercial interests are not subject to restrictive state legislation."[422] The Act could preempt state law and achieve this objective without punishing state officials, the United States said.[423] Arnold seemed to be on solid ground given pre-Depression case law, such as *Gibbons v. Ogden*, which

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[414] *Id.* at 55–56; *see also id.* at 65 ("A state legislative program eliminating competition on such a scale is irreconcilable with the very essence of the Sherman Act, the preservation of commercial competition in interstate industries.").

[415] *Id.* at 61.

[416] *Id.* (quoting Apex Hoisery Co. v. Leader, 310 U.S. 469, 495 (1941)).

[417] *See id.* at 60–62 (discussing Northern Securities Co. v. United States, 193 U.S. 197, 344–46 (1904)).

[418] *See id*. at 60–61. *See also id.* at 62 ("To recognize any such limitation upon the scope of the Congressional enactment would be to open the door wide to state action destructive of the salutary principle that competition, not combination, should be the law of trade.") (alteration in original).

[419] *Id.* at 63–64 ("Congress . . . did not intend to deprive the states of their normal 'police' powers over business and industry."). *See also supra* notes 48–52 and accompanying text (describing case law, derived from Cooley v. Bd. of Wardens, 53 U.S. 299 (1851) empowering states to adopt "indirect" regulations of interstate commerce that ordinarily fell within the police power).

[420] Brief for the United States in *Parker*, *supra* note 413, at 65 (alteration in original).

[421] *Id.* at 65–66.

[422] *Id.* at 66 (alteration in original).

[423] *Id*. at 61; *cf.* Union Pacific Railway Co. v. United States, 313 U.S. 450 (1941) (enjoining city's subsidy to railroad as contrary to federal statute prohibiting any person, including municipalities, from subsidizing shippers).

banned private *and* public restraints that produced monopoly or its consequences.[424]

Still, the Court unanimously sustained California's cartel, rejecting Arnold's effort to protect free competition from wealth-reducing state interference and restore the symbiosis between the Sherman Act and the dormant Commerce Clause. The Court agreed, for the sake of argument, that the cartel would violate the Sherman Act if "organized and made effective solely by virtue of a contract . . . ."[425] The Court also "assume[d]," without identifying any counter-argument, that Congress could preempt California's cartel "because of its effect on interstate commerce."[426]

Nonetheless, the prorate scheme did not, the Court said, arise from an agreement between individuals, but instead only came into existence because of a "legislative command of the state . . . ."[427] Given the dual sovereignty that characterized the American system, the Court would not lightly impute to Congress the intent to "nullify a state's control over its officers and agents."[428] There was, the Court asserted, no evidence that Congress intended to restrain a state's agents from activities "directed by its legislature."[429] While approval by producers was a condition precedent for creation of a prorate arrangement, the state as sovereign determined the terms of the arrangement and enforced it with penal sanctions.[430] There was no indication, the Court claimed, that the Sherman Act, aimed at persons, was designed to interdict this state action.[431]

The Court then considered whether the state's interference with free competition to the detriment of out-of-state consumers contravened the Commerce Clause. The Court began by applying its traditional "mechanical test [for] determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it . . . ."[432] This test, of course, was akin to the Court's pre-1937 efforts to distinguish between "direct" and "indirect" restraints of interstate commerce, the former of which were beyond the power of individual states and contrary to the Sherman Act if imposed by private parties.[433] However, two months earlier, the Court had repudi-

424 *See supra* notes 57–63 and accompanying text.

425 Parker v. Brown, 317 U.S. 341, 350 (1943).

426 *Id.* (citing four cases, including Illinois Gas v. Public Service Co., 314 U.S. 498, 510 (1943)).

427 *Id.*

428 *Id.*

429 *Id.* at 350–51.

430 *See id.* at 352.

431 *See id.* at 351.

432 *Id.* at 360.

433 *See* Meese, *Liberty and Antitrust*, *supra* note 50, at 58 (describing the distinction between "direct" and "indirect" restraints in early Supreme Court cases).

ated prior holdings that "indirect" restraints were beyond Congress's authority.[434]

Applying this "mechanical" and otherwise defunct test, the Court found that California's cartel was merely an "indirect" regulation of local activity, because the raisins were packed and processed before shipment.[435] The Court did not attempt to square this result with its prior conclusion that a strike in one steel plant in Pennsylvania would have an "immediate" and perhaps "catastrophic" effect on interstate commerce, or that a strike at one clothing factory could directly restrain such commerce and authorize congressional imposition of collective bargaining.[436]

Thus, having jettisoned the distinction between manufacturing and commerce six years earlier and empowering Congress to authorize labor cartels, the Court revitalized this distinction as a means of sheltering identical, state-created burdens.[437] If anything, the restraint imposed by California was *more* severe than that imposed by the respondents in *Jones & Laughlin Steel* and its companion cases. California's scheme, unless repealed, imposed permanent output reductions and price increases on exports to other states; the state held a virtual monopoly over raisins.[438] By contrast, the burdens on commerce resulting from the unfair labor practices in *Jones & Laughlin Steel* were purely hypothetical, and would only result if: (1) a work stoppage occurred and (2) the firm's rivals declined to increase output in response.[439]

Perhaps recognizing the shortcomings of its mechanical test, the Court offered a different means of analysis.[440] Where state regulation of "matters of local concern" was "so related to interstate commerce that it

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[434] *See* Wickard v. Filburn, 317 U.S. 111, 125 (1942) ("[Activity may] be reached by Congress if it exerts a substantial economic effect on interstate commerce and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.' ").

[435] *See Parker*, 317 U.S. at 360–61.

[436] *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937) ("[S]toppage of those operations by industrial strife would have a most serious effect upon interstate commerce . . . . [I]t is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic."); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937) (determining that a single clothing factory fell within the NLRB's jurisdiction).

[437] *See generally Parker*, 317 U.S. at 362 (stating that a state may impose regulations affecting interstate commerce "[w]hen Congress has not exerted its power under the Commerce Clause" and "the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities . . . .").

[438] *See id.* at 345, 359 (describing California's market dominance and the prorate program); Richard A. Epstein & Michael S. Greve, *Preemption Doctrine and its Limits*, *in* FEDERAL PREEMPTION 309, 321 (Richard Epstein & Michael Greve eds., 2007) (explaining that the pro-rate scheme was intended "to tax the nation for California's benefit").

[439] *See Jones & Laughlin Steel Corp.*, 301 U.S. at 41.

[440] *See Parker*, 317 U.S. at 362 ("But courts are not confined to so mechanical a test.").

also operate[d] as a regulation of that commerce," and Congress had not exercised its commerce power (given the Court's Sherman Act holding), the Court sought to "reconcil[e]" congressional and state power.[441] Such "reconciliation," the Court said, required "the accommodation of the competing demands of the state and national interests involved."[442] The inquiry was not, the Court said, whether the restraint in question was "direct" (as it assuredly was).[443] Instead the question was whether "the matter is one [that] may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress."[444] Because of the activity's "local character," the Court said, there was a "wide scope for local regulation without substantially impairing the national interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce."[445] The Court did not explain why the impact of California's cartel on interstate commerce was not "material."[446] Nor did the Court mention more relevant decisions invalidating state efforts to fix the price of interstate commerce, including its 1927 holding that the State of Rhode Island could not regulate the price of electric current that a Rhode Island corporation sold to a corporation in Massachusetts.[447]

Applying this more malleable standard, the Court determined that California's cartel did not offend the Commerce Clause, even though 95% of its production was sold in interstate commerce.[448] Without citing *Nebbia* or *Appalachian Coals*, the Court embraced California's argument (which *had* invoked these decisions) that state-enforced cartelization was necessary to counteract the "evils attending the production and marketing of raisins in that state," which "urgently demand[ed] state action for the economic protection of those engaged in one of [the state's] important

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[441] *Id.* Indeed, as explained earlier, the Court (properly) assumed for the sake of argument that a similar private restraint would violate the Sherman Act. *See* Meese, *Liberty and Antitrust*, *supra* note 50, at 55 (discussing distinction in formative era case law between direct and indirect restraints).

[442] *Parker*, 317 U.S. at 362.

[443] *Id.*

[444] *Id.* at 362–63.

[445] *Id.* at 363 (citing California v. Thompson, 313 U.S. 109, 113 (1941) and Simpson v. Shepard, 230 U.S. 352, 406 (1913)). Neither decision cited was particularly apposite. *Simpson* involved the regulation of rates for *intra*state travel. *See Simpson*, 230 U.S. at 376–77. *Thompson* involved the licensure of transportation agents whose participation in interstate commerce was incidental to their primary *intra*state business. *See Thompson*, 313 U.S. at 111.

[446] *See Parker*, 317 U.S. at 363.

[447] *See, e.g.*, Pub. Util. Comm'n of R. I. v. Attleboro Elec. Co., 273 U.S. 83, 84–85, 90 (1927).

[448] *See Parker*, 317 U.S. at 359, 368.

industries."[449] The Court reported that raisin prices had peaked in 1921 at $235 per ton, inducing increased production, thereby depressing prices, which had ranged between $40 and $60 per ton since that time.[450] Since 1934, prices had fallen so low that "students of the industry" believed that prices were below production costs.[451] Indeed, since 1929, the industry had continuously sought to "stabilize . . . the raisin crop and maintain a price standard which would bring about a fair return to the producers,"[452] the same sort of collective action that Justice Brandeis had endorsed in his *New State Ice* dissent.[453] California's prorate program had in fact helped stabilize production, reducing interstate shipments and increasing prices "to some undetermined extent."[454] In so doing, the Court said, California had simply mimicked federal policy, expressed in the 1937 Agricultural Marketing Act, to "in one way or another, . . . prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective."[455] Thus, invoking reasoning unthinkable before *Nebbia*, the Court sustained California's coercive interference with free-market competition because both the state *and* the federal government had embraced agricultural cartelization. This holding, it should be noted, did more than empower states to impose cartels: it also authorized direct state antitrust regulation of interstate commerce—authority once held solely by Congress—resulting in what one commentator rightly called a "very broad" overlap of state and federal antitrust authority.[456]

Parker's reasoning is both ironic and questionable. As already noted, the Court did not explain why California's cartelization of the nation's entire raisin output, nearly all of which was consumed outside the state, had a "local" and "immaterial" effect on interstate commerce, while a temporary shutdown of a single steel or clothing factory produced an "immediate" and perhaps "catastrophic" effect within congres-

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449 *Id.* at 363; *see also* John T. Delacourt & Todd Zywicki, *The FTC and State Action: Evolving Views on the Proper Role of Government,* 72 ANTITRUST L.J. 1075, 1077 (2005) (contending that *Parker* depended upon a "mindset . . . extremely skeptical of markets, favoring instead government industrial policy").

450 *See Parker*, 317 U.S. at 363–64.

451 *Id.* at 364.

452 *Id.*

453 *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 292–93 (1932) (Brandeis, J., dissenting) (describing the dangers of competition and the ice industry's tendency to discourage competition).

454 *See Parker*, 317 U.S. at 367.

455 *See id.* at 367–68. *See also* Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246 (1937); *supra* 375 and accompanying text (discussing post-*Schechter* legislation authorizing agricultural marketing orders limiting production).

456 *See* JOHN J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 214 (1964); *see also* Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 401–02 (1982) (addressing the relationship between state and federal antitrust law).

sional jurisdiction.[457] Moreover, the Court's finding that California's de facto export cartel did not thwart national policy followed from its holding that the Sherman Act does not preempt such regulation.[458] That conclusion, in turn, involved a reconstruction of the subjective intent of the Congress that passed the Act.[459] The Court did not recognize that the 1890 Congress would have assumed that state-initiated cartels that directly restrained interstate commerce were independently unconstitutional because they offended either or both the Commerce and Due Process Clauses.[460] It thus would have made little sense for Congress to outlaw conduct that was already unconstitutional.[461] By eviscerating economic liberty in previous decisions and rejecting the petitioner's Commerce Clause challenge, the Court undermined the very protection from state restraints on competition that may have deterred the Sherman Act's drafters from expressly preempting such restrictions. During the same period, of course, the Court was *expanding* the application of the Sherman Act to private parties in unprecedented ways, equating free competition with atomistic markets.[462]

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Before the Depression, a unified and mutually reinforcing framework had protected free-market competition from state, federal, and private threats. In *Appalachian Coals*, however, the Supreme Court blinked, approving private restraints on free competition in the name of economic stabilization.[463] A year later, in *Nebbia*, the same Court approved state-imposed price fixing, ignoring well-settled precedent to the contrary.[464]

While Congress and the President sought to thwart free competition via the NIRA and its partial repeal of the antitrust laws, the Supreme Court struck back and restored the Sherman Act as the law of the land. Within five years of *Schechter*, the Court had implicitly repudiated *Ap-*

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457 *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41 (1937); *see also* NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 75 (1937) (relying upon *Jones & Laughlin Steel Corp.* to hold that Congress has authority to impose collective bargaining upon a single clothing factory with a trivial share of the nation's clothing production).

458 *See Parker*, 317 U.S. at 350–51 ("We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.").

459 *See id.* (interpreting the legislative history of the Sherman Act).

460 *See* Meese, *Liberty and Antitrust*, *supra* note 50, at 32–33, 61, 66 (discussing decisions invalidating state interference with contractual liberty, including state price fixing, and describing case law prohibiting state impositions of "direct restraints" on interstate commerce). *See also supra* notes 58–63, 104–22 and accompanying text.

461 *See* HOVENKAMP, FEDERAL ANTITRUST POLICY 725 (2d ed. 1999).

462 *See* Meese, *Price Theory, Competition*, *supra* note 80, at 133–34.

463 *See* Appalachian Coals v. United States, 288 U.S. 344, 377 (1933).

464 *See* Nebbia v. New York, 291 U.S. 502, 539 (1934).

palachian Coals and restored free competition as antitrust's central principle, perhaps paving the way for restoration of free competition as the guiding principle for all regulation. However, instead of treating antitrust as a role model and restoring the pre-Depression symbiosis between various doctrines protecting free competition, the Court took a radically different course, reaffirming *Nebbia*'s repudiation of economic liberty and free competition and rejecting pre-Depression precedents that had banned state-imposed wage and price fixing under the Due Process Clauses and dormant Commerce Clause.[465] As a result, the pre-Depression symbiosis between the Sherman Act, dormant Commerce Clause, and Due Process Clause was a thing of the past. Free-market competition and the beneficial results it produced existed only at the sufferance of the national and state governments, which were all too eager to reduce or eliminate competition altogether.

VIII. CARTELIZATION AS (POOR) STABILIZATION POLICY

Proponents of the NIRA, the NLRA, and some other abridgments of free competition and economic liberty believed that such measures would counteract the Depression by sparking economic recovery. Indeed, Congress and FDR designed both the NIRA and the NLRA to increase the "purchasing power" of workers by raising wages relative to prices, and the United States invoked this rationale when defending the NIRA in *Schechter*.[466] In the same way, the first Agricultural Adjustment Act sought to restore the purchasing power of farmers by reducing agricultural output and raising crop and livestock prices.[467] States, too, relied on the supposed propensity of coercive interference with free competition to increase purchasing power.[468] Nearly five decades after the NIRA, leading economists would claim that Americans have the "political activists of the Roosevelt administration," who purportedly reversed Herbert Hoover's policies, to thank for recovery from the Depression.[469]

This belief—that interference with free competition helped spark economic recovery—has even left its mark on constitutional law. Indeed, in 1992, three Supreme Court Justices claimed that economic events of the 1930s had *compelled* the Supreme Court to overrule decisions protecting economic liberty from undue interference. The occasion for this pronouncement was *Planned Parenthood v. Casey*, a decision

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[465] *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (upholding minimum wage legislation).

[466] *See* Brief for the United States in *Schechter Poultry*, *supra* note 319, at 114–15.

[467] *See* HAWLEY, *supra* note 166, at 192.

[468] *See, e.g.*, Morehead v. New York, 298 U.S. 587, 615 n.2 (1936) (reproducing legislative findings that minimum wages would enhance purchasing power).

[469] *See* WILLIAM J. BAUMOL & ALAN S. BLINDER, ECONOMICS: PRINCIPLES AND POLICY 170 (2d ed. 1982).

about abortion regulation, thereby illustrating subtle linkages between supposedly unrelated doctrines.[470] In *Casey*, the Court reconsidered its controversial holding in *Roe v. Wade* that the "liberty" referenced in the Due Process Clause includes the right to abort a fetus and that protection of fetal life is not a "compelling state interest" to justify prohibiting abortion before the third trimester.[471]

The controlling opinion by Justices O'Connor, Kennedy, and Souter declined to opine on *Roe*'s correctness, instead relying upon stare decisis to reaffirm *Roe*'s "essential holding."[472] The joint opinion's invocation of stare decisis drew immediate criticism, given that the Court had previously overruled decisions that had stood longer than *Roe*.[473] One example, of course, was *Allgeyer v. Louisiana*,[474] which presaged *Lochner v. New York*.[475] Decided unanimously in 1897, *Allgeyer* was applied and reaffirmed, sometimes unanimously, over three decades, and then implicitly questioned in *Nebbia* and abandoned in *West Coast Hotel Co*.[476]

The joint opinion argued that, even if *Allgeyer* and *Lochner* were correct, subsequent real world events, external to both the Court and the applicable legal doctrine, undermined the factual premises supporting these decisions, thereby *compelling* the Court to overrule them.[477] As the joint opinion put it:

> The Lochner decisions were exemplified by *Adkins v. Children's Hospital of District of Columbia* . . . in which the Court held it to be an infringement of constitutionally protected liberty of contract to require employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, . . . signaled the demise of *Lochner* by overruling *Adkins*. In the meantime the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated

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[470] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–62 (1992).

[471] *See* Roe v. Wade, 410 U.S. 163, 164–65 (1973).

[472] *See Casey*, 505 U.S. at 846 (summarizing this holding).

[473] *See id.* at 957 (Rehnquist, C.J., dissenting) (leveling this critique).

[474] 165 U.S. 578 (1897).

[475] 198 U.S. 45 (1905).

[476] *See* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (upholding minimum wage legislation); Nebbia v. New York, 291 U.S. 502, 539 (1934) (upholding price fixing); Charles Wolff Packing Co. v. Kansas, 262 U.S. 522, 544 (1923) (unanimous) (invalidating wage regulation of private industry as contrary to freedom of contract). *Roe*, by contrast, had never been reaffirmed unanimously. *See Casey*, 505 U.S. at 835 (discussing the subsequent history of *Roe*).

[477] *See Casey*, 505 U.S. at 836.

> market to satisfy minimal levels of human welfare. . . . [T]he clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.[478]

These Justices echoed scholars who had previously concluded that protection for economic liberty and free-market determinations of wages and prices had prevented economic recovery before the Court reversed course and allowed Congress and the states to supplant free competition with state-imposed cartels.[479] Nearly a decade after *Casey*, Justice Souter, joined by Justices Stevens, Breyer and Ginsburg, reiterated his belief that "laissez-faire" was not able to "govern the national economy 70 years ago," and that this reality necessitated expansion of Congress's commerce power.[480]

Theory and evidence suggest that there is no conflict between maintaining free competition, with its wealth-creating advantages on the one hand, and macroeconomic stabilization on the other. Instead, protection for economic liberty can help prevent downturns and facilitate recovery.[481] Take theory first. Proponents of the NIRA and similar measures believed that low prices and wages "caused" the Depression by depriving consumers, farmers and small businesspeople of the "purchasing power" necessary to buy up the output of capital-intensive industries.[482] By stabilizing wages and prices, it was said, these measures could restore the

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[478] *See id.* at 861–62.

[479] *See, e.g.*, Wayne McCormack, *Property and Liberty—Institutional Competence and the Functions of Rights*, 51 WASH. &. LEE L. REV. 1, 10 (1994) ("The protections thus developed [during the *Allgeyer/Lochner* era] withered when the Great Depression showed that unregulated industrialization represented risks too great to be borne by a sensible society."); ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 125–37 (1941) (arguing that the Supreme Court thwarted economic recovery when it voided the Agricultural Adjustment Act); Edwin S. Corwin, *Social Planning Under the Constitution—A Study in Perspectives*, 26 AMER. POL. SCI. REV. 1, 26–27 (1932); *cf.* Nancy Staudt & Yilei He, *The Macroeconomic Court: Rhetoric and Implications of New Deal Decision-Making*, 5 NW. J.L. & SOC. POL'Y 87, 112 (2010) (contending that the Court moderated its protection for economic liberty when recovery from the Depression stalled).

Indeed, Laurence Tribe has argued as follows:

> In large measure, however, it was the economic realities of the Depression that graphically undermined *Lochner's* premises. No longer could it be argued with great conviction that the invisible hand of economics was functioning simultaneously to protect individual rights and produce a social optimum . . . . Positive government intervention came to be more widely accepted as essential to economic survival, and legal doctrines would henceforth have to operate from that premise.

LAURENCE TRIBE, CONSTITUTIONAL LAW 578 (1999).

[480] *See* United States v. Morrison, 529 U.S. 598, 655 (2000) (Souter, J., dissenting).

[481] *See* Alan J. Meese, *Will, Judgment and Economic Liberty: Mr. Justice Souter and the (Mis)Translation of the Due Process Clause*, 41 WM. & MARY L. REV. 3, 46–50 (1999) [hereinafter Meese, *Will, Judgment and Economic Liberty*] (critiquing this argument, propounded by Justice Souter and others).

[482] *See supra* Part IV.

masses' purchasing power, stimulate demand, and counteract the Depression.[483] Indeed, Herbert Hoover had himself cajoled business into maintaining nominal wages and thus "consuming power."[484] The NIRA and similar state and federal measures merely gave legal sanction to Hoover's policy of wage and price stabilization.[485]

Modern economists would reject this logic, pointing out, as John Maynard Keynes did in a 1933 letter to FDR, that depressions cause low wages and prices, not the other way around, that falling wages and prices can facilitate recovery, and that propping up wages and prices will exacerbate a downturn.[486] To be precise, an unanticipated shock, e.g., a sudden tax increase, can reduce consumption and investment and thus reduce aggregate demand.[487] Absent legal or de facto wage and price controls, nominal wages and prices will fall. For any given nominal money supply, the reduced price level will increase the real value of the money that individuals hold, thereby reducing real interest rates, spurring consumption and investment, and enhancing aggregate demand.[488] Absent an additional shock, overall output will rise back to the pre-contraction level.[489]

In the real world, however, wages and prices are sometimes inflexible. If, after a fall in aggregate demand, prices remain fixed or, worse, rise, no self-correction will occur and the economy will remain "stuck"

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[483] *See, e.g.*, Brief for the United States at 90–91, A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (Nos. 854, 864) (contending that NIRA's price and wage-fixing provisions would increase purchasing power and consumption); Morehead v. New York, 298 U.S. 587, 615 (1936) (reproducing New York's legislative findings that minimum wage would enhance purchasing power and thus consumption). *See also supra* notes 466–69 and accompanying text (reproducing arguments that NLRA and Agricultural Adjustment Act would enhance purchasing power and thus consumption).

[484] *See supra* note 161 and accompanying text.

[485] *See* discussion *supra* Part IV.

[486] *See* Open Letter of John Maynard Keynes to President Roosevelt (Dec. 16, 1933) ("[T]oo much emphasis on the remedial value of a higher price[ ] level as an object in itself may lead to serious misapprehension as to the part which prices can play in the technique of recovery. The stimulation of output by increasing aggregate purchasing power [i.e., aggregate demand] is the right way to get prices up[,] not the other way [a]round."). Keynes, of course, employed "purchasing power" as a synonym of "aggregate demand," and believed that government could increase such demand via deficit spending. *See also* Meese, *Will, Judgment and Economic Liberty*, *supra* note 481, at 48–49 (explaining how the NIRA's wage and price fixing likely exacerbated the Depression and slowed economic recovery).

[487] *See* Meese, *Section 2 and the Great Recession*, *supra* note 20, at 1661 n.172 (citing MANKIW, PRINCIPLES OF ECONOMICS, *supra* note 140, at 328).

[488] *See* F.M. SCHERER, INDUSTRIAL STRUCTURE AND ECONOMIC PERFORMANCE 308–09 (1970) (describing this chain of events); Pigou, *supra* note 169, at 351 ("[I]f wage earners follow a competitive wage policy, the economic system must move ultimately to a full-employment stationary state . . . ."); Christina D. Romer, *The Nation in Depression*, 7 J. ECON. PERSPECTIVES, 19, 25 (1993) ("In the conventional textbook model a fall in wages and prices raises real balances, lowers interest rates, and thus stimulates investment. The rise in investment serves to counteract at least some of the fall in demand.").

[489] *See* Pigou, *supra* note 169, at 349–50.

below full employment.[490] Indeed, even if prices fall, inflexible wages can prevent recovery.[491] According to Keynes's famous dictum, recessions persist because nominal "wages are sticky [downwards]," such that real wages rise when the economy contracts and prices fall.[492] Inflated real wages will increase production costs, thereby reducing output at any given price level.[493] Labor markets will remain in semi-permanent disequilibrium as the quantity of labor supplied at pre-contraction wages exceeds the labor demanded, thereby creating unemployment.[494]

Rudimentary macroeconomic theory thus predicts that the NIRA and similar policies exacerbated and prolonged this disequilibrium by adding legal sanction to the natural propensity of firms and employees to resist price and wage reductions, thereby thwarting the normal economic adjustment process described above.[495] Keynes had said as much, observing that the NIRA "probably impede[d] recovery."[496] For decades other economists observed that recovery from the Depression was significantly slower and less robust than the average recovery before or since.[497] Some even speculated that the NIRA and similar measures had

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490 MANKIW, MACROECONOMICS, *supra* note 165, at 274–75; F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 363 (2d ed. 1980).

491 *See* HENRY SIMONS, *A Positive Program for Laissez Faire: Some Proposals for a Liberal Economic Policy,* 53 (1934), *reprinted* in ECONOMIC POLICY FOR A FREE SOCIETY, 40–77 (1948) ("Decisively important in the [cycle of recession] is the exceeding inflexibility of wages . . . .").

492 *See* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY 232, 237 (1936) (referring to wages as being "sticky in terms of money"); *id.* at 7–13 (detailing how real wage often rises in a downturn); Pigou, *supra* note 169, at 344 ("[S]hould wage-earners . . . contrive, by means of combination or otherwise, to set the real rate of wages 'too high,' the stationary state would not be one of full employment.").

493 *See* BAUMOL & BLINDER, *supra* note 469, at 169–70 (explaining how "sticky" wages can prevent self-correction from an economic downturn).

494 *See* WENDY CARLIN & DAVID SOSKICE, MACROECONOMICS AND THE WAGE BARGAIN: A MODERN APPROACH TO EMPLOYMENT, INFLATION, AND THE EXCHANGE RATE 49 (1990) ("[In] Keynes's model . . . the failure of money wages to fall . . . led, in the context of a fall in autonomous demand, to the real wage rising and the consequent fall in employment and output . . . .").

495 *See* STEIN, *supra* note 159, at 149 (noting that Keynes believed the NIRA impeded recovery); *see also* John D. Harkrider, *supra* note 342, at 23 ("[C]artelization is unlikely to lift the nation out of economic stagnation . . . ."); Meese, *Will, Judgment and Economic Liberty*, *supra* note 481, at 48–49 ("Before the NIRA and other schemes to set minimum wages, prices and wages were sticky; afterwards, they were stuck. Liberty of contract and full employment are not mutually exclusive."); Meese, *Section 2 and the Great Recession*, *supra* note 20, at 1662–66.

496 *See* Open Letter from John Maynard Keynes to President Roosevelt (Dec. 16, 1933) ("[M]y first reflection [is] that the N.I.R.A., which is essentially Reform and probably impedes Recovery, has been put across too hastily, in the false guise of being part of the technique of Recovery.").

497 *See* Cole & Ohanian, *supra* note 383, at 779–81 (detailing weak recovery from the Depression); Robert Lucas & Leonard A. Rapping, *Unemployment in the Great Depression: Is There a Full Explanation*?, 80 J. POL. ECON. 186, 191 (1972).

slowed recovery,[498] while others argued that poor fiscal and monetary policies helped turn the 1929 downturn into a Depression.[499]

Such speculation and Keynes's prediction were spot on. More recently, economists have directly measured the impact of the NIRA, particularly its wage-enhancing provisions, on recovery.[500] These scholars have found that wages and prices in industries governed by NIRA codes were higher than they otherwise would have been and also higher than in industries without such codes.[501] Moreover, after *Schechter*, the NLRA preserved the NIRA's policy of labor cartelization, further boosting wages.[502] Thus, scholars have also found that such increased wages reduced output and employment in sectors governed by the NLRA, while increasing employment (and reducing wages) in competitive sectors.[503] As a result, idle resources in cartelized sectors, including labor, flowed after some friction and delay into less valuable uses in non-cartelized sectors, thus depressing wages in those sectors relative to wages in cartelized sectors.[504] On balance, the misallocation of resources caused

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[498] *See* Lucas & Rapping, *supra* note 497, at 186 n.4 (finding that "traditional theory" could not explain the jump in wages and prices that occurred in 1934 despite 25% unemployment); *see also* ARMEN ALCHIAN, *Information Costs*, *Pricing and Resource Unemployment* (1969), *in* 1 THE COLLECTED WORKS OF ARMEN A. ALCHIAN 53, 76–77 (2006) (suggesting that the NIRA, minimum wage measures and similar regulations were "autonomous factors pushing up permissible (though not the equilibrating) prices" without which "1933–37 would have shown greater employment"); FRIEDMAN & SCHWARTZ, *supra* note 156, at 498–99; KENNETH D. ROOSE, THE ECONOMICS OF RECESSION AND REVIVAL 45–57 (1954) (making a similar argument).

[499] *See, e.g.*, MANKIW, MACROECONOMICS, *supra* note 165, at 331–32.

[500] *See* Cole & Ohanian, *supra* note 383 *passim*.

[501] *Id.* at 787–93, 811–12 (finding that the NIRA and similar policies raised wages and prices in covered sectors relative to wages and prices elsewhere); Christina D. Romer, *Why Did Prices Rise in the 1930s?*, 59 J. ECON. HIST. 167, 197 (1999) ("The more important effect of the NIRA was to diminish the responsiveness of price changes to the deviation of output from trend. By preventing the large negative deviations of output from trend in the mid-1930s from exerting deflationary pressure, it prevented the economy's self-correction mechanism from working. Thus, the NIRA can be best thought of as a force holding back recovery, rather than as one actively depressing output."); *cf.* Lucas & Rapping, *supra* note 497, at 191 (wages increased in 1933–34 by 11% despite 25% unemployment).

[502] *See* Cole & Ohanian, *supra* note 383, at 785–86.

[503] *Id.* at 810–12.

[504] *See* SCHERER, *supra* note 488, at 309–10 (explaining that such a transfer of resources from one sector to another entails costly frictions and temporary unemployment, during which unutilized workers produce nothing). *See also* Harkrider, *supra* note 342, at 9 ("Allowing competitors to restrict output and increase price above a competitive level may allow these firms to pay higher wages to their workers, but it does so at a significant cost, by restricting output at a time when the economy needs to expand."); Henry Simons, *Economic Stability and Antitrust Policy*, 11 U. CHI. L. REV. 338, 343 (1943) ("During depressions, the stabilization of particular prices against a general decline serves to shift the burdens of depression heavily upon other groups and, thus, to increase the difficulties of effective monetary and fiscal counteraction. Sustaining such prices means larger curtailment of employment and, thus, of spending. It means drawing off a larger share of spending to the particular enterprises, and thus, deepening the depression in other areas of the economy.").

by the NIRA and NLRA resulted in reduced output overall.[505] Absent the NIRA and similar measures, then, the Depression would have ended significantly sooner than it actually did. Indeed, two scholars have concluded that by artificially inflating wages, the NIRA and the NLRA, taken together, lengthened the Depression by several years.[506] These findings likely understate the impact of the NIRA, given the various other ways in which the "codes of fair competition" interfered with free competition, distorted the allocation of resources, and reduced the value of national output.[507] Simply put, adherence to the pre-Depression constitutional doctrines that protected free-market competition from coercive interference would have spurred recovery and thus enhanced the nation's economic welfare.

IX. LESSONS LEARNED AND A NEW WAY FORWARD

The (de)evolution of various doctrines that once protected free competition from undue private, state, and national restraints and the negative macroeconomic impact of resulting interference with free competition hold many lessons for a body politic considering the appropriate scope of state and national regulation. This experience can also inform efforts to avoid or ameliorate future recessions and maximize society's potential output. This concluding section sketches some of these lessons and offers suggestions for how to restore free competition as the presumptive economic norm in sectors currently characterized by state interference with free-market pricing and output.

First, macroeconomic stability and free competition reinforce one another. On the one hand, severe macroeconomic fluctuations can result in poor competition policy, indeed, coercive displacement of competition altogether. Imagine, for instance, if there had been no Depression. Hoover, who opposed the Swope Plan and other amendments to the antitrust laws, may have won reelection in 1932. The history of competition policy—both statutory and constitutional—may have been much different. There may have been no *Appalachian Coals* decision and no NIRA. State efforts to displace competition by, for instance, creating raisin or

[505] *See* Cole & Ohanian, *supra* note 383, at 804–13 (contending that artificial gap between wages in competitive and cartelized sectors reduced employment in cartelized sectors and caused individuals in competitive sectors to forgo work and search for employment in high-wage cartelized sector).

[506] *See* Cole & Ohanian, *supra* note 383, at 808–09 (finding that 1936 GDP was 25% below predicted level); *id.* at 781 (attributing most of the negative deviation from trend to wage and price rigidity caused by the NIRA and NLRA); *id.* at 782 (showing output well below trend even in 1939); Harold L. Cole & Lee E. Ohanian, *How Government Prolonged the Depression*, WALL ST. J. (Feb. 2, 2009, 12:01AM), http://online.wsj.com/news/articles/SB123353276749137485 ("Our research indicates that New Deal labor and industrial policies prolonged the Depression by seven years.").

[507] *See* discussion *supra* Part IV.

dairy cartels, may not have emerged in the first place. Even if such cartels had arisen, they may have fallen prey to either or both liberty of contract and dormant Commerce Clause challenges in a Court that was more confident that economy-wide free competition would maximize the nation's welfare.[508] America may have avoided post-*Schechter* industry-specific limitations on competition such as the Motor Carrier Act, Robinson-Patman Act, minimum wages, and the NLRA. Sound fiscal and monetary policy, it seems, can do more than ensure full employment, stable prices and economic growth. These first order consequences can have second order effects, namely, dampening the political demand for coercive displacement of free-market competition.

On the other hand, free competition and the resulting flexibility of wages and prices promote macroeconomic stability. Stabilization policy, whether by fiscal or monetary stimulus, does not work instantly. Measures that reduce wage and price flexibility interfere with the normal process of macroeconomic adjustment and slow recovery.[509] If history is any guide, free competition did not cause the 2008 downturn and displacing free competition will only slow recovery. Modern policy makers would do well to avoid the New Deal's mistakes and resist recent calls to displace free competition even further by raising the minimum wage and encouraging the formation of unions, for instance.[510]

Given the correlation between free competition and macroeconomic stability, it is more than a little ironic that the national government's failure to counteract the Depression, a downturn exacerbated by Hoover's tax increases and FDR's NIRA, created a political environment conducive to other measures that slowed the economic recovery in the short run and reduced output in numerous industries in the longer run. These conclusions reinforce the importance of getting macroeconomic stabilization policy right.

Second, in a society characterized by private property, free contract and federalism, various regulatory regimes will govern the extent to which free competition allocates resources and determines prices, output, and society's economic welfare. At the same time, nominally distinct doctrines, such as liberty of contract and the application (or not) of the Sherman Act to state-enforced cartels, are not hermetically sealed from one another; developments in one area of the law can influence other seemingly disparate doctrines. *Appalachian Coals* and the FTC's "codes

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[508] *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 861–62 (1992) (plurality opinion) (contending that the Depression convinced the Court that protection for economic liberty reduced nation's economic welfare); Staudt & He, *supra* note 479, *passim*.

[509] *See supra* notes 481–86 and accompanying text (collecting theory and evidence to this effect).

[510] *See supra* notes 34–39 and accompanying text (detailing recent calls to increase minimum wages).

of fair competition" set in motion a cascade of departures from free competition, culminating in the *Parker* Court's unanimous validation of California's raisin export cartel, a result unthinkable under pre-Depression precedent.[511]

Rationales for rejecting free markets in one context, whether statutory or constitutional, cannot be confined to a particular doctrinal pigeonhole. Anti-market advocates will deploy such rationales elsewhere, seeking to influence other doctrines and spread the anti-market contagion. The Roosevelt Administration learned this the hard way in *Parker v Brown*, having invoked *Nebbia* and *Appalachian Coals* to justify the NIRA only to see the rationales of these decisions deployed less than a decade later in *Parker* to justify state-enforced cartelization of an industry exporting the vast majority of its products to other states.[512] If protecting producers justifies abridging the right to sell healthy food to destitute citizens, why not allow a state to limit the supply of raisins sold in interstate commerce? Those who advocate departure from free markets in one context should not be surprised when the resulting rationale comes back to haunt them in a different setting.

Third, poor competition policy, of whatever source, can have a long half-life and is not easily undone, even when economic science discredits the rationale for displacing free-market outcomes. "Experimental" departures from free competition during "emergencies" predictably create vested interests in maintaining the new status quo and cartel profits. We lived with the worst aspects of the Motor Carrier and Civil Aeronautics Acts for over four decades.[513] The Miller-Tydings Act authorizing "fair trade laws" stood thirty-eight years, and the Robinson-Patman Act is still with us, tamed somewhat by the Supreme Court.[514] The "labor exemption" from the antitrust laws, the NLRA, and some of the unions both spawned survive to this day, albeit defanged somewhat by the 1947 Taft-Hartley Act, "right to work" states, deregulation and international trade, all of which constrain union market power.[515] There is a still a federal

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511 Parker v. Brown, 317 U.S. 341, 363, 368 (1943).

512 *See supra* notes 403–21 and accompanying text (detailing the federal government's unsuccessful argument that California's raisin cartel violated the Sherman Act and dormant Commerce Clause).

513 *See* Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (deregulating the trucking industry); Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (deregulating the airline industry).

514 *See, e.g.*, Brooke Group v. Brown and Williamson Tobacco Co., 509 U.S. 209 (1993) (increasing burden on plaintiffs seeking to establish that price discrimination substantially reduced competition and thus violates the Robinson-Patman Act).

515 *See supra* note 86 and accompanying text (describing labor exemption from the antitrust laws). *See also* Labor Management Relations (Taft-Hartley) Act, 1947 Pub. L. No. 80-101, 61 Stat. 136, 140–43 (1947); Michael L. Wachter, *Labor Unions: A Corporatist Institution in a Competitive World*, 155 U. PA. L. REV. 581, 613–23 (2007) (explaining how various forms of deregulation and changes in corporate law have reduced labor cartels' power).

"minimum wage," and numerous states impose even higher wages still.[516] Various federal "marketing orders" increase the price of milk and other agricultural commodities.[517] Other exemptions protect industries such as insurance, international ocean shipping, higher education, and baseball.[518]

Parker has also survived, even thrived; if anything, the doctrine is *more* anticompetitive than ever. *Parker*'s dormant Commerce Clause holding portrayed agriculture as a local activity;[519] the Court also invoked national legislation discouraging raisin production.[520] Under *Parker*'s progeny, however, states may authorize cartels regardless of whether Congress has pursued a similar output-reducing policy.[521] Moreover, even municipalities may displace competition, despite the Sherman Act, with only implicit state legislative sanction.[522] All despite the antitrust community's long-standing rejection of claims that "ruinous competition" justifies the imposition of price and output restraints by parties with an economic interest in the outcome.[523]

Moreover, *Parker*-like reasoning, whereby "federalism" purportedly justifies one state's override of national competition policy, does more than justify immunity for either or both state-imposed cartels and monopolies that injure consumers in forty-nine other states. Such invocations of federalism also encourage states to ban, under their own antitrust laws, practices that enhance economic welfare and are thus perfectly reasonable and lawful under the Sherman Act.[524] Federalism is also said to justify state imposition of remedies that national policy deems excessive and counter-productive.[525]

As noted earlier, however, such concurrent jurisdiction over purported restraints of interstate commerce contravenes the intent of the

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516 *See* Ellis, *supra* note 7 and accompanying text.

517 *See* Chris Edwards, *Milk Madness*, CATO INST. TAX & BUDGET BULL., July 2007, *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/tbb_0707_47.pdf.

518 *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 378 (2007) (collecting these and other antitrust exemptions).

519 *See* Parker v. Brown, 317 U.S. 341, 363 (1943).

520 *See id.* at 368.

521 *See* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 377, at 736–42. *See also* Consumer Goods Pricing Act, 89 Stat. 801 (1975).

522 *See* City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 370–72 (1991).

523 *See, e.g.*, Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695–96 (1978); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210–18 (1940).

524 *See supra* note 31 and accompanying text. *Cf.* Leegin v. PSKS, 551 U.S. 877, 886–87 (2007) (collecting decisions banning minimum RPM under state law).

525 *See* Cal. v. ARC Am. Co., 490 U.S. 93, 93–94 (1989) (holding that states may empower indirect purchasers to obtain treble damages for violations of their own antitrust laws even though such remedies are not available under Federal law due to possibility of duplicative recoveries); Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 ANTITRUST L.J. 29, 29 (2000).

Congress that passed the Sherman Act, which assumed that jurisdiction over restraints governed by antitrust law was mutually exclusive between states and the national government.[526] As others have argued, states that second-guess regulatory choices that federal courts and enforcement agencies make when implementing federal antitrust laws often lack the expertise and incentives necessary to generate welfare-enhancing rules.[527] Moreover, to the extent that states ban efficient conduct that is lawful under the Sherman Act, even to foster additional (atomistic) "competition," the negative impact on economic welfare is indistinguishable from that caused by state orchestration of a cartel.[528] Preventing conduct that improves the allocation of resources is as harmful as allowing conduct that distorts such allocation.

The debate over health care reform illustrates the continuing influence on public policy and national welfare of anticompetitive New Deal legislation implementing an extreme version of federalism. As explained earlier, President Obama and his congressional allies advocated creation of a "public option" health insurance plan, owned by the national government, to inject "competition" into health insurance markets.[529] Why, though, are such markets concentrated, and prices for health insurance so high, in the first place? One obvious reason is the 1945 McCarran-Ferguson Act, which exempts such companies from nearly all federal antitrust regulation, so long as there is minimal state oversight of the industry.[530] Given this exemption, firms can jointly propose rates, subject only to negation by a state agency that may instead "rubber stamp" collusive proposals.[531] Moreover, the McCarran-Ferguson Act goes even further, allowing states to protect their domestic insurance companies by prohibiting entry by out-of-state firms.[532]

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526 *See supra* notes 393–94 and accompanying text.

527 *See* Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99 (2005); Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 252, 261–62 (Richard A. Epstein and Michael S. Greve, eds., 2004) (contending that states should not apply their own antitrust laws to conduct that occurs in or affects interstate commerce).

528 For instance, banning efficient non-standard contracts to increase "competition" will reduce economic welfare by inducing a less efficient allocation of scarce resources. *See* Oliver E. Williamson, *Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach*, 127 U. PA. L. REV. 953, 988–89 (1979) [hereinafter Williamson, *Assessing Vertical Market Restrictions*] (explaining how non-standard agreements that reduce transaction costs facilitate efficient allocation of resources).

529 *See supra* notes 24–25 and accompanying text.

530 *See supra* notes 27, 377 and accompanying text (explaining contours of the McCarran-Ferguson Act).

531 HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 377, at 732 (reporting that the McCarran-Ferguson exemption applies even if the state agency merely "rubber stamps" regulated entities' requests).

532 *See supra* note 27 and accompanying text.

Of course, Congress rejected the Public Option.[533] Congress also rejected calls to repeal the McCarran-Ferguson Act and thus subject insurance to free-market discipline.[534] Finally, Congress declined to preempt "certificate of need laws," analogous to those invalidated in *New State Ice*, which prevent hospitals from entering concentrated markets without administrative approval.[535] It is no surprise, then, that most markets for health care and health insurance are highly concentrated.[536] As a result, consumers must fend for themselves in state-by-state markets rigged to promote concentration among health care providers and both concentration and collusion among health insurance firms. One can only guess what the modern health insurance market would look like if the Sherman Act governed the industry. The NIRA's dead hand, channeled via the McCarran-Ferguson Act and certificate of need laws, still influences our economic welfare. The longevity and genesis of such schemes actually gives rise to a presumption against them.

Fourth, antitrust law is not the only potential source of competition policy, and even the very best antitrust law, administered by expert and well-incentivized officials, cannot ensure optimal competition policy society-wide. As a statutory regime, antitrust law is subject to change at the whim of Congress, which can replace antitrust principles with regulatory diktat or exempt particular industries from federal oversight. The McCarran-Ferguson Act does exactly that, of course. Moreover, given *Parker* and its progeny, state legislatures and city councils can replace competition with cartelization, even when the near-exclusive effect of such collusion falls on out-of-state consumers. Under our current antitrust regime, then, a few doctors cannot, for anticompetitive reasons, vote to exclude a single physician from a single hospital in Los Angeles.[537] However, California can create a raisin cartel, set resale prices of liquor manufactured out-of-state, or prevent new hospitals from entering the Los Angeles market by requiring them to obtain "certificates of need" that may be denied.[538]

Thus, a society interested in ensuring that free markets allocate its resources and direct its growth must do more than simply pass and enforce a well-crafted antitrust statute. It must also prevent other legal regimes from intruding on the workings of the very sort of free markets

[533] *See* Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

[534] *See* Competitive Health Insurance Reform Act of 2011, H.R. 1150, 112th Cong. (2011) (proposed legislation to end McCarran-Ferguson antitrust immunity).

[535] *See supra* note 28 and accompanying text (describing such laws).

[536] *See supra* note 29 and accompanying text (collecting evidence on such concentration).

[537] *See* Summit Health, Ltd., v. Pinhas, 500 U.S. 322, 332–33 (1991).

[538] *See generally* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 (1987) (condemning such state price-fixing, because state did not actively supervise the prices).

antitrust is designed to encourage. Such protection for free competition can take many forms. While meaningful protection for liberty of contract may be a thing of the past, a political culture that values economic liberty and free-market resource allocation can raise the cost of enacting anticompetitive legislation, and antitrust scholars and lawyers can help shape that culture. Moreover, playing this role requires more than simply advocating application of pro-competitive rules of conduct within the current scope of antitrust doctrine. Scholars and lawyers must also advocate just as vigorously—perhaps more so—for expanding the domain of antitrust, eliminating exemptions and immunities that can reduce economic welfare far more than a facet of antitrust doctrine that departs only somewhat from the optimum.[539] This same constituency can follow the lead of anti-competition advocates during the 1930s, exporting principles and assumptions from the antitrust context—but this time principles that *favor* markets—to other doctrinal contexts such as the dormant Commerce Clause. In this connection, scholars and other advocates should consider whether the intellectual energy spent making arguments "around the edges" about the exact scope of a particular immunity might be better employed generating arguments against either or both the existence and continued validity of such exemptions in the first place. If anything, lawyerly arguments about the exact scope and qualities of a particular exemption can buttress the legitimacy of the exemption in the minds of policy makers.[540] Relaxation of antitrust norms helped instigate the repudiation of free-market principles during the 1930s. Perhaps it is time that antitrust's better angels have their way instead.

Indeed, the enforcement agencies sometimes engage in just such advocacy—criticizing current or proposed state or federal limitations on free-market rivalry.[541] Still, such advocacy can be quite uneven. Thus, the current Antitrust Division has vigorously advocated repeal of the McCarran-Ferguson exemption, while simultaneously remaining silent as the President and his allies seek stronger labor unions and higher minimum wages, both of which displace free-market competition in wage setting.[542] Mixed messages often fall on deaf ears.

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[539] Imagine, for instance, if antitrust scholars and practitioners devoted the same time and energy to limiting the scope of *Parker*, or repealing McCarran-Ferguson, as they do debating each other about the precise standards that govern exclusionary conduct.

[540] *Cf.* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 377, at 752–55 (devoting thirteen paragraphs to "special problem of municipal antitrust liability"); *id.* at 739–40 (devoting a mere four paragraphs to the supposed historical basis for the *Parker* doctrine).

[541] *See, e.g.*, Todd J. Zywicki et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091, 1111–12 (2005).

[542] *See Prohibiting Price Fixing and Other Anticompetitive Conduct in the Health Insurance Industry: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 3–4 (2009) (statement of Christine Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice);

Parker is an obvious target for such redirected free-market advocacy. No statutory text or constitutional provision commands the decision's safe harbor for state-created private cartels restraining interstate commerce and injuring out-of-state consumers. Moreover, as explained earlier, the decision's invocation of a supposed lack of legislative intent regarding state-created cartels was nonsensical, as Congress would have assumed that states lacked the authority to impose cartels directly restraining interstate commerce.[543] If we are to take seriously the absence of such intent, we must also take seriously the reason for this absence, a reason that would compel a pointed reexamination of the *Parker* Court's dormant Commerce Clause holding.

If anything, the rationale for wielding the dormant Commerce Clause against state-compelled cartels is even stronger today than in 1943, given what we have learned about state and federal price-fixing during the New Deal. *Parker* embraced as a valid state objective, as articulated by California's brief, the reduction of output during an economic downturn so as to prevent ruinous competition and raise prices. This, of course, was the same rationale behind various NIRA code provisions, not to mention the *Appalachian Coals* cartel and the provisions reviewed in *New State Ice* and *Nebbia*.

We now know, however, that such price control can itself be ruinous to the macro-economy. Both theory and evidence establish that putting floors under wages and prices exacerbates economic downturns and slows recovery.[544] The national government, of course, has a unique responsibility to stabilize the macro-economy, and Congress has endorsed "free competitive enterprise" as well as full employment and production as overriding national goals.[545] Recognition that responsibility for macroeconomic stability is "inherently national," combined with knowledge about the negative macroeconomic impact of rigid wages and prices, bolsters the case for a return to the pre-*Parker* regime whereby state price fixing or state-conferred monopoly that directly restrains interstate commerce offends the dormant Commerce Clause.[546] Anticompetitive protection for a state's domestic industries should not trump the stability of the national macro-economy.

President Barack Obama, 2013 State of the Union Address (Feb. 12, 2013) (detailing administration support for higher minimum wages and stronger labor unions).

[543] *See supra* note 460 and accompanying text. *See also* HOVENKAMP, FEDERAL ANTITRUST POLICY, *supra* note 377, at 739–40 ("[*Parker*] rests on a fictional reading of the legislative history of the antitrust laws.").

[544] *See supra* note 486–508 and accompanying text.

[545] *See* 15 U.S.C. § 1021 *et seq.* (2006) (committing national government to "promote free competitive enterprise" and full employment, full production, and price stability).

[546] *See supra* note 58–63 and accompanying text. *See also* Gibbons v. Ogden, 22 U.S. 1, 197–209 (1824) (opining that state obstruction of interstate commerce, there a state-granted monopoly over interstate commerce, violated the commerce clause) (*dicta*).

Fifth, and finally, state and federal interference with free competition can take many forms. The most obvious forms involve state-imposed cartels or state-granted monopolies. However, some wolves come in sheep's clothing; government efforts to hamper free markets can be subtle, sometimes even masquerading as competition policy while actually banning efficient practices. Recall, for instance, the numerous trade practice conferences and NIRA codes that prohibited either or both below-cost pricing and price discrimination as "unfair competition," regardless of anticompetitive effects. Then came the Robinson-Patman Act, which banned price discrimination that injured a rival unless justified by (narrowly-defined) cost considerations, again without regard to the practice's impact on economic welfare.[547] More recently, states, exercising their post-1937 power to regulate restraints of interstate commerce, have banned practices that federal courts have found reasonable under the Sherman Act, ostensibly in an effort to enhance "competition."[548]

As a result, scholars and lawyers interested in protecting free-market allocation of resources must not confuse useful competition with atomistic rivalry. Competition policy, of whatever source, should take its cue from the rule of reason explicit in *Standard Oil*, and implicit in the Court's pre-New Deal economic liberty jurisprudence, banning only those practices that, instead of overcoming market failure, create market power and economic harm without countervailing efficiencies.[549] More extensive regulation, even if aimed at practices that also raise consumer prices, will needlessly *prevent* the realization of substantial efficiencies, protect inefficient rivals and destroy economic welfare in pursuit of distributional objectives better served in other ways.[550]

These admonitions are particularly important during a serious economic downturn. The Obama Administration's Antitrust Division has claimed that insufficient antitrust enforcement by the prior administration helped cause the Great Recession and that antitrust condemnation of efficient monopolies that increase purchaser prices will hasten recovery.[551]

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547 *See* ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS, 311–12 (2007) (detailing Robinson-Patman Act's anticompetitive effects).

548 *See supra* note 31 and accompanying text.

549 *See* cases cited *supra* note 74–80 and accompanying text. *See also* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 687–88 (1978) (explaining how enforcement of private contracts enables competitive markets to function).

550 *See* Williamson, *Allocative Efficiency*, *supra* note 139, at 109–10 (arguing that antitrust law should only ban practices that reduce economic welfare on balance, without regard to price effects).

551 *See* Meese, *Section 2 and the Great Recession*, *supra* note 20, at 1639 and accompanying text; Daniel Crane, *Obama's Antitrust Agenda*, 32 REGULATION, Fall 2009, at 16-17 (noting that the Obama Administration "has gone so far as to suggest that the economic crisis is partly attributable to lax antitrust enforcement").

At the same time, some members of Congress have proposed legislation banning all minimum RPM, even though such contracts often create wealth, again in the name of increasing (atomistic) competition and reducing prices.[552] However, monopoly earned or preserved by means of efficient practices will almost certainly create wealth, unlike the New Deal cartels that destroyed it.[553] The same is true for minimum RPM that courts validate under the rule of reason.[554] Banning such efficient practices simply because they increase purchaser prices will protect inefficient rivals and reduce the nation's potential output.[555] To be sure, economic distress does not justify or otherwise counsel relaxation of anticartel norms.[556] Nor, however, does it justify overly aggressive enforcement against efficient practices that create wealth, even when such enforcement purportedly increases the welfare of the particular consumers that purchase a defendant's product.[557] If the New Deal and its aftermath taught us anything, it is that regulation seeking to enrich business or labor at the expense of others reduces overall welfare and exacerbates macroeconomic instability. We know too much today to repeat the very costly errors of the past.

CONCLUSION

Before the Great Depression, the antitrust laws, dormant Commerce Clause and Due Process Clauses established free competition as the norm governing American economic life. New Deal-era legislation and radical changes in all three sources of competition policy coercively displaced free competition throughout the economy, and resulting wage and price fixing during the 1930s deepened and lengthened the Depression. While the Supreme Court restored "free competition" as the overriding goal of

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[552] *See* Discount Pricing Consumer Protection Act, S. 75, 112th Cong. (2011). Such legislation would "overrule" Leegin Creative Leather Prod.'s, Inc. v. PSKS, Inc., 551 U.S. 877, 898–99 (2007), which properly held that courts should analyze minimum RPM under a rule of reason.

[553] *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Trade-Offs*, 58 AM. ECON. REV. 18, 27 (1968) (explaining how a transaction or practice that creates non-trivial efficiencies will likely increase overall welfare regardless of the impact on purchasers in the relevant market).

[554] *See* Williamson, *Assessing Vertical Market Restrictions*, *supra* note 528, at 988 (explaining how non-standard agreements that reduce transaction costs facilitate efficient allocation of resources).

[555] *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, 737 (2010).

[556] *See* Carl Shapiro, Deputy Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, Remarks Prepared for ABA Antitrust Symposium: Competition Policy in Distressed Industries 18–19 (May 13, 2009).

[557] *See id.* at 22–23 (advocating extra-vigilant scrutiny of alleged "exclusionary conduct" by firms that are healthier than smaller rivals).

antitrust, neither the dormant Commerce Clause nor the Due Process Clauses currently prevent government interference with free-market outcomes.

The most recent recession has increased support for such anticompetitive interference with free competition. However, the nation's experience with similar schemes during the Depression and New Deal teaches that such anticompetitive intervention will reduce the nation's economic welfare. Hopefully policymakers will learn from the mistakes of the past, reject these proposals and work to expand and not contract free competition.