Ropes of Sand: State Antitrust Statutes Bound by Their Original Scope

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Many state antitrust statutes passed around the turn of the twentieth century contain language that ostensibly limits their jurisdiction to their state’s borders. Courts typically equate this language, as well as the jurisdictional limits of some early antitrust statutes without explicit limits, to the dormant Commerce Clause boundaries present during these statutes’ enactment. However, courts disagree considerably on the historical limits of state antitrust jurisdiction and thus, promulgate a variety of standards that purportedly limit state antitrust statutes to their original scope. This Note argues that these standards, which focus on the goods, transactions, or effects related to trade restraints, are ill-suited for determining the original scope of these statutes. When analyzing state antitrust statutes, early courts frequently held that the fate of state enforcement turned on whether the restraint itself crossed state borders, even when it exclusively affected interstate transactions. Accordingly, this Note argues that modern courts should adopt a “restraint-focused” standard as a more historically faithful approach to understanding the scope of early antitrust statutes.

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† Yale Law School, J.D. expected 2018. Special thanks to Professor George Priest for his guidance throughout the writing process. I would also like to thank Steve Lindsay and Clark Hildabrand for their insights, as well as Leigh Terry and Gail Johnson for reading early drafts. I am grateful to Lauren Hobby, Richard Frohlichstein, Laura Savarese, Jenna Pavelec, and the editors of the Yale Journal on Regulation for their thoughtful suggestions. Finally, I am deeply indebted to Johnathan Speer for editing everything of consequence I have written over the past seven years, including this Note. All errors are mine.
Introduction: Modern Confusion over the Original Scope of Early State Antitrust Statutes

Responding to rising populism against monopolistic trusts, the Alabama State Legislature enacted Act Number 202 on February 17, 1891, which criminalized a variety of anticompetitive practices.1 When translating the Act into Alabama’s code, State Code Commissioner William Martin, a mid-level bureaucrat charged with eliminating redundancy in Alabama’s laws, curiously removed one occurrence of “within this state” from the Act’s language.2 He noted that this change was “necessary in phraseology” in his subsequent report to the Governor.3

For 108 years, this alteration led a quiet, unacknowledged existence. Plaintiffs used Alabama’s antitrust statutes to secure large judgments against a variety of extraterritorial restraints.4 It was only when a pair of high-stakes antitrust claims landed on the docket of the Alabama Supreme Court that the statute’s ambiguous geographic reach entered center stage. In companion decisions, handed down over vociferous dissent, the court used the fact that “within this state” existed in the original Act to dismiss both claims, which were collectively worth millions.5 The court held that Alabama’s antitrust statute did not apply to any “goods shipped in interstate commerce,” reasoning

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2. The Act made it a misdemeanor to “within this state, engage or agree with other persons, corporations or association of persons, or enter into ... any combination, pool, trust or confederation to regulate or fix the price of any article or commodity.” Id. § 1 (emphasis added). The codified version, ALA. CODE §§ 196-5-5557 to -5559 (1896), lacked the emphasized words.
5. Abbott Labs. v. Durrett, 746 So. 2d 316 (Ala. 1999); Archer Daniels Midland Co. v. Seven Up Bottling Co., 746 So. 2d 966 (Ala. 1999).
that it was only ever intended to apply to intrastate affairs.\(^6\) This conclusion effectively eliminated the law’s jurisdiction over most modern commercial transactions.\(^7\)

These rulings brought Alabama into a national debate over the proper scope of state antitrust statutes enacted during the turn of the twentieth century.\(^8\) Several of these statutes contain similar language dating back to the 1890s that ostensibly limits jurisdiction by geography.\(^9\) The modern courts that interpret these statutes through textualism or intentionalism typically equate this language—and occasionally the legislative intent underlying antitrust statutes that lack explicit geographic limits—to the dormant Commerce Clause’s boundaries at the time of these statutes’ enactment.\(^10\) Consequently, these courts must parse century-old case law to determine if a given restraint

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6. *Abbott Labs.*, 746 So. 2d at 339; *Archer Daniels Midland Co.*, 746 So. 2d at 989. For a thorough discussion of these decisions and the Alabama Supreme Court’s underlying reasoning, see *infra* Section II.B.1.


10. The dormant (or “negative”) Commerce Clause is a court-inferred limit on state authority to regulate interstate commerce. While the U.S. Constitution affirmatively grants Congress the power to regulate interstate commerce, U.S. CONST. art. I, § 8, cl. 3, it is silent on the extent to which states can regulate such commerce. Throughout its history, the Supreme Court has wrestled with the appropriate limit, if any, that the Commerce Clause places on states in areas where Congress has not preempted state regulation. See *Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW* 404-13 (2d ed. 1988). Even the modern Court disagrees sharply on the legitimacy of the dormant Commerce Clause. *Compare* Ky. Dep’t of Revenue *v. Davis*, 553 U.S. 328, 361 (2008) (Thomas, J., concurring) (arguing that the dormant Commerce Clause “has no basis in the Constitution” and should be “discarded”); (internal quotations omitted), *with id.* at 363 (Kennedy, J., dissenting) (noting that the dormant Commerce Clause represents “a delicate, sensible implementation of the Framers’ original purpose”); (internal quotations omitted). For a discussion of the Court’s dormant Commerce Clause jurisprudence during the turn of the twentieth century, see *infra* notes 49-55 and accompanying discussion. For a discussion of the dormant Commerce Clause’s modern implementation, see *infra* note 137.
would have fallen within a statute’s original scope.\textsuperscript{11} Yet, these courts diverge considerably in their conclusions.

At the least restrictive end of the spectrum, some states allow their statutes to apply when the alleged restraint had “substantial effects” within their borders.\textsuperscript{12} This standard is flexible, allowing courts to examine claims “pragmatically” on a case-by-case basis.\textsuperscript{13} Still, many courts have adopted more stringent demands. For example, some espouse a predominance standard that hinges on whether the transactions related to the restraint were primarily intrastate or interstate in nature.\textsuperscript{14} Other courts eschew standards based on effects or transactions altogether and require proof that a defendant engaged in “intrastate conduct” related to the restraint.\textsuperscript{15} Such conduct-based standards range from Alabama’s rule that all conduct related to the transaction must have been intrastate,\textsuperscript{16} to Mississippi’s standard that requires “some” level of in-state conduct by the defendant.\textsuperscript{17}


\textsuperscript{12} E.g., In re Graphics Processing Units Antitrust Litig., 540 F. Supp. 2d 1085, 1099 (N.D. Cal 2007) (interpreting the antitrust statutes of South Dakota and Mississippi to allow jurisdiction when anticompetitive behavior “substantially affected commerce in each of those states”); Freeman Indus., 172 S.W.3d at 523 (adopting a “substantial effects” standard for antitrust conduct in Tennessee); see also In re Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 668 (E.D. Mich. 2000) (asserting a “more than incidentally affects” standard for Wisconsin’s antitrust statute).

\textsuperscript{13} Freeman Indus., 172 S.W.3d at 523.

\textsuperscript{14} E.g., Fed. Trade Comm’n v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 50-51 (D.D.C. 1999) (dismissing claims under Oregon’s statute because the statutory language limits jurisdiction to “intrastate trade or commerce which is primarily of an intrastate nature”); Lynch Display Corp. v. Nat’l Souvenir Ctr., 640 S.W.2d 837, 840 (Tenn. Ct. App. 1982), overruled by Freeman Indus., 172 S.W.3d 512. In addition to the aforementioned cases, a useful discussion of the standard and its effects is found in Emergency One, Inc. v. Waterous Co., 23 F. Supp. 2d 959, 967-68 (E.D. Wis. 1998). Notwithstanding the current expansive jurisdiction of federal antitrust law, the predominance standard essentially rests on the presumption that either state or federal law should apply in a given antitrust action, but not both. See Emergency One, Inc., 23 F. Supp. 2d at 967.

\textsuperscript{15} E.g., Fed. Trade Comm’n, 62 F. Supp. 2d at 52 (interpreting Utah’s Unfair Trade Practice Act to hold that a “violation, not just the end location of the product at issue, must have occurred intrastate for the statute to apply”).

\textsuperscript{16} See Abbott Labs., 746 So. 2d 316; Archer Daniels Midland Co., 746 So. 2d 966; see also Young v. Seaway Pipeline, Inc., 576 P.2d 1148, 1150-51 (Okla. 1977) (holding that the state did not have subject matter jurisdiction over an interstate conspiracy in restraint of trade).

\textsuperscript{17} See In re TFT-LCT (Flat Panel) Antitrust Litig., 599 F. Supp. 2d 1179, 1188 (N.D. Cal. 2009) (“[T]he Mississippi Antitrust Act requires some allegations of intrastate conduct . . . .”); California v. Infineon Techs. AG, 531 F. Supp. 2d 1124, 1158 (N.D. Cal. 2007) (”[T]he Mississippi Antitrust Act should be construed to require allegations of at least some activity or conduct occurring in intrastate commerce or trade.”).
State Antitrust Statutes Bound by Their Original Scope

The issue is further convoluted for statutes that lack the benefit of a state supreme court ruling on the issue. In such cases, federal courts decide claims by predicting what state courts would hold if they heard the issue. Unsurprisingly, they often come to conflicting opinions when interpreting a state statute. Moreover, without the clarity of final state court resolutions, federal courts managing multidistrict litigation must not only oversee claims brought by multiple states, but also relitigate the same claim of statutory scope for each state statute in a single case. Accordingly, the effect of 1890s-era language on state antitrust statutes varies significantly, both between and within states.

Federal law is of little assistance in this debate, as national antitrust laws do not preempt the antitrust efforts of states in any substantive way. Modern dormant Commerce Clause jurisprudence is equally unavailing. It will only invalidate nondiscriminatory state statutes if their burden on interstate commerce is "clearly excessive" in relation to their intrastate benefits. Consequently, court holdings that curtail state antitrust enforcement via the

18. In the absence of a state supreme court opinion, the jurisdictional limits of state antitrust statutes can "be measured against a number of yardsticks." Emergency One, Inc., 23 F. Supp. 2d at 967. Many state antitrust statutes lack such a holding. See, e.g., LA. STAT. ANN. §§ 51:121 to 122 (2003 & Supp. 2016); ME. STAT. tit. 10, § 1101 (2009); N.J. STAT. ANN. §§ 56:9-3 to -4(a) (West 2012); N.C. GEN. STAT. § 75-1 (2015).

19. For example, some federal courts addressing Mississippi's antitrust statute have dissented from the general consensus that its statute requires only some level of intrastate conduct. Compare In re Graphics Processing Units Antitrust Litig., 540 F. Supp. 2d 1085, 1099 (N.D. Cal 2007) ("Mississippi law requires that the majority of an antitrust conspiracy occur within the state."); with In re Flat Panel Antitrust Litig., 599 F. Supp. 2d at 1188 (adopting a standard requiring at least some conduct to be intrastate for Mississippi). Likewise, federal courts have interpreted South Carolina's antitrust statute in conflicting ways. Compare Robinette Hardware Co. v. Square D Co. (In re Wiring Device Antitrust Litig.), 498 F. Supp. 79, 85 (E.D.N.Y. 1980) ("Exclusion of interstate commerce from the scope of section 39-3-10 reflects the well-established South Carolina policy against enforcing state statutes which may impose an undue burden on interstate commerce."); and Three J. Farms, Inc. v. Alton Box Bd. Co., No. 78-1257, 1978 WL 1459, at *6 (D.S.C. Nov. 29, 1978) (holding that the South Carolina antitrust statute's "application was limited many years ago to exclude activities having an effect upon interstate commerce");, with Welch in v. Tenet Healthcare Corp., 366 F. Supp. 2d 338, 353 n.19 (D.S.C. 2005) (holding that South Carolina's antitrust law is not limited to intrastate commerce), and In re Linerboard Antitrust Litig., 223 F.R.D. 335 (E.D. Pa. 2004) (allowing application of South Carolina's antitrust statute against a national trade restraint).


21. See California v. ARC Am. Corp., 490 U.S. 93, 101-02 (1989) (holding that Congress has not preempted state antitrust laws, even when those laws are more stringent or expansive than federal law); see also Adkinson, supra note 7, at 291 (noting that courts have "refused to significantly limit" state antitrust statutes via the Supremacy Clause).

dormant Commerce Clause are extremely rare. When this highly deferential standard is compared to the diverse interstate constraints contemplated by state courts, the potentially massive effect of the current debate over these statutes’ original scope is clear: a court’s interpretation of the issue can effectively determine if a statute has no application in modern commerce or a very robust operation. Indeed, this debate is decisive as to where a state statute will fall between these two points.

The lack of uniformity among modern courts is not surprising. Legislative histories for these statutes are largely nonexistent; the Supreme Court’s dormant Commerce Clause jurisprudence around the turn of the twentieth century was convoluted; and litigants rarely challenged these statutes on dormant Commerce Clause grounds before the 1980s, limiting the early judicial record. While general analyses of the historical boundaries of state antitrust statutes exist, scholars typically do not employ historical examination as a lens for understanding the modern scope of these laws. Instead, most scholarship is content to note that turn-of-the-twentieth-century dormant Commerce Clause jurisprudence was so different from the constitutional constraints of today that an examination of original scope is unhelpful for determining modern jurisdiction. While such conclusions may be useful in pressing the case for broader state enforcement, they are irrelevant for states that must divine original scope.

In light of this confusion, this Note proposes a framework for properly understanding when courts considered an antitrust violation to be “intrastate” within the context of the dormant Commerce Clause. Specifically, it argues that modern courts should interpret relevant statutes—that is, those with geographically limiting language enacted during statutory antitrust enforcement’s “formative period” of 1890 to 1915—using a “restraint-
focused” standard, which asks whether the restraint itself crossed state borders. Under this standard, out-of-state or multistate restraints fall outside of a state’s authority, with the exception of a local corporate subsidiary’s intrastate implementation of a national restraint. While this standard falls on the restrictive end of current interpretations, it reconciles much of the complex jurisprudence in the formative period, presenting a historically faithful avenue for states to apply their statutes through the lens of original scope.

Before discussing this Note’s outline, two caveats are in order. First, major debates exist over both the propriety of original scope interpretations—i.e., intentionalism and textualism—and the net benefit of state antitrust enforcement in the modern era. Such first-order debates are outside of this Note’s scope. This Note does not question state decisions to abide by original statutory scope. It also prioritizes historical faithfulness over a normative case for expanding or contracting state antitrust enforcement.

Second, this Note’s proposal is only relevant for states that limit antitrust statutes to their formative-period scope. To be sure, many states have updated the jurisdictional reach of their antitrust laws over the last century. Other states have dodged the debate entirely by ignoring any geographically limiting language or legislative expectations and instead, have expanded their antitrust


31. Additionally, courts that adhere to legislative intent interpretations could use this standard on antitrust statutes that lack limiting language.


33. Compare ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 82 (2012) (arguing that interpreting statutes via the original public meaning of their text is the “only approach to text that is compatible with democracy”), with WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 108 (1994) (arguing that statutes should be adapted “to new circumstances . . . even when the interpretation goes against as well as beyond original legislative expectations”).

34. See infra note 147.

35. See, e.g., The Illinois Antitrust Act, 1965 Ill. Laws 1943 (codified as amended at ILL. COMP. STAT. 10/1-10/12 (2010)) (replacing the state’s 1891 antitrust statute); The Missouri Antitrust Law, 1973-75 Mo. Laws 901 (codified as amended at MO. REV. STAT. § 416.131(4) (2016)) (amending the state antitrust statute to apply to direct restraints on interstate commerce); Olstad v. Microsoft Corp., 700 N.W.2d 139, 156 (Wis. 2005) (holding that the Wisconsin legislature’s extensive amendments to the state’s antitrust statutes in 1980 removed the intrastate limitations present in the state’s formative-period statute). It should be noted that in addition to these states, Pennsylvania has never enacted an antitrust statute, despite several failed attempts. Instead, Pennsylvania courts simply continue to use common law, attaching it to federal jurisprudence. Because the state does not have a statute to question, its antitrust enforcement does not face the same challenges concerning scope as do the states discussed in this Note. See 3 ABA SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES 41-1 to -23 (Rocky C. Tsai et al. eds., 5th ed. 2014).
laws to the edges of the modern dormant Commerce Clause. Naturally, these cases are irrelevant to this discussion.

This Note simply clarifies the role that states played when they enforced their antitrust laws during the formative period. Based on this original understanding, it establishes a standard for when courts should consider trade restraints "intrastate" and therefore subject to state jurisdiction. Accordingly, this standard can be dispositive in states that clarify original scope through this boundary, whether through statutory text or legislative intent. For courts that utilize other criteria for statutory interpretation, this standard can still be informative as to the jurisdictional outlines of antitrust statutes that date back to the formative period.

The remainder of this Note proceeds as follows: Part I explores the relationship between state antitrust enforcement and the dormant Commerce Clause during the formative period. In particular, it observes that courts allowed states to significantly affect interstate commerce, often to the point of overlap with federal regulations, when enforcing antitrust statutes. Part I concludes that the question of state jurisdiction primarily turned on whether the restraint itself crossed state borders. Part II bridges the gap between the formative period and the present, identifying key areas of doctrinal shift and the modern applications of state antitrust statutes. Part II then discusses modern state supreme court cases that interpreted the original scope of Alabama and Tennessee's antitrust statutes. The interpretations of these courts produced very different conclusions regarding the original scope of their statutes, offering a chance to analyze the shortcomings of two prominent interpretations of the issue. Part III builds on the holdings of formative-period courts to argue for a restraint-focused standard as a superior, more historically faithful alternative for enforcing the original scope of state antitrust legislation.

I. The Commerce Clause Contours of Early Antitrust Enforcement

Historical dormant Commerce Clause doctrine is critical to understanding the original scope of state antitrust statutes enacted during the formative period. During this time, thirty-five states passed antitrust statutes and brought dozens of actions against local and national forces, developing a small body of case law. Because of the dearth of historical materials regarding formative-period state legislation, these court decisions constitute the most complete early

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37. See May, supra note 8, at 498-502.
discussions of state antitrust statutes and frequently direct modern courts' understanding of original scope. 38

The following section utilizes this case law to clarify when states had jurisdiction over a trade restraint. It builds on the well-established proposition that states had jurisdiction over intrastate affairs by positing that the formative-period definition of "intrastate affairs" was quite expansive when applied to trade restraints. Courts were more reserved in their deployment of the dormant Commerce Clause against state antitrust enforcement, because states were allowed to exert a significant level of "indirect" influence on interstate commerce and trade restraints were often one step removed from the interstate transportation of goods. Indeed, courts occasionally stated that certain restraints fell under the jurisdiction of both federal and state law. After examining the three major areas of challenge to state jurisdiction—restraints prior to the shipment of products, restraints after shipment, and restraints implemented by local subsidiaries—this Note concludes that the question of state jurisdiction often turned on whether the restraint itself crossed state borders.

Broadly, dual sovereignty—the presumption that states should regulate local affairs while the federal government should regulate interstate commerce—was the prevailing theory of Commerce Clause federalism around the turn of the twentieth century. 39 The Supreme Court aptly described the doctrine in its first federal antitrust case: "Congress and the State cannot occupy the position of equal opposing sovereignties . . . . That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state." 40 The Court's decisions on the constitutionality of state laws under the dormant Commerce Clause generally focused on whether the statute had an "indirect" or "direct" impact on interstate commerce. 41 Under this standard, a state's exercise of police power was valid so long as the effect on interstate commerce was indirect. 42

During the formative period, dual sovereignty formally underpinned both state antitrust statutes and the Sherman Act, the legislative backbone of federal antitrust policy. 43 Prior to the passage of the Sherman Act in 1890, states

38. See supra note 11.
40. United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (holding that the Sherman Act did not apply to manufacturing restraints within a single state). For a discussion of the case, see infra Section I.A.
41. TRIBE, supra note 10, at 408.
42. Congruently, Congress could regulate interstate commerce directly, but it could not expand beyond commercial regulation into the realm of state police power.
assumed the role of regulating trade restraints, initially through common law\textsuperscript{44} and later through statutes.\textsuperscript{45} Given that monopolists' activities extended into the regulatory domains of both the states and the federal government, however, states could not effectively regulate these restraints alone. Congress enacted the Sherman Act to supplement state enforcement, reaching those restraints that no single state could dismantle.\textsuperscript{46} While debating the Sherman Act, members of Congress repeatedly reiterated this cooperative purpose.\textsuperscript{47} The House Judiciary Committee Report, issued shortly before the Act's final passage, illustrates formative-period views on the relationship between antitrust enforcement and dual sovereignty:

Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States . . . . It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies.\textsuperscript{48}

On the surface, the dividing line seemed simple: states would regulate intrastate restrictions, while Congress would manage interstate restrictions.\textsuperscript{49} And yet, courts had difficulty determining when a state regulation's effect on interstate commerce rose to the level of "direct." Prior to the New Deal, the definition of "commerce" was generally limited to mercantile and

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  \item The common law cases generally involved private parties, rather than the state itself. See, e.g., Chapin v. Brown, 48 N.W. 1074 (Iowa 1891); Anderson v. Jett, 12 S.W. 670 (Ky. 1889); India Bagging Ass'n v. B. Kock & Co., 14 La. Ann. 168 (1859); People v. Sheldon, 34 N.E. 785 (N.Y. 1893); Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666 (1880); Nester v. Cont'l Brewing Co., 29 A. 102 (Pa. 1894); Tex. Standard Oil Co. v. Adoue, 19 S.W. 274 (Tex. 1892); Milwaukee Masons' & Builders' Ass'n v. Niezerowski, 70 N.W. 166 (Wis. 1897); see also Vulcan Powder Co. v. Hercules Powder Co., 31 P. 581, 581-83 (Cal. 1892) (offering an explanation of why California moved from common law to statutory regulation); Bailey v. Ass'n of Master Plumbers, 52 S.W. 853 (Tenn. 1899) (finding violations via statute and common law).
  \item See supra note 8. In addition to antitrust statutes, states also deployed their corporate laws to combat trusts and combinations. See infra Section I.C.
  \item E.g., 21 Cong. Rec. 2614 (1890) (statement of Sen. Coke) (noting that "Congress has not the power to deal fully with this subject" and that states will be drawn to pass similar legislation); id. at 2469-70 (statement of Sen. Reagan) (observing the need for state supplementation to fully combat monopolistic practices); see also 20 Cong. Rec. 1460 (1890) (statement of Sen. George) (noting the limited Commerce Clause power of the Federal government); Bork, supra note 39, at 31-35 (describing the congressional assumption of state supplementation in antitrust regulation).
  \item PROTECTION OF TRADE AND COMMERCE AGAINST UNLAWFUL RESTRAINTS AND MONOPOLIES, H.R. REP. NO. 1707, at 1 (1890).
  \item There is general scholarly consensus on this distinction. See, e.g., Michael DeBow, State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY, supra note 7, at 267, 269 ("According to the original understanding, the division of labor between federal and state antitrust statutes and enforcers was straightforward: State enforcement was directed at local, intrastate violators, and federal authorities could reach business behavior that restrained interstate trade.").
\end{itemize}
transportation activities.\textsuperscript{50} Because states often regulated subjects closely linked to these activities—manufacturing, for example—the effects of state laws frequently reverberated into interstate commerce.\textsuperscript{51} As such, the limits of state authority under the dormant Commerce Clause generated frequent litigation during the formative period. Admittedly, a few cases went straight to the heart of interstate commerce. For example, the Supreme Court was quick to strike down state attempts to regulate the actual transportation of goods and persons between states, subject to a few exceptions.\textsuperscript{52} Additionally, the formative-period Court occasionally held certain subjects, like insurance and securities sales, to be exclusively within state control, because no "goods" were being transported.\textsuperscript{53} Such holdings frequently enlarged the scope of state antitrust enforcement.\textsuperscript{54}

Outside of these cases, however, state jurisdiction under the dormant Commerce Clause was a "judicial question often of much difficulty."\textsuperscript{55} The major constitutional disputes relevant to antitrust enforcement in this area primarily occurred in three situations: regulations on goods before they were

\begin{footnotes}
\footnote{50. See, e.g., \textit{The Federalist} No. 17, at 101 (Alexander Hamilton) (Modern Library ed., 2000) (noting that agriculture was a matter of local concern and not of the federal government); \textit{The Federalist} No. 21, at 127 (Alexander Hamilton) (Modern Library ed., 2000) (referring to commerce, arts, and industry as distinct); \textit{see also} \textit{United States} v. \textit{Lopez}, 514 U.S. 549, 584-600 (1995) (Thomas, J., concurring) (discussing the subject matter distinctions that existed in the Court's pre-New Deal Commerce Clause jurisprudence).}
\footnote{51. See, e.g., Hennington \textit{v.} Georgia, 163 U.S. 299, 317 (1896) (holding that a Georgia statute forbidding freight trains from running on Sundays was a constitutional exercise of state police power). Similarly, the effects of congressional statutes often expanded past interstate commerce and into state police power. See, e.g., \textit{United States} v. \textit{Dewitt}, 76 U.S. (9 Wall.) 41 (1869) (striking down a federal ban on certain types of lamp oil, because it would encroach on the state police power).}
\footnote{52. See, e.g., \textit{Kelly} v. \textit{Rhoads}, 188 U.S. 1, 8 (1903) (invalidating a state tax on interstate goods being transported through the state); \textit{In re State Freight Tax}, 82 U.S. (15 Wall.) 232, 282 (1872) (holding the same). \textit{But see} \textit{Nashville} \textit{v. Alabama}, 128 U.S. 96, 98, 101 (1888) (upholding an Alabama law requiring rail workers to undergo testing for "color-blindness and defective vision" because it "only affects [interstate commerce] incidentally, and therefore cannot be called, within the meaning of the constitution, a regulation of commerce"); \textit{Sherlock} \textit{v. Alling}, 93 U.S. 99, 104 (1876) (holding that where Congress has not regulated the tort liability of participants in interstate commerce, state laws can govern).}
\footnote{53. \textit{Paul} \textit{v. Virginia}, 75 U.S. (8 Wall.) 168, 183 (1868) ("Such [insurance] contracts are not inter-state transactions, though the parties may be domiciled in different States."); \textit{see also} \textit{Hall} \textit{v. Geiger-Jones Co.}, 242 U.S. 539, 552 (1917) (noting the "intangibility" of securities). However, a state did not have jurisdiction when its citizen signed an insurance contract outside the state with a foreign corporation. \textit{See Allgeyer} \textit{v. Louisiana}, 165 U.S. 578 (1897).}
\footnote{54. \textit{State} \textit{v. Phipps}, 31 P. 1097, 1098 (Kan. 1893) (upholding antitrust enforcement against a horizontal combination of out-of-state corporations who sold insurance in state because "issuing a policy of insurance is not a transaction of commerce"); \textit{Fire Ins. Co. v. State}, 22 So. 99 (Miss. 1897) (holding the same). \textit{But see} \textit{Queen Ins. Co. v. State}, 24 S.W. 397 (Tex. 1893) (holding that insurance was not trade within the meaning of the Texas antitrust statute). It should be noted that the Texas case dealt with a statute that did not encompass insurance trusts. \textit{See} \textit{Act of Mar. 30, 1889, ch. 117, 1889 Tex. Gen. Laws} 141. Indeed, the Texas court’s conclusion regarding the Commerce Clause was identical to those of Kansas and Mississippi. \textit{Queen Ins. Co.}, 24 S.W. at 401 ("It is only by a strained construction that the word 'commerce' can be made to embrace the business of insurance . . . . [Insurance] is an aid to commerce, but not commerce itself; nor is it an article of commerce.").}
\end{footnotes}
physically shipped, regulations after goods had arrived in the state, and state regulatory powers over corporate actors.

A. Prior to Shipment

The Supreme Court was reluctant to restrict the state regulation of goods when physical transportation had not actually begun.\textsuperscript{56} The Court did hold that federal antitrust laws could apply to trade restraints that were made prior to shipment, but only when the restraint directly concerned the sale of goods in multiple states.\textsuperscript{57} In those situations, it was the contract in restraint of trade itself, rather than the good, that established the interstate link. Other than agreements that "had a direct, immediate and intended relation to and effect upon" the sale of an article of interstate commerce, however, states had exclusive control.\textsuperscript{58}

This control enabled states to exert a significant level of "indirect" influence over interstate trade, including and extending beyond antitrust regulation. Most relevant to antitrust analysis was the authority of states over modes of commercial production, such as manufacturing or agriculture. Both before and during the formative period, it was understood that this state power was nearly absolute as far as the dormant Commerce Clause was concerned. In \textit{Kidd v. Pearson}, the Supreme Court upheld an Iowa statute banning the manufacture of all alcohol.\textsuperscript{59} The Court observed that if the Commerce Clause power extended to a ban on manufacturing, then Congress could "regulate, not only manufacture, but also agriculture, horticulture, stock-raising, domestic fisheries, mining—in short, every branch of human industry.... [I]nterests which in their nature are, and must be, local in all the details of their successful management."\textsuperscript{60} The holding affirmed state influence over production and other affairs that were tightly linked to commerce prior to shipment, even when such state influence could eliminate an entire product category from entering the stream of interstate commerce. It also strongly suggested that the Court might prohibit Congress from regulating manufacturing.

The expansive state jurisdiction embodied in these holdings is also illustrated in congressional debates over the Sherman Act. In spite of the

\textsuperscript{56} See, e.g., \textit{Coe v. Errol}, 116 U.S. 517 (1886) (upholding a municipal tax in New Hampshire on lumber that would be exported, because it was not in actual transit at the time of taxation).

\textsuperscript{57} \textit{Addyston Pipe & Steel Co. v. United States}, 175 U.S. 211 (1899). The Court did maintain that federal enforcement could not apply to similar contracts that concerned intrastate shipments. \textit{Id.} at 246-48.

\textsuperscript{58} \textit{Id.} at 243; see also \textit{Cincinnati, Portsmouth, Big Sandy & Pomeroy Packet Co. v. Bay}, 200 U.S. 179, 183-84 (1906) (holding that the Sherman Act did not apply to contracts that do not directly contemplate interstate commerce).

\textsuperscript{59} 128 U.S. 1 (1888).

\textsuperscript{60} \textit{Id.} at 21. The Court protected state control over production long before this holding. For an earlier example, see \textit{McCready v. Virginia}, 94 U.S. 391 (1876) (upholding a state restriction on the use of its oyster beds to in-state citizens, because "commerce has nothing to do with land while producing, but only with the product after it has become the subject of trade").
generally inconclusive nature of legislative history, these debates are a helpful reflection of formative period congressional views on the limited nature of Congress’s Commerce Clause power. Inferentially, they also illustrate congressional perceptions of expansive state jurisdiction prior to the interstate transportation of goods.

The Commerce Clause played a central role in congressional debates over the Sherman Act. Senator John Sherman, the Act’s namesake and a proponent of expansive Commerce Clause authority, included a ban on restraints of “production [or] manufacture” in his initial draft of the Act. This inclusion received a frosty reception in the Senate, whose members openly argued against any congressional authority to regulate manufacturing. Most notably, Senator James George espoused a more limited view of Congress’s Commerce Clause power, citing Kidd for the proposition that Congress did not have jurisdiction “until transportation has actually commenced.”

Critically, these debates altered the legislation to the benefit of state enforcement. Senator George and his allies successfully referred the bill to the Judiciary Committee, which rewrote it by removing the specific assertions of congressional authority and adopting general terms for courts to interpret as they saw fit. Despite vehemently disagreeing with the changes, Senator

61. See SCALIA & GARNER, supra note 33, at 376-78. Adding to the already existing complications of using legislative records in statutory interpretation is the Sherman Act’s specific history. Congress substantively amended the Act shortly before passage, but did not debate it extensively following the changes, which limited the legislative record. See THOMAS D. MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS 25, 29 (5th ed. 2014).

62. See JOHN J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 70 (1964) (“[T]he Senate debates are . . . relevant evidence as to the then prevailing view of the constitutional effect of the commerce clause upon state and federal antitrust jurisdiction.”); accord Clark L. Hildabrand, Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now, 16 TRANSACTIONS 67, 67-68 (2014). While the debate focused almost entirely on the affirmative Commerce Clause powers of Congress, Senator Sherman did observe that the state of New York could take action against a local implementation of a multistate combination. 21 CONG. REC. 2459 (1889).

63. 20 CONG. REC. 1459 (1889) (reporting the language in Senator Sherman’s initial draft).

64. See Bork, supra note 39, at 32 (“There is ample evidence in the Congressional Record that the Fifty-first Congress took a limited view of the reach of the interstate concept . . . .”); Charles W. McCurdy, The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903, 53 BUS. HIST. REV. 304, 324-25 (1979) (“Speaker after speaker contended that [Senator Sherman’s] equation of the trusts . . . was entirely inappropriate. Quoting profusely from Supreme Court opinions, congressional authorities on constitutional law demonstrated that the federal bench had long maintained a rigid distinction between transportation and traffic, on the one hand, and production or manufacturing, on the other.”). See generally THORELLI, supra note 28, at 170-210 (providing a narrative of the Senate’s debate over the Sherman Act).

65. 20 CONG. REC. 1461 (1889).

66. McCurdy, supra note 64, at 325-27. Senate Judiciary Chairman George Edmunds stated that the amendments to the Sherman Act used “terms that were well-known to the law already” so that courts could determine its scope. 21 CONG. REC. 3147 (1890).

67. Senator Sherman warned that the amendments gutted the Act such that “[a]ll corporations can ride through or over it without fear of punishment or detection.” McCurdy, supra note 64, at 326.
Sherman begrudgingly supported the Act, which Congress enacted on July 2, 1890.68

These modifications were significant. Facing overwhelming fears that the Court would hold production to fall outside of its Commerce Clause authority, Congress surrendered control to the Judicial Branch before the fight even began.69 Initially, the Supreme Court agreed with Senator George’s limited view of federal power. Shortly after the Sherman Act’s passage, the Court held in United States v. E.C. Knight Co. that a horizontal combination controlling ninety-eight percent of the United States’ sugar refining industry was outside of the federal government’s jurisdiction because manufacturing was only indirectly related to commerce.70 From the Court’s perspective, the regulation of manufacturing restraints was more appropriately placed under the state police power.71

While the Court would gradually soften its stance throughout the formative period—for example, by broadening “commerce” to encompass livestock sales72 and manufacturing contracts that directly crossed state lines73—the Court continued to uphold state regulation of production activities,74 including in situations of antitrust violations.75 The state power to regulate goods prior to shipment, which predated the Sherman Act, was controlling law when states passed their formative-period antitrust statutes. The Sherman Act’s amendments, in conjunction with the Supreme Court’s early holdings, ensured that federal enforcement did not preempt state regulation in this area.

This history holds a key implication for modern analysis: the Court was concerned with the restraint itself, rather than the effects of the monopoly. Because the restraint in E.C. Knight concerned manufacturing and occurred before interstate commerce was implicated, the restraint was considered intrastate and, therefore, under state jurisdiction. That the monopoly’s physical products and trade effects would eventually cross state borders was of no concern. Moreover, even though the state hosting the trade restraint may not

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70. 156 U.S. 1, 16 (1895).
71. Id. at 12-13.
73. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).
74. See, e.g., Champlin Ref. Co. v. Corp. Comm’n, 286 U.S. 210, 235 (1932) (holding that oil extraction is production and precedes commerce); Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 178 (1923) (holding that “[m]ining is not interstate commerce, but like manufacturing, is a local business”); Capital City Dairy Co. v. Ohio, 183 U.S. 238, 245 (1902) (upholding state regulation on the manufacture and intrastate sale of oleomargarine because it occurred “before [the product] had become a subject of interstate commerce”).
75. See Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 136 (1923) (upholding a state law that required mandatory divestiture of cotton ginning operations because cotton gins “precede, but are not part of interstate commerce”).
have felt any negative effects, it was still allowed to take action. Even when a restraint of production was implemented by the local subsidiary of a multistate corporation, as was the case in *E.C. Knight*, the state or states hosting the manufacturing subsidiary had jurisdiction.\(^{76}\)

**B. After Delivery**

The boundaries of federalism were harder to discern when they involved state regulations over goods delivered from out-of-state entities. Well before the passage of the Sherman Act, the Court held that dormant Commerce Clause restrictions extended beyond transportation.\(^{77}\) It established a bright line for rejecting any state legislation that discriminated against foreign goods, such as those imposing additional taxes\(^ {78}\) or inspection requirements.\(^ {79}\) In addition, the Court prohibited states from interfering with business of a “federal nature,” which included most transportation between states,\(^ {80}\) areas protected by congressional statute,\(^ {81}\) and “drummers” incentivizing out-of-state sales.\(^ {82}\) In the Court’s eyes, these activities were directly integrated into interstate commerce.

Beyond these clear restrictions, the lines defining where “intrastate” ended and “interstate” began were blurry. For example, when considering state taxes, the Supreme Court typically allowed states to impose nondiscriminatory taxation the moment the product came to rest.\(^ {83}\) For other regulations, the Court generally drew the line at the time of storage or transfer of title in the receiving state.\(^ {84}\)

\(^{76}\) The defendant in *E.C. Knight*, the American Sugar Refining Co., was incorporated in New Jersey. The alleged trade restraint was the company’s acquisition of sugar refineries that were incorporated and based in Pennsylvania, including the E.C. Knight Company. See 156 U.S. at 2-3.

\(^{77}\) Cf. *Welton v. Missouri*, 91 U.S. 275, 282 (1875) (holding that Congress’s Commerce Clause authority continues to protect a product “even after it has entered the State”).


\(^{79}\) See, e.g., *Voight v. Wright*, 141 U.S. 62 (1891).

\(^{80}\) See supra note 52 and accompanying text.

\(^{81}\) Gibbons v. Ogden., 22 U.S. (9 Wheat.) 1 (1824). Technically, the general inability of states to conflict with congressional statutes concerns the Supremacy Clause rather than the dormant Commerce Clause. However, this preclusion did result in a restriction on state regulation of interstate commerce.

\(^{82}\) E.g., *Asher v. Texas*, 128 U.S. 129 (1888); *Robbins v. Taxing Dist.*, 120 U.S. 489 (1887).

\(^{83}\) Am. Steel & Wire Co. v. Speed, 192 U.S. 500, 519-20 (1904) (holding that goods from others states “were subject to state taxation after they had reached their destination and whilst held in the [s]tate for sale”); *Brown v. Houston*, 114 U.S. 622 (1855) (holding the same). In addition, the Court formally recognized that both federal regulatory authority and state taxation power would apply to goods expressly destined for shipment across state lines. Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 245-46 (1899). For a substantive list of case law surrounding state taxation power over goods shipped in interstate commerce, see Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1872 n.116 (2007).

\(^{84}\) Am. Steel & Wire Co., 192 U.S. at 520. The origins of this rule were established in *Leisy v. Hardin*, 135 U.S. 100 (1890), where the Supreme Court held that imported beer remained an
Perhaps because the restraint, the object of state antitrust regulation, was often one step removed from interstate activity, courts granted state antitrust statutes greater jurisdiction than other commercial regulations during the formative period. To be sure, courts typically refused to void contracts simply because the relevant good was affected by an out-of-state trade restraint. Restraints that crossed state lines were also immune from prosecution in the receiving state. Critical for modern analyses of original scope, a restraint’s location was much more relevant to the jurisdiction of state statutes than its effects on consumers, however substantial they may have been.

Still, states otherwise had expansive authority to regulate antitrust concerns. As with other commercial regulations, states could regulate items commingled in the general mass of property within the state, whether via intrastate sale, storage, or receipt by a local branch of a national corporation. Further, if an interstate transaction contained local restrictions, then courts allowed the state to deploy its antitrust statute. As Professor James May notes, “Although the sale and shipment themselves were deemed to be part of interstate commerce, the appended local restrictions were not, and their invalidity under local antitrust law was held to render the entire contract void and unenforceable.”

The Texas Supreme Court considered such a situation in *Fuqua v. Pabst Brewing Co.* There, a Wisconsin brewing company came to an illegal agreement with a Texas distributor to limit the sale of its beer within the state. Specifically, the contract stipulated that the distributor would not sell or consign the beer of any of the brewery’s competitors. Even though the goods were shipped across state lines, the court held that the local restrictions constituted a vertical restraint, rendering the foreign seller liable under Texas’s antitrust statute. As a result, the contract was void.

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article of interstate commerce outside of state regulatory authority until it was disposed of in the receiving state.

85. *E.g.*, Frank A. Menne Factory v. Harback Bros., 107 S.W. 991, 992-93 (Ark. 1908); *see also* Akin v. Butler St. Foundry & Iron Co., 66 N.E. 349, 353 (Ill. 1903) (holding that Illinois’s antitrust statute only applied to restraints within the state’s borders). At least one state, Missouri, took exception to this rule. *See First Nat. Bank v. Mo. Glass Co.*, 152 S.W. 378, 381 (Mo. Ct. App. 1912) (quoting *State ex rel. Hadley v. Standard Oil Co.*, 116 S.W. 902, 1013 (Mo. 1908)) (“It is wholly immaterial where the unlawful conspiracy was entered into, or the means by which it was formed, if ... the commodities are sold in this state in pursuance to such conspiracy—then the vendors are violators of our law ...”). However, it appears to be an outlier.


87. *See, e.g.*, Standard Oil Co. v. State, 65 So. 468, 470 (Miss. 1914); Standard Oil Co. v. State, 100 S.W. 705, 712 (Tenn. 1907).

88. May, *supra* note 8, at 520 (emphasis added).

89. 38 S.W. 29 (Tex. 1896).

90. *Id.* at 29.

91. *Id.*

92. *Id.* at 30-31.

93. *Id.*

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regularly exercised jurisdiction over and refused to respect agreements that contained local trade restraints, even when they concerned interstate transactions.94

The Supreme Court agreed that the Constitution granted states this power, affirming the distinction between intrastate trade restraints and attached interstate transactions. In the 1898 case Hopkins v. United States, the Court held that the Sherman Act did not extend to an alleged trade restraint between individuals who sold consigned cattle owned by out-of-state sellers and shipped across state lines, because the restraint did not directly affect interstate commerce.95 While the Court acknowledged that the cattle were articles of interstate commerce, it held that "it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce . . . ."96 In essence, the Sherman Act did not necessarily apply, even when the restraint involved the sale of a good shipped in interstate commerce and affected the good's final price. Because the restraint itself was not interstate, the Court considered it to be an attached local restraint.

The Court reiterated this reasoning when considering a state statute in Standard Oil Co. v. Tennessee.97 There, it concluded that Tennessee's antitrust statute applied to an out-of-state company's act of sending an agent into the state to convince local merchants to cancel orders from out-of-state competitors, because the local restraint was only indirectly related to commerce.98 Again, even though the restraint dealt exclusively with goods shipped in interstate commerce and involved out-of-state parties, the Court held that the state should have jurisdiction because the restraint was local.

In short, a good's classification as an article of interstate commerce was neither sufficient to establish federal jurisdiction, nor fatal to state jurisdiction over alleged trade restraints during the formative period. Instead, courts regularly focused on the restraint, and specifically whether it directly or indirectly affected interstate commerce, in their determination of state statutory jurisdiction.

94. E.g., Commonwealth v. Strauss, 78 N.E. 136, 136 (Mass. 1906) (holding that a contract restricting a Massachusetts vendor from selling goods from anyone other than a single out-of-state manufacturer constituted an illegal vertical restraint under state law); Standard Oil Co. v. State, 65 So. 468, 470 (Miss. 1914) (holding that Mississippi's antitrust statute could apply to a territorial restraint between out-of-state Standard Oil subsidiaries, so long as the restraint itself was intrastate in nature); Segal v. McCall Co., 184 S.W. 188, 189-90 (Tex. 1916) (concluding that a contract between a New York manufacturer and Texas vendor that restricted local resale prices constituted illegal price maintenance in violation of the state antitrust act); Pasteur Vaccine Co. v. Burkey, 54 S.W. 804, 805-06 (Tex. Civ. App. 1899) (finding that an otherwise interstate contract that restricted a local merchant's sales to specific counties in Texas constituted an illegal territorial restraint in violation of state law).
95. 171 U.S. 578 (1898).
96. Id. at 591; cf. Anderson v. United States, 171 U.S. 604, 615-16 (1898) (noting in dicta that the Sherman Act could not apply to constraints that did "not directly relate to and act upon and embrace interstate commerce").
97. 217 U.S. 413 (1910).
98. Id. at 422.
C. Distinguishing Doctrinal Overlap: Quo Warranto Suits

Perhaps the largest formative-period overlap between state and federal antitrust enforcement occurred via the expansive state power to regulate the intrastate activities of corporations and sue for violations in *quo warranto* actions. These cases allowed states to effectively broaden the reach of their enforcement beyond what the formative-period dormant Commerce Clause allowed in suits against individuals. Accordingly, a brief discussion of *quo warranto* cases helps to clearly define the original scope of state antitrust statutes. Generally, these suits are indicative of the formative period judiciary’s comfort with state antitrust actions that produced large extraterritorial effects. They also illustrate the contemporary understanding of the broad control that states wielded over corporations and local subsidiaries within their borders, although *quo warranto* actions were certainly not the only source of this authority.99

During the formative period, the Supreme Court did not recognize a corporate right to intrastate commerce.100 If a company wished to engage in intrastate commerce, such as producing goods or otherwise establishing a physical presence in a state, it had to receive recognition from that state.101 States, in turn, often conditioned this recognition on the company’s adherence to a variety of restrictions, such as limitations on its capital or operational scope.102 If a corporation violated these restrictions, states could initiate a *quo warranto* action to revoke that corporation’s charter or license to do business in the state.103

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99. It was expected that states would take action against monopolistic consolidations by individual corporations. See McCurdy, *supra* note 64, at 304-05. By contrast, it was unclear—even doubtful—that the federal government had the authority to prosecute these consolidations during the first half of the formative period. See United States v. E.C. Knight Co., 156 U.S. 1, 16 (1895) (holding that the Sherman Act did not attempt to deal with monopolistic combinations “directly” and was not intended to “limit and restrict the rights of corporations created by the states . . . in the acquisition, control, or disposition of property; or to regulate or prescribe the price or prices at which such property or the products thereof should be sold; or to make criminal the acts of persons . . . which the states of their residence or creation sanctioned or permitted”); *In re Greene*, 52 F. 104, 112-13 (S.D. Ohio 1892) (“[C]ongress certainly has not the power or authority under the commerce clause, or any other provision in the constitution, to limit and restrict the right of corporations created by the state . . . in the acquisition, control, and disposition of property.”). In fact, states functioned as the only barrier against the monopolistic effects of corporate consolidations—nearly all of which acted in interstate commerce—until the Supreme Court’s 5-4 opinion in *Northern Securities Co. v. United States*, 193 U.S. 197, 347-48 (1904), which held that the Sherman Act could prohibit monopolistic consolidations even when sanctioned by state laws. Still, this expansion did not abridge the traditional power of states over corporations. States still pursued *quo warranto* actions against monopolistic combinations throughout the formative period.

100. Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1869) (holding that the state regulation of an out-of-state insurance company did not violate the dormant Commerce Clause).


102. McCurdy, *supra* note 64, at 305.

103. See *id.* But see Clark L. Hildbrand, *supra* note 62, at 84-86 (noting reluctance on the part of state enforcers to pursue claims against monopolies for fear of losing the political support of certain industries).
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This authority fit neatly within the goals of antitrust enforcement. With one exception, state laws prohibited corporations from surrendering control of their operations to trusts or holding companies via stock transfers.\textsuperscript{104} As such, the combination of firms into trusts was beyond the powers granted to corporations in their charters. Quo warranto actions gave individual states the ability to nullify cross-border consolidation agreements and rescind the charters of corporations located within their borders that violated these limits.\textsuperscript{105} Multiple states flexed this authority even before the Sherman Act's passage. In 1887, Louisiana sued the Cotton Oil Trust, chartered in New York, on the theory that its interest in Louisiana-chartered corporations amounted to an illegal operation by an unincorporated entity.\textsuperscript{106} State courts agreed, enjoining the trust from operating in Louisiana.\textsuperscript{107} Five other states launched similar suits prior to the Sherman Act's enactment, all of which were eventually successful.\textsuperscript{108} Ten more states brought dozens of other suits against the major combinations during the remainder of the formative period.\textsuperscript{109}

Additionally, states often required that corporations agree to adhere to their antitrust laws in all of their operations as a prerequisite for recognition.\textsuperscript{110}

\textsuperscript{104} New Jersey revised its corporate law five times between 1888 and 1893 to allow holding companies to enjoy both legal status in the state and the power to hold the stock of firms chartered in other states. Act of Apr. 4, 1888, ch. 269, 1888 N.J. Laws 385; Act of Apr. 17, 1888, ch. 295, 1888 N.J. Laws 445; Act of May 9, 1889, ch. 265, § 4, 1889 N.J. Laws 412,414; Act of Mar. 14, 1893, ch. 171, 1893 N.J. Laws 301. The fact that New Jersey allowed such action did not prevent other states from taking action against businesses chartered under their laws, even if they combined with a corporation in New Jersey. See Cent. Transp. Co. v. Pullman's Palace Car Co., 139 U.S. 24, 54 (1891) (holding that a consolidation contract is only binding if it is within the corporate powers of all parties).

\textsuperscript{105} McCurdy, supra note 64, advances this argument to a great degree, arguing that the quo warranto power was the primary vehicle through which the Supreme Court initially believed trust busting would occur. Under McCurdy's reasoning, \textit{E.C. Knight Co.} was actually the Supreme Court's attempt to continue utilizing state power over corporations as the primary vehicle for antitrust enforcement. \textit{Id.} at 308.

\textsuperscript{106} Bill Filed by the State of Louisiana in the Proceeding Against the American Cotton Oil Trust, 1 Railway & Corp. L.J. (L.K. Strouse & Co.), at 406-08 (1887).

\textsuperscript{107} The final decision of the case was not published. It was discussed in \textit{Thorelli, supra} note 28, at 79, and reproduced in \textit{id.} app. VI at 615.

\textsuperscript{108} People v. Am. Sugar Ref. Co., 7 Railway & Corp. L.J. (L.K. Strouse & Co.), at 83-86 (Cal. Super. Ct. 1890) (annulling a corporate franchise after it had surrendered control to the American Sugar Refining Company); People \textit{ex rel.} Peabody v. Chi. Gas Trust Co., 22 N.E. 798 (Ill. 1889) (enforcing a state statute restricting gas companies from purchasing and holding the stock of other gas companies even when the power was listed in the company's articles of association); People \textit{v.} N. River Sugar Ref. Co., 24 N.E. 834 (N.Y. 1890) (ordering the dissolution of a corporation in the state after it formed a trust in violation of its charter); State \textit{v.} Neb. Distilling Co., 46 N.W. 155 (Neb. 1890) (annulling the Nebraska Distilling Company's franchise because of its involvement with the Distillers' & Cattle Feeders' Trust); State \textit{ex rel.} Att'y Gen. \textit{v.} Standard Oil Co., 30 N.E. 279 (Ohio 1892) (enjoining corporate connections to the national Standard Oil Trust after it entered into a trust).

\textsuperscript{109} See \textit{Thorelli, supra} note 28, at 259-65. Interestingly, courts in some of these cases deemed license forfeiture too extreme and instead leveled civil fines against the corporations. \textit{E.g.}, State \textit{ex rel.} Crow \textit{v.} Armour Packing Co., 73 S.W. 645 (Mo. 1903). In effect, these states accomplished the same result they would have achieved through direct application of their antitrust statutes.

\textsuperscript{110} See, \textit{e.g.}, Act of March 23, 1903, ch. 140, § 2, 1903 Tenn. Pub. Acts 268, 268-69 (codified as amended at \textit{Tenn. Code Ann.} § 47-25-104 (2013)) (requiring forfeiture of a charter or license to do business for any corporation that violates Tennessee's antitrust statutes); \textit{see also} James May, \textit{The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust Enforcement}.
In *Hammond Packing Co. v. Arkansas*, Arkansas won a $10,000 judgment against an Illinois corporation for an alleged price-fixing conspiracy that neither occurred in nor had any effect upon Arkansas. The state argued that its *quo warranto* powers did not forbid acts done outside the state, but "simply forbade a corporation from continuing to do business within the state after it had done, either within or outside of the state, the enumerated acts." The Supreme Court agreed, holding that setting conditions for a corporate license was a "valid exertion of state power." It followed that Arkansas could essentially contract for whatever terms it desired without running afoul of the dormant Commerce Clause.

This broad *quo warranto* authority did not last. The Supreme Court eventually limited the states' more expansive applications of *quo warranto* actions, including suits that effectively attempted to regulate interstate commerce directly. Additionally, states voluntarily gutted their corporate charter regulations in an effort to attract corporations to their jurisdictions. Perhaps most critically, the prohibition against corporate ownership of stock—the foundation for many early state *quo warranto* suits—was subsequently legalized by every state. Accordingly, state *quo warranto* actions involving direct antitrust violations must be carefully parsed from those that stem from traditional corporate violations, such as illegal stock transfers. Suits considering the latter are not illustrative of the specific limits of state antitrust enforcement under the dormant Commerce Clause. While suits in the former category must contend with the Court's subsequent constitutional limitations, they still offer direct insight into the dormant Commerce Clause's limitations on state antitrust action against corporate subsidiaries. Further, both categories of cases still

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Policy, 59 ANTITRUST L.J. 93, 100 (1990) (describing the extraterritorial effect of this connection generally).

111. 212 U.S. 322 (1909).
112. *Id.* at 342.
113. *Id.* at 343. However, Arkansas could not interfere with the interstate commerce of those corporations beyond ouster. If a company wished to ship goods into the state directly to a purchaser, they were able to do so.
114. Frost v. R.R. Comm'n, 271 U.S. 583, 593-94 (1926) (holding that states cannot enforce charter conditions that require the relinquishment of constitutional rights); see also Terral v. Burke Constr. Co., 257 U.S. 529, 532-33 (1922) (holding that states cannot condition corporate charters on a waiver of a corporation's right to resort to federal courts).
117. See supra notes 104-109 and accompanying text.
118. Additionally, states bringing *quo warranto* suits under antitrust statutes typically had statutory links between their antitrust laws and *quo warranto* authority. The argument could be made that states would still need this statutory authority. While this potential complication is outside of this Note's scope, it is worth observing that the antitrust statutes of many states still carry the authority to revoke corporate charters and licenses. *See, e.g.*, ARK. CODE ANN. § 4-75-205(a) (2011); TENN. CODE ANN. § 47-25-104 (2013).
broadly illustrate states’ expansive formative period authority over corporate entities.

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As the foregoing analysis indicates, the broad outlines of dual sovereignty underpinned the federalism framework of antitrust enforcement.\footnote{119} Courts frequently observed that state statutes were confined to intrastate commerce\footnote{120} and scuttled attempts by state legislatures to directly regulate interstate commerce or the affairs of other states.\footnote{121}

And yet, court holdings recognized a jurisprudence for antitrust enforcement that was more complex than a simple dividing line at a state’s border. They established that state authority was broad and could occasionally overlap with federal laws. Due to the restrictive definition of interstate commerce at the turn of the twentieth century, courts initially found certain subjects within the ambit of modern commerce, most notably production, to be outside of the federal government’s jurisdiction.\footnote{122} Additionally, because states were still given authority to indirectly affect interstate commerce, the Supreme Court recognized several areas that Congress and the states could both regulate.\footnote{123} For example, even after the Court started expanding federal jurisdiction into production,\footnote{124} states did not lose power. Similarly, once the Court extended the Sherman Act to corporate consolidations, both state and federal law applied to corporate monopolies.\footnote{125} During the second half of the formative period, federal and state authorities often coordinated their prosecutions of monopolistic combinations.\footnote{126} Finally, where a contract shipped goods across state lines, but also contained local restraints, either government could rescind the whole contract as a restraint of trade.\footnote{127}

\footnote{119} See supra notes 39-40, 46-50 and accompanying text.
\footnote{120} See supra notes 85-86.
\footnote{121} Texas’s statute included perhaps the most egregious attempt at state overreach. It stated that the statute would reach any violations of its provisions “whether within or without the state.” Act of Mar. 30, 1889, ch. 117, § 9, 1889 Tex. Gen. Laws 141, 142. When striking that provision, a federal district judge held that the statute was “so absurd that a denial thereof is scarcely necessary.” In re Grice, 79 F. 627, 638 (C.C.N.D. Tex. 1897), rev’d on other grounds sub nom. Baker v. Grice, 169 U.S. 284 (1898). The judge continued that if the provision were valid then “it would be unnecessary for any other state or the nation at large to have any other laws upon the subject, as all persons within the limits of the United States could be regulated in their dealings and in the conduct of their business according to the wishes of the legislature of Texas.” Id. at 639. For other examples of federal courts quashing state attempts to regulate interstate commerce directly, see Cole Motor Car Co. v. Hurst, 228 F. 280 (5th Cir. 1915); and Hadley Dean Plate Glass Co. v. Highland Glass Co., 143 F. 242 (8th Cir. 1906).
\footnote{122} See supra notes 53-54, 59-60.
\footnote{123} See Williams, supra note 83, at 1851-53; see also May, supra note 8, at 517-21 (noting areas in which state governments were able to substantively “affect” interstate commerce).
\footnote{124} See supra notes 72-73.
\footnote{125} See supra note 99.
\footnote{126} See, e.g., Hildabrand, supra note 62, at 85-90.
\footnote{127} See supra note 94.
These areas of overlap were explicit in certain court opinions. For example, when applying its statute to the Standard Oil Company, the Mississippi Supreme Court held that a corporation "having for its object the creation of a monopoly in both the inter and intra state commerce in a commodity is necessarily subject to the laws both of the general government and of the states." Similarly, the Fuqua Court held that "the commerce clause of the constitution was not designed to protect the contractual rights of a person who thus voluntarily intermingles an otherwise legal interstate commerce transaction with an entirely local and unlawful one." Both courts recognized the overlap between interstate and intrastate authority, specifically distinguishing the intrastate restraint from the interstate transaction. In addition to its holdings that concurred with this distinction, the Supreme Court explicitly observed overlap, albeit at the end of the formative period. In a single opinion, it remanded a case to the New York Court of Appeals for a state violation, while acknowledging that the same action violated the Sherman Act.

These cases belie the assumptions that expansions in federal jurisdiction reduced state authority or that dual sovereignty resulted in an absolute division of authority between states and the federal government. Instead, they demonstrate that states had broad authority to regulate intrastate affairs. Indeed, they were acutely aware of their ability to take action against restraints over goods shipped in interstate commerce. Simply holding to a surface conception of dual sovereignty will not produce an accurate understanding of the dormant Commerce Clause’s limits on antitrust enforcement during the formative period. Instead, any examination should move beyond the specific transactions and examine the restraint itself.

II. Contextualizing Modern Debates over Jurisdictional Reach

A. Bridging the Gap Between the Formative Period and the Present

The Supreme Court departed from dual sovereignty during the 1930s and 1940s. Growing popular anger during the Great Depression pressured the Court

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128. In addition to court opinions, treatises during this time recognized certain areas of overlap in state and federal enforcement of commerce. See, e.g., ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 71-72 (1904); FREDERICK N. JUDSON, THE LAW OF INTERSTATE COMMERCE AND ITS FEDERAL REGULATIONS § 44 (1st ed. 1905).
129. Standard Oil Co. v. State, 65 So. 468, 470 (Miss. 1914).
130. 38 S.W. 29, 31 (Tex. 1896); see also Segal v. McCall Co., 184 S.W. 188, 190 (Tex. 1916) ("[W]hen the contract contains more . . . than a contract for interstate shipment, and embraces acts . . . which are not essential ingredients of an interstate shipment, it falls within the regulation of state law.").
131. See supra notes 95-98.
to take a broader stance regarding congressional jurisdiction. In a series of landmark cases, the Court eliminated the legal barriers between intrastate and interstate commerce, eventually supporting a test for congressional legislation that simply required the regulated activity to have a "substantial economic effect" on interstate commerce. In practice, the Court abdicated its role as a substantive scrutinizer of congressional activity, giving rise to highly expansive legislation.

The Supreme Court's view of state jurisdictional limits evolved as well. In the 1940s, the Court adopted an analysis that balanced the state's interests against national interests. The framework underlying this balancing test has carried over into modern dormant Commerce Clause analysis, including in cases involving state antitrust statutes. Courts now adhere to a very deferential two-part test, examining if (1) a statute unfairly discriminates against out-of-state commerce, and if it does not, (2) whether the statute's burden on interstate commerce is "clearly excessive in relation to the putative local benefits." As noted, this test has not substantively limited the extraterritorial application of state antitrust statutes.

Despite the relaxation of dormant Commerce Clause limits, state antitrust statutes did not see expansive use following the breakdown of dual sovereignty. Federal antitrust law, largely unencumbered by Commerce Clause restraints,
became the primary vehicle for antitrust enforcement following the New Deal, resulting in few challenges to state antitrust laws.\footnote{139} It was only in the 1980s that federal law’s monopoly over antitrust litigation began to wane. State action was catalyzed by the combination of limited federal enforcement by the Reagan Administration and court holdings that narrowed the Sherman Act.\footnote{140} State attorneys general and private plaintiffs began to litigate antitrust issues affirmatively, a practice that continues to this day.

State antitrust statutes function as one of the primary avenues of these efforts. While many of these statutes contain harmonization provisions that link them to federal antitrust jurisprudence,\footnote{141} state legislatures have nevertheless shown a willingness to carve out exceptions that correct for perceived limitations in federal antitrust policy.\footnote{142} Perhaps the most significant such exception can be seen in indirect purchaser suits: actions where a downstream purchaser sues an alleged antitrust violator who sold products through a middleman. In the 1977 case \textit{Illinois Brick Co. v. Illinois}, the Supreme Court concluded that indirect purchasers do not have standing under federal antitrust law, precluding a wide swath of otherwise meritorious claims against monopolistic practices.\footnote{143} Since the Court’s ruling, twenty-six states and the District of Columbia have responded by enacting “Illinois Brick Repealer” statutes to establish indirect purchaser claims under state law,\footnote{144} in addition to...
the two states that explicitly allowed for indirect purchaser claims before *Illinois Brick*.

Additionally, at least four state courts have held that indirect purchasers can litigate under state antitrust law without these statutory provisions.

Accordingly, this revival in state antitrust enforcement has had demonstrable implications for the landscape of antitrust enforcement, the net benefits of which are still hotly debated.

More relevant for the purposes of this Note, defendants facing antitrust charges under state laws have vociferously challenged the geographic jurisdiction of these statutes, arguing that they should be enforced only within their original, restricted scopes.

Because these statutes had limited appellate interpretation following the formative period, courts have been forced to grapple with the implications of dual sovereignty’s abandonment fifty-to-eighty years after it occurred. As noted, these deliberations have produced a confusing morass of case law, where widely different standards apply to nearly identical statutory language.

### B. Analyzing Existing Interpretations of the Dormant Commerce Clause

To contextualize the restraint-focused standard and highlight the deficiencies of existing interpretations, this Section discusses the Alabama and Tennessee Supreme Courts’ treatment of their respective state antitrust statutes’ original scopes. Alabama posited an exclusively intrastate conduct standard, while Tennessee applied a substantial effects rule. The decisions of the two courts are ideal case studies for this discussion. When considering the issue,

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145. *ALA. CODE § 6-5-60(a) (2014); MISS. CODE ANN. § 75-21-9 (2016).*


147. *Compare* Hildabrand, *supra* note 62, at 69 (arguing that dual enforcement via the federal government and states provides for greater consistency because antitrust enforcement does not hinge on a single federal agency), Hovenkamp, *supra* note 29, at 376-77 (noting that federal antitrust law has narrowed while state law has broadened, providing more options for litigation via state statutes), and Lamb, *supra* note 29, at 1716-18 (arguing that the broad construction of state antitrust statutes provides more thorough consumer protection), with Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. L. & PUB. POL’Y 5, 13 (2004) (arguing that state statutes should not apply to any antitrust violations that “occur in or affect interstate or foreign commerce” because state laws potentially facilitate inefficient over-deterrence), and Michael J. Ruttger, *Note, Is There a Dormant Extraterritoriality Principle?: Commerce Clause Limits on State Antitrust Laws*, 106 MICH. L. REV. 545, 560 (2007) (arguing that expansive state enforcement often results in contradictory holdings that render compliance difficult for national corporations).

148. *See, e.g.*, Brief for Appellants at 22, Abbott Labs. v. Durrett, 746 So. 2d 316 (Ala. 1999) (No. 1960464) (on file with the Alabama Supreme Court) (arguing that applying Alabama’s antitrust statute to interstate commerce would be “wholly inconsistent with original intent”).

149. *See supra* notes 12-17 and accompanying text.
both courts stated a desire to remain true to original legislative intent and thus to the original statutory scope. Additionally, the antitrust statutes of both states had early court decisions indicating limits to intrastate commerce, a lack of historical records surrounding their statutes, and conflicting modern federal court opinions as to the proper way to interpret them. Perhaps most importantly, the courts reached opposing opinions. The following analysis discusses the substantive departures that each court took from historical precedent.

1. Alabama: An Over-Restrictive Standard Based on Historical Generalities

As previously stated, the Alabama Supreme Court limited the scope of its antitrust statute when it heard two price-fixing cases in the late 1990s: Abbott Laboratories v. Durrett and Archer Daniels Midland Co. v. Seven Up Bottling Co. After reviewing both cases, the court held that its statute did not regulate goods shipped via interstate commerce. In Abbott Laboratories, the owners of individual drug stores in Alabama sued various drug manufacturers, wholesalers, HMOs, and drug mail-order companies on behalf of all independent pharmacists in Alabama who had purchased brand-name drugs from the defendants. The plaintiffs alleged that the defendants, most of whom were out-of-state corporations, established a price-fixing conspiracy that granted HMOs and wholesalers “favored purchaser” status. This agreement, plaintiffs alleged, implicitly forced independent pharmacies to pay artificially inflated prices.

150. In their opinions on their states’ respective antitrust statutes, the Alabama and Tennessee Supreme Courts both stated that legislative intent was their standard for judgment. Abbott Labs., 746 So. 2d at 318 (Ala. 1999) (“In determining whether [Alabama’s antitrust statute] provides a cause of action ... we must follow the cardinal rule of statutory construction and ascertain and give effect to the intent of the Legislature in enacting the statute.”); Archer Daniels Midland Co. v. Seven Up Bottling Co., 746 So. 2d 966, 969 (Ala. 1999) (holding the same); Freeman Indus., 172 S.W.3d at 522 (“[I]n construing the reach of [Tennessee’s antitrust statute], we must develop a standard that is consistent with the legislature’s intent and purpose without offending constitutional provisions.”).


153. 746 So. 2d 316.

154. 746 So. 2d 966.

155. Abbott Labs., 746 So. 2d at 339; Archer Daniels Midland Co., 746 So. 2d at 989.

156. 746 So. 2d at 317.

157. Id.
State Antitrust Statutes Bound by Their Original Scope

In *Archer Daniels Midland*, the Seven Up Bottling Company of Jasper, Inc. filed a class action claim on behalf of any individuals who indirectly purchased citric acid, a flavoring and preservation ingredient in soft drinks, from the Archer Daniels Midland Company, Cargill, Inc., or the Haarmann & Reimer Corporation during the previous decade. The complaint alleged that the defendants, all foreign corporations, conspired to control the price of citric acid shipped into the state. The defendants moved to dismiss in both cases, arguing that Alabama’s antitrust statute did not provide a cause of action for goods shipped through interstate commerce. The respective trial courts denied the defendants’ motions, resulting in interlocutory appeals to the Alabama Supreme Court.

When considering the appeal, the court substantiated its holding with a range of historical evidence. First, it observed that Alabama’s original statutory prohibition on monopolies, Act Number 202, included the geographically limiting language “within this state.” The court reasoned that construing the entire statutory scheme in pari materia with that language revealed legislative intent to constrain antitrust enforcement to intrastate affairs. More broadly, the court provided a cursory review of dormant Commerce Clause jurisprudence during the turn of the twentieth century, which it determined established a “dichotomy between interstate commerce and intrastate commerce” that divided state jurisdiction from federal. The court also considered early Alabama cases, which indicated in dicta that state antitrust statutes applied to intrastate affairs. For example, the first state appellate court to review Alabama’s statute observed that both state and national antitrust laws existed, “one law relating to intrastate, the other to interstate, commerce.” Finally, the court noted that the Illinois Supreme Court limited its original antitrust statute, which was the model for Alabama’s own antitrust statute, to intrastate commerce in 1903. Combining all of this evidence, the court...

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158. 746 So. 2d at 967-68.
159. Id.
160. *Abbott Labs.*, 746 So. 2d at 317; *Archer Daniels Midland*, 746 So. 2d at 989-90. Because these opinions are nearly identical and in the same reporter, the following analysis will only cite to *Abbott Laboratories* when discussing the Alabama Supreme Court’s reasoning.
161. *Abbott Labs.*, 746 So. 2d at 337-38.
162. Id. The court’s implicit holding that “within this state” should have legal force might run afoul of Alabama’s well-established rule that “[o]nce the Code Commission modifies an act and the Legislature thereafter adopts a Code containing the modification, the modification has the force of law.” *Swift v. Gregory*, 786 So. 2d 1097, 1100 (Ala. 2000). However, any further analysis of this issue is outside of this Note’s scope.
163. *Abbott Labs.*, 746 So. 2d at 330. In particular, the court cites heavily from Justice Stewart’s dissent in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 632-36 (1976) (Stewart, J., dissenting), which discusses the Sherman Act’s legislative history and the intent for federal laws to supplement state laws.
164. *Abbott Labs.*, 746 So. 2d at 334 (citing Ga. Fruit Exch. v. Turnipseed, 62 So. 542 (Ala. Ct. App. 1913)); see also id. at 335 (citing Dothan Oil Mill Co. v. Espy, 127 So. 178 (Ala. 1930)) (noting that Alabama’s antitrust statute was concerned with intrastate affairs).
165. Id. at 338 (citing Akin v. Butler St. Foundry & Iron Co., 66 N.E. 349 (Ill. 1903)).
concluded, albeit hesitantly,\textsuperscript{166} that the statute could not allow recovery for restraints that involve goods shipped in interstate commerce.\textsuperscript{167}

There is little doubt the Alabama Supreme Court kept to its goal of ascertaining the original scope of its statute. Its analysis focused on the historical features surrounding Act 202 and disregarded the policy implications of its decision for modern antitrust enforcement. Nevertheless, its interpretation is still troubling. While the court correctly observed that states were generally limited to regulating intrastate affairs, neither it nor any of the sources it cited took the additional step of defining when an action constituted intrastate commerce in the formative period.\textsuperscript{168} Instead, the court simply assumed that if a good crossed state borders, the states automatically lost jurisdiction over linked restraints.\textsuperscript{169} By circumventing the complex dormant Commerce Clause jurisprudence of the formative period and relying only on the broad outline of dual sovereignty, the Abbott court narrowed the scope of Alabama's statute far beyond the dormant Commerce Clause limits of the formative period, without identifying any reason why Alabama's statute was more limited than other states. Applying such a bright line at the physical border itself does a disservice to original scope. Businesses frequently shipped goods across state borders during the formative period. Under the Abbott court's holding, local versions of trusts, as well as other corporations with a presence in multiple states, could have simply shipped goods between branches or through straw-sellers to circumvent state statutes entirely.

Indeed, this holding presumes that formative-period courts thought that state enforcement ended the moment interstate commerce was affected. Beyond the fact that states were authorized to regulate activity indirectly affecting

\textsuperscript{166} The court did express hesitation throughout its opinion, noting at one point that "we certainly can never know for sure" what the legislature's original intent was. \textit{Id.} at 339.

\textsuperscript{167} \textit{Id.}

\textsuperscript{168} Curiously, the only formative-period case referencing Alabama's statute that the majority cited, \textit{Ga. Fruit Exch. v. Turnipseed}, 62 So. 542 (Ala. Ct. App. 1913), expressly held that the court's authority under common law gave it jurisdiction to void contracts that concerned goods shipped across state lines. Specifically, the \textit{Georgia Fruit Exchange} court held that "it [was] immaterial" whether a contract in restraint of trade was intrastate or interstate in nature, because it was void as a matter of Alabama's public policy. \textit{Id} at 546. Indeed, Alabama's courts never formally outlined the jurisdiction of the state's antitrust statute during the formative period.

For the purposes of modern analysis, these "public policy" (common law) holdings are of little use. Despite early arguments in favor of expanding this common law authority, see, e.g., Frederick H. Cooke, \textit{The Adequacy of Remedies Against Monopoly Under State Law}, 19 \textit{YALE L.J.} 356 (1910), public policy-based holdings fell out of favor during the twentieth century. Today, common law holdings are typically only used to clarify ambiguities in state antitrust statutes. William T. Lifland, \textit{STATE ANTITRUST LAW} § 1.03 (26th ed. 2010); see also \textit{Sheet Metal Workers v. GlaxoSmithKline}, PLC, 737 F. Supp. 2d 380, 429 (E.D. Pa. 2010) (holding that antitrust claims based in state common law were preempted by Alabama's statutory limitation to intrastate commerce for antitrust enforcement).

\textsuperscript{169} This analysis presumes that the court would allow Alabama's antitrust statute to apply to production, as it approvingly cites \textit{United States v. E.C. Knight Co.}, 156 U.S. 1 (1895), and \textit{Dothan Oil Mill Co. v. Espy}, 127 So. 2d 178 (Ala. 1930). Both cases held that production is an intrastate affair, even if the activity created goods that would eventually enter interstate commerce. The Abbott court also expressly noted that the fact that an item may eventually find its way into interstate commerce would not preclude state jurisdiction, further supporting this view. 746 So. 2d at 337 n.5.
interstate commerce, the historical record shows that states with statutes similar to Alabama’s were very concerned with restraints that were national in their scope, but local in their application. The formative period response to Alabama’s restrictive holding was best epitomized by the Texas Court of Civil Appeals, which considered an argument closely resembling the holding in Abbott: that goods shipped across borders were subject only to federal regulations. It observed that if such an interpretation were true, “then indeed have the [state] anti-trust laws bound the octopus with a rope of sand, and predatory and oppressive combines, like the wild ass of the desert, can say: ‘Ha! Ha!’” The substantive control that formative-period courts afforded state antitrust statutes over local restraints precludes this restrictive interpretation.

The court’s subsequent holding in Freeman v. DuPont Pharmaceuticals Co. is illustrative of the problems inherent with the Abbott court’s absolute holding. Shortly after the court’s Abbott Laboratories and Archer Daniels Midland decisions, a circuit court judge granted summary judgment in favor of a defendant drug company that was alleged to have “conducted an orchestrated campaign” to convince Alabama patients and doctors to cease using a generic alternative. The circuit court judge held that because the defendant company shipped its drug in interstate commerce, no claim could arise under Alabama’s antitrust statute. The Alabama Supreme Court affirmed.

This holding is historically suspect. Formative-period antitrust cases directly considered this issue. In the aforementioned Standard Oil Co. v. Tennessee case, which was decided shortly after Alabama passed its civil statute and before its courts interpreted its antitrust regime, the Supreme Court affirmed Tennessee’s application of its statute against an out-of-state corporation. There, the Standard Oil Company’s local division in Kentucky convinced Tennessee merchants to cancel oil orders from other out-of-state sellers, ostensibly to maintain monopoly pricing of its oil imports. A unanimous Court held that even though enforcement of Tennessee’s law would remove a restraint that affected interstate conduct, the action by a third party to sabotage a different product was sufficiently indirect to allow for state jurisdiction. Essentially, the Court focused on the restraint, not the fact that...
the illegal behavior exclusively concerned goods that had, or would, cross a state border. Similarly, in DuPont, the restraint itself (the action of convincing doctors to cancel the purchase of a third party's drug) did not cross state borders, even if the defendant's drug did. Accordingly, the Alabama Supreme Court should have retained jurisdiction after finding the interstate effect to be indirect.

Future challenges loom over what little remains of Alabama's antitrust statute. In Vandenberg v. Aramark Educational Services,\(^{180}\) the defendants—university food service providers headquartered outside of the state but with a significant presence in Alabama—claimed that their status as a "foreign" corporation should classify the alleged trade restraint as interstate in nature.\(^{181}\) Historically, courts did not preclude state enforcement due to the location of a corporation's headquarters or the fact a business shipped items to its local branches. As noted, states could prosecute local restraints perpetrated by out-of-state entities. Still, the Jefferson County Circuit Court refused to rule on the question, stating that it was not clear if the Abbott Laboratories holding would preclude enforcement.\(^{182}\) The Alabama Supreme Court subsequently dismissed the case on state action grounds, leaving this ostensibly clear issue for another day.\(^{183}\)

While Alabama's statute currently has applications in extremely limited circumstances,\(^{184}\) it is largely irrelevant in broader antitrust cases across the nation. This result is at odds with the historical antitrust enforcement of states. A more proper application of formative-period jurisprudence would have produced some limited reach in modern society.

2. Tennessee: An Over-Expansive Standard Based on "Purpose"

In Freeman Industries v. Eastman Chemical Co.,\(^{185}\) the Tennessee Supreme Court reached a more expansive standard than Abbott court regarding


\(^{182}\) Final Order, supra note 180, at 3-4.

\(^{183}\) Vandenberg, 81 So. 3d 338. But see Griffiths v. Blue Cross & Blue Shield, 147 F. Supp. 2d 1203, 1221 (N.D. Ala. 2001) (holding that the fact that the defendant operates in other states and has relationships that cross state borders does not preclude the existence of an intrastate restraint of trade).

\(^{184}\) See McCluney v. Zap Prof'l Photography, 663 So. 2d 922 (Ala. 1995), for an example of a restraint that the Alabama Supreme Court considered to be a purely local antitrust violation. See also Griffiths, 147 F. Supp. 2d at 1221 (denying a motion to dismiss because plaintiffs could conceivably allege a purely intrastate claim).

\(^{185}\) 172 S.W.3d 512 (Tenn. 2005).
the scope of its antitrust statute. It held that the legislative intent underlying the statute—"to protect the state's trade or commerce affected by the anticompetitive conduct"—was best served through the "substantial effects" standard.186

At issue in Freeman Industries was a price-fixing agreement between several producers of sorbate, a chemical used in food preservatives. The producers had previously pled guilty to price-fixing under section one of the Sherman Antitrust Act, which set off a string of tag-along state lawsuits on behalf of indirect purchasers, including Freeman Industries. Freeman Industries, a New York corporation, filed a claim against the defendant producers alleging a violation under the Tennessee Trade Practices Act (TTPA), Tennessee's antitrust law.187 The trial court granted the defendants' motion to dismiss on the grounds that the TTPA did not apply to transactions occurring outside of the state.188 The Tennessee Court of Appeals offered a different rationale, affirming the dismissal on the grounds that the statute did not apply to those who were not "Tennessee consumers."189

While the Tennessee Supreme Court affirmed the lower courts' dismissals—the New York corporation had tenuous connections to Tennessee commerce—it took the opportunity to offer yet another perspective on the TTPA's extraterritorial scope, one that would clear up decades of conflicting opinions.190 Prior to discussing the scope, however, the court had to address Standard Oil Co. v. State, a century-old case in which the Tennessee Supreme Court explicitly held that the TTPA was limited to intrastate commerce.191 Specifically, the Standard Oil court held that "the [state] Legislature was cognizant . . . that it had no power to enact laws regulating interstate commerce, and did not intend to enact an unconstitutional law."192 The Freeman court, however, differed from both the Standard Oil and Abbott courts in how it handled this presumption. It held that the Standard Oil court did not substantively interpret the statute, but, rather, sought to preserve Tennessee's antitrust regime by avoiding constitutional conflict.193 This interpretation limited Standard Oil to the constitutional context of its time, which demanded the conclusion that its holding was irrelevant to modern considerations. By
doing so, the *Freeman* court established a blank slate for constitutional interpretation.

Unsurprisingly, the *Freeman* court took a different approach in constructing its standard. Unlike the *Abbott* court, which disregarded the policy effects of its decision, Tennessee began its consideration by looking at policy effects. It first examined early court decisions on the case to determine what purpose the legislature intended the Act to have. Quoting from one of its earliest interpretations of the statute, the court noted:

> The first purpose is to preserve full and free competition in the sale of merchandise that “had become a part of the mass of property in the State.”
> The second purpose is to preserve full and free competition in the manufacture and sale of “articles of domestic growth and domestic raw material” and to prevent combinations tending to affect the price or cost of these articles to the producer or consumer. 194

This approach enabled the court to work backwards in constructing its standard, achieving its desired effect through the lens of original purpose. The court started by rejecting any standards previously proposed by federal and lower courts that required “monopolistic conduct” or a “predominance of effect” to have occurred within the state. 195 With regards to the former, the court reasoned that since the purpose of the legislation was to protect commerce, a conduct-based test would examine the wrong criteria, as it would fail to consider a restraint’s negative commercial effects. 196 For the latter, the court held that the collapse of dual sovereignty, which occurred after the TTPA’s passage, would prevent the statute from achieving its purpose if it were limited to a predominance of intrastate activity. 197 Thus, the court reasoned, it would be best to adopt the “substantially affects” standard, which would “further[] the TTPA’s goal of protecting Tennessee commerce without offending constitutional provisions.” 198

The Tennessee Supreme Court’s criterion of developing “a standard that is consistent with the legislature’s intent and purpose” 199 was more heavily weighted towards legislative purpose than original intent. 200 The court’s

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194. *Id.* at 517 (quoting Baird v. Smith, 161 S.W. 492, 493 (Tenn. 1913)).
195. *Id.* at 521-23.
196. *Id.* at 522.
197. *Id.* at 523.
198. *Id.*
199. *Id.* at 521.
200. Generally, interpretations based on original intent ask how the enacting legislature would have answered the question presented to the court, while interpretations rooted in purpose inquire into the broad goals of the legislation. For further discussions on the distinction between legislative intent and purpose, see William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479-80 (1987); and Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 426-34 (1989). Sunstein depicts purposivist methods of interpretations as a “functional” inquiry that may compensate for questions that legislatures could not have anticipated. *Id.*
rationale effectively endorsed the idea of post-hoc changes of standards to achieve an original purpose. From a historical perspective, it is notable that Tennessee linked its *quo warranto* enforcement to the TTPA and used both to challenge major trusts.\(^{201}\) Perhaps, if given the chance, the Tennessee legislature would have wanted their statute to extend as far as possible.

However, it is more likely that the two-pronged "purpose" elucidated by the *Freeman* court from early court decisions simply reflected the state's contemporary dormant Commerce Clause limits. The first purpose, "to preserve full and free competition in the sale of merchandise 'that had become a part of the mass of property in the State,'"\(^{202}\) was the boundary at which courts allowed receiving states to regulate incoming goods. Similarly, the first half of the second purpose, "to preserve full and free competition in the manufacture and sale of 'articles of domestic growth and domestic raw material,'"\(^{203}\) reflected the shipping state's enforcement limits. Finally, the second half of the second purpose, "to prevent combinations tending to affect the price or cost of these articles to the producer or consumer,"\(^{204}\) was indicative of the state's *quo warranto* powers that prohibited combinations. The enacting legislature likely viewed these purposes not as amorphous goals but as well-defined expressions of state authority to regulate antitrust violations.

Purpose aside, the *Freeman* court erred by trying to reconcile legislative intent with the desire to produce a fully functional law. Even with the various areas of overlap between state and federal jurisdiction, the broader jurisprudential outline of the formative period was still dual sovereignty. Formative-period courts, including the Tennessee Supreme Court, refused to recognize state jurisdiction simply because "effects" were felt in that state.\(^{205}\) Since the formative period, courts have limited the circuitous avenues states used to apply their statutes to extraterritorial restraints, such as *quo warranto* suits, while also expanding states' general jurisdiction.\(^{206}\) While modern dormant Commerce Clause analysis focuses on a deferential balancing test, formative-period jurisdiction was rooted in dual sovereignty. Accordingly, antitrust statutes that are cabined to their formative-period jurisdictions will

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\(^{202}\) 172 S.W.3d at 517 (quoting Baird v. Smith, 161 S.W. 492, 493 (Tenn. 1913)).

\(^{203}\) Id.

\(^{204}\) Id.

\(^{205}\) E.g., State v. Lancashire Fire Ins. Co., 51 S.W. 633, 636 (Ark. 1899) (denying the application of the Arkansas antitrust statute to out-of-state restraints and noting that "it is so unusual for a legislature to intend that its acts shall have such world-wide effect that courts are never justified in putting such construction upon them if their language admits of any other reasonable interpretation"); Standard Oil Co. v. State, 100 S.W. 705 (Tenn. 1907).

\(^{206}\) See supra notes 114-116, 136-137 and accompanying text.
invariably be anachronistic in the context of modern federalism, which allows for much more expansive applications.

In its attempt to fit the statute within the modern era, the Freeman court warped original scope beyond recognition. By conflating legislative “intent” with “purpose,” the court presumed that a legislature at the turn of the twentieth century would have wanted its statute to extend in ways that would likely have been patently unreasonable at the time. Such an interpretation ignores the complexity of legislative debate and deliberation, which are not conducive to simplistic assertions of legislative purpose. As the Supreme Court noted in Rodriguez v. United States, “no legislation pursues its purposes at all costs .... [I]t frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute’s primary objective must be the law.” The Tennessee Supreme Court’s assumption that its state legislature would have enacted such a broad statute is unfounded at best—especially given that the legislature was hesitant to pursue action against trusts in the formative period. The “substantial effects” test represents a radical expansion far beyond any conceivable scope at the time of the statute’s enactment. Thus, the Freeman court’s charge to remain consistent with the legislature’s intent rings hollow.

III. Developing a Modern Understanding of Original Scope

In light of the deficiencies inherent in existing interpretations, this Note presents the restraint-focused standard as a clearer, more historically faithful approach. The standard could replace existing ones that consider tangential factors such as effect, conduct, or transactions. Under this standard, the restraint, which was already the subject of state police power, is also the subject of jurisdictional analysis. Specifically, if an implemented restraint actually crosses state borders, then state statutes should not apply. If the restraint remains within the state, then states should have jurisdiction. In addition, states could take action against a local subsidiary’s intrastate implementation of a national restraint.

Looking first to out-of-state and multistate restraints, the intrastate or interstate nature of a given restraint was largely dispositive as to whether a state had jurisdiction during the formative period. States did not have control over restraints that occurred in another state or multistate restraints perpetrated by a
single entity. Thus, expansive modern tests that focus on a restraint’s effects or only require some level of in-state conduct by the defendant are in direct tension with the cases underlying these principles. By contrast, the restraint-focused standard contemplates these jurisdictional limitations.

Conversely, states at the turn of the twentieth century could regulate a restraint when it was within their own borders, even if the surrounding factors were or would become heavily involved in interstate commerce. The ability to combat these restraints fell squarely within the states’ police power to regulate the “domestic peace, order, health and safety of their people.” So long as the direct object of state action was an intrastate restraint, courts did not find dormant Commerce Clause violations “simply because, for a limited time or to a limited extent, they cover[ed] the field occupied by those engaged in [interstate] commerce.”

Due to the tight commercial links inherent in antitrust issues, this leniency was especially pertinent to state action against trade restraints. When upholding a state antitrust statute in 1910, Justice Holmes offered the analogy that “it hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery, that the person assaulted was engaged in peddling goods from another state.” Similarly, it would hardly be an answer for a trade restraint that the goods were produced in a different state. Indeed, state and federal courts, including the Supreme Court, repeatedly recognized the distinction between local restraints and national commerce. Restrictive tests that examine the restraint’s surrounding factors, such as whether a product had previously crossed state borders, are irreconcilable with this flexibility. A restraint-focused standard, by definition, would not conflict with this distinction.

When examining state power under a restraint-focused standard, it is important to note that the existence of a linked, national restraint did not necessarily preclude state action against a local restraint. During the formative period, states did prosecute intrastate monopolies that were linked to national restraints. Outside of quo warranto actions, which were directly employed against local subsidiaries, these prosecutions primarily occurred in two situations. First, states had jurisdiction over aspects of a national restraint that involved the production of goods. Because production was not considered to be commerce in the formative period, it followed that a restraint of it would not implicate Congress’s interstate commerce power. Second, states could enforce

209. See supra notes 85-86.
210. See supra Sections I.A-B.
212. Id. at 318.
214. See cases cited supra notes 89-98.
215. See supra Section I.C.
216. See supra notes 70-75 and accompanying text.
their statutes when local actors, engaging in anticompetitive behavior, received goods from another state, because the goods became commingled with the state’s intrastate property. In this situation, the key to state jurisdiction was whether the restraint was local. Accordingly, the restraint’s scope should be considered in relation to any connected intrastate applications.

How would the restraint-focused standard look in practice? It would not have altered the results of Abbott Laboratories, Archer Daniels Midland, or Freeman Industries. All three cases concerned nationwide anticompetitive behavior that was not implemented by a local subsidiary. Accordingly, neither Alabama nor Tennessee’s statutes would create jurisdiction in these cases under the restraint-focused standard, which comports with the holdings of both states’ supreme courts.

Still, this standard would diverge in other cases. Consider the two largest antitrust actions of the twenty-first century: the Microsoft antitrust case and the pending litigation against the Blue Cross Blue Shield (BCBS) health insurance companies. In the Microsoft antitrust case, the U.S. Department of Justice and nine states settled claims against Microsoft that alleged the software company restrained trade by bundling its Windows operating system with its Internet Explorer browser. However, nine additional states rejected the settlement and litigated separately. Under the restraint-focused standard, state statutes, as well as the remedies or procedural benefits entailed within them, would not have application. The restraint clearly crossed state borders and was implemented solely by Microsoft. The Tennessee Court’s “substantial effects” holding would, by contrast, allow for recovery. Indeed, Microsoft settled with Tennessee consumers for violations under the TTPA.

In the BCBS litigation, two groups of plaintiffs—customers and healthcare providers—have alleged that the BCBS insurance giants conspired to allocate the nationwide health insurance market between themselves to avoid competition, raising insurance prices for consumers and lowering the

217. See, e.g., Standard Oil Co. v. State, 65 So. 468, 470 (Miss. 1914) (“It is true that no petroleum is produced in the state of Mississippi, and all petroleum sold and distributed by the Standard Oil Company of Kentucky in this state must necessarily have been imported from another state. These sales and distributions, however . . . were made by this company after the petroleum products had been received by it.”); Standard Oil Co. v. State, 100 S.W. 705, 712 (Tenn. 1907) (noting that because a product had “come to rest” in a subsidiary’s control, it was “subject to . . . the police power of the State”).

218. The plaintiffs did not contest the nationwide or international scope of the restraints in any of the three cases. All three involved hundreds of claims spanning multiple states.


220. See In re Blue Cross Blue Shield Antitrust Litig., 26 F. Supp. 3d 1172 (N.D. Ala. 2014), for a recent decision in the litigation.


222. Id.

compensation that doctors receive.\footnote{224} The pending issues in the case are complex and involve a collision between trademark and antitrust statutes.\footnote{225} However, if plaintiffs are successful in their federal claims, then some states may be able to use their statutes to assert jurisdiction under the restraint-focused standard. The standard would apply where a local BCBS licensee/subsidiary exclusively restrained trade within a single state.\footnote{226} BCBS of Alabama, for example, holds ninety-seven percent of the state’s small-group market and ninety-one percent of the individual business market, and does not operate outside of the state.\footnote{227} If a court were to find that BCBS of Alabama had restrained trade, it would be for implementing a local version of a national restraint, which would allow for state enforcement. Under Alabama’s current standard, consumers would not have standing, because of the linked national restraint.

Admittedly, the restraint-focused standard does not fit neatly within modern debates over the net benefits of state antitrust statutes. Its application to parts of the BCBS litigation but not the Microsoft case does not rest on a substantive policy rationale, as the standard prioritizes historical accuracy. While the standard might appeal to opponents of robust state enforcement—because it is more limited than most modern interpretations—it would still allow for a substantial level of overlap between state and federal jurisdiction. This result could potentially create opportunities for the overly punitive, duplicitive suits that these opponents decry. Similarly, proponents of state antitrust enforcement could find the standard to be more palatable than those based on exclusively intrastate conduct. Nevertheless, it would still leave restraint-affected states at the discretion of federal law when a local actor could not be implicated.

\footnote{224}{Class Action Complaint at 44-75, \textit{In re Blue Cross Blue Shield Antitrust Litig.}, 26 F. Supp. 3d 1172 (N.D. Ala. 2014) (No. 2:13-CV-20000-RDP), 2013 WL 3363247, at *20-38.}
\footnote{225}{Commentators have noted the unique tensions between these two areas of law present in the BCBS case. See Anna Wilde Mathews, \textit{Antitrust Lawsuits Target Blue Cross and Blue Shield}, \textit{WALL ST. J.} (May 27, 2015, 5:06 PM), http://www.wsj.com/articles/antitrust-lawsuits-target-blue-cross-and-blue-shield-1432750106.}
\footnote{226}{While many Blue Cross Blue Shield companies operate exclusively within a single state, some do not. For example, the largest company, Anthem Inc., deals with plans in fourteen states. \textit{Id.} Multi-state insurers would likely not be subject to state jurisdiction under the restraint-focused standard.}

However, it is also important to reiterate that insurance was not considered commerce during the formative period. It fell under state jurisdiction. \textit{See supra note 53} and accompanying text; \textit{see also FREUND, supra note 128}, at 335 (“A combination formed for the purpose of engaging in the business of . . . insurance is subject to state law, and a state may prevent a combination formed in another state from engaging in such business in its territory.”). Insurance purchasers could still litigate contracts in their own state against providers, even when the parties to the agreement were in different states. An argument could be made, depending on the statute and a court’s interpretive prerogatives, that insurance would have fallen within the original scope of a given statute regardless of the restraint’s geographic location. Of course, such an application would require the state to have considered insurance to fall under its antitrust statute’s subject-matter jurisdiction, which varied by state in the formative period. \textit{See supra note 54; see also Dameron, supra note 46}, at 1104-06 (distinguishing the subject-matter jurisdictions of formative-period state antitrust statutes).\footnote{227}{Mathews, \textit{supra} note 225.}
Perhaps the best solution for states that interpret their antitrust laws through the lens of original scope, then, would be to simply pass new statutes. Doing so would enable them to update the policy rationale underlying their antitrust authority to meet the concerns of modern federalism. However, this solution is easier said than done. Following the *Abbott Laboratories* and *Archer Daniels Midland* decisions, the Alabama Attorney General proposed legislation to extend the state’s antitrust statute to interstate issues. Facing vehement opposition from business interests, this bill never made it out of committee in the state senate.

Accordingly, states that cannot or will not pass new antitrust legislation should thoughtfully engage with the totality of antitrust jurisprudence from the formative period. This Note posits that a restraint-focused standard would reconcile this complex body of Supreme Court and state court holdings. Moreover, it contends that the standard presents a superior alternative to current interpretations because it is not as burdened by conflicting opinions.

Conclusion

Restrictions based on the formative-period understanding of the dormant Commerce Clause represent an existential challenge to state antitrust statutes, either granting them new life or gutting them of all utility. Given the fog of holdings that surrounded dormant Commerce Clause jurisprudence during the formative period, it is perhaps impossible to gauge the original scope of a given antitrust statute perfectly. The diversity of modern holdings on the issue is indicative of this difficulty. Still, the restraint-focused standard proposed by this Note clears much of the confusion, presenting an effective avenue for interpreting the applicability of formative-period state antitrust statutes in modern contexts.

228. Interestingly, the *Abbott* court made a point of affirming that the state legislature could enact new antitrust laws if it so chose. *Abbott Labs.* v. *Durrett*, 746 So. 2d 316, 318 (Ala. 1999).