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## Jurisdiction Under the Sherman Act: A Close Look at the Affects Test

Congress passed the Sherman Act,<sup>1</sup> prohibiting contracts, combinations or conspiracies in restraint of trade, pursuant to its power under the commerce clause of the United States Constitution.<sup>2</sup> The United States Supreme Court has determined that Congress intended jurisdiction under the Act to be coextensive with that of the commerce clause.<sup>3</sup> Sherman Act jurisdiction is therefore as broad as Congress' commerce power,<sup>4</sup> but no broader.<sup>5</sup> The

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1 15 U.S.C. §§ 1, 2 (1982). Section 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ." For a discussion of the legislative history of the Sherman Act, see E. KINTNER, 1 FEDERAL ANTITRUST LAW 125-243 (1980).

2 See notes 9-10 *infra*.

3 U.S. CONST. art. I, § 8. *McLain v. Real Estate Bd.*, 444 U.S. 232, 241 (1980); see note 5 *infra*. The Clayton Act and the Robinson-Patman Act, unlike the Sherman Act, are not jurisdictionally coextensive with the commerce power. The Supreme Court found that the distinct "in" commerce language of the former two Acts precluded the Court from exercising "affects" jurisdiction. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974).

4 Under the Sherman Act, "commerce" is almost any intercourse or activity. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984) (medical services); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (legal services); *United States v. Shubert*, 348 U.S. 222 (1955) (theatrical entertainment); *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952) (patent transaction); *Associated Press v. United States*, 326 U.S. 1 (1945) (distribution services); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944) (insurance transaction); *Costello Publishing Co. v. Rotelle*, 670 F.2d 1035 (D.C. Cir. 1981) (religious liturgical literature); *Bain v. Henderson*, 621 F.2d 959 (9th Cir. 1980) (interstate criminal activity). However, some business activities are curiously not considered "commerce" under the Sherman Act. See, e.g., *Flood v. Kuhn*, 407 U.S. 258 (1972) (baseball is not commerce); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 532 (5th Cir. 1982) (union representation is not a commercial activity), *cert. denied*, 461 U.S. 942 (1983); *Local Union 808, Int'l Brotherhood of Teamsters v. P & W R.R.*, 576 F. Supp. 693, 697 (D. Conn. 1983) (human labor is not an article of commerce); *Kalmanovitz v. G. Heileman Brewing Co.*, 576 F. Supp. 922, 928-29 (D. Del. 1983) (a transaction of the stock of a single corporation is not commerce).

5 444 U.S. at 241 (1980). See also *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 558 (1944) ("That Congress wanted to go to the utmost extent of its Constitutional power in [the Sherman Act] . . . admits of little, if any doubt."); Note, *McLain v. Real Estate Board of New Orleans, Inc.*, 11 ENV'T L. 161 (1980) [hereinafter cited as Note, *McLain*] (citing 21 CONG. REC. 3147, 6341 (1890) (Sen. George and Rep. Stewart stated that the Sherman Act was intended to cover everything the Constitution gave Congress the power to regulate under the commerce power)). Although the Court had divided the Sherman Act into substantive and jurisdictional language in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 494-95 (1939), see also *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 521-22 (9th Cir.), *cert. denied*, 412 U.S. 950 (1973), this understanding of a dichotomized Sherman § 1 may no longer be valid. In *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 742 n.1 (1976), the Court asserted that a challenge based on a plaintiff's failure to show a nexus to interstate commerce can come equally under either a 12(b)(1) (lack of subject

commerce clause determines the constitutional limits of jurisdiction under the Sherman Act.

Recently, however, lower federal courts have encountered difficulties in determining the parameters of Sherman Act jurisdiction. In *McLain v. Real Estate Board*,<sup>6</sup> the Supreme Court attempted to clarify the most troublesome jurisdictional standard of Sherman—the “affects” test.<sup>7</sup> Unfortunately, *McLain* created even greater

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matter jurisdiction) or a 12(b)(6) (failure to state a claim) motion. This implies that the interstate commerce nexus is both a substantive and a jurisdictional requirement. Aside from the real differences between the two motions, compare *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); Comment, *Expanding Federal Antitrust Jurisdiction: A Close Look at McLain v. Real Estate Bd. Inc.*, 19 HOUS. L. REV. 143, 169-71 (1981) [hereinafter cited as Comment, *Federal Antitrust Jurisdiction*]; with *McLain v. Real Estate Bd.*, 583 F.2d 1315, 1324 (5th Cir. 1978), *rev'd on other grounds*, 444 U.S. 232 (1980); *Englert v. McKeesport*, 736 F.2d 96, 98-99 (3d Cir. 1984), there is also a constitutional difficulty in unifying the language. Either the court has subject matter jurisdiction, in which case a 12(b)(1) motion is inapplicable, and the court should proceed to the merits, see Note, *Sherman Act "Jurisdiction" in Hospital Staff Exclusion Cases*, 132 U. PA. L. REV. 121 (1983) [hereinafter cited as Note, *Hospital Staff*]; cf. P. AREEDA, ANTITRUST LAW ¶ 232.1, at 97-99 (Supp. 1982) (article III of the Constitution is not limited by a requirement of interstate commerce, but the practice of considering it as a jurisdictional issue is firmly entrenched), or else the court has no subject matter jurisdiction and therefore has no power to hear the merits of the case. In the latter case a 12(b)(6) motion would be constitutionally inappropriate. See *Apex*, 310 U.S. at 483 (“[The federal courts’] only jurisdiction is to vindicate such federal right as Congress has conferred on petitioner by the Sherman Act. . . .”); *McLain*, 583 F.2d at 1323; *Englert*, 736 F.2d at 98-99. The view that the courts have jurisdiction unless the Act is unconstitutional on its face, see Note, *Hospital Staff*, at 127-29, misses the fact that if the Act is unconstitutional as applied to the particular defendant, due to the defendant’s lack of any nexus with interstate commerce, the court equally lacks jurisdiction. Regardless of whether one views the interstate commerce requirement as jurisdictional or substantive, it seems tautologically true that it cannot be equally both. But see Note, *The Interstate Commerce Test for Jurisdiction in Sherman Act Cases and Its Substantive Implications*, 15 GA. L. REV. 714, 720-24 (1981) [hereinafter cited as Note, *Commerce Test*]. Of course, the court has jurisdiction to consider jurisdiction. See WRIGHT, LAW OF FEDERAL COURTS 84-89 (1983).

6 444 U.S. 232 (1980).

7 The focus of this note is the “affects” test. The other jurisdictional test is the “in” interstate commerce test. When determining which “activity” need be “in” interstate commerce, courts look to whether the alleged restraint is on some article of commerce that is transported interstate. See *Local 167, Int'l Brotherhood of Teamsters v. United States*, 291 U.S. 293 (1934); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Loewe v. Lawlor*, 208 U.S. 274 (1908).

It is difficult to determine when goods are “in” interstate traffic. Early Supreme Court precedent attempted to set limits for the beginning and end of an article’s trip in interstate commerce. See *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (an article is not “in” interstate commerce until after manufacture, and the article actually begins its journey across state lines); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 442 (1827) (an article is not in interstate commerce once the original package is opened, originating the “come to rest” doctrine which arose in the context of taxation. However, that doctrine might not apply to cases of regulation, such as Sherman Act cases. See *Katzenback v. McLung*, 379 U.S. 294, 302 (1964)). Now, however, the very broad “flow of commerce” theory determines when an article begins or ends its trip in interstate commerce. Under this theory, if a product has been “in” the flow of commerce, the article is still in the stream of commerce for Sherman Act jurisdiction. See, e.g., *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954) (plastering materials which had been in interstate commerce before being

confusion, leaving the lower courts uncertain as to the method of determining jurisdiction under the Sherman Act.<sup>8</sup>

sold intrastate for intrastate construction are still within Sherman Act stream of commerce jurisdiction); *Local 167, Int'l Brotherhood of Teamsters v. United States*, 291 U.S. 293 (1934) (poultry formerly sold interstate is still in the stream of commerce for Sherman Act jurisdiction during later intrastate sales and distributions); *Rasmussen v. American Dairy Ass'n*, 472 F.2d 517 (9th Cir.) (filled milk ingredients from out-of-state, shipped in-state, mixed with in-state water, and sold wholly intrastate are still in stream of commerce), *cert. denied*, 412 U.S. 950 (1973). Further, if a product will be "in" the flow, the article is already in the stream of commerce for Sherman Act jurisdiction. *See, e.g., United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949) (the product from wholly intrastate stitchers are "in" the flow of commerce to the extent that the clothes on which they work later travel through another business into interstate commerce); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (fact of chemical restructuring of beets into sugar neither begins the sugar's trip nor ends the beets' trip in the stream of commerce); *Loewe v. Lawlor*, 208 U.S. 274 (1908) (restraint on intrastate production of hats ultimately destined for interstate market is "in" interstate commerce); *Swift & Co. v. United States*, 196 U.S. 375, 398-99 (1905) (flow of meat interstate interrupted); *United States v. Azzarelli Constr. Co.*, 612 F.2d 292, 295-96 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980) (fact of chemical restructuring of restrained good does not interrupt the flow). *See also Gordon, Swift & Co. v. United States: The Beef Trust and the Stream of Commerce Doctrine*, 28 AM. J. LEGAL HIST. 244 (1984).

The Supreme Court further extended the "in" commerce jurisdiction of the Sherman Act in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), holding that any activity which was a "necessary and integral part" of an interstate transaction, even if otherwise wholly intrastate, is "in" interstate commerce for the purposes of Sherman jurisdiction. *Id.* at 784. Thus, an intrastate attorney title investigation, needed to secure title insurance, was a necessary and integral part of an interstate real estate transaction, and was therefore within Sherman Act "in" commerce jurisdiction. *See Bain v. Henderson*, 621 F.2d 959, 960 (9th Cir. 1980).

This "flow of commerce" theory raises the questions whether an article ever begins or ends its trip in interstate commerce, and whether the stream of commerce has any limiting shores. But, although defining the stream's limits would be helpful analytically, practically speaking, the stream merely spills over into the "affects" test. *See Burke v. Ford*, 389 U.S. 320, 321 (1967); *Employing Plasterers Ass'n*, 347 U.S. at 189 ("We are not impressed by the argument that the Sherman Act could not possibly apply here because the interstate buying, selling and movement of plastering materials had ended before the local restraints became effective. Where interstate commerce ends and local commerce begins is not always easy to decide and is not decisive in Sherman cases."); *Local 167*, 291 U.S. at 293 ("[W]e need not decide when interstate commerce ends and that which is intrastate begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."). Of course, this is not altogether true because whether jurisdiction is based on a restraint being "in" commerce rather than "affecting" commerce determines whether or not one need prove substantiality of impact. *See* 444 U.S. at 246; Note, *Antitrust Application of the Sherman Act to Local Real Estate Brokerage Activities—McLain v. Real Estate Board of New Orleans, Inc.*, 29 DE PAUL L. REV. 1063, 1066-67 (1980); Comment, *Federal Antitrust Jurisdiction*, *supra* note 5, at 159. *See also* note 9 *infra* and accompanying text. Yet, this statement is practically true in that nearly any impact is considered substantial; therefore, any restraint near enough to the shores of the stream of commerce to slip into it analytically will necessarily have a substantial enough impact. *See also* notes 68-72 *infra* and accompanying text.

8 The courts have dealt with this problem in varying ways. Aside from the four interpretations discussed in notes 30-45 *infra* and accompanying text, other responses include: 1) extensive discussion of the split of interpretations, followed by a refusal to choose between them, *Tarleton v. Meharry Medical College*, 717 F.2d 1523, 1527-30, 1532 n.2 (6th

This note analyzes the various interpretations of the "affects" test following *McLain* and suggests an appropriate approach for eliminating the confusion. Part I discusses the principal jurisdictional tests under the commerce clause. Part II analyzes the "affects" test for Sherman Act jurisdiction in light of *McLain* and sets forth the courts of appeals' four interpretations of *McLain*. Finally, part IV explains why the "particular enterprise" interpretation of *McLain's* "affects" test best reflects the Sherman Act's full jurisdiction.

## I. Jurisdiction Under the Commerce Clause

Because Congress enacted the Sherman Act pursuant to its power to regulate interstate commerce,<sup>9</sup> an examination of the scope of Congress' commerce power is appropriate. The commerce clause specifically grants Congress jurisdiction over interstate commerce.<sup>10</sup> The necessary and proper clause of article I grants Congress implied jurisdiction over any activity substantially affecting interstate commerce.<sup>11</sup> The commerce clause and the necessary and proper clause are the bases of Congress' "commerce power."<sup>12</sup>

Courts have construed "interstate commerce" jurisdiction liberally.<sup>13</sup> If the activity is in interstate commerce or affects interstate

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Cir. 1983); *James R. Snyder Co. v. Associated Gen. Contractors of Am.*, 677 F.2d 1111, 1115 n.3 (6th Cir.), cert. denied, 459 U.S. 1015 (1982); 2) extensive discussion of the split, followed by a holding that the impact of the defendant's activities is not determinable at the pretrial stage, i.e., it is a question of fact dependent on "scrutiny of the proof that may be offered," *Bunker Ramo Corp. v. United Business Forms*, 713 F.2d 1272, 1282 (7th Cir. 1983); and, 3) ignoring the dispute, wording the test ambiguously enough to satisfy either interpretation, *United States v. Georgia Waste Sys.*, 731 F.2d 1580, 1583 (11th Cir. 1984); *Alabama Homeowners, Inc. v. Findahome Corp.*, 640 F.2d 670, 673-74 (5th Cir. 1981); *United States v. Central State Bank*, 564 F. Supp. 1478, 1480 (W.D. Mich. 1983); *Bartleys Town & Country Shops v. Dillingham Corp.*, 530 F. Supp. 499 (D. Hawaii 1982).

9 See *McLain v. Real Estate Bd.*, 444 U.S. 232, 241 (1980); *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *United States v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954); *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460 (1949); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1939). See also E. KINTNER, *supra* note 1, at 244-48 (1980).

10 U.S. CONST. art. I, § 8; *Kansas v. Colorado*, 206 U.S. 46 (1907).

11 U.S. CONST. art. I, § 8, cl. 3.

12 U.S. CONST. art. I, § 8, cl. 18; *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); ENGDahl, CONSTITUTIONAL POWER: FEDERAL AND STATE 95 (1974).

13 See ENGDahl, *supra* note 12, at 95. The full extent of the commerce power probably cannot be reduced to rules or tests. Changing circumstances and economic realities require adapting commerce power jurisdiction to the times. 444 U.S. at 241.

Where Congress finds that a "class of activities" affects interstate commerce, the courts presume jurisdiction. *Perez v. United States*, 402 U.S. 146, 154 (1971). Where Congress' interstate regulation is affected by intrastate activity, the courts find jurisdiction. *Wickard v. Filburn*, 317 U.S. 111 (1942). Where the instrumentalities of commerce are affected, the

commerce, Congress has jurisdiction over the activity.<sup>14</sup> Theoretically, if an activity is wholly intrastate and does not affect interstate commerce, the commerce power is not triggered and Congress has no authority to act. Nevertheless, a court may find that such an activity falls within the "class of activities" that, according to Congress, affects interstate commerce per se. In this situation, the courts generally defer to Congress' judgment and hold that the specific activity is within Congress' commerce power.<sup>15</sup>

Because Sherman Act jurisdiction is coextensive with the commerce power,<sup>16</sup> the Supreme Court has held that all activities re-

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courts find jurisdiction. *Katzenbach v. McLung*, 379 U.S. 294 (1964); *United States v. Cargo Serv. Stations*, 657 F.2d 676, 679-80 (5th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *United States v. Azzarelli Constr. Co.*, 617 F.2d 292, 296-97 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980). In essence, the courts find that "when national interests are at stake, seemingly local and wholly intrastate activities . . . fall within the sweep of the commerce power." *Chatham Condominium Ass'n v. Century Village, Inc.*, 597 F.2d 1002, 1006 (5th Cir. 1979). The commerce power is "as broad as the need that evokes it." *Carter v. Carter Coal Co.*, 298 U.S. 238, 328 (1936) (Cardozo, J., dissenting).

The question of what need evokes the jurisdiction is quite important in any case in which the jurisdiction is challenged. As indicated in note 16 *infra*, civil rights and other regulatory areas are given considerably greater jurisdictional leeway than that given the Sherman Act. Apparently, the need to alleviate civil rights violations is greater than the need to address restraints of trade. Arguably, the Sherman Act should not be given wide jurisdictional latitude because to do so would overload the federal courts with complex and time-consuming antitrust litigation. See *Comment, Federal Antitrust Jurisdiction*, *supra* note 5, at 168-69. Others argue that the state antitrust laws are quite sufficient to handle intrastate violations and that overreaching through the Sherman Act emasculates those state antitrust laws. See *McLain v. Real Estate Bd.* 583 F.2d 1315, 1324-25 (5th Cir. 1978), *rev'd on other grounds*, 444 U.S. 232 (1980); Note, *McLain*, *supra* note 5, at 169 (1980); *Comment Federal Antitrust Jurisdiction*, *supra* note 5, at 172.

Yet another reason for restricting Sherman Act jurisdiction is the courts' wish to use the jurisdictional requirement to dispose of cases they feel are not meritorious. See *P. AREEDA*, *supra* note 5, ¶ 232.1, at 97-99; see, e.g., *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1983); *Furlong v. Long Island College Hosp.*, 710 F.2d 922 (2d Cir. 1983); *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F.2d 36 (1st Cir. 1981); *Alabama Homeowners, Inc. v. Findahome Corp.*, 640 F.2d 670 (5th Cir. 1981); see also Note, *Hospital Staff*, *supra* note 5.

See also *Women's Sportswear*, 336 U.S. at 464 ("The source of the restraint may be intrastate . . . the application of the restraint may be intrastate . . . but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.").

14 See *Katzenbach v. McLung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Houston, E. & W. T. Ry. v. United States*, 234 U.S. 342 (1914).

15 *Perez v. United States*, 410 U.S. 146, 154 (1971) (the "class of activities" test). See also note 13 *supra*.

16 Although the Sherman Act is often held to be coextensive with the commerce power, see, e.g., *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980); *Cardio-Medical Assocs. v. Crozer-Chester Medical Center*, 721 F.2d 68, 73-74 (3d Cir. 1983); *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019, 1031 (5th Cir. 1983); *Chatham Condominium Ass'n v. Century Village, Inc.*, 597 F.2d 1002, 1008 (5th Cir. 1979); *Thornhill Pub. Co. v. GTE Corp.*, 594 F.2d 730, 736 (9th Cir. 1979), this claim

straining trade, that either are in interstate commerce or affect interstate commerce, are within Sherman Act jurisdiction.<sup>17</sup> But how the courts are to determine whether a given activity affects interstate commerce remains problematic.

## II. The "Affects" Test under *McLain*

A controversial jurisdictional issue which arises under the Sherman Act is whether interstate commerce is *affected* by the activity in question.<sup>18</sup> Using the "affects" test, otherwise intrastate activity falls within the jurisdiction of the Sherman Act. In applying the "affects" test, courts have reached different results on the question of exactly which activity need affect interstate commerce in order to establish jurisdiction over the challenged conduct.

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is not completely true. First, a different level of liberality in commerce power restraints is applied to some regulatory activities than to others. See Furgeson, *The Commerce Test for Jurisdiction Under the Sherman Act*, 12 HOUS. L. REV. 1052 (1975); Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U. L. REV. 323 (1974) (a more rigorous standard is applied to Sherman Act than to civil rights acts). Second, the full extent of the commerce power includes the "class of activities" jurisdiction. See note 15 *supra* and accompanying text. Because the "class of activities" test has never been applied to the Sherman Act, its jurisdiction may not be as broad as the commerce power. This is unfortunate because the "class of activities" test more efficiently dispatches with jurisdictional challenges. The "class of activities" test could be applied to the Sherman Act by allowing a strong presumption of jurisdiction over any "class of activities" that is per se violative of the Sherman Act. *But cf.* *McLain v. Real Estate Bd.*, 583 F.2d 1315, 1320 (5th Cir. 1978) (no presumption of jurisdiction for per se violations), *rev'd on other grounds*, 444 U.S. 232 (1980). Only particularly egregious violations, horizontal price-fixing, vertical price maintenance, horizontal market allocation, group boycotts, and tying arrangements are per se violations of Sherman § 1. See E. KINTNER, *supra* note 1, at 362-70. So one could presume that Congress finds such activities as a class to affect interstate commerce. This or some other creative way of applying the "class of activities" test seems constitutionally permissible and appears proper on the policy grounds of maximizing legitimate Sherman Act jurisdiction, reducing legal costs, and relieving the courts of unnecessary, involved analyses of "affects." One could argue that the courts should not utilize this "class of activities" approach because that approach would extend Sherman Act jurisdiction to purely intrastate conduct merely on the basis that the aggregate, or class, of such activities do affect interstate commerce. But this argument misses the point. This argument is attacking the "class of activities" test in theory, and does not show why it is inapplicable as applied to the Sherman Act. The Supreme Court used the "class of activities" approach to test commerce power jurisdiction. Short of overruling *Perez*, the real question is whether the "class of activities" is inapplicable as applied to the Sherman Act or whether Sherman Act jurisdiction is truly coextensive with the commerce power so long as this entire area of jurisdiction is ignored.

17 See notes 5, 7, 14 *supra*. For interesting histories of jurisdiction under the Sherman Act, see Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. BR.J. 282 (1965); Furgeson, *supra* note 16; Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236; Note, *Hospital Staff*, *supra* note 5, at 121; Note, *Antitrust: Application of the Sherman Act to Local Real Estate Brokerage Activities* *McLain v. Real Estate Board of New Orleans, Inc.*, 29 DE PAUL L. REV. 1063 (1980) [hereinafter cited as Note, *Antitrust*]; Note, *Portrait of the Sherman Act as a Commerce Clause Statute*, 49 N.Y.U. L. REV. 323 (1974); Comment, *Expanding Federal Antitrust Jurisdiction: A Close Look at McLain v. Real Estate Board, Inc.*, 19 HOUS. L. REV. 143 (1981).

18 See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Wickard v. Filburn*, 317 U.S. 111 (1942); *Houston, E. & W. T. Ry. v. United States*, 234 U.S. 342 (1914).

In *McLain v. Real Estate Board*,<sup>19</sup> the Supreme Court attempted to resolve the question. In *McLain*, the New Orleans Real Estate Board set a minimum brokerage commission rate for Louisiana brokers.<sup>20</sup> These brokers were licensed only in Louisiana, and brought buyers and sellers together concerning purchases of property located solely in Louisiana.<sup>21</sup> But much of the financing and many buyers came from out-of-state.<sup>22</sup> The plaintiffs, purchasers of real estate, claimed the Real Estate Board was illegally fixing prices. The district court dismissed the case for failure to state a claim upon which relief may be granted.<sup>23</sup> The Court of Appeals for the Fifth Circuit affirmed the dismissal based on the lack of subject matter jurisdiction.<sup>24</sup>

On review, the Supreme Court held that both lower courts had applied the "affects" test improperly.<sup>25</sup> Attempting to clarify the "affects" test, the Court determined that for the federal courts to have jurisdiction some definite, identified, activity of the defendant must have a causal nexus with interstate commerce.<sup>26</sup> In addition, the Court wished to extend the Sherman Act's jurisdiction to the limits of the commerce power.<sup>27</sup>

Applying the "affects" test, the Court held that the plaintiffs did not have to show that the allegedly illegal activity itself, the fixing of commission rates, affected interstate commerce.<sup>28</sup> Rather, "it would be sufficient for petitioners to demonstrate a substantial

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19 444 U.S. 232 (1980)

20 *Id.* at 235-36.

21 *Id.*

22 *Id.* at 237-38.

23 *Id.* at 240-41. The trial court stated that (1) the interstate commerce requirement was a substantive rather than a jurisdictional requirement, and (2) the plaintiffs failed to show the required interstate nexus because, unlike *Goldfarb*, see note 14 *supra*, the realtor activity was only an incidental rather than an integral part of an interstate transaction; and therefore, the realtors failed to meet the "necessary and integral" part test, as set out in *Goldfarb*.

24 583 F.2d 1315, 1319, 1324 (5th Cir. 1978). The court stated that (1) the interstate commerce requirement was jurisdictional, (2) the trial court had correctly applied *Goldfarb*, and (3) that per se violations of the Sherman Act do not merit a reduced jurisdictional threshold. Thus, the court concluded that it lacked the power to hear the case on the merits.

25 444 U.S. at 244-45. Their application was improper because they applied *Goldfarb*, an "in" commerce test to the "affects" commerce question. The lower courts' error is understandable. *Goldfarb's* language is ambiguous and does not reflect the difference between the "in" and "affecting" commerce tests. Rather, the Court mixed the two tests. In *Goldfarb*, 421 U.S. 773, 784, the Court stated: "Thus a title examination is an integral part of an interstate transaction." The Court also noted: "Given the *substantial* volume of commerce involved, and the inseparability of the particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently *affected*." *Id.* at 785. (emphasis added).

26 444 U.S. at 242, 246.

27 *Id.* at 242-43.

28 *Id.*



effect on interstate commerce *generated by respondents' brokerage activity.*"<sup>29</sup> The Court did not clarify the meaning of "respondents' brokerage activity." The phrase could refer to: 1) defendants' general business, including a brokerage operation; 2) defendants' illegal activity of fixing commission rates for its brokerage activities; 3) defendants' brokering sales which were infected by the price fixing; or 4) defendants' particular enterprise of conducting a brokerage operation. The Supreme Court's ambiguous statement has led to four different interpretations in the lower courts: the "general business activity," "challenged activity," "infected activity," and "particular enterprise activity" tests.

The "general business activity" test, enunciated by the Court of Appeals for the Ninth Circuit in *Western Waste Service Systems v. Universal Waste Control*,<sup>30</sup> provides that it is "not necessary for the alleged antitrust violations complained of to have affected interstate commerce as long as *defendant's business activities, independent of the violations, affected interstate commerce.*"<sup>31</sup> Under this test, jurisdiction exists whenever the defendant is engaged in some activity that substantially affects interstate commerce, even if that activity is wholly divorced from the alleged antitrust violation. Thus, if an interstate conglomerate is named as a defendant for an alleged antitrust violation engaged in by a small wholly intrastate subsidiary, the court would have jurisdiction because the conglomerate's actions substantially affect interstate commerce, even though the restraint had no such impact.<sup>32</sup> Also, if a business affected interstate trade through one aspect of its activities, the court would have jurisdiction regardless of whether or not the aspect of its activities that allegedly restrain trade affects interstate commerce.

Under the "challenged activity" test, the Court of Appeals for

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29 *Id.* at 243 (emphasis added).

30 616 F.2d 1094 (9th Cir.) (A garbage collection business in Phoenix, Arizona, which was a wholly owned subsidiary of a Delaware corporation and which purchased machinery from out-of-state, was within the court's jurisdiction under the Sherman Act.), *cert. denied*, 449 U.S. 869 (1980). While the following cases stated that they were using the "general business activity" test, the analysis in these cases often appears to follow the "particular enterprise" approach rather than the "general business activity" approach: *Construction Aggregate Transp. v. Florida Rock Indus.*, 710 F.2d 752 (11th Cir. 1983); *Miller v. Indiana Hosp.*, 562 F. Supp. 1259, 1284-85 n.81 (W.D. Penn. 1983); *Justice v. NCAA*, 577 F. Supp. 356, 378 (D. Ariz. 1983). *See also* Note, *McLain*, *supra* note 5, at 166; Note, *Commerce Test*, *supra* note 5, at 714 (should use general business activity test for jurisdictional challenges and illegal activity test for challenges under 12(b)(6) for failure to state a claim).

31 616 F.2d at 1097 (emphasis added).

32 *See, e.g.*, *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank*, 649 F.2d 36, 45 (1st Cir. 1981); *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 723 (10th Cir. 1980); Comment, *Federal Antitrust Jurisdiction*, *supra* note 5, at 167-68 (general business activity test would cover nearly every business relationship—"out-of-state purchases, financing, or corporate relationships").

the Tenth Circuit, in *Crane v. Intermountain Health Care, Inc.*,<sup>33</sup> interpreted *McLain* to mean that the plaintiff must show that the allegedly illegal activity itself had a substantial effect on interstate commerce.<sup>34</sup> The application of this test apparently conflicts with *McLain's* holding that the challenged activity test was too narrow because such a test would require the plaintiff to show that the alleged restraint actually had its intended anticompetitive effect.<sup>35</sup> The Tenth Circuit concluded, however, that *McLain's* statement, "a plaintiff need not 'make the . . . particularized showing,'"<sup>36</sup> meant only that an elaborate sufficiency analysis need not be made.<sup>37</sup> Under the Tenth Circuit's approach, the court would have jurisdic-

33 637 F.2d 715 (10th Cir. 1980).

34 637 F.2d at 723. See also *Hayden v. Bracy*, 744 F.2d 1338, 1343 n.2 (8th Cir. 1984); *Nurse Midwifery Assocs. v. Hibbett*, 577 F. Supp. 1273, 1276-77 (M.D. Tenn. 1983). See Comment, *Federal Antitrust Jurisdiction*, *supra* note 5, at 712 (wording of Sherman Act prohibits restraints of interstate trade, not restraints of trade engaged in by interstate traders); P. AREEDA, *supra* note 5, ¶ 232.1, at 94-95.

Two objections to the illegal activity test were alluded to in *McLain*. First, that test fails to accord jurisdiction to a significant area of substantive violations of the Sherman Act. The Act prohibits more than just actual restraints on interstate trade; it also prohibits conspiracies and combinations that have the purpose of restraining such trade—even if the conspiracy or combination is unsuccessful or still nascent when brought to the court's attention. Given the illegal activity test, a court would never have jurisdiction over an unsuccessful or incomplete conspiracy, because such a conspiracy would never have had a chance to enter or affect the stream of commerce.

If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. A violation may still be found in such circumstances because . . . liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect.

444 U.S. at 243 (citations omitted; emphasis in original). See also *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) ("A combination may be one in restraint of interstate trade or commerce . . . in violation of the Sherman Act, although such restraint or monopoly may not have been actually attempted to any harmful extent."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-25 n.59 (1940) ("It is the 'contract, combination . . . or conspiracy in restraint of trade or commerce' which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.").

Second, the illegal activities test, and the infected activity test, to a lesser extent, require too particularized a showing. 444 U.S. at 242-43. Requiring a plaintiff to make a particularized showing of market effect by a given restraint or targeted sale would be fundamentally unfair to the plaintiff because of the unnecessary expense and duplicative effort involved in such a showing. See note 71 *infra*. What is too particularized can only be determined by showing the proper breadth of the commerce power, see note 3 *supra*, for any limitation on the Act's jurisdiction not equally applicable to the commerce power itself, is an unwarranted limitation, or "too particularized a showing." See also *Chatham Condominium Ass'n v. Century Village, Inc.*, 597 F.2d 1002, 1008 (5th Cir. 1979) ("[A]ny challenge to subject matter jurisdiction in a Sherman Act case is necessarily resolved by answering the following question: Can Congress prohibit the challenged conduct under the Commerce Clause?").

35 444 U.S. at 242-43.

36 637 F.2d at 723 (quoting *McLain*, 444 U.S. at 242-43).

37 *Id.*

tion only if the conspiracy, restraint, or combination in question did, in fact, substantially affect interstate commerce.

The "infected activity" test, announced first by the Court of Appeals for the First Circuit in *Cordova & Simonpietri Insurance Agency Inc. v. Chase Manhattan Bank*,<sup>38</sup> has enjoyed more support than the other tests.<sup>39</sup> This test requires that the defendant's activity that allegedly utilized or, if the conspiracy never came to fruition, would have utilized the illegal activity, must have affected interstate commerce substantially.<sup>40</sup> Thus, if a business "unsuccessfully" conspires to restrain trade on the sales of goods or services, the sales of those goods or services involved in the failed conspiracy must have affected interstate commerce to establish jurisdiction.

The fourth interpretation of *McLain* is the "particular enterprise" test.<sup>41</sup> The Ninth Circuit,<sup>42</sup> in *Parks v. Watson*<sup>43</sup> and *Turf Par-*

38 649 F.2d 36, 45 (1st Cir. 1981).

39 See *Furlong v. Long Island College Hosp.*, 710 F.2d 922 (2d Cir. 1983); *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289 (9th Cir. 1981); Note, *Antitrust, supra* note 17, at 1063.

40 649 F.2d at 45.

41 Functionally, the "particular enterprise" test has been applied in *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983); *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813 (9th Cir.), cert. denied, 456 U.S. 1011 (1982); *Feldman v. Jackson Memorial Hosp.*, 571 F. Supp. 1000 (S.D. Fla. 1983); *United States v. H & M, Inc.*, 562 F. Supp. 651 (M.D. Penn. 1983). This test has never been expressly discussed with the other three approaches, but has been utilized on a case by case basis. Apparently these courts felt the "defendant's conduct" approach was archaic, see note 46 *infra* and accompanying text, yet feared the "general business activity" test was much too broad. See, e.g., *Parks*, 716 F.2d at 661 (As a city, defendant obviously affected interstate commerce through its general business activity; however, plaintiff had to establish that the city's particular enterprise of establishing a geothermal heating district affected interstate commerce.); *Turf*, 670 F.2d at 818-19 ("To meet the 'effect on commerce' test, Turf need only allege that the local activity of horseracing has a substantial effect on interstate commerce." Jurisdiction was based on the fact that the enterprise of operating a horseracing track affected interstate commerce.); *Feldman*, 571 F. Supp. at 1006 n.10 ("[T]he defendants' activity of providing medical care to patients . . . must be connected with interstate commerce."); *H & M*, 562 F. Supp. at 656-68 (the enterprise of paving roads must affect interstate commerce.).

42 Interestingly, the Ninth Circuit has utilized three of the four interpretations since the Supreme Court decided *McLain* in 1980. In *Western Waste Serv. Sys. v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.), cert. denied, 449 U.S. 869 (1980), the Ninth Circuit created the "general business activity" test. They abandoned that test in *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1291 (9th Cir. 1981), in favor of the "infected activity" test. In *Hahn v. Oregon Physicians Serv.*, 689 F.2d 840, 844 (9th Cir. 1982), cert. denied, 103 S. Ct. 3115 (1983), they appeared uncertain as to which activity should be considered the relevant activity. They resolved that "defendants' relevant insurance activities" had to affect interstate commerce. This fact-specific finding seems to have been the beginning of the Ninth Circuit's transition from the "infected activity" test to the "particular enterprise" test. The Ninth Circuit now appears to utilize a particular enterprise interpretation. See *Parks*, 716 F.2d 646; *Turf*, 670 F.2d 813 ("Turf need only allege that the local activity of horseracing" affects interstate commerce.); *Bain v. Henderson*, 621 F.2d 959, 961 n.2 (9th Cir. 1980) ("[W]e must examine defendants' preparation of the attorney selection list generally and determine whether this activity has any impact on interstate commerce.").

43 716 F.2d 646 (9th Cir. 1983).

*adise, Inc. v. Arizona Downs*,<sup>44</sup> utilized this approach. Although difficult to formulate, this approach analyzes the general activities of the particular enterprise through which the defendant is engaging in the illegal activity. Thus, if a subsidiary of a conglomerate engages in an anticompetitive combination regarding the wholly intrastate sales of goods or services, the courts need only connect the subsidiary entity to interstate commerce.<sup>45</sup>

To illustrate the different results which courts could reach under these varying tests, assume that an interstate bank owns a small insurance company that combined to restrain trade. Assume further that the attempted restraint was unsuccessful. Because the bank that owns the insurer affects interstate commerce, the court would automatically have jurisdiction under the "general business activity" test. Because the restraint failed, the combination could not have affected interstate commerce. The court would therefore not have jurisdiction under the "challenged activity" test. Applying the "infected activity" test, the court would have jurisdiction only if the plaintiff could show that the sale of the insurance that was the object of the restraint on trade affected interstate commerce. Lastly, the court would establish jurisdiction under the "particular enterprise" test if the defendant's particular insurance business affected interstate commerce.

#### IV. Suggested Solution: The Particular Enterprise Test

In general, the four tests fall within two different approaches: the "defendant's entity" approach and the "defendant's conduct" approach.<sup>46</sup> The "general business activity" and the "particular en-

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<sup>44</sup> 670 F.2d 813 (9th Cir. 1982).

<sup>45</sup> A recent Supreme Court decision, *Copperweld Corp. v. Independence Tube Corp.*, 104 S.Ct. 2731 (1984), has negative implications for dividing the particular enterprise's activity from those of the conglomerate business. *Copperweld* held for the first time that, as a rule, subsidiaries were incapable of conspiring with their parent corporation, for the subsidiary, as a matter of economic reality, does not have the requisite independence to be considered anything more than a part of the parent corporation. If this is the case, one could analogize Sherman Act conspiracy law to Sherman Act jurisdictional law and argue that in reality the illegal acts of the subsidiary are the illegal acts of its parent. Then, one should look not only to the effects of the particular enterprise, but also to those of the entire business, when checking for a jurisdictional nexus with interstate commerce. But, such an analogy would not be on point. The purpose of looking at only the particular enterprise's activities and not to those of the general business is not to recognize their separate legal existence—that would clearly violate the policy of *Copperweld*. Rather, the purpose is to recognize the degree of effect the two qualitatively and quantitatively different attenuations of the effect have on interstate commerce as derived from the illegal conduct. See notes 71-73 *infra* and accompanying text.

<sup>46</sup> This distinction between the defendant's "entity approach" and defendant's "conduct approach" has received little attention; however, the differences can create varying results. See, e.g., *The Employer Liability Cases*, 207 U.S. 463, 488-89 (1908) (while the defendant entity was extensively involved in interstate commerce, the regulated conduct

enterprise" tests share the "defendant's entity" approach which emphasizes that only the defendant need have some general nexus with interstate commerce to establish jurisdiction. The "challenged activity" and the "infected activity" test share the "defendant's conduct" approach. To establish jurisdiction under the "defendant's conduct" approach, some identified conduct of the defendant must be involved in some way in an allegedly unlawful restraint of trade having a nexus with interstate commerce. Between these two general approaches, the "defendant's entity" approach best maximizes Sherman Act jurisdiction while keeping that jurisdiction within constitutional limits. Furthermore, of the two tests which constitute the "defendant's entity" approach, the "particular enterprise" test best reflects the constitutionally permissible limit to Sherman Act jurisdiction under the "affects" test.

The "defendant's entity" approach is superior to the "defendant's conduct" approach due to economic realities.<sup>47</sup> In order to discover the danger the defendant poses to interstate commerce, courts should examine a defendant's activities and their effects as a

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was intrastate in nature); *Page v. Work*, 290 F.2d 323, 330 (9th Cir.) ("The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such a business."), *cert. denied*, 368 U.S. 875 (1961); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 590 F. Supp. 1528, 1535 (W.D. Pa. 1984) (In a RICO case, only the entity enterprise, not the predicate acts of racketeering, need affect interstate commerce.) (citing *United States v. Nerone*, 563 F.2d 836, 852-54 (7th Cir. 1977), *cert. denied*, 435 U.S. 951 (1978); *United States v. Rone*, 598 F.2d 564, 573 (9th Cir. 1979), *cert. denied*, 445 U.S. 946 (1980)). See also P. AREEDA, *supra* note 5, ¶ 232.1 at 94-95; Comment, *Federal Antitrust Jurisdiction*, *supra* note 5, at 172 (wording of Sherman prohibits conspiracies or combinations "'in restraint of trade or commerce among the states,' and not anticompetitive acts affecting local businesses which generate some interstate commerce."): Compare Note, *Hospital Staff*, *supra* note 5, at 134 (Because the commerce power is coextensive with Sherman Act and the aggregation of all hospital staff activities affect interstate commerce, the general business activities of the hospital should therefore be within the scope of the Sherman Act.). This analysis overlooks the fact that conduct, not entities, are regulated. Such an analysis must first show that the conduct has some direct or indirect nexus with interstate commerce. See also *Houston, E. & W. T. Ry. v. United States*, 234 U.S. 342, 353-54 (1914) (the *Shreveport* case) ("This is not to say that Congress possesses the authority to regulate the internal commerce of a state, as such, but that it does possess the power to foster and protect interstate commerce and to take all measures necessary or appropriate to that end, *although intrastate transactions of interstate carriers may thereby be controlled*. It is immaterial, so far as the protecting power of Congress is concerned, that the discrimination arises from intrastate rates as compared with interstate rates.") (emphasis added). But see Kissam, Weber, Biggus & Holzgraefe, *Antitrust and Hospital Privileges: Testing the Conventional Wisdom*, 70 CALIF. L. REV. 595, 632-33 (1982) (rejects the wider approach, blaming the dispute between the *McLain* interpretations on "casual dicta at worst or simply an inadvertant expression that has been wrongly torn from its context by other lawyers and judges.").

47 *McLain*, 444 U.S. at 241 ("During the near century of Sherman Act experience, forms and modes of business and commerce have changed along with changes in communication and travel, and innovations in methods of conducting particular businesses have altered relationships in commerce. Application of the Act reflects an adaptation to these changing circumstances.").

whole, rather than as isolated conduct.<sup>48</sup> Indeed, the *McLain* Court emphasized that courts should look to economic reality when testing whether jurisdiction exists.<sup>49</sup> Economic reality, not rigid formalism, determines which activities affect interstate commerce; the Sherman Act is designed to protect interstate competition from all restraints that affect it.

Early Supreme Court precedent created the principle that an entity which puts its goods or services in the flow of interstate commerce, or an entity that affects interstate commerce, subjects itself to regulations pursuant to the commerce power but only with regard to conduct that either is in interstate commerce or affects interstate commerce. The entity would therefore not be subject to regulation regarding conduct unrelated to interstate commerce.<sup>50</sup> This principle seems to have been the basis of *Crane's*<sup>51</sup> rejection of the "defendant's entity" approach. The court stated that general business activity "is not a sufficient condition because even though the defendant's entire business may greatly affect interstate commerce, the challenged activity may in every practical economic sense be unrelated to interstate commerce."<sup>52</sup> Thus, according to those courts which reject the "defendant's entity" approach, the regulated or challenged *conduct* must come under the court's subject matter jurisdiction, not merely the defendant as an entity.

But this principle developed at a time when the Supreme Court drew distinct lines between interstate and intrastate commerce.<sup>53</sup> Modern economic reality shows that a business' conduct cannot be divided into that which does and does not affect interstate commerce.<sup>54</sup> The intrastate activities of a business which affects interstate commerce invariably benefit or harm the interstate commerce which is affected by the other non-infected activities of the defendant. In reality, the "intrastate" activities of such a defendant have

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48 *Id.* See also 444 U.S. at 246 (to establish federal jurisdiction, plaintiffs need only show that defendant's activities " 'as a matter of practical economics' . . . have a not insubstantial effect on the interstate commerce involved. . . . Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance [which are in interstate commerce].").

49 444 U.S. at 246.

50 See *The Employer Liability Cases*, 207 U.S. 463, 488-89 (1908) (defendant railway successfully argued that its employer-employee relations were wholly intrastate in nature and beyond the purview of the commerce power, despite the fact it was an interstate business in other aspects).

51 See note 33 *supra* and accompanying text.

52 *Crane*, 637 F.2d at 723.

53 See *Employer*, 207 U.S. at 488-89; *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895). See also note 50 *supra*.

54 See *McLain*, 444 U.S. at 246; *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Local 167, Int'l Brotherhood of Teamsters v. United States*, 291 U.S. 293 (1934); *Standard Oil Co. v. United States*, 221 U.S. 1, 68-69 (1911).

an interstate character. A court must look, therefore, to the entity itself to determine whether interstate commerce is affected by an intrastate trade restraint. When a business is protected, aided, restrained, or harmed in its intrastate dealings, the effects will also appear on the interstate market. These effects may appear as changes in overall competitive strength or in the amount of assets, or both.<sup>55</sup> Therefore, it appears that the Constitution does not require that Sherman Act jurisdiction be based solely on the infected or illegal activities of the defendant.

In analyzing the issue of Sherman Act jurisdiction, a court must consider the "channel of commerce" question.<sup>56</sup> In determining whether an activity "affects" interstate commerce, the court must first determine which channel of commerce is relevant.<sup>57</sup> If the rel-

<sup>55</sup> 444 U.S. at 241; *see* note 47 *supra*.

<sup>56</sup> The "channel of commerce" is that activity which flows into the "stream of commerce." Although these metaphors are somewhat unclear, the courts have chosen them because they help explain what are essentially inexplicable concepts. Basically, one must attempt to trace the defendant's activity to the flow of interstate commerce. If the restraint is directly in the "stream of commerce," *see* notes 11-19 *supra* and accompanying text, then one need not look to the "channel of commerce." In applying the "affects" test, however, one must trace the defendant's conduct to that activity which is affected by such conduct and which affects the flow of commerce by entering into an interstate transaction. Thus, one is trying to identify which stream of commerce is affected and how.

Although this difficulty is not given its full due, it has received some attention by the courts. "[T]he crucial issue is whether the 'relevant channel of interstate commerce' requirement . . . relates to plaintiff's or defendant's activities, or both." *Cardio-Medical Assocs. v. Crozer-Chester Medical Center*, 536 F. Supp. 1065, 1076 (E.D. Pa. 1982), *rev'd*, 721 F.2d 68 (3d Cir. 1983) (only plaintiff's channel is relevant). The courts have taken three approaches: (1) that only the plaintiff's channel of commerce is relevant, 536 F. Supp. at 1076; *Nara v. American Dental Ass'n*, 526 F. Supp. 452 (W.D. Mich. 1981); *Western Waste Serv. Sys. v. Universal Waste Control*, 616 F.2d 1094, 1101 (9th Cir.) (Claiborne, J., dissenting), *cert. denied*, 449 U.S. 869 (1980); (2) that only the defendant's channel is relevant, *Western Waste*, 616 F.2d at 1097 n.2; and (3) that both parties' channels are relevant. *Cardio-Medical Assocs. Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68, 72-74 (3d Cir. 1983); *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 926 (2d Cir. 1983); *Construction Aggregate Transp. v. Florida Rock Indus.*, 710 F.2d 752, 767 n.31 (11th Cir. 1983). The weight of opinion and of logic seems to have made this issue moot. There really is no constitutional reason for limiting the "affects" commerce test to either just plaintiff's or just defendant's channel of commerce; *see* Note, *Hospital Staff*, *supra* note 5, at 138-39.

*McLain* suggests a more important reason for analyzing the relevant channel of commerce. *See* 444 U.S. at 242; note 57 *infra*; *see also* *Hahn v. Oregon Physicians Serv.*, 689 F.2d 840, 844 (9th Cir. 1982).

<sup>57</sup> Although the cases demonstrate the breadth of Sherman Act prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate . . . either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.

*McLain*, 444 U.S. at 242. Thus, one reason to concentrate on the relevant channel of commerce is ease of analysis. Indeed, a further concentration on the channels of interstate

evant channel of commerce is the plaintiff's, the jurisdictional issue is easily resolved. If the defendant's conduct harms the plaintiff's ability to operate in its intrastate market, that injury will be felt quickly and noticeably in plaintiff's interstate connections (such as a loss of ability to purchase out-of-state machinery).<sup>58</sup> However, if the relevant channel of interstate commerce is the defendant's, the effects are indirect and less noticeable. Yet, in terms of "practical economics,"<sup>59</sup> the "critical relationship"<sup>60</sup> between the alleged illegality and the defendant's interstate-affecting enterprise is the same. If the defendant is restraining commerce as charged, then that restraint is protecting, or shoring up, its business. If the defendant's particular enterprise affects interstate commerce, and that enterprise is protected from intrastate competition through improper trade restraints, then that enterprise can use the unlawfully obtained proceeds from the restraint in its interstate commerce activities. Thus, this activity will "affect" interstate commerce.<sup>61</sup>

Under the broader "defendant's entity" approach, the allegedly illegal conduct is still the basis for Sherman Act jurisdiction. However, it is the basis only insofar as the illegal conduct runs through the related *and unrelated* aspects of the defendant's activities and on to affect commerce. Thus, the defendant's entity approach to jurisdiction merely recognizes tacitly the deeper effects of an illegal restraint, as a matter of practical economics.<sup>62</sup>

In addition to addressing the modern economic realities, emphasizing the defendant-entity's effects on interstate commerce also promotes the Sherman Act's policy of protecting competition. The antitrust laws were designed not to protect the individual competitor, but rather to protect the integrity of the competitive process for the benefit of the consumer.<sup>63</sup> If courts require, as a jurisdictional basis, that the defendant's conduct which is actually in issue must

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commerce could replace the present emphasis of tracing the effect backward, from the restraint to commerce, that is evident in the various interpretations of *McLain*. Rather, by tracing the line of commerce down to the effect of the restraint the courts would clarify their analyses. See also 689 F.2d at 844.

58 Construction Aggregate Transp. v. Florida Rock Indus., 710 F.2d 752 (11th Cir. 1983). See *Hahn*, 689 F.2d at 844 (it is easy to see the effects of destroying the plaintiff if the plaintiff's activities affect interstate commerce; however, it is not so easy to see the effects of strengthening the defendant if only the defendant affects interstate commerce).

59 444 U.S. at 246.

60 *Id.* at 242.

61 *Id.* at 246; see note 48 *supra*.

62 444 U.S. at 246.

63 See *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984); *University Life Ins. Co. of Am. v. Unimarc Ltd.*, 699 F.2d 846, 852-53 (7th Cir. 1983); *Products Liability Ins. Agency, v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663, 665 (7th Cir. 1982); *Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1203-06 (7th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1363-64 (5th Cir. 1980). See also E. KINTNER, *supra* note 1, at 342 n.8.



affect interstate commerce, the courts would lose the forest, tree by tree.<sup>64</sup> Insignificant competitors, whose elimination does not affect interstate commerce, would fall to trade restraints one by one, allowing the integrity of the entire market to be slowly compromised.<sup>65</sup>

Thus, the "defendant's entity" approach, emphasizing the nature of the defendant as an entity, better fulfills *McLain's* policy of establishing the maximum constitutionally permissible jurisdiction for the Sherman Act.<sup>66</sup> Of the two tests which comprise the "defendant's entity" approach ("particular enterprise" test and "general business activity" test), the "particular enterprise" test better approaches the constitutional limits of the commerce power that the courts will accept.<sup>67</sup>

Jurisdiction under the commerce power "affects" test requires substantiality of impact.<sup>68</sup> Although the courts have failed to address how substantial this impact must be,<sup>69</sup> they have never abandoned the requirement.<sup>70</sup> Apparently, courts downplay the

64 Cf. *Palmer v. Roosevelt Lake Log Owners Ass'n*, 641 F.2d 1289, 1293-94 (9th Cir. 1981) (the Sherman Act protects small competitors too, regardless of the substantiality of impact on commerce); *Mac Adjustment, Inc. v. General Adjustment Bureau*, 597 F.2d 1318, 1321 (10th Cir. 1979) (even if the company is too small to affect commerce substantially, it is still entitled to Sherman Act protection).

65 See *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 213 (1959) ("Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups.").

66 The wider jurisdictional approach brings Sherman Act jurisdiction in line with commerce power jurisdiction. Note, *Commerce Test*, *supra* note 5, at 729.

67 In reality, that which the courts are willing to accept as not overreaching determines the scope of jurisdiction. Sherman Act jurisdiction is as broad (and therefore as narrow) as the need that evokes it. See note 13 *supra*.

68 444 U.S. at 246 ("a not insubstantial effect"); see *St. Bernard Gen. Hosp. v. Hospital Servs. Ass'n*, 712 F.2d 978, 984 (5th Cir. 1983), *cert. denied*, 104 S. Ct. 2342 (1984); *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1291-94 (9th Cir. 1981) ("a not wholly insubstantiality affect"). But cf. Note, *McLain*, *supra* note 5, at 167-68 (argues the substantiality requirement demands no more than a de minimus impact, but that a plaintiff must now show an appreciable amount of commerce to be involved, however substantially).

69 One need show only a de minimus effect, not a substantial and adverse effect; see P. AREEDA, *supra* note 5, ¶ 232.1, at 91-92, 95-97. The "shift of commerce" theory arguably has stripped the "substantiality" requirement of its content. This theory holds that a plaintiff need not show an increase or decrease in interstate trade, so long as a shift takes place; see *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183 (3d Cir. 1984); *Cardio-Medical Assocs. v. Crozer-Chester Medical Center*, 721 F.2d 68, 72-74 (3d Cir. 1983) (rejected shift theory); *Mishler v. St. Anthony's Hosp. Sys.*, 694 F.2d 1225, 1227 (10th Cir. 1981); *Nurse Midwifery Assocs. v. Hibbet*, 577 F. Supp. 1273, 1276-77 (M.D. Tenn. 1983). Or even if trade is actually increased, see *Harold Friedman Inc. v. Thorofare Markets*, 587 F.2d 127, 132 (3d Cir. 1978). Further, *McLain* required an anticompetitive effect *or purpose*, 444 U.S. at 243; thus, one could argue substantiality is becoming less important. See Note, *McLain*, *supra* note 5, at 166.

70 *McLain*, 444 U.S. at 246. A greater emphasis on the question of substantiality could replace the current dispute as to which activity should be addressed. Cf. *Bunker Ramo Corp. v. United Business Forms*, 713 F.2d 1272, 1282 (7th Cir. 1983); *Crane v. Intermountain Health Care*, 637 F.2d 715 (10th Cir. 1980). However, such an approach would fall to

substantiality requirement to avoid a complicated, prolonged, and duplicative market impact analysis at the pre-trial stage.<sup>71</sup> But the derivative effect on interstate commerce from an illegal restraint in a wholly different enterprise that runs through the general business activities of a conglomerate is *de minimus* due to the attenuation between the restraint and the impact on interstate commerce. So, for the sake of practicality, the jurisdictional standard for determining which activity need affect interstate commerce should be the "particular enterprise" test which tacitly recognizes the *de minimus* effect a more derivative activity has on commerce.<sup>72</sup>

The substantiality requirement refers to the relevant activity's impact. Therefore, one could argue that the *de minimus* effect argument is deficient in that it fails to recognize the dual purpose of focusing on the relevant activity. However, the rationale for broadening the jurisdictional tests is based upon modern economic realities. The "defendant's entity" approach tacitly recognizes that the "illegal activity" infects the defendant's entire entity. The substantiality of the effect of the anticompetitive conduct, however, becomes *de minimus* because the relationship between the anticompetitive conduct and interstate commerce becomes further attenuated as the effect moves up through the corporate chain. This second tacit recognition makes the "particular enterprise" test the more constitutionally sound standard.

## V. Conclusion

The Constitution limits which activities Congress may regulate. Congress enacted the Sherman Act under the commerce power of the Constitution. Only those activities that are in interstate commerce or affect interstate commerce fall under the jurisdiction of the Sherman Act. The question of which activities affect interstate commerce has troubled the courts. Attempting to clarify the issue, the Supreme Court established two requirements for Sherman Act jurisdiction: (1) that some identified nexus with interstate commerce must be established; and, (2) that the scope of Sherman Act jurisdiction should be extended and reflect the realities of the mod-

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the problem of inefficiency, *see* note 71 *infra*, or would ignore the courts' lack of power to hear the case without a preliminary finding of jurisdiction and try the jurisdictional and substantive issues together, *see* note 5 *supra*.

71 To require a full-blown analysis of the substantiality of the effect on interstate commerce would require as extensive an analysis at this early stage of determining jurisdiction as would later be required for the market impact analysis, determining the impact on competition for the case in chief. This would be even more questionable in a case where a *per se* violation is charged, *see* notes 13, 15 *infra* and accompanying text, because this jurisdictional phase of the trial would require a more thorough analysis than the case in chief where the market impact would be presumed. *See also* 444 U.S. at 242-43.

72 *See Rasmussen v. American Dairy Ass'n.*, 472 F.2d 517, 526 (9th Cir. 1973).

ern marketplace. Unfortunately, the Court's attempt to clarify the jurisdictional standard for the Sherman Act created confusion among the courts of appeals. Four different tests developed: the "general business activity," the "challenged activity," the "infected activity," and the "particular enterprise activity" interpretations. Of the four interpretations, the "particular enterprise" interpretation of *McLain's* "affects" test best balances the policy of applying the Sherman Act to all restraints of trade that affect interstate commerce and the requirement of showing a not wholly insubstantial effect on interstate commerce caused by some activity with an identified nexus with that commerce. The "particular enterprise" test best determines the extent of Sherman Act jurisdiction under the "affects" test.

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