

**Conflicting Federal and State Enforcement of Federal Antitrust Law: Statutory Crisis or
Celebration of Diversity?**

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Introduction

The United States Department of Justice (DOJ), the United States Federal Trade Commission (FTC), and state attorneys general enjoy concurrent jurisdiction over federal antitrust law. During the 1980's, the states, primarily through the mechanism of coordinated multistate litigation, became increasingly active in antitrust litigation in areas where the federal authorities chose not to pursue. Thus far, based in part on renewed efforts at federal-state coordination and cooperation in antitrust enforcement during the 1990's, no direct conflict has occurred between express positions taken in litigation by the two groups. This paper will assert, however, that a conflict is highly plausible given the somewhat different motivations and between the federal government and state attorneys general driving enforcement decision-making and given the different remedies available to federal and state authorities within federal antitrust law. In addition, this paper will argue that such a conflict, which, according to critics, creates serious statutory and doctrinal concerns, nevertheless is consistent with the intent of the Hart-Scott-Rodino Act of 1976,¹ as well as the express position of the Supreme Court that state involvement in federal antitrust enforcement forms a complementary, not divisive, function in articulating antitrust law.

¹ 15 U.S.C. §15c-h (2000).

Part I of this essay will explore the language and legislative intent of the Hart-Scott-Rodino Act of 1976. Part II will discuss the subsequent state of antitrust enforcement during the 1980s and 1990s, along with a brief discussion of the role of the Microsoft case as a barometer for President George W. Bush's antitrust policy. Part III will then illustrate why conflicting approaches to antitrust enforcement between state and federal authorities is likely, both along prudential and doctrinal lines, and the legal areas where such conflict most frequently occurs. Finally, Part IV will assess criticism of and support for multistate antitrust activity in conflict with express DOJ or FTC decisions.

I. The Hart-Scott-Rodino Act

a. Antitrust Law Prior to the Hart-Scott-Rodino Act

The Hart-Scott-Rodino Act represented a continuation of, rather than a departure from, federal attitudes towards state antitrust enforcement. Prior to the Act, states have been able to sue, as *parens patriae*, for injunctive relief from antitrust violations injurious to a state's citizens, pursuant to Section 16 of the Clayton Act.² State attorneys general, and indeed all private citizens bringing suit under 15 U.S.C. §16, were authorized to pursue not only injunctive relief but also divestiture of assets in a merger dispute even in cases where the federal government had already approved the merger.³ Additionally, private parties, including private class actions,

² See *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451 (1945); see also *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972).

³ *California v. American Stores*, 493 U.S. 916 (1989). This case, and its implications for state-federal disputes, will be discussed in greater detail in Part IV, *infra*.

could bring suit under Section Four of the Clayton Act.⁴ Moreover, states, in their capacity as proprietary purchasers, were included in the definition of “any person” and therefore could also bring suit for monetary damages under federal antitrust law.⁵ Section Four of the Clayton Act had been largely underutilized, however, because of cost constraints to individual plaintiffs and judicial impediments to the use of class actions in seeking antitrust remedies.⁶ When California attempted to sue for monetary relief under Section Four, however, the Ninth Circuit held that, despite the popular appeal of such a notion, states could not pursue monetary damages absent modification to current federal antitrust law.⁷ The Hart-Scott-Rodino Act aimed, *inter alia*, to provide “a response to that case and a recognition that the consuming public currently has no effective means of obtaining compensation for its injuries.”⁸

b. The Language and Legislative History of the Hart-Scott-Rodino Act

The language and legislative history of the Hart-Scott-Rodino Act can be viewed either in support of or in opposition to state antitrust enforcement when contrary to positions taken by the federal government. Indeed, the primary articulation of the Act’s scope, in 15 U.S.C. §15c(a)(1), is confusing in its simplicity.

Any attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State...to secure monetary relief as provided in this section for injury sustained by such

⁴ 15 U.S.C. 15(4) provides a cause of action for treble damages, costs, and attorneys’ fees, for “any person...injured in his business or property by reason of anything forbidden in the antitrust laws.”

⁵ *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906).

⁶ S. Rep. No. 803, Pt. 1, 94th Cong., 2d. Sess., *The Hart-Scott-Rodino Antitrust Act of 1976*, Report of the Senate Committee on the Judiciary, at 41 (1976) (“S. Rep.”) (“Title IV is the legislative response to the restrictive judicial interpretations of the notice and manageability provisions of Rule 34 of the Federal Rules of Civil Procedure and of the rights of consumers and States to recover damages under section 4 of the Clayton Act...”).

⁷ *California v. Frito-Lay*, 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973).

⁸ H.R. Rep. 94-499, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976*, at 3 (reprinted at 1976 U.S.C.C.A.N. 2572) (1977) (“H.R. Rep.”). See also S. Rep., *supra* note 6, at 41 (stating that the Hart-Scott-Rodino Act is a response “to the Ninth Circuit’s invitation for legislative action” in *Frito-Lay*).

natural persons to their property by reason of any violation of sections 1 to 7 of this title.⁹

Support may be found in the legislative history of the Act for the proposition that the Act clearly envisioned state antitrust activity in areas where the federal government was not pursuing claims.

Federal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers...H.R. 853 fills this gap by providing the consumer an advocate in the enforcement process—his State attorney general.¹⁰

Congress envisioned that states would supplement federal antitrust efforts by tackling anticompetitive practices in areas the federal government had neither the resources nor the expertise to investigate, “circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as 25 or 30 cents.”¹¹ In this way, the state attorneys general would ensure consumer and business protection in situations currently left unprotected due to gaps in federal enforcement. Thus, while the DOJ and the FTC investigated practices affecting markets on a national scale, the states were presumed to address other, less high-profile instances of local¹² price fixing and other unfair practices.

Additional support for Congressional intent for an overlapping antitrust structure may be seen in the Act’s requirement that the federal government notify states of potential *parens patriae* claims when federal agencies brought suit. Section 15F(a) of the Hart-Scott-Rodino Act states that:

⁹ 15 U.S.C. §15c(a)(1).

¹⁰ H.R. Rep., *supra* note 8, at 2-3.

¹¹ *Id.* at 3.

¹² For this essay, I will use the phrase “local” to refer to intrastate or statewide effects, as opposed to purely national effects.

Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.¹³

The fact that the federal government is required to notify state attorneys general of additional *parens patriae* claims when it files suit strongly suggests that federal government action often does not implicate the entire range of antitrust violations. Instead, Congress anticipated that because some areas of local concern would be left out of federal investigations, the federal government should cooperate with states to empower states to bring additional suits.

Moreover, even in areas of mutual concern, the scope of the Act suggests distinct yet complementary roles for the federal and state government. This is because the Act, while expanding state antitrust enforcement powers by allowing state attorneys general to sue for treble damages, did not create a cause of action for the DOJ or FTC to sue for damages.¹⁴ As a result, the Act creates a two-tiered structure for antitrust enforcement whereby the federal government could sue for injunctive relief and the states could sue, complementarily, for damages over the exact same violation.

In spite of this evidence, critics of state antitrust activity in conflict with federal prerogatives also have support within the legislative history of the Hart-Scott-Rodino Act. First, the legislative history implies that the types of cases the states will bring will be in areas the federal government deems unworthy of expending its resources, not in areas exclusively reserved to the domain of states that the DOJ or FTC feel precluded from addressing. For

¹³ 15 U.S.C. §15f(a)(2000).

¹⁴ The strict requirement that the federal authorities not receive damages was somewhat challenged in the recent *Mylan* decision, where a D.C. District Judge ruled that a “disgorgement remedy” was in fact available to the FTC. The court clarified, however, that the disgorgement remedy was distinct from damages. Conversation with Kevin O’Connor, Wisconsin Assistant Attorney General for Antitrust, and former Chair of the NAAG Antitrust Task Force, conducted on January 30, 2001 (“Conversation with Kevin O’Connor”).

example, the House Report notes that the federal government “has been particularly effective in cases involving large purchasers,” whereas the federal government has not been active in pressing violations “of relatively small size.”¹⁵ Thus, it may be argued, the role of the state attorneys general is simply to fill in gaps in enforcement in small, local antitrust violations, and to leave broader, more national antitrust matters to the federal authorities.

Moreover, the coordination between the federal government and state attorneys general was intended to facilitate “the promotion of cooperation in antitrust enforcement between the States and the federal government.”¹⁶ It is somewhat dubious that state suits in direct opposition to contrary federal conclusions constitute the type of cooperation envisioned by Congress.

Additionally, Congressional reluctance to allow state suits using contingency fees, the small size of state antitrust offices, and the minimal scope of multistate practice in 1976 led Congress to believe that there would be few state, including multistate, antitrust actions.¹⁷ Indeed, as one proponent of *parens patriae* suits pointed out,

I think it is unrealistic to believe that more than a handful of States will be in a position to conduct a significant amount of [antitrust] litigation on their own in the foreseeable future. And some States will never have the resources or the interest to hire and train the large staffs which antitrust litigation requires.¹⁸

Finally, Congress placed several constraints on *parens patriae* suits, including the Section 15c(c) limitations on the power of states to settle¹⁹ and the Section 15c(b)(1-2) obligation of states to provide notice to constituents of their right to exclusion election²⁰, thereby indicating Congressional intent to limit the scope of state antitrust enforcement. Thus, states were not given

¹⁵ H.R. Rep., supra note 8, at 3.

¹⁶ Id.

¹⁷ H. Rep., supra note 8, at 13.

¹⁸ H. Rep., supra note 8, (quoting Congresswoman Barbara Jordan), at 20.

¹⁹ 15 U.S.C. §15c(c) (2000).

²⁰ 15 U.S.C. §15c(b)(1-2) (2000).

the same amount of leeway as the relatively unencumbered FTC and DOJ in determining the resolution of an antitrust investigation.

II. State Antitrust Activity Following the Hart-Scott-Rodino Act

Despite some Congressional concerns that the Hart-Scott-Rodino Act would be underutilized, states have been quite aggressive in antitrust litigation since the passage of the Act. Spurred to action by the Reagan Administration's decision to de-emphasize antitrust enforcement generally, the states, both individually and through coordinated multistate suits, took on the burden of enforcing federal antitrust law. The resultant rift between state attorneys general and the federal government began to diminish during President George H.W. Bush's tenure, with considerable cooperation and collaboration finally emerging during the 1990s under President Clinton's two terms. In spite of the close relationship that has developed between the states and the federal antitrust authorities, as well as the development of an infrastructure to secure increased cooperation, several differences in enforcement prioritization remain present today and risk snowballing into renewed antipathy should President George W. Bush return to President Reagan's approach to antitrust policy.

a. Antitrust Enforcement During the 1980s

President Reagan sought to impose his Chicago School of economics-oriented ideology on federal antitrust enforcement by calling for the virtual elimination of DOJ and FTC antitrust investigations. While the Supreme Court continued to assert the per se illegality of vertical price

restraints, for example, neither the FTC nor the DOJ brought actions “against companies imposing such restraints. Instead, they adopted the Chicago School view that virtually all vertical restraints, pricing or otherwise, are either neutral or beneficial to consumers.”²¹ As a result, the states, which were concerned about these areas of antitrust, became the chief enforcers of federal antitrust law.²² The state attorneys general uniformly rejected reliance on the economic models of the Chicago School, instead deciding to sue companies engaging in vertical price maintenance because, viewed practically, “vertical pricing restraints actually led to higher retail prices in the real-world marketplace.”²³ Moreover, the states rejected the federal acceptance of a merger’s impact on total welfare, including that of shareholders. In contrast, the states insisted “on a focus on consumer welfare.”²⁴

To expedite state challenges to mergers or alleged price-fixing occurring within a number of states, the state attorneys general began organizing collective, multistate investigations and litigation.²⁵ This, in turn, led to a much more pronounced role for the National Association of Attorneys General (NAAG) in coordinating multistate antitrust suits. NAAG created a Multistate Antitrust Task Force to coordinate multistate antitrust investigations. NAAG also recommended, and the states unanimously adopted, Vertical Restraint Guidelines in 1985 and Horizontal

²¹ Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and Arc America Corp.*, 68 *Antitrust L.J.* 29, 32 (2000) (“Antitrust Federalism”).

²² Conversation with Stephen Houck, former New York Assistant Attorney General for Antitrust, January 31, 2001 (“Conversation with Stephen Houck”). See also Pamela Jones Harbour and Patricia A. Conners, *Antitrust Enforcement in the Area of Vertical Trade Restraints by State Attorneys General*, SD62 ALI-ABA 243, 246 (1999) (describing the states’ “intention of becoming the primary enforcers in this area of antitrust law which the federal agencies had abandoned”) (“Vertical Trade Restraints”).

²³ *Antitrust Federalism*, supra note 21, at 33.

²⁴ Joel I. Klein, Kevin J. O’Connor, Robert Pitofsky, Eleanor M. Fox, Janet L. McDavid, and Richard Schmalensee, *Roundtable Conference with Enforcement Officials*, 65 *Antitrust L.J.* 929, 951 (1997) (“Roundtable”).

²⁵ *Vertical Trade Restraints*, supra note 22, at 245. See also *Hannaford Brothers, Maine v. Hannaford Bros.*, CV-83-151 (Me. Super. Ct., July 11, 1983).

Merger Guidelines in 1987, to propose both an alternative to federal antitrust policy²⁶ “as a protest against the prevailing [federal agencies’] antitrust enforcement policies, particularly those of the Reagan administration,”²⁷ and a guideline for all states to follow in deciding whether or not to challenge a merger or vertical price maintenance practice.

Both individual and multistate antitrust activity occurred throughout the 1980s. When the matter was of a purely local nature, the states had no need to organize collectively, so an individual state would bring the challenge.²⁸ Increasingly, however, states banded together to sue companies collectively.²⁹ This was based both on the need to pool scarce state antitrust enforcement resources and on the national nature of many price-fixing and merger challenges.

b. Antitrust Enforcement During the 1990s

The late 1980’s and early 1990’s saw a gradual return of federal enforcement of antitrust law. While the federal government remains limited in its enforcement of vertical price restraints, it nevertheless has become more aggressive in bringing antitrust claims generally and in applying existing decisional law standards, often in conjunction with state attorneys general. Indeed, one scholar has noted that the head antitrust authorities at the DOJ and the FTC “have

²⁶ William H. Pryor, Jr., A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits, 74 Tul. L. Rev. 1885, 1900 (2000) (“Multigovernment Lawsuits”).

²⁷ Jonathan Rose, State Antitrust Enforcement, Mergers, and Politics, 41 Wayne L. Rev. 71, 104 (1994) (“Antitrust and Politics”).

²⁸ See, e.g., *New York v. Anheuser Busch*, 673 F.Supp. 644 (E.D.N.Y. 1987). See also *California v. American Stores*, supra note 3.

²⁹ See, e.g., *In re Minolta Camera Products Antitrust Litigation*, 668 F.Supp. 456 (D. Md. 1987)(37 states sued, and ultimately settled, a claim against Minolta for alleged national resale price maintenance conspiracy); *In re Panasonic Consumer Electronics Products Antitrust Litigation*, 1989 WL 63240 (S.D.N.Y. June 5, 1989)(49 states sued, and ultimately settled, a claim against Panasonic for an alleged national conspiracy to fix retail prices); *In re Mid-Atlantic Toyota Antitrust Litigation*, 516 F. Supp. 1287, 1289 (D. Md. 1981), settlement approved, 605 F. Supp. 440 (D. Md. 1984) (several states sued, and ultimately settled, a claim against Toyota for alleged unlawful tying of automobiles to purchase of accessories).

sent a clear message to their staffs that cooperation with the states is now the rule.”³⁰ One of the main reasons for this cooperation has been the decision by leaders of the DOJ and the FTC to distance themselves from the Chicago School approach in favor of a pragmatic, realistic assessment of the impact of mergers and other potentially unlawful antitrust activities on consumers and business competitors.³¹

In addition to this policy shift in antitrust enforcement by the federal government, federal and state antitrust authorities have created an infrastructure to facilitate greater federal-state coordination. A full-time position was established by then-Assistant Attorney General for Antitrust, Anne Bingaman, to coordinate federal and state criminal antitrust enforcement.³² Additionally, the Executive Working Group for Antitrust, formed in October 1989, created an opportunity for the DOJ, FTC, NAAG, and individual state attorneys general to gather and discuss antitrust policy and enforcement. Further, the NAAG has redrafted its Horizontal Merger and Vertical Restraints Guidelines to become more consistent with the Federal Guidelines, and states, through NAAG coordination, have supported the federal government with multistate amici briefs in several cases.³³ More recently, federal and state antitrust authorities developed the 1998 Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, which has greatly increased cooperation between states and the federal government during merger investigations. As a result, “coordinated state-federal enforcement has now proceeded to the state where a target of both

³⁰ James E. Tierney, NAAG Antitrust, **Error! Reference source not found.** (visited on January 30, 2001).

³¹ Roundtable, *supra* note 24, at 950.

³² Assistant Attorney General Bingaman’s first selection for the federal-state liaison position was Milton Marquis, who had served as Virginia Assistant Attorney General for several years and was quite familiar with NAAG and the multistate framework.

³³ See Kevin J. O’Connor, State Antitrust Law and Enforcement, **Error! Reference source not found./...9-tg7.htm?OpenElement&964632483660**, at 7-8 (1999) (visited on December 15, 2000).

State and federal investigations can request, though not insist, on responding to a single set of document demands.”³⁴

There have been numerous examples of multistate-federal cooperation in antitrust enforcement during the 1990s. Recent examples include a 1996 settlement between Rite Aid, several states, and the FTC³⁵, a 1997 settlement between Thomson-West, the DOJ, and seven states³⁶, a divestiture agreement between Cargill, several states, the DOJ³⁷, and several recent oil company mergers³⁸. The states also filed an amicus brief in support of the FTC in the FTC’s request for a preliminary injunction in the *Office Depot/Staples* merger.³⁹

In spite of the increased cooperation over the past decade, “multistate antitrust enforcement actions [during the Clinton Administration] nonetheless illustrate a continuing difference in view as to what types of activity properly are actionable under the antitrust laws.”⁴⁰ Most of the antitrust cases undertaken by the states have not been supported by federal agencies.⁴¹ Perhaps most tellingly, the states have filed two amici briefs, in *Kodak*⁴² and *Kahn*⁴³, in opposition to positions taken by the DOJ. Even in situations where the federal government and the states have undertaken joint investigations, the states have rejected federal government consent decrees, choosing instead to enter into more extensive consent decrees with the

³⁴ Vertical Trade Restraints, *supra* note 22, at 260.

³⁵ Rite Aid Corp./Revco D.S., No. 961-0020 (FTC Apr. 17, 1996).

³⁶ Thomson Corp./West Publishing Co., 1997 U.S. Dist. LEXIS 1893 (D.D.C. Feb. 27, 1997).

³⁷ Missouri v. Cargill, Inc. 4:97CV0087SNL (E.D. Mo. 1997) (settlement approved April 25, 1997); United States et al. v. Cargill, Inc., 1997-2 Trade Cas. (CCH) ¶ 71,893 (W.D.N.Y. 1997).

³⁸ For a list of these mergers and other instances of federal-state cooperation, see Henry First, Thomas Greene, and Kevin O’Connor, State Antitrust Law and Enforcement, 1181 PLI/Corp 831, 841 (2000).

³⁹ F.T.C. v. Staples, 970 F. Supp. 1066 (D.D.C. 1997).

⁴⁰ Stephen Paul Mahinka and Kathleen M. Sanzo, Multistate Antitrust and Consumer Protection Investigations: Practical Concerns, 63 Antitrust L.J. 213, 215 (1994) (“Practical Concerns”). See also Part III, *infra*, for a discussion of these differences.

⁴¹ See, e.g., State of N.Y. by Vacco v. Reebok Intern. Ltd., 96 F.3d 44 (2d Cir. 1996); State of Texas ex rel. Atty. Gen. Morales v. Zeneca, Inc., 1997 WL 570975 (N.D.Tex. 1997); State of Missouri, et al. v. American Cyanamid Co., Dkt. No. 97-4024- CV-C-SOW (W.D. Mo. Jan. 30, 1997).

⁴² Eastman Kodak Co. v. Image Technical Service, Inc., 112 S. Ct. 2072 (1992).

⁴³ State Oil Co. v. Khan, 118 S.Ct. 275 (1998).

defendant company⁴⁴. To date, however, the states have yet to engage in multistate litigation in direct opposition to a substantive stance taken by the federal government.

c. The Microsoft case and its implications for multistate antitrust policy

The ultimate resolution of *U.S. v. Microsoft*⁴⁵ could have dramatic implications for the near future of federal antitrust enforcement. The *Microsoft* case, alleging illegal tying of Microsoft's Internet Explorer with its Windows operating system, has been pursued jointly by the DOJ and nineteen states. After a lengthy bench trial, District Judge Thomas Penfield Jackson ordered a controversial break-up of Microsoft⁴⁶, and it is presently unclear whether the D.C. Circuit will affirm his decision. In spite of merciless pressure from Microsoft, the states and the DOJ have thus far been able to retain a united front in terms of the choice of remedy desired.⁴⁷

It is quite possible, however, that President Bush would choose to persuade Attorney General Ashcroft to settle the case on lenient terms or to drop the investigation altogether

⁴⁴ See, e.g., *State of N.Y. ex rel. Koppell v. Keds Corp.*, 1994 WL 97201 (S.D.N.Y. 1994) (several states settled with Keds for alleged vertical price restraints violations, receiving damages, following a narrower DOJ settlement); *State of N.Y., by Abrams v. Primestar Partners, L.P.*, 1993 WL 527984 (S.D.N.Y. 1993) (45 states settled with Primestar and other direct broadcast satellites for alleged violations of the Sherman Act, obtaining both injunctive relief and damages, following a narrower DOJ consent decree).

⁴⁵ *U.S. v. Microsoft Corp.*, 1998 WL 614485 (D.D.C. 1998).

⁴⁶ *U.S. v. Microsoft Corp.*, 97 F.Supp.2d 59 (D.D.C. 2000).

⁴⁷ Although individual states such as Ohio, Illinois, Florida, and Maryland have had reservations about a full breakup of Microsoft, and other states, such as California, have desired a more extensive breakup, the vast majority of the states, with the exception of Ohio and Illinois, ultimately managed to put aside their differences and have continued to pledge support for the DOJ's plan for a partial breakup of Microsoft. See James Grimaldi, *States Split on Justice Dept. Plan to Break up Microsoft*, *Washington Post*, Thursday, April 27, 2000, page E03. Additionally, all nineteen states have signed the appellate brief, thereby indicating continued state support for aggressive structural relief of Microsoft. Were individual states to choose to withdraw from the Microsoft litigation, moreover, such action would not be inconsistent with the multistate litigation paradigm; individual states, as well as the DOJ or the FTC, are autonomous political creatures. Considering that two full election cycles have passed since the Microsoft investigation began, it is rather predictable that a state or two, given an altered political direction in the 2000 elections, might choose to withdraw from the multistate effort. As each individual state is empowered to bring a *parens patriae* suit, under 15 U.S.C. §15c, regardless of the actions of other states, and as actions by two or more states constitutes a "multistate" effort, the withdrawal of a single state does not and cannot preclude additional states from continuing their multistate suit against Microsoft. Conversation with James E. Tierney, former Attorney General of Maine and presently a distinguished faculty member at Columbia Law School, conducted on February 1, 2001.

subsequent to the D.C. Circuit's ruling, in order to avoid breaking up Microsoft.⁴⁸ Despite the support for Judge Jackson's decision by conservatives such as Kenneth Starr and Robert Bork and by CEO's of many large corporations⁴⁹, the decision has also been sharply criticized by leading proponents of the Chicago School⁵⁰. Should Attorney General Ashcroft choose to endorse the position that the market should be left alone to sort out antitrust concerns, and in particular allegations of tying, he would then reject the idea of governmental intervention through litigation and would order the DOJ to drop or settle the lawsuit. Additionally, Attorney General Ashcroft might choose to offer pragmatic considerations for dropping or settling the lawsuit. For example, President Bush might argue that the federal government, based on the enormous cost of continuing the litigation against Microsoft, can no longer afford the litigation risk that inevitable appeal attempts would require⁵¹.

Should President George W. Bush and Attorney General Ashcroft indeed choose a pro-Chicago School path akin to President Reagan, it is quite plausible that the state attorneys general will insist on continuing the litigation until a final verdict is reached. This decision might stem from the policy motivation that the states continue to believe in the harm to consumers and local businesses that Microsoft's bundling has caused. A decision to continue pressing a breakup of Microsoft could also come from the pragmatic concern that the states don't want to have to re-litigate these issues again⁵². In general, given the multistate desire to sue

⁴⁸ Conversation with James E. Tierney, *supra* note 47; Conversation with Kevin O'Connor, *supra* note 14.

⁴⁹ Conversation with James Tierney, *supra* note 47.

⁵⁰ See John R. Wilke, Mediator in Microsoft Suit Blasts State Role in Antitrust Enforcement, *The Wall Street Journal* (September 19, 2000) ("Mediator in Microsoft") (describing, *inter alia*, Judge Richard Posner's rejection of the idea of a breakup of Microsoft).

⁵¹ Conversation with Kevin O'Connor, *supra* note 14.

⁵² The current lawsuit against Microsoft comes just a few years after a 1995 consent decree was signed between Microsoft and the DOJ. Stephen Houck was quite clear that the states were wary of any settlement proposal with Microsoft, and Bill Gates in particular, because of the states' perception that Microsoft had blatantly and brashly violated the 1995 consent decree leading. Conversation with Stephen Houck, *supra* note 22.

Microsoft, preceding the DOJ's involvement, in the early phases of the Microsoft case⁵³, it is highly plausible that the states would continue to press their suit with or without the DOJ's support. As Kevin O'Connor succinctly remarked, "simply put, the states have a vital interest in maintaining competition in markets affecting their states and we will do whatever it takes to protect that interest."⁵⁴

Thus, the states might then be placed in the unprecedented situation of continuing to press for a breakup of Microsoft regardless of the DOJ's decision to settle or drop the investigation. As a result, the states would directly face the scenario directly at issue in this paper: whether states, in a multistate capacity, are justified in bringing a suit or investigation subsequent to the federal government's express determination that no violation had occurred or that the matter was now settled⁵⁵.

III. Likelihood of Conflict Between State and Federal Antitrust Enforcement

States frequently pursue a slightly different focus in antitrust enforcement than do their federal counterparts. Often, these differences can be explained by prudential factors or differences of opinion amongst prosecutors regarding the particular facts of a case. In other instances, however, the differences stem from more doctrinal, policy-driven motivations about substantive antitrust law. Because of the significant costs involved in litigating an antitrust matter, moreover, the policies and pragmatic concerns influencing state and federal enforcement

⁵³ John Heilemann, *Pride Before the Fall: The Trials of Bill Gates and the End of the Microsoft Era* 22-25 (Harper Collins Publishers, Inc. January 2001) (noting that the DOJ began to take the litigation more seriously when the states informed Assistant Attorney General Joel Klein of their impending intention to begin their lawsuit).

⁵⁴ Roundtable, *supra* note 24, at 943.

officials have an immense impact on deciding which claims will be pursued. As a result, it is quite possible for the states and either the DOJ or the FTC, while investigating potential violations of the same substantive law, to come up with divergent views over whether or not to challenge a merger or bring a claim for vertical price-fixing.

a. Non-Doctrinal Reasons for Divergent Federal-State Antitrust Enforcement

Several reasons exist for non-doctrinal differences in antitrust enforcement between federal and state law enforcement. As was discussed in the House Report on the Hart Scott Rodino Act, the federal government has limited resources in antitrust enforcement.⁵⁶ As a result, if the FTC, for example, is examining national mergers A and B, the FTC might decide that, based on budgetary constraints, it can only challenge merger A. The FTC, then, would not be passing judgment on merger B's legality, and the FTC would have no objection to, and indeed probably welcome, a decision by a state or states to challenge merger B should the state(s) deem the merger unlawful.⁵⁷ Moreover, the DOJ or FTC might decide not to bring a challenge or a complaint because they deem the matter too local or otherwise small in scope to expend the federal government's limited resources. In particular, the federal government might feel that, in a purely local matter, the state in which the conduct occurred would have more expertise and therefore be better suited to bring a claim or challenge.⁵⁸ Additionally, the federal government might decide not to bring a claim in an instance where damages relief is more appropriate than injunctive relief. Because only the states, and not the federal government, have the power to sue

⁵⁵ A settlement by the DOJ might also lead some states to defect from the breakup remedy in support of a more moderate settlement, thereby creating additional pressure on those states still pursuing a breakup remedy to justify their position and thrusting the federal-state conflict into an even more glaring spotlight.

⁵⁶ See Part I, *supra*.

⁵⁷ Conversation with James Tierney, *supra* note 47.

⁵⁸ Conversation with Stephen Houck, *supra* note 22; see also Part I, *supra*.

for treble damages, the DOJ and FTC might not, contrary to the states, be interested in pursuing a claim against a company that has recently, but is no longer, engaging in antitrust violations.⁵⁹ Finally, individual state attorneys general and federal antitrust authorities might simply disagree on the import of the facts of a given case. Prosecutorial discretion plays a key function in antitrust enforcement, and in a case where the facts could be viewed as either constituting a violation or not, reasonable minds might differ over whether or not to bring a claim.⁶⁰ In any of these instances of different approaches taken by the federal and state governments, most critics of multistate activity would concede that these prudential differences were both anticipated by Congress in the Hart-Scott-Rodino Act and consistent with joint enforcement generally.

b. Doctrinal differences based on somewhat contrasting policy objectives

In addition to differences stemming from pragmatic and discretionary considerations, states and the federal government at times have different motivations and policy objectives shaping the area and degree of antitrust enforcement administered by each branch.⁶¹ In particular, the states have historically been much more active in prosecuting vertical price-fixing and in rejecting amorphous efficiency defenses in merger investigations. The primary reason for state vigilance in these antitrust areas, and for the lesser degree of enforcement by the federal government (especially during the 1980's), appears to be the states' concern for "localized impacts on state employment or state economic activity"⁶² in contrast to the federal government's more pronounced focus on general notions of efficiency and national competition.

⁵⁹ Injunctive relief is prospective—it only prevents current and future harm—whereas damages can be punitive and retroactive, by imposing a severe fine on a company for its past (subject, of course, to any statute of limitations defense) illegal conduct.

⁶⁰ Conversation with Stephen Houck, *supra* note 22.

⁶¹ Practical Concerns, *supra* note 40, at 229 (states and the federal enforcement authorities "do not uniformly follow the same enforcement guidelines or utilize the same modes of analysis.")

Concern for consumer protection, state business prosperity, and state employment, while not legally sufficient to bring an antitrust claim, nevertheless shapes when a legal claim is brought by states.⁶³ Indeed, because state attorneys general are primarily elected officials, they tend to “care about local business impact whereas the federal government doesn’t necessarily.”⁶⁴ For example, a proposed merger’s potential harm to local workers may prompt a state attorney general to investigate the proposed merger’s legality in an instance where the federal authorities, who may not consider the local effects on the job market, would choose not to investigate.⁶⁵ Additionally, state attorneys general may receive more pressure to take action from competing local businesses than their federal counterparts. Because these businesses represent part of their constituency, state attorneys general may feel more compelled to heed the concerns of local businesses than would be the federal government.⁶⁶

Perhaps most importantly, state attorneys general, as political actors attuned to the power of the media, may choose a course of action different from the federal government out of a desire to appear to do something good for his/her consumer constituents.⁶⁷ As one commentator opines, “antitrust’s central purpose [to the states] is to prevent income transfers from consumers to producers. The NAAG [Horizontal Merger] Guidelines frequently emphasize this philosophy...as the major purpose of antitrust enforcement...”⁶⁸ An example of the latter can be

⁶² Id. at 228.

⁶³ Conversation with Kevin J. O’Connor, supra note 14.

⁶⁴ Conversation with Stephen Houck, supra note 22; see also Roundtable, supra note 24, at 939 (“The intent behind [state] involvement is to ensure the existence, maintenance, and nurturing of competitive local exchange markets”).

⁶⁵ David A. Zimmerman, Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers, 48 Emory L.J. 337, 346 (1999) (“Limited Role”).

⁶⁶ Antitrust and Politics, supra note 27, at 121-22 (“The political and social goals of antitrust, or more parochially a desire to protect state firms and jobs, may induce a state attorney general to act. Again, this possibility is not merely theoretical as...it has in fact occurred.”).

⁶⁷ Limited Role, supra note 65, at 347. See also Antitrust and Politics, supra note 27, at 77 (noting that many state attorneys general view consumer protection “as playing an important political and legal role for their offices and view[] antitrust as a significant component of consumer protection...”).

⁶⁸ Antitrust and Politics, supra note 27, at 105.

seen in the case of *Maine v. American Skiing Co*⁶⁹, when the Maine Attorney General “challenged a ski resort’s acquisition of a competitor because of concerns that Maine residents would not have as many discounts available.”⁷⁰ As will be discussed shortly, this difference plays out not only in different cases being brought by the DOJ/FTC and the states, but also in different consent decrees being negotiated in cases originally brought jointly by the states and a federal agency.

Concomitant with their emphasis on the local impact of antitrust decisions, the states are often driven by real-world concerns to a greater degree than the federal government.⁷¹ As several commentators have noted, state attorneys general do not wholeheartedly embrace the Chicago School of economics, instead choosing to focus on “the impact of the mergers [or vertical price-fixing] on employment and on consumer prices and not just applied according to an economic efficiency model.”⁷² In contrast, the federal government often does not think of the practical, local effects of mergers or price-fixing, instead engaging in a more abstract, analytical, and ethereal analysis.⁷³ As a result, the states are often more concerned with preserving clear, bright-line tests in antitrust law than their federal counterparts. “As things become more complicated...[local attorneys] have trouble out in the hinterlands telling their clients exactly how this can be applied to their business transactions.”⁷⁴ This split between the states and the federal government came to a head in the *Khan*⁷⁵ case, where the states and the federal

⁶⁹ *Maine v. American Skiing Co.*, 1996-2 Trade Cas. (CCH) PP 71, 478 (Me. Super. Ct. 1996)

⁷⁰ *American Skiing*, 1996-2 Trade Cas. (CCH) PP 71, 478.

⁷¹ Statement by James E. Tierney, former Attorney General of Maine, given January 29, 2001 (“State attorneys general are different from their federal colleagues when engaged in merger analysis. By temperament they are more activist and by intellect they are more skeptical”).

⁷² *Antitrust Federalism*, supra note 21, at 42. See also Roundtable, supra note 24, at 938 (“The states have, at times, urged a more fact-based approach in antitrust cases”).

⁷³ Conversation with Kevin O’Connor, supra note 14.

⁷⁴ Roundtable, supra note 24, at 947.

⁷⁵ *State Oil Co. v. Khan*, 118 S.Ct. 275 (1998) (the Supreme Court adopted the DOJ’s position in eliminating the per se rule for maximum prices in instances of vertical trade restraints).

government wrote opposing amicus curiae briefs regarding the maintenance of a bright-line test in maximum resale price-fixing.

c. Specific areas in which divergent federal-state motivations are played out

The somewhat differing motivations between federal and state authorities have resulted in practical differences in enforcement levels, most particularly in vertical price-fixing and mergers. Since the 1980s, federal-state divergence over doctrinal matters has surfaced both “actively” and “passively.” In an active setting, federal and state authorities have disagreed over actual claims, with one side (usually the states) choosing to enforce the law more vigorously than the other. Additionally, even in areas where the states and the DOJ or FTC have worked together, states often disagree with the breadth of federal consent decrees and subsequently create their own, more expansive decrees. The divergence in an activist setting is easier to witness because officials are taking express positions on whether or not to bring a specific investigation. The passive setting, in contrast, pertains to the deterrent effect of the Federal and NAAG Guidelines on businesses seeking to avoid antitrust investigations. While the passive setting has become decreasingly important with the convergence in recent years between the Federal and NAAG Guidelines, the active setting remains an area of disagreement between federal and state authorities.

Vertical price-fixing cases have provided a seminal area of activist state antitrust enforcement ever since the Hart-Scott-Rodino-Act was passed.

States view vertical price-fixing cases as vitally important to prevent reductions in retail price competition through restraints imposed by upstream suppliers....The states intend to respond to the complaints they receive directly from consumers and retailers about this loss of, or apparent absence of, price competition.⁷⁶

⁷⁶ Roundtable, *supra* note 24, at 938.

Throughout the 1980s, however, the federal government, based on a Chicago School outlook, viewed vertical pricing restraints as neutral or even beneficial to consumers.⁷⁷ As a result, the states became the sole source of enforcement of vertical price-fixing violations. Even today, while the federal government has retreated from its wholesale acceptance of the Chicago School, both the DOJ and the FTC remain much less active in this area of antitrust law.⁷⁸

An additional area of activist dispute between the federal and state governments occurs in merger analysis. “In deciding which mergers to challenge, state enforcement authorities make decisions based on very different motivations and analyses from those employed by the federal antitrust authorities.”⁷⁹ The DOJ and FTC give much greater credence than the states to affirmative defenses of efficiency, requiring a rather minimal prima facie allegation of the efficiency of the proposed merger.⁸⁰ Conversely, the states require that merging parties prove that the efficiency savings are actually transferred to consumers,⁸¹ thereby “downgrad[ing] both the legal and economic significance of allocative and productive efficiency.”⁸² As a result, state approaches to merger analysis “are more restrictive than the policies of the federal antitrust agencies...in practice, the states have challenged mergers at thresholds more stringent than those applied by federal authorities.”⁸³

Even in areas where the federal and state authorities have come to agreement on anticompetitive aspects of mergers, the remedies pursued by each continue to suggest the

⁷⁷ Antitrust Federalism, supra note 21, at 32.

⁷⁸ Conversation with James Tierney, supra note 47.

⁷⁹ Limited Role, supra note 65, at 338.

⁸⁰ Conversation with Kevin O’Connor, supra note 14.

⁸¹ Id.

⁸² Antitrust and Politics, supra note 27, at 106.

⁸³ William E. Kovacic, Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies, 66 U.Cin. L. Rev. 1075, 1080 (1998) (“Merger Enforcement”).

prevalence of different underlying motivations. In *USA Waste Services*⁸⁴, for example, both the states and the DOJ brought suit against the proposed USA Waste Services merger. In seeking out a remedy, the DOJ was only concerned with ameliorating anticompetitive impacts in the top fifteen markets affected. The states, however, refused to enter into a consent decree until each state was able to address anticompetitive practices in its largest local areas. Thus, even in instances of coordinated activity, a failure by federal authorities to appreciate fully the local dimensions of antitrust activity continues to restrict total federal-state consistency in assessing antitrust activity.

The impact of antitrust motivations is enhanced by the relative importance of a challenge by states or the federal government to a proposed merger. As one scholar has noted,

...the decision of whether or not to challenge a merger is in many ways more important than what a court's decision on the merger would be...Merging parties that are challenged can expect to pay great costs to fight a legal battle; if they decide to work out a deal with the enforcement agency, they will probably have to disgorge assets or make other costly concessions. Even merging parties that believe they have a strong case that the proposed transaction is not anticompetitive may want to stay out of court due to the great uncertainty associated with court decisions in merger cases.⁸⁵

These enormous costs are magnified by the lack of predictability in certain types of antitrust litigation. Because the Supreme Court has not adjudicated a horizontal merger case in over twenty-five years,

...the state of the law on mergers in the lower courts today is very confused...This confusion may increase the perception of a threat of a court decision striking down a proposed merger. Thus...most parties will try to reach an agreement with the government officials threatening action.⁸⁶

⁸⁴ *USA Waste Services, Inc.*, 1997-1 Trade Cas. (CCH) (D.D.C. 1996) (nineteen states and the DOJ settled a merger investigation with USA Waste after USA Waste agreed to certain areas of divestiture).

⁸⁵ *Limited Role*, supra note 65, at 361.

⁸⁶ *Id.* at 361.

Out of their desire to avoid the transaction costs and the uncertainty of litigation, many businesses have looked to federal and state merger guidelines to anticipate the types of claims the government is likely to pursue. While neither the Federal nor the NAAG Guidelines are legally binding, the fact that the FTC, the DOJ, and the states have limited resources suggests that certain activities not expressly prohibited in the Guidelines are less likely to be challenged.⁸⁷ To the extent that these two Guidelines conflict, due to the different state and federal motivations shaping them, businesses may be faced with unclear prophylactic options.⁸⁸

This passive prong of federal-state divergence, however, has largely been eliminated by increased cooperation and consolidation between the Federal and NAAG Guidelines. The Federal Vertical Restraints Guidelines, which were in stark contrast to their NAAG counterpart, were rejected by the DOJ during the 1990s and have not been replaced. Moreover, NAAG Guidelines have been amended during the 1990s in an effort to harmonize with remaining federal guidelines. Additionally, a federal-state infrastructure has been developed to insure the Guidelines' future convergence. The Executive Working Group for Antitrust, formed in October 1989, has spawned various task forces and working groups meeting throughout the year, at times addressing inconsistencies between the Guidelines.⁸⁹ As a result, even if a dramatic doctrinal shift occurred, it appears unlikely that passive differences between the Guidelines will remain an issue of serious concern.

IV. Analysis of Anticipated Federal-State Conflict⁹⁰

⁸⁷ Id. at 350.

⁸⁸ See Section IV, *infra*.

⁸⁹ Vertical Trade Restraints, *supra* note 22, at 260.

⁹⁰ This analysis will focus on non-constitutional arguments only; for a discussion of the constitutional dimension of federal-state conflict in antitrust policy, see Note, To Form a More Perfect Union?: Federalism and Informal

The preceding discussion has made clear that pragmatic and discretionary disagreements were foreseen by Congress in enacting the Hart Scott Rodino Act, and that doctrinal disagreement between federal and state antitrust law enforcement has occurred and is likely to continue in the future. The central question, then, is whether the states are entitled to pursue matters of substantive federal law which the DOJ or FTC have already ruled upon, or whether the states should be limited to disagreement only in matters of prudence or prosecutorial discretion. In practical terms, can the states, in a multistate capacity, continue to pursue the breakup of Microsoft should the DOJ decide to settle its antitrust case against Microsoft on less severe terms than the states desire? Critics of large-scale state antitrust enforcement, especially systematic multistate enforcement, will likely argue that, to the extent palpable differences exist between federal and state antitrust enforcement, exposing businesses to two different levels of antitrust regulation puts an undue burden on business, impedes efforts at a clear and consistent federal antitrust policy, hinders the cooperative spirit underlying the Hart-Scott-Rodino Act, and expands the scope of state antitrust enforcement to levels not anticipated by Congress when it passed the Act. Proponents of multistate enforcement activity, conversely, will argue that different standards between states and the federal government are complementary and not contradictory, that state antitrust enforcers are not creating new law or putting an undue burden on business but are simply enforcing federal law, and that piggybacking of multistate suits to federal litigation was endorsed by Congress in passing the Hart-Scott-Rodino Act. Based on the legislative intent underlying the Act as well as the Supreme Court's articulation of the complementary private-public nature of federal antitrust law, this paper will agree with the latter

Interstate Cooperation, 102 Harvard L.Rev. 842 (1989) (discussing the federalism arguments in support of the NAAG Guidelines).

approach in concluding that federal-state disagreement is not only permissible, but at times beneficial, in ensuring the highest quality of enforcement of federal antitrust law.

a. Arguments against divergent multistate antitrust enforcement

The first major critique of multistate involvement argues that divergent federal and state requirements place undue burdens on businesses. Because state attorneys general “ignore the federal approach on matters like vertical restraints and mergers and...pursue federal antitrust cases based on theories rejected by the federal agencies,”⁹¹ critics argue, businesses are left with a significant amount of “uncertainty, delay, and [un]predictability with regard to business planning”⁹² Indeed, a firm cannot feel confident that it will avoid investigation even after it comports with the letter of the Federal Guidelines because “in many cases the federal antitrust authorities may appear willing to approve a merger while the states are not.”⁹³ Inconsistent antitrust enforcement by states, therefore, results in businesses incurring additional compliance costs as well as counseling difficulties for their attorneys, thereby creating an inefficient approach to antitrust enforcement.⁹⁴

Moreover, businesses are doubly burdened with the prospect of states “piggybacking” lawsuits subsequent to actions brought by federal authorities, premised on the same claim but seeking alternate remedies. As Judge Posner candidly put it:

I would like to see states forbidden to bring antitrust suits” unless they are against companies that have directly harmed the state, such as price fixing for goods purchased by the state. “States do not have the resources to do more than free ride on federal antitrust litigation, complicating its resolution.”⁹⁵

⁹¹ Antitrust Federalism, supra note 21, at 39-40.

⁹² Antitrust and Politics, supra note 27, at 117.

⁹³ Limited Role, supra note 65, at 362.

⁹⁴ Antitrust and Politics, supra note 27, at 117-118.

⁹⁵ Mediator in Microsoft, supra note 50 (quoting Judge Richard Posner).

Indeed, piggybacking suits are relatively common. For example, in the recent *Toys R Us* multistate litigation, the states brought suit for damages against Toys R Us after the DOJ had already pressed for, and received, an injunction against the company.⁹⁶ By allowing states to piggyback federal injunctive suits, critics like Posner would argue, antitrust law results in a painful redundancy that simultaneously diminishes the potency of federally pursued injunctions and punishes companies a second time for the exact same infraction. The piggybacking becomes even more pernicious to Posner given the little work required of the states in order to bring suit because the DOJ or the FTC has already completed all the investigative legwork.

Further, critics have argued that collective multistate activity extends beyond mere inconsistency with federal policy towards creating an alternative, illegitimate multistate regulation of antitrust law. As Alabama Attorney General Bill Pryor stated, multistate antitrust lawsuits “have shifted from a role of protecting consumer welfare in commercial transactions to an emerging role of regulation and taxation through litigation.”⁹⁷ Other critics have echoed this concern, arguing that the formation of a uniform state policy, through the coordination of NAAG, risks creating “a ‘shadow Congress’ that seeks to dictate national law in many areas of business regulation,”⁹⁸ and that, “by challenging mergers which the federal authorities do not challenge, the states are interfering with the federal merger policy.”⁹⁹

In contrast to the current method of state antitrust enforcement, at least one critic has proposed an alternate approach, analogous to federal-state interaction under the Clean Air Act,

⁹⁶ *In re Toys R Us Antitrust Litigation*, 191 F.R.D. 347 (E.D.N.Y. 2000).

⁹⁷ *Multigovernment Lawsuits*, *supra* note 26, at 1898.

⁹⁸ Luther C. McKinney & Dewey J. Caton, *What to do When the Attorney General Calls: State Regulation of National Advertising*, 3 *DePaul Bus. L.J.* 119, 123 (1991) (quoting Stratton, *Attorneys General in State of Collusion*, *Wall St. J.*, June 10, 1988, at 22, col. 4).

⁹⁹ *Limited Role*, *supra* note 65, at 362-63.

whereby states would be free to enforce antitrust laws at their discretion, but according to standards set forth only by Congress.

The concept behind state and federal cooperation under the Clean Air Act is that while the federal government cannot possibly do all the regulating and enforcing of the law, it can set the standards and tell the states what they can and cannot do....A similar system would serve merger regulation in the United States well by eliminating the problems associated with states challenging mergers under different policies.¹⁰⁰

An additional criticism, discussed in Part I(b), *supra*, is that state-federal conflict over the enforcement of federal antitrust law runs contrary to the intent of the Hart-Scott-Rodino Act. The House Report to the Act clearly set forth that one of the primary goals of the Act is “the promotion of cooperation in antitrust enforcement between the States and the federal government.”¹⁰¹ The antipathy that occurred during the 1980s, and that would likely recur should President George W. Bush embrace the Chicago School approach to antitrust policy, runs contrary to this spirit of cooperation and mutual assistance. Rather, critics argue, the states must defer to federal decisions when disagreements occur so as to honor the cooperative dimension of the Act.

A final criticism, also addressed in Part I(b), *supra*, maintains that Congress intended a limited, localized scope of state enforcement of federal antitrust law. Congress circumscribed the autonomy and scope of state antitrust enforcement by limiting the power of states to settle¹⁰² and obligating states to notify citizens of their right to exclusion election¹⁰³. Moreover, in 1976, the size of state antitrust offices and the scope of multistate litigation generally were relatively small. As Congresswoman Jordan noted during the passage of the Hart-Scott-Rodino Act:

¹⁰⁰ Limited Role, *supra* note 65, at 364-65.

¹⁰¹ H.R. Rep., *supra* note 8, at 3.

¹⁰² 15 U.S.C. §15c(c) (2000).

¹⁰³ 15 U.S.C. §15c(b)(1-2) (2000).

I think it is unrealistic to believe that more than a handful of States will be in a position to conduct a significant amount of [antitrust] litigation on their own in the foreseeable future. And some States will never have the resources or the interest to hire and train the large staffs which antitrust litigation requires.¹⁰⁴

Thus, critics would argue, Congress intended for a limited, constrained level of enforcement by state antitrust enforcement. As a result, complex multistate suits against nationwide violators of federal antitrust law, such as the *Panasonic*¹⁰⁵ litigation, exceed the scope of state authority under the Act and should be dismissed by federal courts.

b. Arguments in support of divergent multistate antitrust enforcement

The primary response to these criticisms is that they fail to recognize the important, and complementary, role divergent state antitrust enforcement actually provides. First, the general intent of the legislative history of the Hart-Scott-Rodino Amendment, while less than clear-cut, does appear to support the proposition of separate, non-conflicting philosophical areas of focus for the federal and state governments. Congress recognized in the House Report that the federal government had been inept at providing for consumer welfare in instances of small-scale price adjusting.¹⁰⁶ By empowering states to bring such actions, the Act strongly implied that Congress envisioned certain policies of antitrust enforcement that would be most effectively handled by states and other areas that would be best addressed by the federal government. The fact that federal authorities are required to notify states of potential *parens patriae* claims stemming from the matter under federal investigation, under Section 15F(a) of the Act, suggests that state and federal spheres of influence, localized consumer or business welfare and national wealth

¹⁰⁴ H. Rep., supra note 8, (quoting Congresswoman Barbara Jordan), at 20.

¹⁰⁵ *In re Panasonic Consumer Electronics Products Antitrust Litigation*, 1989 WL 63240 (S.D.N.Y. June 5, 1989).

¹⁰⁶ H.R. Rep., supra note 8, at 3.

maximization, respectively, could reside within the same potential defendant. As a result, even if the federal government were to find no violation of national allocative efficiency in a proposed merger, ample room remains for a state or states to find an antitrust violation in terms of the merger's effect on the state attorney general's local market.

The Supreme Court has expressly affirmed this notion of federal (public) and state (private) antitrust activity as a cumulative, and not mutually exclusive, approach.

The [federal] Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.¹⁰⁷

The Supreme Court's logic in *Borden* was extended in *American Stores*¹⁰⁸, where the Ninth Circuit, and subsequently the Supreme Court, expressly affirmed the right of a state, as a private party, to object to a proposed merger even after the FTC had given its approval to the merger. "The court reasoned [in *US v. Borden*] that private and public interests in antitrust actions may not necessarily coincide. We think this reasoning applies here. California may have different interests than does the FTC in protecting its citizens from antitrust violations."¹⁰⁹ Thus, the Supreme Court has expressly sanctioned three principles which, when taken collectively, fundamentally support proponents of multistate antitrust enforcement: 1) that states and the federal government may have different interests at stake in antitrust investigations; 2) that these

¹⁰⁷ U.S. v. Borden Co., 347 US 514, 518-18 (1954) (citations omitted).

¹⁰⁸ State of California v. American Stores Co., 872 F.2d 837 (9th Cir. 1989) (rev'd in part on other grounds, 495 U.S. 271 (1990)).

¹⁰⁹ American Stores, 872 F.2d at 843.

different interests are not necessarily conflicting; and 3) that therefore a state¹¹⁰ is allowed to take a position in direct contradiction of an explicit decision by the federal government and need not acquiesce to the federal government's position.

These judicial rulings support the claim, made by state antitrust practitioners such as Kevin O'Connor, that concurrent state enforcement of federal antitrust law insures against "false negative" enforcement decisions because no single enforcement agency can preclude the initiation of cases that should have been brought but were not.¹¹¹ This broad approach, consistent with general principles of federalism, "reminds us that reasonable minds differ regarding what rule or approach will best serve antitrust...[and that] there are differing views regarding what the goals of antitrust and trade regulation should be."¹¹² Indeed, perhaps more than in any other field, the federal government position is not always correct in antitrust law; having states empowered to bring suit ensures that other potentially correct positions may be voiced.¹¹³ Moreover, in areas of uncertainty over the interpretation of substantive antitrust law, this system of concurrent empowerment allows the states to experiment with different analytical models that the federal government might not be willing to endorse but that the courts might find appropriate in antitrust analysis.¹¹⁴

Critics of multistate antitrust enforcement also fail to appreciate that, no matter whether the federal government, the states, or a private citizen brings suit, all plaintiffs are subject to the exact same standard of law. Thus, regardless of the motivations for bringing a case or

¹¹⁰ Based on the logic of *American Stores* and *Borden*, there appears to be no reason to distinguish a claim brought by a single state from a multistate claim. Moreover, critics of multistate activity have yet to provide a compelling argument for why multistate enforcement of federal law should be viewed analytically as any different from single state enforcement.

¹¹¹ Conversation with Kevin O'Connor, supra note 14.

¹¹² Antitrust Federalism, supra note 21, at 41-442. See also Antitrust and Politics, supra note 27, at 106.

¹¹³ See, e.g., *Eastman Kodak Co. v. Image Technical Service, Inc.*, 112 S. Ct. 2072 (1992) (where the Supreme Court agreed with a multistate amicus brief opposing the position of the federal government).

challenging a merger, the states must prove a violation of the same Sherman or Clayton Act provisions as the federal government. As Kevin O'Connor stated in a roundtable forum on antitrust enforcement, "when I go into court and challenge a merger, I'm facing the same standard that Joel [Klein]'s and Bob [Pitofsky]'s agencies are facing when they go into court."¹¹⁵ Moreover, because state attorneys general are political actors, they are quite careful about the claims they bring so that they don't get embarrassed by bringing frivolous lawsuits at the taxpayer's expense.¹¹⁶ Thus, the argument by critics that divergent state antitrust enforcement unduly burdens businesses by subjecting businesses to standards not demanded by the federal government must be viewed as somewhat disingenuous: essentially, these critics are arguing that, so long as the federal government does not investigate or prosecute illegal activity, violators should be free to break the law and should not be burdened by alternative enforcement of the law by other more vigilant authorities. In reality, Congress intended to thwart any such loopholes in antitrust enforcement by empowering the states to bring *parens patriae* damages suits.

Moreover, the interaction between the DOJ, the FTC, and the states suggests the absence of authority by the DOJ or FTC to preclude state enforcement. Rather, relations between federal and state antitrust authorities strongly suggest an understanding of the sovereignty of each body to pursue any antitrust claim it deems worthy of investigation, so long as the claim is pursuant to the Sherman or Clayton Acts *as expressed by Congress*. Evidence of this principle can be seen by the fact that, when the DOJ or FTC finish reviewing a potential merger's Hart-Scott-Rodino

¹¹⁴ Antitrust Federalism, *supra* note 21, at 44.

¹¹⁵ Roundtable, *supra* note 24, at 961.

¹¹⁶ Conversation with Kevin O'Connor, *supra* note 14. In fact, both current practitioners I spoke to, each of whom has been practicing during the 1990s period of increased federal-state coordination, and each of whom were appointed to their antitrust positions by the state attorney general, had a difficult time understanding the very question of what motivated states to bring antitrust lawsuits. Only after repeated questioning was I able to get beyond the reflexive response that "we are only interested in violations of the law. Any local or other motivations are irrelevant." *Id.* James Tierney, however, perhaps because he was an attorney general attuned to political

filings, and decide not to challenge the merger, the federal agency sends the merging parties a termination letter stating that the agency's decision not to challenge does not constitute a decision by the federal government that the merger is legal.¹¹⁷ Additionally, the 1998 Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General affirms each party's right, even when initially engaged in a joint investigation, "to pursue a negotiation or settlement strategy different from that of the other investigating agencies, or...to close its investigation."¹¹⁸ Thus, the federal government has implicitly conceded that its review of mergers, or antitrust matters generally, does not and should not preclude state challenges. This, in turn, reflects the true definition of cooperation referred to in the House Report on the Hart-Scott-Rodino Act: cooperation should be seen not in terms of deference by the states to the articulations of the DOJ or FTC in order to avoid inconsistent statements, but in terms of efforts by all parties to ensure that the law is enforced to the fullest extent possible.

Further, Posner's criticism of state piggybacking of federal investigations should be inconsistent with Congress' explicit actions. Congress elected to give state attorneys general, and not the DOJ or the FTC, the right to sue for treble damages. Congress could have just as easily amended the Clayton Act to allow federal authorities to sue for damages, but it chose not to. That choice reflects a preference by Congress to allow states the latitude to decide when and where to bring claims for damages. Moreover, claims that the states are "free-riding" on the investigations of the federal government also fail to take account of the unambiguous language in Section 15F(a) requiring investigative cooperation between the states and the federal

concerns and he was in office during the 1980s, had an easier time understanding my question and was able to elucidate a bit more on state motivations in bringing suits. Conversation with James Tierney, *supra* note 47.

¹¹⁷ Conversation with Stephen Houck, *supra* note 22.

government.¹¹⁹ As a result, piggybacking federal investigations or suits for injunctive relief with multistate suits for treble damages is consistent with the language and intent of Congress in enacting the Hart-Scott-Rodino Act. If Posner or others disagree with this approach, the proper medium for seeking redress is through new legislation by Congress amending the Act. Absent such statutory modification, both the plain meaning and the intent of Congress clearly support state piggybacking of federal investigations and claims.

Conclusion

In conclusion, “[t]he essence of law is finding ways to accommodate the public’s various and conflicting desires.”¹²⁰ By passing the Hart-Scott-Rodino Act, Congress accomplished this exact goal by providing an alternative policing mechanism, the state attorney general, for areas of antitrust law affecting the welfare of citizens of individual states, while simultaneously preserving the authority of the federal government to bring suits in promotion of national antitrust goals. Although the practical consequences of this concurrent jurisdiction over antitrust matters, in an era where small mom-and-pop stores are being taken over by large, national chains, may be that states and the federal government will have several occasions to bump heads, both branches of government should feel comfortable in pursuing their own policy objectives without regard to the approach taken by the other. In the end, different federal-state attitudes towards antitrust law do not create conflict but instead weave a richer, more complete fabric of antitrust protection for consumers and businesses across the United States.

¹¹⁸ 1998 Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General, Section IV.

¹¹⁹ See H. Rep., *supra* note 8, at 3.

¹²⁰ Antitrust Federalism, *supra* note 21, at 43.