Federal Versus State Antitrust Enforcement: Furthering Competition Through Cooperation

INGRID ULRIKA JERNUDD*

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* J.D., New York University School of Law. Thank you to Professors Christopher Sprigman and Stefan Bechtold for their guidance.

I. INTRODUCTION

The modern scheme of antitrust enforcement frequently involves cooperation between state governments and federal agencies—namely the Federal Trade Commission ("FTC") and the Antitrust Division of the Department of Justice ("DOJ"). This is an area of active interest, since widely covered multistate antitrust actions against Big Tech companies, like Google and Facebook, remain ongoing. While some characterize dual actions as "a prime example of 'cooperative federalism[,]'"[1] others have raised concerns about state cartelization in antitrust enforcement, judicial economy, and states' antitrust enforcement interfering with the federal scheme.[2]

This paper argues that the former positive framing of "cooperative federalism" is correct. To understand why this is the case, this paper first examines how federal and state coordination in merger investigations proceeds and what happens when there is disagreement among enforcers over a merger settlement. It then delves into the Sherman Act[3] and its legislative history, concerns about dual-tiered antitrust enforcement, and how the regulatory framework of antitrust and the judiciary tempers those worries. This analysis discusses legislative history at length, seeking to understand how it informs modern conceptions of cooperative enforcement among the federal and state governments.

II. MERGER INVESTIGATIONS

A. The Legislative Scheme and History of Merger Investigations: The Role of California v. Frito-Lay *and the Enactment of the Hart-Scott-Rodino Act*

In joint antitrust investigations of mergers and acquisitions ("M&A"), federal and state governments often have a symbiotic relationship, thereby reflecting the Congressionally intended antitrust enforcement dynamic between state and federal governments. The procedures and rationales for these joint M&A investigations help elucidate why horizontal and vertical coordination is beneficial to antitrust enforcement writ large.

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1. Younger v. Jensen, 26 Cal. 3d 397 (1980) (citing Stephen Rubin, *Rethinking State Antitrust Enforcement* 26 U. FLA. L. REV. 653, 680 (1974)).
2. *Infra* note 43 and accompanying text; *infra* note 102 and accompanying text.
3. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7.

The Clayton Act authorizes states to bring federal antitrust suits under *parens patriae*.[4] In an early case exploring the scope of such *parens patriae* power, *Georgia v. Pennsylvania Railroad*,[5] the Supreme Court held that a State was not precluded from bringing a suit for injunction under the federal antitrust laws—even where the United States also had brought suit.[6] *Pennsylvania Railroad*, however, limited Georgia's remedy options by holding that Georgia was not entitled to recover damages.[7] Similarly, in *California v. Frito-Lay*,[8] the Ninth Circuit held that California's *parens patriae* action—initiated to recover treble damages for an alleged price-fixing and maintenance conspiracy in violation of Sherman Act §1—was not authorized by §4 of the Clayton Act.[9]

However, the *Frito-Lay* court endorsed California's position that the current remedies to states in antitrust *parens patriae* actions were inadequate[10] and went so far as to "disclaim any intent to discourage the state in its search for a solution."[11] Addressing the institutional competency of courts to facilitate such an improvement to state antitrust enforcement, the Ninth Circuit demurred, suggesting the appropriate power lay with the legislative branch.[12] In a matter of years, Congress took this to heart and enacted the Hart-Scott-Rodino Act of 1976[13] ("HSRA"), which effectively overruled *Frito-Lay* by authorizing states' attorneys generals ("state AGs") to pursue treble (monetary) damages under the federal antitrust laws.[14] Accordingly, the HSRA uniquely positioned state AGs to recover monetary damages on behalf of natural persons for Sherman Act violations, since federal officials lack such capacity.[15] This grant of power exemplifies the exceptional role state AGs are expected to play in vindicating the rights of consumers—their constituents.

The House Committee on the Judiciary report submitted by Congressman Rodino explicitly cited the *Frito-Lay* decision as a source of "judicial invitation" to enable "[s]tate attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability

4. Clayton Antitrust Act of 1914, 15 U.S.C. §§12–17, 29 U.S.C. §§ 52–53.

5. 324 U.S. 439, 451 (1945).

6. *Id.* at 447 ("[T]he fact that the United States may bring criminal prosecutions or suits for injunctions under [the anti-trust laws] does not mean Georgia may not maintain the present suit.").

7. *Id.* at 453.

8. 474 F.2d 774 (9th Cir. 1973).

9. *Id.* at 778.

10. *Id.* at 777 ("The state most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged to be rendered unprofitable and deterred . . . the state is on the track of a suitable answer . . . to problems bearing on antitrust deterrence and the class action as a means to consumer protection.").

11. *Id.*

12. *Id.* ("[I]f the state is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvision but by legislation and rule making[.]").

13. Hart-Scott-Rodino Antitrust Improvements Act of 1976, P. L. No. 94–435, 90 Stat. 1383.

14. *Id.* (codified as 15 U.S.C. § 15c).

15. Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 52 DUKE L.J. 673, 675 (2003).

which some courts have found under Rule 23."[16] In 1990, the Supreme Court further cemented state AGs' antitrust advocacy powers, holding divestiture "a form of 'injunctive relief' within the meaning of § 16 of the Clayton Act" and thereby rendering it an available remedy in states' *parens patriae* suits.[17]

Returning to the passage of the HSRA, the House Committee Report notably highlighted and promoted cooperation in antitrust enforcement between the several states and the federal government.[18] The HSRA itself also included provisions denoting the contours of the federal-state relationship, "includ[ing] provisions that ordered the DOJ to provide investigative information to state attorneys general[.]"[19]

B. The States Establish Themselves in Modern Antitrust: The Creation of the National Association of Attorneys General Taskforce

Because of the widened role for state antitrust enforcement enabled by the Clayton Act and the HSRA, the National Association of Attorneys General established its Antitrust Task Force to better coordinate state efforts under the HSRA by 1983.[20] The Task Force, per its former chair Patricia A. Connors, was also formed in response to increased federal funding for state antitrust enforcement actions and a "perceived decline during the Reagan administration of [federal] antitrust enforcement[.]"[21] After the Task Force was created, state antitrust enforcement increased,[22] and the NAAG Task Force became a visible presence in the antitrust world.[23] With its visibility came influence and the ability to exert political pressure on the federal branches in Washington, D.C.[24] This pressure,

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16. H.R. REP. NO. 94–499, pt. IV, at 8 (1976).

17. California v. Am. Stores Co., 495 U.S. 271, 275 & 296 (1990).

18. H.R. REP. NO. 94–499, pt. III, at 5 ("An extremely important benefit which would flow from H. R. 8532 is the promotion of cooperation in antitrust enforcement between the States and the federal government.").

19. Kris Dekeyser et al., *Coordination among National Antitrust Agencies*, 10 SEDONA CONF. J. 43 (Fall 2009).

20. Patricia A. Conners, *Current Trends and Issues in State Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 37, 39 (2003).

21. *Id.* ("[A]t about the same time [HSRA] became law, Congress amended the Crime Control Act to provide funding for state antitrust enforcement" which was fundamental to the ability of states to develop antitrust divisions."); *see also* Nathaniel C. Nash, *More Antitrust Challenges Are Expected Under Bush*, N.Y. TIMES, Nov. 2, 1989, at D1 (describing how Democrats in Congress and antitrust experts at the time described antitrust enforcement in the 1980's as "lax"). The lackluster federal antitrust enforcement was a point of severe contention between the federal government and the states in the 1980s. Robert M. Langer & Pamela J. Harbour, *State attorneys general: the third prong in the antitrust triad*, *in* GLOB. COMPETITION REV., THE ANTITRUST REVIEW OF THE AMERICAS 2001, at 23 (2001), https://www.wiggin.com/wp-content/uploads/2019/09/langer.pdf [https://perma.cc/4K28-BKEG].

22. *Id.*

23. Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 79–80 (1994).

24. *See* Nash, *supra* note 21 (citing antitrust experts at the time who described the "Government's stiffer attitude" to antitrust enforcement as being partially attributable to "pressure from state law-

combined with a more aggressive approach[25] to antitrust enforcement under the newly-elected Bush administration, led to the creation of the Executive Working Group on Antitrust to coordinate federal and state law enforcement efforts.[26] The Working Group was comprised of the two federal antitrust heads—the Chairman of the FTC and the Assistant Attorney General in charge of the Antitrust Division at the DOJ—and a number of state AGs.[27]

C. Facilitating Federal and State M&A Investigations: The Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and the States' Attorneys General

In addition to the Working Group, in 1992, the DOJ and the FTC developed the "Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General."[28] The Merger Protocol facilitates federal and state coordination under the HSRA when determining whether to allow a pending merger or acquisition to proceed.[29] In direct recognition of the information-sharing mandate of the HSRA,[30] the Merger Protocol provides detailed guidelines on how and when the federal government should share information with state AGs in the course of M&A investigations.[31] An overarching goal of the Merger Protocol is to reduce duplicative production and generally expedite a review of the proposed transaction.[32] The federal government and interested states share confidential information and documentation related to the merger or acquisition, subject to agreement by the parties to the merger.[33] The

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enforcement officials."); *see also* Rose, *supra* note 23, at 80 (describing legislative activities of the Task Force at the federal level).

25. *See* Nash, *supra* note 21. The Bush administration sought to be more aggressive than the "far too lax" antitrust enforcement of the Reagan Era.

26. Rose, *supra* note 23, at 79 ("[T]he Bush administration antitrust enforcers evinced a more respectful and friendly attitude toward the states by joining with them to form the Executive Working Group for Antitrust (EWAG) in 1989."); Nash, *supra* note 21 (speculating that James F. Rill, President Bush's Assistant Attorney General for the DOJ's antitrust division, promise of greater federal-state coordination in antitrust enforcement and the creation of an executive committee reflected the administration's "more aggressive [antitrust] policy").

27. Langer & Harbour, *supra* note 21, at 23.

28. *Id*. The protocol has since been revised. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, PROTOCOL FOR COORDINATION IN MERGER INVESTIGATIONS BETWEEN THE FEDERAL ENFORCEMENT AGENCIES AND STATE ATTORNEYS GENERAL (1998) [hereinafter Justice Merger Protocol], available at https://www.ftc.gov/advice-guidance/competition-guidance/protocol-coordination-merger-investigations [https://perma.cc/5Q8B-EUAT].

29. *See* Justice Merger Protocol, *supra* note 28 ("This protocol is intended to set forth a general framework for the conduct of joint investigations with the goals of maximizing cooperation between the federal and state enforcement agencies and minimizing the burden on the parties."). *See also* Langer & Harbour, *supra* note 21, at 23.

30. 15 U.S.C. § 15f(b) ("To assist a State [AG] in evaluating the notice or in bringing any action under this Act, the Attorney General of the United States shall, upon request by such State attorney general, make available to him . . . any [relevant] investigative files or other materials.").

31. Justice Merger Protocol, *supra* note 28.

32. *Id*.

33. *Id*.

Merger Protocol encourages cooperation as early as possible in the investigatory process, including by encouraging joint interviews and/or depositions, coordination in statements to the press, and collaboration in reaching settlement terms.[34]

Further, the Merger Protocol stipulates that state AGs "should particularly be encouraged to take responsibility for obtaining data located within their respective geographic areas, maintained by state or local governmental agencies," and "to use their greater familiarity with local conditions/business to identify interviewees and schedule interviews."[35] In highlighting the unique insights that state AGs can have into local businesses, the Merger Protocol reflects a large part of the impetus behind the HSRA—prioritizing the states as antitrust enforcers. This is perhaps captured best by the following from the HSRA House Report:

> A state attorney general is an effective and ***ideal*** spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.[36]

If a given investigation is a multistate endeavor, the Merger Protocol also provides guidance. It details the benefit of having a liaison state to administer the sharing of filings (a ministerial function) and of designating a coordinating state to lead the states and effectively coordinate their actions while recognizing "each enforcement agency retains its sovereignty."[37]

Overall, there is a sophisticated intergovernmental scheme with substantial guidance coming from the NAAG Task Force and the Merger Protocol to effectuate successful joint federal-state investigations into pending mergers and acquisitions.

D. The Modern Intergovernmental Scheme for Joint M&A Investigations

A case study of a recent multigovernmental effort is the blocked merger of Great Outdoors Group and Sportman's Warehouse, which was announced in December 2021.[38] The merger investigation presents a clear example of when the geographic expertise of the investigatory parties is particularly relevant. The FTC worked with Colorado, Tennessee, Pennsylvania, Alaska, Iowa, and California in a joint investigation.[39] The two parties to the proposed merger are big outdoor specialty stores—an arena where product differentiation is a big factor, as the

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34. *Id.*
35. *Id.*
36. H.R. Rep. No. 94–499, pt. III, at 5 (emphasis added).
37. Justice Merger Protocol, *supra* note 28.
38. *Canceled merger between Bass Pro Shops Chain and Sportsman's Warehouse 'a big win' for Colorado consumers, says Weiser*, COLO. ATT'Y GEN. (Dec. 3, 2021), https://coag.gov/press-releases/12-3-21/ [https://perma.cc/5YST-XQ2G].
39. Pat Garofalo, *Bass Pro Blocked from Reeling in More Power*, PUB. SEMINAR (Dec. 10, 2021), https://publicseminar.org/2021/12/bass-pro-blocked-from-reeling-in-more-power [https://perma.cc/CVH3-DLA6].

goods and services need to be tailored to the terrain of the relevant geographic region. In other words, consumer needs substantially vary based on geography, which was reflected in Colorado AG Phil Weiser's concern that the merger would "eliminate high quality product offerings"; he also cited general economic impact concerns, like higher prices and labor effects in the form of job loss.[40] The nature of these negative externalities that can result from mergers is highly localized, exemplifying the emphasis in favor of heavy state involvement in antitrust enforcement in the legislative history of the HRSA and the Merger Protocol.

Further, while Colorado has an arguably robust antitrust litigation team led by an expert in antitrust, AG Phil Weiser,[41] Alaska, by contrast, places less of an emphasis on antitrust enforcement, pairing its Antitrust unit with Consumer Protection as a subunit of its Special Litigation Section. Inter-state collaboration enables a state like Alaska, which is relatively under-resourced in its antitrust capacities, to piggyback on antitrust powerhouse states like Colorado in antitrust enforcement actions.[42]

Some antitrust scholars view this joint investigatory work as a normatively bad form of cooperative federalism and cartelization among the states.[43] The underlying theory is that if states are cooperating in antitrust actions they will inevitably engage in anti-democratic practices. Namely, the "partial *surrender* of state regulatory autonomy"[44] will result in state AGs focusing on coalition building in their antitrust actions to the detriment of their constituents. A state AG may fail to, for instance, challenge a merger or anticompetitive conduct so as not to offend another state even if inaction will harm consumers within her state.

There are several reasons this appears to be an inaccurate critique of cooperative enforcement: (1) states have demonstrably conflicted over antitrust enforcement decisions, both with each other and the federal government;[45] (2) state AG departments have highly variable enforcement teams reflecting the unique

40. *Canceled merger 'a big win' for Colorado consumers*, *supra* note 38.

41. *See, e.g.*, Jesse Paul, *Colorado spearheads 35-state lawsuit accusing Google of operating a search-engine monopoly*, COLO. SUN (Dec. 17, 2020), https://coloradosun.com/2020/12/17/colorado-google-lawsuit-anticompetitive-conduct [https://perma.cc/FLQ9-GVPX] (noting Phil Weiser's "experience in antitrust cases"); *see also, e.g.*, Paolo Zialcita, *Colorado Attorney General Sues Google Over Antitrust Violations (Again)*, COLO. PUB. RADIO NEWS (Jul. 8, 2021), https://www.cpr.org/2021/07/08/colorado-attorney-general-phil-weiser-sues-google-antitrust-violations-app-store [https://perma.cc/AZ9N-VWAF] (describing Phil Weiser's initiative in leading a bipartisan coalition in an antitrust suit against Google).

42. Alaska's Antitrust Unit was added to its Consumer Protection Unit as part of the Special Litigation team in the Civil Division. The Consumer Protection Unit is primarily dedicated to "investigat[ing] unfair or deceptive business practices" and not antitrust. Consumer Protection Unit, *The Attorney General's Role in Consumer Protection*, ALASKA DEP'T OF LAW, https://law.alaska.gov/department/civil/consumer/cpindex.html [https://perma.cc/U6XW-EVXT].

43. *See, e.g.*, Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. CHI. L. REV. 99, 121 (2005) (discussing "the larger problem of federalism's galloping cartelization" in coordinated antitrust enforcement actions).

44. *Id.* at 101.

45. *Infra* pp. 585–89 (analyzing conflict among the states, and the DOJ, as to the appropriate antitrust enforcement response to the T-Mobile/Sprint merger).

demands of their states and legislative priorities;[46] and (3) state cartelization is generally a very abstract concern, dependent on states consistently and uniformly getting along over changing administrations.

As to this third point, there is a substantial causation problem. State cartelization theory proponents allege that cooperative antitrust enforcement results in a state being unwilling to bring an antitrust enforcement action against another state sanctioning anticompetitive actions through legislation and regulations. However, it is empirically untestable whether without Parker Immunity[47] (originating in a case preceding the introduction of NAAG's Task Force and the ensuing era of state coordination in antitrust matters),[48] states would forego bringing such actions. There are constitutional debates to be had about the Supreme Court's frequent invocation of the "sovereignty" of the states[49] and how to design the appropriate test for preempting state actions through federal law. There is not, however, a clear connection between (a) multistate litigation and intergovernmental resource sharing for enforcement purposes; and (b) state cartelization insofar as states not bringing actions against other states. That is attributable to the Parker Immunity Doctrine, and it is highly speculative to argue otherwise.

Considering that some states would otherwise completely lack the ability to bring antitrust enforcement actions without the ability to coordinate with others, it is spurious to suggest barring such cooperation would result in greater enforcement. It seems far more likely that states with the requisite resources could leverage antitrust enforcement against other states with ultimately anticompetitive ends. The comparably weaker states would be unable to retaliate when stronger states engaged in anticompetitive state action, but the stronger states would be able to restrain any of the weaker states contemplating doing so themselves. In other words, the risk of reciprocity is a necessary deterrent in allowing states to bring antitrust actions against state actors.

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46. Civil Division, *Alaska Department of Law's Civil Division has sections for Environmental, Natural Resources, and Oil and Gas*, ALASKA DEP'T OF LAW, https://law.alaska.gov/department/civil/civil.html [https://perma.cc/WG7G-XAAW]. By way of contrast, Vermont has dedicated resources to address Patent Trolling and Nuclear Matters. Distinguishing itself from both Alaska and Vermont, Oklahoma has focused substantial attention on opioid abuse. Civil Division, *About the Attorney General's Office*, OFF. OF THE VT. ATT'Y GEN., https://ago.vermont.gov/about-the-attorney-generals-office/divisions/civil/ [https://perma.cc/7DTS-MLC2]. These necessarily different priorities mean some states would likely have little to no antitrust enforcement without the a ability to rely on other states (and the federal government) for guidance in antitrust investigations and more experienced antitrust litigators in multistate litigation.

47. Parker v. Brown, 317 U.S. 341, 350 (1943) (finding that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature" thereby immunizing states and state actors from antitrust actions under the Sherman Act).

48. Corners, *supra* note 20, at 39.

49. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 711 (finding "subjecting a consenting State to the coercive process of judicial tribunals" to be "offensive to state sovereignty"); *see also, e.g.*, Printz v. United States, 521 U.S. 898 (1997).

It is also useful to remember politics' influence on (if not total entanglement with) the law. State AGs are predominantly elected officials,[50] democratically accountable to their citizens directly or through their governor. There are electoral incentives for a state AG to be both in political conflict with other state AGs of different political persuasions and to engage in antitrust enforcement that will be popular with her constituents. When the source of antitrust is politically created legislation, it is not clear why it is a problem for it to be partially politically driven in its enforcement.

E. Conflict Among the States and the Federal Government: The T-Mobile/Sprint Merger

The concern of state cartelization is not only theoretically unfounded but also unfounded in practice. States will and do come into conflict and pursue different antitrust enforcement pathways.[51] In July 2019 the DOJ, with Kansas, Nebraska, Ohio, Oklahoma, and South Dakota, brought a "civil antitrust action to prevent the merger of T-Mobile and Sprint,"[52] concurrently filing "a proposed settlement that, if approved by the court, would resolve [the DOJ's] and the Plaintiff States' competitive concerns."[53] Five more states joined in the action,[54] and a federal district court ultimately approved the settlement.[55] The DOJ and the Plaintiff States followed the procedure mandated by the Tunney Act.[56] This included posting the proposed settlement for public written comment in the Federal Register and filing the proposal with the appropriate district court for approval.[57]

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50. *Attorney General Elections*, NAT. ASSOC. ATT'YS GEN. (2022), https://www.naag.org/news-resources/research-data/attorney-general-elections [https://perma.cc/9FQZ-LC2J] (displaying a map showing that the vast majority of state AGs are elected, and a minority are appointed).

51. While the T-Mobile/Sprint merger discussed in this section is the most recent example, this is not the first time some of the states and the federal government have disagreed over settlement terms. *See* Tiffany Hsu & Matthew Goldstein, *Sprint and T-Mobile Merger Faces New Hurdle with Lawsuit by States*, N.Y. TIMES (Jun. 11, 2019), https://www.nytimes.com/2019/06/11/business/sprint-tmobile-merger.html [https://perma.cc/2UJL-94FP] ("Two decades ago, the Justice Department and 20 state attorneys general simultaneously filed antitrust lawsuits against Microsoft. When it came time to negotiate a settlement, some of the state attorneys general balked and tried to hold out for tougher penalties.").

52. Proposed Final Judgment and Competitive Impact Statement, 84 Fed. Reg. 39862 (Aug. 12, 2019) (this was filed pursuant to the Tunney Act's requirements of the proposed consent decree being open to written comment for 60 days).

53. Office of Public Affairs, *Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish*, U.S. DEP'T OF JUST. (Jul. 19, 2020), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package [https://perma.cc/XFU8-62XU].

54. Arkansas, Colorado, Florida, Louisiana, and Texas joined in the settlement. *See* Office of Public Affairs, *Court Enters Final Judgment in T-Mobile/Sprint Transaction*, U.S. DEP'T OF JUST. (Apr. 1, 2020), https://www.justice.gov/opa/pr/court-enters-final-judgment-t-mobilesprint-transaction [https://perma.cc/74YH-UUWA].

55. *See id.*

56. Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528, 88 Stat. 1706 (1974) (codified at 15 U.S.C. § 16).

57. 15 U.S.C. § 16(b).

Before the DOJ announced the approval of the settlement on July 26, 2019, ten AGs (nine states and Washington, D.C.) led by New York's AG Letitia James and California's AG Xavier Becerra, filed suit in the United States District Court for the Southern District of New York on June 11, 2019.[58] Per the Merger Protocol, states are not expected to pursue uniform antitrust enforcement actions:

> If an individual enforcement agency, state or federal, determines that its interests require pursuing a negotiation or settlement strategy separate from the cooperating states and federal agencies, it is incumbent upon that agency to disclose its posture at the earliest possible opportunity and to implement its strategy in a way which minimizes any adverse impact upon the other states and enforcement agencies.[59]

An additional eight state AGs joined in the suit to enjoin the proposed transaction nationwide.[60] The opposing states' legal challenge failed—a Southern District of New York judge agreed with the United States District Court for the District of Columbia's approval of the settlement, finding "the Proposed Merger is not reasonably likely to substantially lessen competition in the [retail mobile wireless telecommunications] Markets . . . ."[61]

1. A Functionalist Conception of Additional Judicial Involvement as an Extension of a Tunney Act Proceeding

Functionally, the SDNY's review of the DDC's approval of the merger could be fairly characterized as an extension of the Tunney Act review process of a DOJ settlement with merging parties.[62] In a Tunney Act review, the reviewing court makes a public interest determination as to the "competitive impact" of approving the consent judgment (here, the consent decree detailing DOJ's settlement terms to allow the merger to proceed was at issue), including a "consideration of the public benefit" of the judgment.[63]

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58. *New York Attorney General James Moves To Block T-Mobile And Sprint Megamerger*, N.Y. ATT'Y GEN. (Jun. 11, 2019), https://ag.ny.gov/press-release/correction-new-york-attorney-general-james-moves-block-t-mobile-and-sprint-megamerger [https://perma.cc/T5RB-JUJ4]. The additional seven states were Colorado, Connecticut, Maryland, Michigan, Mississippi, Virginia, and Wisconsin.

59. Justice Merger Protocol, *supra* note 28.

60. *AG James: Pennsylvania Addition To T-Mobile/sprint Lawsuit Keeps States' Momentum Moving Forward*, N.Y. ATT'Y GEN. (Sep. 18, 2019), https://ag.ny.gov/press-release/2019/ag-james-pennsylvania-addition-t-mobilesprint-lawsuit-keeps-states-momentum [https://perma.cc/LRT7-9KGB].

61. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 247 (S.D.N.Y. 2020). The court also found that "Sprint does not have a sustainable long-term competitive strategy" to axe competition. *Id*. at 223.

62. This conceptualization of a second layer of judicial review of a proposed merger settlement was explored upon the advice of Christopher Sprigman, in a seminar he co-taught with Murray Bring & Kathleen Bring. He questioned why the SDNY's review could not be considered "an expanded Tunney Act proceeding."

63. 15 U.S.C. § 16(e).

While there are procedural stipulations as to the window during which an interested party can submit a public comment in response to the proposed consent judgment,[64] there is nothing in the Tunney Act as codified precluding additional judicial review. As such, the SDNY's review of the DDC's approval of the merger and associated settlement terms is fairly construed as a more comprehensive Tunney Act review. The SDNY's decision discussed the DOJ's analysis and proposed settlement,[65] but noted that "[h]aving been tasked with independently *reviewing* the legality of the Proposed Merger, the Court is not bound by the conclusions of these regulatory agencies."[66] In practicality, the Court was acting as a second independent reviewer of the proposed merger,[67] as the legal consequence of the defendants prevailing in the suit was that their merger would go forward under the DOJ's proposed settlement terms. Thus, a true concern as to overlapping jurisdiction in parallel antitrust enforcement actions does not exist as the statutory scheme has anticipated as much, and the judiciary has responded in kind by incorporating consideration of occurrences of parallel actions into its decision-making process.

2. Competing States in the T-Mobile/Sprint Merger's Consequent Ability to Better Represent Their Constituents

After losing its challenge to the T-Mobile/Sprint merger, New York chose not to appeal in February 2020, opting instead to work with the merging parties to reach better terms than that of the DOJ settlement.[68] Similarly, California chose not to appeal in March 2020, instead seeking a settlement that would better benefit its constituent citizens—and consumers—in California. California was successful in this as T-Mobile/Sprint agreed to additional conditions and reimbursed all of the opposing states' litigation and investigation costs up to $15 million (barring those of New York).[69]

Prior to the SDNY's decision in *Deutsche Telekom AG*[70] and the described subsequent settlement developments in New York and California, the NY AG Office's press release included a comment from the general counsel for the Rural Wireless Association. The counsel decried the merger as anticompetitive and bad for consumer welfare, particularly for those living in rural America, and criticized

64. 15 U.S.C. § 16(d).

65. *Deutsche Telekom AG*, 439 F. Supp. 3d at 225.

66. *Id.*

67. The first reviewing court, the DDC, conducted its own independent review pursuant to 15 U.S.C. § 16(e).

68. *Attorney General James' Statement on T-Mobile/Sprint Appeal*, N.Y. ATT'Y GEN. (Feb. 16, 2020), https://ag.ny.gov/press-release/2020/attorney-general-james-statement-t-mobilesprint-appeal [https://perma.cc/8MFJ-DZ7W].

69. *Attorney General Becerra Announces Settlement Ending the State's Challenge to T-Mobile, Sprint Merger*, CAL. DEP'T OF JUSTICE (Mar. 11, 2020), https://oag.ca.gov/news/press-releases/attorney-general-becerra-announces-settlement-ending-state's-challenge-t-mobile [https://perma.cc/695K-HRPA].

70. *See supra* note 61 and accompanying text.

the Federal Communications Commission's ("FCC")[71] lack of transparency in reviewing the merger and partiality for T-Mobile.[72] This asserted partiality for the merger by the FCC is not ill-founded. The FCC Chairman at the time, Ajit Pai, described the merger as furthering "critical objectives" such as "closing the digital divide in rural America and advancing United States leadership in 5G."[73]

According to a joint DOJ-FCC brief filed in *New York v. Deutsche Telekom* defending the settlement terms,[74] these objectives may have been met for states who joined the DOJ's settlement. The brief "not[ed] praise from the Utah and Arkansas Attorneys General that the settlement 'offer[s] benefits to rural communities while maximizing output and consumer choice for all Americans' . . . ."[75] However, maintenance of the suit by NY, CA, and the other state parties indicate that this was not uniformly satisfactory. Besides the Rural Wireless Association comments endorsed by the NY AG's office, the complaint filed by NY and CA included the anticompetitive impact on rural areas of the merger, primarily focusing on the disparate impact on low-income subscribers.[76] This divide illustrates two important points: (1) states have localized interests that conflict with federal goals and differ from the interests of other states; and (2) politics and state antitrust enforcement are important mitigators of the risk of the federal government prioritizing the interests of some states to the detriment of others.

The first point entails a good faith perspective of the intergovernmental dynamics at play in the T-Mobile/Sprint merger saga. States are not going to be wholly aware of the interests of other states, hence the importance of localized knowledge in antitrust enforcement for advancing consumer welfare. It is not rare that the federal government has distinct goals from individual state governments and is responsive to a broader polity. Naturally, this will sometimes result in conflicting positions in antitrust enforcement decisions. The federal government may be utilitarian in its approach and make a cost-benefit calculus that finds the merger will be beneficial overall to the average American consumer across state lines. However, this might not be a net positive for the average consumer in each individual state, and the negatively impacted states would understandably be opposed to the merger. Further, if one of those negatively impacted states does not have a robust antitrust team that can successfully bring its own action, thus standing up

71. The FCC's approval is required where "[t]elecommunication carriers seek[] to transfer assets or corporate control in mergers and acquisitions[.]" Competition Policy Division, *Transfer of Control*, FED. COMMC'N CMM'N, https://www.fcc.gov/general/transfer-control, [https://perma.cc/LH35-AFSC] (last updated Oct. 26, 2022).

72. Justice Merger Protocol, *supra* note 28 ("[t]he merger is bad for competition, and it is bad for consumers . . . [t]he process at the FCC has not been transparent and the FCC appears to be blindly accepting New T-Mobile's words as truth.").

73. Hsu & Goldstein, *supra* note 51.

74. Statement of Interest of the United States of America, *New York v. Deutsche Telekom AG*, 419 F. Supp. 3d 783 (S.D.N.Y. 2019) (19 Civ. 5434 (VM)).

75. *Id.* at 6.

76. Redacted Complaint, *New York v. Deutsche Telekom AG*, 419 F. Supp. 3d 783 (S.D.N.Y. 2019) (19 Civ. 5434 (VM)), at 5, 31.

to the federal government, it has no pathway to advocate for its constituents' consumer welfare. This demonstrates, again, how cooperation among the states enables enforcement actions where they otherwise might not happen.

The second point is compatible with the first, albeit more insidious. In the case where a merger is particularly harsh on one or more states, national politics may result in federal agencies not caring because of background electoral system considerations. Due to prioritizing a swing state, for instance, the cost-benefit analysis of the national effect of a merger may not be the guiding principle in whether to consent to a merger. Instead, if Arkansan interests are at the top of the list, a merger particularly beneficial to Arkansans but awful for Californians may be permitted for political reasons. Thus, state antitrust enforcement actions can act as a corrective to political defects in the national government, as states can advocate for their own interests.

III. THE SHERMAN ACT AND FEDERALISM CONSIDERATIONS

A. Legislative History and Its Support of a Prominent Role for the States

Shifting away from mergers and acquisitions and going back in time to over a century ago, we look at the Sherman Antitrust Act of 1890[77] and its origins. Prior to the passage of the Sherman Act, many states had passed similar antitrust laws regulating intrastate commerce.[78] The Sherman Act was passed to regulate interstate commerce in addition to recognizing the states roles as enforcers.[79] Section 4 of the Sherman Act, as passed in 1890, contemplated a prominent role for the several states, providing that the state AGs would work "under the direction of the Attorney-General" to bring antitrust actions for violations against the Sherman Act.[80]

The legislative history of the Sherman Act further corroborates the intended continued enforcement powers of the states. The House Report accompanying the Sherman Act was explicit that the states retained their sovereignty, while also delineating jurisdictional authority between the federal government and the states' governments along interstate and intrastate commerce lines, respectively:

> No attempt is made to invade the legislative authority of the several States or even to occupy doubtful grounds . . . Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to

77. Sherman Antitrust Act, 15 U.S.C. §§ 1–7.

78. *See, e.g.*, Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 375 (1983) (remarking that "[b]efore 1890, when the first federal antitrust statute was enacted, restraints of trade were regulated largely by state law").

79. *See id.* ("Neither the United States Congress that enacted the Sherman Act nor subsequent Congresses that enacted the other federal antitrust laws meant to change the scope of state regulation.")

80. Sherman Antitrust Act of 1890, ch. 647, § 4, 26 Stat. 209 (codified as amended at 15 U.S.C. § 4) ("[I]t shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations [of the act].").

> legislate in respect to commerce between the several States or with foreign nations. It follows, therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trades and monopolies.[81]

As is evident from the excerpt and language in both the Sherman Act and the Clayton Act, Congress intended that states would have enforcement powers within their quasi-sovereign territories. Further, the federal government would act to supplement predominantly state enforcement when the commerce at issue was interstate.

B. Establishing the Ability for the Federal Government to Regulate Manufacturing Through Antitrust: United States v. E.C. Knight Co. *and* Swift & Co. v. United States

In the early days of the Sherman Act, when the Dormant Commerce Clause was merely the Commerce Clause, *United States v. E.C. Knight Co.*[82] limited the ability of the federal government to pursue antitrust actions under the Sherman Act, thereby mooting any concerns over overlapping enforcement actions. The Court held that "a practical monopoly . . . is subject to regulation by state legislative power" and that manufacturing falls under the state police powers and thereby is not subject to the Commerce Clause.[83] Regulating manufacturing, as compared to the distribution of goods, was distinguished as a local activity that fell outside of the powers of Congress and lay with the states. This drastically limited the ability of the federal government to bring actions under the Sherman Act for just over a decade.

E.C. Knight has never been explicitly overruled, but was functionally overruled by *Swift & Co. v. United States*.[84] In *Swift*, the alleged horizontal agreement among dealers of fresh meat was "embrac[ing] restraint and monopoly of trade within a *single* State," but was found to have an "effect upon commerce among [other] States."[85] Thus, the Court distinguished *E.C. Knight* on the basis that in *Swift* the intended object of the combination was to affect commerce in other states—thus bringing it under the purview of the Sherman Act—whereas in *E.C. Knight* "the direct object [was] monopoly of manufacture *within* a State."[86]

Ultimately, the Supreme Court held, in relevant part, that "commerce among the States is *not* a technical legal conception, but a practical one, drawn from the course of business."[87] In doing so, the Court blurred the lines between what

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81. H.R. Rep. No. 51–1707, at 1 (1890).
82. 156 U.S. 1 (1895).
83. *Id.* at 11.
84. 196 U.S. 375 (1905).
85. *Id.* at 397–98 (emphasis added) (restated later in the opinion as "intent . . . to aid in an attempt to monopolize commerce among the States").
86. *Id.* at 397 (emphasis added).
87. *Id.* at 398 (emphasis added).

constitutes interstate commerce and intrastate commerce under the Sherman Act. The Court went so far as to stipulate to the possibility of overlapping jurisdiction: it stated that the cut-off for interstate versus intrastate commerce is not where state taxation or regulation becomes permissible.[88] The Court explicated that such a point is not necessarily "beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States."[89] Instead, the appropriate determination is whether the goods enter the "current of commerce among the States,"[90] effectively enabling a far broader scope of regulation under the Sherman Act.

C. Federal Antitrust Laws Supplement State Antitrust Laws

One of the seminal cases on the Sherman Act and overlapping jurisdiction is *California v. ARC American Corp.*,[91] which found that federal antitrust laws do not preempt state antitrust laws, but rather supplement them.[92] The case involved four states in a consolidated antitrust class action seeking treble damages under Section 4 of the Clayton Act for an alleged conspiracy to fix prices in violation of Section 1 of the Sherman Act and state antitrust laws.[93] The states were initially denied payment from the settlement as indirect purchasers because of federal preemption.[94] The Court found this initial finding erroneous, and the states were allowed to recover damages under their state statutes that allowed for recovery for indirect purchasers, even though under federal law recovery was limited to direct purchasers.[95]

As part of its reasoning, the Court cited sentiments by Senator Sherman that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies."[96] This corresponds to the previously discussed legislative history of the Sherman and Clayton Acts as putting the states in the center of antitrust enforcement, with the federal government in a supporting role.[97] The Court also noted that there were no cases dealing with antitrust law where it had identified "a federal policy against States imposing liability in addition to that imposed by federal law."[98] In other words, there was no precedent to support a prohibition on overlapping jurisdiction in antitrust enforcement.

88. *Id.* at 400.
89. *Id.*
90. *Id.* at 399.
91. 490 U.S. 93 (1989).
92. *Id.* at 102.
93. *Id.* at 97.
94. *Id.* at 97–99.
95. *Id.* at 103.
96. *Id.* at 102.
97. *See supra* pp. 582–85.
98. *ARC Am. Corp.*, 490 U.S. at 105.

The *ARC American Corp*. holding has been followed broadly by lower courts with limited criticism.[99] However, in *Lorix v. Crompton Corp*.,[100] the Supreme Court of Minnesota expressed concerns over the possibility for duplicative recoveries in a "dual system of private antitrust enforcement" between the federal and state governments.[101]

D. Herbert Hovenkamp's Concerns About Dual Antitrust Enforcement

Herbert Hovenkamp had somewhat distinct concerns from the Minnesota Supreme Court about overlapping jurisdiction and the consequent risk of state inference with federal antitrust enforcement. He highlights two primary issues: (1) that "state rules creating liability or giving rights of action can interfere with the federal system of antitrust enforcement when state law is different from federal"; and (2) whether "certain applications of state antitrust laws can defeat the strong federal interest in efficient and nonrepetitive litigation."[102]

In support of these contentions, Hovenkamp discusses some of the legislative history. For instance, he points to Senator Sherman's conception of commerce in 1890: federal enforcement would supplement state enforcement by reaching interstate commerce and states would retain exclusive jurisdiction over intrastate actions.[103] It is fair to imagine that Senator Sherman would not have anticipated *Swift & Co*. and subsequent Lochner era broadening of what constitutes interstate commerce under the Commerce Clause, and instead imagined the doctrine, reflected in *E.C. Knight*, of a clear delineation between the jurisdictional scopes.

That being said, these arguments seem questionable if only because Congress has maximally consented though the legislative scheme to the modern conceptions of commerce and the federal/state balance. For instance, Congress has enacted legislation since the Sherman Act, like the HSRA, which further solidifies the prominent role of the states.[104] Hovenkamp acknowledges this in his paper, astutely noting that the strict dichotomy between state and federal jurisdiction when it comes to commerce does not comport with modern understandings. He even writes that there is "no evidence that Congress has ever wanted to prohibit extraterritorial [(i.e., affecting interstate commerce)] assertions of state antitrust law."[105] I would further argue that blurrier lines as to what counts as interstate versus intrastate commerce is an inevitable byproduct of a largely nationalized, and increasingly globalized, market.

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99. Shepherd's Report, California v. ARC Am. Corp., 490 U.S. 93 (1989), https://plus.lexis.com/zhome?crid=6c510933-70b7-4da1-bb25-8787c995e5c4 [https://perma.cc/HT7E-UWSY] (last visited Feb. 22, 2022). Per Lexis, the holding of *ARC American Corp*. has been followed in 52 cases since *ARC American Corp*., by courts in every federal circuit and in California, Kansas, Massachusetts, Montana, North Carolina, New York, Pennsylvania, Virginia, Washington, and Wisconsin. *Id*.

100. 736 N.W.2d 619 (Minn. 2007).

101. *Id*. at 628.

102. Hovenkamp, *supra* note 78, at 378.

103. *See supra* notes 78–79 and accompanying text.

104. *See* Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a.

105. Hovenkamp, *supra* note 78, at 400–01.

Hovenkamp does not go so far as to advocate for federal dominance. He accepts that "[a] foundation of American federalism is that . . . an aggrieved party can seek its protection from either the federal or the state government" when there are "two overlapping and in some cases virtually congruent bodies of substantive law," as is the case with antitrust liability.[106] In order to respect the federalism design, Hovenkamp emphasizes *In re Sugar Antitrust Litigation* as an ideal case that preserves the ability to bring a case in state court but allows for removal where appropriate so as to reduce clashes in overlapping jurisdiction.[107] In that case, defendants removed a state-filed case (asserting state law complaints) to federal court for consolidation with about 100 other separate consolidated actions involving hundreds of plaintiffs and 14 defendants on the basis that the state-law claims were really "a cause of action under federal antitrust law."[108]

This example of the Artful Pleading Doctrine[109] in action is a potentially judicially manageable method to address the duplicative recoveries concern of *Lorix*[110] and the efficiency concern that Hovenkamp cites.[111] Federal courts have the capacity to assess actions for removal, the supplemental jurisdiction to hear state law claims, and the analytical framework to determine whether a purported state law antitrust action is really an antitrust action under federal law. However, Congress would seem to disagree, or at a minimum be concerned with removal being used as a tool to unfairly strip jurisdiction from state courts in state brought antitrust actions. Congress moved to better support state antitrust enforcement actions with the State Antitrust Enforcement Venue Act,[112] which prevents the Judicial Panel on Multidistrict Litigation from transferring "suits brought by states under federal antitrust laws . . . to other districts."[113] This confers on the states the same advantage federal antitrust litigators have in being able to prevent undesired transfers instigated by defendants.[114]

IV. CONCLUSION

In conclusion, it does not appear that there is true cause for concern over duplicative enforcement actions, overlapping jurisdiction, or the appropriate balance between state and federal enforcement. Overlapping jurisdiction concerns only

106. Hovenkamp, *supra* note 78, at 411.

107. In re Sugar Antitrust Litig., MDL 201, 588 F.2d 1270 (9th Cir. 1978); Hovenkamp, *supra* note 78, at 412.

108. *In re Sugar Antitrust Litig*., 588 F.2d at 1270.

109. Rivet v. Regions Bank of La., 522 U.S. 470, 471 (1998) (describing that "[t]he artful pleading doctrine allows removal [to a federal court] where federal law completely preempts an asserted state-law claim . . . for a claim of that preempted character is, from its inception, a claim that can arise only under federal, not state, law").

110. *See Lorix*, 736 N.W.2d at 619.

111. *See id*.; *see also* Hovenkamp, *supra* note 78, at 378.

112. 28 U.S.C. § 407(g). The current version, yet to be published by Government Printing Office, is: § 301 H.R. 2617—1512 Pub. L. No. 117–328.

113. Emilie Ruscoe, *Senate Bill Aims to Boost State AGs in Antitrust Cases*, LAW360 (May 26, 2021), https://www.law360.com/articles/1388272 [https://perma.cc/NTK3-TFZ6].

114. *Id*. (describing it as a "homefield advantage").

arise if both the state and the federal government antitrust enforcement entities bring suit. If the federal government does not bring an action, there is no real argument or cause of concern if the states do, whether individually or as a coalition. Prior to the Sherman Act, the states were the primary governmental entities handling antitrust violations,[115] and the fact that commerce more frequently crosses state lines should not act to strip the states of enforcement power.

Moreover, as discussed, the Congressional regulatory scheme anticipates and actively works to support dual federal and state enforcement of antitrust law.[116] As demonstrated by the case of the T-Mobile/Sprint merger, the judiciary has appropriately responded to this regulatory framework. In a case where there were parallel actions, the SDNY adapted to changing conditions of what it needed to review in deciding the case and ultimately the SDNY functioned as a second Tunney Act Review and did not treat the multistate coalition action in isolation.

Overall, dual enforcement facilitates cooperative federalism to the benefit of consumers and, simultaneously, allows for competing actions to be brought when a state and the federal government, or two states with each other, are not in agreement. Cooperation allows state AGs to better allocate resources and thus increases the chances that the interests of their constituents will be vindicated. Competition allows states to advocate for the unique interests of their constituents when a parallel action is deemed inadequate.

115. Hovenkamp, *supra* note 78.

116. *See, e.g.*, 15 U.S.C. § 15f (requiring that the US Attorney General notifies one or more state AGs she "believe[s] . . . would be entitled to bring an action" where the US Attorney General has brought an antitrust action and mandated that the US attorney general assist any state AGs who decide to act upon such notice).