

Northwestern Journal of International Law & Business

Volume 30

Issue 2 *Spring*

Spring 2010

Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement is a Model for Effective Economic Regulation

Katherine Mason Jones

Follow this and additional works at: <http://scholarlycommons.law.northwestern.edu/njilb>



Part of the [Antitrust and Trade Regulation Commons](#), [International Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Katherine Mason Jones, Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement is a Model for Effective Economic Regulation, 30 *Nw. J. Int'l L. & Bus.* 285 (2010)

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of International Law & Business by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement is a Model for Effective Economic Regulation

*Katherine Mason Jones*¹

Abstract

*The focus of the article is on the proper role of U.S. state governments in regulating international business. The specific issue analyzed is the desirability of having state attorneys general enforce federal antitrust laws in global markets concurrently with federal antitrust regulators. Congress granted state officials this power in 1976. In 2009, however, a large proportion of the world's commerce is now conducted in international, rather than national markets. This development has led Judge Richard A. Posner and others to advocate that the states be stripped of their statutory power to enforce federal antitrust laws on behalf of their residents as *parens patriae*. The argument has an initial appeal in light of a long judicial inclination to see state involvement in either "interstate commerce or "international affairs" as a threat to the ability of the United States to formulate a coherent national economic policy. Thus, the issue forms part of a larger question currently facing U.S. policy makers: How can the United States best transform the hodgepodge of state and federal economic regulation implemented during the New Deal into an effective regulatory regime for the global markets of the 21st Century?*

In taking on the controversial debate over the role of state attorneys general in antitrust enforcement, the article draws upon recent legal and historical

¹ By Katherine Mason Jones, B.A., University of Georgia, M.A., University of Virginia, J.D., University of Michigan, LL.M., London School of Economics & Political Science. Ms. Jones is currently an Associate Professor of Law at Widener University School of Law. I would like to thank Professors Peter Carstensen, John Dernbach, Michael Dimino, Anna Hemingway, John Gedid, Juliette Moringello, Christopher Robinette, Sophie Smyth, and William M. Wiecek for their insightful comments on an earlier draft of this article. Samuel Farkas also provided useful comments and invaluable research assistance.

scholarship on federalism to argue that globalization requires a paradigm change in concepts of U.S. federalism. While many assume that increasing international economic integration makes state participation in economic regulation with international implications inherently problematic, the article demonstrates that, to the contrary, states have an important role to play in the regulation of international business. States have a long history of challenging the federal government in a way that has promoted a robust national dialogue on matters of public policy. In addition, states have historically played and should continue to play a vital role in safeguarding the health, safety, and welfare of the American public. Historical research reveals that the view of state governments as protectors of the public interest formed an important part of the Founders' vision. Globalization may suggest that states are not capable of carrying out this function independently of the federal government. But the fact that today's "local" threats to state residents now often spring from international sources does not suggest that states should renounce their traditional role as guardians of the public welfare. Indeed, it makes that role all the more important.

TABLE OF CONTENTS

INTRODUCTION	287
I. TWO VIEWS OF OVERLAPPING ENFORCEMENT	292
A. Historical Background: The Hart-Scott-Rodino Antitrust Improvements Act of 1976	294
B. Restrictive Views of State Authority	297
1. Posner's Position: Eliminate Statutory State <i>Parrens Patriae</i> Authority	297
2. The AMC's Recommendation: Congress Should Limit But Not Eliminate State <i>Parrens Patriae</i> Authority	301
C. Expansive Views of Concurrent Enforcement	302
1. Congress Should Retain State <i>Parrens Patriae</i> Authority	302
2. Congress Should Not Limit State Officials to the Prosecution of Local Conduct	304
II. THE LARGER DEBATE: TWO VIEWS OF FEDERALISM	305
A. Dual Federalism	306
B. Overlapping Federalism	307
C. Dual and Overlapping Federalism in Supreme Court Jurisprudence	309
III. RESOLVING THE FEDERALISM DEBATE.....	315
A. There is No Constitutional Mandate for Dual Federalism	315
1. The Founders' Assumptions Regarding Concurrence.....	315
2. The Founders' Assumptions Regarding the Importance of State Police Powers	316
3. Historical Overlap between the Regulation of Commerce and the Exercise of Police Powers	317
4. Flawed Logic of the New Federalism Decisions.....	320

B.	Why Overlapping Jurisdiction is Consistent with Fundamental Principles of Federalism	321
1.	Madison’s Theory of State and Federal Competition for the People’s Affection.....	321
2.	Federalism as Expressing a Constitutional Preference for Robust Debate on Matters of Public Policy.....	322
C.	The Impossibility of Drawing a Clear Dividing Line between the “Truly Local” and the “Truly National”	323
IV.	RESOLVING THE ENFORCEMENT DEBATE	324
A.	History of Concurrent Antitrust Enforcement.....	325
B.	Possible Federalism-Related Objections to Concurrent Antitrust Enforcement.....	327
1.	Federal Preemption.....	327
2.	Dormant Commerce Clause.....	327
3.	Foreign Affairs Preemption.....	328
C.	Answers to Objections	328
1.	The Inapplicability of the Doctrine of Foreign Affairs Preemption	329
2.	Why Dormant Commerce Clause Related Concerns are Misplaced	330
D.	Concurrent Enforcement Promotes the Values Underlying the Federal System	332
1.	Concurrent Enforcement of Antitrust Promotes Robust Debate on Issues of Public Policy	332
2.	Antitrust Laws Play an Important Role in Safeguarding the Public, Health, Safety, and Welfare	334
E.	Impossibility of Separating the “Truly National” from the “Truly Local” in Antitrust Cases.....	335
F.	Dangers of Under-enforcement in Antitrust.....	336
	CONCLUSION.....	338

INTRODUCTION

Increasing economic competition in global markets raises novel issues for lawmakers, as well as attorneys and scholars interested in antitrust policy. The application of U.S. antitrust law to conduct occurring outside its territorial boundaries has always been controversial. Similarly, enforcement of U.S. antitrust law by state attorneys general has become increasingly controversial as they have begun to play a larger role in the international arena. Considered together, these two facts raise the question of the proper role state antitrust enforcers should play in policing

anticompetitive conduct in increasingly dynamic global markets.²

Consider a recent headline. On June 11, 2008 the American Antitrust Institute (“AAI”) held a press briefing on the U.S. Federal Trade Commission’s (“FTC”) recently opened investigation into alleged anticompetitive practices engaged in by Intel in the over \$30 billion a year global market for X86 computer chips.³ The situation came to light when Intel’s only competitor in this market, American Micro Devices (“AMD”), filed a private law suit in U.S. court.⁴ Soon after, the Japanese Fair Trade Commission began to investigate Intel’s behavior and ultimately reached a settlement with Intel with undisclosed terms.⁵ This was followed by an investigation into the same allegations by the South Korean Fair Trade Commission that resulted in a fine of \$26 million against Intel in early June of 2008.⁶ In 2007, the European Union also began an investigation into Intel’s conduct that resulted in a record-setting fine of \$1.45 billion.⁷ In early 2008, the Attorney General of the State of New York instituted an investigation of the allegations.⁸ Last to enter the fray was the U.S. federal government when the FTC belatedly opened an investigation, issued subpoenas in June of 2008,⁹ and filed suit on December 16, 2009.¹⁰ In addition to these governmental enforcement actions and the private lawsuit by AMD, dozens of purchasers of X86 computer chips have filed class actions against Intel in U.S. courts.¹¹

What is one to make of this apparently chaotic situation, which one observer has referred to as “a three-dimensional chess match”?¹² In this

² The issues addressed in this article form part of the larger question currently faced by U.S. policy makers: How can the United States best transform the relatively random mix of state and federal law governing most international industries and markets into an effective regulatory regime for the 21st Century?

³ Telephone Conference Discussing Intel, American Antitrust Institute (June 11, 2008), <http://www.antitrustinstitute.org/archives/intelcalltranscript.ashx> (follow the “Download the Complete Transcript” hyperlink).

⁴ Laurie J. Flynn, *A.M.D. Suit Says Intel Bullied Clients*, N.Y. TIMES, June 29, 2005, at C5.

⁵ Conference Discussing Intel, *supra* note 3.

⁶ *Id.*

⁷ See, e.g., James Kanter, *Europe Fines Intel \$1.45 Billion in Antitrust Case*, N.Y. TIMES, May 13, 2009, at B8.

⁸ Nicholas Confessore, *Cuomo Subpoenas Intel over Antitrust Accusations*, N.Y. TIMES, Jan. 11, 2008, at C3.

⁹ Editorial, *The Intel Investigation*, N.Y. TIMES, June 15, 2008, at WK 11.

¹⁰ Steve Lohn, *F.T.C. Says Intel Stifles Competition*, N.Y. TIMES, Dec. 16, 2009, at B1.

¹¹ The cases brought under federal law have been consolidated in Delaware, but there were also dozens of consolidated class actions filed in California state court under California’s antitrust law. Intel 2008 Annual Report - Financial Statements - Notes to Consolidated Financial Statements, <http://www.intc.com/intelAR2008/financial/statements/note24/index.html> (last visited Aug. 10, 2009).

¹² See Remarks of Albert Foer, Director of the American Antitrust Institute, Conference

example, the parties claiming the right to investigate Intel's conduct included a large multinational corporation filing suit as a private party, the national antitrust authorities of three sovereign nations (Japan, South Korea, and the United States), a regional arrangement of sovereign nations (the European Union Commission), and a sub-national component (the State of New York) of one of the sovereign nations (the United States) whose national antitrust authorities ultimately opened their own investigation of the conduct. Surely this many prosecutors are too many?

Surprisingly enough, upon close examination of the facts and legal principles involved, the answer is no. When more than one enforcement authority has jurisdiction to prosecute the same conduct, there is indeed the potential for complexity and even conflict. Antitrust violations by companies that operate globally raise complicated legal issues because the United States has long claimed the right to enforce its antitrust laws extraterritorially.¹³ Today, other nations claim the same prerogative with respect to their national competition law, or in the case of the EU, supranational competition laws.¹⁴ The situation is further complicated by the fact that in 1976, Congress granted state attorneys general the authority to enforce federal antitrust law in their capacity as guardians of the public welfare of the residents of their states.¹⁵

The Intel example illustrates the application of different legal standards to the same conduct, including different national antitrust statutes. In the case of the U.S. involvement, it also illustrates what appears to have been initially inconsistent exercises of prosecutorial discretion by the federal government and the State of New York.¹⁶ Each nation investigating Intel's conduct applied its own national law, while the European Union Commission applied EU competition law.¹⁷ That the United States claimed the right to prosecute Intel under federal law by way of separate investigations by the FTC and New York undoubtedly complicated an already messy international situation.

Allowing multiple sovereign governmental units in the United States to investigate potential antitrust violations in markets not confined to the territory of the United States, however, benefits both U.S. consumers and the consumers of other nations. Despite the plethora of government entities

Discussing Intel, *supra* note 3.

¹³ See *United States v. ALCO*, 148 F.2d 416 (2d Cir. 1945).

¹⁴ See generally Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263 (2002); Il Hyung Jung, *A Comparative Study on the Question of Extraterritorial Application of the Competition Law*, 18 DICK. J. INT'L L. 305 (2000).

¹⁵ Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. §18 (2000)).

¹⁶ See Confessore, *supra* note 8; Editorial, *supra* note 9.

¹⁷ *Id.*; Conference Discussing Intel, *supra* note 3.

potentially exercising jurisdiction over businesses operating in global markets, the presence of overlapping state and federal authorities to prosecute violations of federal antitrust law is not a problem that complicates antitrust enforcement, but rather a situation that offers the potential for more rational and effective enforcement. In fact, examination of the history of concurrent state and federal enforcement of federal antitrust statutes reveals the advantages of such redundancy and suggests that the example of dual antitrust enforcement provides a model for effective regulation in other areas of the law involving global markets. When multiple sovereign governmental units investigate the same conduct, U.S. consumers reap the benefits of a system that provides a higher level of enforcement than a system that allocates the prosecutorial authority of the United States to a single level of government. If wisely implemented, such a system promotes both competition and innovation in global markets while imposing few costs on legally compliant businesses.

The debate over the desirability of allowing states to prosecute conduct in global markets that potentially violates federal antitrust law becomes easier to resolve once it is recognized that much of the debate is fundamentally intertwined with a larger debate about the nature of U.S. federalism itself.¹⁸ The view that allowing overlapping state and national antitrust enforcement tends to chill private enterprise or lead to conflict is based on the notion that in general, states and the federal government each should operate in their “own territory” nearly exclusively. Under this view, often referred to as “dual federalism,” allowing areas of overlapping jurisdiction is problematic because it creates undesirable conflict, and further, is not consistent with fundamental principles of federalism.

Under a second view of federalism, however, allowing concurrent state and federal enforcement of antitrust laws is preferable to exclusive national enforcement because it leads to more effective antitrust enforcement with few corresponding costs. This view makes an important contribution to the debate because it recognizes three important issues that have not always been taken into account by other theories. These three issues are: (1) the historical and continued importance of the role of states in protecting the public health, safety and welfare of their residents; (2) the danger of under-enforcement in this area due to the enormous difficulty of detecting private anticompetitive activity in global markets; and (3) the impossibility of separating the truly national from the truly local in today’s economic environment. In addition, such enforcement allows state governments to play a role in the U.S. constitutional order that arguably is more consistent with fundamental principles of federalism than an approach that would

¹⁸ An examination of the history of concurrent enforcement of antitrust also sheds light on the federalism debate. Arguments about federalism often tend to be highly abstract. The debate over federalism in antitrust should supply a context that may illuminate the costs and benefits of various policy choices.

segregate regulated areas into those deemed most appropriate for either state or federal control.

Americans have debated the desirability and even the constitutionality of concurrent versus dualist views of state and federal jurisdiction since the United States first came into existence.¹⁹ At different times, each theory has achieved ascendancy. In the late 1990s and early years of the 21st century, this debate once again gained salience due in part to increasing globalization. The inevitable increase in areas of overlapping jurisdiction brought about by increasing economic integration of formerly national or even local markets requires a return to this time-honored debate. An understanding of the contours of the federalism debate is essential to a full appreciation of the issues at stake in the antitrust enforcement debate.

Simply put, globalization requires a paradigm change in concepts of U.S. federalism. While the language of the Constitution's Commerce Clause has not changed, the real world of commerce has changed immeasurably. In much the same way that the New Deal economic reforms worked a major change in the allocation of responsibilities in our federal system in response to changing economic conditions, the rise of the global economy compels a similar endeavor if the United States is to safeguard the health and welfare of its citizens in today's world. An important consequence of globalization is that, today, the most pressing local issues in any particular state are more likely to have global rather than truly local origins. Thus the areas of greatest concern to state governments, *i.e.*, those issues most relevant to the states' constitutional responsibility to provide for the health, safety, and welfare of their residents, are more and more often areas over which the federal government has authority to regulate under its commerce power. The relatively small and rapidly shrinking areas considered to be of exclusively local concern threaten to make state governments irrelevant if they are limited to addressing such purely local matters. This result would be extremely unfortunate for U.S. consumers because states were originally designated in the constitutional order as the primary guardians of public health and welfare.

The contribution of this article to the debate on enforcement of the federal antitrust laws is to apply legal scholarship on federalism to new challenges posed to Congress and U.S. policymakers by the reality of globalization and the transformation of national markets into world markets. This article is divided into four parts. Part I outlines the debate over the desirability of allowing states to enforce federal law concurrently

¹⁹ Other federal nations such as Australia, Canada, and Germany face their own unique challenges and have dealt with these challenges in different ways. *See, e.g.* NICHOLAS ARONEY, *THE CONSTITUTION OF A FEDERAL COMMONWEALTH: THE MAKING AND MEANING OF THE AUSTRALIAN CONSTITUTION* (2009); Gerald Baier & Katherine Boothe, *What is Asymmetrical Federalism and Why Should Canadians Care?*, in *BRAVING THE NEW WORLD: READINGS IN CONTEMPORARY POLITICS* (Thomas Michael Joseph Bateman, Roger Epp & Richard M. Myers, eds., 4th ed. 2006).

with national enforcement authorities in global markets. Part II sets forth the two sides of the larger issue that forms a backdrop to the debate: the debate over the nature of federalism itself and its “working processes.”²⁰ Part III analyzes the federal debate and concludes that theories of federalism that are willing to accept large areas of overlapping state and federal jurisdiction are both consistent with constitutional principles and lead to better policy outcomes than do dualist theories when international markets are involved. Part IV analyzes the arguments made in the enforcement debate in light of insights provided by the debate over federalism. It concludes that the primary advantage of concurrent enforcement is a beneficial redundancy that increases the effectiveness of the federal antitrust laws in deterring harmful anticompetitive conduct by large corporations, a type of conduct notoriously difficult to police. Enforcement authorities at one level of government may discover the existence of covert anticompetitive activities that enforcement authorities at a second level of government with different incentives might miss. In addition, because the antitrust laws are subject to interpretation, dual public enforcement encourages a beneficial dialogue between enforcement authorities at different levels of government, the courts, and Congress regarding which types of potentially-harmful commercial activities should be deterred in order to protect the public interest.

I. TWO VIEWS OF OVERLAPPING ENFORCEMENT

The statutory scheme governing federal antitrust law in the United States is unusual in the extent to which it relies on multiple means of enforcement.²¹ In addition to the Antitrust Division of the Department of Justice (“DOJ”) and the FTC, fifty states and the District of Columbia are authorized to enforce federal antitrust laws as *parens patriae*.²² Recognizing the difficulty of detecting anticompetitive private business conduct, Congress also took the step of authorizing private individuals injured by antitrust violations to sue for treble damages as “private

²⁰ EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 6–7 (2007).

²¹ See Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L. J. 1401, 1425 (2003) (“Antitrust Law is unusual in the number of its potential enforcers, both American and foreign.”).

²² Each state also has its own antitrust laws, which generally parallel federal law. See Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 CONN. J. INT'L L. 501, 506–07 (1994). The Antitrust Divisions of the DOJ and the FTC have shared responsibility for government enforcement of the federal antitrust laws for decades. *Id.* at 504–05. The position of Assistant Attorney General for Antitrust was created in 1903, and the Antitrust Division became a separate operating unit within the DOJ thirty years later. *Id.* Congress separately created the FTC in 1914, in part specifically to supplement the DOJ’s enforcement of the antitrust laws. *Id.*

attorneys general.”²³ As one U.S. antitrust authority has noted:

Antitrust enforcement today involves two federal antitrust agencies, multiple regulatory agencies, fifty states, countless private plaintiffs, and the common law, which has developed through multiple levels of courts. If you were sitting down to construct an antitrust enforcement system today, it is likely that you would not create a system that looked like this.²⁴

This statement refers only to the parties authorized to enforce U.S. antitrust laws. In addition to the United States, approximately 100 countries have now enacted their own competition laws, which they have been enforcing internationally much more aggressively than in the past.²⁵

The role of state attorneys general in enforcing antitrust law is multifaceted. In addition to enforcing their state’s antitrust statute, state attorneys general are able to enforce federal antitrust law under a variety of circumstances.²⁶ The subject of this article is the statutory *parens patriae* authority Congress granted to state attorneys general to sue for treble damages on behalf of “natural persons” residing in the state who have suffered antitrust injury.²⁷ “*Parens patriae*” translates literally into “parent of the country.”²⁸ The term “refers to a state’s role as guardian and its sovereign right to protect its citizens.”²⁹ The issue of the propriety or desirability of this statutory *parens patriae* authority gained renewed salience in the 1980s when an increase in the enforcement activities of state

²³ Clayton Antitrust Act, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2002)).

²⁴ Deborah Garza, *Remarks on the Progress of the Antitrust Modernization Commission: Remarks at the Milton Handler Antitrust Review, November 29, 2006*, 2006 COLUM. BUS. L. REV. 261, 273. Garza is Chair of the Antitrust Modernization Commission. *Interview with Antitrust Modernization Commission Chair Deborah A. Garza*, THE ANTITRUST SOURCE, Apr. 2007, available at www.abanet.org/antitrust/at-source/07/04/Apr07-GarzaIntrvw4=30f.pdf.

²⁵ See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343 (1997) (describing the spread of antitrust law and its international enforcement).

²⁶ State officials may sue as private plaintiffs under federal antitrust law if the state itself or one of its political subdivisions is injured. In some circumstances, states may sue to enjoin conduct that injures or threatens the states’ economy or its consumers under the states’ common law *parens patriae* capacity. See 15 U.S.C. § 26 (1995); see also *Hawaii v. Standard Oil*, 405 U.S. 251, 257–60 (1972).

²⁷ Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 15.

²⁸ Sara Zdeb, *From Georgia v. Tennessee Copper to Massachusetts v. EPA: Parens Patriae Standing for State Global Warming Plaintiffs*, 96 GEO L.J. 1059, 1068 (2008).

²⁹ *Id.* (“*Parens patriae* originated as an English common law doctrine which allowed the Crown to assert the rights of subjects who were incapacitated, such as children or the mentally ill, or who lacked a legally cognizable injury.”) American courts later adopted the English doctrine and expanded its application. *Id.* Under the U.S. version of the doctrine, states were permitted to sue not only on behalf of helpless individuals, but also to protect the general health and welfare of their citizens. *Id.*

attorneys general, particularly in response to conduct occurring in global markets, led to calls for Congress to eliminate this authority either completely or in the alternative, restrict its use to instances involving primarily local conduct.³⁰

A. Historical Background: The Hart-Scott-Rodino Antitrust Improvements Act of 1976

State legislatures were quicker to pass laws in response to perceived threats from the economic power of large corporate entities in the mid-nineteenth century than was Congress.³¹ When Congress entered the field in 1890 by passing the Sherman Act, it did so with intent to supplement, rather than replace, preexisting state law.³² Thus the states and the federal government have shared the task of antitrust enforcement from its inception.³³ In 1976, Congress enlarged the state role in antitrust enforcement when it granted state attorneys general the right to enforce federal antitrust law when antitrust violations injured their residents.³⁴ That Congress possessed the power to do this under the Commerce Clause was uncontroversial because the Supreme Court has held that Congress is free to delegate or “share” its power to regulate interstate commerce with state governments if it so desires.³⁵ The Hart-Scott-Rodino Antitrust Improvements Act (“H-S-R Act”) not only authorized state attorneys

³⁰ See, e.g., Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925 (2001) (discussing antitrust law and federalism) [hereinafter Posner, *New Economy*]; Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 267, 280–82 (Richard A. Epstein & Michael S. Greve, eds., 2004) (discussing antitrust law, federalism, and merger enforcement). The analysis here is limited to the policy implications of concurrent state and federal authority to investigate and prosecute anticompetitive conspiracies or attempts to monopolize markets. *Id.* It does not deal with merger enforcement, which is a unique type of antitrust regulation that raises issues that have little in common with enforcement of restrictions on anticompetitive conduct. *Id.*

³¹ See Stephen Rubin, *Rethinking State Antitrust Enforcement*, 26 FLORIDA L. REV. 653, 657–61 (1974).

³² See *Id.* at 660–61.

³³ It was assumed initially that state antitrust laws were essential because Congress had no power to regulate purely local activities. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130 (1978); *ARC Am. Corp.* 490 U.S. 93, 101 (1989) (holding state antitrust laws to be within “an area traditionally regulated by the states” for which there is a “presumption against preemption”). Changes in the Supreme Court’s interpretation of the Commerce Clause in the wake of the Depression of the 1930s altered this assumption, however. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942).

³⁴ Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 15 at § 301. In the same year, Congress encouraged state governments to beef up enforcement of state antitrust statutes when it enacted the Crime Control Act of 1976, which provided seed money to states to be used for this purpose. Crime Control Act of 1976, Pub. L. No. 94-503, 90 Stat. 2407 (codified in scattered sections of 5 U.S.C. & 28 U.S.C. and repealed in part).

³⁵ See *Prudential Ins. v. Benjamin*, 328 U.S. 408, 431, 434, 436–38 (1946).

general to bring suits on behalf of their injured residents, it also directed the DOJ to share with state officials information the DOJ had collected in its antitrust investigations.³⁶

Title III of the Act granted to state attorneys general the right to sue for treble damages for injury sustained to the property of “natural persons,” as opposed to business entities, resident in their states.³⁷ The legislative history of the Act explains the reasons that Congress took this step.³⁸ The House Judiciary Committee reported that Congress desired “to provide a new federal antitrust remedy” to state residents injured by violations of the antitrust laws” for three reasons: “to compensate the victims of antitrust offenses who might otherwise go uncompensated; to prevent antitrust violators from being unjustly enriched; and to deter future antitrust violations.”³⁹

Of special concern was providing a remedy to individual consumers injured by price-fixing conspiracies involving multiple small transactions in essential commodities such as food or medicine.⁴⁰ While business entities injured by such conspiracies had both the economic incentive and the ability to sue for redress under existing law, the same was not true of injured consumers who often lacked the incentive to sue for damages due to the small size of their losses.⁴¹ The House Report also noted the particular problems involved with bringing class actions in this area,⁴² as did the Senate Report on the legislation. The Senate Report stated, “consumers have found little relief under the class action provisions of the Federal Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 and practical problems in the proof of individual consumers’ damages under Section 4 of the Clayton Act.”⁴³ Indeed, one Court of Appeals judge noted that the purpose of the grant of statutory *parens patriae* authority to state attorneys general was “to overcome obstacles to private class actions through enabling state attorneys general to function more efficiently as consumer advocates.”⁴⁴ Granting state attorneys general the right to sue on such consumers’ behalf, it pointed out, would not unfairly increase any defendant’s liability, but rather would make an additional method of enforcement available to persons suffering

³⁶ Hart-Scott-Rodino Antitrust Improvements Act of 1976, *supra* note 15, § 301.

³⁷ *Id.*

³⁸ H.R. REP. NO. 94-499(I) (1975); H.R. REP. NO. 94-499(II) (1975).

³⁹ H.R. REP. NO. 94-499(I) pt. 1 at 2572.

⁴⁰ H.R. REP. NO. 94-499(I) pt. 3 & pt. 4.

⁴¹ H.R. REP. NO. 94-499(I), pt. 3.

⁴² H.R. REP. NO. 94-499(I), pt. 5 subsection 4C(b).

⁴³ *See generally*, S. REP. NO. 94-803, pt. 1, at 6 (1976).

⁴⁴ *New York v. Reebok Int’l Ltd.*, 96 F.3d 44, 48 (2d. Cir. 1996) (quoting *In re Grand Jury Investigation of Cuisinarts*, 665 F.2d 24, 35 (2d. Cir. 1981). *Connecticut v. Cuisinarts, Inc.* 460 U.S. 1068 (1983)).

actual antitrust harm who would otherwise go uncompensated.⁴⁵ The report noted,

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, accountable and responsible public officer whose duty is to promote the public interest.⁴⁶

The legislation was expected to have other benefits as well. “An extremely important benefit” of the legislation, noted the Report, was the “promotion of cooperation in antitrust enforcement between the states and the federal government.”⁴⁷ An additional reason given for empowering state attorneys general in this way was that state attorneys general have traditionally represented the “proprietary” interests of the state.⁴⁸ According to the Report, “When the state itself is the victim of anticompetitive restraints, an attorney general can recover treble damages on behalf of the state as a purchaser of goods and services. Attorneys general also can act as a group representative of entities at other levels of government.”⁴⁹

As noted above, in the years after passage of the H-S-R Act, two trends coalesced to call into question the wisdom of allowing state enforcement of federal antitrust law. One development was an increase in the number and types of competitive activities previously considered to be antitrust violations that the FTC and the Antitrust Division of the DOJ declined to prosecute and a corresponding increase in the number of antitrust cases brought by state officials.⁵⁰ In order to tackle complex antitrust cases for which states had limited resources, the National Association of Attorneys General (“NAAG”) formed the Multistate Antitrust Task Force in 1983.⁵¹ Representing all the states, plus the U.S. territories and the District of Columbia, the NAAG Antitrust Task Force now represents all the states, plus the U.S. territories and the District of Columbia and assists in coordinating investigation, litigation, lobbying, and training tasks.⁵²

⁴⁵ H.R. REP. NO. 94-499(I) pt. 4.

⁴⁶ H.R. REP. NO. 94-499(I) pt. 3.

⁴⁷ *Id.*

⁴⁸ H.R. REP. NO. 94-499(I) pt. 5 § 4F.

⁴⁹ See H.R. Rep. 94-499(I) pt. IV (1975).

⁵⁰ See Jay L. Himes, Chief of Antitrust Bureau, Office of the Attorney Gen. of N.Y., Remarks Presented to Antitrust, Competition and Trade Committee of LEX MUNDI: Federal “Unemption” of State Antitrust Enforcement (May 14, 2004).

⁵¹ AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, STATE ANTITRUST ENFORCEMENT HANDBOOK (2d ed. 2008).

⁵² Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1014 (2001).

The second development was the increasing economic importance of anticompetitive business practices, such as those involved in the Intel situation, occurring in global markets that threatened injury to purchasers in widely dispersed geographic areas. In the Intel case, for example, Intel was the dominant manufacturer of an important computer chip that it sold throughout the world.⁵³ In 2001, the *Microsoft* case⁵⁴ greatly increased the profile of state attorneys general in international commerce when a number of states that had filed suit against Microsoft refused to agree to a remedy proposal favored by both the DOJ and Microsoft officials.⁵⁵

B. Restrictive Views of State Authority

Those who see the complications arising out of dual enforcement as an increasingly intractable problem have proposed two different but closely-related solutions. Both are motivated by a desire to limit the antitrust enforcement activities of state attorneys general to conduct occurring primarily within the borders of their states. These two solutions are to eliminate states' statutory *parens patriae* authority completely or to restrict its use to situations involving only local competitive issues rather than issues that have a detrimental effect on competition in national or international markets.

1. Posner's Position: Eliminate Statutory State *Parens Patriae* Authority

The first solution, most prominently endorsed by Judge Richard A. Posner, is for Congress to reverse the grant of *parens patriae* power to the states it made in 1976.⁵⁶ Eliminating this authority, he argues, would avoid the potential for state enforcement actions to complicate and possibly duplicate federal antitrust enforcement actions.⁵⁷ Posner describes the problem this way:

No sooner does the Antitrust Division bring a case, but the states, and now the European Union, are likely to join the fray, followed at a distance by the antitrust plaintiffs' class action bar. The effect is to lengthen the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation and increase litigation costs.⁵⁸

⁵³ See Flynn, *supra* note 4.

⁵⁴ *United States v. Microsoft Corp.*, 231 F. Supp. 2d 144 (2003).

⁵⁵ Paul Davidson, *States Split on Accepting Microsoft Ruling*, USA TODAY, Nov. 7, 2001, at 3B.

⁵⁶ See Posner, *New Economy*, *supra* note 30, at 940. See also McChesney, *supra* note 21 at 1424–31; Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877 (2003).

⁵⁷ Posner, *New Economy*, *supra* note 30, at 940.

⁵⁸ *Id.*

He contends that such state action chills private enterprise and interferes with the national government's right to set policy on matters with national and international implications.⁵⁹ Posner would thus leave enforcement of federal antitrust laws to the efforts of private plaintiffs and national antitrust enforcement authorities, such as the DOJ and the FTC.⁶⁰

Posner believes that it is desirable for state officials to have authority to bring antitrust suits, federal or state, only "under circumstances in which a private firm would be able to sue, as where the state is suing firms that are fixing the prices of goods or services that they sell to the state."⁶¹ Posner's goal is to prevent companies from being subject to multiple remedies for the same misconduct.⁶² The case against permitting states to bring enforcement actions under either state or federal law is even greater, he argues, in the case of international transactions.⁶³ Posner offers no detailed explanation for why he believes the case to be stronger in international transactions. Others have noted, however, that state regulation of conduct and actors doing business in international markets tends to raise a general

⁵⁹ See Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y, 5, 8–13 (2004) [hereinafter Posner, *Federalism*]; Posner, *New Economy*, *supra* note 30, at 939. See also DeBow, *supra* note 30; Michael S. Greve, *Against Cooperative Federalism*, 70 MISS. L.J. 557 (2000); Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 879–80 (2003).

⁶⁰ See Posner, *Federalism*, *supra* note 59, at 12–14 (proposing that states not be allowed to apply antitrust law to interstate or foreign commerce); Posner, *New Economy*, *supra* note 30.

⁶¹ RICHARD A. POSNER, *ANTITRUST LAW* 281 (2d ed. 2001) [hereinafter Posner, *ANTITRUST LAW*]. Alternatively, Posner has proposed giving the federal authorities "a right of first refusal" with respect to antitrust suits. *Id.* at 282. Under this proposal, state antitrust suits would be preempted if a federal suit were filed involving the same conduct. See Posner, *New Economy*, *supra* note 30, at 940. Posner would eliminate state *parens patriae* enforcement of federal law but does not go so far as to argue for the preemption of all state antitrust laws. Posner argues there is a stronger case under principles of federalism for allowing this type of enforcement since individual plaintiffs can sue under state antitrust law, as well as state officials such as the state attorney general. Posner supports a limited role for state antitrust laws because he argues that if antitrust violations that did not affect interstate or foreign commerce were not actionable under state law, there would be a law enforcement vacuum because the Commerce Clause does not authorize federal action against such violations. But he would limit its applicability to cases involving only "local" activities and effects. See Posner, *Federalism*, *supra* note 59, at 8–13.

⁶² See Posner, *Federalism*, *supra* note 59. This concern has also been expressed by others. See, e.g., American Bar Association, Section of Antitrust Law, Comments Regarding Government Enforcement Institutions: The Enforcement Role of the States with Respect to Federal Antitrust Laws in Civil Nonmerger Cases 6 (Oct. 19, 2005), available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/051019_ABA_State_Civil_Nonmerger-Enf_Inst.pdf [hereinafter ABA Comments]; ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATION 196–97 (Apr. 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf [hereinafter AMC REPORT].

⁶³ See Posner, *Federalism*, *supra* note 59, at 13.

concern arising from the idea that the United States should speak with one voice in matters involving foreign affairs, and that voice should be the voice of the national government, not that of a single state or group of states.⁶⁴

Posner cites three reasons for eliminating state antitrust jurisdiction. First, “[s]tates do not have the resources to do more than free ride on federal antitrust litigation, complicating its resolution. . . .”⁶⁵ This lack of resources is presumably the reason for his second objection, which is the generally poor legal abilities of lawyers in the attorneys general office of most states.⁶⁶ Here, Posner’s view is based on personal experience. He relates that:

When I was a law clerk at the Supreme Court, almost forty years ago, I was struck by the poor quality of the briefs and arguments of the lawyers in the offices of the state attorneys general. Since becoming a judge almost twenty years ago, I have been struck by the poor quality of the briefs and arguments of most, though not all, of the lawyers in the offices of the state attorneys general of my circuit.⁶⁷

He attributes this low level of competence to the low salaries paid to state officials.⁶⁸

Posner’s third objection to state enforcement is that state officials are:

too subject to influence by particular interest groups that may represent a potential antitrust defendant’s competitors. This is a particular concern when the defendant is located in one state and one of its competitors is in another, and the competitor, who is pressing his state’s attorney general to bring suit, is a major political force in that state.⁶⁹

According to Posner, “A situation in which the benefits of government action are concentrated in one state and the costs in other states is a recipe for irresponsible state action.”⁷⁰ Posner sees this phenomenon as a

⁶⁴ See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999).

⁶⁵ See Posner, *New Economy*, *supra* note 30, at 940.

⁶⁶ *Id.* at 941.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 940–41.

⁷⁰ Posner, *New Economy*, *supra* note 30, at 941. This concern has been raised by others. See, e.g., Hahn & Layne-Farrar, *supra* note 56, at 79; Comments of the Chamber of Commerce of the United States on Commission Issues Accepted for Study 3, Memorandum from the Antitrust Modernization Commission Staff to AMC Commissioners (May 19, 2006), available at http://govinfo.library.unt.edu/amc/pdf/meetings/EnfInst_State_DiscMemo_pub.pdf.

“genuine downside of federalism.”⁷¹ For the proposition that the federal government is less subject to pressure from special interests, he cites James Madison’s argument regarding the benefits of a large republic, which is set forth in Federalist No. 10.⁷² He does not assert that federal agencies are free from such special interest pressure, but believes it is only to a small degree because most lawyers at federal agencies aspire “[t]o land good berths in the private practice of law” which requires them to “demonstrate their professionalism.”⁷³

Posner asserts that statutory *parens patriae* authority has disadvantages not only because states are more subject to political pressure than the federal government, but also because “state attorneys general are not the states.”⁷⁴ He contends that state attorney generals have detrimental incentives to seek to maximize the political benefits of their actions and minimize their cost by “free-riding” on suits originally instituted by federal authorities.⁷⁵ Another disadvantage of state attorney general participation in such lawsuits is the possibility that they will complicate any settlement efforts, or that they will attempt to channel the funds they recover on behalf of their residents into charitable uses that advance their political agendas.⁷⁶

Posner concedes that “[i]n principle, by offering competition in public enforcement of federal antitrust laws to the U.S. Department of Justice, the state attorneys general keep the Department on its toes”⁷⁷ He discounts the value of such competition, however, by noting that the overlapping jurisdiction of the DOJ and FTC generates competition in the enforcement of U.S. federal antitrust law and by observing that, “increasingly, there is competition at the international level as well.”⁷⁸ In addition, he argues that resource constraints make it “unlikely that state attorneys general will be sources of innovative antitrust doctrines or methods of proof”⁷⁹

Posner asserts that any new doctrines resulting from state enforcement are of limited value because state attorneys general can only offer a more restrictive interpretation of the federal antitrust laws than federal

⁷¹ Posner, *New Economy*, *supra* note 30, at 941.

⁷² *Id.* “The federal government, having a larger and more diverse constituency, is, as James Madison recognized in arguing for the benefits of a large republic, less subject to takeover by a faction. I am not myself inclined to make a fetish of federalism.” (taking his argument from THE FEDERALIST No. 10 (James Madison)).

⁷³ See Posner, *New Economy*, *supra* note 30, at 942.

⁷⁴ See Posner, *Federalism*, *supra* note 59, at 8.

⁷⁵ *Id.* at 9.

⁷⁶ *Id.* at 10.

⁷⁷ *Id.* As Posner puts it, “The effect of the [Hart-Scott-Rodino Antitrust Improvements] Act, in principle at least, is to make public enforcement of federal antitrust law a competitive rather than a monopoly ‘market.’” *Id.* at 8.

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 10.

enforcement authorities.⁸⁰ This fact raises the danger that interstate businesses will be forced to conform their business practices to the most restrictive state interpretation of federal antitrust law.⁸¹ A third reason that Posner argues state *parens patriae* actions are unnecessary is that injured private parties can seek redress through class action suits.⁸² Based on all of his arguments against state *parens patriae* actions, Posner would prefer that national authorities alone be allowed to operate in national and especially international markets.⁸³

2. *The AMC's Recommendation: Congress Should Limit But Not Eliminate State Parens Patriae Authority*

There are those who would not go so far as to eliminate state *parens patriae* authority but instead propose that such authority be exercised only in limited situations. This was the recommendation of the Antitrust Modernization Commission ("AMC") and others.⁸⁴ The AMC is a bipartisan commission established by Congress in 2002 to study issues arising from the globalization of commerce, including the issue of concurrent state and federal antitrust enforcement.⁸⁵ In 2006, the Commission recommended in its Final Report that state attorneys general continue to possess *parens patriae* authority, but that such authority should be limited to the prosecution of local matters.⁸⁶ This solution is intended to allow the federal government to play the primary role in setting national antitrust policy and to allow the nation to speak with one voice in its foreign affairs.⁸⁷

⁸⁰ See Posner, *Federalism*, *supra* note 59.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 13.

⁸⁴ See AMC REPORT, *supra* note 63; see also DeBow, *supra* note 30, at 279–81; *Hearings on the Allocation of Antitrust Enforcement Between the States and the Federal Government Before the Antitrust Modernization Commission* (Oct. 26, 2005) (statement of Phillip A. Proger, Attorney, Jones Day), available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-Proger.pdf [hereinafter Statement of Phillip A. Proger].

⁸⁵ Antitrust Modernization Commission Act of 2003, Pub. L. No. 107-273, §11051-11060, 116 Stat. 1856 (2002) (codified at 15 U.S.C. § 1). This act tasked the AMC with four objectives: "(1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues; (2) to solicit views of all parties concerned with the operation of the antitrust laws; (3) to evaluate the advisability of proposals and current arrangements with respect to issues so identified; and (4) to prepare and submit to Congress and the President a report. . ." *Id.* § 11053. The Act required that the AMC have twelve members, with four appointed by the President, two by the majority leader of the Senate, two by the minority leader of the Senate, two by the Speaker of the House of Representatives, and two by the minority leader of the House of Representatives. *Id.* § 11054.

⁸⁶ AMC REPORT, *supra* note 62, at 196–97.

⁸⁷ See *id.* at 216.

The AMC declined to recommend that state *parens patriae* authority be eliminated altogether because it concluded that on balance, the benefits of state enforcement outweighed its costs.⁸⁸ Nevertheless, it recommended that as a policy matter, states should focus their enforcement efforts “primarily on matters involving localized conduct or competitive effects,” and leave conduct with national and international competitive effects to the national enforcement authorities.⁸⁹ The rationale for this division of labor was that state authorities often possess advantages in discovering and prosecuting locally-based anticompetitive conduct, and that “a state focus on local or regional matters can avoid unnecessary overlaps in state and federal antitrust enforcement, thereby using limited enforcement resources more efficiently.”⁹⁰ The AMC noted that “for matters of national or international scope that also have local competitive effects, it seems most appropriate for states to investigate competitive conditions in their own local markets.”⁹¹

C. Expansive Views of Concurrent Enforcement

1. Congress Should Retain State *Parens Patriae* Authority

Critics of the proposals to limit or eliminate states’ *parens patriae* enforcement authority see overlapping state and federal authority to enforce federal antitrust law not as a problem but as a success.⁹² They point out that eliminating this authority does nothing to solve the problems that concerned Congress when it enacted legislation granting states this authority.⁹³ One of these concerns was that no general federal authority exists to obtain damages on behalf of injured individuals, and that state *parens patriae*

⁸⁸ See *id.* at 192–203.

⁸⁹ See AMC REPORT, *supra* note 62, at 187, 194. The Final Report did not recommend a procedure for implementing this recommendation. Presumably a mechanism could be set up to coordinate the investigative activities of state attorneys general and national authorities that would operate in a similar fashion as the current “clearance procedure” used to coordinate the investigative activities of the DOJ and FTC to avoid overlapping investigations of the same alleged anticompetitive conduct. *Id.* at 132–37.

⁹⁰ *Id.* at 197.

⁹¹ *Id.*; see also JOHN J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 239–42 (1964) (advocating using economic impact to allocate antitrust responsibility between state and federal authorities).

⁹² See, e.g., Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003); Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361 (1999); First, *supra* note 52.

⁹³ See Jay L. Himes, Chief Antitrust Bureau Office of the Attorney General of the State of New York, *Federal “Unemption” of State Antitrust Enforcement*, Remarks Presented to the Antitrust, Competition and Trade Committee of Lex Mundi (May 14, 2004). For a discussion of the legislative history of the Hart-Scott-Rodino Antitrust Improvements Act, see Part I.A. of this article.

authority helps fill this gap.⁹⁴ These proponents of state *parens patriae* authority also assert that injured individuals have benefited from state officials developing innovative methods for distributing settlement proceeds developed by state officials.⁹⁵ In response to the argument that class action suits could be substituted for *parens patriae* actions, they note that the latter offer a number of advantages over private class actions.⁹⁶

Proponents of state *parens patriae* authority are untroubled by the existence of overlapping jurisdiction to prosecute the same conduct; a situation, they point out, that is commonplace in much of criminal law. In their view, the federal design of the Constitution sets up a system with many areas of concurrent state and federal regulatory authority, suggesting there is no need to separate jurisdiction over interstate and intrastate commerce.⁹⁷ Overlapping jurisdiction, they argue, stimulates competition in antitrust enforcement and results in better public policy outcomes.⁹⁸ Finally, they argue that the history of state *parens patriae* actions demonstrates its many advantages and that opponents' claims of state parochialism or favoritism toward in-state interests are overstated.⁹⁹

Not surprisingly, many of the most vocal opponents of limiting *parens patriae* authority of state attorneys general have been state attorneys general themselves and their staffs.¹⁰⁰ They argue that litigation brought on behalf

⁹⁴ Unlike the states, neither the DOJ nor the FTC has the power to recover damages on behalf of consumers injured by antitrust violations. The FTC has claimed the right to seek the equitable remedy of disgorgement, but has used that remedy sparingly.

⁹⁵ Statement of Phillip A. Proger, *supra* note 84, at 14; Calkins, *supra* note 92, at 691–92.

⁹⁶ See *Hearings on the Allocation of Antitrust Enforcement Between the States and Federal Government Before the Antitrust Modernization Commission* (Oct. 26, 2005) (statement of Hon. G. Steven Rowe, Attorney General, State of Maine), available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/051026_State_Enforc_Transcript_reform.pdf [hereinafter Statement of G. Steven Rowe]; First, *supra* note 52, at 1039; COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE WORKING GROUP ON MERGER ENFORCEMENT 9 (July 15, 2005), available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/merger_pdf/050715_AAI-Merger.pdf [hereinafter AAI COMMENTS]. For example, states need not meet the requirements for Rule 23 class certification and states possess the power to investigate potential violations prior to filing suit. Moreover, attorneys for the class are often criticized as the primary beneficiaries of class action suits. See Memorandum from AMC Staff to AMC Commissioners on Enforcement Institutions – States Discussion Memorandum (May 19, 2006), available at http://govinfo.library.unt.edu/amc/pdf/meetings/EnfInst_State_DiscMemo_pub.pdf.

⁹⁷ For a more detailed explanation of this concept, see *infra* pp. 23–24 of this article.

⁹⁸ *Hearings on the Allocation of Antitrust Enforcement Between the States and the Federal Government Before the Antitrust Modernization Commission* (Oct. 26, 2005) (statement of Harry First, Professor, New York University Law School) available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement-First.pdf [hereinafter Statement of Harry First].

⁹⁹ *Id.*; Statement of Phillip A. Proger, *supra* note 85, at 14; Statement of G. Steven Rowe, *supra* note 97.

¹⁰⁰ See Statement of G. Steven Rowe, *supra* note 96.

of state residents has set important precedents in a number of instances, despite Judge Posner's assertion to the contrary, that state enforcement has often been focused on areas of local competitive importance, and that even when state attorneys general have gotten involved in cases that involve global markets, their participation has been beneficial, rather than detrimental.¹⁰¹ Finally, state attorneys general argue that state enforcement is rooted in a strong tradition of federalism,¹⁰² and that states can both fill gaps in local enforcement matters and pick up the slack by prosecuting national or international matters during periods of lax federal enforcement.¹⁰³

2. *Congress Should Not Limit State Officials to the Prosecution of Local Conduct*

Proponents of retaining unlimited state *parens patriae* acknowledge the benefits of state enforcement in local matters, but contend that state enforcement of both national and international antitrust violations has great benefits as well. According to Professor Harry First, there are three problems with limiting state attorneys general to investigating and prosecuting only local matters.¹⁰⁴ The first is that the federal agencies are not themselves actually confined to cases with broad geographic effects.¹⁰⁵ Thus, limiting states will not in fact lead to a clear division of labor between activities that are interstate and international and those that are intrastate. Without corresponding limits on federal agencies to cases with broad geographic effects, there will remain overlap between federal and state enforcement leading to possible inconsistency in the outcome of suits or in any resulting remedies imposed by a court.¹⁰⁶

Secondly, First notes that "although it has always been difficult to separate the local from the more national, it is increasingly difficult today."¹⁰⁷ Health care provides an important example. State attorneys general have a great interest in promoting the health, safety, and welfare of their residents, making health care a local issue.¹⁰⁸ On the other hand, a large number of health care providers operate on the national level.¹⁰⁹ Thus developments crucial to an individual state resident's access to health care

¹⁰¹ See, e.g., *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (making it easier for federal as well as state authorities to prosecute antitrust cases involving foreign defendants).

¹⁰² See, e.g., ABA Comments, *supra* note 62, at 6.

¹⁰³ *Id.* at 7.

¹⁰⁴ See First, *supra* note 52, at 1035; see also, ABA Comments, *supra* note 62, at 11–13.

¹⁰⁵ See First, *supra* note 52, at 1035.

¹⁰⁶ See *id.*

¹⁰⁷ *Id.*

¹⁰⁸ See generally *id.*

¹⁰⁹ See generally *id.*

may well occur outside the borders of the state.¹¹⁰

Third, First argues that “it is not necessarily true that the best allocation of a state antitrust enforcement dollar is to spend it on truly local anticompetitive agreements.”¹¹¹ Principles of federalism counsel against preventing officials of a sovereign state from determining whether a state’s consumers are better served through an investigation of an interstate violation or by investigation of an intrastate matter.¹¹² In addition, in light of the current expansive definition of interstate commerce, limiting states to matters concerning only intrastate commerce would greatly limit their roles as both enforcers of federal antitrust laws and guardians of the health, safety and welfare of their residents.¹¹³

II. THE LARGER DEBATE: TWO VIEWS OF FEDERALISM

The fundamental political and philosophical disagreement between those who applaud concurrent state and federal enforcement of federal antitrust law and those who view it as a problem turns on a disagreement about the nature of federalism itself. The term “federalism” has the disadvantage of having been used to refer to a plethora of different but related concepts. Here it connotes a system of government, such as that in the United States, combining national government with constituent governments that ensures the continued existence of each and distributes power among them so that neither is completely subordinate to the other.¹¹⁴ In the federal system of the United States, Congress makes certain policy decisions at the national level, while other decisions are made at the state level.¹¹⁵ In theory, the members of Congress represent the collective will of the “people of the United States,” while members of state legislatures are elected to represent the collective will of the people of their respective

¹¹⁰ *Id.*; see also ABA Comments, *supra* note 62, at 11–13; AAI COMMENTS, *supra* note 96, at 12.

¹¹¹ First, *supra* note 52, at 1035.

¹¹² ABA Comments, *supra* note 62, at 11–13; *Supplemental Testimony of Maine Attorney General G. Steven Rowe: Hearings on the Allocation of Antitrust Enforcement between the States and Federal Government Before the Antitrust Modernization Commission 2* (2006) (statement of Hon. G. Steven Rowe, Attorney General, State of Maine), available at http://govinfo.library.unt.edu/amc/public_studies_fr28902/enforcement_pdf/060723_suppl_state_merger_com.pdf.

¹¹³ ABA Comments, *supra* note 62, at 12 (under the Commerce Clause, nearly all activity falls within interstate commerce).

¹¹⁴ See DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES 2* (3d ed. 1984); see also Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 59 (2002).

¹¹⁵ Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543, 545 (1954). I use the term “people of the United States” to stress that the purpose of federalism is to protect the prerogatives of the “people of the states” acting collectively, rather than the prerogative of state legislators.

states.¹¹⁶

A primary issue in the federalism debate is whether principles of federalism mandate, or at least point toward, a relatively strict division of labor between state and federal governments in deciding matters of public policy. Some have suggested that the answer is yes.¹¹⁷ This view is commonly referred to as dual federalism or sometimes as a “dualist view” of federalism. Others contend that the only workable interpretation of federalism requires that state and national governments exercise concurrent jurisdiction to decide issues in a substantial number of areas. They assert that demarcation of areas of public policy into separate state and national spheres is neither mandated by the text of the Constitution nor consistent with the intent of the Founders.¹¹⁸

A. Dual Federalism

Historically, the term “dual federalism” referred to the concept that state and national governments each possess independent, exclusive, and non-overlapping spheres of authority.¹¹⁹ As articulated by Chief Justice Taney in 1858, “the powers of the General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.”¹²⁰ The theory of dual federalism in its purest form was repudiated by both the Civil War and the New Deal. Nevertheless, theories that tend toward a dualist view of the structure of the U.S. government have formed a consistent thread throughout U.S. constitutional history and have been endorsed by Justices of the U.S. Supreme Court.¹²¹ In fact, the Rehnquist Court articulated a

¹¹⁶ *Id.*

¹¹⁷ See *Printz v. United States*, 521 U.S. 898, 935 (1997) (noting, in an opinion written by J. Scalia, that “Congress cannot compel States to enact or enforce a federal regulatory program,” and holding that Congress “cannot circumvent that prohibition by conscripting the States’ officers directly”); *Gonzales v. Raich*, 545 U.S. 1, 57–74 (2005) (Thomas, J., dissenting) (finding that separation of powers did not allow the federal government to regulate California’s medical marijuana program). Included among these protected values are the autonomy and legislative prerogatives of the states. Included among these protected values are the autonomy and legislative prerogatives of the states. See generally, *Printz v. United States*, 521 U.S. 898; *Gonzales v. Raich*, 545 U.S. 1.

¹¹⁸ For a detailed discussion, see *infra* Part III.A. of this article.

¹¹⁹ The term “dual federalism” was first used by Edward Corwin. See Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. REV. 1847, 1849 n.8 (2007) (citing Edward S. Corwin, *Congress’s Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L. Q. 477, 481 (1933)); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005).

¹²⁰ *Ableman v. Booth*, 62 U.S. 506, 516 (1858).

¹²¹ JOHN T. NOONAN, JR., *NARROWING THE NATION’S POWER: THE SUPREME COURT SIDES WITH THE STATES* (2002); *THE REHNQUIST COURT: JUDICIAL ACTIVISM ON THE RIGHT* (Herman Schwartz ed., 2002); see *COMPETITION LAWS IN CONFLICT*, *supra* note 31; PURCELL,

view of federalism that, while not adhering strictly to earlier forms of dual federalism, possessed tendencies that were “dualist in nature.”¹²² Contemporary versions of the theory of dual federalism differ significantly from earlier historical versions because they recognize that today the federal and state governments possess concurrent jurisdiction in a number of areas, but they believe that minimizing these jurisdictional overlaps is desirable.¹²³

B. Overlapping Federalism

A body of recent scholarship has arisen to debunk the “myth of dual federalism.”¹²⁴ Scholars working in fields as disparate as corporate law and immigration law have concluded that there are significant benefits to the exercise of concurrent state and national jurisdiction in these particular areas in which, as a matter of constitutional law, Congress has the option to regulate exclusively.¹²⁵ Other scholars have formulated a general theory of the benefits of the exercise of state and federal jurisdiction.¹²⁶ These “anti-dual federalism” theories of overlapping jurisdiction are referred to by various labels.¹²⁷ But each theory posits that federalism, properly

supra note 20.

¹²² *Id.* Robert A. Schapiro has written that “[d]ual federalism is dead, but not gone. Its spirit continues to haunt contemporary discussions of federalism.” Schapiro, *supra* note 119, at 246.

¹²³ *Id.*

¹²⁴ See Williams, *supra* note 119, at 1847.

¹²⁵ For corporate law, see Renee M. Jones, *Dynamic Federalism: Competition, Cooperation, and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005); Brett McDonell, *Recent Skirmishes in the Battle Over Corporate Voting and Governance*, 2 J. BUS. & TECH. L. 349 (2007); Robert B. Thompson, *Collaborative Corporate Governance: Listing Standards, State Law and Federal Regulation*, 38 WAKE FOREST L. REV. 961 (2003); William W. Bratton & Joseph A. McCahery, *The Equilibrium Content of Corporate Federalism*, 41 WAKE FOREST L. REV. 619 (2006). On the subject of immigration law, see, e.g., Cristina M. Rodriguez, *The Importance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Peter J. Spiro, *Learning to Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997); Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT’L L. 121 (1994).

¹²⁶ See, e.g., ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* (2008); Schapiro, *supra* note 119, at 243; Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1 (2007); Michael D. Ramsey, *supra* note 64.

¹²⁷ Marcel Kahan and Edward Rock have coined the term “Symbiotic Federalism.” Kahan & Rock, *supra* note 125. Robert B. Ahdieh has written about “Dialectical Regulation.” See Robert B. Ahdieh, *The Dialectical Regulation of Rule 14a-8: Intersystemic Governance in Corporate Law*, 2 J. BUS. & TECH. L. 165 (2007); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006). Robert Cover has written of “Jurisdictional Redundancy.” Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM & MARY L. REV. 639 (1981). Robert Thompson’s work discussing the notion of “collaborative” regulation provides yet another example. Thompson, *supra* note 125.

understood and implemented, can lead to the best of both worlds in a truly federal (rather than exclusively state or national) regulatory scheme. All describe a middle ground between federal and state governance in economic regulation of activities that are at least national in scope. Many of these authors rely on the idea that there is a market in regulatory rules in which “best regulatory practices” tend to emerge after contesting with competing regulatory philosophies. Each posits, however, that federalism, when not limited by attempts to divide responsibilities cleanly between state and national authorities, can lead to better and more effective regulation than could either an exclusively state or national regulatory scheme. Proponents of overlapping theories of federalism assert that upon close examination, constitutional principles do not mandate a theory of near-exclusive state and federal jurisdiction.¹²⁸ In their view, the Constitution leaves the issue of the proper working relationship between state governments and the federal government an open question in most areas.¹²⁹ Indeed, one commentator argues that the writings of the Founders, particularly those of James Madison, provide more support for the view that concurrent state and federal jurisdiction is more consistent with fundamental principles of federalism than “dualist” theories.¹³⁰

Proponents of overlapping federalism point out that while dual federalism ideas claim to base the desirability of dividing state and federal power on the need to protect the autonomy of the states, in practice such theories generally operate to restrict state regulatory power.¹³¹ Others stress that doctrines such as federal preemption, the Dormant Commerce Clause, and dormant foreign affairs preemption adequately serve to protect national prerogatives from unwarranted exercises of state power.¹³² Under these doctrines, they assert, Congress has the means to determine whether it wishes to regulate the area exclusively, leave the area to state regulation, or allow concurrent regulation.¹³³ Given this power, the risk that state actions will interfere with national policy is slim.

¹²⁸ PURCELL, *supra* note 20; *see also* CHEMERINSKY, *supra* note 126, at 58 (“The Constitution is silent about the allocation of power between state and federal governments. Nor can major premises be derived from the intent of the framers. Ultimately, the analysis must focus on what is the most desirable division of authority between state and federal governments; that is, what arrangement will best lead to effective government. This analysis, of necessity, is functional.”).

¹²⁹ *See* PURCELL, *supra* note 20, at 3–6.

¹³⁰ *See* Jones, *supra* note 125, at 121–23.

¹³¹ *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997); CHEMERINSKY, *supra* note 126.

¹³² Schapiro, *supra* note 119, at 260.

¹³³ *See, e.g., id.*; CHEMERINSKY, *supra* note 126; Gardbaum, *supra* note 131.

C. Dual and Overlapping Federalism in Supreme Court Jurisprudence

Before and during the nineteenth century, the predominant view held that the national government was one of limited, delegated powers and that the states were independent sovereigns possessing all non-delegated powers, including exclusive authority over identifiably “local” matters.¹³⁴ In Supreme Court commerce clause jurisprudence, the model of dual federalism divided commerce into two types: intrastate commerce, which was to be regulated by the states, and interstate commerce, which fell under the purview of Congress.¹³⁵ In theory, an important function of dual federalism was to ensure that each level of government safeguarded its own sovereign prerogatives so as to continually check the expansionist efforts of the others.¹³⁶

From the late nineteenth century until 1937, principles of dual federalism were at times used to construe the scope of Congress’s power to legislate under the Commerce Clause narrowly.¹³⁷ The “Constitutional Revolution of 1937” effectively ended the use of dual federalism principles in commerce clause jurisprudence.¹³⁸ In the course of upholding the new regulatory initiatives of the New Deal, the Court affirmed that there were virtually no judicially enforceable limits to the areas over which Congress could legislate.¹³⁹ A necessary implication of this principle was that the exercise of concurrent state and federal jurisdiction was appropriate in a great many areas. This implication was necessary because, unless one accepted that concurrent authority existed, the finding that the national government could now exercise authority over a large number of areas previously considered within the province of state governments would have resulted in a massive preemption of existing state law.¹⁴⁰ This, however, did not occur. First of all, Congress’s passage of the 1933 and 1934 Securities Acts did not invalidate the existing body of state blue-sky laws.¹⁴¹ Similarly, Congress’s establishment of the Federal

¹³⁴ Some legal scholars have argued that the theory that the Supreme Court was ever committed to a dual federalist interpretation is only a myth. See, e.g., Williams, *supra* note 119.

¹³⁵ *Id.* at 1850.

¹³⁶ PURCELL, *supra* note 20, at 178 (citing Edward S. Corbin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950)). For a judicial statement, see *Tarble’s Case*, 80 U.S. 397, 406 (1871).

¹³⁷ Not everyone accepts that the Supreme Court ever truly embraced the theory of dual federalism. See Williams, *supra* note 119, at 1851–52.

¹³⁸ See, e.g., BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998) (describing the relationship between dual federalism, the Commerce Clause, and the “Constitutional Revolution”).

¹³⁹ *Id.*

¹⁴⁰ *Id.* See also Gardbaum, *supra* note 131.

¹⁴¹ See generally, Brian J. Fahrney, Comment, *State Blue Sky Laws: A Stronger Case for Federal Pre-emption Due to Increasing Internationalization of Securities Markets*, 86 NW.

Communications Commission (“FCC”) did not negate the authority of state public utility commissions over various media of communications.¹⁴²

A major result of the “Constitutional Revolution of 1937,” then, was the tacit acknowledgment of the death of dual federalism. The New Deal cases held that Congress’s power to regulate under the Commerce Clause was virtually unlimited.¹⁴³ Both those in favor of the sweeping constitutional changes wrought by the Court’s validation of the New Deal statutes and those opposed to those changes understood that state governments had not been dispossessed of their extensive police powers to regulate in the interest of the public health and welfare of their citizens in every area in which Congress would now be allowed to legislate under the Commerce Clause. This meant that now very large areas of economic and other activity in the United States would be subject to regulation by both state legislatures and by Congress.

Before the “switch in time that saved nine,” the Supreme Court took responsibility for policing the line between state and federal power.¹⁴⁴ After the Court abdicated this responsibility, Professor Herbert Wechsler developed a theory to explain that such policing was unnecessary because the national government could be trusted not to intrude into the areas properly under the purview of state legislatures.¹⁴⁵ His theory, as elaborated by Professor Jesse Choper, became known as the “The Political Safeguards of Federalism.”¹⁴⁶ In Wechsler’s view, decision-making by Congress is not inherently aimed at increasing national power at the expense of the states.¹⁴⁷ Rather, the design of the Constitution serves to preserve state legislatures’ authority over “subjects that dominant state interests wish preserved for state control.”¹⁴⁸ Consistent with this theory, for approximately thirty years after the Court’s validation of New Deal legislation, the Supreme Court made no attempt to limit Congress’s ability to legislate under the Commerce Clause on federalism grounds.¹⁴⁹

The Supreme Court appeared to signal a change in course in 1976, when it suggested that Congress had no power to regulate in certain areas under the Commerce Clause because those areas fell within the exclusive jurisdiction of the states.¹⁵⁰ In *National League of Cities v. Usery*, the Court

U. L. REV. 753 (1992).

¹⁴² Matthew S. Bewig, *Federalism and Telecommunications: On the Right Wavelength?*, 59 GEO. WASH. L. REV. 1190, 1190–95 (1991).

¹⁴³ See e.g. *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹⁴⁴ See CUSHMAN, *supra* note 138.

¹⁴⁵ See generally Wechsler, *supra* note 115, at 547–48.

¹⁴⁶ *Id.*; Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

¹⁴⁷ Wechsler, *supra* note 115, at 543–52.

¹⁴⁸ *Id.* at 548.

¹⁴⁹ See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

¹⁵⁰ *Id.*

held that Congress could not regulate the activities of state governments in areas of “traditional” or “integral” state responsibility.¹⁵¹ But the Court overruled *Usery* in 1985 when it decided *Garcia v. San Antonio Metropolitan Transit Authority*, which declined to recognize judicially enforceable limits on federal authority under the Commerce Clause.¹⁵² In *Garcia*, the Court explicitly relied on Professor Wechsler’s theory and stated it would no longer strike down federal statutes for intruding on “traditional functions” of state government because “the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.”¹⁵³ The Court elaborated:

The Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.¹⁵⁴

This view of Congress’s commerce power held sway for many years.

Concepts reminiscent of dual federalism reemerged in a series of Supreme Court cases beginning with *Gregory v. Ashcroft* in 1991 and followed by *New York v. United States*, *United States v. Lopez*, *Printz v. United States* and *United States v. Morrison*.¹⁵⁵ These cases are often referred to as the Rehnquist Court’s “New Federalism” or “The Federalism Revival.”¹⁵⁶ The quintessential dual federalist tone of these decisions is Justice Scalia’s statement in *United States v. Morrison* that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”¹⁵⁷ Although “dualist” in the sense of tending to allocate areas of competence to either the state governments or to Congress, the understanding of federalism embodied in the Rehnquist Court’s cases differs significantly from the strict dual federalism of the pre-New Deal Era.¹⁵⁸ For example, proponents of the “new federalism” do not insist that

¹⁵¹ *Id.* at 843, 852.

¹⁵² *Garcia*, 469 U.S. 528 (1985).

¹⁵³ *Id.* at 550.

¹⁵⁴ *Id.* at 522.

¹⁵⁵ See e.g. *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *New York v. United States*, 505 U.S. 144 (1992); *United States v. Lopez*, 514 U.S. 549 (1995); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁵⁶ See *Williams*, *supra* note 119, at 1853; see also *id.* at 1849 (“The Court has expressly and repeatedly endorsed a dualist doctrinal framework for the Commerce Clause.”).

¹⁵⁷ *Morrison*, 529 U.S. at 617–18.

¹⁵⁸ According to Robert A. Schapiro: “Dual federalism is dead, but not gone. Its spirit continues to haunt contemporary discussions of federalism.” See Schapiro, *supra* note 119,

concurrent state and federal jurisdiction is always inappropriate because it is indisputable that the two levels of government today both regulate in a great many areas. In many of these areas, including criminal law and environmental law, concurrent jurisdiction is well established.¹⁵⁹

Despite this difference, the “new federalism” cases reflect aspects of the theory of dual federalism. Robert Shapiro explains it this way:

Dual federalism defined the core issue of federalism as the separation of state and national power. The rigid boundary that dual federalism sought to erect has disappeared, but the basic conception of federalism continues to be a system of independent national and state governments that must be protected from each other. Federalism remains an exercise in line-drawing.¹⁶⁰

That the *Printz* decision rests on this view of federalism can be seen in the majority opinion in which Justice Scalia stated that “[i]t is incontestable that the Constitution established a system of dual sovereignty.”¹⁶¹

In 2000, the Court again relied on principles of dual federalism in *United States v. Morrison* to hold that Congress lacked authority to regulate non-economic activity that had traditionally fallen within the states’ police powers.¹⁶² In that case, Justice Scalia explained the need to demarcate areas of respective state and national authority, stating that: “The Constitution requires a distinction between what is truly national and what is truly local.”¹⁶³ In *Morrison*, the Supreme Court held that in an area that has been

at 246. Actual “cooperative federalism,” Shapiro explains, was developed by political scientists and emphasizes voluntary interaction rather than a system for resolving jurisdictional conflicts arising between states and the federal government. *Id.* at 248.

¹⁵⁹ See Basil J. Musnuff, Note, *Concurrent Jurisdiction Over RICO Claims*, 73 CORNELL L. REV. 1047 (1988); Christopher S. Elmendorf, Note, *State Courts, Citizen Suits, and the Enforcement of Federal Environmental Law by Non-Article III Plaintiffs*, 110 YALE L.J. 1003 (2001).

¹⁶⁰ Shapiro, *supra* note 119, at 246; see also Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 820 (2004) (“[T]he dominant tendency in U.S. jurisprudence has been to view the projects of federal and state governance as essentially distinct and to solve intergovernmental conflicts by trying to establish clear boundaries between the two.”).

¹⁶¹ *Printz*, 521 U.S. at 918.

¹⁶² *Morrison*, 529 U.S. at 617–19.

¹⁶³ *Id.* at 617–18. Justice Scalia has articulated why his particular reading of constitutional history has convinced him of the need for the Court to police the boundaries of state and federal power. See generally Antonin Scalia, *American Federalism and the Supreme Court*, in *THE NEW FEDERALISM: STRUCTURES AND INFRASTRUCTURES, AMERICAN AND EUROPEAN PERSPECTIVES* 56, 57–81 (Kjell Ake Modeer ed. 2000). In Scalia’s view, the increased size and power of the national government relative to the states now mandates that the Court step in to protect state prerogatives. *Id.* More specifically he argues: “[t]he vast expansion of the federal government in this century is attributable . . . to two constitutional amendments and three elements of judicial constitutional interpretation.” *Id.* The constitutional amendments were the Seventeenth Amendment, which eliminated the direct

traditionally regulated by the states, Congress has no power to regulate noneconomic, private activity based merely upon a cumulative substantial effect of that activity on interstate commerce.¹⁶⁴ Thus, *Morrison* further limited the scope of Congress's commerce power, originally subjected to limits in *Lopez*, by narrowing Congress's ability to regulate based on findings of substantial effects on interstate commerce in areas deemed to be both "noneconomic," as well as traditionally regulated by the states.

Had the activity been deemed to fall within the ambit of "economic" activity, however, Congress's power to regulate it would have withstood the Court's scrutiny, even if the activity had been one traditionally regulated by the states. This fact led Justice Thomas to express a concern for the future of federalism in his concurring opinion: "Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce."¹⁶⁵ Thomas's opinion reflects the influence of dual federalism principles in his suggestion that power exercised by the federal government is necessarily power appropriated from the states. Thomas apparently found this to be troubling given his understanding of the importance of the states as wielders of police powers and guardians of the public interest.

In the aftermath of *Morrison*, the Supreme Court appears to have moderated its interest in limiting Congress's power to legislate under the Commerce Clause. For example, the Supreme Court refused to overturn Congressional legislation on federalism grounds in *Pierce County, Washington, v. Guillen*.¹⁶⁶ In that case, the Supreme Court unanimously reaffirmed Congress's power to legislate in the area of road safety as a part of its power to regulate the channels of international trade.¹⁶⁷ The Court

election of senators by state legislators, and the Sixteenth Amendment, which authorized the federal government to impose an income tax that, Scalia argues, now allows the national government to spend money in almost any area. The two other elements of judicial constitutional interpretation that have permitted the extensive expansion of federal powers in this century are the Supreme Court's broad reading of the Commerce Clause since the New Deal and its expansive construction of the Due Process Clause of the Fourteenth Amendment. Justices Lewis Powell and Sandra Day O'Connor have voiced similar opinions based on formal constitutional amendments and extra constitutional developments, such as the emergence of a national two-party system. See generally Mark Tushnet, *Globalization and Federalism in a Post-Printz World*, 36 TULSA L.J. 11 (2000) (arguing that the Framers' original design to protect state prerogatives has been eroded by historical constitutional changes).

¹⁶⁴ *Morrison*, 529 U.S. at 617–19; CHEMERINSKY, *supra* note 126. In *Morrison*, the Court deemed the regulated activity, violence against women, to be insufficiently related to interstate commerce, even though the plaintiff had alleged that such violence had a substantial effect on the national economy.

¹⁶⁵ *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

¹⁶⁶ 537 U.S. 129 (2003).

¹⁶⁷ *Id.* at 147–48.

said nothing to indicate that recognizing this authority would deprive states of their authority to continue to regulate road safety as a core function of their mandate to protect the health, safety and welfare of their residents. Similarly, in *Sabri v. United States*, the Court upheld a federal law outlawing the bribery of state, local, and tribal officials receiving at least \$10,000 in federal funds, without indicating that in doing so it intended to interfere with the ability of state officials to prosecute such criminal activity.¹⁶⁸

In *Gonzales v. Raich*, in 2005, the Court allowed Congress, under its commerce power, to prohibit an activity (the cultivation and use of marijuana for certain purposes) in an area traditionally regulated by the states, despite a California law allowing the activity.¹⁶⁹ The Court in *Raich* relied on *Wickard v. Filburn* for the proposition that the intrastate (or local) production of a commodity sold in interstate commerce constituted “economic activity,” and that Congress could base a finding of a “substantial effect on commerce” by looking to the cumulative impact of such conduct.¹⁷⁰ The Court stated that “[c]ase law firmly establishes Congress’ power to regulate purely local activities that are a part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”¹⁷¹

Justices O’Connor and Thomas both dissented in *Raich*, but for somewhat different reasons. Justice O’Connor disagreed with the majority because she perceived a need to protect the “historic spheres of state sovereignty from excessive federal encroachment.”¹⁷² In her view, the state regulation at issue should have been upheld because “[t]he States’ core police powers have always included authority to define criminal law and to protect the health, safety, and welfare of their citizens.”¹⁷³ In Justice O’Connor’s view, the Court should preserve a core area of state sovereignty, but she acknowledged the difficulty of “drawing a meaningful line between what is national and what is local.”¹⁷⁴ In Justice Thomas’s dissent, he agreed with Justice O’Connor that states have important responsibilities for safeguarding the public welfare of their citizens.¹⁷⁵ He disagreed with the majority’s validation of the federal law, however, because “[h]ere, Congress has encroached on States’ traditional police powers to define the criminal law and to protect the health, safety, and

¹⁶⁸ 541 U.S. 600 (2004).

¹⁶⁹ *Gonzales v. Raich*, 545 U.S. 1, 18–19 (2005).

¹⁷⁰ *Id.* at 17 (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

¹⁷¹ *Id.*

¹⁷² *Id.* at 42 (O’Connor, J., dissenting).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 49.

¹⁷⁵ *Gonzales v. Raich*, 545 U.S. at 57-74 (Thomas, J., dissenting).

welfare of their citizens.”¹⁷⁶

III. RESOLVING THE FEDERALISM DEBATE

A. There is No Constitutional Mandate for Dual Federalism

The text of the Constitution itself nowhere mentions the word “federalism.” In addition, no consensus exists regarding the Founders’ intentions regarding the desirability of exclusive versus overlapping state and federal jurisdiction. On balance, however, those who argue that there is no constitutional mandate for dual federalism have made a more persuasive historical case for their view than have advocates of dual federalism.¹⁷⁷

1. The Founders’ Assumptions Regarding Concurrence

In his exhaustively researched book, *Federalism: An Historical Inquiry*, Edward Purcell makes a convincing case for the proposition that the Founders did not address the issue of concurrency in the text of the Constitution or in the debates leading up to its ratification.¹⁷⁸ His review of historical evidence relating to the Constitutional Convention indicates that the Founders often disagreed among themselves about the proper roles of the state and federal governments they created.¹⁷⁹ Moreover, to the extent the Founders held particular views in common, such views were the result of historical accident rather than due to a common adherence to a particular theory of federalism.¹⁸⁰ In his view, only a very few questions about the form of government they were creating were actually decided

¹⁷⁶ *Id.* at 66.

¹⁷⁷ PURCELL, *supra* note 20; see also CHERMERINSKY, *supra* note 126, at 58 (“The Constitution is silent about the allocation of power between state and federal governments. Nor can major premises be derived from the intent of the framers.”); Williams, *supra* note 119, at 1926 (“[T]here is no universal, a priori definition of what a federal government may do and what residual power state governments must have. There are a number of permissible models of constitutional federalism, of which dual federalism is only one.”).

¹⁷⁸ PURCELL, *supra* note 20.

¹⁷⁹ *Id.* at 177–78. (“From the first days of Washington’s presidency, the members of the founding generation demonstrated that they shared no determinate and comprehensive agreement on the federal structure or the lines of division between national and state powers.”).

¹⁸⁰ *Id.* at 177. He cites for this proposition HERBERT J. STORING, TOWARD A MORE PERFECT UNION: THE WRITINGS OF HERBERT J. STORING 81 (Joseph M. Bessette ed. 1995); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 168, 201 (1997); DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 204–06, 210–13 (2005); Murray Dry, *Anti-Federalism in The Federalist: A Founding Dialogue on the Constitution, Republican Government, and Federalism*, in SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING 40, 55 (Charles R. Kesler, ed., 1987).

definitively.¹⁸¹ Such actual decisions held that the states would continue to have a separate sovereign existence, but that in case of conflict, federal law was to be supreme.¹⁸² Thus Purcell argues that no true or correct balance of state and federal authority ever existed to be found by historians or jurists: “The Constitution neither gave the federal structure any proper shape as an operating system of government nor mandated any particular and timeless balance among its components. The Constitution established a structure that accepted certain types of change as natural and desirable.”¹⁸³ His ultimate conclusion is that for scholars of constitutional law, “sound constitutional reasoning on federalism issues has to move beyond originalism and ‘principle’ and ground itself on specific, pragmatic and empirically based analyses of the operation of the federal structure and the likely practical consequences involved in accepting any particular interpretation of its nature and limits.”¹⁸⁴

Even if it were possible to know how the Founders expected federalism to operate as an initial matter, however, there is no way to know with any certainty how their ideas would have evolved in response to changed circumstances. For example, if it could be proven that the Founders expected the states and the federal government to operate in separate spheres, this was only one of many, perhaps equally important, assumptions that they held. Thus, there is no way to know how the Founders would resolve the challenge to their system brought about by expanding notions of the Commerce Clause. There is a great deal of evidence¹⁸⁵ that the Founders placed great importance on allowing states to exercise their plenary police powers, suggesting that if changing circumstances put these two norms in conflict, it is impossible to know how the Founders would have resolved the resulting dilemma.

2. *The Founders’ Assumptions Regarding the Importance of State Police Powers*

The Founders understood that while the powers of the national government were to be specifically enumerated and limited, state governments were to exercise a plenary “police power” which they were to wield in the interest of promoting the public welfare, which included promoting peace and security from crime, public safety and health, public order and comfort, and public morals.¹⁸⁶ States were also the guardians of the dependent classes of its citizens.¹⁸⁷ The all-encompassing nature of

¹⁸¹ PURCELL, *supra* note 20, at 177.

¹⁸² *Id.*

¹⁸³ *Id.* at 7.

¹⁸⁴ *Id.* at 9.

¹⁸⁵ See generally Williams, *supra* note 119.

¹⁸⁶ *Id.*

¹⁸⁷ See THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 317

state governments' police powers explain why, despite the grant to Congress of the power to regulate interstate commerce, the Founders assumed that, in a world where most business activity took place within the confines of a single state, state governments would be the primary regulators of business.¹⁸⁸ In the 18th and early 19th centuries, their assumptions were born out. In fact, Congress failed to enact any substantial regulations of commercial activity.¹⁸⁹ According to historian William Novak:

In the 18th and most of the 19th century's state and local governments conducted the overwhelming amount of the nation's public business. Their extensive activities ranged from substantial efforts to stimulate economic development to relatively continuous supervision of many of the most basic areas of daily life. The idea of "salus populi", the right and power of the people to secure their general welfare, underlay political debate and legal regulation. With little or no national involvement, state and local governments enforced "minute and ubiquitous regulations shaping the most important public policy concerns of the nineteenth century: public safety, public economy, public property, public morals and public health."¹⁹⁰

The lack of federal commercial regulation in the early years of the nation is unsurprising in light of the Tenth Amendment, which expressly sets out a presumption in favor of state regulatory power over most issues by providing that all residual governmental powers remain with state governments.¹⁹¹ Similarly, in Federalist No. 45, James Madison stated that,

The powers delegated . . . to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite . . . The powers reserved to the several states will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.¹⁹²

3. *Historical Overlap between the Regulation of Commerce and the Exercise of Police Powers*

In *Gibbons v. Ogden*, Chief Justice Marshall held that even in an area

(Kermit L. Hall ed.,1992) (citing ERNST FREUND, *THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS* (1904)); Williams, *supra* note 119, at 1859.

¹⁸⁸ See generally Williams, *supra* note 119.

¹⁸⁹ *Id.* at 1854.

¹⁹⁰ WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH CENTURY AMERICA* 235 (1996).

¹⁹¹ See U.S. CONST. amend. X.

¹⁹² THE FEDERALIST No. 45 (James Madison).

that could be termed interstate commerce, the states retained their police powers to enact regulations for the health, safety, morals, or welfare of their citizenry.¹⁹³ Marshall's analysis took into account the fact that "the sphere of federal commercial regulation overlapped with the sphere of state police regulations," and that in this area of overlap, the states and the federal government would exercise concurrent jurisdiction.¹⁹⁴

A number of subsequent Supreme Court cases stressed the importance of state police powers and recognized the concurrent state authority in areas also regulated by Congress, such as interstate and foreign commerce. For example, in 1873, the Court relied on the states' traditional police power to uphold state commercial regulation in the *Slaughter-House Cases*.¹⁹⁵ In *Munn v. Illinois*, the Court affirmed the constitutionality of a state's exercise of its police power for the purpose of regulating private business.¹⁹⁶ In 1934, the Court upheld concurrent state and federal regulation of the same conduct in *Home Building & Loan Ass'n v. Blaisdell*, and *Nebbia v. New York*.¹⁹⁷

From the 19th century until today, a significant body of law related to business and commercial activities has remained exclusively the province of state legislatures. For example, in the early 19th century, the primary means of regulating business activities was state enforcement of its own corporate law and other bodies of common law such as the law of partnership and unfair competition.¹⁹⁸ Beginning in the mid to late 19th century, state governments also exercised control over business by establishing state regulatory commissions, such as railroad commissions.¹⁹⁹

¹⁹³ See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

¹⁹⁴ See *Williams*, *supra* note 119, at 1859.

¹⁹⁵ The *Slaughter-House Cases*, 83 U.S. 36 (1872).

¹⁹⁶ 94 U.S. 113 (1876). Other cases upholding state economic regulatory measures include *Holden v. Hardy*, 169 U.S. 366 (1898) and *Muller v. Oregon*, 208 U.S. 412 (1908).

¹⁹⁷ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Nebbia v. N.Y.*, 291 U.S. 502 (1934).

¹⁹⁸ Perhaps the most important way that state governments exerted control over business corporations was through the state's exclusive authority to issue corporate charters. Early corporate charters often contained state imposed restrictions on corporate activities, such as owning the shares of another corporation, or a charter might provide that the state possessed the power to regulate the rates charged by the business. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 63 (2005). States enforced the restrictions in corporate charters through *quo warranto* actions against corporations who engaged in acts that were *ultra vires* or outside the limitations the state provided in their charters. The power to limit the activities of corporations through such charter restrictions allowed states a great degree of control over business activities affecting their residents because in the late 1800s, states also had the power to exclude corporations chartered in other states from doing business within their borders.

¹⁹⁹ The first regulatory agency in America was a railroad commission established by Rhode Island in 1839. See THOMAS MCCRAW, *PROPHETS OF REGULATION* 17 (1984). The first effective commission was established by Massachusetts in 1869. *Id.* at 18. States initially attempted to control railroads by requiring them to operate under special charters

The growth of the railroads was also a prime motivating factor leading state legislatures to pass antitrust statutes.²⁰⁰

The rise of railroads raised novel issues of federalism because they simultaneously operated in both intrastate and interstate markets. Beginning in 1871, the legislatures of Illinois, Wisconsin, Minnesota, and Iowa passed laws regulating the rates railroads could charge within each state.²⁰¹ Federal railroad regulation followed soon afterward in 1887 with the establishment of the Interstate Commerce Commission.²⁰² But the advent of federal railroad regulation did not automatically oust states' authority to regulate these entities, which had an enormous impact on the health, safety, and welfare of their residents.²⁰³

The readjustment of concepts of federalism that began with the rise of the railroads continued through the post-New Deal period, as the Great Depression created additional economic problems that states could not resolve through the exercise of their police powers alone. In an attempt to deal with the hardship caused by the Depression, the New Deal legislation and the "Supreme Court Revolution of 1937" together enlarged the boundaries of the areas in which the national government could exercise its power over interstate commerce.²⁰⁴ But the new national legislation did not automatically preempt or replace the states' exercise of police powers in these areas. Rather, as with the passage of the federal antitrust laws, state law was expected to continue to apply concurrently with the new overlay of federal regulation.²⁰⁵

from the state legislature which often imposed strict conditions on their operations. As the economic power of the railroads grew exponentially, this method of control proved ineffective, prompting a number of state legislatures to enact special regulatory legislation to address the "railroad problem."

²⁰⁰ *Id.* at 57.

²⁰¹ *Id.*

²⁰² *Id.* at 63. While it became clear in the 1880s that state jurisdiction extended only over local, intrastate routes, the Supreme Court allowed states to exert substantial influence on interstate routes by classifying the interstate effects as merely "indirect" until 1920 when Congress expressly preempted most state rate-making power in the Transportation Act of 1920. *Id.* It was presaged by the Supreme Court's decision in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U.S. 557 (1886), in which the Court held that commerce originating or ending outside the boundaries of a state could not be regulated by that state, even though the federal government provided no alternative means of regulation. *Id.* at 564.

²⁰³ While it became clear in the 1880s that state jurisdiction over railroads extended only to local intrastate routes, the Supreme Court allowed states to exert substantial influence on interstate routes by classifying the interstate effects as merely "indirect." MCCRAW, *supra* note 199, at 63. This ended in 1920 when Congress expressly preempted most state rate-making power in the Transportation Act of 1920. *Id.*

²⁰⁴ Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

²⁰⁵ See *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934); *Nebbia v. N.Y.*, 291 U.S. 502 (1934) (allowing both state and federal regulation of the same area); see also CUSHMAN, *supra* note 138.

4. *Flawed Logic of the New Federalism Decisions*

The most recent cases to stress the idea that separate spheres of state and federal competence exist are sometimes referred to as the “New Federalism” cases or “Federalism Revival.”²⁰⁶ In these cases, the Court invalidated a number of federal statutes on the grounds that they intruded on state power.²⁰⁷ In doing so, the Court relied on the Founders’ original intent to limit the powers of the national government and to protect the sovereignty of the states.²⁰⁸ The idea was that because the states originally played a greater role in regulating American life than they do currently, and the federal government a lesser role than it does currently, the Founders would wish to reduce the power wielded by the federal government as a result of the Supreme Court’s expansive interpretation of the Commerce Clause.²⁰⁹ But limiting the power of the federal government is only necessary if one assumes that the Founders intended a system of dual federalism that allowed little if any room for concurrent state and federal jurisdiction. In a system of overlapping federalism, there is no conflict between the desire to allow states to play an important role in the constitutional order through the exercise of plenary police powers and the expanded scope of action accorded the federal government under modern Commerce Clause jurisprudence.

Today, under cases such as *Raich*, which confirmed that the Supreme Court recognizes few limits on the reach of national power, there remains no significant area of economic activity left to the states if state authority must exist only where federal authority does not.²¹⁰ Thus, if state governments are limited to addressing truly “local” problems, they will lose their role as guardians of the public welfare. It is this fact that led Justices O’Connor, Rehnquist, and Thomas to disagree with the majority in *Raich*, because they thought the majority’s opinion did not sufficiently take into account the need to protect “historic spheres of state sovereignty from excessive federal encroachment”²¹¹ The historic spheres of state authority that most concerned them were those related to the states’ police powers. O’Connor stated, “[t]he States’ core police powers have always included authority . . . to protect the health, safety, and welfare of their citizens.”²¹² In his separate dissent, Justice Thomas expressed a similar

²⁰⁶ See PURCELL, *supra* note 20, at 3–8.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ A significant exception to this generalization is regulation of the “business of insurance” which is carried out primarily at the state level due to the McCarran-Ferguson Act. McCarran-Ferguson Act, ch. 20, 59 Stat. 33 (1945) (codified at 15 U.S.C. §§ 1011–1015). Even here, states have primary regulatory authority only because Congress granted it to them.

²¹¹ *Gonzales v. Raich*, 545 U.S. 1, 42 (O’Connor, J., dissenting).

²¹² *Id.*

view when he stated, “Here, Congress has encroached on the states’ traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens.”²¹³

In *Raich*, both the majority and the minority were correct. The majority correctly held that Congress could regulate in the area at issue and that principles of federal supremacy invalidated contrary state law. But given the dissenters’ dual federalist assumptions about regulatory authority, a finding that the federal government did have authority to regulate the activity under the Commerce Clause in such cases of local conduct does threaten to encroach on the states’ traditional police powers, if one assumes that constitutional principles forbid areas of jurisdictional overlap. The solution, however, is not to find that Congress has no authority to regulate in this area, but to accept concurrent state and federal authority to regulate the conduct. A specific finding of the preemption of a particular state statute encroaches far less on the states’ traditional police powers than would a finding that *any* state regulation of an area is invalid because Congress may exercise its regulatory power in that arena if it chooses to do so.

In light of the size of the entities that governments must regulate today, it is not feasible to vest the primary responsibility for economic regulation exclusively at the state level. But even if it could be proven that the Founders assumed a system of dual federalism, given that they also assumed a system of federalism in which states possessed plenary police powers, there is no reason to assume they would prefer their vision with respect to concurrency over their vision with regard to the role of state governments as primary guardians of the public welfare.²¹⁴

B. Why Overlapping Jurisdiction is Consistent with Fundamental Principles of Federalism

1. *Madison’s Theory of State and Federal Competition for the People’s Affection*

Corporate law professor Renee Jones has argued that “the concept of vertical competition was central to the framers’ vision of the federalist system.”²¹⁵ Using the term vertical federalism to refer to competition between state governments and the federal government, she argues that overlapping state and federal jurisdiction is necessary in order to allow the two levels of government to compete for the affection or loyalty of U.S.

²¹³ *Id.* at 66 (Thomas, J., dissenting).

²¹⁴ See Williams, *supra* note 119, at 1924 (arguing that the New Federalism decisions are “driven by the impulse to circumscribe federal authority so as to reserve some matters exclusively for state or local regulation”).

²¹⁵ Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625, 634 (2004).

citizens.²¹⁶ For this proposition, she relies on the writings of James Madison in Federalist No. 46.²¹⁷

In order for the two levels of government to compete, it is necessary that both should have the constitutional authority to regulate in the same areas. Under these circumstances, voters have the opportunity to lobby for state regulation if they have more confidence in the competence of their state governments. It also allows voters to lobby Congress to pass legislation preempting any state law measures that lack popular support.²¹⁸ Such vertical competition is impossible under a system of dual federalism that attempts to separate the areas in which the state and federal government are able to compete. Without concurrent jurisdiction, voters presented with incompetent or insufficient regulation from the level of government assigned to a particular sphere will have little recourse. Jones considers a system of overlapping jurisdiction necessary in order for state regulation to serve as a regulatory “safety valve.”²¹⁹

2. *Federalism as Expressing a Constitutional Preference for Robust Debate on Matters of Public Policy*

A number of scholars have stressed that much of federalism’s value lies in the opportunity it provides for dialogue and debate in the course of state and federal competition in the formation of public policy.²²⁰ When both state and federal power is available to deal with a social problem, the public reaps the advantages of exposure to multiple approaches to solving the problem and of full political debate over policy choices. According to Judith Resnick,

the federated system within the United States—with its hundred plus mentions of the word state in the Constitution and its tripartite division of federal power—entails aspirations for transparent, redundant debates about laws and policies. These multiple sites for conflicts about social norms are the opportunities provided by democratic federalism to permit problems to be argued in more than one forum and more than once.²²¹

Similarly, David Schapiro has written that “the true genius of American federalism lies in the continuing and constitutionally assured basis for dialogue—for moral, political, economic and social debate over

²¹⁶ *Id.* at 635.

²¹⁷ *Id.* (citing THE FEDERALIST NO. 46 (James Madison)).

²¹⁸ Jones, *supra* note 215, at 637.

²¹⁹ *Id.* at 639.

²²⁰ See, e.g., CHEMERINSKY, *supra* note 126; Hills, Jr., *supra* note 126, at 3; Schapiro, *supra* note 119, at 248.

²²¹ Resnik, *infra* note 228, at 41.

the merits of the allocation of power.”²²² Robert Ahdieh’s view of federalism as a forum for interaction is similar. He writes,

the goal is not to identify the single regulatory actor best suited to or most appropriately charged with responsibility for a given entity or subject matter. Rather, multiple regulators are embraced as having a shared—if both competing and cooperating—place in a more inclusive and all encompassing regulatory regime.²²³

Under this view, overlapping regulatory jurisdiction offers the public four benefits: better regulatory rules, a failsafe in case of regulatory failure at a particular level of government, increased innovation in policymaking, and increased integration across systems.²²⁴

Any concerns that such inclusive policy debates will too often result in excessively fragmented national or international policies is greatly mitigated by the fact that Congress has the power to best the states by using its preemption power in any cases involving either interstate or foreign commerce. Critics of state involvement in issues with national or international implications often invoke Dormant Commerce Clause-type concerns when thinking of the consistency of such state involvement with constitutional principles. Perhaps the better view is that the opportunities for debate, competition, and interaction provided by a view of federalism that accepts concurrent jurisdiction is more consistent with the constitutional principles embodied in the First Amendment.

C. The Impossibility of Drawing a Clear Dividing Line between the “Truly Local” and the “Truly National”

The biggest advantage that theories embracing concurrent jurisdiction have over dualist theories is that it is not possible to draw a principled line between what is “local” and what is “national.”²²⁵ The difficulty is not merely a problem in theory. As one corporate law scholar writes,

A review of academic literature and judicial opinions that seek to enforce notions of federalism shows that efforts to define appropriate boundaries between federal and state authority over corporate regulation are incoherent at best. In the end, such efforts fail because no workable conception exists on which to base such divisions.²²⁶

The problem is that most contemporary problems are both local and non-

²²² DAVID L. SCHAPIRO, *FEDERALISM: A DIALOGUE* 140 (1995).

²²³ Robert Ahdieh, *Dialectical Regulation*, 38 *CONN. L. REV.* 863, 872 (2006).

²²⁴ *Id.* at 882–83.

²²⁵ PURCELL, *supra* note 20, at 175.

²²⁶ Renee M. Jones, *Does Federalism Matter? Its Perplexing Role in the Corporate Governance Debate*, 41 *WAKE FOREST L. REV.* 879 (2006).

local. In other words, “every national activity has its local aspects and every local activity has a national perspective.”²²⁷

Looking to the original understanding of the Founders for guidance in ascertaining the contemporary meaning of the word “local” is especially problematic because the very definition of the word “local” has changed over time.²²⁸ The Founders’ view that states would exercise their police powers in response to threats to the public welfare of state residents most likely assumed that the those residents were most in need of protection from local actors and circumstances. This is no longer the case, because today’s “local” issue is unlikely to have a “local” cause.²²⁹ The issue of the local harms arising due to global warming is a good example of this.²³⁰ Judith Resnik has argued:

[E]fforts to essentialize a certain kind of problem as intrinsically to be decided by a particular level of government are doomed to fail, as many of today’s challenges have local, national, and global dimensions. Whether the problem is rape or global warming, the toys in a child’s hands (and mouth), or the birds that fly over us and the mercury in the water nearby, one cannot presume that problems are “truly national” or “truly local,” as many issues are both local and national as well as domestic and foreign.²³¹

Since proponents of non-dualist theories of federalism do not accept the need or possibility of separating the local from the national, they assert that the better question to ask is how state and national regulators can coordinate “to maximize the benefits of concurrent authority and minimize its burdens.”²³²

IV. RESOLVING THE ENFORCEMENT DEBATE

Analysis of the federalism debate strongly indicates that theories of

²²⁷ AARON WILDAVSKY, *FEDERALISM AND POLITICAL CULTURE* 68 (David Schleicher & Brendon Swedlow eds., 1988).

²²⁸ See PURCELL, *supra* note 20, at 161–85; see generally Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31 (2007) (discussing the relation between federalism, international relations, and what is considered local).

²²⁹ According to Purcell, “[a]t the beginning of the twenty-first century. . . the typical “local” issue seldom involved values or habits peculiar to a particular location but rather questions raised by the relationship between specific geographic areas and powerful institutions and interests rooted in other parts of the nation or world.” PURCELL, *supra* note 20, at 175.

²³⁰ See David R. Hodas, *State Law Responses to Global Warming: Is It Constitutional to Think Globally and Act Locally?*, 21 PACE ENVTL. L. REV. 53 (2003).

²³¹ Judith Resnik, *The Internationalism of American Federalism: Missouri and Holland*, 73 MO. L. REV. 1105, 1123 (2008).

²³² Jones, *supra* note 226, at 880.

federalism that accept overlapping areas of state and federal jurisdiction do not suffer from any general overarching constitutional infirmities. A remaining question is whether principles of federalism counsel against overlapping exercises of state and federal jurisdiction in the specific context of antitrust enforcement. If not, the question becomes whether a statutory regime that relies on concurrent state and federal antitrust enforcement is more likely to promote the twin goals of consumer welfare and good governance than other possible enforcement schemes. An examination of the history of concurrent antitrust enforcement, and possible constitutional objections to concurrent enforcement of antitrust, reveals that there are no persuasive constitutional objections to concurrent enforcement in the antitrust context. It also reveals a number of ways in which concurrent enforcement actively promotes important principles of federalism.

A. History of Concurrent Antitrust Enforcement

In the early years of the Sherman Act, states continued to actively enforce state antitrust measures, despite the presence of concurrent federal antitrust enforcement.²³³ In doing so, they did not limit their enforcement efforts to anticompetitive restraints with only local or in-state effects. For example, in 1890, in *People v. North River Sugar Refining Co.*, the state of New York successfully sued a member of the National Sugar Trust.²³⁴ Two years later, in *State ex rel. Attorney General v. Standard Oil Co.*, the Ohio Attorney General sued Standard Oil and won a court order severing that company's connection with the Standard Oil Trust.²³⁵

Over time, federal antitrust enforcement increased and came to overshadow state enforcement.²³⁶ Beginning in the 1960s, however, the states as a group increased their involvement in antitrust enforcement by bringing class actions on behalf of the states themselves and their consumers. At least one of these suits involved antitrust claims against multinational pharmaceutical companies.²³⁷ The number of antitrust lawsuits filed by state attorneys general increased again in 1976, after

²³³ Between 1890 and 1902, the federal government filed 19 antitrust suits and the states filed 28 suits. See Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L. J. 375, 378 (1983).

²³⁴ 24 N.E. 834 (N.Y. 1890). See James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA L. REV 495, 495-501 (1987).

²³⁵ 30 N.E. 279 (Ohio 1892).

²³⁶ Hovenkamp, *supra* note 233; May, *supra* note 234.

²³⁷ See, e.g., *In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y.), *amended*, 333 F. Supp. 291 (S.D.N.Y.), *mandamus denied sub. nom.*; *Pfizer, Inc. v. Lord*, 449 F.2d 119 (2d Cir. 1971); *West Va. V. Chas. P. Pfizer & Co.*, 314 F. Supp. 710 (2d Cir. 1971), *cert. denied sub. nom.*; *Cotler Drugs, Inc. v. Chas. Pfizer & Co.*, 404 U.S. 871 (1971).

Congress passed the H-S-R Act.²³⁸ A third increase in state antitrust enforcement in the 1980s corresponded to a decrease in federal antitrust enforcement during the Reagan era.²³⁹ A number of state attorneys general increased their level of interest in enforcing antitrust prohibitions because they considered this new enforcement policy to be inadequate to protect their citizens from illegal anticompetitive activities.²⁴⁰

As a result, in 1983, a number of state attorneys general created a Multistate Antitrust Task Force under the auspices of the National Association of Attorneys General designed to provide what they considered to be a necessary state supplement to federal enforcement.²⁴¹ During the 1980s and 1990s, both the NAAG Task Force and individual state attorney general offices brought cases that set important legal precedents in a number of areas, including the international arena.²⁴² In many instances, state attorneys general became involved in the case only after the DOJ declined to investigate the alleged offenses.²⁴³

In recent years, state antitrust enforcement efforts have often been aimed at areas related to the states' traditional powers to safeguard the public health, safety, and welfare. For example, the NAAG Multistate Antitrust Task Force has brought a number of cases in areas that involve the provision of health care, such as multi-state suits successfully challenging pharmaceutical patent misuse that delays competition from generic drugs.²⁴⁴

²³⁸ See Himes, *supra* note 50.

²³⁹ *Id.*; See also Lloyd Constantine, June 22, 2004, Remarks to the American Antitrust Institute, June 22, 2004 at 3. During the Reagan Administration the number of staff attorneys in the Antitrust Division of the Department of Justice was cut from 467 to 209. *Id.* The size of the Federal Trade Commission was reduced by 40% and the staff at FTC Regional Offices was severely cut. *Id.* The staff of the FTC Regional Office in New York was reduced from 93 to 12. *Id.*

²⁴⁰ See Constantine, *supra* note 239.

²⁴¹ See AMERICAN BAR ASS'N, *supra* note 51.

²⁴² An important example is *Hartford Fire Insurance v. Cal.*, *supra* note 101, in which attorneys general of nineteen states sued several of the major domestic insurance companies, as well as domestic and foreign re-insurers, most notably Lloyds of London, and insurance brokers alleging an international conspiracy between the companies.

²⁴³ See Himes, *supra* note 50, at 6.

²⁴⁴ In October 2004, Organon USA Inc. settled multistate claims that it tried to keep generic competition for the drug Remeron off of the market. Organon was ordered to pay \$36 million to consumers, states and third parties. *Settlement Offered in Drug Patent Case*, N.Y. TIMES, Oct. 23, 2004, at C2. State attorneys general also brought suit against the manufacturers of children's Motrin. Press Release, *Oregon Department of Justice, AG Announces Settlement with 2 Drug Manufacturers of Generic Children's Motrin* (Aug. 12, 2004), <http://www.doj.state.or.us/releases/2004/re1081304.shtml>. Other recent multistate enforcement actions against pharmaceutical companies include the *Cardizem CD Antitrust Litigation*, also referred to as *New York v. Aventis*, see *In Re Cardizem CD Antitrust Litigation*, 391 F.3d 812 (6th Cir. 2004), in which all fifty states, D.C. and Puerto Rico challenged restraints of trade for Cardizem and generic equivalents, gaining an \$80 million settlement. In the *Buspiron Antitrust Litigation*, the states recovered \$100 million to

B. Possible Federalism-Related Objections to Concurrent Antitrust Enforcement

Critics of state level involvement in areas considered to be related to national and international commerce generally raise three federalism-related objections to such involvement. The first involves the doctrine of federal supremacy and federal preemption. The second objection rests on the Dormant Commerce Clause, and the third objection relates to the doctrine of foreign affairs preemption.

1. Federal Preemption

The first possible objection is based on the doctrine of federal supremacy and federal preemption. In 1787, the Founders' constitutional design specified that the national government was one of limited, delegated powers. On the other hand, the states' possession of full police powers meant that states had authority to enact any type of law that the text of the Constitution did not expressly deny to the states.²⁴⁵ The Constitution's Supremacy Clause, however, stated that federal law is the "supreme law of the land" and would supersede any conflicting state law on the same subject.²⁴⁶ In interpreting the relationship between federal and state law under the Supremacy Clause, courts developed the doctrine of federal preemption. This doctrine holds that a state law that conflicts with a federal statute or treaty is invalid when the federal statute expresses intent to preempt the state law, when the federal statute completely occupies the field, or when the state statute obstructs a federal statute from achieving its purpose.²⁴⁷ Under the preemption doctrine, then, any state law that conflicts with a federal statute regulating commerce would be preempted if a court found a Congressional intent to do so.

2. Dormant Commerce Clause

A second possible objection is the Dormant Commerce Clause. This

reimburse consumers and government agencies in their settlement of a suit for the company's anticompetitive maintenance of a monopoly on the drug. *See* *In Re Buspirone Patent Litigation*, 185 F. Supp. 2d 363 (S.D.N.Y. 2002). In a settlement involving *Ohio v. Bristol-Myers Squibb*, No. 1:02-cv-01080 (EGS) (D.D.C. Nov. 2003), state officials recovered a \$555 million in settlement of the states claims that Bristol-Myers fraudulently obtained an anti-cancer drug patent for the purpose of delaying the development of generic alternatives to its cancer drug. *See* PRACTICING LAW INSTITUTE, STATE ANTITRUST ENFORCEMENT 847 (2005).

²⁴⁵ Hodas, *supra* note 230, at 65. Thus, states could not enact *ex post facto* laws or bills of attainder, pass laws affirmatively regulating interstate or foreign trade, or enter into state treaties with other countries. *Id.* At that time, the word "commerce" as used in the Commerce Clause referred to trade or sales of merchandise, rather than other business activities such as manufacturing.

²⁴⁶ U.S. CONST. art. VI, cl 2.

²⁴⁷ *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

judicially-created federalism limit on state power operates to invalidate an otherwise valid state law that presumably violates the will of Congress by discriminating against interstate commerce or that unduly burdens interstate commerce.²⁴⁸ This doctrine has been used to invalidate state economic legislation that courts have deemed to unduly favor economic actors within the state vis-à-vis economic actors located outside the state. The argument against concurrent enforcement based on this doctrine asserts that when state prosecutors exercise their discretion to enforce federal antitrust laws against out-of-state actors, they have incentives similar to those of state legislators to favor in-state business interests over out-of-state or international business interests. Indeed, some commentators have argued that because state attorneys general are elected officials, they are likely to be unduly influenced by dominant state business interests in their enforcement of the federal antitrust laws.

3. *Foreign Affairs Preemption*

Some have argued that a third potential federalism limit on concurrent antitrust enforcement, an emerging doctrine known as “foreign policy preemption” or “dormant foreign policy preemption,” may limit state enforcement actions with international implications.²⁴⁹ The doctrine of “foreign policy preemption” holds that the power to conduct foreign affairs is fundamentally an executive power to be wielded by the President, and that this power should not be interfered with by state actions.²⁵⁰ Significantly, however, each of these doctrines was designed to deal with the problem of state statutes that conflict with either the intent of Congress or the will of the national Executive Branch in areas allocated to them by the Constitution. The three doctrines have no application to situations in which there is no conflicting state statute.

C. Answers to Objections

It should be noted that each of the three objections to concurrent state enforcement raised by critics involve doctrines designed to deal with the problem of state statutes that directly conflict with either the policy of Congress as embodied in a federal statute or with the exercise of power by the executive branch in an area in which it has express authority to act. Thus, none of the three doctrines were designed to apply in the absence of a

²⁴⁸ See generally Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Freedom*, 1987 DUKE L.J. 569 (1987) (explaining the history and effect of the Dormant Commerce Clause while calling for its demise).

²⁴⁹ See generally Michael D. Ramsay, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341 (1999) (providing an overview of foreign policy preemption and concluding that the doctrine is hardly sound constitutionally).

²⁵⁰ *Id.*

state statute that has been deemed to conflict with a matter involving a national policy. Because concurrent enforcement of federal antitrust involves no conflicting state statute, these doctrines are only applicable by analogy.

1. *The Inapplicability of the Doctrine of Foreign Affairs Preemption*

The doctrine of foreign affairs preemption refers to a judicially constructed doctrine designed to protect the authority of the national government to conduct relations with other nations without undue interference from state legislatures.²⁵¹ It is based on the concept that the actions of state governments could negatively affect the ability of the national government to conduct foreign affairs and necessarily presumes that the nation is better off when the United States speaks with one voice in foreign affairs.²⁵² The Supreme Court articulated this concern in *Zschernig v. Miller*, when it stated that state and local laws are unconstitutional if they “impair the effective exercise of the Nation’s foreign policy.”²⁵³ However, for the doctrine of foreign affairs preemption to apply, one must assert that a state legislative enactment arguably conflicts with an aspect of national foreign policy. In the case of concurrent enforcement of federal antitrust laws, no state measure exists to be preempted.²⁵⁴

A second reason that the doctrine does not apply is that any national policy involving antitrust enforcement, whether international or domestic, falls within the Congress’s authority to regulate interstate and foreign commerce, rather than within the sphere of “foreign affairs,” an area considered to fall within the purview of the Executive Branch. It makes no sense to think of a statute expressing a congressional preference for concurrent state involvement in enforcing federal antitrust law, such as the Hart-Scott-Rodino Act, being “preempted” due to a conflict with national policy, when the Act itself is a valid reflection of national policy.²⁵⁵ In fact, state involvement in international antitrust enforcement under powers

²⁵¹ See generally Resnik, *supra* note 228 (giving an overview of foreign affairs preemption).

²⁵² See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (“The nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch.”) (quoting U.S. Senate Reports, Committee on Foreign Relations, vol. 8, p. 24).

²⁵³ 389 U.S. 429, 440 (1968).

²⁵⁴ In the case of a possible dormant foreign affairs preemption doctrine, a federal statute may not be necessary, but the need for a state legislative act to be preempted remains.

²⁵⁵ See Peter J. Spiro, *Contextual Determinism and Foreign Relations Federalism*, 2 CHI. J. INT’L L. 363, 365 (2001) (arguing that it makes no sense for a court to allow the Executive Branch to preempt state activities in an area that has been specifically allocated to Congress’s jurisdiction, especially in the case where the state involvement has not only not been preempted by Congress, but where Congress itself has encouraged the states to get involved in the area).

granted to the States by Congress under the Hart-Scott-Rodino Act should rarely, if ever, be a candidate for dormant foreign affairs preemption based on Executive Branch policy preferences, since the regulation of interstate and foreign commerce is an area allocated to Congress.²⁵⁶

A larger problem with the doctrine of dormant foreign affairs preemption is that globalization has blurred the line not only between what is national and what is local, but also between the foreign and the domestic. If it is true that all local acts now have global implications,²⁵⁷ then an expansive view of the doctrine of foreign affairs preemption now means that nearly all state action should be restricted. The effect of this on traditional notions of federalism has led Professor Peter Spiro to advocate that states be allowed to act relatively freely in areas with international implications and that courts should invalidate on a case-by-case basis only those few state activities with detrimental effects on national foreign relations.²⁵⁸

Spiro also argues that in the 21st century, state actions are less likely than in the past to interfere with the nation's conduct of foreign policy.²⁵⁹ According to Spiro "the crucial switch is found in notions of international responsibility. In the past, national governments were, as a matter of law and practice, held responsible for the misdeeds of subnational authorities."²⁶⁰ Today, international actors better understand the internal workings of other nations and in particular they understand that when dealing with the United States, state actions do not represent U.S. foreign policy. Today, foreign nations not only realize this, they are able to exercise influence over state actions by threatening to restrict their investment in or commerce with a particular offending state. In this situation, Spiro argues that "subnational activity no longer poses a risk of interfering with national policy, and there is no need to depart from the federalism construct that governs other areas of regulation" when considering state activities with international implications.²⁶¹

2. *Why Dormant Commerce Clause Related Concerns are Misplaced*

The Dormant Commerce Clause has been applied by the Supreme Court to invalidate state economic protectionist legislation that discriminates against or unduly burdens the commercial activities of out-of-

²⁵⁶ U.S. CONST. art I, § 8, cl. 8 ("[The Congress shall have the power] [t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

²⁵⁷ See Spiro, *supra* note 255, at 365.

²⁵⁸ *Id.* at 366-67; see also Peter J. Spiro, *Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1255-58 (1999) (asserting that courts have demonstrated an institutional competency in determining whether state measures interfere with foreign relations).

²⁵⁹ See Spiro, *supra* note 255, at 367.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 368.

state businesses, including international firms. Posner's concerns about "protectionist" state enforcement of federal antitrust law seems to fall within the category of Dormant-Commerce-Clause-related concerns. It does not apply directly to the issues involved in concurrent antitrust enforcement because when state attorneys general enforce federal antitrust law, no discriminatory state legislation is involved. Advocates of Posner's position, however, could argue that the rationale for the Dormant Commerce Clause applies equally well to the exercise of discretion by state prosecutors when it is used to favor in-state businesses at the expense of out-of-state firms.²⁶²

Posner claims that because state attorneys general hold elected office, they have incentives to sue business firms that are competitors of businesses resident within their states, "including corporations that have headquarters or extensive operations in the state."²⁶³ He does not argue that state attorneys general are likely to openly champion the cause of in-state business, presumably because the H-S-R Act authorizes states to bring suit only on behalf of individuals and specifically denies them the power to sue on behalf of business entities.²⁶⁴ Rather, Posner argues that in-state businesses will covertly exert influence on state officials in order to persuade them to exercise their prosecutorial discretion in a way that favors local businesses and burdens out-of-state competitors.²⁶⁵ There appears to be little empirical support for this view and none has been provided by the advocates of this position. Posner's view of the suitability of State attorneys General as antitrust enforcers is directly contrary to the view expressed in the legislative history of the Hart-Scott-Rodino Act. After stating that the additional antitrust enforcement powers granted to State attorneys general would provide an additional method of enforcement to persons suffering actual antitrust harm who would otherwise go uncompensated, the House Report expressed the view that a state attorney general is "an effective and ideal spokesman for the public in antitrust cases." The reasons cited included that a state attorney general is "normally an elected, accountable and responsible public officer whose duty is to promote the public interest."²⁶⁶

Patricia Conners, the head of the NAAG Multistate Task Force, however, has described the criteria that generally dictate whether a state or states will choose to pursue an antitrust matter. These criteria bear little resemblance to the concerns that Posner posits may motivate state antitrust actions. The criteria she lists are as follows: "(1) Does the matter have a local or regional impact upon the state's consumers or economy?; (2) Does

²⁶² See Posner, *New Economy*, *supra* note 30; Posner, *Federalism*, *supra* note 60.

²⁶³ See Posner, *Federalism*, *supra* note 59, at 8–10.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ H.R. Rep. No. 94-499(1) pt.3.

the matter affect the public interest?; (3) Are state or local governmental agencies impacted?; (4) Can consumers directly or indirectly benefit from state enforcement regarding this matter?; (5) Is the matter already being adequately addressed by the federal agencies or private plaintiffs? If so, has adequate injunctive relief been obtained?; (6) Is it the right thing to do?"²⁶⁷

Several current or former members of the staffs of state attorneys general also have provided evidence to refute Posner's claim. For example, a former New York Antitrust Bureau Chief noted that the New York Attorney General's office filed an *amicus curiae* brief in the U.S. Supreme Court in 2004 taking a position adverse to Verizon, one of New York's largest employers.²⁶⁸ He also noted that the decision by the New York Attorney General to settle the Microsoft case was not in the economic interest of IBM, one of the state's leading corporate citizens.²⁶⁹

Even if state officials had an incentive to file antitrust suits for the purpose of giving a competitive advantage to business entities located within their state, such a strategy would not be effective due to the role of the federal judiciary in antitrust enforcement. As one AMC member stated: "It is important to remember that multiple enforcement itself is subject to a critical check and balance: the federal courts."²⁷⁰ He noted that every aspect of non-merger antitrust enforcement requires judicial intervention.²⁷¹ The result of this is that "notwithstanding multiple enforcers of the antitrust laws, only the courts can determine whether a violation of law has been established. Having multiple enforcers simply provides greater assurance that the courts have that chance."²⁷²

D. Concurrent Enforcement Promotes the Values Underlying the Federal System

1. *Concurrent Enforcement of Antitrust Promotes Robust Debate on Issues of Public Policy*

Rather than raise constitutional concerns, concurrent enforcement of antitrust is instead in harmony with basic principles of federalism, especially with federalism's role in promoting robust debate over issues of public policy. The functions of the NAAG Antitrust Task Force, for

²⁶⁷ Patricia A. Conners, *Current Trends and Issues in State Antitrust Enforcement*, 16 LOY. CONSUMER L. REV. 37, 58 (2003).

²⁶⁸ See Himes, *supra* note 50.

²⁶⁹ *Id.*

²⁷⁰ Antitrust Modernization Commission, *Report and Recommendation: Separate Statements of Commissioners Burchfield, Delrahim, Jacobson, Kempf, Litvack, Valentine, and Warden*, available at http://govinfo.library.unt.edu/amc/report_recommendation/separate_statements.pdf [hereinafter *Statement of Jacobson*].

²⁷¹ *Id.*

²⁷² *Id.* at 415.

example, reveal the desire of state officials to take part in the policy debate over ways to improve antitrust enforcement for the benefit of consumers. In addition to its function as a way to coordinate the multistate litigation process, a major purpose of the Antitrust Task Force is to participate in the formulation of antitrust policy initiatives. Indeed three of its four major listed functions relate to this goal. They are: “to facilitate the state attorneys general participation as *amicus curiae* in antitrust matters where appropriate”; “to suggest or comment upon legislation for Congress and state legislatures”; and “to develop policy positions on antitrust issues.”²⁷³

An important illustration of the way in which state enforcement has sparked debate on controversial issues of antitrust enforcement is provided by the debate over the harmfulness of vertical restraints. Former New York Assistant Attorney General for Antitrust and one-time senior advisor to Eliot Spitzer, Lloyd Constantine has described how, during the Reagan Administration, federal agencies were engaged in what he terms an “all out assault on the application of antitrust law to all vertical restraints of trade.”²⁷⁴ When the issue of the *per se* illegality of vertical restraints came before the U.S. Supreme Court in *Monsanto v. Spray-Rite*, the Reagan administration filed an *amicus* brief against their continued prohibition while the states collectively filed an *amicus* brief taking the opposite position.²⁷⁵ The Supreme Court agreed with the states’ position and refused to overrule a leading case on vertical restraints, *Dr. Miles Medical Co.*²⁷⁶ In January 1985, however, the Antitrust Division issued its Vertical Restraints Guidelines, which indicated that the Division would not prosecute many forms of vertical restraint.²⁷⁷ In response to this federal action, the NAAG Task Force on Antitrust issued its own Vertical Restraints Guidelines which indicated that the states would continue to prosecute vertical restraints.²⁷⁸ In relating this history, Constantine remarked that “[w]hen the States joined together in that non-partisan effort we bucked the conventional knock on the States, which said that because of negative ‘collective action’ principals the State could not and would not foster the greater good for the nation and instead would engage in a race to the bottom.”²⁷⁹

One commentator summed up the role of concurrent enforcement in fostering debate over antitrust policy this way:

²⁷³ Connors, *supra* note 266, at 56.

²⁷⁴ Constantine, *supra* note 239, at 4.

²⁷⁵ *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

²⁷⁶ *See Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). *Dr. Miles* was overruled in part in 2007 by *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

²⁷⁷ Donald L. Flexner & Mark A. Racanelli, *Merger Control and State Aids Panel: State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 CONN. J. INT’L L. 501 (1994).

²⁷⁸ *See* Constantine, *supra* note 239.

²⁷⁹ *Id.* at 7.

Federalism serves antitrust jurisprudence, society, and democracy by giving voice to the diversity of opinion and by allowing the states to find ways to serve their citizens' varying (and, at times, conflicting) concerns Federalism allows for the experimentation, the successes, and the failures needed to find the best approach for a given time and a given market. It reminds legislators, courts, and scholars that, on many key issues, reasonable minds may differ and that, because society has conflicting and overlapping desires, there may not be one single answer.²⁸⁰

2. *Antitrust Laws Play an Important Role in Safeguarding the Public, Health, Safety, and Welfare*

Given the Supreme Court's current broad interpretation of Congress's power under the Commerce Clause, limiting state attorneys general to prosecution of "local" or "intrastate" commerce would leave state officials with an extraordinarily limited scope of authority.²⁸¹ As cases such as *Wickard v. Filburn*²⁸² and *Gonzalez v. Raich*²⁸³ make clear, Congress may regulate even local economic conduct that has more than a tangential effect on interstate commerce.

In *Hartford Fire Insurance*, the attorneys general of nineteen states sued several of the major domestic insurers, domestic and foreign re-insurers, and insurance brokers after the DOJ declined a request by the state attorneys general to investigate an alleged conspiracy between the companies to boycott general liability insurers and force those insurers to conform the terms of their domestic commercial general liability policies to the forms used by defendants.²⁸⁴ The alleged boycott had an adverse impact upon municipalities because it effectively foreclosed cities and counties from obtaining commercial general liability insurance terms.²⁸⁵ In this instance the British authorities did not in fact regulate the alleged anticompetitive activity, and there was little benefit to deferring to their regulatory choices in this area, since many nations, including the United States, are less diligent in enforcing their competition laws when the injured consumers reside outside their boundaries.²⁸⁶

²⁸⁰ Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 ANTITRUST L.J. 29, 43, 44 (2000).

²⁸¹ ABA Comments, *supra* note 63, at 12.

²⁸² 317 U.S. 111 (1942).

²⁸³ *Gonzales v. Raich*, 545 U.S. 1 (2005).

²⁸⁴ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 770, 784–90 (1993).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 799.

E. Impossibility of Separating the “Truly National” from the “Truly Local” in Antitrust Cases

The problems of separating local from national issues discussed above apply with particular force to the types of consumer welfare issues addressed by the antitrust laws. Even a cursory examination of the ways in which state attorneys general have exercised their *parens patriae* authority makes clear that limiting state officials to prosecuting only completely local competitive restraints would seriously interfere with their ability to operate as guardians of the public, health, safety, and welfare of their residents. A good illustration of this can be seen in the *Hartford Fire Insurance* case decided by the U.S. Supreme Court in 1993.²⁸⁷ The regulation of insurance is an area of particular concern for state regulators and is acknowledged to be a special area of “traditional state concern.”²⁸⁸ In fact, the McCarran-Ferguson Act specifically declares that state regulation of insurance is in the public interest.²⁸⁹ In *Hartford Fire*, a group of state attorneys general became aware of an international antitrust conspiracy that they believed was making it impossible for both state agencies and state residents to obtain necessary property and casualty insurance.²⁹⁰ This case graphically illustrates the way in which even an international conspiracy can have very immediate effects on both state governments and on the vital interests of state residents.²⁹¹

A second illustration is provided by a number of cases brought by state attorneys general acting together through the NAAG Antitrust Task Force in industries such as pharmaceuticals, health care and telecommunications—all areas of intense local concern with national implications.²⁹² According to Patricia Conners, state antitrust officials have focused more attention on the health care industry than any other industry.²⁹³ She explains the reason for this as being “health care markets are typically local in nature and therefore more likely to draw the attention of state attorneys general. Of course, the increasingly high costs of health care, health insurance, and pharmaceuticals also make it a prime issue of concern for state attorneys general acting on behalf of consumers.”²⁹⁴ Another particular state concern in the health care industry concerns tying

²⁸⁷ 509 U.S. 764.

²⁸⁸ See McCarran-Ferguson Act, 15 U.S.C. § 1011 (2000).

²⁸⁹ *Id.*

²⁹⁰ 509 U.S. at 770, 784–90.

²⁹¹ See *Insurance Companies Settle Multistate Conspiracy Charges*, 67 ANTITRUST & TRADE REG. REP. 434 (Oct. 13, 1994).

²⁹² See Conners, *supra* note 266, at 46 (“Over the last five years in particular, state attorneys general have also made challenging abuses within the pharmaceuticals industry a primary enforcement initiative. Since January 2003, state attorneys general have announced three major settlements with pharmaceutical companies, totaling \$235 million.”).

²⁹³ *Id.* at 43–44.

²⁹⁴ *Id.*

and bundling the sale of pharmaceuticals to state agencies and to state employee health plans.²⁹⁵

F. Dangers of Under-enforcement in Antitrust

In general, when a statute is designed to prevent covert business conduct, there is a serious problem with detection of the conduct. For this reason, the punishments for statutory violations are often designed to have an *in terrorem* effect. Good examples of this phenomenon are the stiff penalties levied for the violation of insider trading rules or for violation of rules concerning obstruction of justice, such as shredding documents.²⁹⁶ Concurrent enforcement of federal antitrust laws prevents potentially harmful under-enforcement of prohibitions on conduct harmful to consumers by allowing states to pursue federal antitrust claims notwithstanding a decision by federal authorities not to act.²⁹⁷ A benefit of concurrent state and federal antitrust laws is that it promotes a consistent U.S. antitrust policy by insulating antitrust policy decisions from the political pressures to which it is inevitably subject.²⁹⁸ An AMC Commissioner stated that,

If antitrust is a priority of a presidential administration, we can be confident of appointees to the Justice Department and Federal Trade Commission who will pursue robust enforcement. But, as we have seen at times over the past 30 years, antitrust is not always an Executive Branch priority. In some instances, the Executive Branch may seek to curtail antitrust significantly, or more commonly, to sit on the sidelines while cases are not brought. In any given case, the federal enforcement agencies may elect not to proceed, but injured parties and the states have the ability to fill the gap.²⁹⁹

In addition, in cases where both the states and federal authorities bring suit, states possess the power to seek relief beyond that sought by federal authorities.³⁰⁰ Some have argued that this dual authority presents the

²⁹⁵ Kathleen E. Foote, *State Antitrust Enforcement*, 2009 PRACTICING LAW INSTITUTE, PLI Order No. 18840, May–June 2009, at 750.

²⁹⁶ Many of the concerns expressed about the danger of over-regulation in regard to concurrent enforcement are concerns about duplicative state and federal review of proposed mergers, which is not within the scope the issues considered in this article.

²⁹⁷ See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

²⁹⁸ See *Statement of Jacobsen*, *supra* note 269, at 415 (“Multiple enforcement ensures that the administration of the antitrust laws will be not only vigorous, but insulated, to a degree from the vagaries of the electoral process.”).

²⁹⁹ *Id.*

³⁰⁰ See, e.g., *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132 (D.D.C. 2002) (states pursued remedies following DOJ settlement); *In re Compact Disc Minimum Advertised Price Antitrust Litigation*, 216 F.R.D. 197 (D. Me. 2003) (states pursued remedies following FTC settlement).

potential for unfairness because it subjects businesses to “multiple remedies.”³⁰¹ This argument, however, ignores the fact that when multiple plaintiffs are able to prove that each has suffered independent antitrust injury from the same actions, each is entitled to a recovery.³⁰² Not allowing parties to antitrust cases to sue for different remedies when those parties represent the interests of different victims harmed by the anticompetitive activities is a recipe for under-enforcement of the antitrust laws and for unjust enrichment for antitrust defendants. For example, the fact that a particular defendant must pay compensation to a particular private plaintiff for injury suffered by a conspiracy does not preclude other injured parties from also suing for treble damages.³⁰³ In fact, the legislative history of the H-S-R Act makes clear that granting state attorneys general the right to sue on consumers’ behalf would not unfairly increase any defendant’s liability, but merely provide another avenue of enforcement to victims of antitrust conspiracies who would otherwise not be compensated for their injury.³⁰⁴ Indeed, the Supreme Court has noted that antitrust suits brought by different injured parties are “designated to be cumulative, not mutually exclusive . . .”³⁰⁵ In fact, Professor Stephen Calkins has argued persuasively that even in the *Microsoft* case, a case often cited to illustrate the disadvantages of state involvement in prosecution of conduct that is the subject of simultaneous federal prosecution, the participation of state enforcement authorities was beneficial because state officials represented injured parties who would otherwise not have had their injuries addressed by the relief proposed by federal authorities.³⁰⁶

As proponents of concurrent state antitrust enforcement have pointed out, the practical costs imposed on businesses of dual enforcement have at times been exaggerated. An AMC Commissioner stated that,

The record before the Commission demonstrates convincingly, in my view, that the states can effectively supplement the federal agencies in bringing important cases; and by their very presence, provide an important check against federal under-enforcement The Commission was presented with no evidence demonstrating that state enforcement has resulted in harmful inconsistencies in legal obligations, deterrence of precompetitive conduct or excessive costs.³⁰⁷

³⁰¹ Posner, *New Economy*, *supra* note 30.

³⁰² See generally H.R. REP. NO. 94-499(I).

³⁰³ See H.R. REP. NO. 94-499(I) pt. 4.

³⁰⁴ See *id.*

³⁰⁵ *United States v. Borden Co.*, 347 U.S. 514, 518, 519 (1954) (quoting *United States v. Bendix Home Appliances*, 10 F.R.D. 73, 77 (S.N.D.Y. 1949)).

³⁰⁶ See, Calkins, *supra* note 92, at 675.

³⁰⁷ See *Statement of Jacobsen*, *supra* note 269, at 415.

CONCLUSION

If the decades of the 1980s and 1990s are remembered as the “Era of Deregulation,” it now looks as though the early decades of the 21st Century may be remembered as the “Era of Rethinking Regulation for a Global Economy.” A key issue for the United States in the coming years will be deciding what sort of federal system works best in a world where business increasingly takes place in international markets. In particular, what role should state officials play in this new economic order? I am inclined to agree with Professor Cristina Rodríguez, who has written that: “Counterintuitively, the changes wrought by international economic integration demand strong institutions beneath the national level.”³⁰⁸ As the foregoing analysis indicates, considering the debate over the desirability of concurrent state and federal enforcement of the federal antitrust laws in light of contemporary scholarship on federalism reveals that a regime combining national and state enforcement in antitrust has been a success and provides a model for effective economic regulation in a global world.

³⁰⁸ Rodríguez, *supra* note 125.