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Avoiding Impotence: Rethinking the Standards for Applying State Antitrust Laws to Interstate Commerce

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Ratio est legis anima.
("The reason for the law is its soul.")[1]

I. INTRODUCTION

State antitrust laws are broadly constructed.[2] With sweeping, general terms, often mirroring the language of the federal antitrust laws,[3] most state antitrust statutes manifest a legislative design to prevent—and to punish—a variety of commercial activities that are anticompetitive in purpose or effect.[4] These statutes, in conjunction with consumer protection statutes, constitute the primary vehicles through which state authorities protect consumers from harmful, anticompetitive behavior.[5] Of course, despite the importance of state antitrust laws in preserving a competitive marketplace, the Constitution confines their reach.[6] Through the Commerce Clause,[7] the Constitution vests in Congress the exclusive

1. Antonin Scalia, *Judicial Deference to Administrative Interpretation of Law*, 1989 DUKE L.J. 511, 515.

2. Virtually every state has enacted a fair trade or anti-monopoly statute of general application. *See* A.B.A. SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES 1-18 (Jeffrey L. Kessler & Michael K. Lindsey eds., 2d ed. 1999). In this Note, these statutes are referred to collectively as "state antitrust laws." For a collection of antitrust laws by state, see State Laws, 6 TRADE REG. REP. (CCH) ¶ 30,000 (1988).

3. *See* State v. Sterling Theatres Co., 394 P.2d 226, 228 (Wash. 1964) (noting the "nearly identical wording" of a Washington statute and the federal Sherman Antitrust Act).

4. Of course, this is a general statement, and there is a great deal of variation in the language and construction of state antitrust provisions. *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, 510 (1994) (finding "little uniformity" among state antitrust laws). In addition, although state antitrust laws are in the majority of instances similar in structure and language to the federal statutes, this is not always the case. *Id.* at 510-11. *See generally* Mary B. Cranston & Ellyn Freed, *The Tension Between Federal Antitrust and State Unfair Competition Laws*, at 135 (PLI Corp. Law & Practice Course, Handbook Series No. B-968, 1997) (describing the overall tension between California's antitrust and consumer protection statutes and federal antitrust laws).

5. *See* Cranston & Freed, *supra* note 4, at 137-38 (noting that while the federal antitrust laws are designed to protect *competition* alone, state laws, in some cases, serve to protect individual *competitors* in the marketplace).

6. *See* Herbert Hovenkamp, *State Antitrust Enforcement in the Federal Scheme*, 58 IND. L.J. 375, 387 (1983) ("No modern court . . . has ruled that state antitrust statutes can be applied to interstate commerce without limit.").

7. U.S. CONST. art. I, § 8, cl. 3.

power to regulate interstate commerce. Accordingly, since passage of the Sherman Act in 1890,[8] Congress has promulgated an extensive body of antitrust legislation regulating interstate commercial conduct.[9] Another federal constraint on state antitrust laws arises through the Supremacy Clause.[10] To the extent that state antitrust laws conflict with federal legislation in the same field, courts will find them constitutionally invalid.[11]

State antitrust statutes, however, are not completely preempted by federal antitrust laws.[12] Instead, the legislative history accompanying most state and federal antitrust statutes indicates that the two sets of statutes were designed to function as equally potent ingredients in a comprehensive protective scheme.[13] In fact, early federal antitrust legislation directly reflected the policies behind the state antitrust laws of the late nineteenth century; they also reflected contemporary principles of common law.[14] As coexisting and complementary instruments, state and federal antitrust statutes form an excellent example of the potential for effective multi-layered legislation. In one court's analysis, the relationship between the federal and state antitrust laws is a quintessential example of "cooperative federalism."[15]

Problems arise, however, when attempting to determine exactly how far the reach of state antitrust legislation actually extends within the federal scheme. Arguably, given the limitations

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8. Sherman Antitrust Act, ch. 647, §§ 1-2, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1994)).

9. *See, e.g.*, 15 U.S.C. §§ 1-7; Clayton Act, ch. 323, § 7, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12, 13, 14-19, 26 (1994)); Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13-13b, 21a (1994); Hart-Scott-Rodino Act of 1976, 15 U.S.C. § 15c (1994).

10. U.S. CONST. art. VI, cl. 2.

11. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203-04 (1983); Ray v. Atl. Richfield Co., 435 U.S. 151, 158 (1978); Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963); Mark E. Chadwick, Note, *Invigorated State Merger Enforcement: A Proposed Analytical Framework That Preempts Preemption Problems*, 35 ARIZ. L. REV. 445, 457-59 (1993).

12. *See* California v. ARC Am. Corp., 490 U.S. 93, 101 (1989) (noting "the long history of state common-law and statutory remedies against monopolies and unfair business practices"); Watson v. Buck, 313 U.S. 387, 404 (1941) (describing the power of states to regulate restraints of trade as "long-recognized"); Hovenkamp, *supra* note 6, at 375, 378-79; Chadwick, *supra* note 11, at 457-59.

13. *See* R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 660 (Cal. Ct. App. 1974) (discussing the history of the Sherman Antitrust Act and emphasizing that Congress did not intend to preempt consistent state antitrust laws); Hovenkamp, *supra* note 6, at 375, 378-79 ("[T]he legislative history of the Sherman Act is replete with statements that the Act was designed to supplement rather than to abrogate existing state antitrust enforcement, but to leave that enforcement itself unaffected.").

14. *See* Hovenkamp, *supra* note 6, at 378-79.

15. Younger v. Jensen, 605 P.2d 813, 818 (Cal. 1980).

imposed by the Commerce Clause, state antitrust laws should cover only conduct that is "predominantly intrastate in nature."[16] Application of this standard, however, is increasingly problematic in a modern context. Federal regulatory authority under the Commerce Clause has expanded significantly throughout the twentieth century;[17] thus it may be appropriate to reevaluate the validity of maintaining a strict interstate/intrastate dichotomy in the application of antitrust laws. For example, if even discrete, local transactions, through their tangential effect on interstate commerce, are subject to Congressional regulation,[18] little, if any, commercial behavior remains that can fairly be labeled "intrastate commerce." Defining interstate commerce too broadly will thus leave no transactions in the intrastate category, and state antitrust laws confined to in-state conduct will become, in effect, dead letters.[19]

Such an outcome comports neither with the intent of the antitrust laws' drafters nor with the idea of coexisting state and federal legislative schemes. Indeed, even the Supreme Court has recognized that state laws may constitutionally reach transactions that are on some level "interstate" in nature.[20] The extent of this reach is the primary focus of this Note. Accordingly, this Note explores how the courts should characterize "intrastate commerce" in order to preserve the continued viability of state antitrust laws. It also addresses the extent to which the federal and state antitrust laws overlap or, in contrast, the extent to which they fatally conflict. With an emphasis on the development of the law in Tennessee, this Note analyzes judicial decisions attempting to determine the appropriate reach of state antitrust jurisdiction. Relying primarily upon tradition and legislative intent, some courts have upheld a rigid division between interstate and intrastate conduct for anti-

16. The obvious argument here is that beyond the realm of intrastate commerce, the Commerce Clause governs and state laws should have no application. For examples of decisions reflecting this straightforward approach, see Kosuga v. Kelly, 257 F.2d 48, 55 (7th Cir. 1958) (restricting the reach of Illinois' antitrust statute to intrastate commerce); FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 42, 51 (D.D.C. 1999) (confining the reach of Tennessee's antitrust law to intrastate commerce); Young v. Seaway Pipeline, Inc., 576 P.2d 1148, 1151 (Okla. 1977) ("The courts of this state have no jurisdiction over the subject matter of an alleged interstate conspiracy . . . ."). This Note argues, however, that this is a dubious position in the modern context.

17. *See infra* notes 40-41 and accompanying text.

18. *Id.*

19. *See In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 613 (7th Cir. 1997); R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 660 (Cal. Ct. App. 1974); Commonwealth v. McHugh, 93 N.E.2d 751, 762 (Mass. 1950).

20. *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 127-29 (1978).

trust purposes.[21] If widely adopted, these interpretations—some of which are anachronistic relics of early twentieth-century jurisprudence—could seriously impede the success of future enforcement claims brought under state antitrust laws. Fortunately, other courts have invoked a more flexible analysis, defining "intrastate commerce" so as to preserve the efficacy of state law.[22]

This Note argues in favor of expanded application of state antitrust laws. Part II explores the legal and historical background surrounding the relationship between state and federal antitrust laws. This Part emphasizes the resurgence of state authority following the expansion of federal regulatory authority enabled by twentieth-century Commerce Clause jurisprudence. This resurgence resulted in a situation wherein state laws, when broadly applied, are often a more attractive alternative, and perhaps the only available option, for certain parties harmed by anticompetitive conduct. Part III considers potential problems arising under both the Supremacy Clause and the negative Commerce Clause. Given the objectives of state antitrust legislation and its unique relationship with interstate competition, this part concludes that neither the supremacy of federal law nor the "burden" of state regulations upon interstate commerce requires preemption of state antitrust laws.

In Part IV, this Note examines various judicial interpretations of Tennessee antitrust law and describes the current uncertainty surrounding the appropriate application of Tennessee's Trade Practices Act. This Note offers an example of a recent case, *FTC v. Mylan Laboratories*,[23] where the victims of anticompetitive conduct were left without an adequate remedy due to a narrow and perhaps erroneous characterization of Tennessee law. An alternative construction of Tennessee's antitrust laws appears in *In re Cardizem CD Antitrust Litigation*,[24] where the court applied the Trade Practices Act to any conduct with "more than incidental" in-state effects, thereby affording more protection for Tennessee producers and consumers.[25] Part V turns to other jurisdictions for guidance, specifically analyzing the approaches of various courts

21. *See, e.g., Kosuga*, 257 F.2d at 55; *Mylan*, 62 F. Supp. 2d at 51; Abbott Labs. v. Durrett, 746 So. 2d 316, 337-39 (Ala. 1999); *Young*, 576 P.2d at 1150-51.

22. *See, e.g., Brand Name Prescription Drugs*, 123 F.3d at 611-13; *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 665-68 (E.D. Mich. 2000); Emergency One, Inc. v. Waterous Co., 23 F. Supp. 2d 959, 961-67 (E.D. Wisc. 1998); St. Joe Paper Co. v. Superior Ct., 120 Cal. App. 3d 991, 995-1000 (Cal. Ct. App 1981); *R.E. Spriggs*, 37 Cal. App. 3d at 657-66; C. Bennett Bldg. Supplies, Inc. v. Jenn Air Corp., 759 S.W.2d 883, 886-91 (Mo. Ct. App. 1988).

23. *Mylan*, 62 F. Supp. 2d at 25.

24. *Cardizem*, 105 F. Supp. 2d at 618.

25. *See id.* at 667.

regarding the appropriate reach of state laws into the interstate arena. This Part highlights the federal courts' expansive application of state laws in *Emergency One, Inc. v. Waterous Co., Inc.*[26] and *In re Brand Name Prescription Drugs Antitrust Litigation.*[27] Drawing on these opinions and other state court decisions that illustrate the benefits of a broad application of state antitrust laws, Part VI argues in favor an effects-based approach that will more successfully combat anticompetitive conduct that significantly affects in-state businesses and consumers. Finally, this Note offers a few suggestions for a broader conception of "intrastate commerce" that reflects contemporary trends while sustaining the potency of state antitrust statutes as appropriate and effective protective instruments.[28]

II. LEGAL AND HISTORICAL BACKGROUND

A. The Sherman Act and State Antitrust Laws

The legislative history surrounding passage of the Sherman Act indicates Congress' intent to supplement, but not to supplant, existing state antitrust statutes.[29] As Senator Sherman stated at the time that Congress passed the Sherman Act, the Act did not "announce a new principle of law, but applie[d] old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."[30] Building on traditions established under common law and the example set by the several states that had previously enacted legislation dealing with restraints on trade,[31] Congress designed the Sherman Act "to supplement the enforcement of the established rules."[32] According to

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26. *Emergency One*, 23 F. Supp. 2d at 959.

27. *Brand Name Prescription Drugs*, 123 F.3d at 599.

28. The focus of this Note is upon judicial application of state antitrust laws and the extent to which their reach is limited. Of course, to the extent that courts are legitimately constrained by the language of state antitrust statutes themselves, the task of guaranteeing appropriate antitrust remedies lies in the hands of state legislatures.

29. *See* California v. ARC Am. Corp., 490 U.S. 93, 101 & n.4 (1989); R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 660 (Cal. Ct. App. 1974) ("The history of the Sherman Antitrust Act makes it clear that the Congress did not intend that the federal legislation preempt parallel state efforts to control unfair competitive practices."); Hovenkamp, *supra* note 6, at 375.

30. 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman).

31. *See ARC Am.*, 490 U.S. at 101 & n.4 (noting that over twenty states had enacted their own antitrust statutes at the time Congress passed the Sherman Act); *R.E. Spriggs*, 37 Cal. App. 3d at 660.

32. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

Senator Sherman, the "single object" of the Act was to "arm the Federal courts . . . *that they may cooperate with the State courts* in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States."[33] Clearly, Congress did not initially seek to preempt state authority to regulate harmful, anticompetitive conduct. Rather, as one observer noted, Congress' intent in passing the federal antitrust laws was to "leave state antitrust enforcement more or less intact."[34]

B. The Breakdown of the Interstate/Intrastate Paradigm

What Congress intended at the end of the nineteenth century, however, is no longer the only, or the most relevant, consideration. Indeed, the legislative intent behind the federal antitrust laws is increasingly *irrelevant* in light of the gradual breakdown of the interstate/intrastate dichotomy.[35] States initially assumed the authority to regulate only those activities occurring entirely within their borders.[36] Through the early stages of the twentieth century, this limited power fit with prevailing notions of judicial and legislative jurisdiction.[37] In this context, a complementary, dual-tier antitrust enforcement scheme made perfect sense: The federal government pursued antitrust actions against combinations and conspiracies that were located in more than one state, while state enforcement agencies regulated transactions taking place entirely within a single state.[38] In other words, it was easy to characterize certain commercial conduct as "intrastate" in nature. Therefore, the reach

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33. *Id.* (emphasis added).

34. Hovenkamp, *supra* note 6, at 375.

35. *See id.* at 378 (suggesting that, given the changes since 1890 in both the economy and the nature of federalism, issues of congressional intent at the time the Sherman Act was passed are "virtually moot").

36. *Id.* at 379-80; *see also* Ray W. Campbell, *Subject Matter Jurisdiction*, *in* Illinois Institute for Continuing Legal Education 2 (June, 1996).

37. *See* Hovenkamp, *supra* note 6, at 379-80; Campbell, *supra* note 36, at 2. While an analysis of applicable state jurisdictional standards lies beyond the scope of this Note, it is important to at least recognize the relationship between the early antitrust laws and contemporary notions of state jurisdiction. For example, the complementary but distinct regulatory roles envisioned by Senator Sherman for state and federal antitrust laws reflect the overall jurisdictional scheme outlined by the Supreme Court in *Pennoyer v. Neff*: "The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed . . . an illegitimate assumption of power, and be resisted as mere abuse." Pennoyer v. Neff, 95 U.S. 714, 720 (1877).

38. *See* Hovenkamp, *supra* note 6, at 379; *see also* Kosuga v. Kelly, 257 F.2d 48, 55 (7th Cir. 1958) (refusing to apply Illinois' antitrust laws to an alleged interstate price-fixing scheme since the statute was "applicable only to interstate commerce").

of state laws into the interstate arena was unlikely to represent a significant concern for either courts or law enforcement.

As the economy modernized, however, this neat paradigm eroded, and the formerly clear distinction between interstate and intrastate transactions became increasingly murky.[39] Meanwhile, certain instrumental Supreme Court decisions greatly expanded federal jurisdiction under the Commerce Clause.[40] As a result, virtually any commercial transaction is subject to federal regulation as long as Congress could reasonably infer that the transaction has a significant impact on interstate commerce.[41] Under this modern standard, very little commercial conduct may fairly be characterized as entirely "intrastate" in nature. These developments have the potential to seriously limit the effectiveness of state antitrust laws if they are limited in application to intrastate commerce.

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39. Again, this evolution mirrored the expansion of state jurisdictional standards in general. Eventually dismissing the straightforward paradigm established in *Pennoyer*, the Supreme Court in the twentieth century sanctioned the application of state laws to a variety of conduct taking place beyond state lines. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462, 479-80, 487 (1985) (holding that substantial and continuous contact with a forum state supports jurisdiction over claims arising out of such contact); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774-75 (1984) (upholding jurisdiction because defendant had purposefully availed itself of the privilege of doing business in-state); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (supporting a "minimum contacts" standard and permitting jurisdiction over out-of-state defendants as long as maintenance of the lawsuit does not offend "traditional notions of fair play and substantial justice"). Significantly, courts in recent jurisdiction cases have increasingly considered in-state interests, such as providing appropriate remedies to injured state residents. *See Burger King*, 471 U.S. at 476-77, 483; *Keeton*, 465 U.S. at 776-77. This trend may lend some support to arguments in favor of expanded application of state antitrust laws. For a recent discussion of the appropriate reach of state long-arm statutes as applied to antitrust defendants, see *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 671-76 (E.D. Mich. 2000) (upholding personal jurisdiction over defendants under Tennessee and Minnesota long-arm statutes). For additional analysis of a contacts-based approach to determining the scope of a state's antitrust laws, see Emergency One, Inc. v. Waterous Co., Inc., 23 F. Supp. 2d 959, 968-69 (E.D. Wisc. 1998).

40. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (sustaining Congress's conclusion that discriminatory serving practices by a local restaurant could have a "direct and adverse effect" on interstate commerce); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 255-58 (1964) (upholding legislation designed to prevent racial discrimination in local accommodations since such discrimination could have a "substantial and harmful effect" on interstate commerce); Wickard v. Filburn, 317 U.S. 111, 124-25 (1942) (extending regulation under the Commerce Clause to local activities if Congress concludes that, in the aggregate, they exert a "substantial economic effect" on interstate commerce). *But see* United States v. Lopez, 514 U.S. 549, 559, 567-68 (1995) (limiting the reach of the commerce power to activities that "substantially affect" interstate commerce and concluding that possession by a student of a firearm within a school zone fails to meet this test).

41. *See Katzenbach*, 379 U.S. at 303-04.

C. Declining Federal Enforcement and the Resurgence of State Authority

Ironically, while the scope of federal authority under the Commerce Clause expanded to unprecedented levels, federal antitrust enforcement eventually weakened.[42] After peaking in the 1960s, federal antitrust actions declined dramatically during the Reagan Administration.[43] For example, under President Carter, federal enforcement agencies conducted reviews of 10.8% of all reported mergers from 1979 to 1980.[44] From 1982 to 1986, under President Reagan, these agencies reviewed only 4.4% of reported mergers.[45] In addition, while enforcement actions were brought against 2.5% of all mergers from 1979 to 1980, this figure dropped to 0.7% of all transactions from 1982 to 1986.[46]

While the Department of Justice and the Federal Trade Commission maintained an increasingly hands-off attitude toward antitrust enforcement, certain Supreme Court rulings significantly restricted the scope of federal antitrust authority. One major restriction resulted from the Court's holding in *Illinois Brick Co. v. Illinois*.[47] The Supreme Court in that case held that under the Clayton Act,[48] only direct purchasers[49] may recover damages resulting from violations of the federal antitrust laws.[50] This decision left in-

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42. *See* Flexner & Racanelli, *supra* note 4, at 503-04, 508 (noting the decline in federal antitrust enforcement in the 1980s, due in part to the "minimal investigative attention given to mergers by the Department of Justice").

43. Chadwick, *supra* note 11, at 449; Flexner & Racanelli, *supra* note 4, at 503-04, 508.

44. *See* Flexner & Racanelli, *supra* note 4, at 504.

45. *Id.*

46. *Id.* (noting further that the rate of federal challenges to mergers declined "from 20.7% between 1960 and 1980 to 10.4% between 1981 and 1984").

47. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

48. The Clayton Act provides in part: "[A] person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained . . . ." 15 U.S.C. § 15(a) (1994).

49. Direct purchasers are those purchasing directly from an antitrust violator. Indirect purchasers, in contrast, are separated from the antitrust violator in the chain of production by one or more independent sellers. *See* Michael V. Gisser, Note, *Indirect Purchaser Suits Under State Antitrust Laws: A Detour Around the* Illinois Brick *Wall*, 34 STAN. L. REV. 203, 203-05 (1981). For example, in *Illinois Brick*, the alleged antitrust violator, a concrete block manufacturer, sold to masonry contractors, who in turn sold to general contractors. *See Ill. Brick*, 431 U.S. at 725-26. The general contractors eventually sold to respondents, including the State of Illinois, local government bodies, and school districts. *Id.* at 726. Collectively, these respondents were "indirect purchasers of concrete block, which passes through two separate levels in the chain of distribution before reaching respondents." *Id.*

50. The Court held that only overcharged direct purchasers, and not those farther along the chain of distribution, are the parties "injured in his business or property" under the Clayton Act. *Ill. Brick*, 431 U.S. at 729. The primary reasons offered by the Court in support of its decision

direct purchasers—often the party most seriously harmed by antitrust violations—without recourse under federal law.[51] Thus, as states faced the encroachment of federal law into areas of commercial conduct previously regulated by state authorities,[52] federal antitrust enforcement simultaneously diminished in both breadth and intensity. The result was a laissez-faire environment in which anticompetitive conduct was largely unregulated and the victims of such conduct were frequently left without an effective remedy.[53]

In response to this situation, enforcement agencies in various states began to reassert their authority in order to combat antitrust violators under state law. According to one pair of commentators, several factors combined to facilitate this resurgence of state antitrust enforcement.[54] First, in 1976 Congress passed the Crime Control Act, which provided "seed money" to be used by states to establish their own antitrust enforcement departments.[55] Also in 1976, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act, which granted state attorneys general the significant power to bring antitrust actions as *parens patriae* on behalf of state

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were that barring suits by indirect purchasers would (1) avoid unnecessarily complicated litigation, (2) provide direct purchasers with incentives to bring private antitrust actions, and (3) avoid the potential for multiple liability of defendants. *Id.* at 725-26, 736-38. The *Illinois Brick* decision is problematic though, because direct purchasers are often able to "pass on" the overcharges resulting from anticompetitive agreements to consumers or other indirect purchasers. While recognizing this problem, the *Illinois Brick* Court nonetheless relied upon the precedent established in *Hanover Shoe*, where the Court refused to recognize a "pass on" defense for antitrust violators. *See* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 487-94 (1968) (rejecting the "passing-on" defense, largely based on the difficulties in determining when, and to what extent, direct purchasers actually pass on the increased costs they incur at the hands of antitrust violators). According to the *Illinois Brick* majority, if a pass-on theory may not be used defensively by antitrust defendants, a similar theory may not be used offensively by indirect purchaser plaintiffs against alleged antitrust violators. *Ill. Brick*, 431 U.S. at 728-36.

51. As Justice Brennan pointed out in his *Illinois Brick* dissent, consumers, as indirect purchasers, often bare "the brunt of antitrust injuries." *Ill. Brick*, 431 U.S. at 749 (Brennan, J., dissenting). When this is the case, the compensatory and deterrence purposes of the antitrust laws are frustrated, since "[i]njured consumers are precluded from recovering damages from manufacturers, and direct purchasers who act as middlemen have little incentive to sue suppliers so long as they may pass on the bulk of the illegal overcharges to the ultimate consumers." *Id.* This effectively states the problem facing the state of Tennessee in *Mylan*, in which Tennessee, as an indirect purchaser of overpriced pharmaceutical products, was barred from collecting damages under the federal antitrust laws. *See* FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25 (D.D.C. 1999).

52. *See supra* notes 39-41 and accompanying text.

53. As one state official describing this situation observed, "[w]e have been witnessing the watchdog put to sleep." Flexner & Racanelli, *supra* note 4, at 508 (quoting New York Attorney General Robert Adams).

54. *Id.* at 506-09.

55. *Id.* at 507.

citizens.[56] Finally, and perhaps most importantly, state officials became deeply concerned with the apparent abdication of responsibility on the part of federal enforcement agencies.[57]

Emboldened with a sense of urgency, the state attorneys general in 1983 formed the Multistate Antitrust Task Force of the National Association of Attorneys General ("NAAG Task Force").[58] This group's objectives included coordination of multistate antitrust actions, multistate participation in antitrust cases as *amici curiae*, lobbying of Congress and state legislatures, and developing common antitrust policies.[59] Under the leadership of the Task Force, states initiated antitrust enforcement actions at an accelerated pace.[60] Notably, an increasing number of these actions dealt with transactions that were to a significant extent interstate in nature.[61]

In addition to the new aggressiveness on the part of state officials, the Supreme Court proffered multiple decisions in the 1970s and 1980s reaffirming the states' authority to enforce their own independent antitrust standards, even if they strayed from the principles outlined in the federal antitrust laws. For instance, the Court confirmed in *Exxon Corp. v. Governor of Maryland* that states have the power to pass laws that impact interstate commerce without necessarily violating the Commerce Clause.[62] Later, in *California v. ARC America*, the Court conceded that state antitrust laws are not as a rule preempted by federal antitrust laws with similar procom-

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56. *Id.* Under the Hart-Scott-Rodino Act, state attorneys general have the authority to "bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such state, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief... for injury sustained by such natural persons to their property by reason of" certain antitrust violations. 15 U.S.C. § 15c(a) (1994). Like the Clayton Act, Hart-Scott-Rodino is limited by the *Illinois Brick* decision. *See supra* notes 47-49 and accompanying text. Thus, suits brought by state attorneys general as *parens patriae* are permitted only insofar as the injured consumers are direct, and not indirect purchasers. *See* Flexner & Racanelli, *supra* note 4, at 513 n.65; *see also* A.B.A., *supra* note 2, at 1-6 to 1-8 (discussing *parens patriae* actions and the direct purchaser limitation).

57. *See* Flexner & Racanelli, *supra* note 4, at 508.

58. *Id.* at 509.

59. *Id.* at 509-10.

60. *Id.* at 507-10. *See generally* Thomas Greene et al., *State Antitrust Law and Enforcement*, at 957, 959-67 (PLI Corp. Law & Practice Course, Handbook Series No. B0-009D, 1999) (describing the recent increase in proactive coordinated enforcement efforts under the leadership of the NAAG Task Force).

61. *See* Greene, *supra* note 60, at 959-63 (citing examples of recent state enforcement actions against large corporations operating in interstate commerce).

62. *See* Exxon Corp. v. Governor of Md., 437 U.S. 117, 127-29 (1978) (upholding a Maryland statute designed to regulate the retail gasoline market against claims that the statute impermissibly burdened interstate commerce).

petitive purposes.[63] The *ARC America* Court also held that state laws allowing recovery of damages by indirect purchasers are permissible, despite the federal policy established in *Illinois Brick*.[64] Combined with the explicit "*Illinois Brick* repealer" statutes passed by several states,[65] these decisions empowered state authorities to more aggressively pursue violators of state antitrust laws. This aggressiveness has resulted in the development of state authorities into "a de facto third national antitrust enforcement agency."[66]

D. A Preference for State Antitrust Laws

The resurgence of state authority in the 1980s also provided new avenues of potential recovery for antitrust plaintiffs. From a plaintiff's perspective, there are numerous reasons why suing under state laws might be preferable to the federal alternative.[67] First, as seen above, the indirect purchaser problem is a substantial obstacle for victims of vertical agreements[68] that lead to inflated consumer prices.[69] The *Illinois Brick* standard is particularly onerous in that it denies attorneys general the ability to bring *parens patriae* actions in federal courts to obtain relief on behalf of indirect purchasers.[70] In contrast, several states expressly authorize actions by indirect purchasers of illegally overpriced goods.[71] Here, the preference for state law is a matter of standing; denied the opportunity to sue under federal law, indirect purchasers must rely on state laws spe-

63. *See* California v. ARC Am. Corp., 490 U.S. 93, 101-02 (1989) (upholding claims brought by indirect purchasers of cement, brought under state antitrust laws, against argument that such claims were preempted by federal antitrust policy).

64. *Id.* at 103-06.

65. *See* A.B.A., *supra* note 2, at 1-19 & n.107.

66. Robert M. Langer, *60 Minutes with Robert M. Langer*, 60 ANTITRUST L.J. 197, 198 (1991). The Federal Trade Commission and the Antitrust Division of the Department of Justice have traditionally been responsible for enforcing federal antitrust laws. *See* Flexner & Racanelli, *supra* note 4, at 504-06.

67. *See* Hovenkamp, *supra* note 6, at 378, 384-85.

68. A vertical agreement is defined as "[a] restraint of trade imposed by agreement between firms at different levels of distribution (as between manufacturer and retailer)." BLACK'S LAW DICTIONARY 1316 (7th ed. 1999).

69. *See supra* notes 50-51.

70. *See* A.B.A., *supra* note 2, at 1-6 to 1-8 (discussing *parens patriae* actions and the direct purchaser limitation). As one observer has noted, since "most consumers are indirect rather than direct purchasers, the viability of the *parens patriae* provision is in doubt." *See* JULIAN VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION §101.11, at n.11.1 (1992).

71. *See* A.B.A., *supra* note 2, at 1-6 to 1-8 (discussing *parens patriae* actions and the direct purchaser limitation). Despite the seeming conflict with the precedent established in *Illinois Brick*, state indirect purchaser statutes were upheld in California v. ARC Am. Corp., 490 U.S. 93, 103-06 (1989).

cifically creating a cause of action for parties indirectly harmed by anticompetitive conduct. In other words, state antitrust laws may constitute the sole means of obtaining adequate relief for indirect purchasers. Moreover, many states' "*Illinois Brick* repealer" statutes allow indirect purchasers to recover treble damages, thereby affording a real remedy to parties who otherwise would be limited to injunctive relief in the federal courts.[72] State laws may also provide more meaningful protection in cases of horizontal restraints on trade,[73] where guidelines published by the NAAG Task Force indicate that thresholds triggering review of certain mergers are lower on the state level.[74] Again, courts have upheld such review notwithstanding the clear interstate aspects of most mergers in the modern economy.[75]

Furthermore, state antitrust statutes, though often interpreted by federal standards,[76] are often substantively broader in scope than federal antitrust law.[77] For instance, the Maryland statute upheld in *Exxon* included restrictions considerably more stringent than comparable price discrimination provisions in the Robinson-Patman Act.[78] Similarly, federal courts have upheld California's price discrimination law even though it is broader and demands a higher level of price uniformity than Robinson-Patman.[79] Other

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72. *See, e.g.*, CAL. BUS. & PROF. CODE § 16750(a) (West 1997); 740 ILL. COMP. STAT. 10/7(2) (West 1993).

73. A horizontal agreement is defined as "[a] restraint of trade imposed by agreement between competitors at the same level of distribution. The restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." BLACK'S LAW DICTIONARY 1316 (7th ed. 1999).

74. *See* Flexner & Racanelli, *supra* note 4, at 514-16.

75. *See id.* at 529-30 (noting that state antitrust enforcement agencies have not "refrained from flexing their muscle in cases which have effects and significance reaching far beyond their borders").

76. *Id.* at 511; La. Power & Light Co. v. United Gas Pipe Line Co., 493 So. 2d 1149, 1158 (La. 1986) (stating that federal interpretations, though not controlling, should be a "persuasive influence" on state interpretation).

77. *See* Flexner & Racanelli, *supra* note 4, at 511; Hovenkamp, *supra* note 6, at 377 n.10 (citing various examples of state antitrust provision that reach beyond the scope of comparable federal laws).

78. Exxon Corp. v. Governor of Md., 437 U.S. 117, 129-31 (1978). While Robinson-Patman generally prohibits price discrimination "between different purchasers of commodities of like grade and quality," 15 U.S.C. § 13a (1994), the Maryland statute at issue in *Exxon* required producers or refiners of petroleum products to extend all temporary price restrictions uniformly to all service stations in the state supplied by the producers or refiners. *See Exxon*, 437 U.S. at 120, n.1 (presenting the text of the Maryland statute). The *Exxon* Court disagreed with appellants' argument that complying with the statute's uniformity requirements would, in some cases, violate Robinson-Patman. *Id.* at 129-31.

79. *See* Shell Oil Co. v. Younger, 587 F.2d 34, 36 (9th Cir. 1978) (relying on *Exxon* and finding no reason for preemption since the basic purposes of the state and federal laws are similar).

reasons why antitrust plaintiffs might opt for state law include more agreeable procedural rules, a more favorable jury venire, the desire to avoid consolidation in multidistrict federal litigation, or even a more sympathetic bench.[80] Taking such considerations into account, state antitrust laws often constitute the only real option for certain parties significantly harmed by antitrust violations.[81] According to one commentator, by the mid-1980s it was "no longer a foregone conclusion that if an effect on interstate commerce is present, a plaintiff would fare better under federal law than in a state court under state law."[82]

III. CONSTITUTIONAL CONSIDERATIONS

A. The Supremacy Clause

Despite the appeal of state antitrust laws to potential plaintiffs, opposing litigants have continually questioned the constitutionality of such laws under the Supremacy Clause.[83] In many cases, they have lost.[84] Generally, the "supremacy" of federal law preempts state regulations only if (1) Congress states an intention to preempt state law in express terms ("express preemption"),[85] (2) Congress enacts a scheme of regulation in a particular field that is

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80. *See* Campbell, *supra* note 36, at 2; Greene, *supra* note 60, at 965; Hovenkamp, *supra* note 6, at 384-85.

81. *See* Hovenkamp, *supra* note 6, at 378 ("The result of these related phenomena is that people who at one time would naturally have carried their antitrust complaints to federal court now choose state court, even though the alleged illegal acts were clearly in interstate commerce, or were committed outside the state whose law is being applied.").

82. *Id.* at 384.

83. The Supremacy Clause provides: "Th[e] Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. For a general discussion of the appropriate application of the Supremacy Clause in the antitrust context, see Michael Conant, *The Supremacy Clause and State Economic Controls: The Antitrust Maze*, 10 HASTINGS CONST. L.Q. 255 (1983) (criticizing the Supreme Court's decision in *Parker v. Brown*, 317 U.S. 341 (1943), which created antitrust immunity for certain state regulatory statutes that conflict with the Sherman Act).

84. Most notable here is the Supreme Court's explicit refusal to compel states to abide by the indirect purchaser rule outlined in *Illinois Brick*. *See* California v. ARC Am. Corp., 490 U.S. 93, 103-06 (1989) (upholding state indirect purchaser statutes against claim of federal preemption); *see also* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 78-87 (1987) (denying federal preemption of Indiana's takeover statute); Exxon Corp. v. Governor of Md., 437 U.S. 117, 129-34 (1978) (rejecting appellants' contention that compliance with Maryland law would require violation of the Robinson-Patman Act).

85. *See* Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983).

"so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it" ("field preemption"),[86] or (3) the state law "actually conflicts with a valid federal statute" ("conflict preemption").[87] Certainly Congress has not articulated a desire to fully preempt state antitrust laws. Moreover, as demonstrated above, the history and purpose behind the major federal antitrust provisions indicate an absence of Congressional intent to occupy the entire field of antitrust regulation to the exclusion of the states.[88] Upholding the viability of state indirect purchaser laws in *ARC America*, the Supreme Court stated that "[g]iven the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the states."[89]

The most plausible challenges to state antitrust provisions involve claims of field or conflict preemption. In cases such as *Exxon* and *ARC America*, however, the Supreme Court has indicated its willingness to uphold state antitrust laws even when they reach beyond the scope of analogous federal statutes.[90] In *Exxon*, for example, the appellate oil companies argued that, by imposing certain price restrictions, the Maryland statute at issue[91] could potentially lead to "discrimination between customers who would otherwise receive the same price."[92] The oil companies claimed this would violate the anti-price discrimination policy of the Robinson-Patman Act.[93] Despite this potential "conflict," however, the *Exxon*

86. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); *accord Pac. Gas*, 461 U.S. at 204; Hines v. Davidowitz, 312 U.S. 52, 61 (1941) (holding that field preemption may also result when Congress regulates in a field "in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject").

87. Ray v. Atl. Richfield Co., 435 U.S. 151, 158 (1978); *accord Pac. Gas*, 461 U.S. at 204; Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) (explaining that conflict preemption exists "where compliance with both federal and state regulations is a physical impossibility"); *Hines*, 312 U.S. at 67 (stating conflict preemption occurs where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress").

88. *See* Watson v. Buck, 313 U.S. 387, 404 (1941) (holding that nothing in the language or legislative history of federal copyright laws justified depriving the state of Florida of the "long recognized power to regulate combinations in restraint of trade"); *see also supra* notes 29-34 and accompanying text.

89. *ARC Am.*, 490 U.S. at 101; *see* Greene, *supra* note 60, at 985 ("Because of the legislative history of the federal antitrust laws, [Supremacy Clause] preemption has had an extremely limited role in antitrust.").

90. *See supra* notes 62-66, 78 and accompanying text. The analysis applied by the Supreme Court in any claim of preemption in the antitrust context is based upon the Court's opinion in Rice v. Norman Williams Co., 458 U.S. 654, 659-63 (1982).

91. For the text of the Maryland statute, see Exxon Corp. v. Governor of Md., 437 U.S. 117, 120 n.1 (1978).

92. *Id.* at 130.

93. *Id.* at 130-34.

Court refused to agree that Robinson-Patman preempted the Maryland statute.[94] Instead, it upheld the statute as a legitimate expression of state authority. According to the Court:

> [I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to pre-empt the State's power to prohibit any conduct within that exclusion. This Court is generally reluctant to infer pre-emption . . . and it would be particularly inappropriate to do so in this case because the basic purposes of the state statute and the Robinson-Patman Act are similar. Both reflect a policy choice favoring the interest in equal treatment of all customers over the interest in allowing sellers freedom to make selective competitive decisions.[95]

In upholding the validity of state laws allowing claims by indirect purchasers—despite the precedent established by *Illinois Brick*—the *ARC America* Court maintained a similar position.[96] Noting that state laws permitting indirect purchaser recovery are entirely consistent with the purpose of the federal antitrust laws,[97] the Court reversed the opinion of the Court of Appeals that federal law preempted indirect purchaser statutes.[98] "Ordinarily," the Court held, "state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law . . . and no clear purpose of Congress indicates that we should decide otherwise in this case."[99]

The Court's stance in these cases is logically correct, for despite the apparent "conflict" between federal antitrust law and more aggressive state provisions, the objectives of both schemes are basically the same: protecting fair trade and ensuring a competitive marketplace.[100] That legislatures in various states have in some instances elected to surpass the enforcement standards established

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94. *See id.* at 131 ("This sort of hypothetical conflict is not sufficient to warrant pre-emption.").

95. *Id.* at 132-33.

96. *See* California v. ARC Am. Corp., 490 U.S. 93, 103 (1989) ("[N]othing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust laws.").

97. *See id.* at 102 ("State laws to this effect are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct.").

98. *Id.* at 101-06.

99. *Id.* at 105.

100. *See* State v. Lawn King, Inc., 417 A.2d 1025, 1032 (N.J. 1980) (requiring "consonance" between state and federal law); State v. Sterling Theatres Co., 394 P.2d 226, 228 (Wash. 1964) (observing that the similarity between the Sherman Act and Washington's Consumer Protection Act "indicates that the motive or goal of federal and state regulation is the same, and leads to the conclusion that state enforcement, far from frustrating or interfering with federal purpose or national policy, actually furthers it").

by federal law should not be justification for preemption.[101] Rather, the determining factor is whether there exists an "irreconcilable conflict between the federal and state regulatory regimes."[102] Considering the mutually reinforcing nature of the state and federal antitrust schemes, it is unremarkable that courts have been "extraordinarily reluctant" to hold state antitrust laws preempted under notions of federal supremacy.[103]

B. The Negative Commerce Clause and Interstate Commerce

More problematic issues arise when courts analyze state antitrust laws under the Commerce Clause. As previously suggested, the reach of the Congressional power under the modern Commerce Clause could potentially stultify state enforcement abilities if courts limit application of state antitrust statutes to commerce that is entirely intrastate in nature.[104] Recognizing this problem, most recent decisions have upheld state antitrust regulations despite their incidental impact on interstate commerce.[105] Courts have refrained, however, from issuing a general declaration that states may issue laws affecting interstate commerce without limitation.[106] The problem thus becomes one of drawing a line between state laws that have an acceptable impact on interstate commerce and those that are unduly burdensome. Determining an adequate solution to this

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101. Significantly, the Supreme Court has held that even state legislation that adversely affects competition will not necessarily be preempted by the federal antitrust laws. *See* Rice v. Norman Williams Co., 458 U.S. 654, 659 (1989) ("A state regulatory scheme is not preempted . . . simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not preempted . . . simply because the state scheme might have an anticompetitive effect . . . . A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.").

102. *Id.*; *accord* C. Bennett Bldg. Supplies, Inc. v. Jenn Air Corp., 759 S.W.2d 883, 889 (Mo. Ct. App. 1988) (arguing against preemption unless there is "specific state frustration of strong federal policy").

103. Hovenkamp, *supra* note 6, at 403; *see* Campbell, *supra* note 36, at 6 (claiming that the *ARC American* decision "makes clear the reluctance of the Supreme Court to preempt state law"). Again, this reluctance derives largely from the Supreme Court's general presumption against preemption of state laws under the Supremacy Clause. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 716 (1985).

104. *See* Commonwealth v. McHugh, 93 N.E.2d 751, 762 (Mass. 1950) ("If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens, without . . . any corresponding contribution to the national welfare.").

105. *See* Hovenkamp, *supra* note 6, at 386-87.

106. *See id.* at 387. *But see* Flood v. Kuhn, 443 F.2d 264, 267 (2d Cir. 1971) ("Our difficulty lies in determining to what extent, if at all, the states are precluded from antitrust regulation of interstate commerce.").

problem is necessary if the vitality of state antitrust laws is to be preserved.[107]

Nowhere in the text of the Constitution does it explicitly prohibit states from regulating interstate commerce.[108] Precedent establishes, however, that state regulations violate the "negative," or "dormant," Commerce Clause when they unduly impede upon interstate commerce.[109] In determining whether a given state regulation impermissibly burdens interstate commerce, courts frequently employ the balancing test originally announced in *Pike v. Bruce Church*.[110] Under this standard, if a state law reflects a legitimate local concern and its regulations are neither discriminatory nor protectionist, courts will uphold it.[111] If, on the other hand, a court finds the burden on interstate commerce excessive relative to local benefits, the court will strike it down as an impermissible violation of the negative Commerce Clause.[112]

Unfortunately, application of the *Pike* balancing test is inevitably a highly subjective process, and courts must still analyze state antitrust statutes on a case-by-case basis.[113] Despite guidance from precedent, courts interpreting state antitrust provisions that affect interstate commerce often have little to guide them beyond vague perceptions of legislative intent and judges' own subjective notions of the appropriate distinction between interstate and intrastate commerce.[114] Unfortunately, neither of these tools is particularly enlightening. As in the case of the Sherman Act, legislative intent at the time many state antitrust provisions were passed is

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107. *See* Campbell, *supra* note 36, at 8 (concluding that the appropriate reach of state antitrust laws is an "important live issue").

108. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987); GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 259 (13th ed. 1997); James E. Gaylord, Note, *State Regulatory Jurisdiction and the Internet: Letting the Dormant Commerce Clause Lie*, 52 VAND. L. REV. 1095, 1106 (1999).

109. *See* Or. Waste Sys., Inc. v. Dep't. of Envtl. Quality, 511 U.S. 93 (1994); Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1981); S. Pac. Co. v. Arizona, 325 U.S. 761 (1945); Gaylord, *supra* note 108, at 1107-08.

110. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

111. *See id.* at 142 ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

112. *Id.* For an example of a decision striking down a state measure as a violation of the negative Commerce Clause, see Edgar v. MITE Corp., 457 U.S. 624, 643-46 (1982) (declaring an Illinois anti-takeover statute unconstitutional under the *Pike* balancing test).

113. *See* Chadwick, *supra* note 11, at 458.

114. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (Scalia, J., concurring) (suggesting that because it requires such subjectivity, the *Pike* balancing inquiry "is ill suited to the judicial function and should be undertaken rarely if at all").

increasingly irrelevant in a modern context.[115] Furthermore, the breakdown of a clear interstate/intrastate dichotomy presents even the most astute judges with a difficult dilemma: They must either apply concepts of purely interstate or purely intrastate commerce that are grossly anachronistic, or invent a new test to determine whether or not the state law in question represents an appropriate exercise of state authority.[116] In fashioning such tests, some courts have produced guidelines for application of state antitrust laws that are appropriate and effective in a modern context.[117] Conversely, others have held to a restricted interpretation of state laws, resulting in the denial of appropriate remedies to parties harmed by antitrust violations.[118]

IV. INTERPRETING TENNESSEE LAW: A PROBLEMATIC STANDARD?

An examination of how various courts have interpreted Tennessee's antitrust statutes highlights the problems that result when courts attempt to apply outdated standards to today's complex legal issues. Unfortunately, the absence of clear guidance from the Tennessee Supreme Court has led to interpretations of Tennessee law that neglect important economic and legal developments and deny victims of anticompetitive conduct the relief they deserve. A closer look at some of these interpretations illustrates the need for a more effective standard for applying state antitrust laws to interstate commerce.

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115. Again, this is a function of the economic, social, and constitutional changes taking place since the passage of many state antitrust laws. *See supra* notes 35-41 and accompanying text. The extent to which the language of these statutes has remained intact over time most likely reflects legislative reinterpretations, rather than approval by current legislatures of the intent of the original drafters.

116. Professor Hovenkamp suggests that the decline of the interstate/intrastate distinction and the strong arguments against a finding of federal presumption creates a situation in which "there are virtually no operative limits on the reach of state antitrust law under the commerce clause." Hovenkamp, *supra* note 6, at 390. This observation may be increasingly accurate in a modern context, but it is unlikely that most judges would interpret state antitrust law so broadly.

117. *See, e.g., In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, 611-13 (7th Cir. 1997); St. Joe Paper Co. v. Superior Ct., 120 Cal. App. 3d 991, 995-1000 (Cal. Ct. App 1981); R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 657-66 (Cal. Ct. App. 1974); C. Bennett Bldg. Supplies, Inc. v. Jenn Air Corp., 759 S.W.2d 883, 886-91 (Mo. Ct. App. 1988). For a more thorough examination of these cases and their significance, see *infra* Part V.

118. For examples of such interpretations (in addition to the Tennessee decisions discussed below), see Kosuga v. Kelly, 257 F.2d 48, 55 (7th Cir. 1958); Abbott Labs. v. Durrett, 746 So. 2d 316 (Ala. 1999); Young v. Seaway Pipeline, Inc., 576 P.2d 1148, 1150-51 (Okla. 1977).

A. Case in Point: FTC v. Mylan Laboratories

An example of a recent opinion based upon questionable treatment of Tennessee's antitrust statutes is *FTC v. Mylan Laboratories, Inc.*[119] In *Mylan*, the District Court for the District of Columbia presided over a consolidated action involving claims brought by the FTC and the attorneys general of several states.[120] In the state law portion of his opinion, Judge Thomas F. Hogan tersely dismissed Tennessee's antitrust claims,[121] supporting his decision with the conclusory statement that "[w]hen the challenged conduct occurs before the products arrive in Tennessee, the conduct is considered interstate in nature and [state law] should not apply."[122] This application of Tennessee law is arguably based upon a mistaken interpretation of relevant Tennessee precedent.[123] Moreover, it reflects outdated judicial notions of the proper extension of state antitrust law into the interstate arena.

In *Mylan*, Tennessee and thirty-one other states brought state law claims against the manufacturer of the generic drugs lorazepam and clorazepate, as well as the primary supplier of the active ingredient in these drugs.[124] The states claimed that the defendant companies had violated §§ 1 and 2 of the Sherman Act and various state antitrust laws, and they brought action as *parens patriae* on behalf of state citizens, on behalf of their states' general economies, and as injured purchasers or reimbursers under state health care programs.[125] Specifically, the states' complaint alleged that defendant, Mylan Laboratories, entered into illegal exclusive licensing agreements with the supplier of the active ingredients for lorazepam and clorazepate.[126] These agreements resulted in price increases for the two drugs, which ranged from 1,900% to 3,200%.[127] Tennessee brought its state antitrust claims under the Trade Practices Act ("TPA"),[128] which forbids, in part, all combinations or

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119. FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25 (D.D.C. 1999), *reconsidered in part by* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1 (D.D.C. 1999).

120. *Id.* at 32-34.

121. *Id.* at 51. Upon reconsideration, Judge Hogan upheld the dismissal.

122. *Id.*

123. *See infra* Parts IV.C-D.

124. *Mylan*, 62 F. Supp. 2d at 32-34. Lorazepam is used to treat anxiety, tension, agitation, insomnia, and as a preoperative sedative. *Id.* at 33-34. Clorazepate is used to treat anxiety and in therapy for nicotine and opiate withdrawal. *Id.* at 34.

125. *Id.* at 32.

126. *Id.* at 34.

127. *Id.* These sudden price increases eventually cost the State of Tennessee millions of dollars.

128. TENN. CODE ANN. § 47-25-101 (1995).

agreements "which tend to lessen, full and free competition in the importation or sale of articles imported into this state . . . or which tend to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article."[129]

The defendants argued that challenges to interstate conduct brought under state antitrust laws must be dismissed if the relevant state law applies only to intrastate violations.[130] Accordingly, Judge Hogan concluded that four of the suing states, including Tennessee, "*have determined* that their state antitrust statutes apply only to violations having *solely* intrastate impact."[131] This conclusion, used to justify the dismissal of Tennessee's claims, appears to be inaccurate.[132] The existing case law reveals that Tennessee courts have not determined the precise reach of the TPA; and to the extent that the precedent cases attempt to define this reach, they have not required that the challenged anticompetitive conduct must be "solely" intrastate in nature.[133] Rather, the prevailing standard in Tennessee is apparently based on a "predominance" requirement.[134] Upon reconsideration, Judge Hogan seemed to recognize as much, since his language reflected a "predominance" standard rather than one requiring that the challenged conduct be "solely" intrastate in nature.[135] In any case, the *Mylan* decisions are based on principles outlined in Tennessee decisions nearly a century old and of questionable value today.

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129. *Id.* The TPA provides, in full:

> All arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance, reduce, or control the price or the cost to the producer or the consumer of any such product or article, are declared to be against public policy, unlawful, and void.

Id.

130. *See Mylan*, 62 F. Supp. 2d at 42 (summarizing defendants' argument that "state law challenges to the interstate conduct alleged here must be dismissed if the state law applies only to intrastate violations of law").

131. *Id.* at 42 (emphasis added).

132. At least one federal district court strongly disagrees with Judge Hogan's interpretation of Tennessee law. *See In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 666-68 (E.D. Mich. 2000) (criticizing *Mylan* and providing an alternative interpretation of Tennessee precedent). For further discussion of this opinion and its evaluation of the reasoning employed in *Mylan*, see *infra* Part IV.D.

133. *See infra* Parts IV.C-E.

134. *See infra* notes 158-72 and accompanying text.

135. *See* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 9 (D.D.C. 1999) (stating that Tennessee law is inapplicable to "predominantly interstate" conduct).

B. Applying Precedent: Standard Oil Co. v. State

In reaching its decision, the *Mylan* court relied upon *Standard Oil Co. v. State*, a Tennessee Supreme Court opinion issued in 1907.[136] In *Standard Oil*, the court upheld the constitutionality of a 1903 Tennessee antitrust law with language nearly identical to that of the TPA.[137] While it found that the statute constituted a valid expression of state authority, the *Standard Oil* court simultaneously confined the statute's reach.[138] "[W]hen properly construed," the Tennessee Supreme Court claimed, "[the statute] does not apply to interstate commerce."[139] In reaching this conclusion, the court took great pains to emphasize the legislative history behind the statute and the legal and historical context in which it was passed.[140] According to the court, the sole purpose of the act was "to correct and prohibit abuses of trade within the state. This was the legislative intent and [it] will prevail over the literal meaning of words or terms found in the act."[141]

One important conclusion reached by the *Standard Oil* court—arguably correct in 1907, but less so today—involved the appropriate interpretation of the term "importation" and of the phrase "imported into this state."[142] Again, the court emphasized that such language should be construed to reflect legislative intent over literal meaning.[143] At the turn of the century, the *Standard Oil* court observed, the Tennessee legislature was surely aware of both the Commerce Clause and the recently enacted Sherman Act.[144] Therefore, the court assumed that the purpose behind the state antitrust legislation could only have been to address "[t]he wrongs to trade . . . *which Congress could not reach.*"[145] This meant that the references in the Tennessee statute to "importation" and "imported

136. Standard Oil Co. v. State, 100 S.W. 705 (Tenn. 1907).

137. *Id.* at 709-12. For the text of the 1903 statute at issue in the case, see *id.* at 706-07.

138. *Id.* at 709.

139. *Id.*

140. *Id.* at 709-12.

141. *Id.* at 709.

142. *Id.* at 710-11.

143. *Id.* at 709. The court relied heavily on the Supreme Court's decision in *Rector of Holy Trinity Church v. United States*, 143 U.S. 457 (1892), where the Court set forth the general rule "that a thing may be within the letter of a statute and yet not within the statute, because not within its spirit, nor within the intention of its makers . . . . It is the duty of the courts, under these circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the Legislature, and therefore cannot be within the statute." *Id.* at 459, 472.

144. *Standard Oil*, 100 S.W. at 710.

145. *Id.* (emphasis added).

into this state" could relate only to articles that had come to rest in Tennessee *before* any alleged antitrust violations occurred.[146] In other words, once products from other states or foreign nations reached Tennessee and became "comingled with the common mass of property in this state, and no longer articles of interstate commerce,"[147] they became subject to state regulation.[148] If, however, the "importation" took place at a point in time after an anticompetitive agreement had been formed, state law could have no effect; otherwise the state law would impermissibly burden an interstate transaction.[149] In order to avoid such an unconstitutional construction of Tennessee's antitrust law—one which the Tennessee legislature could not have intended—the *Standard Oil* court held that "the importation of articles was not the inducement of the enactment of the statute [and] that the primary and chief purpose . . . beyond all question, was to protect commerce within the state."[150]

The purpose of the *Standard Oil* court's linguistic wrangling—preserving legislative intent—was certainly legitimate, but the precedent established by the court in 1907 is of dubious validity today. As discussed above, the legislative intent behind the earliest state antitrust laws is "virtually moot" given subsequent changes in both the national economy and the relationship between state and federal authority in the federal scheme.[151] Clearly, the state and federal antitrust laws no longer exist in separate realms, and state laws are not entirely restricted to transactions "that Congress could not reach."[152] Tennessee's antitrust provisions have been amended several times, and the original language has primarily survived intact,[153] but one could fairly doubt the conclusion that current legislative interpretations of TPA's language closely parallel those of a century ago.

The court's construction of Tennessee law in *Mylan* is a vestige of a former time. Citing *Standard Oil*, Judge Hogan found the TPA inapplicable to the allegedly illegal licensing contracts between Mylan Laboratories and its supplier because these agree-

146. *See id.* at 710-12 ("We give no force to the word 'importation' . . . because we think it was inaccurately used . . . .").

147. *Id.* at 711.

148. *Id.* at 712.

149. *Id.* at 710-12.

150. *Id.* at 711.

151. *See supra* Part II.B.

152. *See Standard Oil*, 100 S.W. at 710.

153. For the various incarnations of the Tennessee antitrust statute, see 1891 Tenn. Pub. Acts, ch. 218, § 1; 1903 Tenn. Acts, ch. 40, § 1; Shan., § 3185; Code of 1932, § 5880; TENN. CODE ANN. § 69-101 (1955).

ments materialized before Mylan's products—the overpriced clorazepam and lorazepate—came to rest in Tennessee and became "comingled" with mass of property in the state.[154] Because it took place "before the products arrive[d] in Tennessee," the challenged conduct was interstate in nature and the court dismissed Tennessee's state law claims.[155] Thus construed, state antitrust laws will or will not apply based upon certain facts surrounding the location and timing of the alleged illegal agreements. Meanwhile, the anticompetitive nature of the challenged agreement and its potential effects on in-state parties become secondary afterthoughts. One must question whether in these circumstances the real intent behind the antitrust laws is genuinely being served. When first enacted, Tennessee's antitrust law may indeed have simply filled a legal void that existed due to the limited reach of federal jurisdiction. The *Mylan* decision, however, by constraining state authority in the name of preserving distinctions between state and federal jurisdiction that are no longer appropriate, seems to defeat the ultimate purpose of preventing and punishing illegal anticompetitive conduct.

C. Subsequent Tennessee Decisions

Perhaps the *Mylan* court felt compelled to follow the *Standard Oil* court's interpretation of Tennessee's antitrust laws, but there may have been a legitimate alternative position. Based on subsequent Tennessee precedent, it is plausible to argue that the TPA applies to certain conduct that is interstate in nature. Significantly, even the *Standard Oil* court conceded that state laws necessarily will have at least some impact in the interstate arena:

> A combination affecting interstate commerce is none the less a violation of the federal antitrust statute and punishable under it because the agreement made incidentally affects intrastate commerce; and the same rule will apply to combinations made in violation of the statute of the state upon the same subject where interstate commerce is incidentally affected. If it were otherwise, neither the federal nor the state laws could be enforced in any case.[156]

This passage, prescient in 1907, becomes increasingly relevant as the interstate/intrastate dichotomy breaks down. The Tennessee Court of Appeals seemingly agreed when it concluded in 1982 that "[t]he old constitutional doctrine of mutual exclusivity between

154. FTC v. Mylan Labs. Inc., 62 F. Supp. 2d 25, 51 (D.D.C. 1999).
155. *Id.*
156. *Standard Oil*, 100 S.W. at 712.

state and federal laws affecting commerce has long been rejected."[157] In *Lynch Display Corp. v. National Souvenir Center, Inc.*, the court announced that Tennessee's antitrust laws were properly applied to transactions "predominantly intrastate in character."[158] The *Lynch* court's "predominance" standard could perhaps be viewed as nothing more than a renewed articulation of the precedent established in *Standard Oil*, but it clearly refutes Judge Hogan's initial statement limiting application of the TPA to transactions that have a "solely" intrastate effect.[159] It may further suggest, however, that Tennessee courts are willing to adopt a more flexible standard in response to changing circumstances.[160]

The Tennessee Court of Appeals revisited the issues surrounding application of the TPA in *Dzik & Dzik v. Vision Service Plan*, a 1989 case involving allegations of antitrust violations made by a Tennessee corporation against a Georgia corporation.[161] After reviewing the legislative history behind the *Standard Oil* decision, the *Dzik* court applied the "predominantly intrastate in character" standard announced in *Lynch*.[162] While conceding that the transactions between the two parties implicated intrastate commerce, the court held that such intrastate effects were "of a nature only incidental to the predominant agreement," which itself was clearly in-

157. Lynch Display Corp. v. Nat'l Souvenir Ctr., Inc., 640 S.W.2d 837, 840 (Tenn. Ct. App. 1982).

158. *Id.* In *Lynch*, the court considered the appropriateness of applying Tennessee's antitrust statute to lease agreements between a wax museum and a manufacturer of wax figures. *See id.* at 839. The court concluded that the statute did not apply because "the predominant character of [the] agreements is in interstate commerce." *Id.* at 841.

159. *Mylan*, 62 F. Supp. 2d at 42.

160. In 1994, the District Court for the Western District of Tennessee relied on *Lynch* in dismissing a claim brought under the TPA. *See* Valley Prods. Co., Inc. v. Landmark, 877 F. Supp. 1087, 1094-95 (W.D. Tenn. 1994) (stating that the conduct challenged in the case "clearly involves significant interstate commerce and activity and only minimally affects intrastate commerce"). Notably, though, the court introduced a slightly altered standard, stating that the TPA applies to matters that "more than incidentally affect intrastate commerce." *Id.* at 1095. Again, this may be viewed as a reiteration of the standard initially used in *Standard Oil*. Taken literally, though, a "more than incidental" test arguably allows for expanded application of state law. In fact, this is exactly what occurred in the *Cardizem* opinion discussed *infra*. *See infra* Part IV.D.

161. Dzik & Dzik, P.C. v. Vision Serv. Plan, 1989 WL 3082 (Tenn. Ct. App. Jan 20, 1989). Plaintiff, a Tennessee professional corporation, had provided various optometric services through defendant's group insurance plan. *Id.* at *1. When the defendant informed the plaintiff that it no longer wished to use plaintiff's services, plaintiff sued under the TPA. *Id.* Specifically, plaintiff claimed that defendant required plaintiff to purchase products from laboratories other than those owned by plaintiff. *Id.* This resulted in slower, lower quality service, which made it difficult for plaintiff to compete. *Id.*

162. *Id.* at *2.

terstate in nature.[163] The claims at issue therefore fell within the reach of the Sherman Act, and accordingly, the court upheld the trial court's dismissal.[164] Apparently finding the facts in *Dzik* analogous to the situation presented in *Mylan*, Judge Hogan cited the *Dzik* case as authority for his order of dismissal.[165] Later, he relied primarily upon *Dzik*'s "predominantly intrastate" standard in denying Tennessee's motion for a rehearing: "The states' complaint . . . alleges a price-fixing conspiracy that operated on a national level and affected at least 32 states. The allegations therefore concern conduct that was predominantly interstate, and outside the ambit of Tennessee's antitrust laws."[166]

Prior to *Mylan*, the most recent Tennessee decision involving the TPA and the intrastate/interstate problem was *Blake v. Abbott Laboratories*.[167] This case involved an allegation of conspiracy among the defendant companies that resulted in gross overcharges to consumers who purchased baby food formula in Tennessee.[168] *Blake* is therefore significant since it involves anticompetitive conduct that closely parallels the challenged conduct in *Mylan*.[169] It is also relevant because the *Blake* court reversed the trial court's dismissal of the alleged state antitrust claims despite defendants' insistence that the plaintiffs' complaint alleged a price-fixing scheme that occurred outside of Tennessee and, presumably, before the relevant products arrived within state borders.[170] In this light, *Blake* arguably refutes the interpretation in *Standard Oil* that the "importation" referred to in the TPA must always precede the formation of the alleged anticompetitive agreement. Ultimately, though, the *Blake* decision did not deviate significantly from the "predominance" standard relied upon in *Lynch* and *Dzik*;[171] thus the

163. *Id.*

164. *Id.*

165. FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 51 (D.D.C. 1999)

166. FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 9 (D.D.C. 1999)

167. Blake v. Abbott Lab., Inc., 1996 WL 134947 (Tenn. Ct. App. March 27, 1996).

168. *Id.* at **1-2.

169. *Id.* at *1. The plaintiffs claimed that the defendants' arrangement caused the price of infant formula sold across the United States, and in Tennessee in particular, to be "raised, fixed, maintained and stabilized at artificially high and non-competitive levels." *Id.* As in *Mylan*, the case thus involved an out-of-state pricing scheme that seriously impacted in-state purchasers.

170. *Id.* at *4 ("The question . . . is not whether the plaintiff's claim is, in fact, predominately intrastate commerce or predominately interstate commerce, but whether the plaintiff's complaint states a claim cognizable under the laws of the State of Tennessee. We hold that it does.").

171. *See id.* at *5 ("If it is later determined by some manner cognizable under Tennessee law that the actions complained of . . . predominantly affect interstate commerce, the defendants must prevail on this issue.").

case does little to clarify the standards for proper application of the TPA.[172]

D. An Alternative Approach: In re Cardizem CD Antitrust Litigation

In contrast to the narrow approach taken by the courts in *Mylan* and *Dzik*, one federal court has offered a more liberal construction of Tennessee's antitrust statute.[173] In *In re Cardizem CD Antitrust Litigation*, the District Court for the Eastern District of Michigan analyzed Tennessee precedent in order to determine the appropriate reach of the TPA.[174] Basing its decision on the plain language of the statute, and emphasizing the in-state effects of anticompetitive conduct, the *Cardizem* court refused to limit application of the TPA to transactions "predominantly intrastate" in character.[175] Instead, the court concluded that the TPA applies to "anticompetitive conduct occurring outside the state but having more than an incidental effect on interstate commerce."[176]

In *Cardizem*, the manufacturer of the brand name prescription heart medication Cardizem CD entered into an allegedly anticompetitive agreement with the manufacturer of the drug's first generic equivalent approved for sale by the FDA.[177] This horizontal agreement delayed the introduction of the generic drug into the U.S. market, effectively protecting the manufacturer of Cardizem

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172. The recent Microsoft litigation has spawned a subsequent Tennessee opinion addressing the proper scope of the TPA. *See* Sherwood v. Microsoft Corp., 2000 WL 33200786 (Tenn. Cir. Ct. July 5, 2000). In *Sherwood v. Microsoft Corp.*, the plaintiffs sued under the TPA, alleging that Microsoft's anticompetitive conduct had a significant, direct impact within Tennessee. *Id.* at **1-3. As in *Mylan* and *Dzik*, the defendants countered that the complaint should be dismissed because the challenged conduct was predominantly interstate in character. *Id.* at *1. Relying in part upon the *Blake* decision, the Circuit Court of Tennessee sided with plaintiffs, holding that injured indirect purchasers of Microsoft products have a viable cause of action under the TPA. *Id.* at *7 ("[T]he complaint in this case is subject to a construction other than that the transactions complained of predominantly affect interstate commerce . . . ."). Although the court essentially adhered to a predominance standard and refused to adopt the broad, effects-based standard advanced by the plaintiffs (and advocated in this Note), the *Sherwood* court seemingly opened the door to an expanded interpretation of the TPA. *Id.* at *7 (noting the limitations imposed by the *Lynch* and *Blake* decisions but suggesting that appellate courts might employ an adverse impact test). The *Sherwood* decision thus constitutes further evidence that Tennessee courts may be willing to adopt a broader construction of the state's antitrust laws than that presented in *Mylan*.

173. *In re* Cardizem CD Antitrust Litig., 105 F. Supp. 2d 618, 666-68 (E.D. Mich. 2000).

174. *Id.*

175. *See id.* at 667 (agreeing with plaintiffs that Tennessee's antitrust laws "are not limited to transactions that are wholly or predominantly intrastate in character").

176. *Id.* at 667.

177. *See id.* at 622-23 (describing the terms of the manufacturers' agreement).

CD from competition.[178] In response, a class of indirect purchasers of Cardizem CD sued both manufacturers under the Sherman Act and various state antitrust laws.[179] Among the claims in the plaintiffs' complaint were charges that the manufacturers' agreement constituted a per se violation of the TPA.[180] The defendant manufacturers sought dismissal, arguing that the TPA applies only to transactions that are intrastate in character.[181] As in *Mylan* and *Dzik*, the defendants claimed that their alleged anticompetitive conduct predominantly affected interstate commerce;[182] therefore, the defendants claimed, the plaintiffs could not possibly state a claim under the TPA.[183]

The *Cardizem* court disagreed, holding that the plaintiffs' claims were cognizable under Tennessee law.[184] Citing *Standard Oil* for the proposition that Tennessee's antitrust laws, if they are to be effective at all, must not be limited to disputes exclusively intrastate in character, the court abandoned the "wholly or predominantly intrastate" standard.[185] In doing so, the court criticized the narrow interpretation of the TPA employed in *Lynch*, *Blake*, *Dzik*, and *Mylan*, and found these cases to be "wrongly decided."[186] As an alternative, the *Cardizem* court employed an effects-based standard seemingly building upon the "incidental effects" language that had appeared previously in both *Standard Oil* and *Lynch*.[187] The court predicted that the Tennessee Supreme Court, if presented with a similar case, would agree that the plaintiffs raised viable claims under Tennessee law:

> The mere fact that there are allegations that *Cardizem* CD was sold in other states . . . or that the anticompetitive conspiracy was hatched and implemented in other states . . . does not mean that Tennessee Plaintiffs, who allege they purchased *Cardizem* CD in Tennessee at artificially inflated prices as a result of Defendant's

178. *Id.* at 623.

179. *Id.* at 622-27.

180. *Id.* at 625 n.3.

181. *Id.* at 666-67.

182. *See id.* at 667 (presenting defendants' argument that plaintiffs complaint "alleges anticompetitive activity and restraints of trade occurring in several jurisdictions [and therefore that] the Tennessee plaintiffs cannot possibly claim that the alleged restraints of trade in Tennessee predominantly affect Tennessee's intrastate commerce, as opposed to their 'predominantly' affecting interstate commerce . . . .").

183. *Id.*

184. *Id.* at 668.

185. *See id.* at 667 ("[T]he Tennessee statutes at issue here are not limited to anticompetitive conspiracies that are hatched and implemented solely or predominantly in Tennessee; they do not apply 'only to transactions that are intrastate in character . . . .' ").

186. *Id.*

187. *Id* at 667-68; *supra* notes 156, 160 and accompanying text.

> anticompetitive conduct, are precluded from asserting a claim under Tennessee's antitrust and consumer protection laws. Rather, the Tennessee Supreme Court would find that a cognizable claim for relief under Tennessee's antitrust statute is stated when the alleged facts show that an illegal combination or agreement *more than incidentally affects Tennessee's intrastate commerce.*[188]

Although the *Cardizem* court did not elaborate upon the "incidental effects" standard, or precisely define when this threshold would be met, it made it clear that Tennessee's antitrust laws should be applied to disputed agreements such as the one at issue in the *Cardizem* case.[189] There was no question, the court held, that the TPA applied in "situations . . . where anticompetitive conduct may have occurred outside the state but results in a prescription drug product intentionally coming to rest within Tennessee and causing injury to Tennessee citizens . . . ."[190] Significantly, the facts presented in *Cardizem* are extremely similar to those in *Mylan*,[191] indicating that Judge Hogan's decision in that case rested on a questionable interpretation of Tennessee law.

E. The Current Ambiguity

On its face, the TPA prohibits any schemes or agreements "which tend to advance, reduce, or control the price or the cost to the producer or the consumer" of products or articles "imported into [Tennessee]."[192] Considering the plain language of the statute alone, it would seem clear that the TPA in fact applies to conduct that is interstate in nature, as long as there are some significant adverse consequences for Tennessee producers or consumers.[193] Accepting such a broad interpretation of the TPA, the *Cardizem* court indicated its willingness to emphasize the consequences to in-state consumers of out-of-state anticompetitive conduct.[194] In doing so, the court preserved the viability of the TPA as a potent regulatory tool

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188. *Cardizem*, 105 F. Supp. 2d at 667-68 (emphasis added). In a footnote, the *Cardizem* court cited a recent Sixth Circuit opinion holding that federal courts construing questions of state law "must attempt to ascertain how [the state's highest court] would rule if it were faced with the issue." *See id.* at 668 n.23 (quoting Meridian Mut. Ins. Co. v. Kellman, 197 F.3d 1178, 1181 (6th Cir. 1999)).

189. *Id.* at 667.

190. *Id.*

191. In both cases, an anticompetitive agreement by pharmaceutical manufacturers led to inflated prices for prescription drugs, which seriously harmed Tennessee purchasers. *Id.* at 622-25; FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 32-35 (D.D.C. 1999).

192. TENN. CODE ANN. § 47-25-101.

193. *See Cardizem*, 105 F. Supp. 2d at 667 (relying in part on the plain language of the TPA to conclude that the statute can be used to regulate anti-competitive conduct with more than incidental state effects).

194. *Id.*

while at the same time granting the victims of anticompetitive conduct an opportunity to obtain appropriate relief.

Overall, however, an analysis of case law interpreting Tennessee precedent reveals a great deal of uncertainty regarding the appropriate reach of the TPA. Much of this uncertainty stems from the ambiguity in the *Standard Oil* decision. By stressing legislative intent over literal meaning, the *Standard Oil* opinion limited the ability of future courts to construe the TPA flexibly in response to changing circumstances.[195] As a result, subsequent decisions—notably *Lynch*, *Dzik*, and *Mylan*—have utilized a "predominantly intrastate" requirement as the appropriate standard.[196] Unfortunately, a standard based on "predominance" is indefinite and insufficient; and given the continued expansion of federal Commerce Clause authority into the intrastate arena, such a standard is also increasingly irrelevant.[197] Perhaps recognizing the deficiencies of any standard based strictly upon "predominance," some courts have applied Tennessee's antitrust laws to conduct that "more than incidentally affects" intrastate commerce.[198] In the absence of legislative action, however, the precise reach of the TPA will remain uncertain until the Tennessee Supreme Court provides a more definite interpretation. More certain is the fact that the outdated interstate/intrastate paradigm has been abandoned, and that the proper judicial approach to applying Tennessee antitrust law to interstate commerce is not as clear cut as the *Mylan* decisions suggest.

V. GUIDANCE FROM OTHER JURISDICTIONS

Faced with the problem of conceptualizing intrastate commerce for antitrust purposes, courts in other jurisdictions have suggested more appealing approaches. On both the federal and state levels, courts have construed state antitrust laws to be applicable to interstate commerce in a variety of contexts. Most of these courts, like the Eastern District of Michigan in the *Cardizem* case, stress the consequences of anticompetitive conduct for in-state purchasers and consumers. When these in-state effects are significant enough, state antitrust laws should be applied, despite the interstate aspects of the underlying conduct.

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195. *See supra* notes 138-50 and accompanying text.
196. *See supra* notes 158-72 and accompanying text.
197. *See infra* notes 223-28 and accompanying text.
198. *See Cardizem*, 105 F. Supp. 2d at 667-68; *supra* notes 156, 160 and accompanying text.

A. Emergency One v. Waterous*: An Effects-Based Approach*

Prior to *Cardizem*, one of the more thorough discussions of the appropriate reach of state antitrust laws into the interstate arena appeared in *Emergency One, Inc. v. Waterous Co., Inc.*[199] In *Emergency One*, the District Court for the Eastern District of Wisconsin addressed the scope of Wisconsin's antitrust statute ("Chapter 133").[200] Much of the court's opinion involved a discussion of the standards that should be applied when determining whether antitrust plaintiffs present viable claims under Chapter 133 when the conduct complained of arises in interstate commerce.[201] Like the Eastern District of Michigan in *Cardizem* (and unlike the District of D.C. in *Mylan*), the *Emergency One* court rejected a standard based upon predominance.[202] Instead, the court adopted a standard based on the adverse in-state effects of anticompetitive conduct.[203]

The challenged conduct in *Emergency One* involved vertical and horizontal agreements among manufacturers of fire trucks and fire pumps.[204] According to the plaintiffs, these alleged conspiracies "choked the U.S. market for fire pumps," artificially inflated prices, and restricted competition, all in violation of Chapter 133.[205] As in *Mylan* and *Cardizem*, the defendants moved for dismissal, claiming that the conduct complained of was interstate in nature and thus "flatly beyond the reach of state antitrust statutes and subject only to federal law."[206] While the court ultimately ruled in favor of dismissal,[207] the analysis employed in the decision strongly supports an expanded interpretation of state antitrust laws.[208]

A major problem facing the court in *Emergency One*, similar to the problem facing the courts that have attempted to interpret and apply Tennessee law, was the absence of clear guidance from

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199. Emergency One, Inc. v. Waterous Co., Inc., 23 F. Supp. 2d 959 (E.D. Wisc. 1998).

200. *Id.* at 961-70.

201. *Id* at 967-70.

202. *Id.* at 967-68.

203. *Id.* at 969-70.

204. *Id.* at 960-61. "[M]id-ship mounted fire pumps" are one of the "key components" of the fire trucks manufactured by the parties. *Id.* at 960.

205. *See id.* at 961 (laying out the specific allegations in plaintiff's amended complaint).

206. *Id.* at 962.

207. *Id.* at 970-71. In granting dismissal, the court noted that the plaintiff's complaint concerned conduct "almost entirely interstate in nature." *Id.* at 970. To raise a cognizable claim, though, the plaintiff needed only to allege "any significant adverse effects on trade and economic competition with Wisconsin." *Id.* (emphasis added).

208. In support of its broad "adverse effects" standard, the court clarified that "plaintiff's allegations are not cognizable under Wisconsin antitrust law, not because they depict predominantly interstate transactions, but because they do not allege significant and adverse effects on economic competition in Wisconsin." *Id.* at 971.

the Wisconsin Supreme Court.[209] The lack of controlling precedent led the court to examine a line of cases discussing the appropriate scope of Chapter 133 and its predecessor legislation.[210] As in Tennessee, the earliest decision addressing the proper relationship between Wisconsin's antitrust statute and the federal antitrust laws, *Pulp Wood Co. v. Green Bay Paper*, appeared in the early twentieth century.[211] Significantly, the *Emergency One* court noted that this early decision, like *Standard Oil* in Tennessee, did not mandate mutually exclusive application of state and federal law in the antitrust context.[212] Unfortunately (and again, like *Standard Oil*) the *Pulp Wood* decision failed to articulate a definite standard.[213] As in Tennessee, the resulting ambiguity presented a problematic situation for Wisconsin courts charged with interpreting state antitrust law and its application to interstate commerce.

Two subsequent developments, however, one judicial and one legislative, helped to give the *Emergency One* court some direction.[214] First, in 1960 the Wisconsin Supreme Court issued a decision, *State v. Allied Chemical*, which rejected the defendants' argument that the state's antitrust law conflicted with federal law and unduly burdened interstate commerce.[215] In *Allied Chemical*, according to the court in *Emergency One*, the state supreme court

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209. *See id.* at 966-67 (noting that the state supreme court "has never spoken directly to the question" of proper application of Chapter 133). The court added, "in the absence of direct state precedent, I evaluate this matter as I believe the Wisconsin Supreme Court would if asked to do so." *Id.* at 967.

210. *Id.* at 964-66.

211. Pulp Wood Co. v. Green Bay Paper & Fiber Co., 147 N.W. 1058 (1914).

212. *See Emergency One*, 23 F. Supp. 2d at 964 (pointing out that the *Pulp Wood* decision "does not unequivocally bar the simultaneous application of state antitrust law, although such a stance would have been entirely in keeping with the prevailing federal constitutional law of the time").

213. *Id.* The *Emergency One* court noted that "subsequent cases have tended to cite *Pulp Wood* summarily for the proposition that Wisconsin antitrust law . . . applies 'to intrastate as distinguished from interstate transactions.' " *Id.* The court added, however, that "[w]hen state courts have paused to consider the application of Chapter 133 to facts clearly involving interstate commerce . . . the line is not so clearly drawn." *Id.*

214. *Id.* at 962-66.

215. State v. Allied Chem. & Dye Corp., 101 N.W.2d 133, 134 (1960). The *Allied Chemical* court had stated:

> The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as the result of an illegal combination or conspiracy. The people of Wisconsin are entitled to the advantages that flow from free competition in the purchase of [certain] products, and if the state is able to prove the allegations made in its complaint it is apparent that the acts of the defendant deny to them those advantages.

Id. at 134.

had assumed that "defendants' conspiratorial acts—both in and out of Wisconsin—may be subject to Chapter 133 under certain circumstances."[216] Second, in 1980 the Wisconsin legislature passed significant amendments to Chapter 133.[217] These amendments, which included an explicit provision creating a cause of action for indirect purchasers,[218] reflected a legislative assumption that Chapter 133 reached interstate conduct.[219] Together, the effects of the 1980 amendments and the Wisconsin Supreme Court's position in *Allied Chemical* led the *Emergency One* court to conclude that Wisconsin's antitrust law could be applied to interstate commerce.[220]

Having reached this conclusion, the court set out to establish an appropriate standard for determining more precisely the scope of Chapter 133.[221] Among the options the court analyzed were a "predominance" standard (similar to the standard utilized in *Lynch, Dzik,* and *Mylan*) and an "adverse effects" standard.[222] The *Emergency One* court's analysis of these potential standards is extremely instructive in that it illustrates the significant deficiencies of any approach based on "predominance"; at the same time, it highlights the positive attributes of a standard emphasizing adverse in-state effects.

In criticizing the predominance approach, the *Emergency One* court first observed, contrary to the defendants' arguments, that Wisconsin precedent did not establish that "predominance"

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216. *Emergency One*, 23 F. Supp. 2d at 966 (emphasis added).

217. *See id.* at 962-64 (discussing the details of the 1980 amendments and their impact on the scope of Chapter 133).

218. This provision represented an explicit rejection of the Supreme Court's decision in *Illinois Brick*, which limited recovery of damages under the federal antitrust laws to direct purchasers. *Id.* at 964. For a discussion of the *Illinois Brick* decision, see *supra* notes 47-51 and accompanying text.

219. *See id.* at 964 ("To the extent that the state indirect purchaser claim was meant to replace the lost federal cause of action . . . the 1980 amendments clearly assume that Chapter 133 may reach interstate commerce.").

220. *See id.* at 966 (concluding that "the Wisconsin Supreme Court has for some time interpreted the state antitrust statutes to reach interstate activities . . . and has rejected a mutually exclusive vision of state/federal antitrust enforcement").

221. *Id.* at 967.

222. *See id.* at 967-70 (discussing the benefits and drawbacks of the potential standards). The *Emergency One* court also analyzed a contacts-based standard grounded in legislative jurisdiction and choice of law doctrine. *See id.* at 968-69. The court refused to adopt such a contacts-based standard, however, cautioning that "[a] state's choice-of-law interest in the outcome of litigation may rest on a number of general considerations having nothing to do with antitrust law. Thus . . . a contacts-based standard may permit the application of state antitrust law in situations where trades or economic competition within the state have not been significantly injured." *Id.* at 969. Because the *Emergency One* court did not feel that a contacts-based standard would further the legislative objective behind Chapter 133, it did not believe that Wisconsin courts would adopt such a standard. *See id.*

was the appropriate standard.[223] Rather, the court noted, any requirement that alleged anticompetitive conduct be "predominantly intrastate" in character reflects a misunderstanding of the relationship between state and federal antitrust laws.[224] A standard focused on predominance, the court explained, implied a mutual exclusivity of remedies; but such exclusiveness, as noted previously, is contrary to the legislative intent behind both state and federal antitrust laws.[225] "[A] careful reading of Wisconsin cases," the court stated, "does not support the thesis that either state or federal antitrust law, but not both, may apply to a given antitrust action. And indeed, that is what a standard focused on predominance must imply. An action cannot be both predominantly interstate in nature and predominantly intrastate in nature; it must be one or the other."[226] The *Emergency One* court thus recognized that even anticompetitive conduct that is fairly described as "predominantly" interstate in nature can result in serious harm to intrastate commerce;[227] and since the prevention of such harm is a legitimate objective of state legislatures, state antitrust laws should remain available as potential remedies whether or not the underlying conduct is predominantly intrastate in nature.[228]

Having rejected a "predominance" approach, the *Emergency One* court indicated its preference for a standard that would "extend the jurisdictional scope of the Wisconsin antitrust law to unlawful activity which has significantly and adversely affected trade and economic competition within this state."[229] The court emphasized that a standard based on adverse effects was both faithful to the "clear legislative directive" behind Chapter 133[230] and consistent with state and federal precedent.[231] Therefore, the court predicted that Wisconsin state courts would follow an adverse effects standard if asked to consider the proper application of Chapter 133

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223. *Id.* at 967.

224. *Id.* at 967-68.

225. *Id.* (holding that "a standard which results in the mutually exclusive application of state and federal antitrust law is contrary to Congressional intent and Supreme Court Precedent"). *See also infra* Part II.A.

226. *See Emergency One*, 23 F. Supp. 2d at 967 (adding that "framing the issue as one of predominance . . . becomes a way of reintroducing federal preemption of state antitrust law—a result consistently rejected by the Supreme Court").

227. *Id.* at 968.

228. *Id.* ("[A] predominance standard does not advance . . . [a state's] legitimate interest in providing a remedy for citizens injured by monopolistic interstate activity.").

229. *Id.* at 969.

230. *See id.* at 969-70 (citing the legislative objectives laid out in Chapter 133).

231. *Id.*

to interstate conduct.[232] The court also recognized that an effects-based standard comports with the Supreme Court's interpretation of the appropriate reach the federal antitrust laws in relation to foreign or extraterritorial transactions.[233] Noting that the federal antitrust laws have been applied to extraterritorial conduct as long as there are significant anticompetitive effects within the U.S.,[234] the *Emergency One* court concluded that "[t]here is no reason that the effects-based logic of these federal cases should not then govern the question of which interstate transactions constitute unlawful activity under Chapter 133."[235] Overall, the *Emergency One* "significant adverse effects" standard represents an improved approach to the problem of defining the scope of state antitrust laws. By emphasizing adverse in-state effects, the court's reasoning constitutes an excellent example of judicial willingness to preserve the viability of state laws as a means of mitigating the harmful effects of anticompetitive conduct. "Ultimately," as the *Emergency One* court held, "an adverse effects standard is the only standard that remains faithful to the purpose of state antitrust laws—to protect and encourage competition in this state, by paralyzing interstate activities that adversely affect it."[236]

B. In Re Brand Name Prescription Drugs Antitrust Litigation: *Posner's Approach*

Another example of a more progressive decision on the federal level is Judge Posner's opinion in *In re Brand Name Prescription Drugs Antitrust Litigation*.[237] This complex case involved multiple claims of a price-fixing scheme by drug manufacturers.[238] The plaintiffs claimed this conspiracy violated Alabama antitrust provisions,[239] but the district court agreed with the defendants that the case could be removed to federal court.[240] In reversing the lower

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232. *Id.*

233. *Id.* at 970.

234. *Id.*

235. *Id.*

236. *Id.*

237. *In re* Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599 (7th Cir. 1997).

238. For a summary of the facts behind the alleged conspiracy and the case's procedural history, see *id.* at 603-07.

239. ALA. CODE § 6-5-60(a) (1975).

240. *See Brand Name Prescription Drugs*, 123 F.3d at 607. The District Court based its removal decision on both diversity jurisdiction and the "artful pleading" doctrine. *Id.* Under the artful pleading doctrine, a plaintiff cannot characterize a claim as falling under state law if federal law "has so far occupied a field of disputes as to extinguish any basis in state law for seeking a resolution of the dispute . . . ." *Id.* at 611; *see also* Caterpillar, Inc. v. Williams, 482 U.S. 386,

court's removal decision, Judge Posner confirmed that Congress did not intend to preempt state antitrust laws.[241] He stressed that "states are free to enact their own antitrust laws, reaching the same conduct as the federal laws, except insofar as the states' power to regulate economic activities in other states in limited by . . . the federal Constitution."[242] Given the evolution of constitutional law over the past century, the recognition of the considerable overlap in the state and federal antitrust schemes is unremarkable. Posner's defense of the plaintiffs' state antitrust claims, however, is more enlightening.

Despite precedent suggesting that Alabama's antitrust laws applied only to intrastate commerce,[243] and although it was doubtful that any of the alleged price-fixed sales occurred intrastate,[244] Posner argued that the plaintiffs nonetheless made legitimate state law claims for relief.[245] In explanation, Posner offered the following analysis of the defendant's claim that recovery was unavailable to the plaintiffs under state antitrust law:

> The cases on which defendants rely . . . date from a period in which, interstate commerce being narrowly defined, and federal power to regulate such commerce being deemed exclusive, a state statute limited to intrastate commerce . . . could not have a greater scope no matter how much the state wanted it to. The cases thus were not interpreting the statute; they were interpreting the Constitution as placing upper and lower bounds on the reach of the statute, and the Constitution has since been reinterpreted. If the statute is limited today as it once was to commerce that is not within the regulatory power of Congress under the commerce clause, it is a dead letter because there are virtually no sales, in Alabama or anywhere else in the United States, that are intrastate in *that* sense.[246]

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393 (1987); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987). In other words, a plaintiff may not disguise federal claims as state law claims in order to obtain more favorable relief. Significantly, though, the artful pleading applies only when federal law is the sole ground for obtaining relief. *See Brand Name Prescription Drugs*, 123 F.3d at 611. The issue before Judge Posner thus involved the appropriate application of the artful pleading doctrine to plaintiffs' state antitrust claims. *See id.* ("The problem comes in setting limits to the doctrine."). Concluding that Alabama state law afforded relief independent of the remedies available under federal law, Posner held that the artful pleading doctrine did not require removal. *Id.* at 611-13.

241. *Brand Name Prescription Drugs*, 123 F.3d at 611.

242. *Id.*

243. *See id.* at 612-13 (citing cases relied upon by defendants).

244. *See id.* at 612 (observing that it was "doubtful that any of the price-fixed sales attacked in the suit took place in intrastate rather than interstate commerce").

245. In *Abbott Laboratories v. Durrett*, 746 So. 2d 316, 337-39 (Ala. 1999), the Alabama Supreme Court subsequently ruled that Alabama's antitrust law does not provide a cause of action for damages resulting from an interstate conspiracy to control the price of prescription drugs. While the *Abbott* decision may have resolved, for the time being, the issue of the proper scope of Alabama's antitrust law, Judge Posner's analysis remains applicable to state antitrust laws in general.

246. *Brand Name Prescription Drugs*, 123 F.3d at 612-13 (emphasis in original).

Of course, the reach of state laws is not unlimited. Accordingly, Judge Posner verified that states cannot regulate sales or commercial transactions taking place entirely beyond state borders.[247] Posner nevertheless suggested that when a "nontrivial" number of transactions appreciably impact in-state interests, state regulation is entirely appropriate.[248] The significance of Posner's opinion thus lies in the clear implication that if state antitrust laws are to have any meaningful effect, their reach should extend at least to anticompetitive conduct that has significant in-state effects. From this perspective, judicial emphasis upon the precise timing and location of anticompetitive agreements appears misguided.

C. Local Wisdom: State Court Opinions

Expanded application of state antitrust laws finds support in several state court decisions. Like the *Brand Name Prescription Drug* opinion, these decisions abandon outdated notions of mutually exclusive state and federal antitrust jurisdiction. Echoing Judge Posner's concern with preserving the efficacy of state law, they also suggest that the local consequences of anticompetitive agreements deserve considerable attention.

1. California

California's leadership in this area is exemplified in *R.E. Spriggs Co. v. Adolph Coors Co.*[249] In *Spriggs*, the California Court of Appeals reversed a lower court's dismissal of an action brought under California's antitrust law, the Cartwright Act.[250] Notable for its treatment of the jurisdictional and preemption issues arising under principles of federal supremacy,[251] the *Spriggs* decision makes an important contribution through its emphasis upon the overlapping nature of state and federal antitrust laws.[252] Recognizing that the goals of the two antitrust schemes are mutually re-

247. *Id.* at 613.

248. *See id.* (arguing that plaintiffs' suit survives scrutiny under the artful pleading doctrine because it challenges sales to in-state pharmacies).

249. R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653 (Cal. Ct. App. 1974).

250. *Id.* at 666. For the relevant provisions of the Cartwright Act, see CAL. BUS. & PROF. CODE §§ 16720, 16726, 16750(a) (West 1997).

251. *See R.E. Spriggs*, 37 Cal. App. 3d at 657-60 (considering and rejecting respondent's claims of field and conflict preemption).

252. *Id.*

inforcing rather than mutually exclusive,[253] the court indicated that standards governing the proper reach of state antitrust laws into the federal sphere may legitimately vary from the jurisdictional limitations applied in other areas of the law.[254] From this perspective, state antitrust laws—because they effectively protect interstate commerce as an inevitable consequence of the effort to preserve and promote competition within state borders—should perhaps play an even greater role within the federal system.[255] As the *Spriggs* court concluded, "where the effect of the application of [state antitrust laws] upon interstate commerce is to facilitate competition and not to place a restraint upon it, it is one which conforms with like policies of the federal government, and the state courts have jurisdiction over the subject matter of the action."[256]

In *St. Joe Paper Co. v. Superior Court*, the California courts again addressed the issue of proper application of the Cartwright Act.[257] The case involved allegations of a price-fixing conspiracy among out-of-state paper companies.[258] The court first determined whether the business intentionally conducted by the defendants in California satisfied the "minimum contacts" and "substantial justice" jurisdictional tests established under federal precedent.[259] Here the court turned for guidance to an earlier federal decision holding that "if a person engages in an out-of-state conspiracy *that is designed to and affects the prices charged in the forum state*, the

253. *See id.* at 662 (describing the case as "a situation in which both the state and federal governments have a stake in the outcome"); *see also* Younger v. Jensen, 605 P.2d 813, 818 (Cal. 1980) (observing the considerable overlap between the coverage of the Sherman Act and that of the Cartwright Act).

254. *See R.E. Spriggs*, 37 Cal. App. 3d at 661 n.10 ("Regulation of business practices through the antitrust laws . . . may justifiably reach further than some other types of regulation because the antitrust laws are concerned directly with aiding the flow of commerce.").

255. *See id.* at 660 n.9 (proposing that "concurrent regulation is preferable [in order] to lessen the opportunity for antitrust violators to escape in a failure between state and federal authorities to exert a power of prosecution"). The court further noted that "elimination of this twilight zone of nonenforcement was a long sought goal of both state and federal authorities." *Id.* Judge Hogan's dismissal in *Mylan* may constitute an apt example of a decision falling squarely within this "twilight zone of non-enforcement." *See also* Commonwealth v. McHugh, 93 N.E.2d 751, 762 (Mass. 1950) (warning presciently that a state should be "thoroughly convinced" before abandoning jurisdiction in areas traditionally subject to state regulation, "lest it discover later that it has retreated where the Federal government will not advance and has therefore been derelict in its duty").

256. *R.E. Spriggs*, 37 Cal. App. 3d at 666.

257. St. Joe Paper Co. v. Superior Ct., 120 Cal. App. 3d 991 (Cal. Ct. App. 1981).

258. *Id.* at 995.

259. *See id.* at 995-96 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945)); *see also supra* note 39 and accompanying text. The *St. Joe Paper* opinion thus centered primarily upon the appropriate reach of California's long-arm statute as applied to out-of-state conspirators.

forum state has jurisdiction of the conspirators."[260] Accordingly, because the defendants had availed themselves of the advantages of doing business in California, and since their alleged price-fixing conspiracy allowed them to reap extraordinary windfall profits "at the expense of California consumers," they were subject to the jurisdiction of state laws, including the Cartwright Act.[261] Again, the court stressed the importance of the *consequences* of illegal anticompetitive conduct (to in-state consumers in the form of higher prices and to the out-of-state conspirators in the form of foreseeable economic benefit) rather than the factual circumstances (e.g., timing, location, etc.) surrounding consummation of the challenged agreement.

In *Younger v. Jensen*, the California Supreme Court considered the scope of the state attorney general's authority to investigate alleged violations of the Cartwright Act.[262] Specifically, the case concerned the Attorney General's ability to conduct investigations into activity by defendants that affected the California market for natural gas.[263] Because this natural gas originated in Alaska, the attorney general's investigation involved both interstate and intrastate aspects.[264] Rejecting defendants' claims that various federal acts precluded investigation by state authorities,[265] the court emphasized the overlapping nature of the state and federal antitrust schemes.[266] Rather than engaging in jurisdictional power struggles, the court implied that state and federal authorities should cooperate in order to combat anticompetitive conduct.[267] State laws such as the Cartwright Act comprise important tools in this effort, and nothing in the Constitution or the federal antitrust statutes "prevents those state laws from reaching transactions that have interstate aspects but *significantly affect state interests*."[268]

260. *St. Joe Paper*, 120 Cal. App. 3d at 997 (citing Maricopa County v. Am. Petrofina, Inc., 322 F. Supp. 467 (N.D. Cal. 1971)).

261. *Id.* at 999-1000.

262. Younger v. Jensen, 605 P.2d 813 (Cal. 1980).

263. *Id.* at 816-17.

264. *Id.* at 818.

265. *See id.* at 820 (rejecting defendants' Supremacy Clause arguments and stating that "[a] federal regulatory act does not preempt harmonious state regulation").

266. *Id.* at 818.

267. *Id.* at 818-19.

268. *Id.* at 818 (emphasis added).

2. Other States

A Missouri court confirmed that in-state consequences are of primary concern in *C. Bennett Building Supplies, Inc. v. Jenn Air Corporation.*[269] Here, the plaintiff sought $1.8 million in damages under Missouri's antitrust law;[270] but the trial court dismissed, agreeing with defendants that the plaintiff's claim was not valid under state law since the challenged conduct took place in interstate commerce.[271] The appeals court reversed, applying the balancing test outlined in *Pike v. Bruce Church*[272] and concluding that the law's local benefit outweighed any burden on interstate commerce.[273] Summarizing the authority supporting its decision, the court announced that even when interstate commerce is affected, "antitrust violations may also be prohibited by state antitrust law provided some state trade or commerce is affected and personal jurisdiction may be had."[274] The *Jenn Air* analysis would therefore seemingly support application of state antitrust laws to any transaction with a recognizable in-state impact.[275] Absent a direct conflict with federal law or a demonstrable impediment to interstate competition, this proactive standard represents an effective means of affording antitrust victims an adequate remedy.

In a decision preceding *Jenn Air* by nearly a quarter century, the Washington Supreme Court in *State v. Sterling Theatres* reached a similar conclusion regarding the extent to which state antitrust laws may regulate interstate commercial conduct.[276] The court considered a suit challenging state efforts to enforce recently enacted antitrust legislation against four groups of motion picture exhibitors.[277] The court reversed the trial judge's dismissal, rejecting defendant's claims of Sherman Act preemption.[278] In doing so, the *Sterling* court emphasized "the existence of [a] predominantly

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269. C. Bennett Bldg. Supplies, Inc. v. Jenn Air Corp., 759 S.W.2d 883 (Mo. Ct. App. 1988).

270. *Id.* at 886.

271. *Id.* at 886.

272. *See supra* notes 110-12 and accompanying text.

273. *Jenn Air*, 759 S.W.2d at 889-91.

274. *Id.* at 890 (emphasis added).

275. The court recognized two potential limitations on this seemingly broad standard. Any state regulation is inapplicable, the court explained, if it "substantially impedes" interstate commerce, or if the subject of the regulation is an area demanding "national uniformity." *Id.* at 889.

276. State v. Sterling Theatres Co., 394 P.2d 226 (Wash. 1964).

277. *Id.* at 227. The state's complaint against the defendants included claims of monopolization of feature film runs in the Seattle area as well as illegal market division of such films on a pre-arranged basis. *Id.*

278. *Id.* at 228-29.

local interest" and concluded that as justification for enforcement, these interests outweighed any apparent burden on interstate commerce.[279]

Again, in contrast to the anachronistic reasoning reflected in the *Mylan* decision, the *Sterling* court refused to recognize a stark distinction between interstate and intrastate conduct. Similarly, courts in Nebraska, New Jersey, and Massachusetts have jettisoned a strict state/federal dichotomy in favor of the balancing approach employed in the cases above.[280] In aggregate, the decisions of these state courts support an expanded application of state antitrust laws into the interstate arena.

VI. TOWARD A MORE EFFECTIVE STANDARD

Courts that have maintained a strict interpretation of state antitrust laws have relied heavily upon legislative intent and traditional notions of state authority within the federal scheme.[281] Unfortunately, their approach is largely based upon standards and principles announced in cases nearly a century old and of questionable viability today.[282] As an example, the Tennessee decisions discussed in Part IV relied heavily upon the analysis employed by the Tennessee Supreme Court in its 1907 decision in *Standard Oil*.[283] Similarly, as noted in *Emergency One*, Wisconsin courts frequently turned to the approach taken in the Wisconsin Supreme Court's 1914 *Pulp Wood* opinion.[284] Adhering to the precedent established in such early decisions, some courts have refused to extend the ap-

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279. *Id.* at 228.

280. *See* Health Consultants, Inc. v. Precision Instruments, Inc., 527 N.W. 2d 596, 607 (Neb. 1995) (applying *Pike* balancing test and concluding that the "impact upon local residents" of the challenged conduct supported application of Nebraska's antitrust statute); State v. Lawn King, Inc., 417 A.2d 1025, 1032 (N.J. 1980) (holding that New Jersey's antitrust law was not preempted by federal law); Commonwealth v. McHugh, 93 N.E.2d 751, 761-62 (Mass. 1950) (emphasizing the continued viability of state antitrust laws after the Sherman Act).

281. *See, e.g.*, Kosuga v. Kelly, 257 F.2d 48, 55 (7th Cir. 1958); Abbott Labs. v. Durrett, 746 So. 2d 316, 337-39 (Ala. 1999); Young v. Seaway Pipeline, Inc., 576 P.2d 1148, 1151 (Okla. 1977); Standard Oil Co. v. State, 100 S.W. 705, 709-12 (Tenn. 1907).

282. *See Abbott*, 746 So. 2d at 337-39 (holding that "the field of operation of Alabama's antitrust statutes . . . is no greater today than it was when the laws were first enacted"). The *Abbott* court held that Alabama's antitrust law did not provide a cause of action for damages resulting from an agreement to control the price of goods shipped in interstate commerce. *Id.* In doing so, the court relied heavily upon the legislative intent behind Alabama's earliest antitrust statutes, which were "first enacted at a time in this country's history when the United States Supreme Court maintained a clear dichotomy with respect to a state's power to regulate commerce." *Id.* at 335.

283. Standard Oil v. State, 100 S.W. 705, 709-12 (Tenn. 1907); *see also supra* Parts IV.B-C.

284. *See* Emergency One, Inc. v. Waterous Co., 23 F. Supp. 2d 959, 965 (E.D. Wisc. 1998); *see also supra* Part IV.A.

plication of state antitrust laws into the realm of interstate commerce.[285] Instead, they have persisted in an attempt to be faithful to the presumed legislative intent behind the earliest antitrust statutes.[286] Because state legislatures at the beginning of the twentieth century were aware of the recently enacted Sherman Act, and since they were presumably familiar with the limited reach of state authority under the Commerce Clause, they could not have intended state laws to apply to interstate conduct.[287] Accordingly, courts advocating a traditional interpretation of state antitrust laws have generally confined their reach to transactions or agreements either "solely" or "predominantly" intrastate in character.[288]

Proper application of state antitrust laws, however, may ultimately depend little upon whether the challenged conduct is "wholly," "predominantly," or "substantially" either intrastate or interstate in nature.[289] As the *Emergency One* opinion illustrates, standards such as these are inherently problematic because they result in mutually exclusive application of state and federal law.[290] Such exclusivity is inappropriate given the purpose and objectives of antitrust laws.[291] As emphasized by the California courts in *Spriggs*, state and federal antitrust laws are designed to achieve similar goals; primary among them is the protection of a competitive marketplace.[292] Thus, there is little merit in rendering state antitrust laws impotent in cases where the conduct or agreement allegedly violating the state law is "predominantly" or "substantially" interstate in character.

Rather, as cases such as *Cardizem* CD, *Emergency One*, and *Brand Name Prescription Drugs* suggest, the *effect* of anticompetitive conduct upon local interests deserves primary consideration. An extension of the reasoning in these cases should form the basis

285. *Kosuga*, 257 F.2d at 55; FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25 (D.D.C. 1999), *reconsidered in part by* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1 (D.D.C. 1999); *Abbott*, 746 So. 2d at 337-39; *Young*, 576 P.2d at 1151.

286. *Abbott*, 746 So. 2d at 337-39; *Standard Oil*, 100 S.W. at 709-12.

287. *Standard Oil*, 100 S.W. at 710.

288. *See Mylan*, 62 F. Supp. 2d at 42 ("solely"); *Mylan*, 99 F. Supp. 2d at 9 ("predominantly"); *Abbott*, 746 So. 2d at 337-39 ("within the geographic boundaries of the state"); *Lynch*, 640 S.W.2d at 840 ("predominantly"); Dzik & Dzik, P.C. v. Vision Serv. Plan, 1989 WL 3082, *2 (Tenn. Ct. App. Jan 20, 1989) ("predominantly").

289. As seen in Tennessee cases discussed above, courts have continued to use such terms when framing standards for the application of state antitrust laws, even though these terms appear nowhere in the text of the statutes themselves.

290. Emergency One, Inc. v. Waterous Co., 23 F. Supp. 2d 959, 967-68 (E.D. Wisc. 1998).

291. *Id.*

292. R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 660 (Cal. Ct. App. 1974).

for future determinations of whether state laws can be applied to alleged antitrust violations. At the outset, courts considering state antitrust claims should determine whether in-state interests (e.g., consumers, direct or indirect purchasers, or state agencies) have, in the aggregate, suffered significant, discernible economic or competitive harm due to violations of state antitrust law.[293] If the aggregate local effect of the challenged conduct is discernibly "nontrivial," then the state provision should apply.[294] If the state law protects competition and does not favor in-state interests over those of out-of-state competitors, the law should stand, regardless of the extent to which interstate commerce is involved or of the location or timing of the challenged conduct.[295] As long as the defendant or defendants have directed their conduct toward in-state purchasers or consumers, and if they have established minimum contacts sufficient to satisfy the forum state's long-arm statute, application of state antitrust laws appears entirely appropriate.

Alternatively, states should be free to regulate any intrastate aspects of harmful, anticompetitive behavior. In other words, whenever anticompetitive conduct violates a state antitrust law on its face, the law should apply to any aspects of that conduct that have adverse in-state effects. Again, the emphasis here is upon affording an adequate remedy to in-state victims of unlawful conspiracies, combinations or agreements.[296] Under an "intrastate aspects" standard, however, the fact that the challenged conduct is "primarily" or "significantly" interstate in nature becomes irrelevant. *Any* negative in-state consequences would be enough to justify application of state antitrust laws, and the details of the un-

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293. When making this determination, courts should of course take into account the legislative intent and policy interests behind the statutes themselves. In doing so, however, courts cannot ignore the social, economic, and constitutional realities that constantly demand judicial reassessment of legislative intent.

294. *See supra* text accompanying note 238.

295. In spite of the *Mylan* and *Standard Oil* decisions, the fact that the challenged conduct occurred beyond the geographic borders of the state, or before overpriced products crossed state lines, should not be a prevailing concern. *But see* Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (stating that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State"). The *Edgar* decision, the product of a sharply divided Court, is distinguishable from cases such as *CTS* and *Exxon* since it apparently rested on a finding that the Illinois statute in question was at bottom a protectionist measure designed to primarily to serve in-state interests. *See id.* at 642 (characterizing the Illinois statute as "a direct restraint on interstate commerce" having "a sweeping extraterritorial effect").

296. The desire to provide an adequate remedy to persons or business in-state should not be characterized as protectionism. As long as state statutes regulate even-handedly, with no discrimination against interstate commerce or preference to in-state competitors, they should be upheld against any claims of protectionist intent.

derlying conduct would no longer be determinative.[297] Given the general reluctance on the part of courts to hold state antitrust laws preempted under notions of federal supremacy, an "intrastate aspects" approach to state regulation should create few, if any, constitutional problems.[298]

To the extent that challenges to state antitrust laws arise under the negative Commerce Clause, the most relevant inquiry becomes whether the perceived impact of the regulation upon interstate commerce is procompetitive.[299] This inquiry essentially requires application of the *Pike* balancing test. The reviewing court must therefore weigh the burden on interstate commerce against the strength of the local interests served by the statute.[300] Because state antitrust statutes are designed to protect and enhance free and fair commercial competition, these "local interests" will generally be procompetitive in nature.[301] Therefore, under any type of

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297. This approach may in fact represent a natural outgrowth of *Cardizem*, *Emergency One*, *Brand Name Drugs*, and some of the more progressive state court opinions discussed above. As an example of the potential benefits of this standard, had it been employed in *Mylan*, the court might have interpreted Tennessee law as allowing recovery for all sales in Tennessee of the artificially overpriced lorazepam and clorazepate tablets.

298. One of the more persuasive counter-arguments to expanded application of state law focuses on the benefits of predictability and national uniformity in the law. If individual states are free to regulate the conduct of the same defendant under various standards, these objectives may in fact be frustrated. The Supreme Court's stance against preemption, however, is the obvious rebuttal to these concerns. If either Congress or the Supreme Court viewed national uniformity of antitrust laws as essential, federal preemption would be the rule. Since it is not, we can assume a preference for independent state regulation, despite any potential effects on predictability or uniformity. The same can be said in response to arguments that enhanced state regulation may in some cases result in double liability for antitrust violators.

299. Judicial focus on the pro- or anti-competitive nature of alleged statutory burdens on commerce would be entirely consistent with the current standards governing antitrust challenges to private restraints on commerce. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780 (1999) (confirming that the "essential inquiry" in antitrust cases is "whether or not the challenged restraint enhances competition").

300. As a potential model analysis, the balancing test employed in *Jenn Air*, with its emphasis on "local consequences," represents a sensible approach that granted an in-state plaintiff the opportunity to recover the damages lost due to defendants' interference with fair trade. C. Bennett Bldg. Supplies, Inc. v. Jenn Air Corp., 759 S.W.2d 883, 890 (Mo. Ct. App. 1988).

301. As some commentators have noted, the nature of free competition is such that it is difficult, and perhaps illogical, to characterize procompetitive antitrust statutes as serving only "local" interests. *See* Hovenkamp, *supra* note 6, at 388 ("Theoretically, every price-fixing conspiracy in the United States injures everyone in the United States."). Perhaps for this reason, some observers have questioned whether, absent a clear discriminatory or protectionist intent, the negative Commerce Clause should impose any scrutiny at all on state regulation of interstate commerce. GUNTHER & SULLIVAN, *supra* note 108, at 322. For a Supreme Court opinion that may indicate the Court's reluctance to apply the *Pike* balancing test in negative Commerce Clause cases in general, see CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 87 (1987) ("The principle objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce.").

balancing test, the "burden" imposed on interstate commerce by state antitrust laws will invariably be lower than in the case of most other types of statutes.[302] In this regard, courts should perhaps grant state antitrust laws special consideration when assessing their propriety under the negative Commerce Clause.

VII. CONCLUSION

Total restrictions on the authority of states to enforce their antitrust laws in the interstate arena are misguided in a modern context. A full and fair consideration of the legislative intent behind the federal antitrust laws reveals the insistence of the drafters that these provisions were not designed to preempt analogous state laws protecting fair trade and competition. The advantages of complementary and overlapping state and federal antitrust laws within our unique system of government have since been confirmed in numerous cases, including several by the Supreme Court. These cases establish that preemption analysis under either the Supremacy clause or the negative Commerce Clause, at least as traditionally applied, may be inappropriate in modern antitrust disputes.

Decisions such as *Cardizem*, *Emergency One*, *Brand Name Drugs*, *Spriggs*, and *Jenn Air* indicate the desirability of applying state antitrust laws as broadly as permissible under the Constitution. In focusing on the local, in-state consequences of illegal anticompetitive conduct, these opinions address the real issues involved in antitrust disputes and ultimately serve the true objectives lying at the core of state antitrust statutes. They also avoid the pitfalls associated with blind adherence to a rigid, anachronistic interstate/intrastate dichotomy, which, appropriate at the turn of the last century, is inconsistent with the social values and legal and economic realities of a new millennium.

The problems and issues addressed in this Note could perhaps be resolved easily through legislative amendment of state antitrust statutes, which would clarify both their purpose and the extent of their reach. Indeed, to the extent that judicial interpretations of state law lag behind the times, it may in fact be the duty of the legislatures to forge appropriate statutory responses. Given the broad language employed in many of these provisions, however, state lawmakers might understandably remain content with the laws as they are currently written. Establishing an effective stan-

302. Outside the realm of antitrust, most state regulations involve exercise of the police power of the states in areas that are more fairly described as "primarily local in nature."

dard for interpretation and application of state antitrust laws is therefore largely, perhaps primarily, a judicial responsibility. Judges have frequently been called upon to mold existing law to address contemporary needs, and they have done so. In the case of state antitrust laws, the judiciary should take a similarly proactive stance to afford in-state antitrust victims an appropriate remedy.

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