PERSPECTIVES ON STATE AND FEDERAL ANTITRUST ENFORCEMENT

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ABSTRACT

This Article reviews federal and (especially) state antitrust enforcement in light of the Microsoft *proceeding. Criticism of state enforcement based on that case is misplaced. The Article identifies three consensus comparative advantages of state enforcers: familiarity with local and regional markets, closeness to state and local institutions, and ability and experience in compensating individuals. A review of state enforcement activities finds that the vast majority are consistent with one or more of these advantages. The Article also identifies hallmarks of generally accepted federal civil non-merger enforcement: both antitrust agencies participate actively, using a variety of tools, while showing support for mainstream, economics-based antitrust and an interest in addressing important questions, litigating, and addressing legal issues arising in private as well as public cases. These factors are considered through review of the agencies' role in addressing the appropriate application of the per se rule, the rule of reason, and mid-level review. The Article ends with modest recommendations. Enforcers should continue to use their array of powers, they should address systemic issues in the antitrust system, and they should apologize less. State enforcers, in particular, need to do a better job of helping observers understand what they actually do—which is something on which state enforcers are working, and something to which this Article may contribute.*

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INTRODUCTION

State and federal antitrust enforcement are perceived differently. State antitrust enforcement is viewed as the new kid on the block, is less understood, and is more controversial.[1] In contrast, federal antitrust enforcement has achieved widespread acceptance and support.[2]

Overly influenced by the aberrant *Microsoft* case,[3] commentators have misconstrued the roles that state and federal antitrust enforcement officers play.[4] This Article seeks to correct these misunderstandings. Part I identifies three consensus comparative advantages of state enforcers: familiarity with local and regional markets, closeness to state and local institutions, and ability and experience in compensating individuals. A review of state antitrust enforcement shows that the vast majority of activities (unlike *Microsoft*) are consistent with one or more of these comparative advantages.

Part II then examines federal antitrust enforcement practices. Federal antitrust enforcement enjoys such sweeping comparative advantages—especially in criminal and merger enforcement—that there is little point in cataloguing them. Instead, this Article identifies hallmarks of generally accepted, civil, non-merger enforcement: (1) both the Justice Department's Antitrust Division (Division) and the Federal Trade Commission (FTC) participate actively, (2) using a variety of tools, while (3) showing support for mainstream,

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1. *See, e.g.*, RICHARD A. POSNER, ANTITRUST LAW 281–82 (2d ed. 2001) [hereinafter POSNER, ANTITRUST LAW] (calling for states to be stripped of most of their authority to file antitrust cases); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001) [hereinafter Posner, *New Economy*] (same).

2. *See, e.g.*, *The State of Federal Antitrust Enforcement—2001: Report of the Task Force on the Federal Antitrust Agencies*, 2001 A.B.A. SEC. ANTITRUST L. 10, 14–19 [hereinafter *ABA Antitrust Report*] (calling for increased resources for federal agencies, and noting that "there is broad consensus today on the major outlines of appropriate antitrust policies"), *available at* http://www.abanet.org/antitrust/antitrustenforcement.pdf. *But cf.* Holman W. Jenkins, Jr., *FTC Screams for Antitrust*, WALL ST. J., Mar. 12, 2003, at A19 (mocking FTC merger investigation and claiming that "the problem with the FTC can be stated . . . simply: [i]t exists").

3. New York v. Microsoft Corp., 224 F. Supp. 2d 76 (D.D.C. 2002) (modifying a monopolization settlement approved over objections of non-settling states). *See infra* notes 55–65 and accompanying text.

4. *See supra* note 1.

economics-based antitrust and an interest in addressing important questions, (4) litigating, (5) and addressing legal issues arising in private as well as public cases. As an illustration of how these factors work, the Article reviews the agencies' role in addressing the appropriate application of the per se rule, the rule of reason, and mid-level review. The agencies' attempt at addressing these issues is a singularly challenging enterprise yet one where the agencies, in spite of their failure to achieve ultimate resolution, are nevertheless seen as playing responsible roles.

The Article ends with modest recommendations. Enforcers should continue to use their array of powers, they should address systemic issues in the antitrust system, and they should apologize less. State enforcers, in particular, need to do a better job of helping observers understand what they actually do—which is something on which state enforcers are working, and something to which this Article may contribute.

I. STATE ATTORNEYS GENERAL

The *Microsoft* case has been a mixed blessing for the states.[5] Thanks to that case, everyone knows that the states are major players on the antitrust scene. But that case has also brought the role of state enforcers to the attention of persons—most notably Judge Posner[6]—who are displeased with it. In fact, however, critics are attacking something of a shadow. If one were to list generally accepted comparative advantages enjoyed by state enforcers, one would find that the bulk of state enforcement fits comfortably within the bounds of those advantages.

A. Overview of State Antitrust Enforcement

Although antitrust law as a subject refers principally to federal statutes—the Sherman Act[7] and the Clayton Act,[8] supplemented by the Federal Trade Commission Act[9]—state antitrust enforcement predates the oldest of those acts.[10] Indeed, Senator Sherman declared

5. The *Microsoft* case is discussed *infra* at notes 55–65 and accompanying text.

6. *See supra* note 1.

7. 15 U.S.C. §§ 1–7 (2000).

8. 15 U.S.C. §§ 12–27 (2000), 29 U.S.C. §§ 52–53 (2000).

9. 15 U.S.C. §§ 41–77 (2000).

10. David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 141 (1990). State antitrust enforcement is well chronicled in A.B.A. ANTITRUST SECTION, MONOGRAPH NO. 15,

that a purpose of the act that bears his name was "to supplement the enforcement of" state laws.[11] In the early years, state enforcement rivaled federal enforcement in terms of numbers of cases and monetary recoveries.[12]

After a half-century of relative inactivity, state antitrust enforcement was revived in 1976. That was the year that the Crime Control Act[13] sent antitrust enforcement seed money to the states[14] and the Hart-Scott-Rodino Act[15] directed the Justice Department (DOJ) to share investigative information with state attorneys general and authorized state attorneys general to enforce the Sherman Act with *parens patriae* treble damages actions on behalf of state residents.[16] A score of states adopted modernized antitrust statutes throughout the 1970s, and many states used their seed money to establish antitrust divisions or units.[17] When, during the Reagan years, states perceived that the federal government was slacking in antitrust enforcement, the states became a force with which to be reckoned.[18]

ANTITRUST FEDERALISM: THE ROLE OF STATE LAW (1988); 1 A.B.A. SECTION OF ANTITRUST, ANTITRUST LAW DEVELOPMENTS 803–34 (5th ed. 2002) [hereinafter ANTITRUST LAW DEVELOPMENTS]; A.B.A. SECTION OF ANTITRUST LAW, STATE ANTITRUST PRACTICE AND STATUTES (2d ed. 1999); ANTITRUST LAW IN NEW YORK STATE (Robert L. Hubbard & Pamela Jones eds., 2d ed. 2002).

11. 21 CONG. REC. 2457 (1890).

12. *See* James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. PA. L. REV. 495, 500–02 (1987) (describing that, between 1890 and 1902, twelve states brought twenty-eight antitrust actions while the Department of Justice (DOJ) brought nineteen antitrust suits, and that Texas collected over $1.6 million in fines in one pre-1919 case while total fines in all federal antitrust actions prior to 1919 were less than $800,000).

13. Crime Control Act of 1976, Pub. L. No. 94-503, 90 Stat. 2407 (codified as amended at 42 U.S.C. §§ 3701–96c (2000)).

14. Pub. L. No. 94-503, § 116, 90 Stat. 2415 (1976) (omitted by general revision, 1969).

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

16. 15 U.S.C. §§ 15c, 15f (2000); *see* Susan Beth Farmer, *More Lessons from the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 376–91 (1999) (describing the history and implementation of statutory *parens patriae* authority).

17. *See* Ralph H. Folsom, *State Antitrust Remedies: Lessons from the Laboratories*, 35 ANTITRUST BULL. 941, 950, 955 (1990) (describing the role of federal funding and passage of modern state antitrust statutes).

18. *See* Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413, 421 (2002) ("In reaction to federal retrenchment, the states became much more active in enforcing state and federal antitrust laws . . . ."); Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 GEO. MASON L. REV. (forthcoming 2003) ("This [state antitrust enforcement] expansion continued during the Reagan Era in response to what many perceived

Today, every state (and the District of Columbia) has some kind of antitrust law,[19] although the courts of many states rely on federal antitrust jurisprudence to construe most of these provisions. State statutes usually allow the state attorney general to file civil or criminal suits and permit private suits for damages and injunctions.[20] State attorneys general also may file federal antitrust suits, because states and their political subdivisions are "persons" for those purposes.[21]

Of particular importance, states can file federal *parens patriae* suits on behalf of natural persons seeking monetary relief for violations of the Sherman Act, and can recover treble damages plus attorneys fees.[22] The effect of this authorization was undermined for a time by *Illinois Brick Co. v. Illinois*,[23] which prevented federal lawsuits (including *parens patriae* suits) by most indirect purchasers.[24] *Illinois Brick* does not apply to litigation invoking state law,[25] however, and states quickly assembled an array of "*Illinois Brick* repealer" statutes that allowed indirect purchasers to invoke state law or have it invoked for them.[26] Either through "repealer" statutes or through state consumer protection and unfair trade practices statutes, more than 70% of Americans can have claims for indirect antitrust

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to be a sharp decline in antitrust enforcement at the federal level."). For a contemporary view, see Symposium, *Current Trends in State Antitrust Enforcement*, 56 ANTITRUST L.J. 97, 99 (1987).

19. State statutes are reprinted in 6 Trade Reg. Rep. (CCH) ¶¶ 30,202.03–35,585 (2003).

20. ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 812–13. A directory of state antitrust officials is available at Directory of Antitrust Officials, 3 Trade Reg. Rep. (CCH) ¶ 8905 (May 7, 2003).

21. *See* Georgia v. Pa. R.R., 324 U.S. 439, 447 (1945) ("Georgia, suing for her own injuries, is a 'person' within the meaning of § 16 of the Clayton Act . . . ."); Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 396 (1906) ("The city was a person [and] was [i]njured in its property . . . by being led to pay more than the worth of the pipe.").

22. 15 U.S.C. § 15c(a) (2000). Congress authorized these suits in part in response to *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), which held that a state may not sue as *parens patriae* on behalf of citizen-consumers injured by antitrust violations, *id.* at 775. *See* H.R. REP. NO. 94-499, pt. 1, at 5 (1975), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2574–75 ("In large part, H.R. 8532 is a response to that case and a recognition that the consuming public currently has no effective means of obtaining compensation for its injuries.").

23. 431 U.S. 720 (1977).

24. *Id.* at 736, 747 n.31 (rejecting argument that *parens patriae* authority made suits by indirect purchasers manageable).

25. *See* California v. ARC America Corp., 490 U.S. 93, 101–04 (1989) (holding that state indirect purchaser statutes were not preempted).

26. Kevin J. O'Connor, *Is the* Illinois Brick *Wall Crumbling?*, ANTITRUST, Summer 2001, at 34–35.

injuries advanced under state law.[27] Moreover, *Illinois Brick* also has no applicability to lawsuits seeking injunctive relief under section 16 of the Clayton Act[28]—and it has long been established that a state can obtain injunctive relief as *parens patriae* for actual or threatened harm to its general economy.[29]

In 1983, the National Association of Attorneys General Antitrust Committee took an important step by creating the Multistate Antitrust Task Force.[30] Whereas the Antitrust Committee is comprised of attorneys general, the Task Force is a staff-level committee.[31] The Task Force drafts guidelines and amicus briefs and coordinates multistate investigations and litigation.[32] (For simplicity, this Article will use "NAAG" to refer to the efforts of the attorneys general working together under the auspices of their National Association, but the reference will usually be to the work of the Task Force.)

B. The States' Comparative Advantages

The most accepted roles for the states are ones derived from the states' comparative advantages.[33] Three advantages stand out: familiarity with local markets, familiarity with and representation of state and local institutions, and ability to send money to injured individuals.[34]

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27. *Id.* at 34; ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 811–12; *see also* FTC v. Mylan Labs., Inc., 99 F. Supp. 2d 1, 4–10 (D.D.C. 1999) (reinstating attorneys general claims for equitable remedies such as restitution, and sometimes damages, for more than a dozen states).

28. *See* 15 U.S.C. § 26 ("Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of antitrust laws . . . ."); *see, e.g.*, *In re* Warfarin Sodium Antitrust Litig., 214 F.3d 395, 399–400 (3d Cir. 2000) ("Indirect purchaser status . . . is not fatal to a plaintiff's request for injunctive relief under section 16 of the Clayton Act.").

29. *See* Hawaii v. Standard Oil Co., 405 U.S. 251, 261–65 (1972) (holding that the Clayton Act authorizes a state to pursue an injunction—but not damages—for injury to general economy); *see also* California v. Am. Stores Co., 495 U.S. 271, 275–76, 295–96 (1990) (concluding that divestiture is a form of injunctive relief authorized by section 16 to remedy an illegal merger).

30. ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 824–25.

31. *See* Directory of Antitrust Officials, 3 Trade Reg. Rep. (CCH) ¶ 8905 (May 7, 2003) (listing members of the Antitrust Committee and officers of the Multistate Antitrust Task Force).

32. ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 824–25.

33. For an overview of state antitrust law and enforcement, see sources cited *supra* note 10.

34. Other distinguishing characteristics have been identified from time to time, but those three are the most compelling. Other touted advantages are the flip side of lamented

1. *Familiarity with Local Markets.* For all the talk about globalization of competition, antitrust enforcement is routinely concerned about competition in local markets. Almost half of the FTC's merger complaints make allegations involving local markets,[35] which should not be surprising given the number of challenges to mergers in groceries, gasoline retailing, construction, natural gas transportation, and health care.[36] Intimate knowledge about local competitive conditions is essential to effective antitrust enforcement.

State attorneys general have a clear comparative advantage in understanding local markets.[37] It would make little sense for Washington-based enforcers trying to craft divestitures to remedy a grocery store merger, or debating about the viability of stores on different sides of some small town, not to consult with or involve a state enforcer who is more likely to be familiar with the history and current market dynamics of that area.[38] Similarly, the Antitrust

deficiencies. State partisans can boast of responsiveness to citizen views. *See* Lloyd Constantine, *Antitrust Federalism*, 29 WASHBURN L.J. 163, 182–83 (1990) (noting that state enforcement maximizes citizen participation). Judge Posner laments over-responsiveness to special interests. *See* POSNER, ANTITRUST LAW, *supra* note 1, at 281 ("[States] are excessively influenced by interest groups . . . ."). One side claims that state enforcement "promotes diversity and innovation in competition policy and enforcement." Constantine, *supra*, at 183–84; *see also* Harry First, *Delivering Remedies: The Role of the States in Merger Enforcement*, 69 GEO. WASH. L. REV. 1004, 1036–39 (2001) (noting the role of states as an additional force in antitrust enforcement). Others complain of that same diversity and innovation. *See* Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 115–26 (1994) (lamenting differences in federal and state antitrust standards); David A. Zimmerman, Comment, *Why State Attorneys General Should Have a Limited Role in Enforcing the Federal Antitrust Law of Mergers*, 48 EMORY L.J. 337, 346–66 (1999) (same). One side views state enforcers as essential fillers of enforcement "gaps"; others dispute the existence of any gap. *See* Deborah Platt Majoras, Antitrust and Federalism, Remarks Before the New York State Bar Association 16–17 (Jan. 23, 2003) (denying the existence of a federal enforcement void), *at* http://www.usdoj.gov/atr/public/speeches/200683.htm (on file with the *Duke Law Journal*).

35. Computed from FTC Bureau of Competition, Antitrust Enforcement Activities Fiscal Year 1999—Mar. 15, 2003 (2003) (on file with the *Duke Law Journal*).

36. *See id.* at 1–18 (listing FTC merger complaints and describing the outcomes).

37. *See* Robert B. Bell, *Counterpoint: States Should Stay out of National Mergers*, ANTITRUST, Spring 1989, at 37, 37 ("There is little doubt that states should take the lead in scrutinizing and challenging mergers that are purely local in scope."); First, *supra* note 34, at 1034–36 ("[T]his understanding [of local markets] gives state antitrust enforcers a comparative advantage over federal antitrust enforcers.").

38. The importance of state involvement in challenging localized mergers has prompted calls for allocating areas of primary responsibility. *See, e.g.*, Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1072–89 (1990) (proposing a series of "'federalism guidelines,' which would allocate responsibility for enforcement between the DOJ and the FTC and the states, with certain categories of responsibility").

Division has recognized that it can be logical for states to take the lead in challenging conspiracies in localized markets.[39]

2. *Familiarity with Local Institutions.* State attorneys general are more likely than federal enforcers to know and be known and be trusted by state and local government officials. They are thus uniquely situated to help prevent anticompetitive harm from being inflicted on or by government agencies.[40]

Government and nonprofit entities play major roles, even in the United States' capitalist economy. A third of the gross domestic product (GDP) is government:[41] Governments purchase huge quantities of good and services, including health care, education, and prison services. Government regulations affect where and how people live, how people are born, and how they die.[42] State and local governments are critical points of focus for competition policy. Both government purchasers and government regulators are notoriously susceptible to anticompetitive manipulation.[43] Although federal

39. *See* Protocol for Increased State Prosecution of Criminal Antitrust Offenses, 70 Antitrust & Trade Reg. Rep. (BNA) 362, 362 (1996) (announcing that the Division may transfer to state attorneys general the criminal prosecutorial responsibility "for offenses including, but not limited to, bid rigging and/or price fixing in localized markets").

40. *See* Patricia A. Conners, State Antitrust Enforcement in Health Care: Recent Developments, Written Materials to Accompany Remarks by the Chair of the Multistate Antitrust Task Force before the ABA Section of Antitrust Law and the American Health Lawyers Association Program on Health Law 2 (May 15–16, 2003) (transcript on file with *Duke Law Journal*) (finding many attorneys general counsel state regulatory boards and thus have a "close relationship" with them).

41. Timothy J. Muris, Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy, Remarks at the Milton Handler Annual Antitrust Review (Dec. 10, 2002), *at* http://www.ftc.gov/speeches/muris/handler.htm (on file with the *Duke Law Journal*). For instance, government payments represent 45 percent of U.S. health care spending. Ctrs. for Medicare & Medicaid Servs., Program Information on Medicare, Medicaid, SCHIP, and Other Programs 6 (June 2002), *at* www.cms.gov/charts/series/sec1.ppt (on file with the *Duke Law Journal*).

42. The growth of regulation is chronicled in countless works, including DENNIS C. MUELLER, PUBLIC CHOICE II 320–47 (1989).

43. *See* ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 144 (1985) (government purchasers "are most susceptible to collusive pricing" because they reveal bidding information and thus discourage conspirators from "cheating" on a cartel); ROBERT H. BORK, THE ANTITRUST PARADOX 347 (1978) ("Predation by abuse of governmental procedures, including administrative and judicial processes, presents an increasingly dangerous threat to competition."); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 728 (1986) ("[M]arket regulation has become the target of increasing criticism for being an instrument by which industry can exploit the public . . . .").

enforcers regularly engage in "competition advocacy," as it is called,[44] no Washington-based voice is likely to be listened to as carefully as the voice of the state attorney general.[45]

3. *Compensating Individuals.* State attorneys general recover money for injured individuals in two ways. First, states implicitly represent taxpayers by recovering overcharges exacted from state purchasing operations.[46] Beyond that, state attorneys general are the only governmental officials specifically authorized by federal statute to recover monetary relief in treble damages for natural persons injured by Sherman Act violations.[47] The Justice Department has no such power, and the FTC finds authority for a court to award consumer redress only by implication (and very rarely invokes the authority in antitrust cases).[48] In 1976, the House Judiciary Committee declared an intention to promote deterrence and compensation of

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44. Timothy J. Muris, Creating a Culture of Competition: The Essential Role of Competition Advocacy, Prepared Remarks Before the International Competition Network Panel on Competition Advocacy and Antitrust Authorities (Sept. 28, 2002), *at* http://www.ftc.gov/speeches/muris/020928naples.htm (on file with the *Duke Law Journal)*. The FTC's advocacy filings are collected at http://www. ftc.gov/be/advofile.htm (last visited Sept. 10, 2003).

45. *Cf. 60 Minutes with Robert M. Langer, Assistant Attorney General, State of Connecticut, and Chair, NAAG Multistate Antitrust Task Force*, 60 ANTITRUST L.J. 197, 214–15 (1991) (discussing the role attorneys general regularly play both in representing regulatory boards and counseling on antitrust).

46. *See* O'Connor, *supra* note 18, at 422 ("[V]irtually all states have the authority to recover direct damages on behalf of state agencies.").

47. 15 U.S.C. § 15c (2000). *Parens patriae* authority was established by Title III of the Hart-Scott-Rodino Antitrust Improvement Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383, 1394 (1976) (codified at 15 U.S.C. § 15c (2000)).

48. Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b) (2000), authorizes the FTC to seek injunctive relief, and that authorization has been interpreted by the courts to permit the Commission also to obtain equitable remedies including disgorgement and consumer redress. *See, e.g.*, FTC v. Amy Travel Serv. Inc., 875 F.2d 564, 572 (7th Cir. 1989) ("[T]he statutory grant of authority to the district court to issue permanent injunctions includes the power to order any ancillary equitable relief necessary to effectuate the exercise of the granted powers."). Although the Commission routinely uses this authority in consumer protection cases, it very rarely uses it in competition cases. *See* FTC Policy Statement on Monetary Equitable Remedies in Competition Cases (July 25, 2003), *at* http://www.ftc.gov/os/2003/07/disgorgementfrn.htm (on file with the *Duke Law Journal*) ("[T]he commission has . . . used its monetary remedial authority [of disgorgement and restitution in the competition area] sparingly."). In theory, the Justice Department could ask the courts to read the attorney general's authorization to seek injunctions, 15 U.S.C. §§ 4, 25 (2000), as empowering courts to use equitable powers to award money, but it has never done so. The Sherman Act expressly authorizes forfeiture of property owned pursuant to an illegal conspiracy, 15 U.S.C. § 6 (2000), but the DOJ rarely invokes this power, ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 756 n.208.

consumers "by providing the consumer an advocate in the enforcement process—his State attorney general."[49]

The problem of governmental remedies for antitrust violations is longstanding. Unlike the states, federal enforcers almost always choose between two remedies: criminal penalties (an option only for the Justice Department) and a prospective-only injunction of limited duration.[50] Although criminal penalties are increasingly serious,[51] they are appropriate only in a limited range of cases.[52] Federal civil remedies are intended to be preventative, not punitive.[53] If the only risk associated with disobeying antitrust laws is a requirement to obey those laws prospectively, deterrence is singularly missing; on the other hand, a heavy-handed, regulatory decree may harm consumers by chilling future competition and driving up future expenses. The Hart-Scott-Rodino Act anticipated that federal and state enforcers would work together so that, through the states' use of their *parens patriae* authority, ill-gotten gains would be turned over to consumers and antitrust violations would be adequately deterred through monetary transfers rather than onerous decrees.[54]

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49. H.R. REP. NO. 94-499, pt. 1, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2574.

50. ERNEST GELLHORN & WILLIAM E. KOVACIC, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 450–52 (4th ed. 1994).

51. Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 699–702 (2001); *see* R. Hewitt Pate, The DOJ International Antitrust Program—Maintaining Momentum, Remarks before the ABA Section of Antitrust Law 2003 Forum on International Competition Law 2–3 (Feb. 6, 2003) (noting that in the past seven years, the Antitrust Division has obtained thirty-eight fines of $10 million or more and six fines of $100 million or more; in the past four years, thirty defendants have been sentenced to imprisonment of a year or more), *available at* http://www.usdoj.gov/atr/public/speeches/20073.pdf (on file with the *Duke Law Journal*).

52. *See* DEPARTMENT OF JUSTICE, ANTITRUST DIVISION MANUAL § III-16 (3d rev. ed. 2002) ("In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging and horizontal customer and territorial allocations."), *available at* http://www.usdoj.gov/atr/foia/divisionmanual/ch3.pdf (on file with the *Duke Law Journal*).

53. *See, e.g.*, FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952) ("Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future."); *cf.* FTC v. Febre, 128 F.3d 530, 537 (7th Cir. 1997) (approving disgorgement because it was remedial and not punitive); DEPARTMENT OF JUSTICE, *supra* note 52, at IV-51 ("In general, adequate relief in a civil antitrust case is relief that will (1) stop the illegal practices alleged in the complaint, (2) prevent their renewal, and (3) restore competition to the state that would have existed had the violation not occurred."), *available at* http://www.usdoj.gov/atr/foia/divisionmanual/ch4.pdf (on file with the *Duke Law Journal*).

54. H.R. REP. NO. 94-499, pt. 1, at 4, 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 2572, 2573–74, 2586–87; *cf.* 15 U.S.C. § 15f (2000) (requiring the U.S. Attorney General to notify states of

The states not only have the assignment and authority to transfer ill-gotten gains to consumers; they also have the experience. As is set out below in Section C.3, state attorneys general have used their *parens patriae* authority and state statutes to provide substantial monetary relief for consumers. States now have both the tools for delivering compensation to consumers, as well as the experience in using these tools.

C. The Critics

One of the dramatic moments in the *Microsoft* story came when Judge Jackson, with the concurrence of the parties, referred the dispute to mediation by Judge Posner.[55] Four months of intense effort yielded no fruit,[56] except possibly in one respect: it may have caused Judge Posner to reflect seriously on multilevel antitrust enforcement.

The *Microsoft* litigation began in May 1998 when the Justice Department and a score of states filed separate complaints alleging that Microsoft had illegally monopolized the Internet browser market, and the case has dominated antitrust headlines ever since.[57] The cases were consolidated and tried jointly, resulting—after the failed attempt at mediation by Judge Posner—in a sweeping win for the Justice Department and the states. The district court found that Microsoft had illegally monopolized the operating system market, attempted to monopolize browsers, and bundled Windows and Internet Explorer. To address these violations, the court ordered, among other things, the splitting up of the company.[58] The court of appeals affirmed in part, reversed in part, and remanded for reassignment to a different trial judge.[59] After a presidential election changed the leadership team heading the Justice Department,[60] the

parens opportunities and share investigative files).

55. *See* United States v. Microsoft Corp., 253 F.3d 34, 47–48 (D.C. Cir. 2001) (per curiam) (noting mediation was tried with consent of the parties).

56. *See id.* at 48 ("Mediation failed after nearly four months of settlement talks between the parties.").

57. *See* Himes, *supra* note 18 (recounting federal-state efforts in the case); *see generally* KEN AULETTA, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES (2001) (describing details of the *Microsoft* case).

58. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 35–56 (D.D.C. 2000); United States v. Microsoft Corp., 97 F. Supp.2d 59, 64 (D.D.C. 2000).

59. United States v. Microsoft Corp., 253 F.3d 34, 118–19 (D.C. Cir. 2001) (per curiam).

60. *See* Top Antitrust Enforcement Personnel (1890–present), 3 Trade Reg. Rep. (CCH) ¶ 8554 (June 25, 2003) (listing that Charles A. James, President George W. Bush's first Antitrust Attorney General, began service on June 21, 2001).

Department and nine states agreed to a consent order, which a new district judge modified and entered over the objections of nine states and the District of Columbia.[61]

After his mediation effort had failed, Judge Posner promptly called for stripping the states of their authority to bring state or federal antitrust suits except in their capacities as injured consumers.[62] "States do not have the resources to do more than free ride on federal antitrust litigation, complicating its resolution; in addition, they are too subject to influence by interest groups that may represent a potential antitrust defendant's competitors."[63] Posner sees states as contributing little to the effective enforcement of antitrust law, while imposing costs either by misusing the law to advance special interests or through making settlement more difficult.[64] Almost by itself, *Microsoft* had made state antitrust enforcement newly controversial.[65]

The most recent catalogue of criticisms of state antitrust enforcement is contained in the remarks Deputy Assistant Attorney General Deborah Platt Majoras prepared for a program on antitrust and federalism.[66] In each case attributing the views to others, she identified four problems that have been made: (1) "many believe that the states' role adds a significant layer of uncertainty for businesses in their consideration of possible mergers and in their business conduct—uncertainty that may chill procompetitive mergers and conduct and add significant costs"; (2) "some believe that the

61. New York v. Microsoft Corp., 224 F. Supp. 2d 76, 86 n.3 (D.D.C. 2002). One state is pursuing an appeal from that decision. *See* Joint Status Report on Microsoft's Compliance with the Final Judgments at 1 n.1, United States v. Microsoft Corp., Civil Action No. 98-1232 (D.D.C. 2003) (noting that West Virginia has dismissed its appeal; Massachusetts is still pursuing its appeal of the States' Final Judgment), *available at* http://www.usdoj.gov/atr/cases/f201100/201135.pdf (on file with the *Duke Law Journal*).

62. POSNER, ANTITRUST LAW, *supra* note 1, at 281; Posner, *New Economy*, *supra* note 1, at 940. Professor Harry First provides the best state-oriented rebuttal, arguing that Posner's findings of free-riding on federal antitrust litigation, undue interest group influence, and incapable state attorneys are unfounded. First, *supra*, note 34, at 1027–34.

63. Posner, *New Economy*, *supra* note 1, at 940.

64. POSNER, ANTITRUST LAW, *supra* note 1, at 281–82; *cf.* Zimmerman, *supra* note 34 (calling for legislation to compel states to follow federal merger policy).

65. *See, e.g.*, William Rainbolt, *Panelists Debate Role of State Government in Antitrust Enforcement*, ST. B. NEWS, Mar.–Apr. 2003, at 10 (reporting panelist debate about appropriateness of state antitrust enforcement). "Newly" controversial, because state antitrust enforcement has always attracted criticism. *See, e.g.*, Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 127 (1994) ("State merger enforcement causes numerous problems and costs and may be unwise from a policy standpoint.").

66. Majoras, *supra* note 34, at 2–7.

states . . . are more likely to take into account factors that have been discarded in U.S. antitrust jurisprudence"; (3) "some believe that state antitrust officials are more likely to be influenced by individual lobbying businesses within their states"; and (4) "some believe that as many antitrust matters have grown not only increasingly national, but increasingly global, in scope, states should confine their role to local or perhaps regional antitrust issues."[67] Although she conceded that the non-settling states in *Microsoft* "further[ed] the development of antitrust jurisprudence,"[68] Deputy Majoras evinced uneasiness over the role of the states in that case and others.

D. The States' Activities

Microsoft is the exception.[69] It may be the only state case principally devoted to seeking injunctive relief for alleged monopolization.[70] That is just not what states typically do. As discussed below, the vast majority of state antitrust complaints and other activities fit comfortably within the bounds of the states' consensus comparative advantages.

State attorneys general deserve some of the blame for the misperception. The Antitrust Division and the FTC chronicle all of their activities on their websites,[71] which are constantly being updated and improved. Both agencies publish reports with a wealth of data

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67. *Id.* at 3–6.

68. *Id.* at 16.

69. *See* First, *supra* note 34, at 1018–19 (noting that *Microsoft* "is not particularly representative of state antitrust enforcement"). For a spirited defense of the states' role in *Microsoft*, see Himes, *supra* note 18.

70. *See* Patricia A. Conners, Chair, Multi-State Antitrust Task Force, State Enforcement—Trends and Issues, Remarks Before the ABA Section of Antitrust Law, State Antitrust Enforcement Committee Spring Meeting 3–11 (Apr. 2, 2003), *available at* www.abanet.org/antitrust/committees/state-antitrust/statetrends.pdf (on file with the *Duke Law Journal*) (canvassing a wide range of past and current cases, of which only a single state merger challenge sought principally injunctive relief); Jay L. Himes & Patricia A. Conners, Presentation for the Antitrust Federalism and Multistate Antitrust Enforcement, 14–15 (June 7, 2002) (listing recent illustrative cases of multistate enforcement activities). Similarly, if one goes to the consent orders collected on the best state-enforcement-oriented website, www.abanet.org/antitrust/committees/state-antitrust/settlements.html (last visited November 4, 2003), one finds many of the cases referenced above, a few state court settlements, other locally oriented settlements, some resale price maintenance settlements, and only one injunction-oriented proceeding on a local hospital joint venture. The cases are overwhelmingly about getting money for consumers.

71. *See* Department of Justice, Antitrust Division, *at* http://www.usdoj.gov/atr/ (last visited Oct. 2, 2003); Federal Trade Commission, *at* http://www.ftc.gov/ (last visited Oct. 2, 2003).

and statistics.[72] NAAG is strikingly different. Its website[73] includes no data, no annual reports, no listings of different kinds of cases—nothing that would communicate an understanding of what NAAG does. Following hyperlinks leads one to an ABA Antitrust Section page that lists NAAG amicus briefs,[74] and another one that lists NAAG settlements, organized by judicial circuit,[75] but the website poorly communicates what state attorneys general do in antitrust enforcement. NAAG publishes a monthly *Antitrust Bulletin* (formerly titled a *Report*, but for simplicity references herein will be only to "*Bulletins*") comprised of reports on state activities and other antitrust news, but the *Bulletin* is not widely available and includes no summary data. NAAG representatives regularly give speeches about recent initiatives,[76] but inevitably the emphasis is on the major projects and the big-picture policy work,[77] which can communicate a distorted picture.

The extent to which state attorneys general concentrate on areas of their comparative advantage becomes clear from a review of a

72. *See, e.g.*, ANTITRUST DIV., U.S. DEP'T OF JUSTICE, ANNUAL REPORT: FY 1999, *available at* http://www.usdoj.gov/atr/public/4523.pdf (on file with the *Duke Law Journal*). Attendees at the ABA Antitrust Section 2003 Spring Meeting could walk away with a glossy, twenty-three-page booklet chronicling the FTC's year and separate compendia of accomplishments by each of the three bureaus (including a sixty-page compendium of Bureau of Competition accomplishments). *See* FEDERAL TRADE COMMISSION, A POSITIVE AGENDA FOR CONSUMERS: THE FTC YEAR IN REVIEW (Apr. 2003) (featuring cover photos of, among other things, a mother receiving a telemarketer's call during the family dinner), *available at* http://www.ftc.gov/reports/aba/gpra2003.pdf (on file with the *Duke Law Journal*).

73. http://www.naag.org/issues/issue-antitrust.php (last visited Sept. 10, 2003) (on file with the *Duke Law Journal*).

74. *See* Competition Advocacy by the States Attorneys General, *at* http://www.abanet.org/antitrust/committees/state-antitrust/advocacy.html (last visited Sept. 10, 2003) (on file with the *Duke Law Journal*).

75. *See* Settlement Agreements with State Attorneys General, *at* http://www.abanet.org/antitrust/committees/state-antitrust/settlements.html (last visited Sept. 10, 2003) (on file with the *Duke Law Journal*).

76. *See, e.g.*, Conners, *supra* note 70; Patricia A. Conners & Kevin J. O'Connor, Antitrust Enforcement Regarding Vertical Restraints by State Attorneys General, Remarks at ALI-ABA Course of Study Product Distribution and Marketing (March 20–22, 2003), *available at* http://www.abanet.org/antitrust/committees/state-antitrust/atenforcementvertical.pdf (on file with the *Duke Law Journal*); Himes & Conners, *supra* note 70.

77. *See, e.g.*, *Roundtable Conference with Enforcement Officials*, 69 ANTITRUST L.J. 367, 373–74 (2001) (including remarks by the chair of the NAAG Multistate Antitrust Task Force reporting to the organized bar on recent big-picture developments); *see also* Thomas Greene & Robert L. Hubbard, *State Antitrust Enforcement*, *in* 44th Annual Antitrust Law Institute, 1371 PLI/CORP. 765, 780 (2003) (enforcement actions by individual states are "[l]argely under-reported" although they "represent[ ] the area of greatest state enforcement").

decade of *Bulletins*. Since they report developments considered newsworthy, the results are biased in favor of the major national matters—which makes the results all the more striking.

The methodology was as follows. Every *Bulletin* from 1993 to 2002, was read.[78] For each state lawsuit reported,[79] I noted (a) whether it had a significant local or regional aspect (typically because a local market was alleged); (b) whether the state attorney general was representing or appearing before a public entity; and (c) whether it represented an effort to compensate individual victims directly or through *cy pres*. Results were as follows[80]:

Total lawsuits:	213
Lawsuits with local aspect:	174 (82%)
Public entity lawsuits:	59 (28%)
Lawsuits to compensate consumers:	29 (14%)

1. *Local Emphasis.* State antitrust enforcement as reflected in this survey is overwhelmingly local. Challenged mergers involve hospitals, movie theaters, waste disposal operations, grocery stores, Jewish funeral homes, dairies, radio stations, gasoline stations, ski resorts, de-icing salt production facilities, and a sardine processing plant. Some of the mergers feature major national firms where a state is joining with a federal agency (grocery store mergers are a prime example), but it seems logical to draw on state-level expertise when examining street-level competition between stores. Challenged conspiracies involved travel agents and tour bus operators, health care providers, school bus companies, road builders, roofers, auto

78. Many thanks to Saira Nayak-Lieb, NAAG Antitrust & Health Care Counsel, for providing these to me. The last four months of 2001 are not covered by *Bulletins*, so the 2001 *Bulletins* were supplemented by a review of the BNA Antitrust & Trade Regulation Report.

79. *Bulletins* might have multiple reports of a single lawsuit—one for its filing, one for a key court decision, one for settlement, etc.—but I counted each lawsuit only the first time it appeared. Multiple defendants settling separate times were counted only as one entry. Lawsuits by different states, filed at different times, were counted as separate entries even if each lawsuit challenged the same kind of conspiracy by the same defendant.

No count was made of letters and amicus briefs, of which there is a fair amount. *See* http://www.abanet.org/antitrust/committees/state-antitrust/advocacy.html#acb (last visited Aug. 2, 2003) (listing letters and amicus briefs relating to antitrust cases filed by state attorneys general).

80 Percentages sum to more than 100 because some local lawsuits involved public entities or compensation of consumers).

body shops, dairies, group homes repairers, bakers of Italian bread, individuals who gave carriage rides, towers, and trash haulers. Tying violations, where the purchase of one product is illegally conditioned on the purchase of another, include mobile homes and tours of Alcatraz.

States play an important role by helping inform federal enforcers of local market realities and by helping persuade courts that federal enforcers have considered those realities.[81] Missouri was a crucial partner of the FTC in challenging with temporary success a local hospital merger,[82] and states have played important roles on their own or with federal enforcers in questioning other hospital mergers.[83] On the other hand, federal enforcers failed to achieve even temporary success when New York supported a local hospital merger[84] and when Michigan remained primly on the sidelines of a challenge to a Michigan hospital merger.[85] Hospital mergers raise political issues that make them unusually difficult to challenge, but the federal

81. For a good example of how federal and state enforcers can work together in the context of a grocery merger case, see First, *supra* note 34, at 1024–25. In contrast, a trial court denied an FTC-sought temporary restraining order stating: "It looks to me like Washington D.C. once again thinks they know better what's going on in southwest Missouri. I think they ought to stay in D.C." FTC v. Freeman Hosp., 69 F.3d 260, 263 (8th Cir. 1995) (staying the denial of the temporary restraining order and affirming the denial of preliminary injunction).

82. *See* FTC v. Tenet Health Care Corp., 17 F. Supp. 2d 937, 942 n.4 (E.D. Mo. 1998) (granting preliminary injunction to Missouri and the FTC even though federal and state attorneys were "'out-lawyered' by the defendants"), *rev'd*, 186 F.3d 1045 (8th Cir. 1999).

83. *See, e.g.*, United States v. Morton Plant Health Sys., Inc., 1994-2 Trade Cas. (CCH) ¶ 70,759, at 73,200 (M.D. Fla. 1994) (granting a consent judgment in the first case filed jointly by the Division and a state); *Rhode Island Hospitals Call Off Merger After Attorney General Seeks Concessions*, NAAG ANTITRUST REP., Sept.–Oct. 2000, at 10 (describing a hospital merger called off after Rhode Island attorney general sought concessions); *see also* Anne K. Bingaman, Antitrust Division Cooperation with State Attorneys General, Address Before the National Association of Attorneys General (Oct. 11, 1995), *at* http://www.usdoj.gov/atr/public/speeches/951011.htm (on file with the *Duke Law Journal*) (saluting success of DOJ cooperation with states in antitrust enforcement); *cf.* New York v. St. Francis Hosp., 94 F. Supp. 2d 399, 411–16 (S.D.N.Y. 2000) (granting state's motion for summary judgment, holding that purported joint operating agreement is illegal per se). Of course, states proceeding alone also face challenges, as California experienced when it bravely (but unsuccessfully) took on a local hospital merger it viewed as anticompetitive. *See* California v. Sutter Health Sys., 84 F. Supp. 2d 1057, 1081 (N.D. Cal. 2000), *aff'd mem.*, 217 F.3d 846 (9th Cir. 2000).

84. *See* United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 134–35 (E.D.N.Y. 1997) (refusing to enjoin merger strongly supported by New York State Department of Health).

85. *See* FTC v. Butterworth Health Corp., 946 F. Supp. 1285 (W.D. Mich. 1996), *aff'd*, 121 F.3d 708 (6th Cir. 1997) (including multiple amici briefs, some by attorneys general from other states, but not by Michigan).

agencies face an uphill battle when the antitrust enforcer who knows the area best is opposed to an antitrust challenge.[86]

2. *Public Institutions.* Not surprisingly, given the predominance of local issues, many of the matters involved state or local institutions; indeed, frequently an attorney general was representing an aggrieved public entity. According to attorneys general, schools were overcharged for milk, roofs, carpets, and fuel; local governments were overcharged for fuel, waste disposal, flooring, and ambulance services; and state agencies were overcharged for road building, infant formula, travel, and health care services.

States can be unusually effective at detecting and preventing these bid-rigging activities (agreements that prevent competition for government contracts theoretically allocated by competitive bid). Government procurement rules almost invite price fixing, because they make instantaneous the detection of "cheating" conspirators.[87] States have worked effectively with purchasing authorities to deter and prosecute such illegality, returning money to the taxpayers and the victims of conspiracy.[88] States and the federal government proceed criminally, as well,[89] but government bid-rigging cases are particularly attractive examples of the importance of compensating victims.[90]

Additionally, the states' special local ties are important in ways that go beyond representing government agencies victimized by conspiracy. *Contact Lenses*[91] is an unusually good example. After a two-year investigation, Florida filed this lawsuit challenging an alleged industry boycott of alternative channels of distribution of contact lenses,[92] and thereafter a total of thirty-five states and various

86. *See* Robert F. Leibenluft, Issues in Litigating Hospital Mergers, Presentation to FTC/DOJ Hearings on Health Care and Competition Law and Policy 12, 22 (Mar. 29, 2003) (describing the problem of "[h]ome court disadvantage" and noting that state support is critical), *available at* http://www.ftc.gov/ogc/healthcarehearings/docs/leibenluft2.pdf (on file with the *Duke Law Journal*).

87. BLAIR & KASERMAN, *supra* note 43, at 144.

88. *See, e.g.*, Press Release, Florida Attorney General, Milk Case Recoveries Set National Record (Sept. 29, 1988) (on file with the *Duke Law Journal*) (describing the more than $32 million recovered by Florida against milk companies accused of price fixing in schools).

89. State antitrust indictments are collected at http://www.abanet.org/antitrust/committees/state-antitrust/litdocs.html#indictments (last visited Aug. 2, 2003).

90. What can be more appealing than returning ill-gotten gains to schools? *See, e.g.*, Press Release, Florida Attorney General, *supra* note 88.

91. *In re* Disposable Contact Lens Antitrust Litig., 2001-1 Trade Cas. (CCH) ¶ 73,150, at 89,542 (M.D. Fla. 2001) (denying defense motions for summary judgment).

92. NAAG ANTITRUST REP., May–June 1994, at 3.

private parties worked for eight years successfully to resolve the matter.[93] State agencies easily could have blocked alternative distribution channels, and, indeed, the defendants argued unsuccessfully that various state statutory and regulatory impediments had done so, thus depriving the defendants' acts of consequence.[94] A key court decision denied summary judgment because it found a host of unresolved issues related to this defense, including "whether the states are actively enforcing their [regulatory] statutes."[95] State attorneys general were unusually valuable defenders of the competitive process because they were uniquely well positioned to help persuade state agencies neither to block such distribution nor to support defense arguments that agency regulations had done so.

3. *Compensation to Consumers.* One of the states' most powerful competitive advantages—and one that they have been employing vigorously—is their ability to deliver substantial monetary recoveries directly to consumers.[96] For example, in *Compact Discs*,[97] about 3.5 million people will receive almost $13 apiece as their share of a settlement.[98] This scale of distribution of a modest sum was possible only because the states implemented an innovative web-

93. *In re* Disposable Contact Lens Antitrust Litig., MDL No. 1030 (M.D. Fla. Nov. 1, 2001) (Final Order and Judgment), *available at* http://www.abanet.org/antitrust/committees/state-antitrust/lensfinalorder.pdf; *see also Bausch & Lomb Will Pay Rebates Valued at $17.5 Million to Settle States' Charges*, 80 Antitrust & Trade Reg. Rep. (BNA) 164, 164 (2001) (reporting terms of settlement). The FTC has recently become active in protesting impediments to alternative contact lens distribution. *See* Comments of the Staff of the Federal Trade Commission, Intervenor, Declaratory Ruling Proceeding on the Interpretation and Applicability of Various Statutes and Regulations Concerning the Sale of Contact Lenses (Conn. Dep't of Pub. Health Mar. 27, 2002) (stating that stand-alone sellers of replacement contact lenses should not be required to obtain Connecticut licenses), *at* http://www.ftc.gov/be/v020007.htm (on file with the *Duke Law Journal*).

94. *See In re* Disposable Contact Lens Antitrust Litig., 2001-1 Trade Cas. (CCH) at 89,542 (denying defense motions for summary judgment).

95. *Id*.

96. *See* First, *supra* note 34, at 1018 (noting that eleven of thirteen cases surveyed included a monetary award).

97. *In re* Compact Disc Minimum Advertised Price Antitrust Litig., No. 2:01-CV-125-P-H, 2003 U.S. Dist. LEXIS 12663 (D. Me. July 9, 2003).

98. *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 2003-1 Trade Cas. (CCH) ¶ 74,060, at 96,591 (D. Me. 2003) (certifying class and preliminarily approving settlement).

based claim submission.[99] In *Bristol Myers-Squibb*,[100] the FTC settled a case against a pharmaceutical firm that allegedly abused the patent system to block entry of generic competition.[101] The states deferred to the FTC's lead in crafting injunctive relief,[102] but are expected to recover over $150 million.[103] In another generic drug case, *Cardizem*,[104] the defendant pharmaceutical companies agreed to pay $80 million to compensate consumers, state agencies, and insurance companies for overcharging them (in addition to $110 million won by private drug wholesalers).[105] In *Contact Lenses*, more than 18,000 checks have been processed, from a total cash-and-coupon settlement of $90 million.[106] In *Vitamins*,[107] state attorneys general won two settlements—$30

99. *Id.* at 96,594 ("Here, given the millions of unidentified CD purchasers during the class period, individual notice was not possible. . . . [O]ver 5 million visitors logged on to the settlement website, www.misiccdsettlement.com . . . ."); *Court Approves CD Settlements, Except for Sales by Music Clubs*, 84 Antitrust & Trade Reg. Rep. (BNA) 619, 619–21 (June 20, 2003) (reviewing settlement and litigation, including the web-based submission method for claims).

100. Bristol-Myers Squibb Co., FTC File Nos. 0010221 (Taxol), 0110046 (BuSpar), 0210181 (Cisplatin) (Mar. 7, 2003) ("Agreement Containing Consent Order"), *available at* http://www.ftc.gov/os/2003/03/bristolmyersconsent.pdf (on file with the *Duke Law Journal*); *see* Press Release, FTC, FTC Charges Bristol-Myers Squibb with Pattern of Abusing Government Processes to Stifle Generic Drug Competition (Mar. 7, 2003), *at* http://www.ftc.gov/opa/2003/03/bms.htm (on file with the *Duke Law Journal*).

101. Press Release, FTC, *supra* note 100.

102. *Id*.

103. *Bristol-Myers Squibb Settles Charges for Stifling Generic Drug Competition*, 84 Antitrust & Trade Reg. Rep. (BNA) 238, 238–39 (Mar. 14, 2003); Press Release, Florida Attorney General, States Reach Tentative Agreement with Bristol Myers-Squibb in Antitrust Drug Cases (Jan. 7, 2003), *at* http://myfloridalegal.com/newsrel.nsf/newsreleases/9E2439956993A54285256CA70075AB79?OpenDocument (on file with the *Duke Law Journal*).

104. *In re* Cardizem CD Antitrust Litig., No. 99-Md-1278 (E.D. Mich. Jan. 29, 2003) (consent agreement), *available at* http://www.abanet.org/antitrust/committees/state-antitrust/aventiscarderm.pdf (on file with the *Duke Law Journal*).

105. *See* Press Release, Florida Attorney General, Drug Makers to Pay $80 Million in Settlement (Jan. 27, 2003), *at* http://myfloridalegal.com/newsrel.nsf/b57e80b88fcebfad85256403005cbc7a/803a0e20da608bba85256cbc00498749!OpenDocument (on file with the *Duke Law Journal*).

106. Declaration of Joy Ann Bull Re Final Accounting of Settlement Funds, *In re* Disposable Contact Lens Antitrust Litig., 97-861-CIV-J-20 (M.D. Fla.), Ex. 5 (on file with the *Duke Law Journal*) (reporting that 18,786 checks were mailed); E-mail from Robert Hubbard, Office of the New York State Attorney General, Antitrust Division, to Stephen Calkins, Professor of Law, Wayne State University (Aug. 25, 2003, 16:19:00 EST) (on file with the *Duke Law Journal*) (noting that the final order included a $90 million settlement); *see States Reach $60 Million Settlement with Johnson & Johnson in Disposable Contact Lens Case*, NAAG ANTITRUST REP., May–June 2001, at 5 (detailing the settlement with one defendant); Conners, *supra* note 70, at 4 (reporting on the settlement).

107. Giral v. F. Hoffmann-La Roche Ltd., No. 98 CA 7467 (D.C. Super. Ct. Jan. 22, 2001) (master settlement agreement), *available at* http://www.abanet.org/antitrust/committees/state

million for their own purchases and (with private plaintiffs) $225 million for indirect business and individual purchasers—and California won an additional $85 million.[108] In *Mylan*,[109] the FTC and the states worked together to resolve the case. The FTC received an unusual disgorgement remedy, but the vast bulk of the $147 million recovery was distributed by the states.[110]

The FTC has recognized that it lacks the experience and resources to distribute efficiently competition-based disgorgement funds. It has used this authority "cautiously" and "sparingly," employing it in only a handful of cases.[111] In the Commission's two recent exercises of this authority, it has combined the funds it recovered with other funds in a single claims administration process (such that, in *Mylan*, the states distributed even the FTC's portion of the recovery). Beyond that, the states' ability to represent the public, including under state law, simplifies litigation (and settlement discussions) by removing a series of standing/*Illinois Brick* issues from the table.[112]

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antitrust/vitamins1.pdf (on file with the *Duke Law Journal*); *see States Reach Settlement with Vitamin Makers in Massive Price-Fixing Case*, NAAG ANTITRUST REP., Sept.–Oct. 2000, at 1.

108. *Giral*; *see* First, *supra* note 34, at 1021–23, 1022 n.101 (describing the case generally, emphasizing New York's role, and pointing out difficulties in the case and the final disposition); O'Connor, *supra* note 26, at 36–37, 37 n.24 (same); Press Release, California Attorney General, Attorney General Lockyer Announces $80 Million Antitrust Settlement Involving Alleged International Vitamins Price-Fixing Scheme (Oct. 10, 2000), *at* http://www.caag.state.ca.us/newsalerts/2000/00-129.htm (on file with the *Duke Law Journal*) (detailing breakdown of the settlement: $42 million in refunds to businesses, $38 million for consumer health programs, plus $5 million costs).

109. Connecticut v. Mylan Labs., 2000-1 Trade Cas. (CCH) ¶ 73,273, at 90,403–04 (D.D.C. 2001); *see* O'Connor, *supra* note 26, at 36–37 (describing case as an example of how the law is moving towards allowing indirect purchasers to recover under antitrust law); Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bombs or Rough Justice?*, *in* ANTITRUST LAW IN NEW YORK STATE, *supra* note 10, at 1 (same).

110. *Cf.* FTC, Policy Statement on Monetary Equitable Remedies in Competition Cases, *at* http://www.ftc.gov/os/2003/07/disgorgementfrn.htm (July 25, 2003) (on file with the *Duke Law Journal*) ("[A] single claims administration process handled the administration of all the funds.").

111. *Id.*

112. As noted above, federal law prevents most recoveries by indirect purchasers, whereas state law, especially when enforced by an attorney general, does not. *See supra* notes 23–29 and accompanying text. The law of standing is a major issue in private litigation, *see* ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 838–66, whereas, by definition, state and federal *parens patriae* suits allow recoveries on behalf of injured consumers.

E. State Antitrust Enforcement in Perspective

The above review makes clear that state antitrust enforcement is based overwhelmingly on the states' comparative advantages. The vast majority of cases involve local or regional markets and competitive effects. State enforcers almost never bring national monopolization cases.

This conclusion is consistent with the expressed views of state enforcers. According to the chair of the Multistate Antitrust Task Force, a state antitrust enforcement issue can be identified by asking, among other things, whether the matter has "a local or regional impact upon the state's consumers or economy," whether "state or local governmental agencies [are] impacted," and whether consumers can "directly or indirectly benefit from state enforcement."[113]

Of course, not every state antitrust case is consistent with states' comparative advantages. For instance, in 2001, Utah sought to enjoin GS Industries' acquisition of Nucor Corporation's Utah-based manufacturing assets because GS Industries planned to move the business to Chile.[114] Utah's action might have had more to do with an interest in employment than in competition. Similarly, in 1999, Indiana sought to enjoin the merger of B.F. Goodrich and Coltec Industries[115] out of concern about the global market for integrated aircraft landing systems and 1100 South Bend jobs.[116] Likewise, in 1993, Pennsylvania sought to enjoin the merger of Russell Stover Candies and Whitman Chocolates, with the attorney general saying that, although the case would be argued solely on antitrust grounds, he "could not, 'as a responsible official, ignore the fact that this merger will put 600 people in the Philadelphia area out of work.'"[117]

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113. Patricia A. Conners, The Role of State Antitrust Enforcement in Our System of Concurrent Enforcement, Remarks Delivered at the ABA Section of Antitrust Law 2002 Fall Forum 20–22 (Nov. 7–8, 2002) (transcript on file with the *Duke Law Journal*).

114. *See Utah Seeks to Block Acquisition in Grinding Ball Market*, NAAG ANTITRUST REP., Mar.–Apr. 2001, at 6 (describing lawsuit and negotiated standstill agreement); *see also* Frank Haflich, *GSI to Resume Grinding Media Output*, AM. METAL MARKET, Sept. 5, 2002, at 1 (describing proposed transaction).

115. *Indiana Attorney General Seeks to Block Merger of B.F. Goodrich and Coltec*, NAAG ANTITRUST REP., Mar.–Apr. 1999, at 11.

116. *See CIGNA to Drop Medicare HMO in Ohio*, PLAIN DEALER (Cleveland), Apr. 30, 1999, at 2C (describing Indiana's reasons for attempting to enjoin the merger).

117. *Pennsylvania Sues to Block Chocolate Merger*, NAAG ANTITRUST REP., May–June 1993, at 5; *see* Pennsylvania v. Russell Stover Candies, Inc., 1993 Trade Cas. (CCH) ¶ 70,224, at 70,095 (E.D. Pa. 1993) (refusing injunction for want of competitive effect). The dispute was settled by the parties' agreeing to two years of conduct restraints, paying $35,000 for job

Even when a state is operating in an area of its comparative advantage, it may take action in tension with what many might consider sound competition policy. For instance, last year, the Puerto Rico district court was so outraged at what it saw as the Puerto Rico Secretary of Justice's attempt to use antitrust laws to promote unrelated social policies that it enjoined her from attempting to block a grocery store merger.[118] Even state efforts to pursue antitrust policies may engender controversy. For instance, states have made something of a specialty of pursuing vertical restraints cases,[119] an area of considerable antitrust disagreement.[120] Most fundamentally, the states' increasing success in winning large monetary recoveries has triggered a debate about appropriate levels of deterrence.[121] Discomfort is particularly acute with respect to indirect purchasers: If treble damages based on an entire overcharge can be recovered by a

assistance and economic development, and stating an intention to patronize a Pennsylvania supplier. *Pennsylvania Resolves Competitive Concerns with Boxed Chocolates Industry Acquisition*, 65 Antitrust & Trade Reg. Rep. (BNA) 361, 361–62 (1993).

118. Wal-Mart Stores, Inc. v. Rodriguez, 238 F. Supp. 2d 395, 409 (D.P.R. 2002) ("[E]vents culminated in the vindictive filing of a state antitrust lawsuit in an effort to coerce Plaintiffs . . . ."), *vacated at request of parties*, 322 F.3d 747 (1st Cir. 2003). The dispute was settled while on appeal, with Wal-Mart agreeing to divest two additional stores and to maintain for a decade its level of local employment and purchases. Ivan Roman, *Wal-Mart's Deal with Government Fails to End Monopoly Fears*, ORLANDO SENTINEL, Mar. 9, 2003, at A22. Twenty states filed an amicus brief supporting Puerto Rico's right to pursue its own antitrust claim "in the interests of consumers," while taking "no position on whether the specific items Puerto Rico sought in its negotiations were likely to improve the competitive situation in the relevant local markets." Brief of Commonwealth of Massachusetts et al. at 10–11, 11 n.12, Wal-Mart Stores, Inc. v. Rodriguez, 322 F.2d 747 (1st Cir. 2003) (No. 02-2710).

119. *See* Conners & O'Connor, *supra* note 76, at 2 ("Vertical enforcement continues to be a priority for the States.").

120. *See generally* Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism:* Parker *and* Arc America Corp., 68 ANTITRUST L.J. 29, 41–42 (2000) (seeing virtue in diversity of views about vertical restraints). *Compare* Richard Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 25 (1980) ("[A]ll purely vertical restrictions in distribution should be legal per se . . . ."), *with* Peter C. Carstensen, *The Competitive Dynamics of Distribution Restraints: The Efficiency Hypothesis versus the Rent-Seeking, Strategic Alternatives*, 69 ANTITRUST L.J. 569, 571 (2001) (arguing that vertical restraints are not as procompetitive as many believe).

121. *See* Michael L. Denger & D. Jarrett Arp, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, ANTITRUST, Summer 2001, at 41, 43 (describing risk of "unpredictable duplicative recoveries"); Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 221–33 (2003) (noting that punishments range from too little to too much).

direct purchaser, is it fair or proper for indirect purchasers to recover treble damages based on passed-on injuries?[122]

Nonetheless, states overwhelmingly pursue cases within their comparative advantages and based on antitrust doctrines within the mainstream. Monetary remedies, even if substantial, do not change the structure of industry or mandate a change in business operations. *Microsoft* really is the exception.

II. FEDERAL ANTITRUST AGENCIES

While state antitrust enforcers enjoy only three primary comparative advantages, federal enforcers enjoy boundless advantages. The two federal antitrust enforcement agencies, the FTC and the Antitrust Division, enjoy comparatively massive resources, sweeping criminal enforcement powers, an elaborate merger notification system, and traditional respect from Congress and the courts.[123] In short, the FTC and the Antitrust Division enjoy too many advantages to make a comparison meaningful.

Rather than focus on advantages, as such, this Article suggests some hallmarks of effective civil antitrust enforcement.[124] In particular, those hallmarks are the active participation by both agencies; use of a variety of tools to address an issue; support for mainstream, economics-oriented antitrust while addressing important questions; litigation; and enforcement by both public and private entities. Having set out those hallmarks, the Article then illustrates their importance by examining federal antitrust agencies' work on addressing the intersection between the per se rule and the rule of reason, and the possible existence and contours of a middle form of scrutiny. The agencies' efforts stand as a striking example of respected work even though that work may not yet have resulted in an ultimate resolution of the problem.[125] Although the issues have not

122. *See ABA Antitrust Report*, *supra* note 2, at 21–24 (detailing the concern about duplicative litigation, and noting that with indirect purchasers now being able to sue, the number of duplicative cases will increase). The seemingly self-answering question is more hypothetical than real, since so few cases come close to approximating that situation either through litigation or through settlement; nonetheless, the tension is obvious and eventually will have to be resolved.

123. Good overviews of the two agencies are provided in ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 603–724 (FTC), 725–802 (Antitrust Division).

124. Criminal antitrust enforcement is a crucial but separate world of its own.

125. *Cf., e.g.*, *ABA Antitrust Report*, *supra* note 2 (recommending changes in agency programs); Deborah A. Garza, *A Comparative Analysis of the Clinton Antitrust Program and*

been finally resolved, the agencies have been working responsibly to address them.

A. Hallmarks of Effective Civil Antitrust Enforcement

The United States has two federal antitrust agencies: the Department of Justice's Antitrust Division and the Federal Trade Commission.[126] As a practical matter, the Antitrust Division and the FTC enforce the same statutes, with a major and a minor exception: Only the Division can bring criminal actions,[127] and only the FTC can allege "unfair methods of competition," which is a slightly more expansive wording than the usual antitrust statutes.[128] The majority of the agencies' resources are devoted to criminal (DOJ) and merger work.[129] The bulk of the controversy about agency activities arises from the rest of their activities.[130] The agencies' non-merger, civil antitrust program is most likely to be healthy and accepted when it bears several hallmarks.

1. *Active Participation by Both Agencies.* Although one can debate the pros and cons of having two antitrust agencies, given that the U.S. has two, the system works best when both are engaged on legal issues. Specialization by line of commerce (business area) can yield enforcement efficiencies; specialization by area of law generally

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Suggestion of Changes to Come, ANTITRUST, Summer 2001, at 64, 64 (identifying and analyzing controversial aspects of Clinton administration antitrust); Press Release, Loyola University Law School Institute for Consumer Antitrust Studies, Bush Administration Gets a "C" for Antitrust Enforcement (Oct. 9, 2002), *at* http://www.luc.edu/law/academics/special/center/antitrust/bushgetc.shtml (on file with the *Duke Law Journal*) (giving low marks to other aspects of Bush's agencies).

126. GELLHORN & KOVACIC, *supra* note 50, at 449–56 (describing the roles of the Antitrust Division and FTC).

127. *Id.* at 450.

128. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 608–15 (noting that the Commission has the authority to define "unfair competition" and bring actions for violations thereof).

129. *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 61–62 (1989) [hereinafter *Kirkpatrick II*]. The author was counsel to this committee.

130. *See id.* (noting that the FTC's special role, which needs attention, is in its non-merger work); *Report of the ABA Antitrust Law Section Task Force on the Antitrust Division of the U.S. Department of Justice*, 58 ANTITRUST L.J. 735, 765–69 (1989) [hereinafter *Antitrust Section Task Force Report*] (describing the differing views of ABA section members on monopoly and vertical restraints, two important areas of work outside of criminal and merger work).

sacrifices too much.[131] The agencies' tendency to specialize by line of commerce guarantees that each will have different experiences to contribute to developing the law. Each agency has different strengths from time to time. Law development is likely to work best when both participate.[132]

2. *Using a Wide Array of Tools.* The agencies do far more than litigate and settle cases. They promulgate guidelines and file amicus briefs; they issue advisory opinions and business review letters and staff advisory letters; their leaders give speeches and deliver prepared testimony; they hold conferences and workshops and prepare reports.[133] It makes no sense for the litigating part of the operation to be divorced from the rest. Especially for the FTC, which was designed as an independent agency with broad powers, it is important to bring as many powers as possible to bear on a problem.[134]

3. *Addressing Important Questions from a Position of Mainstream, Economics-Supported Antitrust.* An agency's efforts will have greatest acceptance when the agency is seen as working within mainstream antitrust to promote a legitimate, economics-based enforcement agenda. Controversy is more likely to follow where an agency head is questioning the agency's importance,[135] or an agency can be portrayed as experimenting with extensions of the law[136] or with symbolically dramatic retrenchments.[137]

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131. The clearance procedures between the two agencies are set out in DEPARTMENT OF JUSTICE, ANTITRUST DIVISION MANUAL, *supra* note 52, at VII-1 to VII-5, *available at* http://www.usdoj.gov/atr/foia/divisionmanual/ch7.pdf (on file with the *Duke Law Journal*). A 2002 agency attempt to revise the clearance arrangements to make them more detailed and precise was abandoned in the face of Congressional opposition. *DOJ/FTC Clearance Agreement Succumbs to Political Inflammation*, 82 Antitrust & Trade Reg. Rep. (BNA) 467, 467–69 (2002).

132. The advantages and importance of both agencies participating are discussed in *Kirkpatrick II*, *supra* note 129, at 115–19, and *Antitrust Section Task Force Report*, *supra* note 130, at 771–72.

133. *See* GELLHORN & KOVACIC, *supra* note 50, at 449–56 (reviewing activities of federal enforcers).

134. *See also Kirkpatrick II*, *supra* note 129, at 63.

135. *See* Daniel Oliver, Chairman, FTC, Luncheon Address at the 34th Annual Meeting of the Antitrust Law Section, *in* 55 ANTITRUST L.J. 349, 350 (1986) ("[T]he principal source of restraints on competition is government—the State. . . . The Federal Trade Commission is, of course, part of the State, and historically has been part of the problem, along with the Antitrust Division of the Department of Justice.").

136. *Cf.* Official Airlines Guides, Inc. v. FTC, 630 F.2d 920, 925–27 (2d Cir. 1980) (reversing innovative FTC order requiring monopolist publisher of airline flight schedules to also publish schedules for commuter airline connecting flights); United States v. Cuisinarts, Inc., [U.S.

4. *Litigating.* Government litigation is important: (a) for evolution of legal doctrine, (b) for certainty and predictability, (c) because some cases are wrongly decided, and (d) as a foundation for and disciplining of agency actions.[138] Cases being wrongly decided matters because (i) the government must be able to afford to lose, (ii) subsequent litigation should be sufficiently common that wrongly decided cases can be buried in the sands of time, and (iii) wrong-headed cases can attract criticism. All are illustrated by the agencies' experience with the per se rule/rule of reason.

5. *Interacting with Private Enforcement.* Although government agencies must enforce important antitrust laws even where, as with merger law, there is little private enforcement of those laws,[139] the active involvement of the private sector yields a number of advantages. Today, as always, antitrust litigation is overwhelmingly private:[140]

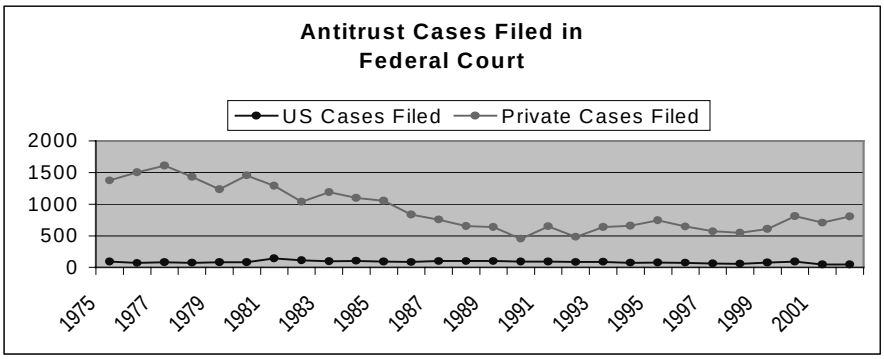
Antitrust Case Summaries 1980–1988] Trade Reg. Rep. (CCH) 53,436-37 (D. Conn. Dec. 19,1980) (accepting *nolo contendere* plea and ordering $250,000 fine in criminal resale price maintenance case). This is not to suggest that an agency should never seek to move the law. *See Kirkpatrick II*, *supra* note 129, at 62–63 (arguing that FTC development of uncertain legal theories can be appropriate). Rather, it recognizes the much greater risks that flow from such an attempt.

137. *Cf. Baxter Will Not Urge Abandonment of Per Se Rule in Spray-Rite Argument*, 45 Antitrust & Trade Reg. Rep. (BNA) 888, 888 (Dec. 1, 1983) (describing legislation barring use of funds to advocate abandonment of traditional rule); Vertical Restraints Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,105 (Jan. 23, 1985, *withdrawn* Aug. 10, 1993) (announcing and later retracting change from traditional enforcement policy); *Antitrust Section Task Force Report*, *supra* note 130, at 769 (concluding, about a Division effort sharply to change vertical restraint law, that "this kind of confrontation, which in the end is unproductive in any event, should be avoided").

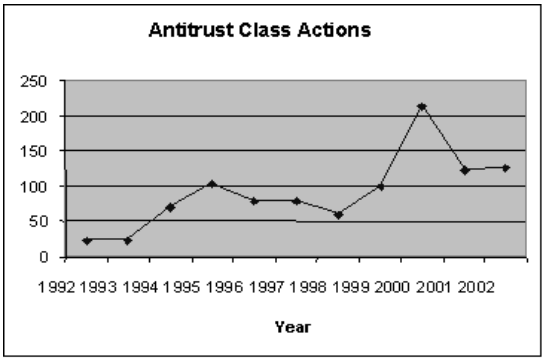
138. Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 5 (1998) (describing factors (a)–(c)); *see infra* Part II.B.4(d) (factor (d)).

139. *See* Phillip Areeda, *Justice's Merger Guidelines: The General Theory*, 71 CAL. L. REV. 303, 305 (1983) (arguing that government case selection is much more critical to merger enforcement than to areas with active private enforcement).

140. *Antitrust Cases Filed in U.S. District Courts by Type of Case, 1975–2000*, LexisNexis, *at* http://www.lexis-nexis.com/statuniv (last visited Aug. 2, 2003) (on file with the *Duke Law Journal*) (citing Bureau of Justice Statistics, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2000, at 451 (2001)). Antitrust class actions have made a notable comeback as well. Federal Court Antitrust Class Action Statistics:



The predominance of private litigation means that issues litigated privately will receive much more ongoing and robust judicial treatment, which is a benefit by itself, but further benefits flow when private and government efforts address the same subject. Legal standards must be set forth with clarity because one cannot rely on administrative discretion to prevent abuses. Charges that antitrust is nothing but an agency "pork barrel," as have been leveled at Japanese antitrust,[141] have little traction for the bulk of the system.



The Office of the U.S. Courts, 2002 Annual Report, Table C-2A, *U.S. District Courts—Civil Cases Commenced by Nature of Suit, During the Twelve Month Periods Ending September 30, 1998 Through 2002, at* http://www.uscourts.gov/judbus2002/appendices/x05sep02.pdf (last visited Aug. 2, 2003) (on file with the *Duke Law Journal*); Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 416–17 (1997).

141. J. Mark Ramseyer, *The Antitrust Pork Barrel in Japan*, ANTITRUST, Summer 1992, at 40, 41. This comparison with Japanese antitrust is well developed in Harry First & Tadashi

Changes in legal standards are made clearly and publicly, courts in opinions subject to review and criticism. The agencies can and do play a leading role though amicus briefs and guidelines, as has been seen, but they are only part of the story.

The benefits flowing from the mix of private and public enforcement are suggested also by the exception to this pattern, merger enforcement. As has been chronicled elsewhere, the world of merger enforcement has become almost exclusively an agency practice, and largely regulatory.[142] The occasional litigation provides a check on overly aggressive agency policies, but nothing formally serves as an effective prevention of agency permissiveness. During the end of the Reagan years, for instance, Justice Department merger enforcement appears to have declined,[143] but there is little review of nonenforcement.

For that matter, there is no meaningful way to know whether a consent order is a draconian imposition of unreasonable requirements or a blessing of a highly anticompetitive merger for the price of trivial relief. Complaints and consent orders are typically filed simultaneously,[144] so it should be no surprise that the allegedly threatened harms are addressed by the proposed relief. (One never sees a complaint allege violations in ten local markets and an admission that the remedy in five of those was all the government could negotiate.) Because most of the external pressures favor settlement—it reduces litigation risk, it saves resources, it avoids criticism from the lawyers and economists representing the merging

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Shiraishi, Concentrated Power: The Paradox of Antitrust in Japan (unpublished manuscript, on file with the *Duke Law Journal*).

142. *See* Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 869 (1997) (appraising the "transformation of merger practice from litigation to very comprehensive regulation"); E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997, 1053–54 (1986) (arguing that agencies as regulators are efficient but that the change from traditional enforcement agencies to regulatory agencies lacks clear congressional approval).

143. *See* Thomas G. Krattenmaker & Robert Pitofsky, *Antitrust Merger Policy and the Reagan Administration*, 33 ANTITRUST BULL. 211, 225 (1988) (lamenting the "paucity of enforcement actions"); Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105, 122 (2002) (noting that merger enforcement was at its lowest during the "later Reagan years (1986–1989)").

144. *See* Thomas E. Kauper, *The Justice Department and the Antitrust Laws: Law Enforcer or Regulator?*, 35 ANTITRUST BULL. 83, 107–08, 114 n.98 (1990) (noting that the simultaneous filing of complaints and consent orders had ended in 1974 but resumed in the 1980s); Sullivan, *supra* note 142, at 1041 (outlining the consent decree process and noting that consent decrees are usually filed at the same time as complaints).

parties, it lets one claim victory, etc.—one has to rely principally on the good faith of the enforcers to avoid cheap settlements of either lawful or unlawful mergers. Reliance on that good faith is usually well founded, but it leaves this part of the system open to charges of pork-barreling.[145] The agencies are aware of the problems, and have taken significant steps to increase transparency.[146] Although private interests have sought to comment on settlements and to provide a healthy check on they system,[147] the system is still based significantly on trust.

Merger regulation as an agency process also makes the legal standards less reliably lasting. Whereas the per se rule/rule of reason has benefited from a parade of private and government merger cases, the Supreme Court has not decided a merger antitrust case since 1974.[148] Merger law, as practitioners think of it, differs radically from the Supreme Court cases still on the books; the agencies, through guidelines and enforcement decisions, and the few lower court decisions, have simply moved away from Supreme Court standards.[149] At least in theory, nothing would prevent new agency leaders from taking office and pushing a radically more aggressive enforcement agenda.[150] The existence of private merger litigation would have prevented this by keeping court standards consistent with agency standards.

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145. *See* Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J.L. & ECON. 329, 342 (1982) (suggesting that FTC actions may be responsive to budget-maximizing interests and congressional influence).

146. Among the clearest statements of agency thinking occurred when the FTC closed its cruise ships investigation. *See In re* Royal Caribbean Cruises, Ltd., FTC File No. 021-0041 (Oct. 4, 2002) (stating theories pursued and reasons action was not taken), *available at* http://www.ftc.gov/os/caselist/0210041.htm (on file with the *Duke Law Journal*).

147. Commenting on government enforcement is among the purposes of the American Antitrust Institute. *See* American Antitrust Institute, *at* http://www.antitrustinstitute.org (last modified Aug. 22, 2003) (on file with the *Duke Law Journal*).

148. United States v. Marine Bancorporation, Inc., 418 U.S. 602, 641–42 (1974) (affirming judgment for defendants in the last Supreme Court antitrust merger case).

149. *See Federal, State, International Enforcers Update Participants at ABA Spring Meeting*, 84 Antitrust & Trade Reg. Rep. (BNA) 336, 340 (Apr. 11, 2003) (describing how FTC Chairman Muris stressed the importance of the Supreme Court deciding a merger case because merger case law is outdated).

150. *See id.* (highlighting, for example, FTC Chairman Muris's concern that "'the possibility exists that there could be an attempt to return to a more simplistic and wrong application of merger law'").

B. An Illustration: The Agencies and the Structured Rule of Reason

The story of the search for a middle category of antitrust analysis started with the Antitrust Division. Currently, the FTC has the lead. Key parts have been played by courts and academics. The ending is unknown. In spite of that, the story serves as a good illustration of the hallmarks of sound non-merger civil antitrust enforcement. Even though an ultimate resolution has escaped realization, the exercise has been widely viewed as legitimate and responsible, in part because it has born the five hallmarks discussed herein.

The story began with the filing of a fairly simple complaint alleging per se illegal price fixing.[151] A society of engineers' code of ethics banned competitive bidding. The society responded to the charge of per se (automatic) illegality by claiming, among other things, that the practice was reasonable.[152] The district court ruled that reasonableness was not an issue where, as there, a defendant had engaged in price fixing,[153] and it adhered to this view after the Supreme Court remanded the case for reconsideration in light of *Goldfarb v. Virginia State Bar*.[154] The court of appeals affirmed the lower court, specifically approving use of the per se rule and holding that the district court did not err when it refused to make factual findings on the balancing of costs and benefits.[155] In language hinting

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151. United States v. Nat'l Soc'y of Prof'l Eng'rs, 389 F. Supp. 1193 (D.D.C. 1974), *vacated and remanded for further consideration*, 422 U.S. 1031 (1975), *on remand*, 404 F. Supp. 457 (D.D.C. 1975), *aff'd in part and remanded in part*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

152. *Nat'l Soc'y of Prof'l Eng'rs*, 389 F. Supp. at 1197 (arguing that "learned professions" are not subject to the antitrust laws and that the code was exempted by state regulation).

153. *Id.* at 1199.

154. United States v. Nat'l Soc'y of Prof'l Eng'rs, 404 F. Supp. 457, 460–61 (D.D.C. 1975) (referring to *Goldfarb*, 421 U.S. 773 (1975)). The *Professional Engineers* district court held that the per se rule was not made inapplicable to professional organizations by *Goldfarb*. The *Goldfarb* Court had written that:

> [t]he fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Goldfarb, 421 U.S. at 788 n.17.

155. *Nat'l Soc'y of Prof'l Eng'rs*, 555 F.2d at 982:

> The Society is vexed because the district court did not make findings on its massive evidence, including its 17 expert witnesses, filling the bulk of a joint appendix of 10,000 pages. There was no need for the district court to embark on protracted

at the confusion that lay ahead, however, the court of appeals approvingly noted that the district court "did not take the [challenged] rule solely on its face" and condemned merely "an unfortunate use of language. It assessed the rule by taking into account how it had operated in fact, and with what practical anti-competitive consequences."[156] In truth, however, although the district court had found that the society had actively promoted its ethical rules and discouraged competitive bidding,[157] the court made no finding about market power or changes in price, output, or quality: "It is not important to know what effect the Sec. 11(c) prohibition has on the price of professional engineering services."[158]

The Supreme Court could have simply affirmed this use of the per se rule (as requested by the solicitor general[159]), but it did not. In response to the society's argument that its rules were reasonably addressed to the prevention of dangerously harmful price competition, the Court, in an opinion by Justice Stevens, affirmed "[b]ecause we are satisfied that the asserted defense rests on a fundamental misunderstanding of the Rule of Reason."[160] The Court's Delphic opinion set out a classic distinguishing between the per se rule and the rule of reason:

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business,

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> findings on matters that it considered, in the last analysis, to be unavailing as a defense. Sound antitrust doctrine did not require a simulation of a "cost-benefit ratio" analysis, or a "balancing" of the benefits accruing from competitive restraints of this nature.

See also id. at 984 (holding that the district court correctly found the rule "illegal without regard to claimed or possible benefits").

156. *Id.* at 982.

157. *Nat'l Soc'y of Prof'l Eng'rs*, 389 F. Supp. at 1200 ("[T]he record does support a finding that NSPE and its members actively pursue a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients.").

158. *Id.* at 1120 (citing Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951)); *see also Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. 679, 686 (1978) ("The District Court did not, however, make any finding on the question whether, or to what extent, competition had led to inferior engineering work which, in turn, had adversely affected the public health, safety, or welfare.").

159. Brief for the United States at 35–37, *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. 679 (No. 76–1767).

160. *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 681.

> the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry.[161]

The Court then coyly refrained from selecting between the two approaches. By affirming a judgment applying the per se rule and writing that the challenged agreement "[o]n its face . . . restrains trade,"[162] the opinion seems to apply the per se rule, but it nonetheless weighs the society's justification (and finds it wanting), while repeatedly sketching the contours of the rule of reason.[163] To this day there is disagreement about whether *Professional Engineers* is a per se or a rule of reason case[164]—or perhaps, as Justice Stevens queried during oral argument in *California Dental Ass'n v. FTC*,[165] something in between.[166]

The enigma of *Professional Engineers* launched more than two decades of debate during which the antitrust system, like Diogenes with his lamp, has sought answers to a thicket of challenging, intricately related questions. Are there different rules? If so, how does one decide which to apply? What can be presumed, and when? What shortcuts may plaintiffs or defendants take?

Inevitably, the brightest landmarks along the way have been provided by the Supreme Court.[167] The most important decision, if

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161. *Id.* at 692.

162. *Id*. at 693; *see also id.* at 692 ("While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.").

163. *Id.* at 694 (noting that the possibility that competitive bidding may lead to suboptimal results is not a reason to permit an agreement to eliminate it).

164. Stephen Calkins, California Dental Association*: Not a Quick Look but Not the Full Monty*, 67 ANTITRUST L.J. 495, 523 n.139 (2000) (citing differing views).

165. 526 U.S. 756 (1999).

166. Transcript of Argument at 29, *Cal. Dental Ass'n* (No. 97-1625) (asking petitioner's counsel whether he viewed *Professional Engineers* as "a quick look case").

167. Although overshadowed by the stature of the High Court, some of the most powerful judicial analysis has, in fact, been contributed by Judges Bork, Easterbrook, and Posner, in a quartet of cases issued on the heels of *NCAA v. Board of Regents*, 468 U.S. 85 (1984). *See* Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J.) (asserting that restraints ancillary to the existence of a joint venture are judged by the rule of reason); Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185, 190 (7th Cir. 1985) (Easterbrook, J.) (reasoning that a covenant not to compete between parties to a new venture was an ancillary restraint that must be judged under the rule of reason); Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 603 (7th Cir. 1984) (Posner, J.) ("The Supreme Court has told us that before we leap

only because it was first, was *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*[168] There the Court reversed a Second Circuit finding that a blanket copyright license was per se illegal price fixing.[169] The Court treated the label "price fixing" less as the beginning of the analysis and more as the end: "'price fixing' is a short-hand way of describing certain categories of business behavior to which the *per se* rule has been held applicable."[170] Application of the per se rule, the Court held, turns on "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"[171] The test continues to be applied today.[172]

In another important private case, *NCAA v. Board of Regents*,[173] the Court used the rule of reason to analyze (and condemn) an agreement among colleges jointly to market television rights to football games.[174] In response to defendant's insistence that it had no market power, the Court ruled that "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output,"[175] but it also concluded, nonetheless, that the NCAA had market power.[176]

Two FTC cases round out the crucial entries to date.[177] In *FTC v. Indiana Federation of Dentists*,[178] the Court upheld a Commission ban

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to the conclusion that an agreement among competitors is price fixing we should take a quick look to see whether it has clear anticompetitive consequences and lacks any redeeming competitive virtues."); Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.) ("[I]f the elimination of competition is apparent on a quick look, without undertaking the kind of searching inquiry that would make the case a Rule of Reason case in fact if not in name, the practice is illegal per se.").

168. 441 U.S. 1 (1979).

169. *Id.* at 7, 18–20.

170. *Id.* at 9.

171. *Id.* at 19–20 (quoting United States v. United States Gypsum Co., 438 U.S. 422, 441 n.16 (1978)).

172. *See, e.g.*, La. Wholesale Drug Co. v. Hoechst Marion Roussel, Inc., 332 F.3d 896, 906–08 (6th Cir. 2003) (applying the test to find a per se violation).

173. 468 U.S. 85 (1984).

174. *See id.* at 98–107 (noting that horizontal restraints on competition are essential in the industry, but that the anticompetitive consequences of the particular agreement are too great).

175. *Id.* at 109–10.

176. *Id.* at 111–13.

177. *See also* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49–50 (1990) (per curiam) (holding that geographic market division between even potential competitors is per se illegal); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 428–36 (1990) (declining to recognize a lack of market power exception to politically expressive agreements among competitors to withhold

of the Federation of Dentists' refusal to make x-rays freely available to insurers.[179] Formal findings of market power were unnecessary because 'the absence of proof of market power does not justify a naked restriction on price or output [which would] require[] some competitive justification even in the absence of a detailed market analysis,'[180] and because the Commission had adequately proven "actual, sustained adverse effects on competition."[181] Most recently, in *California Dental Ass'n v. FTC*,[182] the Court ruled that the Ninth Circuit had permitted the FTC to take too quick a look at the competitive effects flowing from a dental association's ethical rules purportedly directed at misleading advertising.[183]

Although the key landmarks are judicial, judges were not operating as the only caretakers of the public interest. Academics regularly sought to enlighten and advance the discourse, here with pride of place being shared by then-Professor Bork, whose seminal articles on the rule of reason[184] underlay *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[185] and Professor Areeda, whose initially obscure but seminal work made the "essential point" that "the rule of reason can sometimes be applied in the twinkling of an eye."[186]

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services unless prices were raised); Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 354–57 (1982) (4-3 decision) (applying the per se rule to an innovative agreement among physicians to cap professional fees); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 649 (1980) (per curiam) ("[W]hen a particular concerted activity [a horizontal agreement to eliminate credit] entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*.").

178. 476 U.S. 447 (1986).

179. *Id.* at 465–66 (reversing the decision of the court of appeals).

180. *Id.* at 460 (quoting NCAA v. Bd. of Regents, 468 U.S. 85, 109–10 (1984)).

181. *Id.* at 461.

182. 526 U.S. 756 (1999). The case is discussed in Calkins, *supra* note 164 (engaging in an exhaustive review of the record and discussing implications of the case).

183. *Cal. Dental Ass'n*, 526 U.S. at 778 ("[T]he plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated.").

184. Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 1), 74 YALE L.J. 775 (1965) (distinguishing between the "main tradition" and "deviant themes" in the rule of reason); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 373, 380–84 (1966) (endorsing the doctrine of ancillary restraints).

185. 441 U.S. 1 (1979).

186. PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 38 (Federal Judicial Center 1981), *quoted in Cal. Dental Ass'n*, 526 U.S. at 763; NCAA v. Bd. of Regents, 468 U.S. 85, 110 (1984).

Additionally, throughout the entire period, and down to today, the antitrust agencies were busily playing essential roles. Review of the agencies' activities during this saga reveals several key features: (1) both the FTC and the Antitrust Division participated actively, (2) using a wide array of tools, while (3) showing support for mainstream, economics-based antitrust enforcement and an interest in addressing important questions,[187] (4) litigating, and (5) addressing legal standards also being enforced by private parties.

1. *Active Participation by Both Agencies.* Although perhaps not surprising given the centrality of antitrust to the intersection between the per se rule and the rule of reason, it is nonetheless striking how thoroughly both the FTC and the Antitrust Division have participated in the development of this body of law. The seminal Supreme Court case, *Professional Engineers*, was brought by the Justice Department,[188] but three of the most recent Supreme Court cases featured the FTC as a party.[189] Although the Justice Department filed several amicus briefs on its own *(Broadcast Music*,[190] *Catalano*,[191] *Maricopa County*,[192] *Palmer v. BRG*[193]), one of the most important

187. *But cf. infra* notes 219–220 (providing criticism suggesting insufficient attention to economics).

188. 435 U.S. at 681.

189. *See Cal. Dental Ass'n* (vacating judgment that had enforced an FTC order against dental association ethical rules regarding advertising); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990) (holding that the lawyers' boycott of the practice of acting as court-appointed counsel for indigent defendants was per se illegal); FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986) (upholding FTC order against association rule discouraging supplying of x-rays to dental insurers).

190. Brief for the United States as Amicus Curiae, Broad. Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) (Nos. 77-1578, 77-1583) (asserting that blanket licenses are not unlawful per se).

191. Memorandum for the United States as Amicus Curiae, Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (No. 79-1101) (arguing that the Court should consider summarily reversing the lower court decision that erroneously concluded that an agreement to eliminate competition in credit terms was not illegal per se).

192. Brief for the United States as Amicus Curiae, Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982) (No. 80-419) (asserting that arrangements among doctors that achieved horizontal, maximum price fixing should be illegal per se at least unless defendants show that the restrictions are necessary to procompetitive benefits). Further enriching the discussion, an individual state and a group of states filed their own amicus briefs supporting their sister state. Brief for the State of Ohio as Amicus Curiae, *Maricopa County Med. Soc'y* (No. 80-419); Brief for the States of Alabama et al. as Amici Curiae, *Maricopa County Med. Soc'y* (No. 80-419). A group of states also filed an amicus brief supporting the FTC in *California Dental Ass'n*. Brief of the States of Arizona et al. as Amici Curiae, *Cal. Dental Ass'n* (No. 97-1625).

early advocacies of a structured rule of reason was in the government's amicus brief in *NCAA*, in which the Justice Department and the FTC both joined.[194]

At times, the agencies have experimented with differing approaches. In 1988, the FTC, building upon the approach taken in the *NCAA* amicus brief, set out an elegant set of decisional questions that guided its analysis in *In re Massachusetts Board of Registration in Optometry*,[195] with the opening question being "whether the restraint is 'inherently suspect.'"[196] Later that same year, the Antitrust Division set forth its own somewhat differently structured list of queries.[197] Eight years later, the FTC gave *Massachusetts Board* a quiet burial when it failed to apply it in its *California Dental Ass'n* opinion,[198] only to see Assistant Attorney General Joel Klein publicly advocate a "stepwise approach" that was strikingly similar to *Massachusetts Board*.[199] The agencies joined together once again to issue Antitrust Guidelines for Collaborations Among Competitors.[200] The story, however, continues with separate initiatives, as is discussed below.

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193. Brief for the United States as Amicus Curiae, Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990) (No. 89-1667) (urging the Court summarily to reverse the lower court decision that held the per se rule inapplicable to an agreement designed to end competition).

194. Brief for the United States as Amicus Curiae, NCAA v. Bd. of Regents, 468 U.S. 85 (1984) (No. 83-271) (authored by, among other, Assistant Attorney General J. Paul McGrath and FTC General Counsel John H. Carley) (asserting that a rule of reason analysis supports the affirmance of the lower court's holding that a television broadcasting plan violates the Sherman Act).

195. 110 F.T.C. 549 (1988); *see id.* at 604 (providing a structured series of questions for analyzing horizontal restraints).

196. *Id*.

197. Antitrust Enforcement Guidelines for International Operations—1998, 4 Trade Reg. Rep. (CCH) ¶ 13,109.10, at 20,600 (Nov. 10, 1988) (describing a four-step analysis, starting with whether a proposed joint venture "would likely have any anticompetitive effect" in its market(s)). These Guidelines were replaced by revised Guidelines. Antitrust Enforcement Guidelines for International Operations—1995, 4 Trade Reg. Rep. (CCH) ¶ 13,107 (April 6, 1995).

198. *In re* Cal. Dental Ass'n, 121 F.T.C. 190, 321 & n.26 (1996) (finding the result "not inconsistent" with *Massachusetts Board*); *see* Timothy J. Muris, *The Rule of Reason After* California Dental, 68 ANTITRUST L.J. 527, 528–29 (2000) ("In *[Cal. Dental Ass'n]* however, Chairman Pitofsky attempted to revive *per se*/rule of reason categorization. . . . This approach proved to be incorrect.").

199. *See* Joel I. Klein, A Stepwise Approach to Antitrust Review of Horizontal Agreements, Address Before the ABA Antitrust Section Semi-Annual Fall Policy Program (Nov. 7, 1996), *at* http://www.usdoj.gov/atr/public/speeches/jikaba.htm (on file with the *Duke Law Journal*) (discussing various approaches to analyzing whether a practice is in violation of antitrust laws).

200. 4 Trade Reg. Rep. (CCH) ¶ 13,160 (Apr. 7, 2000).

2. *Using a Wide Array of Tools.* As already intimated, the agencies have addressed these challenging issues using a variety of tools. Both agencies have litigated cases, the Antitrust Division in the federal courts and the FTC administratively. Both agencies have filed amicus briefs. Both have given speeches.

Most ambitiously, in 1997, the agencies embarked upon a major "Joint Venture Project."[201] Testimony was taken and roundtables with scores of participants were held.[202] Massive staff papers were prepared on the role of market power and "the search for a foreshortened antitrust analysis."[203] Eventually—and one would guess after the agencies deliberately waited for the Supreme Court to issue its *California Dental Ass'n* opinion—the agencies published guidelines in draft[204] and final form.[205]

The guidelines have not been an unqualified success: they endured a painfully long gestation process,[206] their emergence was

201. *See* Comment and Hearings on Joint Venture Project (Apr. 22, 1997), *available at* http://www.ftc.gov/os/1997/04/jointven.htm (on file with the *Duke Law Journal*) (inviting public comment on issues to be addressed in the Joint Venture Project).

202. Information is available at the Joint Venture Project website, at http://www.ftc.gov/opp/jointvent/index.htm (last visited Nov. 1, 2003).

203. William E. Cohen, Per Se Illegality and Truncated Rule of Reason: The Search for a Foreshortened Antitrust Analysis, FTC Policy Planning Staff Discussion Draft (Nov. 1997), *at* http://www.ftc.gov/opp/jointvent/1Persepap.htm (on file with the *Duke Law Journal*) (providing a review and appraisal of "alternative formulations for application" of the per se analysis); *see* Michael S. McFalls, The Role and Assessment of Classical Market Power in Joint Venture Analysis, FTC Policy Planning Staff Discussion Draft (Oct. 1997), *at* http://www.ftc.gov/opp/jointvent/classic8.htm (on file with the *Duke Law Journal*) (reviewing the role of market power analysis). Although nominally only for purposes of discussion, the Cohen draft was quoted in litigation by FTC complaint counsel as recently as the fall of 2002. Answering Brief of Counsel Supporting the Complaint in Support of the Initial Decision at 10, 30, *In re* Polygram Holding, Inc., No. 9298 (FTC Sept. 11, 2002), *available at* http://www.ftc.gov/os/adjpro/d9298/020911answerbrief.pdf (on file with the *Duke Law Journal*).

204. FTC and DOJ Propose Antitrust Guidelines for Collaborations Among Competitors, *at* http://www.ftc.gov/opa/1999/10/jointven.htm (Oct. 1, 1999) (on file with the *Duke Law Journal*); *see* Susan S. DeSanti, Guideposts in the Analysis: The Federal Trade Commission and U.S. Department of Justice, Antitrust Division Competitor Collaboration Guidelines, Remarks Before the Houston Bar Ass'n (Dec. 7, 1999), *available at* http://www.ftc.gov/opp/jointvent/houstonspeech.pdf (on file with the *Duke Law Journal*) (reviewing draft guidelines and inviting comments); Robert Pitofsky, Joint Venture Guidelines: Views from One of the Drafters, Remarks Before an ABA Antitrust Section Workshop (Nov. 11–12, 1999), *at* http://www.ftc.gov/speeches/pitof sky/jvg991111.htm (on file with the *Duke Law Journal*) (reviewing the history and structure of the draft guidelines).

205. Antitrust Guidelines for Collaborations Among Competitors, 4 Trade Reg. Rep. (CCH) ¶13,161, at 20,851 (Apr. 7, 2000).

206. Pitofsky, *supra* note 204 ("A major theme that I hope many of you subscribe to is the following: better late than never.").

greeted with mixed reviews,[207] few courts cited them,[208] they receive varying play in some leading antitrust books,[209] and sophisticated practitioners rarely consult them for definitive answers to hard questions.[210]

Nonetheless, the guidelines have made a significant contribution. A new casebook describes them as "the most ambitious effort to synthesize" this area of law.[211] Neophytes consult them, and even sophisticated practitioners use them to stimulate thinking and illustrate points. Citations to them can be found in scores of law review articles.

Most significantly, in terms of the agencies and law development, the guidelines provided a ready vehicle for the agencies to respond to the setback in *California Dental Ass'n.* In *California Dental Ass'n*, the FTC, in an opinion authored by noted scholar and Chairman Robert Pitofsky, condemned a dental association's advertising restraints by using the per se rule and by taking a "quick look under the rule of reason."[212] The factual record is murky, because it turned on the

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207. *See* Comments of the Section of Antitrust Law of the American Bar Association on the "Antitrust Guidelines for Collaborations Among Competitors" Issued in Draft on October 1, 1999, by the Federal Trade Commission and U.S. Department of Justice (Feb. 4, 2000 draft) (unpublished manuscript, on file with the *Duke Law Journal*) (asserting that the guidelines defined competitor collaboration too broadly, gave too much sweep to the per se rule, were excessively strict in application of the rule of reason, were in tension with other guidelines, and failed to address important issues); Letter from Robert H. Lande, Director and Senior Research Scholar, American Antitrust Institute, to Donald S. Clark, Secretary, FTC, (Feb. 4, 2000), *at* http://www.antitrustinstitute.org/recent/53.cfm (on file with the *Duke Law Journal*) ("AAI Comments on New FTC/DOJ Collaboration Guidelines") (clarifying that the American Antitrust Institute applauds the guidelines but offers suggestions for improvements); Janet L. McDavid and Mary Anne Mason, Competitor Collaboration Guidelines: Delphic Messages from the Antitrust Agencies, Remarks before an ABA Antitrust Section Program, Joint Ventures and Strategic Alliances: The New Federal Antitrust Competitor Collaboration Guidelines (Nov. 11–12, 1999), at 2 (noting that "the draft guidelines are more generic and less utilitarian than . . . predecessor efforts").

208. They have been cited only in *Mariana v. Fisher*, 338 F.3d 189, 196 (3d Cir. 2003); *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239, 248 (3d Cir. 2001), and *Paladin Associates, Inc. v. Montana Power Co.*, 328 F.3d 1145, 1155 (9th Cir. 2003).

209. *See, e.g.*, ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 78–79 (discussing enforcement agencies' approaches with respect to FTC and DOJ Intellectual Property Guidelines); ROBERT PITOFSKY ET AL., TRADE REGULATION 407–08 (5th ed. 2003) (explaining the substance of the guidelines); E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS 236–92 (5th ed. 2003) (discussing the meaning and scope of the rule without mentioning the guidelines).

210. This conclusion is based on a series of interviews by the author.

211. ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 200 (2002).

212. *In re* Cal. Dental Ass'n, 121 F.T.C. 190, 320 (1996).

enforcement as well as the wording of the association's ethical addressing advertising, but the Commission found that the association had substantially interfered with the advertising of discounts and with the making of quality claims.[213] The Ninth Circuit affirmed, because California Dental Association's justification, "preventing false and misleading price advertising," did not "require[] more than a quick look under the rule of reason."[214] The Supreme Court reversed through a 5-4 opinion by Justice Souter that held that "a less quick look was required."[215] The Court treated the question of the legal standard as one of law, and concluded that the Ninth Circuit had been too willing to defer to the Commission's use of the "quick look."[216] The opinion is singularly enigmatic, and is susceptible of being read as a powerful attack on anything that could be considered "burden shifting."[217]

The Joint Venture Project provided a ready vehicle for an agency response and interpretation. The guidelines preserve a substantial role for the per se rule, carefully preventing any facile escape from its coverage.[218] They also preserve, even for restraints *not* subject to the

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213. *Id.* at 301; s*ee* Calkins, *supra* note 164, at 500–02 (reviewing the Commission's opinions in *Cal. Dental Ass'n*).

214. Cal. Dental Ass'n v. FTC, 128 F.3d 720, 728 (9th Cir. 1997), *vacated*, 526 U.S. 756 (1999).

215. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 781 (1999).

216. *See id.* at 778 (finding that the Ninth Circuit's review of the Commission's order was "indulgently abbreviated"); Calkins, *supra* note 164, at 503–05 (reviewing court opinions).

217. *See Cal. Dental Ass'n*, 526 U.S. at 775 n.12:

> The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered *whether the effects actually are anticompetitive*.

(emphasis added).

California Dental Ass'n has been considered a "troublesome opinion." Clark C. Havighurst, *Health Care as a (Big) Business: The Antitrust Response*, 26 J. HEALTH POL. POL'Y & L. 939, 953 (2001). Some observers wish that the FTC trial team in *California Dental Ass'n* had introduced additional evidence. *See* Lawrence J. White, *Antitrust During the Clinton Administration: An Assessment*, *in* HIGH STAKES ANTITRUST: THE LAST HURRAH? AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES (Robert Hahn ed., forthcoming 2003) (manuscript at 11, on file with the *Duke Law Journal*) (noting that *Cal. Dental Ass'n* was a missed opportunity); Timothy J. Muris, FTC Chairman, Antitrust Enforcement at the Federal Trade Commission: In a Word—Continuity, Prepared Remarks before the ABA Antitrust Section Annual Meeting (Aug. 7, 2001), *at* http://www.ftc.gov/speeches/muris/murisaba.htm (on file with the *Duke Law Journal*) (asserting that the FTC would have prevailed under the *Massachusetts Board* standard with evidence explaining why a truncated approach was appropriate).

218. 4 Trade Reg. Rep. (CCH) ¶ 13,161, at 20,855 (Apr. 7, 2000) (Guidelines Section 3.2):

per se rule, an important role for a mid-level form of analysis potentially capable of condemning restraints without proof of market power or actual anticompetitive effects.[219] *California Dental Ass'n* was almost casually folded into the analysis.

3. *Addressing Important Questions from a Position of Mainstream, Economics-Based Antitrust.* The antitrust community is not populated by shrinking violets. From time to time, decisions, actions, motives, and even sanity have been vigorously questioned. Although some fret that the increasingly regulatory nature of the practice may have chilled dissenters, so many strong personalities have played important roles that disagreement has always been easy to stimulate.

Because of that, it is striking how little ill will has been engendered by the lengthy struggle over the proper role and form of the per se/rule of reason/mid-level approaches. Articles, opinions, briefs, and guidelines bear the names of Phil Areeda, William Baxter,

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> Agreements of a type that always or almost always tends to raise price or reduce output are per se illegal. . . . Types of agreements that have been held per se illegal include agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories or lines of commerce . . . .
>
> If, however, participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason . . . .

(footnotes omitted).

219. *Id.* at 20,856 (Guidelines Section 3.3):

> Under the rule of reason, the Agencies' analysis begins with an examination of the nature of the relevant agreement, since the nature of the agreement determines the types of anticompetitive harms that may be of concern. . . . If the nature of the agreement and the absence of market power together demonstrate the absence of anticompetitive harm, the Agencies do not challenge the agreement. Alternatively, where the likelihood of anticompetitive harm is evident from the nature of the agreement, or anticompetitive harm has resulted from an agreement already in operation, then, absent overriding benefits that could offset the anticompetitive harm, the Agencies challenge such agreements without a detailed market analysis.

(citation and footnotes omitted). Of course, not every commentator applauds this attempted preservation of a mid-level scrutiny. *See, e.g.*, Thomas C. Arthur, *A Workable Rule of Reason: A Less Ambitious Antitrust Role for the Federal Courts*, 68 ANTITRUST L.J. 337, 359–62 (2000) ("[F]or restraints other than those *the Court* has previously condemned under a per se rule or an abbreviated rule of reason, the only safe course is to engage in an extensive inquiry . . . in short, the full-blown version of the rule of reason."); Alan J. Meese, *Farewell to the Quick Look: Redefining the Scope and Content of the Rule of Reason*, 68 ANTITRUST L.J. 461, 464 (2000) ("[T]he quick look is an artifact of a bygone Populist era . . . [and developments in economic theory and historical research] suggest that courts should accord full-blown rule of reason treatment to any restraint that is plausibly procompetitive.").

Robert Bork, Stephen Breyer, Frank Easterbrook, Douglas Ginsburg, Joel Klein, Douglas Melamed, Timothy Muris, Robert Pitofsky, Richard Posner, and Charles "Rick" Rule, but the writings all evince the shared respect of people of substance striving to accomplish the common good.

Another striking feature is that the state attorneys general have played only a very minor role. There are no NAAG competitor collaboration guidelines. One does not see innovative consent orders that push the envelope on when horizontal agreements should be presumptively unlawful. The state attorneys general have filed the occasional timely and supportive amicus brief, but have not been major participants on this front.

Both phenomena—relative harmony and the modest role of NAAG—can be explained in part by the nature of the agencies' project. This is important stuff. The per se rule/rule of reason tension is at the heart of antitrust. No one can suggest that an agency pursuing these issues is off on a frolic. Rather, the story is one of two agencies led by leaders of varying perspectives, working in good faith to promote legitimate enforcement and resolve one of antitrust's central conundrums.

If there has been a failing, it may have been in making economics or empiricism insufficiently central to the enterprise. Economics plays a key role in the antitrust agencies, as it should.[220] Economics has informed much of the agencies' thinking about these per se/rule of reason issues.[221] The Commission has been faulted for insufficiently introducing economics evidence during the *California Dental Ass'n* proceeding.[222] Certainly the Court perceived that there had been an insufficiently searching examination of the situation,[223] so perhaps

220. *See Kirkpatrick II*, *supra* note 129, at 96–104 (discussing the role of economic analysis in the FTC's programs and research); *see also* Jonathan B. Baker, *"Continuous" Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 859, 869 (1997) ("[T]he Commission has created an organizational structure and information-gathering process that involves economists in every stage of substantive decisionmaking.").

221. *See* James L. Langenfeld & Louis Silvia, *Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, 61 ANTITRUST L.J. 653, 684–85 (1993) (asserting that the Commission's approach and the economic theories explaining such an approach may help separate anticompetitive from efficient conduct).

222. *See* Muris, *supra* note 198, at 538 ("[I]n [*Cal. Dental Ass'n*], the complaint counsel did not even bother to have an economist testify.").

223. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 775 n.12 (1999) ("[T]he absence of any empirical evidence on this point [whether the restrictions' virtues offset any anticompetitive

additional attention to economic evidence might have helped gain that fifth vote. Regardless of whether that particular setback could have been avoided, the overall record is one of addressing important questions from a mainstream, economics-based perspective.

4. *Litigating.* The per se/rule of reason tension serves as a terrific illustration of the importance of government antitrust litigation. Government litigation has been important: (a) for evolution of legal doctrine, (b) for certainty and predictability, (c) because some cases are wrongly decided, and (d) as a foundation for and disciplining of agency actions.[224]

a. Evolution of Legal Doctrine. The per se/rule of reason tension would be a better illustration of government litigation leading to the healthy evolution of legal doctrine if *California Dental Ass'n* had achieved a harmonious resolution. Thankfully, the agencies remained in the business of adjudicating these issues. The recent issuance of its unanimous opinion in *In re Polygram Holding, Inc.*[225] has given the FTC another chance to contribute to doctrinal development.

The case arose after Polygram and Warner had agreed jointly to produce and market a Paris 1998 album by the Three Tenors (and possibly a greatest hits album or a boxed set), but very shortly into the project there arose concerns that discounting of PolyGram's 1990 album or Warner's 1994 album might undermine sales.[226] Accordingly, Polygram and Warner entered into a "moratorium agreement" promising not to advertise or discount their older Three Tenors albums during the ten-week period in which the 1998 album initially

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effects] indicates that the question was not answered, merely avoided by implicit burden shifting . . . .").

224. *See* Calkins, *supra* note 138 (reviewing the benefits of government agencies litigating antitrust cases).

225. 5 Trade Reg. Rep. (CCH) ¶ 15,453, at 22,446 (F.T.C. July 24, 2003).

226. *Id.* at 22,451. Attempts to develop such distinctive new repertoire had not succeeded. Warner executive Anthony O'Brien explained:

> "[T]he problem that we had was that The Three Tenors [are] perhaps three of the laziest performers we have ever seen performing this type of music, and what we were hoping for . . . was to have new and exciting repertoire. . . And they're not particularly given to sort of learning new arias, and so Nessun dorma! would come back again, or maybe Carreras would sing one of the Pavarotti songs or vice versa."

In re Polygram Holding, Inc., No. 9298, slip op. at 22 (F.T.C. June 20, 2002) (initial decision), *available at* http://www.ftc.gov/os/ 2002/06/polygramid.pdf (on file with the *Duke Law Journal*).

would be sold.[227] Administrative Law Judge James P. Timony found that the moratorium was illegal per se and under an abbreviated rule of reason.[228]

It was almost a foregone conclusion that the FTC, led by the leading advocate of the *Massachusetts Board* approach,[229] would adopt some version of that structured form of inquiry. After the Commission in *California Dental Ass'n* had departed from *Massachusetts Board* in favor of what then-Professor Muris described as the per se/rule of reason "categorization" approach—and even before the Supreme Court had handed the Commission its *California Dental Ass'n* defeat—Muris wrote that "[w]ithin the Commission, whether emphasis on categorization will continue or not depends on the Commission leadership, particularly the Chairman and Bureau Director."[230] Once Muris became chairman of a collegial, majority Republican Commission with no members from the *California Dental Ass'n* Commission remaining,[231] it was clear that some form of *Massachusetts Board* would return. The *Polygram* opinion did not disappoint this expectation.

Polygram adopted a structured form of analysis obviously descended from but not identical to *Massachusetts Board*. *Massachusetts Board* asked three fairly simple questions set out below. *Polygram* is more complicated.

In *Massachusetts Board*, "[f]irst, we ask whether the restraint is 'inherently suspect.' In other words, is the practice the kind that appears likely, absent an efficiency justification, to 'restrict competition and decrease output'?"[232] *Polygram* similarly, if somewhat less precisely, requires a plaintiff to "demonstrate[] that

227. *Polygram*, 5 Trade Reg. Rep. (CCH) at 22,451.

228. *Polygram*, No. 9298, slip op. at 75–77.

229. FTC Chairman Muris has defended the *Massachusetts Board* approach in Muris, *supra* note 198, at 531–32, 536–39; Timothy J. Muris, California Dental Association v. Federal Trade Commission*: The Revenge of Footnote 17*, 8 SUPREME CT. ECON. REV. 265, 304–09 (2000); Timothy J. Muris, *The Federal Trade Commission and the Rule of Reason: In Defense of* Massachusetts Board, 66 ANTITRUST L.J. 773 (1998) [hereinafter Muris, *In Defense*]; Timothy J. Muris, *The New Rule of Reason*, 57 ANTITRUST L.J. 859 (1989).

230. Muris, *In Defense*, *supra* note 229, at 798–99.

231. *See* 4 Trade Reg. Rep. (CCH) ¶ 9562, at 16,452 (Aug. 6, 2003) (showing that five Commissioners were appointed in 1997 or later).

232. *In re* Mass. Bd. of Registration in Optometry, 110 F.T.C. 549, 604 (1988) (quoting Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20 (1979).

the conduct at issue is inherently suspect owing to its likely tendency to suppress competition."[233]

Massachusetts Board's "*second* question" asks, "Is there a plausible efficiency justification for the practice? . . . Such an efficiency defense is plausible if it cannot be rejected without extensive factual inquiry."[234] Here, *Polygram* is more demanding. An "inherently suspect" practice can be defended "only by advancing a legitimate justification for those practices."[235] Although "the defendant need only articulate" this justification, "the proffered justifications must be both cognizable under the antitrust laws and at least facially plausible."[236] As in *Massachusetts Board*, "[a] justification is plausible if it cannot be rejected without extensive factual inquiry."[237] But the defendant "must articulate the specific link between the challenged restraint and the purported justification."[238]

In *Massachusetts Board*, if a justification is "plausible," a "*third inquiry* . . . determine[s] whether the justification is really valid."[239] If it is, the restraint is evaluated under the full rule of reason analysis. Again, *Polygram* is more demanding. If a defendant "advances" a legitimate justification, "the plaintiff must make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition. Such a showing still need not prove actual anticompetitive effects or entail 'the fullest market analysis.'"[240] The showing "may or may not require evidence about the particular

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233. 5 Trade Reg. Rep. (CCH) ¶ 15,453, at 22,458 (F.T.C. July 24, 2003) ("Such conduct ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation."). A showing that conduct is "inherently suspect" is required by a plaintiff seeking to "avoid full rule of reason analysis, including the pleading and proof of market power." *Id*. Unlike *Massachusetts Board*, *Polygram* also explicitly reserved a role for the per se rule for "cases with no possible arguments that restraints are needed to achieve beneficial results." *Id.* at 22,466 n.66 ("Such matters are commonly the subject of criminal prosecution and are appropriately deemed *per se* illegal, as are other restraints for which the proffered justifications can likewise be dismissed summarily.").

234. 110 F.T.C. at 604.

235. *Polygram*, 5 Trade Reg. Rep (CCH) at 22,458.

236. *Id.* at 22,458–59. Although Polygram and Warner Communications, like all persons against whom FTC administrative complaints are filed, are technically "respondents" rather than "defendants," *see id.* at 22,448, and the complaint is prosecuted by "complaint counsel" rather than "plaintiffs," *see id.* at 22,451, the Commission phrased its test in terms of the more familiar "defendants" and "plaintiffs," and those terms will be used herein as well.

237. *Id.* at 22,459.

238. *Id*.

239. 110 F.T.C. at 604.

240. *Polygram*, 5 Trade Reg. Rep. (CCH) at 22,459 (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999) (footnote omitted)).

market at issue, but at a minimum must entail the identification of the theoretical basis for the alleged anticompetitive effects and a showing that the effects are indeed likely to be anticompetitive."[241] It could "be based on a more detailed analysis of economic learning about the likely competitive effects of a particular restraint," on a showing "that the proffered procompetitive effects could be achieved through means less restrictive of competition."[242] Most notably, if the plaintiff "address[es] the justification, and provide[s] the tribunal with sufficient evidence to show that anticompetitive effects are in fact likely," then "the evidentiary burden shifts to the defendant."[243]

Note how much tougher *Polygram* is than *Massachusetts Board*. In *Massachusetts Board*, a "plausible" justification was sufficient. Now, only a "legitimate" one will suffice, i.e., one that is both "plausible" and "cognizable." In *Massachusetts Board*, finding a justification "plausible" leaves only one remaining inquiry—whether the justification is "valid"—with a positive answer triggering the full rule of reason. In *Polygram*, a finding of legitimacy results in a more detailed inquiry, but that inquiry can focus exclusively on theory and need not necessarily include evidence about the market at issue. It is not clear that the full rule of reason ever would be found to apply.

Whether or not *Polygram* will be upheld on appeal, and whether or not its particular approach will prevail over time at the Commission or in the courts, the litigation has already contributed to the development of doctrine by focusing attention on a series of challenging issues. The briefs and the oral argument before the Commission found talented lawyers joining issue on several of the issues left uncertain by *California Dental Ass'n*—ancillarity, inference of competitive effects, the context for evaluating restraints, and the standard for evaluating procompetitive justifications. These issues, and the Commission's resolution of same, justify careful attention.

First, for an otherwise problematic restraint to avoid the per se rule, it must have some relation to something like legitimate integration.[244] Complaint counsel would have limited this to where a

241. *Id*.

242. *Id.* at 22,459–60.

243. *Id.* at 22,460 ("At this stage, the defendant's burden to respond will likely depend in individual cases upon the quality and amount of evidence that the plaintiff has produced . . . ."). The Commission noted that the "plaintiff has the burden of persuasion overall, but not necessarily the burden with respect to each step of this analysis." *Id*.

244. *See* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 356–57 (1982) (holding that agreement among doctors on prices was illegal per se where arrangement was "not analogous to

restraint is "necessary to facilitate the procompetitive integration."[245] Respondents championed a more permissive standard: "the restraint needs to be reasonably related to the integration,"[246] which is satisfied if the restraint "furthers the efficiency and success of a legitimate joint venture."[247] On the narrow issue of wording, the Commission subscribed to the "reasonably necessary" language.[248] Purported benefits from restraints of competition in products outside the scope of a venture were not "cognizable," to use the wording of the *Polygram* structured analysis.[249] More fundamentally, the Commission explained that no test could bless every restraint of competition that aided a venture, lest naked price fixing be justified as a way of achieving resources needed for some social good.[250]

Second, for cases not triggering the per se rule, respondents read *California Dental Ass'n* as requiring a showing of anticompetitive effects or the presence of market power before there is any burden of justification.[251] Complaint counsel disagreed, arguing that "courts infer competitive injury from the existence of the inherently suspect agreement."[252] The Commission sided with complaint counsel, and, indeed, seemingly would not require proof of competitive effects even

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partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit").

245. Answering Brief of Counsel Supporting the Complaint in Support of the Initial Decision at 51, *In re* Polygram Holding, Inc., 5 Trade Reg. Rep. (CCH) ¶ 15,453 (F.T.C. July 24, 2003) (No. 9298).

246. Transcript of Oral Arguments at 13, *Polygram* (No. 9298).

247. *Id.* at 16.

248. *Polygram*, 5 Trade Reg. Rep. (CCH) at 22,465 ("A determination of ancillarity includes, of course, the factual inquiry whether a particular restraint was indeed reasonably necessary to permit the parties to achieve a particular efficiency.").

249. *Id.* at 22,462–63.

250. *Id.* at 22,464–65. During oral argument, the Commissioners seemed uncomfortable with respondents' proposal, with Chairman Muris asking a question inspired by complaint counsel's brief: In the General Motors-Toyota joint venture, "[i]f they had agreed to restrict competition from similar General Motors and Toyota cars . . . would that be the kind of restriction that would be treated the same way under your analysis?" Transcript of Oral Arguments at 17, *Polygram* (No. 9298); *see* Complaint Counsel's Brief at 52 n.60, *Polygram* (No. 9298) (pointing to the approved joint venture as "illustrating the distinction between restraints upon products inside versus outside the venture").

251. Respondents' Opening Brief at 31, *Polygram* (No. 9298); *see also* Transcript of Oral Arguments at 5 ("[U]nder the rule of reason, any version of the rule of reason, the plaintiff . . . is required to make at least some showing of anticompetitive effect."); *id.* at 77 ("You cannot put the burden on the defendant to show actual procompetitive effect unless there's a showing of actual anticompetitive effect . . . .").

252. Complaint Counsel's Brief at 14.

for suspect restraints for which the respondent has a "legitimate justification."[253]

Third, respondents argued that it would be error to consider the anticompetitive consequences of the restraints alone, without regard to the larger venture;[254] complaint counsel disagreed.[255] The Commission's principal basis for decision was to side with complaint counsel and rule that restraints outside a larger venture cannot be justified by procompetitive benefits flowing from that venture.

Fourth, respondents argued that even if a presumption of anticompetitive effect is allowed, respondent can answer by pointing merely to a "'plausible' procompetitive justification"; thereafter, the burden should be on complaint counsel to prove net anticompetitive effects.[256] Complaint counsel strenuously objected that respondents must show not only plausibility but "validity as well, and if you don't put that burden upon the respondents, then you don't have truncated analysis."[257] The Commission chose to require not explicit "validity" (the *Massachusetts Board* term), but much more than mere plausibility.

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253. Commissioner questions during oral argument evinced some discomfort with complaint counsel's position, with Commissioner Leary asking, "is it right even under a burden-shifting analysis to say that the commission can say something is inherently suspect based on evidence that is not necessarily directly related to the practice in issue and then put a burden on the parties to be more specific than the commission has been in bringing its own case?" Transcript of Oral Arguments at 69. *See also id.* ("Neither party here has, quite frankly, a great deal of empirical evidence on what the impact of this restraint was. Is it right to put a higher burden of specificity on the respondent?"); *id.* at 70 ("I'm just concerned about the fact that burden-shifting means the Commission gets away with waving its hand and saying 'inherently suspect' and they can't say 'reasonably related' in response.").

254. Respondents' Opening Brief at 47–49.

255. *See* Transcript of Oral Arguments at 41 ("The price-fixing agreement—and this distinction is critical—applied to products that were separate from the joint venture, that were created prior to the joint venture . . . .").

256. Respondents' Opening Brief at 42 (quoting Cal. Dental Ass'n v. FTC, 526 U.S. 756, 771 (1999)).

257. Transcript of Oral Arguments at 73; *see also* Complaint Brief at 27 ("Respondents must show that the moratorium was necessary in order to promote competition and benefit consumers."); *id.* at 27–28:

> Respondents assert that a plausible efficiency theory alone—without evidence showing that the theory applies in the instant case—triggers the need for a full rule of reason review. App. 50. This precept would return antitrust analysis to the days of the strict per se/rule of reason dichotomy, with abbreviated analysis surviving in name only. Under Respondents' mistaken view of the law, abbreviated analysis would govern only where a defendant's attorneys and experts are too hapless to utter the words "free riding," or otherwise fail to assert any efficiency rationale . . . .

Polygram's parent, Vivendi Universal, has announced that it will appeal the Commission's decision.[258] That appeal, regardless of its outcome, offers the prospect of clarifying these central and perplexing antitrust issues.[259]

b. Certainty and Predictability. Again, addressing this subject after the Ninth Circuit had upheld the Commission on *California Dental Ass'n*, one could reassuringly write that certainty and predictability were increasing. *California Dental Ass'n* put an end to that. Continued litigation, however, has now provided new hope that certainty and predictability will be enhanced. Clarification of the law is more likely when issues are squarely joined.

c. Cases May Be Wrongly Decided. Government agencies do not lightly decide to litigate. Resources are scarce, and experienced

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258. David Ho, *Recording Firms Meet Their Match*, DAILY TELEGRAPH (Sydney, Australia), July 31, 2003, at 49.

259. The Commission's actual holding—a horizontal agreement not to discount or advertise products not included in a joint venture cannot avoid condemnation by pointing to benefits to the venture, at least where those benefits are not necessary to the achievement of the venture's procompetitive benefits, In re *Polygram Holding, Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 13,453, at 22,470 (F.T.C. July 24, 2003)—seems obviously correct and should be sustained on appeal. Nonetheless, legitimate questions can be asked about the opinion.

The leading critic of *Massachusetts Board* attacked its use of the term "inherently suspect," because the Commission "never gave content" to the term and the term was aggressively applied to "a broad range of situations." Joseph Kattan, *The Role of Efficiency Consideration in the Federal Trade Commission's Antitrust Analysis*, 64 ANTITRUST L.J. 613, 624–25 (1996). Although *Polygram* declares that "most cases" will require the full rule of reason, and states that "inherently suspect" conduct "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation," 5 Trade Reg. Rep. (CCH) at 22,458, it provides, if anything, even less content to the term "inherently suspect" than *Massachusetts Board* did.

Although "inherently suspect" remains as imprecise a term as in *Massachusetts Board*, the consequences of such categorization have become even more serious. It is not clear whether, once conduct has been labeled "inherently suspect," it can ever qualify for evaluation under the full rule of reason. What the Commission has really done in *Polygram* is to attempt to create the *California Dental Ass'n*-endorsed "sliding scale" that considers a specified series of factors to use to judge seriously troubling behavior.

For better or worse, the Commission may have newly embarked on developing its own jurisprudence for this middle category of restraints. No court ever relied upon the Commission's *Massachusetts Board* opinion, for instance. The Commission could have relied upon the leading federal court mid-level scrutiny cases and fit within their language and structure. By choosing a different approach, it enjoys the opportunity (subject to court review) to craft its own language and analytical sequencing. *Cf.* Arthur, *supra* note 219, at 383–88 (advocating FTC-unique, mid-level scrutiny). On the other hand, it may have sacrificed an opportunity to help easily shape federal court doctrine.

litigators even scarcer. This is evident from the Justice Department's retaining David Boies (and others) to work on Microsoft,[260] but there are other examples as well.[261] Neither agencies nor individuals profit from association with losing causes.[262]

Although *California Dental Ass'n* is a case that the FTC should have won, in my biased view, the loss serves as a nice illustration of the value of continued litigation. Litigating *California Dental Ass'n* involved many risks, including the risk of making bad law. At best one can say that *California Dental Ass'n* confused the law. But the FTC is back adjudicating two other cases that provide vehicles for clarifying and strengthening the law. Well-placed confidence that there could promptly be future cases makes more acceptable the inevitable risk-taking of litigation.

California Dental Ass'n also offers proof that problematic cases attract criticism. As of this writing, the case has been discussed in more than 125 law review articles, as well as in countless speeches and programs.[263] Its strengths and weaknesses have been thoroughly reviewed, and pathways to improvements have been suggested from the right and from the left.[264] Nothing an agency can do—not consent orders, or speeches, or guidelines—attracts the detailed scrutiny accorded to major judicial decisions. Wrong decisions in other venues may be glossed over or left unchallenged (and uncorrected) for decades; wrong decisions by major courts attract immediate and potentially corrective notice.[265]

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260. *See* Plaintiffs' Joint Proposed Findings of Fact—Revised at 875, United States v. Microsoft, 87 F. Supp. 30 (D.D.C. 2000) (No. 98-1233) (listing David Boies as "Special Trial Counsel"), *available at* http://www.usdoj.gov/atr/cases/f2600/vii-e.pdf (on file with the *Duke Law Journal*).

261. For instance, Melvin H. Orlans from the FTC general counsel's office was assigned to work on trying a recent Commission antitrust case. *See* Appeal Brief of Counsel Supporting the Complaint at 91, *In re* Schering-Plough Corp., No. 9297, 2002 FTC LEXIS 40 (initial decision June 27, 2002) (listing counsel), *available at* http://www.ftc.gov/os/2002/08/scheringtrialbrief.pdf (on file with the *Duke Law Journal*).

262. *See, e.g.*, Jonathan B. Baker, *The Problem with* Baker Hughes *and* Syufy*: On the Role of Entry in Merger Analysis*, 65 ANTITRUST L.J. 353, 365–71 (1997) (describing the harm caused by some key defeats).

263. This was determined through a search of the Lexis database search, Antitrust Law Journal file and U.S. & Canadian Law Reviews, Combined file (August 6, 2003) ("California Dental & FTC").

264. *See, e.g.*, *Symposium: The Future Course of the Rule of Reason*, 68 ANTITRUST L.J. 331 (2000) (offering six perspectives on the rule of reason).

265. For instance, the Commission has communicated views on price discrimination through a variety of means, including formal guides on merchandising payments and services. Federal Trade Commission Guides for Advertising Allowances and Other Merchandising Payments and

d. Litigation as a Foundation for, and Disciplining of, Agency Action. There is nothing like litigation to keep one honest and provide a dose of reality. When in the 1980s the Justice Department drafted vertical restraint guidelines, knowing there was no meaningful chance it would be bringing a vertical case, it was almost an academic exercise—and, in part because of that, the guidelines received little acceptance.[266] In contrast, when in the 1990s the agencies added an expanded efficiencies defense to their merger guidelines, the drafting was informed and chastened by the prospect of litigation.[267]

So also, the experience with and prospect of future litigation informed and disciplined the agencies' drafting of the competitor collaboration guidelines.[268] Critics suggest that litigation fears made

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Services, 16 C.F.R. § 240 (2003). Since these are nonbinding, one cannot be sure whether the guides, last revised in 1990, 55 Fed. Reg. 33,651 (1990), are good law.

In comparison, when the Commission communicated its views on buyer liability for price discrimination through an adjudicative opinion affirmed by a court of appeals, the Supreme Court promptly reversed that lower court. Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 85 (1979). That opinion is routinely consulted to this day. *See, e.g.*, ANTITRUST LAW DEVELOPMENTS, *supra* note 10, at 514 (beginning its discussion of buyer liability with *Great Atl. & Pac. Tea*).

266. *See supra* note 137 and accompanying text; Alan A. Fisher et al., *Do the DOJ Vertical Restraints Guidelines Provide Guidance?*, 32 ANTITRUST BULL. 609, 641 (1987) ("[Guidelines] only minimally affected private and state cases."). As Assistant Attorney General Bingman explained when announcing the withdrawal of the Guidelines:

> They were controversial from the outset; even beyond the norm for antitrust. Within the year, Congress expressed its "sense" that the Vertical Restraints Guidelines: (1) were not an accurate expression of federal antitrust law or of Congressional intent; (2) should not be accorded any force of law or be treated by the courts as binding or persuasive, and (3) should be recalled by the Attorney General.

Anne K. Bingaman, Assistant Attorney General, Address to the ABA's Antitrust Section, *in* 65 Antitrust & Trade Reg. Rep. (BNA) 250, 251 (Aug. 12, 1993); *see also* George A. Hay, *The Effect of* GTE Sylvania *on Antitrust Jurisprudence: Observations:* Sylvania *in Retrospect*, 60 ANTITRUST L.J. 61, 65 (1991) (referring casually to the "notorious DOJ Vertical Restraints Guidelines").

267. *See* U.S. Dep't of Justice, Horizontal Merger Guidelines § 4, 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569 (April 8, 1997); *see also* William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5, 14–20 (2000) (stating that the 1982 Merger Guidelines succeed in part because they had credibility from substantial adherence to case law yet "fairly portrayed contemporary government enforcement policy"). Of course, some commentators and even sitting Commissioners have complained that, perhaps out of fear of litigation consequence, the guidelines are too restrictive. *See, e.g.*, Thomas B. Leary, Efficiencies and Antitrust: A Story of Ongoing Evolution, Remarks Before the ABA Antitrust Section Fall Forum (Nov. 8, 2002), *available at* http://www.ftc.gov/speeches/leary/efficienciesandantitrust.htm (on file with the *Duke Law Journal*) (pointing to ways in which he would be more receptive than current Guidelines to efficiency claims).

268. *See, e.g.*, Antitrust Guidelines for Collaborations Among Competitors § 3.1 n.15, 4 Trade Reg. Rep. (CCH) ¶13,161, at 20,851 (Apr. 7, 2000) (noting Commission defeat in *Cal. Dental Ass'n* during a discussion of policy background).

the agencies too cautious,[269] but the disciplining prospect of having to stand behind espoused standards in litigation makes the drafting prospect more serious and ultimately more legitimate.

A recent example of the disciplining effect of litigation was provided by the Justice Department's lawsuit against LSL Biotechnologies.[270] The Antitrust Division's single-count complaint charged that a covenant not to compete in the long-shelf-life tomato business, which was included in the document dissolving a joint venture, violated section 1 because the covenant "was not reasonably necessary to effectuate the contemplated transaction . . . or achieve integration efficiencies."[271] The district court quoted from the line of cases indicating that plaintiffs must allege either per se or rule of reason violations, and "[i]f the restraint is not alleged to be a per se violation, the plaintiff must establish the 'relevant market' affected by the alleged restraint."[272] The government having failed sufficiently to establish a relevant market (and implicitly having failed to allege a per se violation), the complaint was dismissed.[273]

On appeal the Division howled. Ignoring the single "violation alleged," it pointed out that an early paragraph in the complaint alleged that the covenant was "a naked restraint of trade,"[274] and argued that the complaint "thus alleged a per se antitrust violation."[275] This is a strange way to run a railroad, by quite deliberately refraining from alleging a per se violation and then arguing that in fact the

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269. *See* Comments of the Section of Antitrust Law of the American Bar Association on the "Antitrust Guidelines for Collaborations Among Competitors" Issued in Draft on October 1, 1999, by the Federal Trade Commission and U.S. Department of Justice (Feb. 4, 2000 draft) (unpublished manuscript, on file with the *Duke Law Journal*) (commenting that the "safety zones in the draft Guidelines are conservative," which is understandable but problematic).

270. United States v. LSL Biotechnologies, Inc., 2002-2 Trade Cas. (CCH) ¶ 73,836 (D. Ariz. Mar. 28, 2002).

271. Complaint ¶ 42, at 12, *LSL Biotechnologies* (No. CV-00-529-TUC-RCC).

272. *LSL Biotechnologies*, 2002-2 Trade Cas. (CCH) at 94,824.

273. *Id.* at 94,827.

274. Complaint ¶ 6, at 3 ("The Restrictive Clause is a non-compete agreement between actual or potential competitors. It was not reasonably necessary to any legitimate joint activity between defendants and is so overbroad as to scope and unlimited as to time as to constitute a naked restraint of trade . . . .").

The Division also pointed to paragraph 7, which alleged that the clause "also violates Section 1 . . . because it has harmed and will continue to harm American consumers by unreasonably reducing competition to develop better seeds for fresh-market, long-shelf-life tomatoes for sale in the United States." Complaint ¶ 7, at 3.

275. Brief for Appellant United States of America at 17, *LSL Biotechnologies*, No. 02-16472 (9th Cir., argued Aug. 8, 2003).

complaint implicitly had done so. If nothing else, the tonic of a litigation defeat will help sharpen the Division's thinking about what kind of restraint is judged under what kind of standard.[276]

5. *Interacting with Private Enforcement.* Finally, the per se/rule of reason story is one of healthy progression in part because the agencies have not been lone rangers. The two Supreme Court cases most important in setting forth the issues (*Broadcast Music* and *NCAA*) were brought by private parties, and all of the important opinions by Judges Bork, Easterbrook and Posner were issued in private lawsuits. The Supreme Court's *California Dental Ass'n* opinion has now been interpreted by about a dozen judicial opinions, all but one of which involved a private plaintiff.[277] The government has not had a monopoly on this body of law.

C. Summary

The point is not that all of the five features that marked the agencies' participation in the per se/rule of reason issue—must be present for agency action to represent good shepherding of the antitrust system. Indeed, for instance, appropriate agency action may emphasize the unique advantage of one agency over the other (criminal sanctions for the Antitrust Division; section 5 for the FTC). The point rather is that these five features help explain why the agencies' work has been seen as legitimate and responsible even though the work has failed to achieve an ultimate resolution.

III. RECOMMENDATIONS

With respect both to the state enforcers and the federal agencies, the appraisal is positive. Much is working. At the state level, enforcers' activities are almost always consistent with one or more of

276. More recent complaints, albeit ones filed to accompany consent judgments, have more boldly pleaded per se violations. *See*, *e.g.*, Complaint, United States v. Village Voice Media, LLC, Civ. No. 1:03CV0164 (N.D. Ohio, complaint filed Jan. 27, 2003), *available at* http://www.usdoj.gov/atr/cases/f200600/200673.pdf (on file with the Duke Law Journal) (arguing two causes of action: per se and rule of reason); Complaint, United States v. Mathworks, Inc., Civ. No. 02-888-A (E.D. Va., complaint filed June 21, 2002), *available at* http://www.usdoj.gov/atr/cases/f11300/11369.pdf (on file with the *Duke Law Journal*) (arguing per se illegality or alternatively an unreasonable restraint of trade).

277. *See, e.g.*, NHL Players' Ass'n v. Plymouth Whalers Hockey Club, 325 F.3d 712, 718 (6th Cir. 2003) (citing *Cal. Dental Ass'n* for the proposition that the rule of reason "employs a burden-shifting framework").

their areas of consensus comparative advantage. At the federal level, the antitrust agencies responsibly wrestle with challenging issues in part by drawing on the strengths of both agencies, employing the variety of available tools, addressing important questions while supporting mainstream antitrust, litigating, and interfacing with private enforcement.

Three recommendations emerge from the above review: (1) Enforcers should not shy away from using the powers they have, (2) they should address systemic issues in antitrust, and (3) they should apologize less.

A. Continue to Use and Develop Existing Powers

The first point is simply that the antitrust agencies need to continue to use and develop the powers they possess. The FTC currently has what may be a modern record of competition matters in active adjudication,[278] which is taxing the agencies resources but simultaneously developing its administrative litigation capabilities. Those capabilities should also be used to challenge hospital mergers.[279]

Nor should protests prevent the agencies from using the full array of their powers. In the pending *Schering-Plough* case,[280] respondents protested the citation by complaint counsel of a generic drug study conducted during the pendency of the litigation.[281] One could imagine an argument that letting the Bureau of Competition both litigate a case and conduct a study creates concerns about impartiality and potential ex parte communications. The simple

278. *See* Adjudicative Proceedings, *at* http://www.ftc.gov/os/adjpro/index.htm (last visited Sept. 9, 2003) (listing current FTC adjudicative proceedings).

279. *Cf.* Timothy J. Muris, Everything Old Is New Again: Health Care and Competition in the 21st Century, Prepared Remarks Before the 7th Annual Competition in Health Care Forum 19–20 (Nov. 7, 2002), *available at* http://www.ftc.gov/speeches/muris/murishealthcare speech0211.pdf (on file with the *Duke Law Journal*). Chairman Muris said that past hospital mergers should be challenged administratively, but, given the speed that modern FTC administrative adjudication can achieve, there is no reason why certain planned hospital mergers should not also be challenged administratively, at least where (as is common) the merging hospitals do not plan substantial immediate integration of operations.

280. *In re* Schering-Plough Corp., No. 9297, 2002 FTC LEXIS 40 (initial decision June 27, 2002).

281. Upsher-Smith's Motion to Strike Complaint Counsel's Reliance on the July 2002 FTC Study, *In re* Schering-Plough Corp., No. 9297 (F.T.C. initial decision Nov. 21, 2002), *available at* http://www.ftc.gov/os/adjpro/d9297/021121upshermotostrikegendrug.pdf (on file with the *Duke Law Journal*).

answer is that Congress intended the FTC to be an expert body with a variety of powers,[282] and potential litigation awkwardness is not a reason for it to refrain from advancing the public interest to the fullest extent possible.[283]

The states, also, need to use existing powers. The sizes of state antitrust offices vary substantially, from more than a dozen lawyers to less than a single lawyer with many other responsibilities.[284] This disparity inevitably means that enforcement will vary from state to state, with some states failing to engage in meaningful antitrust work. Even a single half-time professional can promote competition policy by participating in multistate enforcement that recovers ill-gotten gains for state citizens, and that same part-timer can speak up for competition values when other parts of the state government are contemplating anticompetitive regulations.[285] State regulation is notoriously susceptible of being used for anticompetitive ends,[286] and a forceful voice for competition in an attorney general's office could be a powerful protector of consumers.[287]

Even the states with real antitrust departments could do much more. Several states engage in regular scrutiny of the bidding processes, but most states lack the resources to do this.[288] Open-bid

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282. *See* Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace, FTC Staff Report 1 (May 1996) (reviewing the Commission's historic investigatory mission).

283. Protecting respondents' right to a fair trial also is essential, of course. In the cited case, the FTC permitted reference to the study but allowed respondents extensive opportunity to comment on it. Order Granting Motion for Leave to File Reply Memorandum; Denying Motion to Strike Reliance on FTC Study; and Permitting Each Party to File a Brief Addressing Cited Facts Contained Therein, *In re* Schering-Plough Corp., No. 9297 (F.T.C. Jan. 6, 2003), *available at* http://www.ftc.gov/os/adjpro/d9297/030106ordgrntmotforleave.pdf (on file with the *Duke Law Journal*).

284. *See* Christine H. Rosso, *State Attorney General's Role in Waste Mergers*, ABA ANTITRUST SECTION STATE ANTITRUST ENFORCEMENT NEWSLETTER, Winter 2001, at 17 (commenting on the discrepancies between various state attorneys general capacities).

285. It would be far better for state attorney generals to spend resources resisting anticompetitive statutes and regulations than defending them, as occurred in *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 243 (4th Cir. 2003); *Craigmiles v. Giles*, 312 F.3d 220, 224–29 (6th Cir. 2002); and *Swedenberg v. Kelly*, 232 F. Supp. 2d 135, 143–47 (S.D.N.Y. 2002).

286. *See supra* note 43 and accompanying text.

287. The importance of state attorney general competition advocacy has been recognized from time to time, of course. *See, e.g.*, *60 Minutes with Robert M. Langer*, *supra* note 45, at 214–15 ("We spent a tremendous amount of time . . . on competition advocacy.")

288. *Compare* Susan Beth Farmer, *Report from the National Ass'n of Attorneys General—Dual Enforcement of State and Federal Antitrust Laws*, 58 ANTITRUST L.J. 197, 198–99 (1989) ("Local enforcement efforts include not only litigation, but bid monitoring, reviewing the rules and regulations of state boards and agencies, and antitrust education for business and

systems breed antitrust conspiracies, and governmental consumers would benefit from regular attention to bidding.[289] And anticompetitive statutes and regulations are issued by large states as well as small.[290]

B. Address Systemic Issues in the Antitrust System

Any law enforcement system needs continuous improvement, and antitrust is no exception. The above review suggests several areas of needed improvement.

1. *NAAG Should Communicate Its Activities More Effectively.* State officials do a good job of making presentations, giving speeches, and writing articles. What is missing is data. In a world in which research is conducted on the web, NAAG needs a far better antitrust website. Because facts are the best response to epithets, NAAG should invest the resources needed to collect data about what state attorneys general actually do in antitrust.[291]

NAAG officials also need to communicate more consistently what state enforcers actually do. All too often, over the years, NAAG speakers have understandably highlighted the new developments and the glamorous activities while giving short shift to the smaller, local matters and competition advocacy.[292]

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purchasing agents."), *with* Rosso, *supra* note 284, at 17 (noting that many antitrust programs are extremely small).

289. *See supra* note 43 and accompanying text.

290. *See* Possible Anticompetitive Barriers to E-Commerce: Wine, A Report from the Staff of the Federal Trade Commission 7–9 (July 2003) (reviewing state restrictions on direct shipping of wine), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf. This report is part of a larger commission review of regulatory impediments to Internet competition. *See* FTC Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet, *at* http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm (last visited Sept. 9, 2003).

291. The current chair of the Multistate Task Force, Patricia A. Conners, has been persuaded of the importance of improved presentation of data. NAAG has embarked on "an admittedly ambitious project of compiling in one place a comprehensive, statistical, and substantive history of state antitrust enforcement, first in multistate matters and then eventually in non-multistate matters." *Federal, State, International Enforcers Update Participants at ABA Spring Meeting*, 84 Antitrust & Trade Reg. Rep. (BNA) 336, 338 (Apr. 11, 2003).

292. For a typical example, the otherwise unusually thorough 1997 review of state activities mentions only two single-state actions. *Roundtable Conference With Enforcement Officials*, 65 ANTITRUST L.J. 929, 941 (1997) (statement of Kevin J. O'Connor, Chair, NAAG Multistate Antitrust Task Force, Ass't Attorney General, State of Wisconsin).

2. *The States and Agencies Should Keep a Long-Term Perspective.* Leadership in state and federal agencies regularly changes, so time horizons may be short. This is unfortunate. Effective leaders need to look to the long term. The problem is particularly acute at the state level, where the benefits from short-sighted actions may be enjoyed by a single state, but the costs are borne by all. At the federal level as well, however, the system works only if top enforcers think beyond their time in office.

At the state level, consider the consequences of the invocation of antitrust authority for purposes unrelated to antitrust. The gains, if any, accrue immediately to the attorney general doing the invoking. The costs—which may be substantial if state antitrust enforcement is discredited—are borne by the other states over the many years that follow. It is in the collective interest of the NAAG antitrust team to discourage misuse of antitrust authority, by bringing to bear whatever moral suasion is possible.

Also at the state level, consider the tension created by differing direct purchaser/indirect purchaser rules in federal and state law. This will simply have to be resolved someday, and the states would be well advised to work toward achieving a resolution. Until then, states should avoid injustice by refraining from filing suit against that rare defendant who really has paid the full private antitrust penalty, and by structuring settlements so as to avoid prospective injustice.

At the federal level, the nature of antitrust litigation and leadership terms at the agencies is such that cases filed under one set of leaders are resolved under another.[293] FTC Chairman Muris authored the Commission's opinion in *In re Polygram Holding, Inc.*[294] and is expected to play a key role in *In re Schering-Plough Corp.*,[295] both of which were filed without his participation. Conversely, the Commission's recent adjudicative complaints will likely be heard by a

293. Of the twenty-six Assistant Attorneys General who have served since legendary Assistant Attorney General Thurman Arnold ended his five-year term in 1943, only one (Thomas Kauper, 1972–1976) served as long as four years; most served less than three. *See* 3 Trade Reg. Rep. (CCH) ¶ 8554 (June 25, 2003) (listing AAGs). Of the thirty-two FTC commissioners appointed in the modern era starting in 1969 when Caspar Weinberger became chairman, only six have served full seven-year terms, and no chairman has served longer than Robert Pitofsky (1995–2001). *See FTC Members—1915 to Present*, 4 Trade Reg. Rep. (CCH) ¶ 9562 (Aug. 6, 2003) (listing Commissioners).

294. 5 Trade Reg. Rep. (CCH) ¶ 13,453 (July 24, 2003).

295. No. 9297 (F.T.C., complaint filed March 30, 2001 (*In re Schering-Plough* was filed before Muris took office)).

very different group of commissioners than issued them.[296] Similarly, the Department of Justice Antitrust Division Assistant Attorney General (currently R. Hewitt Pate, President Bush's second Assistant Attorney General) is litigating cases filed by his predecessors (principally Joel Klein, a Clinton appointee).[297]

Looking more directly at litigation, one small example of agency action with long-term benefits is the deliberate hiring of outside economics experts. Every time an agency litigates, there must be a judgment whether to rely on inside or outside experts. The decision turns on various factors, including cost, comparative expertise, and the nature of the assignment.[298] Hiring outside experts yields benefits beyond the litigation in question. Without suggesting that pro-defense consulting work biases academic research, one can suggest that it is more healthy for consulting work to offer a mix of incentives and the opportunity for academics to view issues from plaintiffs' as well as defendants' perspectives. It is healthy to have NYU/Princeton economist William J. Baumol (for the defense) confronted by Stanford's Joseph Stiglitz;[299] to have Virginia's Kenneth Elzinga and MIT's Richard Schmalensee going up against MIT's Franklin Fisher.[300] Hiring academic economists has positive externalities that should be part of the decision mix.

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296. Commissioner Anthony recently stepped down. Commissioner Thompson's term expires September 26, 2003. Commissioner Swindle's term expires a year later. *See* 4 Trade Reg. Rep. (CCH) ¶ 9562, at 16,452 (Aug. 6, 2003) (listing Commissioners).

297. *See, e.g.*, United States v. LSL Biotechnologies, Inc., No. 02-16472 (9th Cir., complaint filed Sept. 15, 2000, by AAG Joel I. Klein, DOJ reply brief filed Nov. 20, 2002, by AAG Charles James); United States v. AMR Corp., No. 01-3202 (10th Cir., complaint filed May 13, 1999, by AAG Joel I. Klein, DOJ reply brief filed Mar. 19, 2002, by acting AAG R. Hewitt Pate); United States v. Visa U.S.A., Inc., No. 02-6074(L) (2d Cir., complaint filed Oct. 7, 1998, by AAG Joel I. Klein, DOJ brief filed June 28, 2002, by acting AAG R. Hewitt Pate).

298. Factors to consider generally in selecting economics experts are reviewed in George A. Hay, *The Economist as Expert Witness*, *in* EXPERT WITNESSES 335, 346–59 (Faust F. Rossi ed., 1991). In *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997), the Commission used two outside expert economists and an inside accounting expert, *id.* at 1070, 1089; in *FTC v. H.J. Heinz, Inc.*, 246 F.3d 708 (D.C. Cir. 2001), the Commission used an inside expert, *id.* at 724; E-mail from Jonathan Baker, Associate Professor of Law, Washington College of Law, American University, to Stephen Calkins, Professor of Law, Wayne State University Law School (Aug. 19, 2003, 09:26:00 EST) (on file with the *Duke Law Journal*).

299. *See* United States v. AMR Corp., 140 F. Supp. 2d 1141, 1192 (D. Kan. 2001) (noting testimony of experts), *aff'd*, 335 F.3d 1109 (10th Cir. 2003).

300. *See* United States v. Microsoft Corp., 253 F.3d 34, 99 (D.C. Cir. 2001) (noting proffered testimony); Spencer Weber Waller, *Antitrust: New Economy, New Regime*, 52 CASE W. RES. L. REV. 283, 332 n.201 (2001) (naming chief economics experts).

The antitrust system also could benefit from the cautiously increased use of independent economics experts.[301] Economics is becoming increasingly central to antitrust liability and damages disputes, and yet courts (let alone juries) are frequently at sea about how to resolve battles of experts.[302] A couple of antitrust cases have relied upon neutral experts.[303] Where a neutral expert is respected by both sides, he or she could temper the extravagance of the testimony of experts and help the court distinguish between points on which the profession really agrees and on which it experiences disagreement. A neutral expert is likely to be of greatest value on damages issues, where small differences can yield large numerical consequences and where there is less risk that testimony in one trial could embarrass one academically or in subsequent litigation. It also could be of value in proof of conspiracy cases, where the profession has something to contribute; for that matter, if econometrics became central to any case (rather than just supportive of other evidence), a neutral expert might be of great value. On the other hand, it would be important to structure the experts' role carefully. Because the antitrust system would benefit from appropriate use of independent experts, the agencies should promote the welfare of that system by seeking an opportunity to use such experts where use of an independent expert would be helpful.

Other observations could be made, but the point is illustrated. Both state and federal enforcers need to resist the incentives to think short term and discipline themselves to work on building a foundation from which others may build.

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301. *Cf. In re* High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 665 (7th Cir. 2002) (Posner, J.) ("We recommend that the district judge use the power that Rule 706 of the Federal Rules of Evidence expressly confers upon him to appoint his own expert witness, rather than leave himself and the jury completely at the mercy of the parties' warring experts."). Thanks to Dr. Carl Shapiro for help thinking through these issues.

302. *See id.* (urging the appointment of independent experts); *see also* POSNER, ANTITRUST LAW, *supra* note 1, at 276–78 (advocating court appointments of neutral experts).

303. The best known example is *New York v. Kraft General Foods, Inc.*, 926 F. Supp. 321, 325 (S.D.N.Y. 1995) (utilizing Dr. Alfred Kahn as an independent expert). Dr. Michael Whinston has served as a neutral expert in a private CD price-fixing case presided over by Judge J. Spencer Letts, Central District of California, that has not been finally resolved as of this writing. In re Compact Disc Antitrust Litigation; Master Docket File No. 1216(JSL) (C.D. Cal.); E-mail from Michael Whinston, Robert E. and Emily King Professor of Business Institutions, Department of Economics, Northwestern University, to Stephen Calkins, Professor of Law, Wayne State University (Sept. 3, 2003, 11:36:00 EST) (on file with the *Duke Law Journal*).

3. *Government Enforcers Should Be More Appreciative of Private Litigation.* The relationship between federal enforcers and private attorneys general has always been uneasy. From time to time, one senses resentment by government lawyers that "their good work" may yield substantial private profit.[304] This concern achieved concrete form when, in *In re First Databank Antitrust Litigation*,[305] the FTC objected to the attorneys' fees requested by private counsel in a companion case to an FTC proceeding.[306] That filing may have been appropriate, because the Commission had unique knowledge about its role and the role of private counsel.[307] Also appropriate could be filings where proposed relief is wholly inadequate or even harmful to consumers.[308] Were the Commission to consider more generally objecting to fee awards in antitrust cases, however, it would risk overreaching and going beyond agency's expertise and proper role.

From time to time, of course, the agencies have been appropriately supportive of private enforcement. A recent example from the FTC's consumer protection authority features an amicus brief making clear that FTC and other agency regulations have not preempted a field and barred private litigation.[309] The agencies have even expressed concern about overly aggressive use of arbitration clauses and standing requirements that prevent private consumer protection and antitrust plaintiffs from litigating the merits of their

304. *Cf.* Kauper, *supra* note 144, at 98 ("The relationship between the Division and private plaintiffs was, and still is, an uneasy one.").

305. 209 F. Supp. 2d 96 (D.D.C. 2002).

306. *See* Federal Trade Commission's Memorandum of Points and Authorities in Support of Motion to Intervene for the Limited Purpose of Opposing Class Counsel's Fee Application or, in the Alternative, to Participate as *Amicus Curiae*, *In re* First Databank Antitrust Litig., 209 F. Supp. 2d 96 (D.D.C. 2002) (No. 1:01CV008979 (TPJ)), *available at* http://www.ftc.gov/ogc/briefs/firstdatabank.pdf. The brief and the FTC's concerns about class actions more generally are discussed in Thomas B. Leary, The FTC and Class Actions, Remarks at the Class Action Litigation Summit (June 26, 2003), *at* http://www.ftc.gov/speeches/leary/classaction summit.htm#N_1 (last visited Sept. 9, 2003) (on file with the *Duke Law Journal*). For discussion of the delicate relationship between state and private enforcers, see First, *supra* note 34, at 1039–40 (arguing that the relationship can be complementary, but may be in some tension).

307. Leary, *supra* note 306.

308. Federal Trade Commission's Memorandum of Law as Amicus Curiae, Erikson v. Ameritech Corp., No. 99 CH 18873 (Cir. Ct. Cook County, Ill., County Dep't, Ch. Div. filed Oct. 16, 2000, *available at* http://www.ftc.gov/os/2002/06/eriksonmemo.pdf.

309. Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellant and Urging Reversal at 2, Nelson v. Chase Manhattan Mortgage Corp., 282 F.3d 1057 (9th Cir. 2002) (No. 00-15946) (recognizing "the importance of private enforcement actions as a vital additional means of securing compliance"), *available at* http://www.ftc.gov/ogc/briefs/nelsont.pdf.

claims.[310] Although these examples flow from previous administrations, one hopes that antitrust agencies under varying leaderships can appreciate the symbiotic role, well illustrated in the per se/rule-of-reason saga, played by private enforcers.

C. There Should Be More Pride and Less Apologizing

At the federal level, there is no need to apologize about the existence of two agencies. To be sure, other nations have not, and cannot be expected to, follow America's lead and have two antitrust agencies. To be sure, there is duplication and inefficiency, but each agency has special strengths. There will be periods when one agency, or the other, is better able to attract and employ top talent; and the contributions of the two agencies really can make for a better system.

At the state level, a disheartening moment occurred when the Wall Street Journal attacked state attorneys general, and particularly Connecticut Attorney General Richard Blumenthal, only to see General Blumenthal respond defensively: "What separates us from the so-called 'private marauders of the trial bar' is that we focus on obtaining injunctive relief in court orders that change industry practices . . . ."[311] With all due respect, that is precisely where states' comparative advantages do *not* lie. It is a good, noble, and important thing to provide compensation to schools that have overpaid for milk, to highway departments that have overpaid for roads, and to consumers who have overpaid for contact lenses. The antitrust system needs the deterrent value that sometimes states are best positioned to provide.[312]

Thanks in no small part to their comparative advantages, states play an essential role in the United States's antitrust enforcement system. There are times when states may be attracted by the

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310. Brief for Amicus Curiae Federal Trade Commission in Support of the Real Parties in Interest and in Opposition to the Petition for a Writ of Mandamus at 2–3, *In re* Am. Homestar of Lancaster, Inc., 50 S.W.3d 480 (Tex. 2001) (No. 00-0722), *available at* http://www.ftc.gov/ogc/briefs/amerhomebrf.pdf (on file with the *Duke Law Journal*).

311. Richard Blumenthal, Letter to the Editor, *What I Do for My "Clients," the Citizens*, WALL ST. J., Sept. 16, 2002 at A15.

312. *See Roundtable Conference with Enforcement Officials*, 67 ANTITRUST L.J. 453, 466–67 (1999) (discussing awards secured by states as an important part the antitrust system). Thomas Greene, chair of NAAG Multistate Task Force, explained that the major difference, when federal and state enforcers work on the same alleged violation, "is the fact that we are going for damages and relief for the actual victims of the conduct," which "represents, I think, a fairly effective partnership and a fairly effective division of labor." *Id.*

glamorous role of writing guidelines or filing amicus briefs.[313] Diversity of views can be a good thing, struggling with challenging issues may enhance the antitrust discussion, and at times states bring an essential perspective to bear on an issue. It would be a pity were the glamorous work to distract from critical enforcement efforts, however. State attorneys general usually concentrate on their areas of comparative advantage, and ordinary enforcement should be a source of pride.

Even the *Microsoft* case is an exception that proves the rule. The states stayed in the case to the end only because they were in it at the beginning. They were in it at the beginning not because they were anxious to embark on the project, but because they perceived a void at the federal level.[314] State perception of a lack of federal will is the most common stimulus to expansive state activity.[315] In contrast, consider the crucial antitrust issue of the per se rule/rule of reason. Here there are no NAAG guidelines, no NAAG enforcement protocols, no aggressive NAAG litigation.[316] NAAG has filed an occasional amicus brief, but one senses confidence that federal enforcers are doing legitimate, mainstream antitrust; NAAG is content to leave that project principally to the federal government, and concentrate on its areas of comparative advantage.

CONCLUSION

The renewed attention to state antitrust enforcement associated with the *Microsoft* case is healthy, in part because it can contribute to a better understanding of the states' role. The case itself is the exception. In fact, state attorneys general appropriately concentrate

313. NAAG Guidelines are collected at http://www.naag.org/issues/issueantitrust protocols.php (last visited Sept. 9, 2003); NAAG amicus briefs are collected at http://www.abanet.org/antitrust/committees/state-antitrust/amici.html (last visited Sept. 9, 2003).

314. *See, e.g.*, O'Connor, *supra* note 18, at 423 (identifying state interest as "originat[ing] in the perceived weakness" of a decree negotiated by Microsoft and the Antitrust Division).

315. *See, e.g.*, *Cooperation and Competition among Antitrust Prosecutors: Recent Developments in Antitrust Federalism*, *in* ANTITRUST LAW IN NEW YORK STATE, *supra* note 10, at 401, 404–07 (Lloyd Constantine's review of the energizing of state enforcers); James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 ANTITRUST L.J. 93, 98–99 (1990) ("[I]n both the formative and modern eras, state efforts intensified partly in response to the believed inadequacy of federal enforcement efforts.").

316. *But cf.* New York v. St. Francis Hosp., 94 F. Supp. 2d 399, 411–16 (S.D.N.Y. 2000) (finding that a town's only two hospitals' use of a common, exclusive agent to negotiate with insurers was per se illegal).

on building on their comparative advantages in delivering money to consumers and in leveraging special understanding of local markets and institutions. Federal antitrust enforcement is already widely accepted, in part, as illustrated by the per se rule/rule-of-reason struggle, because the federal agencies actively participate together, using an array of tools, addressing important questions from a mainstream, economics-based perspective, litigating, and interacting with the private sector. To build for the future, enforcers should continue to use their array of powers, they should address systemic issues in the antitrust system, and they should apologize less. State enforcers, in particular, need to be more clear about and proud of the contributions they can make to the antitrust system, simply through working where they have comparative advantages.