State Anti-Merger Policy: Divesting the Federal Government of Exclusive Regulation

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INTRODUCTION

The states have entered into a new era of responsibility in the realm of antitrust enforcement. Although state antitrust laws pre-dated federal antitrust legislation,¹ few state laws have been vigorously enforced and, until recently, most of them have been virtually dead.² The revival of state antitrust enforcement, prematurely hailed in the early 1960's,³ finally appears to be underway.⁴

Because of the dominance of the federal government in establishing antitrust policy,⁵ a determination must be made of the appropriate role state efforts are to play. The purpose of this article is to examine the necessity of antimerger enforcement at the state level and the means used to effectuate such enforcement. Initially, the article will explore the current status of state antimerger law in

1. See notes 9-10 infra and accompanying text.
light of its historical context. Next, the article will illustrate the need for a state antimerger complement to the federal merger regulations. Limitations on an effective state antimerger policy will then be discussed and analyzed. Finally, this article will present the essential role the states must assume to ensure the protection of the local market's competitive vigor and to establish a national, as opposed to a federal, antitrust policy.

STATUS OF STATE ANTIMERGER INVOLVEMENT

Historical Perspective

During the past century, this nation's social and political development has been shaped and guided to a degree by its antitrust policy. The antitrust laws were founded upon the premise that unrestrained interaction of competitive forces will inevitably yield the best allocation of resources, the lowest prices, and the highest quality of goods. In retrospect, antitrust legislation has been relatively successful in dispersing economic power, thereby protecting and preserving the efficacy of the free enterprise system.

Most of the dramatic accomplishments of antitrust policy have occurred on the federal level. State antitrust legislation, however, preceded the first federal legislative efforts. Fourteen states had constitutional provisions against trusts and monopolies and at least twelve states had antitrust statutes before the federal Sherman Act. See, e.g., Northern Pac. R.R. v. United States, 356 U.S. 1, 4 (1958). Early antitrust efforts have been characterized as public reaction to economic frustration, especially with respect to the agricultural community. See Limbaugh, Historic Origins of Antitrust Legislation, 18 Mo. L. Rev. 215, 230-48 (1953); McDermott, History and Identity of the Relevant Antitrust Statutes, 5 Tulsa L. J. 265, 267 (1968). Other commentators have characterized the passage of the early antitrust laws as a social protest in response to the apparent impersonality of the marketplace. See, e.g., R. Hofstadter, The Age of Reform 10-11 (1955).

State antitrust legislation, however, preceded the first federal legislative efforts. Fourteen states had constitutional provisions against trusts and monopolies and at least twelve states had antitrust statutes before the federal Sherman Act. The number is equivocal, however, because the language of early statutes was often ambiguous and the manner of their application uncertain. See Miles, Current Trends in Antitrust Enforcement.
man Act\textsuperscript{11} was passed. Although the purpose of the Sherman Act, according to its sponsor, was to supplement the state antitrust laws,\textsuperscript{12} its passage sounded the death knell for state enforcement efforts for well over half a century.\textsuperscript{13}

Increasingly, states began to defer to federal regulation and enforcement, on the grounds that federal jurisdiction was exclusive or that federal antitrust enforcement was sufficient.\textsuperscript{14} Additional explanations for the failure of state legislators and agencies to pursue an aggressive antitrust policy include perceived state resource limitations, and a desire not to drive business away.\textsuperscript{15} Moreover, public incentive was lacking at the state level to provide a viable alternative to the federal forum for antitrust claims.\textsuperscript{16}

\textsuperscript{12} Senator Sherman intended that the Act:

\begin{quote}
... invoke the aid of the courts of the United States to deal with the combinations . . . and in this way to supplement the enforcement of the established rules of common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limits of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. . . .
\end{quote}

\textsuperscript{21} CONG. REC. 2457 (1890). \textit{See also} Standard Oil Co. v. Tennessee, 217 U.S. 413, 423 (1910).

\textsuperscript{13} Following a short flurry of state antitrust activity between 1892 and 1906, enforcement efforts tapered off. \textit{See} Rahl, supra note 2, at 754; Rubin, supra note 4, at 661. This dearth of enforcement efforts was pervasive enough that Professor Rahl commented: "[State antitrust laws] have been so dead that it may be wondered whether it would have been unethical in recent years for lawyers in most states to tell their clients to ignore them." Rahl, supra note 2, at 753.


\textsuperscript{15} \textit{See} Rahl, supra note 2, at 756; \textit{Note}, NEW WINE, supra note 4, at 569-77.

\textsuperscript{16} The special committee report of the New York State Bar Association included reports from many states that public demand for state enforcement was slight. \textit{See} NEW YORK STATE BAR ASSOCIATION, supra note 10, at 89a-116a. For the private litigant, even in those states with adequate substantive antitrust laws, many factors militated against the choice of
Present Opportunity for State Antimerger Enforcement

Recently, there has been a renewed interest in state antitrust enforcement. Adoption of new antitrust laws has occurred in some states and substantial revision has taken place in others. A total of forty-five states presently has some type of antitrust statute. Ten states have merger provisions comparable to section 7 of the Clayton Act. Approximately nineteen states have general re-

the state forum over the federal court. For example, several state laws made no provision for civil recovery. See Note, Commerce Clause, supra note 10, at 1470. In addition, certain procedural and substantive advantages traditionally have been available to the plaintiff in the federal forum. See note 18 infra and accompanying text.

17. Since 1970, the following states have adopted new antitrust statutes: Alaska (1975); Connecticut (1971); Maryland (1972); Nevada (1975); New Jersey (1970); Oregon (1975); Rhode Island (1979); Virginia (1974); and West Virginia (1978). In 1976, Kentucky added a provision similar to the substantive provisions of the Sherman Act to its Consumer Protection Act, Ky. Rev. Stat. §§367.110-.175 (Cum. Supp. 1980).

18. Since 1970, the following thirty-two states have revised or rewritten their antitrust statutes: Arizona (1974); California (amended ten times, most recently in 1978); Connecticut (amended four times, most recently in 1978); Florida (amended five times, most recently in 1980); Hawaii (amended nine times, most recently in 1980); Illinois (amended thirteen times, most recently in 1979); Indiana (1978); Iowa (1976 and 1977); Kansas (1974); Louisiana (amended three times, most recently in 1978); Maine (1977 and 1979); Maryland (1975); Massachusetts (1978); Michigan (1976); Minnesota (amended three times, most recently in 1977); Missouri (1974); Montana (1975 and 1977); Nebraska (1974 and 1977); Nevada (1979); New Hampshire (1973 and 1979); New Jersey (1972); New Mexico (1979); New York (1975); North Carolina (amended six times, most recently in 1979); Ohio (amended four times, most recently in 1981); Oklahoma (1971); Oregon (1977); South Dakota (1977 and 1980); Utah (1979); Virginia (1975 and 1979); Washington (1970 and 1974); West Virginia (1978); and Wisconsin (amended fourteen times, most recently in 1979).

19. The only states lacking some form of antitrust statute are Delaware, Georgia, Pennsylvania, Vermont, and Wyoming.


No person engaged in commerce [or in any activity affecting commerce] shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce [or in any activity affecting commerce], where in any line of commerce in any section of the country, the effect of such an acquisition may be substan-

straint provisions in their antitrust statutes that may reach merg-
ers resulting in prohibited effects.\textsuperscript{21} With this increased legislation, attorneys general of many states have initiated or expanded state antitrust enforcement.\textsuperscript{22}

New methods of state funding\textsuperscript{23} and investigation\textsuperscript{24} have led to the creation of a viable state-level supplement to federal antitrust efforts. The realization by the states that each must bear the ultimate responsibility for local economic interests,\textsuperscript{25} as well as federal recognition of the practical limitations on federal enforcement of antitrust policy,\textsuperscript{26} has led to the enhanced coordination of federal and state investigation and litigation efforts.\textsuperscript{27} Moreover, recent congressional appropriations to aid state antitrust efforts have served as seed money to establish antitrust offices in states where such offices were lacking and to upgrade existing state offices.\textsuperscript{28}

Modern state efforts, however, may not extend far enough. States, perhaps, will not aggressively pursue mergers with anticompetitive effects at the local level, for reasons similar to not vigorously enforcing state antitrust laws generally.\textsuperscript{29} The success of

\begin{footnotes}
21. Those states are: Arkansas; California; Florida; Georgia; Illinois; Indiana; Iowa; Kansas; Kentucky; Maryland; Michigan; Minnesota; Missouri; Nevada; New York; North Carolina; Ohio; Oklahoma; and Tennessee. For a discussion of the application of state general restraint provisions to acquisitions, see State v. Creamery Package Mfg. Co., 110 Minn. 415, 126 N.W. 126 (1910); People v. Milk Exch., 145 N.Y. 267, 39 N.E. 1062 (1895).


23. See notes 174-179 \textit{infra} and accompanying text.

24. See notes 191-200 \textit{infra} and accompanying text.


27. See notes 190-201 \textit{infra} and accompanying text.


29. See Rahl, supra note 2, at 756.
\end{footnotes}
state antitrust efforts is measurable, not in terms of the number of cases filed or the number of suits successfully asserted, but only in light of the goal of attaining a truly national antitrust policy offering the same protection to competitors in local markets as that offered at the federal level. Such efforts remain substantially incomplete when the antitrust policy addressing mergers is not implemented at the state level.

The Need for State Antimerger Laws

Federal Limitations

The many years of state inactivity with respect to antitrust efforts in general and antimerger efforts in particular suggest that a viable state antimerger supplement to the federal law is neither needed nor desired. If, however, need is measured in terms of potential for injury in the local marketplace, particularly if the present system provides no redress for injury, a substantial need does exist. Significantly, the heavy responsibilities of state antitrust law in the merger field have been noted by a spokesperson for the Antitrust Division of the Department of Justice. SeeStaff of Senate Temporary National Economic Comm., 76th Cong., 3d Sess., Monograph 16 (1941) [hereinafter cited as Monograph 16]; Stern, A Proposed Uniform State Antitrust Law: Text and Commentary on a Draft Statute, 39 Tex. L. Rev. 717 (1961) [hereinafter cited as Stern, Draft Statute]. Without specific state antitrust provisions similar to §7 of the Clayton Act, some concededly anticompetitive mergers may go without redress. See notes 64-69 infra and accompanying text.

Congress, in 1890, expressly contemplated a partnership of mutual cooperation in antitrust responsibility:

It follows therefore, that the legislative authority of Congress and that of the several States must be exerted to secure the suppression of restraints upon trade and monopolies. Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the states shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.


See notes 13-16 supra and accompanying text.

See Stern, State Antitrust Handbook 31 (1960) [hereinafter cited as Stern, Antitrust Handbook]. At the time of publication of the handbook, the author was a member of the Antitrust Division of the Department of Justice.
Commerce clause limitations, moreover, may preclude federal enforcement of activities occurring in the exclusive sphere of state jurisdiction. Local activities which the federal antitrust laws could arguably reach may go unredressed because the necessity of establishing jurisdiction may overly complicate the case. There is no reason to believe that challenges to federal jurisdiction and the accompanying complexities will necessarily be less prevalent as a result of the recent expansion of the Clayton Act.

In addition, federal resources for antitrust enforcement are limited. Given the substantial number of antitrust violations occurring each year, federal enforcement efforts are necessarily selective. As a result, local interests often forego federal protection. For example, the local merger which may not have the multi-state impact of other types of restraints, and may result in monopolies of far greater concern to local businesspersons and officials than to distant federal authorities, may get no federal attention. The Department of Justice recently emphasized federal resource limitations and the states' need to assume responsibility for protecting their citizenry from antitrust violations occurring on the local level.

the Appellate Section of the Antitrust Division of the Department of Justice.

35. See Swope, supra note 26, at 2-3.

36. See The Antitrust Procedural Improvements Act of September 12, 1980, Pub. L. No. 96-349, §6(a), 94 Stat. 1157. Courts no longer need to accept evidence relating to whether a company has engaged in activities “in” commerce as opposed to merely those “affecting” commerce. See Antitrust Procedural Improvements and Jurisdictional Amendments: Hearings on H.R. 4049 Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 96th Cong., 1st Sess. 21, 169 (1979). Nevertheless, the parameters of the coextensive reach of Sherman Act jurisdiction have not been given a precise definition, but rather have been left to the courts for “a practical, case-by-case economic judgement.” Rasmussen v. American Dairy Ass'n, 472 F.2d 517, 523 (9th Cir.), cert. denied 422 U.S. 950 (1973). See also United States v. Darby, 312 U.S. 100, 120 (1941); Swift & Co. v. United States, 196 U.S. 375, 398 (1905).

37. In 1960, the Department of Justice and the Federal Trade Commission filed a total of less than 300 antitrust proceedings, which were “carefully selected for their national importance, legal significance, or other special circumstances.” See Rahl, supra note 2, at 759.

38. Id. See also STERN, ANTITRUST HANDBOOK, supra note 34, at 2-3; Fellmeth, Local Prosecutors, supra note 30, at 5 n.18.

39. See Ewing, supra note 26, at 6-7.

40. See STERN, ANTITRUST HANDBOOK, supra note 34, at 9-10.

41. One spokesperson recently stated:

Federal resources are simply not sufficient to enable us to investigate and prosecute all of the violations that experience leads us to believe are occurring. The smaller cases—smaller, but no less significant to their victims—require the attention and diligence that state enforcement authorities can bring. The Antitrust Division and the Bureau of Competition of the Federal Trade Commission between
In light of these resource limitations, the federal antitrust agencies face substantial difficulties in monitoring the local market as well as prosecuting local activity. The premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 apply only in certain circumstances not always applicable to the local merger setting. Furthermore, federal field offices of the Department of Justice and the Federal Trade Commission are noticeably absent from the majority of counties in major states.

In contrast, the district attorney maintains an office at the county level where violations occur and is more apt to detect local restraints of trade.

Special area limitations also curtail federal enforcement. Although Congress has recently expanded the jurisdiction of the Clayton Act, several of the most important segments of the economy, such as banking and insurance, remain the particular re-

us have fewer than 1,000 attorneys, an impossibly small number to police an economy approaching $2 trillion in gross national product. We believe that the solution is not continuing massive expansion at the federal level. Where problems can be handled locally, they should be, and in the area of antitrust enforcement, states do have the incentives to protect their citizens from economic crimes.

Ewing, supra note 26, at 6-7.


43. Requirements for filing include: (1) the “commerce” test, mandating that either the acquired or acquiring “person” be engaged in activities affecting commerce; (2) the tripartite “size of person” standard, establishing certain minimums on the total assets or annual net sales of the parties to the acquisition before filing is necessary; and (3) the “size of transaction test,” establishing percentage and monetary limitations on the aggregate total acquired. See generally Smith & Lipstein, Premerger Notification: Coverage, Corporate Planning and Compliance, 47 ANTITRUST L. J. 1181 (1979).

44. As of 1978, no state had more than two counties with federal antitrust offices. More than ninety percent of all counties in major states lack such offices. See Fellmeth, Local Prosecutors, supra note 30, at 6 n.21.

45. Many states allocate coextensive powers to enforce state antitrust laws between attorneys general and district attorneys or grant optional powers to district attorneys. Other states grant some or all powers exclusively to district attorneys. See Fellmeth, Local Antitrust Prosecution, A Survey of State Laws, 4 CLASS ACTION REP. 376 (1976); Fellmeth, Local Prosecutors, supra note 30, at 6.

46. Id.

47. See note 5 supra.

responsibility of the states in certain antitrust enforcement contexts, evidencing Congress' intent to rely on state regulation in the area. Furthermore, state-mandated activities are generally not subject to federal antitrust statutes. The states, rather than the federal government, have assumed a responsible role in assuring the vitality of competition in these areas. An effective state antitrust statute incorporating a provision similar to section 7 of the Clayton Act would be a means of assuring national policy at the state level.

 Alternatives to State Antimerger Provisions

Several alternatives exist to a state analogue of section 7 of the Clayton Act. First, private enforcement of the Clayton Act in the federal forum could be relied upon to maintain an effective antimerger policy. Such reliance is misplaced, however, for several reasons. Violations of antitrust statutes often present problems of detection for those with standing to seek civil remedies. In the merger context, early detection is critical for reason that the most effective remedies generally must issue before or immediately after an impermissible acquisition. Moreover, financing a federal antitrust suit may be prohibitively expensive for a small local company. By the time the suit reaches adjudication, those injured by

51. See Cantor v. Detroit-Edison, 428 U.S. 579 (1975); Parker v. Brown, 317 U.S. 341 (1943). See also Flynn, Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement, 4 J. Corp. L. 479, 506 (1979) where the author states: [E]ven where federal courts may find state action immunity for federal antitrust purposes, the same activity viewed from a state antitrust perspective may not be immune from state antitrust policy absent a showing of legislative intention to vest primary jurisdiction in a state or local regulatory authority and then only to the extent necessary to achieve the regulatory goal.
53. See generally Fellmeth, Local Prosecutors, supra note 30, at 7. See also Fellmeth and Papageorge, supra note 26.
54. By the time a private litigant detects a violation of the antitrust laws, problems associated with divestiture may have become so complex that an effective remedy would not be available. See H.R. REP. No. 1191, 81st Cong., 1st Sess. 5 (1949).
55. Although a class action suit might be available, recent developments have made many such suits impractical at the federal level. See, e.g., Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 177 (1974).
the merger might lack the resources to proceed. Furthermore, private enforcement in the federal forum ignores the limitations on federal jurisdiction. Allowing private civil litigation at the federal level to serve as the only form of redress for those injured by anticompetitive conduct could indeed practically result in discounting any remedy at all for such parties.57

Another alternative to a specific state antimerger law would entail restricting state antitrust efforts to prosecution of violations of section one of the Sherman Act58 or its state equivalent. Including provisions similar to the Clayton Act in state antitrust statutes may inject a degree of ambiguity and controversy into state antitrust policy that would frustrate the basic objective of antitrust law.60 Other commentators have suggested that most serious re-

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56. See Fellmeth, Local Prosecutors, supra note 30, at 7, citing People v. Pepper Indus., Inc., No. 364672 (Super. Ct. San Diego, Cal., Jan. 26, 1976) (one competitor able to obtain small settlement only after bankruptcy; remaining competitor unable to proceed without assistance).

57. See notes 33-51 supra and accompanying text. Several recent developments have greatly facilitated state proprietary actions in the federal courts. The 1966 amendment to Rule 23 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 23, allows states to bring class action suits on behalf of government agencies or consumers of the state. The Multidistrict Litigation Act, 28 U.S.C. §1407 (1976), authorizes the transfer of civil actions involving common questions of fact to a single district court for coordinated or consolidated pre-trial proceedings. Additionally, the Hart-Scott-Rodino Antitrust Improvements Act, 14 U.S.C. §15c (1976), amended the Clayton Act to permit state attorneys general to secure monetary relief for Sherman Act violations on behalf of natural persons residing in the state. Although these developments are of significant value to the states and consumers, they are of little value in the local merger context. See generally Levy, Complex Multidistrict Litigation and the Federal Courts, 40 FORDHAM L. REV. 41 (1971).

58. Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), provides in pertinent part: “Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states . . . is hereby declared to be illegal.” Conversely, other commentators have urged that enforcement of a state provision analogous to §7 of the Clayton Act is a necessary supplement to the Sherman Act or its state equivalents. See Stern, ANTITRUST HANDBOOK, supra note 34, at 31; Arnold & Ford, supra note 6, at 102; Fellmeth & Papageorge, supra note 26, at 9-10, 20; Inman, The Uniform State Antitrust Act: A Review and Commentary, 14 AM. BUS. L.J. 171, 182-85 (1976) [hereinafter cited as Inman]; Stern, Draft Statute, supra note 31, at 739-42.


60. See Hanson & von Kalinowski, supra note 59, at 32. See also Rahl, supra note 2, at 773 where the author states: “The 1950 amendments revived [section 7], but at this writing its meaning in many respects is doubtful, and it may not receive all the necessary clarifying decisions for years to come.” Since the time Dean Rahl wrote this passage many merger cases have been decided under the amended Clayton Act, clarifying most of the “ambiguities.” See, e.g., FTC v. Proctor & Gamble Co., 386 U.S. 568 (1967); United States v. Pabst
straints of trade in the merger context can be prohibited by the general language of section 1 of the Sherman Act, embodied in state statutes.  

Alternatively, because these serious restraints typically affect more than one state, they will fall within the jurisdictional reach of the Sherman Act or Clayton Act.

These views do not comport with the legislative history of the amended section 7 of the Clayton Act as enunciated by Congress and the Supreme Court. The purpose of section 7 is to "cope with monopolistic tendencies in their incipiency, well before they have attained such effects which would justify a Sherman Act proceeding," or to "nip monopoly in the bud." Without a specific antimerger provision, the state enforcement agencies are in no better position to retard the trend toward industrial concentration than was the Department of Justice prior to passage of section 7 of the Clayton Act, as amended. By the time the activity has attained a level of monopolistic proportions so as to constitute an unreasonable restraint of trade, the opportunity to provide the most effective remedy has been lost. Few would argue against the economic util-


61. See, e.g., Arnold & Ford, supra note 6, at 109. See also BAR COMMITTEE COMMENTS, COMMITTEE ON ANTITRUST OF THE CHICAGO BAR ASSOCIATION (1967), reprinted in III. ANN. Stat. ch. 38, §60-3, 452 (Smith-Hurd 1979)[hereinafter cited as BAR COMMITTEE COMMENTS]:

Nothing comparable to Section 7 of the Clayton Act is included in the Illinois statute and hence, the legality of a merger will be tested under the unreasonable restraint of trade provisions . . . or under the monopolization provisions . . . after an examination of the competitive and economic consequences of the merger.

62. See notes 79-131 infra and accompanying text. See also Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, reh. denied, 334 U.S. 835 (1948). The impact of the restraint, rather than the location of the activities or parties involved, may determine the existence of federal antitrust jurisdiction. The Sherman Act may reach conspiracies to monopolize trade even though the conspirators engage only in intrastate activities to achieve this end. See, e.g., Montrose Lumber Co. v. United States, 124 F.2d 573, 578 (10th Cir. 1941). Monopolization may be reached by the Sherman Act even if the immediate injured parties are not engaged in interstate commerce. See, e.g., United States v. Griffith, 334 U.S. 100, 106 (1948); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 395 (4th Cir. 1974). For a discussion of the recent expansion of jurisdiction under § 7 of the Clayton Act by the Antitrust Procedural Improvements Act of 1980, see generally Note, Improvements Act, supra note 5. This recent expression of congressional intent to extend federal antimerger jurisdiction may serve to buttress arguments against the utility of state antimerger efforts. See notes 144-5 infra and accompanying text.


64. S. REP. No. 1775, 81st Cong., 2d Sess. 4296 (1950).


66. See MONOGRAPH 16, supra note 31; Arnold & Ford, supra note 6, at 109-110.

67. A series of acquisitions could occur before the activity could be reached under gen-
ity of section 7 of the Clayton Act. The considerations that led to the enactment of the Clayton antimerger provisions to enhance the success of the Sherman Act are equally valid at the state level.

Ultimately, this alternative is tantamount to suggesting that, rather than share responsibility in the policing of mergers, the states defer such enforcement to the federal agencies. The tradition of exclusive federal antitrust enforcement in the field of merger regulation would thereby be maintained. According to general restraint of trade provisions. Competitors could have disappeared before the state could act. The problems of divestiture may have become so complex that no possible remedy could restore the vitality of the market to its former status. See H.R. REP. No. 1191, 81st Cong., 1st Sess. 5 (1949); E. Rockefeller, Antitrust Questions and Answers 240-43 (1974). Furthermore, whether or not divestiture of a consummated merger will be ordered in a private action remains an open question in the federal courts. See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); I.T. & T. v. G.T.E., 518 F.2d 913 (9th Cir. 1975). In contrast, a private party suing under §16 of the Clayton Act is entitled to injunctive relief. See Zenith Radio Corp. v. Hazeltine Research Inc., 395 U.S. 100 (1969); United States v. W.T. Grant Co., 345 U.S. 629 (1953). See also Note, Commerce Clause, supra note 10, at 1495 (observing that the Department of Justice had recognized the efficacy of state disposition of primarily local restraints, particularly in injunctive actions).

But see Posner, supra note 59, at 212 (1976), where the author recommends the repeal of all antitrust laws other than §1 of the Sherman Act in stating that the “elaborate statutory edifice is almost entirely superfluous.”

One noted scholar has observed that the regulation of mergers may be an unreasonable state objective:

It would be better to be content with prosecution of relatively simple cases of clearly wrong behavior, especially price fixing and market allocation, thereby embracing reasonable goals. The state law should be slow to take on complex economic problems associated with market structure, mergers, oligopoly and related problems, which are better left to federal policy.

Rahl, supra note 2, at 772. See also Wilson, The State Antitrust Laws, 47 A.B.A.J. 160, 162 (1961). The prefatory note to the Uniform State Antitrust Act, 7 Uniform Laws Ann. 469 (Supp. 1978), approved by the Nat’l Conference of Comm’rs on Uniform State Laws at Annual Conference Meeting at Hyannis, Mass., July 26-August 2, 1973, and approved by the Am. Bar Ass’n at its meeting in Houston, Tex., Feb. 6, 1974 (see 4 Trade Reg. Rep. § 30,101 (Feb. 11, 1974)), supports this proposition, indicating that the drafters felt that the resources of the states and their courts are not well-suited for the resolution of the complex economic issues normally associated with §7 Clayton Act cases. Other commentators have advised specifically against inclusion of state provisions similar to §7 of the Clayton Act. See, e.g., Hanson & von Kalinowski, supra note 59, at 33.

Although a number of states have statutes regulating mergers, they have been rarely used, opening the way to a tradition of federal enforcement. See notes 13-16 supra and accompanying text. This tradition of state deferment of merger regulation was noted in J. Flynn, Federalism and State Antitrust Regulation (1964) [hereinafter cited as Flynn]:

In light of pervasive federal enforcement, anemic state regulation, possible jurisdictional difficulties in enforcing state substantive antitrust laws, and the problems involved where one state attempts to fashion a remedy for a multistate restraint of trade, the tailoring of a proper, utilitarian, and realistic state antitrust program ought to be directed toward those cases where the interstate commerce
some observers, the interests of uniformity and effectiveness in the administration of antitrust laws would also be fostered by the exclusive jurisdiction of the federal courts. 73

A policy of uniform national antitrust enforcement is not disdained by concurrent federal and state enforcement of antimerger laws. 73 At present, the federal antitrust laws may be enforced by numerous agencies and persons. 74 Adding the states to this network of expertise permits even greater efficiency in detecting violations and monitoring compliance. The risk of seriatim prosecutions 75 and conflicting rulings 76 in various courts can be substantially eliminated by the careful drafting of statutes and the

involved is least extensive. In practice, this seems to be what the most active states are attempting to do. A study of recent cases involving local restraints of trade has shown that the vast majority involve the equivalent of the “per se” offenses under the Sherman Act.

Id. at 78-79. See also Note, New Wine, supra note 4, at 605-8.

73. In Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2d Cir. 1955), Judge Learned Hand stated:

There are sound reasons for assuming that (antitrust damages) recovery should not be subject to the determinations of state courts. It was part of the effort to prevent monopoly and restraints of commerce, and it was natural to wish it to be uniformly administered, being national in scope. . . . [A]n administration of the acts, at once effective and uniform, would be best accomplished by an untrammeled jurisdiction of the federal courts.

Id. at 189. See also Garner v. Teamsters Union, 346 U.S. 485 (1953), where the Court stated: “A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law.” Id. at 490-91.

One basis supporting the argument of frustration of national uniformity involves the nonreviewability of state court interpretations of state antitrust statutes. The federal courts may review state antitrust judgments only to correct wrongly adjudicated federal rights, such as the preemption question. See Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). The Supreme Court has consistently refused to review state court judgments based upon adequate and independent state grounds, even if federal issues were present as well. See, e.g., Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935); Zucht v. King, 260 U.S. 174 (1922).


75. See note 123 infra and accompanying text.

76. See notes 72-3 supra and accompanying text.
implementation of an effective system of federal-state coordination.\textsuperscript{77} If states do not enforce antimerger policy in those areas where the federal agencies jurisdictionally cannot or financially will not proceed, the national scheme of antitrust enforcement will be thwarted.\textsuperscript{78}

\textit{State Authority to Regulate Anticompetitive Mergers: A Jurisdictional Continuum}

Federal antitrust jurisdiction is constitutionally defined and limited by the commerce clause,\textsuperscript{79} which vests in Congress the power to regulate commerce.\textsuperscript{80} The Constitution neither excludes nor reserves a concurrent power to regulate commerce in the states. State antitrust laws have traditionally been recognized as a proper economic regulation within the states’ police powers.\textsuperscript{81}

Commonly suggested reasons for the absence of vigorous state efforts in the area of antitrust are the states’ lack of jurisdiction over interstate commerce and federal preemption of state laws.\textsuperscript{82}

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\item[77.] See notes 190-214 infra and accompanying text.
\item[79.] U.S. const. art. I §8 provides in pertinent part: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . .”
\item[80.] This assertion is qualified to the extent that the supremacy clause, U.S. Const. art. VI §2, and the tenth amendment, U.S. Const. Amend. X, shape the contours of federal and state jurisdictional authority.
\item[81.] In Wilson v. Black-Bird Creek Marsh Co., 27 U.S.[2 Pet.] 245 (1829), the Court declared state legislation for the general welfare and common good of its citizens would be sustained if it did not conflict with federal legislation. The state “police powers” were further defined by the Supreme Court in Cooley v. Board of Wardens, 53 U.S. [12 How.] 299 (1851), which established the doctrine that a state can regulate interstate commerce if the subject is so “local” in character as to require diverse state treatment and if Congress has been silent on the subject. Since West Coast Hotel v. Parrish, 300 U.S. 379 (1937), the Court has been increasingly deferential in the area of economic regulation. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297 (1976); Ferguson v. Skrupa, 372 U.S. 726 (1963).

Modern cases adjudge the validity of state police power regulation by examining the relation of the state regulation to a legitimate state purpose and determining whether any burden imposed upon interstate commerce or discrimination against it are outweighed by the state interest in enforcing the regulation. See, e.g., Cities Service Co. v. Peerless Oil and Gas Co., 340 U.S. 179, 186-187 (1950); Southern Pac. Co. v. Arizona, 325 U.S. 761, 770-71 (1945).

State antitrust statutes were held to be within the states’ police power in Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910). There, the Court stated: “[C]ertainly there is nothing in the present state of the law that at least precludes States from a familiar exercise of their power. . . .” Id. at 422. See also International Harvester Co. v. Missouri, 234 U.S. 199 (1914); Waters-Pierce Oil Co. v. Texas, 177 U.S. 28 (1900); National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905).
\item[82.] See Rahl, supra note 2, at 756. A growth in interest in the preemption question has
\end{itemize}
\end{footnotesize}
Even the most carefully worded state antimerger statute is of little value if the courts find merger regulation to be within the exclusive sphere of federal jurisdiction.\(^{68}\) Owing to the recent expansion of federal jurisdiction under section 7 of the Clayton Act,\(^{64}\) defense counsel may argue the jurisdictional issue with renewed vigor in cases brought under state antimerger laws.\(^{65}\)

Antitrust jurisdiction may presently be viewed as a continuum of exclusive and concurrent powers.\(^{8}\) The dramatic expansion of federal power under the commerce clause in recent years\(^{87}\) has necessitated the evolution of jurisdictional theory to provide for continued state authority to regulate business activity.\(^{88}\) Although, in


83. Jurisdictional defenses have been used with increasing frequency to challenge state prosecution efforts. See Mosk, State Antitrust Enforcement and Coordination with Federal Enforcement, 21 A.B.A. Antitrust Section Rep. 358, 361 (1962)[hereinafter cited as Mosk].

84. See note 5 supra and accompanying text.

85. For many alleged violations, the defendant may assert that the unlawful activity is permitted under federal regulatory laws. By raising a challenge to jurisdiction, the defendant "can open the case with an attack." See Fellmeth, Local Prosecutors, supra note 30, at 25.

86. See Fellmeth & Papageorge, supra note 26, at 8.


88. The Supreme Court originally adopted a dual sovereignty theory of commerce jurisdiction, consisting of exclusive state and federal zones of power. If a subject was determined to be "interstate" in nature, it was within the exclusive regulatory control of Congress. See Missouri Pacific R.R. v. Stroud, 267 U.S. 404, 408 (1925); Sturges v. Crowinshield, 17 U.S.[4 Wheat.] 122, 193 (1819). Conversely, if the subject was not interstate commerce, the states had exclusive authority to regulate it. See, e.g., Coe v. Errol, 116 U.S. 517 (1886); Nathan v. Louisiana, 49 U.S.[8 How.] 73 (1850). The definition of mutually exclusive spheres of jurisdictional authority may have motivated Congress to enact federal antitrust laws, as demonstrated by the fact that one of the avowed purposes of the Sherman Act was to allow Congress to regulate antitrust violations occurring outside the sphere of state power. See 21 Cong. Rec. 2457 (1890). The original test, defining mutually exclusive areas of interstate or intrastate commerce, would have virtually eliminated the authorized sphere of state regulatory activity under modern notions of expansive federal authority. See, e.g., United States v. Sullivan, 332 U.S. 689 (1948)(upholding the power of Congress to prohibit a retail druggist
theory, exclusive zones of federal and state authority continue to exist, expanding definitions of federal and state authority has resulted in an increasingly broad area of jurisdictional confluence.\textsuperscript{89}

**Exclusive Federal Jurisdiction**

The regulation of activity which may be characterized as purely or wholly interstate is within the exclusive jurisdiction of the federal government.\textsuperscript{80} A merger involving an interstate restraint of trade which lacks a local nexus is solely within the reach of federal antitrust law.\textsuperscript{91} If local consequences are not felt at the state level, prosecution of the suit will not inure to the benefit of state interests.\textsuperscript{92} Exclusive federal jurisdiction in such a case is eminently reasonable.\textsuperscript{93} If local consequences are felt at the state level, then

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\textsuperscript{89} The expansion of concurrent jurisdiction has necessarily been accompanied by a proportionate narrowing of the exclusive zones of jurisdictional authority. See Fellmeth & Papageorge, supra note 26, at 11; Rubin, supra note 4, at 669.

\textsuperscript{90} See Fellmeth & Papageorge, supra note 53, at 11. Abdication of the dual sovereignty theory and the concomitant expansion of state antitrust authority to activity unmistakably involving interstate commerce has necessitated the redefinition of the scope of exclusive federal jurisdiction from one including those activities “in” or “affecting” interstate commerce to only those activities wholly within interstate commerce. See Rubin, supra note 4, at 674-77.


\textsuperscript{91} Exclusive federal jurisdiction must be viewed in conjunction with the broad area of concurrent jurisdiction now recognized by the Supreme Court. See notes 108-163 infra and accompanying text. An attempt to define in precise terms the boundaries of exclusive “interstate commerce” without reference to the particular need for diverse response from the states and to the interests of national uniformity would be a return to the repudiated era of arbitrary “labeling” to establish the scope of jurisdiction. See, e.g., Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917); Southern Ry. Co. v. King, 217 U.S. 524 (1910).

\textsuperscript{92} See Rubin, supra note 4, at 676 (there is “general agreement” that states can only regulate restraints in interstate commerce “when such commerce has significant local consequences”). See also Baker v. Walter Reade Theatres, 37 Misc. 2d 172, 237 N.Y.S. 2d 795 (Sup. Ct. 1962) (jurisdiction of the state denied because the “significant local consequences” occurred in another state); Leader Theatre Corp. v. Randforce Amusement Corp., 186 Misc. 290, 283, 58 N.Y.S.2d 304, 307 (Sup. Ct. 1945), aff’d, 372 App. Div. 844, 76 N.Y.S.2d 846 (1st Dep’t, 1948) (states may enact legislation affecting interstate commerce only “when such commerce has significant local consequences”).

\textsuperscript{93} This is particularly true in light of the resource limitations in many states. See notes 164-180 infra and accompanying text. Congressional power, however, may not extend beyond that delegated by the Constitution. The fact that a restraint of trade lacks sufficiently local consequences in any state so as to supply any single state with effective power to regulate the restraint does not of itself extend federal power beyond that granted in the Constitution. See, e.g., Kansas v. Colorado, 206 U.S. 46 (1907) (mere fact that state lacks power to claim land outside its borders does not give Congress that power). The grant of power to the
the states are entitled to exercise jurisdiction concurrently with the federal government. A local consequences test thus delineates the boundary between exclusive federal jurisdiction and concurrent federal and state jurisdiction over interstate commerce.

Exclusive State Jurisdiction

The regulation of restraints of trade properly characterized as wholly intrastate in nature is within the exclusive jurisdiction of the states. With the expansion of the definition of “interstate commerce,” a concomitant contraction of exclusive state jurisdiction has occurred. The Sherman Act has been held to reach intrastate contracts or combinations, whatever their avowed pur-

94. The jurisdictional requirement of local consequences within the state is analogous to the “minimum contacts” requirement between the forum state and the defendant for purposes of establishing in personam jurisdiction. See International Shoe v. Washington, 326 U.S. 310, 316 (1945), where the Court determined that the due process clause of the fourteenth amendment required such minimum contacts so that maintenance of a suit in the forum state would not offend “traditional notions of fair play and substantial justice.” See also McGee v. International Life Ins. Co., 355 U.S. 220 (1957). The expanded definition of due process created a “new enclave” of state statutory power which allowed for a more expansive assertion of state antitrust authority. See Bomze v. Nardis Sportswear, Inc., 165 F.2d 33, 36 (2d Cir. 1948). See also Mantzoros, Federal-State Antitrust Jurisdiction, 9 N.Y.L.F. 74, 80 (1963) [hereinafter cited as Mantzoros] for a broader discussion of the expansion of state antitrust authority. For examples of early cases upholding state statutes against fourteenth amendment challenges, see Standard Oil Co. v. Tennessee, 217 U.S. 413, 420-21 (1910); National Cotton Oil Co. v. Texas, 197 U.S. 115 (1905); Smiley v. Kansas, 196 U.S. 447 (1905).

95. State regulation is valid as a matter of federal constitutional law, unless explicitly or implicitly prohibited by the Constitution. The tenth amendment, U.S. Const. amend. X, provides: “The power not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” See note 81 supra, discussing the states’ police power. See also State v. Allied Chem. & Dye Corp., 9 Wis.2d 290, 101 N.W.2d 133 (1960) where the Wisconsin Supreme Court emphasized the particular injury within the state in declaring: “The public interest and welfare of the people of Wisconsin are substantially affected if prices of a product are fixed or supplies thereof are restricted as a result of an illegal combination or conspiracy.” 9 Wis.2d at 295, 101 N.W.2d at 135.


97. See, e.g., Burke v. Ford, 389 U.S. 320 (1967) (intrastate division of liquor market
poses, as long as they "substantially affect" interstate commerce.

If federal antitrust jurisdiction is considered to be fully coextensive with federal power under the expanded commerce clause, the scope of exclusive state jurisdiction is virtually non-existent.' Courts have never gone this far, however, in extending the federal antitrust laws into local affairs, despite Supreme Court declara-

within scope of the Sherman Act even though the liquor had "come to rest"); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219(1948)(Sherman Act held to reach conspiracy involving sugar beet farmers although only the sugar crossed state lines); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945)(intrastate conspiracy of liquor dealers within Sherman Act jurisdiction).

98. See Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738 (1976) where the Court stated: "[T]he fact that an effect on interstate commerce might be termed 'indirect' because the conduct producing it is not 'purposely directed' toward interstate commerce does not lead to a conclusion that the conduct at issue is outside the scope of the Sherman Act." Id. at 744.

99. See Burke v. Ford, 389 U.S. 320 (1967); Las Vegas Merchant Plumbers' Ass'n v. United States, 210 F.2d 732, 739 n.3 (9th Cir.), cert. denied, 384 U.S. 817 (1954). Commerce clause power has also been measured by use of a "flow of commerce" analysis. See, e.g., Swift & Co. v. United States, 196 U.S. 375, 399 (1905). Several courts have utilized this type of analysis to measure the reach of the Sherman Act. Under this analysis, a restraint is considered within the flow of commerce and within the ambit of Sherman Act jurisdiction if it is part of the continuous flow of a product that crosses a state line. See, e.g., United States v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970); Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 343 (9th Cir. 1969); Las Vegas Merchant Plumbers' Ass'n v. United States, 210 F.2d 732, 745-46 (9th Cir.), cert. denied, 348 U.S. 817 (1954). See also 1 P. Areeda & D. Turner, ANTITRUST LAW 231 (1978) [hereinafter cited as Areeda & Turner]. The "substantial economic effect" test does not require a determination that the restraint was "in" the flow of commerce. Rather, a wholly intrastate activity having sufficient impact in other states may be reached by the Sherman Act regardless of whether the activity occurs before, during, or after interstate movement. See, e.g., United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 569 (1939).

100. See, e.g., United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460, 464 (1949) for the often-quoted statement: "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." See also Areeda & Turner, supra note 99, at 240, where the commentators state: "Undoubtedly, inherent effects on interstate contacts are so ubiquitous that jurisdictional dismissals could become extinct. It is a rare business that buys nothing that came from a different state or services no interstate customers. The courts should understand, in short, how easily the affecting-commerce test is satisfied." The jurisdiction of the federal government in a merger case is seldom contested. Id. at 253. United States v. American Bldg. & Maint. Indus., 422 U.S. 271 (1975), is the only case to date in which the federal government was found not to have jurisdiction under § 7 of the Clayton Act. A possible reason for the lack of jurisdictional dispute is the selective enforcement policies the federal government has been forced to implement. See notes 34-41 supra and accompanying text.

101. See Rahl, supra note 2, at 758, where the author states: "Although Congress used all the power it possessed to reach trade restraints of interstate commerce, it does not follow that it thereby reached all of the restraints of trade it might constitutionally reach through some different exercise of power over commerce."
tions that Congress intended to employ its full Constitutional power in curbing restraints of trade. The "substantially affecting commerce" limitation placed on the jurisdictional reach of the Sherman Act has been used to bar its application to local restraints of trade arguably within the reach of federal power under the expanded commerce clause. Significantly, several courts have

102. See United States v. South-Eastern Underwriters' Ass'n, 322 U.S. 533, 538 (1944); Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940).

103. See United States v. Yellow Cab Co., 332 U.S. 218 (1947); United Leather Workers' Int'l Union v. Herkert & Meisel Trunk Co., 265 U.S. 457 (1924); Las Vegas Merchant Plumbers' Ass'n v. United States, 210 F. 2d 732, 739 n.3 (9th Cir.), cert. denied, 384 U.S. 817 (1954). Previously, the language of the Clayton Act was more restrictive than that of the Sherman Act in that the former applied only to activities occurring "in commerce." 15 U.S.C. §19 (1976). The Supreme Court found that the "in commerce" limitation of the Robinson-Patman Act, 15 U.S.C. §13 (1976) barred federal jurisdiction over primarily intrastate activities in Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974). The Court declared: "[I]n contrast to §1 [of the Sherman Act], the distinct "in commerce" language of the Clayton and Robinson-Patman Act provisions...cannot be satisfied merely by showing that allegedly anticompetitive acquisitions and activities affect commerce." Id. at 195. The interstate commerce limitation was extended explicitly to the Clayton Act in United States v. American Bldg. Maint. Indus., 422 U.S. 271 (1975). This restrictive trend was recently halted by passage of the Antitrust Procedural Improvements Act of 1980, which ostensibly extends the jurisdiction of the Clayton Act to match that of the Sherman Act. See generally Note, Improvements Act, supra note 5. It should be noted that, in contrast to the "interstate commerce" jurisdictional prerequisite to the federal antitrust laws, state jurisdiction is based upon the commission of an act in furtherance of anticompetitive activity within the state. See Mantzoros, supra note 94, at 82 n.59.

104. The Sherman Act has been held inapplicable to: A conspiracy to exclude competition in the operation of local taxicabs in United States v. Yellow Cab Co., 332 U.S. 218 (1947); activity involving the construction and rental of apartments in Marston v. Ann Arbor Property Management Ass'n, 422 F.2d 836 (6th Cir.), cert. denied, 399 U.S. 929 (1970); the county-wide collection and disposal of garbage in Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969); the printing of legal notices in Page v. Work, 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961); the furnishing of hospital services in Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167 (6th Cir.), cert. denied, 361 U.S. 884 (1959); the sale of cemetery vaults in Lawson v. Woodmere, Inc., 217 F.2d 148 (4th Cir. 1954); a price-fixing combination of local drive-in theatres in United States v. Starlight Drive-In, Inc., 204 F.2d 419 (7th Cir. 1953); the sale of state bar review courses in Kallen v. Nexus Corp., 353 F. Supp. 33 (N.D. Ill. 1973); the operation of barber shops in Hotel Philips, Inc. v. Journeymen Barbers Int'l Union of America, 195 F. Supp. 664 (W.D. Mo. 1961); aff'd per curiam, 301 F.2d 443 (8th Cir. 1962); and the sale of cemetery monuments in Northern Cal. Monument Dealers Ass'n v. Interment Ass'n, 120 F. Supp. 93 (N.D. Cal. 1954). See generally Rubin, supra note 4, at 675-76. See also New Jersey v. Lawn King, Inc., 150 N.J. Super. 204, 221, 375 A.2d 295, 303 (1977), where the state court found that restraints by an equipment manufacturer and distributor having numerous interstate contacts did not have sufficient impact on interstate commerce to sustain Sherman Act jurisdiction and thus was within the jurisdiction of state antitrust regulation.

Dean Rahl has observed: "[I]f the Sherman Act treated interstate commerce as a purely jurisdictional matter, as distinguished from treating it as the subject matter being given substantive protection, the presence of elements of interstate commerce [in such cases] such as interstate movement of materials prior to the restraint, would justify reaching the re-
indicated that federal antitrust jurisdiction may not be sustained absent an effect on interstate commerce that is "direct and substantial, and not merely inconsequential, remote or fortuitous."  

In light of the jurisdictional limitations, in relation to the commerce clause, which courts have placed on the reach of the federal antitrust laws, federal enforcement of anticompetitive conduct is effectively incomplete. Local mergers without sufficient effect on interstate commerce may still occur within the sphere of exclusive state jurisdiction. When such mergers occur, the states bear the responsibility to supervise the same in order to protect the competitive vitality of the local marketplace.

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1. Rahl, supra note 2, at 758-59. But cf. United States v. Yellow Cab Co., 332 U.S. 218 (1947). (held, the operation of local taxicabs was “too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act” [Emphasis added] Id. at 230).

2. Page v. Work, 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961). See also United States v. Jack Foley Realty, Inc., (1977-2) Trade Cas. 72,785, 72,789; Spears Free Clinic & Hospital For Poor Children v. Cleere, 197 F.2d 125 (10th Cir. 1952).

3. United States v. Jack Foley Realty, Inc., supra note 2, at 759. Cases involving the local distribution of goods and services with some measure of interstate contacts, such as retailing goods, may also be considered within the exclusive state jurisdictional sphere, depending upon the circumstances. Id.

The extent of the realm of exclusive state jurisdiction is not insignificant. A State Attorney General has commented: “An enormous volume of commerce confined within the state is still beyond the reach of the Sherman Act, notwithstanding the extension of its jurisdiction in recent years.” See Mosk, supra note 83, at 359. Recognizing a significant area of exclusive state jurisdiction, therefore, is not the same as “[Underestimating] the scope of federal law under the expanding concept of commerce [which] would be foolish indeed.” Rahl, supra note 2, at 758. But see Jefferis, State and Federal Antitrust Actions Against Employer-Union Conspiracies: The Double Dosage Doctrine, 39 Tex. L. Rev. 811, 813 (1961) [hereinafter cited as Jefferis].

4. The competitor who is injured by anticompetitive acquisitions in a local setting
Concurrent Jurisdiction

State jurisdiction over restraints of trade does not halt at the outer boundary of exclusive state jurisdiction. Primarily interstate activities with "significant local consequences" and activities which, although primarily intrastate, "substantially affect interstate commerce," constitute a broad area of overlapping federal and state jurisdiction. Because these matters cannot easily be characterized as wholly "inter-" or "intra-" state in nature, they give rise to the most frequent jurisdictional challenges.

1. State Regulation of Interstate Commerce

Taken alone, the Constitution's affirmative grant of power to Congress to regulate commerce may be read to prohibit state in-

may have only the state prosecutors and state courts to turn to in such a situation. See Stern, Draft Statute, supra note 31, at 740. Because state antitrust officials must rely upon state law for this purpose, it is imperative that adequate state antitrust machinery exist. See notes 181-189 infra and accompanying text.

108. The court, in Commonwealth v. McHugh, 326 Mass. 249, 93 N.E.2d 751 (1950), recognized that monopolies and other restraints of trade may vary substantially in nature, stating:

"[Some restraints of trade] expend their effects almost wholly upon intrastate commerce and are of only local interest and some almost wholly upon interstate commerce and so become matters of national concern, and there are all gradations between. If state laws have no force as soon as interstate commerce begins to be effected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens. . . ."
326 Mass. at 265, 93 N.E.2d at 762.

109. See notes 92-94 supra and accompanying text.

110. See notes 99-105 supra and accompanying text.

111. In State ex rel. Cates v. Standard Oil Co., of Ky., 120 Tenn. 86, 110 S.W. 565 (1908), the court observed the necessity of recognizing concurrent authority in antitrust regulation, stating:

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

120 Tenn. at 86, 110 S.W. at 581.

112. See Dillon, But the Other Referee Said! - A Criticism of Multiple Litigation in Identical Bidding and Merger Cases, 39 Tax. L. Rev. 782, 805 (1961). Challenges based upon the commerce clause, the supremacy clause, or other constitutional provisions are often dealt with under the general category of preemption. Courts often fail to make the distinction explicit in dealing with federal preemption challenges, leaving the grounds of the decision uncertain. See Fellmeth and Papageorge, supra note 26, at 15; Rubin, supra note 4, at 678-79.

terference with interstate commerce.\textsuperscript{114} State antitrust regulation, however, performs a dual role: (1) protection of the efficient function of commercial activity; and (2) simultaneous imposition of certain limitations upon such activity. This second function creates the potential for interference with interstate commerce and thus may be grounds for excluding state regulation under the commerce clause.\textsuperscript{115}

The tremendous expansion of federal commerce power into the traditional sphere of exclusive state power has increased the possibility that state antimerger laws will place impermissible burdens upon commerce better served by a national policy.\textsuperscript{116} The commerce clause precludes the states from enacting antitrust laws imposing unjustified burdens on interstate commerce.\textsuperscript{117} Courts evaluate the legitimacy of state regulation under the commerce clause on the basis of the regulation's relationship to a legitimate state purpose. Any burdens imposed upon and discrimination against interstate commerce are weighed against the state interest which the regulation serves.\textsuperscript{118}

Substantively diverse state antimerger statutes might impose

\begin{itemize}
  \item \textsuperscript{114} Although the Constitution does not purport to expressly limit the power of the states to regulate interstate commerce, the Supreme Court has so limited state regulatory authority through interpretation of "[t]hese great silences of the Constitution." H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 535 (1949). See Sholley, The Negative Implications of the Commerce Clause, 3 U. Chi. L. Rev. 556 (1936).
  \item \textsuperscript{115} The "dual sovereignty" theory, prevalent in the late nineteenth century, would have precluded the establishment of an area of concurrent state and federal jurisdiction. See note 88 supra and accompanying text. The doctrine's sporadic longevity has been promoted by state antitrust provisions limiting state jurisdiction to "intrastate" commerce and infrequent restrictive state court decisions. See, e.g., Kosuga v. Kelly, 257 F.2d 48 (7th Cir. 1958), aff'd on other grounds, 358 U.S. 516 (1959); Vendo Co. v. Stoner, 105 Ill. App.2d 261, 245 N.E.2d 283 (1969); State v. Virginia-Carolina Chem. Co., 71 S.C. 544, 51 S.E. 455 (1905). The Kosuga decision was subsequently discredited in Henry G. Meigs, Inc. v. Empire Petroleum Co., 273 F.2d 424, 430-31 (7th Cir. 1960), and the doctrine's existence was eliminated in Illinois in 1969 when the scope of the Illinois Antitrust Act was extended to activities occurring within interstate commerce pursuant to P.A. 76-208, §1, now codified at Ill. Rev. Stat. ch. 38, §60-7.9 (1979). Missouri has also recently amended its antitrust statute to be applicable to interstate commerce. See Mo. Rev. Stat. §416.131(4)(Vernon Supp. 1979). Following repudiation of the "dual sovereignty" theory, modern courts have tended to focus on a balancing of state and federal interests of determining state regulatory preclusion by the unexercised commerce clause. See, e.g., California v. Zook, 336 U.S. 725 (1949); Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945).
  \item \textsuperscript{116} See Note, Commerce Clause, supra note 10, at 1476.
\end{itemize}
burdens on interstate commerce. Diversification in a field requiring 
uniform regulation can impair the mechanism of efficient free 
enterprise, create prohibitively high costs of compliance for 
those subject to regulation, and hinder effective monitoring and 
enforcement of the regulatory scheme. A dual system of state 
and federal antimerger statutes creates the potential for multiple 
prosecutions for the same activity. The interstate nature of most

119. State antitrust statutes seek to serve the same broad purposes as the federal laws: protection of the marketplace. See Stern, Antitrust Handbook, supra note 34, at 3-4. Various state statutory schemes augment a showing of coincidence of purpose by adopting federal statutory language and precedent. See notes 181-189 infra and accompanying text. It has been suggested that "[t]he more it appears to be a complete [federal] system of regulation the more likely the state acts are to be displaced." Dunham, Congress, the States and Commerce, 8 U.Chi. L.S. Rec. 54, 61-2 (Supp. Autumn 1958)[hereinafter cited as Dunham]. See also Parker v. Brown, 317 U.S. 341 (1943) (state program upheld in part because it filled gap in federal regulatory scheme).

The substantial limitations on the federal government in antitrust enforcement support the argument that national interests are better served by concurrent statutory schemes and enforcement. See notes 33-51 supra and accompanying text. Any argument based on the need for a single enforcement agency is weakened by the present federal system allocating responsibility for enforcement of the antitrust laws between the Department of Justice and the Federal Trade Commission. See Alfred M. Lewis, Inc. v. Warehousemen Union, 163 Cal. App.2d 771, 790, 330 P.2d 53, 64 (4th Dist. Ct. App. 1958)(no need for uniformity in antitrust regulation).

120. See Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945). Although state merger regulation has as its ultimate goal the removal of restraints upon trade, prevention of economic concentration at the state level may to some degree impair economic efficiency in those instances when an impending or consummate merger will or has resulted in a concomitant benefit. Such a situation is present when greater size or access to material has produced an economy of scale. In Exxon v. Governor of Md., 437 U.S. 117 (1978), the Supreme Court answered a challenge contending that the economic inefficacy of a state statute represented an impermissable burden on commerce, stating: "It may be true that the consuming public will be injured by the . . . [operation of the law], but again that argument relates to the wisdom of the statute, not its burden on commerce." Id. at 128. It is therefore highly unlikely that a burden of this type will be found to preclude state regulation of anticompetitive mergers. See Note, New Wine, supra note 4, at 560-61.

121. See Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959). State antitrust laws generally do not require affirmative compliance. Rather, they require only that business enterprises abstain from certain anticompetitive practices. In order to insure that it does not violate state laws, a business need only ascertain the applicable laws and adjust its business practices accordingly. See Note, New Wine, supra note 4, at 559-560. If the states were to adopt substantive antitrust provisions similar to those of the federal laws, compliance with the federal scheme will seldom violate state antitrust laws. See generally Flynn, supra note 71, at 88.

122. State antitrust provisions paralleling § 7 of the Clayton Act, but sufficiently limited in scope, would allow state and local prosecutors to discover early on those acquisitions having a substantial impact on the local market and allow relief in those instances where federal remedies would normally not be forthcoming. See notes 33-51 supra and accompanying text.

123. Double recovery is precluded in civil damage actions. Serial prosecution for criminal
commerce, giving rise to multi-state contacts and difficult choice-of-law questions, may compound already complex issues. Although these burdens might be substantial, they are more aptly characterized as practical burdens than legally cognizable burdens upon commerce. Rather than justify the exclusion of the states from a role in antimerger enforcement, such burdens serve to emphasize the need for complementary state and federal policy.

Compelling reasons exist for implementing a state antimerger regulatory scheme. Significant state interests are served by such a program. The concentration of economic power through mergers of primarily local business enterprises may result in significant harm to the competitive vigor of the local marketplace. The suppletory nature of section 7 of the Clayton Act as an "incipiency" statute is equally necessitated in the statutory scheme at the state level to adequately police potential monopolies. Moreover, federal enforcement alone cannot provide adequate protection for essentially local interests. Additionally, state regulation of re-

violations, however, is not precluded by pleas of double jeopardy or violation of due process. One set of facts has been held to constitute two separate crimes, each against a different sovereign. See Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). Cf. Pennsylvania v. Nelson, 350 U.S. 497, 509-10 (1956) (assumption that Congress would not permit the possibility of double punishment).

In Bartkus, however, the dissenting opinion of Justice Black referred to the "universal abhorrence of such double prosecutions." 359 U.S. at 151. Issues of fairness would thus dictate against serial prosecutions for the same offense. The potential for multiple prosecutions emphasizes the need for cooperation and coordination between federal and state authorities, but does not establish in itself an impermissible burden on commerce. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); United States v. Crescent Amusement Co., 323 U.S. 173, 189 (1944). But see Jeffers, supra note 106, at 819.

125. See Mosk, supra note 83, at 360-61.
126. Less weight may be accorded the local interest when the state law regulates purely economic matters, as do antitrust laws, rather than health or safety interests. See, e.g., Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970); H.P. Hood & Sons v. DuMond, 336 U.S. 525, 531 (1949). However, the Supreme Court has more readily permitted regulation imposing only economic burdens rather than obstructing the movement of goods. Compare Union Brokerage Co. v. Jensen, 322 U.S. 202 (1944) with Bibb v. Navajo Freight Lines, 359 U.S. 570 (1959).
127. See Fellmeth, Local Prosecutors, supra note 53, at 5-6. See also State v. Allied Chem. & Dye Corp., 9 Wis.2d 290, 295, 101 N.W.2d 133, 135 (1960)(emphasis on the substantial effects of antitrust violations on the welfare of state residents). The importance of the antitrust laws was recently noted by the Supreme Court in United States v. Topco Associates, Inc., 405 U.S. 596 (1972). There, the Court stated: "Antitrust laws in general . . . are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." Id. at 610.
128. See notes 64-69 supra and accompanying text.
strainst of trade has a particularly long common law and statutory history. In the absence of attempts to discriminate against interstate commerce, the states are not precluded by the commerce clause from regulating mergers within the broad area of concurrent antitrust jurisdiction.

2. The Supremacy Clause

a. Affirmative Preemption

If Congress exercises its power in a particular area, irreconcilable conflicting state statutes become inoperative by virtue of the supremacy clause. The conflict may arise with respect to federal legislation or affirmative federal policy as revealed by congres-


131. The Supreme Court has been relatively hostile to state action imposing distinct burdens on out-of-state interests not represented in the states' political process. See, e.g., Southern Pac. Co. v. Arizona, 325 U.S. 761, 767-68 n.2 (1945); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938). For a recent case applying this principle, see Exxon Corp. v. Governor of Maryland, 437 U.S. 177 (1978).

132. The supremacy clause, U.S. Const. art. VI §2, provides in pertinent part that the Constitution and the laws thereunder are: "the supreme Law of the land . . . any Thing in the Constitution or Laws of any State to the contrary notwithstanding." Many of the issues relevant to a challenge to state authority to regulate mergers based upon the supremacy clause have been previously discussed in the context of state authority under the expanding commerce clause. See notes 82-131 supra and accompanying text.

133. See, e.g., Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942); Shell Oil Co. v. Younger, [1976-1] Trade Cas. 69,246 (N.D. Cal.).
sional intent.\textsuperscript{134} Citing the common goals of federal and state antitrust policy\textsuperscript{135} and the substantive similarity between federal and state statutes,\textsuperscript{136} most courts have found no irreconcilable conflict requiring the displacement of state antitrust regulation.\textsuperscript{137} Because state antimerger efforts are subsumed in antitrust regulation, they likewise should suffer no displacement.

**b. Preemption of the Field**

In the absence of irreconcilable conflict with federal law, state laws may still be invalidated if Congress expressly\textsuperscript{138} or impliedly\textsuperscript{139} denies states the authority to regulate the area. The intrusion of federal antitrust jurisdiction into areas traditionally considered local is undisputed.\textsuperscript{140} Parties challenging the jurisdiction

\begin{footnotesize}
\begin{enumerate}
\item[136.] See J. Hanson, A Comparison of State and Federal Antitrust Laws in Selected Areas, 29 A.B.A. ANTITRUST SECTION 267, 283 (1965); Rahl, supra note 2, at 760-63. Cf. notes 181-89 infra and accompanying text.
\item[140.] See notes 95-107 supra and accompanying text. The scope of federal antitrust jurisdiction, however, is not absolute. See notes 101-106 supra and accompanying text. One court summarized the requirements for establishing Sherman Act jurisdiction as follows: A case under the antitrust laws, so far as the interstate commerce element is concerned, may rest on one or both of two theories: (1) That the acts complained of occurred within the flow of commerce . . . (2) That the acts complained of oc-
of state courts frequently maintain that by allowing the jurisdiction of the antitrust acts to expand in conjunction with the commerce clause, Congress impliedly intended to preempt the antitrust field.141 Yet, congressional silence may equally imply satisfaction with developing doctrines such as concurrent jurisdiction.142

Congress' affirmative statements with respect to the antitrust laws, moreover, may be of greater import. During the debates, Senator Sherman declared that his purpose was to supplement state law so that federal authorities might cooperate in a national effort to curb anticompetitive activity.143 More recently, Congress has indicated its intent to extend the jurisdictional reach of section 7 of the Clayton Act to be coextensive with that of the Sherman Act.144 The original supplementary purpose of the Sherman Act suggests that if Congress had intended to affirmatively preclude state merger regulation, it would have chosen alternate jurisdictional ex-

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curred wholly on the state or local level, in interstate commerce, but substantially interstate commerce.

Las Vegas Merchant Plumbers' Ass'n v. United States, 210 F.2d 732, 739 n.3 (9th Cir.), cert. denied, 384 U.S. 817 (1954).

141. See generally Fellmeth & Papageorge, supra note 53, at 12; Note, Commerce Clause, supra note 10, at 1475.

142. See Mosk, supra note 83, at 364. It has been suggested that the silence of Congress on a matter of national concern is to be interpreted as evidence of its will that the matter not be regulated by the states, while its silence on matters of local concern does not disclose such objection. See Bikle, The Silence of Congress, 41 Harv. L. Rev. 200 (1927). See also Dunham, supra note 119, wherein the author states that whether the issue is the significance of Congressional silence or the effect of limited federal regulation, the courts must still decide whether an activity should be left unregulated in some respect. See, e.g., State v. Milwaukee Braves, Inc., 31 Wis.2d 699, 726-30, 144 N.W.2d 1, 15-18 (1966). Cf. California v. Zook, 336 U.S. 725, 733 (1945)(noting that congressional purpose to displace a state statute must be clearly manifested).

143. See comments of Senator Sherman, 21 Cong. Rec. 2457 (1890)(avowed purpose of the proposed legislation was to supplement state laws). See also House Judiciary Committee Report, H.R. Rep. No. 1707, 51st Cong., 1st Sess. 1 (1890)(disclaiming preemptive intent). Although these statements were made prior to the expansion of the commerce clause, they serve as indications that Congress was contemplating continuing efforts of antitrust enforcement by the states. See Fellmeth & Papageorge, supra note 26, at 13. On the other hand, Senator Sherman's comments may indicate a recognition that the states were constitutionally unable to regulate interstate activities. See Note, New Wine, supra note 4, at 558.

144. In response to the narrow construction afforded the jurisdictional language of § 7 of the Clayton Act by the Supreme Court in United States v. American Bldg. Maint. Indus., 422 U.S. 271 (1975), Congress has recently amended that language by the Antitrust Procedural Improvements Act of September 12, 1980, Pub. L. No. 96-349, 94 Stat. 1154. The amendment extends the jurisdictional reach of § 7 to cover acquisitions between "persons" whose activities are "in commerce" or "affect commerce." See generally Note, Improvements Act, supra note 5.
pression or made its intent to do so known in some other manner.\textsuperscript{145}

Courts have either explicitly or implicitly rejected the argument of a “presumption of preemption by coincidence or mere coverage” of federal and state antitrust laws.\textsuperscript{146} Consequently, the application of state antitrust laws to activity concurrently within the scope of the federal commerce power has been upheld.\textsuperscript{147} The Supreme Court may, indeed, have settled the matter long ago by affirming the application of state antitrust laws to activity affecting interstate commerce.\textsuperscript{148} Subsequent Supreme Court decisions\textsuperscript{149} and

\textsuperscript{145}. Congress recognized the anomalous situation created by the existence of a supplementary statute intended to reach monopolies in their incipiency having a narrower jurisdictional scope than the anti-monopoly statute it was intended to supplement. See H.R. Rep. No. 871, 96th Cong., 2d Sess. 4 (1980). In extending the jurisdictional reach of § 7 of the Clayton Act to be coextensive with that of the Sherman Act, Congress has corrected this anomaly. There is no indication, however, that Congress intended that the amended Clayton Act be given a more expansive reading than the Sherman Act. The jurisdictional limitations applicable to the Sherman Act would therefore appear to be equally applicable to the scope of § 7 of the Clayton Act, as amended. See notes 101-106 supra and accompanying text.

That courts have not found state statutes regulating activity concurrently within the scope of the Sherman Act to be preempted is equally significant. See notes 149-151 infra and accompanying text.


\textsuperscript{147}. With respect to antitrust regulation, this proposition is a matter of some debate. See, e.g., Rubin, supra note 4, at 671-72; Note, Commerce Clause, supra note 10, at 1478.

\textsuperscript{148}. See Standard Oil Co., of Ky. v. Tennessee, 217 U.S. 413 (1910). Justice Holmes, speaking for a unanimous Court, concluded that the interstate aspects of the challenged anticompetitive activity did not preclude application of the Tennessee antitrust statute: “How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law at least that excludes the states from a familiar exercise of their power. . . .” Id. at 422. The Court concluded by citing Field v. Barber Asphalt Paving Co., 194 U.S. 618 (1904), in which the Court had upheld the application of state regulation to matters only “indirectly” affecting commerce. Some commentators have suggested that, in light of the limited scope of the commerce clause at the time Standard Oil was decided and Justice Holmes’ reliance on Barber Asphalt, the Court was of the opinion that no federal statute could have reached the activities of Standard Oil. If this interpretation is valid, the case stands only for the proposition that the states may permissably regulate intrastate activity not affected by the federal antitrust laws. See Jeffers, supra note 106, at 815-16; Rubin, supra note 4, at 671-72; Note, Commerce Clause, supra note 10, at 1478.
lower federal\textsuperscript{160} and state court cases\textsuperscript{161} have validated the concurrent jurisdiction of federal and state antitrust statutes with respect to commerce clause and preemption issues.

State antimerger legislation, however, must overcome still another preemption challenge. Even absent a clear statutory expression, the nature of the activity may manifest congressional intent to exclude state regulation. If the federal regulatory scheme is so pervasive that state regulation of the subject matter would impair the federal scheme\textsuperscript{162} or the federal interest in exclusive regulation is predominant,\textsuperscript{183} the courts may find that Congress intended to preempt state authority. As a general proposition, the Supreme Court has declared that preemption of the challenged state action depends upon whether or not it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."\textsuperscript{164}

\textsuperscript{149} See, e.g., Teamsters Local 24 v. Oliver, 358 U.S. 283 (1959); Watson v. Buck, 313 U.S. 387 (1949); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); Strauss v. American Publishers' Ass'n, 231 U.S. 222 (1913); Waters Pierce Oil Co. v. Texas, 212 U.S. 86 (1909). See also Gibbs v. Buck, 307 U.S. 66 (1939), where Justice Black, in a dissenting opinion stated: "[A] state law prohibiting monopolistic price-fixing in restraint of trade is not 'novel' and 'unique' and raises no 'grave constitutional questions.' The constitutional right of the States to pass laws against monopolies should now be beyond possibility of controversy." Id. at 83. The value of these precedents is diminished by the fact that preemption was not discussed by the Court. However, the importance of the decisions rests in the validation of state antitrust regulation affecting or involving activities that could have been within the ambit of the commerce clause when they were decided.

\textsuperscript{150} See e.g., Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), aff'd on other grounds, 407 U.S. 258 (1972); Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America, 438 F.2d 1286, 1313 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); Matthew Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73, 82 (6th Cir. 1943).


\textsuperscript{154} Hines v. Davidowitz, 312 U.S. 52, 67 (1941). A finding of preemption would be improper in the absence of state interference with the federal regulatory scheme, because there would be no actual conflict or intrusion into a field Congress has reserved to the federal sphere. See Note, Commerce Clause, supra note 10, at 1489.
State antimerger laws, as supplementary legislation to section 7 of the Clayton Act, will be sanctioned by the Supreme Court so long as compliance with the federal statute and the effectuation of its purposes are not significantly impeded by the state scheme. In areas of potential conflict, courts will balance the federal and state interests. Absent contrary congressional declarations, the significant local interests to be served by state antimerger regulation and the dearth of evidence of significant impediment to national antimerger policy should preclude a finding of preemption based upon the supremacy clause.

Jurisdictional defenses to enforcement of state antimerger regulation have little merit. Although some state courts are assuming responsibility for adjudication of the jurisdictional issue, the easy and frequent preemptory removal of state antitrust civil ac-

155. See, e.g., California v. Zook, 336 U.S. 725 (1949) where the Court sustained a state statute containing language nearly identical to a federal statute and imposing a heavier burden than the federal statute.


157. See Note, Commerce Clause, supra note 10, at 1493-94 n.162.

158. See notes 126-130 supra and accompanying text. The federal agencies may be precluded from reaching certain state activity not only because of remaining limitations on the federal commerce power, see notes 95-107 supra and accompanying text, but also because Congress may have precluded federal action in particular areas, see notes 48-49 supra and accompanying text. An analogy may be drawn to sedition law. Although the Court in Pennsylvania v. Nelson, 350 U.S. 497 (1956), held that Pennsylvania could not legislate to protect the United States against sedition, the subsequent decision of Uphaus v. Wyman, 360 U.S. 72 (1959), restricted preemption to only such action and held that the states could take appropriate action to protect themselves against sedition. An appropriate state statute regulating mergers is generally enacted to protect state interests, despite its possible applicability to activities subject to concurrent regulation by the federal government. See E. Pollock, Address to Chicago Bar Association Symposium On State Antitrust Laws, April 25, 1961, quoted in Stern, Draft Statute, supra note 31, at 719-20.

159. See notes 119-125 supra and accompanying text.

160. State antitrust laws have withstood preemption challenges in cases where the state law was more stringent than the corresponding federal law. See, e.g., W.J. Seifert Land Co. v. National Restaurant Supply Co., [1973-2] Trade Cas. 94,819 (Ore). Such laws have also been sustained where activity, which federal law prohibited, was permitted. See, e.g., Ohio v. The Klosterman French Baking Co., [1977-1] Trade Cas. 71,271, 71,274 (S.D. Ohio 1976).

Courts have applied a presumption against preemption that can be overcome only by a showing of Congressional intent to preempt, by evidence of a conflict with federal policy, or by a showing of substantial burden on interstate commerce in an area requiring uniformity of policy. See, e.g., Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947).

161. See note 151 supra.
tions to the federal court is noteworthy. Once a case is removed, without hearing, in the state court, the burden shifts to the public prosecutor to proceed in the federal court and regain state jurisdiction. Jurisdictional issues do not serve as an excuse for failing to enforce state antimerger laws vigorously and should not be allowed to complicate state antimerger proceedings.

State Limitations—Countervailing Considerations

Resource Limitations

The greatest obstacle to effective state antimerger enforcement is the perceived limitations on state resources. Federal merger cases are characterized by complexity and attendant expenses. Determinations as to the relevant product and geographic markets, the market structure, and the effect of the merger on the marketplace must all be made in merger suits. As a result, investigation, discovery, and litigation expenses tend to be higher for merger cases than for cases involving other restraints on trade, such as price fixing, collusive bidding, market divisions, tying arrangements, and boycotts. In addition, the preparation and presentation of merger cases frequently require the use of expert witnesses as well as economic expertise on the part of prosecutors and judges. Moreover, multi-state interviews and testimony may be required. These enumerated complexities and concomitant costs may be substantially diminished in an antimerger enforcement program implemented at the state level.

162. See Fellmeth, Local Prosecutors, supra note 30, at 25.
163. Id.
164. See note 70 supra.
167. See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
169. Establishing these elements of proof is the primary source of investigative complexity and expense in federal merger cases. See Arnold & Ford, supra note 6, at 110.
170. One commentator has estimated that a single merger case can require more than five man-years of work. See R. Savarese, Uniform Antitrust Act: A Re-evaluation and Revision of the Legislative Research Center's Tentative Draft 61 (1964)[hereinafter cited as Savarese].
171. Id. at 62.
172. See Arnold & Ford, supra note 6, at 110. But cf. Savarese, supra note 170, at 65, where the author contends that merger cases remain as burdensome and complex at the state level as they are on the federal level.
Budget limitations still confront state antitrust agencies, however, and are often cited as the justification for lack of active antitrust enforcement at the local level. Federal financial assistance has been available for states to counter these limitations. Recognizing the importance of state antitrust enforcement and the lack of sufficient funds, Congress provided a means for the states to initiate or maintain a responsible antitrust program. The Crime Control Act of 1976 authorized the Department of Justice to allocate up to $10 million per year in grants to aid state enforcement efforts. Moreover, the Law Enforcement Assistance Administration, a division of the Department of Justice, is authorized to grant separate funds for pilot projects.

State-initiated methods also exist for providing and maintaining adequate funding for antitrust enforcement. Several states have statutory provisions authorizing antitrust revolving funds. Other states allow for recovery of full prosecutorial and investigative costs. A third possibility, especially in areas requiring particular expertise, is the employment of private attorneys on a contingency basis. Inadequate funding, albeit a continuing source of concern

173. See Fellmeth & Papageorge, supra note 26, at 24 where the authors, noting the budget limitations on law enforcement agencies, suggest that states may forego the more expensive or sophisticated inquiries into violations of the law. Political as well as economic considerations may provide the impetus away from vigorous antitrust enforcement. See Rahl, supra note 2, at 765-66; Note, Commerce Clause, supra note 10, at 1472. Political hesitancy, fostered by a fear of driving business away from a state, is unfounded, however, in that a competitive market is as likely to attract business as it is to drive it away. See Rubin, supra note 4, at 697, n.299; Comment, The Illinois Antitrust Law Disinterred, 43 Ill. L. Rev. 205, 207 (1948).


177. An antitrust revolving fund is legislative authorization to finance antitrust enforcement with a fixed percentage of recoveries from previous antitrust litigation. See National Association of Attorneys General, supra note 22, at 304-5. The advantage this system has for the antimerger field is that monies recovered in treble damage suits for relatively simple cases, such as price fixing, could be used to finance the generally more expensive antimerger actions.

178. See Fellmeth & Papageorge, supra note 26, at 25.

179. This manner of enforcement was used extensively in Texas in the years preceding 1974, and many other states followed suit. A revolving fund was employed in Kansas until 1976 to finance the employment of private attorneys. See Note, New Wine, supra note 4, at
for state antimerger enforcement, should not prevent prosecution of local mergers having the proscribed anticompetitive effect.\textsuperscript{180}

### State Law and Precedent

Only ten states have antitrust merger provisions similar to section 7 of the Clayton Act.\textsuperscript{181} Ambiguities exist in the antitrust statutes of those states lacking specific antimerger provisions.\textsuperscript{182} Moreover, state antimerger case law is sparse and often conflicting.\textsuperscript{183} As a result, a lack of uniformity prevails. Faced with varying federal and state merger provisions, businesses experience increased compliance burdens.\textsuperscript{184} Plaintiffs find pleading difficult and defendants employ delaying motions.\textsuperscript{185} Certain defenses have remained available to state court defendants which are disallowed in federal actions.\textsuperscript{186} Furthermore, plaintiffs in state forums are denied some

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\textsuperscript{180} As Dean Rahl noted:

The most important suggestion may be made at the outset very quickly. It is that for most of the states which now have a law, however antique it may be, a resolution of the legislature directing the Attorney General to enforce it and appropriating some money for that purpose would mean more than a carload of new substantive provisions. For the basic deficiency now is not lack of an ideal statute, but lack of a decision as to whether the state really wants any antitrust law at all. Rahl, supra note 2, at 758.

\textsuperscript{181} See note 20 supra.

\textsuperscript{182} See Fellmeth & Papageorge, supra note 26, at 25. In addition, state substantive law may have a number of omissions otherwise covered by its federal counterpart. Interpretation of local antitrust law may remain relatively uncertain even in those states with counterparts to the federal statutes as a result of time lags between clarifying rulings in federal court and adoption by the states. Id. at 28.

\textsuperscript{183} Compare, e.g., Steele v. United Fruit Co., 190 F. 631 (E.D. La. 1911); Straits Transit, Inc. v. Union Terminal Piers, 121 N.W.2d 679 (Mich. 1963); Indus. Financial and Thrift Corp. v. Smith, 179 Miss. 323, 175 So. 206 (1937) with Moody & Waters Co. v. Case-Moody Pie Corp., 354 Ill. 82, 187 N.E. 813 (1933); Hall v. Woods, 325 Ill. 114, 156 N.E. 258 (1927); People’s Bank v. Lamar County Bank, 107 Miss. 852, 66 So. 219 (1914); Southern Elec. Sec. Co. v. State, 91 Miss. 195, 44 So. 785 (1907).

\textsuperscript{184} This reason has often been advanced to support the passage of the Uniform State Antitrust Act, 7 Uniform Laws Ann. 469 (Supp. 1978). The preface to the Act contends that state antitrust laws will integrally contribute to national antitrust policy only when the burden of compliance with diverse state laws is rectified by uniform legislation. Id. For a discussion of uniform legislation, see Arnold & Ford, supra note 6, at 102; Inman, supra note 57, at 185; Rubin, supra note 4, at 722-33; Stern, Draft Statute, supra note 31.

\textsuperscript{185} See Fellmeth & Papageorge, supra note 26, at 25.

\textsuperscript{186} Compare, American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), aff'd, 317 U.S. 519 (1943)(the antitrust laws extend to such “services” as the practice of medicine) with Marin County Bd. of Realtors v. Palsson, 16 Cal.3d 920, 549 P.2d 833 (1976)(striking down defense that antitrust laws did not cover “services” more than thirty years after Supreme Court had affirmatively disallowed the defense in federal actions). Federal decisions restricting the in pari delicto and “unclean hands” defenses and laches have
procedural advantages available in federal courts. An apparent difference in experience level also exists between state and federal court judges handling antitrust cases. Owing to these substantive, procedural, and judicial discrepancies, the potential for forum shopping in merger cases is great. The discrepancies could be eliminated if the states adopted an antimerger provision paralleling section 7 of the Clayton Act and made adherence to federal precedent mandatory. Fifteen states, in fact, have enacted statutes authorizing construction of state law according to federal precedent. To remedy the described defects and to provide an element of uniformity in merger law, the other thirty-five states must follow this lead.

**APPROPRIATE STATE ANTIMERGER ROLE**

Once the need for a responsible state antimerger program is recognized, implementation primarily depends on coordinating practical exigencies within the federal and state systems. The Attorney General of California has observed that coordination between state
and federal authorities primarily entails the efficient utilization of available resources and the effective shaping of relief once a judgment is obtained. Consequently, the federal agencies responsible for antitrust enforcement, the state attorneys general, and local officials should each have particular responsibilities within the national antimerger scheme. Presently, a considerable number of states explicitly vest state and local officials with authority to enforce the state antitrust statutes. The district attorney’s office provides an excellent vantage point to detect merger violations. In turn, the state attorney general’s office, at the matrix of state administrative and regulatory agencies, can monitor the competitive practices of industries within the state. The states are also able to exercise control over businesses through the reporting requirements of corporation and certification acts. Moreover, federal officials have evidenced their willingness to expand state antitrust enforcement efforts by pledging to turn over more cases to

190. The California Attorney General stated:

When concurrent state and federal laws are harmoniously directed to a common end, having in mind their complementary function, the coordination of their administration is essentially a practical problem. . . . The efficient use of available manpower, the effectiveness of investigative procedures, the type of relief sought, the minimizing of travel and other expenses in light of the location of prospective defendants and probable venue . . . are inherent in the meaning of the word coordinate as applied to the federal-state relationship.

Mosk, supra note 83, at 360. One Antitrust Division spokesperson has further remarked that "[A] healthy partnership is developing between State Governments and the Federal Government on antitrust enforcement matters. The Justice Department is committed to nurturing that partnership so that together we can achieve the mutual goal of making competition work better in our economy." See Ewing, supra note 26, at 19. The Director of the Bureau of Investigation of the Federal Trade Commission also recently told the National Association of Attorneys General (NAAG) that the Commission intended to refer to the states "every legitimate action on which we decline to take action." 844 Antitrust and Trade Reg. Rptr. (BNA) D-4 (Dec. 22, 1977). The NAAG in turn has endorsed active federal-state coordination. Section 21 of the Uniform State Antitrust Act, 7 Uniform Laws Ann. 469 (Supp. 1978), which the NAAG endorses, authorizes the state attorney general "to cooperate with and coordinate the enforcement of this Act with officials of the federal government and the several states." See Fellmeth & Papageorge, supra note 26, at 18 n.23.

191. Id. at 18.

192. See notes 44-46 supra and accompanying text.

193. The state attorney general often serves as legal counsel for many state regulatory agencies and boards, and may also retain primary responsibility for the enforcement of consumer protection laws. See National Association of Attorneys General, supra note 22, at 529-45.

state officials for local enforcement. To enhance antimerger enforcement efforts, the states have access to several sources of federal information. The Antitrust Improvements Act of 1976 provides state officials with the means of obtaining merger information from federal investigations. State officials may also obtain information from federal authorities under the Freedom of Information Act. Statutory authority exists for public attendance at deposition proceedings for injunctive suits brought by the Department of Justice. In addition, the Federal Trade Commission is charged with the public dissemination of information obtained through its antitrust investigations. What emerges is a comprehensive network of federal and state antitrust machinery which, through coordinated efforts, is fully capable of becoming an integrated national antitrust scheme.

Within this framework, states can assume a responsible role in regulating local antitrust violations. A specific antimerger provi-

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197. Although §15f of the Antitrust Improvements Act of 1976 is primarily applicable to information relevant to bringing action under the federal laws, the policy of cooperation does not stop at the federal forum. The Federal Trade Commission will release files in appropriate circumstances upon written request from a state where the state enforcement effort is congruent with policies underlying the Federal Trade Commission Act. See Fellmeth & Papageorge, supra note 53, at 17.
201. One goal of a system of federal-state cooperation should be to avoid multiple prosecutions for the same activity. See note 123 supra. See also Jeffers, supra note 106, at 820-21. At present, the Department of Justice will refrain from bringing an action subsequent to a state prosecution "except when necessary to advance compelling interests of federal law enforcement." Rinaldi v. United States, 434 U.S. 22, 28 (1977). Although not particularly relevant in the local merger context, an adequate state antitrust statute might include a specific provision prohibiting the attorney general from commencing an action against a defendant who has been previously indicted under the federal antitrust laws for the same activity. See, e.g., Md. Code Com. Law §11-207(e) (1975).
202. The most effective use of the state antimerger provision will depend upon the nature of the local marketplace in each state and the allocation adjustments made between the various antitrust enforcement agencies. In addition to referrals of cases when appropriate, some commentators have suggested the development of areas of "primary responsibility." See, e.g., Arnold & Ford, supra note 6, at 107-08. Although primarily the product of discussions between federal and state officials, one suggestion is that the states retain primary responsibility for restraints "in retail distribution and wholesaling and manufacturing for essentially local consumption, as well as...wholly intrastate restraints." Id. Several states
sion paralleling the language of section 7 of the Clayton Act should be adopted by every state to achieve a consistent national policy. Concurrently, the antitrust statutes of states which have not adopted federal precedent should be revised to assure consistent and predictable decisions no matter what the forum of adjudication.\textsuperscript{203}

One proposed draft of a uniform state antitrust law included the following section on acquisitions:

It is unlawful for any person not a natural person to acquire an asset from any person if the effect may be to lessen competition in any line of commerce.\textsuperscript{204}

Such a provision conforms with the amendment in the recent Antitrust Procedural Improvements Act of 1980, changing the jurisdictional language of section 7 of the Clayton Act.\textsuperscript{205} Acquisitions having substantial anticompetitive impact on the local market are thus brought within a state's reach through such a provision.\textsuperscript{206}

An effective state antimerger program will remain incomplete unless the statutes provide for appropriate investigatory\textsuperscript{207} and remedial\textsuperscript{208} authority. Several state antitrust prosecutors have indi-
cated that the primary cause of weak enforcement has been the lack of effective investigative procedures.\textsuperscript{209} Currently, the broad civil investigative demand powers of the Antitrust Improvements Act of 1976\textsuperscript{210} have been emulated in state statutes.\textsuperscript{211} Under section 7 of the Clayton Act, the possible remedies available are as broad as equity affords to rectify the harmful effects of a violation.\textsuperscript{212} Such remedies include injunctions, divestitures, and compensation for injury caused by the merger. In both the state and federal courts, an additional but rarely used remedy is dissolution.\textsuperscript{213} On the state level, the remedy of revocation of corporate charter is also available. Some of these remedies may be so severe as to discourage reporting of violations.\textsuperscript{214} Others may have no deterrent effect on future violations. Implementation of effective antimerger remedies, a necessary concomitant to an effective state enforcement program, will require careful consideration of all these issues.

**Conclusion**

The federal agencies no longer should be burdened with monitoring merger conduct for which the states ultimately should be responsible. Practical limitations on federal antitrust enforcement suggest that an effective state antimerger supplement to federal enforcement under section 7 of the Clayton Act is necessary. Jurisdictional limitations pose no obstacle to effective state antitrust statutes, and may indeed provide an additional justification for their enactment. Existing state resource allocations pose a significantly greater impediment to a state antimerger policy, requiring increased awareness by state legislatures of the potentially devastating consequences of antitrust violations on the local market.\textsuperscript{215}


\textsuperscript{211} See Rubin & Malit, supra note 198, at 530.


\textsuperscript{213} See Note, New Wine, supra note 4, at 646. Dissolution, divorcement, and divestiture refer to various equitable remedies requiring the dismemberment of a firm following successful prosecution of an antitrust violation. Id.

\textsuperscript{214} See Rahl, supra note 2, at 764.

\textsuperscript{215} The Chicago Bar Committee comments to the 1967 Illinois Antitrust Act, Smith-Hurd Ill. Ann. Stat. ch. 38, §60 (1967), concluded that measures comparable to the Clayton Act were not included in the statute because:

"[t]he Clayton. . . . provisions have been controversial and many competent ob-
A commitment to revitalize substantive and procedural state antitrust machinery and to provide adequate funds to make such efforts meaningful is a prerequisite to viable state regulation of acquisitions.

State antitrust enforcement can play an increasingly integral role in establishing a national front to counter impermissible industrial concentration. Specific statutory provisions, modeled after section 7 of the Clayton Act and adopting the advances the federal authorities have achieved through precedent, are necessary additions to state statutes which do not already include them. An aggressive enforcement program is required to implement a national antitrust policy and to halt local mergers before they have a chance to blossom into monopoly. Failure to provide either will result in a substantially incomplete supplement to federal efforts and provide the loam in which anticompetitive acquisitions will flourish.

DAVID ANTHONY UPAH

servers deem them not to be necessary. The Bar Association was not motivated by a desire to add unnecessary legal burdens to those already imposed upon businessmen. It was drawn in the hope that its basic approach would find favor in the business world.”