Preemption by Prosecution: Antitrust Consent Decrees and their Effect on State Law

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Preemption by Prosecution: Antitrust Consent Decrees and their Effect on State Law

Consent decrees are the most common method of disposing of cases brought by the Justice Department under the Sherman Act. They resemble ordinary agreements to dismiss, but differ in that they are signed by a judge and entered as orders of the court. Pursuant to Section 5(a) of the Tunney Act, a court may approve a consent decree only if it finds that the decree is "in the public interest." In addition, the government must publish the proposed decree in the Federal Register at least sixty days prior to its entry, and "must receive and consider any written comments relating to the proposed decree." Once entered, the decree gains the force of an injunction, and a party who violates its terms may be held in

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3 15 U.S.C. § 16(e) (1982) provides:
   Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest. For the purpose of such determination, the court may consider—
   (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
   (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

4 15 U.S.C. § 16(b)-(d) (1982). Any comments received, along with the government's responses, are to be published in the Federal Register. In addition, the Antitrust Division must prepare a competitive impact statement that contains, among other things, a description of the defendant's practices which gave rise to the alleged violation, an explanation of the proposed decree, and a description and evaluation of the alternatives to the proposal actually considered by the Justice Department.

5 Because the terms of a consent decree are negotiated between the parties, such a decree is similar to a contract in many respects. However, unlike a private agreement, a consent decree, once it has been accepted by a
contempt.\(^8\)

The limits of this framework were recently tested by Judge Harold Greene's approval of the consent decree in *United States v. American Telephone and Telegraph Co.* ("AT&T").\(^7\) Over the objections of several states that sought to intervene, Judge Greene approved a decree which granted AT&T and the divested operating companies exemptions from certain state regulations.\(^8\) He held that entry of the consent decree preempted conflicting state regulation of the telephone industry.\(^9\) Judge Greene based his decision on the Supremacy Clause of the United States Constitution\(^10\) and on the Sherman Act,\(^11\) stating that a decree issued under the authority of the Sherman Act renders unenforceable "state regulatory statutes . . . to the extent that they prevent compliance with [the decree's] terms."\(^12\)

Associate (now Chief) Justice Rehnquist dissented from the Supreme Court's summary affirmance of the decree. He was concerned that a consent decree was an insufficient predicate for invocation of the Supremacy Clause: "I am troubled by the notion that a district court, by entering what is in essence a private agreement between parties to a lawsuit, invokes the Supremacy Clause powers of the Federal Government to pre-empt state regulatory laws."\(^13\)

This comment addresses the tension between Chief Justice Rehnquist's position and that of Judge Greene. First, it discusses
the problem raised by the AT&T consent decree. Second, it explores possible sources of authority for finding that an antitrust consent decree may preempt state law, including those relied upon by Judge Greene. Finally, it proposes a framework for determining when such a consent decree may in fact preempt state law.

I. PRIVATE CONSENT AS FEDERAL LAW

A. AT&T: The Question Raised

The AT&T consent decree required AT&T to “take various actions for which regulatory approval [was] required under state law,” such as the transfer of assets, and it “restrict[ed] the Operating Companies with respect to activities which they [were] authorized to engage in under state regulation,” such as long distance telecommunications. Twenty-four states contended that the federal district court “lack[ed] the power to enter the decree proposed by the parties without the approval of the regulatory commissions acting under state law.” In response, the Justice Department and AT&T argued that the decree would preempt state laws to the extent that they conflicted with the decree, and that state consent was therefore unnecessary.

Judge Greene recognized that requiring such consent would effectively block entry of the decree. In addition, he was concerned that continued state regulation of the telephone industry might result in a “‘balkanized scheme of telecommunications service’” that could impede industry competition. “If the States’ claims are valid,” he stated, “the Court and the parties might have to search for different means to implement the mandate of the Sherman Act.” But in dealing with these concerns he may have ignored valid claims by the states.

Judge Greene dealt with the claims of the states by declaring that the decree preempted state law and that their consent was therefore unnecessary. He proposed two justifications for this rationale. First, he argued that since the decree was an order issued pursuant to federal law and approved by a court, it was federal law for purposes of preemption. As he saw it, “a consent decree has the same effect as a decree issued after a finding of liability on the

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14 AT&T, 552 F. Supp. at 153-54 (footnote omitted).
15 Id. at 153.
16 Id. at 154.
17 Id. at 154 n.100 (citation omitted).
18 Id.
19 Id. at 155 n.102.
merits.”20 Thus, Judge Greene equated consent decrees with judicial acts; and since judicial acts can supercede state law,21 he concluded that consent decrees have the same preemptive effect. Alternatively, he stated that the Tunney Act hearing and his finding that the decree was in the public interest were sufficient to allow preemption of state law under the Sherman Act and the Supremacy Clause.22

II. THE SUPREMACY CLAUSE: WHAT IS FEDERAL LAW?

The Supremacy Clause of the United States Constitution provides:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.3

This is the textual basis for the principle that federal law may preempt conflicting state law. The question raised by the AT&T decree is whether an antitrust consent decree should be considered federal “law” for the purpose of preempting state law. Certain things are “law” without question. The Constitution, statutes passed by Congress pursuant to an enumerated power, and judicial decisions interpreting statutes are all “law” for the purposes of the Supremacy Clause. A consent decree, however, fits within none of these categories. Even though a decree is entered by a court, and thus has a judicial component, it also has a private, contractual component.24 By equating consent decrees with judicial acts, Judge Greene essentially ignored this contractual component.

The remainder of this comment will address three related rationales for asserting that consent decrees do rise to the level of federal law. First, an antitrust consent decree may be law simply

20 Id.
22 AT&T, 552 F. Supp. at 160.
23 U.S. Const. art. VI, cl. 2.
24 Douglas Laycock, Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties, 1987 U. Chi. Legal F. 103. See also Local Number 93 v. City of Cleveland, 106 S. Ct. 3063, 3074 (1986), citing United States v. ITT Continental Baking Co., 420 U.S. 223, 235-37, and n.10 (1975): “More accurately, then, as we have previously recognized, consent decrees ‘have attributes both of contracts and of judicial decrees,’ a dual character that has resulted in different treatment for different purposes.”
because Congress intended to give such contracts the power to pre-empt state law; second, the judicial approval and hearing procedure mandated by the Tunney Act may render a decree issued pursuant to that procedure federal law (this was an alternative rationale offered by Judge Greene); or finally, an antitrust decree might constitute federal law because it is coterminous with the Sherman Act, which is federal law, in that it imposes no additional requirements on the parties.25

Each of these rationales is facially plausible, but this comment will demonstrate that only the last is consistent with the Supremacy Clause and with the legislative history of the Sherman Act.

III. POSSIBLE SOURCES OF AUTHORITY FOR THE PREEMPTION OF STATE LAW

There are two possible sources for a conclusion that Congress intended antitrust consent decrees to have preemptive force. The first source is the body of judicial decisions regarding the preemptive force of the Sherman Act itself. The second source is the Tunney Act, which defines judicial procedures for approval of antitrust consent decrees. Neither demonstrates the legislative intent necessary to support Judge Greene's conclusions.

A. Preemption of State Law by the Sherman Act

Federal law preempts state law in two circumstances. First, if the federal law "occupies the field"—in other words, if Congress has determined that the federal government's interest in a particular area of law requires that it override all state law in that area—then the federal law preempts the state law regardless of whether the two provisions actually conflict.26 Second, if the federal law does not occupy the field, it may nevertheless preempt state law if there is a direct conflict between the two.

The preemptive effect of the Sherman Act is limited. First, the Sherman Act does not occupy the field.27 As a result, state regu-

25 See Local Number 93, 106 S. Ct. at 3077 where the Supreme Court held that a court may approve a consent decree that gives broader relief than a court could have awarded after trial.


27 See Itco Corp. v. Michelin Tire Corp., Com. Div., 722 F.2d 42, 48 n.9 (4th Cir. 1983),
tion of commerce is preempted by the Act only when it "conflict[s] or interfere[s]" with the objectives of the Sherman Act.28 Second, even when there is a conflict, individual conduct which would otherwise violate the Sherman Act has been held exempt from the Act when it is found to constitute "state action."29 An examination of the history of the Sherman Act and of the development of the "state action" exemption demonstrates that Congress intended to give a great deal of deference to state regulation of commerce, even when that regulation seems to conflict with the Act.

1. The Legislative History of the Sherman Act and the Commerce Clause. The Sherman Act prohibits only contracts or conspiracies in restraint of interstate commerce.30 The drafters of the Act thereby linked its reach to the scope of congressional power to regulate commerce. The modern trend in Supreme Court Commerce Clause analysis shows a much greater willingness to defer to legislative determinations. Under present doctrines, the Court will uphold commerce-based laws if there is any rational basis upon which Congress could have found a relation between the regulation and interstate commerce.31 In 1890, when the statute was passed, the reach of the commerce power was far narrower.32 Before the turn of the century, the Court had insisted upon a "direct" relationship between the interstate activity being regulated and interstate commerce.33 Thus, the Sherman Act was enacted against the background of a Commerce Clause which reached only interstate commerce and which left states broad power to regulate intrastate commerce.34

quoting Bostick Oil Co. v. Michelin Tire Corp., 702 F.2d 1207, 1219 (4th Cir. 1983): "'Nothing in the nearly century old history of antitrust regulation is cited to us to suggest that Congress has manifested a clear intent to displace state regulation of unfair trade practices.'"

29 See text at notes 41-57.
30 The Act provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations is declared to be illegal...." 15 U.S.C. § 1 (1982).
33 U.S. v. E.C. Knight Co., 156 U.S. 1, 17 (1895).
34 The Sherman Act and the regulatory power of Congress under the Commerce Clause of the Constitution are both strictly confined to matters which directly and immediately affect interstate or foreign commerce. See U.S. v. E.C. Knight Co., 156 U.S. 1 (1895); United States v. Trans-Missouri Freight Assoc., 166 U.S. 290 (1897); United States v. Joint Traffic
2. The Conflict/Interference Determination. The Supreme Court repeatedly has held that states have the authority to regulate commerce "with respect to matters of local concern, on which Congress has not spoken." Federal courts properly uphold state regulations when, "upon a consideration of all the relevant facts and circumstances," they determine that a regulation, "because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress." In the absence of a determination that federal law occupies the field, the preemption analysis must focus on the relationship between the state statute and the federal law. First, a court must find that the state statute operates in the same regulatory field as does the Sherman Act. The court must then determine whether they conflict.

The standard for state law preemption under the Sherman Act is whether the state statute mandates or authorizes conduct that will always violate Section 1 of the Act:

[T]he inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes. The existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of the state statute. A state regulatory scheme is not pre-empted by the federal antitrust laws simply because in a hypothetical situation a private party's compliance with the statute might cause him to violate the antitrust laws. A state statute is not pre-empted by the federal antitrust laws simply because the state scheme might have an anticompetitive effect.

Assoc., 171 U.S. 505 (1898); Hopkins v. United States, 171 U.S. 578, 594 (1898); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899).

See text at notes 41-57.


7 Id. at 362-63. The Court continued: "[b]ecause of its local character also there may be wide scope for local regulation without substantially impairing the national interest in the regulation of commerce ... which were the principle objects sought to be secured by the Commerce Clause." Id. at 363.


Thus, only if the state statute authorizes behavior that is per se illegal under the Sherman Act, such as price fixing, will it be deemed preempted on its face. If, on the other hand, the state regulation simply authorizes conduct which is subject to “rule of reason” analysis—conduct which must be scrutinized on a case-by-case basis—then it will be preempted only after a determination that a specific application of the statute conflicts with the Sherman Act.40

3. The State Action Exemption. Even when per se violations of the Sherman Act are involved, it does not necessarily follow that state regulation is preempted. State regulation is further protected by the “state action” exemption, first enunciated in Parker v. Brown.41 In Parker, California had established a raisin cartel. The cartel restricted output and fixed prices at a level established by California state officials.42 The Court held that the Sherman Act did not preempt the California law. It found no suggestion in the legislative history of the Sherman Act of a purpose “to restrain a state or its officers from activities directed by its legislature,”43 finding instead that the Act was intended to suppress “business combinations” of private individuals.44 The Court stated that the Act applied to “persons” and not to states, and that a state, “in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade . . . but as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.”45

The Parker Court was concerned with the federalism implications of the case. It respected a state’s authority to regulate commerce that was purely intrastate and recognized that absent an interstate connection, regulatory authority was the domain of the states.46

Although the federal antitrust law immunity recognized in Parker does not extend to every transaction in which a state is involved,47 it does apply where “‘the challenged restraint [is] “one

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40 Rice, 458 U.S. at 661. See also Parker, 317 U.S. at 361-63.
41 317 U.S. 341 (1943).
42 Id. at 347-48.
43 Id. at 350-51.
44 Id. at 351.
45 Id. at 352.
46 “In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” Id. at 351.
47 Id. at 351-52.
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clearly articulated and affirmatively expressed as state policy” [and] the policy [is] “actively supervised” by the state itself.”

However, state participation will not always immunize what would otherwise violate federal law. A state may not authorize private antitrust violations by individuals, or declare them lawful. In addition, the state must intend to displace federal antitrust law. Thus, a state official’s mere policy-based approval of private action cannot immunize that action from the operation of the Sherman Act. For example, in Cantor v. Detroit Edison Co., although the state public utility commission had approved a utility’s longstanding practice of replacing consumers’ lightbulbs free of charge while defraying the costs through increased electric rates, a majority of the Court discerned no state intention to displace federal antitrust law. Similarly, the Court distinguished the California plan in Parker from state laws invalidated in Northern Securities Co. v. United States, and Union Pacific Railroad Co. v. United States. In those cases the states had merely authorized private illegal activity. The raisin cartel in Parker, however, instituted California’s clearly expressed purpose to substitute its own regulation for the open market and federal antitrust law. It did not simply leave private parties unsupervised, but provided for continuous final decision making by a state official.

After Parker, most state action litigation has concerned the liability of private parties regulated by public agencies. When a state delegates certain powers to private parties, those parties may be granted state action immunity. For example, the Court in Bates v. State Bar found state action immunity for a rule against lawyer advertising, where the state’s highest court had actively super-

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49 Id. at 351. In Union Pacific Railroad Co. v. United States, 313 U.S. 450 (1941), the Court found that certain benefits conferred by a railroad terminal amounted to an unlawful rebate by the railroad, which was participating in the terminal project with a governmental agency. The case held that a private price-fixing conspiracy among rival producers is not immune from the antitrust laws because one of the participants is state-owned.
50 Id. at 351, citing Northern Securities Co. v. United States, 193 U.S. 197, 332, 344-47 (1904).
52 Id. at 584-85.
53 193 U.S. 197 (1904).
54 313 U.S. 450 (1941).
55 Parker, 317 U.S. at 353-59.
vised the implementation of the rule through judicial enforcement proceedings. 57

Despite the limitations discussed above, the state action exemption is an example of federal deference to state regulation. Given that even the Sherman Act—which certainly rises to the level of federal "law"—has limited preemptive force, it is difficult to imagine that an agreement between the Justice Department and an alleged antitrust violator would, without more, be a sufficient predicate to the creation of an exemption from state regulation.

B. Preemption By Fairness Hearing

The second possible source for elevation of antitrust consent decrees to the level of federal law is Section 5(a) of the Tunney Act, which mandates that a judge preface approval of such decrees with a finding that the decree is in the public interest. It may be argued that Congress, by requiring such approval, intended the agreements so approved to have the preemptive force of federal law. Nothing in the legislative history of the Tunney Act demonstrates such intent. In fact, the purpose of the Tunney Act was exactly the opposite. Congress was concerned that the Justice Department was entering into decrees that verged on collusion with antitrust violators. It would be ironic to interpret a statute that was intended to curb prosecutorial discretion as enhancing the power of Justice Department lawyers to grant alleged violators exemptions from state regulation.

1. Tunney Act Legislative History: Reining in Prosecutorial Discretion. A study of consent decree approval procedures prior to the enactment of the Tunney Act and of the Tunney Act's legislative history indicate that its purpose was to rein in Justice Department discretion. The Justice Department traditionally was given considerable discretion in its enforcement of the antitrust laws. 58 As consent decrees became the preferred means of antitrust enforcement, questions were raised regarding the scope of the Justice Department's power. 59 The Justice Department could bring and

57 Id. at 359-61.
58 See 15 U.S.C. §§ 4, 9 (1982). The United States attorneys, under the direction of the Attorney General, are required to "institute proceedings in equity to prevent and restrain" antitrust violations. Id.
settle actions on terms arrived at by an essentially administrative process. The only check on its actions was a review by the court before it entered a decree, and few trial courts actually questioned the terms of the government’s decrees. Thus, judicial review was virtually no check at all.\textsuperscript{61}

After entry of the consent decree in the government’s initial action against AT&T in 1956, Congress investigated the Justice Department’s entire settlement program. The House Antitrust Subcommittee conducted extensive hearings and issued a report that was highly critical of the Justice Department’s consent decree program.\textsuperscript{62} The report concluded that judicial review of proposed consent decrees was at best cursory, even though a decree could have an impact on an entire industry.\textsuperscript{63} Nevertheless, the report failed to enunciate a proper standard of review and confusion persisted as to the degree of discretion granted the Justice Department in settling antitrust actions versus the court’s authority to check that discretion in the name of the public interest.

The procedures mandated by the Tunney Act implement a distinction made in \textit{United States v. Automobile Manufacturers Association}.\textsuperscript{64} In that case, the court bifurcated and distinguished the complementary roles of the Justice Department and of courts in antitrust cases. It drew a distinction between the administrative discretion vested in the Antitrust Division and the discretion based on legal considerations that provided a foundation for the court’s power to disapprove a proposed decree. The court stated that the Antitrust Division could determine what actions it would bring

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\item \textsuperscript{60} 1973 House Report at 6538 (cited in note 1).
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id. at 6537. The committee determined that the principal officials of the Justice Department had abdicated their duty in accepting the 1956 AT&T decree. See Antitrust Consent Decrees and the Television Broadcasting Industry, Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess. 3 (1961) ("Antitrust Hearings") (citing to 1959 Antitrust Subcommittee report on Justice Department practices regarding, inter alia, the 1956 AT&T decree). The committee labeled the decree a "blot on the enforcement history of the antitrust laws," Antitrust Hearings at 3, and concluded that the consent decree practice of the Antitrust Division had "established an orbit in the twilight zone between established rules of administrative law and judicial procedures," 1973 House Report at 6537 (cited in note 1) (quoting also from 1959 Antitrust Subcommittee report on Justice Department practices regarding, inter alia, the 1956 AT&T decree).
\item \textsuperscript{63} Id. at 6538.
\item \textsuperscript{64} 1959 House Report at 14 (cited in note 5).
\item \textsuperscript{65} 307 F. Supp. 617 (C.D. Cal. 1969).
\end{itemize}
and that these decisions were not subject to judicial review.\textsuperscript{66} The court, on the other hand, could disapprove a proposed consent decree after considering the enforceability of the decree, the degree to which the relief obtained was consistent with that asked for in the complaint, the extent to which the decree jeopardized the rights of parties not before the court, and whether the decree, as a whole, was in the public interest.\textsuperscript{67} Justice Department discretion was limited to the initiation of actions and their disposition, and courts would reserve for themselves legality determinations.

Not all courts acted forcefully within the \textit{Automobile Manufacturers} parameters. Three suits against the International Telephone & Telegraph Company ("ITT") were brought by the Antitrust Division and were resolved by a single consent decree.\textsuperscript{68} Although the strength of the government's case was questionable,\textsuperscript{69} the settlement was approved by the court\textsuperscript{70} amidst much controversy.\textsuperscript{71} These circumstances caused renewed congressional concern for the viability of the Justice Department's consent decree program.\textsuperscript{72} In an effort to deal with these concerns, the Tunney Act became law a few months after the approval of the \textit{ITT} decree.\textsuperscript{73}

Through the Tunney Act, Congress opened the consent decree negotiation and settlement process to public scrutiny.\textsuperscript{74} Justice Department discretion is effectively limited by provisions that call for a judicial determination that the proposed decree is in "the public interest."\textsuperscript{75} Because the courts were perceived as having become mere "rubber stamps" for the exercise of Justice Department discretion,\textsuperscript{76} the Tunney Act was enacted in an attempt to engender

\textsuperscript{66} Id. at 620.
\textsuperscript{67} Id. at 620-21.
\textsuperscript{68} United States v. International Telephone & Telegraph Corp. ("Hartford"), 1971 Trade Cas. (CCH) ¶ 73,666 (D. Conn. 1971); United States v. International Telephone & Telegraph Corp. ("Canteen"), 1971 Trade Cas. (CCH) ¶ 73,619 (N.D. Ill. 1971); United States v. International Telephone & Telegraph Corp. ("Grinnell"), 324 F. Supp. 19 (D. Conn. 1970).
\textsuperscript{69} The Government lost the first two cases at trial (Grinnell and Canteen) and failed to obtain a preliminary injunction in the third (Hartford).
\textsuperscript{70} See United States v. International Telephone & Telegraph Corp., 1974 Trade Cas. (CCH) ¶ 74,872 (D. Conn. 1974) (rejecting attempt by amici to reopen decree).
\textsuperscript{71} Id.
\textsuperscript{73} See United States v. International Telephone & Telegraph Corp., 1974 Trade Cas. (CCH) ¶ 74,872 (D. Conn. 1974).
\textsuperscript{74} 15 U.S.C. § 16(b)-(d) (1982).
\textsuperscript{76} See 1973 House Report at 6538 (cited in note 1) ("One of the abuses sought to be
confidence in the Justice Department's antitrust enforcement program\textsuperscript{77} and to reiterate the enforcement policy of the Antitrust Division.\textsuperscript{78} The legislative history of the Tunney Act plainly demonstrates that its purpose was to define and restrict prosecutorial discretion. Its purpose was not to elevate a consent decree to the level of federal law and thereby increase prosecutorial authority to preempt state law.

C. The Shortcomings of Judge Greene's Reasoning

Although the structure of Judge Greene's argument in support of his finding that the AT&T decree preempted state law was somewhat unclear, he appears to have made it in three parts. First, he implied a finding of conflict between state law and the Sherman Act.\textsuperscript{79} In addition, he argued that since the provisions of the consent decree were fully within the federal government's jurisdiction over interstate commerce, and since telecommunications is an industry in need of national control and uniformity of regulation, federal law in this area ought to preempt state law.\textsuperscript{80} This sounds like an argument that federal law occupies the field; but, as discussed above, it is plain that Congress did not intend the Sherman Act to occupy the field.\textsuperscript{81} Thus it is a little unclear which preemption doctrine Judge Greene was relying on—the occupy-the-field doctrine or the conflict/interference doctrine.

In the second part of his argument, Judge Greene showed that the state action exemption did not apply to the facts of the AT&T decree negotiations. He argued that because the states had not adequately supervised telephone service, they failed the second part of the \textit{Parker} test.\textsuperscript{82} Third—and this was the crux of his argument—Judge Greene

reminded by the bill has been called 'judicial rubber stamping' by district courts of proposals submitted by the Justice Department.

\textsuperscript{77} Id. at 6536; 119 Cong. Rec. 3451 (1973) (statement of Sen. Tunney).
\textsuperscript{79} AT&T, 552 F. Supp. at 154-55.
\textsuperscript{80} Id at 152.
\textsuperscript{81} See text at note 25.
\textsuperscript{82} AT&T, 552 F. Supp. at 158.
found that the decree was a judicial act, and therefore was federal law.\textsuperscript{83} Judge Greene correctly stated that "preemption ... may be based on [the Constitution], on treaties, or on federal statutes such as the Sherman Act."\textsuperscript{84} He properly cited Supreme Court authority for the rule that "[s]tate-law prohibition[s] against compliance with [a] District Court's decree cannot survive the command of the Supremacy Clause of the United States Constitution."\textsuperscript{85} His reasoning went awry, however, when he made the leap from the Constitution, treaties and federal statutes to consent decrees, saying "if this Court has authority under the Sherman Act to issue the proposed decree, state regulatory statutes are unenforceable to the extent they prevent compliance." In a footnote he added, "[t]he fact that the decree would be issued pursuant to the parties' consent is irrelevant to its status, for a consent decree has the same effect as a decree issued after a finding of liability on the merits."\textsuperscript{86}

\textsuperscript{83} See text at notes 20-21.

\textsuperscript{84} AT&T, 552 F. Supp. at 155.

\textsuperscript{85} Judge Greene cited Washington v. Washington State Commercial Passenger Fishing Vessel Assoc. in support of this proposition. AT&T, 552 F. Supp. at 154-55. Although the case does support that proposition, the case is analogous to AT&T and Judge Greene's reasoning is coherent only if one substantively equates consent decrees such as the AT&T decree with court orders entered subsequent to determinations that state law conflicts with federal law or the Federal Constitution. Judge Greene leaves us with a mere tautology on the preemption question because the cases he cites involved consent decrees entered subsequent to a finding of conflict between federal and state law and thus entered subsequent to the preemption determination. See Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S 658 (1979) (determining that laws protecting the domestic fishing industry were preempted because of conflict with federal treaties; decree promulgated by lower court was not the basis for the preemption determination, but was issued subsequent to that determination).

Similarly, the school desegregation cases cited in AT&T involved decrees issued subsequent to findings that state law conflicted with the Constitution. The decrees themselves enjoyed no substantive preemptive power. See North Carolina Board of Education v. Swann, 402 U.S. 43 (1971); Griffin v. County School Board, 377 U.S. 218 (1964); Cooper v. Aaron, 358 U.S. 1 (1958).

\textsuperscript{86} AT&T, 552 F. Supp. at 155 and n.102. Again, Judge Greene evaded a difficult inquiry by equating injunctions issued after findings of liability on the merits with judge-signed decrees negotiated by the parties. It is rather startling that he cited one of the oldest and least clear items in the consent decree catalogue in support of his argument—United States v. Swift & Co., 286 U.S. 106 (1932). AT&T, 552 F. Supp. at 155 n.102. Swift does state that a consent decree is to be treated as a judicial act, id. at 115, but the words "judicial act" are not equivalent to the phrase "a finding of liability on the merits." Swift does not attempt to make such an equation. The passage from which he cites is concerned with questions of consent decree modification. Justice Cardozo intended to establish only that consent decrees, unlike contracts, are modifiable. See Charles Sullivan, Enforcement of Government Antitrust Decrees By Private Parties: Third Party Beneficiary Rights and Intervenor Status, 123 U. Pa. L. Rev. 822, 845-47 (1975) (discussing Justice Cardozo's opinion in Swift).

 Judge Greene's reading of Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981), was similarly
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This assertion is at best partially correct. In Local Number 93 v. City of Cleveland, the Court found that "consent decrees 'have attributes both of contracts and of judicial decrees,' a dual character that has resulted in different treatment for different purposes. . . . The question is not whether we can label a consent decree as a 'contract' or a 'judgment,' for we can do both." The Court found that the relevant inquiry was whether, "given their hybrid nature," consent decrees should be treated as "orders" within the context of the law under consideration. The Court stated that where the language of a law does not specifically address the characterization problem, the lower courts should consider the legislative history.

As we have seen, the legislative history of neither the Sherman Act nor the Tunney Act explicitly speaks to whether a consent decree is to be considered federal "law" for preemption purposes. The Tunney Act's legislative history does recognize that "once it has been accepted by the court, [a consent decree] has the same legal effect as a judgment in a fully litigated decree." Perhaps Judge Greene reached his conclusion in AT&T because he stopped reading the history here. It continues, "[a]fter entry, the legal effect of an antitrust consent decree on the rights of the parties, including the rights of the Government, are adjudicatory rather than contractual in nature." The history makes no statement regarding the characterization of a consent decree with respect to non-parties. One cannot presume that because a decree is a judgment as between the parties it sufficiently manifests federal law for the purpose of preempting state law where a state is not a party to the decree.

To the extent that a decree is a contract, it is not limited by the jurisdictional statute. Parties can agree to whatever they please with respect to their obligations to each other. They cannot, how-

flawed. Brown merely discusses the scope of the Supremacy Clause. It does not support Greene's contention that a consent decree as such constitutes a judicial act sufficient to displace state law. Furthermore, as in the school desegregation cases cited in note 85, the Brown decree was issued after the Court's finding that state law conflicted with the Constitution. The city "agreed it had a constitutional duty to eradicate discrimination. The only issues in question were the specific steps the city would take. . . . That was what the consent decree in this case was all about," that is, an interpretation of the applicable federal law. Id. at 562-62.

87 Local Number 93, 106 S. Ct. at 3074 (citations omitted).
88 Id.
89 Id.
91 Id.
however, free each other from their obligations to other people or other governmental entities, such as states. Neither can the parties to a consent decree. An injunction, on the other hand, can supercede state law. To the degree that a consent decree has the force to preempt, it derives that force from its status as an injunction. But an injunction, unlike a consent decree, may not require more than would be required by federal law. Therefore, a decree should be given preemptive effect only to the extent that it requires no more than federal law. In the antitrust context, that means it must require no more than would be required by the Sherman Act. Any term that cannot be reconciled with the Sherman Act should be relegated to the status of a contractual term between the parties and should not have any effect on the operation of state law.

Judge Greene failed to distinguish between a decree that was written to reflect the requirements of, and to conform with, federal law and a decree that in essence is an agreement between the parties, that while lawful, is not a reflection of the particular law in question. To the degree that a decree is found to embody the requirements of the statute, those terms should be given preemptive effect. Any consent decree term that exceeds what would be permitted under the underlying statute should only be binding upon the parties and should not be given preemptive effect.

IV. TAILORING THE CONSENT DECREES APPROVAL PROCEDURE TO SATISFY THE REQUIREMENTS OF THE PREEMPTION DOCTRINE

If full adjudication of antitrust liability were required to link a consent decree to the Sherman Act for the purposes of a preemption determination, effective antitrust enforcement by consent decree would be impossible. One need only look at the resources spent on the two most complex antitrust actions in recent years, IBM and AT&T, to see that the Justice Department would be hard-pressed to bring more than a single antitrust action at any

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92 Local Number 93, 106 S. Ct. at 3080. Associate (now Chief Justice) Rehnquist, dissenting from a denial of certiorari in Ashley v. City of Jackson, similarly concluded “there is no suggestion in the statutory scheme that a prior consent decree to which petitioners were not parties either forecloses an individual’s right to sue or divests federal courts of jurisdiction.” 464 U.S. 900, 903 (1983), quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974).


94 See Local Number 93, 106 S. Ct. at 3077. See also note 25.

given time in the absence of the consent decree device. Such a low level of antitrust enforcement would profoundly undercut the effectiveness of the Sherman Act.

We therefore need a framework whereby consent decree negotiation and approval satisfies the need for national regulation and yet does not authorize prosecutorial avoidance of state regulation. These requirements can be satisfied if a court allows preemption only after a determination that the terms of the consent decree mirror the requirements of the Sherman Act. Only then should a consent decree gain the force of law, sufficient to preempt conflicting state law.

Consent decree negotiations usually occur shortly after the filing of a complaint by the Justice Department. The course of the negotiations depends greatly upon the litigation process. A court presented with a consent decree must address two questions: (1) whether the consent decree fairly represents the purposes and requirements of federal law; and (2) if the states have a colorable claim, whether they have had an adequate opportunity to present it. If the court cannot answer both questions affirmatively, it must consider the consent decree for preemption purposes as a mere contract or agreement between the parties which cannot properly result in the preemption of state law.

A. Is the Consent Decree a Fair Representation of Federal Law?

Consent decree provisions do not necessarily reflect the mandates of federal law. Because a consent decree may go beyond the legal authority of the Sherman Act, the court must find that the decree is congruent with the requirements of the Sherman Act before finding that the decree preempts state law. If a consent decree is not a fair representation of the federal law under which the parties negotiated the decree, the federal government cannot properly use the decree to circumvent state law.

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88 See United States v. City of Jackson, 519 F.2d 1147, 1152 n.9 (5th Cir. 1975) ("Because of the consensual nature of the decree, voluntary compliance is rendered more likely, and the government may have expeditious access to the court for appropriate sanctions if compliance is not forthcoming. At the same time, the private parties involved also minimize costly litigation and adverse publicity and avoid the collateral effects of adjudicated guilt.").

89 See United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) ("If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.").

90 See text at note 96.

92 Local Number 93, 106 S. Ct. at 3077. See also note 25.
B. State Participation in the Conflict/Interference Determination

To the extent that the reviewing court cannot determine that the terms of a consent decree are based directly on the underlying federal law, this comment suggests that the consent decree must be deprived of preemptive effect. In addition, where the states have a colorable argument that there is no conflict between the decree and state regulation, they ought to be given the opportunity to participate in the conflict/interference determination.

Admittedly, AT&T did not involve state claims that were likely to have prevailed in the conflict/interference determination. Judge Greene properly disposed of the state's argument that this case fell within the state action exemption. On the other hand, his conflict/interference determination, which might have limited the court's authority to order some of the remedial measures required by the consent decree, was too casual:

[T]hose provisions in the proposed decree which are necessary to vindicate the federal interest in the enforcement of the antitrust laws will be approved notwithstanding the fact that they may conflict with the state laws or interests. However, in its overall consideration of the public interest, the Court will also take into account that a particular provision may be merely peripheral to the federal interest but have a substantial adverse impact on state laws.100

The process of weighing the relative importance of the federal and state interests involved is one in which the states should have participated. In general, an amicus brief is a sad substitute for direct participation. State law should not be preempted by provisions "peripheral to the federal interest" unless the Sherman Act clearly so provides, and interested states should have greater, and more direct, involvement.

Conclusion

Consent decrees have characteristics of both contracts and judicial acts. For the purposes of this comment, the most significant difference between a consent decree and a judicial act is that the former is not binding upon the rights of nonparties. For this reason, a consent decree does not necessarily rise to the level of fed-

100 AT&T, 552 F. Supp. at 160 (footnote omitted).
eral law. To the extent that a decree is not federal law, it cannot preempt state law.

Because of limited Justice Department antitrust enforcement resources, it is not appropriate to require that antitrust actions be fully adjudicated before preemption can occur. If there is to be a certain minimum amount of antitrust enforcement, we have to accept a certain amount of preemption by consent decree. To ensure that an antitrust consent decree does not unwarrantedly ignore important state interests, however, such decrees must be coterminous with the Sherman Act.

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