Cartel Federalism?

Antitrust Enforcement by State Attorneys General

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Largely in connection with the Microsoft litigation, the antitrust enforcement authority of state attorneys general, in their parens patriae capacity, has generated acrimonious debate.¹ Perhaps the only point of genuine agreement is the complaint over the lack of reliable empirical evidence on state antitrust enforcement.² This Essay attempts to make a modest contribution to the data front and a more

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¹ See, for example, Michael DeBow, State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal, in Richard A. Epstein and Michael S. Greve, eds, Competition Laws in Conflict 267 (AEI 2004) (examining empirical data on state antitrust enforcement, and both proposing that the Microsoft litigation was exceptional and suggesting modest reform); Richard A. Posner, Federalism and the Enforcement of Antitrust Laws by State Attorneys General, in Epstein and Greve, eds, Competition Laws 252 (proposing that states not be allowed to apply antitrust law to interstate or foreign commerce, or, as a second-best solution, that state attorneys general be appointed rather than elected); Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L J 673 (2003) (arguing that criticism of state antitrust enforcement is "misplaced" and noting the comparative advantages of state antitrust enforcers over federal ones); Jay L. Himes, Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case, 11 Geo Mason L Rev 37 (2002) (arguing that Microsoft's arguments against allowing the states to litigate antitrust actions were unsound and that the court should not defer to the Justice Department in fashioning a remedy for antitrust violations); Richard Wolfram and Spencer Weber Waller, Contemporary Antitrust Federalism: Cluster Bomb or Rough Justice?, in Robert L. Hubbard and Pamela Jones Harbour, eds, Antitrust Law in New York State 1 (NY State Bar Association 2d ed 2002) (examining whether concurrent antitrust litigation is unnecessarily duplicative and concluding that the current situation defies harmonization and resolution except on an ad hoc basis at the trial level); Richard A. Posner, Antitrust in the New Economy, 68 Antitrust L J 925 (2001) (criticizing the quality of antitrust work by state attorneys general and proposing that they be precluded from bringing parens patriae cases under federal antitrust laws); Carole R. Doris, Another View on State Antitrust Enforcement—A Reply to Judge Posner, 69 Antitrust L J 345 (2001) (defending against Posner's criticism and arguing that states do more than free ride off federal antitrust agencies); Harry First, Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 Geo Wash L Rev 1004 (2001) (calling Posner's position "extreme" and advocating a state role in antitrust enforcement).

² See Calkins, 53 Duke L J at 728 (cited in note 1) (urging better collection and dissemination of data).
ambitious and provocative contribution to the theoretical debate. I present and examine two sets of data:

- A list of state *parens patriae* antitrust actions, compiled and kindly made available to me by Judge Richard Posner. I combined and cross-checked these cases with *parens patriae* cases extracted from a similar list of state antitrust cases for the 1993–2002 period, compiled by different means by Michael DeBow. So amended, the list (hereinafter, “the Posner-DeBow list”) comprises 103 *parens patriae* actions.

- Sixty-eight antitrust cases, dating back to 1977, in which states submitted eighty-four briefs amici curiae. (In four cases, different states submitted briefs on either side; in the remaining cases, states submitted briefs at different stages of the litigation.) Robert Hubbard kindly supplied this list; I have added some briefs from a website and a few obviously “missed” Supreme Court cases.

While these sets of data are still incomplete and, perhaps, unrepresentative, they are at least somewhat more comprehensive than the preceding efforts on which they build. They confirm earlier findings about state antitrust enforcement in two respects: the extraordinary extent of state consensus and cooperation on antitrust matters (coordinated, since 1983, through the National Association of Attorneys General (NAAG) Antitrust Task Force); and a pattern of limited, 

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3 Unpublished list on file with author.
4 For Judge Posner’s analysis of his list, see Posner, *Federalism and the Enforcement of Antitrust Laws* at 263 (cited in note 1).
9 Through the NAAG Antitrust Task Force, the states coordinate antitrust enforcement activities, amicus briefs, and cooperation with federal agencies. The Task Force has also produced
somewhat parochial, state enforcement, interpersed by dramatic and increasingly frequent multistate interventions in high-stakes national antitrust proceedings.

To my mind the most intriguing aspect of the data, however, and the principal subject of this Essay, is not what state attorneys general have done but what they have failed to do. In antitrust federalism's "horizontal," state-to-state dimension, attorneys general have almost never invoked antitrust laws to challenge sister states' anticompetitive conduct. In federalism's "vertical," state-to-federal dimension, state attorneys general have consistently advocated a partial surrender of state regulatory autonomy.

**Horizontal Antitrust Federalism.** Some critics—prominently, Judge Posner—have argued that state enforcers may deploy antitrust law for strategic and parochial purposes, as a means to protect domestic producers and to exploit consumers and producers in other jurisdictions. They may do so either by deploying antitrust law as a sword against out-of-state producers or as a shield for domestic producers (for example, by granting exemptions for export cartels). Either way, one would expect the victimized states to resist the imposition.

guidelines on horizontal mergers and on vertical restraints. For current versions, see NAAG Vertical Restraints Guidelines, 4 Trade Reg Rep ¶ 13400 (CCH 13th ed 1988); NAAG Horizontal Merger Guidelines, 4 Trade Reg Rep ¶ 13406 (CCH 13th ed 1988). For an overview of the Task Force's recent activities, see Patricia A. Conners, Current Trends and Issues in State Antitrust Enforcement, 16 Loyola Consumer L Rev 37, 38 (2003) (discussing the "unprecedented cooperation between the state attorneys general and federal antitrust enforcement agencies").

10 See DeBow, State Antitrust Enforcement at 272–73 (cited in note 1) ("[T]he level of state activity is low, particularly in comparison to federal enforcement efforts. On average, the states brought twelve cases per year (five horizontal, five merger, one vertical, and one monopolization)—not exactly a tidal wave.").

11 See Posner, Federalism and the Enforcement of Antitrust Laws (cited in note 1). The Posner list of *parens patriae* actions contains well over a dozen high profile antitrust proceedings in which all or substantially all state attorneys general participated. Consistent with this pattern, the state amicus list shows high rates of state participation and agreement. In only four cases did states openly disagree on the merits.


13 See Posner, Federalism and the Enforcement of Antitrust Laws at 257–58 (cited in note 1) (arguing that, "given the political incentives," state attorneys general will decide "to bring an antitrust suit against a competitor of a resident enterprise ... even if unconvinced of its merit," and that this behavior "is a form of protectionism"). The incoming chair of the Federal Trade Commission, Deborah Platt Majoras, has voiced similar concerns. See Deborah Platt Majoras, Antitrust and Federalism, remarks before the New York State Bar Association Antitrust Law Section 3-6 (Jan 23, 2003), online at http://www.usdoj.gov/atr/public/speeches/200683.pdf (visited Nov 22, 2004) (arguing that state enforcement of antitrust actions may be motivated by a desire to protect small businesses and avoid job losses due to mergers, and that "state antitrust officials are more likely to be influenced by individual lobbying businesses within their states").
But they don't. Consider *Parker v Brown,*\(^\text{14}\) origin of the eponymous *Parker* or "state action" immunity doctrine, which shields certain anticompetitive state laws and their private beneficiaries against liability under federal antitrust laws. California had established an export cartel *par excellence,* which supplied some 95 percent of the entire U.S. raisin market and earned virtually its entire surplus profit outside California. And yet, no state protested the imposition in an amicus capacity. (It was the federal government that advocated limits on state cartels with pronounced extraterritorial effects.)\(^\text{15}\) The *Parker* example illustrates a general pattern: the evidence shows no clear instance of state resistance to exploitation by other states.

**Vertical Antitrust Federalism.** As a practical matter, both state and federal antitrust enforcers are constitutionally unconstrained with respect to the scope of their jurisdiction. Each may regulate the full range of private conduct that arguably has price effects within their jurisdictions. Consequently, one would expect rivalry, conflict, and turf protection. But while such federal-state disagreements occurred under the Reagan administration,\(^\text{16}\) the general pattern is mutual accommodation. The states have supported both broad federal antitrust authority over purely local transactions and a very narrow view of state action immunity. Conversely, federal agencies have consistently tolerated and sometimes supported state antitrust enforcement, even at considerable cost to national priorities.

These findings are orthogonal to ordinary intuitions about (anti-trust) federalism. This Essay explains them as the products of an antitrust enforcement cartel built on extraterritorial exploitation: state governments agree to exploit each other's citizens because that leaves all governments better off (and consumers worse off). The model explains both the extraordinary antitrust consensus among the states

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14 317 US 341 (1943). State amicus briefs were much less common at the time than they are now. But they were not unheard of. One year before *Parker,* in *Georgia v Evans,* 316 US 159 (1942), the U.S. Supreme Court ruled that states could maintain actions for treble damages under § 7 of the Sherman Act, codified at 15 USC § 15 (2000). An impressive thirty-four states supported Georgia’s petition. If the states failed to participate in *Parker,* the most likely explanation is that they all had their own agricultural cartels to defend. See text accompanying notes 76–77.

15 See Easterbrook, *26 J L & Econ* at 45 n 48 (cited in note 11) (noting that it was the U.S. Solicitor General's amicus brief in *Parker* that urged the Court to focus on the out-of-state effects of regulation), citing Brief for the United States as Amicus Curiae, *Parker v Brown,* No 46, *62–66 (S Ct filed Oct 9, 1942).

16 See DeBow, *State Antitrust Enforcement* at 269–70 (cited in note 1) (discussing the NAAG's "counterrevolution," led by "dissident attorneys" working through the NAAG, during the Reagan years, including the establishment of "their own alternative antitrust bureaucracy . . . to coordinate the states' efforts" and the federal-state disagreements over mergers and vertical restraints).
and some of their otherwise perplexing legal positions on antitrust federalism. An extension of the model interprets the federal government’s accommodation of the states as part of a two-way bargain: states support the federal government’s quest for a highly restrictive scope of state action immunity in exchange for federal accommodation of aggressive, extraterritorial state antitrust enforcement. Conversely, the federal government supports state enforcement (even at some cost to coherent national policy) in order to gain state acquiescence to federal enforcement against state-sanctioned cartels. The Conclusion notes the limitations and some implications of this analysis.

I. HORIZONTAL ANTITRUST FEDERALISM

In support of his contention that state attorneys general may be deploying antitrust law discriminatorily and as a kind of industrial policy, Judge Posner has pointed to the prevalence of out-of-state defendants in parens patriae actions. Table 1 shows the distribution of defendants in the amended Posner list of cases. Confirming Posner’s original findings, the table shows that fewer than half of all state parens patriae actions involve in-state defendants only.

<table>
<thead>
<tr>
<th>Defendants Residing Within Plaintiff State(s)</th>
<th>In-State</th>
<th>Single-State Litigation</th>
<th>Multistate Litigation</th>
<th>Both Single- and Multistate Litigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Defendants</td>
<td>36 (46.8)*</td>
<td>12 (46.2)</td>
<td>48 (46.6)</td>
<td></td>
</tr>
<tr>
<td>Some Defendants</td>
<td>10 (13.0)</td>
<td>7 (29.2)</td>
<td>17 (16.5)</td>
<td></td>
</tr>
<tr>
<td>No Defendants</td>
<td>31 (40.3)</td>
<td>7 (26.9)</td>
<td>38 (36.9)</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>77 (100)**</td>
<td>26 (100)</td>
<td>103 (100)</td>
<td></td>
</tr>
</tbody>
</table>

* Number (percent)
** Rounded

However, I remain inclined to think that the evidence is ambiguous with respect to the point at issue. Considering the realities of the

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17 Posner, Federalism and the Enforcement of Antitrust Laws (cited in note 1); DeBow, State Antitrust Enforcement (cited in note 1); author’s calculations.
18 "Remain," because I have co-articulated the doubt elsewhere. See Richard A. Epstein and Michael S. Greve, Postscript: In Defense of Small Steps, in Epstein and Greve, eds, Competition Laws 333, 347 (cited in note 1) (stating that Posner’s assertion that “state antitrust enforce-
national and international economies, state antitrust enforcement—even when free from any parochial bias—is bound to hit mostly out-of-state defendants; in fact it is the count of in-state defendants that seems remarkably high. More important, any plausible jurisdictional regime for antitrust will have to encompass some version of an effects test that permits states to complain of extraterritorial, anticompetitive conduct so long as that conduct has a price effect within the state. That test opens the door for exploitation. But not every application of the test necessarily has that motive or effect. Had a state (rather than a dissident producer) challenged the raisin cartel of *Parker* fame, we should hardly chalk that complaint up to parochial bias. We should rather view it as a legitimate—and, as we shall see, all too rare—effort to protect citizens against monopolization.¹⁹

That said, the Posner list supports one circumspect inference, and one firm and striking conclusion. As for the inference: it is hard to exclude *some* parochial bias. State enforcers appear to focus on cases with tangible local effects, such as divestiture demands in supermarket and other retail industries.²⁰ That orientation may reflect a healthy preoccupation with local anticompetitive effects that federal regulators may have underestimated and a much needed enforcement of antitrust norms that may be underenforced by the out-of-state producer’s home jurisdiction.²¹ But it may also signal an undue solicitude of local producer interests, regardless of consumer welfare. While one cannot tell the difference without closer analysis, it is hard to believe that parochial bias plays no role whatsoever. As for the firm conclusion: state enforcers have no compunction about enforcing antitrust rules against private out-of-state parties.

In contrast, when anticompetitive conduct has been officially sanctioned by another state, state antitrust enforcers have consistently failed to act. Consider the *Parker* scenario, where one state’s anticompetitive regulatory regime imposes costs on consumers and producers in other states: do state antitrust enforcers complain? I cross-checked

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¹⁹ See notes 22–25 and accompanying text.

²⁰ The leading case sustaining the remedy of divestiture is *California v American Stores Co*, 495 US 271 (1990) (holding, in response to a suit brought by the California attorney general under § 1 of the Sherman Act, that divestiture was an appropriate remedy after the fourth largest grocery chain in California acquired the largest grocery chain in the state).

²¹ See Doris, 69 Antitrust L J at 345 (cited in note 1) (“States review mergers, from hospitals to supermarkets, that affect the local populace but may not be sufficiently broad ranging to attract federal attention. States also prosecute local bid-rigging or price-fixing cases.”). See also Calkins, 53 Duke L J at 688 (cited in note 1) (characterizing state antitrust enforcement as “overwhelmingly local” and showing that 82 percent of state antitrust lawsuits surveyed between 1993 and 2002 featured a local aspect, typically because a local market was alleged).
the Posner-DeBow list against reported cases that rely on or discuss *Parker* or *California Retail Liquor Dealers Association v Midcal Aluminum, Inc.* the basic modern formulation of *Parker* immunity. I assume that an antitrust defendant with a plausible state action defense will assert it and, moreover, that a court, in accepting or rejecting the defense, will cite to either *Parker* or *Midcal*. Not a single case on the *Parker* list, and only two cases on the *Midcal* list of 241 cases, can be found in the Posner-DeBow list. Those two cases were brought against purely in-state defendants. With one arguable exception, I could not find a *parens patriae* case in which out-of-state defendants could assert a colorable state action defense. Thus, although states liberally enforce antitrust laws against out-of-state producers, they fail to do so when out-of-state producers act (arguably) with another state’s official permission.

It stands to reason that a state enforcer will rarely complain about a rival state’s impositions on consumers, whose losses are too dispersed to prompt an effective demand for official assistance. But such demands should surface, and official assistance should be forthcoming, when one state’s anticompetitive laws affect another state’s producers, who have the motives and the means to impress the point upon the state’s officers. One such case is *Harmar Bottling Co v Coca-Cola Co.*, in which several soft drink bottlers sued competing Coca-Cola bottlers over sales and marketing agreements—commonly known as “calendar marketing agreements,” or CMAs—with retailers. Plaintiffs retained the good offices of Harold Nix, a famous Texas trial lawyer, to file the case in Morris County, Texas, Nix’s home turf and

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22 445 US 97 (1980) (holding that California’s sanctioning of an essentially private price-fixing regime for wine did not qualify for *Parker* immunity because of the minimal level of state involvement).

23 In only one case did the state clearly initiate the suit: *Spitzer v Saint Francis Hospital*, 94 F Supp 2d 399 (SD NY 2000) (deciding an antitrust challenge brought by New York over a price-fixing agreement between two hospitals). In the second case, *United States v Title Insurance Rating Bureau of Arizona, Inc.*, 700 F2d 1247 (9th Cir 1983), the state of Arizona joined the United States and private plaintiffs in a suit alleging a price-fixing conspiracy for escrow services.


25 States may prefer to prosecute parties who might enjoy *Parker* immunity under state antitrust laws, which arguably do not allow for that defense. Most such cases will elude the search parameters described in the text. But this possibility seems remote, as the vast majority of state antitrust cases to date have been brought in federal court, under federal law. See First, 69 Geo Wash L Rev at 1005 (cited in note 1).

26 111 SW3d 287 (Tex App 2003), appeal pending (Tex S Ct argued Oct 21, 2004). The trial court’s unreported decision is discussed in the appellate court’s opinion. Id.
one of the nation’s notorious hellhole jurisdictions. Several of the plaintiffs and defendants operate in Arkansas and Louisiana, where the contested CMAs are lawful (as they are in the rest of the country). The out-of-state defendants never marketed or sold soft drinks in Texas and in fact are barred from doing so: soft drinks are marketed under exclusive territorial franchises, and the non-Texas defendants’ territories do not extend into Texas. Even so, the Texas courts ordered monetary and injunctive relief for all plaintiffs, against all defendants, on the remarkable theory that the state of Texas has prescriptive jurisdiction—over conduct and effects wholly outside its territory—whenever a state court manages to exercise personal jurisdiction over one of the defendants. Given the economic realities of the soft drink market, the Texas injunction profoundly affects bottlers and sales agreements in all states where the named defendants do any business, including Alabama, Georgia, and Tennessee.

_Harmar_ is now pending before the Texas Supreme Court, and the state of Alabama has filed an amicus brief protesting the imposition. But there appears to be virtually no other case like _Harmar_. The state amicus list contains precisely one previous case, _Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP_, in which some states sided with a defendant-corporation (Verizon) against a private plain-

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27 See Skip Hollandsworth, _The Lawsuit from Hell_, 24 Tex Monthly 106 (June 1996) (discussing a massive products-liability lawsuit led by Nix in Morris County with “three thousand plaintiffs, five hundred defendants, three hundred lawyers, and no evidence”).


29 See, for example, _Bayou Bottling, Inc v Dr. Pepper Co_, 725 F2d 300 (5th Cir 1984) (holding that a similar sales and marketing agreement was permitted under antitrust law); _Louisa Coca-Cola Bottling Co v Pepsi-Cola Metropolitan Bottling Co_, 94 F Supp 2d 804 (ED Ky 1999) (holding that CMAs between plaintiff’s competitor and retailer were not contracts in restraint of trade). With the exception of _Harmar_, there appears to be no reported decision concluding that CMAs violate state or federal antitrust law.

30 The appellate court predicated the exercise of jurisdiction on the fact that some of the CMAs had been executed in Texas or designated Texas as a legal forum. Those features, however, are at most sufficient to establish personal jurisdiction. They do not warrant the extension of Texas antitrust law to foreign jurisdiction. See Justice Scalia’s dissent in _Hartford Fire Insurance Co_, 509 US at 812–21 (“The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct.”).


32 540 US 398 (2004) (holding that there was no monopolization claim against an incumbent local exchange carrier that allegedly breached its duty to share its telephone network with competitors).

33 Brief of Amici Curiae Commonwealth of Virginia, States of Alabama, Delaware, Indiana, Nebraska, New Hampshire, Oklahoma, and Utah in Support of Petitioner, _Verizon Commu-
tiff and its state amici. It contains one additional case, *FTC v Ticor Title Insurance Co*, in which four states sided with a private corporation against the Federal Trade Commission (FTC) and thirty-six state amici. That is it. Admittedly, the evidence is incomplete. State "defense" briefs may be most likely to be filed on behalf of producers whose operations are concentrated in a single state, and the state amicus list does not systematically capture single-state briefs. Then again, we know of one conspicuous case where such assistance failed to materialize. That case is *New York v Microsoft Corp*., where the defendant-company's home state remained AWOL—though not, one strongly suspects, for Microsoft's lack of trying to bring Washington Attorney General Christine Gregoire on board.

Perhaps, state enforcers fail to complain of sister states' anticompetitive laws (or more precisely, of private anticompetitive practices with official state sanction) because protective state regulations rarely have sufficient extraterritorial effects to warrant legitimate complaints. But in light of the general propensity of states to export regulatory costs, that explanation does not seem plausible. Alternatively, attorneys general must, in representing their own client-agencies, often take a broad view of state action immunity. They may therefore be reluctant to initiate or participate in cases that would implicate an attack on a state action defense under another state's law. But that

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35 504 US 621 (1992) (reversing the lower court's finding that Wisconsin's and Montana's uniform rate schemes for title searches qualified for state action immunity).


38 See Ackerman and Hubbard, *Multistate Antitrust Amici* at 1 (cited in note 6).

39 209 F Supp 2d 132 (D DC 2002) (holding that the states had *parens patriae* standing to bring an antitrust suit and that the alleged injury rested upon sufficiently severe and generalized harm to the states' citizens).

40 In fact, at one point in the litigation, Gregoire supported the litigating states' authority to pursue the case even after Microsoft's settlement with the federal government. Id at 136 n 2 (referencing the amicus brief filed by twenty-four states, including Washington, supporting the states' authority to pursue the case).
putative explanation is contrary to fact: as shown below, state attorneys general in fact take a narrow view of state action immunity.

With respect to state enforcers' failure to assist domestic interests against another state's excessive or parochial antitrust actions, one might argue—more in a normative than in a positive vein—that attorneys general ought to enforce antitrust laws, as opposed to objecting to another state's enforcement. Consumer-oriented attorneys general, though, ought to countenance the possibility of overenforcement and false positives. The alarm bells ought to go off when the proceeding is instigated by an in-state producer's competitor: the identity of the plaintiff raises a strong inference that the proceeding will benefit competitors rather than competition.\(^4\) Conversely, the targeted producers (such as the out-of-state bottlers in \textit{Harmar}) are in this setting a pretty good proxy or stand-in for the consumer interests that the state's attorney general is sworn to protect. In the real world, however, state antitrust enforcers will go to the mat for producer plaintiffs—such as local supermarkets that are endangered by national mergers among other market participants—but not for defendants. In that respect, state antitrust enforcement is biased. The question is why.

II. VERTICAL ANTITRUST FEDERALISM

As shown in Table 2, thirty-nine of the states' antitrust amicus briefs, or almost half of those surveyed, have addressed questions of antitrust federalism, as distinct from substantive antitrust issues and various other matters, such as pleading standards. Of these thirty-nine "powers" briefs, twenty-two address the affirmative power of state attorneys general to enforce federal and state antitrust laws. Seventeen deal with the "negative" side of antitrust federalism—that is, \textit{Parker} immunity and its \textit{Noerr-Pennington} extension, which shield from antitrust liability private firms' attempts to obtain anticompetitive state legislation.\(^3\)


\(^3\) See \textit{United Mine Workers of America v Pennington}, 381 US 657 (1965) (holding that joint efforts to influence public officials do not violate antitrust laws even if intended to eliminate competition); \textit{Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc}, 365 US 127 (1961) (holding that the railroads' publicity campaign to influence legislative action against the trucking industry did not violate antitrust laws).
TABLE 2

State Amicus Participation by Subject Matter, 1977–2004

<table>
<thead>
<tr>
<th>Number of States</th>
<th>Powers</th>
<th>Substance</th>
<th>Other</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1–10</td>
<td>21</td>
<td>13</td>
<td>1</td>
<td>35</td>
</tr>
<tr>
<td>11–20</td>
<td>3</td>
<td>5</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>21–30</td>
<td>8</td>
<td>12</td>
<td>2</td>
<td>22</td>
</tr>
<tr>
<td>31–40</td>
<td>3</td>
<td>5</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>41–50+</td>
<td>4</td>
<td>3</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Total</td>
<td>39</td>
<td>38</td>
<td>7</td>
<td>84</td>
</tr>
</tbody>
</table>

As state antitrust officials have put it, "[t]he States are motivated to enter the arena of antitrust litigation as amici by important sovereign interests." Those interests extend to the powers of the attorneys general—their parens patriae authority, and the scope of their remedial authority in "indirect purchaser" actions. They also extend to averting "any recrudescent threat of [federal] preemption." But the states' notion of sovereign interests does not imply exclusive state autonomy to legislate antitrust rules for their own internal commerce—that is to say, economic conduct that has no price effects outside the state in which it occurs. Rather, state attorneys general have affirmatively—and successfully—contended that federal law and enforcement powers extend to purely local transactions. Moreover, they have taken a very narrow view of Parker immunity.

A. State Regulatory Autonomy

Antitrust federalism, to the minds of attorneys general, does not imply separate spheres of authority (such that the states govern intrastate transactions and federal agencies regulate interstate transactions or transactions with price effects in more than one state). Rather, their operative ideal is concurrent state and federal jurisdiction over the full range of private transactions. Consider the amicus submission by

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43 Ackerman and Hubbard, Multistate Antitrust Amici (cited in note 6); author’s calculations.

44 Id at 6 (internal citation omitted).

45 See, for example, California v American Stores Co, 495 US 271 (1990); California v ARC America Corp, 490 US 93 (1989) (holding that state indirect purchaser laws were not preempted by the rule limiting federal antitrust actions to direct purchasers only and that therefore the states could pursue indirect purchaser claims under their state laws).

46 Ackerman and Hubbard, Multistate Antitrust Amici at 7 (cited in note 6).
twenty-two states in *Summit Health, Ltd v Pinhas*, where the Supreme Court held that the Sherman Act extends to the outer limits of congressional power under the Commerce Clause, including purely local transactions with no conceivable extraterritorial price effect. In support of that position, the states argued that territorial limitations on the reach of federal law would leave policy and enforcement gaps, as many states lack statutes that parallel all the prohibitions of the Sherman, Clayton, and FTC Acts. From the vantage of state enforcers, this insistence on the boundless reach of the Sherman Act is perfectly understandable. Since state attorneys general enforce federal as well as state antitrust laws, a regime under which local transactions are beyond the reach of federal antitrust law would entail a diminution of their powers. Even so, the position of the attorneys general implies a somewhat curious notion of state autonomy and sovereignty. While states are left free to legislate and enforce antitrust restrictions over and above the federal baseline, a state’s choice to have less restrictive laws, even with respect to purely internal affairs, merits no such respect. It is a policy lacuna, and states raise alarm over such gaps even when they gape mostly in sister states. The *Summit Health* brief lamented that fifteen states lack prohibitions against unilateral monopolization paralleling §2 of the Sherman Act—but only three of those states had signed the brief. The notion that the other twelve states might “lack” such a prohibition as the result of a deliberate and legitimate policy choice is wholly absent.

B. The State Action Doctrine

State attorneys general invest a great deal in defending various state immunities (for example, under the Eleventh Amendment) and in resisting federal preemption. Accordingly, one would also expect states to defend a broad view of *Parker* immunity. In a handful of

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48 15 USC § 1 et seq (2000).
49 *Summit Health*, 500 US at 332–33 (holding that Congress has the power “to regulate a peer review process controlling access to the market for ophthalmological surgery in Los Angeles” and that the plaintiff’s claim of a conspiracy “to abuse that process and thereby deny respondent access to the market for ophthalmological services provided by general hospitals in Los Angeles has a sufficient nexus with interstate commerce to support federal jurisdiction”). See also id at 329 n 10 (“It is well settled that when Congress passed the Sherman Act, it ‘left no area of its constitutional power [over commerce] unoccupied.’”).
51 Id at *7 n 17.
cases, such as California’s defense of its liquor sales laws in Midcal, individual states have done so. In more recent cases, state attorneys general have defended the Master Settlement Agreement (MSA) among attorneys general and leading tobacco manufacturers on state action immunity grounds. Those cases, however, are exceptional. The MSA was the creation of the attorneys general, not that of a coordinate government agency or for that matter a state legislature, and its only conceivable antitrust defense is immunity under the Parker doctrine or perhaps its Noerr-Pennington adjunct. In the general run of cases, states have taken a remarkably restrictive view of state action immunity.

Community Communications Co v City of Boulder addressed the Parker immunity of local governments. A divided Supreme Court ruled that only states but not local governments enjoy such immunity unless the local government acts on behalf of the state itself or in furtherance of a clearly articulated state policy. The state of Colorado, 52 See Brief of Amicus Curiae State of California, California Retail Liquor Dealers Association v Midcal Aluminum, Inc, No 79-97 (S Ct filed Nov 15, 1979) (available on Lexis at 1979 US Briefs 97). The regulation of liquor may prompt attorneys general to articulate positions they would not otherwise take. See, in addition to Midcal, TFWS, Inc v Schaefer, 242 F3d 198, 210–11 (4th Cir 2001) (rejecting Maryland’s invocation of Parker in defense of the state’s liquor wholesale regulations).

53 The MSA—a comprehensive regime governing the taxation and regulation of tobacco products in the United States—cannot be found in any federal or state code. It is, however available on the NAAG’s website at http://www.naag.org/issues/tobacco/index.php?spidid=919 (visited Nov 22, 2004). For a judicial reference to the MSA, see United States v Philip Morris USA, Inc, 327 F Supp 2d 1 (D DC 2004) (holding that the existence of, and compliance with, the MSA between companies and states did not moot claims brought by the United States).

54 The MSA and the state laws that implement it create a market-sharing arrangement among the major manufacturers, while subjecting their competitors to payment obligations that “fully neutralize” their pricing advantages. The arrangement has been subject to numerous attacks on antitrust (and other) grounds, with varying results. See, for example, Freedom Holdings, Inc v Spitzer, 357 F3d 205 (2d Cir 2004) (holding that, based on the complaint’s allegations, the statute enacted pursuant to the MSA was not protected under the Parker state action immunity doctrine), rehearing denied, 363 F3d 149 (2d Cir 2004); Mariana v Fisher, 338 F3d 189 (3d Cir 2003) (holding that state officials’ actions in initiating a lawsuit and lobbying for the Pennsylvania Qualifying Statute were protected under Noerr-Pennington but not under Parker), cert denied, 124 S Ct 1413 (2004); A.D. Bedell Wholesale Co, Inc v Philip Morris Inc, 263 F3d 239 (3d Cir 2001) (holding that the settlement with the government was “akin” to petitioning it, so that tobacco manufacturers were immune from antitrust action under Noerr-Pennington, but not under Parker). The Second Circuit pointedly suggested that an analogous private agreement would be criminal. Freedom Holdings, 357 F3d at 226 (“Had the executives of the major tobacco companies entered into such an agreement without the involvement of the States and their attorneys general, those executives would long ago have had depressing conversations with their attorneys about the United States Sentencing Guidelines.”).

56 455 US 40 (1982) (finding that Boulder violated federal antitrust law when it temporarily prevented the plaintiff from expanding his cable television business).

57 Id at 52.
supported by twenty-two sister states, advocated this limitation of the state action doctrine. Justice Rehnquist's dissent in *City of Boulder* denounced that incongruity as a backdoor attempt on the part of the states to claw back authority, which many of them had been compelled to surrender to local governments. That, though, cannot be the whole story. *Ticor* involved state rather than local regulation—specifically, several states' schemes for the regulation of certain insurance rate-setting practices. The question in *Ticor* was whether those so-called "negative option" schemes satisfied the criteria of state action immunity under *Midcal*, which held that private actors enjoy protection from federal antitrust law so long as they operate under a state policy that is (1) clearly articulated and (2) actively supervised by the state.

Thirty-six states, including the states whose laws were at issue in *Ticor*, argued against a suggestion that the state regulation provided protection against antitrust liability. Only four states took the opposite position. Relying on the majority states' amicus brief, the Supreme Court articulated an interpretation of *Midcal*'s "active supervision" prong that very nearly amounts to a causation requirement.

The states' failure to defend state autonomy in *Parker* immunity cases is of one piece with their *Summit Health* support for the unrestricted territorial application of the Sherman Act. Here as there, state attorneys general have advocated a partial surrender of state autonomy. Here as there, that partial surrender is the price for expanding the enforcement powers of attorneys general against state or local anticompetitive regulation. Unlike in the *Summit Health* context, however, the attorneys general have no intention of utilizing the enforcement powers that flow from a narrowing of state action immunity: they are notoriously reluctant to prosecute cases of state-sanctioned

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59 Id at 71 n 7 (Rehnquist dissenting).

60 *Midcal*, 445 US at 105.

61 Id at 71 n 7 (Rehnquist dissenting).


64 *Ticor*, 504 US at 635 ("The State of Wisconsin, joined by Montana and 34 other States, has filed a brief as amici curiae on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the amici submission.").

65 Id ("Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy.").
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anticompetitive conduct. Hospital mergers and cooperative arrangements, an area of acute antitrust concern, illustrate the ambivalence. The state of New York—as noted, the state that brought the lone case on the Posner list to involve a state action defense—conspicuously, and successfully, opposed federal enforcement efforts in a strikingly similar case. Likewise, "Michigan remained primly on the sidelines of a [federal] challenge to a Michigan hospital merger" even as sister states' attorneys general supported the FTC.

Perhaps state attorneys general are making the best of a lousy situation. A campaign against state-sponsored cartels would compel state enforcers to litigate against their own client-agencies or against the state's municipal governments. In light of the political difficulties, state enforcers may prefer to lend amicus support to private or FTC enforcement efforts against state-sponsored cartels. That surmise seems plausible—but also a bit ad hoc. In Part III, I explore a more systematic explanation.

III. A CARTEL THEORY OF ANTITRUST FEDERALISM

To earlier findings of extensive antitrust cooperation and consensus among the states and of their use of antitrust law for protectionist or exploitative purposes, this Essay has added evidence of what states have failed to do. First, states have consistently failed to check or resist exploitation by other states. That assessment is confirmed by independent evidence from the analogous context of the dormant Commerce Clause: just as states fail to raise antitrust complaints against exploitation by another state, so they have generally failed to bring dormant Commerce Clause challenges to another state's discriminatory laws. Second, state attorneys general have consistently advo-

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66 Spitzer v Saint Francis Hospital, 94 F Supp 2d 399 (SD NY 2000). See also note 23 and accompanying text.
67 United States v Long Island Jewish Medical Center, 983 F Supp 121, 134–35 (ED NY 1997) (refusing to enjoin a state-supported hospital merger, and noting that the state attorney general declined to join the Department of Justice in the prosecution of the case). To be fair and precise, the state opposition here came from the New York State Department of Public Health, not the Office of the Attorney General. Intergovernmental conflict at the state level goes a long way toward explaining the states' seemingly schizophrenic state action position.
69 See Part I.
70 On the parallelism between the state action doctrine and the dormant Commerce Clause, see Easterbrook, 26 J L & Econ at 45–46 (cited in note 12).
71 Only five of the Supreme Court's sixty-one dormant Commerce Clause decisions since 1970 were issued in state-initiated cases. See Christopher R. Drahozal, Preserving the American
cated a partial surrender of state sovereignty both with respect to the autonomous formulation of state antitrust policy and with respect to the scope of state action immunity. The remainder of this Essay presents a rough analytical model that connects these dots. That model, which one can loosely call "cartel federalism," was developed by Geoffrey Brennan and James Buchanan for the context of taxation. It can be extended to cover regulatory matters, including antitrust.

Brennan and Buchanan approach the question of federalism design by asking what jurisdictional rules a rational individual would choose behind a preconstitutional veil of ignorance, on the assumption that governments at all levels will behave as "Leviathans" who seek to maximize their own surplus. In choosing rules for a single jurisdiction (in a world with cross-border trade), rational individuals will seek to ensure that Leviathan will be financed, so far as possible, by noncitizens through extraterritorial taxes (in the analogous antitrust context, through export cartel exemptions). The individual will seek to have the policies applied to industries "for which foreign demand looms large relative to domestic demand, and for which domestic supply is relatively elastic." This is why we observe steep hotel taxes in New York City and taxicab monopolies at the local airport. The global welfare losses are predictable. But the individual must expect that other jurisdictions will select exploitation-maximizing rules, and the rational choice is to return the favor.

In contrast, in choosing rules for a federal regime with partially autonomous states, the preconstitutional individual will consider the costs of mutual exploitation among the states, and the choice will run against horizontal tax exports from one state to another (by analogy, against export cartels). Among the reasons is a desire to discipline state government by means of exit, or "voting with one's feet." That mechanism of control—often called "Tiebout competition"—would be thwarted if the junior Leviathans could trawl for revenue in each other's waters.

In federalism's vertical, state-to-federal dimension, the preconstitutional individual will opt for some assignment of exclusive tax authority to lower-level jurisdictions—in a regulatory context, some division between "internal" and "external" matters, with junior governments retaining exclusive authority over the former. A monopolistic

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73 Id at 169–70. With respect to imports, the reverse holds.
assignment would vitiate competition among governments. Assignment to the states will impose frictional losses, but these are tolerable so long as personal and firm mobility can be relied on to check local abuse.

While the model yields no unambiguous set of optimal rules, it does yield constitutional baselines—such as general rules of tax assignment, a dormant Commerce Clause as an antidiscrimination rule, and a presumption for leaving purely local events (with no external price effects) to the states. Without some external enforcement mechanism, however, political institutions at all levels will defect from these rules. One possible outcome of defection—the spectacle feared by the Founders—75 is a kind of trade, tax, tariff, or antitrust war among the states. One defection begets another retaliatory defection, with no end in sight.

The Brennan-Buchanan model, in contrast, suggests an alternative equilibrium—a state cartel to suppress or vitiate Tiebout competition. Because the free rider and holdout problems that bedevil private cartels also operate on competing states, an attempt to suppress competition often requires intervention by the central government. The state demand for federal cartelization—which explains, for example, the persistence of revenue sharing and intergovernmental grants76—is readily explained: while the consumers of government services favor jurisdictional competition, the Leviathan-producers emphatically do not. (Just like private firms, they would much rather enjoy monopolistic access to their customers.) Likewise, individual states should favor rules or institutional arrangements that permit them, unilaterally, to export tax or regulatory burdens: it is always easier to tax and regulate folks who have neither a vote nor an exit than those who do.

But why should states agree to extend the privilege of tax exportation to all states—a regime that leaves each state defenseless against exploitation by all sister states? The likeliest explanation is rational (consumer, taxpayer, and citizen) ignorance and agency problems. While consumers will bear losses under a general rule of mutual aggression among states, they cannot tally those losses, let alone trace them to their own government’s failure to resist the imposition. Producers who bear the costs of another state’s tax or regulatory export

75 See Federalist 7 (Hamilton), in The Federalist 36 (Wesleyan 1961) (Jacob E. Cooke, ed).
76 Brennan and Buchanan, The Power to Tax at 169 (cited in note 72). The demand may also take other forms, such as the states’ demand in the debate over internet sales taxation for the federal authorization of extraterritorial state taxation. See Michael S. Greve, Sell Globally, Tax Locally: Sales Tax Reform for the New Economy (AEI 2003) (explaining that state governments have a powerful interest in establishing a tax cartel, which—like private cartels—will typically require central coordination).
can be expected to pay closer attention, especially when those costs are heavily concentrated. (This is why state lawsuits under the dormant Commerce Clause materialize chiefly when the costs fall on government entities or on highly concentrated producer interests in the plaintiff-state, such as public or quasi-public utilities.) But for every producer who stands to lose from aggression by other states, others stand to gain from their own government’s authority to export burdens and to exploit outsiders. (The notorious Parker cartel again comes to mind.) In short, citizen-consumers will be worse off under a state cartel built on mutual exploitation among states. All the junior Leviathans, in contrast, will be able to increase their surplus by agreeing to exploit each other’s citizens.

Many otherwise perplexing aspects of the antitrust enforcement market begin to make sense in the context of a cartel story. On this interpretation, states favor the unlimited reach of the Sherman Act not in the interest of cohesive antitrust regulation (which would actually require wholesale federal preemption) but rather to mow down Tiebout competition that might induce some firms—those with predominantly local markets—to shop around for more or less restrictive antitrust regimes. The unwillingness of state enforcers to bring antitrust challenges to sister states’ anticompetitive regimes—even when those regimes inflict tangible external costs, and even while state enforcers have no compunction about proceeding against private anticompetitive conduct or arrangements among nonresident firms—reflects a reluctance to defect from a cartel that is built on maximizing mutual state exploitation. The NAAG’s Antitrust Task Force—formed, tellingly, in 1983, when the Reagan administration’s antitrust initiatives threatened to curtail state enforcers’ powers—on this uncharitable view emerges as a kind of cartel maintenance and monitoring organization, designed to drive down the costs of collective action and to distribute its proceeds.

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77 See, for example, *Wyoming v Oklahoma*, 502 US 437 (1992) (holding that an Oklahoma law requiring the state’s coal-fired electric utilities to use a certain percentage of Oklahoma-mined coal violated the Commerce Clause); *New England Power Co v New Hampshire*, 455 US 331 (1982) (holding that a New Hampshire statute prohibiting a hydroelectric company from dispersing energy out of the state without the state’s approval violated the Commerce Clause); *Commonwealth Edison Co v Montana*, 453 US 609 (1981) (holding that Montana’s severance tax imposed on coal mined in the state did not violate the Commerce Clause); *City of Philadelphia v New Jersey*, 437 US 617 (1978) (holding that a New Jersey statute prohibiting importation of waste that originated outside the state violated the Commerce Clause); *Hunt v Washington State Apple Advertising Commission*, 432 US 333 (1977) (holding that a North Carolina statute requiring that all apples sold or shipped into the state be labeled a certain way, thereby excluding Washington apples, violated the Commerce Clause). Also recall the discussion of Alabama’s amicus intervention in *Harmar*, discussed in notes 26–31 and accompanying text.
IV. AN EXCHANGE THEORY OF ANTITRUST FEDERALISM

The model so far fails to explain, first, state enforcers' curiously narrow view of state action immunity, and, second, the federal government's accommodation of the states' aggressive demands for enforcement authority. Federal agencies might oppose those demands for good reasons—for example, a concern over interstate or international spillovers, or a concern that an aggressive state role might distort national antitrust priorities. But while considerations of this sort have recently prompted calls by some federal officials for improved protection of federal priorities against state interference and for some form of sorting federal from state antitrust responsibilities, the general pattern has been federal accommodation to the states' demands for an expanded role. The list of federally supported—or at least unopposed—extensions of state authority includes "indirect purchaser" actions under state law, state divestiture remedies, state antitrust jurisdiction over foreign corporations, and the right of states to pursue equitable remedies even after the defendant's entry of a settlement with federal authorities.

One can interpret these seemingly odd positions—the states' consistent support for the federal government's bid to limit Parker immunity, and the federal government's equally consistent failure to assert federal prerogatives against the states—as two sides of a single bargain. On this interpretation, state enforcers have supported the federal position on state action to obtain maneuvering room for state antitrust actions that the federal government might otherwise oppose. Conversely, the federal government has tolerated the expansion of state enforcement authority to make progress at the state action front.

One highly suggestive piece of evidence is the amici states' position in Ticor, where the majority states portrayed a demanding state action requirement and especially its "active supervision" prong as a

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78 See Jaret Seiberg, Checks and Imbalances, Daily Deal (July 26, 2004) (discussing suggestions to that effect by Hewitt Pate, Assistant Attorney General, Antitrust Division, and describing state officials' hostile response).
79 See, for example, California v ARC America Corp, 490 US 93 (1989) (featuring a federal amicus brief supporting the states' position).
80 See, for example, California v American Stores Co, 495 US 271 (1990).
81 See, for example, Hartford Fire Insurance Co v California, 509 US 764 (1993).
82 See Memorandum Amicus Curiae of the United States, New York v Microsoft Corp, No 98-1233, (D DC filed Apr 15, 2002), online at http://www.usdoj.gov/atr/cases/f10900/10980.htm (visited Nov 22, 2004) (urging the court to give "substantial weight" to the "important considerations of antitrust policy and federal-state relations" set forth by Microsoft, but nonetheless to reject Microsoft's motion to dismiss nonsettling states' demand for equitable relief).
pristinely federalist position. That line of reasoning has been described as "not easy to understand" and as a "challenge [to] historians." Notwithstanding the Ticor Court's insistence that "[s]tates must accept political responsibility for actions they intend to undertake," little in economic theory, and less in federalism theory, recommends that ruling. Someone has to supervise the states' "active supervision," and that "someone" cannot be the citizens in the various states; it has to be the FTC. There may be reasons for such an arrangement, but state autonomy and local accountability cannot be among them.

In fact, Ticor presented the FTC and the U.S. Solicitor General with a massive federalism problem. Among the obstacles was an effusively "federalist," pro-immunity decision by then-Judge Anthony Kennedy in a case presenting very similar questions. Predictably, Ticor played the federalism angle and especially the opinion of Kennedy—by then, a crucial vote on an increasingly federalism-friendly Supreme Court—to the hilt. The majority states' brief allowed the federal government, which had theretofore ignored Ticor's federalism

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85 Ticor, 504 US at 636.
86 Robert P. Inman and Daniel L. Rubinfeld have endorsed a demanding supervision requirement as a means of forcing state legislatures to make deliberate, explicit decisions. Robert P. Inman and Daniel L. Rubinfeld, Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism, 75 Tex L Rev 1203, 1269–70 (1997). But even assuming that citizens pay attention to these sorts of state decisions, "accountability forcing" in this context forces states into a series of all-or-nothing choices between full-scale monopolization and wholesale deregulation, where some in-between choice might make considerably more sense. See Easterbrook, 26 J L & Econ at 33 (cited in note 12) ("The Parker decisions put states to an unpalatable all-or-nothing choice: they must either put the full regulatory apparatus into play or withdraw in favor of competition.").
88 Llewellyn v Crothers, 765 F2d 769 (9th Cir 1985) (holding, with then-Judge Kennedy writing for a unanimous appellate panel, that Oregon's workers' compensation system qualified for state action immunity).
89 See Calkins, 61 Antitrust L J at 276 n 34 (cited in note 84) (discussing the respondents' and amici's use of Kennedy's federalism arguments in Llewellyn).
argument, to denounce that argument as rank opportunism. Justice Kennedy's explicit reliance on the majority states' averments suggests that the FTC might well have lost the case but for the states' support.

If the federal government had every reason to seek the states' support, the states had equally good reasons to lend it. The *Ticor* briefs were submitted shortly before a certiorari petition in *Hartford Fire Insurance Co v California*, then described by a leading state antitrust enforcer as "the biggest and most important civil case . . . pending in the United States." The states had initiated the *Hartford* litigation despite the FTC's severe misgivings, and there was every reason to think that the outcome could well depend on the U.S. government's position before the Supreme Court—which was by no means a foregone conclusion at the time of *Ticor*. Lo, at the end of the day, in *Hartford* the federal government deferred to the states.

The proximity and parallelism between the states' and the federal enforcers' interests do not imply some outright quid pro quo. An explicit bargain actually seems unlikely, since both sides sport multiple institutional actors who cannot easily commit their sister agencies, let alone their successors in interest. Moreover, the analysis is meant to capture the political economy of the federal-state transaction (which the economics literature treats under the heading of "incomplete contracts"), not its social dimension (which will to the participants look like collegial, if not frictionless, "networked enforcement"). So understood, though, the stipulated logic fits, and may help to explain, the trajectory of federal-state antitrust relations from confrontation during the Reagan years to increased cooperation since the first Bush administration and to this day. Throughout, state-sponsored cartels

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90 Id at 274–75 ("The Solicitor General observed that with the FTC and the States in agreement that antitrust enforcement was essential, 'only the foxes are insisting that they were not left behind to guard the henhouse.'").

91 509 US 764 (1993). For an illuminating discussion of the connection between the two cases, see Calkins, 61 Antitrust L J at 274 n 25 (cited in note 84) (noting that the states' timing for filing the *Ticor* brief may have been in part due to their pending case against the insurance companies in *Hartford*).


94 I owe the point to Stephen Calkins.

95 The change is often, though to my mind not altogether persuasively, attributed to personnel changes. For a concise account of federal-state relations over the period, see DeBow, *State Antitrust Enforcement* at 269–71 (cited in note 1) (discussing the conflict between NAAG and Reagan administration antitrust enforcers).
were a top enforcement priority for the FTC, under both Republican and Democratic administrations. Federal enforcers soon realized that state opposition often impedes federal enforcement at this front, and that state support is worth something. Conversely, an aggressive state agenda requires federal accommodation. The broad enforcement powers of state authorities, from divestiture remedies to indirect purchaser actions, may now be settled law. But that was not true twenty-five years ago, when state attorneys general aspired to play a more prominent role in antitrust law. At that time, the states needed federal accommodation, both in the everyday enforcement process and in high-stakes cases involving questions of federal preemption and prerogatives, where the federal government’s official position often makes a crucial difference. And one of the few meaningful concessions the states had to offer was their support for federal enforcement efforts that might otherwise be perceived as nationalist intrusions into “states’ rights.”

CONCLUSION

The cartel model has its limitations, both with respect to data and to the theory. It cannot exclude rival explanations of the sort mentioned throughout, and it is rough. Notably, it treats Leviathan (at all levels) as a unitary actor. That useful heuristic device cannot fully capture a far richer institutional context. The obvious remedy here is a more sophisticated model, applied to better data.

Moreover, the model tells us next to nothing about the welfare effects. The suggested accommodation between federal and state enforcers, for instance, may be bad if (as I am inclined to think) the regulatory output of a federally supported state antitrust cartel is substantially more interventionist than what would emerge from a wholly centralized regime, or from a federalist regime that would separate state from federal responsibilities. But suppose that (as I am also inclined to think) those options are politically off the table. Suppose further that the states’ support for restricting state action immunity truly facilitates the federal government’s enforcement efforts at that front, and suppose that federal opposition to the expansion of state enforcement powers would have failed (for legal or political reasons) to arrest that development in any event: under those debatable but plausible assumptions, an intergovernmental cartel may actually yield positive returns.

Finally, antitrust law is in many ways an unlikely venue for an intergovernmental cartel. While state enforcers may suffer from parochial bias and may get it wrong on vertical restraints or some such, they ultimately favor competition, and that disposition distinguishes them from practically all other state regulatory agencies. Antitrust law is a far more disciplined body of law than, say, general purpose prohibitions against unfair trade practices, and for that reason does not lend itself as readily to the exploitation of out-of-state producers. And, in comparison to state taxation (the Brennan-Buchanan paradigm), the Tiebout effects of antitrust competition are bound to be much smaller for most firms and smaller yet for consumers, which means that the states’ prospective gains from suppressing competition on that margin are also smaller.

Even so, the antitrust case illustrates the larger problem of federalism’s galloping cartelization. In response to the Reagan administration’s deregulatory antitrust initiatives, the demand for regulation migrated to the states. The great attraction of the cartel model is to explain why that downward shift should prompt almost spontaneous consensus and cooperation among notoriously ornery states: imperfectly monitored state agents will establish societies for the exploitation of each other’s citizens so long as no constitutional rules stand in the way and the central government fails to arrest the move. This scenario has played out whenever the federal government has deregulated or failed to regulate to the states’ satisfaction, in industries from airlines to brokerage firms to pharmaceutical producers.  

Time and again, the states—usually under the auspices of the NAAG—have accommodated increased demands for regulation by means of coordinated enforcement campaigns. Time and again, state unanimity is predicated on state officials’ agreement to inflict regulatory and tax costs on each other’s producers and consumers, who—due to the extraterritorial reach of state authority—have no exit and who usually will be none the wiser. Time and again, federal authorities have failed to intervene.

The most conspicuous example, and the template for all coordinated state enforcement campaigns since, is the 1998 agreement between the states and the major tobacco manufacturers.  That agreement is not a metaphorical cartel, or a state cartel in the sheep’s cloth-

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97 For a brief description of some of these initiatives, see, in addition to daily newspaper reports of another Eliot Spitzer–led multistate campaign, Michael S. Greve, Federalism’s Frontier, 7 Tex Rev L & Pol’ Pol 93, 100–04 (2002).
98 See Michael S. Greve, Compacts, Cartels, and Congressional Consent, 68 Mo L Rev 285, 286 (2003) (arguing that the tobacco settlement is “clearly unconstitutional without congressional consent”). See also notes 53–55 and accompanying text.
ing of policy coordination; it is the actual wolf. The MSA and implementing statutes created a uniform national tobacco excise tax, which would obviously be unconstitutional if a single state tried to levy it. The naked extraterritoriality of this scheme is masked only because the states all conspired to impose it. It enabled the signatories to capture upwards of an estimated $243 billion in monopoly profits, paid almost entirely by consumers and distributed to trial lawyers, states, and favored tobacco producers.

In defense of this nationwide scheme of monopolization, state attorneys general have at last asserted the immunity defenses that they have otherwise so strangely eschewed. That fact is ironic—and, like many others, highly consistent with a cartel story of state enforcement conduct.

99 See Ian Ayres, Using Tort Settlements to Cartelize, 34 Valp U L Rev 595, 602 (2000) (“It is clearly true that an explicit attempt by the Florida legislature to impose a $0.02 per pack national excise tax would be unconstitutional.”).

100 W. Kip Viscusi, Smoke-Filled Rooms: A Postmortem on the Tobacco Deal 4 (Chicago 2002).

101 For an unbiased, perceptive, and utterly sobering description of the agreement’s genesis, structure, financial impact, and history, see Martha Derthick, Up in Smoke: From Legislation to Litigation in Tobacco Politics (CQ 2d ed 2004).