Antitrust, Vol. 39, No. 2, Spring 2025.

State Antitrust Enforcement in the National Economy: Promoting More Democratic and Effective Outcomes Through State Reliance on Federal Law

BY ERIC J. STOCK

OVER THE PAST SEVERAL YEARS, there has been significant public discussion about potential reform of the United States antitrust laws, with many advocates of reform focused on curbing the perceived economic power of large technology companies. Some advocates of reform—perhaps losing confidence in the ability of reform to succeed at the federal level—have proposed actions by individual states as a means towards furthering their goals. State level efforts have included greater enforcement activity by state attorneys general ("state AGs"), as well as proposed state legislation that would create new, state-specific, antitrust legal standards that differ from federal law. These and other state level efforts justify a re-examination of the balance between federal and state antitrust enforcement, including whether state antitrust enforcement may be an appropriate means of achieving change at the national level. In this article, I argue that states seeking to promote antitrust reform on fundamentally national issues should do so by utilizing their antitrust enforcement tools under federal law, not state law.

An examination of the appropriate use of state-level enforcement tools to impact competition at the national level is highly relevant in the current economic, political, and legal environment. There is proposed antitrust legislation being considered in multiple states, including New York's proposed *Twenty-First Century Antitrust Act*, and the proceedings of the California Law Review Commission relating to California state antitrust laws.[1] In addition, state AGs have been highly active in pursuing antitrust litigation implicating national economic issues, including participating in recent antitrust litigation against Google, Meta, Amazon, and Apple.[2] There have also been recent antitrust lawsuits filed by state AGs challenging the proposed merger of the retail chains Kroger and Albertsons, including a challenge by the state AG of Colorado that was brought in Colorado state court, under state antitrust law.[3]

There has historically been disagreement among policymakers and other commentators on the value and proper role of state-level antitrust enforcement. While most antitrust law enforcement in the United States is undertaken by the federal antitrust agencies, state AGs enforce their own states' antitrust laws and also have authority to bring cases under federal antitrust law in federal court. Many commentators consider state antitrust enforcement as an important complement to federal enforcement, particularly in local markets, and at the national level during periods of perceived federal underenforcement.[4] Critics have characterized state antitrust enforcement as an unnecessary and inefficient duplication of federal enforcement, especially when states investigate mergers and acquisitions that are already subject to review by the federal antitrust agencies under the procedures of the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act").[5] The utility and legitimacy of state antitrust enforcement is most broadly accepted when a state is acting to protect competition within its own local market.

This article does not attempt to answer the question of precisely when state antitrust enforcement is valuable or should be pursued. Instead, it addresses a narrower but still very important question: If a state does seek to use antitrust enforcement to influence the national economy, how should it do so? The thesis of this article is that when states do seek to use the antitrust laws to influence fundamentally national economic issues, they should exercise their

Eric Stock is a partner at Gibson Dunn & Crutcher. He served as Chief of the Antitrust Bureau of the New York Attorney General's Office from 2013-2016.

enforcement discretion and bring such cases in federal court under the federal antitrust laws. States should not seek to promote state-specific legislation or state antitrust rules that differ from federal standards when their goal is to regulate fundamentally national business conduct taking place in the national economy.

State AGs have often had success in litigating antitrust issues under federal law—even novel ones—and achieving their desired outcomes with nationwide impact. When state AGs bring such cases under federal antitrust law, their claims are adjudicated by federal courts that regularly interpret the law and apply it to the national economy, and under legal authority developed through a national democratic process. In contrast, a state seeking to invoke novel state-specific antitrust legislation or legal interpretations in an effort to regulate the national economy is doing an end run around national democratic processes and replacing them with a single state's policy views. Absent consensus among states on the appropriate scope of antitrust reform (which does not exist today), that also risks creating an inefficient patchwork of potentially inconsistent antitrust rules across the states. Instead, states should utilize their well-established authority under federal law to influence the national economy, and, if they desire, engage in their role as "laboratories for democracy" by applying any preferred state-specific antitrust rules to business conduct and markets solely within their own borders.

States Have the Legal Authority to Address National Economic Issues By Bringing Antitrust Cases in Federal Court Under Federal Law

State AGs have several statutory and legal bases for commencing lawsuits under federal antitrust law. To begin with, when Congress passed the HSR Act, it included a provision that authorizes each state AG to bring parens patriae actions for damages on behalf of their states' citizens under federal antitrust law.[6] State AGs may bring these parens patriae actions when a state's consumers directly purchase a good or service subject to the alleged anticompetitive activity.[7] Indeed, from a plaintiff perspective, state AGs commencing these actions have significant litigation advantages over private class actions.[8] A state AG's action, for example, does not need to meet all the class certification requirements that a private class action must satisfy.[9] An example of a case brought under the states' parens patriae authority under the HSR Act is the *E-Books* litigation brought by numerous state AGs against Apple.[10]

The Supreme Court has also held that states may bring federal antitrust claims for injunctive relief in their quasi-sovereign capacity as a representative of the broader interests of their states.[11] Further, states have the authority under the Clayton Act to bring federal actions in their capacities as direct purchasers of goods or services from an antitrust defendant, just as a private plaintiff does.[12] State AGs regularly bring federal antitrust actions based on these authorities.

Accordingly, in the vast majority of cases, a state seeking to challenge the behavior of a national firm in the national marketplace is able to do so through its state AG office by commencing a federal antitrust lawsuit. And in practice, this is how state AGs typically do bring antitrust challenges to business conduct at the national level—by bringing federal antitrust claims in federal court, often (but not always) together with the federal antitrust agencies or as part of a multistate coalition of state AGs.[13]

Defining What Types of Cases or Conduct are Fundamentally "National"

This article recommends that when states pursue antitrust cases that are fundamentally national in scope, they do so by utilizing federal law.[14] In using the term "fundamentally national," this article seeks to distinguish those cases that raise truly national issues from those that do not. Some business conduct may be purely local in nature, such as the business of a local hospital or ski resort.[15] Other conduct by a business may occur across the country but fairly be characterized as local in each state where it takes place—for example, a seller of consumer goods that seeks exclusive arrangements at local retail outlets across the country, but manages that strategy separately in each geographic area. The term "fundamentally national" is not intended to cover conduct by a national business that can easily be adapted to local market conditions in each state. Instead, the concept of fundamentally national issues is intended to cover business conduct and decision-making by firms that occur exclusively or primarily on the national level, where varying such conduct across different states is impractical, and where a remedy prohibiting such conduct cannot readily or efficiently be limited to the local market or consumers of a specific state.

An illustration of a case that is *not* fundamentally national is New York's public investigation into Simon Property Group with respect to the Woodbury Common shopping center. New York clamed Simon had monopoly power in the market for retail space in outlet centers in the New York City area, and New York objected to Simon's leases with retailers that allegedly prevented those retailers from opening competing outlet stores within a sixty-mile radius of the shopping center.[16] Simon is a national, publicly listed company, with properties in thirty-seven states and abroad.[17] But an antitrust suit challenging conduct with respect to a local retail market is not fundamentally national. The Simon case was investigated and resolved by the New York AG utilizing a state procedural device (an Assurance of Discontinuance), and the state alleged violations of both state and federal antitrust laws.[18]

An example of a fundamentally national case is the states' case against the Sprint/T-Mobile merger. In their complaint, the initial ten plaintiff states (without the support of the federal antitrust agencies) alleged that the merger between T-Mobile and Sprint violated Section 7 of the Clayton Act and sought an injunction against the merger in its entirety.[19]

The claims pursued and remedy sought (blocking the merger) would necessarily affect the merging parties' businesses nationwide, including competition in those states that did not oppose the merger.[20] Applying the principles advocated by this article, this type of case—if brought by states—should be brought by them under federal law in a federal court—and that is, in fact, how the states pursued the challenge to the Sprint/T-Mobile Merger.[21] Where the remedy sought is a nationwide injunction, or the divestiture of a business operating nationally, it is most obvious that the enforcement action is a fundamentally national one.

Whether a case against a business is fundamentally national will depend on the facts and circumstances of each case. A case involving alleged monopolization of the U.S. market nationally will likely involve claims and proposed remedies that are national in scope. For example, in the monopolization case brought by DOJ and 11 states against Google related to general search, the DOJ and plaintiff states seek numerous nationwide remedies, including a prohibition on certain types of nationally applicable agreements between Google and other national market players, and the potential divestiture of Google's Chrome browser.[22] However, in other types of cases, business conduct might be more locally adaptable, and a state might be able to pursue a remedy that would apply only to sales or consumers in its own state. If it were simple and efficient for the defendant to implement such a single-state remedy, then the case might reasonably be considered not to be a fundamentally national one, but rather one where a single state could reasonably take action with respect to its own consumers while not forcing the defendant to change its conduct in other states.

The Advantages of States Bringing Fundamentally National Cases Under Federal, not State, Law

There are multiple reasons why it is beneficial to both federal and state antitrust policy (and the national economy) for states that seek to bring fundamentally national cases to bring such cases under federal law in federal court.

A. Ensuring the nationwide impact of state antitrust enforcement on national issues. First, by bringing cases raising national antitrust issues under federal law in federal court, states have the opportunity to win victories that are nationwide in their impact. Legal standards that arise out of federal court decisions on federal antitrust law, unlike state law, can have instant nationwide effects. In such cases, state AGs can win nationwide injunctions and can change the rules by which our national economy operates. Federal antitrust law is largely judge-made,[23] so persuading federal judges to adopt a novel theory of antitrust law can have great impact on national legal standards going forward, without the need for Congress to amend the antitrust laws. An example of such a case is *New York ex rel. Schneiderman v. Actavis PLC*, where the New York Attorney General challenged certain alleged "product hopping" conduct by a pharmaceutical company.[24] New York obtained a nationwide injunction, and the decision was unanimously affirmed by the Second Circuit Court of Appeals. The decision has become an important federal antitrust precedent.[25] Another example of a state antitrust case in federal court having a significant impact on federal antitrust jurisprudence is *Hartford Fire Insurance Co. v. California*, a case brought by several states, including the State of California, that addresses the jurisdictional reach of the U.S. antitrust laws.[26]

State enforcers seeking to influence the national economy benefit by having their perspective on the antitrust laws heard in federal court as part of a broader dialogue that includes the federal enforcers and private litigants. States may bring a different perspective from the federal agencies (and private plaintiffs) to their antitrust cases providing the opportunity to spark judicial debate on antitrust orthodoxy.[27]

State AG cases bringing antitrust cases under federal law can also serve the goal of preventing what some states may perceive as under-enforcement of federal law by the federal agencies.[28] And for those states concerned about federal *over*-enforcement, state AGs also have the opportunity to serve as a voice of skepticism against antitrust claims by the federal agencies that these states perceive as unreasonable (such states may file amicus briefs or bring their own claims that are narrower in scope).[29] That state AGs have a voice in the development of *federal* antitrust law can arguably reduce the possibility that federal antitrust enforcement rises and falls solely—or excessively—with the tides of politics in Washington, D.C. And given that private litigants and class action lawyers already have the ability to bring federal antitrust cases and influence the development of federal antitrust law, it is hard to see why those private parties should have more of an opportunity to shape this crucial federal antitrust jurisprudence than the elected attorney general of a U.S. state.

B. Avoiding Anti-Democratic Outcomes. Second, when states bring national cases under federal law, it avoids the unfairness of applying one state's laws—reflecting the democratic will of that particular state—to an issue that affects all (or many) states. One of the main critiques of antitrust federalism is the potential for a "one-state dominator problem"[30] where the economic infeasibility of following a patchwork of regulations forces firms to follow nationally the law of the strictest state. This critique reflects the very real possibility that a state could make enforcement decisions that promote its own policy goals (or its own consumers' interests) but that are in conflict with other states' policies (or the interests of those states' consumers).[31] This critique is in part an appeal to fairness: Why should one state control the other forty-nine? In part, it is also an observation of optimal regulatory efficiency: Is one state—be it a state legislature or a state AG—with its state-specific interests, really in the

best position to regulate national commerce when there is a federal government built for that purpose? Both fairness and efficiency are important elements of legitimacy.[32]

The prudential principle advocated in this article—that states limit their antitrust enforcement efforts on fundamentally national issues to bringing cases under federal law—answers both the fairness and the efficiency prongs of the above critique. It also leans into one of the most common justifications for a state-antitrust role—state enforcement as a counterweight to a perceived under-enforcing federal executive.[33] Like states, federal antitrust enforcers must deal with limited budgets; some states believe they can help fill the enforcement gap. By choosing to litigate fundamentally national cases in federal court, states can address any enforcement gap while minimizing the risk that they are replacing national concerns and policies with their own state-based ones.[34] And in the current political atmosphere, it can be argued that state enforcement of federal law may also serve as a check against any perceived bias or favoritism of specific firms or industries by the federal executive.[35]

C. Enhancing the Legitimacy of State Antitrust Enforcement on the National Scene. Refraining from inserting unique state-specific antitrust laws or rules into national cases is also likely to increase states' legitimacy as antitrust enforcers in the eyes of courts with respect to national competition issues. Doing so helps avoid some (albeit not all) of the most common critiques of states' role in antitrust enforcement, and it allows states to benefit from the federal judiciary's legitimacy as a proper promulgator of rules for the national economy.

State AGs, for example, have been accused of being more susceptible to political interests as compared to their federal counterparts, among other reasons, because state AG offices are typically led by a directly elected Attorney General. Some critics have expressed the view that state AGs are "more likely to be influenced by individual lobbying businesses within their states."[36] A state bringing a national antitrust case might be accused of favoring parochial interests (such as the interests of competitors in that state) above the national interest.[37] Seeking to pursue a novel national antitrust case in a local state court could very well exacerbate such concerns, and even a victory by the state AG in its own local state court (before a state judge who may be directly elected by a local constituency) might have its legitimacy questioned if it seeks to address issues of national import.

A state AG pursuing that same novel antitrust claim in federal court under federal law would gain the benefit of the legitimacy of the rulings by the federal judiciary. If a state AG can present its facts and legal theory to a federal court—and win—then the national economic changes wrought by that state's successful lawsuit will have the imprimatur of a federal court, be appealable to the U.S. Supreme Court, and leave detractors with little room to argue against the legitimacy of the outcome in shaping rules for the national economy.

D. Facilitating Interstate Commerce and Reducing the Compliance Costs of National Businesses by Avoiding Inconsistent Rules Across States. Bringing fundamentally national cases under federal law also avoids the risk of inconsistent rules applying across different states.[38] A patchwork of different antitrust rules for competing in national markets could make it difficult for national firms to operate their businesses. And even if they could, their compliance costs could be excessive. This outcome could result in reduced innovation, higher prices, and other forms of inefficiency. Consumers would be worse off.

Refraining from bringing antitrust lawsuits under state law to address fundamentally national economic questions is even more important where liability theories are novel—as is likely to be the case in state efforts to promote antitrust law reform.[39] Where federal and state law are similar, using state law is less likely to have a strong impact on outcomes. The same is not the case where issues of first impression are involved. Antitrust law is arguably particularly open to novel liability theories because of the evolution of markets and economic thinking. A novel case brought under federal law can create new but consistent law for the nation. But by bringing a novel antitrust case with national import under state law (and in a state court), a state AG risks undermining uniformity, and instead creating a patchwork of potentially contradictory legal standards. As noted, this result may significantly increase the costs of the businesses that must navigate them, be a drag on economic activity, and harm consumers.[40]

These Principles Are Also Consistent with—and In Many Cases May Be Required by—Dormant Commerce Clause Jurisprudence

States following the principles set forth in this article will also avoid being bogged down in delegitimizing dormant commerce clause challenges. As with any state regulation, state antitrust law must pass constitutional muster, including the principles of the dormant commerce clause. The Supreme Court has interpreted the Commerce Clause's affirmative grant of regulatory power to Congress to impose an implicit limit on state regulation.[41] Under these dormant commerce clause principles, states cannot, among other things, facially discriminate against interstate commerce in favor of intrastate commerce,[42] regulate entirely extraterritorial conduct,[43] or otherwise place an undue burden on interstate commerce.[44]

Should a state go forward with novel state-law specific antitrust legislation or lawsuits seeking to address fundamentally national competitive issues, it will face a serious dormant commerce clause problem. As an example, consider a hypothetical suit against a nationally dominant firm accused of operating a national business anticompetitively under a state law that applies stricter standards than federal

antitrust law. Under the dormant commerce clause, state laws that "regulate[] even-handedly to effectuate a legitimate local public interest" will not be upheld if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[45] In undertaking this balancing, a court must consider local benefits and burdens on interstate commerce, determine if the burden is "'clearly excessive in relation to' the local benefits," and ask whether there is a less burdensome alternative to achieve the same local benefits.[46] As such, the test for constitutionality involves a court taking on a complex and "thorough examination" of what the court perceives to be the benefits, burdens, and alternatives associated with a state law.[47]

Efforts to utilize state antitrust legislation or unique state law interpretations of antitrust principles to influence fundamentally national issues in the national economy may well be struck down or limited greatly under these dormant commerce clause principles—as occurred recently with respect to a California state law seeking to regulate pharmaceutical patent settlements under antitrust principles.[48]

But state AGs pursuing claims—even novel claims—under federal law will avoid entirely implicating these dormant commerce clause principles and, as noted, can expect a "win" in their case to have a national impact—and with the legitimacy of a federal court interpreting laws enacted with the input of all states.

These Principles Also Preserve the States as "Laboratories" For Other States to Emulate (or Not)

Limiting the pursuit of novel antitrust standards or theories under state-specific laws only to cases involving local competition also creates a better environment for effective state experimentation, if a state wishes to experiment. A classic rationale for federalism is, as Justice Brandeis stated, that a state can act as "laboratory" of democracy in its specific jurisdiction.[49] The theory is that through state experimentation in regulation, we can observe and evaluate the outcome and determine the superior regulatory result. Some may argue that antitrust, with its clashes between Chicago School, Post-Chicago, and Neo-Brandeisian theorists, could benefit from this system of experimentation. With its data-driven results, antitrust law may be a proper subject for empirical analysis.[50] There is, indeed, a field of comparative competition law, studying the different approaches to antitrust law across national borders.[51] Scholars have discussed using data from differing jurisdictions to attempt to answer questions regarding the empirical effect of different antitrust standards on competitive outcomes.[52]

If a state believes that federal antitrust law is getting the enforcement balance wrong, then one answer to that critique would be for that state to prove it. A state could attempt to show, through application of its preferred antitrust standards only to businesses and markets in its own local economy, that its proposed legal framework promotes better competitive outcomes, job increases, improvements in consumer welfare, or other policy goals.[53] With their ability to create and enforce state antitrust laws within their own borders, states can both guard against anticompetitive tactics at home and further experiment in order to develop and demonstrate effective competition policy.

A state that follows the principle of applying any unique state-specific antitrust laws only to its own economy is in the best position to act as a laboratory of democracy. A problem with using unique or state-specific laws to regulate nationwide conduct is that experimentation only works when we can isolate and measure the effects of a policy. If a state imposes its interpretation of antitrust law on the rest of the nation, it will be less feasible to isolate the effects of the change in antitrust law and compare the resulting performance to how other antitrust law regimes performed under analogous circumstances. But if a state enforces its proposed novel approach to antitrust within its own state, experts can look at the effect that approach had on that state's economy and more easily compare it to the results experienced in other states during the same time period and thus under presumably similar technological and macroeconomic circumstances. Indeed, Justice Brandeis specifically envisioned that a state acting as a "laboratory" of democracy could "try novel social and economic experiments without risk to the rest of the country."[54]

Conclusion

States seeking to influence the national economy on fundamentally national issues should do so by invoking federal, not state, antitrust law. States may do so through their state AG offices, which have significant authority to commence lawsuits under the federal antitrust laws. Following this recommendation allows states to be more effective in enforcement, preserves more democratic outcomes, avoids the creation of a patchwork of conflicting rules, and enhances the legitimacy of state antitrust enforcement on the national scene. It also preserves states' ability to pursue their policy goals by acting under state law in their local markets as legitimate laboratories of democracy.

Adopting these principles would not require any legislation, but only a choice by states and state AGs to self-regulate in a strategic way by following these principles. State AGs doing so will promote better antitrust enforcement, and better economic outcomes, for each of their states as well as the nation as a whole.[55] ■

[1] The sponsors of the *21st Century Antitrust Act* expressly state that it is intended to adopt novel antitrust rules to govern the conduct of national technology companies. *See, e.g.,* Michael Gianaris, *New Study Shows Monopolies Are Top Concern Of Small Business; Senate Deputy Leader Gianaris Urges More Support For His 21st Century Antitrust Act* (March 31, 2022), www.nysenate.gov/newsroom/press-releases/2022/michael-gianaris/new-study-shows-monopolies-are-top-concern-small. In 2022, the California Legislature authorized the California Law Review Commission ("CLRC")

to study, among other things, whether California law should be "revised in the context of technology companies so that analysis of antitrust injury in that setting reflects competitive benefits such as innovation and permitting the personal freedom of individuals to start their own businesses and not solely whether such monopolies act to raise prices." 2022 Cal. Stat. res. ch. 147.

[2] *See, e.g.,* United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. 2023) (joined by 18 states); United States v. Google LLC, No. 20-cv-03010 (APM), 2024 WL 3647498 (D.D.C. Aug. 5, 2024) (joined by 38 states); FTC v. Meta Platforms, Inc., No. 1:20-cv-03590 (D.D.C. 2020) (joined by 46 states); FTC v. Amazon.com, Inc., No. 2:23-cv-01495, (W.D. Wash. 2023) (joined by 17 states); United States v. Apple Inc., No. 2:24-cv-04055 (D.N.J. 2024) (joined by 16 states).

[3] *See* Complaint at 33-34, Colorado v. The Kroger Co., No. 24-cv-30459 (Denver Dist. Ct. 2024); Findings of Fact and Conclusions of Law, Washington v. The Kroger Co., No. 24-2-000977-9 (King Cty. Sup. Ct. Dec. 10, 2024); Opinion & Order, FTC v. The Kroger Co., No. 3:24-cv-000347 (D. Or. Dec. 10, 2024) (joined by nine states).

[4] *See*, e,g., Harry First, *Delivering Remedies: The Role of States*, 69 Geo. Wash. L. Rev. 1004, 1025 (2001); Lloyd Constantine, *The States' Role in Challenging National Mergers Is Vital*, Antitrust, Spring 1989 at 37–38.

[5] See, e.g., Robert Bell, *States Should Stay Out of National Mergers*, 3 Antitrust 37, 39 (1989); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. Sch. L. Rev. 1047, 1047 (1990).

[6] 15 U.S.C. §§ 15c–15h.

[7] *See* 15 U.S.C. § 15c (a)(1) (authorizing state attorney generals to bring parens patriae actions on behalf of injured state citizens*); Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977) (holding that only direct purchasers are parties "injured in his business or property" within the meaning of the Clayton Act).

[8] *See, e.g.,* Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 Fordham L. Rev. 361, 386–91 (1999).

[9] *See, e.g.,* Com. of Pa. v. Budget Fuel Co., Inc., 112 F.R.D. 184, 185 (E.D. Pa. 1988) ("The superiority of the parens patriae action over the class action is evidence by the lack of any provision of requirement for court approval or certification of a parens patriae action.") (comparing 15 U.S.C. § 15c and Fed. R. Civ. P. Rule 23(c)(2)). In addition, under the State Antitrust Enforcement Venue Act, a state AG's action need not be consolidated in multidistrict litigation, thus giving the states another advantage over private litigation. *See* 28 U.S.C.A. § 1407(g) (carving out "any action in which . . . a State is a complainant arising under the antitrust laws" from being eligible for consolidation in multidistrict litigation).

[10] *See In re* Elec. Books Antitrust Litig*.,* 14 F. Supp. 3d 525, 531 (S.D.N.Y. 2014).

[11] State of Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945); California v. American Stores Co., 495 U.S. 271 (1990); *See also* First, supra note 4, 69 Geo. Wash. L. Rev. at 1025 (2001).

[12] *See, e.g.,* State of Ga. v. Pennsylvania R. Co., 324 U.S. 439, 447 (1945) (holding that State of Georgia is a "person" within the meaning of the Clayton Act when it sues for its own injuries).

[13] *See, e.g.*, *In re* Elec. Books Antitrust Litig., supra note 10, at 525 (33 states brought a federal antitrust action with United States against Apple).

[14] *Cf.* Antitrust Modernization Comm'n, *Report and Recommendations*, at 185-87 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf (recommending that the states continue to be empowered to bring actions under federal antitrust law).

[15] Of course, even these two examples may be competing in national markets as well as local markets (e.g., a quaternary hospital).

[16] *See* 2017 Press Releases, Nat'l Ass'n Of Att'y Gen., A.G. Schneiderman Announces Settlement with Nation's Largest Mall Operator to Stop Anticompetitive Tactics at Woodbury Common Outlet Center (Aug. 21, 2017), https://www.naag.org/wp-content/uploads/2020/11/08-22-2017-Schneiderman-Mall-Settlement.pdf.

[17] *See* Simon Prop. Grp., Inc., Quarterly Report (Form 10-Q) at 11 (Oct. 30, 2017).

[18] *See* In the Matter of Investigation by Eric T. Schneiderman, Attorney General of the State of New York, of Simon Property Group, Inc., Assurance of Discontinuance at 1 (assurance of discontinuance was issued) and 4 (alleging that both New York state laws and the Sherman Act were violated) (Aug. 21, 2017), https://ag.ny.gov/sites/default/files/executed_aod_8.21.17.pdf.

[19] *See* Complaint, New York v. Deutsche Telekom AG, No. 19-cv-5434 (S.D.N.Y.).

[20] *Deutsche Telekom AG*, 439 F. Supp 3d 179.

[21] *Id.*

[22] *See* Plaintiff's Initial Proposed Final Judgment at 9, 19-22, United States v. Google LLC, No. 20-CV-3010 (APM) (D.D.C. Aug. 5, 2024).

[23] *See , e.g.,* Note, *Antitrust Federalism, Preemption, and Judge-Made Law*, 133 Harv. L. Rev. 2557, 2569 (2020).

[24] 787 F.3d 638 (2d Cir. 2015).

[25] *See* John R. Thomas, Cong. Rsch. Serv., R44222, Pharmaceutical Patent-Antitrust: Reverse Payment Settlements and Product Hopping 12-14 (2015).

[26] 509 U.S. 764 (1993).

[27] *See, e.g.*, Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement Is a Model for Effective Economic Regulation*, 30 Nw. J. Int'l L. & Bus. 285, 333 (2010).

[28] *See id.* at 336; First, *supra* note 4, at 1036 ("In response to the widely perceived withdrawal by the Reagan *Administration* in certain key areas (mergers and vertical restraints), the states stepped in to supply the government enforcement effort.").

[29] For an example of a state AG antitrust amicus brief in a federal antitrust case, *see* Brief for Nevada et al. as Amici Curiae Supporting Plaintiff-Appellant, Regeneron Pharms., Inc. v. Novartis Pharma AG, 96 F.4th 327 (2d Cir. 2024) (No. 22-0427) (expressing no view on the claims before the Second Circuit but arguing for reversal of the district court decision based on a different understanding of basic antitrust principles).

[30] Note, *supra* note 23, at 2562; Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 Geo. J.L. & Pub. Pol'Y 5, 11 (2004); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. Sch. L. Rev. 1047, 1047 (1990).

[31] *See* Note, *supra* note 23, at 2562.

[32] *See* Tom R. Tyler & Justin Sevier, *How Do The Courts Create Popular Legitimacy?: The Role of Establishing the Truth, Punishing Justly, and/or Acting Through Just Procedures*, 77 Alb. L. Rev. 1095,1100-03 (2014); Max Minzner, *Should Agencies Enforce?*, 99 Minn. L. Rev. 2113, 2157-58 (2015).

[33] *See, e.g.*, Am. Antitrust Inst., *The State of Antitrust Enforcement and Competition Policy in the U.S.* 34(2020), https://www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL2.pdf.

[34] *See id.*; Lande, *supra* note 29, at 1047; First, *supra* note 4, at 1035.

[35] *See, e.g.*, Tim Wu, Opinion, *With One Move, New York Cuts Sprint and T-Mobile Down to Size*, N.Y. Times (June 12, 2019), https://www.nytimes.com/2019/06/12/opinion/sprint-tmobile.html.

[36] Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 573, 685–86 (2003) (citing critiques heard by high level DOJ Antitrust official).

[37] Lande, *supra* note 29, at 1065. Judge Richard Posner also questioned the states' competency in antitrust enforcement due to, among other things, their more limited resources and experience in antitrust cases. He stated in *Antitrust In The New Economy* that "[s]tates do not have the resources to do more than free ride on federal antitrust litigation." Richard A. Posner, *Antitrust in the New Economy*, 68 Antit. L.J. 925, 940-41 (2001); Posner, *supra* note 29, at 9. *But see generally* First, *supra* note 4.

[38] *See, e.g.,* Jeffrey A. Eisenach & Robert Kulick, *Do State Reviews of Communications Mergers Serve the Public Interest?*, 71 Fed. Commc'ns L.J. 125, 134–35 (2019).

[39] *See* Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 ANTIT. L.J. 29, 35 (2000).

[40] In national cases, it would not necessarily be a violation of the principles of this article for state AGs to bring supplemental state law claims in a federal case solely to add additional state law financial remedies, so long as the state is not advancing interpretations of state law that are inconsistent with the proposed interpretation of federal law. A state AG challenging nationwide business conduct under federal law might, for example, bring an accompanying state law claim, not for purpose of pursuing a different theory of liability, but to seek disgorgement of the defendant's profits under state law where federal law does not provide such a remedy. *See, e.g.,* Federal Trade Commission v. Skreli, Case No. 22-728 (2d Cir. Jan. 24, 2024)

[41] *See* South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2089 (2018).

[42] *See* Maine v. Taylor, 106 S. Ct. 2440, 2447 (1986); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 117 S. Ct. 1590, 1598 (1997).

[43] *See* Edgar v. MITE Corp., 102 S. Ct. 2629, 2640–41 (1982).

[44] *See* Pike v. Bruce Church, Inc., 90 S. Ct. 844, 847 (1970); *see also* Nat'l Pork Producers Council v. Ross, 143 S. Ct. 1142, 1153, 1158 (2023) (leaving the "'courtroom door open' to challenges premised on 'even nondiscriminatory burdens'" despite recognizing that "antidiscrimination principle lies at the 'very core' of [the] dormant Commerce Clause jurisprudence").

[45] *Pike*, 90 S. Ct. at 847.

[46] Blue Circle Cement, Inc. v. Bd. of Cnty. Comm'rs of Rogers, 27 F.3d 1499, 1512 (10th Cir. 1994) (citation omitted); *see also Taylor*, 106 S. Ct. at 2452 (observing that a state law "serves legitimate local purposes that could not adequately be served by available nondiscriminatory alternatives" in a dormant commerce clause analysis).

[47] F. Italia Patti, *Judicial Deference and Political Power in Fourteenth Amendment and Dormant Commerce Clause Cases*, 55 SAN DIEGO L. REV. 221, 230–32 (2019); *see also* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 984 (1987) (describing judicial balancing "as replicating the legislative task").

[48] *See* Ass'n for Accessible Meds. v. Bonta, 2022 WL 463313, at *2–8 (E.D. Cal. Feb. 15, 2022) (limiting California law creating a presumption that certain pharmaceutical patent settlements were anticompetitive to agreements negotiated, completed, or entered into within California's borders); *see also* Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664 (4th Cir. 2018) (finding Maryland statute unconstitutional).

[49] *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[50] *See* Keith N. Hylton & Fei Deng, *Antitrust Around the World: An Empirical Analysis of the Scope of Competition Laws and Their Effects*, 74 ANTITRUST L.J. 271, 271 (2007) ("Since the early studies of Arnold Harberger, George Stigler, and Richard Posner, there has been a growing movement calling for the use of empirical evidence to judge the effectiveness of antitrust law in securing its goals." (footnotes omitted)).

[51] *See* Anu Bradford et al., *Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets*, 16 J. EMPIRICAL LEGAL STUD. 411, 412-13 (2019).

[52] *See, e.g.*, Hylton & Deng, *supra* note 49, at 273–74.

[53] *See* Burns, supra Note 38, 68 ANTIT. L.J. at 44.

[54] *Liebmann*, 285 U.S. at 311 (Brandeis, J., Dissenting).

[55] For a more thorough discussion of the benefits of executive branch self-regulation, see Elizabeth Magill, Foreword, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009).