FEDERALISM IN ANTITRUST

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Several scholars have suggested that states should play a much more limited role in antitrust enforcement, especially in matters that are national or global in scope. In this paper, we analyze the states' part in the *Microsoft* case—a case that illustrates the costs of state intervention in antitrust matters that extend beyond state borders. Here, the states' involvement lengthened the lawsuit, complicated the settlement process, and increased both legal uncertainty and litigation costs. These results followed from the states' focus on parochial interests rather than broader concerns for efficiency and equity. We conclude that a state's antitrust enforcement authority should be restricted in matters that extend beyond its borders.

After analyzing the motivations for state behavior in federal antitrust, we consider whether restrictions should apply to federal antitrust authorities in cases with international implications. Though a global competition authority could, in principle, be designed to maximize economic well-being, practical and political obstacles appear to rule this option out, at least in the short term.

I. INTRODUCTION

Antitrust regulation is an important government tool for curbing excesses in a market economy.[1] These excesses can result from a variety of behaviors, such as illegal acts to maintain a monopoly or collusion with the goal of raising prices.[2] In reducing the incentive for firms to engage in certain types of anticompetitive behavior, antitrust regulation is intended to promote consumer welfare.[3] Remedies used

1. *See generally* DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION ch. 19 (3d ed. 2000); RICHARD POSNER, ANTITRUST LAW pt.1 (2d ed. 2001).

2. CARLTON & PERLOFF, *supra* note 1, at 616-17.

3. Within the U.S., most analysis proceeds from the assumption that consumer welfare is the appropriate yardstick by which to measure competitive effects. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51 (1993) ("The only legitimate goal of American antitrust law is the maximization of consumer welfare."); Robert E. Litan & Carl Shapiro, *Antitrust Policy During the Clinton Administration*, *in* AMERICAN ECONOMIC POLICY IN THE 1990S 435 (Jeffery Frankel & Peter Orzag eds., 2002) ("For at least 20 years a broad, bipartisan consensus has prevailed regarding the goal of U.S. antitrust policy: to foster competitive markets and to control monopoly power, not to protect smaller firms from tough competition by larger corporations. The interests of consumers in lower prices and improved products are paramount."). Other scholars would broaden consumer welfare to "social welfare," which includes producer surplus as well as consumer surplus. "Consumer surplus" is an economic term of art indicating the difference between what value a consumer holds for a good or service and what that consumer must actually pay to obtain the good or service. A similar definition holds for producer surplus: it is the difference between what a producer would sell a good or service for and what it is

in antitrust regulation range from breaking up a company to imposing financial penalties on a firm for inappropriate conduct.[4]

The United States was one of the first countries to enact antitrust laws and has traditionally been one of the most active enforcers of them.[5] The U.S. government is the primary enforcer.[6] But the individual states have enacted their own antitrust laws and, at various times, have been quite active in their enforcement.[7]

In recent years, more states within the United States, as well as many countries, have taken an active role in antitrust policy.[8] With a larger number of players in the antitrust regulation arena, there are likely to be increased conflicts as different nations and states pursue different policies. The problem is exacerbated as commerce becomes increasingly global. This paper focuses on the appropriate role of the states and the federal government in antitrust regulation, but also examines the related issue of whether a global authority is needed to promote consumer welfare.[9, 10]

Several scholars, including U.S. Circuit Court of Appeals Judge

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actually able to sell that good or service for. *See* N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS, 135, 140 (1998). *See* CARLTON & PERLOFF, *supra* note 1, at 604 ("Most economists believe the antitrust laws *should* have the very simple goal of promoting efficiency. That is, they should prevent practices or amalgamations of firms that would harm society through the exercise of market power."); POSNER, *supra* note 1, at 23 ("[T]he courts and the scholars alike are now pretty uniformly committed to the economic approach.").

4. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 653 (2d ed. 2002).

5. Canada became the first country to enact competition laws when it enacted "the Act for the Prevention and Suppression of Combinations in Restraint of Trade" in 1889, one year before the United States enacted the Sherman Act. MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER: A GUIDE TO THE OPERATION OF UNITED STATES, EUROPEAN UNION, AND OTHER KEY COMPETITION LAWS IN THE GLOBAL ECONOMY 3 (2d ed. 2001).

6. In addition to federal and state antitrust agencies, private parties play a role in U.S. enforcement as well. *See generally* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000).

7. *See* Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047 (1990).

8. Aside from the United States, the European Commission is probably the most active enforcer of antitrust laws, but as many as 90 countries have enacted competition laws. *See* U.S. DEP'T OF JUSTICE, INT'L COMPETITION POLICY ADVISORY COMMITTEE TO THE ATT'Y GEN. AND ASSISTANT ATTY GEN. FOR ANTITRUST: FINAL REPORT ch. 2 (Feb. 2000).

9. We focus here on whether a state should have a role in antitrust cases that extends beyond its borders or beyond what the federal government chooses to pursue.

10. Other justifications for antitrust laws, such as protecting national interests or certain groups such as small businesses, have been suggested in the past. As noted above, in the U.S. and the European Union (EU), at least, there is a consensus that the primary objective of antitrust laws should be promoting consumer welfare. *See supra* note 3; CARLTON & PERLOFF, *supra* note 1, at 617.

Richard Posner, have suggested that the states should not be in the business of antitrust regulation.[11] Posner suggests that states do not have adequate resources to perform the task and are excessively influenced by a defendant's competitors.[12] Specifically, he argues that state involvement does nothing but "lengthen the original lawsuit, complicate settlement, magnify and protract the uncertainty engendered by the litigation, and increase litigation costs."[13]

To mitigate the problems of rent seeking and free riding,[14] several commentators have proposed limits on the states' role in antitrust enforcement. Posner argues that states should not be allowed to file antitrust charges except in situations in which a private firm would be able to file a suit.[15] Robert Bell argues that a state should only play a role in antitrust matters confined to its own borders.[16] And Robert Lande proposes that states agree to refrain from challenging "specified exceptionally large, truly national transactions, and transactions that primarily do not affect that state."[17] While these authors disagree on the extent of state involvement in antitrust

11. Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-41 (2001); Robert B. Bell, *States Should Stay Out of National Mergers*, 3 ANTITRUST 37, 39 (Spring 1989). *See also* the discussion in Lande, *supra* note 7.

12. Posner, *supra* note 11, at 940-41. In addition to being more prone to local influence, the states have little to contribute to prosecution of the case. As Lande states, "[a] state assistant attorney general, who might in his or her career have seriously examined the competitive effects of only a handful of mergers, is more likely to make mistakes during his or her occasional forays into merger enforcement no matter how intelligent, diligent, and public-spirited the effort." *See* Lande, *supra* note 7, at 1064.

13. Posner, *supra* note 11, at 940.

14. Rent seeking is the redistribution of existing resources through non-market activity, such as lobbying. Anne Krueger coined the term "rent seeking" in *The Political Economy of the Rent Seeking Society*, 64 AM. ECON. REV. 291 (1974). *See also* DENNIS C. MUELLER, PUBLIC CHOICE II 229-46 (1989); MANCUR OLSON JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 141-48 (1971). Free riding occurs when one entity is able to benefit from the efforts of another without paying. For example, if Smith plants a flowerbed, and Jones enjoys the view without paying, Jones is said to be free riding. Free riding typically arises in the context of public goods whose consumption is not easily excluded. For a classic treatment, see Paul Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

15. Posner proposes to strip states of their power to bring parens patriae suits on behalf of consumers. They would still be allowed to sue, as a private company would, in instances in which state agencies directly suffered antitrust injury. Posner, *supra* note 11, at 940.

16. *See* Bell, *supra* note 11, at 39.

17. Lande, *supra* note 7, at 1072-73. Lande argues that this kind of compromise would require a voluntary agreement on the part of the states. *Id.* As Herbert Hovenkamp notes, states do have a right to apply state antitrust laws to situations involving interstate commerce "[s]ince the Supreme Court has held in a long line of cases that preemption is not to be presumed or inferred, and because Congress clearly intended that state antitrust law *not* be preempted as a general matter. . . ." Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L. J. 375, 389-90 (1983).

matters, they are in accord that the states have little to add to cases with a national scope.[18] Moreover, the states have the potential to cause great harm. We argue in this paper that the states did just that in the *Microsoft* trial.

The issue of state involvement in national antitrust enforcement reemerged in *United States v. Microsoft Corporation.*[19] Nine states and the District of Columbia rejected a settlement proposed by the U.S. Department of Justice (DOJ), nine other states and Microsoft.[20] Led by California, the District of Columbia along with Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, and West Virginia chose to pursue litigation against Microsoft.[21]

In response, Microsoft filed a motion to dismiss the non-settling states' demand for additional conduct remedies, arguing that the states did not have legal standing to seek a remedy separate from that accepted by the federal government.[22] The plaintiffs, joined by twenty-five other states (including many of those states that accepted the settlement), argued that existing case law did provide standing for separate state action.[23] The DOJ agreed with the states, but noted that Microsoft had raised valid policy issues. Although D.C. District Court Judge Kollar-Kotelly[24] denied Microsoft's motion, she seemed to agree with the DOJ that the problems Microsoft discussed in its brief were worth addressing at a later date.

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18. Indeed, because of their limited experience with any antitrust matters, state attorneys general are more likely to make mistakes at the state level as well. *See* the discussion of state resources and expertise in Lande, *supra* note 7, at 1064. *See also* Bell, *supra* note 11, at 37, 39.

19. *See* Plaintiff Litigating States' First Amended Proposed Remedy, New York v. Microsoft, (D.D.C. 2002) (No. 98-1233). A procedural history of the Microsoft Antitrust Litigation can be found in *United States v. Microsoft*, 231 F. Supp. 2d 144, 150-51 (D.D.C. 2002).

20. The nine settling states are New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin. *Microsoft*, 231 F. Supp. 2d at n.1.

21. Plaintiff Litigating States' at 1, *New York* (No. 98-1233).

22. Defendant Microsoft Corporation's Motion for Dismissal of the Non-Settling States' Demands for Equitable Relief, New York v. Microsoft, (D.D.C 2002) (No. 98-1233).

23. *See* Plaintiff Litigating States' Response to Microsoft's Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief, New York v. Microsoft, (D.D.C. 2002) (98-1233).

24. Judge Colleen Kollar-Kotelly is the federal district court judge assigned to the case on remand after the Court of Appeals decision. She replaced federal district court Judge Thomas Penfield Jackson, who was disqualified retroactively to the date he ordered the breakup of Microsoft. *See* United States v. Microsoft Corp., 253 F.3d 34, 116-117 (D.C. Cir. 2001) ("We therefore will vacate that order in its entirety and remand this case to a different District Judge, but will not set aside the existing Findings of Fact or Conclusions of Law (except insofar as specific findings are clearly erroneous or legal conclusions are incorrect).").

In this paper, we analyze the litigating states' proposed antitrust remedy, highlighting why the states should be preempted by federal antitrust actions when a case is national in scope.[25] This case provides an excellent example of the problems that arise when states file follow-on suits in federal antitrust proceedings. After reaching an agreement with the DOJ and several states, Microsoft still faced a series of accusers, each with the potential to sabotage the settlement. Further, as we show, the non-settling states' proposed remedy exemplifies the kind of rent seeking likely to take place when state attorneys general (AGs) enter the antitrust arena in federal cases.[26] The Microsoft case thus offers an ideal opportunity to analyze the issues of federalism in antitrust regulation.

One problem with state enforcement is that state officials do not face appropriate incentives to represent U.S. consumer interests in an antitrust case that could have national, or even international, ramifications.[27] State AGs typically face pressure from well-organized coalitions of in-state businesses and consumer groups arguing for the prosecution of an out-of-state company. Indeed, one would expect that these interest groups would attempt to impose costs on firms or individuals situated outside of their own state's borders.[28] And that is exactly what happened in the *Microsoft* case.

A second issue relates to lack of expertise and resources. While state involvement can add to the length of a trial, make a settlement more difficult, and generally increase the costs and uncertainty of a trial, this involvement is not likely to benefit consumers. In the

25. We focus on the economic reasons for limiting state authority in national antitrust cases and do not analyze the case law on this matter. "National" refers to any case that impacts consumers beyond a state's immediate borders or nearby region. Some scholars, Posner included, would have states excluded from almost all antitrust enforcement. *See* Posner, *supra* note 11, at 940-41. As we discuss later in the paper, we do not go this far, arguing instead that a state should be preempted by federal action and limited in cases that extend beyond its borders.

26. The problem of rent seeking does not arise only in the United States. Political issues emerge in antitrust cases across national boundaries as well. For example, the Boeing-McDonnell Douglas merger cleared U.S. review rather quickly, but received intense political scrutiny in Europe, where Airbus is headquartered. In the end, the European Commission cleared the merger, but required the firms to change several business practices. *See* Eleanor M. Fox, *Lessons from Boeing: A Modest Proposal to Keep Politics Out of Antitrust*, ANTITRUST REP., Nov.-Dec. 1997, at 19.

27. Section IV addresses some of the problems with national or trans-national antitrust agencies addressing markets that are truly international or global in scope. For a general analysis, *See* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? (Simon J. Evenett et al. eds., 2000). *See also* David S. Evans, *The New Trustbusters, Brussels and Washington May Part Ways*, 81 FOREIGN AFF. 14 (2002).

28. For an empirical analysis of geography-influenced antitrust enforcement, see Roger L. Faith et al., *Antitrust Pork Barrel*, 25 J. L. & ECON. 329 (1982).

Microsoft case, the states derailed early settlement talks[29] and clouded the settlement finally reached by the DOJ. Moreover, the states offered little in the way of new arguments or data related to anticompetitive practices. In fact, the states only became major players in the remedies phase of the trial.

The proposed remedy put forth by the litigating states illustrates "the tendency of antitrust litigation to create multiple lawsuits out of a single dispute."[30] The states did not have the resources to contribute meaningfully to the prosecution during the *Microsoft* trial. Instead, these states had parochial interests in mind rather than some general concern with national economic well-being.

Parallel arguments apply to the role of national interests in antitrust cases that involve international markets or consumers outside the United States. While the issues of available resources and antitrust expertise are not relevant for the United States' antitrust agencies, they certainly can be of concern for smaller countries. Moreover, the existence of multiple antitrust laws across countries and differences in interpretation across antitrust authorities is likely to increase uncertainty.[31]

Finally, national interests—rather than a concern for global consumer welfare—can interfere with the efficient application of antitrust enforcement.[32] Several economists have suggested that the world needs a unified antitrust approach—say, under the authority of the World Trade Organization.[33] We discuss some of the practical issues associated with a global antitrust authority.[34] We conclude that, while in principle such an authority might effectively address many of the issues discussed in this paper, practical and political obstacles rule this option out, at least in the short term.

Section II of this paper examines the problems with state involvement in antitrust cases brought by a federal agency. Both theory and evidence suggest that rent seeking is a salient feature in many proceedings. We also show that the states lack the resources to handle national antitrust cases. Moreover, even if rent seeking and

29. KEN AULETTA, WORLD WAR 3.0: MICROSOFT AND ITS ENEMIES 347 (2001).

30. Posner, *supra* note 11, at 940.

31. *See, e.g.*, Evans, *supra* note 27, at 15.

32. This assumes that consumer welfare is the main goal of antitrust. As we discuss in Section IV, this goal is not shared by all countries with competition policies in place.

33. *See, e.g.*, F. MICHAEL SCHERER, COMPETITION POLICIES FOR AN INTEGRATED WORLD ECONOMY 91-96 (1994).

34. In our discussion in Section IV, other options are considered as well, such as the harmonization of antitrust policies across countries and regions.

resources were not issues, state involvement in national antitrust matters runs the risk of a proliferation of standards, leading to conflicting antitrust rules.[35]

Section III provides a case study of federalism in antitrust enforcement. We analyze *United States. v. Microsoft*, examining lobbying behavior and key provisions in the litigating states' proposed remedy.[36] This suit clearly illustrates the arguments against state involvement in national antitrust cases. The states had little to offer during the trial but were major players during the remedies phase. The potential beneficiaries of the litigating states' remedy proposal are Microsoft's rivals, not software consumers.

Section IV then discusses the broader implications of the "federalism" issue. While the theory suggests the desirability of taking a global approach to some antitrust matters in order to protect global economic well-being, there are significant obstacles to the creation of an effective worldwide antitrust authority.

Section V presents our main conclusions. We argue that there are good economic and political reasons for limiting the role of states in antitrust matters that extend beyond their borders.

II. THE PROBLEMS WITH FEDERALISM IN ANTITRUST ENFORCEMENT

A. The Legal Process as a Political Tool

A substantial academic literature suggests that antitrust policymaking and enforcement often serve narrow private agendas rather than broad public ends.[37] According to this research, politicians are responsive to lobbyists because lobbyists represent interests that are more focused and better organized than consumer interests. At

35. Lande observes that, while the states have agreed to a common set of rules, the National Association of Attorneys General Merger Guidelines, "[n]o set of guidelines with fifty different potential enforcers can offer anything close to predictability, however, since enforcers with divergent philosophies necessarily will interpret ambiguous terms differently in various factual contexts." Lande, *supra* note 7, at 1063.

36. *See* Plaintiff Litigating States', *New York* (No. 98-1233) [hereinafter Plaintiff's Proposal].

37. *See generally* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE (Fred S. McChesney & William F. Shughart II eds., 1995); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & ECON. 247 (1985).

work are relatively small coalitions of producers with a "strong community of interests [who] tend to have stronger political voices because each group member has a larger financial stake in the outcome. . . ."[38] While these small coalitions stand to receive substantial benefits, any costs imposed on the nation as a whole are diffused and therefore are not as damaging to a politician as the cost of refusing to help the well-organized special interests.[39]

Given these incentives, it is hardly surprising that private companies often move aggressively to influence antitrust cases by pushing for tough prosecution of a rival and arguing for restrictive remedies at a case's close. For a business, the political process represents one more weapon in its competitive arsenal.

Of course, strong lobbying efforts can influence any elected official, state or federal. In national antitrust cases, however, state AGs are especially vulnerable to parochial interests, particularly as compared to unelected federal enforcers. State officials frequently face well-funded, well-organized, coalitions of in-state businesses arguing for the prosecution of an out-of-state company—an unequal political contest. We can expect state officials to be more likely to choose in-state interests over national ones—not because they are corrupt, but because political incentives encourage this kind of action. For example, state AGs are elected officials and many aspire to higher office.[40] It can be politically rewarding to bring high-profile cases against large corporations, especially if their headquarters are out-of-state. Federal authorities, on the other hand, represent the nation as a whole. While lobbying certainly can and does occur at the federal level, the DOJ and Federal Trade Commission (FTC) are less vulnerable to narrow state interests.

Private interests are expressed through the political process in a number of ways. Lobbying is one popular route.[41] Individual

38. William F. Shughart II, *Public-Choice Theory and Antitrust Policy*, *in* THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE, *supra* note 37, at 7, 13. *See also* OLSON, *supra* note 14.

39. As Posner noted, due to geographic concentrations of companies within a state, the potential exists to exercise "a great deal of power to advance the interest of businesses located in [a Congressman's] district however unimportant the interests may be from a national standpoint." Richard Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 83 (1969).

40. For instance, Richard Blumenthal, Connecticut's Attorney General, was recently accused of using his office to "make himself a national political figure." Editorial, *A Welcome Rebuke*, WALL ST. J., Aug. 27, 2002, at A12.

41. For a general discussion of the relationship between lobbying and democracy, see JONATHAN RAUCH, DEMOSCLEROSIS (1994).

companies can do this directly or use third parties, such as industry trade groups sponsored by companies with similar interests.[42] For example, in the technology sector a great many associations are headquartered in Washington, D.C. and are geared towards influencing Congress.[43] Corporations may also fund legal teams and experts who write reports in an effort to have charges brought against a rival, or in an attempt to make a stronger legal case against a competitor.[44] Once an antitrust case is underway, rival corporations and their associations often take an active role by sponsoring "friend of the court" briefs and comments.[45]

Companies have come to view political pressure and litigation not as occasional and extreme measures, but as everyday business tools.[46] Private lawsuits, or even just the threat of them, can be used as bargaining chips in business negotiations. Recently, Be Inc. and Sun Microsystems each filed lawsuits against Microsoft stemming from allegations in *United States v. Microsoft*.[47] For example, AOL sued for alleged damages resulting from the actions Microsoft took against Netscape (later acquired by American Online (AOL)) that were found

42. See MANCUR OLSON, JR., THE ROBERT SCHUMAN CENTRE AT THE EUROPEAN UNIVERSITY INSTITUTE, THE VARIETIES OF EUROSCLEROSIS: THE RISE AND DECLINE OF NATIONS SINCE 1982 (1995), for a discussion of economic problems associated with entrenched interest groups.

43. For example, the Computer and Communications Industry Association (CCIA), the Project to Promote Competition and Innovation in the Digital Age (ProComp), the Software and Information Industry Innovation Association (SIIA), Association for Competitive Technology (ACT), and Americans for Technology Leadership (ATL) are organizations comprised of individual and company members that lobby government to promote their group's interest in the technology sector. *See* Information about CCIA, *available at* http://www.ccianet.org (last visited Apr. 5, 2003); ProComp, a group founded by Netscape Communications, Oracle, Sun Microsystems, and other technology companies, *available at* http://www.procompetition.org/index.html (last visited Apr. 5, 2003); ACT, a pro-Microsoft group, *available at* http://www.actonline.org/about (last visited Apr. 5, 2003); ATL at http://www.techleadership.org (last visited Apr. 5, 2003).

44. For instance, United Technologies Corp. and Rolls-Royce funded experts to write reports to convince European regulators to reject General Electric Co.'s proposed $42 billion purchase of Honeywell Inc. Laurie P. Cohen, *How United Technologies Lawyers Outmaneuvered GE*, WALL ST. J., July 2, 2001, at B1.

45. *See, e.g.*, Michael Kanellos, *AOL Hopes to File Brief in Microsoft Antitrust Case*, CNET NEWS, Oct. 24, 2000, *available at* http://news.com.com/2100-1001-247541.html?legacy=cnet (last visited Mar. 20, 2003). *See also* index of comments on the *United States v. Microsoft* Settlement, *available at* http://www.usdoj.gov/atr/cases/ms-major.htm (last visited Apr. 3, 2003).

46. *See* David Yoffie & Sigrid Bergenstein, *Creating Political Advantage: The Rise of the Corporate Political Entrepreneur*, 28 Cal. Mgmt. Rev. 124 (1985).

47. Complaint and Jury Demand, Be Inc. v. Microsoft Corp., (N.D. Cal.) (No. 02837MEJ), *at* http://www.beincorporated.com/msft_complaint.pdf (last visited Apr. 5, 2003); Complaint, Sun Microsystems, Inc. v. Microsoft Corp., (N.D. Cal.) (No. C02-01150), *available at* http://www.sun.com/lawsuit/complaint.pdf (last visited Apr. 5, 2003).

to be anticompetitive by the courts. As a *Wall Street Journal* article observed, "[t]he Netscape lawsuit is just the latest move in a bigger chess match between AOL and Microsoft."[48] AOL is the world's largest Internet access provider and has an extensive proprietary online network that competes directly with Microsoft's MSN Internet service. "AOL had been holding out the prospect of a lawsuit as a threat against Microsoft as the two companies negotiated last spring," the *Journal* story noted.[49]

The nature of political and legal pressure implies that once one company in a sector uses these tactics as part of a competitive strategy, all companies in that sector face stronger pressures to follow suit. It is extremely risky for a company to ignore the state capital or Capitol Hill when its competitors are actively wooing local and federal politicians. This follows directly from the arguments we make above: politicians respond to well-organized and vocal communities.

B. A Free Ride for States

The costs associated with the rent seeking motivations of state participants might theoretically be a reasonable price to pay in exchange for the benefits that additional antitrust watchdogs bring to a case. But what do the states really bring to a national case? Antitrust experts working for the FTC and the DOJ analyze thousands of cases each year.[50] In contrast, most states review only a few antitrust cases in a given year. For example, Pennsylvania conducts only twenty-five antitrust investigations per year.[51]

This relative lack of expertise in antitrust cases at the state level leads to a higher probability of missteps. As Lande puts it, "A state assistant attorney general, who might in his or her career have seriously examined the competitive effects of only a handful of mergers, is more likely to make mistakes during his or her occasional forays into merger enforcement no matter how intelligent, diligent,

48. Julia Angwin & Jared Sandberg, *Netscape Goes One More Round*, WALL ST. J., Jan. 24, 2002, at B1.

49. *Id. See also* Dan Carney & Jay Greene, *The Wind Shifts for Microsoft*, BUS. WK., Feb. 12, 2001, at 93.

50. In 2001, the DOJ initiated 275 antitrust investigations and received notifications for 2,376 mergers. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS: FY 1992 - FY 2001 (2002), *available at* http://www.usdoj.gov/atr/public/10108.htm (last visited Apr. 5, 2003).

51. Most states do not report how many antitrust investigations they undertake. *See* Commonwealth of Pennsylvania, Offices of the Budget, *available at* http://sites.state.pa.us/ PA_Exec/Budget/ (last visited Sept. 4, 2002).

and public-spirited the effort."[52]

Consider this description from James Tierney, the former Attorney General of Maine:

> Most state attorneys general now have antitrust divisions usually located as part of the Consumer or Public Protection Divisions within their office. The number of specific lawyers assigned full time to antitrust is usually quite small, but when particular cases arise most attorneys general will assign senior civil litigators to assist on a particular matter.[53]

In other words, most of the people that litigate antitrust cases on behalf of state attorneys general have little direct experience in antitrust matters.

Combined with the lack of antitrust expertise is a lack of resources. No one state can match the money or manpower that federal agencies can bring to bear. For the small group of states that report a separate line item in their budgets, Table 1 shows state AG antitrust budgets, noting the percent of the total AG budget that antitrust outlays comprise.[54] DOJ and FTC antitrust budgets are included for comparison.

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52. Lande, *supra* note 7, at 1064.

53. James E. Tierney, *NAAG Antitrust*, *available at* http://users.clinic.net/jtierney/articles/art5.html (last visited Mar. 21, 2003).

54. All states report AG budgets, but only those states included in Table 1 report specific budgets for antitrust enforcement. The state AG budgets vary considerably across states. California has the highest AG budget ($619.9 million), while New Hampshire has the smallest ($2.2 million). *See* California state budget, FY2002, *available at* http://www.dof.ca.gov/HTML/BUD_DOCS/Bud_link.htm (last visited Sept. 4, 2002); New Hampshire state budget, FY2002 , *available at* http://www.gencourt.state.nh.us/lba/budget_operating.html#2002_2003 (last visited Sept. 4, 2002).

TABLE 1. STATE AND FEDERAL ANTITRUST BUDGETS
(IN MILLIONS OF DOLLARS)

State	Antitrust Budget FY2002	Antitrust Budget as a Percent of Total Budget FY2002
Maryland	1.0	5.1%
New Hampshire	0.1	4.5%
Florida*	2.5	1.8%
New York	2.2	1.2%
Massachusetts	0.5	1.0%
Michigan	0.6	1.0%
California	5.6	0.9%
North Carolina	0.5	0.7%
Pennsylvania	0.8	0.7%
Ohio	0.4	0.6%
U.S. FTC	73.0	46.8%
U.S. DOJ	130.8	5.3%

Source: State budgets, FY2002 except where noted; http://www.antitrustinstitute.org/recent2/168.cfm; http://www.usdoj.gov/jmd/budgetsummary/btd/1975_2002/btd01summary.htm. * Data from FY2001.

State antitrust expenditures pale in comparison to federal expenditures. Among those states reporting a separate line item, antitrust budgets are usually only one to two percent of the overall AG budget. Only two states, Maryland and New Hampshire, devote more than two percent of their AG budget to antitrust. Florida, which is among the most active states in terms of antitrust enforcement, has an annual antitrust budget of $2.5 million and a staff of twenty-three.[55] California, the largest state in terms of population, spent $5.6 million. The budget for the Antitrust Division of the U.S. Department of Justice, on the other hand, was $130.8 million in fiscal year 2002.[56] Moreover, the DOJ employs a total staff of approximately 850, including sixty staff economists who participate in every

55. Press Release, National Ass'n of Attorneys General, Oregon Attorney General Hardy Myers Appoints New Chair and Vice Chair of NAAG Multistate Antitrust Task Force (Nov. 29, 2001), *available at* http://www.naag.org/news/pr-20011129-or_antitrust.php (last visited Mar. 21, 2003).

56. U.S. DEP'T OF JUSTICE, APPROPRIATION FIGURES FOR THE ANTITRUST DIVISION 6 (2003), *available at* http://www.usdoj.gov/atr/public/10804a.htm (last visited Apr. 3, 2003).

investigation.[57] Meanwhile, the FTC spent $73 million on antitrust enforcement in FY2002 and maintains a staff of approximately 500, including at least forty economists.[58] Even a group of states acting in concert would have fewer experienced staff and face more severe budget restrictions than the DOJ or FTC.[59]

Fewer experienced personnel and less funding means that states have little to contribute to an antitrust case the federal government has already chosen to pursue. As a result, state efforts in national antitrust enforcement at best amount to little more than free riding on federal actions.

Unfortunately, state efforts in national cases do not stop with relatively benign free riding. By joining federal agencies in antitrust prosecution, each state becomes an additional party to settlement negotiations.[60] Because of states' more narrow interests, settlements that promote national economic welfare are not guaranteed to satisfy state demands. Thus, state participation reduces the probability of reaching a resolution, and when one is reached, increases the costs of achieving that resolution. Even more troublesome, settlements endorsed by the states are more likely to involve rent redistributions favorable to their constituents, not to the nation as a whole.[61]

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57. Charles A. James, Address at the Program on Antitrust Policy in the 21st Century 16 (May 15, 2002) (transcript available at http://www.usdoj.gov/atr/public/speeches/11148.pdf (last visited Mar. 23, 2003)) (remarking that the DOJ employs 60 staff economists); *Antitrust Fares Relatively Well in President's FY 2003 Budget, But Slowing Merger Pace Can Spell A Problem*, American Antitrust Institute, *available at* http://antitrustinstitute.org/recent2/168.cfm (last visited Apr. 3, 2003) [hereinafter *Antitrust Fares Relatively Well*] (noting that the DOJ has an antitrust staff of 851). *See also* ORGANISATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN THE U.S., OCT. 1, 1998 - SEPT. 30, 1999 7-8, *available at* http://www1.oecd.org/daf/clp/Annual_reports/1999-00/us.pdf (last visited Apr. 7, 2003) [hereinafter OECD].

58. *Antitrust Fares Relatively Well*, *supra* note 56 (noting that the FTC employs a staff of 505 and spent $ 73 million in FY 2002); OECD, *supra* note 56, at 8.

59. We do not address the division of antitrust responsibilities between the DOJ and the FTC here.

60. Robert Hahn, *The Benefits of MS-Settlement* 25 REG. 11 (2002). *See also* Thomas Leary, Address at the Sixth Annual Health Care Antitrust Forum at Northwestern University Law School (Nov. 3, 2000) (transcript available at http://www.ftc.gov/speeches/leary/learypharma.htm (last visited Apr. 7, 2002); CARL SHAPIRO, ANTITRUST LIMITATIONS TO PATENT SETTLEMENTS (Berkeley Center for Law & Tech., Working Paper No. 5-01, 2001), *available at* http://www.law.berkeley.edu/institutes/bclt/pub/wp/501.pdf (last visited Apr. 7, 2003).

61. It is by no means obvious that federal antitrust policies developed by the Federal Trade Commission or the U.S. Department of Justice have had a positive effect on consumer welfare. For some preliminary evidence that suggests federal antitrust policies have not enhanced consumer welfare—at least in the context of structural remedies—see Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109 (2001). *See also* Robert W. Crandall & Clifford Winston,

C. Conflicting Competition Policies

Another cost of state involvement in national antitrust cases is the potential for confusing, contradictory state-level enforcement. At the federal level, the Hart-Scott-Rodino Act pre-merger notification rules provide antitrust authorities with substantial information on the merging companies, which tends to weed out mergers unlikely to cause anticompetitive harm, resulting in fewer merger cases scrutinized by federal authorities reaching litigation.[62] In contrast, when states file merger challenges, Hart-Scott-Rodino does not apply and less information is available for review by state enforcers.[63] Moreover, with access to less information, state trial courts are more likely to grant preliminary injunctions—with each state court potentially applying different standards.[64]

When states file antitrust cases under state statutes rather than under the Clayton or Sherman Acts, the likelihood of inconsistent and conflicting antitrust precedent is even higher. As a result, state action affects not only current cases, but can also affect future firm behavior. With mergers, the possibility of a challenge from any of the fifty states, each with its own standard of evaluation, could prevent companies from even attempting a beneficial transaction.[65] As Lande points out, "it is confounding enough for antitrust counselors to have to contend with two potential federal enforcement agencies."[66]

Even if state laws were identical, the interpretation and application of those laws would differ "since enforcers with divergent philosophies necessarily will interpret ambiguous terms differently in various factual contexts."[67] Philosophical differences in approaches to antitrust enforcement are likely to stem from many sources, such as

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Antitrust Policy and Consumer Welfare: Assembling the Empirical Evidence (Mar. 2002) (unpublished manuscript, on file with author). Even if it were true that antitrust enforcement at the federal level does not enhance consumer welfare, our analysis suggests that limiting state involvement in national cases would still be an improvement over the current situation in which states effectively lobby for their narrowly defined interests in the antitrust political arena.

62. *See* Bell, *supra* note 11, at 39. The Hart-Scott-Rodino Act requires that parties to certain mergers or acquisitions (determined by the value of the transaction or the size of the parties) notify the FTC before consummating the proposed acquisition. The parties submit company and transaction information to the FTC as part of the notification process. They must then wait a specified period of time (usually thirty days) while the FTC reviews the proposed transaction. 16 C.F.R. §§ 801, 803.

63. Bell, *supra* note 11, at 39.

64. *Id.*

65. Lande, *supra* note 7, at 1047; Bell, *supra* note 11, at 39.

66. Lande, *supra* note 7, at 1062.

67. *Id.* at 1063.

political affiliation, educational training, and personal experience. The National Association of Attorneys General (NAAG) Merger Guidelines for the states explicitly allow for this, noting that the general policy can be supplemented or varied in light of differing precedents, and "in the exercise of [the AGs'] individual prosecutorial discretion."[68] While differing views can be helpful in some areas of law, such as when different states provide a testing ground for new regulations appropriate for federal adoption,[69] this kind of experimentation is likely to be wasteful in the antitrust arena.

III. A CASE STUDY OF FEDERALISM IN ANTITRUST ENFORCEMENT: *UNITED STATES V. MICROSOFT*

While the entire four-year *United States v. Microsoft* trial record offers numerous examples of rent seeking and delays or complications due to state involvement, we focus here on a small, but important, part of the case. Section A centers on the rent seeking aspects of the case, specifically the lobbying efforts made by Microsoft and its rivals in attempting to influence the settlement process and the remedy proposed by the litigating states as a substitute for the settlement reached between Microsoft and the DOJ. Section B summarizes state participation in the trial, examining the problem of states free riding on federal efforts. Section C reviews the legal arguments made by Microsoft, the DOJ, and a coalition of states regarding the litigating states' standing to press for a remedy different from the one defined by the settlement.

A. Rent Seeking

1. Lobbying—Politics as Usual

The *Microsoft* case illustrates the many avenues that rent seeking can take in national antitrust enforcement. Through the course of the lawsuit, rivals lobbied state attorneys general, federal antitrust authorities, and even the courts.

As noted earlier, states are especially vulnerable to special interest pressures. California in particular—which is home to Silicon

68. *Horizontal Merger Guidelines of the National Association of Attorneys General*, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1306, at S-3 (Mar. 12, 1987).

69. *See* Martti Vihanto, *Competition Between Local Governments as a Discovery Procedure*, 148 J. INSTITUTIONAL THEORETICAL ECON. 411 (1992); Ronald J. Daniels, *Should Provinces Compete? The Case for a Competitive Corporate Law Market*, 36 MCGILL L.J. 130 (1991).

Valley—has seen especially aggressive lobbying in the *Microsoft* case. Indeed, the idea that it is the state government's job to serve its corporate constituents is so ingrained that elected officials do not try to conceal their complicity. Shortly after California and several other states decided to reject the settlement, a local newspaper reported that California Attorney General Bill Lockyer said "his resolve was hardened after listening over the weekend to advice from technical experts and officials from Microsoft's competitors, such as IBM, AOL Time Warner Inc., Sun Microsystems Inc. and Novell Inc."[70] California subsequently took the lead in the continuing litigation—in particular, by providing funding. As one press account confirmed, "Microsoft's competitors lobbied California lawmakers and Governor Gray Davis to approve the extra $3.7 million for antitrust enforcement . . . ."[71]

In fact, companies in the technology sector have been wielding the antitrust weapon for many years.[72] At least as far back as 1993, Novell, a major producer of computer networking software, urged the FTC to pursue an antitrust case against Microsoft.[73] When the FTC decided to suspend its investigation, Novell, Lotus, and WordPerfect lobbied the Department of Justice to pick up where the FTC left off.[74] More recently, Microsoft's rivals have increased their visibility in Washington and dramatically increased their lobbying expenditures.[75] For example, in 1998, Sun underwrote the $3 million cost of a team of legal and economic experts given the task of persuading the

70. Ted Bridis, *Many of 18 States Prepare to Reject Settlement with Microsoft*, Ardmoreite Business, *available at* http://www.ardmoreite.com/stories/110601/mon_microsoft.shtml (last visited Apr. 5, 2003). *See also* Mary Ann Ostrom, *Lockyer in Limedlight of Marathon Case*, SAN JOSE MERCURY NEWS, Nov. 7, 2001, at C1.

71. *States Say They Have Funds to Press Microsoft Case*, U.S.A. TODAY, Nov. 8, 2001, *available at* http://www.usatoday.com/tech/news/2001/11/08/microsoft-states.htm (last visited Apr. 5, 2003). In all likelihood, California expects to be reimbursed for that expenditure. In January 2002, Microsoft agreed to pay approximately $10 million to the nine settling states to reimburse them for legal fees incurred during the litigation. Associated Press, *Microsoft to Pay Legal Bills of States That Settled Suit*, *available at* http://www.usatoday.com/tech/news/2002/01/31/microsoft-settlement.htm (last visited Apr. 5, 2003).

72. For example, IBM's competitors "egged on the antitrust suit that the Department of Justice filed against IBM in 1969." DAVID M. HART, NEW ECONOMY, OLD POLITICS: THE EVOLVING ROLE OF THE HIGH-TECHNOLOGY INDUSTRY IN WASHINGTON, D.C. 9 (Working Paper, Jan. 15, 2001) (on file with the Harvard Journal of Law and Public Policy), *available at* http://ksghome2.harvard.edu/~.Dhart.CSIA.Ksg/papers/new_economy_old_politics.pdf (last visited Apr. 5, 2003).

73. *See* Julie Pitta, *Microsoft's Dark Shadow*, FORBES, Mar. 1, 1993, at 107.

74. RICHARD B. MCKENZIE, TRUST ON TRIAL 197-98 (2000).

75. JOHN HEILEMANN, PRIDE BEFORE THE FALL 76 (2001).

Department of Justice to bring an antitrust case against Microsoft.[76]

Microsoft is no more immune to the inducements of the current system than its rivals are. In its early years, Microsoft paid little or no attention to politics.[77] But, after years of antitrust accusations, the company has learned to play the game as well. In fact, Microsoft has been accused of trying to delay the case[78] and of lobbying the DOJ to force a settlement.[79]

At the court level, the Tunney Act proceedings—in which the district court judge was required to weigh the merits of antitrust settlements in terms of the broader public interest—was yet another venue for special interest pleading.[80] Ironically, one of the motivations for enacting the Tunney Act was to shield antitrust decisions from politics.[81] Competitors and pro-defendant groups alike can and do file comments, though. AOL, Novell, Palm, RealNetworks, SBC, and Sun Microsystems all filed Tunney Act comments against the settlement.[82] Trade groups supported by many of Microsoft's biggest rivals also opposed the settlement and filed

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76. *Id.* at 88-94.

77. Microsoft did not establish a Washington D.C. policy office until 1995. The office began with only two professional staffers. Until 1998, when the group expanded and moved, the policy group's office was located within the Microsoft federal sales group's office. HART, *supra* note 71, at 14. Evidently, Microsoft began its policy group reluctantly: "I'm sorry we have to have a Washington [D.C.] presence," Bill Gates told The Washington Post in 1995. *Mind Behind the Microsoft Miracle*, WASH. POST, Dec. 3, 1995, at H1.

78. Press Release, Computer & Communications Industry Ass'n, CCIA Condemns Microsoft's Attempts to Delay Case (Aug. 14, 2001), *available at* http://www.ccianet.org/press/01/0814.php3 (last visited Apr. 5, 2003).

79. Comments of Computer & Communications Industry Association on the Revised Proposed Final Judgment, United States v. Microsoft Corp., 253 F.3d 34 (C.A.D.C. 2001) (No. 98-1232 (CKK)), *available at* http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00030610b.htm (last visited Apr. 7, 2003) [hereinafter *Comments of CCIA*]. The government responded to public comments alleging that the judgment "resulted from improper influence exerted by Microsoft" by stating that the allegations "lack any factual support," and that they are solely based on "the fact and size of Microsoft's political contributions." Response of the United States to Public Comments on the Revised Proposed Final Judgment at 7-8, *Microsoft* (No. 98-1232 (CKK)), *available at* http://www.usdoj.gov/atr/cases/f10100/10145.pdf (last visited Apr. 7, 2003).

80. The Tunney Act requires a federal court to certify that consent judgments proposed by the United States are in the public interest. The Tunney Act proceeding provides an opportunity for any interested party to submit comments on the proposed decree. 15 U.S.C. § 16 (2003).

81. *See* Bell, *supra* note 11, at 39.

82. The U.S. Department of Justice has posted "major" comments on the proposed settlement; links for these are provided at http://www.usdoj.gov/atr/cases/ms-major.htm (last visited Apr. 5, 2003). Direct competitors submitting "major" comments include: AOL Time Warner, Red Hat, RealNetworks, SBC, Novell, Palm, and Sun Microsystems. *Id.*

motions asking for permission to participate in the hearings.[83] On the other side, several associations aligned with Microsoft responded in kind by arguing for the settlement.[84]

As these examples highlight, lobbying is ubiquitous within the state and federal executive branch and in the judicial branch. We would argue, however, that among these three groups, the states are the most likely to succumb to lobbying. The narrower interests of the particular industries and consumer groups within its own borders are more likely to guide a state than executive agencies or the federal judiciary. Pressure from in-state companies is more likely to lead to actions that do not comport with national consumer interests. On the other hand, as comments made by officials at the Justice Department illustrate, federal authorities appear to be a much tougher sell for lobbyists than state AGs. Assistant Attorney General for Antitrust Charles James emphasized his concern over special interests: "Indeed, the number of requests for meetings with me immediately after my nomination but before my confirmation became so daunting that I adopted the posture of refusing to meet personally with any third parties in the *Microsoft* case. . . ."[85] That is, while lobbying certainly occurs at the federal level, the sheer magnitude of issues and points of view on all sides of

83. In particular, the CCIA and ProComp each submitted comments. Press Release, Computer & Communications Industry Ass'n, CCIA Seeks to Intervene in Microsoft Settlement Hearing (Feb. 8, 2002), *available at* http://www.ccianet.org/press/02/0208.php3 (last visited Apr. 7, 2003); Press Release, The Project to Promote Competition & Innovation in the Digital Age, ProComp Files Motion Asking to Participate in Tunney Act Proceedings (Feb. 8, 2002), *available at* http://www.procompetition.org/headlines/020802.html (last visited Apr. 7, 2003). CCIA, another lobbying association that receives major funding from Microsoft's competitors, including Sun and Oracle, also filed a comment. *Comments of CCIA*, *supra* note 78. The Progress & Freedom Foundation, a think-tank that receives funding from (among others) Sun, Novell, Oracle, IBM, and SBC filed a comment as well. Comments of The Progress & Freedom Foundation on the Revised Proposed Final Judgment and the Competitive Impact Statement, *Microsoft* (No. 98-1232 (CCK)), *available at* http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00030606.htm (last visited Apr. 8, 2003).

84. For example, ACT and ATL filed comments. Comments of the Association for Competitive Technology, Microsoft (No. 98-1232 (CCK)), *available at* http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00027806.htm (last visited Apr. 7, 2003); Email from Jim Prendergast, Executive Director, Americans for Technology Leadership, to the Department of Justice (Jan. 28, 2002, 11:40:00), *available at* http://www.usdoj.gov/atr/cases/ms_tuncom/public/34/mtc-00033587.htm (last visited Apr. 8, 2003).

85. Charles A. James, *The Real* Microsoft *Case and Settlement*, 16 ANTITRUST No. 1, at 66 n.16. Deborah Majoras, Deputy Assistant Attorney General for Antitrust, also "decried what she called the 'strategic use' of antitrust lawsuits by companies to hurt competitors." She remarked that one lobbyist for a Microsoft competitor "threatened that if I did not do as his client wished, I could count on the fact that I would never again get any more help in Silicon Valley in any investigation in the future." Mark Wigfield, *DOJ Atty Decries Companies' Politicization of Antitrust*, DOW JONES NEWS SERVICE, Feb. 2, 2002.

an issue make reaching a federal authority a more costly proposition for lobbyists. More importantly, federal authorities have a broader base of interests—protecting national welfare as opposed to protecting a handful of important employers within one state. In some cases, however, the payoffs for lobbying federal authorities can be higher as well. It remains an empirical matter as to whether federal antitrust enforcers are more or less prone to special interest influence.[86]

2. The Litigating States' Proposed Remedy—A Voice For Competitors

In many of the Tunney Act filings, Microsoft's critics derided the settlement put forth by the Department of Justice, nine of the original plaintiff states, and Microsoft as being too weak.[87] These critics said the remedy proposed by the remaining nine litigating states and the District of Columbia would do a better job of restoring competition.[88] But a close look at the states' proposal leads to very different conclusions. The Department of Justice along with nine states chose to settle the case.[89] One state, South Carolina, withdrew its complaint in December 1998 when Internet access leader AOL announced it would purchase Netscape; another state reached an independent settlement with Microsoft.[90] Another thirty states never participated in the litigation at all. Meanwhile, the nine remaining states along with

86. *See* discussion *infra* Part IV.B.

87. *See, e.g.*, Comment of Robert E. Litan, Roger D. Noll, and William D. Nordhaus on the Revised Proposed Final Judgment, *Microsoft* (No. 98-1233 (CKK)), *available at* http://www.usdoj.gov/atr/cases/ms_tuncom/major/mtc-00013366.htm (last visited Apr. 8, 2003). The authors argue in favor of either a structural separation or the litigating states' remedy. For a critique of a structural remedy, see Howard A. Shelanski & J. Gregory Sidak, *Antitrust Divestiture in Network Industries*, 68 U. CHI. L. REV. 1 (2000). For an analysis of the litigating states' proposed settlement see Hahn, *supra* note 60. *See also* George Priest, Editorial, *Microsoft Wins . . . Sort Of*, WALL ST. J., Nov. 2, 2001, at A14.

88. *See, e.g.*, Press Release, The Project to Promote Competition & Innovation in the Digital Age, ProComp Calls on Court to Uphold Antitrust Law in Microsoft Case (June 6, 2002), *available at* http://www.procompetition.org/headlines/061902.html (last visited Apr. 8, 2003); Press Release, Computer & Communications Industry Ass'n, States AG's Remedial Proposal: a "Solid, Thoughtful Effort" (Dec. 7, 2001), *available at* http://www.ccianet.org/press/01/1207.php3 (last visited Apr. 8, 2003); Press Release, American Antitrust Institute, American Antitrust Institute Applauds New States' Microsoft Proposal (Dec. 7, 2001), *available at* http://www.antitrustinstitute.org/recent/159.cfm (last visited Apr. 8, 2003).

89. These states, listed earlier, presumably had their own parochial reasons for settling. See *supra* note 20 and accompanying text for a list of the settling states.

90. Both South Carolina and New Mexico were party to the original lawsuit. New Mexico reached an independent settlement with Microsoft in July 2001.

the District of Columbia have decided to pursue litigation.[91]

While the litigating states account for only a small portion of the U.S. population and economy, they do represent some of Microsoft's most vocal rivals.[92] California is home to Apple, Palm, Oracle, Sun Microsystems, and Netscape (although Netscape is now part of AOL Time Warner, based in New York). Massachusetts is home to the Lotus division of IBM as well as major operations of Sun and Oracle. Utah is home to Novell. Accordingly, the attorneys general for these states resisted settlement attempts and instead pushed both the Justice Department and the courts for stronger action against Microsoft.[93] By no coincidence, the states' remedy proposal neatly dovetails with the interests of Microsoft's competitors. To illustrate the danger of state involvement in federal antitrust proceedings, we focus on the main provisions in the litigating states' proposed remedy.

a. Raising a Rival's Costs

One of the most stringent provisions in the litigating states' proposed remedy is the prohibition on the "binding" of "middleware" code to Microsoft's operating system software.[94] In short, the litigating states would require Microsoft to allow licensees (mostly PC manufacturers) to remove the software code for any middleware they could conceivably single out, while still requiring Microsoft to maintain the performance of the operating system. This provision is far more restrictive than including "Add/Remove" buttons that delete access to, but do not remove the code for, the limited middleware at issue during the trial.[95] To comply, Microsoft argued it would have to

91. As noted above, the nine litigating states are California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, and West Virginia.

92. The nine states plus the District of Columbia represent only 26 percent of the U.S. population. STATISTICAL ABSTRACT OF THE UNITED STATES 22 (122nd ed. 2002).

93. *See* Michael F. Brockmeyer, *Report on the NAAG Multi-State Task Force*, 58 ANTITRUST L.J. 215 (1989). Robert Bell expands on this point: "State attorneys general are elected officials, and parochial political concerns may well influence their decisions to challenge mergers. Suits may be filed to generate favorable publicity, to prevent plants or offices from being transferred to another state, or merely to thwart unpopular acquirors [sic], such as foreign companies." Bell, *supra* note 11, at 39.

94. Plaintiff's Proposal, *supra* note 35, at 2. Because the definition of the terms "middleware" and "browser" were hotly debated during the remedies phase of the trial, for clarity we rely on the litigating states' definitions.

95. In response to the DOJ settlement, Microsoft updated its most recent operating system, Windows XP, to allow the removal of access to the five types of middleware analyzed during the trial: Internet Explorer (a Web browser), Outlook Express (an email program), Windows Media Player, Windows Messenger (for instant messaging), and Microsoft's version of the Java Virtual Machine. Joe Wilcox, *Antitrust Case Spurs XP Makeover*, ZD Net, *available at* http://zdnet.com.com/2100-1104-922147.html (last visited

rewrite the Windows operating system from scratch as a combination of thousands of separable, modular components.[96] Computer makers could then offer PCs with various versions of "Windows" installed simply by excluding different combinations of these modules at will.[97]

Consider the implications. Under the litigating states' definition of middleware, many different kinds of software features would have to be remade in a way that made them removable from Windows. But software developers rely on interfaces[98] in many of Microsoft's middleware programs for their own programs to run. For example, SnapStream's Personal Video Station, a digital video recorder, relies on Windows Media Player for playing back recorded programs.[99] Software developers like SnapStream would no longer be able to count on the presence of key segments of software code in Windows. Instead, to ensure that their software worked properly, developers would have to provide the software code themselves or obtain and distribute it separately for consumers to install as needed. The immediate result would be to raise software developers' costs, but the provision would also raise Microsoft's costs to the extent that consumers blamed Windows for any difficulties with applications.[100]

End-users may or may not want versions of Windows with certain middleware code removed. Microsoft, in anticipation of the consent decree, has already put several of its middleware products in the

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Apr. 8, 2003).

96. *See* Joe Wilcox, *Gates Says States' Remedy "Impossible"*, CNET.COM, *available at* http://news.com.com/2102-1001-888101.html (April 22, 2002). Designing any modern operating system with millions of lines of code, especially a new modular operating system, is generally accepted to be an extremely difficult and costly task. For instance, it took about three years for Linus Torvalds and the open source programmers contributing to Linux to develop version 1.0 of the Linux Kernel. *What is Linux*, LINUX ONLINE, *available at* http://www.linux.org/info/index.html (last visited March 22, 2002).

97. In addition to OEMs (original equipment manufacturers), all licensing, contract and negotiation rules would apply to "third-party licensees" offering to purchase and redistribute at least 10,000 licenses for a product or combination of products. This would include individuals, independent software vendors (ISVs), systems integrators, and value-added resellers. Therefore, any licensee ordering the minimum 10,000 copies would be able to dictate what middleware had to be removed from Windows. *See* Plaintiffs' proposal, *supra* note 36, at 26.

98. An important example is the application programming interfaces, or APIs.

99. *See* David Coursey, *Coming Soon: Windows Your Way*, ZDNET NEWS, (May 24, 2002), *available at* http://zdnet.com.com/2100-1107-922183.html.

100. For a discussion of the strategy of raising rivals costs, *see generally* Steven. C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Steven. C. Salop & David T. Scheffman, *Cost-Raising Strategies*, 36 J. INDUS. ECON. 19 (1987); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L. J. 209 (1986).

Add/Remove utility program.[101] It is unclear whether PC manufacturers will take advantage of this option[102]—multiple versions of "Windows," each with different middleware products removed, could cause confusion among consumers. If so, support costs for Microsoft, other software developers, and computer manufacturers would increase due to necessary questions determining which version of Windows was installed on the computer. Thus, the litigating states' provision would allow rivals to impose high costs on Microsoft with no apparent benefit to end consumers.[103]

The litigating states' remedy would also micromanage Microsoft's pricing decisions in an unconventional way. The proposal would require that each less-than-complete version of Windows be licensed at a reduced price, with the discount proportional to the relative "development costs" of the omitted Microsoft middleware.[104]

If a Microsoft programmer had a flash of inspiration and created valuable new middleware for Windows in just a few days, Microsoft's discount for omitting that middleware would be negligible. If another feature, less valuable to consumers but still deemed worthy of investment, took months to develop, the discount associated with omitting the feature would be much higher. The remedy would thus require that discounts be based on the cost of inputs alone rather than being influenced by market demand—which

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101. *See* Wilcox, *supra* note 96.

102. PC manufacturers have responded positively to the option. "Several PC makers have already indicated that they would consider swapping out Microsoft middleware, such as Windows Media Player or Windows Messenger, for competing software. But many are still evaluating their options." Data on which manufacturers have actually removed Microsoft middleware from their PCs was unavailable when this article was written. *See* Wilcox, *supra* note 96.

103. In another example of raising Microsoft's costs, the litigating states' remedy would require Microsoft to distribute, free of charge, a version of the "Java runtime environment" that is "compliant with the latest Sun Microsystems Technologies Compatibility Kit" with each copy of Windows and IE. Plaintiffs' proposal, *supra* note 36, at 10. Note that, as part of the settlement for an earlier suit brought by Sun, Microsoft had already agreed to cease developing its own version of Java and eventually to stop distributing its version altogether. *See* Settlement Agreement and Mutual Limited Release, Sun Microsystems v. Microsoft Corp., No. C 97-20884 (D.N.D. Cal. Oct. 7, 1997) *available at* www.microsoft.com/presspass/java/01-23settlement.asp. Requiring a company to distribute a competitor's product could set a dangerous precedent: where should this type of bundling end? See the discussion in David Morgenstern, *Sun vs. MS: Whose Side Are You On?* ZDNET NEWS (Mar. 14, 2002), *available at* http://zdnet.com.com/2100-1107-859758.html.

104. The maximum total discount would be 25 percent, unless Microsoft offered the middleware for sale separately, such as for use by customers who obtain a version of Windows that omitted it. In that case, the discount would be determined by the separate distribution "price" and would not be limited to 25 percent. *See* Plaintiffs' Proposal, *supra* note 19, at 3.

ordinarily leads market prices to reflect value to consumers.

To understand the implications of this kind of pricing rule, consider two possible consequences. The version of Windows containing Windows Messenger instant messaging software would be priced higher than the "base" version. But AOL could still give away its competing Instant Messenger. Similarly, Microsoft would have to charge extra if Media Player were included with Windows, but RealNetworks could continue to give away versions of its RealPlayer. The pricing rule could result in higher prices for consumers: those wanting Microsoft's versions of middleware would have to pay for them according to the proposal's formula. Moreover, rival middleware producers would face less price competition.

b. Intellectual Property Giveaways

In another attempt to aid Microsoft's rivals, the litigating states would require Microsoft to license large amounts of valuable intellectual property (IP) for little or no compensation.[105] Competitors would get Microsoft's software code for free, but consumers could suffer in the long term from decreased innovation since the disclosure requirements would leave Microsoft with little incentive to improve Windows or many of the company's applications programs.

Under the litigating states' proposed remedy, Microsoft would have to sell through auction the right to adapt its Office business applications suite to non-Windows operating systems.[106] The auction would recognize three winners, all of whom could decide to adapt Office to the same operating system.[107] Microsoft would receive only

105. This paper covers just a few examples of the IP giveaway requirements in the litigating states' remedy. Another provision calls for Microsoft to license "all intellectual property rights . . . that are required to exercise any of the options or alternatives provided or available to them under this Final Judgment." Plaintiffs' Proposal, *supra* note 36, at 11. Microsoft would have to disclose "all APIs, Technical Information and Communications Interfaces" needed to permit rival middleware to achieve "interoperability" with Microsoft software. Plaintiffs' Proposal, *supra* note 36, at 6. Microsoft would also have to allow "qualified representatives of OEMs [original equipment manufacturers, or PC makers], ISVs [independent software vendors], IHVs [independent hardware vendors], IAPs [Internet access providers], ICPs [Internet content providers], and Third-Party Licensees" to "study, interrogate and interact with the source code and any related documentation and testing suites of Microsoft Platform Software." Plaintiffs' Proposal, *supra* note 36, at 7. The litigating states define Microsoft Platform Software as operating systems and middleware, so it would seem to encompass all of Microsoft's major products.

106. Auction winners would not be allowed to adapt Office to the Macintosh platform either (note that Microsoft already maintains a version of Office for the Macintosh). Plaintiffs' Proposal, *supra* note 19, at 11.

107. One plausible scenario is that more than one of the three auction bidders would want to adapt Office to the open source operating system Linux.

the one-time auction bids and would be prevented from charging any royalty payments. If multiple auction winners chose to adapt Office to the same platform, stiff competition at auction would likely result in modest auction payments to Microsoft. Thus, in addition to losing a stream of royalty payments, Microsoft could receive little in auction payments.

Equally important, the company would lose a distinguishing application for the Windows platform and would be required to disclose portions of the intellectual property encompassed in Windows. As part of the mandated auction, Microsoft would have to provide all relevant source code for both the Macintosh and Windows versions of Office[108] as well as "all parts of the source code of the Windows Operating System Product necessary for the porting."[109] New versions of Office, plus all new "necessary" Windows source code, would also have to be passed on to the auction winners at no additional charge. All told, it is unlikely that Microsoft would receive full compensation for the intellectual property embedded in Office and Windows.

Yet another provision of the litigating states' proposal would require Microsoft to release its browsers (Internet Explorer and MSN Explorer) under "open source" licenses.[110] That is, Microsoft would have to release source code (the "blue prints") for the browsers to the general public—not just to three auction winners as with Office—for use, modification and redistribution. And it would have to do so for free.

Thus, under the litigating states' remedy, technology companies stand to gain a great deal of Microsoft's intellectual property at little to no cost. Any rival wishing to clone Windows or to improve another operating system could access the technology included in Internet Explorer (IE), MSN Explorer, and Office. Sun Microsystems, for example, could use the disclosure provisions to gain access to information needed to copy key Windows features in its server operating system, Solaris. Oracle, IBM and Novell, all of which compete with Microsoft in email software, would be in a similar

108. These are different products based on unrelated source code.

109. Porting is the technical term for adapting software to different platforms. Plaintiffs' Proposal, *supra* note 19, at 11.

110. Plaintiffs' Proposal, *supra* note 19, at 9. Along with the requirement to give away source code, Microsoft would also have to expend resources to assist competitors in understanding the source code with the goal of modifying it. For additional information on open source licensing, see The Open Source Initiative, *The Approved Licenses*, *available at* http://www.opensource.org/licenses/ (last visited Mar. 22, 2002).

position. They could learn how Microsoft's email software, the MS Exchange Server, communicates, significantly lowering the costs of cloning Exchange. The result would be a large-scale expropriation of Microsoft's intellectual property.

The intellectual property giveaway would be even more helpful to competitors because it would be offered in combination with the binding and pricing provisions discussed above. Consider that under the provisions Microsoft would have to provide its browsers as open source software. At the same time, Microsoft would have to charge a higher price for any version of Windows containing the IE browser, as compared to the versions without it. Since it could not guarantee the presence of the browser software code, Microsoft could not tout IE as a feature that enhanced Windows. On the other hand, AOL would remain free to pay computer makers not to install any Microsoft browser software (IE or MSN Explorer) and to feature the AOL browser (currently a customized version of IE).[111] Under these circumstances, few computer makers would distribute Internet Explorer and none would ever pay for it. Thus, under the litigating states' remedy, AOL could more easily maintain its dominance in Internet access and instant messaging.

In fact, virtually all of the IP disclosure rules proposed by the litigating states are designed in a way that guarantees Microsoft could not recoup the value of R&D investments through licensing. A few examples: IE and MSN Explorer would be provided free of charge; the Office auction would allow for a one-time payment only with no ongoing royalties; all new Office enhancements would be given to the auction winners for free; and large amounts of Windows source code would be shown to competitors for free.

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111. An analyst at Giga Information Group noted that cutting all ties with Microsoft is "one of [AOL's] goals in life." Julia Angwin & Rebecca Buckman, *America Online Tests Netscape Browser*, WALL ST. J., Mar. 18, 2002, at B4. As part of that process, AOL recently completed testing a version of Netscape's browser as a possible replacement for the customized version of IE it currently provides its subscribers. AOL is expected to switch browsers for all 34 million AOL users from IE to Netscape. *See* Kim Stuart, *AOL Releases Netscape Update, Aims to Win Back Web Surfers*, WALL ST. J. ONLINE, Aug. 29, 2002, *available at* http://www.wsj.com. Estimates of Netscape's share of users differ dramatically depending on the estimation method. The Jim Hu article reports the Netscape current share at around 3.4 percent. *See* Jim Hu, *AOL Launches New Netscape Browser*, ZDNET NEWS (Aug. 29, 2002), *available at* http://zdnet.com.com/2100-1104-955850.html. "According to comScore, 14 million home Internet users, or 12.3% of home users, actively used Netscape in June 2002, compared with 76.6 million, or 67.1%, for Internet Explorer." *See* Riva Richmond, *New Netscape Browser to Heat Up AOL-Microsoft Rivalry*, DOW JONES BUSINESS NEWS, *available at* http://biz.yahoo.com/djus/020830/1424000477_2.html (Aug. 30, 2002).

The initial effect of providing broad access to intellectual property after it has been developed is necessarily positive for consumers, who need not compensate the innovator to get the benefit. But the long-term effects are decidedly negative: a firm will have little incentive to invest in development if it cannot prevent others from using its intellectual property and will not receive compensation for the expropriation.[112]

B. Free Riding

The preceding analysis suggests that the litigating states expended a good deal of effort in crafting a proposed remedy that would benefit in-state technology companies. But how much energy did the states expend during the trial in supporting the allegations that were raised? As we show below, not nearly as much as they did later to facilitate rent seeking. The states did not add to the allegations raised by the DOJ, which were already extensive; nor did they contribute meaningfully to the support of those allegations during the trial. Given the above discussion regarding the lack of state antitrust experience and resources, this is neither surprising nor necessarily bad. The problem lies in the fact that the states main contribution to the trial was to reject the settlement and to propose an alternative remedy that would largely benefit competitors rather than competition.

As noted earlier, the states have few resources to contribute to the prosecution of national antitrust cases. The antitrust budget for California, one of the lead states in the *Microsoft* trial, was $7.5 million in FY2001 and $5.6 million in FY2002. Of the 2002 amount, $3.7 million was targeted specifically for antitrust enforcement in the "high-technology industry."[113] While California's budget reflects its leading role in the Microsoft remedies trial, and is unusually high for a state, the figures are still dwarfed by the federal antitrust budget.[114]

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112. As Jean-Jacques Laffont and Jean Tirole observe, "the regulated firm may refrain from investing in the fear that once the investment is in place, the regulator would pay only for variable cost and would not allow the firm to recoup its sunk cost." JEAN-JACQUES LAFFONT & JEAN TIROLE, A THEORY OF INCENTIVES IN PROCUREMENT AND REGULATION 54 (1993).

113. *Taxpayer Group Blasts Lockyer's Request for More Money to Regulate High-Tech Industry: Budget Request Proves That the Case Against Microsoft Was Just the Beginning*, National Taxpayers Union & NTU Foundation Press Release, *available at* http://www.ntu.org/news_room/press_releases/pr_052301a.php3 (May 23, 2001).

114. *See* State of California, Department of Finance, 2002-2003 Governor's Budget, LJE 57, Line 22, *available at* http://www.documents.dgs.ca.gov/osp/GovernorsBudget03/pdf/lje.pdf (last visited Aug. 21, 2002).

For the Microsoft case alone, the Department of Justice spent $7 million through 1999.[115] By the beginning of 2001, this amount went up to nearly $50 million.[116] The total amount spent through 2002 is certain to be higher still.

The states' substantive legal contribution is more important than their level of spending. Here too, however, the record indicates that the litigating states were free riding on the DOJ's efforts. Indeed, since the beginning of the case, the states have not added substantially to the charges levied against Microsoft. The states' original complaint included only two claims not already made by the United States government.[117] The states later dropped one of these claims; the other was dismissed as a matter of law.[118]

After the dismissal, the allegations made by the states were essentially identical to those made by the DOJ. In fact, the two cases differed only marginally in other aspects as well: certain states sought penalties and counsel fees under their respective state statutes.[119] Aside from these differences, however, the states' case was identical to the case brought by the United States. As a result, the Court consolidated the two cases.[120]

The states contributed little during the trial as well. The individual states' claims were not specifically addressed by the Court and the states assured the Court that all relevant state statutes were coterminous with the Sherman Act. No discovery was targeted at any state law as distinct from the Sherman Act.[121] The Court directed that

115. James V. Grimaldi, *Microsoft Probe Has Cost Federal Government $13.3 Million*, SEATTLETIMES.COM (Oct. 6, 1999), *available at* http://seattletimes.nwsource.com/news/technology/html98/micr_19991006.html.

116. Declan McCullagh, *DOJ Pushes Case Against MS*, WIRED (Jan. 12, 2001), *available at* http://www.wired.com/news/antitrust/0,1551,41163,00.html.

117. First, the states claimed that Microsoft had unlawfully monopolized the market for "office productivity suite" software applications. Second, they claimed that Microsoft had unlawfully "leveraged" a monopoly in PC operating systems to gain an unfair competitive advantage in other products. *See* Plaintiff States' Complaint, New York, *et al.* v. Microsoft Corp., Civil Action No. 98-1233, 109-19 (D.D.C. May 18, 1998).

118. The office suite claim was dropped. *See* Plaintiff States' First Amended Complaint, State of New York, *et al.* v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. Jul. 17, 1998). The monopoly leverage charge was dismissed as a mater of law. *See* United States v. Microsoft Corp., 1998 WL 614485, 27 (D.D.C. 1998).

119. Plaintiff States' First Amended Complaint, at 35 e and f.

120. United States v. Microsoft Corp., No. 00-5212 (D.D.C. Aug. 17, 2001).

121. *See* Memorandum of Defendant Microsoft Corporation in Support of Its Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief, State of New York, *et al.* v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. Feb. 26, 2002), *available at* http://www.microsoft.com/presspass/legal/feb02/02-26ndismissal.asp. In its response to Microsoft's Memorandum in Support of Its Motion for Dismissal, the DOJ stated that "the non-settling States are advancing claims under *federal* law." *See* Memorandum Amicus

witnesses would be questioned by only one lawyer for each side—that is, one lawyer for the defendant and one lawyer representing all of the plaintiffs, federal and state governments combined.[122] While the states could have requested separate examination of any witness, they never sought any additional questioning.

None of the District Court rulings distinguished charges made by the plaintiff states. The Findings of Fact[123] make reference only to the consolidated actions while the Conclusions of Law mentions the plaintiff states only briefly, noting, "[t]he facts proving that Microsoft unlawfully maintained its monopoly power in violation of § 2 of the Sherman Act are sufficient to meet analogous elements of causes of action arising under the laws of each plaintiff state."[124] In short, the states' and the United States' cases were tried as a single case. Likewise, the Appeals Court ruling treats the states' case as subsumed by United States' case.[125]

It was not until the remedies phase, after all the arguments had been made and all of the evidence presented, that the federal and state cases were split.[126] The states did not add to the determination of charges. They did not add to the evaluation of evidence. But they did want to add to the penalties imposed at trial's end. While free-riding on the DOJ's allegations and arguments is harmless (limited state participation is, after all, what we are advocating), joining in a suit for the sole purpose of altering remedies to benefit in-state constituencies is not. The piling-on in the remedies phase illustrates the danger of state involvement in national or global antitrust enforcement.

C. The Arguments For and Against State Involvement

In an attempt to defuse the "cluster bomb"[127] created by the states,

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Curiae of the United States Regarding Microsoft Corporation's Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief at 17, State of New York *et al.* v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. Apr. 15, 2002), *available at* http://www.usdoj/atr/cases/f10900/10980.pdf.

122. *See* Memorandum of Defendant Microsoft Corporation in Support of Its Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief, State of New York *et al.* v. Microsoft Corporation, Civil Action No. 98-1233 (D.D.C. Feb. 26, 2002), *available at* http://www.microsoft.com/presspass/legal/feb02/02-26ndismissal.asp.

123. Findings of Fact at 2 United States v. Microsoft Corp., Civil Action No. 98-1232, and New York *et al.* v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. Nov. 5, 1999), *available at* http://www.microsoft.com/presspass/trial/c-fof/fof.asp.

124. Conclusions of Law at 43 United States v. Microsoft Corp., Civil Action No. 98-1232, and New York *et al.* v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. Apr. 3, 2000), *available at* http://www.microsoft.com/presspass/trial/col/col.asp.

125. *See* United States v. Microsoft Corp., 253 F.3d 34, 46 (D.C. Cir. 2001).

126. Plaintiffs' Proposal, *supra* note 19.

127. Posner uses this phrase to describe "the tendency of antitrust litigation to create

Microsoft submitted a legal brief calling for a dismissal of the demand for equitable relief by litigating states.[128] In the brief, Microsoft argued that the states did not have standing to seek a remedy separate from the federal government on issues that were not state-specific. In particular, Microsoft argued that the litigating states fell short on four points of law:

> 1. The litigating states lacked *parens patriae* standing to seek relief under federal law.
>
> 2. State law does not offer the relief sought.
>
> 3. Granting the litigating states the right to seek the relief sought raises serious constitutional issues.
>
> 4. The relief sought is contrary to the conditions and principles of equity expressed in the Clayton Act.

In response to Microsoft's brief, the plaintiff states as well as 24 states not involved in the remedies proceedings (including many of the states that accepted the DOJ-Microsoft settlement) filed a brief with the court opposing Microsoft's motion.[129] The states denied that they were obliged to demonstrate any state-specific injury. Moreover, they asserted that they had in fact demonstrated their standing as it is defined in existing case law.

The U.S. Department of Justice also weighed in on the debate, submitting an *amicus curiae* brief at the request of the judge overseeing the trial.[130] While the DOJ brief agreed in principle with Microsoft's argument, it rejected Microsoft's interpretation of current law. In short, "the United States [found] no definitive case law that would require granting the relief Microsoft [sought] as a matter of law."[131] However, it did concede that "[t]he movement of some States into the field of antitrust enforcement with respect to national or international markets, and their demands for relief that will affect competition and consumers outside of their borders, raise issues that

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multiple lawsuits out of a single dispute." Posner, *supra* note 11, at 3.

128. *See* Memorandum in Support of Defendant's Microsoft's Motion for Dismissal, *supra* note 121.

129. Memorandum of 24 States as Amici Curiae in Support of the Commonwealth of Massachusetts, The District of Columbia, and the States of California, Connecticut, Iowa, Florida, Kansas, Minnesota, Utah, and West Virginia, State of New York, *et al.* v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. Mar. 15, 2002).

130. Memorandum Amicus Curiae of the United States Regarding Microsoft Corporation's *Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief*, New York *et al.* v. Microsoft Corp., Civil Action No. 98-1233 (D.D.C. Apr. 15, 2002), *available at* http://www.usdoj.gov/atr/cases/f10900/10980.pdf.

131. *Id.* at 1.

have not been fully developed in the jurisprudence."[132] And it concluded, "[t]he important considerations of antitrust policy and federal-state relations set forth in the Motion should be given substantial weight in the Court's exercise of its equitable authority."[133]

Judge Kollar-Kotelly ruled for the litigating states, denying Microsoft's motion. Nonetheless, she acknowledged the importance of the issues raised by Microsoft, noting that "the legal issues addressed herein may prove appropriate for consideration in a subsequent case where they are not hobbled at the outset by the existing law of the case."[134]

While the *Microsoft* case has left the question of state involvement in national antitrust cases for future law, the economic evidence is clear: state involvement should be limited in cases that extend beyond the state's borders.[135]

IV. THE GLOBAL IMPLICATIONS OF FEDERALISM IN ANTITRUST: IS THE WORLD READY FOR A GLOBAL ANTITRUST AUTHORITY?

The preceding analysis illustrated how a state brings very little to the table in prosecuting alleged antitrust violations beyond its borders. States typically do not have the resources and expertise to protect the interests of consumers nationwide.[136] More importantly, they do not face appropriate incentives because they represent a fraction of consumers, a subset of industries, and a small portion of competitors within an industry.

This raises a natural question: should the U.S. government or other national and supranational governments (such as the European Commission) have the primary responsibility for administering antitrust policy in markets that are multinational in scope? Or should that responsibility be placed in a separate institution, such as a global antitrust authority?

Many of the issues behind these questions are analogous to the

132. *Id.*

133. *Id.* at 27.

134. New York v. Microsoft, 209 F. Supp.2d 132, 155 (D.D.C. 2002).

135. We discuss just what those limitations might comprise in the conclusions to the paper.

136. Moreover, as Lande notes, "Principles of federalism suggest that states were not meant to have so much ability to influence national affairs. States entered the union knowing they would occasionally have to sacrifice their own economic interests for the greater good of the nation." Lande, *supra* note 7, at 1062.

state-federal government debate. For instance, rent seeking based on national politics and conflicting approaches to competition policy across jurisdictions are problems at the supranational level, not just the state level. Other issues, such as coordinating an enforcement body that sovereign nations would agree to, are unique to transnational institutions. We explore these issues in the following sections and then turn to potential solutions. The theoretical case for a global antitrust authority with enforcement powers flows logically from the discussion of the problems with dual state and federal enforcement presented earlier. If a benevolent authority could be designed, it would be possible in principle for this authority to increase economic welfare.[137] That is, a global authority could, in theory, be free from parochial national concerns and would be less susceptible to lobbying by national interests. There are, however, serious practical problems in designing such an authority.

A. National Antitrust Resources

It is instructive to begin by examining current national and supranational resources devoted to antitrust. Table 2 lists annual outlays of several countries along with the European Commission (EC).[138] While none of the jurisdictions spends as much as the U.S., several jurisdictions do have substantial budgets, such as the EC, Korea, and Japan. Many jurisdictions employ significant numbers of people. For example, Russia has over 600 more antitrust employees than the U.S.[139]

Of course, high dollar budgets and large staffs do not necessarily translate into "good" antitrust policy. It is not always clear whether specific jurisdictions have the expertise to address antitrust issues that

137. An alternative that might be more attractive to economists would be to focus on economic efficiency, or the sum of changes in consumer and producer surplus. On economic efficiency, see generally MICHAEL L. KATZ & HARVEY S. ROSEN, MICROECONOMICS (1998); and JOSEPH E. STIGLITZ, PRINCIPLES OF MICROECONOMICS (1997).

138. The table does not include private sector expenditures, which are likely to be substantial. Also note that staff numbers reported earlier for DOJ and FTC are for different years, and therefore, differ from the total US staff number reported in the table.

139. Russia had a population of 145 million people in 2000. *Russian Population in Steep Decline*, BBC NEWS, (Oct. 24, 2000) *available at* http://news.bbc.co.uk/1/hi/world/europe/988723.stm. The U.S. had a population of 281 million in 2000. *See* U.S. Population: The Basics, *available at* http://www.ameristat.org/Content/NavigationMenu/Ameristat/Topics1/Estimates_Projections/U_S_Population_The_Basics.htm (last visited Sept. 4, 2002). Therefore, the U.S. has around four antitrust enforcers per million people while Russia has just over twelve enforcers per million.

cross national boundaries.[140] The United States is a recognized leader in this area, with substantial economic and legal expertise residing within the Department of Justice and the Federal Trade Commission.[141] In contrast, both the European Commission and Japan's Fair Trade Commission, for instance, have not developed strong reputations for economic analysis, although both have improved over time.[142]

TABLE 2. NATIONAL AND SUPRANATIONAL ANTITRUST RESOURCES

Country	Annual Budget (US$ Million)	Total Staff
United States	140.1	1157
Korea	77.3	431
European Commission	59.9	537
Japan	53.6	558
Turkey	49.0	297
United Kingdom	46.6	153
Australia	32.9	401
Canada	25.8	382
Germany	18.0	262
Netherlands	10.1	124
Mexico	9.7	201
Denmark	8.7	187
Norway	7.7	145
Sweden	7.3	116

140. Global Competition Review conducts a survey that rates competition bureaus across the world. The GCR conducted interviews with thousands of competition "specialists," such as lawyers, in-house corporate counsel, economists and others over a four-month period in twenty-five countries. The respondents rated antitrust agencies in several different performance areas, including (to name just a few) economic expertise, performance in merger and cartel cases, and independence from political influence. In addition to grading the agency, respondents also commented on performance particulars. In the most recent GCR analysis, the U.S. DOJ scored a perfect mark (5 of 5 stars). Germany's competition bureau (Bundeskartellamt) scored four and a half stars and the European Commission scored four stars. The Mexican and Argentinean authorities, however, scored only two stars and Brazil scored only one. See *Rating the Enforcers 2002*, GLOBAL-COMPETITION.COM (2002), *available at* http://www.globalcompetition review.com.

141. *Id.* at 48.

142. *Id.* at 22, 33, respectively.

New Zealand	7.1	71
Russia	4.7	1834
Finland	3.4	54
Switzerland	2.9	57
Hungary	2.1	103
Argentina	1.4	23
Czech Republic	1.0	106
Slovak Republic	0.7	71
Belgium	0.2	51

Note: The European Commission budget is reported for FY2001. All other data are reported for 1999-2000.

Source: OECD website at http://www1.oecd.org/daf/clp/Annual_reports/1999-00.htm; European Commission website at http://europa.eu.int/comm/budget/abb/abb_2002/comp_en.htm#top.

B. National Rent Seeking

Just as with individual states in the U.S., the problem of national incentives transcends that of resources and expertise. Do federal antitrust authorities have adequate incentives to improve economic welfare beyond a country's borders?

Certainly, a case can be made that within the U.S. the federal antitrust authorities have an incentive to protect the interest of consumers nationwide—at least to a greater extent than the state AGs.[143] But in a world in which business is increasingly conducted globally, the implications of national antitrust enforcement often extend beyond the borders of individual countries. We therefore return to the same problem discussed before, just on a grander scale: each country's government—by design—cares more for its own citizens than it does for the citizens of other nations.

A case affecting consumers in different nations or regions in different ways would most likely bring partisan national interests to the fore. Consider the Boeing/McDonnell Douglas merger of 1997.[144]

143. Limiting antitrust enforcement to federal agencies most likely would not eliminate lobbying. Corporations on both sides of an antitrust case would still have strong incentives to lobby the Department of Justice and the Federal Trade Commission directly. And surely the parties would still pressure their Congressional representatives to promote their preferred policy positions. Nonetheless, as Posner notes: "The federal government, having a larger and more diverse constituency, is, as James Madison recognized in arguing for the benefits of a large republic, less subject to takeover by a faction." POSNER, *supra* note 1, at 281.

144. Thomas L. Boeder & Gary J. Dorman, *The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law and Politics of the Aerospace Industry*, 45 ANTITRUST

Both companies were based in the United States and had no productive assets in Europe. However, they did business on a global scale.[145] The FTC reviewed the merger and concluded that McDonnell Douglas no longer constituted a meaningful competitor in the market for commercial aircraft and proceeded to approve the merger.[146] The EU, however, argued that the merger was anticompetitive because it would create a dominant player that would harm competition in Europe.[147] U.S. authorities then accused Europe of protecting European-based (and subsidized) Airbus rather than consumers.

Regardless of the motivations for Europe's opposition to the merger and despite the similarity of the rules governing antitrust in the U.S. and the EU, crucial differences remain. Some Americans claim that the EU antitrust review process is too open to influence.[148] In any region, regardless of the institutions in place, "The pressures to turn an issue of antitrust into an issue of national might are great when the matter is 'too important' and especially when nationalistic instincts are provoked."[149] The current Assistant Attorney General for Antitrust, Charles James, cautions that the most serious problem posed by multi-jurisdictional merger enforcement "is the significant risk that economic nationalism will prevail in antitrust merger enforcement in some jurisdictions, with the accompanying politicization of enforcement."[150]

Multiple jurisdictions taking part in global antitrust enforcement also leads to the by now familiar problem of multiple vetoes. A handful of states were able to derail early settlement talks in *United States v. Microsoft*; a handful of countries can do the same at a worldwide level. As David Evans observes, "According to the U.S. Council for International Business, a typical multinational corporation needs to file in 20 to 30 jurisdictions to propose a merger. An objection by any country in which either firm does significant

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119 (Spring 2000).

145. At the time of the merger, Boeing accounted for over sixty percent of world sales of commercial jets; Airbus, a European consortium that has received subsidies from three European governments, accounted for around thirty percent; McDonnell Douglas accounted for around five percent. Fox, *supra* note 26, at 19-24.

146. Boeder & Dorman, *supra* note 144, at 135.

147. *The Commission Clears the Merger Between Boeing and McDonnell Douglas Under Condition and Obligations*, The European Commission Press Release IP/97/729, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc= IP97/729|0|AGED&lg=EN&display= (last visited Aug. 29, 2002).

148. For example, Evans discusses lobbying efforts made by chief competitors during the GE and Honeywell merger review. *See* Evans, *supra* note 27, at 18.

149. Fox, *supra* note 26, at 23.

150. James, *supra* note 57, at 3.

business can kill a deal."[151] The EU recently did just that: after the U.S. DOJ approved the merger of General Electric and Honeywell, the European Commission moved to block the deal. As of this writing, the case was on appeal.[152]

As a theoretical matter, it is unclear whether national authorities are more or less vulnerable to rent seeking efforts in the global arena as compared to state AGs in the national arena. On the one hand, it is generally more costly to lobby national enforcers. As noted above, Charles James received so many requests for meetings during the *Microsoft* case that he refused to meet with anyone except the parties directly involved. Breaking through the clutter of multiple lobbyists would necessarily be difficult and costly for would-be rent-seekers. On the other hand, the potential payoff to lobbying is higher. The actions that national authorities take can generate significantly greater rents than the actions available to state AGs. For example, the benefits of trade quotas or government-sanctioned national cartels could make the extra effort in lobbying worthwhile.[153]

C. Conflicting Jurisdictional Approaches

As discussed earlier, state involvement in national antitrust enforcement can lead to a jumble of laws for businesses to navigate. With multinational corporations obliged to notify twenty or thirty jurisdictions of merger plans, the jumble of laws can be equally troublesome at the global level as well.[154] This increases uncertainty and costs for businesses and may prevent them from engaging in

151. Evans, *supra* note 27, at 15. *See also* International Competition Advisory Committee Hearing, Washington, D.C., *available at* http://www.usdoj.gov/atr/icpac/2601.htm (Apr. 22, 1999).

152. *GE and Honeywell Contest EU Veto*, BBC NEWS, *available at* http://news.bbc.co.uk/1/hi/business/1541569.stm (Sept. 13, 2001).

153. For example, on two separate occasions U.S. producers of citric acid tried to use anti-dumping duties to shelter the domestic market from Chinese imports. Both petitions failed, however. *See* Simon J. Evenett et al., *International Cartel Enforcement: Lessons from the 1990's*, 24(9) WORLD ECON. 1221, 1227 (Sept. 2001).

154. Multiple suits are also an issue in antitrust cases. This issue was one of the motivations for the creation of the European Commission: "Another reason for legislating at the Community level has been the need to create and maintain equal conditions for economic operators. Competition could be distorted if undertakings in one part of the Community had to bear much heavier costs than in another . . ." *See* Case 92/79, Comm'n v. Italian Republic, 1980 E.C.R. 1115, 1122 P 2.13. Antitrust cases can span continents as well. In addition to the DOJ case, the European Commission also alleged that Microsoft engaged in anticompetitive behavior. *Commission Initiates Additional Proceedings against Microsoft*, the European Commission Press Release IP/01/1232, *available at* http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1232|0|AGED&lg=EN&display= (Aug. 30, 2001).

potentially welfare-enhancing activities such as mergers.[155]

The solution to this problem would be a uniform set of regulations, but defining global antitrust guidelines that countries could agree upon is a very difficult task.[156] Different countries have different antitrust regulations. Even the United States and Europe, which have cooperated for years on competition policy, have major differences in their theoretical approaches to enforcement.[157] Add in Australia, Canada, Japan, and other countries—ninety or so currently have some form of competition laws—and one observes almost as many methods of addressing competition regulation as there are countries.[158]

Ideology, historical accident, and country size are just a few of the factors that have led to variations in antitrust enforcement. Capitalist and non-capitalist countries will clearly view "monopoly power" and "anticompetitive" behavior through different lenses.[159] In Japan, social norms led to strong cross-company (both vertical and horizontal) organizations ("keiretsu") that are well ingrained; until recently the government has had little political will to control these cartels.[160] Country size can matter too: "The fear of scale economy losses" can deter smaller nations from opposing in-country mergers.[161] Frederick Jenny argues that just such a concern led to France's weak and selective enforcement of its merger control policy. He concludes that a "lingering feeling" among public officials that larger companies are better able to withstand international competition encouraged France to view national monopolies

155. James, *supra* note 57; Timothy J. Muris, *Merger Enforcement in a World of Multiple Arbiters*, Remarks Presented at the Brookings Institution Roundtable on Trade and Investment Policy, *available at* http://www.ftc.gov/speeches/muris/brookings.pdf (Dec. 21, 2001).

156. Even within the United States, the individual states had difficulty in agreeing on the NAAG Merger Guidelines. *See New Mexico Attorney General Stratton Repudiates NAAG's Horizontal Guidelines*, 52 ANTITRUST & TRADE REG. REP. (BNA) No. 1314, May 7, 1987, at 869.

157. *See generally* James, *supra* note 57; William J. Kolasky, *North Atlantic Competition Policy: Converging Toward What?*, Address Before the BIICL Second Annual International and Comparative Law Conference, *available at* http://www.usdoj.gov/atr/public/speeches/11153.pdf (May 17, 2002); Evans, *supra* note 27, at 14.

158. 1 WORLD TRADE ORG. ANN. REP., *Special Topic: Trade and Competition Policy* (1997), at 31, 45.

159. SCHERER, *supra* note 33, at 36.

160. *Id.* at 73-76. For a discussion of improvements, see *Rating the Enforcers 2002*, *supra* note 140, at 33 ("Cartel enforcement is a strength—especially bid-rigging cases. The JFTC has taken aim at the construction section, electronic appliances, petroleum products, civil engineering works and medical care.")

161. SCHERER, *supra* note 33, at 61.

favorably.[162]

Given the obstacles to reaching an agreement on rules, the current trend in international antitrust is towards multilateral working groups hosted by formal and informal international institutions. Several of these groups are focused on defining a uniform set of antitrust guidelines. The newest and perhaps most important initiative is the International Competition Network (ICN), which was founded in October 2001 by antitrust officials from fourteen jurisdictions. Its members now include sixty countries representing seventy-five percent of world GDP.[163] The ICN has formed working groups to address a variety of issues in international antitrust enforcement. The group's long-term goal is to develop one set of guiding principles to which members will adhere *voluntarily*.[164]

Several other international organizations, including the OECD, WTO, and the United Nations Conference on Trade and Development (UNCTAD), have established working groups and programs to examine issues in international antitrust. Nearly all of these organizations serve as debating forums and are essentially designed to promote the convergence of antitrust regulations across nations. None are intended to become international antitrust authorities with their own enforcement powers.

On a smaller scale, several countries have signed bilateral agreements of cooperation between antitrust authorities.[165] One key agreement is between the United States and the European Union.[166] This accord lays out the terms of cooperation between the United States and the European Union. One of its primary purposes is to address problems of multi-jurisdictional enforcement. The agreement defines the objective as follows:

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162. Frederick Jenny, *French Competition Policy in Perspective*, *in* COMPETITION POLICY IN EUROPE AND NORTH AMERICA: ECONOMIC ISSUES AND INSTITUTIONS 185 (W.S. Comanor et al. eds., 1990).

163. James, *supra* note 57.

164. Both James and Kolasky note that they do not expect to "achieve convergence on all merger issues in the first year, or even the second or third." James, *supra* note 57, at 28. *See also* William J. Kolasky, *International Convergence Efforts: A U.S. Perspective*, Address Before the International Dimensions of Competitive Law Conference, at 5, *at* www.usdoj.gov/atr/public/speeches/10885.pdf (Mar. 22, 2002).

165. *See*, e.g., *Antitrust Cooperation Agreements*, *available at* http://www.usdoj.gov/atr/public/international/int_arrangements.htm (last visited Sept. 4, 2002).

166. *Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws*, *available at* http://www.usdoj.gov/atr/public/international/docs/1781.htm (last visited Sept. 4, 2002).

> Establish cooperative procedures to achieve the most effective and efficient enforcement of competition law, whereby the competition authorities of each Party will normally avoid allocating enforcement resources to dealing with anticompetitive activities that occur principally in and are directed principally towards the other Party's territory, where the competition authorities of the other Party are able and prepared to examine and take effective sanctions under their law to deal with those activities.[167]

In theory, the agreement attempts to allocate enforcement resources in order to avoid overlap. In practice, this is not always how it is done, especially in high-profile cases with important competitive implications in both the United States and the European Union.[168]

D. Toward A Global Antitrust Authority

As the myriad of bilateral agreements and international group efforts attest to, achieving a single set of rules to govern worldwide competition regulations is a daunting task. But even if it were possible, enforcement of the regulations would surely differ dramatically across countries. As Simon Evenett et al. observe, "Different national competition authorities applying identical principles in identical cases are likely to reach different conclusions or specify different remedies."[169] Changing staff in government administrations or in national courts could easily alter interpretations of the rules.[170] Even with well-trained personnel, many aspects of antitrust enforcement are more art than science. For example, tough issues like defining the relevant market are difficult for one country, let alone multiple countries attempting to act together.

Very difficult distributional issues are likely to arise if a principle of worldwide consumer welfare were adopted in various countries and regions. Assume, for the sake of argument, that all participating nations agree that welfare should be the overriding goal of every antitrust enforcement action.[171] It is not hard to imagine a situation in

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167. *Id.*

168. The merger of GE and Honeywell, which the U.S. DOJ approved but the European Commission blocked, provides a recent example of conflict arising from enforcement on both sides of the Atlantic.

169. Simon J. Evenett et al., *Antitrust Policy in an Evolving Global Marketplace*, *in* ANTITRUST GOES GLOBAL: WHAT FUTURE FOR TRANSATLANTIC COOPERATION? 16 (Simon J. Evenett et al., eds., 2000). *See also* Evans, *supra* note 27, at 14. Note that this problem is analogous to the situation with the states and their differing interpretation of the NAAG Merger Guidelines, as discussed above.

170. Evenett et al. (2000), *supra* note 169, at 22.

171. *But see* Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down,*

which global welfare was enhanced by a particular merger, but consumers in some countries were made worse off by the consolidation.[172] That is, the benefits accruing to some nations far outweighed the harm to a handful of others, so that overall welfare increased.[173] It is difficult to imagine a nation willingly placing global welfare above national interests, however. The former U.S. FTC Chairman Robert Pitofsky has in fact said the FTC would be skeptical of such an approach: "Balancing anti-competitive effects in a domestic market against efficiencies in a foreign market is unusually difficult. . . . [I]t is an unattractive prospect to "tax" United States consumers (as a result of the domestic anticompetitive effect) in order to confer benefits on U.S. exporters and non-U.S. consumers."[174]

A recurring issue in multinational cartel enforcement illustrates another problem: information sharing.[175] Even when nations agree that cartels should be prosecuted,[176] getting genuine cross-border cooperation is difficult. Evenett, Levenstein, and Suslow discuss several examples of countries harmed by the activities of export cartels based in other nations, but "the lack of cooperation from home countries means that information gathering is difficult and prosecution impossible."[177]

Agreeing on common rules, an important and difficult first step, is not enough. As the above examples highlight, agreeing on information sharing guidelines, enforcement mechanisms, and accountability rules would also be required if international competition law coordination is to develop further.

To solve the above problems of uneven expertise, misaligned

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and Sideways, 75 N.Y.U.L. REV. 1781, 1782 (2000).

172. For a discussion of this scenario in terms of the U.S. and the EU, see Evenett *et al.* (2000), *supra* note 169, at 22. See also the discussion in the 1 WORLD TRADE ORG. ANN. REP., *supra* note 158, at 30.

173. Of course, this kind of trade-off can occur within a nation too. In the U.S., federal antitrust enforcers are not supposed to sacrifice welfare in one or more states for overall national benefit. Clayton Act, 15 U.S.C. § 18 (1988).

174. Robert Pitofsky, The Effect of Global Trade on United States Competition Law and Enforcement Policies, given at the Fordham Corporate Law Institute, *available at* http://www.ftc.gov/speeches/pitofsky/fobebf1.htm (Oct. 15, 1999).

175. Because different countries are likely to have varying standards of confidentiality, the lack of information sharing in cartel enforcement might well be justified in some cases.

176. Because many of its trading partners did not (and many still do not) prohibit cartels, the U.S. passed the Webb-Pomerene Act in 1918. The Act exempts American export cartels from some of the legal restrictions against cartels. *See* Webb-Pomerene Act of 1918, 15 U.S.C. §§ 61-66 (1994). The Export Companies Trading Act of 1982 provides additional exemptions to registered U.S. export cartels. *See* Export Trading Company Act (the ETC Act) of 1982, Pub. L. No. 97-290, 96 Stat. 1233. *See also* the discussion in Evenett *et al.* (2001), *supra* note 169, at 1230.

177. Evenett et al. (2001), *supra* note 153, at 1233, 1237.

incentives, conflicting regulations, and varying degrees of enforcement in the global arena, one might consider a rule analogous to barring the U.S. states from joining national antitrust proceedings: barring national governments from joining multinational antitrust proceedings. Of course, this raises the issue of devising a mechanism to replace national competition authorities in multiple country proceedings. The logical solution would be a global antitrust authority with enforcement powers.[178]

A system that acknowledges the primacy of consumer welfare worldwide is the natural extension of a national antitrust authority aimed at promoting domestic welfare. More and more products, particularly high technology products like computer software, are made and sold with little regard for national borders.[179] While a global antitrust authority would solve many of the problems of balkanized national antitrust policies, it would have its own set of problems—some unique and some similar to those discussed earlier in relation to the U.S. states' participation in federal antitrust enforcement.

First, a global competition authority would require nations to give up considerable sovereignty in the area of antitrust—something that politicians have been reluctant to do.[180] Second, it would also require

178. For a proposal along these lines, see SCHERER, *supra* note 33, at 92-96. For a more recent treatment, see Fox, *supra* note 171. Diane Wood presents both practical and theoretical arguments against a global competition authority. *See* Diane P. Wood, *International Law and Federalism: What is The Reach of Regulation?* 23 HARV. J.L. & PUB. POL'Y 97 (Fall 1999). In other contexts, international agreements and organizations have evolved to deal with issues that transcend national borders, but none of these institutions provide a blueprint for creating a global antitrust authority with enforcement powers. For example, the Bretton Woods agreement established a post-war international economic system [The Bretton Woods agreement established the International Monetary Fund, World Bank, and International Trade Organization with the purpose of eliminating the causes of war. For a further discussion of Bretton Woods, see THE BRETTON WOODS-GATT SYSTEM: RETROSPECT AND PROSPECT AFTER FIFTY YEARS (Orin Kirshner ed., 1996).], the General Agreement on Tariffs and Trade (known more commonly as GATT) and its successor, the World Trade Organization, arose to deal with international trade issues. *See generally* DOUGLAS A. IRWIN, FREE TRADE UNDER FIRE (2002). The Kyoto protocol, another multinational agreement, is meant to address problems with global climate change. *See generally* Scott Barrett, *Towards a Better Climate Treaty*, POLICY MATTERS 01, 29 (Nov. 2001), *available at* http://aei.brookings.org/policy/page.php?id=21; DAVID G. VICTOR, THE COLLAPSE OF THE KYOTO PROTOCOL AND THE STRUGGLE TO SLOW GLOBAL WARMING (2001). In some cases, such as many of the environmental treaties, international agreements place restrictions on the behavior of nations, but individual nations are responsible for enforcing the treaty requirements within their own borders—including disciplining private firms. Such agreements do not typically create international institutions with authority to discipline private firms.

179. Evenett, Lehmann, and Steil document a wave of cross-border mergers of "unprecedented scale." *See* Evenett et al. (2000), *supra* note 169, at 3.

180. While our proposal to limit U.S. state involvement in national antitrust suits would require states to give up some degree of state sovereignty, the states are willing members

agreement on the goal of such an authority, which as discussed above, would be a non-trivial task. Third, a global antitrust authority would need to define a mechanism for getting individual nations to comply with an agreement—that is, it would need an enforcement mechanism to ensure nations cooperated and supplied necessary information. Finally, a global antitrust enforcer would require funding.[181]

Despite the formidable obstacles, some movement toward the globalization of competition policy seems inevitable.[182] But designing and implementing a sensible worldwide approach that would maximize economic efficiency and consumer welfare to antitrust is daunting. Current international agreements, such as the WTO, do not offer a viable model since they concern interactions between nations. They are not designed to regulate the behavior of private firms and they do not have enforcement powers in the same sense that national competition authorities do.

The closest analogy to an international antitrust enforcement regime is regulation through the European Commission. The EEC Treaty established the competition rules for the European Economic Community (then consisting of six member states) in 1958, and the Commission was given responsibility for enforcing them in 1962.[183] The European Union currently consists of fifteen member nations. Many member nations have their own antitrust authorities,[184] but the Commission is primarily responsible for enforcing competition law at the European level.[185] While the European model may have some appeal, it developed as a result of specific historical and political circumstances in Europe that do not exist at the global level. As a result, the EC does not provide a model for addressing global antitrust issues.[186]

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of the United States and federal preemption of state law is not unheard of within the U.S.

181. It is unclear whether the resources allotted to a global antitrust authority would match those of any well-funded individual entity, such as the United States or European Union. That depends on the commitment of the supporting countries, which will be affected to a large extent by domestic politics.

182. Witness the bilateral agreements and international working groups discussed in Section IV.C. above.

183. *See generally* VALENTINE KORAH, EC COMPETITION LAW AND PRACTICE (7th ed. 2000).

184. For example, Austria, France, Germany, Greece, Ireland, Italy, Portugal, Spain, and the United Kingdom all maintain their own competition agencies. *See Rating the Enforcers 2002*, *supra* note 140.

185. National competition authorities deal with some matters that do not involve cross-border issues.

186. As Wood observes, ". . . there is a common assumption among many that the need for, and success of, European competition law provides support for the contention that the world community should create world competition rules within the WTO. While the latter

We should continue to proceed along a path in reforming competition policy that recognizes the need for acknowledging economic welfare considerations outside national or regional borders, but we should proceed with great caution. The progress towards convergence in antitrust policies is likely to be incremental and slow in coming. In the short term, it probably makes most sense for selected antitrust authorities, such as the United States and the European Commission to continue to address such matters through bilateral agreements.[187]

V. CONCLUSIONS

Antitrust policy is likely to play an important role in shaping the world economy. The policies adopted by various levels of government could have far-reaching implications for the development of industries ranging from software to diamonds.

This paper has examined the appropriate role for different levels of government in antitrust enforcement. Specifically, we highlighted the issue of federalism in antitrust within the U.S., focusing on the role of states and the federal government in developing policy. Several scholars have suggested that states should play a very limited role in antitrust enforcement, especially in matters that are national or global in scope.

The analysis presented here supports the argument that the states' role should be limited. Studying the behavior of the states and individual companies in the high-profile *United States v. Microsoft* case illustrates why the legal scholars proposing limits on state authority are right. The question is, limited in what ways? We feel that the evidence supports at least one kind of limitation: states should be preempted from all antitrust suits the federal government addresses—including cases that the DOJ or FTC investigates and decides to dismiss. Federal authorities are more experienced in antitrust enforcement, have greater resources, and are more likely to consider national welfare than are the individual states. Because of these factors, federal agencies are more likely to reach an efficient

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is an issue that reasonable people can debate, they should do so without any illusions that anything like the European system would enforce such rules. We must ask whether it is possible to separate the structural aspects of European competition law from its content." Wood, *supra* note 178, at 102.

187. "The [bilateral] agreements would need no oversight or supervision by WTO bureaucracy. They would have the advantage of allowing countries to choose their dancing partners with care while avoiding both extravagant promises of cooperation and gold seals of approval for competition law regimes that are incompatible with their own." *Id.* at 110.

outcome, especially in cases that are national in scope.

Defining the appropriate state role when federal agencies have not acted is a more difficult matter. Our preference, especially in light of the lessons learned in the *Microsoft* trial, is that the states should not be involved in antitrust at the national level. A review of the states' role in the case highlighted numerous examples in which Microsoft's competitors, not competition itself, would have benefited from the plaintiffs' proposed remedies. In addition to giving away large amounts of Microsoft's intellectual property for little or no compensation and increasing Microsoft's costs of doing business, some of the litigating states' provisions would have rendered ongoing development of Windows unprofitable. Rather than restoring competition, the litigating states' proposal amounts to a classic exercise in rent seeking.

While there are many senses in which the *Microsoft* case is unusual, the role of rent seeking is not one of them. Based on the current system of incentives, state involvement in national antitrust enforcement is likely to have similar rent seeking outcomes when corporate rivals are based in different states. States, considering the interests of their local and most vocal constituents, will put parochial concerns over national welfare. Moreover, states have little to offer the antitrust enforcement process in terms of expertise that is likely to lead to efficient outcomes.

Despite the obvious problems with the states' involvement in the *Microsoft* case, however, barring states entirely from national antitrust cases may be excessive. The federal government is far from perfect. Enforcement activities ebb and flow with changes in our economic understanding of antitrust and national politics. States may have valid reasons for pursuing national cases when they deem that federal agencies are asleep at the wheel.

Pressure from the states could thus provide a useful check on federal antitrust enforcers. States could act as watch dogs while federal preemption (including after-the-fact preemption) would reduce the risks of parochial interests undermining national settlements and would eliminate the problems with multiple follow-on suits.

Similar issues arise regarding national interests in antitrust matters that have a global or trans-national reach. Individual governments are clearly more concerned with their own consumers and producers than with consumers and producers in other countries. Thus, one would expect to see individual nations engaged in rent seeking policies that

benefit domestic companies at the expense of foreign competitors.[188] One would also expect to see national polices aimed at helping consumers within a country, even if those policies hurt consumers elsewhere.

A logical antidote to such national rent seeking is the establishment of some kind of global antitrust authority aimed at promoting welfare worldwide. Though a global antitrust authority could, in principle, be designed to improve global economic welfare, practical and political obstacles appear to rule out this option in the foreseeable future.

However, granting the U.S. Government the authority to preempt state action in antitrust prosecution would be practical. Ironically, the European Union, whose antitrust agency is relatively new compared to the United States, has already adopted an analogous rule. While individual nations oversee antitrust enforcement within their own borders, the European Commission is primarily responsible for competition policy in cases with a cross-border aspect where company revenues exceed a specified amount.[189] At the same time, national competition authorities can still take action where the Commission does not. The U.S. would do well to follow the EU lead by limiting state authority when a state's action conflicts with federal decisions.

188. For example, the United States's recent attempts to enact tariffs and quotas to protect ailing American steel producers from foreign competition. *See U.S. Specialty Steel Producers React to Import Relief Recommendations*, PRNEWSWIRE, *at* http://biz.yahoo.com/prnews/011207/dcf037_1.html (Dec. 7, 2001). The U.S. International Trade Commission denied U.S. steel manufacturers' requests to impose a duty. *See* Robert Guy Matthews, *Trade Panel Rejects Request For Tariffs on Foreign Steel*, WALL ST. J. ONLINE, (Aug. 28, 2002), *available at* http://www.wsj.com/.

189. EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, Official Journal P 013, 21/02/1962 P. 0204-0211.