



# **DEPARTMENT OF JUSTICE**

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## **ANTITRUST AND FEDERALISM**

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Thank you, Lloyd, and members of the New York State Bar Association, for inviting me here today; I am particularly honored to be speaking on a Panel with my friends, Attorney General Eliot Spitzer, Mike Denger, and Lloyd Constantine, all of whom I have had the pleasure of working with in the past.

How fitting it is that we should gather in New York to discuss federalism issues, given that The Federalist Papers originally were published in New York newspapers in large part to convince representatives of the State of New York, Alexander Hamilton's home state, to support and ratify the newly drafted constitution establishing a national government. Obviously, New York and the other states overcame their concerns, and yet here we are some 215 years later still grappling with some of the same issues.

The dictionary definition of "federalism" is "[a] system of government in which power is divided between a central authority and constituent political units."<sup>1</sup> In the debate that rages within the antitrust community, the term "federalism" takes on different meanings. To some, the term has expanded to connote a system comprised of multiple antitrust enforcers, both public (state and federal) and private, all struggling to co-exist and sometimes to achieve supremacy. To some, it means that states simply have the right and even the obligation to enforce the federal antitrust laws, as well as their own state laws, without regard to federal enforcement. Regardless of how it is used, the crux of the issue it raises is *how* the "power is divided between a central authority and constituent political units."

In a publication of the Federalist Papers, editor Clinton Rossiter noted that the Constitution and the federalist system it established were the result of "a bundle of compromises" exhibiting the tensions built into the very document.<sup>2</sup> In many contexts,

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<sup>1</sup>The American Heritage Dictionary of the English Language 668 (3d ed. 1992).

<sup>2</sup>The Federalist, at xv (Clinton Rossiter ed., 1961).

compromise can produce a watered-down product. But, with respect to our Constitution, perhaps genius can be found in the compromise, *i.e.*, in the tension between federal and state government. That said, living with the system is not without difficulties — difficulties that we should go beyond acknowledging and work to address within the bounds of constitutional jurisprudence.

Some have suggested that, given the federalist approach that many political conservatives take, a Republican official that advocates anything less than full support for states independently exercising antitrust enforcement authority must be hypocritical. But that criticism ignores half of the federalist equation. Twenty years ago, Judge, now Supreme Court Justice, Antonin Scalia, reminded us that federalism is not a principle that runs in only one direction.<sup>3</sup> Rather, it is a compromise between, on the one hand, the “autonomy, disunity, the conflict of independent states; at the other, the uniformity, the inflexibility, the monotony, of one centralized government.”<sup>4</sup>

Congress has explicitly provided the states a role in federal antitrust enforcement, and the federal courts have done some molding of that role.<sup>5</sup> Further, most states have their own state antitrust laws that they enforce in a sovereign capacity, and those laws are not pre-empted solely because “they may impose liability over and above that authorized by federal law.”<sup>6</sup> Although

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<sup>3</sup>Antonin Scalia, *The Two Faces of Federalism*, 6 Harv. J.L. & Pub. Pol. 19 (1982).

<sup>4</sup>*Id.* at 19.

<sup>5</sup>In *American Stores*, the Supreme Court made clear that states, treated as private litigants under § 16 of the Clayton Act, can pursue federal antitrust remedies in addition to those being sought by the federal government. *California v. American Stores Co.*, 495 U.S. 271 (1990).

<sup>6</sup>*California v. ARC America Corp.*, 490 U.S. 93, 105 (1989). In that case, the Supreme Court held that a state statute permitting recovery by indirect purchasers did not conflict with, and therefore was not preempted by, federal law, even though federal precedent prohibits

the states traditionally have played a significant role in antitrust enforcement, their role has been subject to criticism, praise, and debate in between for a number of reasons.

(I will begin with the critics' viewpoints, given that Eliot and Lloyd can be counted on to give the praise.) First, many believe that the states' role adds a significant layer of uncertainty for businesses in their consideration of possible mergers and in their business conduct — uncertainty that may chill procompetitive mergers and conduct and add significant costs.<sup>7</sup>

Antitrust is an area in which over-enforcement and promotion of multiple divergent enforcement views may cause affirmative harm. As the Supreme Court said in the *Gypsum* case, over-deterrence of antitrust laws does not “redound to the public’s benefit.”<sup>8</sup> To avoid a possible enforcement action, or even an investigation, which can be quite burdensome and costly, firms may steer so far clear of potentially violative behavior that they avoid legitimate, competitive behavior that would have produced benefits for consumers. In fact, conduct about which we receive antitrust complaints sometimes turns out to be aggressive competitive behavior, which we would not want to deter. Under the current system, however, businesses may have to tailor their behavior to pass muster with the most restrictive of many potential enforcers, if they can even discern who it is and what that enforcer wants.

Second, some believe that the states, in considering whether to investigate or act, are

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indirect purchaser recovery.

<sup>7</sup>See, e.g., Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 Wayne L. Rev. 71, 117 (1994); Robert Lande, *When Should States Challenge Mergers? A Proposed Federal/State Balance*, 35 N.Y.L. Sch. L. Rev. 1047, 1063 (1990) (“the additional uncertainty from fifty potential state reviews, along with the inevitable accompanying delays and costs, could cause many beneficial transactions never to be attempted”); Robert Bell, *States Should Stay Out of National Mergers*, 3 Antitrust 37, 39 (1989).

<sup>8</sup>*United States v. U.S. Gypsum Co.*, 438 U.S. 422, 443 (1978).

more likely to take into account factors that have been discarded in U.S. antitrust jurisprudence, such as the potential for the merger to produce unemployed workers or the desire to disproportionately assist small businesses.<sup>9</sup> In fact, the National Association of Attorneys General Horizontal Merger Guidelines (“NAAG Guidelines”) articulate policy goals that permit states to take into account how a merger “may affect the opportunities for small and regional businesses to survive and compete.”<sup>10</sup> As established by the Supreme Court and the lower federal courts, the goal of the antitrust laws is to increase efficiency and productivity to the benefit of the consumer in the form of lower prices, better products, and increased value.<sup>11</sup> The goal is not to promote small businesses and entrepreneurs over larger businesses, and it is not to

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<sup>9</sup> See, e.g., Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 Wayne L. Rev. 71, 121 (1994) (noting that states “may challenge mergers for reasons other than the merger’s effect on competition. The political and social goals of antitrust, or more parochially a desire to protect state firms and jobs, may induce a state attorney general to act”); Charles F. Rule, “On Being Head of the Antitrust Division: The World View of a Soon-to-Be Former Assistant Attorney General,” Remarks Presented Before the Antitrust Law Section of the New York State Bar Association (Jan. 18, 1989) (“State attorneys general are elected officials, and parochial political concerns may well influence their decisions to challenge mergers”); Helene Jaffe, *Multi-State Compact Procedure and Pre-Merger Review*, 58 Antitrust L.J. 223, 227 (1989).

<sup>10</sup>Section 2, NAAG Guidelines (available at [http://www.naag.org/issues/pdf/at-hmerger\\_guidelines.pdf](http://www.naag.org/issues/pdf/at-hmerger_guidelines.pdf)).

<sup>11</sup>See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 610 (1985) (finding ski resort’s exclusion of competitor unlawful because it was not motivated by efficiency concerns and inconvenienced consumers); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1433 (9<sup>th</sup> Cir. 1995) (“[A]n act is deemed anticompetitive under the Sherman Act only when it harms both allocative efficiency and raises the prices of goods above competitive levels or diminishes their quality”); *Town of Concord, Massachusetts v. Boston Edison Co.*, 915 F.2d 17, 21-22 (1<sup>st</sup> Cir. 1990) (“[A] practice is ‘anticompetitive’ only if it harms the competitive process. . . . It harms that process when it obstructs the achievement of competition’s basic goals--lower prices, better products, and more efficient production methods”).

save jobs.<sup>12</sup> In fact, mergers that generate efficiencies can force smaller competitors “to improve, rather than worsen, their competitive performance.”<sup>13</sup>

Certainly, a state legislature may determine that protecting local jobs or assisting small businesses are legitimate goals and, within constitutional limits, pass laws to accomplish those goals. It is much harder to make the case that states, in enforcing federal antitrust law, should focus on protecting such interests, especially when the effects of action extend beyond one state’s borders. Indeed, it is difficult to see a federal court upholding an antitrust violation prosecuted on that basis.

Third, some believe that state antitrust officials are more likely to be influenced by individual lobbying businesses within their states.<sup>14</sup> The argument is that state enforcers, in attempting to protect local businesses or jobs, might be more inclined to act upon the complaints of individual constituent competitors who are opposed to an otherwise benign, or even procompetitive, transaction.<sup>15</sup> While some would argue that this should hardly be a criticism in a

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<sup>12</sup>*See, e.g., Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (“The purpose of the [Sherman] Act is not to protect business from the working of the market; it is to protect the public from failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself...”); *Cargill, Inc. v. Montfort of Colorado*, 479 U.S. 104 (1986) (“[C]ompetition for increased market share is not activity forbidden by the antitrust laws. It is simply vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for ‘[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.’”).

<sup>13</sup>Robert H. Bork, *The Antitrust Paradox* 252 (1978).

<sup>14</sup>*See, e.g.,* Richard Posner, *Antitrust in the New Economy*, 68 *Antitrust L.J.* 925, 940 (2001).

<sup>15</sup>Alexander Hamilton himself noted over 200 years ago the tendency of states to act in such a protectionist matter: “Each State, or separate confederacy, would pursue a system of

democratic system, antitrust enforcement concerns itself with “competition, not competitors,”<sup>16</sup> and complaints from competitors and even customers do not always amount to antitrust complaints worthy of prosecution. In the district court’s recent *Microsoft* decision denying certain states almost all of remedies they sought, the court “took careful note of those remedial proposals which advance[d] the interests of particular competitors” and expressed concern that certain of the states’ remedial proposals had “been included for the benefit of particular competitors, rather than for the benefit of competition itself.”<sup>17</sup>

Fourth, some believe that as many antitrust matters have grown not only increasingly national, but increasingly global, in scope, states should confine their role to local or perhaps regional antitrust issues, lest one or a handful of states make decisions that can impact the entire U.S. or world economy.<sup>18</sup> Former Assistant Attorney General Jim Rill has noted, “Independent action taken by state attorneys general, without regard for the international ramifications of their

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commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent.” *The Federalist* No. 7.

<sup>16</sup>As former Assistant Attorney General Thurman Arnold said, more than 60 years ago, “the economic philosophy behind the antitrust laws is a tough philosophy. [Those laws] recognize that someone may go bankrupt. They do not contemplate a game in which everyone who plays can win.” (*quoted in* Jack Brooks, Address at Symposium in Commemoration of the 60<sup>th</sup> Anniversary of the Establishment of the Antitrust Division (Jan. 10, 1994)). Forty years later, federal Court of Appeals Judge Frank Easterbrook added: “Competition is a ruthless process . . . [T]he antitrust laws are not a balm for rivals’ wounds.” *Ball Mem’l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F. 2d 1325, 1338 (7th Cir. 1986).

<sup>17</sup>*State of New York, et al. v. Microsoft Corp.*, 224 F. Supp. 2d 76, 111, 153 (D.D.C. 2000).

<sup>18</sup>*See* Bell, *supra* note 7. *See also* “Advisers to Presidential Candidates Differ on Most Aspect of Enforcement,” 55 *Antitrust & Trade Reg. Rep. (BNA)* No. 1382, at 448 (Sept. 15, 1988).

actions, may sabotage international enforcement efforts as well as domestic ones.”<sup>19</sup> The importance of coordination of enforcers in global matters is increasing, and that role is limited to the federal government. Under the Constitution, of course, the states cannot conduct international relations and cannot enter into international agreements, such as the promulgation of “best practices” for coordination of investigations announced recently by the DOJ and FTC and the European Commission.<sup>20</sup> As James Madison noted in Federalist Paper No. 42, “If we are to be one nation in any respect, it clearly ought to be in respect to other nations.”<sup>21</sup>

On the other side of the debate, the state attorneys general and other supporters of broad state enforcement repeatedly point to the alleged downturn in federal enforcement during Republican administrations in the 1980's, and the states' increased enforcement efforts, as proof that they have to fill the void that may be left by a less aggressive federal government.<sup>22</sup> Some

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<sup>19</sup>James F. Rill and Christine S. Chambers, *Federalism in Antitrust Enforcement: The United States' Experience With a Dual Enforcement Regime*, European University Institute, 2000 EU Competition Workshop/Proceedings, April 19, 1996 (available at [http://www.iue.it/RSC/competition/Rill\\_2.pdf](http://www.iue.it/RSC/competition/Rill_2.pdf)).

<sup>20</sup>US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (available at <http://www.atrnet.gov/subdocs/200405.htm>).

<sup>21</sup>Justice Taney wrote with respect to the Compact Clause in 1840 that the Framers meant to “use the broadest and most comprehensive terms; and that they anxiously desired to cut off all connection or communication between a State and a foreign power” and that they meant “to prohibit every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties.” *Holmes v. Jennison*, 39 U.S. 540, 570-72 (1840).

<sup>22</sup>In 1988, then-New York Attorney General Robert Abrams asserted, “We have been witnessing the watchdog put to sleep. The states have had to fill the breach.” (quoted in Daniel B. Moskowitz, *Why the States are Ganging Up on Some Giant Companies*, Business Week, Apr. 11, 1988, at 62). See also Michael Brockmeyer, *Report on the NAAG Multistate Task Force*, 58 Antitrust L.J. 215, 216 (1989) (noting that “the states found themselves in an enforcement void that was leaving the citizens of their individual states unprotected”); Sara Fritz, *Another N.Y. Official Making National Name for Himself*, St. Petersburg Times, Nov. 29, 2002, at A1 (New York State Attorney General Eliot Spitzer discussing more generally the role of state attorneys general, noting “I see us as advocates who jump in where we see a need because there has been a



state officials have pointed to what they see as a history of more aggressive enforcement by states in all recent periods as evidence of their importance in enforcing federal law.<sup>23</sup> In contrast to the argument that state attorneys general are too susceptible to lobbying influences, some view the state officials as closer to the citizenry they serve and thus more directly accountable to the electorate.<sup>24</sup> (I believe Lloyd once referred to federal antitrust officials as “unelected and substantially unaccountable federal bureaucrats”.)<sup>25</sup> Finally, it is argued that state enforcement assures that there will be innovation in antitrust jurisprudence and policy.<sup>26</sup>

It is impossible currently to discuss the topic of federal and state roles in antitrust enforcement without discussing the *Microsoft* case. Several states have pointed to that case as an example of how a subset of states can and should act in a case of national importance independently of federal enforcers. It is true that nine states and the District of Columbia did proceed with the case after the federal government and nine other states settled (and, indeed, two states are still proceeding with the case).

Following largely coordinated investigations, in 1998, the United States and several states commenced separate suits against Microsoft challenging substantially the same conduct.<sup>27</sup> The two cases were consolidated for all purposes, tried together, decided together, appealed

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void”).

<sup>23</sup>See, e.g., Lloyd Constantine, *Antitrust Federalism*, 29 Washburn L.J. 163 (1990).

<sup>24</sup>*Id.* at 183 .

<sup>25</sup>*Id.* at 163.

<sup>26</sup>*Id.* at 183-84.

<sup>27</sup>*United States v. Microsoft Corp.*, Civil Action No. 98-1232 (D.D.C. filed May 18, 1998); *State of New York, et al. v. Microsoft Corp.*, Civil Action No. 98-1233 (D.D.C. filed May 18, 1998). By the time the case made it to trial, the counts alleged by the United States and the states were identical.

together, and remanded together.<sup>28</sup> The courts treated the cases as indistinguishable, as did the parties. Upon remand of the “slimmed down” case, in late September 2001, the district court ordered all parties to engage in settlement negotiations “seven days a week and around the clock.”<sup>29</sup> Representatives from New York, Ohio, and Wisconsin negotiated, together with Antitrust Division representatives, although they did not have authority to bind the other states.

When we emerged after five weeks of settlement negotiations, the latter half aided by professional mediators, the United States and nine states, including New York, Ohio, and Wisconsin, had agreed to a settlement with Microsoft.<sup>30</sup> Nine other states<sup>31</sup> and the District of Columbia, after taking a few days to consider it, declined to join. Notwithstanding our cooperation -- which states involved described as unprecedented<sup>32</sup> -- we had a divergence. We nonetheless opted to move ahead with our settlement, while the non-settling states proceeded with remedies litigation, seeking additional and broader remedies.

The legality of the states proceeding with the case was questioned when Microsoft filed a

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<sup>28</sup>See *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>29</sup>Order, *United States v. Microsoft Corp.*, at 2-3 (September 28, 2001).

<sup>30</sup>See Revised Proposed Final Judgment, *United States v. Microsoft Corp.* (filed November 6, 2001) (*available at* <http://www.usdoj.gov/atr/cases/f9400/9495.htm>) and Second Revised Proposed Final Judgment (filed on February 27, 2002) (*available at* <http://www.usdoj.gov/atr/cases/f10100/10146a.htm>). The settling states include New York, Ohio, Illinois, Kentucky, Louisiana, Maryland, Michigan, North Carolina, and Wisconsin.

<sup>31</sup>The nine non-settling states were California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, and West Virginia.

<sup>32</sup>See *Roundtable Conference with Enforcement Officials*, 70 Antitrust L.J. 261, 294 (2002) (comments of Patricia Conners, Chair of the National Association of Attorneys General Multistate Antitrust Task Force).

motion to dismiss the non-settling states' demand for equitable relief, claiming that the demand exceeded the states' *parens patriae* standing.<sup>33</sup> Microsoft contended that, as a matter of antitrust and constitutional law, the states had no role to play in a case that involved nationwide conduct and in which the federal government had litigated and reached a settlement. Microsoft's central argument was that, in order to establish *parens patriae* standing, the states must establish that they are seeking to remedy some state-specific injury, rather than just seeking to substitute their judgment for that of the United States.<sup>34</sup> The states, with some variations among them, presented the view that in fact state antitrust enforcement is the work of independent sovereigns standing on an equal footing with the United States.<sup>35</sup> In their view, the fact that the case involved conduct of importance to the nation as a whole and as to which the Justice Department had already settled should not cause the Court to hesitate with respect to their claims for additional remedial measures that would affect the computer industry nationwide.

At the Court's request, we filed an *amicus* brief.<sup>36</sup> In it, we noted that the action by the

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<sup>33</sup>Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief, *State of New York, et al. v. Microsoft Corp.* (filed February 26, 2002).

<sup>34</sup>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.*, at 17 (filed February 26, 2002).

<sup>35</sup>Plaintiff Litigating States' Response to Microsoft's "Motion for Dismissal of the Non-Settling States' Demand for Equitable Relief," *State of New York, et al. v. Microsoft Corp.*, at 12-15 (filed March 15, 2002); Memorandum of Plaintiff State of New York as Amicus Curiae in Opposition to the Motion of Defendant Microsoft Corporation for Dismissal of the Litigating States' Demand for Equitable Relief, *State of New York, et al. v. Microsoft Corp.*, at 9-14 (filed March 15, 2002); Memorandum of 24 States as Amicus 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.*, at 8-11 (filed March 15, 2002).

<sup>36</sup>Order, *State of New York, et al. v. Microsoft Corp.* (March 25, 2002). Memorandum Amicus Curiae of the United States of America Regarding Microsoft Corporation's Motion for

nine non-settling states raised for the first time the prospect that a small group of states, with no particularized interests to vindicate, could obtain divergent injunctive relief with wide-ranging, national economic implications. Nonetheless, we disagreed with Microsoft that dismissal was required as a matter of law and made several important points.

The first point was that, by statute, the United States is the sole enforcer of the federal antitrust laws on behalf of the American public.<sup>37</sup> While the states have the authority to seek injunctive relief under federal law, they do so as private parties under Section 16 of the Clayton Act,<sup>38</sup> not as sovereign law enforcers. Section 16 is narrower than the Clayton Act and Sherman Act provisions for equitable relief in actions brought by the United States.<sup>39</sup> In sum, the U.S. may seek and secure injunctions to restrain violations without a showing of injury. The states, on the other hand, like private parties, cannot seek injunctive relief based on a sovereign interest in law enforcement. State standing is based on a quasi-sovereign interest as *parens patriae* on behalf of citizens of the state, and the states must demonstrate the requisite interest.<sup>40</sup> This distinction was not accidental. Congress considered and expressly rejected the proposal that the states be authorized to seek federal injunctive relief on the basis of a sovereign interest.<sup>41</sup>

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Dismissal of the Non-Settling States' Demand for Equitable Relief, *State of New York, et al. v. Microsoft Corp.* (filed April 15, 2002) (hereinafter "U.S. Amicus Mem.") (*available at* <http://www.usdoj.gov/atr/cases/f10900/10980.htm>).

<sup>37</sup>*Id.* at 4-9.

<sup>38</sup>15 U.S.C. § 26.

<sup>39</sup>U.S. Amicus Mem. at 6.

<sup>40</sup>*See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (A state acting as *parens patriae* asserts the "quasi-sovereign interest in the health and well-being — both physical and economic — of its residents in general").

<sup>41</sup>During the floor consideration of the Clayton Act, Senator Reed proposed an amendment, later rejected, that would have added a new section to the bill: "That the attorney

Nonetheless, we said that Microsoft had not established a basis for dismissal of the claims as a matter of law.<sup>42</sup> The law does impose some limits on state standing. On the one hand, as I mentioned, the states must show some level of injury to their citizens in order to be proper plaintiffs. And on the other hand, the states cannot use *parens patriae* standing to advance the interests of private parties. But no case supported the notion that, having shown an injury, a state could not have standing as a plaintiff because that same injury was also felt in other states.<sup>43</sup> While the non-settling states' pursuit of additional remedies presented difficulties in the Division's conduct of a very complex case, the law was clear that they had a right to participate, and, therefore, that is what we told the Court.

We did, however, point out that the limitations of Section 16 of the Clayton Act and the enforcement judgment of the United States were important considerations in the Court's exercise of equitable discretion.<sup>44</sup> We took the position, backed by case law, that the Court in exercising

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general of any State may, at the cost of the State, bring suit in the name of the United States to enforce any of the antitrust laws." 51 Cong. Rec. S14,476 (daily ed. August 31, 1914), *reprinted in* 3 Earl W. Kintner, *The Legislative History of the Federal Antitrust Law and Related Statutes* 2288 (1978).

<sup>42</sup>U.S. Amicus Mem. at 9-21.

<sup>43</sup>*Id.* at 11.

<sup>44</sup>*Id.* at 21-26. In *American Stores*, 495 U.S. at 295-96, the Supreme Court stated:

Our conclusion that a district court has the power to order divestiture in appropriate cases brought under § 16 of the Clayton Act does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief under § 15. In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief. See *Du Pont*, 366 U.S. at 319-321; see also *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."); *United States v. San Francisco*, 310 U.S. 16, 30-31 (1940) (authorizing issuance of

equitable discretion should take into account the United States' enforcement judgment in entering into its settlement and, if approved, how that would bear on the non-settling states' requisite threatened loss or damage; whether a small group of states were the parties best situated to obtain relief of such broad reach and implication; and whether the states were using their *parens patriae* authority improperly to act on behalf of the private interests of certain firms, an allegation that Microsoft had lodged.<sup>45</sup>

The Court denied Microsoft's motion, largely on the basis that the Court of Appeals had implicitly or explicitly confirmed the states' *parens patriae* standing.<sup>46</sup> At the time, the Court noted that the United States' policy arguments on the issue might inform the Court's exercise of equitable powers in devising a remedy in the non-settling states' case.<sup>47</sup>

On November 1, 2002, Judge Kollar-Kotelly issued her opinions in what had become two *Microsoft* cases. In sum, with only minor exceptions, the Court accepted the settlement reached by the United States and nine states and almost entirely rejected the non-settling states' request for additional relief.<sup>48</sup>

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injunction at Government's request without balancing of the equities). A private litigant, however, must have standing--in the words of § 16, he must prove "threatened loss or damage" to his own interests in order to obtain relief. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986). Moreover, equitable defenses such as laches, or perhaps "unclean hands," may protect consummated transactions from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest.

<sup>45</sup>U.S. Amicus Mem. at 23-26.

<sup>46</sup>*State of New York, et al. v. Microsoft Corp.*, 209 F. Supp. 2d 132 (D.D.C. 2002).

<sup>47</sup>*Id.* at 155 n.28.

<sup>48</sup>*United States v. Microsoft Corp.*, 2002 WL 31439450 (D.D.C. 2002) (conditionally approving the settlement); *State of New York, et al. v. Microsoft Corp.*, 224 F. Supp. 2d 76

The Court's assessments of the two remedies proposals are a study in contrast. The Court found that the Department's settlement was in the public interest and approved it.<sup>49</sup> And, after addressing virtually every criticism of the settlement, the Court commended the settling parties for the quality of the proposed final judgment, in particular the:

clear, consistent, and coherent manner in which it accomplishes its task. Far from an amalgam of scattered rules and regulations pieced and patched together to restrict Microsoft's anticompetitive business conduct, the proposed final judgment adopts a clear and consistent philosophy such that the provisions form a tightly woven fabric. The proposed final judgment takes account of the theory of liability advanced by Plaintiffs, the actual liability imposed by the appellate court, the concerns of the Plaintiffs with regard to future technologies, and the relevant policy considerations.<sup>50</sup>

The Court disapproved of the non-settling states' attempt to seek relief for "all existing anticompetitive conduct" that has not been proven "or for which liability has not been ascribed."<sup>51</sup> The Court further noted that the non-settling states showed "little respect for the parameters of liability that were so precisely delineated by the appellate court," and presented "little, if any" legitimate legal or economic justification for their proposed remedies.<sup>52</sup>

The Court also took "careful note of those remedial proposals which advance[d] the interests of particular competitors."<sup>53</sup> Even a cursory review of the opinion indicates that there were many such proposals, including those relating to handheld devices, web services, regulation of Microsoft third-party licenses, the cloning of Microsoft products, open sourcing Internet

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(D.D.C. 2002) (rejecting almost all of the non-settling states' request for further relief).

<sup>49</sup>*Microsoft*, 2002 WL at \*\*157-58.

<sup>50</sup>*Id.*

<sup>51</sup>*Microsoft*, 224 F. Supp. 2d at 192.

<sup>52</sup> *Id.*

<sup>53</sup>*Id.* at 111.

Explorer, mandatory auction of Office products, and mandatory JAVA distribution. On several occasions, the Court expressed concern that certain of these remedial provisions had “been included for the benefit of particular competitors, rather than for the benefit of competition itself.”<sup>54</sup>

It is not over yet. Two non-settling states, Massachusetts and West Virginia, have appealed Judge Kollar-Kotelly’s November 1 decision rejecting virtually all of the alternative remedies proposed by the non-settling states. The remaining seven non-settling states and the District of Columbia have declined to appeal, and they are working with us to enforce the judgments.

This was an example of a matter in which a small group of states decided that the federal government was not properly enforcing the antitrust laws and that they must step in to fill the void. The rhetoric from their supporters was deafening. Here, said the critics, was a new administration bent on “gutting” the *Microsoft* case, as those same critics apparently ignored the significant ways in which the D.C. Circuit had scaled back the case. Nonetheless, we believed that we had accepted a settlement that appropriately remedied Microsoft’s violations in accordance with antitrust law, including the appellate decision. And almost one year to the day after we settled, the district court opined that our settlement was the right one.

What happened in this rare case in which the federal government and the states disagreed? Did the non-settling states fill a void? No, because, quite simply, there was no void to fill. Were the non-settling states more aggressive? Unquestionably, the non-settling states were more aggressive in their remedy proposals. But, in a 300-page opinion, the Court dissected their aggressive remedial proposals and made plain that they were unacceptable in light of the

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<sup>54</sup>*Id.* at 153.



Court of Appeals' decision.

Were the non-settling states closer to the public whose interest we serve and thus more accountable? Divining what is in the public's best interest is the hardest (and most important) task we face. Certainly the states had strong support from Microsoft's competitors, as well as from many others in the computer industry and some academics. But we spoke to those same people and listened to their views. And by law, of course, the Justice Department, not the states, was charged with protecting the interests of *all* United States consumers, and we did just that. In addition, even if you agree that the staff of state attorneys general are closer and more accountable to the electorate than the staff of the United States Attorney General (and I do not), nine other states chose the settlement, and there is no colorable argument that they are less accountable than their non-settling counterparts. Finally, did the non-settling states further the development of antitrust jurisprudence? Yes, I believe they did. Litigation of their remedial proposals allowed the Court to consider most of them on the basis of a full evidentiary record, and the lengthy opinion it produced should provide guidance in future antitrust cases.

I am not suggesting that this one case by any means ends the debate. It does, however, raise a number of questions, particularly for cases of national or international significance when the federal government is taking action. Who decides whether there is a "void" in federal antitrust enforcement? Are there 56 potential decision-makers who can independently decide if there is a "void" to be filled? What if they use different standards? Do the federal antitrust agencies have a role to play when they believe the states have left a "local void"? Do the federal antitrust agencies have a role to play when they believe the states are inappropriately enforcing the antitrust laws to the detriment of the marketplace and consumers? When a federal antitrust agency is investigating or bringing a case of national significance, should states conduct parallel

investigations and bring parallel actions? If the states believe that more antitrust enforcement is a good thing, why duplicate our resources? If the federal government and one or more states do conduct parallel investigations, should the states defer to the federal agencies if they are unable to agree? Does it make a difference whether only one state diverges? Does it make a difference if the European Commission or another foreign competition authority is conducting a parallel investigation?

(You didn't think I was actually going to answer all of those questions, did you?) Critics of the current system periodically offer proposals for change. In 1990, for example, Bob Lande proposed that the federal government and the states adopt "Federalism Guidelines" as a means of avoiding duplicative enforcement in the merger context.<sup>55</sup> In doing so, he noted that "principles of federalism suggest that states were not meant to have so much ability to influence national affairs. . . [A]llowing states to go further and interfere in fundamentally national decisions runs counter to basic principles of federalism." In short, Lande proposed a system that would presumptively put the federal government in charge of large transactions with national effects, place states in charge of more local transactions, and try to find some common principles for dealing with situations in between.<sup>56</sup>

Judge Posner of the United States Court of Appeals for the Seventh Circuit would go further, suggesting that states be stripped of their authority to bring federal or state antitrust suits, except "under circumstances in which a private firm would be able to sue, as where the state is

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<sup>55</sup>Robert H. Lande, *When Should States Challenge Mergers: The Past and Future of Antitrust as Public Interest Law*, 35 N.Y.L. Sch. L. Rev. 1047 (1990). Interestingly, Mr. Lande was a strong critic of the Justice Department's *Microsoft* settlement and an equally strong supporter of the non-settling states' remedial proposals.

<sup>56</sup>*Id.* at 1062.

suing firms that are fixing the prices of goods or services they sell to the state.”<sup>57</sup> He has proposed that Congress should enact a statute that would make antitrust law an exclusively federal body of law. In doing so, he cites concerns about states “free riding” on federal antitrust litigation, complicating its resolution, and potentially being “too subject to influence by interest groups that may represent a potential antitrust defendant’s competitors.”<sup>58</sup>

Because I believe our current system is unlikely to change significantly in the near term, I think all enforcers should keep in mind the questions the system raises and our ultimate goals, as we exercise our prosecutorial discretion and utilize the precious resources of our clients, the taxpaying public. I also offer a few additional thoughts. Without question, under the current system, the state attorneys general should enforce the antitrust laws in matters of local reach. When presented with the question of whether to open a matter that appears to be confined within a single state, I always ask that the state attorney general be contacted and asked to take on the matter. In many cases, including a recent one brought by the State of New York, that referral system works well. But recently we have encountered a few cases in which a state has declined to take on such a matter, citing lack of resources and asking that we nonetheless investigate. The problem has been, however, that those same states were at the same time involved in one or more large national matters in which the Antitrust Division was also involved. I submit that it makes little sense to have the federal government bringing intrastate antitrust matters so that states can

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<sup>57</sup>Richard Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940 (2001). Judge Posner’s observations are part of a larger proposal he has made to eliminate the tendency of antitrust litigation to create multiple lawsuits out of a single dispute, or the “cluster bomb” effect, as he call as it. He has suggested that the Justice Department be empowered to bring antitrust suits for damages and parcel out the proceeds of the suit among the victims, and that private (and state suits, if still available) be preempted.

<sup>58</sup>*Id.*

be free to bring cases of national significance.

Second, I think it is critical to the integrity of antitrust enforcement and, most importantly, to the public we serve, that our enforcement efforts be complementary and not conflicting. We must all continue working toward that goal, both substantively and procedurally. In most instances, state and federal enforcers work closely with one another to achieve effective and consistent results. In 1998, the Department, the FTC, and the states adopted a protocol for cooperation on merger investigations.<sup>59</sup> The protocol sets forth the procedures that the agencies and states have been using for many years, and we continue to follow it. Its goals are to avoid unnecessary duplication of efforts in conducting merger investigations, to reduce compliance costs for merging parties, and to conserve public resources. The protocol outlines the steps for maintaining the confidentiality of information; details the procedures under which the Department and the FTC will provide states with types of sensitive information; sets forth best practices for conducting joint investigations; and addresses how the agencies should coordinate the release of information to the media.

Recent examples of successful cooperation and coordination include the Department's challenges of the United Airlines/USAirways and DirecTV/Echostar mergers. In the United matter, the parties abandoned the transaction after we indicated an intent to challenge. In the DirecTV/Echostar matter, the Department was joined in its lawsuit challenging the merger by the Attorneys General of 23 states, the District of Columbia, and the Commonwealth of Puerto Rico.

Complementing our joint efforts on certain litigation matters is the formation in 2002 of a federal and state relations working group that includes state representatives, DOJ and FTC dedicated liaisons, and other federal agency staff. The group currently is examining several

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<sup>59</sup>See Antitrust Trade Reg. Rep. (CCH) ¶ 13,420 (1998).

issues related to conducting investigations, including facilitating the electronic production of materials. In addition, we are considering possible expansion of regional meetings and collaboration, as well as ways to achieve stronger integration of discovery and trial teams, where appropriate.

Finally, we need to remember that we enforce the antitrust laws together with an even larger web of enforcers, here and around the world. The Justice Department works closely with the FTC and, as appropriate, other federal agencies like the Federal Communications Commission, to avoid duplication of effort and divergence in enforcement positions. The states have worked with private class action lawyers toward the same ends. These efforts are critical and must continue. In addition, the importance of U.S. cooperation with non-U.S. competition agencies cannot be understated and that, of course, must be done by the federal antitrust agencies.

In closing, I would like to note a federalism effort beyond our borders. The European Union's recent modernization regulation has contributed to the debate over the appropriate allocation of responsibility in a multijurisdictional system of antitrust enforcement. The new regulation, which is scheduled to take effect in May 2004, will decentralize non-merger antitrust enforcement by allowing EU member states and courts to enforce Article 81 in its entirety — the EU counterpart to Section 1 of the Sherman Act — which prohibits agreements that distort competition.<sup>60</sup>

The regulation will, in effect, create joint jurisdiction between the Commission and affected member states for cases involving intra-EU trade. The Commission will retain the

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<sup>60</sup>The member states have always had the power to enforce Article 82 — the EU's abuse of dominance provision — as well as their own national rules in this area.

power to assert jurisdiction or to intervene in cases of particular EU interest, and member state authorities and courts will be obligated to notify the Commission of all national cases involving Article 81. The Commission also has the power to open its own investigation, which then removes the case from the jurisdiction of the member states. While the regulation does not offer much guidance on how cases are to be allocated between the Commission and member states, the European Council and Commission issued a joint statement indicating that the Commission will be better equipped to deal with cases that: affect more than three member states; are closely linked to other Commission policies that may be exclusively or more effectively applied by the Commission; or require the adoption of a Commission decision to develop competition policy in the Community interest.<sup>61</sup>

To further ensure a uniformity of interpretation of Article 81, the Commission will continue to issue guidelines and block exemptions. The regulation also provides that if a member state's antitrust agency applies national antitrust rules to cases that might affect trade between member states, it must also apply EU rules to such cases, and where Article 81 does not prohibit an agreement, national rules may not prohibit that agreement.

We have also followed with interest the European Commission's recent proposal to refine its "one-stop-shop" system of merger review. Under this system, either the Commission or the member states — but never both — rule on proposed mergers.

Although the United States has a few more decades of antitrust enforcement experience than the EU, perhaps we can learn a valuable lesson or two from our European counterparts about federalism in practice. While we will have to wait and see how the reforms function in

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<sup>61</sup>Joint Statement of the Council and Commission on the Functioning of the Network of Competition Authorities, 15435/02 (*available at* <http://register.consilium.eu.int/pdf/en/02/st15/15435-a1en2.pdf>).

practice, the EU should be applauded for its attempt to create a complementary, and not conflicting, enforcement regime.