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WHEN SHOULD STATES CHALLENGE MERGERS:
A PROPOSED FEDERAL/STATE BALANCE*

ROBERT H. LANDE**

It is clear that state antitrust enforcers are able to challenge corporate mergers. A state is even able to challenge the largest nationwide transactions so long as it can show that the state itself, its citizens, or its economy is affected in a way that provides standing. Each state has the power to initiate such challenges regardless what enforcement or nonenforcement decisions the federal antitrust enforcers make. In recent years the states have shown much greater willingness to exercise this prerogative.

Critics fear negative effects from ascendent state merger scrutiny. Many believe that the government’s position towards exceptionally large transactions should be a fundamental matter of national economic policy. Enforcement and nonenforcement decisions, they say, should be made by officials appointed by the President with the approval of the U.S. Senate. Such critics fear that the prospect of challenge by any of fifty states adds uncertainty and delay into an already problematic process, and will cause beneficial transactions never to be attempted. Their fears are often exacerbated by the belief that state enforcers sometimes have parochial or politically suspect motives and may be relatively inexperienced. Critics watch the European Economic Community advance towards greater


** Associate Professor, University of Baltimore School of Law. The author thanks Michael Brockmeyer for help developing many of the central ideas in this article. The author also is grateful to William Blumenthal, James Egan, David Frankel, Ernest Gellhorn, Robert Langer, and Malcolm Ffunder for extremely insightful comments and suggestions, and to David Kimberling for research assistance. This article evolved from work the author performed while on an ABA Antitrust Section task force that was studying the relationship between federal and state merger enforcement. The views expressed and remaining mistakes are solely those of the author.

1. This article will use the term “merger” as a shorthand that includes related types of corporate acquisitions, as well.


3. Id.

4. Id.

5. Id.; see also infra notes 82-83 and accompanying text.
economic unity in 1992 and fear that the United States economy is sliding into Balkanization.

Others hotly dispute these contentions. They maintain that state merger enforcement has been responsible, and contend that each state attorney general has an obligation to protect his or her state and its economy and citizens from the potential exercise of market power. 6 Although Congress wanted our nation's primary antitrust enforcement to be at the federal level, it also intended for the states to have a role. 7

This article will attempt to balance these competing concerns by focusing upon the classes of mergers for which the potential problems are likely to be most significant. It will attempt to delineate categories of mergers for which states should be the primary enforcer, and categories for which they normally should defer to federal enforcement and nonenforcement decisions. This balancing will occur in light of the role the states are supposed to play in the federal system and the degree to which the critics' fears have been justified. This article will attempt to reconcile principles of federal supremacy and the need for national economic decisionmaking with the states' obligations to protect themselves, their citizens, and their economies from potentially anticompetitive mergers. It also will attempt to accommodate merging parties' need to know, as a practical matter, which enforcer is likely to scrutinize a particular merger closely.

This article will propose a series of merger "Federalism Guidelines" that the state and federal enforcers should consider for inclusion within their respective sets of substantive merger guidelines, or within any unified set of substantive guidelines that the federal and state enforcers might be able to negotiate. The proposed Federalism Guidelines are printed in an Appendix to this article. 8 These Federalism Guidelines start with the premise of general federal supremacy in merger enforcement and from this promulgate an explicit division of responsibility. They delineate a category of mergers for which the state enforcers should virtually always defer to federal enforcement decisions. 9 The Federalism Guidelines also delineate a category of mergers for which the states should be the prime enforcers, 10 leaving the remaining mergers subject to scrutiny at both

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7. See infra notes 12-14 and accompanying text.
8. See infra at p. 1091.
9. This category encompasses the largest national mergers and is modeled after the European Economic Community approach which provides that such mergers usually should be handled at the Community level.
10. This category includes mergers that primarily affect only that state.
The primary purpose of the Federalism Guidelines is to inform firms, as a practical matter, when states are most—and least—likely to initiate a challenge.

In the recent past no solution remotely like the one being proposed here could have been seriously considered, due to mutual federal/state distrust. But there now exists the solid basis for an era of mutual state/federal tolerance and respect. The current federal enforcers are reasonable pragmatists whose enforcement decisions are likely to be given great deference by the state enforcers. This is the perfect time to memorialize and solidify the spirit of cooperation. Federalism Guidelines agreed to under the current climate would be likely to constitute reasonable compromises that the federal and state enforcers would be able to accept for many years.

I. INTRODUCTION AND BACKGROUND

A. The States’ Authority to Challenge Mergers

When Congress enacted the federal antitrust laws it chose not to foreclose state antimerger activity. The legislative histories of the antitrust laws indicate that the congressional purpose was to supplement, not supplant, state activity. This intention has repeatedly been affirmed by the Supreme Court.

11. See infra pt. III(C).


13. Senator Sherman intended that the Sherman Act invoke the aid of the courts of the United States to deal with the combinations . . . and in this way to supplement the enforcement of the established rules of the common and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of these states. It is to arm the Federal courts within the limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States. 21 CONG. REC. 2457 (1890); see also Note, State Anti-Merger Policy: Divesting the Federal Government of Exclusive Regulation, 12 LOY. U. CHI. L.J. 531, 557 n.143 (1981) (stating that Senator Sherman’s declared purpose of the Sherman Act was to supplement state law, not to preempt it).

14. The most recent case supporting this view is California v. American Stores Co.,
States can sue under state antimerger laws or under state antitrust statutes with provisions comparable to the Sherman Act. States also can sue under the federal antitrust laws, using three theories. First, the state may be able to sue for injunctive relief in its capacity as a purchaser of the product(s) in question and, if it is a direct purchaser, for damages. Second, a state can bring suit under its common law parens patriae authority in its "quasi-sovereign" capacity or "as agent and protector of her people against a continuing wrong done to them ...." Under federal common law a state has the parens patriae authority to secure injunctive relief to protect its economy against future violations of the federal antitrust laws. Third, a state can obtain injunctive relief and divestiture under section 16 of the Clayton Act, acting as parens patriae of the consumers within its borders.

State merger challenges potentially can give rise to two types of constitutional issues. First, Congress could preempt state antimerger

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110 S. Ct. 1853 (1990) (holding that states can seek divestiture as a form of equitable relief under section 16 of the Clayton Act). In California v. ARC America Corp., 490 U.S. 93 (1989), the Court observed that "[i]t is plain that [antitrust] is an area traditionally regulated by the States" and that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Id. at 101-02.


16. A list of 19 such state statutes was compiled in 1981. See id. at 535 n.21. Suits based on state laws can be brought in federal court if the states have pendent federal claims. See M. Pfunder, supra note 12, at 11.

17. These theories are explained in more detail in M. Pfunder, supra note 12, at 12.


21. Id. at 445, 447-48; Hawaii v. Standard Oil Co., 405 U.S. 251, 261 (1972). States, under their parens patriae authority, may obtain injunctive relief but not treble damages. Suits seeking such relief have long been recognized and there is no reason to exclude them from the purview of the antitrust acts. Id. at 261-64.


23. Several other constitutional issues, such as equal protection and due process, also could arise from state merger enforcement. See ABA ANTITRUST SECTION, MONOGRAPH No. 15, ANTITRUST FEDERALISM: THE ROLE OF STATE LAW 16-24 (1988). In addition, a mandatory compact among the states at the expense of the supremacy of the United States government could violate the Constitution's compact clause. See Note, To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation, 102 HARV. L. REV. 842, 858-59 (1989).
laws by virtue of its powers under the supremacy clause to the extent necessary to effectuate federal goals.\(^{24}\) Second, the commerce clause may prevent state merger enforcement actions that unduly discriminate against, regulate, or burden interstate commerce.\(^{25}\) Although the issues are not free from doubt,\(^{26}\) constitutional problems related to state merger enforcement

\(^{24}\) See M. Pfunder, supra note 12, at 38-41. The Supreme Court recently explained the doctrine succinctly:

It is accepted that Congress has the authority, in exercising its Article I powers, to pre-empt state law. In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

... When Congress legislates in a field traditionally occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Given the long history of state common-law and statutory remedies against monopolies and unfair business practices, it is plain that this is an area traditionally regulated by the States. California v. ARC Am. Corp., 490 U.S. 93, 100-01 (1989) (citations omitted).

\(^{25}\) See M. Pfunder, supra note 12, at 42-49. In Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986), the Supreme Court summarized the analysis:

This Court has adopted what amounts to a two-tiered approach to analyzing state economic regulation under the Commerce Clause. When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the state's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits. We have also recognized that there is no clear line separating the category of state regulation that is virtually per se invalid under the Commerce Clause, and the category subject to the ... balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity.

Id. at 578-79 (citations omitted).

\(^{26}\) For example, noted constitutional authority Ernest GeIIhorn concluded:
In many cases, I believe that recent state efforts are preempted because the federal government has preempted the field, but I recognize it is often a difficult question. ... Our federalist fathers wrote a Constitution which includes a Commerce Clause and Supremacy Clause that provide for different state
appear to be minor. It seems unlikely that any state merger challenge, under either federal law or a substantially identical state law, would be found unconstitutional either because of federal preemption or the commerce clause. No state merger challenge has recently been blocked on constitutional grounds.

B. The Federal/State Relationship

Many observers analyze the relationship between federal and state merger enforcement under the implicit assumption that the states have come virtually out of nowhere and are now invading the federal enforcers' enforcement approaches than the ones [recently carried out] . . . . in reviewing recent state innovations, I find the encroachment on federal antitrust responsibilities too intrusive. The states have ignored the fact that the federal government has occupied the field of national antitrust policy. Gellhorn, States' Role Is Regulation of Local Conduct, 2 ATRS REP. 6, 6 (1989).

27. According to Professor Herbert Hovenkamp, "[i]t seems clear, today, that the assertion that federal law occupies the field will not be sufficient to preempt state antitrust law." Hovenkamp, State Antitrust in the Federal Scheme, 58 Ind. L.J. 375, 403 (1983). Professors Areeda and Turner explained:

Where state law prohibits the same, or less than the federal antitrust law, there is, therefore, no general difficulty in giving effect to the state's commands. However, where state law forbids more than federal law—which is not the usual situation—the problem is more subtle. The general answer is that such a state law remains consistent with federal law, and is not preempted. The fact that federal law tolerates certain conduct does not necessarily mean that there is an affirmative federal policy encouraging such conduct.


29. As Professor Hovenkamp observed:

Applications of state antitrust laws to situations “in or affecting” interstate commerce have rarely been condemned and nearly all cases that did condemn such applications were decided before 1935, when judges had a much more restrictive view of the power of the states to regulate in interstate commerce, or to exercise their jurisdiction over persons outside the state. The Supreme Court has upheld applications of state antitrust laws where significant interstate commerce or extraterritorial activity is involved . . . .

. . . Since 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, there are virtually no operative limits on the reach of state antitrust law under the commerce clause.

Hovenkamp, supra note 27, at 386-90 (footnotes omitted).
province. They analyze this "change" and evaluate whether it is desirable. This approach, however, is like viewing one frame of a motion picture. The current dynamic is merely the latest stage in a complementary relationship that goes back a century. The balance between federal and state enforcement of the trade regulation laws has shifted throughout this period. This history suggests that for the foreseeable future there will be overlapping and potentially conflicting federal and state trade regulation activity. The federal and state regulators, and the rest of the antitrust world, should accept this shifting balance and attempt to devise the best overall approach towards reconciling competing state and federal concerns.

To put the role of the states in perspective we should briefly return to the start of the modern trade regulation movement. An incisive article by Professor James May observes that before the Sherman Act was passed thirteen states had enacted antitrust statutes, fourteen state constitutions contained antitrust provisions, and the states had prosecuted half a dozen successful antitrust cases against major trusts. During the first decade after the Sherman Act was passed, more antitrust suits were filed by state enforcers than by their federal counterparts. Not only were the state


31. This section will focus on trade regulation generally rather than on merger enforcement, since prior to the 1950 Cellar-Kefauver Act and relevant Supreme Court interpretations of the Sherman Act in the 1960s, federal merger enforcement was very lax. See, e.g., Rhoades & Burke, Economic and Political Foundations of Section 7 Enforcement in the 1980's, 35 ANTITRUST BULL. 373, 373-80 (1990).


33. Id. at 500-01. During this early period of relatively vigorous state enforcement of the antitrust laws there does not appear to have been any anti-state rhetoric from federal enforcers. No scholars with whom I have consulted are aware of such rhetoric. During the first decades after the passage of the Sherman Act critics were not, for example, admonishing the states to leave the Standard Oil trust alone and wait for the federal antitrust enforcers to prosecute. Rather, the attitude appears to have been that both the states and the federal antitrust enforcers should, separately or together, attempt to sue the Standard Oil trust for antitrust violations. While it is hard to prove a negative, any future historian looking back at the late 1980s easily could find an abundance of "anti-state" rhetoric promulgated by certain Reagan administration enforcers. See, e.g., infra notes 82-83.
suits more numerous, several were against large national targets.\textsuperscript{34} This early period also saw the beginning of state merger activity.\textsuperscript{35}

As federal enforcement grew, state enforcement waned.\textsuperscript{36} A generation ago state antitrust enforcement was virtually nonexistent,\textsuperscript{37} and even ten years ago, it was just beginning to come back to life.\textsuperscript{38} Only in

34. One might, for example, ask which antitrust enforcement agency was responsible for the most antitrust fines collected during the first generation of the existence of the Sherman Act. The surprising answer is not the U.S. Department of Justice Antitrust Division, which during the first 20 years of the Sherman Act was responsible for only a total of $219,000 in antitrust fines. See supra note 32, at 502. One 1909 suit by the state of Texas against a single Standard Oil affiliate led to a fine of more than $1.6 million. Id. During this early period, ten states and the Oklahoma Territory brought 24 suits against members of the Standard Oil trust and also sued the beef, sugar, and tobacco trusts. Id. at 501.


36. There is not enough information to conclude with certainty that state enforcement diminished because federal enforcement rose. There were other factors at work that diminished the level of state enforcement, such as World War I, and still other factors responsible for the rise of federal enforcement, including the appointment of Thurmond Arnold to head the Antitrust Division.


38. A major reason for the states' renewed energy was the state Antitrust Grant Program, established in 1976, under which the U.S. Congress provided nearly $30 million to the states for antitrust enforcement activity. See 60 Minutes with the Honorable Michael F. Brockmeyer, Chief, Antitrust Division, Office of Attorney General, Maryland, 59 ANTITRUST L.J. 25, 32 (1990) [hereinafter 60 Minutes with Brockmeyer]. One source suggested ten reasons behind the recent surge in state antitrust enforcement:

(1) a wave of new "modern" state antitrust legislation; (2) federal financial support; (3) beneficial changes in federal evidentiary and remedial provisions; (4) interstate cooperation through the National Association of Attorneys General (NAAG); (5) the self-supporting nature of state and local antitrust enforcement coupled with a desire to fill the gap created by Reagan administration antitrust policies; (6) the removal by the courts of doubts surrounding the constitutionality
the last five years has state enforcement become so vigorous that critics have taken the trouble to mount a serious campaign against it. 39

The historical evidence appears to suggest that there is a popular demand for a level of trade regulation that must somehow be met by the public enforcers. 40 There is little doubt that federal merger enforcement decreased during the 1980s. 41 Although reasonable observers differ as to whether this was desirable, it is clear that many state enforcers believed that federal enforcement became too lax. 42 They perceived a vacuum and attempted to fill it, in three ways.

First, the states began to file many more merger enforcement actions. Although reliable statistics on state merger cases are difficult to assemble and it often is hard to determine, using consistent criteria, whether an action is a "state merger case," 43 an undoubtedly incomplete search uncovered no state merger actions filed during the 1930s, 1940s, or 1950s, two during the 1960s, 44 two during the 1970s 45 and twenty-nine

of state antitrust statutes; (7) the general tendency of state law to follow federal precedent and operate in harmony with federal antitrust law; (8) an expansion of state antitrust jurisdiction; (9) state legislative repudiations of the Illinois Brick ban against indirect purchaser actions for damages; and (10) powerful state antitrust remedies.


39. See infra notes 82-84. It is ironic that the "anti-state" rhetoric may have helped actuate state merger enforcement.

40. This level varies over time. It might be lower during a war than during boom times since antitrust is in certain respects perceived of as a luxury item.


43. Methodological issues could arise over my decision to count cases where private or federal participation prior or subsequent to the state suit also occurred, cases settled without a formal complaint being filed, and unreported cases. Reasonable people also could disagree over my decision to count cases involving more than one state as only one case, to count cases involving two mergers in the same industry at roughly the same time as one case, and that certain joint ventures and monopolization schemes were in effect mergers. Mergers abandoned after a state decision to challenge but without an agreement in writing between the state and the parties were not counted.

44. The two 1960s actions were Michigan ex. rel. Slay v. Michigan Savings Bank, 1966 Trade Cas. (CCH) ¶ 71,741 (Sup. Ct. Mich. April 5, 1966) (unsuccessful challenge to
cases\textsuperscript{46} and sixteen amicus briefs or comments filed\textsuperscript{47} during the 1980s.

\textsuperscript{45} The two actions filed in the 1970s were California v. Timberlanes of Redding, Inc., 1979-2 Trade Cas. (CCH) ¶ 62,987 (Cal. Super. Ct. 1979) (consent decree barring merger of two bowling alleys), and Minnesota v. Koch Refining Co., No. 4-78, Civ. 135 (D. Minn. 1979) (attempt to enjoin merger of petroleum distributors).

\textsuperscript{46} State merger cases filed during the 1980s:

1989

1. Pennsylvania moved to block Eastern Airlines' sale of its gates to USAir by filing a petition in the U.S. Bankruptcy Court in New York. The sale was ultimately canceled. See \textit{In re} Eastern Airlines, Inc., No. 89-B-10449 (Bankr. S.D.N.Y. 1989); NAAG Antitrust & Commerce Rep. 8 (Summer 1989).

2. A consent decree was entered by West Virginia to preclude Hickman Corporation from acquiring the Wolman division of Koppers Company, Inc. Both manufactured a chemical used for the preservation of wood and wood products. See NAAG Antitrust & Commerce Rep. 6 (Mar./Apr. 1989).


4. Washington brought a suit regarding the merger of St. Joseph Hospital and St. Luke's Hospital. A Memorandum of Understanding (essentially a settlement), effective April 18, 1989, was entered into.


1988


3. Texas attempted to block a merger between Gearhart Industries and Halliburton, two companies in the wireline service industry. A temporary restraining order was granted but then dissolved based on an agreement that the policies and practices of Gearhart would continue. See Texas v. Gearhart Indus., Inc., 1988-2 Trade Cas. (CCH) ¶¶ 68,308, 68,309 (D. Tex. 1988); NAAG Antitrust & Commerce Rep. 6 (Oct. 1988).


6. A written agreement was entered into by North and South Carolina and West Point Pepperell, Inc. to lessen the impact of the company's merger with J.P. Stevens & Co., Inc. The two were competitors in the manufacture and sale of sheets and towels. New York urged the Federal Trade Commission to reject the settlement and bring suit. See NAAG Antitrust & Commerce Rep. 3 (Nov./Dec. 1988); 55 Antitrust & Trade Reg. Rep. (BNA) No. 1387, at 669 (Oct. 20, 1988); 55 Antitrust & Trade Reg. Rep. (BNA) No. 1377, at 178 (Aug. 4, 1988).


1987


1986


1985


1984

1. California attempted to block the merger between Texaco and Getty Oil. See State ex rel. Van de Camp v. Texaco, Inc., 1984-2 Trade Cas. (CCH) ¶ 66,253 (Cal.


1983


1982

During 1988, the states appear to have filed two more merger cases than

1986
1. New York and Massachusetts filed comments with the Department of Transportation regarding the Texas Air-Eastern merger. The Department of Transportation partially agreed with their assessment of the markets and effects, and denied the merger accordingly. See NAAG Antitrust & Commerce Rep. 12 (Aug. 1986); NAAG Antitrust & Commerce Rep. 13 (June 1986).

1985
1. Texas filed comments with the Department of Transportation regarding the merger of Muse Air Corp. and Southwest Airlines Co. The merger was ultimately completed. See 48 Antitrust & Trade Reg. Rep. (BNA) No. 1216, at 879 (May 23, 1985); Evans Letter, supra.

2. Pennsylvania opposed the Conrail and Norfolk Southern merger by comments to the Department of Transportation and to Congress. The merger was ultimately disapproved by Congress. See 50 Antitrust & Trade Reg. Rep. (BNA) No. 1269, at 1040 (June 12, 1986); NAAG Antitrust & Commerce Rep. 7 (Sept. 1985).

3. Texas filed comments with the Interstate Commerce Commission regarding the merger of the Santa Fe and Southern Pacific Railroads. See 51 Antitrust & Trade Reg. Rep. (BNA) No. 1286, at 560 (Oct. 16, 1986); Evans Letter, supra.

1984

2. California filed comments with the Interstate Commerce Commission expressing concern over the proposed merger between the Santa Fe and Southern Pacific Railroads. See NAAG Antitrust & Commerce Rep. 10 (July 1984).


1983
1. Iowa intervened in bankruptcy court proceedings to oppose the merger of Concrete Pipe Manufacturing and Black Clawson. The bankruptcy court disapproved the merger. See In re Concrete Pipe Mach. Co., 28 Bankr. 837 (Bankr. N.D. Iowa 1983); 44 Antitrust & Trade Reg. Rep. (BNA) No. 1121, at 1261 (June 30, 1983).

2. Michigan challenged the proposed sale of a company going through bankruptcy. The acquisition plans were abandoned. See In re Wickes Cos., No. LA-82-06657WL through LA-82-06657WL (Bankr. C.D. Cal. filed June 16, 1983).


1982

1981 None.

1980 None.

I am grateful to David Kimberling for helping to assemble these lists of state merger activities.
the Department of Justice. 48

Second, in 1987 the states promulgated their own substantive merger guidelines. 49 This was an effort to bring uniformity to the states' enforcement approaches and to carry out the congressional intent underlying the Clayton Act and relevant Supreme Court precedent more faithfully than the federal merger guidelines. 50

Third, in 1988 the states issued their Voluntary PreMerger Disclosure Compact. 51 This state counterpart to the federal Hart-Scott-Rodino premerger notification program allows merging parties to file one set of documents with the states and be assured that the states will not serve them with multiple civil investigatory demands. 52

Largely as a result of this state activism, the federal and state enforcers have formed a working group that is attempting to harmonize enforcement by, among other things, agreeing upon a single set of substantive merger guidelines. 53 This group also is striving to avoid duplication, is devising mechanisms to minimize the reporting burdens caused by two levels of scrutiny, and is attempting to establish a method to allocate specific mergers to the most appropriate enforcer. 54 Both the federal and state enforcers thus recognize the potential problems from their overlapping authority and are earnestly cooperating to prevent any difficulty this may cause. 55

48. For the eight state filings, see supra note 46. For the six 1988 Department of Justice filings, see Antitrust Division's Workload Statistics During 1980s, 58 Antitrust & Trade Reg. Rep. (BNA) No. 1449, at 109, 111 (Jan. 18, 1990) [hereinafter Workload Statistics].


50. For example, the Department of Justice merger guidelines do not specify whether they take the wealth-transfer effects of market power into account. The NAAG guidelines carefully follow congressional intent by incorporating these effects. See Barnes, Federal and State Philosophies in the Antitrust Law of Mergers, 56 GEO. WASH. L. REV. 263, 278-81 (1988). The NAAG and DOJ guidelines use virtually the same structural parameters and have many other features in common. The main difference is their tone. Id. at 263-64.


52. See 60 Minutes with Brockmeyer, supra note 38, at 42.


54. Id.

55. See id.
II. Policy Issues Arising from Overlapping Federal/State Authority

A. Potential Problems

Although the states' ability to challenge mergers is clear, many assert that they should not have this power. Some believe that the states should not have the ability to challenge any interstate mergers whatsoever, 56 while others stress particular categories of mergers for which they believe state enforcement is particularly inappropriate. The ABA Antitrust Section recently noted that “[i]t is probably fair to conclude that a strong majority of the antitrust bar and academic community favors exclusive federal merger enforcement except for purely local intrastate mergers.” 57

Many contend that national policy towards large nationwide mergers is a crucial part of our nation's economic policy, so only the federal enforcers 58 should be able to challenge these mergers. 59 They find it highly inappropriate that any of the fifty state attorneys general can challenge and possibly block a multi-billion dollar nationwide transaction even if the Federal Trade Commission, the Antitrust Division of the U.S. Department of Justice, and the forty-nine other state attorneys general desire for it to proceed, 60 especially where the relief largely will occur in

56. For example, Timothy J. Muris, adviser to the presidential campaign of then Vice-President George Bush, was interviewed in 1988. “Asked about merger enforcement, Muris found no need for a state attorney general to analyze mergers unless the transaction 'has no significance beyond the one state.' If the merger is being examined at the federal level, Muris noted, then states do not 'add anything' to the investigation.” Advisers to Presidential Candidates Differ on Most Aspects of Enforcement, 55 Antitrust & Trade Reg. Rep. (BNA) No. 1382, at 448 (Sept. 15, 1988); see also infra notes 82-84.


58. See 60 Minutes with Steiger, supra note 57, at 15-16. While private plaintiffs also can challenge major nationwide mergers they cannot do so as law enforcers. Their motives may be suspect since they cannot as readily claim to be representing the public, and their arguments sometimes lack the credibility of the state enforcers.

59. See Mattox v. FTC, 752 F.2d 116 (5th Cir. 1985), where the court speculated that “[b]ecause HSR [the Hart-Scott-Rodino premerger notification act] only covers transactions likely to affect the entire national economy, Congress may have wanted to centralize regulation of such mergers in the FTC and the Justice Department. Disclosure to state attorneys general would tend to balkanize that needed centrality.” Id. at 122.

60. A state attorney general need only prove that the merger may substantially lessen
other states. The only check on the power of a state attorney general to challenge a nationwide transaction—the requirement that the merger detrimentally affect the economy or citizens of that state, or the state itself—is viewed as overly weak.61

Principles of federalism suggest that the 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.62 The Constitution did give the states a way to attempt to ensure that their interests were not unduly trampled for the sake of the federal union: their elected representatives in the United States Congress were supposed to vote and influence legislation on their behalf. Allowing states to go further and interfere in fundamentally national decisions runs counter to basic principles of federalism.

Further, it is confounding enough for antitrust counselors to have to contend with two potential federal enforcement agencies. Since both the Assistant U.S. Attorney General and the Chair of the FTC are selected by the President,63 however, their approaches are in practice similar, if not identical.64 Experienced merger counselors can provide relatively certain advice to their clients as to what the federal enforcers are likely to do by closely monitoring both agencies.65

It is immensely more difficult to actively monitor the enforcement philosophies of fifty state attorneys general, many of whom have little

competition “in any section of the country.” See infra note 106 and accompanying text.

61. See sources cited supra notes 57-58 and infra notes 82-83.

62. See Note, supra note 13, at 544-46; see also Hughes v. Oklahoma, 441 U.S. 322, 325 (1979) (“[a] central concern of the framers [was that] ... the new union would have to avoid the tendencies toward economic Balkanization that had plagued relations among ... the States under the Articles”), Professor John Flynn observed that “[p]erhaps the most important lesson taught by the failure of the Articles was the realization that the American Colonies could not hope to prosper unless a common market was established, subject to control by one voice of government rather than thirteen.” J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 2 (1964).

63. Both are, of course, selected with the advice and consent of the Senate. The President has the power to select the FTC Chairman only from then-existing Commissioners. If the President isn’t especially enamored with any of the Commissioners (this might not be too unusual if they all were selected by the previous administration) he can designate the least objectionable as Acting Chairman and wait for a vacancy to arise.

64. FTC officials have been reluctant to allow their policies to diverge too much from those of the Antitrust Division, perhaps partly out of fear that different policies could lead to business confusion that might prompt Congress to end dual jurisdiction at the federal level by stripping the FTC of its antitrust authority.

65. Merger counselors observe which mergers the federal enforcers choose to challenge and monitor their speeches and articles. Counselors can meet with the federal enforcers on repeated transactions and thereby learn a good deal about their enforcement approaches.
track record in the merger area (and some of whom bring few antitrust cases of any type). The state attorneys general come from both political parties and can have widely differing enforcement philosophies. The states have agreed upon a common substantive standard to be used in evaluating mergers—the NAAG Merger Guidelines. No 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. In the extreme, business would be forced “to limit its activities to the levels set by the most restrictive state interpretation of federal antitrust law.” 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. These uncertainties and costs are an increment to the transaction costs already arising from federal review, which by itself may deter significant beneficial transactions.

The prospect of simultaneous investigations or suits by both federal and state enforcers gives rise to more than just costs, delays and uncertainty. As the number of parties increase, settlements may become exponentially more difficult to reach. Confidentiality problems also multiply as the number of investigations rise.


67. For example, one state attorney general, Hal Stratton of New Mexico, objected to the issuance of the NAAG Merger Guidelines after they were issued. See New Mexico Attorney General Stratton Repudiates NAAG's Horizontal Guidelines, 52 Antitrust & Trade Reg. Rep. (BNA) No. 1314, at 869 (May 7, 1987); Stratton, Attorneys General in State of Collusion, Wall St. J., June 10, 1988, at A3, col. 4.

68. See NAAG Merger Guidelines, supra note 49.

69. Moreover, the NAAG Merger Guidelines explicitly provide that “[i]ndividual Attorneys General may vary or supplement this general policy in recognition of variations in precedents among the federal circuits and differences in state antitrust laws and in the exercise of their individual prosecutorial discretion.” Id. at S-3.

70. Gellhorn, supra note 26, at 21.

71. See Lieberman v. FTC, 771 F.2d 32 (2d. Cir. 1985), where the court noted that giving state authorities the premerger information and the chance to bring suit more easily might well mean big delays in the fast world of mergers . . . . We doubt if Congress would have intended to have the staffs of fifty state attorneys general sitting as oversight committees reacting to Commission or Justice Department decisions whether to block large-scale mergers of national or international significance. Id. at 40.

72. Experienced practitioners have told the author that this happened to their clients on several occasions.
Furthermore, many state enforcers lack resources, experience, and expertise. Only twenty-one states apparently filed one or more merger actions since 1980. To my knowledge, New York, the state most active in merger enforcement, brought only eight enforcement actions during the 1980s. No merger enforcer can learn to evaluate mergers properly from just a theoretical perspective. Federal antitrust enforcers have significant practical experience since they seriously scrutinize dozens of mergers each year. Nonetheless, even they could never claim to be error free. 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. This disadvantage in experience is exacerbated by their lack of relevant information. The federal enforcers have access to a tremendous quantity of information before making enforcement decisions, but they apparently cannot share this material with state enforcers. Only rarely do parties voluntarily submit material pursuant to the states’ premerger compact.

73. Merger enforcement may divert resources from more “appropriate” tasks.
74. However, assistant attorneys general for antitrust are sometimes able to borrow attorneys from other divisions for special projects. Moreover, any state with the determination and financial resources can hire outside counsel to litigate for them.
75. See supra notes 46-47, infra note 182. The following states have filed merger cases: Alabama, California, Connecticut, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington, and West Virginia. This total does not include states that only participated in multistate efforts.
76. See supra notes 46-47.
77. Only experience gives enforcers the ability to discern which types of assertions by the merging parties are likely to be true and which are more likely to be suspect.
78. See Workload Statistics, supra note 48.
79. In addition, turnover is high among state enforcers, as it is among their federal counterparts.
80. This is due in large part to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a(d) (1988). This requires the submission of such documentary material and information relevant to a proposed acquisition as is necessary and appropriate to enable the FTC and the Assistant Attorney General for Antitrust to determine whether the acquisition would violate the antitrust laws.
81. See Lieberman v. FTC, 771 F.2d 32, 37-38 (2d Cir. 1985) (section 7(A)(h) of the Clayton Act limits disclosure of premerger information to the public, including state officials); Mattox v. FTC, 752 F.2d 116, 124 (5th Cir. 1985) (language of § 7(A)(h) and statements of its legislative proponents preclude providing premerger material to state attorneys general).
Moreover, some believe that state attorneys general often have parochial or political motives, including the protection of local jobs and industries. As a result, some assert that state enforcement actions sometimes are undertaken even if they cannot be justified fully on traditional antitrust grounds.

Another potential problem could be the most damaging of all. States could enact antimerger statutes with different substantive goals or could

82. Some critics contend that NAAG stands not for “National Association of Attorneys General,” but instead for “National Association of Aspiring Governors.” See Brockmeyer, Report on the NAAG Multi-State Task Force, 58 Antitrust L.J. 215, 220 (1989). Charles F. Rule, while Assistant Attorney General for Antitrust, asserted that some state attorneys general “more interested in headlines than in sound law enforcement, have begun to use antitrust enforcement as a means of advancing their political careers.” 60 Minutes with Charles F. Rule Assistant Attorney General, Antitrust Division, 58 Antitrust L.J. 377, 381 (1989) [hereinafter 60 Minutes with Rule]. He earlier alleged that state enforcers were using “state antitrust enforcement as a vehicle for promoting the personal political ambitions of state officials . . . .” C. 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) (on file at New York Law School Law Review office). “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, such as foreign companies . . . .” Bell, supra note 2, at 39.

83. “State attorneys general use Clayton Act actions to pursue local employment concerns, without regard to the interests of consumers nationally, or even in their own states.” Zuckerman, Courts May Not, and Should Not, Order Divestiture in Private Section 7 Cases, 4 Antitrust 37, 41 (1990). Helene Jaffe gave an example:

[W]hen we were going through, representing a party to an acquisition where the states were involved, we ended up negotiating a letter agreement with three state attorneys general. The terms of this agreement really don’t bear any resemblance to any consent order that one usually thinks about negotiating with the federal enforcement agencies in the context of a merger. Our agreement concerned the level of support that the company would continue to provide to local suppliers of products that the factory was using. It concerned the level of support we would give to charities and community services and community activities that the company had sponsored. These are different types of considerations than you are usually negotiating over when you are at the Federal Trade Commission or the Antitrust Division. But they are concerns particular to the state AGs—they are local in nature, and these are the things that you have to consider and worry about when the states are involved.

Jaffe, Multi-State Compact Procedure and Pre-Merger Review, 58 Antitrust L.J. 223, 227 (1989). Jaffe does not state whether the relief caused significant inefficiencies or anticompetitive effects.

84. See 60 Minutes with Rule, supra note 82; C. Rule, supra note 82.

85. For example, a state could enact a statute with the express goals of protecting
legislate perverse methodologies. The more these statutes differed significantly from the existing antitrust laws, the more likely they would be held unconstitutional. It is unclear, however, when this line would be crossed, and even a state statute ultimately found to be unconstitutional could do mischief during the years of uncertainty.

Many believe that these problems—whether existing or potential—are real to the extent they are perceived of as being real since even incorrect perceptions can lead to business uncertainty, costs, and delays. Taken as a whole, they are said to threaten the Balkanization of the United States economy. It is especially ironic that this fragmentation is occurring while the European Economic Community is in the process of unification.

B. Are the Problems Real?

Despite recent increases, state merger challenges have not been common. The states collectively appear to have never filed more than nine merger actions per year, and the average number of state filings during even the second half of the 1980s was only approximately six per year. Moreover, much of the impetus behind the state challenges was their perception that the federal enforcers should have been more aggressive, as well as possible distrust generated by the anti-state rhetoric and conservative philosophy emanating from certain Reagan competitors or jobs.

86. For example, a state statute could mandate that markets be defined in some manner that severely discriminates against the producers of imported goods.

87. A radically different merger statute could, for example, constitute an undue burden on interstate commerce. See supra notes 24-25.

88. See Hovenkamp, supra note 27. "Congress has not declared that state antitrust laws are legitimate only when they are identical with federal law. The doctrine of federal supremacy applies only when an assertion of state power substantially frustrates the policies of the federal antitrust system." Id. at 395 (footnotes omitted).

89. See supra notes 44-47 and accompanying text.

90. Filings and actions include cases plus amicus curiae briefs and comments.

91. See supra notes 46-47 and accompanying text.

92. However, many believe that state enforcement will not decrease as federal enforcement increases, perhaps because the states now view themselves as being truly in the merger enforcement business. For example, Attorney General Robert T. Stephan of Kansas made the following remarks at the annual conference of the National Association of Attorneys General in July, 1990: "Increased enforcement by the federal agencies does not mean that state enforcement efforts will recede....[t]he states finally have partners to share the enforcement burden." Federal-State Cooperation Continues To Be Major Theme at NAAG Conference, 59 Antitrust & Trade Reg. Rep. (BNA) No. 1475, at 84 (July 19, 1990). For 1990 state antimerger filings, see infra note 182.
administration officials.93 These problems have, however, disappeared during the Bush administration.94

While it is possible to imagine a host of serious problems arising from two levels of enforcement, documenting specific instances is problematic since, as is the case for so many nebulous antitrust issues, the side with the burden of persuasion will usually lose.95 It is, for example, difficult to demonstrate that desirable, large, national transactions were not attempted or were delayed due to the added uncertainty arising from possible state enforcement since: (1) it is difficult to show that virtually any specific merger is desirable;96 (2) this is especially true for mergers that did not actually occur; (3) even if there were no potential state plaintiffs there would have been uncertainty due to the prospect of a possible federal challenge, and it is difficult to document the increment due to the added prospect of state challenges; and (4) the possibility of private challenges also makes it difficult to ascertain any incremental uncertainty facing merging parties due to the existence of state enforcement. It is similarly difficult to document any instance where a beneficial transaction was blocked by a state enforcer acting primarily or largely out of a political

93. See supra notes 82-84 and accompanying text.

94. Bush administration antitrust officials are enforcing the antimerger laws more vigorously than were Reagan administration officials. See, e.g., P. Nelson, Reading Their Lips: Changes in Antitrust Policy Under the Bush Administration (June 30, 1990) (unpublished manuscript). They also have been extremely congenial in their relations with the state enforcers. Informal federal/state consultation, trust, and respect is starting to work well. See 60 Minutes with Steiger, supra 57, at 6; 60 Minutes with Brockmeyer, supra note 38, at 31-32.

95. The burden of proof, however, should be on those making these assertions.

motivation, or with a parochial, nonlegitimate interest such as protecting jobs in their state.

As a practical matter it is extremely unlikely that a peripherally affected state will initiate a challenge to a large nationwide merger. If a large percentage of the sales or purchases of the merging firms are within a state it certainly is legitimate for that state to raise a challenge. Yet

97. The critics offer little or no specific evidence of such actions, noting only that the state enforcers are politicians, most of whom are elected and will run for higher office. Of course, many instead go into private practice. James F. Rill, currently Assistant Attorney General in charge of the Antitrust Division, discounted the possibility that state attorneys general often would file cases for political reasons, noting that "one must question whether a commitment to serious antitrust enforcement can be viewed as a springboard to the governor's mansion or the U.S. Senate." Rill, Antitrust: Where We Stand Today, 57 ANTITRUST L.J. 3, 6 (1988).

Three men of unquestionable integrity would necessarily have their motives impugned by the argument of some of the critics. These former antitrust enforcers have gone on to higher offices in the executive, judicial, and legislative branches of government, respectively, yet each possesses integrity beyond question: (1) James C. Miller, III went from Chairman of the Federal Trade Commission to the head of the U.S. Office of Management and Budget, (2) Douglas H. Ginsburg went from the Assistant Attorney General of the Antitrust Division of the U.S. Department of Justice to the U.S. Court of Appeals for the District of Columbia Circuit, and (3) Thomas P. Campbell went from Director of the Bureau of Competition of the Federal Trade Commission (via a period as a law professor) to Representative in the U.S. Congress. See THE AMERICAN BENCH: JUDGES OF THE NATION 36 (M. Hough 6th ed. 1991/92) (Ginsburg); WHO'S WHO IN AMERICA 497 (46th ed. 1990/91) (Campbell); FTC Member Appointed As Agency's Acting Head, L.A. TIMES, Oct. 8, 1985, § 1, at 8, col. 6 (Miller).

98. None of the sources that the author has been able to find provide such documentation. Lloyd Constantine, while head of the NAAG Antitrust Task Force and the Chief of New York's Antitrust Section, stated to the author that he took nontraditional factors, such as jobs within his state, into account when attempting to decide the cases to which he should devote his scarce enforcement resources, but only from among those cases that also made sense on traditional economic grounds.

Similarly, critics have never documented confidentiality problems arising from state merger enforcement. Lloyd Constantine noted that

[The states have an admirable, perhaps even flawless, record in maintaining the confidentiality of pre-merger disclosure in the face of widespread criticism that the NAAG Pre-Merger Disclosure Compact would compromise confidentiality. In contrast the FTC is widely reported to be a sieve, and at least one publication relies on documents leaked by the FTC for its daily bread.

Constantine, supra note 6, at 38.

99. Michael Brockmeyer, former Chairman of the NAAG Multistate Antitrust Task Force, concludes that states typically act only when the state has a significant interest in the merger. He observed that because approximately 80% of the assets involved in California v. American Stores Co., 872 F.2d 837 (9th Cir. 1989), rev'd, 110 S. Ct. 1853 (1990), were within the state of California, the state's interest was both legitimate and foreseeable. See 60 MINUTES WITH BROCKMEYER, supra note 38, at 29.
if only a trivial percentage of sales or purchases are within a state, that state is very unlikely as a practical and political matter to spend the enormous sums of money required to sustain a challenge. Moreover, most of those instances where the challenging state is only concerned with a small percentage of a national transaction involve retailing enterprises, and in most such circumstances a hold-separate order involving the assets in question can be arranged relatively easily, allowing the bulk of the transaction to proceed.

Every state merger challenge apparently has been filed under a federal antitrust statute or a substantively identical state statute. It is unclear whether a state statute that was in any significant manner different from the federal antitrust statutes would be constitutional. Regardless, no state has brought a case under such a statute. Moreover, the state enforcers regularly consult with one another and with legal academics and economic consultants in advance of a challenge, and often work and file in groups. For these reasons, the collective actions of the members of the NAAG antitrust group, operating under their own substantive guidelines, are more predictable and less error-prone than one might otherwise expect.

C. Affirmative Reasons for States to Challenge Mergers

A state antitrust enforcer has the duty to protect the state (as a purchaser), its consumers, and its economy from the potential exercise of market power. Every private corporation that would purchase from or sell to the postmerger corporation has the right to bring a private action. State challenges are at least as legitimate as those brought by private firms since a state is more likely to be filing for the good of the public. A state

100. See infra note 152.
101. See, e.g., the discussion of Associated Dry Goods, infra note 150 and accompanying text.
102. See sources cited supra notes 44-47. States typically file under state statutes rather than a substantively identical federal statute because the state statute has better discovery or other procedures. The current Chairman of the NAAG Multistate Antitrust Task Force, Robert M. Langer, believes “that the next few years will witness a growing number of challenges to mergers and acquisitions in state courts under state antitrust laws.” Interview with Robert M. Langer, 3 INT’L MERGER L. 3 (1990).
103. Many would agree that Professor John Flynn’s 1964 conclusions are still valid: While antitrust policy may be perverted by legislatures or local enforcement officials to serve the parochial interests of local economic groups, there is no evidence of such an occurrence. If a state were to attempt a misuse of antitrust policy, the equal protection clause, the due process clause, the commerce clause and federal antitrust policy provide sufficient safeguards to prevent the Balkanization of American trade and commerce.
J. FLYNN, supra note 62, at 247.
attorney general would be remiss if he or she did not challenge mergers that seemed likely to result in supracompetitive prices.

The primary task of a state attorney general is to protect the direct interests of his or her state, its consumers and economy. Others have the task of protecting the nation as a whole. The United States Congress could have removed the states’ prerogative when it passed the antitrust laws, but chose not to. Moreover, even the federal enforcers are not supposed to sacrifice the interests of one or more states for the national benefit since the Clayton Act prohibits any merger the effect of which may be substantially to lessen competition "in any section of the country." The Supreme Court has interpreted this literally, providing no exception for mergers detrimentally affecting competition in one market because of possible beneficial effects in other markets. Moreover, it is extremely difficult even to predict the existence or magnitude of efficiencies in advance of a merger, let alone to balance market power and efficiency effects in the same geographic market to determine whether a merger is beneficial. A state enforcer would rarely, if ever, be able to ascertain in advance whether his or her decision to challenge a merger which might lead to market power within his or her state also might be likely to lead to significant offsetting efficiencies elsewhere. Thus, a federal/state trade-off is largely nonexistent.

104. As Professor Flynn observed:

It would indeed be strange if the policy of federalism, dedicated to the protection of the individual from a concentration of political power, were ever held to deny states the power to enforce the policy of antitrust, a policy dedicated to the protection of the individual’s economic freedom and the promotion of the common weal by the prevention of the concentration of economic power.

Id. at 247-48.


106. See United States v. Philadelphia National Bank, 374 U.S. 321 (1963), where the Court stated that

[w]e are clear . . . that a merger the effect of which ‘may be substantially to lessen competition’ is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence . . . .

Id. at 371.

107. See Fisher & Lande, supra note 96, at 1604-24 (discussing the nature, extent, and predictability of efficiencies from mergers based on accounting data, stock market studies, and case studies).

108. See Philadelphia National Bank, 374 U.S. at 370; see also Fisher & Lande, supra note 96, at 1624-77 (discussing the factors involved in balancing efficiency and market power effects in merger enforcement).
The framers of the antimerger laws had a set of goals that many members of the antitrust community believed were misinterpreted by certain Reagan administration enforcers. The state attorneys general apparently believed that the federal enforcers were not adequately carrying out the will of the Congresses that passed the merger laws and were not faithfully implementing the decisions of the Supreme Court. Even if these state attorneys general believe that national merger policy is best made and implemented by the federal antitrust enforcers, they could also believe that a "second best" solution might sometimes be warranted.


110. See Krattenmaker & Pitofsky, supra note 41.

111. For example, Assistant Attorney General J. Paul McGrath announced that he was evaluating mergers under a Sherman Act standard. See Henderson, Baldridge Merger Plan Criticized, Washington Post, Mar. 3, 1985, at F1, col. 6. His successor, Douglas Ginsburg, wrote that the department should evaluate mergers under a "criminal law standard" which presumably would require that the government not challenge a merger unless it was sure, beyond a reasonable doubt, that the merger would be anticompetitive. See Ginsburg, The Appropriate Role of the Antitrust Enforcement Agencies, 9 Cardozo L. Rev. 1277, 1283 (1988). The state attorneys general apparently concluded that when Congress included an incipiency provision with the Clayton Act it meant for mergers to be prosecuted more aggressively than a Sherman Act or criminal standard would allow. See Barnes, supra note 50, at 264 n.3; Lande, supra note 109, at 136 n.274.

112. The federal antitrust enforcers appear to have engaged in similar "second best" law enforcement when they targeted relatively local matters that are most appropriately within the states' domain. For example, in 1988 the Federal Trade Commission approved consent orders against five obstetricians in Aquidneck Island, Rhode Island, who were alleged to be colluding to obtain additional medicare revenue. See In re O'Halloran, 5 Trade Reg. Rep. (CCH) ¶ 22,543 (Aug. 26, 1988). Second, in 1985 the Federal Trade Commission challenged anticompetitive aspects of the taxicab regulatory systems of New Orleans and Minneapolis. See In re City of Minneapolis, 105 F.T.C. 304 (May 7, 1985); In re City of New Orleans, 105 F.T.C. 1 (Jan. 3, 1985) (the author was involved in the taxicab actions when he worked at the FTC).

The FTC probably would have preferred that the respective state attorneys general had handled these relatively local problems. But since the states did not do so, the federal enforcers intervened. The federal enforcers in effect determined that they knew best how to regulate (or deregulate) taxicabs in Minneapolis and New Orleans, and whether it was a good idea to prosecute five obstetricians in Aquidneck Island, Rhode Island. Even though on the merits of each case the FTC was right, these suits constituted an intrusion into relatively local affairs by the federal enforcers.

For extensive documentation concerning federal suits involving essentially local matters, see Appendix: Indictments and Complaints Filed By the Antitrust Division of the Department of Justice, Involving Essentially Local Restraints of Trade, J. Flynn, supra note 62, at 251-312 (concluding that, for complaints filed in 1957 through 1967, 148 out of the 417 complaints and indictments filed—35.49%—involved essentially local restraints of trade).
They might believe that it would be better for the policies of Congress and the Supreme Court to be implemented by state attorneys general than to be misconstrued by the federal enforcers.\textsuperscript{113}

State activism currently might be especially important in light of the last decade's steep cutbacks in the federal enforcement agencies' budgets,\textsuperscript{114} despite a rapid increase in the number of large mergers.\textsuperscript{115} At the same time, standing has become more difficult for private plaintiffs to obtain.\textsuperscript{116} In light of these changes, Congress's decision to provide the state enforcers as a "back up" system has proven to be a wise one.\textsuperscript{117}

III. A PROPOSED RESOLUTION OF COMPETING CONCERNS

Some of the problems associated with two levels of enforcement could arise if states remained free to initiate any merger challenges. But others, including the most important, could be minimized if each state agreed usually\textsuperscript{118} to refrain from challenging specified exceptionally large, truly

\textsuperscript{113} See 60 Minutes with Brockmeyer, supra note 38, at 38.

\textsuperscript{114} State antitrust enforcement resources also are extremely limited. It is possible, however, that favorable publicity from a successful merger action would result in a net increase in a state's available antitrust resources.

\textsuperscript{115} Michael Brockmeyer, while chairman of the NAAG Antitrust Multi-State Task Force, provided this as a reason for state activism. He observed that federal antitrust resources declined by approximately 50% during the 1980s. He also noted that in 1979 there were 861 premerger filings under the Hart-Scott-Rodino Act, of which the federal government challenged 28. By contrast, in 1987 the federal government challenged 14 of 2533 premerger filings. Brockmeyer, States and Private Parties Must Be Able to Obtain Divestiture, 4 ANTITRUST 37, 39 (1990); see also P. Nelson, supra note 94, at 8-10; Rill Laments Funding Shortfall As Shadow on Division's Program, 58 Antitrust & Trade Reg. Rep. (BNA) No. 1469, at 874 (June 7, 1990) (discussing decrease in federal premerger notification filings).

\textsuperscript{116} See Cargill Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986) (although the Court did not completely deny private plaintiffs standing to challenge acquisitions on predatory-pricing theories, it held that to obtain injunctive relief plaintiff must show a real threat of antitrust injury).

\textsuperscript{117} As Justice Powell noted generally, "[t]he Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective 'counterpoise' to the power of the Federal Government." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 571 (1985) (Powell, J., dissenting).

\textsuperscript{118} Additional certainty would arise if the states would announce that they would "never" challenge certain categories of mergers. Guidelines, however, are rarely written in such absolutist language, and despite the absence of absolutist language in the DOJ Merger Guidelines and the general caveat that the enforcers may make exceptions, this document does serve to increase business certainty. The states, moreover, would be unlikely to agree to such a strong statement. See, e.g., supra note 69 for the provision in the current NAAG Merger Guidelines that states may vary their implementation of the Guidelines somewhat.
national transactions, and transactions that primarily do not affect that state. If the states were effectively to concede enforcement and nonenforcement decisions for these mergers to the FTC and the Department of Justice, it might be appropriate for the federal enforcers normally to decline to scrutinize mergers having their primary impact on only one state. Since many states have neither the resources nor expertise to evaluate mergers, the federal enforcers should not identify any group of mergers, no matter how small or localized, that they will never challenge. They should only announce that for certain categories of mergers they will defer to state judgments whenever practicable. Accordingly, the National Association of Attorneys General, the FTC, and the DOJ should attempt to agree upon “Federalism Guidelines” that would divide potential mergers into: (1) areas of federal responsibility where states virtually always would decline to challenge mergers; (2) areas of primary state responsibility; and (3) areas of shared responsibility. This allocation would start from the premise that the DOJ and the FTC are to be our primary national antimerger enforcers.

The state and federal enforcers have formed a working group to coordinate and improve federal/state merger enforcement. Although

in accordance with their exercise of prosecutorial discretion. If a state did challenge a merger despite its general acceptance of Federalism Guidelines that suggested that a challenge would normally not be forthcoming under the circumstances, the challenged parties would be able to point this out to the presiding judge. In an otherwise close case, the judge might be inclined to accept the argument that, despite the generic caveat in the front of the Guidelines that the states are free to make exceptions, the state should be “held to its own guidelines,” and the judge might be less inclined to block the merger. Id.

119. If many states declined to agree to a division of primary responsibility, the Federalism Guidelines would be less likely to increase business certainty. More generally, some merging firms might of course be able to adjust their transaction somewhat to cause it to be evaluated by the preferred level of evaluator(s).

120. Cities and counties sometimes have the authority to challenge mergers, particularly if they are a direct purchaser of the products in question. Cities and counties should forego initiating any challenges that the state they are within has agreed to forego.

121. States also typically lack the information on each merger that the federal enforcers obtain under the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a(d) (1988); see also supra notes 73-79, 81-83 and accompanying text.

122. As Michael Brockmeyer observed while head of NAAG’s Antitrust Task Force, [n]o one can dispute the overall primacy of the federal agencies in merger enforcement . . . . The states have never questioned that. Indeed, I think you will find that in virtually all the state merger prosecutions, there was an attempt, in the first instance, to defer to the federal government. In American Stores, California didn’t sue until after the Commission had finished its review of that transaction.

60 Minutes with Brockmeyer, supra note 38, at 39.

123. They have formed an Executive Working Group that is attempting to devise
they are pursuing many possible avenues of cooperation, one of their primary goals is to unify the existing substantive merger guidelines of the DOJ, the NAAG, and the FTC. If this substantive unification succeeds, the working group should next consider a division of primary merger responsibilities along the lines suggested by this article. The "Federalism Guidelines" could be the preface to the new Unified Merger Guidelines. Even if the enforcers cannot agree upon identical substantive guidelines, each could insert an identical division of primary responsibility into its own document.

A. Areas of Federal Responsibility

1. Exceptionally Large Mergers with a National Dimension

When exceptionally large firms operating nationwide desire to merge, the decision as to whether there is a governmental interest in challenging the merger should usually be made by federal, not state, enforcers. Whether such transactions should be scrutinized closely, generally forbidden or restricted, or treated leniently are fundamental national economic policy questions. If the United States is to continue to have a truly integrated national market and a national policy towards important industrial issues, the states should play little role in these enforcement decisions. The federal enforcers, appointed by the President with the advice and consent of the Senate, are more likely to reflect national concerns than the state attorneys general, whose tasks are to protect state concerns.

124. Id. at 32.
126. NAAG Merger Guidelines, supra note 49.
128. Whether private parties should continue to have standing to challenge exceptionally large transactions with a national dimension is beyond the scope of this article. One of the reasons why antitrust embodies the "private attorney general" concept may be the suspicion that the federal enforcers will not always vigorously enforce the antitrust laws. To the extent state enforcement is vigilant, this argument loses some validity.
129. The states would, of course, continue to play an indirect role through their elected representatives in Washington, D.C., and through their ability to supply information to the federal antitrust enforcers.
The European Economic Community has determined that exceptionally large mergers with a “Community dimension” should generally be evaluated at the Community level, not by individual member nations. The EEC Merger Regulations that went into effect in September of 1990 provide that a transaction will be considered to have a “Community dimension” when (1) total worldwide sales of the parties exceeds 5 billion ECU (approximately $5.7 billion), and (2) at least two parties to the transaction each have sales within the EEC that exceed 250 million ECU (approximately $280 million). The EEC Merger Regulations contain three exceptions under which individual member nations are free to initiate challenges: (1) where each of the parties have more than two-thirds of their EEC sales within the same member state, that state can challenge the merger; (2) the EEC Merger Commission has the discretion to refer mergers to member nations for action after the member state notifies the Commission that a merger threatens competition in a distinct market within that member state; and (3) a nation can challenge a merger when that nation believes that such action is necessary to “protect legitimate interests other than those taken into consideration by the [EEC Merger] Regulation—such as [p]ublic security, plurality of the media and prudential rules [for financial institutions]."

The Merger Commission predicts that approximately fifty mergers each year will exceed the thresholds in the Regulations. These thresholds for defining transactions with a “Community dimension” are to be reviewed by no later than December 21, 1993, and the Commission has stated its opinion that the aggregate worldwide sales requirement for the merging firms should drop from 5 billion ECU to 2 billion (approximately $2.3 billion) and that the threshold for sales of each of two or more parties

130. See Council Regulation No. 4064/89, 32 O.J. EUR. COMM. (No. L 395) art. 5, at 5 (1989) [hereinafter Council Regulation]. I am grateful to Harry Katricious for comments on this section of this article.

131. The Regulations actually are framed in terms of “turnover,” a concept similar but not identical to sales. See id. at 5 (calculation of turnover).

132. If the Commission concludes that no such distinct market exists or that the alleged threat to competition does not exist it need not refer the matter to the member nation. Id. at 7; B. Hawk & M. Weiner, EEC Regulation on the Control of Concentrations Between Undertakings 30-31 (Feb. 1990) (unpublished manuscript) (on file at New York Law School Law Review office).


134. CCH Commentary: Community-Wide Merger Control, 2 Common Mkt. Rep. (CCH) ¶ 2843, at 2099-7 (Nov. 1990) [hereinafter Commentary]. This number is likely to increase as community-wide merger activity increases and if the thresholds outlined therein are reduced. Id.
to the transaction should drop from 300 million ECU to 100 million (approximately $110 million). 135

The United States should consider adopting a similar approach to exceptionally large mergers with a national dimension. One could argue that the thresholds the United States should implement should be lower than those adopted by the EEC since states within the United States surely should play less of a role in the United States' economy than individual European nations should play within the EEC. Regardless, the particular thresholds selected for the EEC Merger Regulations were compromises, 136 and a similar compromise between federal and state enforcers would have to occur within the United States as well. Perhaps a mix of the EEC's current and possible post-1993 thresholds might be appropriate for the United States to adopt initially. 137

One possible problem with the particulars of the EEC approach is that it focuses upon the total sales of the transacting firms, 138 rather than their sales in any market that might be of interest for antitrust purposes. 139 This approach has the advantage of great clarity since firms will know their total sales with much more certainty than their sales in any market ultimately deemed "relevant" for antitrust purposes. Nevertheless, it could lead to some transactions that are small from an antitrust perspective being

135. See Hawk, supra note 133, at 208 & n.37; B. Hawk & M. Weiner, supra note 132, at 29-30.

136. For example, Barry Hawk notes that member states without well-developed merger enforcement systems had a "preference for lower thresholds (e.g., one or two billion ECU rather than five billion ECU) that would have subjected more transactions to the mandatory jurisdiction of the Merger Regulation." Hawk, supra note 133, at 227. The new merger regulation reportedly was negotiated for more than 16 years! See EC Commission Officials Stress Readiness for New Merger Regime, 59 Antitrust & Trade Reg. Rep. (BNA) No. 1484, at 465 (Sept. 27, 1990) [hereinafter New Merger Regime].

137. The use of a threshold similar to that used by the EEC would have the added benefit of signalling that the United States views itself as a competitor in a world market and that a merger that seems large for the Community also is large for the United States. Moreover, it might sometimes be difficult to determine in advance if a particular merger would be subject to United States antimerger laws, to EEC antimerger laws, or to both. To the extent the standards are identical, it would matter less which entity had jurisdiction.

138. If only part of a corporation will be acquired, the regulations do focus only upon the sales of those portions of the firm. See Council Regulation, supra note 131, at 5. It is unclear whether the sales of a division of the acquiror, instead of the entire acquiror, would be used in calculating whether a transaction exceeds the thresholds. "Other problems that could surface include whether the sale of a branch or division of one company to another is a 'concentration' covered by the regulation. As one Commission official pointed out, it could simply represent a 'sale of property,' but the decision will 'depend on the individual case.'" New Merger Regime, supra note 136, at 465.

139. A similar criticism was made in ABA Comments, supra note 57, at 252-53.
classified as having Community dimensions. If one very large firm with a $10 million widget division merged with another very large firm with a $10 million widget division, and the two firms had only widgets in common, this transaction appears to be one that would have a Community dimension for merger purposes, even though the size of the merging widget divisions suggests that this merger’s antitrust effects are small.

Antitrust issues in the United States are decided upon a market-by-market basis, not according to the size of the transacting parties, since competitive effects are felt on a market-by-market basis. The Federalism Guidelines also should be crafted in terms of relevant markets, whenever the markets in question could be readily segregated from the remainder of the transaction. While this would sacrifice clarity compared to the EEC approach, it would avoid classifying large transactions with minor, segregable overlaps as mergers with a national antitrust dimension.

There might, however, be potentially anticompetitive components of national transactions that could not readily be segregated from the remainder of the transactions. Suppose, for example, that two nationwide $5 billion computer companies attempt to merge, and that the transaction would give rise to potentially anticompetitive effects in one relevant nationwide $500 million market in which each of the merging firms sold $100 million of goods. If the relevant market that could become anticompetitive could not be segregated from the remainder of the transaction this should not, of course, immunize the transaction from antitrust scrutiny. Such a merger should nevertheless fairly be considered a “national transaction” and therefore within the federal area of responsibility. The Federalism Guidelines should classify segregable assets on a market-by-market basis, while nondivisible transactions should be classified as a whole.

Something similar to the first EEC exception for mergers when both parties have more than two-thirds of their sales within a single state almost certainly would be insisted upon by the states, although the state and the federal enforcers might want to change its particulars. Some undoubtedly would desire to expand the exception, perhaps by lowering its

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140. Only if we care about size for its own sake would the size of the corporate parents be relevant.

141. If the thresholds in the United States Federalism Guidelines were designed in terms of relevant markets, the appropriate monetary thresholds should be lower than if they were designed in terms of the overall transaction.

142. See United States v. Philadelphia Nat’l Bank, 374 U.S. 321, 371-72 (1963) (stating that even if a merger may produce some beneficial effects in one market, it may not proceed if it may substantially lessen competition in another relevant market).

143. See supra text accompanying notes 131-32.
threshold to a 51% standard\textsuperscript{144} or by allowing groups of states to aggregate sales within those states to arrive at the two-thirds threshold.\textsuperscript{145} The United States should consider adopting the EEC’s general approach concerning this type of exception,\textsuperscript{146} with the particulars subject to federal-state negotiation.

The EEC’s second exception, allowing for possible challenges by member nations to mergers causing problems in distinct geographic markets within member nations,\textsuperscript{147} seems an appropriate one for the United States as well. The overriding purpose of the EEC Merger Regulations is to have most exceptionally large transactions with a Community dimension be handled at the Community level. Suppose, however, that a large transaction produced an isolated competitive overlap that could be cured through a divestiture that would not significantly affect the rest of the transaction.\textsuperscript{148} It is unlikely that the states would give up

\textsuperscript{144} The exception could provide that when both companies have a majority of their sales within the same state, that state should be the primary scrutinizer of the merger.

\textsuperscript{145} In recent years many important antitrust cases were filed by groups of states and there is every reason to believe that this trend will continue. If there is a merger that disproportionately affected a related group of states they would of course consider joint action, and it could be argued that it would be appropriate to aggregate the merging firms’ sales within states that file together. For example, suppose that 30% of the crab pots sold within the United States were sold to residents in the states on the Chesapeake Bay. Suppose that Maryland and Virginia citizens each purchase 15% of the crab pots sold within the United States, but that the Federalism Guidelines have deemed that 15% of sales does not quite meet the “disproportionate interest” standard. If Virginia and Maryland agreed that the transaction would be likely to detrimentally affect both their economies and filed jointly, the firms’ sales in both states arguably should be aggregated in which case they might exceed the disproportionate impact threshold. The Federalism Guidelines suggested in this article do not, however, permit aggregation of states’ shares. To do so would mean that some aggregation of states could potentially be found to challenge any merger and the Federalism Guidelines would provide much less business certainty.

\textsuperscript{146} One could use assets in addition to or instead of sales. The EEC focus on sales should, however, be adopted because a focus on assets could encourage states to protect local jobs.

\textsuperscript{147} See supra text accompanying notes 131-33.

\textsuperscript{148} For example, the Associated Dry Goods-May Co. transaction involved two large nationwide chains of department stores. See Pennsylvania v. May Dep’t Stores, 1986-2 Trade Cas. (CCH) ¶ 67,304 (W.D. Pa. 1986). Associated Dry Goods, with 1985 sales of $3.774 billion and projected 1986 sales in the Pittsburgh metropolitan area of $260 million, attempted to purchase May Department Stores, with 1985 sales of $5.028 billion and projected 1986 sales in the Pittsburgh metropolitan area of $169 million.

This would have led to an isolated possibly anticompetitive overlap in Pittsburgh. After the transaction was challenged by the City of Pittsburgh and the Commonwealth of Pennsylvania, the vast bulk of the transaction was permitted to proceed while the small overlap in the Pittsburgh metropolitan area—approximately 3.4% of the overall
the right to challenge such mergers. The major drawback with such an exception, however, is that it often would be difficult to determine in advance whether the assets at issue could be segregated and held separate without threatening the overall transaction, especially if an industry other than retailing is involved.\textsuperscript{149} When it would be relatively easy to fashion a hold-separate order, however, it would seem reasonable to treat the segregable assets as a separate merger for federalism purposes, and allow the states to challenge that portion of the merger.\textsuperscript{150}

The United States thus should adopt an exception similar to the EEC exception for mergers affecting a distinct market within a member nation, except that the United States exception should perhaps be narrower and only apply if the assets in question could be readily segregated and held separate from the overall transaction. The Federalism Guidelines should provide that such challenges should always be available to the states, since it is highly unlikely they would agree to the discretionary nature of the EEC provision.

It would, admittedly, often be difficult for the merging firms to be able to predict in advance whether the assets that a state would attempt to have held separate would be considered by the state enforcers to be relatively segregable, or whether they might be of the type that would be crucial to the transaction. One partial answer might be for the Federalism Guidelines to create a rebuttable presumption that a merger consisting largely of retailing assets\textsuperscript{151} would be considered relatively segregable, and a rebuttable presumption that a merger consisting largely of nonretailing

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transaction—was held separate. After a brief trial, the parties agreed to divest the disputed Pittsburgh assets. \textit{Id.} at ¶ 61,552.
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149. In some cases segregation would be difficult or impossible. Suppose two nationwide manufacturing firms, one with a single plant in New York, the other with a single plant in California, want to merge, and that the state of Maryland is the only state that believes that its consumers would be detrimentally affected. It would probably be impossible to fashion a limited hold-separate order that would protect Maryland consumers without unraveling the entire transaction.
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150. For example, the author was following the Associated Dry Goods-May Co. transaction for an arbitrage client and concluded, using publicly available data, that only approximately 5\% of the transaction's assets were in the Pittsburgh metropolitan area. Since the disputed assets involved a group of department stores, I was able to advise my client with great confidence that the parties could relatively easily segregate and frame a hold-separate order for the disputed assets that would not endanger the bulk of the transaction.
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151. I am grateful to Michael Brockmeyer for suggesting the special focus on retailing mergers. If the Federalism Guidelines limited or presumptively limited state suits to retailers, then “retailing” would have to be defined. “Retailing” probably should be defined to include all direct sales to consumers. This definition should take in such services as airline transportation since these services are sold to consumers by the firms that produce them.
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assets would not be considered segregable. Since most of the state suits involved retailing assets, this presumption would enable the states to challenge many of the mergers of greatest interest to them in a way that increased business certainty.

The final EEC exception, however, is unwise. If states are permitted to challenge mergers to protect "other legitimate interests," this could encourage state decisions based on such illegitimate interests as protecting local jobs. These and other factors that formerly played a counterproductive role in United States merger enforcement could be resurrected by such an exception.

If these thresholds and exceptions were combined, subject to the modifications discussed, the resulting portion of the Federalism Guidelines could describe one area of virtually exclusive federal responsibility as follows:

I. Areas of federal responsibility, in which states will virtually never challenge mergers.

Mergers will be classified into the following categories on a market-by-market basis if most of the assets at issue readily can be segregated and held separate from the remainder of the transaction. There is a rebuttable presumption that retailing assets can be so segregated, and that nonretailing assets cannot. If the assets potentially giving rise to the anticompetitive concerns cannot readily be so segregated, the merger will be classified and evaluated as a whole to determine whether it is within the following categories:

A. Exceptionally large mergers with a national dimension, defined as mergers for which

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153. If the Guidelines did create this rebuttable presumption, a difficult issue would be to determine how this presumption would be overcome. The merging parties would be free to attempt to convince the state enforcers that the retailing assets in question could not readily be segregated. The states similarly should be able to sometimes conclude that nonretailing assets could readily be segregated from the bulk of a transaction.

154. See supra text accompanying notes 83 and 133.

155. For examples of such counterproductive challenges, see generally Fisher & Lande, supra note 96, and at 1582 n.5, 1593-96, in particular.
1. Aggregate worldwide sales of both firms combined exceed $2.0 billion; and

2. The merging companies each have worldwide sales of at least $250 million; except that

3. A state is not foreclosed from challenging a portion of any merger if the assets giving rise to the potentially anticompetitive problems readily could be segregated and held separate from the remainder of the transaction without causing the overall transaction to be abandoned; and

4. A state may challenge any merger if more than two-thirds of both firms’ sales or purchases are within that state.

This approach arbitrarily uses approximately the EEC’s projected post-1993 threshold for aggregate sales of the merging firms, and the EEC’s current threshold for the sales of each company. The two-thirds exception has been expanded slightly to include purchases as well as sales since monopsony or oligopsony could sometimes be a concern. The suggested test uses worldwide sales, instead of national sales, since companies with significant exports are more of a national than a state concern. The suggested test would not permit states to challenge minor overlaps within that state if doing so would be likely to scuttle the entire national transaction.

If the states agreed to this provision they would be making a major concession. They would be agreeing not to challenge many—perhaps most—of the very largest national mergers.

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156. Reasonable people obviously could select significantly higher or lower levels. The levels ultimately selected would of course be a compromise, and not necessarily the same compromise that the nations within the EEC negotiated (and will renegotiate). “The thresholds have been set at a relatively high level—in fact higher than was originally proposed by the Commission and was desired by some Member States (principally the ones with underdeveloped national merger controls)—but only for an initial period.” Commentary, supra note 134, at 2099-7.

157. The relevant market would be the location of the purchaser(s) of the product in question or, if monopsony were the issue, the location of the sellers of the potentially monopsonized products.

158. This should not create a presumption that markets will be defined to be worldwide.

159. States could still be left the option of filing amicus curiae briefs in any federal or private challenge.
2. Mergers That Do Not Disproportionately Affect a State

Our nation's economic policy might also be well served if states voluntarily refrained from challenging any merger unless that merger disproportionately affected the challenging state. Many mergers smaller than those defined to have a "national dimension" are still basically national transactions whose impact will be felt throughout the country. Unless there is some special reason why a state is disproportionately affected by such a transaction it usually should defer enforcement decisions for these mergers to the most affected state(s) or to the federal enforcers.  

As a practical matter states rarely if ever challenge transactions that do not have a significant and disproportionate effect on that state. Currently a merger counselor can only advise his or her clients in general terms that most states are unlikely to scrutinize transactions that do not disproportionately affect that state. The Federalism Guidelines might be able to increase business certainty by delineating specific categories of mergers that relatively unaffected states would usually not challenge. The purpose of the disproportionate impact standard is to provide noncontroversial transactions with the virtual certainty that most states will not initiate a challenge. Using these screens, attorneys advising a large, nationwide transaction might be able to quickly ascertain that forty-eight states will not initiate a challenge. The merging firms could then focus their attention on the two remaining states.

For the reasons given above, the disproportionate impact standards probably should apply separately to each relevant market, which could

160. Interestingly, at least one state antitrust law is based upon this general principle. The Massachusetts antitrust law applies only to activities that "occur and have their competitive impact primarily and predominantly within the commonwealth and at most, only incidentally outside New England." MASS. GEN. L. ch. 93, § 3 (1991).

161. California was the state most likely to challenge the American Stores-Lucky Stores transaction even though it also affected many other states, since approximately 73% of Lucky's Stores were located within California. See California's Petition for a Writ of Certiorari at 3, California v. American Stores Co., 110 S. Ct. 1853 (1990).

The Texaco-Getty merger may have been a rare example of a huge transaction that primarily affected one state. Texaco, Inc. offered $10.1 billion for Getty Oil Co. in 1984, at the time the largest merger in history. Most of Getty's assets were located within California, and the transaction was believed by some to have the potential for detrimentally affecting competition within several California and West Coast markets. See State ex rel. Van de Kamp v. Texaco, Inc., 46 Cal. 3d 1147, 1174-76, 762 P.2d 385, 402-04, 252 Cal. Rptr. 221, 238-40 (1988) (Mosk, J., concurring in part and dissenting in part).

162. See supra text accompanying notes 140-41.

163. As noted earlier, this exception often would cause uncertainty since market definition frequently is unclear in advance of a transaction.
be international, national, regional, statewide or local, so long as the portion of a transaction in question could be held separate from the remainder of the transaction. If the states were to agree to this type of provision they would be agreeing to forego challenging many sizeable transactions. Many large transactions that could have a detrimental effect on particular states would not lend themselves to hold-separate orders involving primarily the assets alleged to cause the anticompetitive problems. For these transactions, each state would invoke its prosecutorial discretion by leaving enforcement decisions to the federal enforcers or the disproportionately affected states. The Federalism Guidelines might embody these concerns by providing that a state would virtually always refrain from challenging:

B. Mergers that do not disproportionately affect that state. A merger will not be considered to disproportionately affect a state unless

1. At least 25% of the sales or purchases in the relevant market in question are within that state; or

2. The sales or purchases within a state are more than five times that state’s proportionate share of the United States population (or the population of any region of the U.S. that constitutes a relevant geographic market for the product market in question); notwithstanding the above

3. The sales or purchases in the relevant market(s) being challenged, of the merging firms combined, must exceed $5 million. If more than two-thirds of the purchases or sales at issue are within the same state, however, that state may challenge the merger even if it is below the $5 million threshold; except that

164. This would mean that if the Federalism Guidelines had been in effect, the Commonwealth of Pennsylvania would have been free to challenge that portion of the Associated Dry Goods-May Co. transaction that was located in the Pittsburgh metropolitan area, so long as the Pittsburgh metropolitan area constituted a relevant geographic market and so doing would not seriously risk stopping the entire transaction. Since only approximately 3.4% of the transaction was significantly affected (see supra note 148), and it was relatively easy to hold these retailing assets separate, the challenge would have been appropriate under the proposed Federalism Guidelines. By contrast, if 50% of the transaction had been the subject of a state antitrust challenge, a hold separate order concerning the disputed assets might well have caused the entire transaction to fail.
4. A state is not foreclosed from challenging a portion of any merger if the merger would be likely to cause harm to a discrete market within that state and if most of the assets in dispute could readily be segregated and held separate from the remainder of the transaction. There is a rebuttable presumption that retailing assets can be so segregated, and that nonretailing assets cannot. If the assets can be segregated and held separate, the tests in subparts B(1) through B(3) above will be applied to these assets.

The 25% threshold is meant to be the primary identifier of markets of particular concern to the larger states. It is, of course, arbitrary and other figures could be used.\(^{165}\) Provision 2 would be of most concern to the less populous states;\(^{166}\) without it they would be excluded from challenging many mergers that disproportionately affected them, a position they would be unlikely to agree to.\(^{167}\) The $5 million threshold is partially redundant but may provide additional certainty that a challenge will not be forthcoming in many instances. It is meant to apply regardless of whether the first or second prong is used, as a way to prevent a state

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165. One could imagine a number of possibilities, including allowing a state to challenge when: (1) there are no interstate effects; (2) there are no direct interstate sales or purchases; (3) more than 50% of sales and/or purchases are within that state; (4) the transaction would have a disproportionately high impact on that state; (5) the transaction would have at least a proportionate effect on that state; (6) direct sales or purchases were made within that state; or (7) the transaction would have any effect on that state.

166. The “five times” standard is, of course, arbitrary. It was selected only to illustrate the type of test that could be employed to ensure that no state would challenge a transaction unless it disproportionately affected that state.

167. Some mergers, especially those involving the retailing and consumer-goods markets that state attorneys general are most likely to challenge, might only give rise to antitrust issues in a relatively segregable relevant market entirely within one state so no calculations to determine disproportionate impact would be required. See, e.g., the discussion of Associated Dry Goods-May Co., supra note 164. Other mergers would require some calculations to determine whether a state challenge would be permitted under the Federalism Guidelines.

For example, suppose that a merger concerned a relevant market that was national in scope and the states of Maryland and California, with approximately 2% and 12% of the national population, respectively, were examining the transaction closely. Maryland would decline to challenge the transaction unless there existed some relevant market for which at least 10% (the lesser of 5 x 2% and 25%) of the sales were to Maryland customers. California would decline to challenge the transaction unless at least 25% (the lesser of 5 x 12% and 25%) of the sales were to California customers.
from initiating challenges when only a de minimis amount of the transaction affects that state.\textsuperscript{168}

\section*{B. \textit{Areas of Primary State Responsibility}}

The federal enforcers are acknowledged to be our nation's primary antimerger enforcers; the state enforcers have never contested this.\textsuperscript{169} Moreover, many states have little or no antitrust enforcement capability, and most states have never brought a merger case.\textsuperscript{170} In addition, the federal Hart-Scott-Rodino premerger notification program ensures that the federal enforcers often will have crucial data that the state enforcers lack.\textsuperscript{171} Accordingly, it would never be prudent for the federal enforcers to announce that there are certain categories of mergers for which they will always defer to state enforcement or nonenforcement decisions.

\textsuperscript{168.} Several related approaches were considered and rejected. The tests that this article is suggesting focus on sales or purchases, not assets, state of incorporation or location of corporate headquarters. A focus on anything other than purchases or sales could encourage states to focus on jobs or otherwise to engage in parochial protective measures that should not affect antitrust decisions (of course, a state certainly could select, from among the group of cases that meet the thresholds and cause traditional antitrust injury, those cases that also will preserve or increase employment within the state; a state would be free to devote its scarce prosecutorial resources to such cases).

Nor do the tests that this article suggest focus upon the market shares of the merging parties within a state. They instead focus upon the percentage of the relevant market that is sold or purchased in that state.

The suggested tests do not allow states to aggregate purchases or sales to surmount a threshold. If states could combine to exceed, for example, the 25\% threshold, the Guidelines would provide very little certainty to merging parties that there would not be a challenge.

The suggested tests do not limit the states to retailers. Many state challenges concern retailers and these mergers are more likely to have a disparate impact on individual states. Nevertheless, other mergers can disproportionately affect particular states, and such states should not be foreclosed from scrutinizing these mergers.

\textsuperscript{169.} See, e.g., \textit{60 Minutes with Brockmeyer}, supra note 38.

\textsuperscript{170.} To the best of my knowledge only 21 states have filed a merger action since 1980. \textit{See supra} note 75. Other states may, however, have antitrust attorneys on staff with merger experience acquired elsewhere, or may have participated in multistate enforcement actions. For example, Eugene Waye, longtime Assistant Attorney General in charge of antitrust for the Commonwealth of Pennsylvania, had extensive experience with merger enforcement before he accepted this position.

Any state with enough determination and money can hire outside counsel with the necessary expertise to investigate and litigate. For example, Pennsylvania and the City of Pittsburgh hired Buchanan and Ingersol to help challenge the Associated Dry Goods-May Co. transaction. But only state officials can make the determination whether to sue, and these determinations can best be made wisely by people with substantial experience.

\textsuperscript{171.} \textit{See supra} notes 80-81.
It might, however, be possible to identify categories of mergers for which able and willing states should be given primary enforcement responsibility. The states could be responsible for mergers that primarily affect only that state, unless the merger is so large as to have a national dimension. Moreover, mergers that do not affect interstate commerce cannot be challenged by the federal enforcers, and at least one court would go further since it held that a substantially sized market is required for a Clayton Act violation. If this court is correct, even mergers involving combined sales by the merging firms within a single relevant market of more than $3 million per year might have to be evaluated solely under state antitrust laws. Regardless whether this is correct, the Federalism Guidelines could consider delegating primary enforcement responsibility to the states in the following manner:

II. Areas of primary state responsibility.

Many states lack the resources to challenge mergers. Except for mergers that do not affect interstate commerce, the federal enforcers often must continue to play the primary enforcement role.


173. In United States v. Baker Hughes, Inc., 731 F. Supp. 3 (D.D.C.), aff’d, 908 F.2d 981 (D.C. Cir. 1990), the court stated that “[t]he minuscule size of the market creates problems for the government’s case, because one element of a Section 7 violation is that ‘[t]he market [affected] must be substantial.’” Id. at 9 (quoting United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586, 595 (1957)). The du Pont opinion did not elaborate. It merely cited Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346, 357 (1922), which states that an arrangement would not violate the Clayton Act unless it “substantially lessened competition.” Id. It does not require a substantial amount of commerce. Thus, the Baker Hughes and du Pont requirement of a substantially sized market is probably in error.

174. In Baker Hughes, Oy Tamella AB, a Finnish corporation, sought to acquire Secoma, a French corporation, owned by Baker Hughes. Baker Hughes, 731 F. Supp. at 4. Oy Tamella’s Tamrock division and Secoma were competing major industrial concerns with business in a variety of mining products in various countries. Id. Secoma had sales over a three year period of 18 or 19 rigs worth $2.5 million, while Tamrock sold between 33 and 42 rigs. Id. at 9. Tamrock’s interrogatories indicated 33 rigs sold and valued at approximately $7.8 million, while internal documents and Secoma’s interrogatories indicated 42 rigs sold, the value of which was undetermined. Id. at 9 n.6. Thus, the two firms’ average annualized sales in the relevant market must have exceeded $3 million per year.

175. A rejected approach would have left all mergers too small to be reportable under the Hart-Scott-Rodino program to the state enforcers. There is, however, no reason to believe that such mergers are likely to have a special impact on only one state.
States that are able and willing to challenge mergers will have primary responsibility for:

A. Mergers that do not affect interstate commerce;

B. Mergers that primarily affect one state or a portion of a state, such mergers being defined as those where at least two-thirds of sales or purchases within the relevant market(s) potentially affected by the merger are within a single state;

C. A state is not foreclosed from challenging a portion of a merger if most of the assets in question readily could be segregated and held separate from the remainder of the transaction. There is a rebuttable presumption that retailing assets can be so segregated, and that nonretailing assets cannot. If the assets can be segregated and held separate, the tests in part II(B) will be applied to these assets;

D. States will file in federal courts whenever possible, using federal statutes or substantively identical state statutes with better discovery or other procedural provisions. The state attorneys general will oppose all attempts to enact state antimerger laws inconsistent with the substantive provisions of the Clayton Act. If states file under state law they will stipulate that the statute is substantively identical to the parallel federal antitrust law and that federal precedents should control;

E. Notwithstanding the above, a transaction shall not be considered to be within the area of primary state responsibility if:

1. Aggregate worldwide sales of both companies exceed $2.0 billion; and

2. The merging companies each have sales of at least $250 million.

The suggested definition of nonnational mergers again parallels the EEC determination. The two-thirds requirement, again borrowed from the EEC approach, will mean that few mergers—only those that are truly the
primary concern of one state—will be classified as within the primary responsibility of a state. 176

Every existing state antimerger law is worded substantively identically to the federal antimerger laws, although it is unclear if each would be interpreted identically by state judges. 177 The requirement that the states normally file in federal courts using federal statutes or substantively identical state statutes is intended to increase certainty by making it more likely that federal substantive precedent will be applied by federal judges.

The following provision is also recommended:

III. A state or group of states will be less likely to challenge a merger if the necessary relief would involve assets not located primarily within the challenging state(s).

In all cases where the relief will occur substantially outside of the challenging state(s), the challenging state(s) should endeavor to consult and coordinate with state(s) where the assets are located, as well as with the federal enforcers, in advance of instituting a challenge and when planning any necessary relief.

States are constitutionally permitted to challenge a merger even if necessary relief would arise outside of the challenging state. 178 Nevertheless, a merger is less of a state's affair to the extent necessary relief primarily must be effectuated in other states. If two firms in state X, who primarily sell in state Y, were to merge, the anticompetitive effects would detrimentally affect state Y. If state Y was not allowed to challenge such mergers, state X might be able to further the interests of its corporations, who might be able to charge supra-competitive prices after the merger at the expense of consumers in state Y.

176. Thus, if a merger of two chains of stores would lead to a readily segregable and potentially anticompetitive overlap only in Pittsburgh, the federal enforcers normally would defer that enforcement decision to officials within Pennsylvania unless the overall transaction was so large that it had a national dimension. The Associated Dry Goods-May Co. merger discussed supra note 164, would not fall within the area of primary state responsibility since it exceeds the thresholds in section II(E). Nor would it be within the area of presumptive federal authority, since it allegedly would have had effects in a discrete, easily segregable market. Rather, it would have fallen within the zone of shared federal/state responsibility.

177. See M. Pfunder, supra note 12, at 13-14.

178. "Now no one doubts that state courts can reach persons located outside the forum state, or that state legislatures have the authority to condemn certain acts that take place outside the state." Hovenkamp, supra note 27, at 376; see also id. at 395, 399 (discussing extraterritorial application of state antitrust law).
C. Areas of Shared Federal/State Responsibility

Lastly, the following provision should be added to the Federalism Guidelines to apply to other kinds of mergers:

IV. Both the federal and state enforcers may challenge other mergers. For these mergers the federal enforcers are to be the primary enforcers. The state and federal enforcers will coordinate responsibility for these mergers through a clearance mechanism.

The state and federal enforcers should establish a formal joint clearance mechanism analogous to the current FTC-DOJ merger liaison and clearance procedure, to ensure that enforcement actions will be brought by the most appropriate enforcer.179 One problem that would arise, however, stems from the federal enforcers’ inability to release Hart-Scott-Rodino material to the state enforcers, or even to confirm the existence of a premerger filing.180 The only way an effective clearance mechanism could be established would be if an interested state had the burden of going to the federal enforcers and telling them that the state had learned of the existence of a specific merger and that the state wanted clearance to challenge it. The federal enforcers would then have three options. First, they could agree to let the state challenge the merger. Second, they could agree that the merger should be challenged, but assert that they were best suited to bring the case. Third, they could attempt to convince the state not to challenge. As a practical matter, they often would be unable to convince the states not to sue without revealing confidential information, for which they would have to secure the merging parties’ permission.

If the state and federal enforcers were able to come to an agreement, federal/state duplication, misunderstandings, and animosity could be avoided and the enforcers’ desires for appropriate relief could be coordinated. The enforcers would be able to let the merging firms know which enforcers would, and would not, be closely scrutinizing the transaction. If no agreement were reached, either the federal or state enforcers—or both—would be free to initiate a challenge; the situation as it stands today.

179. One consideration would be the industry specific expertise of the different enforcers.

180. See Lieberman v. FTC, 771 F.2d 32, 37 (2d Cir. 1985); Mattox v. FTC, 752 F.2d 116, 121 (5th Cir. 1985).
IV. CONCLUSIONS

Many state antitrust enforcers now consider merger enforcement a significantly higher priority than they did a decade ago. Their determination recently has been reinforced by a noteworthy Supreme Court victory, and it is unlikely that they will return to inactivity despite the recent increase in federal enforcement. There now exists, however, a spirit of mutual federal/state respect that contrasts sharply with the situation that existed during parts of the Reagan administration. This might be the optimal time to concretize the mutual deference and cooperative spirit through the negotiation of Federalism Guidelines.

The primary purpose of any Federalism Guidelines would be more to tell merging firms, as a practical matter, whether state or federal enforcers might seriously scrutinize the transaction than it would be to restrain state or federal activity. Nevertheless, any agreed-upon Guidelines would entail some self-restraint. This agreed-upon division of responsibility would only last so long as reasonable people continue to head the antitrust enforcement agencies, they continue to act in good faith, and their enforcement decisions are continued to be viewed by the other antitrust enforcers as mainstream and nonpolitical. Since future federal/state friction could cause the NAAG, the DOJ, or the FTC to withdraw from the Federalism Guidelines, this document's very existence might help to give all parties somewhat more of an incentive to continue to behave cooperatively and to continue enforcement patterns in antitrust's mainstream.

The proposed recommendations might not go far enough in many respects. They might not strike the correct balance of federal, state, and business planning concerns. They are only intended to constitute a first

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182. Three cases were filed by state enforcers in 1990:
   3. Maine filed a suit against Georgia-Pacific Corp. to block a takeover bid of Great Northern Nekoosa Corp. Both corporations were integrated forest product companies. A consent decree was entered. See Maine v. Georgia-Pacific Corp., No. CV90-8 (Kennebeck Co. Super. Ct. 1990); NAAG Antitrust & Commerce Rep. 17 (Feb./Mar. 1990).
draft of a beginning to a complex analysis, discussion, and negotiation. Their main purpose is to establish federalism principles in a way that both federal and state enforcers, as well as the business community, would regard as a step forward. If an approach similar to that advocated in this article could be agreed upon, it should be considered only to be a modest starting point. Perhaps after a few years of experience under the Federalism Guidelines additional avenues of federal/state cooperation and deference would emerge, and the particulars of the federal/state division of responsibility could be modified appropriately.
APPENDIX

SUGGESTED MERGER FEDERALISM GUIDELINES

I. Areas of federal responsibility, in which states will virtually never challenge mergers.

Mergers will be classified into the following categories on a market-by-market basis if most of the assets at issue readily can be segregated and held separate from the remainder of the transaction. There is a rebuttable presumption that retailing assets can be so segregated, and that nonretailing assets cannot. If the assets potentially giving rise to the anticompetitive concerns cannot readily be so segregated, the merger will be classified and evaluated as a whole to determine whether it is within the following categories:

A. Exceptionally large mergers with a national dimension, defined as mergers for which

1. Aggregate worldwide sales of both firms combined exceed $2.0 billion; and

2. The merging companies each have worldwide sales of at least $250 million; except that

3. A state is not foreclosed from challenging a portion of any merger if the assets giving rise to the potentially anticompetitive problems readily could be segregated and held separate from the remainder of the transaction without causing the overall transaction to be abandoned; and

4. A state may challenge any merger if more than two-thirds of both firms’ sales or purchases are within that state.

B. Mergers that do not disproportionately affect that state. A merger will not be considered to disproportionately affect a state unless

1. At least 25% of the sales or purchases in the relevant market in question are within that state; or

2. The sales or purchases within a state are more than five times that state’s proportionate share of the United States population
(or the population of any region of the U.S. that constitutes a relevant geographic market for the product market in question); notwithstanding the above

3. The sales or purchases in the relevant market(s) being challenged, of the merging firms combined, must exceed $5 million. If more than two-thirds of the purchases or sales at issue are within the same state, however, that state may challenge the merger even if it is below the $5 million threshold; except that

4. A state is not foreclosed from challenging a portion of any merger if the merger would be likely to cause harm to a discrete market within that state and if most of the assets in dispute could readily be segregated and held separate from the remainder of the transaction. There is a rebuttable presumption that retailing assets can be so segregated, and that nonretailing assets cannot. If the assets can be segregated and held separate, the tests in subparts B(1) through B(3) above will be applied to these assets.

II. Areas of primary state responsibility.

Many states lack the resources to challenge mergers. Except for mergers that do not affect interstate commerce, the federal enforcers often must continue to play the primary enforcement role.

States that are able and willing to challenge mergers will have primary responsibility for:

A. Mergers that do not affect interstate commerce;

B. Mergers that primarily affect one state or a portion of a state, such mergers being defined as those where at least two-thirds of sales or purchases within the relevant market(s) potentially affected by the merger are within a single state;

C. A state is not foreclosed from challenging a portion of a merger if most of the assets in question readily could be segregated and held separate from the remainder of the transaction. There is a rebuttable presumption that retailing assets can be so segregated, and that nonretailing assets cannot. If the assets can be segregated and held separate, the tests in part II(B) will be applied to these assets;
D. States will file in federal courts whenever possible, using federal statutes or substantively identical state statutes with better discovery or other procedural provisions. The state attorneys general will oppose all attempts to enact state antimerger laws inconsistent with the substantive provisions of the Clayton Act. If states file under state law they will stipulate that the statute is substantively identical to the parallel federal antitrust law and that federal precedents should control;

E. Notwithstanding the above, a transaction shall not be considered to be within the area of primary state responsibility if:

1. Aggregate worldwide sales of both companies exceed $2.0 billion; and

2. The merging companies each have sales of at least $250 million.

III. A state or group of states will be less likely to challenge a merger if the necessary relief would involve assets not located primarily within the challenging state(s).

In all cases where the relief will occur substantially outside of the challenging state(s), the challenging state(s) should endeavor to consult and coordinate with state(s) where the assets are located, as well as with the federal enforcers, in advance of instituting a challenge and when planning any necessary relief.

IV. Both the federal and state enforcers may challenge other mergers. For these mergers the federal enforcers are to be the primary enforcers. The state and federal enforcers will coordinate responsibility for these mergers through a clearance mechanism.