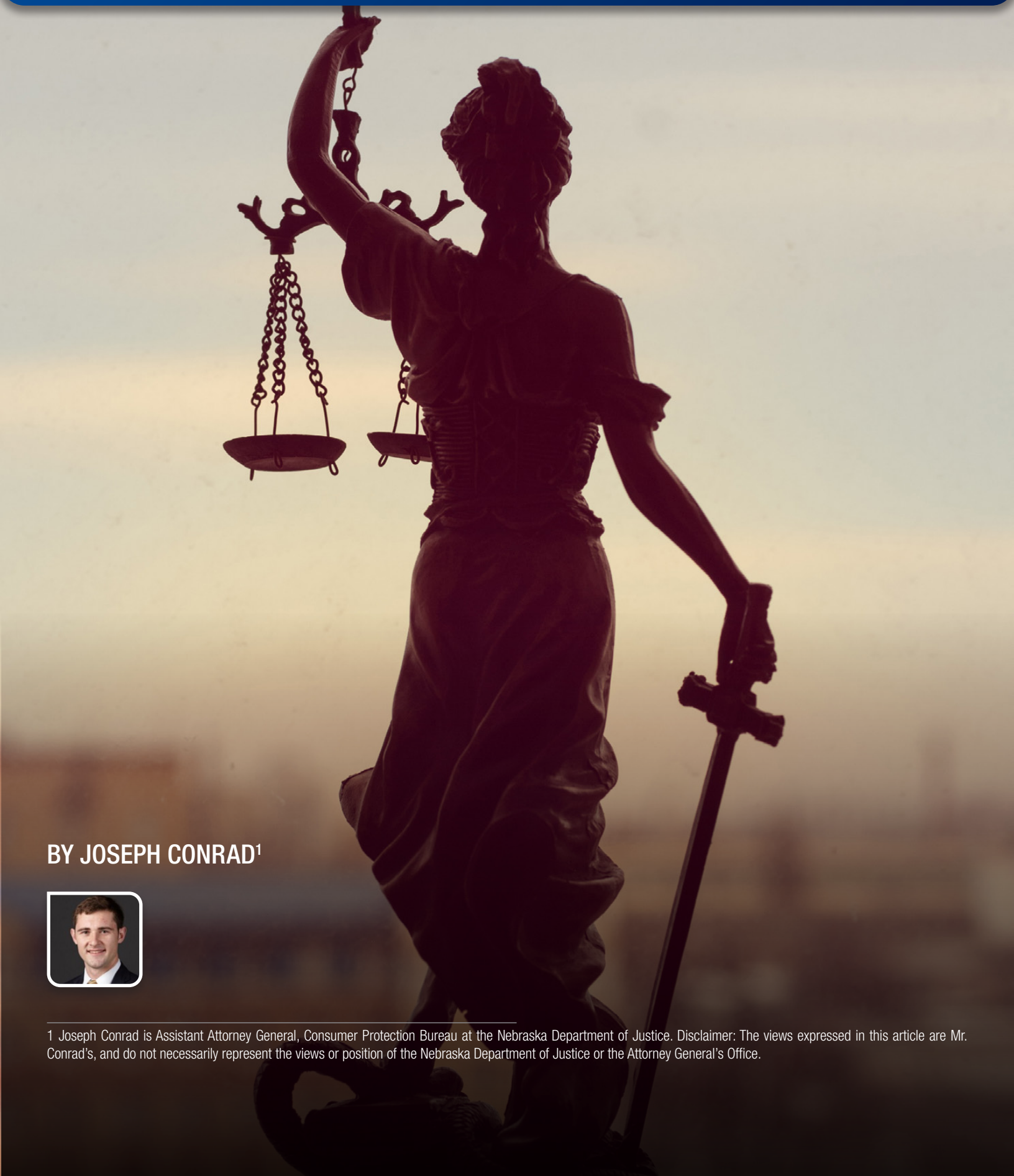
IN DEFENSE OF STATE ENFORCEMENT: A POSITIVE PERSPECTIVE ON STATE AND FEDERAL COOPERATION



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I. INTRODUCTION

Congress has constructed antitrust enforcement in the United States in a cake-like fashion: with three separate layers. Each layer contains its own set of independent enforcers, adding further complexity to the U.S. enforcement regime.

Federal enforcement sits atop the structure with enforcement duties divided between the U.S. Department of Justice Antitrust Division ("USDOJ") and the Federal Trade Commission ("FTC"), who largely share parallel jurisdiction. The middle layer of this structure is comprised of state enforcement. States Attorneys General Offices ("State AGOs") wield independent authority to bring enforcement actions under federal law, while simultaneously holding separate power to bring state antitrust claims. At the bottom of the enforcement structure rest private plaintiffs, who most commonly invoke antitrust and serve as the enforcement foundation.

This multi-faceted and overlapping enforcement regime is much maligned for increasing the probability of over-deterrence. To be sure, antitrust enforcement can be a significant liability for defendants. Government enforcers have the ability to exercise investigative authority to pursue potential violators, even before filing a lawsuit. Then, if litigation does ensue, the costs can be exponential. Antitrust litigation often brings about follow on suits from other government enforcers, along with private plaintiffs.[2] The high costs associated with enforcement are acceptable when incurred while prosecuting anticompetitive conduct. However, those costs may have a chilling effect on procompetitive conduct when enforcers commit false positives (wrongly concluding there was harm to competition) when making enforcement decisions.

In particular, critics of the two-headed enforcement regime have complained that state enforcers create unnecessary uncertainty for business and contribute to over-deterrence.[3] These concerns largely decry state enforcement efforts for chilling procompetitive conduct, mudding national competition policy, and distorting antitrust analysis with unrelated policy concerns. In short, state enforcement has come under its fair share of scrutiny.

Despite complaints from critics, state enforcement provides substantive contributions to the field of antitrust. For instance, state enforcement delivers additional resources to our nation's capacity, as the States employ over 150 attorneys dedicated to antitrust.[4] Moreover, state

2 Richard A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925, 940 (2001) [hereinafter Posner, New Economy].

3 Deborah Platt Majoras, Deputy Assistant Attorney General, Dept. of Justice, Antitrust Division, Antitrust and Federalism, Remarks Before the New York State Bar Association (Jan. 23, 2003) at https://www.justice.gov/atr/speech/antitrust-and-federalism#N_8_. [hereinafter Majoras, Antitrust and Federalism].

4 Thurman Arnold Project at Yale, State Antitrust Employment at https://som.yale.edu/faculty-research-centers/centers-initiatives/thurman-arnold-project-at-yale/state-antitrust-employment.

enforcement facilitates viewpoint diversity and policy competition between state and federal enforcers to promote robust enforcement. Finally, state enforcement also generates substantially more case law, which helps develop antitrust understanding.[5]

Contrary to what critics suggest, the enforcement system captures substantive benefits with limited costs because of cooperative enforcement. Often overlooked by critics is the symbiotic relationship that has developed between state and federal enforcers. Since the end of the Reagan Administration, state and federal enforcers have developed synergies by coordinating investigations and subsequent litigation. State enforcers offer their federal counterparts familiarity with local markets and industries, close ties with local institutions, and the ability and experience in compensating injured individuals.[6] In exchange, federal enforcers provide experienced and intently focused staff, national and international perspective on competition issues, and in-house staff economists.

Cooperative enforcement mitigates the often-cited costs and burdens associated with state enforcement efforts. For example, coordinated investigations reduce redundant and duplicative requests made upon investigatory targets and allow enforcers to find efficiencies in the process. But, perhaps even more importantly, synchronization between enforcers mitigates potential problems arising from inconsistent state and federal antitrust policy and enforcement decisions.

Generally, state and federal enforcers have incentive to reach consensus on enforcement policy. The incentive lies in two separate mechanisms. First, the spillover effects that result from a single enforcer's enforcement decision; and second, the harmonization between state and federal antitrust law. The aforementioned incentives ensure that state enforcement policy commonly coincides with positions taken by federal enforcers; however, differences do at times ensue – particularly on some high-profile matters. Despite these rare public disagreements between enforcement bodies, the gains derived from our multilayered system overwhelm any efficiencies produced from policy deviations.
The next section will provide details on the historical perspective on state antitrust enforcement before we explore the incentives for cooperation. The third section will then provide details on the potential spillover effects resulting from state enforcement in federal law, which in turn offer incentives for both sets of agencies to coordinate. The fourth section will turn the tables and identify ways in which federal enforcement exerts external forces on state antitrust laws. Finally, the paper will end with a brief conclusion.

II. HISTORICAL PERSPECTIVE

Before exploring the incentives for cooperation between state and federal antitrust agencies, it is first important to have a historical perspective on the enforcement mechanisms and the growth of state enforcement. State antitrust enforcement has existed longer than the first federal antitrust law, the Sherman Act, which was passed in 1890. Senator Sherman himself announced during debate over the Sherman Act that our nation's federal antitrust laws are meant to only supplement, not displace, state enforcement.[7]

Modern antitrust law refers principally to federal statutes. Although state antitrust enforcement predates the passage of the Sherman Act, contemporary state antitrust enforcement did not begin until the passage of two pieces of federal legislation in 1976. First, the Crime Control Act of 1976 provided financial resources to state attorneys general for antitrust enforcement.[8] Second, the Hart-Scott-Rodino Act ("HSR")[9] in which states received Congressional authority to bring federal antitrust claims as *parens patriae* for treble damages.[10] Shortly after HSR's passage, the National Association of Attorneys General ("NAAG") established an Antitrust Task Force to develop antitrust policy and coordinate antitrust investigations and litigation.[11]

The authority granted in HSR places States AGOs a privileged position as a private plaintiff. Under that authority, State AGOs may bring federal antitrust cases on behalf of its residents for treble-damages and equitable relief when the welfare of its citizens is threatened.[12]

5 Brief for the American Antitrust Institute as Amicus Curaie, *Wal-Mart Stores, Inc. v. Rodriguez*, 322 F.3d 747, 748 (1st Cir. 2003).

6 Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L.J. 673, 673 (2003) [hereinafter, Calkins, Perspectives].

7 21 Cong. Rec. 2457 (1890).

8 Pub. L. No. 94 -503.

9 Pub. L. No. 94-435.

10 Calkins, Perspectives at 676-77, *supra* note 6.

11 *Id.* at 678.

12 Jean Wegman Burns, Symposium: Antitrust at the Millennium (Part 1), 68 Antitrust L.J. 29, 32 (2000).

State enforcement grew from its newfound authority throughout the 1980s, partially in response to a decline in federal enforcement during the Reagan administration.[13] In the first Bush and Clinton administrations, the relationship between state and federal enforcers became more cooperative, which only enhanced state intervention in antitrust.[14] *Microsoft* perhaps best characterizes the growth of state enforcement. The states began investigating Microsoft in 1997 and jointly litigated the case with the USDOJ, marking one of the most significant antitrust cases in history.[15]

The *Microsoft* experience, however, set ablaze a new debate over the proper role of state antitrust enforcement after the states splintered from the USDOJ's negotiated remedy. In the years following, Judge Posner[16] would call for states to be stripped of nearly all antitrust authority and the Antitrust Modernization Commission would review state authority. While the federal statutory basis for state enforcement has not changed in the time since, debates over state antitrust enforcement remain active.

III. SPILLOVER EFFECTS IN ENFORCEMENT DECISIONS

The growth of state antitrust enforcement has brought with it concerns that State AGOs may take an overly aggressive posture or espouse policies inconsistent with federal agencies. In doing so, states may undermine the policy choices by their federal counterparts. The spillover implications could come in different, yet related, forms. Some of which are have dynamic implications for antitrust enforcement, while others are purely static.

Perhaps the most widely cited rationale for rejecting state antitrust enforcement is the concern that inconsistent enforcement decisions between state and federal enforcers could chill pro-competitive conduct in the long-run.[17] Antitrust commentators and policymakers have long feared that the extra layer of state enforcement may add uncertainty for businesses who may fear catching the ire of state enforcers.[18] As a result, businesses may decline to pursue pro-competitive mergers or conduct in an effort to avoid any antitrust scrutiny. In turn, consumers miss potential efficiencies or improvements.

In a different sense, state enforcement has another important dynamic impact: it can feed into the development of federal antitrust jurisprudence through case selection.[19] Federal antitrust is more a creature of judicial construction than statutory drafting. The Sherman Act and Clayton Act largely delegate authority to the judiciary, where much of the meaning behind our federal antitrust laws have been crafted. In practice, this raises the possibility that disjointed enforcement could develop unfavorable case law to the detriment of both state and federal agencies.

Concerns over fragmented enforcement efforts also pose a present risk to a given case at hand. The overlapping enforcement structure provides opportunities for disagreement between agencies over whether specific conduct or a proposed merger is anticompetitive. Agencies that decide to pursue enforcement while their fellow enforcers acquiesce to the allegedly anticompetitive conduct or merger seemingly undermine the policy choice made by their peers. In doing so, a single state action may undo conduct or mergers seen as pro-competitive by federal enforcers.

Fortunately, evidence suggests that state and federal enforcers are largely able to avoid the aforementioned spillover effects through coordination. The Antitrust Modernization Commission, while a bit dated, provides helpful insights in their final report about the harmonization of enforcement efforts. Studying 343 antitrust actions accounted for in the National Association of Attorneys General State Antitrust Litigation database from 1990 through 2006, the Commission reported that 59 percent of those cases represented joint enforcement efforts between states and a federal partner. More recently, the USDOJ alone reported bring 25 cases with states that reached a settlement or final disposition after trial from 2010 to 2017.[20]

13 Margaret H. Lemos, State Enforcement of Federal Law, 86 N.Y.U. L. Rev. 698, 711 (2011).

14 Stephen D. Houck, Transition Report: The State of State Antitrust Enforcement, National State Attorneys General Program, Columbia Law School (Oct. 2009).

15 Kevin J. O'Connor, Federalist Lessons for International Antitrust Convergence, 70 Antitrust L.J. 413, 423 (2002).

16 Posner, New Economy, *supra* note 2, at 940.

17 Majoras, Antitrust and Federalism, *supra* note 3.

18 *Id.* ("Antitrust is an area in which over-enforcement and promotion of multiple divergent enforcement views may cause affirmative harm.").

19 Antitrust Federalism, Preemption, and Judge-Made Law, 133 Harv. L. Rev. 2557, 2576 (2020).

20 Renata B. Hesse, Protecting Competition Across 50 United States: Advocacy and Cooperation in Antitrust Enforcement, Remarks at the ABA Fall Forum (Nov. 17, 2016) at https://www.justice.gov/opa/speech/file/911166/download [hereinafter, Hesse, Competition Across 50 United States].

Of the 142 state-only enforcement actions, 56 percent were related to price-fixing, bid-rigging, or market allocation. All three of these theories are well understood and likely to result in consumer harm.[21] Moreover, the majority of state antitrust effort is focused on areas in which states have a comparative advantage. State antitrust is particularly centered on issues of local or regional importance. One study concluded that over 80 percent of state lawsuits included allegations of local markets, indicating regional consequences involved in the case.[22] These statistics signal a high degree of cooperation and suggest an efficient allocation of resources between state and federal enforcers.

Although the statistics demonstrate how well State AGOs coordinate with federal agencies, divergences do sometimes occur. There have been several high-profile instances in which fractures separate the enforcement posture taken by state and federal enforcers. Two notable examples reflect the spillover effects previously described. The *American Express*[23] litigation and *Sprint/T-Mobile*[24] offer two examples of discrepancies between the approaches taken by state and federal enforcers.

As previously mentioned, sometimes differences in litigation strategy can lead to unhelpful precedent that later impacts antitrust jurisprudence. Such was the case in *American Express*.[25] Throughout much of the litigation, State AGOs and USDOJ worked together as co-plaintiffs in an effort to reform vertical restraints imposed on merchants, who American Express forbid from implying a preference for non-American Express cards. American Express successfully defended the practice in the Second Circuit[26], which several State AGOs later appealed to the Supreme Court, despite the USDOJ's brief in opposition to certiorari. Ultimately, the Court granted certiorari and upheld the Second Circuit's decision, finding that courts should evaluate harm to both sides of a two-sided market in certain instances. Federal enforcers felt the spillover effects from the *American Express* decision not long after the decision. The confusion caused by *American Express* later cast a shadow over USDOJ's attempt to block the merger between Sabre and Farelogix, exemplifying the spillover effects.[27]

In addition, state enforcement can sometimes displace enforcement decisions pursued by federal enforcers. The recent effort by thirteen states and the District of Columbia to enjoin the merger between Sprint and T-Mobile provides a recent example. In this instance, both State AGOs and the USDOJ reviewed the potential merger but diverged as states pressed for litigation while USDOJ reached a settlement. Unlike *American Express*, the *Sprint/T-Mobile* case merely presented the threat of spillover effects that never manifested. Ultimately, the merger was consummated after the district court rejected the state's request for an injunction to prevent the merger.[28]

The *American Express* and *Sprint/T-Mobile* examples reveal how disagreements in antitrust federalism often occur in high profile cases, which creates the erroneous assumption that these incongruities are common. However, as demonstrated by the enforcement statistics compiled by NAAG and various law review articles, discrepancies are actually quite rare.

Moreover, it appears that these rare disagreements in antitrust federalism are overwhelmed by more effective enforcement garnered from state enforcement. Past experience shows that state enforcement is responsible for diminishing error cost. Commentators have historically credited State AGOs for *Hartford Fire*[29] in the face of federal inaction.[30] In that instance, State AGOs decided to independently investigate and later file suit against a group of insurance firms for alleged boycotts of certain types of business insurance and municipal bonds. Action undertaken by State AGOs was the direct result of federal inaction. It only took place after states made direct asks to the USDOJ to pursue the matter. The State AGOs would ultimately litigate the case through the Supreme Court, receiving favorable rulings. In this matter, State AGOs actually exhibited positive spillover effects. Today, USDOJ predicates many of its own cartel enforcement efforts upon the precedent established by *Hartford Fire*.

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21 Antitrust Modernization Commission, Report and Recommendations (2007), at https://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf.

22 Calkins, Perspectives at 678, *supra* note 6.

23 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) [hereinafter, *Amex*].

24 *New York v. Deutsche Telekom AG*, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) [hereinafter, *Sprint/T-Mobile*].

25 *Amex*, *supra* note 23.

26 *United States v. Am. Express Co.*, 838 F.3d 179, 205 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

27 *United States v. Sabre Corp.*, No. CV 19-1548-LPS, 2020 WL 1855433, at *1 (D. Del. Apr. 7, 2020).

28 *Sprint/T-Mobile*, *supra* note 24.

29 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

30 Kevin J. O'Connor, Federalist Lessons for International Antitrust Convergence, 70 Antitrust L.J. 413, 423 (2002).

In a more modern example, the Connecticut AGO, along with more than 40 states and jurisdictions independently uncovered alleged conspiracies among generic drug manufacturers.[31] The *Apple e-books* case provides yet another example. There, Texas opened the original investigation into coordinated conduct between e-book publishers and Apple. The state investigation proceeded for a period before USDOJ joined the effort.[32]

These examples only account for a small portion of State AGO's contribution. As mentioned earlier, enforcement activity pursued by State AGOs normally coincide and harmonize with federal enforcers. This tends to suggest that the instances in which antitrust enforcement between state and federal agencies diverges are rare and not representative. Instead, both state and federal officials understand the potential drawbacks from spillover effects caused by disjointed efforts, and these numbers suggest that antitrust federalism can contribute to a more robust enforcement regime.

IV. THE INTERPLAY BETWEEN STATE AND FEDERAL LAW

Commentators on antitrust focus nearly all of their attention on the influence State AGOs have on federal law but often overlook the inverse. The tight connection between state and federal antitrust law makes it possible for federal policies to bleed into state law. Similar to how federal enforcers have incentive to coordinate with state enforcers on federal antitrust cases, state enforcers are equally incentivized to work with their federal counterparts to protect against efforts that might adversely affect how their state antitrust laws are interpreted.

As a general matter, state antitrust laws are similar to their federal counterparts, and are commonly construed consistent with federal law. Approximately half of states use language mirroring Section 1 of the Sherman Act in their own state statutes.[33] In addition, state legislatures have commonly codified provisions to ensure that their state antitrust statutes are construed consistent with federal precedent. As of 2007, at least 27 states had ratified harmonization statutes and state courts have developed rules of construction to embody this statutory feature.[34]

The majority of states bind themselves to federal precedent, to at least some extent, meaning that developments in federal law cause spillover effects into state law. In some instances, states have moved to disentangle themselves from federal law by passing laws denouncing specific federal precedent. The most common examples are state statutes refuting the Supreme Court's holding in *Illinois Brick*; however, other examples are rare.

The decision by state legislatures to bind state antitrust law to federal precedent creates a similar pressure on state enforcers to engage with federal enforcers to protect against significant shifts in antitrust precedent and preserve their ability to pursue certain conduct in state court. Perhaps the most influential example of divergence between state and federal priorities on issues of state law occurred in the *Leegin* litigation.

In the Supreme Court decision in *Leegin*, the Court overruled its nearly century old precedent, making resale price maintenance subject to rule of reason analysis.[35] The USDOJ filed an amicus brief in that case supporting the Court's ultimate decision. Meanwhile, in a separate state-based claim after the *Leegin* decision, the Kansas consumers pursued the very same conduct under Kansas antitrust law as a *per se* violation.[36] In a rare departure from federal law, the Kansas Supreme Court sided with the Kansas consumers, concluding that federal precedent did not bind the court's decision.[37] Shortly after the Kansas Supreme Court's decision, the legislature moved to impose *Leegin* as binding precedent for purposes of state law.[38]

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31 Mark Pazniokas, Drug price-fixing lawsuit pushes CT probe into national spotlight, CT Post, May 13, 2019 at https://www.ctpost.com/local/article/Drug-price-fixing-lawsuit-pushes-CT-probe-into-13840601.php.

32 Hesse, Competition Across 50 United States, *supra* note 20 ("A short anecdote from that case illustrates quite concretely the benefits of federal-state cooperation. One of the best documents that provided evidence of the conspiracy to raise e-book prices – a document that wound up being featured in the opening paragraph of the Government's Trial Brief – was found during document review by a staff attorney from the Arkansas Attorney General's Office.").

33 Michael A. Lindsay, Resale Price Maintenance and the World After Leegin, Antitrust, Fall 2007, at 32.

34 *Id.* at 34.

35 *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

36 *O'Brien v. Leegin Creative Leather Prod., Inc.*, 277 P.3d 1062 (2012).

37 *Id.* at 1068.

38 Joseph G. Krauss, et al., Kansas legislature overrides state Supreme Court's attempt to depart from U.S. Supreme Court precedent, Lexology, May 1, 2013, at https://www.

The experience in Kansas is unique, but it does reflect the broader need for cooperative antitrust federalism on behalf of state enforcers to protect their sovereign enforcement tools. Most states have harmonization statutes imposing federal precedent on interpretation of state antitrust laws. However, even for states without harmonization statutes, the reaction post-*Leegin* illustrates potential limits on expanding state enforcement efforts at odds with federal policy.

The practical realities of state-based antitrust enforcement further incentivize states to work with federal enforcers. A harmonized enforcement strategy that relies upon strong relationships and soft power is the best way to mitigate (1) significant changes in federal precedent that will ultimately impact state laws; and (2) the probability that state legislatures will in some way revoke state statutory authority.

V. CONCLUSION

Enforcers should work to accomplish a cooperative antitrust federalism. When enforcers harmonize their efforts, it has the practical effect of driving down compliance costs, reduces enforcement errors, and creates a more unified enforcement policy across both levels of government.

The spillover effects discussed in this paper provide the incentive for improved coordination. The externalities imposed by state enforcement decisions on federal policy is well documented, andsome commentators use these spillover effects in their arugments for federal preemption. Instead the spillover effects actually provide the proper incentives for alignment between enforcement entities. While it is impossible for enforcers to always agree, it is important that each agency has an open dialogue to form common ground and joint initiatives to bring about a more effective and robust system.

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