

INTERACTIVE ANTITRUST FEDERALISM: ANTITRUST ENFORCEMENT IN TENNESSEE THEN AND NOW

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I. INTRODUCTION

Due to a narrower interpretation of the Interstate Commerce Clause and the national regulatory powers, early proponents of federal antitrust laws viewed the Sherman Antitrust Act (the “Sherman Act”)¹ as a supplement to, rather than a replacement for, state antitrust enforcement.² While legislative history has its weaknesses,³ especially in light of the extensive record of debate surrounding the Sherman Act,⁴ U.S. Senator John Sherman⁵ specifically noted that the Sherman Act was intended “to supplement the enforcement of the established rules” so that the federal government “may cooperate 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.”⁶ Unlike today, at the time that the Sherman Act was enacted, many members of Congress did not understand the Interstate Commerce Clause to give the national government extensive regulatory control over intrastate economic activity; this narrower view of the Commerce Clause resulted in congressmen and senators enacting federal antitrust laws, while still respecting broad areas of uniquely state-level enforcement.⁷ Regarding the applicability of these distinct laws, Senator Sherman

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¹ 15 U.S.C. §§ 1-7 (1890).

² David W. Lamb, Note, *Avoiding Impotence: Rethinking the Standards for Applying State Antitrust Laws to Interstate Commerce*, 54 VAND. L. REV. 1705, 1710-11 (2001).

³ See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 16-18 (1997).

⁴ THOMAS D. MORGAN, CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS 24-25 (4th ed. 2009).

⁵ Senator John Sherman (R-OH) was the principal author of the Sherman Antitrust Act, hence why it bears his name.

⁶ 21 CONG. REC. 2457 (1890).

⁷ See Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 378-79 (1983).

provided a simple formula for determining the appropriateness of state versus federal regulation: “If the combination is confined to a [single] state, the state should apply the remedy, [but] if it is interstate and controls any production in many states, Congress must apply the remedy.”⁸

The conflicting desires to achieve supplemental enforcement while at the same time maintaining distinct federal and state antitrust enforcement roles created difficulties for the courts in determining when economic activity rose to the level of interstate commerce.⁹ Purely intrastate economic activities, such as manufacturing (as courts then defined intrastate activity), could easily have interstate effects from the subsequent transportation and trade of goods and products across state borders, while interstate transactions, by definition, affect multiple states within the national economy and result in goods and products crossing into individual states.¹⁰ The continued nationalization of the economy and the subsequent expansion of the Supreme Court’s definition of interstate activity would provide the basis for broader federal antitrust regulation.¹¹ Eventually, the New Deal Court expanded the definition of interstate commerce to encompass purely intrastate activities that, in the aggregate, have a substantial effect on the national economy, either directly or indirectly.¹² This more expansive definition of interstate commerce led to a centralization of federal antitrust enforcement, while at the same time state enforcement in this area declined following World War I and even more so during World War II.¹³

In recent years, state antitrust enforcement has risen to some degree, and state attorneys general have begun supplementing federal enforcement, such as in the notable antitrust litigation involving Microsoft.¹⁴ Federal prohibitions against indirect purchaser antitrust actions¹⁵ have opened an area of antitrust regulation for state enforcement dominance.¹⁶ Some commentators view the heightened

⁸ 21 CONG. REC. 2457 (1890).

⁹ See *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

¹⁰ See *Hovenkamp*, *supra* note 7, at 379.

¹¹ See *e.g.*, *Swift & Co. v. United States*, 196 U.S. 375 (1905).

¹² See *e.g.*, *Wickard v. Filburn*, 317 U.S. 111 (1942).

¹³ James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust Policy*, 59 ANTITRUST L.J. 93, 98-99 (1990).

¹⁴ See Daniel R. Karon, “Your Honor, Tear Down That Illinois Brick Wall!” *The National Movement Toward Indirect Purchaser Antitrust Standing and Consumer Justice*, 30 WM. MITCHELL L. REV. 1351 (2004).

¹⁵ See *e.g.*, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁶ See *e.g.*, *California v. ARC America Corp.*, 490 U.S. 93 (1989).

state enforcement as a completely novel deviation from the traditionally “passive” state antitrust role,¹⁷ but the current trend of more active state enforcement is, in fact, a revitalization of historic state antitrust enforcement activity.¹⁸ State antitrust enforcement overlapped and occasionally exceeded federal enforcement in the years before World War I, and, in the absence of negative economic effects from over-regulation, the resurgence of state antitrust enforcement is not inherently troubling.¹⁹

In light of the recent debates surrounding the proper relationship between federal and state antitrust enforcement, this Article explores the early years of state antitrust enforcement to see how the Sherman Act impacted state antitrust enforcement. Since Tennessee was the location of the first federal case brought under the Sherman Act²⁰ and has been involved in a recent indirect purchaser action against Microsoft Corporation,²¹ this Article specifically focuses on the development of antitrust law within Tennessee. Before the Sherman Act, Tennessee antitrust enforcement was limited to the narrow confines of common law restraint of trade,²² but the implementation of the Sherman Act and the national acceptance of stronger antitrust regulation contributed to state antitrust enforcement that surpassed and supplemented the limited federal antitrust capacity in the first few decades following the enactment of the Sherman Act. For these reasons, the author contends that the development and implementation of Tennessee’s antitrust law demonstrates the usefulness of federalism in providing two avenues for consistent enforcement of antitrust law when political and legal limitations preclude one of the methods of enforcement from adequately punishing behavior that harms consumer welfare within states, while simultaneously discouraging the inefficient over-enforcement of antitrust laws.

II. THEORY OF STATE AND FEDERAL ANTITRUST INTERACTION

Despite criticism of state antitrust enforcement as overly punitive and often ineffective,²³ Congress initially allowed states to play a key role in the

¹⁷ Hovenkamp, *supra* note 7, at 384.

¹⁸ May, *supra* note 13, at 107.

¹⁹ Lamb, *supra* note 2, at 1710-18.

²⁰ *United States v. Jellico Mountain Coal & Coke Co.*, 46 F. 432 (C.C.M.D. Tenn. 1891).

²¹ *Sherwood v. Microsoft Corp.*, No. M2000-01850-COA-R9CV, 2003 WL 21780975 (Tenn. Ct. App. July 31, 2003).

²² *See, e.g., Armstrong v. McConnell*, 9 Tenn. 33 (1820) (using the common law restraint of trade in the context of a fraudulent transaction).

²³ Judge Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940-42 (2001).

enforcement of both state and federal antitrust laws, including the Sherman Act and subsequent federal antitrust legislation.²⁴ This type of dual enforcement regime is not unique to antitrust laws and enables respect for the dual sovereignty of the states and the federal government.²⁵ Dual antitrust enforcement results in more consistent application of antitrust penalties when either the state or federal government is unable to effectively enforce antitrust laws on its own.²⁶ Jurisdictional, financial, and political restrictions act as checks on inefficient over-enforcement of state and federal antitrust laws and placate the concerns of critics of state antitrust enforcement.²⁷

On one hand, some critics of state antitrust enforcement focus on the interstate character and impact of state antitrust litigation.²⁸ Due to the nationalization and increased interconnectivity of the country's economy, a broader reading of the Interstate Commerce Clause and other federal antitrust laws, that at one time simply precluded state enforcement of activities with interstate effects, would, today, effectively render state antitrust laws useless.²⁹ However, the U.S. Supreme Court has consistently held that federal antitrust laws do not preclude or preempt application of similar or more far-reaching state antitrust statutes.³⁰ As long as the state law or policy in question reflects a legitimate state public interest and is not excessively discriminatory or protectionist, state antitrust enforcement does not run afoul of the Dormant Commerce Clause.³¹ State antitrust enforcement thus overcomes one potential barrier for situations in which the regulated activity has interstate effects.

In addition to proponents of broader and possibly exclusive federal antitrust regulation of intrastate economic activities with interstate effects, criticism of state enforcement of antitrust laws also comes from an unexpected

²⁴ See 21 CONG. REC. 2457 (1890).

²⁵ See *infra* notes 45-48 and accompanying text.

²⁶ See *infra* notes 51-60 and accompanying text.

²⁷ See *infra* notes 61-81 and accompanying text.

²⁸ See Lamb, *supra* note 2, at 1722-23.

²⁹ The Supreme Court has previously held that the production of wheat on a private farm solely for on-site consumption may, nonetheless, qualify as "interstate commerce;" accordingly, today, few positive economic activities qualify as purely intrastate under current doctrine. See *Wickard*, 317 U.S. 111.

³⁰ See *California v. ARC America Corp.*, 490 U.S. 93, 109 (1989); *U.S. v. Underwriters Assn.*, 322 U.S. 533 (1944); *Watson v. Buck*, 313 U.S. 387 (1941).

³¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); Lamb, *supra* note 2, at 1722-23; see also *Parker v. Brown*, 317 U.S. 341, 342, 362 (1943) (upholding the validity of a California state program that did not violate the Commerce Clause despite its anticompetitive effect).

corner of legal scholarship.³² Debates over the proper balance of state and federal enforcement of antitrust laws present the seemingly paradoxical scenario of conservative and libertarian legal scholars and jurists, who would typically press for a more limited federal regulatory role,³³ acting as the primary advocates of federal supremacy in the realm of antitrust enforcement.³⁴ The chief explanation for this alignment of viewpoints is the competition between interests in efficient economic policy and the conflicting desire to enhance the role of states in the structure of federalism.³⁵ Supporters of free market policies are concerned that the dual enforcement of federal and state antitrust regimes will lead to overcompensation, rent seeking, and free riding as state attorneys general capitalize on federal antitrust litigation with further state action.³⁶

Judge Richard Posner, who presides over the United States Court of Appeals for the Seventh Circuit, adopts several of these arguments and claims that state enforcement action is unnecessary in light of private actors providing a sufficient alternative that prevents the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) from monopolizing antitrust enforcement.³⁷ Furthermore, Judge Posner harshly criticizes the advocacy abilities of state attorneys general: “Since becoming a judge almost twenty years ago, I have been struck by the poor quality of the briefs and arguments of most, though not all, of the lawyers in the offices of the state attorneys general of my circuit.”³⁸ State attorneys general may suffer from a lack of specialization in antitrust law, but, if the advocacy abilities of state attorneys general and their staff are truly so inadequate, then Judge Posner would have less to fear from overzealous state enforcement actions, unless state judges are unable to follow the guidance of

³² See *infra* notes 36-43 and accompanying text.

³³ *In Memoriam: Robert H. Bork*, THE FEDERALIST SOCIETY, <https://www.fed-soc.org/publications/page/in-memoriam-robert-h-bork> (last visited Oct. 1, 2014) (noting the contributions of Judge Bork to the Federalist Society upon his passing); *Hon. Richard Posner*, THE FEDERALIST SOCIETY, <https://www.fed-soc.org/publications/author/richard-posner> (last visited Oct. 1, 2014) (indicating the connection between Judge Posner and the Federalist Society).

³⁴ See *infra* notes 36-43 and accompanying text.

³⁵ See Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL’Y 877, 878-81 (2003).

³⁶ *Id.* at 880; Hovenkamp, *supra* note 7, at 431-32. For an example of liberal justices arguing that stronger roles for state governments might lead to enhanced protection of individual rights, see generally Justice William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

³⁷ Judge Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL’Y 5, 8 (2004).

³⁸ Posner, *supra* note 23, at 940-42.

federal law and state precedent. However, if state attorneys general are unable to effectively enforce antitrust laws, then the possibility remains that state enforcement will expend inefficiently the limited resources of state attorneys general and the courts. For conservative and libertarian scholars, limiting state enforcement actions and focusing federal litigation on punishing only behavior contrary to consumer welfare would remedy the abuses of the federal antitrust laws of the *per se* era.³⁹

Original intent and original understanding of statutes and constitutional texts are significant considerations for conservative and libertarian legal scholars,⁴⁰ and the legislative history of the Sherman Act provides some support for a consumer welfare approach to federal antitrust law. Senator Sherman's original bill, for example, defined illegal combinations and business practices as those that would either "prevent full and free competition" or "advance the cost to the consumer."⁴¹ Enhancing competition and consumer welfare, however, were not the sole concerns of the entire Congress, and other legislators expressed concern for protecting small businessmen, weak industries, and natural monopolies.⁴² Consistent with the complementary view of state antitrust law, but odd in comparison to the current balance in enforcement, the states remained the primary antitrust enforcers in the first couple of decades following the enactment of the Sherman Act; "Between 1890 and 1902, twelve states brought a total of twenty-eight antitrust actions, while in the same period the DOJ instituted a total of nineteen antitrust suits."⁴³ At least in those early years of antitrust law, states did not act as inefficient free riders on federal enforcement, but rather worked in tandem with private actors to effectively enforce the new federal and state antitrust regulations.⁴⁴

This dual enforcement and complementary system of state antitrust laws are not unique to antitrust laws and respect the dual sovereignty of the states and federal government. In many criminal and civil prosecutions, the dual sovereignty of a state and the federal government often overlap so that separate causes of

³⁹ See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 66 (1978) (arguing that Congress viewed the Sherman Act as a "consumer welfare prescription").

⁴⁰ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

⁴¹ 21 *CONG. REC.* 2457 (1890).

⁴² THOMAS D. MORGAN, *CASES AND MATERIALS ON MODERN ANTITRUST LAW AND ITS ORIGINS* 27 (4th ed. 2009); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 67 (1982).

⁴³ Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 *GEO. MASON L. REV.* 37, 43 (2002).

⁴⁴ *Id.*

action exist for the same act or transaction, although prosecutors may exercise their discretion in order to avoid unnecessary litigation and over-penalization.⁴⁵ The DOJ has formalized this practice as the Dual and Successive Prosecution Policy, colloquially known as the *Petite* policy.⁴⁶ The DOJ generally presumes that the state prosecution, regardless of the outcome, vindicates the federal interest unless several factors – such as incompetence, jury nullification, unavailability of significant evidence, different state elements for the crime, and exclusion of charges in prior federal prosecutions in consideration of other defendants – indicate otherwise.⁴⁷ Applying this policy to the antitrust context, the DOJ and FTC retain the option to prosecute antitrust offenders if state attorneys general and private actors fail to litigate the issue adequately, though initial deference for state prosecutors mimics DOJ practice in other areas.⁴⁸

Federal additions to antitrust law have emphasized the role of the states in acting as *parens patriae* to ensure adequate protection of a state's citizens. Initially, the Supreme Court viewed state *parens patriae* actions as outside the scope of the Sherman Act and the Clayton Act.⁴⁹ However, the Hart-Scott-Rodino Antitrust Improvements Act specifically altered the federal antitrust statutes to allow state attorneys general to bring *parens patriae* actions under federal law “on behalf of natural persons residing in such State” and limiting monetary relief that “duplicates amounts which have been awarded for the same injury.”⁵⁰ While Judge Posner criticizes this attempt to create a competitive market in the enforcement of federal antitrust law,⁵¹ the restrictions on the ability of states to sue in their *parens patriae* capacity and limitations on potential damages reduce the concern that state enforcement of federal antitrust law will lead to excessive compensation for antitrust violations.⁵² Allowing the states to supplement federal law with additional antitrust statutes recognizes the variation of competition law preferences among jurisdictional units, while the Dormant Commerce Clause and

⁴⁵ See *Rinaldi v. United States*, 434 U.S. 22 (1977); *Petite v. United States*, 361 U.S. 529 (1960).

⁴⁶ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-2.031 (1997), available at <http://www.usdoj.gov>. (Discussing “Dual and Successive Prosecution Policy,” *i.e.*, the “Petite Policy”).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ See *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251 (1972).

⁵⁰ 15 U.S.C. § 15c (1914).

⁵¹ Posner, *supra* note 37, at 8-12.

⁵² See Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. Rev. 698, 763 (2011).

the possibility of private actions at either the federal or state level might restrict unduly prejudicial state antitrust actions.⁵³

State antitrust laws and enforcement also encourage greater consistency in antitrust enforcement over time by weakening barriers to enforcement from financial, jurisdictional, and political restrictions. First, dual enforcement of antitrust regulations allows access to the resources of both the federal government and state governments. Government agency budgets certainly are not immune to reductions and limitations in times of fiscal difficulty.⁵⁴ The DOJ's Antitrust Division announced in 2012 that it planned to close four field offices following the 2013 budget process in an effort to reduce costs.⁵⁵ According to Judge Dan Polster, who presides over the United States District Court for the Northern District of Ohio and started his career in the Cleveland field office of the Antitrust Division, closing the field offices will reduce the DOJ's ability to prosecute regional antitrust cases and resolve local price fixing disputes.⁵⁶ These cases "really have a direct impact on [the] local economy and people's pocket books," but the DOJ Antitrust Division has turned its focus toward larger domestic and international cases.⁵⁷ Encouraging state enforcement of state and federal antitrust statutes may alleviate concerns about a lack of regional enforcement. State attorneys general can pool their resources for enforcement and even appear together as *amici curiae* to better inform courts as to the interests of state consumers.⁵⁸ One widespread fear was that states might pool their resources in order to pursue protectionist litigation in their mutual favor, and to the disadvantage of a few states.⁵⁹ In response to this criticism, Congress dramatically limited the availability of multistate actions "by requiring that any state enforcement action take place 'in any district court of the United States in that State or in a State court that is located in that state and that has jurisdiction

⁵³ *Id.* at 717-21 (explaining the variation in state competition law preferences and checks on states' preferences).

⁵⁴ Jeffrey Benzing, *Antitrust Division Weathers Budget Constraints with Strong Enforcement, Baer Says*, MAIN JUSTICE (Mar. 28, 2014, 5:12 PM), <http://www.mainjustice.com/2014/03/28/antitrust-division-weighs-budget-constraints-with-strong-enforcement-baer-says/> (noting the budget limitations, hiring freezes, pay freezes, travel restrictions, and the sixteen-day shutdown of the DOJ during recent federal budget crises).

⁵⁵ Matthew Volkov, *Career Antitrust Division Attorneys Boggled by Field Office Closure*, MAIN JUSTICE (June 18, 2012, 2:19 PM), <http://www.mainjustice.com/2012/06/18/career-antitrust-division-attorneys-boggled-by-field-office-closures/>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Michael F. Brockmeyer, *State Antitrust Enforcement*, 57 ANTITRUST L.J. 169 (1988).

⁵⁹ Lemos, *supra* note 52, at 763.

over the defendant.”⁶⁰ Thus, state antitrust enforcement and limited regional pooling enable greater consistency in antitrust enforcement even in the presence of shifting federal priorities.

Despite concerns that additional state resources for antitrust enforcement will lead to excessive antitrust enforcement in times of sufficient federal funding, state budgets and attorneys general are responsive to the ebb and flow of federal antitrust enforcement funding.⁶¹ During the recent recession, the DOJ reacted to resource restrictions by encouraging federal and state cooperation and providing some resources as an incentive for greater state antitrust enforcement funding and action.⁶² State resources for antitrust enforcement are supplemental and do not eclipse the amount of money spent on federal enforcement.⁶³ For example, earlier in the 2000s, states’ attorneys general used smaller proportions of their budgets for antitrust enforcement than the DOJ, even excluding the substantial portion of the FTC’s budget spent on antitrust actions.⁶⁴ A federalist approach to antitrust enforcement would present concerns if states poured copious resources into imposing excessive penalties on out-of-state corporations.⁶⁵ However, state attorneys general must efficiently utilize their limited resources by focusing on the cases most important for state consumers. In the single-state antitrust enforcement context, a majority of state actions include at least one in-state defendant; and single-state enforcement actions are 24.5% more likely than multistate enforcement actions to only include defendants within the relevant

⁶⁰ *Id.* (quoting 12 U.S.C. § 5552).

⁶¹ Benzing, *supra* note 54 (emphasizing that state antitrust enforcement “tapered off[] in part because federal antitrust enforcement has increased” and describing the more extensive resources of the federal government for antitrust enforcement).

⁶² Christine A. Varney, Remarks as prepared for the National Association of Attorneys General Columbia Law School State Attorneys General Program (Oct. 7, 2009) (transcript available at <http://www.justice.gov/atr/public/speeches/250635.htm>) (“[T]he Department of Justice has reinstated the Executive Working Group, which brings together representatives of state attorney general offices, local district attorney offices and Department of Justice officials to collaborate and coordinate their efforts on issues of joint concern.”); U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION ANNOUNCES INITIATIVE TO HELP PROTECT RECOVERY FUNDS FROM FRAUD, WASTE AND ABUSE (2009), <http://www.justice.gov/opa/pr/2009/May/09-at-460.html> (announcing the DOJ Antitrust Division’s Recovery Initiative to train thousands of state and federal government officials especially to reduce fraud in stimulus distributions).

⁶³ Hahn & Layne-Farrar, *supra* note 35, at 888.

⁶⁴ In 2002, California, the state with the largest antitrust budget, spent only 0.9% (\$5.6 million) of its attorney general’s budget on antitrust enforcement, while by comparison the DOJ allocated 5.3% (\$130.8 million) of its budget for antitrust enforcement. *Id.* at 889. The FTC allocated an additional \$73.0 million (46.8% of its total budget) for antitrust activities. *Id.*

⁶⁵ Posner, *supra* note 37, at 7.

states.⁶⁶ State antitrust enforcement and statutes thus enable more consistent antitrust enforcement, especially for local and regional cases.

This federalist approach to antitrust enforcement also provides greater consistency in light of jurisdictional limitations on the powers of the federal and state governments. Although the narrower construction of the Interstate Commerce Clause limited federal antitrust enforcement in the years immediately following passage of the Sherman Act,⁶⁷ restrictions on state jurisdictional authority formerly placed strong limitations on the corporations affected by state antitrust laws and proceedings.⁶⁸ At the time of the Sherman Act's passage, the case governing the limits of state jurisdiction was *Pennoyer v. Neff*, which took a territorial approach to jurisdiction.⁶⁹ Courts in those early years took a broader view of what constituted intrastate activity but also, at least nominally, prevented states from exerting jurisdiction over entities and conduct outside of the state's jurisdiction.⁷⁰ Eventually, the emphasis on physical presence began unraveling once state courts could exercise personal jurisdiction over parties with minimum contacts within the state.⁷¹ As long as a corporation purposefully avails itself of the resources of a state or intentionally conducts business in a state, that state's courts will be able to assert personal jurisdiction over the corporation with respect to that matter.⁷² These relaxed limitations on the ability of states to enforce their own antitrust laws on out-of-state corporations clarify the states' ability to step in and punish corporations that harm their consumers' interests. At the same time, continued restrictions on the general jurisdiction of courts⁷³ prevent states from over-zealously applying their antitrust laws to corporations when the allegedly anti-competitive actions of the corporation do not involve any dealings with individuals or entities within those states.

Finally, dual enforcement and use of both federal and state antitrust laws enables balanced and consistent application of antitrust regulations in the presence of political pressures. The typical view of various potential antitrust

⁶⁶ *Id.* at 14.

⁶⁷ *See* *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

⁶⁸ Hovenkamp, *supra* note 7, at 375-76.

⁶⁹ *Pennoyer v. Neff*, 95 U.S. 714 (1877); *see also* Hovenkamp, *supra* note 7, at 379-82.

⁷⁰ Hovenkamp, *supra* note 7, at 380-82.

⁷¹ *See* *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

⁷² *See* *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 112 (1987); *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985).

⁷³ *See* *Helicopteros Nacionales de Colombia, S. A. v. Hall*, 466 U.S. 408, 418 (1984) (holding that "continuous and systematic" contacts are necessary for a court to exercise general jurisdiction).

enforcers is that “states are especially vulnerable to special interest pressures.”⁷⁴ However, federal antitrust enforcers are not themselves particularly immune to special interest pressures. In the 1960s, members of Congress with budgetary and oversight power over the FTC unduly influenced the FTC’s enforcement activity, likely in response to lobbyists and self-interested constituents.⁷⁵ During the pro-business Reagan administration, federal antitrust enforcement “declined dramatically.”⁷⁶ Federal enforcement agencies had reviewed 10.8% of reported mergers during the Carter administration, but those agencies only reviewed 4.4% of reported mergers during the Reagan administration, while federal enforcement actions declined from 2.5% of all mergers to 0.7% of all mergers.⁷⁷ The relaxed federal enforcement might have been the more consumer-friendly policy, but states stepped in to ensure some minimal additional enforcement to protect the interests of state consumers.⁷⁸ In 1983, state attorneys general founded the Antitrust Task Force of the National Association of Attorneys General to coordinate state enforcement actions.⁷⁹ State *parens patriae* actions peaked in the 1980s and declined in the early 1990s.⁸⁰ Even then, states only brought eighteen *parens patriae* actions from 1985 to 1989, the highest amount per five-year span since the passage of the Hart-Scott-Rodino Act.⁸¹ The paucity of state *parens patriae* actions hardly creates concerns of state over-enforcement and instead demonstrates responsiveness to federal enforcement decisions.

III. STATE AND FEDERAL ANTITRUST INTERACTION IN THE MICROSOFT CASES

The antitrust litigation surrounding Microsoft is one prominent example of the various interactions between state and federal antitrust enforcers in recent years. Antitrust enforcers accused Microsoft of abusing its operating system market power to maintain its monopoly in that area while also tying the operating system (Windows) with its Internet browser (Internet Explorer).⁸² According to

⁷⁴ Hahn & Layne-Farrar, *supra* note 35, at 890.

⁷⁵ Roger L. Faith, Donald R. Leavens & Robert D. Tollison, *Antitrust Pork Barrel*, 25 J.L. & ECON. 329 (1982).

⁷⁶ Lamb, *supra* note 2, at 1713.

⁷⁷ *Id.*

⁷⁸ *Id.* at 1715-16.

⁷⁹ *Id.*

⁸⁰ Posner, *supra* note 37, at 14.

⁸¹ *Id.*

⁸² *United States v. Microsoft Corp.*, 253 F.3d 34, 47 (D.C. Cir. 2001).

the DOJ, bundling these two products together undermined the market power of Netscape Navigator, Internet Explorer's predecessor as the dominant Internet browser.⁸³ Computer and Internet systems are a market seemingly ripe for monopolization due to the significant network externalities of interoperable systems.⁸⁴ Economies of scale in consumption increase the gains for individual consumers as more consumers utilize interoperable computer systems.⁸⁵ Standardization, such as when one firm gains a monopoly over the various aspects of the network, might actually benefit consumers while simultaneously reducing inefficiency from multiple firms utilizing excessive resources to overcome initial fixed costs in developing the intellectual property.⁸⁶ On the other hand, the network monopolist might gain "a cost advantage that exceeds the benefit of a superior new technology" and thus inefficiently preclude competition and innovation.⁸⁷ In the years since the antitrust litigation, Microsoft has maintained its operating system monopoly with 90.8% of the operating system market using some form of Windows product in April 2014, although Apple has made some inroads with its Mac operating systems.⁸⁸ The Internet browser market has been more susceptible to change, possibly due to lower fixed costs, as Google Chrome had 58.4% of browser usage in April 2014, followed by Firefox at 25.0%, and Internet Explorer at 9.4%.⁸⁹

Despite the current competition in the Internet browser market, federal courts took a skeptical view of Microsoft's actions. Judge Thomas Penfield Jackson, who presided over the U.S. District Court for the District of Columbia, heard the initial federal case and held that Microsoft had violated the Sherman Act through its attempts to unfairly monopolize and tying arrangements.⁹⁰ As for remedies, Judge Jackson took the drastic step of ordering divestiture to separate the operating system and application business of Microsoft.⁹¹ Judge Jackson made several out-of-court statements to reporters, such as stating that Microsoft

⁸³ *Id.*

⁸⁴ Posner, *supra* note 23, at 928-29.

⁸⁵ *Id.* at 926, 928.

⁸⁶ *Id.* at 926-29.

⁸⁷ *Id.* at 930.

⁸⁸ NETMARKETSHARE, *Desktop Operating System Market Share* (Apr. 2014), <http://www.netmarketshare.com/operating-system-market-share.aspx?qprid=10&qpcustomd=0>.

⁸⁹ W3SCHOOLS, *Browser Statistics* (Apr. 2014), http://www.w3schools.com/browsers/browsers_stats.asp.

⁹⁰ *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 63 (D.D.C. 2000).

⁹¹ *Id.* at 64.

co-founder Bill Gates had “a Napoleonic concept of himself,”⁹² that eventually led the D.C. Circuit Court of Appeals to remove him from the remanded case due to the appearance of bias against Microsoft.⁹³ While the Court of Appeals also held that Microsoft had violated monopolization provisions of the Sherman Act, it held that the rule of reason applies to tying arrangements, vacated the divestiture remedy, and remanded the case to a different D.C. District Court judge, Judge Colleen Kollar-Kotelly.⁹⁴

Following the decision of the D.C. Circuit Court of Appeals, settlement discussions between Microsoft and antitrust enforcers resumed in earnest.⁹⁵ Eventually, Microsoft entered into a settlement agreement with the DOJ and nine states that had participated in the antitrust litigation.⁹⁶ However, the District of Columbia and an additional nine states, led by California, rejected the settlement to continue their own litigation against Microsoft.⁹⁷ D.C. District Court Judge Kollar-Kotelly denied Microsoft’s motion to dismiss the non-settling jurisdictions’ actions against Microsoft despite policy concerns about over-enforcement.⁹⁸ Several of Microsoft’s competitors in California’s Silicon Valley lobbied the California state government to provide additional money for antitrust enforcement against Microsoft, which is headquartered in Redmond, Washington.⁹⁹ Although this state-level lobbying might raise concerns about protectionist actions, lobbying for heightened antitrust enforcement is not unique to the state level.¹⁰⁰ For example, Sun Microsystems Inc. spent \$3 million in 1998 lobbying the DOJ to bring an antitrust case against Microsoft.¹⁰¹ Even in the presence of this lobbying by competitors, Microsoft spends millions itself lobbying government officials,¹⁰² and competitors still have the option of bringing

⁹² Douglas Martin, *Thomas Penfield Jackson, Outspoken Judge, Dies at 76*, N.Y. TIMES (June 15, 2013), <http://www.nytimes.com/2013/06/16/us/thomas-penfield-jackson-outspoken-judge-dies-at-76.html>.

⁹³ *United States v. Microsoft Corp.*, 253 F.3d 34, 115-16 (D.C. Cir. 2001).

⁹⁴ *Id.* at 46-47.

⁹⁵ Hahn & Layne-Farrar, *supra* note 35, at 881.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 892-94.

¹⁰¹ *Id.*

¹⁰² OPENSECRETS, *Microsoft Corp. Client Profile: Summary*, 2014, <https://www.opensecrets.org/lobby/clientsum.php?id=D000000115> (last visited May 27, 2014)

private actions for treble damages if antitrust enforcers decide not to intervene. Just as several supporters of the Sherman Act emphasized the benefits of antitrust regulation were not just for consumers but for smaller businesses as well,¹⁰³ antitrust enforcement by California might be especially appropriate if many of the businesses facing the harshest repercussions of Microsoft's actions reside there and are not spread evenly throughout the country. Several states that are not home to several major technology companies – such as Iowa, Kansas, and Minnesota¹⁰⁴ – participated in the settlement, which indicates that local corporations were not the primary intended beneficiaries, even if some states were still rent seeking.¹⁰⁵

The Microsoft cases provide an example of antitrust federalism at work with the use of state indirect purchaser actions. The U.S. Supreme Court has held that the Sherman Act and Clayton Act do not give standing to indirect purchasers, i.e., those who do not directly buy the product from the allegedly anti-competitive manufacturer, since “the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party ‘injured in his business or property.’”¹⁰⁶ The Court's decision in *Illinois Brick* demonstrates the federal courts' concern about overcompensation and “multiple liability” from the use of offensive pass-on theories that also result in uncertainty, complexity, and inefficiency in the determination of antitrust damages.¹⁰⁷ While federal courts are unwilling to permit indirect purchaser actions under federal law, they also allow for flexibility and innovation at the state level and avoid pre-empting state antitrust laws with broader enforcement capabilities.¹⁰⁸ The U.S. Supreme Court addressed the issue of pre-emption of state indirect purchaser action in *California v. ARC America Corp.* and held that states antitrust law can permissibly allow indirect purchaser actions.¹⁰⁹ Such an arrangement prevents over-enforcement on the federal end while allowing states to determine an acceptable degree of

(indicating that Microsoft spent about \$4 million in lobbying expenses in 1998 and over \$10 million in 2013).

¹⁰³ See MORGAN, *supra* note 42, at 27; Lande, *supra* note 42.

¹⁰⁴ Hahn & Layne-Farrar, *supra* note 35, at 881.

¹⁰⁵ Instead, local consumers might be the intended beneficiaries, but local consumers would have a harder time organizing given the relative obscurity of antitrust litigation to the average consumer. State politicians and antitrust enforcers, representing an organized front for local consumers, might also have fiscal and political incentives to pursue excessive antitrust litigation.

¹⁰⁶ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 729 (1977).

¹⁰⁷ *Id.* at 730-735.

¹⁰⁸ See Lamb, *supra* note 2, at 1719-21.

¹⁰⁹ *California v. ARC America Corp.*, 490 U.S. 93, 105-06 (1989).

antitrust enforcement via indirect purchaser actions. Although states might decide to over-enforce with inefficiently extensive indirect purchaser actions, this flexibility recognizes the supplemental nature of state antitrust law by refusing to allow federal practices to preclude entirely the role of state governments in determining proper levels of antitrust enforcement.¹¹⁰ Additionally, the Supreme Court notes the benign policy implications of having two separate and more efficient fora for resolving damages issues: the federal system for direct purchases and state courts for indirect purchasers.¹¹¹

In contrast to federal antitrust law, thirty-three states (including Tennessee) and the District of Columbia allow indirect purchaser actions.¹¹² Tennessee's indirect purchaser Microsoft litigation¹¹³ demonstrates the development of an independent state system of antitrust enforcement that provides a broader basis for consumer protection.¹¹⁴ Although the Tennessee Court of Appeals noted the Supreme Court's decision in *Illinois Brick* not to recognize indirect purchaser actions under federal antitrust law, the Court of Appeals emphasized the substantial policy flexibility of state legislatures following *ARC America Corp.*¹¹⁵ While the Tennessee legislature had not passed an *Illinois Brick* repealer amendment specifically allowing indirect purchaser actions (despite three legislative attempts and similar action in other states),¹¹⁶ the Tennessee Court of Appeals explained that the lack of affirmative legislative action since *Illinois Brick* did not change the original purposes of Tennessee's antitrust law: "While the purpose of the federal antitrust statutes is to protect competition and commerce, the state act's purposes are to protect both commerce and the consuming public."¹¹⁷ Due to state precedent¹¹⁸ and the state legislature's concern

¹¹⁰ *Id.* at 101-02 ("Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies.").

¹¹¹ *Id.* at 103-04.

¹¹² Karon, *supra* note 14, at 1362-63.

¹¹³ *Sherwood v. Microsoft Corp.*, 91 F. Supp. 2d 1196 (M.D. Tenn. 2000) (remanding the state class action to state court for lack of federal subject matter jurisdiction due to failure to satisfy amount in controversy requirement); *Sherwood v. Microsoft Corp.*, M2000-01850-COA-R9CV, 2003 WL 21780975, at *34 (Tenn. Ct. App. July 31, 2003) (holding that indirect purchasers have standing to bring actions for damages under the Tennessee Trade Practices Act).

¹¹⁴ *See* Karon, *supra* note 14, at 1372-74 (describing the Tennessee Microsoft litigation).

¹¹⁵ *Sherwood v. Microsoft Corp.*, M2000-01850-COA-R9CV, 2003 WL 21780975, at *24 (Tenn. Ct. App. July 31, 2003).

¹¹⁶ *Id.* at *25-26.

¹¹⁷ *Id.* at *29-30.

for Tennessee consumers, the Court of Appeals held that the ultimate consumers, even though they may have purchased the products and suffered harm indirectly, may sue to recover damages under Tennessee antitrust law.¹¹⁹

State courts are not unmindful of the potential hazards of supplemental state antitrust law,¹²⁰ but the Microsoft cases demonstrate how the negatives of a federalist system of enforcement are not overwhelming in light of potential benefits from enforcement levels satisfactory to the tastes of different states. Some states may want stronger antitrust enforcement and consideration of consumer interests than federal antitrust laws allow; the flexibility of a federalist structure allows for experimentation beyond the federal enforcement floor.¹²¹ The idea of indirect purchaser suits, while involving serious criticisms of its feasibility and advisability, is not an irrational one for state governments to adopt to protect state consumers who might be more removed from the anti-competitive company, and state indirect purchaser actions have led to groups such as the Antitrust Modernization Commission to recommend federal statutory changes to specifically overrule *Illinois Brick* and allow federal indirect purchaser actions.¹²² In modern times, state antitrust law and enforcement are established methods for supplemental regulation that interact with federal antitrust activities even when the regulated activities involve and impact interstate commerce to some degree.¹²³

IV. FEDERAL INTERACTION WITH EARLY TENNESSEE ANTITRUST LAW

The federalist structure of antitrust law was by no means certain, but federal and state enforcers interacted significantly in the early decades of antitrust regulation to produce this outcome.¹²⁴ The development of Tennessee's antitrust laws demonstrates these important federal and state interactions, and cases such as *Sherwood v. Microsoft Corp.* explicitly acknowledge the influence of the early

¹¹⁸ See *Blake v. Abbott Laboratories, Inc.*, No. 03A01-9509-CV-00307, 1996 WL 134947, at *3-4 (Tenn. Ct. App. Mar. 27, 1996) (holding that indirect purchasers had standing to sue for damage under Tennessee Trade Practices Act).

¹¹⁹ *Sherwood*, 2003 WL 21780975, at *29.

¹²⁰ *Id.* at *30 (describing commonly-cited negatives of indirect purchaser suits).

¹²¹ See Karon, *supra* note 14, at 1372-74.

¹²² *Report and Recommendation*, ANTITRUST MODERNIZATION COMMISSION, 18 http://govinfo.library.unt.edu/amc/report_recommendation/introduction.pdf (last visited May 27, 2014).

¹²³ *Sherwood*, 2003 WL 21780975, at *8-9.

¹²⁴ May, *supra* note 13, at 93.

decades in defining the reach of current state antitrust law.¹²⁵ Tennessee's Constitution has always provided that "monopolies are contrary to the [g]enius of a free [s]tate and shall not be allowed,"¹²⁶ but this constitutional provision had been limited to "municipal ordinances or legislative public or private acts."¹²⁷ As mentioned previously,¹²⁸ the common law on restraint of trade was primarily limited to unfair or deceptive transactions and overbroad non-compete clauses and eventually led to the Tennessee Consumer Protection Act.¹²⁹ However, the Tennessee Consumer Protection Act and the related common law before it did not directly address many scenarios regarded as the core of antitrust enforcement.¹³⁰ Not until the time of the Sherman Act did Tennessee significantly begin to develop its antitrust law, culminating in the original Tennessee Trade Practices Act of 1903.¹³¹

Tennessee's political climate in the years surrounding passage of the Sherman Act would seem to indicate a sympathetic environment for vigorous antitrust enforcement. In 1889 the Tennessee legislature passed its first antitrust statute,¹³² and the public began to express its displeasure with trusts and monopolies. For example, *The Columbia Herald*, the newspaper for the small town of Columbia in the rural region south of Nashville, expressed disapproval of the sugar trust's national political power in its April 3, 1891 edition: "The sugar trust is doing a bit of juggling with the tariff law, which is not creditable to the law or the men composing the trust, but it is no more than what was predicted by long-headed democrats when the suga [sic] bounty was added to the tariff bill."¹³³ A second antitrust act made its way through the Tennessee legislature in 1891 and

¹²⁵ *Sherwood*, 2003 WL 21780975, at *9 (describing *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S.W. 705 (1907), as the "seminal case" for determining "the reach of Tennessee's antitrust statute").

¹²⁶ TENN. CONST. art. XI, § 23 (1796); TENN. CONST. art. I, § 22 (current).

¹²⁷ Ann Watson, Note, *Tennessee Antitrust Law: Precedent and Proposed Legislation*, 9 MEM. ST. U. L. REV. 281, 284 (1979).

¹²⁸ See *supra* p. 3.

¹²⁹ TENN. CODE ANN. § 47-18-104(a) (prohibiting "unfair or deceptive acts or practices affecting the conduct of any trade or commerce"); see *Sherwood*, WL 21780975, at *31-33.

¹³⁰ *Sherwood*, 2003 WL 21780975, at *31-35 (discussing the differences between the Tennessee Consumer Protection Act and state antitrust law and dismissing the Tennessee Consumer Protection Act suit against Microsoft).

¹³¹ 1903 Tenn. Pub. Acts 268.

¹³² 1889 Tenn. Pub. Acts 475-76.

¹³³ P.D. Lander, COLUMBIA HERALD, Apr. 3, 1891, <http://chroniclingamerica.loc.gov/lccn/sn96091104/1891-04-03/ed-1/seq-2/>.

was signed into law by Governor Buchanan, who also was the leader of the populist Farmers Alliance wing of the state Democratic Party.¹³⁴

Although the state electorate's distrust of trusts might indicate a fertile soil for antitrust enforcement, disconnect between the people and the political insiders prevented the state antitrust measures from having any regulatory teeth.¹³⁵ The same edition of *The Columbia Herald* demonstrates populist anger toward the powerful railroad interests whose "hideous lobby" had "invaded and bribed and disgraced the forty-seventh assembly."¹³⁶ Although the Farmers Alliance nominally controlled that legislative assembly from 1891 to 1892, real political power remained with the long-term insiders of the state Democratic Party.¹³⁷ Politically experienced Democrats, especially from Nashville and other major cities, gained a disproportionate number of key committee positions and patronage appointments.¹³⁸ The state courts, stocked with old-school Democrats with industrial connections, similarly resisted the populist trend. For example, Peter Turney, whose father was a former U.S. senator from Tennessee, was the chief justice of the Tennessee Supreme Court at the time and would later unseat Governor Buchanan of the Farmers Alliance.¹³⁹ Due to an idiosyncrasy in the structure of Tennessee's government, the Tennessee Supreme Court appoints Tennessee's Attorney General.¹⁴⁰ The Tennessee Attorney General thus refused to utilize the state antitrust laws of 1889 and 1891.¹⁴¹

Political instability in the state further weakened the ability of populist politicians to enforce state antitrust laws. The Coal Creek War arguably was the most notable issue during the governorship of Allianceman John Buchanan.¹⁴² The Coal Creek War was a series of riots and disputes between convicts forced to work in the mines and the eastern Tennessee miners whom the convicts

¹³⁴ 1891 Tenn. Pub. Acts 428-30; ROGER L. HART, REDEEMERS, BOURBONS & POPULISTS: TENNESSEE, 1870-1896, at 165 n.165 (1975); PHILLIP R. LANGSDON, TENNESSEE: A POLITICAL HISTORY 220 (2000).

¹³⁵ KARIN A. SHAPIRO, A NEW SOUTH REBELLION: THE BATTLE AGAINST CONVICT LABOR IN THE TENNESSEE COALFIELDS, 1871-1896 130-31 (1998).

¹³⁶ Lander, *supra* note 133; see LANGSDON, *supra* note 134, at 221.

¹³⁷ HART, *supra* note 134, at 133.

¹³⁸ *Id.* at 133, 156.

¹³⁹ LANGSDON, *supra* note 134, at 222.

¹⁴⁰ TENN. CONST.. art. VI, § 5.

¹⁴¹ HART, *supra* note 134, at 165 n.22 (noting that the 1891 bill "could hardly have been seen by corporations as a threat"); Watson, *supra* note 127, at 291 n.61 (indicating that no litigation under the 1889 act reached state appellate courts).

¹⁴² LANGSDON, *supra* note 134, at 221.

replaced.¹⁴³ The Tennessee Coal and Iron Company, which would later become a subsidiary of the United States Steel Corporation,¹⁴⁴ had benefited from its connections with state Democrats and utilized its access to unpaid convict labor.¹⁴⁵ Governor Buchanan and Farmers Alliance legislators slowly became enmeshed in this system of convict labor, and Governor Buchanan's superintendent of prisons encouraged Governor Buchanan to utilize the state National Guard to suppress the revolt of the disillusioned miners who had expected more from a populist governor.¹⁴⁶ In the state courts, Chief Justice Turney led the industry-friendly faction and "consistently ruled against the miners."¹⁴⁷ The Coal Creek War ultimately led to Governor Buchanan's electoral defeat and certainly left him in too weak a position to actualize fully the goals of his industry-wary supporters.¹⁴⁸ Even when populists managed to achieve legislative victories, favored industries were excluded from antitrust coverage.¹⁴⁹

While Tennessee's government resisted attempts to enforce state antitrust law, the political branches of the federal government were rapidly moving toward a heightened role in antitrust enforcement. Although the Sherman Act passed through Congress with relative ease,¹⁵⁰ several Southern legislators emphasized the limited intended role of the federal government in antitrust enforcement based on a restrictive understanding of the Interstate Commerce Clause. For example, Senator Isham G. Harris (D-TN) drew attention to an amendment to the Sherman Act to ensure that it applied only "to such commerce as either foreign or interstate,"¹⁵¹ and Congressman John W. Gaines (D-TN) claimed that "the [s]tates have this full and complete power over domestic corporations or

¹⁴³ *Id.*

¹⁴⁴ SHAPIRO, *supra* note 135, at app. at 250.

¹⁴⁵ *Id.* at 75.

¹⁴⁶ *Id.* at 83.

¹⁴⁷ *Id.* at 200.

¹⁴⁸ See HART, *supra* note 134, at 164-65 (describing the minor legislative accomplishments of the Farmers Alliance).

¹⁴⁹ 1897 Tenn. Pub. Acts 241-42 (exempting agriculture and livestock from state antitrust coverage); see also 15 U.S.C.A. § 17 (exempting "labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit" from federal antitrust laws in a similar manner due to provisions of the Clayton Act).

¹⁵⁰ The Sherman Act passed the Senate with a 51-1 vote on April 8, 1890, and the House of Representatives by a unanimous vote of 242-0 on June 20, 1890. OUR DOCUMENTS, *Sherman Anti-trust Act (1890)*, <http://www.ourdocuments.gov/doc.php> (last visited May 28, 2014).

¹⁵¹ JAMES ARTHUR FINCH, BILLS AND DEBATES IN CONGRESS RELATING TO TRUSTS: FIFTIETH CONGRESS TO FIFTY-SEVENTH CONGRESS 16 (1902).

foreign corporations engaged in local or [s]tate trade.”¹⁵² In contrast to the state-centric political philosophy of Tennessee’s congressional delegation, other legislators emphasized the need for federal enforcement to counteract connections between state governments and local companies. In one tense debate, Congressman Marlin E. Olmstead (R-PA) pointed out to Congressman Henry C. Snodgrass (D-TN) that a Democratic governor of Tennessee had helped form the Tennessee Coal and Iron Company while serving as a state legislator and intimated that the Sherman Act should reach such monopolies.¹⁵³ The ultimate passage of the Sherman Act marked the beginning of the federal government’s ability to provide dual enforcement and antitrust consistency in the presence of unwilling state governments.

The U.S. Attorney General at the time had limited resources to devote to antitrust enforcement, and the only case filed during the first year of the Sherman Act was *United States v. Jellico Mountain Coal & Coke Co.*, 46 F. 432 (C.C.M.D. Tenn. 1891).¹⁵⁴ In conversation with U.S. Attorney General Miller, U.S. District Attorney for the Middle District of Tennessee John Ruhm initiated a lawsuit on September 25, 1890, against the members of the Nashville Coal Exchange, which was driving up the prices for coal in middle Tennessee.¹⁵⁵ Coal producers – mostly located in Kentucky – would agree, in Kentucky, to sell and transport the coal to Nashville dealers at set prices.¹⁵⁶ The Nashville retailers would then sell the coal to consumers at prices no lower than the minimum price set by the Nashville Coal Exchange.¹⁵⁷ Judge Key was reluctant to question the constitutionality of the Sherman Act¹⁵⁸ and ruled that this combination in restraint of trade was illegal under the Sherman Act regardless of the effect on Nashville consumers.¹⁵⁹ This successful antitrust action demonstrates one of the key reasons for dual enforcement: the possibility of political unwillingness at either the state or federal level. In this case, the Tennessee government did not want to prosecute the coal industry it was so entangled with and risk reducing the profits

¹⁵² *Id.* at 819.

¹⁵³ *Id.* at 655.

¹⁵⁴ John J. Siegfried & Michelle Mahony, *The First Sherman Act Case: Jellico Mountain Coal, 1891*, 35 *Antitrust Bull.* 801, 801-02 (1990).

¹⁵⁵ *Id.* at 802-03.

¹⁵⁶ *United States v. Jellico Mountain Coal & Coke Co.*, 46 F. 432, 435-36 (C.C.M.D. Tenn 1891).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 434-35 (“A court, especially an inferior one, should hesitate long and consider carefully before it should declare an act of congress, passed after deliberation and debate, and approved by the president, unconstitutional.”).

¹⁵⁹ *Id.* at 436-37.

of the railroad industry, which also benefited from the cartelization.¹⁶⁰ A somewhat more removed actor, in this case U.S. Attorney John Ruhm took action against industries that were politically powerful at the state level.¹⁶¹ Federal antitrust enforcement was powerful in the early years when the courts determined that the activity involved was interstate commerce,¹⁶² but restrictive definitions of interstate commerce threatened to undermine federal enforcement efforts.¹⁶³

Stepping into this enforcement void, state antitrust authorities began to follow the example of federal enforcers by utilizing state antitrust laws. Tennessee Republicans nearly unseated the ensconced Democratic Party in 1894 until the Democratic-controlled state legislature declared twenty-three thousand votes as fraudulent and returned Democratic Governor Turney to office.¹⁶⁴ At the national level, Republicans appointed Tennessee Democrats to several significant positions in an effort to facilitate cooperation.¹⁶⁵ For example, James McReynolds, a future U.S. Supreme Court Justice, was appointed as Assistant U.S. Attorney General and would later assist with the antitrust actions against the tobacco trust and the anthracite mines.¹⁶⁶ Populists, such as members of the Farmers Alliance, gained acceptance within the Democratic Party with “The Great Commoner” William Jennings Bryan, who represented the Democratic Party in the 1896, 1900, and 1908 presidential elections.¹⁶⁷ Reflecting the populism of the citizenry, the Tennessee state legislature passed another antitrust law in 1897, similar to earlier Tennessee statutes but with an exemption for agriculture and livestock.¹⁶⁸

Unlike past Tennessee antitrust statutes, the state government actually enforced the 1897 antitrust law, initially against less-than-sympathetic defendants.

¹⁶⁰ Siegfried & Mahony, *supra* note 154, at 819 (“The NCE [Nashville Coal Exchange] appears to have shared with the Railroad at least some of the benefits of its cartelization of Nashville’s domestic coal market.”). By sharing some of the appropriated consumer surplus with the railroad, the NCE might have been able to encourage cooperation at first, but competitive pressures and substitutes for consumer demand weakened the power of the NCE.

¹⁶¹ *See Id.* at 801-02.

¹⁶² *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290 (1897).

¹⁶³ *See* United States v. E.C. Knight Co., 156 U.S. 1 (1895).

¹⁶⁴ LANGSDON, *supra* note 134, at 225.

¹⁶⁵ *Id.* at 239

¹⁶⁶ *Id.*

¹⁶⁷ HART, *supra* note 134, at 217.

¹⁶⁸ 1897 Tenn. Pub. Acts 241-42 (exempting agriculture and livestock from antitrust coverage).

Bailey v. Association of Master Plumbers of City of Memphis, 52 S.W. 853 (1899), was the first case in which the state supreme court enforced a Tennessee antitrust statute.¹⁶⁹ Southern states, such as Tennessee, have traditionally lacked social custom in support of trade unions,¹⁷⁰ and the union's group boycott of plumbing suppliers and manufacturers, along with heightened union fees for plumbers who competed with other union members, did not create a sympathetic defendant.¹⁷¹ Even then, the Supreme Court of Tennessee declared the offending union bylaws as void with no additional punishment.¹⁷²

The second state antitrust case involving the 1897 Tennessee antitrust statute was *State ex rel. Astor v. Schlitz Brewing Co.*, 59 S.W. 1033 (1900). In this case, Tennessee had sued to remove the defendant Wisconsin corporation from the state after the foreign corporation entered into price fixing agreements with Tennessee breweries.¹⁷³ In an era of temperance, breweries were even less sympathetic defendants than a union. At that time in the early 1890s, the Prohibition Party was gradually becoming one of the major political forces in Tennessee, gaining 11,000 votes in the 1890 gubernatorial election (over five percent of the vote).¹⁷⁴ By 1901, the Anti-Saloon League became "a power in Tennessee politics."¹⁷⁵ The Tennessee Supreme Court ruled against the brewery and upheld the constitutionality of the 1897 Tennessee antitrust statute.¹⁷⁶

Following these initial cases, Tennessee antitrust laws gained significant regulatory power with the first version of the Tennessee Trade Practices Act in 1903, which did not include the prior exemptions for agriculture and livestock.¹⁷⁷ By 1907, the Tennessee government was even willing to bring state antitrust charges against Standard Oil.¹⁷⁸ Standard Oil had been bribing Tennessee oil customers by promising free oil in exchange for the cancellation of shipments

¹⁶⁹ Watson, *supra* note 127, at 292.

¹⁷⁰ Henry S. Farber, *The Decline of Unionization in the United States: What Can Be Learned from Recent Experience?*, 8 J. LABOR ECON. S75, S78 (1990).

¹⁷¹ Watson, *supra* note 127, at 292-93.

¹⁷² *Bailey v. Ass'n of Master Plumbers of City of Memphis*, 52 S.W. 853, 858 (1899).

¹⁷³ *State ex rel. Astor v. Schlitz Brewing Co.*, 59 S.W. 1033, 1033 (1900).

¹⁷⁴ W. Calvin Dickinson, *Temperance*, TENNESSEE ENCYCLOPEDIA OF HISTORY AND CULTURE (Jan. 1, 2010), <http://tennesseeencyclopedia.net/entry.php?rec=1302>.

¹⁷⁵ *Id.*

¹⁷⁶ *Astor*, 59 S.W. at 1041.

¹⁷⁷ 1903 Tenn. Pub. Acts 268.

¹⁷⁸ *Standard Oil Co. v. State*, 100 S.W. 705 (1907).

from rival oil producers.¹⁷⁹ While the Tennessee Supreme Court seemed to limit the state antitrust act to solely intrastate commerce,¹⁸⁰ its willingness to apply the state regulation to imported goods once they were within Tennessee undercut such limitations since the state government could indirectly regulate behavior with substantial interstate effects.¹⁸¹ The Tennessee Supreme Court held that the monetary damage provisions and fines did not apply to corporations such as Standard Oil, but the state could instead revoke the corporation's right to do business within the state.¹⁸² Tennessee then sought an injunction to prevent Standard Oil from conducting business in the state, and Standard Oil lost its challenge of the injunction in the Tennessee Supreme Court.¹⁸³ Standard Oil did not give up easily and appealed to the U.S. Supreme Court on Equal Protection and Interstate Commerce Clause grounds.¹⁸⁴ Justice Oliver Wendell Holmes, Jr., wrote for the Court in a brief decision affirming the Tennessee Supreme Court.¹⁸⁵ The state antitrust law could regulate behavior with interstate effects since the state statute "is not even directed against interference with that business specifically, but against acts of a certain kind that the state disapproves in whatever connection. The mere fact that it may happen to remove an interference with commerce among the states as well with the rest does not invalidate it."¹⁸⁶ Thus, between 1907 and 1910, the Tennessee government, encouraged by national political changes and federal enforcement, took decisive action against Standard Oil while the U.S. Department of Justice simultaneously brought federal antitrust charges against them.¹⁸⁷ This resulted in a U.S. Supreme Court decision against Standard Oil in 1911.¹⁸⁸

¹⁷⁹ *Id.* at 707.

¹⁸⁰ *Id.* at 709 ("The statute, when properly construed, does not apply to interstate commerce. The sole object and purpose of the enactment of it was to correct and prohibit abuses of trade within the state.").

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *State ex rel. Cates v. Standard Oil Co. of Kentucky*, 110 S.W. 565 (1908), *aff'd sub nom. Standard Oil Co. of Kentucky v. State of Tennessee ex rel. Cates*, 217 U.S. 413, 30 S.Ct. 543, 54 L. Ed. 817 (1910).

¹⁸⁴ *Standard Oil Co.*, 217 U.S. at 420.

¹⁸⁵ *Id.* at 422.

¹⁸⁶ *Id.*

¹⁸⁷ *See Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

¹⁸⁸ *Id.* at 81-82.

This system of dual enforcement remained in place through the Roaring Twenties, but state antitrust enforcement dried up during the Great Depression and World War II as regulators at both the federal and state level were reluctant to take action against business combinations in such lean times.¹⁸⁹ Tennessee appellate courts “did not deal directly with another state antitrust allegation for thirty years,” between 1926 and 1956.¹⁹⁰ Nevertheless, the encouragement and example of federal antitrust enforcers and national politicians had produced a body of state antitrust law and thus had laid the foundation for later state antitrust enforcement, to be applied once state preferences shifted again.

V. CONCLUSION

Despite criticism from such notable antitrust scholars as Judge Posner, state antitrust law and enforcement can play a valuable role in supplementing federal antitrust enforcement. Although state laws might allow for excessive punishment of anti-competitive activities, the limited extent of state enforcement and the flexible relationship with federal enforcers may also encourage more consistent punishment in light of jurisdictional, resource, and political limitations. Our federalist system of antitrust enforcement allows Tennessee and other states to decide if additional antitrust provisions, such as those that allow indirect purchaser actions, are desirable to protect state consumers from harm resulting from both native and foreign corporations. Tennessee’s history of antitrust law and enforcement demonstrates the interactions between the state and federal government that produced a viable system for dual enforcement. While political connections with local business initially impeded the application of state antitrust laws, the example and acceptance of federal enforcement eventually led to rapid state action when Interstate Commerce Clause restrictions impeded the reach of federal regulators. Determining whether state antitrust enforcement leads to excessively or inefficiently restrictive antitrust regulation on a national level is more challenging due to the difficulty of ascertaining the most efficient level of national antitrust enforcement and one state’s impact on the economies of other states. Despite this concern, Tennessee is one example of how dual enforcement has produced more consistent antitrust enforcement, both in the modern day and early in the history of antitrust law.

¹⁸⁹ See *Appalachian Coals v. United States*, 288 U.S. 344, 356 (1933) (allowing blatant price fixing by an exclusive selling agency representing bituminous coal producers in Tennessee, Virginia, West Virginia, and Kentucky).

¹⁹⁰ *Watson*, *supra* note 127, at 313.