Notes

INVIGORATED STATE MERGER ENFORCEMENT: A PROPOSED ANALYTIC FRAMEWORK THAT PREEMPTS PREEMPTION PROBLEMS

Mark E. Chadwick

I. INTRODUCTION

Federal regulators recently approved[1] the merger between BankAmerica and Security Pacific, creating the nation's second largest bank.[2] The resulting BankAmerica will be the largest bank in four states and have a large market share in Arizona and Washington.[3] As a result of the merger, thousands of bank employees will lose their jobs and hundreds of branches will close.[4] Also, to the extent that the two banks competed with each other, the merger will reduce consumer choice. Notwithstanding these negative effects, the Department of Justice allowed the merger to go forward and entered into a consent order with BankAmerica that requires the bank to divest branches and deposits.[5]

In contrast to the permissive stance of the federal regulators, some state officials vehemently opposed the merger. For example, Senator Dennis DeConcini described the merger as "harmful" for competition in Arizona with no positive effects.[6] If the state attorneys general shared these sentiments, they

---

1. Technically, the Department of Justice and the Federal Trade Commission do not "approve" mergers. They merely exercise their prosecutorial discretion and choose not to oppose them or allow the merger to go forward.

2. Andrew Pollack, *Fed Approves Merger of Big California Banks*, N.Y. TIMES, Mar. 24, 1992, at C2. Bank holding companies must satisfy the concerns of the Federal Reserve Board in addition to those of the Department of Justice.

3. *Id.* The four states are California, Arizona, Washington, and Nevada.

4. *Id.* Critics of the merger also assert that it will diminish competition, restrict credit and increase consumer costs. *See* William H. Carlile, *2 Banks Get OK for Huge Merger—BankAmerica, Security Pacific to Unite*, ARIZ. REPUBLIC, Mar. 24, 1992, at A1.

5. *Id.* In February, 1992, the Department of Justice entered into a consent order requiring BankAmerica to divest itself of 211 branches and $8.8 billion in deposits.

6. William H. Carlile, *Huge Bank Merger Ensured BankAmerica, Security Pacific Get OK*, ARIZ. REPUBLIC, Mar. 24, 1992, at A1. In contrast, James F. Rill, Assistant Attorney General for Antitrust, stated that, as structured, the merger would allow consumers to enjoy the benefits of competition, while BankAmerica would realize cost savings. William H. Carlile et al., *U.S. Won't Fight Merger of Banks, DeConcini Fears Proposed Linkup Would Hurt Public*, ARIZ. REPUBLIC, Feb. 29, 1992, at C1.

could have challenged the merger,[7] causing tension between state and federal antitrust enforcement policies. This Note focuses narrowly on the tension that results when states attempt to enjoin mergers under state law.

The BankAmerica-Security Pacific merger is not an isolated incident. Rather, it exemplifies a trend of mergers, aptly named "merger mania,"[8] that began in the early 1980's and still continues. Empirical evidence supports this trend. For example, seventy-five of the largest mergers in the history of the United States occurred between 1981 and 1984,[9] and the reported value of United States corporate acquisitions rose from $33 billion in 1980 to $190 billion in 1986.[10] Also, twice as many acquisitions occurred between 1981 and 1986 as occurred between 1976 and 1980.[11]

Rather than increase enforcement of merger laws during this period, both the Reagan and Bush administrations challenged a smaller percentage of mergers.[12] States have responded to the decrease in enforcement vigorously. For example, the New York Attorney General characterized the federal response to the wave of mergers as an abdication of responsibility.[13] Similarly, the former California Attorney General stated that the states should enforce the antitrust laws because the federal government will not.[14] As a response to the lack of federal enforcement, states have recently challenged several major mergers.[15]

This Note is organized as follows. In Part II, this Note outlines the history of state participation in mergers, emphasizing the states' recent responses to federal retrenchment. In Part III, this Note analyzes the competing rationales for the antitrust laws and concludes that the federal policy focusing on "economic efficiency" does not fully effectuate the intent of the antitrust laws. It then argues that states can actively enforce the merger laws in order to preserve congressional intent. Because state participation in mergers presents unique problems, this Note also addresses the main argument against state enforcement of antitrust laws.

---

7. States have the authority to enforce either federal or state antitrust laws. *See infra* notes 34–47 and accompanying text.

8. The popularized term has been used profusely by the media. *See, e.g.*, James Bennet, *Time Out: We Pause for a Word from Our Skeptic*, NEW REPUBLIC, Apr. 1989, at 20. *See also* IVAN BOESKY, MERGER MANIA (1985).

9. Robert Abrams, *Antitrust Enforcement in the 1990's*, 29 WASHBURN L.J. 350, 354 (1990) (arguing that the Reagan Administration created a hospitable environment for corporate mergers (citing Walter Adams & James W. Brock, *Reaganomics and the Transmogrification of Merger Policy*, 33 ANTITRUST BULL. 309, 310 (1988))).

10. *House Judiciary Committee's Charts on Federal Antitrust Enforcement*, [Jan.–Dec.] 52 Antitrust & Trade Reg. Rep. (BNA) No. 1305, at 451 (Mar. 5, 1987) [hereinafter *Judiciary Committee's Charts*].

11. *Id.* (Contrast 1400 acquisitions in the 1976–1980 period with over 2800 acquisitions in the 1981–1986 period).

12. *See infra* note 41 and accompanying text.

13. Comment of Robert Abrahms, Attorney General of New York, *in* NAT'L L.J., May 23, 1987, at 1338.

14. *Id.*

15. *See, e.g.*, Russo v. Texaco, Inc., 630 F. Supp. 682 (E.D.N.Y. 1986) (several states challenged the proposed oil company); California v. American Stores, Inc., 872 F.2d 837 (9th Cir. 1989) (California challenged proposed merger between Alpha Beta and Lucky supermarkets).

In Part IV, this Note addresses the preemption issues that arise under the Supremacy Clause[16] of the United States Constitution from state enforcement of merger laws. This Note then concludes that states are justified in more actively enforcing merger laws, but recognizes the constitutional problems created if the merger involves national corporations.

In Part V, this Note proposes an analytic framework for the state attorneys general to use in determining whether to challenge a proposed merger. Although the National Attorneys General Horizontal Merger Guidelines (NAAG Guidelines)[17] provide guidance to attorneys general regarding what constitutes a violation of state merger laws,[18] they do not consider the constitutional implications of enforcement. The proposed framework adopts the NAAG Guidelines as the model for evaluation of mergers, but incorporates a version of commerce clause analysis into the enforcement decision. This framework preempts preemption problems by addressing the potential constitutional problems earlier in the process than the judicial forum.

II. BACKGROUND

Because the bulk of antitrust case law is federal, this section presents a brief overview of federal merger laws.[19] It then discusses state participation in merger enforcement with an emphasis on recent state responses to federal retrenchment.

A. Merger Laws: An Overview

In an attempt to promote competition, Congress enacted a series of antitrust laws.[20] Because "competition"[21] is not self-defining, however, commentators have attempted to fill the gap. Robert Bork broadly defines competition as "any state of affairs" in which consumer welfare cannot be enhanced by the courts.[22] In contrast, George Stiegler defines "competition" as a market state in which the "buyer or seller does not influence the price by his purchases

16. U.S. CONST. art. I, §10 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.").

17. NAT'L ASS'N OF ATTORNEYS GEN., HORIZONTAL MERGER GUIDELINES, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,405 (1988) [hereinafter NAAG GUIDELINES].

18. For a brief summary of the evaluation process under the NAAG Guidelines, see *infra* note 199 and accompanying text.

19. The merger described in this section is a "horizontal merger." A horizontal merger occurs when two or more firms that actually or potentially sell roughly comparable products to the same purchasers merge. Determining whether merging firms actually are horizontal competitors can be complex. *See* HERBERT HOVENKAMP, ECONOMICS & FEDERAL ANTITRUST LAW 311 (1985). The characterization is not crucial here, however, because the focus of this Note is not on what constitutes a violation of the merger laws, but rather on the constitutional implications of increased state enforcement.

20. For a summary of the legislative history of the antitrust laws, see HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY (1955). *See also* Standard Oil Co. v. United States, 221 U.S. 1 (1911); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963) (Congress intended the Clayton Act to promote competition and alleviate increasing economic concentration in America).

21. Because the term is not defined in the statute, this Note relies upon definitions by judges and scholars. As an illustration of the elusiveness of the term, Robert Bork has identified five different meanings of competition. *See* ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 58–61 (1978).

22. *Id.* at 61.

or sales."[23] The definition of competition is crucial because the Clayton Act[24] prohibits mergers that "substantially lessen competition."[25]

Merger enforcement[26] theoretically enhances competition by preventing highly concentrated markets.[27] Whether a given merger substantially lessens competition depends on a myriad of economic factors.[28] All horizontal mergers reduce competition to some extent because the merging companies no longer compete with each other.[29] Whether the impact on competition violates the Clayton Act,[30] however, depends on an evaluation of the overall effect on competition, now and in the future.[31]

A merger can be enjoined in several ways. The primary statutory vehicle for merger enforcement is § 7 of the Clayton Act.[32] Under § 7, either the Federal Trade Commission (FTC) or the Department of Justice (DOJ) may enjoin mergers.[33] State attorneys general, acting as *parens patriae*,[34] may enforce a merger under § 7 for the benefit of the state's consumers.[35] Also, private parties can sue under § 7.[36] Finally, most states have antitrust statutes, several of which are analogous to the Clayton Act, permitting attorneys general

---

23. GEORGE STIEGLER, THE THEORY OF PRICE 82 (4th ed. 1987).
24. 15 U.S.C. § 18 (1991).
25. *Id.*
26. "Merger Enforcement" is a term of art that means enforcement of the merger laws. This typically means that the merger will be "opposed" or "challenged" by the agency, but could include a suit for damages to consumers.
27. Concentrated markets occur when one firm controls a high percentage of the market share, presenting two problems for competition. First, large firms with high market shares have "market power" or an ability to affect the price of a product. These firms will therefore charge higher prices to consumers. *See* HOVENKAMP, *supra* note 19, § 11.1. Second, with fewer competitors in the market, collusion among the remaining firms becomes more likely so that merger enforcement may preempt future antitrust violations. *See* Abrams, *supra* note 9, at 354.
28. In California v. American Stores Co., 872 F.2d 837 (9th Cir. 1989), California sought to enjoin a proposed merger between Alpha Beta and Lucky, two large grocery store chains. The Ninth Circuit articulated the relevant factors for determining the competitive effects as: "(1) the market shares of the merging firms, (2) the degree of concentration in the market, and (3) the degree to which that concentration is increased by the merger." *Id.* at 842.
29. *See, e.g.*, FTC v. Procter & Gamble, 386 U.S. 568, 578 (1967) (the United States Supreme Court noted the negative competitive effect that would result from a merger between Procter & Gamble and Clorox, because the two companies would no longer be competitors).
30. 15 U.S.C. § 18 (1991).
31. *Procter & Gamble*, 386 U.S. at 577.
32. 15 U.S.C. § 18 (1991). Section 7 of the Clayton Act provides in pertinent part:
> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id.
33. 15 U.S.C. § 45(a)(2) (1993).
34. *Parens patriae* literally means "parent of the country" and refers traditionally to the role of state as sovereign and guardian of persons under legal disability. BLACK'S LAW DICTIONARY 1003 (5th Ed. 1979). The doctrine gives states standing to raise the rights of consumers in antitrust actions. The United States Supreme Court recognized that the purpose of the *parens patriae* statute was to provide private relief and to "serve the high purpose of enforcing the antitrust laws." California v. American Stores Co., 495 U.S. 271, 284 (1990) (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 131 (1969)).
35. 15 U.S.C. § 26 (1991).
36. *Id.*

to sue under state law.[37] Of course, preemption issues arise only when state attorneys general sue under state law.

B. State Participation in Merger Enforcement

Since the passage of the Sherman Act,[38] states have enforced antitrust laws with varied intensity, increasing their efforts when federal enforcement lags.[39] Although merger activity skyrocketed in the 1980's,[40] federal enforcement of mergers dramatically declined under the Reagan Administration.[41] Because of the decline in federal antitrust enforcement activity, state enforcement may become increasingly important in the near future. Indeed, many state officials feel that more active enforcement of the antitrust laws is necessary.[42]

---

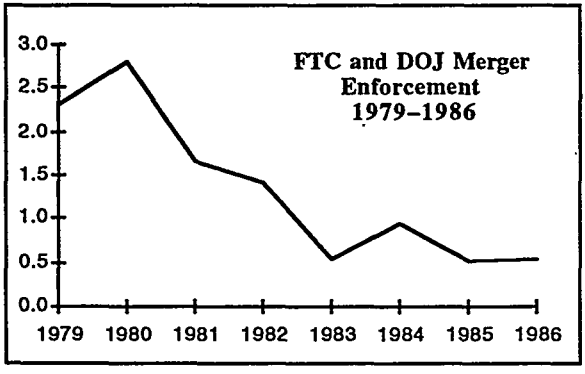
37. *See, e.g.*, N.J. STAT. ANN. § 56:9-4 (West 1991) ("No corporation engaged in commerce shall acquire ... any part of the stock ... of another corporation engaged also in commerce, where the effect of such acquisition *may be to substantially lessen competition* ... or tend to create a monopoly.") (emphasis added); ME. REV. STAT. ANN. tit. 10, § 1201 (West 1991); NEB. REV. STAT. ANN. § 59-501 (West 1991); OHIO REV. CODE ANN. § 1331.021 (Anderson 1991); TEX. BUS. & COM. CODE ANN. § 15.05(d) (West Supp. 1993); WASH. REV. CODE ANN. § 19.86.010 (West 1991). Also, all states with provisions analogous to § 1 of the Sherman Act may challenge mergers if the merger tends toward monopoly. *See, e.g.*, ARIZ. REV. STAT. ANN. § 44-1403 (1991), which prohibits the establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce. *See also* FLA. STAT. ANN. § 542.19 (West 1991), which prohibits attempts to monopolize any part of trade or commerce within the state. However, the Government has not been successful in its attempts to enjoin mergers under the Sherman Act. *See* United States v. Columbia Steel Co., 334 U.S. 495, 529 (1948) (acquisition must become monopolistic to be an unreasonable restraint of trade).

38. Sherman Antitrust Act, ch. 647, §§ 1-8, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1988)).

39. James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495 (1987).

40. The reported value of U.S. corporate acquisitions rose from $33 billion in 1980 to $190 billion in 1986. *Judiciary Committee's Charts*, *supra* note 10, at 451. Also, 75 of the largest mergers in the history of the United States occurred between 1981 and 1984. *See* Abrams, *supra* note 9, at 354.

41. During the 1979-1980 period, government agencies brought enforcement actions 2.5% of the time, while during 1982-1986 the enforcement action rate declined to 0.7%. *Judiciary Committee's Charts*, *supra* note 10, at 451. The graph below depicts merger enforcement as a percentage of premerger transactions for the period 1979-1986 (based on data published in *Judiciary Committee's Charts*, *supra* note 10, at 451).



42. For example, Michael F. Brockmeyer, the Assistant Attorney General and Chief, Antitrust Division, State of Maryland, argues that states have a "substantial interest" in increased

William Baxter, a former Assistant Attorney General of the Antitrust Division, predicts that states will be the primary enforcers of antitrust laws by 1996.[43] Also, twelve states have recently enacted their own antitrust statutes.[44]

In addition to legislative enactments, state attorneys general have begun to coordinate their efforts to enforce antitrust laws.[45] For example, forty-nine states joined as plaintiffs and filed suit against Matsushita Electric Corporation for resale price maintenance of home electronics equipment in violation of the Sherman Act.[46] Similarly, NAAG's recent adoption of the National Association of Attorneys General Horizontal Merger Guidelines (NAAG Guidelines)[47] strongly suggests that states may more actively enforce merger laws in the future. The Guidelines dictate more active enforcement of merger laws and reflect the states' dissatisfaction[48] with the Department of Justice Horizontal Merger Guidelines (DOJ Guidelines)[49] and federal enforcement policy. The NAAG Guidelines attempt to bring about uniform enforcement of merger laws by NAAG members.[50]

The NAAG's adoption of the Premerger Disclosure Compact (Compact) further evidences state cooperation and participation in merger enforcement.[51] The Compact encourages[52] merging companies to submit to NAAG photocopies

---

enforcement of the antitrust laws. Michael F. Brockmeyer, *State Antitrust Enforcement*, 57 ANTITRUST L.J. 169, 174–75 (1988).

43. William Baxter, *What Will Be the State of Antitrust in the Year 1996*, 1 ANTITRUST 32 (Fall 1986).

44. Delaware (1980), DEL. CODE ANN., tit. 6, §§ 2101–14 (1986); Florida (1980), FLA. STAT. chs. 542.15–.36 (1987); Iowa (1987), IOWA CODE ANN. §§ 553.1–17 (West 1986); Kentucky (1976), KY. REV. STAT. ANN. §§ 367.175, 367.176, 367.990 (Baldwin 1986); Massachusetts (1978), MASS. GEN. L. ch. 93, §§ 1–14A, 1–11 (Supp. 1987); New Mexico (1979), N.M. STAT. ANN. §§ 57–1–1 to –16 (Michie 1987); Rhode Island (1979), R.I. GEN. LAWS §§ 6–36–1 to –26 (1984); South Dakota, S.D. CODIFIED LAWS ANN. §§ 53–9 to –11, §§ 37–1–3.1 to –33 (1980); Texas (1983), TEX. BUS. & COM. CODE ANN. §§ 15.01–.26 (West 1987); Utah (1979), UTAH CODE ANN. §§ 76–10–911 to –926 (1978 & Supp. 1988); West Virginia (1978), W. VA. CODE §§ 47–18–1 to –23 (1986).

45. For a general treatment of trends in state enforcement, see Abrams, *supra* note 9, at 352.

46. *In re* Panasonic Consumer Elecs. Prods. Antitrust Litig., 1989–1 Trade Cas. (CCH) ¶ 68,613 (S.D.N.Y. 1989). *See also In re* Minolta Camera Prods. Antitrust Litig., 668 F. Supp. 456 (D. Md. 1987) (36 states cooperatively sued Minolta for allegedly conspiring to fix prices on camera products nationwide in violation of state and federal antitrust laws).

47. NAAG GUIDELINES, *supra* note 17.

48. The NAAG Guidelines have been described as a "political manifesto" which reflects the states' dissatisfaction with federal policies. William J. Kolasky, Jr., *Current Developments: Merger Enforcement By States and Private Parties*, 56 ANTITRUST L.J. 839, 849 (1987).

49. U.S. DEP'T OF JUSTICE, 1984 HORIZONTAL MERGER GUIDELINES, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,103 (1987). On April 2, 1992, the Department of Justice and the Federal Trade Commission jointly issued new Horizontal Merger Guidelines. U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, 1992 HORIZONTAL MERGER GUIDELINES, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1992).

50. The National Association of Attorneys General includes the attorneys general of all states as well as the attorneys general of Samoa, Guam, the Commonwealth of Northern Marina Islands, the Commonwealth of Puerto Rico, and the Virgin Islands.

51. NAT'L ASS'N OF ATTORNEYS GEN., VOLUNTARY PRE-MERGER DISCLOSURE COMPACT, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13, 410 (1991).

52. Compliance with the Compact is merely voluntary. Mandating compliance might contravene the Second Circuit's opinion in Lieberman v. FTC, 771 F.2d 32, 40 (2d Cir. 1982), where the court held that the FTC was precluded from forwarding the pre-merger information to state attorneys general because the information was confidential under the Hart-Scott-Rodino Act (HSR Act). *See infra* notes 53–59 and accompanying text. In addition, a mandatory compliance scheme among the states might be unconstitutional under the Compact Clause of the United

of the pre-merger financial information provided to the FTC[53] under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act).[54] This firm-specific information is crucial for determining whether to challenge a proposed merger.

The FTC previously provided state attorneys general with the HSR Act information as a courtesy. In 1985, however, the FTC changed this policy and denied states access to the information. The Second Circuit upheld the FTC's decision in *Lieberman v. FTC*.[55] *Lieberman* involved an action by several state attorneys general against the FTC for failing to provide access to pre-merger information relating to a proposed merger between Texaco and Getty Oil.[56] After review of the legislative history,[57] the court held that the HSR Act prohibited the FTC from disclosing the information to the attorneys general because it was confidential.[58] The Compact lessened the impact of *Lieberman* by providing firms a convenient method to satisfy both the FTC and NAAG.[59] NAAG members are in the same position they would have been before *Lieberman* if firms voluntarily submit the information to the state attorneys general.

In several respects, then, state attorneys general have become more active in merger regulation. Whether more active enforcement is justified, however, depends on the rationales underlying the merger laws.

III. INVIGORATED STATE MERGER ENFORCEMENT

A. *Introduction*

Social, political, and economic concerns drive antitrust law.[60] To some extent these concerns are inconsistent, making it difficult to pursue each of these concerns simultaneously.[61] Much of the debate in antitrust law revolves around pursuing "economic efficiency" versus promoting other populist or

States Constitution. *See* Peter M. Yu, Note, *To Form a More Perfect Union: Federalism and Informal State Cooperation*, 102 HARV. L. REV. 842 (1989).

53. All merging companies with an interstate commerce effect must submit pre-merger information to the FTC under the HSR Act. The federal agencies then regulate or challenge the merger or allow it to proceed.

54. Title I, 15 U.S.C. §1312 (1982), Title II, 15 U.S.C. § 18a (1982), Title III, 15 U.S.C. § 15(c) (1982).

55. 771 F.2d 32 (2d Cir. 1985). *See also* Mattox v. FTC, 752 F.2d 116, 124 (5th Cir. 1985) (holding that the HSR Act precludes the FTC from disclosing pre-merger information to the state attorneys general).

56. 771 F.2d at 33.

57. *Id.* at 34–35.

58. *Id.* at 40.

59. Of course, if a firm anticipates opposition, it will probably not volunteer the information. As long as *Lieberman* controls, however, states are in a difficult position.

60. *See* David Millon, *The Sherman Act and The Balance of Power*, 61 S. CAL. L. REV. 1219, 1220–21 (1988); Robert H. Bork & Ward S. Bowman, Jr., *The Goals of Antitrust: A Dialogue on Policy*, 65 COLUM. L. REV. 363 (1965); Joyn J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 U. PA. L. REV. 1182 (1977); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

61. *See* David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WM. & MARY L. REV. 787, 790 (1989) (arguing for a broader definition of "efficiency" which would allow pursuit of the social and political goals as well as economic efficiency).

"non-efficiency" goals.[62] Congress' intent to "promote competition" does not clarify the purposes of enforcement.

Legislative history and case law suggest that Congress' primary concerns in passing § 7 of the Clayton Act were to avoid concentrations of economic and political power[63] and to protect small businesses.[64] These non-efficiency concerns[65] often conflict with economic concerns, resulting in contradictory attitudes toward enforcement. For example, if the underlying enforcement policies are purely economic,[66] a merger that enhances "efficiency"[67] may not be challenged even though it is "anticompetitive." [68] In contrast, a merger policy that protects small business might suggest that the merger should be challenged because efficiencies are irrelevant under this rationale; the inquiry is whether the resulting firm is too big. Because the rationale for enforcement is crucial to the decision to enjoin a merger, the competing rationales are more fully discussed below.[69]

B. The "Efficiency" Rationale

The Reagan Administration's permissive enforcement policy was driven by an economic view of the world that focused on efficiency gains.[70] This emphasis on "efficiency" translated into a "hands off" policy toward merger

---

62. *Id.*

63. *See* Brown Shoe v. United States, 370 U.S. 294, 315 (1962). The United States Supreme Court, addressing the Congressional intent of the Clayton Act, stated that "[t]he dominant theme pervading Congressional consideration of the 1950 amendments was a fear of ... a rising tide of economic concentration in the American economy." *Id.* at 315.

64. The Supreme Court stated that "one of the primary purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *Id.* at 316, n.28 (citing United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945)).

65. Often, populist goals are referred to as "noneconomic" but it is clear that preserving small businesses so that they can compete and avoiding concentrations of economic power have an economic component. Thus "nonefficiency" goals more accurately describe the populist goals—it only excludes those goals focusing on economic efficiency. *See* Barnes, *supra* note 61, at 797–98.

66. *See infra* notes 68–75 and accompanying text.

67. Economists define "efficiency" in two ways. Technical efficiency allows the resulting firm to produce more for the same cost or the same amount at a lower cost. The theory suggests that consumers are better off because they can purchase more goods with the same money. Allocative efficiency refers to an optimal mix of goods and services for society. Either type could result from a merger which creates "economies of scale," efficiency gains resulting from the increased size of the firm. *See* HOVENKAMP, *supra* note 19, § 11.2. Although there is no "efficiency defense" under the DOJ Guidelines, the number of mitigating factors suggests that in practice, if efficiencies are demonstrated, the DOJ will not prosecute. *See* John Cirace, *The Horizontal Merger Guidelines of the Department of Justice and the National Association of Attorneys General Compared in the Context of Recent Cases and Consent Decrees*, 33 VILL. L. REV. 281, 323 (1988) (arguing that the DOJ Guidelines permit merged firms to present any economic rationale for high concentration levels).

68. Determining whether a merger has "anticompetitive" effects is complex. For a discussion of how the competitive effects are evaluated under both the NAAG Guidelines and the DOJ guidelines, *See* Cirace, *supra* note 67, at 293–321. For a comprehensive treatment of the evaluation process under the Department of Justice Guidelines, see Symposium, *1982 Merger Guidelines*, 71 CAL. L. REV. 280–667 (1983).

69. Although the discussion that follows obviously oversimplifies the competing rationales, it is intended only to highlight the differences in perspectives.

70. Millon, *supra* note 60, at 1221.

enforcement.[71] The "Chicago School"[72] of economics[73] provides the scholarly support for this policy. Incorporating this view into its antitrust policy, the Reagan and Bush Administrations viewed the goal of antitrust as maximization of "consumer welfare."

Robert Bork, a leading antitrust scholar, argues that maximization of consumer welfare[74] was the sole policy concern of the drafters of the Sherman Act.[75] Although Bork's interpretation of legislative history has been questioned,[76] his view has gained some support in judicial opinions.[77] For example, in *NCAA v. Regents of University of Oklahoma*,[78] the United States Supreme Court considered whether the National Collegiate Athletic Association (NCAA) violated § 1 of the Sherman Act by fixing prices for football game television rights.[79] In determining the "anticompetitive effects" of the pricing policy, the court found it "most significant" that the NCAA was unresponsive to consumer preferences,[80] and declared that Congress intended the Sherman Act as a consumer welfare prescription.[81]

The influence of the "Chicago School" on the Reagan and Bush Administration's enforcement policy is apparent. There is an underlying assumption that mergers generally enhance efficiency through "economies of scale."[82] Thus, the theory counsels against active enforcement of merger laws

---

71. This tendency is apparent in several areas. See *supra* note 41 and accompanying text for evidence of decline in federal enforcement. Also, the DOJ Guidelines consider "efficiency" gains to be one of the mitigating factors to consider when determining whether to enforce a merger; i.e., it serves as a defense under the Guidelines.

72. The "Chicago School" is an influential school of economic thought based on free market ideals that originated at the University of Chicago. The Chicago School begins with assumptions that the ideal world is where markets are perfectly competitive and therefore more efficient. The theory counsels that maximization of "consumer welfare" should be the goal of all economic policy, including antitrust policy. Some of the leading antitrust scholars adhere to this world view. *See, e.g.*, BORK, *supra* note 21; RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976).

73. Economic analysis plays a prominent role in antitrust policy. *See* BORK, *supra* note 21; POSNER, *supra* note 72. Former Attorney General Edwin Meese emphasized the importance of economics for the Reagan Administration's policy when he stated that "[t]he contribution of economics to the law in this area has been of vital importance." *Meese Lauds Role Played by Economists in Restoring Sanity to Antitrust Laws*, [Jan.–Dec.] 50 Antitrust & Trade Reg. Rep. (BNA) No. 1250, at 187–88 (Jan. 30, 1986).

74. Robert Bork defines consumer welfare broadly to include "all things we think of as being good for consumers." BORK, *supra* note 21, at 61.

75. Robert Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7, 11 (1966) ("[T]he legislative intent underlying the Sherman Act was that courts should be guided exclusively by consumer welfare and the economic criteria which that promise implies.").

76. Herbert K. Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 249 (1985) (in contrast to Bork's assertions, there is no resemblance of a "dominant concern for economic efficiency").

77. *See, e.g.*, NCAA v. Board of Regents, 468 U.S. 85, 101 (1984).

78. 468 U.S. 85 (1984).

79. *Id.* at 88.

80. *Id.* at 107.

81. *Id.* at 107. ("'Congress designed the Sherman Act as a consumer welfare proscription.'") (quoting Recter v. Sonotone Corp., 442 U.S. 330, 343 (1979)).

82. This is a questionable assumption. *See* Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1619 (1983) (finding that empirical studies neither prove nor disprove that mergers on average yield efficiencies). *See also* F.M. SHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 174 (3d ed. 1990) (noting that the weight of evidence suggests that, on average, efficiency is reduced following a merger).

and explains the federal government's lax enforcement policies during the Bush and Reagan Administrations.

C. Non-Efficiency Rationales

Although the Reagan and Bush administrations justified lax enforcement by arguing that the purpose of the antitrust laws was to maximize efficiency,[83] the legislative history and case law suggest that Congress' purpose was much different.[84] As an example, during floor debate of the Sherman Act Senator Tellor stated that the purpose was not to make everything cheap.[85] One concern Congress intended to address was the balance of economic power[86] and the relationship between economic organization and individual liberty.[87] In 1914, when the Clayton Act was adopted, many Americans viewed concentrations of economic power as a threat to the political system.[88] Some argue that Jeffersonian ideals[89] of diffused wealth and power are at the root of the antitrust laws.[90] In this view, large corporate institutions threaten individual freedom by amassing economic power and therefore political power.

Legislative history shows that the antitrust laws were passed to promote various goals. Since more active enforcement of antitrust laws would effectuate the intent of Congress, and federal authorities are not enforcing § 7 of the Clayton Act, more active state enforcement appears justified. To this end, the NAAG Guidelines dictate a more active role for states in enforcing merger laws than do the DOJ Guidelines.[91]

---

83. *See supra* notes 69–73 and accompanying text.

84. *See* Millon, *supra* note 60, at 1223. *See also House Committee Report Accompanying Proposed Clayton Act*, H.R. REP. No. 627, 63d Cong., 2d Sess. (1914) ("The concentration of wealth, money, and property in the United States under the control and hands of a few individuals or great corporations has grown to such an enormous extent that unless checked it will ultimately threaten the perpetuity of our institutions.").

85. 21 CONG. REC. 2561 (1890). Senator Tellor stated: "I have not learned the doctrine that cheapness is the only thing in the world we are to go for. I do not believe that cheapness is the only thing in the world we are to go for. I do not believe that the great object of life is to make everything cheap." *Id.*

86. *See* Millon, *supra* note 60, at 1224. *See also* United States v. Aluminum Co. of America, 148 F.2d 416, 428–29 (2d Cir. 1945) ("[G]reat industrial consolidations are inherently undesirable, regardless of their economic results.").

87. *See* Millon, *supra* note 60, at 1224.

88. *Id.* at 1228.

89. According to Jefferson, the greatest threat to individual liberty was tyranny in any form. *See* Letter from Thomas Jefferson to Joseph Cabell (Feb. 2, 1816), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 660–61 (A. Koch & W. Peden ed. 1944) ("What has destroyed liberty and the rights of man in every government which has existed under the sun? The generalizing and concentrating of all cares and powers into one body ....").

90. Paul H. Brietzke, *The Constitutionalization of Antitrust: Jefferson, Madison, Hamilton, and Thomas C. Arthur*, 22 VAL. U. L. REV. 275, 276 (1988) (citing C. KAYSEN & D. TURNER, ANTITRUST LAW 17–18 (1965)).

91. In order to simplify the discussion regarding "state" enforcement, this Note uses the NAAG Guidelines to symbolize the state position. Because the state statutes are remarkably similar in language to the federal statutes, a statutory analysis would not be appropriate. Also, this Note presents an argument based on what state policy should be, favoring the approach in the NAAG Guidelines. Therefore, the Guidelines may seem as if they are treated as "law," but only in the sense described here.

D. The NAAG Horizontal Merger Guidelines: A Political Manifesto?[92]

The NAAG Guidelines[93] may signal the direction that state merger enforcement will take in the future.[94] This is important because the policies underlying the NAAG Guidelines diametrically oppose those of the DOJ Guidelines.[95] NAAG's enforcement policy is intended to prevent excessive levels of industrial concentration and protect opportunities for small and regional businesses to compete.[96]

In a direct attack against the Reagan and Bush Administration, NAAG's policy statement expressly rejects the proposition that antitrust laws serve only to maximize consumer welfare.[97] It states that the purpose of the Clayton Act and analogous state provisions is to protect small business and avoid excessive concentrations of power.[98]

NAAG cites two cases for its position that consumer welfare considerations do not drive § 7. *United States v. Philadelphia National Bank*[99] arguably supports NAAG's contention that a primary value underlying § 7 is to prevent concentrations of economic power. In *Philadelphia National Bank*, the United States filed suit in district court to enjoin a proposed merger between Philadelphia National Bank (PNB) and Girard Trust Corn Exchange Bank, alleging violation of § 7 of the Clayton Act.[100] The proposed merger involved the second and third largest banks in Philadelphia. The merged bank would have been the largest bank in the area,[101] holding thirty percent of the area's

92. *See* Kolasky, Jr., *supra* note 48, at 849 (describing the NAAG Guidelines as primarily a "political manifesto" that reflects dissatisfaction with Reagan Administration enforcement policies).

93. NAAG GUIDELINES, *supra* note 17.

94. It is not clear that the Guidelines will change the law. *See* Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws*, 71 CAL. L. REV. 575 (1983) (arguing that the Guidelines serve as ideological support for whatever position the Department of Justice takes and as propaganda to influence the direction of the courts).

95. The policy statement in the NAAG Guidelines equates the policies under the Clayton Act with those underlying analogous state provisions; the statutes should protect small businesses, avoid concentrations of economic power, and protect consumers. State attorneys general may sue under either the federal or state statutes. Several states have provisions substantially the same as the Clayton Act. *See, e.g.*, ME. REV. STAT. ANN. tit. 10, § 1201 (West 1991); NEB. REV. STAT. § 59–501 (1991); N.J. STAT. ANN. § 56:9–4 (West 1991); OHIO REV. CODE ANN. § 1331.021 (Baldwin 1991); TEX. BUS. & COM. CODE ANN. § 15.05(d) (West Supp. 1993); WASH. REV. CODE ANN. § 19.86.010 (West 1991). Also, all states with provisions analogous to § 1 of the Sherman Act may challenge mergers. *See, e.g.*, ARIZ. REV. STAT. ANN. § 44–1403 (1991); FLA. STAT. ANN. § 542.19 (West 1991). However, the Government has not been successful in its attempts to enjoin mergers under the Sherman Act. *See* United States v. Columbia Steel Co., 334 U.S. 495, 529 (1948) (acquisition must become monopolistic to be an unreasonable restraint of trade). In NAAG's view, the state law provisions and § 7 of the Clayton Act have the same purpose. However, they strongly disagree with the interpretation of § 7 by the DOJ and the FTC.

96. NAAG GUIDELINES, *supra* note 17.

97. In its policy statement, NAAG states forcefully: "Congress evidenced little or no concern for allocative efficiency when it enacted section 7 and the other antitrust laws." *Id.* at 21,185.

98. *Id.*

99. 374 U.S. 321 (1963).

100. *Id.* at 323.

101. The Court defined the relevant area as Philadelphia and the three contiguous counties in Pennsylvania. *Id.* at 330.

total deposits.[102] The district court held that merger did not violate § 7 because it would economically benefit the community.[103]

The United States Supreme Court reversed the district court, viewing the case as a straightforward application of the test articulated in *Brown Shoe*.[104] After noting the strong trend toward concentration in the Philadelphia banking market,[105] the court reiterated its interpretation of congressional intent as a pervasive concern about economic concentration.[106] The defendant argued that the new bank would attract business to the area and stimulate economic development, economically benefitting Philadelphia. The Court rejected the argument, reasoning that Congressional intent was clear.[107]

NAAG also cites *FTC v. Procter & Gamble* to support its interpretation of the rationales underlying the antitrust laws. In that case, the Federal Trade Commission alleged that Procter & Gamble had violated § 7 of the Clayton Act by acquiring Clorox Chemicals.[108] At the time of acquisition, Clorox controlled forty-nine percent of national bleach sales[109] and dominated the bleach market in several parts of the country.[110] Reasoning that the merger placed a powerful firm in a dominant position and eliminated competition between the two firms, the Court held that the merger would substantially lessen competition and therefore violated § 7.[111] Although the Court conceded that "economies of scale" might result from the merger, it interpreted congressional intent to preclude affirmative defenses based on economies of scale.[112]

These cases show that states have substantial support for their stance on enforcement policy. Legislative history and case law bolster NAAG's contention that the DOJ's policy does not effectuate congressional intent.

---

102. *Id.* at 364.
103. *Id.* at 335.
104. The Court refers to the statutory test of whether the effect of the merger "may be substantially to lessen competition ... in any line of commerce in any section of the country." *Id.* at 355.
105. *Id.* at 331.
106. *Id.* at 363. The court reasoned that "a merger which produces a firm controlling *an undue percentage share* of the relevant market ... is so inherently likely to lessen competition that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.* (emphasis added).
107. *Id.* at 371. The Court stated that if a merger substantially lessens competition, it is not saved because it is economically beneficial, reasoning that the judiciary should not make such value judgments, particularly where congressional intent is clear. *Id.* at 371–72.
108. FTC v. Procter & Gamble, 386 U.S. 568, 569–70 (1967).
109. *Id.* at 571.
110. *Id.* at 572. For example, Clorox controlled 72% of the market in the mid-Atlantic states. Procter & Gamble, however, was a new entrant into the bleach market. *Id.*
111. *Id.* at 578–79.
112. *Id.* at 580. The Court stated: "Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers may also result in economies but struck the balance in favor of protecting competition." *Id.*

IV. SUPREMACY CLAUSE ANALYSIS: THE PREEMPTION PROBLEM

To the extent that states bar mergers under state law which the federal authorities would permit, preemption issues arise.[113] This section analyzes the constitutional implications of more active state merger enforcement under state statutes.

A. The Standard

The Supremacy Clause provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."[114] Preemption of state laws flows directly from the supremacy of federal law and Congress' substantive power to regulate.[115] State laws may be preempted in three ways. First, Congress can expressly preempt state laws if it includes a statement in the statute.[116] Second, preemption occurs if an "actual conflict" exists between the federal and state statutes.[117] Third, if the federal government regulates the area so extensively as to "occupy the field,"[118] federal law preempts state law in that field.

Actual conflict between state and federal statutes occurs if compliance with both statutes is impossible,[119] but also may be inferred if the state statute is an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[120] This latter type of conflict occurs when the state law conflicts with narrow objectives that underlie the federal enactments.[121]

Although the preemption question is essentially one of statutory construction[122] and turns on congressional intent,[123] statutory language alone will not invalidate antitrust statutes,[124] particularly because state statutes often use language identical to the federal statutes.[125]

---

113. Assuming that states adopt the thesis of this paper, i.e., that states can justifiably more actively enforce merger laws consistent with nonefficiency rationales, preemption difficulties are implicated.

114. U.S. CONST. art. I, § 10.

115. Thus, as long as the federal law was made pursuant to congressional authority, federal laws have preemptive effect. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 6–25 (2d ed. 1988).

116. *See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (An explicit statement from Congress of an intention to preempt is sufficient for preemption).

117. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963).

118. Field preemption occurs if "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement" federal regulation. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

119. *Paul*, 373 U.S. at 142–43 (federal regulation set minimum standards for quality of avocados, but California regulation of distribution did not pose irreconcilable conflict).

120. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (Pennsylvania alien registration statute posed an obstacle to the accomplishment of the full purposes and objectives of Congress because a comprehensive federal alien registration statute existed).

121. *See, e.g.*, Xerox Corp. v. County of Harris, 459 U.S. 145 (1982) (a silent federal objective in favor of creating a tax-free enclave near the Mexican border was contravened by a state tax on Mexican goods shipped to American warehouses).

122. *See* TRIBE, *supra* note 115, § 6–25.

123. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

124. As in constitutional law, the language of antitrust statutes gives little guidance as to the law in the jurisdiction.

125. Most state antitrust statutes contain language quite similar to federal statutes. *See, e.g.*, N.J. STAT. ANN. § 56:9–4 (West 1991) which states that "[n]o corporation engaged in

The United States Supreme Court held in *Watson v. Buck* that Congress did not intend federal antitrust laws to preempt state antitrust laws generally.[126] The Court reasoned that because the states' power to regulate illegal combinations was "long recognized," [127] and there was nothing in the language or legislative history to suggest an intent to displace such regulation, the state laws were not preempted.[128] The legislative history supports the view expressed in *Watson*. For example, in the floor debate of the Sherman Act, Senator Sherman stated that the federal law was intended to supplement state antitrust laws.[129] Because federal antitrust laws do not generally preempt state laws[130] and the language of state statutes parallels federal language, whether state antitrust laws are preempted depends on the application of the statute in a particular case.

B. The United States Supreme Court and Antitrust Preemption: California v. ARC America Corp.

The trend of increased state merger enforcement raises preemption issues if the application of state law conflicts with federal interpretations of § 7 of the Clayton Act.[131] Because preemption depends on the interaction of the federal and state regulatory schemes, preemption cases dealing with antitrust laws are most helpful for understanding the problem. This section analyzes the application of the most recent United States Supreme Court decision to address the issue.

California v. ARC America Corp.[132] gives insight into the resolution of the preemption problems associated with increased state merger enforcement.[133] In *ARC America*, the states of Alabama, Arizona, California, and

---

commerce shall acquire ... any part of the stock ... of another corporation engaged also in commerce, where the effect of such acquisition *may be to substantially lessen competition* ... or tend to create a monopoly." (emphasis added).

126. 313 U.S. 387, 403 (1940). *See also* Puerto Rico v. Shell Co., 302 U.S. 253, 259–60 (1937) (Puerto Rico antitrust act with substantially similar language and purpose not preempted by the Sherman Act).

127. *Watson*, 313 U.S. at 404.

128. *Id.*

129. 21 CONG. REC. 2547 (1890). At the time of the passage of the Sherman Act, Senator Sherman stated that the Act "does not announce a new principle of law, but applies old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government." 21 CONG. REC. 2456 (1890).

130. At least one commentator has argued, however, that federal law preempts state regulation of mergers. *See* Daniel Oliver, *Federal and State Antitrust Enforcement: Constitutional Principles and Policy Considerations*, 9 CARDOZO L. REV. 1245, 1268–70 (1988). FTC Chairman Daniel Oliver argues that federal regulation of mergers is a "comprehensive scheme" as to occupy the field and preempt state enforcement. However, the question of preemption reduces to a determination of congressional intent. *See* Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947). Thus, Oliver's argument is subject to attack. State regulation of mergers predates the 1976 amendment to the Clayton Act which permitted states to sue as *parens patriae* under § 7 of the Clayton Act. Because Congress was aware of state regulation of mergers through state statutes prior to permitting them to sue under federal statutes, it is unlikely that Congress intended to occupy the field. The same conclusion was reached by Yu, *supra* note 52, at 855–56.

131. Because state and federal statutes rarely differ much in language, the preemption question typically will arise when a state court interprets the state statute in a way that conflicts with federal decisional law. *See supra* note 123.

132. 490 U.S. 93 (1989).

133. Although *ARC America* did not involve mergers, the case discusses the traditional roles of federal and state laws and analyzes the preemption problems presented by the legislation. *Id.* at 97.

Minnesota sued ARC, a supplier of concrete, for allegedly conspiring to fix prices in violation of both the Sherman Act[134] and California's antitrust laws.[135] The plaintiffs sought payment out of settlement funds for the "indirect purchasers," those parties who bought products that incorporated concrete but did not directly purchase concrete.[136]

The potential conflict between the California statute and the Sherman Act arose because the United States Supreme Court had previously held in *Illinois Brick*[137] that only direct purchasers can recover treble damages.[138] The Court had to determine whether the *Illinois Brick* rule, limiting recoveries to direct purchasers under § 4 of the Clayton Act, preempted recovery under state law by "indirect purchasers."[139]

ARC conceded that federal antitrust laws do not generally preempt state antitrust laws.[140] Thus, the Court focused on whether granting indirect purchasers standing under state law posed "an obstacle to the accomplishment of the purposes and objectives of Congress."[141] The Court noted that both state and federal antitrust statutes embrace the broad purpose of deterring anticompetitive conduct and providing compensation to the victims.[142] It then distinguished *Illinois Brick* on the grounds that it did not involve the preemptive force of the federal statutes.[143] Reasoning that state causes of action are not preempted because they impose additional liability,[144] the Court held that the purposes and objectives of Congress were not frustrated by allowing an additional remedy.[145]

The Supreme Court's holding in *ARC America* must be read narrowly, because the state statutes prohibited the same conduct as did the federal law and were intended to further the same objectives. The state statutes merely imposed liability *in addition to* federal law,[146] which is ordinarily not preempted.[147] Thus, the Court did not address the issue of whether a state may prohibit activity that the federal antitrust law does *not* prohibit. Because *ARC America* did not involve preemption of state merger laws, it is useful to consider a state decision that directly addresses the issue.

C. Preemption of State Merger Laws: State *ex rel.* Van De Kamp v. Texaco, Inc.

Although no United States Supreme Court cases directly address whether the Clayton Act preempts a state merger law, the California Court of Appeals

134. *Id.*
135. *Id.*
136. *Id.* at 99.
137. 431 U.S. 720 (1977). This case held that in order to recover treble damages under § 4 of the Clayton Act, the injured party had to be a direct purchaser from the price fixing defendants. Thus, if an injured party purchased products in which the concrete was incorporated, the party could not sue under federal law.
138. *Id.* at 724–25.
139. 490 U.S. at 99–101.
140. *Id.* at 101.
141. *Id.* at 102.
142. *Id.*
143. *Id.*
144. *Id.* at 105.
145. *Id.*
146. *Id.*
147. *Id.* (citing Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257–58 (1984)).

confronted the issue in *State ex rel. Van De Kamp v. Texaco*.[148] Texaco tendered an offer to acquire stock of Getty Oil Company (Getty) as part of a proposed merger.[149] After reviewing the premerger financial information,[150] the FTC filed a complaint alleging violation of § 7 of the Clayton Act.[151] The FTC permitted the merger after Getty agreed to enter into a consent order that regulated the proposed merger.[152]

Despite the FTC's issuance of a consent order, the state of California challenged the merger, alleging violation of California's antitrust laws embodied in the Cartwright Act.[153] The court determined that the FTC consent order preempted any regulation under the state antitrust laws.[154] Focusing on the particular act of the federal regulator, the court reasoned that because the consent order completely regulated the merger, there was no room for state regulation over the same matters.[155] The court forcefully stated that the "[s]tate's action poses a direct conflict with federal law by purporting to prohibit that which the federal government has specifically authorized."[156] In addition to posing a direct conflict with federal authorization of the merger, the court further reasoned that the State's action would pose an obstacle to federal regulation of large mergers through the consent order.[157] If states could challenge a merger *after* a consent order was issued, the bargaining power of the federal government would be hindered.[158]

Texaco makes it clear that once the federal government has issued a consent order,[159] states cannot challenge the merger. However, what if the FTC or DOJ just allows a merger to go forward without issuing a consent order? Is this enough "regulation" to preempt a state challenge? If it is, then state merger enforcement involving interstate commerce might be impossible. Because mergers involving interstate commerce present unique complexities, the next section addresses the preemption problems presented by interstate mergers.

148. 219 Cal. Rptr. 824 (Ct. App. 3 Dist. 1985), *aff'd on other grounds*, 762 P.2d 385, 386 (Cal. 1988).
149. *Id.* at 825.
150. See *supra* notes 53–59 and accompanying text for a discussion of pre-merger financial information.
151. 219 Cal. Rptr. at 825.
152. *Id.* at 827–28. The order required divestiture of assets, placed restrictions on Texaco's ability to acquire other enterprises, and mandated an increase in refining capacity for certain regions. The Court characterized the regulation as "comprehensive."
153. *Id.* at 829.
154. *Id.* at 831.
155. *Id.*
156. *Id.*
157. *Id.* at 834.
158. *Id.* at 834–35. Bargaining power would be limited because the federal government exchanges a promise not to sue for compliance with the consent order. If states can still dissolve the merger, it would be difficult to secure pre-merger concessions.
159. The focus on the consent order is that the "particular matter" has been regulated by the federal agency. *Id.* at 831 (citing Leader Theatre Group v. Randforce Amusement Corp., 58 N.Y.S.2d 304, 308 (Sup. Ct. 1945)).

D. Mergers Affecting Interstate Commerce

Neither *ARC America* nor *Texaco* directly addressed the issue of preemption in the context of a merger affecting interstate commerce.[160] Several state courts have held that federal antitrust laws do not preempt state antitrust laws if the matters affect interstate commerce, but have local impact.[161]

The Missouri Court of Appeals considered the application of state antitrust statutes to interstate commerce in *C. Bennet Building Supplies v. Jenn Air*.[162] The plaintiff alleged that Jenn Air conspired to force plaintiff out of the market in violation of Missouri antitrust laws.[163] The trial court dismissed the complaint for lack of subject matter jurisdiction because the conduct involved interstate commerce.[164]

The Court of Appeals reversed the trial court, holding that the Sherman Act does not preempt Missouri statutes applied to interstate commerce without "state frustration of strong federal policy."[165] Although the court had little difficulty concluding that the state statute was not preempted, the court appropriately characterized federal and state regulation of interstate economic relations as a "maze."[166]

Although state regulation that sufficiently burdens interstate commerce violates the Commerce Clause,[167] this Note focuses on whether state merger regulation violates the Supremacy Clause.[168] The questions are interrelated, however, because national merger regulation is traditionally a federal function, while local merger regulation is traditionally a state function. This interrelation is illustrated by the Washington Court of Appeals decision in *State v. Sterling Theatres Co.*[169] The state alleged that Sterling violated Washington antitrust statutes by monopolizing second-run showings of movies in Seattle.[170] The court considered whether the application of the state's antitrust laws violated the Commerce and Supremacy Clauses. Because the court felt that the factors to be

---

160. *Texaco* involved interstate commerce, but the court did not reach the issue due to the existence of a consent order from the FTC which regulated the merger. *Texaco*, 219 Cal. Rptr. at 831.

161. *See, e.g.*, State v. Sterling Theatres Co., 394 P.2d 226 (Wash. 1964); State v. Southeast Tex. Chapter of Nat'l Elec. Contractor's Ass'n, 358 S.W.2d 711 (Tex. Civ. App. 1962); *Leader Theatre Corp.*, 58 N.Y.S.2d at 304.

162. 759 S.W.2d 883 (Mo. App. 1988).

163. *Id.* at 885.

164. *Id.* at 886.

165. *Id.* at 889. The court stated that the Sherman Act does not preempt Missouri law "absent specific state frustration of strong federal policy." *But see*, Young v. Seaway Pipelines, Inc., 576 P.2d 1148, 1151 (Okla. 1977) (holding that Oklahoma courts do not have juridiction over an interstate conspiracy to violate antitrust laws); Kasuga v. Kelly, 257 F.2d 48, 55 (7th Cir. 1958), *aff'd*, 358 U.S. 516 (1958) (Antitrust Act of Illinois applies only to "intrastate commerce"); Denison Mattress Factory v. Spring-Air Co., 308 F.2d 403, 413 (5th Cir. 1962) (Texas antitrust statutes will not apply to interstate activities).

166. *Jenn Air*, 759 S.W.2d at 887.

167. U.S. CONST. art. I, § 8 ("The Congress shall have the power ... To regulate Commerce ... among the several states."). *See, e.g.*, Partee v. San Diego Chargers, 668 P.2d 674 (Cal. 1983), where the court held that the burden on interstate commerce of regulating national football under state antitrust laws outweighs the state's interest in regulation.

168. The United States Supreme Court held that state antitrust laws can be applied to matters involving interstate commerce. *See, e.g.*, United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944) (state antitrust statutes can be applied to insurance business).

169. 394 P.2d 226 (Wash. 1964).

170. *Id.* at 227.

considered to ascertain congressional intent were "essentially the same," the court addressed the questions together.[171]

After noting the well established rule that state action incidentally affecting interstate commerce is valid when sufficient local interests exist, the court emphasized the "primarily local" impact of the motion picture industry.[172] Furthermore, the court rejected the argument that a need for "uniformity of regulation" indicates Congressional intent to preempt state regulation, because Congress permitted enforcement by private litigants as well as the Attorney General and the FTC.[173]

As *Bennett* and *Sterling* demonstrate, the burden on interstate commerce may influence the preemption analysis. Therefore, an analysis of the relative importance of local versus federal interests may be necessary.[174] If the state law results in either a direct restraint on interstate commerce or an indirect regulation of interstate commerce with excessive burdens on commerce, then a state could not bar a merger allowed under federal law.[175]

Courts have reached different results on the role that interstate effects should play in Supremacy Clause challenges. In *State of Wisconsin v. Milwaukee Braves, Inc.*,[176] Wisconsin sued National League Baseball and ten owners for exercising monopoly power in violation of Wisconsin antitrust statutes.[177] The state sought an injunction requiring the National League to operate a major league baseball team in Milwaukee.[178]

The National League previously enjoyed a judicially created exemption from federal antitrust laws.[179] Because Congress failed to reverse the United States Supreme Court's exemption,[180] the Supreme Court of Wisconsin inferred a congressional policy of exemption.[181] Expressing particular concern about the interstate effects of applying Wisconsin antitrust laws, the court held that the federal "policy" preempted the state laws as to the National League.[182]

In contrast to *Milwaukee Braves*, the New Mexico Supreme Court held that federal law did not preempt the New Mexico Antitrust Act in *United*

---

171. *Id.* at 228 ("[T]he factors which must be considered in reference to an implication of congressional intent to preempt the field of antitrust regulation are essentially the same as those involved in the balancing test used to determine whether the commerce clause would exclude state action of its own force, irrespective of a federal statute.").

172. *Id.*

173. *Id.*

174. *See, e.g.*, Liquor Corp. v. Duffy, 479 U.S. 335 (1987) (Supreme Court balanced the state's local interest in protecting liquor retailers against the federal interest in enforcing antitrust laws barring retail price maintenance).

175. This formulation is analogous to Commerce Clause analysis. It is different, however, because even if the burden does not violate the Commerce Clause, the burden may be a factor in the Supremacy Clause analysis. *See* WILLIAM T. LIFLAND, STATE ANTITRUST LAW, § 6.02, at 6–6 (1984).

176. 144 N.W.2d 1 (Wis. 1966), *cert. denied*, 385 U.S. 1990 (1966), *reh'g denied*, 385 U.S. 1044 (1967).

177. *Id.* at 2.

178. *Id.*

179. *See* Federal Baseball Club, Inc. v. National League Baseball, 259 U.S. 200 (1922).

180. *Milwaukee Braves, Inc.*, 144 N.W.2d 1.

181. *Id.* at 12.

182. *Id.* at 18 ("[T]he impact of a state's action on activities outside its borders are sufficient that we should not read into the silence of Congress permission for the states to regulate these matters.").

Nuclear Corp. v. General Atomic Co.[183] *United Nuclear* involved a complex international cartel to control the production and prices of uranium. Although the supreme court conceded that most of the activities occurred in either interstate or foreign commerce,[184] the court held that the state antitrust laws applied since there were significant "local interests."[185] Because over fifty percent of the uranium mining workforce resided in New Mexico, the court opined that any monopolization of the uranium market would have a "substantial effect" on the commerce of New Mexico.[186] Thus, under *United Nuclear*, a state may challenge a merger which is primarily interstate in its effects, provided there is a "substantial effect" on the economy.

As the above discussion illustrates, the preemption issues related to state merger enforcement become more complex if the merger involves interstate commerce. While no bright lines can be drawn, the authorities suggest that states can challenge interstate mergers, provided there is a substantial effect on a "local interest."

Because state merger enforcement in the interstate context appears justified, the next section addresses the primary argument against state merger enforcement.

B. State Merger Enforcement vs. Nationally Uniform Enforcement?

While states are justified in more actively enforcing their merger laws, a natural question arises: is state involvement in merger regulation good for the country?[187] Because the question is value laden, this Note reserves judgment on whether increased enforcement is "good" for the country. Instead, this section considers whether the question is even relevant to a discussion about whether state merger laws are preempted.

Some commentators express serious reservations about active state regulation of mergers involving companies that operate nationally.[188] The chief argument is the need for national uniformity in merger laws. These commentators argue that states will enforce the laws in an inconsistent manner, burdening businesses.[189] While this contention has intuitive appeal, the Clayton Act does not grant national uniformity in enforcement. The Act applies to "any line of commerce in any activity affecting commerce in any section of the country"[190] and grants standing to private consumers and the state attorneys general.[191]

183. 1980–81 Trade Cas. (CCH) ¶ 63,639 (N.M. Sup. Ct. 1980), *cert. denied*, 454 U.S. 878 (1981).

184. *Id.* at 77,415.

185. Discussing the Commerce Clause, the court framed the issue as whether the conduct "occurred exclusively in interstate and foreign commerce and had no significant local respects." *Id.* at 77,415.

186. *Id.* at 77,416.

187. The DOJ's position is that enforcement of § 7 is not good for the nation; it should reach only as far as § 1. *See Government Loses Bid to Halt Merger of Roanoake Area Hospitals*, [Jan.–Dec.] 56 Antitrust & Trade Reg. Rep. (BNA) No. 1404, at 279 (Feb. 23, 1989).

188. *See* Kolasky, Jr., *supra* note 48, at 849. *See also* Mark Crane, *The Future Direction of Antitrust*, 56 ANTITRUST L.J. 3, 9 (1987) (arguing that a national merger policy is necessary, not one made in "fifty different capitols" because of the inconsistent demands it places on businesses).

189. *See supra* note 188.

190. 15 U.S.C. § 18 (Supp. III 1991).

191. 5 U.S.C. § 15c (Supp. III 1991).

Because Congress never intended nationally uniform merger enforcement, the argument is a red herring: unless Congress emphatically changes its position, we are stuck with dual enforcement.

Although it is true that states could avoid the constitutional problems discussed in this Note by suing under § 7 of the Clayton Act, this tactic would take antitrust issues affecting interstate commerce out of state courts. This tactic presents problems, however, because federal interpretations of the Clayton Act may not be as active as state decisional law.[192]

V. THE PROPOSED ANALYTIC FRAMEWORK THAT AVOIDS PREEMPTION PROBLEMS

The thesis of this Note is essentially that states are justified in more vigorously regulating mergers, even if the companies operate nationally. The preemption problems arise only when the suit is under state law and become problematic when interstate commerce is involved.

The proposed solution to the interstate commerce problems is for state attorneys general[193] to apply the NAAG Guidelines to determine whether to challenge the merger, including the underlying rationales.[194] Then, as to mergers burdening interstate commerce, the attorneys general should incorporate a variation of Commerce Clause analysis into the enforcement decision. The Commerce Clause-type analysis will serve as a defense to prosecutorial challenge. That is, after determining whether the merger would "substantially lessen competition,"[195] the state attorneys general should balance that local impact against the burden on interstate commerce.[196] Thus, even if the merger creates a market concentration that exceeds the standard in the NAAG Guidelines,[197] the attorneys general should decline to oppose the merger.

The proposed test does not just ask the question of whether state regulation of the merger would violate the Commerce Clause. Rather, it is sensitive to the dynamic between interstate commerce and preemption.[198] Thus, the threshold for the "balance" of benefits against burdens will be lower in the context of assessing whether state law should be applied than it will be under conventional Commerce Clause analysis.

Of course, this "interstate commerce defense" does not provide a bright line rule for prosecutors to apply. It is unclear, however, whether a bright line rule would be appropriate to guide prosecutorial discretion. The primary benefit of the defense is that it will avoid preemption problems by addressing them

192. Although the states' proposed increased enforcement has been prompted by the DOJ and FTC attitudes, the underlying rationale applied by federal courts may be moving in a direction incompatible with the rationales in the NAAG Guidelines. *See supra* notes 93–112 and accompanying text.

193. Ideally, state attorneys general would cooperate in merger enforcement, but the focus of the proposed solution is for individual states to make independent determinations under the standards outlined in the Guidelines.

194. *See supra* notes 93–106 and accompanying text.

195. *See supra* notes 29–32 and accompanying text.

196. Ideally, the state attorneys general would engage in rigorous market analysis to determine the local and interstate effects. This Note does not, however, attempt to create a framework for such analysis. It only urges that the market analysis be done.

197. *See infra* text accompanying note 203.

198. *See supra* part IV.D.

in the offices of the attorneys general before they reach the judicial forum. This can save litigation costs and promote cooperation between federal and state regulators.[199]

To further explain the "model" of prosecutorial discretion proposed, a brief overview of the NAAG Guidelines follows.

A. The NAAG Guidelines

The NAAG Guidelines are merely statements of when to exercise prosecutorial discretion[200] and therefore do not have the force of law.[201] They provide a uniform framework for members to use to evaluate the "anticompetitive effects" of a proposed merger.[202]

Under the NAAG Guidelines, evaluation of a proposed merger is a three step process. First, the attorney general defines the relevant product and geographic markets.[203] Second, the attorney general compares the increase in market concentration resulting from the merger to the standard concentration ratio, as defined in the Guidelines.[204] Third, if the concentration level exceeds the standard, other factors such as "barriers to entry" are balanced against the concentration levels.[205] Even if the market is highly concentrated, if it is easy for new firms to enter the market, the concentration levels might not be sufficient to warrant a challenge.

Both the DOJ and NAAG have issued Horizontal Merger Guidelines to guide prosecutorial discretion in determining whether to challenged a merger.[206] The NAAG Guidelines differ in three important respects from the DOJ Guidelines.[207] First, markets are defined more broadly in the DOJ Guidelines, resulting in lower concentration figures. Second, the policy assumptions of the two Guidelines are inconsistent. Finally, the NAAG Guidelines allow fewer defenses to excessive concentration than the DOJ Guidelines.[208]

---

199. *See* Yu, *supra* note 52.

200. Because the Guidelines are promulgated by the attorneys general of the states as suggested behavior by prosecutors, they are not "law." To the extent that the Guidelines coincide with the common law or statutes of the state, the behavior may constitute a violation of that law. However, one could not be prosecuted for violating the NAAG or DOJ Guidelines.

201. Some have argued that the FTC and the DOJ are actually economic regulators and not simply prosecutorial bodies. *See, e.g.*, E. Thomas Sullivan, *The Antitrust Division as a Regulatory Agency: An Enforcement Policy in Transition*, 64 WASH. U. L.Q. 997 (1986). If this argument is taken to its conclusion, it could be argued that the DOJ Guidelines may actually preempt the NAAG guidelines. However, no court has so held.

202. NAAG GUIDELINES, *supra* note 17.

203. *Id.*

204. *Id.*

205. *Id.*

206. Neither the DOJ Guidelines nor the NAAG Guidelines have the force of law—they guide decision-making and inform corporate behavior. *See* Allis Chalmers Mfg. Co. v. White Consol. Indus., 414 F.2d 506, 524 (3d Cir. 1969), *cert denied*, 396 U.S. 1009 (1970) (merger Guidelines do not have the force of law and therefore are not binding; they provide standards for the DOJ to determine whether to challenge a merger).

207. For a comprehensive discussion of the similarities and differences between the NAAG and DOJ Guidelines, see Cirace, *supra* note 67.

208. The NAAG Guidelines permit four "defenses," while the DOJ will consider up to 14 mitigating factors. For an overview of the process under the 1992 Department of Justice and Federal Trade Commission's *Horizontal Merger Guidelines*, see Charles A. James, *Overview of the 1992 Horizontal Merger Guidelines*, 61 ANTITRUST L.J. 447 (1993).

VI. CONCLUSION

States have become more active in enforcement of antitrust laws in general, and mergers in particular. Based on the legislative history of antitrust laws and case law, states can justifiably become more active in merger enforcement, though state involvement raises preemption problems, particularly as to mergers affecting interstate commerce.

This Note has proposed an analytic framework for state attorneys general to use to evaluate the enforcement decision. The framework adopts the approach in the NAAG Guidelines, but adds a "defense" based on the impact a merger has on interstate commerce. The solution does not solve all preemption problems, but preempts many preemption problems because state attorneys general would expressly consider Supremacy Clause issues *before* filing suit. This will conserve judicial resources and promote cooperative federalism.