

ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, October 26, 2005

Federal Trade Commission Headquarters
600 Pennsylvania Avenue, N.W., Room 432
Washington, D.C.

The meeting convened, pursuant to notice, at 1:30 p.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
BOBBY R. BURCHFIELD, Commissioner
W. STEPHEN CANNON, Commissioner
DENNIS W. CARLTON, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

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HIRAM ANDREWS, Law Clerk

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**Allocation of Antitrust Enforcement between the States and
the Federal Government**

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Panelists:

PROF. MICHAEL E. DeBOW, Cumberland School of Law,
Samford University

PROF. HARRY FIRST, New York University Law School

PHILLIP A. PROGER, Jones Day

HON. G. STEVEN ROWE, Attorney General, State of
Maine

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

PROCEEDINGS

CHAIRPERSON GARZA: I would like to open the hearings of the Antitrust Modernization Commission, October 26, 2005.

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I would like to welcome our distinguished witnesses and our guests.

One of the topics selected for study by this Commission is the multiplicity of antitrust policy and enforcement agents in the United States. The U.S. is somewhat unique in the degree of its decentralization. Besides the two federal antitrust agencies, one in the executive branch and the other an independent administrative agency, there are 50 state attorneys general, countless private parties, and several federal and state sector agencies regulating key infrastructure industries like transportation, energy, telecom, and banking.

The question of whether this is an optimal system and what, if any, changes can or should be made needs to be looked at as a whole, and it also needs to be considered in light of other issues the Commission is examining, such as the question of whether federal remedial power should be augmented, the indirect purchaser issue, and even the globalization of antitrust enforcement.

Today's hearing, however, will focus specifically on the interaction of state and federal antitrust enforcement. Other hearings have addressed or will address dual federal enforcement, sector regulation, federal

remedies, indirect purchaser litigation, and international antitrust issues.

I would like to start by asking each of the witnesses to summarize his written testimony in no more than about five minutes. The box here on the table and on your table will have lights to help you monitor your time. Green will come on initially, and as you come to the end of your time, it will turn yellow and then red.

I am not likely to stop you cold in the middle of your statement, but if you could try to monitor your own time, that would be great.

After you have summarized your written testimony, Commissioner Warden will take the lead for the Commission in asking questions initially for about 20 minutes or so.

Following that, other Commissioners will each have about ten minutes to ask any questions they may have. Normally, we do this in five minutes, but because we have a relatively small panel, and one of our Commissioners absent, we will give each Commissioner ten minutes today, if they want it.

The hearing is being transcribed. Transcripts will be available to the public as are all the witness statements on the AMC website, www.amc.gov.

And with that, I will give it over to the panel, and General Rowe, would you like to go first?

MR. ROWE: Yes, ma'am. Thank you very much, Madam Chair, members of the Commission, and fellow panelists. It is a privilege to be here this afternoon, and I thank you for allowing me to come and testify today.

My name is Steven Rowe. I am the Attorney General for the state of Maine. With me today is Assistant Attorney General Francis Ackerman. Francis is a longtime antitrust lawyer in the Office of the Attorney General in Maine.

I have served as Attorney General for the state of Maine for the past five years, and along with the obligations that go with the job of state attorney general is the duty to enforce state antitrust laws.

As you know, state attorneys general have enforcement powers and obligations under federal law as well.

I am here today because I am deeply concerned by proposals to limit or even eliminate states' enforcement and antitrust authority, and to preempt state laws. I know that many other state attorneys general share my concerns.

However, before going any further, let me make clear that my comments today represent my views and the views of my office only, and are not those of any other agency or

person.

I have read my fellow panelists' submissions and look forward to a lively discussion this afternoon, but before speaking about our differences, I want to emphasize that each of us here before the Commission, like you—as enforcers, as scholars, as practitioners, we all share a common commitment, and there are two fundamental premises that I am confident we can all accept as a basis for our dialogue today.

First, antitrust law serves public policy in ways that are crucial to our free enterprise economic system and its governance. They are designed to protect competition in the marketplace and secure its benefits for all citizens.

The second premise really follows from the first. It is that antitrust law should be enforced against all violations, large or small, global or local.

In other words, antitrust enforcement should not be selective. On this basis, I hope we can agree that any reform proposal that would appreciably diminish enforcement coverage at any level should be rejected.

To that end, I would like to try to dispel some fundamental misunderstandings.

Critics of state enforcement argue that reforms are

needed because of the overlap in state and federal jurisdictions. They say it results in duplication and inefficiency and greater burdens and longer delays and philosophical divergence and uncertainty.

At the same time, it has been suggested that state enforcement is expendable because it has accomplished so little. The notion that the states have done little to enforce antitrust laws is a grave misconception, but one that, unfortunately, the states have helped to create.

Frequently, we have failed to toot our own horns. We have failed to sufficiently publicize the results of our cases and to maintain current, accurate, and accessible data.

But I think you will find those things are changing. The substantial nature of the states' enforcement accomplishments over the past 20 years is only beginning to emerge as we continue to gather information and build an accurate database.

Of course, our resources are and will always be far less than those of our federal colleagues, but having fewer resources makes us thrifty. Maine's own data show that over the past 20 years, we brought 50 antitrust actions, 30 of them single-state, and 20 multistate.

On an annual basis, that translates to two or three

cases per year, including one multistate action per year.

In his written testimony, Professor DeBow repeats his estimate that, nationwide, 12 state enforcement cases are brought each year. Professor First's more recent tally for some 20 jurisdictions, which includes Maine but does omit at least two states with very active antitrust programs, shows an average of 17 or 18 cases per year.

At this point, the significance of the states' collective achievement is not fully ascertainable, but at the end of the day, it will certainly be far greater than critics initially assumed.

A second misconception concerns the degree to which the state-federal jurisdictional overlap results in duplication and increased inefficiency, burdens, and delays.

In the non-merger area, the large majority of the single-state actions Maine has brought have been local cases. In most instances, we believe the federal agencies would be poorly situated to investigate and develop those cases.

State attorneys general, in contrast, have superior knowledge of local market dynamics as well as local laws. We're on the spot, and we are capable of rapid and efficient response.

Multistate non-merger cases, for the most part, are

brought by the attorneys general in their unique roles as *parens patriae*.

Given the limitations of private class actions and the Federal Trade Commission's rarely used disgorgement remedy, these *parens* cases are hardly duplicative. Rather, they represent a unique contribution to the achievement of core antitrust goals that is of direct benefit to our citizens.

Millions of dollars have been recovered for consumers across the country. To the extent that there is any duplication on the non-merger side, it is effectively managed through state-federal collaboration as in cases like *Mylan Labs* and *State of Maine v. Maine Health Alliance*. These cases illustrate that.

Moreover, the local presence and capabilities of state enforcers actually enhance efficiency and minimize burdens and delay.

Now in the merger area, there are concededly more occasions for concern about duplicative enforcement and inefficiency. However, the extent to which the enforcement activity of federal agencies and the states in the merger areas is actually duplicative is unclear. Maine's experience shows federal involvement in only three of the 15 single-

state cases, in addition to the five multistate cases in which we participated.

With the Chair's permission, could I continue for another minute? Thank you.

In other words, federal collaboration plays a role in only 40 percent of Maine's merger reviews. Nevertheless, we certainly agree that in merger cases where we do collaborate, the joint federal-and-state process has at times been somewhat cumbersome and inefficient.

However, there has been consistent progress in increasing the efficiency with which states and the federal enforcement agencies work together.

This is due, in large part, to the development of the cooperative procedures for conducting joint merger reviews and to the continuous communication between the federal agencies and the states.

I should mention that the state of Maine has developed excellent working relationships and valued contacts at both the Federal Trade Commission and the Antitrust Division of the Department of Justice.

To be clear, however, there is room for improvement. I agree with Mr. Proger about this problem, how best to enhance cooperation and coordination in the context

of the state-federal joint merger reviews: it does merit your attention. It should certainly be the focus of multilateral efforts.

However, as a chief law enforcement officer of a sovereign state, I am strongly opposed to any statutory change that limits state jurisdiction.

I will finish.

I began these remarks by attempting to explore common ground. I hope to have contributed to clearing up some misunderstanding, but we do need to confront the issues that divide state enforcement and its proponents from its detractors, and I submit that the core issue has two aspects:

First, does state enforcement pose a threat to federal antitrust policy?

And second, do the constitutional values associated with federalism merit continued respect in an antitrust context?

The ultimate issue here is federalism. I doubt very much that any of our federal colleagues would view us as a threat, and indeed, we are not a threat. Certainly, on occasion we have viewed matters differently than the federal enforcement agencies. Sometimes we provide a local or, if you prefer, a parochial perspective. But parochialism isn't

all bad.

By the way, to me it means simply concern for what is happening at the local level. In a given merger, for example, we may care deeply about a local anticompetitive impact overlooked by federal enforcers. Or we may decide to prosecute a local non-merger matter that was passed over by our federal counterparts.

In other instances, we have frankly disagreed with federal enforcers or enforcement decisions involving national or regional matters over which we have concurrent authority.

But independence of this kind—and I believe this is important—whether in a parochial or national context should not be viewed as a threat. Surely, antitrust law need not be a one-party state where central control and orthodoxy are paramount and dissent unacceptable. Insistence on unquestioning acceptance of orthodox antitrust doctrine has never been the American way. In fact, we know the American system of government and law is founded on respect for and acceptance of diversity and pluralism. This is reflected in our unique system of federalism that recognizes the concurrent sovereign jurisdiction of state and federal authorities in many areas.

Our system of overlapping antitrust enforcement is

rooted in these constitutional values.

The real issue is whether, like Justice Brandeis said in the *New State Ice* case, we think there is value in experimentation by the states as laboratories of democracy.

Professor DeBow's written submission makes clear his view that, and I quote, "Experimentation threatens national antitrust policy."

On behalf of one sovereign state in our federal system, I beg to differ. Rather, I believe state enforcement, experimental or not, has contributed significantly to the seamless responsive and efficient administration of justice, and to the extent that our concurrent authority permits honest doctrinal divergence, the resulting dialogue builds, tests, and strengthens our antitrust policy consensus, and it enhances the legitimacy of the policy making.

I thank you very much for allowing me to testify, and I apologize for going over the time.

CHAIRPERSON GARZA: Mr. Proger.

MR. PROGER: Thank you.

When asked to testify here today, I thought about how I could be of some value to this Commission. As I noted in my article, a lot of people who I consider to be much more

knowledgeable than me have written extensively in this area.

I, on the other hand, have practiced extensively in this area, and I have had the pleasure for most of this year of being in a national multistate merger, and I have been involved in a few of the cases cited by Professor First and others.

So in my paper I tried to address some practical considerations that might be helpful when addressing the issue, and I didn't confront the fundamental issue of whether the states should have a role in a federal system of government.

I think it is a very difficult question. But I start off by asking the questions, what is the role of our antitrust laws, and why do we have them.

I believe that they are truly a unique set of laws that are fundamental to this country. The free market system is very important and a key to the success of this nation, and it protects all. It protects everyone with the ability to succeed. And if you have that system, then it seems to me that you have to think about our set of dual or multiple enforcement, and ask, does that serve the ultimate goals?

I perceive four enforcers. There are two federal, there are states, there are private attorneys general—that's

three. But none of us have mentioned the importance of self-policing that goes on every day when lawyers and clients advise themselves of what they can do.

I think it is fairly important in that system and, of course, I would defer to the attorney general sitting to my right, that the laws have a predictability, and that they have a certain degree of consistency.

Now, as Professor First points out, laws should evolve, and I agree with that. But the antitrust laws in and of themselves are, by nature, a fairly vague, difficult set of laws dependent upon very specific facts, and I think it is an important criterion as we look into the system of enforcement that our laws be predictable.

Multiple enforcement that is predictable and is good on a common set of values and is consistent—it's hard to argue that that isn't good. But the real question is, do we have consistent, predictable, good enforcement? And that raises the inevitable question, do the states have the resources to engage in this enforcement?

I think the states have recognized the problem, and through NAAG, the Compact, and the Multistate Task Force, have attempted to deal with some of the issues that they confront in this.

But it is still true today—and this is not with any disrespect to any individual state or the men and women who serve in this area—that the resources at the state level are different than at the federal level. And that is something that I think, if the states want to continue to be active in this area, they need to think through.

Enforcement needs to be without a tax or burden on the parties. Enforcement needs to be efficient, in my view. And it needs to be predictable.

We, more than anything else, are a nation that values self-policing, and we value respect for the law. If the law has so many different views or is so complicated that it's hard to determine what is correct, that, in my mind, is not helpful.

That doesn't mean that multiple enforcement has to have that. I think the states could do several things to enhance the situation.

One, I think they need to look at the NAAG Merger Guidelines and either repeal them or bring them current with current law. Frankly, most states tend to follow the federal Guidelines, anyway, and not the NAAG Guidelines. So if they are going to have them, they need to take a hard look at them.

Two, states—again, with all due respect to our system of federalism—notwithstanding the Compact, still act very individually in the investigations. There needs to be better intrastate-interstate coordination. Maybe some beefing up at NAAG and having some career people at NAAG who develop specialized expertise might be helpful.

Each state has its own confidentiality statute. It is a separate negotiation. Maybe NAAG could take a lead in drafting model statutes that the states then could choose to adopt—if the legislatures pass them—so there would be consistency, and one state could act for all.

I also want to just end—because I see the limit on the time—by pointing out, as I did in my article, that I think we need to separate mergers from other enforcement. Clearly, in *parens patriae*, the states, first of all, are going to the court, so there is some consistency. They have remedies not necessarily available to the federal government. *Nine West* and other cases show examples where I think the states have done enforcement in a way that benefited consumers and, frankly, benefited the respondents. *Nine West* was a case, in which, frankly, the states knocked out a class action brought on behalf of a class by plaintiffs' attorneys. I think the *parens patriae* action was a superior action and

benefited consumers.

So I see my time is up. I will conclude there. But I do think that you are faced with a difficult question in our system of federalism, but I think that there is a lot we can do here to improve it.

CHAIRPERSON GARZA: Thank you.

Professor First?

PROF. FIRST: Thank you, Madam Chair, and thank you, Commissioners, for inviting me here today to discuss state antitrust enforcement. I will summarize my statement, and then hopefully we will have some interesting discussion, I assume.

As I assume you all know, I teach law at New York University Law School, but I did take a two-year leave at one point to head up the New York State Antitrust Bureau, so maybe I'm an example of how a little knowledge can be a dangerous thing.

In my written statement to the Commission, I have tried to provide some historical and theoretical background for assessing state antitrust enforcement, along with a preliminary study that I am working on in the actual scope of state antitrust enforcement today.

So first, with regard to historical background, I

would emphasize that state antitrust enforcement needs to be considered in the context of a rich history in the United States of using multiple institutions of antitrust enforcement, and in particular I would point to the early period of antitrust, starting in 1890, when the Attorney General was given jurisdiction to bring suits under the Sherman Act, and private parties were given a private right of action, and ending in 1914 with the creation of a second federal antitrust enforcement agency, the Federal Trade Commission.

Congressional action in 1890, and particularly in 1914, was taken against the background of some very robust state enforcement, often undertaken against the same trusts that were targets of Justice Department action.

Congress understood in these formative times that antitrust would benefit from multiple institutions of enforcement, and this included state antitrust enforcement.

Second, with regard to the theoretical justification for multiple enforcement, I would emphasize that competition in antitrust enforcement can bring benefits similar to the benefits of competition in product markets, disciplining providers and helping to bring about an optimal level of enforcement.

Setting up a competitive enforcement structure is more likely to produce good results than the establishment of a monopoly provider of antitrust enforcement.

Third, my empirical study: the study was based, as I indicated, primarily on cases assembled by NAAG's Antitrust Task Force, and I want to thank them again for allowing me to draw on that database.

I want to emphasize that the data are still preliminary and that a count of the states actually included in the database to this point is only 24 of the possible 56 jurisdictions, and contrary to what I put in my written testimony, this does include Maine. So my apologies, General Rowe; you are in there.

Now this means that there is certainly an undercount in my study of state enforcement, although I can't say how substantial that undercount is.

The overall conclusion of my empirical study is that the negative story on state antitrust enforcement is not supported by the data, and I'll present six points for the study.

One, state antitrust enforcement is more substantial in numbers than many critics say, and this is set out in Table 1.

Two, there is a greater use of state courts than most observers had thought or most talk about. State enforcement is not just a *parens patriae* story, and I think General Rowe made that point again.

Point three, state involvement in what I call "complementary enforcement" with the federal agencies—that is, enforcement that makes some use of federal effort—is far less frequent than the free-rider epithet would suggest.

Table 3 shows that more than 70 percent of state enforcement is done by the states without federal effort.

Point four, the level of state enforcement is, as might be expected, less than federal agency enforcement but not that much less, actually, than the numbers of cases brought by the FTC; and, in five of the ten years studied, more than Department of Justice civil enforcement actually. And that is set out in Graph 1.

Point five, states do a fair amount of merger enforcement, as we all know—roughly about a third of the cases brought, sometimes more, but the states' antitrust concerns are far more varied. Most of the problems that give rise to antitrust suits are horizontal, with price fixing and bid rigging leading the pack. But interestingly, the states pay more attention to monopolization issues than apparently

the Department of Justice, as shown in the Department's enforcement data; Justice has filed no monopolization cases since 2002.

Sixth point, I think we should be concerned about the overall level of antitrust enforcement, which is not keeping up with the growth in our economy. This is true for federal and state enforcement, although the decline in state enforcement against the growth in the economy is less precipitous than the decline in federal enforcement. At least when measured against the size of the economy, we are more likely to have under-enforcement than over-enforcement.

So, the policy conclusion is this: one way to modernize antitrust enforcement is to invest in it; upgrade the enforcement effort. State agencies are clearly under-resourced. More resources would allow the states to engage in better-informed and more effective enforcement.

Now, there may be a number of ways to provide this capital infusion, but one way may be to make clear that a portion of federal Hart-Scott *parens patriae* recoveries should go to the states for state antitrust enforcement.

Thank you very much.

CHAIRPERSON GARZA: Thank you.

Professor DeBow?

PROF. DeBOW: Thank you, Madam Chairman.

I would like to thank the Commission as well for the invitation to be here today. It is quite an honor to speak on the topic.

My name is Mike DeBow. I teach at the Law School at Samford University, which is in Birmingham, Alabama, and I have been there 18 years, and so my view of this is very much the academic outsider's view of what is sort of an inside-the-Beltway institutional question, and it is limited by that, frankly.

My concern is more doctrinal than it is with the actual practice, cooperation, or coordination that goes on between the federal enforcers and their state counterparts. I know a little bit about that, but not enough really to give you a thorough response along those lines.

So I guess my function here is to present the sort of structural remedy, if you will, to the question of federal-state coordination, and I have in my written remarks taken the position that, in a perfect world, Congress would pass a statute that would preempt the states substantively in the antitrust realm, both in terms of the state antitrust statutes as well as the state "little FTC Acts", which I think would have to be addressed.

I also think it would make sense for Congress to consider repealing the *parens patriae* authority or, in the alternative, to provide for a closer federal-state clearance procedure for the states bringing such suits.

I say this for three reasons:

First of all, in terms of federal constitutional law, state antitrust law is simply an anachronism. It is a holdover from the late 19th century when the Supreme Court's reading of the Commerce Clause was much narrower than it is today, and, conversely, the definition of intrastate commerce, subject to only the state's regulation, was much wider than it is today.

Given the limited view of Congress's commerce power as of the Sherman Act's adoption in 1890, a dual system was virtually a constitutional necessity. State antitrust law was directed at local violators, while federal antitrust law could reach business behavior that restrained interstate trade.

However, the Supreme Court's post-1937 expansion of congressional commerce power cancelled the need for this division of labor between state and federal enforcers and rendered state antitrust statutes almost entirely redundant.

As a constitutional matter, of course, this remains

the case today. State antitrust statutes are simply vestiges of an earlier age.

Secondly, the states' involvement in antitrust, I believe, threatens the coherence of the national antitrust policy that has developed over the past 25 years by successive Republican and Democratic presidential administrations. Antitrust policy experimentation at the state level in the form of either the enforcement activities of the state AGs or the decisions of state courts applying state antitrust statutes poses a threat to national antitrust policy, and I think this is the most significant cost of continuing the role of state law and state enforcement.

Thirdly, the states' involvement in antitrust today has not been particularly significant in overall terms, whether measured by the number of cases brought or additional enforcement resources brought to bear.

I was glad to see Professor First and NAAG continuing to augment our knowledge of what goes on at the state level. My earlier publication certainly disclaims the status of the final word on that topic. It is hard to count cases, as everybody here probably knows, and so—but I think, even in light of Professor First's numbers, I think I would stick to that conclusion. It is still not, it seems to me,

significant when compared to the cost of the potential disruption of national policy through inconsistent developments at the state level.

I recognize, of course, that any congressional proposal to amend the Sherman Act, to do any of this, would be quite controversial, and so there is an alternative in my written remarks, suggesting a procedural improvement in the *parens patriae* area.

Let me just say quickly, the discussion about state policy experimentation—I think everyone cites Justice Brandeis in *New State Ice*—if you look at the full—the sentence that is usually quoted out of that opinion, Brandeis says, “It is one of the happy instances of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and trying novel social and economic experiments without risk to the rest of the country.”

I just don't think that such risk-free experimentation is really possible in antitrust law, given that every state's economy is interconnected with the economy of every other state.

Antitrust policy, if it is to benefit consumers, should be formulated at the national level.

In the time that's left, I would like to expand

just a bit on the written statement's discussion of the potential for inconsistency among states vis-à-vis the federal antitrust policy that's developed over the last 30 years.

CHAIRPERSON GARZA: Professor DeBow, it may be possible—just so we can move on, I realize that I gave General Rowe a little bit more time, but I wonder whether maybe you could develop that a little bit more in response to questions. That would let us start to—

PROF. DeBOW: Yes.

CHAIRPERSON GARZA: Okay, great. Thank you.
Commissioner Warden?

COMMISSIONER WARDEN: Gentlemen, thank you all for coming. I enjoyed reading all of your statements, and I wanted to say particularly, General Rowe, that I enjoyed reading—and I'm sure Mr. Ackerman contributed to this as well—the history of antitrust enforcement in Maine, and it is quite a record based on the availability of personnel. So I thought that was really interesting.

Professor DeBow, I have an initial question for you. You are clearly the Lone Ranger here on this panel.

PROF. DeBOW: It looks that way, sir, yes.

COMMISSIONER WARDEN: I might volunteer to be

Tonto, but—

[Laughter.]

COMMISSIONER WARDEN: Wouldn't your approach throw the baby out with the bathwater in the sense that, how can there be any practical objection to the states enforcing state law or suing as *parens patriae* under federal law against hard-core price fixing and other violations of that type that are primarily local in their impact?

PROF. DeBOW: I don't have any problem at all with the states doing that, but to try to segregate that out—in my earlier paper I tried to suggest a reform that would carve that out as a state responsibility.

Let me say, I worked for four years very recently in a part-time capacity with the Alabama Attorney General's Office, so I have a good deal of respect for state AGs' offices, what they do, the people who work in them, and so on.

Don't take this as—my remarks shouldn't be seen as negative.

COMMISSIONER WARDEN: Oh, no, no, no; of course not.

PROF. DeBOW: But there was no interest in the Alabama legislature to try to do this, and I just think, as a

practical matter, it's not going to work. So the question is, what do you give up by taking the states off that responsibility, which I think they perform very admirably? What is the loss versus the gain from simplifying antitrust law and making it a national, federal-only area?

COMMISSIONER WARDEN: Now, if we adopted your suggestion, the possibility of a federal clearance procedure for state actions, would your provision specify factors in the statute to guide the attorneys' general clearance discretion? For example, local impact, the use of an established legal theory, and an acceptable remedy in the eyes of the DOJ?

PROF. DeBOW: I hadn't really thought about it to that extent. My immediate reaction is to say that I think that might not be necessary.

My purpose in suggesting that was just to try to coordinate the overall state effort with the current federal administration, and I would be willing to leave that to the discretion of whoever sits in the chair in the Antitrust Division and here at the Commission to make that call for whatever policies they are following.

COMMISSIONER WARDEN: Okay. Thank you.

My next questions are for the other three members

of the panel who aren't the Lone Ranger. Each of you makes reference in your written statements, and General Rowe repeated it today, not only to federalism as a basic value of this country, but also to experimentation or divergent enforcement philosophy as a positive good resulting from the present system.

Now my first question is this: would each of you agree that, as to price fixing, bid rigging, and other such hard-core violations, these considerations are beside the point, because no more experimentation is needed?

PROF. FIRST: Actually, of course, that's—who wouldn't agree that we all agree on those being hard-core violations? But, in fact, it does help to illustrate what the experimentation is about, because one of the important areas, I think, in which states have experimented or done something different from the federal government is in the remedies part of those cases, where the states have pushed very aggressively to bring relief, to bring remedies to consumers, whether it's through the passage of state indirect-purchaser statutes or other sorts of contractual things that are put into state bidding contracts.

There is a real effort to check on whether the decision in *Illinois Brick* was a sensible one, and I think

this is an area—it's not doctrine in the sense of, should we apply the rule of reason or not, but it's quite important to how antitrust gets done and how it works. And this is an area in which I think the states have clearly done things that the federal government hasn't, and have to some extent pushed the federal government, at least the FTC, to consider disgorgement.

COMMISSIONER WARDEN: Well, we had a whole hearing on the indirect purchaser doctrine.

PROF. FIRST: Yes, I know.

COMMISSIONER WARDEN: And I don't regard, myself, that experimentation as being a positive one. I think the current system is a mess. I'm not saying how it ought to be fixed, and I don't think that inclusion of contract provisions in state bidding documents has really anything to do with antitrust law.

Mr. Proger, would you accept the proposition I stated, that no experimentation is needed as to hard-core violations?

MR. PROGER: Yes, I think I would agree with that. I would just add that I'm not sure I would agree with the proposition that divergence on enforcement is a particularly good idea. I think, though, we have to be careful—and I want

to make sure I'm answering your question. I think there is a lot in what we all commonly understand to be hard core, and I think hard core is a fairly limited part of the antitrust enforcement fabric, as cases like *Maricopa*, *NCAA*, and the *Indiana Federation of Dentists* show, that even in Section 1 or FTC Section 5 cases, if you are outside of hard core, there are areas that are less predictable, but within hard core, yes.

COMMISSIONER WARDEN: General Rowe?

MR. ROWE: In those areas, there is less divergence, I would say, but I just want to make the statement that when I talk about divergence as a positive, most times there isn't divergence. In most cases we are aligned with the federal government; either the FTC or the Antitrust Division is working with our office. To the extent we get involved early with one another, we have great efficiencies.

You know, the *Microsoft* case is a big case out there that brought this divergence, where you had nine states continue after the federal government stopped, and there was benefit to those nine states continuing in the final remedy, I believe.

So you had divergence there that I think was a plus

for the consumers in this country and in the various 50 states. So I just want to say, when I talk about diversity being a positive quality, and it can be, it's not the norm. In most cases, we are aligned, and I wanted to emphasize that.

With respect to consistency, Mr. Proger talks about that predictability. Listen, I agree, and that's why we work together as much as we do, and this argument that somehow the federal government practices transparency and the states opaqueness, I disagree strongly with that.

We put our cases up on our website. We are going to do a better job telling the reporters about them, but everybody knows we use the federal Merger Guidelines. If folks want to know how we evaluate antitrust situations, we do our best to tell people, so there are no secrets at the state level. I think it's out there, and I think most people who work with us understand that and would agree with me on that.

COMMISSIONER WARDEN: Thank you. I think you might realize that others don't necessarily share your view of the value of having nine states litigate on the *Microsoft* case to essentially the same result that the government had already reached. But that is a good lead-in to my next question,

which is, let's take a look at areas that aren't clear, and I want to use two recent cases on the international level to discuss this.

First, *Microsoft*—but the divergence here is between the United States and the United Kingdom, not the states—and second, *GE-Honeywell*. We have a Section 2 case and a merger with divergent results in the United States and the European Union.

Now those the only two really big developed capitalist markets, the United States and the European Union. But under the approach you advocate, wouldn't each of the 50 states have the power to, in the case of *Microsoft*, cause design changes in its software to suit the policy wishes of that state, or, in the case of *GE-Honeywell*, to prevent a merger on a global scale because of the thought that it has some undesirable impact contrary to the policy views of a particular state? The states would be free to do that under the approach you advocate, wouldn't they?

PROF. FIRST: If I could just—in part, it's very difficult to answer your question, because I'm not certain under what statute you are assuming these cases are brought. So if you are asking me whether or not —

COMMISSIONER WARDEN: We'll get to that in a

minute, but go ahead.

PROF. FIRST: I know, but I think it does make a difference, and in some ways it makes the argument easier within the United States than it is in an international setting.

So if it's the Donnelly Act, could the suit against *Microsoft* have been brought under the Donnelly Act and the same relief that the Department of Justice and the litigating states at that time asked for, which is restructuring—could a state court have brought that, have decided that?

Frankly, I don't know the answer to that constitutionally, so I think —

COMMISSIONER WARDEN: Nor do I.

PROF. FIRST: Right. And that may be the reason that we don't see those cases. Those cases are brought by the states under federal law in federal court. So if the question is, could a single state bring a suit against GE-Honeywell in federal court and ask for some relief, the answer is yes, if that's the relief that is permissible under Section 7 of the Clayton Act. It seems to me it's the same legal question as if the Department of Justice brought the case, or the Federal Trade Commission brought the case, or if it was brought by multiple states, which big cases like that

almost always are because the states are swamped in terms of resources.

So in the United States, it seems to me part of the way of dealing with that is that these cases are brought as *parens patriae* cases by the states. Of course, those hypotheticals haven't quite happened anyway, but they would be brought in federal court, and the answer would be decided as a matter of federal law.

COMMISSIONER WARDEN: Well, in the *Microsoft* case/the state statutes were before the court under pendent jurisdiction and were insisted upon as a source of substantive law by the—

PROF. FIRST: But the penalty there was a monetary penalty that was sought, and it was never pressed actually at the end, as you know. So it was not—no one ever asserted that, independently, under each of the 20 states' laws, somehow the federal court could use those to enter the structural relief that was sought.

So I think, again, to me the answer is, this is going to be decided by federal courts. To the extent that we are concerned about uniformity, these cases are brought in federal court, and federal courts—well, they are not perfectly uniform, either, as we all know. Uniformity can

vanish from circuit to circuit even under federal law. But at least there is that federal law that will govern.

COMMISSIONER WARDEN: Now, the Supreme Court has said, despite some of the statements in the statements submitted to us, such as General Rowe's, which talks about prosecutorial action by the states, that the states don't sue under federal law as law enforcement agencies; they sue solely as private parties. Isn't that correct?

PROF. FIRST: It's —

COMMISSIONER WARDEN: Yes or no, please.

PROF. FIRST: Yes or no.

[Laughter.]

PROF. FIRST: Under *Georgia v. Pennsylvania Railroad*, I think the answer was, they were suing as *parens patriae*. It was decided in the original jurisdiction of the Supreme Court. The full bases of that weren't plumbed, but the Court was clearly looking at the state of Georgia in its sovereign capacity suing for injury to its economy.

Now, if you are referring to the later merger cases, like the *American Stores* case, there is language about suing under the Clayton Act. We view them as private parties because when the states put that case, they said, private parties, anyone suing under this statute, should be entitled

to seek divestiture, and the Court said, yes.

So, in that sense, I say, yes and no. And I think there is still some tension in that. But—

COMMISSIONER WARDEN: Well, I think we could spend a full afternoon on the *parens patriae* standing in equity, and I don't want to go there, because I think my view is, it's pretty clear, and the Supreme Court will keep it pretty clear when it gets a chance.

MR. ROWE: Could I —

COMMISSIONER WARDEN: Yes, would you answer my original question?

MR. ROWE: About the two cases you raised, and about the states? The states have historically filed in these multistate actions involving large corporations in federal court. You are right. There have been pendent state claims that have been there.

If you were to recommend to Congress, and if Congress amended the law so that we could not bring actions under federal law anymore, you would see these cases, more than likely, at least in some states, being brought only in state courts with state causes of action. And I would ask you if Microsoft would like that; would Honeywell like that? I don't think so, unless you follow Professor DeBow and you

repeal everything and you preempt the entire area.

If you do that, we are going to have a lot of antitrust violations that go unattended, because most of the stuff we work on, the FTC doesn't get involved with, the Department of Justice doesn't get involved with, because it's too small. It's local; we understand it better.

So what I'm trying to say, Commissioner Warden, is that we understand the issues about uniformity, about predictability. That's why we have tried to work with the federal government. And I think there are some things that we could do to improve it, but I just would ask you to think about that, where you would go with that.

COMMISSIONER WARDEN: Well, let me ask this, if the federal government has acted—and there is not a free-rider accusation, by the way—what need is there for the states to work cooperatively with the federal government on that matter?

MR. ROWE: In some cases, the states don't get involved because the federal government is acting. It's when we believe that there is a reason to get involved in the investigation, or because we don't believe, perhaps, that the federal government is serving all of the best interests of the citizens of our state. But in many cases we are not

involved; the states are not involved. In some we are involved.

And where we are, most all the time we are working closely together. I think *Microsoft* has been brought out and has been used as the example. I'm just saying there was some good in that. I know we disagree about what happened in that case, but we do live in a--federalism is the model of government we have here, and these are sovereign governments, but they try to work as well with the federal government as possible.

I want you to know that because we do.

COMMISSIONER WARDEN: I appreciate that as a statement of fact that normally applies. I accept it. But with respect to matters going un-remedied or the federal government not being vigilant--put aside the local conspiracy that the federal government doesn't notice and is happy to have you deal with, or your colleagues in the other 49 states deal with it--If we are looking at a truly national or international situation, be it a merger or a type of conduct that's inherently interstate or international, isn't the decision of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division not to bring an action or to seek only a particular form of relief exactly

the kind of law enforcement decision that Article II of the Constitution commits to the President and not to the states?

MR. ROWE: Well, when you say "law enforcement decision," I'm going to have to research the issue talked about under *parens patriae* as-opposed to bringing those. I don't know whether I could answer that the exact way you worded that.

I do believe we have an obligation as attorneys general to protect competition in our states so that the federal government doesn't have a complete monopoly on that role. But I don't know if I can-

COMMISSIONER WARDEN: Well, let me be clear. I read the *parens patriae* decisions of the Supreme Court, and I read them to be very clear in this respect: they confer the right on the states to sue in equity *parens patriae* only in cases in which the economy of that state suffers some injury that is different, distinct, or sole, as opposed to the rest of the country and the rest of the world.

So that is suing to protect your economy, to protect your state. But to take an international merger-I'll stay away from *Microsoft*-and state X doesn't like the effects in state X of that merger, but both the U.S. authorities and the E.U. authorities and the Brazilian authorities and so on

have all said, okay already—and leave aside the question of legislative jurisdiction, which is serious as to the state law—but suing under federal law, and claiming some particularized injury in your state and the right to stop it. Does that make any sense?

MR. ROWE: It may. I think your question is, can you do that? And I believe you can. Now you are maybe more learned on the specific issue than I am, but I believe we can. The question is, does it have to be particularized? Does it have to be different in Maine than it is in New Hampshire?

COMMISSIONER WARDEN: I'm assuming it doesn't. Does it make any sense to let Maine bind the world any more than the island of Tobago? As in the old conflicts casebooks?

MR. ROWE: As the Attorney General of the state of Maine, I want to have that authority, and I believe if I do if I believe the federal government is not adequately protecting the citizens in my state in that situation.

Now, most of the time we don't get involved, but yes—the answer is yes.

COMMISSIONER WARDEN: Okay. My time is up. I have many more questions, but Mr. Proger wants to answer, and then

I'll quit.

CHAIRPERSON GARZA: Phil, can you keep it under five minutes?

MR. PROGER: Sure.

CHAIRPERSON GARZA: Okay.

MR. PROGER: Boy, federalism is messy, isn't it?

Let me see if I can respond to Commissioner Warden a little bit, which I think will get me in trouble with everyone, so that's probably good.

I think there is a continuum here that we might be able to agree upon. I think, at least in my mind, that the states do have an important role to play in the local conduct, local effects, and I think that even the critics of state enforcement would agree that there are places where the states can play a valuable and unique role. I don't think that is where the debate is.

I think the debate is where you focused, and that is where you have multinational or national companies engaging in conduct that affects the United States and other countries across the border.

In my view—and I'm not a constitutional scholar, but as I read it, I think the proper answer is that the Attorney General of Maine—if he believes that a company doing

business in his state is engaging in conduct that violates his state's statutes, he can bring an enforcement action, and that hasn't been preempted or rendered neutral through the Constitution.

I think the *parens patriae* statute has been positive, because I don't think we want companies subjected to 50 separate state enforcement actions under 50 state statutes, but—Pennsylvania doesn't have one—but under 50 different standards. I think there is a benefit in *parens patriae*, at least in saying to the states, if you're going to bring the actions, let's bring them under a consistent set of statutes.

But that leaves us with a more difficult question, which is, should the states be—and I mentioned this in the paper—should we give the states some deference on localized effects and local issues (physicians, health care, used car dealerships, something that is more local)? But should the states—and the federal government should recognize that. But should the states give some deference to the federal government on major national matters? And is society and antitrust enforcement benefited if the states and the federal government differ on the application of federal law and what the appropriate remedies are under federal law?

I do think that, on the whole, that hasn't happened, but when it does happen, it's jarring, and it happened with us with the E.U. and *GE-Honeywell* and *Microsoft*. It's happened with the states and *Microsoft*. There are a few mergers where that has happened, where the federal government took one view and the states took another. And I think that's the difficult issue.

I will say that without saying who is right or wrong in this, because multiple enforcement means that there's multiple enforcers and—look, in our constitutional system of government, there are separate sovereigns with dignity under our Constitution. You can't say that they are second-class. But you do have a fundamental issue, whether antitrust and society is benefited if these multiple enforcers differ on the same set of laws. I think that is a problem.

COMMISSIONER WARDEN: How is this more important in terms of the federalism issues than an area that ERISA entirely preempted? Entirely.

MR. PROGER: Truthfully, I can't answer that. Congress made a decision in ERISA that they haven't made in the antitrust laws.

COMMISSIONER WARDEN: But should they make it in

the antitrust laws is what we're here to try to talk about.

MR. PROGER: Not if the result is that we now have the states applying 50 different state statutes.

COMMISSIONER WARDEN: That isn't a result of ERISA; state law has no role at all.

MR. PROGER: Although, as you know, I am nowhere near an expert on ERISA, there actually is a fairly vigorous debate on where those lines are.

CHAIRPERSON GARZA: Thank you very much. I think if we police ourselves and stick to ten minutes with every Commissioner, we will be able to have everyone have an opportunity to ask questions and still end on time. So that's the goal.

I am fortunate to go next, so let me—I listened, I've read all of the written testimony you have submitted, and I thought it was very thoughtful, and I have listened to what you have had to say today. I wonder whether I could get you to comment on some proposals that have been made, or a proposal that has been made. I think Professor DeBow made something like it, and also we received something in a somewhat sketchy form from the ABA, I think, last week in comments.

But imagine a system in which using the existing

cooperative framework between the federal and state enforcers that exists today, there was some kind of federal right of first refusal. Assume that the federal government would have the first option to investigate anything over which it would have jurisdiction because it's in interstate commerce, and I realize that's broad, but it could also seek the assistance of state AGs or request that a state AG or a group of state AGs handle a matter, or could accede to requests that a state AG or a group of state AGs handle a matter. So there was a kind of a domestic competition network website someplace, and there was a way to communicate with each other about investigations or complaints and to coordinate, and to essentially allocate on somewhat of an ad hoc basis, but with the presumption being that anything that the federal government kept would be preempted under both federal and state law, including a decision not to prosecute.

In addition, imagine that the federal government couldn't seek to dismiss an action in court, for example, but that any settlement that would have a material effect outside a particular state would have to be approved by a court, and the federal government would have an opportunity to comment, and the court would be required to give deference to the views of the federal government, and the federal government

would have a similar right to come in to the court on any proposed injunctive relief that would have a material effect outside the state.

The reason I suggest this framework is that it seems to address, to some extent, some of the concerns that have been raised both about centralization and about decentralization of enforcement. It seems like it might help to address the issues of local competencies and the concern that federal enforcers might miss something. It might better enable the use of scarce resources, but at the same time it might help us to address externality problems, and it might also help to address the issue of policy divergence and essentially help to coordinate on policy, at the same time as allowing for some amount of experimentation in how things are investigated and how things are remedied, and to pool resources.

That may be more complicated than is possible to really address off the cuff, but I wonder if each of you could identify things that we would have to consider or flesh out, as the ABA had in its comments, actually invited us to consider. But what do you think of the general framework? What are the things we should consider that would be important to help it function? And, if you disagree, what

would address some of the issues that you all have raised?

Can I start with Attorney General Rowe?

MR. ROWE: Well, I'm the attorney general for a state, a sovereign state, and I speak for the state of Maine. I do not think that is a good idea. I subscribe to the federalism principles. We are a sovereign government. In that case it is the federal government that is deciding whether you can play or not. Unless they preempted state law, and then even if the federal government decided it was going to take the case, arguably a state could file a suit in state court under state law.

So I question this whole thing. I'm just wondering what's broken. I guess that is my question today. We are trying to fix something, and there have been a couple of cases that seem to have caught everybody's attention, but I think if you talk to the practitioners—one thing I will say, one of the problems is sharing information, and under Hart-Scott-Rodino, as we know, the pre-merger filings by companies, the federal agencies cannot share that information with states.

One thing you might want to consider is amending or proposing Congress amend Hart-Scott-Rodino to allow the FTC and the DOJ to share that information with states. We would

have to be bound by the confidentiality provisions under that statute, but that would get us way ahead in terms of working together from the get-go and having the information.

As you know, now we have to subpoena, and we don't know what is going on with the federal agencies. So that's a way—I'm speaking for one state—that would make it easier for us to find out what's going on, and then perhaps you wouldn't see this competition.

Apparently, people don't like the competition between the enforcers, and I understand that. I think it's probably a good thing in some cases. Some of you do; some of you may not. But if you don't like it, this may help, because it seems to me that the more the states know and are comfortable with what the federal government is doing or not doing, the more likely they will be to back off.

CHAIRPERSON GARZA: Just so I understand, if we have something like that, which is maybe, in part, a more formalized institution than what already occurs today, as I understand it, what do you think the state of Maine, for example, would then not be expected to do that it is doing now? I mean—

MR. ROWE: If you want to use the word "burden", we wouldn't burden these corporations with subpoenas and CIDs

and all that stuff.

CHAIRPERSON GARZA: No, I'm going back to the proposal of the notion that there be an opportunity for federal preemption if the matter isn't something that is primarily local.

So, in other words, I assume that you wouldn't expect, for example, to see a situation in which there was a purely local or sort of a local bid rigging or something that was really localized to a region or a state, where the federal government would say, we want to preempt this area. You would expect, perhaps, to see continued allocation and sharing of resources, or maybe you'd have a situation in which the federal government, because it has greater resources, would undertake it primarily but with the assistance and working in coordination with the state.

So the only difference would be that there might be an instance in which the federal government would preempt an area because of the nature of the conduct or the transaction having a broad effect on the national economy, where it was more appropriate to have a national approach.

So the question is, what is it about something that institutionalizes that process that bothers you? Is it the perception that it's just undermining sovereignty, and you

think it's better to do it voluntarily than to have Congress say, basically, this is how we want national antitrust policy to be implemented? Or is there something else, something that you are afraid the states would not be able to enforce under that kind of situation?

MR. ROWE: Well, again, I don't think anything is broken here, but I do think that what you say is multinational or national still has effects within my state. So if it's a multinational corporation selling products or services in my state, it has a local effect, just as if it's in-state; I mean the effect is the same. And if consumers are being ripped off because there's collusion, there's price fixing, or there's a merger that's going to create a monopoly or near monopoly, and I care about that whether it's someone from the outside or someone within. So it doesn't mean any less to me who the players are, I guess is what I'm saying, as a sovereign. I look within my state.

You're going to hear this from me and, I assume, a lot of other AGs, and it's not because we're crazy. It's because we're state attorneys general. We really believe the United States of America—we're a nation of states. We are united. But we have 50 sovereign states and a central government, and we work together, and I think that's really

important.

I would just say there are ways—I mentioned amending Hart-Scott-Rodino—you maybe could facilitate this to create less of a burden on us and perhaps on mergers or folks who want to merge. But I would hate to see any of this—any of the authority taken away from states when I don't believe that there is a major problem.

Even if there is, one of these days—and I wasn't going to go here today, but—we have been accused; AGs have been accused of being political. In other words, sometimes we want to make a name for ourselves. It's not like that. The antitrust investigations start at the bottom, and they come up through the staffs, and I believe that's true in every office around the country if you look. We don't say we want to investigate here, or we want to investigate there; they come up. And we keep politics out of it.

So I just want to make that point, too. I'm rambling here. I'm sorry. But —

CHAIRPERSON GARZA: Well, just before the light turns red, does anyone else want to say anything about the—
Phil?

MR. PROGER: Very quickly. I think the European Union has a similar concept, which is of the nature of a

community dimension. I think the challenge would be to define the workable standard, but if we could come up with some system where it was recognized that something really impacted the country as a whole and commonly, it might make some sense to do that.

I do think, as General Rowe points out, that unless—and I don't mean to suggest that he's suggesting this—but unless you preempted state law in this area, you wouldn't have accomplished anything.

I think it doesn't deal, Chair Garza, with the more difficult question, and that is part of the divergence here, which is, there are times when the states as separate sovereigns have felt that the federal sovereign was not properly or correctly enforcing the law, and certainly after Assistant Attorney General Bill Baxter, who I think history has shown was correct, but certainly after his 1982 Guidelines, there was a state reaction that got the states into this area. And we don't address that question.

One quick last point. I wouldn't object to the amendment to HSR, but I would point out as a practical matter that parties routinely waive that and provide the information in mergers, so I don't see that as a practical problem today.

CHAIRPERSON GARZA: And I think the proposal that I

talked about actually was meant to deal with the divergence in policy, essentially preserving a national policy, I think.

MR. PROGER: I think that would be good.

CHAIRPERSON GARZA: And I am passing the baton on to Jonathan Yarowsky.

VICE CHAIR YAROWSKY: Hello. I would like to use my time to kind of move from the conceptual to the empirical. Professor DeBow, I'm going to start with you, only because I think a lot of your analysis was very interesting. It kind of stays at that level.

If antitrust—if the issue of interstate commerce, which has evolved, makes that issue an anachronism in the antitrust area, it almost makes it an anachronism in every area of law. If you look at the crime bills passed since the late '80s, juvenile justice issues are now done in federal court; domestic law could be interstate commerce.

So that argument to me is less compelling. I think it's an observation, but if you really look at the federalization of state law in so many subject matter areas, it kind of takes antitrust out as kind of an anomaly. Because it's happening everywhere. That's the first point.

The second point, at least that I see, and I want you to respond, is that in the state laboratories of

experimentation, if in fact the concern is that maybe some creative theory or use of theory would lead to some non-consumer welfare result, that's already happened in the federal antitrust laws. There're 31 exemptions from the antitrust laws. All of those exemptions, for the most part--none of them are based on consumer welfare; they are based on other types of issues.

So in a sense at the federal level that one might venerate, we are fraught with non-consumer welfare analysis. We are forced--we are constricted.

I think lastly, just from my standpoint, and then I want to move to the empirical, because I like the ideas that I hear coming out, and maybe there is a practical way to try to reach a homeostatic mechanism between the federal and state governments.

I think we also have to be careful with the idea that a novel idea is necessarily frivolous, a waste of time to the system, or that it could create problems, because I think orthodoxy tends to go in cycles. I agree really with Commissioner Warden's line of questioning. I think he was trying to establish a baseline. I think that's useful in the hard-core areas, but even that had some variations.

But if you really look, there's a sense to the

substantive fabric of the antitrust laws, I think, even though there was a lot of turmoil with vertical issues in the '80s; it kind of calmed down, reached more or less a consensus.

With a lot of the vertically integrated mergers that we are seeing in the telecommunications area, where distribution and content are controlled by a single company-- I'm not railing against that. You can call it *Keiretsu*, or you don't have to call it *Keiretsu*. Maybe it's the same as widgets, maybe not.

But the point is, I see a vibrant discussion coming down the road on that issue that I thought was pretty well settled for most of us.

So, again, the orthodoxies rule. So do you really think that we should--you made a very provocative analysis from a conceptual standpoint. Do you really think those should be the guideposts that we should try to base our analysis on, as opposed to try to look at the empiricism?

PROF. DeBOW: I'm sorry, what guideposts?

VICE CHAIR YAROWSKY: Well, the guidepost about interstate commerce being an anachronism, that if you have an experimental theory that's somehow going to maybe deviate from--

PROF. DeBOW: Oh, okay.

VICE CHAIR YAROWSKY: All the three central points that you made.

PROF. DeBOW: I guess I put more stock in orthodoxy than you do, perhaps. Business people need reasonably clear statements about what's appropriate and what is inappropriate, and when antitrust enforcement agencies get creative, there's a risk to the economy and to consumer welfare as a result of that.

What I had in mind writing this, and it was a phrase I should have used in the written statement, but it didn't occur to me, the phrase "the mothball fleet of antitrust." It's older decisions that kind of never have been overruled, but they are not really used much anymore. You could construct, I suppose, an alternative antitrust universe out of disused Supreme Court cases that would revolutionize the American economy.

I just don't think—and this is just my personal view on this—that that's the function of the antitrust agencies or the courts hearing antitrust cases. I don't think that is consistent with Congress's intent.

VICE CHAIR YAROWSKY: But do you think that cases like *Brown* would be in that fleet?

PROF. DeBOW: Uh-huh.

VICE CHAIR YAROWSKY: Do you really think state AGs are relying on that case or trying to revive it?

PROF. DeBOW: No. And I hope I made it clear in the earlier writing that I did. When I looked at the cases that were brought over that ten-year period, the ones that I could find, and it's not an exhaustive list—it's the best I could do, but it's not an exhaustive list—I frankly expected to find more use of older theories, more theories that would allow more social rather than efficiency considerations to be taken account of. But I didn't find that, I mean with just a couple of exceptions.

Actually, I was interested to read General Rowe's explanation of that one case involving the fish-packing facility. I'm happy to be corrected about that, about the primary—the state's primary goal there.

But I haven't found much evidence of that. There is a fairly lengthy discussion of the litigating states' perhaps local parochial interest in opposing the *Microsoft* settlement in the article by Hahn and Layne-Farrar that I cite. I don't know anything independently of that to corroborate or undermine it one way or the other. So that might be a fairly significant exception to what I'm saying,

which is, no, I don't find that there's been, up to now, much actual harm from that.

All I am concerned about is that if you don't have a structural solution to this, maybe it will never come. Maybe it comes 50 years from now.

VICE CHAIR YAROWSKY: Here's what I may want to direct to the other witnesses so they can jump in. There are structural answers, and there are also dynamic answers. I think we have heard some suggestions in the dynamic area. How can we improve both communication coordination between these two agencies and drivers in antitrust enforcement? That's what I'm kind of interested in.

I understand the structural. That may be the simpler, less messy answer, but it also does, in my view, great harm to certain federalism concerns that I don't think we should just throw aside lightly. And that's why I'm—rather than just jumping to that point, are there some middle-ground answers?

Last Congress, for example, Congress passed a small package of antitrust provisions that included an amnesty provision, which gave, as you know, the DOJ the power to reach a settlement with one conspirator in return for reduced damages.

At that time the state AGs were brought in, General Rowe, because they were concerned that that would preclude their ability or limit their freedom of movement. There was some compromise worked out.

I'm not saying that's the model one way or the other, but that's the kind of process that happens sometimes on Capitol Hill. That's also a process that, intellectually, I would be interested to hear. Are there suggestions short of structural answers, which is a valid way to proceed, that could preserve both authorities and yet improve communication coordination?

PROF. FIRST: Well, that's a very good question. My reaction, in this sense, picks up on what Deb Garza was asking about as well, which is that the methods of coordination that are being used now are actually working pretty well.

The problems with legislation are that writing these rules ex ante to allocate relationships is, (A) very difficult and (B) creates costs of its own, as then people start trying to figure out what these rules are, how you impose them, and playing with them.

I think this is going on in the European Union right now. In fact, I clipped out of the *Wall Street Journal*

a story--this was in this morning's paper, "Spanish Takeover May Face European Union Antitrust Review."

So the two parties are now having to jockey and litigate over who gets this case.

Now, is this the way we really want to go with hard and fast rules? My feeling is no, that there are tremendous forces for coordination. It can be done better. Bill Kovacic suggests the Domestic Competition Network. I think we should start thinking of things like this. But writing hard and fast rules is very difficult and costly in itself.

I do want to respond to one thing that you said about interstate commerce and this anachronism notion that Professor DeBow mentioned.

One of the interesting things about the early cases is that they weren't local cases. If you look at the early cases the states were taking on--and had difficulty because they were taking on--the national, major trusts of the day.

The states brought suit against International Harvester for the combination that monopolized the market before the Justice Department did, and two state antitrust cases were before the Supreme Court in 1914, when they passed the Federal Trade Commission Act. It wasn't--this was not a divvying up of responsibility; this was complementary

enforcement to get at the difficult issues of those days, which were not confined to two gas-station owners fixing prices on opposite corners of a highway.

So I am not sure that the interstate commerce power explains a lot. I'm not sure whether it's anachronistic or not. There are things with local effects that obviously affect interstate commerce.

So it becomes very difficult to divvy these things up, because people work on it on a constant basis together. I think that's what General Rowe describes.

VICE CHAIR YAROWSKY: Can Phil just respond if it's quick?

MR. PROGER: Well, I think federalism in 2005 is not federalism as it was in 1890 or 1900. I think we have moved way past that.

I think that I do share the point that the rules may be very difficult to work out, but I think there is some benefit in thinking about this.

I would note in the example mentioned in the *Wall Street Journal*, because I have some familiarity with it, that it isn't clear, though, that both parties won't be able to investigate. It's either the Commission or it's the Spanish authority. And so it's a different debate.

CHAIRPERSON GARZA: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Thank you, Madam
Chairman.

Thanks very much for your written submissions and
for your testimony here this afternoon. It's been very
helpful.

I have to confess—and this is not meant with any
disrespect to the attorneys general of the states—I come to
this debate having had a terribly unfortunate experience in
the offices of one of our state attorneys general. As I sat
down to talk to him about a case, he told me almost
immediately, before I could get a word out, where his next
fundraiser was. And in the Antitrust Division, at least, the
tradition was that there could not be any communication
between the White House and the Antitrust Division, or
Capitol Hill and the Antitrust Division. You simply weren't
allowed to take those calls.

So my question of all of you is this: isn't it
perfectly obvious—whether it's dispositive or not is another
question, but isn't it perfectly obvious that state
enforcement is more susceptible to political influence, to
local geographic powers such as leading companies in a state,
or special interests in a state? Isn't that a perfectly

obvious point? And then don't we have to deal with it?

Let me start with you.

PROF. DeBOW: Yes. I think any practical theory of politics would answer your question in the affirmative. And maybe if I could suggest a non-antitrust example, and not one involving any kind of the sort of questionable fundraising or other ethical or even more serious legal questions. Recall that the states rushed to defend companies that were targets of hostile takeovers by passing statutes that made the hostile takeovers much more difficult to bring about. Almost everyone in the field admits that all those statutes are driven by the state legislature's interest in not experiencing job losses as a result of plant closures and the rest of it that often follows hostile takeovers. That's maybe a less dramatic and less arresting example of states' protecting what they see as their own local economic and other interests, perhaps at the interest of a national market for takeovers and the market for hostile takeovers.

COMMISSIONER SHENEFIELD: So you would say yes?

PROF. DeBOW: Yes.

COMMISSIONER SHENEFIELD: Okay.

Harry?

PROF. FIRST: More susceptible—I have no way of

assessing that.

COMMISSIONER SHENEFIELD: What would your intuition be?

PROF. FIRST: My intuition is that federal enforcement is susceptible to political influences, both on occasion, put badly, as you put the fundraiser, and more generally—

COMMISSIONER SHENEFIELD: You said federal enforcement?

PROF. FIRST: Federal enforcement, yes.

COMMISSIONER SHENEFIELD: —is susceptible.

PROF. FIRST: Is susceptible. We do remember the *ITT* case.

COMMISSIONER SHENEFIELD: Which is more?

PROF. FIRST: Which is more? Today I—I'm really hesitant to say this, because I honestly don't know the extent to which, in particularly important cases, there may be some political—at least there is influence in two ways. Either it's directly because of money, which is a bad influence, and I don't think that goes on today— I have no way of knowing on the federal level; I assume it doesn't. And it may go on in the states, but again, I have no way of knowing.

You had that bad experience, and your guess is that there may be some of that in the states. But in a broader sense, I think one of the concerns is that the state attorneys general are sort of politically more out there than the assistant attorney general in charge of -

COMMISSIONER SHENEFIELD: They are elected, after all.

PROF. FIRST: They are elected.

COMMISSIONER SHENEFIELD: Many of them; not all of them.

PROF. FIRST: And part of that can be bad if it's, I'm going to enforce it this way because I raised money from certain constituents.

On the other hand, there is something about democratic theory that might make one say, well, part of it might actually be good. Maybe it aligns antitrust enforcement with the interest of voters. We are not quite, I hope, completely cynical--the notion that that's possible.

Now, whether--how much of any of this goes on goes back to I think General Rowe's question. Is there a problem here? What -

COMMISSIONER SHENEFIELD: Well, I thought there was a problem -

PROF. FIRST: There was a problem in that case. I agree with you. And there was a problem when Dita Beard got in touch with John Ehrlichmann and killed the *ITT* appeal. That was a problem, too. So it can go on. And maybe—what do I know? Maybe there is still some of it today. Some people look at some settlements and say, I wonder if there's—I just don't have the data.

COMMISSIONER SHENEFIELD: All right, sir. Thank you.

MR. PROGER: Well, you know, Professor First, I don't want antitrust to be a popularity contest, so I don't agree with the voters point.

Let me be clear. Since you asked it in a comparative way, the answer is yes.

COMMISSIONER SHENEFIELD: Attorney General?

MR. ROWE: Not in Maine, and I would hope not in any other state. I can assure you not in Maine. I am elected by the legislature. I serve the Speaker of the House. I'm as political as anyone. It never happens on my watch. Never has, never will. In fact, I turn away people—I talk to people on occasion who are upset with what we are doing, but our investigations start with the staff, they come up, we continue them, and we treat everyone the

same. I know that for a fact.

I know I agree with Professor First. I'm not going to get into some things at the federal level, but I know that sometimes, when we change administrations, we see a change in how the Department of Justice, Antitrust Division, is carrying on in a case.

So, does politics play at the federal level? Yes, it does. Does it play a role at the state level? Apparently it did in the state you were in. I feel bad about that. But I hope you can't say that somehow state attorneys general are more susceptible to political—I don't know, "concerns," and they are going to be more likely to change the way they enforce a case because of that than anyone else. That's a problem.

COMMISSIONER SHENEFIELD: Let me pose a hypothetical to you. Suppose there were a monopolization case against a large out-of-state company, and one of the in-state companies for this hypothetical attorney general was a failing competitor. Don't you think there is some greater tendency for that state attorney general to embrace the position of that failing in-state company than there would be for a federal official who had to look at it across the board?

MR. ROWE: Perhaps in terms of human nature, in terms of living in the state, in terms of maybe knowing people who work at that company. But I don't think that's going to change at the end of the day what you do based on whether there is a violation of a law or not in terms of the enforcement action you take. Is it going to make it more difficult for me to make—you know, to file an action? Perhaps. But I'll still do it.

That's why I said at the beginning of my testimony, we treat everyone the same, globally or locally. If we don't, that's the problem. And I think that's why a lot of you are here today. You are concerned about states.

The states are sovereigns; you've got 50 sovereign governments. We don't always agree with one another. It's not the government versus the feds versus the states. You've got 52 folks out there, right?

And, listen, I went to the U.S. Military Academy. I served in the Army. I believe in the federal government. I'm so happy we have a federal government. But I just believe in federalism, too.

[Laughter.]

MR. ROWE: And I know that —

COMMISSIONER SHENEFIELD: This is coming out of my

time, now.

MR. ROWE: Okay. I'm sorry.

COMMISSIONER SHENEFIELD: Let me ask a different kind of a question.

Professor DeBow, if your only two choices were the status quo and state enforcement confined to—and we'll leave how we define it for some other day—confined to hard-core Sherman Act violations, you would be for the second and not for the status quo?

PROF. DeBOW: Right.

COMMISSIONER SHENEFIELD: And if, on the other hand, the provision was that the states could do everything they now do except they couldn't participate in merger investigations in cases and structural Section 2 cases—in other words, opening up everything—keeping it as it is except walling them off from Section 7 and structural Section 2 cases, and the status quo, would you prefer that? Or would you just as soon go with the status quo?

PROF. DeBOW: Well, I would prefer that to the status quo.

COMMISSIONER SHENEFIELD: So any diminution, you would think, is an improvement over the —

PROF. DeBOW: Well, I guess—and the point being

that it's not really so much the scope as it is to try to tie what the states are doing more completely to the federal standards, federal case law, and federal enforcement philosophy as reflected in different administrations' take on that and so on, yes.

COMMISSIONER SHENEFIELD: Final question, Attorney General Rowe. On page seven of your testimony, you mention modest incremental initiatives designed to rationalize the joint review process in the merger area. What did you have in mind?

MR. ROWE: Well, I mentioned the—specifically, the one thing I would offer up today. I would be amending the Hart-Scott-Rodino statute, and I mentioned that.

COMMISSIONER SHENEFIELD: You did. Nothing else?

MR. ROWE: I don't have anything specifically, no.

COMMISSIONER SHENEFIELD: Okay. That's helpful.
Thank you.

Madam Chairman?

CHAIRPERSON GARZA: Okay.

Commissioner Litvack?

COMMISSIONER LITVACK: Well, like Professor DeBow, I may be the Lone Ranger on this group, and I'm not sure I can even find a Tonto. At least you had one. Because I'm

sort of like General Rowe; I'm not sure I understand the problem. And more importantly, I fear that the solutions may be worse than the problem.

Let me just ask a question—let me start with you, Professor, if I may, which is, are you suggesting—you were talking about the importance to business of certainty and predictability. Do you think they have it today from the federal government?

PROF. DeBOW: As compared to what, would be the—

COMMISSIONER LITVACK: I don't know, but if you have some standard in your mind that businesses—and I advise them all the time—ought to be able to predict and know and be comfortable and confident how their government is going to react to a merger, a course of conduct, a business plan—my question is, do you think businesses have it today from the federal government?

PROF. DeBOW: They would have more predictability if there was less possibility of state involvement. So whatever level of unpredictability you may have—maybe it's not optimal and maybe it's not what people would like—at the federal level is only compounded—the unpredictability is only compounded by the presence of the states.

COMMISSIONER LITVACK: Well, what you have when you

have the states, obviously, if you do have a divergency or potential for divergency, and I think General Rowe said it, or at least I wrote it after he said something, which is, not surprisingly, there is probably a price to be paid for divergency. And the question is, how high is the price, and is the price worth it? And so I want to just focus for a moment on what the price is.

The only price I heard so far that at least resonates with me is, it seems to be the burden, the potential burden on businesses in complying with or responding to or talking with different potential enforcers.

Let me start with the General. Is that right, or is there some other burden I'm missing here?

MR. ROWE: I think you're right. That's what we hear. There's a great number of states involved. They are issuing subpoenas, and they are doing depositions. We try to partner with the federal government and streamline that and just do it one time if we can, but certainly that's a complaint that we hear.

COMMISSIONER LITVACK: Mr. Proger, you are a practicing lawyer. Is that really the issue, and if it is, can it be solved pretty easily?

MR. PROGER: I don't know--well, I think it can be

improved, and I tried to deal with that. But I think that—I don't want to say it's the states or it's the federal government. I think it's simply a function of multiple enforcement. It means increased costs and less predictability, and those are two significant burdens. And I'm not sure that I agree with the basic nature that when you have a common set of statutes being applied it's good to have multiple interpretations of them.

I know Professor First and others have suggested that there is some value to that. I told him I thought his paper was outstanding. It raised a lot of issues with me that I want to think about. But intuitively, I'm negative on that.

COMMISSIONER LITVACK: If you did away with the ability of the states to enforce those statutes, wouldn't you have multiple enforcement anyway, from private parties?

MR. PROGER: Well, that's a different subject, but the answer is yes, and I have other views on that that are similar to my views here.

COMMISSIONER LITVACK: So, in other words, you would strip it all away, put it all in the hands of an assistant attorney general or three commissioners at the Federal Trade Commission and say, I'll take my chances?

MR. PROGER: One of the things we haven't talked about is that I would like to see more judicial determination. And, by the way, that raises another question. One of the reasons I do think the states—I feel the states have done a really good job in *parens patriae*. Mergers are a different situation. But the one thing I wouldn't like to see is more state actions under state statutes going to state court judges.

COMMISSIONER LITVACK: You just touched on something that was my last point, which is, to the extent that you are talking about multiple enforcement, or different—at the end of the day, in our system, perhaps, unlike some others, it is that it's not about who brings the case; it's about who decides the case.

In other words, fine, someone can bring suit. If you have a time period where the federal government was not enforcing the laws as vigorously as some state attorneys general thought they ought to, whether the state attorneys general are right or wrong in bringing the suit, but ultimately, is a function of the courts. Doesn't that deal with the problem, Professor, if I may direct it to you?

PROF. FIRST: Yes.

[Laughter.]

PROF. FIRST: But it also illustrates —

COMMISSIONER LITVACK: Don't elaborate. I like the answer.

[Laughter.]

COMMISSIONER LITVACK: Please, feel free.

PROF. FIRST: It also helps to highlight how consistency is such a difficult goal in the end because how many of you have sat around and said, okay, where do I want to bring the suit, because the laws are different in different circuits?

So even with federal law, this notion of consistency—and I keep thinking of my students saying, tell me, is there anything consistent in antitrust? What are we learning here? That may be a comment on my teaching.

[Laughter.]

PROF. FIRST: But consistency is good; it's not the ultimate goal, because you may pay for it in terms of stifling the creativity and the evolution of antitrust, which will have to go on.

COMMISSIONER LITVACK: So far more so than if you had predictability. What about all of us lawyers who sit around advising people? They wouldn't need us.

[Laughter.]

COMMISSIONER LITVACK: I yield. Thank you.

Thank you, Chair.

CHAIRPERSON GARZA: Okay.

Commissioner Jacobson?

COMMISSIONER JACOBSON: Commissioner Litvack, you are not a Lone Ranger on this subject.

[Laughter.]

COMMISSIONER JACOBSON: And I'm usually pretty good about asking questions rather than making statements, but this is an area where I have a couple of things that I do want to put on the record.

The first one—Sandy just completely stole my thunder, because I do think it's unassailably correct that the only thing a state attorney general can do is bring a lawsuit. And, ultimately, that is going to be determined either by a state or a federal judge, so it's not like the state attorney generals' work is self-enforcing except in the context of issuing a subpoena and conducting an investigation.

The state attorneys general have no Hart-Scott hold, so mergers can get through unless the federal judge in most cases, conceivably a state judge, says no, you can't consummate the merger.

So the amount of harm is limited to investigatory costs, and I think, in the context of major deals that we are talking about as the source of the problem, those are a tiny fraction of the overall transaction costs involved.

The second point I want to make is something of an anecdote. I first met Sandy many years ago on the *Ocean Shipping* case, which was a grand jury investigation conducted by Commissioner Shenefield at the time, and we represented a couple of U.S. companies, but most of the defendants were foreign corporations, British, French, and German corporations, who were infuriated that the United States was conducting a criminal investigation into activities being undertaken that were considered not aberrational in those countries at that point in time. Yet the United States took the view that, you want to do ocean shipping into the United States, you're going to be subject to its laws. And the result of that was an extensive investigation resulting in guilty pleas and significant private recoveries as well. And not only did no one bat an eyelash at the assertion by the United States of its law into the conduct of people outside the United States—by the way, in the face of several blocking statutes that were enacted in large part in response to that investigation—but over the course of time, the other

countries involved ultimately adopted the United States' view of what was right and what was wrong in terms of whether price fixing was a good thing or not.

And yet, here today, some people are saying, oh, my goodness, why should Maine be able to exert its authority over people who have the temerity of actually doing business in the state of Maine? Candidly, I don't see a major difference between the two, and it may be that if Maine has a unique parochial view that infuriates people like the clients that many of us represent, that that may turn out in 25 years to be a good thing, just as I think history says the *Ocean Shipping* investigation was a good thing.

The third thing is a little more brief. I would like the states to stop apologizing for *Microsoft*. I think it was a fair thing to do. This was a level of activity that was hotly debated on both sides, but for law enforcers to take the position that we view this conduct as in violation of the law, we don't necessarily share the views of the federal enforcers, particularly when the administration changed hands, that that is something to apologize for; I think is just wrong, and I hear it so often from the state enforcers: well, this is not *Microsoft*; we're not doing that. I would like to stop hearing that, personally, and I'm sure

there are others who feel completely different from me on all these issues, but I did want to state my piece.

Having said that, I do have a question. I have very few. But, Mr. Proger, what are the predictability costs that you see that are engendered by state investigations, particularly in the merger area, that are different in kind from the predictability costs vis-à-vis an investigation by the FTC or the DOJ?

MR. PROGER: Well, just measuring one investigation versus another, I don't see a difference. I think it's the multiple nature that creates the unpredictability. Although, as I do point out, I do think the states ought to address their guidelines, particularly since they don't, as a practical matter, follow them. And General Rowe pointed out that the states generally follow the federal Merger Guidelines, and I think it would be helpful if the states would—and again, they are separate sovereigns, so we say, “the states.”

Apropos your point, I respect that dignity that each state would have to make the decision, but I do think that it would be good for them to either let them update the NAAG Guidelines or announce that they are going to follow the federal Guidelines.

But in terms of predictability, I think it is wrong to gang up on the states as being the problem. The problem is multiple enforcement, in my mind, and that's part of our system. And I don't have a problem with what the states have been doing. That's our system, and I do respect the fact that General Rowe is responsible for the citizens of his state, and if particular conduct is affecting them, then he has a right to enforce his laws or the federal laws under *parens patriae*.

But if all 56 jurisdictions, as there are and as he points out in his paper, do that, and they don't do it in a consistent way, and the federal government does it in yet another way, is that good for the country, and is that good for—Commissioner Jacobson, I know you represent clients. How do you explain to your client that one enforcer believes that this law is not violated by their conduct, but another enforcer believes that this law is, and how does the client then, in a responsible law-abiding way, conduct itself? I think it makes it harder. And I think it is inherent in our system, and I think that we ought to think about some ways of rationalizing it.

COMMISSIONER JACOBSON: Well, if it's a merger case, you close, and you tell the state, if you really

believe that, sue me, and I think history says that they don't in most cases. They do, like the *Bon-Ton* case, but it's a very unique and discrete set of circumstances.

But you raise a very good point about the Guidelines.

General Rowe, why are those guidelines still out there? Aren't they an anachronism?

MR. ROWE: Commissioner Jacobson, I really can't speak to that. The state of Maine uses the federal Merger Guidelines. We don't use the NAAG Guidelines. I'll get back to you on that as to what the status is, and how many states are using them. I don't want to comment, because I don't know the facts on that.

But I do want to just quickly not take too much of your time. I didn't mean to apologize if that's what you thought I was doing for *Microsoft*. I was just saying that seems to be what has caused all this, and I would just ask you to look at the other 99 percent.

I think the states that continued were within their rights. I believe that the end result, the decision, did add to it to protect consumers. But even if it didn't, they had every right to do that. They are sovereign states. And so I'm not—for the record, I'm not apologizing. We didn't

participate. I came in after—it was too late for us to participate when I took office. But I do want to make sure that—I didn't want to leave you with the impression that I'm somehow apologizing for the states, because I'm not doing that at all; please know that.

COMMISSIONER JACOBSON: That was really directed at others. I didn't take it that you would be apologizing. But others, including people in this room, have.

One last question, and it's for Professor First. Harry, what would you think of a proposal to eliminate private indirect purchaser actions and cede the entire authority for indirect purchaser litigation to the state attorneys general?

PROF. FIRST: This clearly is me speaking for myself, not on behalf of the state attorneys general. I wouldn't be in favor of that, actually. I think that there is a—in these cases, there's more of a problem between the private bar and the attorneys general than between the attorneys general and the federal enforcement agencies. And there is a tension here.

The private bar brings its own level of expertise. The private bar sometimes finds cases that the states do not find. I think something that eliminated private enforcement

and those incentives would, in the end, hurt antitrust enforcement, because I think they do bring an important component.

Now that said, of course, the private bar has its own set of incentives for what it does, particularly in terms of fees, the ability of the states to perhaps cut down the bill, the extent that the privates may not represent everyone out there, and the states may represent their consumers and particular classes.

In the end, I think it's a net benefit. So this is another difficult dance that goes on in another set of relationships. But if it works well, you preserve the incentives for private enforcement, and maybe squeeze out some potential for abuse in that, because the states, although they are not perfectly immune to getting attorneys' fees, the real goal is to get recoveries to consumers.

COMMISSIONER JACOBSON: Thank you, Madam Chair.

CHAIRPERSON GARZA: Commissioner Cannon?

COMMISSIONER CANNON: Thank you, Madam Chairman.

Thank you, everybody, for coming. I appreciate that. It's nice to see you after, 20 years is my guess, or something like that. You look the same, and I don't—I can't—

[Laughter.]

COMMISSIONER CANNON: I wanted to follow up, I think, kind of as a corollary to what Commissioner Shenefield was talking about, but also something that Phil said, which is, he's just not in favor of antitrust being a popularity contest.

It is. Unless and until the day ever comes that the final decision to bring a case or not bring a case, or to challenge a merger or not challenge it, whether it's at the Justice Department or the FTC or any state, for that matter—until that's not an elected official or an official appointed by an elected official, then it seems to me that it is a popularity contest.

Politics—all you have to do is look at the history of enforcement over the last 20 or 30 or 50 years, and I think that's amply demonstrated. I can't imagine—is it possible that politics played any role in the selection of Commissioners on this Commission? I mean, who knows, right?

[Laughter.]

COMMISSIONER CANNON: I mean I have no idea, but perhaps it did.

[Laughter.]

COMMISSIONER CANNON: But I'm trying to make a point, which is, pretty simply, it's not a bad thing for this

to be reflective of how the general public feels about this stuff.

Getting to that, the question I've got really gets down to resources. Phil, when I read your comments about kind of the imbalance between resources at the state and the federal level, what I took away from that was, you were saying, when there are limited state resources, that may necessarily translate into bad enforcement or inadequate enforcement or wrong decisions. Am I taking too much from that?

MR. PROGER: No, although I would say that again, I don't think you can be homogenetic about the states. States like California and New York have enormous capabilities and have large sections that can differ from other states.

My point was more that what I was doing in my paper was accepting federalism and accepting that we are going to have it, so how do we make it better? And I was wondering whether NAAG could be a vehicle for permanent lawyers who are experts in this area, like some of the sections of the federal government, maybe economists, accountants, other people who could be available to individual states like General Rowe's state, where that expertise might be available, or some working with the federal government, and I

think there is some of that.

But there is a difference in the resources and the frequency with which each state sees the matters, as compared to the federal agencies.

COMMISSIONER CANNON: But it wouldn't necessarily translate that limited resources means somebody has made a bad decision?

MR. PROGER: Correct.

COMMISSIONER CANNON: Okay. Great. Any other comments about Phil's thought about the NAAG having additional permanent staff on that?

General Rowe?

MR. ROWE: Well, I saw that. I'm not sure it would—maybe it would help to consult with, but we are 50—again, we use the word "sovereign" governments, but we are 50, and so NAAG is an association of the states. We are members for certain purposes. We don't all think alike or act alike, as you well know, and so there could be some benefit of having more resources. But I don't think you should assume the states are all one government. We are not, and so I guess I'm a little troubled by that.

We don't have a lot of resources, which makes us very frugal in the way we allocate our resources, and we go

after things that matter, and we see health care in particular, market allocation, price fixing—that stuff is important to us. The FTC, it's way below their radar screen, most of the stuff that happens. We spend a lot of our time.

Anyway, antitrust based on popularity—I just want to go back to what Commissioner Jacobson said. We can only investigate and we can put things in front of judges. It's their call; you know what I'm saying? And our judges are not elected. Our judges are appointed and confirmed just like federal judges.

COMMISSIONER CANNON: Oh, I think we agree on that. The point I was trying to make was, everyone can make a decision to try to prosecute or try to put somebody in jail or try to stop a merger, but it eventually gets to the courts one way or the other. So this Commission has the ability to suggest a million things, but we certainly can't enact anything. We are an advisory commission, and that's it. So what we say may be instructive or influential, but in terms of it being dispositive, not in a million years.

Mike, what do you think about Phil's suggestion on that, and Professor First, about the NAAG staffer?

PROF. DeBOW: Couldn't hurt, I guess. I mean, if the states stay in this, I assume over time, their role would

grow. It's just sort of in the nature of government to grow like that, right? And so if you could have a staff back-up for the smaller states and sort of a coordinating body, perhaps, at a national but sub-national level, that might facilitate conversations with the federal authorities as well.

COMMISSIONER CANNON: Professor?

PROF. FIRST: In some ways, it's good, but I think that—and this is just my own personal reaction—what the states really need is more policy planning and evaluation and—

COMMISSIONER CANNON: Individually, collectively, or —

PROF. FIRST: I think collectively. I wouldn't—my sense is, I wouldn't want to sort of institutionalize a third coequal enforcement agency. I think, as General Rowe says, the states are different, they have different interests, and they work on different things, and so forth.

What the states lack, and, frankly, sometimes the federal agencies lack, is policy planning and evaluation, and I think that that's a role that NAAG really could take, which the states don't have time to do because they're too busy having to field the cases.

Now there is a problem with economist support in the states. In New York we were fortunate enough to hire an economist in our office, and he made a tremendous difference in what we were doing. And I think that can be handled individually or maybe in some regional way by getting the states more money themselves directly, and that was the reason, I think--through the *parens patriae* vehicle, you might, without taxes, support the state effort better in sort of a directly related way to what they do.

So I like Phil's idea in a way, but I would direct the emphasis to policy planning and evaluation.

MR. ROWE: Commissioner, I also appreciate Mr. Proger's suggestion. I would like to just be able to supplement my answer. I'm going to think about that more, maybe, and talk to a few people if I can, and so I would just like to be able to do that. Maybe I won't. I stand by what I said, but I would like to be able to do that.

COMMISSIONER CANNON: Sure. Thank you.

One thing I was going to comment on, on one of your earlier comments, General, is about this question of cases in the states kind of bubbling up from the staff. Look, my personal opinion is, if you go out and you see something that you think is a problem, there's not a thing in the world

wrong with you telling your staff, I just saw that or this; are we looking at that? Do you see that as a problem? I assume you have done that on occasion.

MR. ROWE: Not at all. It's simply that a lot of times, our antitrust folks are the ones who get the calls, who are talking with the federal counterparts. No, not at all. I'm going to do that if I see it, and if I think something is wrong, I'm going to say, would you look at this, yes.

COMMISSIONER CANNON: It's kind of interesting. I thought about this when John was head of the Antitrust Division, and I had just come in as a staff lawyer. My first matter or case--and you will remember this, John--was registered land surveyors in a county in South Carolina. Do you remember that?

COMMISSIONER SHENEFIELD: Oh, I remember it. It was a brilliant investigation.

COMMISSIONER CANNON: Thanks.

[Laughter.]

COMMISSIONER CANNON: I'm from South Carolina.

COMMISSIONER SHENEFIELD: Mention what happened.

COMMISSIONER CANNON: We did okay, actually, come to think of it.

[Laughter.]

COMMISSIONER CANNON: No, it's funny, I'm from South Carolina, and I had been in the Division a month, and all of a sudden this case lands on my desk, in Columbia, South Carolina. My parents thought I was making it up because I was homesick to be able to come home.

But at that time I thought if there is ever a case that would be a great case for a state AG to investigate and prosecute, that was probably it. And I'm sure there are a lot of the cases that you do that are in that context that are clearly state focused, unless I'm missing something—my guess is on that.

MR. ROWE: Yes, there are; a lot of the cases we do are.

COMMISSIONER CANNON: I did have one other question for the panel, and I'm sure a lot of folks followed this. But in the *Federated-May* merger that was just consummated—and I come from a retail background; I was in Circuit City for about ten years. I did kind of pause when I read the settlement with the states because it was—it struck me as a little unusual. It's not unusual at all for there to be divestitures in a merger, obviously. But I don't know—are you familiar with that settlement?

MR. ROWE: Not as much as I should be to answer your question.

COMMISSIONER CANNON: Okay. Well, I see Phil nodding his head. So I've got a connection right here. But the thing about the settlement was, it said there was an order of divestiture of a certain number of stores. But the states came up with their preferred list of purchasers, and it was clearly in the kind of regional category. There were some national retailers on there, but not a lot. And essentially, as I read the settlement, if there was a bid from one of the folks on that list--and, in fact, there was a bid from another retailer that was higher, as long as that original bid was deemed to be commercially reasonable, then you had to take it.

Now, that struck me as a little unusual, and it also struck me as a little parochial.

COMMISSIONER SHENEFIELD: I rest my case.

COMMISSIONER CANNON: Okay. Phil, do you want to comment on that?

MR. PROGER: Do I want to comment?

COMMISSIONER CANNON: Do you represent anybody on that?

MR. PROGER: I signed it.

COMMISSIONER CANNON: You signed it.

MR. PROGER: That's my case. I represented Federated on that, and negotiated that settlement.

COMMISSIONER CANNON: Did I mischaracterize that at all?

MR. PROGER: That was a long investigation, undertaken by the Federal Trade Commission. Millions of documents—millions of gigabytes of information were produced. The states were involved from the beginning. It was a broader group initially. We entered into the compact of confidentiality, agreed to provide them all information, including HSR, that we agreed to provide the government, and in fact did so on a time-same basis.

At the end, the states disagreed with the conclusion of the government. I'm not going to get into the assurance because I think it gets complicated. I do point out that it illustrates why the ability to go to court is not always the answer as a practical alternative and, I think, is something that is public, so I'm not giving anything away, is that the stores that we agreed with the states to divest were stores we had previously publicly announced were not going to be kept for business reasons.

So a resolution was entered into and—by the way,

the resolution was actually signed after the closing, but it permitted the transaction to move forward in a way that the parties deemed appropriate, but there obviously was a significant divergence of views as to how to enforce the same statute. And that, as I have said today, is, as you all might guess, is something hard to explain to the people making the business decision.

The provisions in there reflected the views of the states, that there was a traditional department store market—I think you can read the FTC statement on that issue—and a desire to be able to divest those traditional department stores. So there is a mechanism that is ongoing at this time.

But that is an example where you had multiple enforcement on the same statute diverging greatly, and I think you are aware that the FTC actually issued a statement of why it didn't bring enforcement.

COMMISSIONER CANNON: My time is up.

CHAIRPERSON GARZA: Commissioner Burchfield?

COMMISSIONER BURCHFIELD: Thank you. I, as has been the case throughout these proceedings, greatly appreciated the statements that you submitted. I read them with tremendous interest and thought they were very well

prepared and quite thoughtful.

I just have a few questions. I may not consume even the time I've got, but General Rowe, I wanted to start with you and just ask you, when the state of Maine brings an antitrust action, does it generally tend to bring federal actions or state actions?

MR. ROWE: State actions in most cases. I did cite some figures in the merger area. We have had, I mentioned, 50 cases that have resulted in consent decrees or court decisions in the last 19, 20 years. Five of those were multistate mergers, and those were in the federal forum. So that's 25 percent, five out of 20 in the merger category.

COMMISSIONER BURCHFIELD: I assume, Professor DeBow, that because those federal antitrust--the federal antitrust claims, when the state brings them, generally are in federal court, that that helps promote doctrinal consistency, doesn't it?

PROF. DeBOW: I would hope so. I mean it's kind of hard to say, to give you a certain answer about that. But I think that that is true, yes. Federal judges would--it's not that every federal trial judge would have experience in trying an antitrust case, but you're more likely to run into that on the federal bench than on the state bench.

COMMISSIONER BURCHFIELD: All right. I think that's right, but ultimately, they are answerable to the Supreme Court, and they are trying to apply the same doctrines, presumably.

Attorney General Rowe, your office also, I assume, has jurisdiction over state consumer protection statutes?

MR. ROWE: Yes, we do.

COMMISSIONER BURCHFIELD: Do you often co-plead antitrust and consumer protection?

MR. ROWE: Sometimes we do, yes. I wouldn't say often, but sometimes, yes. Sometimes.

COMMISSIONER BURCHFIELD: I have seen, in my career, claims pleaded under federal antitrust law, state antitrust law, state consumer protection statutes, and some statutes that are difficult to categorize even in any of those categories. To the degree the states see concerns of activities of this sort, the point is, I take it, that they have other tools available to them to protect the citizens of their states, correct?

MR. ROWE: I didn't follow your question. Could you repeat that, please?

COMMISSIONER BURCHFIELD: If the states have concerns about particular activities of businesses in their

states, they have a variety of mechanisms to address that, don't they, outside of the antitrust laws?

MR. ROWE: It may or may not be the case, depending on the facts. I mean, it may be that we could bring an unfair trade practice action or not. In most cases, I understand from our chief antitrust lawyer, we don't. But in some cases we do. So I wouldn't say. I mean, if the question is, do you need state antitrust law because you have unfair trade practices act, the answer is yes, we need state antitrust laws.

COMMISSIONER BURCHFIELD: And I'm coming at it from a somewhat different position, and I apologize for being a little obscure.

MR. ROWE: Well, I'm obscure, too.

COMMISSIONER BURCHFIELD: My concern is, to the degree that this Commission were to recommend that state antitrust enforcement be pared back in some respect, I suspect the unintended consequence of that would be that states would still pursue similar actions under different state statutes or different common law theories.

MR. ROWE: The answer is yes, we would certainly try. If that's all we had, we would use it as much as we could. This AG would, yes.

COMMISSIONER BURCHFIELD: And that, pursuing the same claims under different theories presumably, Professor DeBow, would not lead to doctrinal consistency?

PROF. DeBOW: No, that's in fact—in my statement, I say you would need to address the "little FTC Acts" as well, for the very reason you are asking me.

COMMISSIONER BURCHFIELD: And probably numerous other types of state statutes. Even state common law.

PROF. DeBOW: I don't know how you would draft the statute, the preemption statute. I don't know if you would have to specify each kind of statute, each state's statutes that you are preempting. I don't know. Could Congress simply say, we are preempting the states to the extent that it's inconsistent with the Sherman and the Clayton Acts and be done with it? I don't know the answer to that.

But you would have to address that.

COMMISSIONER BURCHFIELD: I want to turn to your respective views on what this Commission, with its power solely to recommend, should be thinking about in terms of recommending in this area.

Mr. Proger, you made some suggestions about what the NAAG can do, what the states might do to cooperate more fully. Is it your suggestion that this Commission recommend

that they cooperate more, that this Commission recommend that Congress encourage them to cooperate more? What would be the concrete proposal you would have for this Commission to make the situation that you see better?

MR. PROGER: Well, I do think that the states could cooperate more. Not all of the states are even signatories to the compact. And I tried to make some specific suggestions.

I approached this in this way—I'm not looking for villains or bad conduct here. I think, by and large, all antitrust enforcers, including the states, try to do the right thing. But it doesn't have to be broken to try to improve it. I believe that we always should try to improve the process. And I do think that multiple enforcement raises some issues, and Chair Garza suggested what, to me, sounded a little bit like the European Union concept of community dimensions or something across the board.

I think it is in a relatively small area where you have something that is essentially national, with the federal government investigating, that we need to think about whether it's good to have a proliferation of 56 other enforcers possibly also investigating.

If the decision is that we should, then I would

hope that we could think of ways to do it in the most efficient and consistent way possible so as to minimize the burden of enforcement. Probably something you're looking at in a different panel, but the costs today of antitrust compliance in merger investigations and other investigations today—as someone who is old enough to have worked on reading the original legislation for HSR for the Antitrust Section and helping to draft some comments for Eleanor Fox on that, no one contemplated that companies would spend millions of dollars—I'm aware personally of situations where translations cost millions of dollars. And these are taxes that, ultimately, consumers pay.

So I hope that you could recommend—and I'm really grateful that you're here—some ways to make the system better.

COMMISSIONER BURCHFIELD: Okay. General, do you have any suggestions for what the Commission could write in terms of affirmative recommendations to make the system better? Either recommendations that are legislative or are just merely precatory?

MR. ROWE: Well, other than the one thing I did mention today about authorizing the federal agencies to share with the states the premerger filings under HSR, I don't have

any specifics. There may be some. But I know a little about your charge—I'll be real fast—and you are the Antitrust Modernization Commission. That sort of prejudices that it needs modernizing, and I guess I'm asking you to step back and think about that. It's working. It's working well, I believe.

I have offered one thing that I think would allow the federal agencies to notify the states; the states could get the information; we wouldn't be such a burden to the merging parties.

Beyond that, I don't have any. What I'm going to do again is supplement this real fast if I can think of something as I leave today and get back to you very, very quickly. But thank you for the question.

COMMISSIONER BURCHFIELD: Please. And if anyone else wants to supplement remarks today, we are very open to receiving those.

VICE CHAIR YAROWSKY: Commissioner, would you yield for a second?

COMMISSIONER BURCHFIELD: Yes, although I don't have any seconds left. I want to get comments from Professor First and Professor DeBow on that point, but—

VICE CHAIR YAROWSKY: Would you comment, though, at

some point after answering Commissioner Burchfield's question about model codes? It was alluded to. It may not go for every subject matter area, but is that something also that might have more of a collective action that might be useful?

I'm sorry.

COMMISSIONER BURCHFIELD: Not a problem. My pleasure.

Professor First, do you have any concrete suggestions that this Commission might recommend?

PROF. FIRST: Well, I did make that suggestion for an amendment to 4(e) of the Clayton Act, which would make clear that courts should—they do sometimes now, but this is more discretionary—allocate part of recoveries in federal *parens patriae* cases to the states for state antitrust enforcement.

Now this does happen, but it's more ad hoc, and I think this is an appropriate way to get capital infusion into the states.

It is certainly appropriate after—you all are looking at a broad array of things, and I think this is part of what I view as the antitrust conversation that's going on. Policy competition, shall I say, is an important part of what happens in antitrust, and it's why, when we keep saying are

there problems, you don't see huge divergences. You may see some. The states may still feel that they define retail competition in a better way than the federal government, even though others may disagree, like the defendants. This has happened a lot. It happened in mergers in California with food stores. It's happened in supermarkets. It happens.

I don't think we should assume that because the federal government has decided it and the states differ, that, therefore, the states are wrong. It may be, on occasion, that the federal government has it wrong. This is how we develop things.

Now, when we look at this assurance, we're really talking on the margins, if these were stores that were going to be divested anyway, then maybe my complaint should be that the states are too weak, but that doesn't seem to be the view around the table.

[Laughter.]

COMMISSIONER BURCHFIELD: Madam Chairman, may Professor DeBow answer the question, which is, I'm looking for any concrete suggestions you have.

PROF. DeBOW: Beyond what I have written, I don't have anything further. I haven't been coy about my preference about this.

COMMISSIONER BURCHFIELD: That is definitely concrete, I would say. Thank you.

Thank you all.

CHAIRPERSON GARZA: Thank you.

Commissioner Kempf?

COMMISSIONER KEMPF: Thank you.

Let me pick up on something that, Professor First, you talked about in your written submission. It says, "Calls to decrease antitrust enforcement by cutting down the role of states would seem to me particularly ill advised."

That echoed something that—in his oral remarks, General Rowe said, gee, we surely don't want to do anything that would lead to less antitrust enforcement.

Maybe this is the question that everybody is talking about. I don't think of more antitrust enforcement being a good thing or a bad thing. I think of it as a neutral thing.

First of all, I start off with antitrust as being a hodge-podge of some very different statutes that are, at times, inconsistent with each other. And I view more antitrust enforcement that is sound as good; I view more antitrust enforcement that is ill conceived as bad.

I think of more antitrust enforcement of bad laws

as ill-advised and less antitrust enforcement of those bad laws as good. So I don't think that I can subscribe to the notion that says, we don't want to have less antitrust enforcement; I do want to have less antitrust enforcement that is wacko, and I want to have more antitrust enforcement of sound statutes.

To put it differently, when Attorney General Rowe says, when consumers are being ripped off in my state, I think it's a good thing to go after them, I am a strong believer that we should have more enforcement of Section 1, price fixing, and things like price fixing, but I also have concerns that perhaps we have too much enforcement of other kinds of antitrust laws. Shared monopoly attacks, merger attacks, monopoly cases—I think you said that we haven't had one in several years now. I view that as, perhaps, a good thing.

Robinson-Patman cases that are designed to raise the cost of what everybody pays in America for things they buy—I think more enforcement of that kind is a bad thing.

So I don't view it as a more or less thing; I view it as a sound versus unsound thing.

At one point, Professor First, you said, we don't want to stifle creativity in evolution of the antitrust laws.

I'm not sure I would sign onto that. The creativity and searches for creativity have gotten us into some pretty time-consuming and wrong-headed types of things.

But when I go back to your question, I say, does it cut too much? Attorney General Rowe, for example, does that mean that if we don't want to have less, should we not only not cut back state enforcement, but should also authorize municipalities to go after things that are in their neighborhood? Or should we have not only the--already we have two at the federal level. Should we authorize the Bureau of Mines to bring antitrust cases?

I mean the fact of more or less--you can carry that on, and I really haven't seen a shortage, because on top of all of that, we have private actions.

So I suppose my first question would be to Professor First and to Attorney General Rowe, and that is, address, if you would, this concern that I have that--let me pick up just to add a footnote to Commissioner Jacobson saying, the states don't need to apologize for the *Microsoft* case.

I don't think the states need to apologize any more than the federal government does would be the way I would look at that.

[Laughter.]

COMMISSIONER KEMPF: Or the private competitors. And I have a large concern at the state level, as I did at the federal level, of more antitrust enforcement being translated into the state government acting as a stalking horse for adverse interests of consumers by protecting competitors who don't sell products either as cheaply or make them as well as other people, and they are suffering in the marketplace because of that, and they turn to antitrust enforcement at both levels, and especially at the state level, as a way to protect themselves from the public-serving rigors of competition. It's antitrust upside down in one sense.

So my question is -

[Laughter.]

COMMISSIONER KEMPF: I sound like Commissioner Jacobson. My question is, therefore, what?

Please comment.

[Laughter.]

PROF. FIRST: Well, if the seven judges in the D.C. Circuit were here, who affirmed, in essence, the core of the government's suit in *Microsoft*, I'm sure they would not apologize, either, for their decision. So I'm on the non-

apologetic tack.

I think that your concern about protectionism and protecting competitors is of course always something that antitrust enforcers are concerned about because competitors do complain; it's how you learn about things.

But there I'm skeptical. I think this is the reason that, if you want competition, you want this enforcement to be done by people who have an interest in and a professional connection to antitrust enforcement as it has evolved.

We didn't get to the point that we are at today by chance. You know, if certain ideas about antitrust are felt to be discredited, they got there through a complex evolution that included bringing particular kinds of cases or not. It included guidelines; it included a whole host of things. And I don't think we are at the end of days yet, either. I think that we will continue to evolve.

Now should we bring bad cases? Well, okay, that's—no, I don't think we should.

[Laughter.]

PROF. FIRST: Should we bring good cases, and are there likely more of them out there than are currently being brought?

My quick sort of suggestive charting of antitrust against the growth in the economy is a suggestion that, as economic activity increases, antitrust people can bet that there is more collusion. You know this happens, and there are more things to be worried about in that sort of economy, whether it's bidding to state agencies that states don't have time to go after, whether it's anticompetitive decisions by state agencies that state antitrust enforcement should pay more attention to. There's more to be done, and that's why I said I'd be more concerned about cutting back on this.

At some point I just don't understand why, if we like competition, we would want less of that sort of enforcement. Unless you can say you've got a laundry list of horrors that the states have done, or if the states weren't there, that the FTC did, or if the FTC wasn't there, the Justice Department did.

So I don't see the list of horrors, and if it's the Robinson-Patman Act, nobody enforces that, of course, except the private bar. So you might want to think about dealing with that statute, which I assume you are, by—obviously you don't deal with it by —

COMMISSIONER KEMPF: Let me narrow my question, and I'll ask the other professor and the Attorney General. And

that is, since I think that I would like to see more enforcement at the local level, where dairies, road builders, home builders, and hospitals, you mentioned—and in my judgment, can be a problem.

So, what about a compromise with the total abolition that Professor DeBow advocates that says, okay, here's what we're going to do: we're going to limit the states' jurisdiction to Section 1 claims. What that would certainly result in would be a lot more Section 1 claims and a lot less other claims.

MR. ROWE: Well, if you're asking me, I think that would be wrong. My comment earlier was that I hope we can agree that any reform proposal that would appreciably diminish enforcement coverage at any level should be rejected. I'm not advocating that municipalities or counties have antitrust enforcement tools. I think what we have is working.

We are involved—the cases we are involved with are more the cases that you're talking about, "we" being my lawyers and my department. They are the price fixing, the market allocation, and the bid rigging, those types of things.

We do get involved in mergers from time to time,

but a lot of the stuff intrastate doesn't involve mergers. Sometimes it does.

But I don't know you have to—your idea is, well, we'll take this away from you, and that way, you can dedicate your precious resources—target them more carefully. It doesn't work like that, in my opinion. I think we do quite well with the resources we have because I know what's important—I think I do. We live in our state; we know the markets; we know the players; we know what we hear from consumers; and we alert the FTC on a regular basis that we're looking at something, and we ask, would you like to look at it with us?

So, again, I just don't think it's broken. I'll stop there.

COMMISSIONER KEMPF: Professor DeBow?

PROF. DeBOW: Commissioner Kempf, your proposal is very similar to the one that I mentioned in my earlier article, and I helped draft the legislation that unfortunately died in committee in Alabama, so I could send you a copy of that, if you would like. I think that's a good idea, myself.

COMMISSIONER KEMPF: I would. I would appreciate it.

In that same vein, I have just two quick things for Mr. Proger. One, you are not a panelist on the M&A section we're doing, but I would encourage you to submit something on this issue that you raised about M&A costs and how that has gone so far afield from what was originally contemplated, and, at the end of the day, that's a tax on consumers.

You also made an allusion, if I could comment, where you said something like, perhaps there should be more—there aren't any cases anymore, or maybe the way you phrased it is that perhaps there should be more cases. Can you expand on what you meant when you said that?

MR. PROGER: Yeah. I was referring to the fact—and I think it's pretty well known within the antitrust bar. Some of us are old enough to remember the Expediting Act that a lot less cases are getting judicially decided. I can remember when I first started that it was really important to hear each year and each term what the Supreme Court was going to say about certain things, and cases were coming out of the Supreme Court. Now there are years when—this year is a little different, but there are years when we have no cases, and I think antitrust has benefited by a judicially determined body of law, and we seem to have lost a little of that.

COMMISSIONER KEMPF: That's all.

CHAIRPERSON GARZA: Commissioner Carlton?

COMMISSIONER CARLTON: Thank you.

I, too, appreciated all your statements, and for me, it's especially helpful since I'm not trained as a lawyer, as I'm trying to learn to appreciate the costs and benefits of federalism.

I wanted to start off with that. I wanted to distinguish—and I think everyone would agree with this distinction—the difference between having state law and federal law versus having multiple enforcement agencies for the same law.

Let me start with the first issue. I am really trying to understand it in the context of a statement that I think both Professor First and Attorney General Rowe either have in their statements or made in their testimony, in which they talk about the benefits of competition in antitrust and make reference to 50 separate laboratories.

I understand that entirely, when matters are local. What I cannot understand at all is how competition is desirable when the effect of what you do in one state has effects in other states. Because we know that competition is desirable only when the people who are doing the competing

reap the full benefits and costs of their actions.

To give you a concrete example, let's suppose a state law says that you have to take into account the adverse effects on the citizens, and that is interpreted to mean job losses. If it's a national merger, isn't it the case that competition among state agencies in that case, individual states, could be harmful? And we know competition doesn't work properly in instances when you have these multistate externalities.

So I just wanted to explore—I understand the local matters, and that I am convinced of, from your statements. But I don't understand the statement as it applies to, say, a merger case or any other case with national implications.

So could I start with Professor First and then Attorney General Rowe?

PROF. FIRST: You did start off by making a distinction between state law and differential enforcement of the same law. So I just wasn't certain which one now —

COMMISSIONER CARLTON: Different state laws. Suppose there's a state that has a different law than everybody else, and it gives a value to something that the rest of the states don't care about, but they will be adversely affected.

PROF. FIRST: Okay. So my first reaction is, we don't, because state antitrust law—all the ones that I'm familiar with—basically, unless there's something really clear—take the same view of antitrust as the federal law.

So, as a hypothetical, it seems to me the way we have dealt with that would be through the Commerce Clause, and whether there is some burden on interstate commerce.

So I can answer that sort of hypothetically, because I don't think that state antitrust laws actually have those biases in it.

I think one of the concerns is that state enforcement may be done in a way that would have those biases, and I guess there is a potential for that, although I would like to see actual examples.

One of the things that actually moderates the concern for spillovers is multistate enforcement. Because large cases generally require multistate efforts. Single states don't have the resources. And so it becomes very hard to see which state—if there are spillovers, they would cancel. It won't get into the mix quite so well as if it's one state saying, ah ha, we are going to enforce it in a way that imposes costs on another.

COMMISSIONER CARLTON: Unless it's the state that

benefits from the merger; that state wouldn't be trying to stop it.

PROF. FIRST: Well, if it is a multistate enforcement action, it's going to be hard to know, or the more states you have in there—and generally, in large mergers you're going to have multistate—and you will have the federal government in it as well. It's sort of hard to figure out where those spillovers are.

So I think it's a—this is, to me, more of a theoretical concern, both in terms of the actual statute and in terms of the way enforcement has been done.

COMMISSIONER CARLTON: Yes, but I thought the notion that competition in antitrust is good was precisely a theoretical concern. It's a theoretical statement. And what I'm saying is, it doesn't seem to be correct when there are externalities that maybe practically we can look at whether it has had that effect in light of the state laws. But in light of the fact, as I think was mentioned, that the merger standards, for example, are different than the federal, at least it could, so that, as a theoretical matter, the notion that competition among 50 laboratories supports federalism and antitrust just doesn't seem right.

PROF. FIRST: Well, to me, the way I would think of

it is that that competition has in fact—I think in a way it's operated to take that out of the calculus, frankly, without anyone saying, this is what each state law has to be. I think that the different views have coalesced in a way that there is agreement that that's not part of merger analysis.

You're right that, as a theory, it's a problem of federalism generally. You could have it in any environment; you could have it in every area we think about. So as I think about it, the question is, how do you set up a structure that, on an ongoing basis, will produce better results than just simply saying, there is one way? And there is a danger, and I think in some ways what we see is, maybe there's a reason the danger hasn't come through; because better policies have won.

COMMISSIONER CARLTON: Okay.

Attorney General Rowe?

MR. ROWE: I would agree with everything Professor First said. I would add that I think the scenario you are pointing to, perhaps that one state—it is about enforcement. It's whether that particular state attorney general would get involved or not. Maybe he or she wanted the merger to happen and didn't care to investigate, because they might find something. I don't know.

But all the folks on the same side of the "v." in the action would be presumably in the investigation, the federal agencies and the other states. The competition is a healthy competition, I think, that Professor First is talking about. It's not that you disagree fundamentally about whether the merger should occur or not; it's more the nuances, I think.

I kind of misunderstood how you set that up, but I thought I heard you say, because of the externalities, a particular state may not feel like everybody else because its citizens were going to benefit greatly by the merger, more employment, et cetera.

COMMISSIONER CARLTON: Yes.

MR. ROWE: I don't know what would happen there. The question was put out earlier, what would the attorney general of that state do? How would he or she feel? Would they neglect their duties to investigate what a violation of state law and federal law was because of that?

COMMISSIONER CARLTON: Yes. That's precisely my point.

MR. ROWE: Yes. Well, I would hope they would not. This one would not. I don't know what other ones would do.

COMMISSIONER CARLTON: If they had different

objectives, which they are allowed to have, then it seems to me that that undercuts the basis for federalism.

Now maybe they can work it out, and it hasn't been a problem, but it strikes me as a theoretical matter it's only eliminated if you confine the states to local issues.

But let me go on, because I had an enforcement question. Let's focus now on enforcement, and let's suppose it's the same statute, my assumption. Everybody agrees, and the state laws are all identical, which, by the way, is not my understanding. It's my understanding that state laws do differ. But let's forget about that, and suppose it's a federal action. And I understand one of the benefits that people have talked about is, at least in the papers, if the government isn't living up to its responsibility, for example, the states can step in. So let's suppose the states don't think the government is enforcing the antitrust laws, so the states could step in.

Does that reasoning suggest that if the feds have stepped in, it's not necessary for the states to step in? Maybe they want to cooperate, but we could at least say we might want to give the federal investigation the right to preempt state interference. What would be the reaction of the same two people to that proposition? If the feds are

already investigating something or prosecuting something, we let them settle the case or not, not the states?

PROF. FIRST: Well, I guess my reaction is that, in many cases, it turns out that the federal government actually likes to have the states involved, and—

COMMISSIONER CARLTON: To have the option.

PROF. FIRST: To have the option. Is the question then, should they be able to say, go away and don't do anything?

COMMISSIONER CARLTON: Yes.

PROF. FIRST: I'm not sure of the need for that in this sense. I think if, in those cases, it was up to the states then to say, should we file a second suit, the same as the first, it would be maybe sort of an odd thing for the states to do.

I think the role that has evolved—and again, I think this is because there are some efficiencies and some reasons for it, is some sort of cooperative enforcement in those, and you see it a lot in the merger cases, where the federal government would like to have the support of the local attorney general.

COMMISSIONER CARLTON: The question is whether they have the right to tell them to go away. But let me go on

because I'm about out of time. I wanted to ask both Mr. Proger and Professor DeBow quick questions.

Phil, is it correct that—I just want to make sure I understand your position. You would, in the merger area, want the states to adopt the same policy, say, as the federal Merger Guidelines?

MR. PROGER: I think my point reflects that I think, as a practical matter, when you deal with the states, they do follow the Merger Guidelines, and if they do, then they ought to say so and follow them. And they have outstanding NAAG Guidelines that, if they're not following those, then we ought to do away with them because there is a certain cost of having to review them and trying to deal with something that's apparently on the books but not being enforced.

COMMISSIONER CARLTON: And the last question is a short one for Professor DeBow. Really, Professor First touched on it. When you think about competition among 50 independent laboratories with no externalities across the states, you can think of how a local economic matter might fit that. What is your response, though, to environmental laws that may differ across states or otherwise that may differ across states for an industry that exports its product

to different states?

In other words, just like you can say, I only want to restrict states to passing laws that affect their own citizens, would that mean in that thinking, which I think is reflected in some of your proposals, that you would also want to restrict the states as to what other types of laws they would enact if there were national corporations operating on the borders of those states?

PROF. DeBOW: I guess it's a matter of degree, to a large extent. Are there significant effects outside the state's borders on consumers? If there are, I would try to be consistent about my attitude about that.

If the out-of-state effects are minimal, then I have no problem at all with Maine or Vermont or Idaho or whichever state wants to engage in a different antitrust philosophy. That's fine. But in a merger-

COMMISSIONER CARLTON: What about something other than antitrust?

PROF. DeBOW: Well, or anything else, for that matter. I'm fairly strong on federalism as a concept. I don't have an objection to that at all.

Could I just say a word about the question about state and federal law? Your first question to Professor

First?

I would urge folks to—I think the federal case law in many areas of antitrust is sort of underdetermined. You read the case law—it goes to Commissioner Litvack's point earlier. There is some uncertainty in the federal antitrust regime, and to say, well, the states are going to try to follow that federal law as closely as they can, I think would be arguably within the scope of that commitment for a state court to revive *Brown Shoe* in the merger area. It's still a decision; it's not been overruled.

So I am not certain that you can just assume that the state laws will either now or continue to be linked as closely as perhaps would be optimal for consumers to the federal substantive law.

CHAIRPERSON GARZA: Thank you very much to all of the distinguished witnesses. We all appreciate—everyone on the Commission—the time that you have taken, both to write your submissions and to appear before us and to suffer our questions.

I would like to say that this is definitely the last you will hear from us, but I won't make that commitment. Certainly, if there is anything that you would like to submit to us to consider in light of the questions to supplement

your responses, please feel free to do so.

I will ask the staff to close their ears. We'll take anything that you want to give us.

[Laughter.]

CHAIRPERSON GARZA: We really are receptive to anything that you have to say, so I encourage you to, if you want to, continue the dialogue—feel free to do that.

General Rowe?

MR. ROWE: I just want to clarify one thing for the record. In response to Commissioner Kempf, we talked about only having Sherman 1 and maybe doing away—I said a lot of our work, which is true, is price fixing and market allocation, but it is about 40 percent; 20 of 50 cases involve mergers. So we are active as a state in that area, too, both in multistate—mostly intrastate but I wanted to clarify that because I may have misled you, sir.

Thank you very much.

CHAIRPERSON GARZA: Thank you.

[Whereupon, at 4:08 p.m., the hearing concluded.]