Statement of Harry First*
Before the Antitrust Modernization Commission

Hearings on the Allocation of Antitrust Enforcement
Between the States and the Federal Government

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Summary

I want to thank the Commission for giving me the opportunity of appearing today to discuss state antitrust enforcement.

My remarks today will address two general areas. First, I will try to provide some historical and theoretical background for assessing not just state antitrust enforcement, but the more general question whether there should be multiple institutions of antitrust enforcement in the United States. Second, I will present some of my preliminary research on the actual scope of state antitrust enforcement.

My general conclusions are as follows:

- There is a rich history of using multiple institutions of antitrust enforcement in the United States.
- Multiple institutions of antitrust enforcement can provide necessary policy diversification for our system, fostering useful experimentation, providing legislators with an important

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mechanism for evaluating the professional services rendered by specialized enforcement agencies, and leading to more competitive outcomes in the market for antitrust enforcement.

- My preliminary data on state antitrust enforcement indicate that state enforcers are more active than many commentators may have thought; that states file more suits on their own than commentators may have thought, using state courts more often than some had assumed; that joint state/federal efforts ("complementary enforcement") constitute a smaller part of state antitrust enforcement than some have assumed; but that the overall pattern of state antitrust enforcement appears only modestly different from the pattern of federal antitrust enforcement.
- Although the data themselves cannot show whether there is state under- or over-enforcement, the relatively small number of state cases, coupled with a lack of enforcement resources, leads me to believe that under-enforcement is the more likely conclusion, particularly given the size of the U.S. economy to be policed by antitrust enforcement agencies. Calls to decrease antitrust enforcement by cutting down the role of the states would seem to me particularly ill-advised.
- State antitrust enforcement could be improved by increased funding that would allow the states better to understand and manage their enforcement resources. The Commission might consider, for example, recommending an amendment to the federal parens patriae statute permitting the distribution of some portion of the monetary recovery to the states for this purpose. This would be a good way to modernize antitrust.

I will divide my remarks into four parts. Part I will provide some historical background relating to multiple antitrust enforcement in the United States. Part II sets out a theoretical framework for evaluating multiple enforcement. Part III sets out the preliminary results of my study of state antitrust enforcement, focusing on the last ten years (1995-2004). Part IV sets out my conclusions.

I. Historical Background

State antitrust enforcement has recently become a matter of policy and scholarly concern. Beginning with Richard Posner's proposal to relieve the states of their power to enforce federal or state antitrust law (except for suits for proprietary injury), commentators have directed increasing attention to the role of states in antitrust enforcement in the United States.[1] Despite these recent critiques, however, as an historical matter state antitrust enforcement has a long history, during which it has been well-accepted.

To understand the position of state antitrust enforcement it is helpful to review the early period of antitrust enforcement in the United States. As is well-known, the U.S. antitrust enforcement system began as a common law enterprise. Prior to the enactment of federal and state antitrust laws, private litigants, seeking to avoid contractual obligations, often argued that enforcement of a particular contract would restrain trade and that the contract should consequently be void "as against public policy." Important substantive antitrust doctrines were formed in litigation framed this way, particularly the basic ideas behind what types of private restraints might be considered "unreasonable."

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[1]Examples include Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L.J. 673 (2003); Michael DeBow, State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal, in Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy (Richard A. Epstein and Michael S. Greve, eds. 2004); Harry First, Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 Geo. Wash. L. Rev. 1004 (2001); Michael S. Greve, Cartel Federalism? Antitrust Enforcement by State Attorneys General, 72 U. Chi. L.Rev. 99 (2005); Jay L. Himes, Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the *Microsoft* Case, 11 Geo. Mason L.Rev. 37 (2002); Richard A. Posner, Antitrust in the New Economy, 68 Antitrust L.J. 925 (2001). Scholarly attention to state antitrust enforcement is not new, however. See, e.g., John J. Flynn, Federalism and State Antitrust Regulation (1964); Stephen Rubin, Rethinking State Antitrust Enforcement, 26 U. Fla. L.Rev. 653 (1974); Stone, Reviving State Antitrust Enforcement: The Problems with Putting New Wine in Old Wineskins, 4 J. Corp. L. 547 (1979).

By the end of the nineteenth century a number of states and the federal government had enacted antitrust statutes whose substantive provisions were built on the doctrines developed by the common law. One of the most important innovations of these statutes, however, was institutional, not doctrinal. As Hans Thorelli pointed out in his definitive study of the legislative history of the Sherman Act, these laws created a system of public enforcement, one that could be invoked by government prosecutors who could seek more effective penalties than simply the invalidation of a private contract. Further, for the first time, these remedies could be sought in federal court, as a matter of federal law.[2]

Centralized government antitrust enforcement, however, was not immediately realized. The first federal antitrust statute, the Sherman Act of 1890, put jurisdiction for government antitrust enforcement in the hands of the "several district attorneys of the various federal judicial districts" who acted "under the direction of the Attorney-General."[3] A centralized Department of Justice was only twenty years old at that time; the district attorneys themselves had been under the legal control of the Attorney General for less than thirty years (they had been completely independent from 1789 until 1861).[4] Public antitrust enforcement capacity thus built slowly. It was not until thirteen years after the passage of the Sherman Act, in 1903, that Roosevelt secured an appropriation earmarked for antitrust enforcement and created a specialized antitrust unit within

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[2]See Hans B. Thorelli, The Federal Antitrust Policy: Organization of an American Tradition (1955).

[3]Act of July 2, 1890, c. 647, § 4, 26 Stat. 209 (suits in equity).

[4]See Sewall Key, The Legal Work of the Federal Government: A Study in a Problem of Governmental Organization, 25 Va. L. Rev. 165, 175-81 (1938).

the Department of Justice. Even during the Roosevelt Administration's days of active antitrust enforcement, that unit's average size was only five lawyers.[5]

Despite relatively active antitrust enforcement under both Roosevelt and Taft, this early period was marked by great disagreement over the effectiveness of the Sherman Act. There was concern that the Supreme Court's 1911 decision in the Standard Oil case, adopting a "Rule of Reason" for interpreting the Sherman Act, would make that Act ineffective. The result was the enactment in 1914 of the Clayton Act, with its specific prohibitions, and the Federal Trade Commission Act, establishing a new administrative agency and giving it authority to enforce the Clayton Act and to stop "unfair methods of competition."

From an institutional point of view, an important result of these two statutes is that the United States ended up with two federal government agencies enforcing the antitrust laws, rather than a single agency that would control the direction of enforcement. Why did Congress create dual enforcement? If it wanted to have an administrative agency, why not simply take jurisdiction away from the Justice Department and consolidate it in the new agency? The answer is that Congress' creation of dual enforcement was mostly inadvertent, but not completely so.[6] For one thing, there were provisions in the FTC Act which recognized that the Commission might be an enforcement counterweight to the Justice Department.[7] For another, Congress assumed that the two

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[5]See Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust L.J. 1, 16-17 (2003).

[6]See Winerman, supra note 5, at 88-92.

[7]One provision gave the Commission the power to investigate court orders entered in Justice Department cases and report its findings to Congress; this provision was specifically intended to monitor Justice Department "laxity." See 51 Cong. Rec. 8845 (1914) (remarks of Rep. Covington). The provision is codified at 15 U.S.C. § 46 (c). The Commission used this power in its early days, attempting to prod the Justice Department to enforce previously entered decrees. See Thomas C. Blaisdell, Jr., The Federal Trade Commission: An Experiment in the Control of Business 183-258 (1932) (investigations of meat-packing, steel,

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agencies might operate somewhat differently; indeed, one early commentator wrote that "it is apparently contemplated that both the Attorney General and the Federal Trade Commission could if they were so minded bring simultaneous proceedings against the same party on the same charges."[8] Nothing in the two statutes prevented that result.

Perhaps the most logical reason why Congress might not have been so concerned about overlapping jurisdiction was that there already was overlapping antitrust enforcement in the United States. For one, Congress had created a private treble-damages remedy when it enacted the Sherman Act in 1890, in effect turning the defensive use of the common law's prohibitions on restraints of trade into an offensive remedy that could be invoked by private parties "injured in their business or property" by a violation of the Act. The private right of action was well-established by 1914 when Congress enacted the Federal Trade Commission Act.

More to the point, governmental antitrust enforcement in 1914 was not the sole prerogative of the federal government. State antitrust enforcement, proceeding under state antitrust laws, was quite robust at the time, particularly in comparison to the federal government's efforts. At least thirteen states had enacted antitrust legislation prior to the passage of the Sherman Act in 1890; by 1900, twenty-seven states and territories had antitrust statutes; at least thirty-five had them by

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tobacco, oil, aluminum, and radio). These efforts "received slight consideration by the Department of Justice." Id. at 255.

The other provision allowed courts in Justice Department suits to appoint the FTC as a special master to address remedy issues. This provision is codified at 15 U.S.C. § 47. It apparently has been used only once, in United States v. Corn Prods. Ref. Co., 234 F. 964, 1018 (S.D.N.Y. 1916) (reference to FTC to prepare a plan for dissolution of monopoly firm "which has shown such an inveterate and incorrigible insistence upon interfering with the course of commerce which the law demands") (L. Hand). See Winerman, supra note 5, at 54 n.308.

[8]Gerard C. Henderson, The Federal Trade Commission: A Study in Administrative Law and Procedure 45 (1924).

1915.[9] Between 1890 and 1902, twelve states had brought twenty-eight antitrust suits; the United States Department of Justice had brought nineteen.[10] The total fines imposed in Justice Department antitrust suits by the end of 1914 was $619,965; in one suit brought by Texas in 1906, a subsidiary of Standard Oil was fined $1.6 million for violating Texas antitrust law.[11]

Even more interestingly, during this period state enforcers in fact sued many of the same companies that were sued by the federal government for antitrust violations. These targets included the major trusts of the day—the Standard Oil Trust, and the sugar, beef, and tobacco trusts.[12] On June 8, 1914, just five days before the Senate Commerce Committee reported its bill giving the proposed Federal Trade Commission power to prescribe unfair methods of competition, the Supreme Court decided two important state antitrust enforcement cases. One was brought by Kentucky, and the other by Missouri, against the International Harvester Company.[13] International Harvester had also been a target of federal antitrust action, in a suit brought by the Justice Department in 1912—filed *after* Missouri's action and based on the same grounds as the

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[9]See James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918 135 U. Pa. L. Rev. 495, 499 (1987). Other commentators have different counts. See, e.g., Stanley Mosk, State Antitrust Enforcement and Coordination with Federal Enforcement, 21 A. B. A. Antitrust Section 358, 363 (1962) (21 states had antitrust laws at time Sherman Act was adopted).

[10]See May, supra note 9, at 500-01.

[11]See id. at 502. The Supreme Court upheld the fine against constitutional challenge in Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909).

[12]See May, supra note 9, at 501.

[13]See International Harvester Co. of America v. Kentucky, 234 U.S. 216 (1914) (Kentucky antitrust laws prohibiting fixing a price that was "greater or less than the real value of the article" violates Fourteenth Amendment); International Harvester Co. of America v. Missouri, 234 U.S. 199 (1914) (upholding Missouri antitrust laws) (combination of firms that formed International Harvester included firm doing business in Missouri; after the combination International Harvester had 85 to 90 percent of market in Missouri).

successful Missouri suit.[14] Indeed, state enforcement was substantial enough that during the debates over the proposed FTC Act the Senate considered giving the states the power to bring Sherman Act cases in the name of the United States when the Attorney General did not act (the amendment failed by a vote of 21-39).[15]

Finally, state law also served as a model for the original provisions of the Clayton Act. The seven antitrust statutes that were enacted in New Jersey under the direction of then-Governor (and president-elect) Woodrow Wilson in 1913 became Wilson's template for federal action.[16]

II. A Theoretical Framework for Multiple Enforcement

I offer my brief review of the original structuring of the institutions of antitrust enforcement not just as a matter of historical curiosity. Rather, I think it illustrates some important intuitions about the utility of multiple enforcement. Specifically, I think that this early history suggests that Congress implicitly recognized that competition among enforcement agencies can produce better antitrust enforcement than a system in which enforcement is controlled by a single agency.

The debate over the role of states in antitrust enforcement is, in part, a debate over whether antitrust enforcement should be centralized or decentralized. A number of arguments support decentralization of enforcement. One is that decentralization of the institutions of antitrust enforcement produces policy diversification.[17] Different agencies can reflect different

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[14]See United States v. International Harvester Co., 214 F. 987, 999-1000 (D. Minn. 1914) (combination of five companies, holding 80 to 85 percent of the market, was an unreasonable restraint of trade, in violation of Sections 1 and 2 of the Sherman Act), appeal dismissed, 248 U.S. 587 (1918).

[15]See 51 Cong. Rec. 14,464 (1914); Winerman, supra note 5, at 70 and n.420.

[16]See Winerman, supra note 5, at 49-55. The seven New Jersey statutes were called the "Seven Sisters." Wilson sent them to Rep. Clayton in 1913 to serve as a model for legislation; the resulting proposals were called the "Five Brothers."

[17]See William E. Kovacic, Toward A Domestic Competition Network, in Competition Laws in Conflict, supra note 1,
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constituencies and interests; they can also develop different competencies and specializations. This policy diversification reduces the risk that violations will go unremedied. A second argument is that different enforcement institutions may have different resource commitments and constraints. It may be the case that two organizations with different sources of funding or somewhat different missions may be able to augment antitrust enforcement in a way that a single agency could not. A third argument relates to the constitutional structure of public enforcement agencies. Central enforcement agencies often need the factual and political support of more local agencies, particularly when cases involve local interests. The availability of decentralized enforcement institutions can provide that support.

Those who favor centralization argue the advantages of policy uniformity. A single agency increases the coherence of policy choices by avoiding contradictory results. The broader the jurisdictional competence of a single agency, the better able it will be to internalize all the social costs and benefits of any particular decision, leading to better policy choices. With one agency there is no opportunity for a complainant, who may want to use government antitrust enforcement to restrict the conduct of a more successful business rival, to engage in forum shopping to seek the most pro-enforcement agency. A single enforcement agency might also have the size to achieve economies of scale in its operations, making it a more efficient enforcer. Finally, a centralized agency would reduce compliance costs. Not only would regulatory duplication be avoided, but regulatory uncertainty would also be avoided. Parties would have a clearer understanding of enforcement policies and could be more certain as to whether particular business practices comply with the law or not.

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[17](...continued)
at 321.22.

There are certainly good arguments on both sides of this debate. How should they be resolved? If we were talking about products, rather than about antitrust enforcement, the answer would be relatively easy. We would let markets, and marketplace competition, sort out the optimal level of centralization. That is, markets would decide the optimal number of firms and markets would discipline those firms so as to align the firms' decisions with the interests of consumers.

Antitrust enforcement is not a product in the conventional sense, of course. Nevertheless, the marketplace analogy is not misplaced—antitrust enforcement agencies do "sell" their enforcement to legislatures, which purchase enforcement through budgetary appropriations—and competition among antitrust enforcement agencies can play the same disciplining role that competition plays in more conventional product markets. Indeed, competition can affect the provision of antitrust enforcement in five ways.

First, the market for antitrust enforcement is a market for professional services. Markets for professional services are widely known as markets of incomplete information and information asymmetries. That is, buyers of these services (legislators) have difficulty judging the quality of services before they are purchased and, often, even after they are provided. Buyers must often rely on the professionals themselves for information about the services that are necessary, but asymmetries between the professional sellers and the buyers creates a moral hazard that the seller will choose the level of service it wants to provide rather than the service that the buyer really needs.

Having competition among diverse enforcement institutions can provide a yardstick for comparing the results produced by different professional enforcement agencies.[18] That is, it gives buyers of enforcement services a way to judge the quality of service being offered. Comparing how different agencies handle similar problems is a way of overcoming information asymmetries. Buyers can better judge whether agencies are bringing enough of the right kinds of cases or are operating efficiently.

States can be particularly useful in providing this yardstick competition. States in the United States provide enforcement using dramatically smaller agencies than the federal agencies, sometimes (but not always) with substantial effectiveness. Inefficiencies in scale or scope can be dealt with by partnering with other agencies (as the states do among themselves and as the federal agencies do with the states). Legislatures can also use different pricing mechanisms to affect the incentives of enforcement agencies. Some states use "revolving fund" appropriations which require agencies to self-fund their efforts through recovery of litigation fees in much the same way as private law firms do; others fund through general legislative appropriations. States can also constitute their enforcement agencies in ways that either increase or decrease political control over enforcement, thereby affecting enforcement incentives. Many state Attorneys General (although not all) are directly elected by the voters, providing the potential, at least, for aligning those agencies more closely with voter interests. Voter control is more removed on the U.S. federal level, differing even between the Department of Justice Antitrust Division and the FTC. The Directorate General for Competition in the European Commission is even more politically

[18] See Wolfgang Kerber and Oliver Budzinski, Competition of Competition Laws: Mission Impossible?, in Competition Laws in Conflict, supra note 1, at 36-37. A regulatory example of the yardstick function was the use of the Tennessee Valley Authority's electricity rates to measure the efficiency and pricing of private electric power companies regulated by state and federal agencies. See 2 Alfred E. Kahn, The Economics of Regulation: Principles and Institutions 104-05 (1971).

distant from the voters of the member states. The success of these different approaches provides a market test for effectiveness.

The second type of competition is regulatory competition. It has often been observed that jurisdictions compete through their legal regimes, for example, by using tax law or environmental regulation, in an effort to attract mobile factors of production, such as capital, and thereby increase the economic welfare of their citizens. In jurisdictional competition, legislatures are sellers of legal regulation and business firms are its buyers.

Regulatory competition can occur, at least to some extent, in the market for antitrust regulation.[19] Where corporate activity is sufficiently localized, for example where antitrust rules involve product distribution systems or intellectual property licensing, business firms may choose to shift operations in response to unfavorable antitrust regulation. Such competitive pressures may lead the legislature to force the upstream producer of antitrust enforcement (that is, the antitrust enforcement agency) to modify its practices in a way that will increase the economic welfare of that state's citizens.

Much of antitrust regulation, however, cannot easily be avoided because business firms may be locked into a jurisdiction and, in any event, can be sued when their activities affect citizens in other states. But we can also think of citizens as buyers of antitrust regulation (they are its beneficiaries). Regulatory competition can provide a market test of whether particular forms of regulation are improving public welfare in a way that citizens desire. Citizens, as voters, may eventually make their desires known in the political marketplace, disciplining their legislative agents to act in accord with their public choices.

[19] See Kerber and Budzinski, supra note 18, at 46-49 for a discussion of the question whether regulatory competition involving antitrust law is likely.

The third type of competition is innovation competition. The insight into the states' role here was crystallized by Justice Brandeis in 1932 in his famous dictum in *New State Ice Co. v. Liebmann*, written in dissent to a majority decision holding unconstitutional an Oklahoma statute regulating entry into the business of manufacturing and selling ice: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[20]

I take Brandeis' economic laboratories argument not just as an argument for federalism (which it was), but as a general argument for diversification and competition. It is an argument that applies to the efforts of all antitrust enforcement agencies, spurred by regulatory competition, to improve antitrust enforcement within their jurisdiction. Whatever the motives of any agency in trying different types of antitrust regulation, we should trust market processes to reward (eventually) the good ones and punish the bad. Indeed, we need not take a Panglossian view of state experiments, as always motivated by noble objectives and bound to advance the public interest, to appreciate their benefits.[21] We can learn from experiments that produce bad results as well as from those that produce good ones.[22] Such experiments might be particularly valuable for improving enforcement and regulatory policy in light of the information asymmetries in the

[20]New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311 (1932).

[21]Cf. Frank H. Easterbrook, Antitrust and the Economics of Federalism, in Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy (Richard A. Epstein and Michael S. Greve, eds. 2004) 222 ("The Justice assumed that states calmly experiment, gather information, and write 'better statutes,' as if legislators were public-spirited professors. The economics of federalism arrives at the Brandeis conclusions–people benefit if state and local governments have freedom to enact different laws–without his Panglossian assumptions.").

[22]The benefits of experimentation are fully explored in William E. Kovacic, The Modern Evolution of U.S. Competition Policy Enforcement Norms, 71 Antitrust L. J. 377 (2003).

provision of professional services and the difficulty of making ex ante predictions of how well any regulatory policy will actually work. If enforcement agencies are willing to experiment in antitrust (and competition in regulatory markets provides at least some reason for their doing so), then experiments will be undertaken in the hope of improving the product.

State enforcement agencies may have particular incentives to innovate, incentives that differ from the federal enforcement agencies. Economists often talk about markets being composed of dominant firms and maverick firms, the latter being smaller firms that pursue divergent business strategies as a way of differentiating their offerings from those of more dominant firms with larger market shares.[23] Mavericks have incentives to do things differently. Acting in this maverick role a state enforcement agency might make different enforcement decisions (whether the different decision is to bring suit when the dominant firm chooses not to, or to refuse to join the dominant firm in bringing suit) and to pursue different enforcement priorities (for example, the states' stress on securing monetary recovery for their consumers, including recovery for indirect purchasers).

The states' maverick role leads to the fourth type of competition, competition in outcomes ("output," in traditional market terms). The differentiated behavior of mavericks in product markets can provoke competitive responses from dominant players that might not otherwise occur. So, too, can maverick enforcement agencies. For example, the threat of independent action from a state agency may cause the federal agency to examine a case more closely (*Microsoft* is a good example of this). Another example is the pursuit of monetary remedies by state agencies, which

[23]Mavericks are firms with an economic incentive to deviate from the "terms of coordination" within an industry. The concept is well-explored in Jonathan B. Baker, Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws, 77 N.Y.U. L.Rev. 135 (2002) (a maverick firm can be "an observably disruptive force," id. at 163).

can lead federal agencies to reconsider their hesitation to seek such remedies (as when the FTC reconsidered its use of restitution as a remedy).

Finally, competition among enforcement agencies is important in the policy space. Policy debate affects not only what legislators might do (although legislators act slowly in the area of antitrust legislation). Perhaps more importantly, policy debate affects professional norms, and professional norms have been extremely important in shaping antitrust law as enforced by agencies and applied by the courts and in disciplining enforcers by providing a baseline against which to judge enforcement efforts.[24]

The experience of multiple antitrust enforcement agencies has very much enriched the policy debate. Besides providing different viewpoints, multiple enforcement provides actual examples of different enforcement decisions. Nothing informs antitrust debate better than the empirical information provided by enforcement actions. Are recoveries by indirect purchasers wise? We can examine the cases brought by state and private enforcers in this area. Are state courts suitable fora for antitrust actions? We can examine state antitrust enforcement. Does the grant of prosecutorial amnesty increase cartel detection and diminish incentives to form cartels? We can examine U.S. Justice Department amnesty policy.

These five types of competition—yardstick competition, regulatory competition, innovation competition, outcome competition, and norms competition—were set in motion by decisions made by Congress at the end of the nineteenth and early twentieth century when our system of multiple enforcement was established. The potential benefits of enforcement agency competition may not

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[24] See id. at 380 (defining norms).

have been fully predicted, but the direction was clear. We would do better with diversification than with centralization of antitrust enforcement in the United States. And we have.

III. State Antitrust Enforcement Data

It is one thing to talk about the early history of state antitrust enforcement or to suggest theories that support state antitrust enforcement authority. It is quite another thing, however, to describe what state antitrust enforcement actually consists of today. Several commentators have recently tried to provide more detail about the states' enforcement effort, but all have been hampered by the lack of reliable data.

In an effort to remedy this data problem, the Antitrust Task Force of the National Association of Attorneys General, under the leadership first of Patricia Conners and now of Robert Hubbard, has undertaken to construct a database of all state antitrust actions filed by state antitrust enforcement agencies. Cases were gathered by asking each state agency to report every antitrust case it had a record of filing; included in the report was a description of the type of case and where it was filed. This effort is not yet complete, but it has progressed to the point where a preliminary picture of state antitrust enforcement can be drawn, one that provides greater assurance of accuracy than earlier efforts.

The first question is what is the overall level of state antitrust enforcement activity. Table 1 makes an effort to measure that activity by counting the number of cases filed by state antitrust enforcement agencies. I chose the 10-year period 1995-2004, in part to match the 10-year period used by the Antitrust Division of the Department of Justice for its statistics. This time period choice necessarily omits some important state enforcement actions, but I assume that the data will be less complete the further back in time one attempts to go. The cases in Table 1 include cases filed in federal and in state courts; unlike some earlier data sets, the cases are not limited to federal parens patriae cases.[25]

It is important to note, however, that Table 1 likely undercounts state enforcement. Of the 56 possible state antitrust enforcement agencies, only 19 have responded so far; the non-responders include some states that have been relatively active (such as New Jersey and Connecticut).[26]

Table 1. All filed cases, state antitrust enforcement agencies (1995-2004)

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	10 Years
Single State	17	12	16	12	16	15	10	15	12	7	132
Multi-state	3	3	6	3	5	5	6	3	3	6	43
Total	20	15	22	15	21	20	16	18	15	13	175

One interesting thing shown in Table 1 is the extent to which state antitrust enforcement agencies act on their own, rather than joint venturing with other states by taking part in multistate litigation. There are far more single-state cases than multistates. This is an indication of more

[25]Richard Posner made an effort to assess state enforcement by counting federal parens patriae cases, using a Westlaw search. He found only 77 such cases, from "before 1976" to the "present"; roughly 14 of those were filed during the time period used in Table 1 in the text above. See Richard A. Posner, Federalism and the Enforcement of Antitrust Laws by State Attorneys General, in Competition Laws in Conflict, supra note 1, at 263-64. Michael DeBow, using more sources, found 120 state cases filed between 1993 and 2002. See DeBow, supra note 1, at 272. Michael Greve, using the Posner and DeBow lists, found 103 (presumably federal) parens patriae cases (although the time period covered is not specified). See Greve, supra note 1, at 103 (Table 1). Stephen Calkins, using NAAG's monthly Antitrust Bulletins, found 213 cases filed by state antitrust enforcement agencies for the 10-year period 1993 to 2002. My previous empirical study of state antitrust enforcement was limited to New York's efforts in the two-year period, 1999-2001, showing 7 cases filed during that time. See First, supra note 1, at 1713 (Table 2).

[26]The 19 responding states are Arkansas, California, the District of Columbia, Florida, Illinois, Maryland, Minnesota, North Carolina, New Hampshire, New York, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, Wisconsin, and West Virginia. The 56 state enforcement jurisdictions include, in addition to the 50 states, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the territories of American Samoa, Guam, and the Virgin Islands. See http://www.naag.org/naag/about_naag.php.

independent action among the state agencies than one might have supposed (although some of the single-state cases are brought along with a federal agency).

The extent to which states act independently can also be assessed by examining how many cases the states file in state court, under state law, rather than in federal court. These may be state—not federal—parens patriae cases, state cases seeking injunctive relief under state antitrust law, and state criminal prosecutions. Included are cases in which state antitrust enforcement agencies seek to use state law permitting suits by indirect purchasers.

As shown in Table 2, a substantial amount of state antitrust enforcement is done in state court. This differs from the intuition of most observers (myself included) that state enforcement is done almost exclusively in federal court under federal law.

Table 2. State antitrust enforcement agency cases, state and federal courts (1995-2004)

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
State	7	8	9	8	7	9	6	10	7	4
Federal	9	6	12	6	11	10	10	8	8	7
Total	20	15	22	15	21	20	16	18	15	13
% State	35.0%	53.3%	40.9%	53.3%	33.3%	45.0%	37.5%	55.6%	46.7%	30.8%
% Federal	45.0%	40.0%	54.5%	40.0%	52.4%	50.0%	62.5%	44.4%	53.3%	53.8%
Total %	80.0%	93.3%	95.5%	93.3%	85.7%	95.0%	100.0%	100.0%	100.0%	84.6%

One of the questions about state enforcement is the extent to which the states "free ride" on federal enforcement efforts. Putting aside the question whether "free riding" is simply a pejorative label put on otherwise efficient partnering (indeed, efficient for all parties, as joint ventures are usually assumed to be), I looked at the number of cases in which the states made some use of the federal enforcement effort. Generally, this covered two types of cases, merger cases which one or more states brought along with the federal enforcement agency and parens patriae cases in which the states made some use of a prior federal investigation (most often cartel prosecutions). I call this "complementary litigation" (complements being products that are produced together).

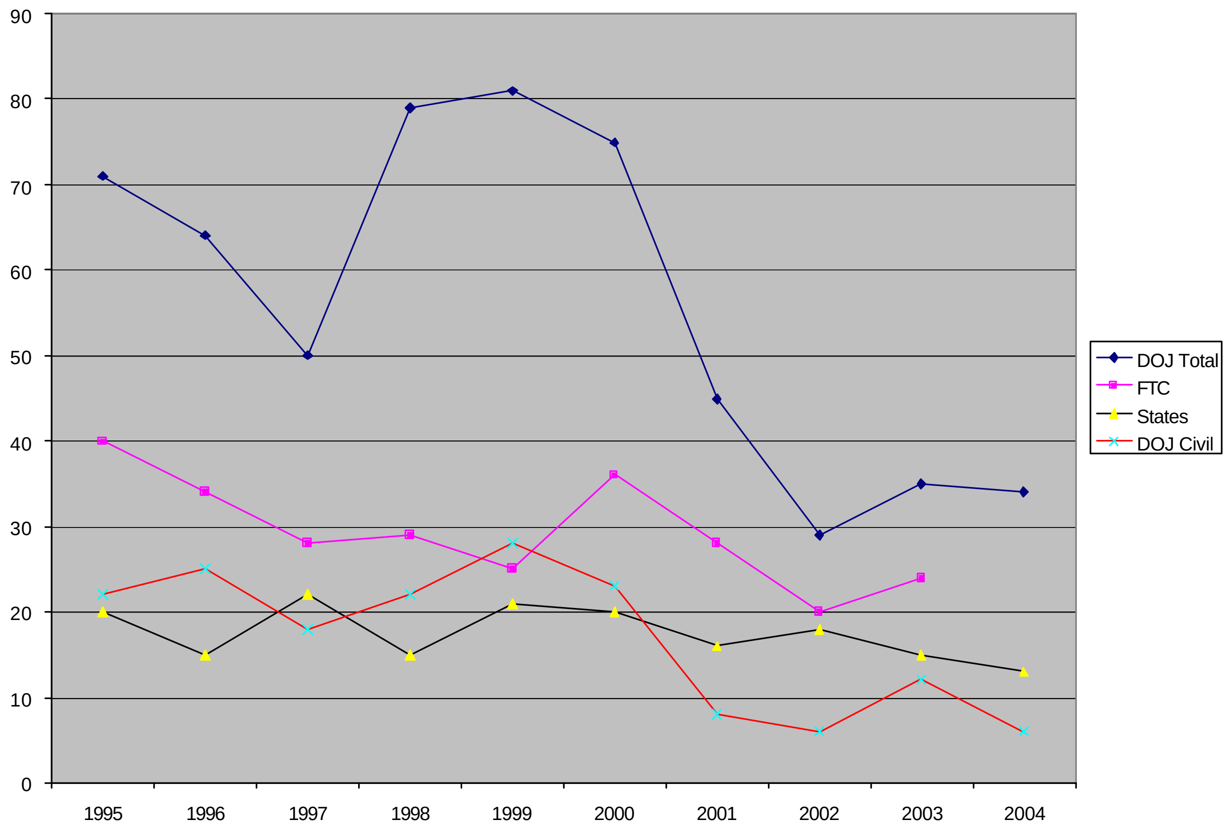
Table 3 shows the extent of such effort over the 10-year period. Again, although it is often assumed that complementary litigation is quite common, such litigation has generally constituted only a bit more than a quarter of the cases filed by the states. This is a quantitative assessment, of course; a qualitative assessment would likely show that many of these complementary cases are very substantial in terms of their scope and enforcement effort. This would also provide an efficiency justification for enforcement agency partnering.

Table 3. Complementary state and federal antitrust litigation (1995-2004)

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	Median	Mean
Total	20	15	22	15	21	20	16	18	15	13		
State/ Federal	4	4	5	4	5	4	4	5	4	6		
% Comple-mentary	20%	27%	23%	27%	24%	20%	25%	28%	27%	46%	26%	27%

Counting filed cases is not the only measure of antitrust activity, of course, but it does provide a consistent and objective way of measuring enforcement efforts and avoids the question whether an agency is overclaiming with regard to its enforcement efforts. Using filed cases also permits a comparison with federal activity, as shown in Graph 1.

Graph 1. Government antitrust enforcement (1995-2004)



As one might predict, state antitrust enforcement agencies file fewer cases than either of the federal agencies. What is interesting is that the number of reported state cases is not that many fewer than the number of enforcement actions filed by the FTC. Indeed, if criminal enforcement is separated out from Justice Department enforcement, for five of the ten years the states filed more cases than the Department of Justice filed civilly (four of those years coming during the George W. Bush administration when civil enforcement by the Justice Department declined substantially).

Another important question is the type of cases that state enforcement agencies file. Two areas have been particularly controversial, for different reasons. One is mergers; the other is vertical restraints. Mergers are controversial because of the concern for conflicting positions between state and federal enforcers and a concern for increased regulatory costs. Vertical restraints have been controversial because of the economic argument that such restraints are often procompetitive, an argument which has led the federal agencies to reduce their enforcement efforts in this area.

Table 4 shows that mergers have been involved in a significant percentage of the cases filed by the states; this is consistent with my own observation of New York's enforcement during 1999-2001.[27]

Table 4. Filed cases involving mergers as a percentage of all cases (1995-2004)

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Mergers	7	5	8	8	8	7	6	5	7	4
Total Cases	20	15	22	15	21	20	16	18	15	13
% Mergers	35.0%	33.3%	36.4%	53.3%	38.1%	35.0%	37.5%	27.8%	46.7%	30.8%

Table 5 provides further information on the types of antitrust issues raised in the cases brought during the 10-year period. Note that the cases collected for Table 5 show all antitrust issues raised in a particular case, rather than assigning a case to a single discrete category. This is different than Justice Department data, which assign cases to only one category even if the complaint charges a variety of violations, and which do not break out restraints of trade between horizontal and vertical.

[27] See First, supra note 1, at 1713 (Tables 1 and 2).

Table 5. Filed cases, by type (1995-2004)

Year	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004
Horizontal Restraints										
Bidrigging	17	2	4	1	2	2	3	4	1	1
Price Fixing	5	7	9	7	4	10	3	6	4	3
Horizontal Non Price Restraint	0	0	2	0	1	0	0	1	1	2
Market Allocation Agreement	2	0	4	1	0	3	3	5	5	3
Vertical Restraints										
Resale Price Maintenance	2	0	2	0	0	2	0	1	0	0
Vertical Non Price Restraint	0	0	0	0	0	0	0	1	0	0
Mergers and Consolida-tions										
Mergers	7	5	8	8	8	7	6	5	7	4
Joint Ventures	0	1	1	1	0	0	0	0	0	0
Monopoliza-tion	3	1	5	2	4	1	6	3	2	2
Other	4	3	3	1	4	1	3	1	1	1
Total Types	40	19	38	21	23	26	24	27	21	16
Total Filed	20	15	22	15	21	20	16	18	15	13

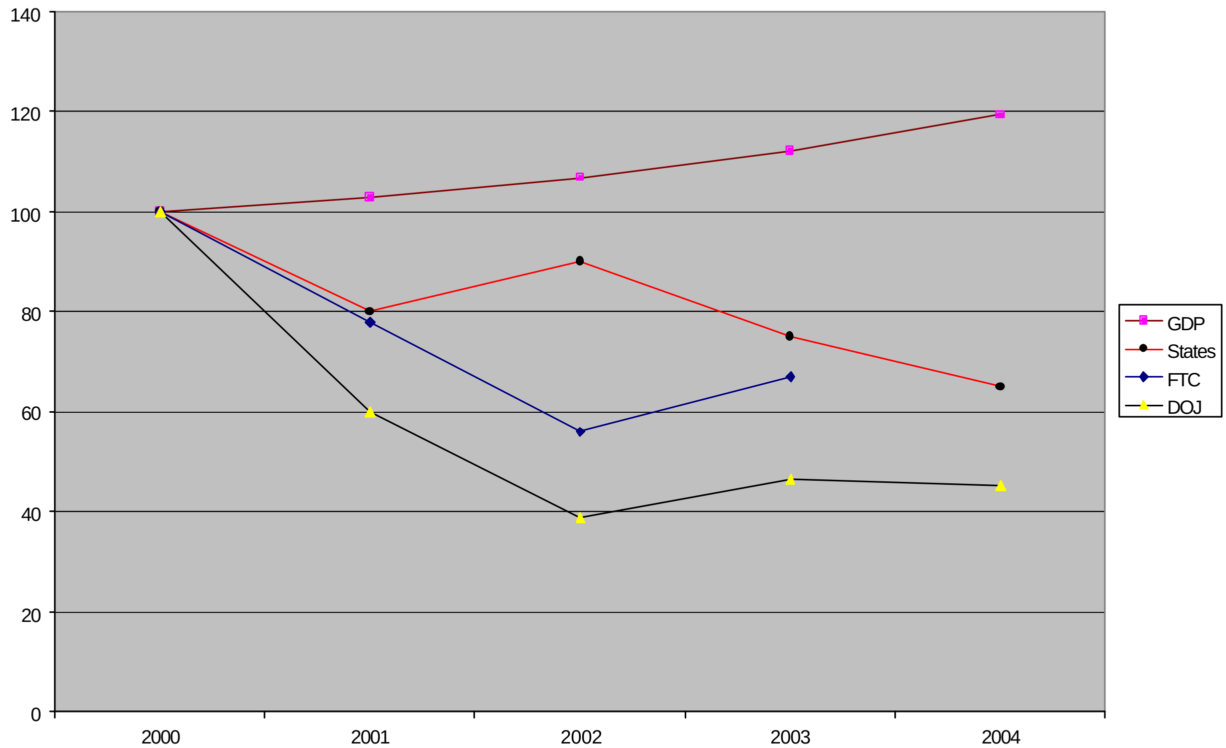
Table 5 echoes Table 4 in showing the prevalence of merger issues in state antitrust enforcement, but Table 5 puts that enforcement in some perspective. This Table shows that the bulk of enforcement comes in horizontal cases, with mergers taking a clear (but significant) second place. Monopolization cases are third (by comparison, the Justice Department filed only 4 monopolization cases in this period and none since 2002). What stands out the most, however, is the paucity of vertical cases. State rhetoric notwithstanding, the states have filed very few cases involving distribution restraints over this period. These data, although perhaps contrary to assumption, are broadly consistent with the conclusion of other commentators that the overall pattern of state enforcement is in line with current consensus views about antitrust's most important concerns.[28]

Finally, enforcement data can provide a suggestive answer to some particularly important bottom-line questions: Has state enforcement has resulted in over-enforcement of the antitrust laws, or, rather, do the relatively small numbers of state cases show under-enforcement? Would it be sensible to cut back on state antitrust enforcement or would the better policy be to increase it?

One way to think about these questions is to compare antitrust enforcement against the size of the economy. It is not implausible to assume that larger economies warrant more antitrust enforcement to keep up with a likely greater amount of collusion, exclusion, and anticompetitive consolidations. Graph 2 provides that comparison by taking enforcement in 2000 as a base year and looking at the changes in GDP against changes in the amount of enforcement.

[28]See DeBow, supra note 1, at 272-73.

Graph 2. Changes in GDP and government antitrust enforcement (2000 index = 100)



Graph 2 shows that GDP has trended up since 2000, but antitrust enforcement, both federal and state, has trended down (although federal enforcement has fallen further behind the growth in the economy than has state enforcement). These trends would indicate that the level of antitrust enforcement is not keeping up with the growth in the economy. This factor, alone, should give one pause before pursuing efforts that decrease antitrust enforcement even more. If anything, these trends suggest that antitrust enforcement needs greater resources than are currently devoted to it.

IV. Conclusion

From the formative days of antitrust Congress has taken a policy approach favoring multiple institutions of antitrust enforcement. This approach led to the creation of two federal enforcement agencies, legislated against a background of state antitrust enforcement that pursued many of the same trusts that were the subject of federal concern. The importance of multiple enforcement is supported by economic theory which stresses the utility of decentralized competing enforcement institutions, particularly given the information asymmetries in assessing enforcement efforts, and recognizes the incentives that maverick institutions have to engage in experimentation.

Economic theory might support multiple enforcement, but it does not tell us exactly how many enforcement agencies are "enough" (are two enough? if not, how many more should we have?) nor does theory tell us whether multiple enforcement is actually producing the results theory might predict. These are questions which require some empirical testing.

The data presented above are a start toward answering some of the empirical questions about state antitrust enforcement. They show that the states file a not insubstantial number of cases, but fewer cases than do either of the federal enforcement agencies (although the states' filings, which are nearly all civil, are roughly comparable to the number of civil cases filed by the Justice Department during 10-year period studied); that states engage in joint venturing (both among themselves and with the federal enforcement agencies) but file more of their cases on an individual-state basis than they do on a multistate basis; that states file a substantial portion of their cases in state court; and that the overall pattern of state enforcement is consistent with current antitrust norms. Although a more qualitative assessment of these cases needs to be done before the states' maverick role can be fully assessed, the data do not support much of a maverick role for the states at least in vertical cases. The data, however, do cast doubt on the views of some critics that states are primarily free-riders on federal enforcement efforts and that state enforcement can best be understood by examining only federal parens patriae cases.

The data on trends in the level of overall government enforcement in relation to the size of the economy suggest caution in recommending policy initiatives to cut back on government enforcement, whether state or federal. The better solution would be to improve enforcement efforts. On the state level this may require an infusion of capital for state agencies, which are generally small and underfunded. These greater capital resources could be used to allow the states better to understand what they do and better to manage their enforcement resources and priorities.

The Commission might wish to consider what mechanisms might be available to increase state funding of antitrust enforcement. In 1976 Congress appropriated $21 million in "seed money" for state antitrust enforcement, but a more likely approach today might be an amendment to Section 4E of the Clayton Act to make clear that courts could distribute part of the monetary recovery obtained in parens patriae cases to the states for use in their enforcement efforts. Better funding for better enforcement would, indeed, be a good way to modernize antitrust.