Bank Mergers and the Antitrust Laws: The Case For Dual State And Federal Enforcement

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BANK MERGERS AND THE ANTITRUST LAWS: THE CASE FOR DUAL STATE AND FEDERAL ENFORCEMENT

ROBERT F. ROACH*

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I. INTRODUCTION

In recent years, the banking industry has experienced a marked trend toward concentration, with a substantial increase in the number of mergers and acquisitions. Commentators project that this trend will continue for the foreseeable future. Although interstate mergers have resulted in a greater number of national and super-regional banks, the business of banking

1. According to a 1992 Congressional Staff Report, "The greatest wave of bank mergers in the history of the United States, both in-market and interstate, is sweeping the banking industry." STAFF OF HOUSE COMM. ON BANKING, FINANCE AND URBAN AFFAIRS, 102D CONG., 2D SESS., ANALYSIS OF BANKING INDUSTRY CONSOLIDATION ISSUES 1 (Comm. Print 1992) [hereinafter CONSOLIDATION ISSUES]. A Federal Reserve Board study reports that the number of bank mergers and acquisitions increased from 144 mergers and acquisitions in 1978 involving $5.5 billion in assets to 710 mergers and acquisitions in 1987 involving $131.4 billion in assets. Bank Mergers: Hearings Before the House Comm. on Banking, Finance and Urban Affairs, 102d Cong., 1st Sess. 190 (1991) [hereinafter Bank Merger Hearings] (statement of John P. LaWare, Member, Board of Governors of the Federal Reserve System). According to the Board, during the 1980s, there were almost 5000 bank mergers and acquisitions involving almost $650 billion in assets. Id. The average annual rate of bank mergers and acquisitions for the 1980s was double the rate of the 1970s and triple the rate for the 1960s. Arthur E. Wilmarth, Jr., Too Big To Fail, Too Few To Serve? The Potential Risks of Nationwide Banks, 77 IOWA L. REV. 957, 961 (1992).

2. Bank Merger Hearings, supra note 1, at 278 (statement of Professor Lawrence J. White, Stern School of Business, New York University); see also Timothy H. Hannan & Stephen A. Rhoades, Future U.S. Banking Structure: 1990 to 2010, 37 ANTITRUST BULL. 737, 764-770 (1992). Using current rates of consolidation, Hannan and Rhoades project that the number of banking organizations may decrease from 9908 in 1989 to as few as 5031 in 2010. Id. at 768.

3. The term "mergers" as used herein refers to all types of mergers, acquisitions, and consolidations.

4. See Geoffrey P. Miller, Legal Restrictions On Bank Consolidation: An Economic
remains substantially local in nature. Accordingly, banking remains a subject of significant state interest and regulation.

Given the potential impact on local economies resulting from the consolidation trend, state attorneys general have become increasingly active in merger analysis. Indeed, since 1990, state attorneys general have matched the United States Department of Justice in reported challenges to proposed bank mergers. Despite the recent success of state attorneys general in


5. See, e.g., Gregory E. Elliehausen & John D. Wolken, Banking Markets and the Use of Financial Services by Households, 78 FED. RESERVE BULL. 169 (1992) [hereinafter Elliehausen & Wolken, Households] (stating that consumers cluster their purchases of banking products at local institutions); Gregory E. Elliehausen & John D. Wolken, Banking Markets and the Use of Financial Services by Small and Medium-Sized Businesses, 76 FED. RESERVE BULL. 801 (1990) [hereinafter Elliehausen & Wolken, Small Businesses] (stating that empirical evidence suggests that small businesses generally conduct their banking within a five mile radius); Hannan & Rhoades, supra note 2, at 744-45; see also infra notes 74-92 and accompanying text.

6. See infra notes 129-44 and accompanying text.

7. See infra notes 74-92 and accompanying text.


challenging anticompetitive bank mergers, or perhaps because of it, the legitimacy of their activities in this area has been questioned publicly. Opponents contend that the proper role for state law enforcement is one of participation within the federally initiated merger review process. They argue that passage of the federal laws governing bank mergers altered the applicability of the Clayton Act in favor of a uniform system of merger review governed by federal banking regulators.

According to this argument, neither the Bank Merger Act (BMA), nor the Bank Holding Company Act (BHCA), confers a private right of action on individuals or state enforcement officials. Instead, state attorneys general are limited to administrative challenges to the completed review process in federal court.

In addition, critics question the validity of applying state antitrust provisions to bank mergers. Under this argument, state law is preempted by both the statutory language of the

of Hawaii, Inc.).


BHCA and the complete occupation of the field by the regulations of federal banking agencies. 15 To date, no court has directly addressed these arguments.

In Part II below, this Article concludes that state attorneys general may legitimately analyze and challenge proposed anticompetitive bank mergers. As a matter of fundamental public policy, states historically have sought to protect competition and local economies by enforcing state and federal antitrust laws. Federal courts have consistently upheld this enforcement policy, rejecting Supremacy Clause 16 challenges. Because banking is an integral part of a state's economy, the same public policy requires state intervention when proposed bank mergers appear anticompetitive. Moreover, federal regulation of banking through the BMA and the BHCA neither preempts state antitrust law nor removes state attorneys general parens patriae standing to enforce federal antitrust law. To the contrary, these two laws create new opportunities and enhanced remedies for attorneys general who represent the interests of the states in federal forums.

II. STATE ATTORNEYS GENERAL MAY CHALLENGE ANTICOMPETITIVE BANK Mergers

A. State Attorney General Antitrust Enforcement

For over one-hundred years, states have been enforcing laws designed to protect competition. 17 For individual states, competition is vital to their local economies, and protecting competition is a public policy of the first magnitude. 18 Federal courts

15. Id. at 514-16.
16. U.S. CONST. art. VI, cl. 2 (stating that the United States Constitution and laws pursuant to it are "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding").
17. See James May, The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History, 59 ANTITRUST L.J. 93 (1990); Folsom, supra note 9, at 942-43.
have respected and supported this public policy and have rejected Supremacy Clause attacks on state antitrust laws. The federal courts, as well as the executive and legislative branches of the federal government, also have fostered the enforcement of federal antitrust laws by state attorneys general. In addition to challenges to bank mergers, states have effectively used state and federal antitrust laws to challenge proposed anticompetitive mergers in such diverse areas as manufacturing, processing, distribution, and retailing.

1. State Antitrust Laws Are Presumed Valid Against Supremacy Clause Challenges

The first antitrust law of general application was not the Sherman Act, but a state statute passed in Kansas in 1889. Indeed, at least twelve states had various forms of antitrust legislation before Congress approved the Sherman Act in 1890. States were very active in the early years of antitrust enforcement, and fundamental policies of federal antitrust law, such as the per se rule against price fixing, were based, at least in part, on principles developed in state courts enforcing state antitrust laws.

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Columbia Gas, 268 N.E.2d at 796; see also Burch v. Goodyear Tire & Rubber, 420 F. Supp. 82, 89 (D. Md. 1976), aff'd 554 F.2d 633 (4th Cir. 1977) (observing that "(t)he economy of a state . . . is certainly one of the major concerns of state government" and that this interest is "only slightly less urgent than public health and safety in the eyes of a state).  
19. See infra notes 35-43 and accompanying text.  
20. See infra notes 53-59 and accompanying text.  
21. See infra notes 60-67 and accompanying text.  
25. May, supra note 17, at 98.  
26. See United States v. Trenton Potteries, 273 U.S. 392 (1927). In Trenton Potter-
While enforcement of antitrust laws in many states became dormant after the early 1900s, the late 1970s and the early 1980s witnessed a substantial revitalization of state antitrust power. During this period, many states passed new antitrust laws or amended existing ones. At present, Pennsylvania and Vermont are the only states without antitrust statutes of general application.

Renewed and invigorated antitrust enforcement efforts by the states generated debate over whether state antitrust enforcement violated principles of federalism. However, the United...
States Supreme Court, which showed increased reluctance to preempt state laws, generally supported increased activism by states on a variety of legal fronts in the 1970s and 1980s. Concepts of states’ rights and federalism espoused by the Supreme Court, beginning with the Burger Court, were characterized by a strong presumption that state law was valid against Supremacy Clause attacks.

In preemption challenges over the years, the Supreme Court has repeatedly shown its reluctance to preempt state antitrust laws. Most recently, the Court reestablished its support for state antitrust enforcement in California v. ARC America Corp. In ARC America, the states of Alabama, Arizona, California and Minnesota sought damages for price fixing as indirect purchasers of concrete block. Because federal antitrust law prohibits indirect purchasers from collecting damages, the states sought damages under their own state antitrust laws. The defendants argued that the federal antitrust rule against indi-

1245 (1988).
32. See William W. Bratton, Jr., Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 COLUM. L. REV. 623 (1975) (describing the Court’s “considerable receptivity to maintaining the diversity of state and local institutions and interests”).
34. See Watson v. Buck, 313 U.S. 387, 403-04 (1941). According to the Court, “nothing either in the language of the [Federal] copyright laws or in the history of their enactment . . . indicate[s] any congressional purpose to deprive the states, either in whole or in part, of their long-recognized power to regulate combinations in restraint of trade.” Id. at 404; see also Puerto Rico v. Shell Co., 302 U.S. 253, 259-60, 263 (1937) (holding that the Sherman Act does not preempt Puerto Rico’s antitrust statute); cf. Exxon Corp. v. Governor of Md., 437 U.S. 117, 133-34 (1978) (holding that a Maryland statute regulating price reductions made by petroleum producers to retail gas stations was not preempted by the Sherman Act or the Robinson Patman Act).
36. Id. at 97. Indirect purchasers do not deal directly with price fixers or others who engage in anticompetitive activity but are injured when the costs of the illegal activity are passed down the distribution chain. See Elmer J. Schaeffer, Passing-on Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis, 16 WM. & MARY L. REV. 883, 914 (1975) (explaining that indirect purchasers have a greater incentive to bring suit because they cannot pass on price increases).
37. ARC Am. Corp. 490 U.S. at 97-98.
rect purchaser claims preempted state antitrust law.\textsuperscript{38} A unanimous Supreme Court ruled in favor of state enforcement.\textsuperscript{39} The Court reaffirmed the strong presumption against finding preemption of state law in areas traditionally regulated by the states.\textsuperscript{40} Recognizing "the long history of state common-law and statutory remedies against monopolies and unfair business practices,"\textsuperscript{41} the Court concluded that Congress had not preempted the field of antitrust law.\textsuperscript{42} Accordingly, the Court held that state antitrust remedies remain valid, even where "they impose liability over and above that authorized by federal law."\textsuperscript{43}

2. \textit{State Attorneys General May Use Federal Antitrust Laws To Enforce Public Policy}

State attorneys general are not limited to enforcing only state antitrust laws when faced with anticompetitive conduct impacting their states; rather, they have \textit{parens patriae} standing to enforce federal antitrust laws. \textit{Parens patriae} gained acceptance early as a basis for antitrust suits by state attorneys general.\textsuperscript{44}

\begin{itemize}
\item \textsuperscript{38} \textit{Id.} at 102.
\item \textsuperscript{39} \textit{Id.} at 105.
\item \textsuperscript{40} \textit{Id.} at 101.
\item \textsuperscript{41} \textit{Id.} (footnote omitted).
\item \textsuperscript{42} \textit{Id.}
\item \textsuperscript{43} \textit{Id.} at 105; see also Texas v. Coca-Cola Bottling Co., 697 S.W.2d 677 (Tex. Ct. App. 1985), appeal dismissed, 478 U.S. 1029 (1986). Texas challenged acquisition of assets by Coca-Cola from Dr. Pepper under state antitrust law. \textit{Id.} at 678. Texas' intermediate appellate court ruled that there is no preemption and no conflict between state and federal antitrust law. \textit{Id.} at 680.
\item \textsuperscript{44} In general, to maintain an action \textit{parens patriae}, "the State must articulate an interest apart from the interests of particular private parties, \textit{i.e.}, the State must be more than a nominal party. The State must express a quasi-sovereign interest." Alfred L. Snapp & Sons v. Puerto Rico, 458 U.S. 592, 607 (1982). This interest can fall into two categories. "First, a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general. Second, a State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system." \textit{Id.} at 607.
\end{itemize}

In establishing the interest in the health and well-being of its citizens, the state must allege more than injury to an identifiable group. \textit{Id.} at 607. "[T]he indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population." \textit{Id.} Although the limits are not clear, Chiles v. Thornburgh, 865 F.2d 1197, 1209 (11th
In Georgia v. Pennsylvania R.R., Georgia brought an antitrust suit in its quasi-sovereign capacity as protector of its people against injury. The State alleged a price fixing conspiracy among a large number of railroad companies and that this conspiracy injured its general economy. The Court recognized that a state, in its parens patriae role, may bring a civil suit under federal antitrust laws, and that such a suit is not limited to protecting the state's proprietary interests. The Court found that the alleged price fixing conspiracy could stifle old industries, impede the establishment of new ones, arrest development of the state, and put the state at a disadvantage in competitive markets. The Court held that these potential economic setbacks were of "grave public concern" and were the type of injury that clearly gave the state standing under the antitrust laws. Lower courts consistently apply the principles articulated in Georgia v. Pennsylvania R.R. and grant states standing...
under federal law to challenge anticompetitive conduct affecting their economy or people.53

Congress and the Executive Branch also support the enforcement of federal antitrust laws by state attorneys general.54 For example, by passing Title III of the Hart-Scott-Rodino Antitrust Improvement Act of 197655 (Rodino Act), Congress formally cod-

53. With respect to injunctions, "[a]llegations of injury to the general economy of the State . . . are sufficient to confer standing upon the [State] Attorney General . . . in a parens patriae capacity where the Attorney General seeks to sue on behalf of the citizens of [the state]. . . ." Burch v. Goodyear Tire & Rubber, 554 F.2d 633, 634-35 (4th Cir. 1977) (citations omitted); see Alfred L. Snapp & Sons v. Puerto Rico, 458 U.S. 592, 592; People v. Seneci, 817 F.2d 1015, 1017 (2d Cir. 1987) (citing Snapp & Sons in dicta); see also In re Montgomery County Real Estate, 452 F. Supp. 54, 59 (D. Md. 1978) ("Congress intended to allow state attorneys general to sue on behalf of the state's injured consumer regardless of the existence or non-existence of injury to the general economy."). See generally Pennsylvania v. Mid-Atlantic Toyota Dist., 704 F.2d 125, 131 n.13 (4th Cir. 1983) ("A state may well have a 'public interest' in maintaining an action without having a 'quasi-sovereign' interest sufficient to support original jurisdiction in the Supreme Court.").

Most recently, a federal district court rejected a challenge to a state's parens patriae standing in an antitrust challenge to a proposed merger. Pennsylvania v. Russell Stover Candies, 1993-1 Trade Cas. (CCH) ¶ 70,224 (E.D. Pa. 1993). The defendants read Cargill, Inc. v. Monfort of Colo., 479 U.S. 104 (1986), to overrule Georgia v. Pennsylvania R.R. as it applies to state parens patriae actions seeking an injunction under federal antitrust laws. Russell Stover, 1993-1 Trade Cas. at ¶ 70,088. They claimed that it would be "anomalous" to allow the state to seek an injunction to prevent harm when it could not recover damages if the threatened injury to its general economy happened. Id. The district court rejected this argument for a number of reasons. First, the question of parens patriae was not before the Court in Cargill. Id. ¶ 70,089. Second, Hawaii v. Standard Oil, 405 U.S. 251 (1972), upon which the defendants also relied, "did not suggest that [the] lack of availability of damages affected the availability of injunctive relief." Russell Stover, 1993-1 Trade Cas. at ¶ 70,089 (citing Standard Oil). Finally, and most importantly, the court recognized that:

The contours of antitrust standing as it relates to a state in its parens patriae capacity are perhaps different from antitrust standing as it applies to other private parties. Precedent involving standing of individual private parties may not control the issue of parens patriae standing as those cases do not implicate quasi-sovereign interests. Although the state is considered a private party, to some extent, when it brings an action parens patriae, [there are] possible nuances between an individual and a state which are relevant to the issue of antitrust standing.

Id.

54. See Folsom, supra note 9, at 951-53.
55. 15 U.S.C. § 15(c) (1988). This Act reads in part:

Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in
ified the states' ability to bring Sherman antitrust suits as *parens patriae.* Other legislative actions provided grants to state attorneys general to develop antitrust expertise and enhanced the states' ability to collect civil damages following federal criminal convictions under the Sherman Act. The Executive Branch has supported state attorneys general in antitrust enforcement through a "web of interdependent projects" encompassing an "extraordinary range of activities" including information sharing, cross-designation of assistant attorneys general, joint investigations, coordinated litigation, and *amicus curiae* support.

3. *State Attorneys General Have Standing To Challenge Anticompetitive Mergers*

States have used their authority to bring antitrust actions under state and federal law to challenge proposed mergers with anticompetitive consequences. Some states have statutes specifically prohibiting anticompetitive mergers and have used these

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such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of sections 1 to 7 of this title.

Id.

56. The House of Representatives, in its report on its version of the bill, stated that "[t]he *parens patriae* doctrine already applies to antitrust injunction cases. [This bill] extends the doctrine to permit States to protect their citizens by suing for damages when they are injured by antitrust violations." H.R. REP. No. 499, 94th Cong., 2d Sess. 9 (1976), reprinted in 1976 U.S.C.C.A.N. 2572, 2578.


60. ALASKA STAT. § 45.50.566 (1986); HAW. REV. STAT. § 480-7 (1985); ME. REV. STAT. ANN. tit. 10, § 1102-A (West Supp. 1993); MISS. CODE ANN. § 75-21-13 (1972);
state antitrust laws to challenge such mergers.61 The states have repeatedly used their parens patriae enforcement authority to oppose anticompetitive mergers.62 Recently, in California v. American Stores,63 the United States Supreme Court approved the states' right to seek divestiture under section 16 of the Clayton Act64 as a proper form of injunctive relief. In addition to actions by individual states, state attorneys general coordinate activities through the National Association of Attorneys General (NAAG).65 NAAG has promulgated Horizontal Merger Guidelines,66 and the state attorneys general have entered into a


65. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS & RESPONSIBILITIES 233-36 (Lynne M. Ross ed., 1990). NAAG's standing Antitrust Committee is comprised of seven attorneys general. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, STATE ATTORNEY GENERAL ANTITRUST ENFORCEMENT 1 (1989). NAAG's Antitrust Taskforce is composed of the chief antitrust attorney from each state attorney general's office. Id. The Taskforce coordinates multistate antitrust investigation, litigation, and amicus curiae briefs. Id. The taskforce also develops proposed legislation, legislative commentary and policy positions for the NAAG Antitrust Committee and for NAAG as a whole. Id.

66. Horizontal Merger Guidelines of the National Association of Attorneys General
compact to receive and share premerger data provided voluntarily by companies contemplating mergers.\textsuperscript{57}

B. Public Policy and Federalism in State Bank Merger Analysis

The public policy articulated above, which encourages state intervention to prevent anticompetitive conduct that adversely affects a state's economy or people, is particularly applicable to anticompetitive bank mergers. Economic research consistently demonstrates that the most significant impact of banking activities is on local communities.\textsuperscript{68} Additionally, concepts of federalism support state intervention to oppose anticompetitive bank mergers.\textsuperscript{69}

1. Bank Mergers and State Economies

According to the Supreme Court, a proposed merger will be considered anticompetitive if the merger may substantially lessen competition "in any line of commerce in any section of the country."\textsuperscript{70} In 1963, the Court held in \textit{United States v. Philadelphia National Bank}\textsuperscript{71} that the impact of mergers in the "line of commerce" known as commercial banking,\textsuperscript{72} was essentially

\begin{itemize}
\item \textsuperscript{64} Antitrust & Trade Reg. Rep. (BNA) No. 1608 Special Supp. at 357 (April 1, 1993).
\item \textsuperscript{67} NAAG's Voluntary Pre-Merger Disclosure Compact 53 Antitrust & Trade Reg. Rep. (BNA) No. 1345 at 943 (1987).
\item \textsuperscript{68} See infra notes 74-92 and accompanying text.
\item \textsuperscript{69} See infra notes 95-115 and accompanying text.
\begin{quote}
[A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.
\end{quote}
\textit{Id.} at 363.
\item \textsuperscript{71} 374 U.S. 321 (1963).
\item \textsuperscript{72} In \textit{Philadelphia National Bank}, the Court held that the "cluster of products" offered by commercial banks was unique and, therefore, constituted "a distinct line of commerce." \textit{Id.} at 356. Because of changes in banking regulations and practices, some commentators have challenged this definition. See, e.g., Note, \textit{The Line of Commerce for Commercial Bank Mergers: A Product-Oriented Redefinition}, 96 HARV. L. REV. 907 (1983); William F. Jung, Note, Banking Mergers and "Line Of Commerce"
local in nature. Since Philadelphia National Bank, economic studies have repeatedly confirmed that the business of banking remains local in nature. For example, a 1990 study by Gregory E. Elliehausen and John D. Wolken, economists for the Board of Governors of the Federal Reserve System, confirms the conclusion of the Supreme Court in Philadelphia National Bank that local commercial banks were the primary source of financial products and services for small and medium sized businesses. Despite the significant changes that have occurred in financial services markets since 1963, Elliehausen and Wolken found

After the Monetary Control Act: A Submarket Approach, 1982 U. ILL. L. REV. 731; Lee B. David, Comment, Banking—Mergers—Is Commercial Banking Still a Distinct Line of Commerce?, 57 TUL. L. REV. 958 (1983). However, recent empirical research indicates that many banking customers still cluster their purchases of banking products and services. See, e.g., Elliehausen & Wolken, Small Businesses, supra note 5, at 180 (observing that small and medium sized businesses cluster their purchases of financial products and services at local commercial banks); Elliehausen & Wolken, Households, supra note 5, at 180 (noting that consumers cluster their purchases of banking products at local institutions); Hannan & Rhoades, supra note 2, at 744-45. Federal courts reject a submarket approach and adhere to commercial banking as the appropriate product market when analyzing bank mergers. See United States v. Central State Bank, 817 F.2d 22 (6th Cir. 1987).

73. Philadelphia Nat'l Bank, 374 U.S. at 358-60. According to the Court, when determining the appropriate section of the country, the “proper question to be asked . . . is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.” Id. at 357. The Court noted that in banking, convenience of location was essential to effective competition. Id. at 358. Accordingly, the Court found that individuals and corporations conferred the bulk of their patronage on banks in their local communities. Id. Since Philadelphia National Bank, federal courts have been concerned primarily with the potential anticompetitive effects of proposed bank mergers on local communities. See, e.g., United States v. Phillipsburg Nat'l Bank, 399 U.S. 350, 362-65 (1970); United States v. County Nat'l Bank of Bennington, 339 F. Supp. 85, 89 (D. Vt. 1972); Washington Mut. Sav. Bank v. FDIC, 347 F. Supp. 790, 798 (W.D. Wash. 1972). Individuals and businesses typically do most of their business with banks in their local community because it is impractical to work at a distance. Id.; see also discussion infra notes 74-80 and accompanying text. Small depositors and borrowers, especially small businesses, therefore often rely upon local banks for banking services. Philadelphia Nat'l Bank, 321 U.S. at 359 n.36, 369; see Phillipsburg Nat'l Bank, 399 U.S. at 363-64; County Nat'l Bank, 339 F. Supp. at 89.


75. Elliehausen & Wolken, Small Businesses, supra note 5, at 815.

76. Since the 1963 decision in Philadelphia National Bank, substantial changes
that "[f]irms use local suppliers to a remarkable extent." 77 For small and medium sized businesses, "local commercial banks are the dominant suppliers of virtually every financial service considered." 78

In 1992, Elliehausen and Wolken tested whether Philadelphia National Bank's conclusions regarding local markets were applicable to consumers and reached similar results. 79 According to the authors, "[l]ocal depository institutions, especially local commercial banks, are still the main suppliers for most of the financial services used by households." 80

As a result of localized demand, banking institutions are able to discriminate between local communities when setting their fees on products such as mortgage loans, based at least in part on the level of local competition. 81 Studies also show that banks in concentrated markets may extract excess profits 82 through higher interest rates on loans, 83 less favorable loan terms and conditions to borrowers, 84 and lower interest payments on deposits. 85 Accordingly, bank mergers that substantially increase concentration in local markets could have significant impact on

have occurred in the banking industry. These changes include the emergence of (1) more nationwide lending institutions, (2) regional and national electronic banking services such as telephone banking and ATMs, and (3) national markets for loans originated by local institutions. See Rhoades, supra note 74, at 2-3. These changes sparked questions as to the validity of the Supreme Court's characterization of banking as local in nature. See id. Recent economic studies, however, affirm the continuing vitality of the Supreme Court's conclusions. See infra notes 77-80 and accompanying text.

77. Elliehausen & Wolken, Small Businesses, supra note 5, at 810.
78. Id. at 808.
79. Elliehausen & Wolken, Households, supra note 5, at 180.
80. Id.
81. Rhoades, supra note 74.
85. Berger & Hannon, supra note 82, at 298-299.
local economies.

Moreover, the combined impact of increased concentration in several individual local banking markets may have statewide implications. For example, banking in California is dominated by only a few banks such as Bank of America, Wells Fargo, and First Interstate. California banks pay interest rates on transaction account deposits that are substantially lower than both the national average and the average in metropolitan areas outside California. California banks also charge interest rates on loans that are significantly higher than the national average and rates charged by banks in out-of-state areas. This disparity has been attributed to highly concentrated and less competitive banking markets.

Mergers may also adversely impact state economies by allowing national and regional banks to drain funds from local communities to support nonlocal lending. Research indicates that in the 1980s, Texas banks withdrew funds from local communities to fund projects elsewhere. Also, a congressional study of the fifteen largest financial institutions in the United States that have satellite operations in other states reported that forty percent of the satellite operations drained funds from their host state.

When increased concentration in local markets permits banks to extract higher interest rates on loans, impose less favorable terms on borrowers, pay less interest on deposits, and drain funds from local economies, the effects will be at least as harmful as the increased railroad rates addressed by the Supreme

86. Wilmarth, supra note 1, at 1022-23 n.307; see also Randall J. Pozdena, Structure and Performance, Some Evidence from California Banking, ECON. REV. 5 (Winter 1986).
87. Wilmarth, supra note 1, at 1022.
88. Id.
90. Wilmarth, supra note 1, at 1044-48.
91. Id.; PETER S. ROSE, THE INTERSTATE BANKING REVOLUTION 184 (1989) ("In order to shore up their lead money-center banks, some holding companies in the Southwest found themselves borrowing huge amounts from their smaller affiliated banks in satellite communities.").
92. CONSOLIDATION ISSUES, supra note 1, at 6.
Court in *Georgia v. Pennsylvania R.R.*: 93

If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have suffered seriously as the result of this alleged conspiracy. Discriminatory [higher local] rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. They may stifle, impede, or cripple old industries and prevent the establishment of new ones. They may arrest the development of a State or put it at a decided disadvantage in competitive markets. 94

Public policy, therefore, demands that states be permitted to use state and federal antitrust laws to challenge bank mergers which substantially increase concentration. Modern concepts of federalism are well served by this public policy.

2. *State Antitrust Enforcement and Federalism*

American federalism embodies more than a redundant system of state and federal law enforcement. 95 It involves a system of vertical checks and balances between state and federal government that is as vital to our political system as the horizontal system of checks and balances between the three branches of the federal government. 96 Commentators have noted that the federal government cannot be relied upon to uniformly enforce antitrust laws. 97 Over time, federal antitrust enforcement swings between generally liberal and generally conservative policies, depending largely upon the economic philosophy of the White House. 98 These enforcement swings are obvious even when com-

94. *Id.* at 450; see *supra* notes 44-53 and accompanying text.
96. *Id.* at 838-39.
paring the antitrust enforcement activities of the two recent Republican administrations of Reagan and Bush.\textsuperscript{99} Moreover, at any given time, the federal government may not be capable of enforcing antitrust laws evenly throughout the states.\textsuperscript{100} Active, competent state enforcement of antitrust laws fulfills a vital role within the federal system of ensuring the uniform application of the law over time and place.\textsuperscript{101}

Congress has recognized the need to supplement federal antitrust enforcement. It adopted the private right of action embodied in section 16 of the Clayton Act in large part because of its dissatisfaction with the results of early merger enforcement activities of the federal government under the Sherman Act.\textsuperscript{102} The funding of state antitrust enforcement by Congress, along with other cooperative federal-state efforts, also reflects the need for state antitrust enforcement as an integral part of the federal system.\textsuperscript{103}

With respect to bank mergers, congressional leaders have explicitly approved state enforcement of federal antitrust laws as an important tool for ensuring the fulfillment of congressional intent.\textsuperscript{104} Recently, the House Banking Committee convened hearings as a result of congressional dissatisfaction with the failure of federal authorities to challenge anticompetitive bank mergers.\textsuperscript{105} At those hearings, Congressman Henry Gonzalez, Chairman of the committee, questioned Carol Smith, chief of the antitrust division in the State of Washington:

THE CHAIRMAN. Well, what do you think can be done on our level to make the [Board of Governors of the] Federal Reserve a little more responsive and do more than just what I described as rubber stamping [approval of bank mergers]? We are asking for your opinion because, clearly, we are in

\textsuperscript{99} Id.; see also supra note 9.
\textsuperscript{100} See Kincaid, supra note 97, at 191-92.
\textsuperscript{101} Constantine, supra note 95, at 840; Kincaid, supra note 97, at 190-92.
\textsuperscript{103} See supra notes 54-59 and accompanying text.
\textsuperscript{105} Antitrust Implications, supra note 9, at 1 (statement of Rep. Gonzalez).
need of some guidance here, and if you have any suggestions we would like to hear them.

MS. SMITH. I don't personally have any specific suggestions. I guess all I can say is that to the extent that the Federal Reserve Board does not take the competitive aspects of an acquisition into account, the States will do so.

THE CHAIRMAN. OK. Well, that is the good news.¹⁰⁶

Moreover, state attorneys general are uniquely qualified to fulfill the congressional purposes behind the federal antitrust laws. Two of the main purposes of federal antitrust laws are the protection of consumers¹⁰⁷ and the protection of small businesses.¹⁰⁸ State attorneys general have been referred to as the

¹⁰⁶. Id. at 13.
¹⁰⁷. The protection of consumers is an important goal of the antitrust laws' prohibitions on anticompetitive behavior. See H.R. Rep. No. 499, supra note 56, at 4, reprinted in 1976 U.S.C.C.A.N. at 2573 (“Although the antitrust laws have the immediate goals of protecting and promoting competition, it is the consuming public that ultimately benefits from the enforcement of the antitrust laws.”); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 55 (9th Cir. 1951), cert. denied, 342 U.S. 919 (1952). With respect to mergers, the goal of slowing the trend toward more concentration was to preserve consumer choice. United States v. El Paso Natural Gas Co., 376 U.S. 651, 659 (1964) (quoting United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 367 (1963)). By preventing anticompetitive actions, Congress and the courts intend to protect small businesses and consumers from a lack of choice in product and price. See United States v. First Nat'l Bank of Sunbury, 311 F. Supp. 374, 378 (M.D. Pa. 1970) (“The intent of the Congress in its enactment of the Clayton Act was for the protection of the small businessman and the consumer through the arrest of mergers which may have a potentially anti-competitive effect.”).
¹⁰⁸. One major goal underlying the procompetitive design of federal antitrust law is a wide dispersal of economic power. Mercantile Tex Corp. v. Board of Governors of Fed. Reserve Sys., 638 F.2d 1255, 1271 (5th Cir. 1981); see United States v. Von's Grocery, 384 U.S. 270, 274-78 (1966); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945); see also United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963). Consumers and small businesses are two of the most important groups that antitrust policy is intended to protect. The vitality of small businesses is crucial to this policy. Accordingly, the primary aim of the Celler-Kefauver Act, Anti-Merger Act, ch. 1184, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. §§ 18, 21 (1988)), was to “aid in preserving small business as an important competitive factor in the American economy” by dealing with monopolistic tendencies in their incipience before Sherman Act proceedings become necessary. S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950), reprinted in 1950 U.S.C.C.A.N. 4295. The courts have repeatedly supported this goal. See, e.g., Von's Grocery, 384 U.S. at 277 (stating that “Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipience”); John Wright & Assocs. v. Ullrich, 328 F.2d 474, 480 (8th Cir. 1964) (stating that “[t]he very raison d'etre of the
"people's lawyers" because the vast majority are popularly elected by the citizens of their states. The responsiveness and proximity of state attorneys general to the people and businesses located within their states place them in a unique position to assess the actual workings of the marketplace and the needs of the people, thereby enabling them to fulfill the purposes behind the antitrust laws. When analyzing bank mergers, this proximity gives state attorneys general a distinct advantage over federal banking and antitrust enforcement agencies.

Finally, in passing federal antitrust laws Congress only intended to supplement state antitrust enforcement. Because protecting local and state economies is of significant importance to the states, and because federal officials may not uniformly enforce federal antitrust laws, state attorneys general must be free to enforce state antitrust laws as a fundamental principle of federalism. Likewise, Congress has repeatedly recognized the need for a dual state-federal banking system and the equally important need for the states to play a role in protecting the integrity of this system. The BMA and the BHCA and their legislative histories suggest that Congress intended to continue this significant feature of our federal system.

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Sherman Act was to secure equality of opportunity for the small businessman); Aluminum Co. of America, 148 F.2d at 425-26, 429 (noting that a monopolist can control smaller competitors' entry into market, and that the goal of Congress is to preserve and strengthen the competitive position of small business); Brown Shoe Co. v. United States, 370 U.S. 294, 315-16 (1962); United States v. Colonial Chevrolet Corp., 629 F.2d 943, 946-47 (4th Cir. 1980), cert. denied, 450 U.S. 913 (1981). One of the main goals of federal antitrust law, therefore, is the restraint of anticompetitive activity in order to allow small businesses to compete.

109. Kincaid, supra note 97, at 190. Forty-three states popularly elect attorneys general. Id.

110. Constantine, supra note 95, at 839-40; Kincaid, supra note 97, at 190-92.

111. Antitrust Implications, supra note 9, at 8 (statement of Maine Deputy Attorney General Stephen L. Wessler).


113. See ARC Am. Corp., 490 U.S. at 102-06; Puerto Rico, 302 U.S. at 262-63.

114. See infra notes 183-93 and accompanying text.

115. See infra notes 185-93 and accompanying text.
C. The Bank Merger Act and the Bank Holding Company Act Do Not Preempt State Antitrust Enforcement

Although public policy and federalism support state intervention to prevent anticompetitive bank mergers, critics contend that the BMA and the BHCA preempt state antitrust laws, remove state parens patriae standing to enforce federal antitrust laws, and create a partial immunity for banks from private and state enforcement of the antitrust laws.116

 Courts are reluctant, however, to infer federal preemption of state law absent an express statement by Congress.117 Because Congress did not expressly preempt state antitrust enforcement in either the BMA or the BHCA, critics of state enforcement bear a substantial burden when arguing for preemption.118 This burden is greater when the area of law traditionally has been regulated by the states. In such cases there is a presumption against finding preemption.119 According to the Supreme Court, when Congress legislates in a field traditionally occupied by the states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."120

In the absence of an express statement by Congress that state law is pre-empted, there are two other bases for finding pre-emption. First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.121

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116. See Greene & MacDonald, supra note 10, at 507-09, 514-16.
118. ARC Am. Corp., 490 U.S. at 100-01.
119. Id. at 101.
121. ARC Am. Corp., 490 U.S. at 100-01 (citations omitted).
Both antitrust and banking are areas traditionally regulated by the states. The language of the BMA and BHCA, along with their legislative histories, establish that it was not the clear and manifest purpose of Congress to preempt state antitrust enforcement in the area of bank mergers. The BMA and BHCA allow traditional state antitrust enforcement to continue within the dual state-federal banking system.

Opponents of state use of federal antitrust laws to challenge bank mergers also face a heavy burden when they argue that the BMA and BHCA grant implied immunity to banks and effect an implied repeal of the parens patriae right of state attorneys general to enforce federal antitrust laws. "Immunity from the antitrust laws is not lightly implied," and, accordingly, the Supreme Court has held that "repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored[,] and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." In applying these principles, the Court found no such repugnancy between the BMA, the BHCA, and the federal antitrust laws. Nor do the BMA and BHCA reflect a regulatory scheme that is plainly repugnant to state antitrust enforcement of the federal antitrust laws.

1. The Dual State and Federal Banking System

From the earliest period of this country's history, the federal government and the states have shared responsibility for the regulation of banking. The nation's first federal bank, the

122. See supra notes 18-43 and accompanying text.
123. See infra notes 129-37 and accompanying text.
124. See infra notes 180-220 and accompanying text.
125. See infra notes 180-258 and accompanying text.
128. Id. at 360-52; see also First City Nat'l Bank, 386 U.S. at 363-64 (holding that an action challenging a bank merger is brought under the antitrust laws, not the BMA).
129. Arthur E. Wilmarth, Jr., The Expansion of State Banking Powers, the Federal Response, and the Case for Preserving the Dual Banking System, 58 FORDHAM L.
Bank of North America, received a federal charter in 1781 and a state charter in 1782 because of doubts about the validity of the federal charter.\footnote{130} During the same period, states were chartering and regulating their own state banks through special legislative acts.\footnote{131}

In the mid-1800s, after the destruction of the First (1791-1811) and Second (1816-1836) Banks of the United States, states began to enact "free banking" laws which permitted any person to obtain a bank charter upon the satisfaction of specified conditions.\footnote{132} When Congress reinstated the national bank system in 1863, it chose to follow the state free banking model.\footnote{133} These new laws facilitated the development of a decentralized, dual state and federal banking system.\footnote{134}

In this century, Congress has repeatedly acted to preserve the dual state-federal banking system, which allowed significant state control, to ensure decentralization and to prevent concentration of economic power.\footnote{135} State involvement in banking regulation remains important. According to the Supreme Court:

\footnote{130. Id. at 1153.}
\footnote{131. Id.}
\footnote{132. Id.}
\footnote{133. Id.}
\footnote{134. Id. at 1153-54; see also National State Bank v. Long, 630 F.2d 981, 985 (3d Cir. 1980) ("Whatever may be the history of federal-state relations in other fields, regulation of banking has been one of dual control since the passage of the first National Bank Act in 1863.").}
\footnote{135. For example, Congress cited the need for state control over bank branching and interstate bank acquisitions, the need for a decentralized banking system, and the prevention of concentrated financial power as reasons for adopting and amending the McFadden Act, ch. 191, § 7, 44 Stat. 1224, in 1927 and 1933, and in passing the Douglas Amendment in 1956. See Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 413 (1987) (Stevens, J., concurring) (quoting 66 CONG. REC. 4437-38 (1925) (statement of Sen. Reed)); S. REP. NO. 584, 72d Cong., 1st Sess. (pt. II) 3-5 (1932) (minority views); 102 CONG. REC. 6857 (1956) (statement of Sen. Douglas); see also Wilmarth, supra note 129, at 1154 n.86. The McFadden Act of 1927, codified as amended at 12 U.S.C. § 36 (1988), prohibits national banks from branching across state lines and allows national banks to open branches within their home states only to the extent that state statutes expressly authorize competing state banks to branch. The Douglas Amendment, § 3(d) of the BHCA and codified at 12 U.S.C § 1842(d) (1988), prohibits bank holding companies from acquiring banks outside of the state in which the holding company's principle operations are located unless the acquisition is authorized by state statute in the bank's home state.}
Both as a matter of history and as a matter of present commercial reality, banking and related financial activities are of profound local concern. . . . Sound financial institutions and honest financial practices are essential to the health of any State’s economy and to the well-being of its people. Thus, it is not surprising that ever since the early days of our Republic, the States have . . . actively regulated [banking] activities.  

It should be noted, however, that the dual state-federal system of banking is not a mutually exclusive system. Rather, it is a symbiotic system with state regulatory control over federal banks as well as federal regulatory control over state banks. For example, in Philadelphia National Bank, the Supreme Court noted that “[s]tate member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks.” Alternatively, the Court noted that federal banks are subject to state control in such areas as usury, interest rates, and branching. The Court also recognized areas of joint state and federal regulation, such as entry into a market and acquisitions of other banks.

Lower courts have reiterated congressional and Supreme Court support for a symbiotic, dual state-federal banking sys-

138. Id. at 327.
139. Id. at 328.
141. Philadelphia Nat’l Bank, 374 U.S. at 328; see 12 U.S.C. § 1842(d) (1988); see also Anderson Nat’l Bank v. Luckett, 321 U.S. 233, 248 (1944) (noting that “[t]his Court has often pointed out that national banks are subject to state laws unless those laws infringe the national bank laws or impose an undue burden on the performance of the banks’ functions”).
tem. For example, in *National State Bank v. Long* the Third Circuit Court of Appeals noted that "National Banks . . . are governed in the daily course of business far more by the laws of the State than of the nation." Likewise, the D.C. Circuit Court of Appeals has held that "federal law does not preempt state banking law in such vital areas as branching, interest rates, and mergers."

The BMA and the BHCA continue the traditional congressional respect for the dual banking system and the role of the states in regulating bank mergers.

2. *Federal Regulation of Bank Mergers—The Bank Merger Act and Bank Holding Company Act*

When Congress passed the BMA in 1960, it was concerned about an increasing number of bank mergers and believed that the existing controls over bank mergers were incomplete and confusing, particularly with respect to the competitive factors involved. Although section 1 of the Sherman Act was fully applicable to the banking industry, Congress concluded that it was "of little use in controlling bank mergers." Congress also found that section 7 of the Clayton Act was limited, insofar as banks were concerned, to cases where a merger was accomplished through stock acquisition. Accordingly, Con-

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142. 630 F.2d 981 (3d Cir. 1980).
143. *Id.* at 985 (quoting McClellan v. Chipman, 164 U.S. 347, 356 (1896)).
144. Independent Bankers Ass'n v. Smith, 534 F.2d 921, 932 (D.C. Cir. 1976); see United Jersey Banks v. Parell, 783 F.2d 360, 368-69 (3d Cir. 1986) (explaining that the law with respect to bank mergers is not exclusively federal and the nature and operation of the federal and state laws must be examined to determine if they can operate compatibly); see also 12 U.S.C. § 215 (1988).
gress passed the BMA in 1960 to help assure vigorous competition in banking.\textsuperscript{150}

The BMA divided the authority to grant consent to bank mergers between the Comptroller of the Currency (national banks), the Federal Reserve Board (state member banks), and the Federal Deposit Insurance Corporation (non-member, state-insured banks).\textsuperscript{151} The federal banking agency with jurisdiction over a merger was required to consult with the other banking agencies and the United States Attorney General.\textsuperscript{152} Vital control over state banks by appropriate state authorities was also anticipated.\textsuperscript{153}

The BMA also required the federal banking agencies to consider several factors when deciding whether to allow a merger, including the financial condition of the banks involved, the effect of the proposed transaction on competition, and the convenience and needs of the community.\textsuperscript{154} Although the BMA of 1960 required the agencies to consider the effects of the merger on competition, Congress did not intend the Act to affect the applicability of the Sherman Act to bank mergers.\textsuperscript{155}

In 1963, in Philadelphia National Bank,\textsuperscript{156} the Supreme Court first considered the applicability of section 7 of the Clayton Act to a bank merger approved by a federal agency under the BMA.\textsuperscript{157} The United States Department of Justice had challenged a consolidation of the Philadelphia National Bank

\footnotesize{\textsuperscript{2002.}
\textsuperscript{150} Id. at 3, \textit{reprinted in} 1960 U.S.C.C.A.N. at 1996.
\textsuperscript{151} S. REP. NO. 196, \textit{supra} note 148, at 22.
\textsuperscript{155} S. REP. NO. 196, \textit{supra} note 148, at 3.
\textsuperscript{156} 374 U.S. 321 (1963).
\textsuperscript{157} Id. at 335-49.
and the Girard Trust Corn Exchange Bank, which had been approved pursuant to the BMA by the Comptroller of the Currency.\textsuperscript{158} The district court had held that section 7 of the Clayton Act did not apply to bank mergers or consolidations and approved the merger.\textsuperscript{159} The Supreme Court reversed.\textsuperscript{160}

The Court determined that by amending the Clayton Act in 1950, Congress intended to reach "the entire range of corporate amalgamations,"\textsuperscript{161} including the banking industry.\textsuperscript{162} The Court also rejected the argument that the BMA, "by directing the banking agencies to consider competitive factors before approving mergers, immunize[d] approved mergers from challenge under the federal antitrust laws."\textsuperscript{163} In reaching this conclusion, the Court noted that the BMA did not confer express immunity to approved mergers. The Court also strongly disfavored implied repeal of the antitrust laws.\textsuperscript{164} In passing the BMA, Congress did not embrace the view "that federal regulation of banking [was] so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure."\textsuperscript{165} To the contrary, the Court indicated that the legislative history did not reflect any suggestion that the "applicability of the antitrust laws was to be affected."\textsuperscript{166}

Philadelphia National Bank was followed by United States v. First National Bank & Trust Co.,\textsuperscript{167} in which the Court held that section 1 of the Sherman Act could be used to challenge anticompetitive bank mergers.\textsuperscript{168} As a result of these two cases, Congress became concerned that all prior bank mergers would now be susceptible to challenge under the antitrust laws because no statute of limitations had been set.\textsuperscript{169} Accordingly,

\textsuperscript{158} Id. at 330-34.
\textsuperscript{159} Id. at 334-35.
\textsuperscript{160} Id. at 323.
\textsuperscript{161} Id. at 342.
\textsuperscript{162} Id. at 348.
\textsuperscript{163} Id. at 350 (citation omitted).
\textsuperscript{164} Id. at 350-51.
\textsuperscript{165} Id. at 352.
\textsuperscript{166} Id.
\textsuperscript{167} 376 U.S. 665 (1964).
\textsuperscript{168} Id. at 672-73.
\textsuperscript{169} S. REP. NO. 299, 89th Cong., 1st Sess. 3 (1965) ("The uncertainty created by
Congress amended the BMA in 1966 to provide for a statute of limitations. Under the 1966 amendments, all bank mergers consummated before June 17, 1963, would become exempt from attack under the antitrust laws, except for an action pursuant to section 2 of the Sherman Act.  

The 1966 amendments to the BMA also reflected a compromise between those who favored exempting the banking industry from antitrust laws and those who favored not granting the banking industry any special consideration whatsoever. According to the House Report on the 1966 amendments, the "intended legal effect" of the amendments was to modify the BMA in three respects:

First, it is intended to make clear that no merger which would violate the antimonopoly section (sec. 2) of the Sherman Anti-Trust Act may be approved under any circumstances.

Second, the bill acknowledges that the general principle of the antitrust laws—that substantial anticompetitive mergers are prohibited—applies to banks, but permits an exception in cases where it is clearly shown that a given merger is so beneficial to the convenience and needs of the community to be served—recognizing that effects outside the section of the country involved may be relevant to the capacity of the institution to meet the convenience and needs of the community to be served—that it would be in the public interest to permit it.

Third, the bill provides that this rule of law is to be applied uniformly, in judicial proceedings as well as by the administrative agencies.

The 1966 amendments do not change the respective duties of the federal agencies involved in merger review. The authori-
ty to grant consent to bank mergers continues to be divided between the Comptroller of the Currency (national banks), the Federal Reserve Board (state member banks), and the Federal Deposit Insurance Corporation (non-member, state-insured banks).\textsuperscript{174} The federal banking agency with jurisdiction over a merger must consult with the other banking agencies and the United States Attorney General.\textsuperscript{175}

In contrast to the BMA of 1960, however, the effect of the proposed merger on competition is now the preeminent consideration.\textsuperscript{176} Under the BMA of 1966, the responsible agency must use the standards set forth in section 7 of the Clayton Act in determining whether the merger will substantially lessen competition.\textsuperscript{177} Any antitrust action challenging a bank merger

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\begin{itemize}
\item No insured depository institution shall merge or consolidate with any other insured depository institution or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured depository institution except with the prior written approval of the responsible agency, which shall be—
\begin{itemize}
\item (A) the Comptroller of the Currency if the acquiring, assuming or resulting bank is to be a national bank or a District bank;
\item (B) the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District Bank);
\item (C) the Corporation if the acquiring, assuming, or resulting bank is to be a State nonmember insured bank (except a District bank or a savings bank supervised by the Director of the Office of Thrift Supervision);
\item (D) the Director of the Office of Thrift Supervision if the acquiring, assuming, or resulting institution is to be a savings association.
\end{itemize}
\end{itemize}

\item \textsuperscript{175} H.R. REP. No. 1221, supra note 170, at 6, reprinted in 1966 U.S.C.C.A.N. at 1864. Under the BHCA, the appropriate “State supervisory authority” must also be consulted. 12 U.S.C. §§ 1842(b), 1849(b).

\item \textsuperscript{176} Washington Mut. Sav. Bank v. FDIC, 482 F.2d 459, 463 (9th Cir. 1973).

\item \textsuperscript{177} 12 U.S.C. § 1828(c)(5). This section provides in pertinent part:

The responsible agency shall not approve—
\begin{itemize}
\item (A) any proposed merger transaction which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or attempt to monopolize the business of banking in any part of the United States, or
\item (B) any other proposed merger transaction whose effect in any section of the country may be substantially to lessen competition, or to tend
\end{itemize}
\end{enumerate}
\end{footnotesize}
must be brought within thirty days of agency approval, and the court is to determine the legality of the merger de novo.\textsuperscript{178} Congress also amended the BHCA in 1966 to apply the procedures of the BMA to bank holding companies.\textsuperscript{179}

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to create a monopoly, or to which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

\textit{Id.; see also} United States v. Third Nat'l Bank, 390 U.S. 171, 181-82 (1968); Washington Mut. Sav. Bank, 482 F.2d at 463 ("The exact language of the principle antitrust laws was incorporated into the 1966 Act, not by coincidence, but to draw on the seventy-five year history of their judicial construction.").

\textsuperscript{178} H.R. REP. No. 1221, \textit{supra} note 170, at 6, \textit{reprinted in} 1966 U.S.C.C.A.N. at 1865. The amended statute now provides:

Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order. In any such action, the court shall review de novo the issues presented.

\textsuperscript{12} U.S.C. § 1828(c)(7)(A).


The Board shall not approve-

(A) any acquisition or merger or consolidation under this section which would result in a monopoly, or which would be in furtherance of any combination or conspiracy to monopolize or to attempt to monopolize the business of banking in any part of the United States, or

(B) any other proposed acquisition or merger or consolidation under this section whose effect in any section of the country may be substantially to lessen competition, or tend to create a monopoly, or which in any other manner would be in restraint or (sic) trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

\textsuperscript{12} U.S.C. § 1842(c)(1).
3. *State Antitrust Enforcement and Preemption Under the BMA and BHCA*

When the standards for preemption announced by the Supreme Court are applied to the regulation of bank mergers under the BMA and BHCA, clearly Congress did not intend to preempt state antitrust enforcement—particularly with respect to state control over state banks. The BMA and BHCA also do not preempt state antitrust laws with respect to federal bank mergers; rather, they include state antitrust laws in the federal enforcement scheme.

*a. State Antitrust Enforcement and State Banks*

Neither the BMA nor the BHCA contains an express statement by Congress that it intended to preempt state law. 180 Nor do the statutes or their legislative histories reflect a clear and manifest congressional intent to implement exclusive federal control over the field of regulation of state bank mergers. To the contrary, by specific statutory language181 and through statements in the legislative histories of the national banking laws,182 Congress clearly expressed its intention not to interfere with the traditional powers of the states to control mergers of state banks.

Historically, Congress has supported a dual state-federal banking system and deferred to state law in mergers affecting state banks. For example, under the national banking laws, which were passed prior to the BMA and BHCA, Congress forbade national banks from merging or consolidating with state banks if the action violated state law.183

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182. See infra note 183 and accompanying text.
183. See Act of Aug. 17, 1950, Pub. L. No. 81-706, 64 Stat. 455 (codified as amended at 12 U.S.C. §§ 214, 215 (1988)). Section 214(c) provides in pertinent part that "no conversion of a national banking association into a State bank or its merger or consolidation with a State bank shall take place under this subchapter and section 321 of this title in contravention of the law of the State in which the national banking association is located." 12 U.S.C. § 214(c). Section 215(d) provides that "no such consolidation shall be in contravention of the law of the State under which such bank is incorporated." 12 U.S.C. 215(d); see also *Ex parte Worcester County Nat'l
Likewise, when the BHCA was first passed in 1956,\textsuperscript{184} it allowed states to restrict federal bank holding company acquisitions.\textsuperscript{185} The BHCA reflected congressional intent that states be permitted to restrain bank holding companies from gaining undue control over the banking industry within their own states.\textsuperscript{186} Therefore, by specific statutory language, Congress assured that the states retained their traditional power to regulate the formation or operation of bank holding companies within their borders. According to the Senate report on the BHCA:

In any event, another provision of this bill expressly preserves to the States a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the federal authorities can be or are under this bill. Under such a grant of authority, each State may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) this bill empowers the Federal authorities to be or (2) such Federal authorities actually are in their administration of the provisions of this bill. In the opinion of the committee, this provision adequately safeguards States' rights as to bank holding companies.\textsuperscript{187}

Thus, section 7 of the BHCA provides: "No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof."\textsuperscript{188}

The legislative history of the BMA also reflects a congressional intent to reserve to the states their traditional role in regulating state bank mergers. In passing the BMA in 1960, Con-

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\item[\textsuperscript{184}] Act of May 9, 1956, ch. 240, § 2, 70 Stat. 133.
\item[\textsuperscript{186}] Id., reprinted in 1956 U.S.C.C.A.N. at 2492.
\item[\textsuperscript{187}] Id., reprinted in 1956 U.S.C.C.A.N. at 2492.
\item[\textsuperscript{188}] 12 U.S.C. § 1846.
\end{enumerate}
\end{footnotesize}
gress recognized that the states regulated the merger of state banks and considered the effects on competition of a proposed merger.\(^{189}\) Congress explicitly stated that it expected states to bar some state bank mergers before the mergers were even presented to federal authorities for review.\(^{190}\) According to the report of the Senate Committee on Banking and Currency, when passing the BMA:

In the case of every merger where the absorbing or result bank will be a State bank, approval by the appropriate State supervisor or other banking authority will have to be obtained, in accordance with the applicable State law, before the Federal Reserve Board or the FDIC will have an opportunity to review an application under this bill.

If the State supervisor refuses his approval of the merger, no application to the Federal Reserve Board or the FDIC would even be considered. There is, therefore, no possibility that the Board or the FDIC would approve a merger which the appropriate State authorities had finally rejected.\(^{191}\)

Alternatively, where state banks merge, Congress intended to permit federal authorities to eject the surviving state bank from the Federal Reserve System and the federal deposit insurance system if the appropriate federal authorities did not approve the competitive aspects of the merger.\(^{192}\) According to the legislative history:

The only possibility of conflict is that the Board or the FDIC might deny an application for a merger which the State supervisor had approved. This kind of conflict is not new under


the dual system of banking, however regrettable any specific instance may be. Under the Board's or the FDIC's standards, the Board may always deny membership, and the FDIC may always deny insurance, to a State bank chartered by the appropriate State authority. The bank may still proceed to operate as a State-chartered bank, without membership or without FDIC insurance, so long as the State supervisor authorizes it to do so.\textsuperscript{193}

The explicit statutory language of the national banking laws and the BHCA, the legislative history of these laws, and the legislative history of the BMA of 1960, establish conclusively that federal law does not exercise exclusive control over the field of state bank merger regulation. Rather, the panoply of federal banking laws shows a clear legislative intent to permit states to control important aspects of the state banking system and, where appropriate, to be more restrictive than federal authorities in regulating their own state banking systems. Nothing in the 1966 amendments to the BMA or the BHCA or their legislative histories suggests that Congress intended to change this fundamental characteristic of the dual state-federal banking system. The Third Circuit's decision in \textit{United Jersey Banks v. Parell}\textsuperscript{194} supports this conclusion.

In \textit{United Jersey Banks}, the plaintiff challenged the merger of a federal bank with a bank holding company under state antitrust law in state court.\textsuperscript{195} The case was removed to federal court, but the Third Circuit ordered the case remanded to the

\footnotesize{\textsuperscript{193} H.R. REP. NO. 1416, \textit{supra} note 146, at 15, \textit{reprinted in} 1960 U.S.C.C.A.N. at 2008; S. REP. NO. 196, \textit{supra} note 148, at 24. Whether the state bank would be permitted to function in the state banking system may also be a function of the nature of the disagreement between the state and federal authorities. If the bank was the result of an anticompetitive bank merger, the merger would be barred. In Northern Securities Co. v. United States, 193 U.S. 197 (1904), New Jersey state law permitted the formation of a bank holding company that resulted in monopolization prohibited by the Sherman Act. \textit{Id.} at 327. The Court held that the state could not authorize a restraint of trade prohibited by Congress. \textit{Id.} at 346. This result is consistent with the above analysis that permits more restrictive restraints on anticompetitive conduct.

\textsuperscript{194} 783 F.2d 360 (3d Cir.), \textit{cert. denied sub nom.} First Fidelity Bancorporation v. Parell, 476 U.S. 1170 (1986).

\textsuperscript{195} \textit{Id.} at 362-63.
state court system. The Third Circuit held that Congress allowed the states considerable authority to legislate in the area of antitrust, and, with respect to bank mergers, federal law did not exclusively occupy the field. According to the court, state laws must operate compatibly with federal law, a determination that it deemed the responsibility of the state court system to make.

Under the standard set forth in United Jersey Banks, states can and should play a role in regulating bank mergers. State antitrust enforcement operates compatibly with the BMA and BHCA and does not "stand[] as an obstacle to the accomplishment and execution of the full purposes of Congress." Rather, state enforcement helps fulfill the congressional goals embodied in the BMA and BHCA by (1) controlling undue concentration in the banking industry, (2) preserving the dual state-federal banking system, and (3) allowing uniform application of antitrust principles to mergers of banks in the federal banking system.

State antitrust enforcement helps fulfill the intent of Congress because state enforcement and the BMA and BHCA have the same principal goal—preventing anticompetitive bank mergers from unduly concentrating the banking industry. With respect to this goal of limiting undue concentration, Congress and the courts have always permitted the states to enforce antitrust laws against activities affecting their own states without preemption. The Supreme Court's holding in Puerto Rico v. Shell Co. reflects the rationale for this policy. According to the Court, "[n]o matter how interested the National Government may be in prosecuting such [antitrust] offenses, instances might occur where the latter would pass unnoticed, or where, for some reason or other, such officers might not display the same activity

196. Id. at 370.
197. Id. at 368-69.
198. Id.
199. Id. at 369.
201. See supra note 186 and accompanying text.
and interest that is to be expected from local officials. 203

Even when state antitrust laws are more restrictive than federal antitrust laws, federal courts have consistently held that federal law does not preempt state antitrust laws because they do not represent an obstacle to the accomplishment of the federal antitrust goal of preserving competition. 204 The courts permit this result because "the fact that the Sherman Act tolerates certain conduct does not mean that there is an affirmative federal policy encouraging such conduct." 205 It is appropriate to apply this principle to state bank mergers because federal antitrust laws do not encourage state bank mergers that are illegal under state law.

Additionally, state antitrust enforcement with respect to state bank mergers helps fulfill the congressional policy of respecting and preserving the dual state-federal banking system. States have traditionally regulated state banks and enforced antitrust laws. Accordingly, Congress anticipated that the appropriate state authorities might well reject proposed state bank mergers as anticompetitive. 206 Congress could not have intended to forbid national banks to merge in violation of state law but permit state banks to do so. Nor is it plausible that in passing the BMA or the BHCA Congress intended to force states to accept into the state banking system banks that state authorities had concluded were anticompetitive and illegal under state law. Such a result would destroy an essential element of the dual state-federal banking system that Congress has carefully sought to preserve. Rather, permitting state antitrust enforcement in state bank merger cases is most consistent with the dual state-federal banking system and the principles of federalism which that system embodies.

203. Id. at 264-65.
Finally, state antitrust enforcement is not an obstacle to the congressional purpose of achieving uniform antitrust standards with respect to the federal banking system—including state member banks. The vast majority of state antitrust laws are interpreted and enforced in harmony with federal antitrust laws. Moreover, state antitrust enforcement will never require the federal banking system, including the Federal Reserve Board and the FDIC, to accept a state bank merger that the appropriate federal agencies believed was anticompetitive.

b. State Antitrust Enforcement and Federal Banks

Under the BMA of 1966, Congress did not preempt enforcement of state antitrust laws in bank mergers involving federal banks. Rather, it included state antitrust laws in the federal enforcement scheme. The BMA of 1966 authorizes actions under the “antitrust laws” to challenge bank mergers approved by federal agencies. The statute also defines the “antitrust laws” that authorize such actions: “For the purposes of this subsection, the term “antitrust laws” means the Act of July 2, 1890 (the Sherman Antitrust Act), the Act of October 15, 1914 (the Clayton Act), and any other Acts in pari materia.”

Statutes are considered in pari materia when they have the same purpose or relate to the same subject matter. State an-
titrust statutes are in pari materia with the Sherman and Clayton Acts because they have the same purpose and subject matter—the restriction of anticompetitive conduct. Indeed, the vast majority of state antitrust laws must be interpreted consistently and in harmony with federal court interpretations of the Sherman and Clayton Acts, either by state statute or by case law. Accordingly, actions under state antitrust law may be brought under the BMA so long as the state law is consistent with federal antitrust law.

The court took this approach in Vial v. First Commerce Corp., a state court action in which a private plaintiff chal-

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lenged a merger between the Bank of New Orleans & Trust Co., a state bank, and First National Bank of Commerce, a national bank. Plaintiff alleged violations of Louisiana’s antitrust laws. The case had been removed to federal court, and plaintiff filed a motion to remand. The court held that although the BMA of 1966 applied to the proceeding, it did not require the state antitrust action to be dismissed on the grounds of preemption. Rather, according to the court, “state courts which are asked to review a proposed merger under state antitrust laws are required to apply the federal standards set forth in the 1966 Act.” The court reached this conclusion because the BMA explicitly permits antitrust actions based on antitrust laws other than the Clayton Act or the Sherman Act, but which are “in pari materia.” In a subsequent opinion, the court stated that the plaintiff was entitled to proceed with his challenge to the merger, and if he succeeded, he could cause divestiture of the acquired bank.

4. State Attorney General (Parens Patriae) Enforcement of the Federal Antitrust Laws Under the BMA and BHCA

State attorneys general may use their parens patriae authority to challenge anticompetitive mergers using federal antitrust laws because the BMA of 1966 did not impliedly repeal this

215. Id. at 69,532-33.
216. Id. at 69,533.
217. Id. at 69,535-36.
218. Id. at 69,535.
219. Id. at 69,636. Although the court recognized the right of private plaintiffs to challenge federal mergers in state court, it also held that such actions ultimately present federal questions and may be removed to federal court. Id. at 69,535-36. But see United Jersey Banks v. Parell, 783 F.2d 360 (3d Cir.) (holding that antitrust challenges under state law involving federal bank and bank holding company may not be removed to federal court and any question of preemption must be decided by the state court), cert. denied sub nom. First Fidelity Bancorporation v. Parell, 476 U.S. 1170 (1986).
220. In the subsequent opinion, the court denied the plaintiff’s right to an automatic stay under the BMA of 1966, but nevertheless held that the plaintiff was entitled to proceed with his antitrust claim, stating, “[o]n the other hand, without a stay, plaintiff’s interests are not irreparably harmed. He still has the right to proceed with his suit, and if he prevails, to cause divestiture of the merger.” Vial v. First Commerce Corp., 564 F. Supp. 650, 667-68 (E.D. La. 1983).
right. The Supreme Court has held that "[r]epeals of the anti-
trust laws . . . are strongly disfavored, [sic] and have only been
found in cases of plain repugnancy between the antitrust and
regulatory provisions."\(^{221}\) The BMA of 1966 leaves antitrust
laws unchanged, and enforcement of these laws by state attor-
neyes general is not repugnant to the BMA. Rather, the plain
language of the BMA of 1966, the legislative history of the Act,
subsequent Supreme Court and district court decisions, and
public policy support both a private right of action and state
antitrust enforcement after the BMA of 1966.

Initially, the plain language of the BMA suggests that a pri-
ivate right of action remains intact:\(^{222}\)

*Any action brought under the antitrust laws arising out of a
merger transaction shall be commenced prior to the earliest
time under paragraph (6) [providing a maximum of thirty
days after agency approval of the merger] at which a merger
transaction approved under paragraph (5) [a merger which
might result in a monopoly or substantially lessen competi-
tion] might be consummated.*\(^{223}\)

Because the statute does not specify any particular plaintiffs,
and because it refers to "any action brought under the antitrust
laws," the plain language of the BMA suggests that there is no
implied repeal of either a private right of action or the right of
state attorneys general to enforce the antitrust laws.\(^{224}\)

Second, the legislative history of the BMA of 1966 suggests
that Congress did not intend to amend or repeal the antitrust
laws themselves. According to Representative Paul H. Todd, Jr.:

The majority report states: "(1) The bill would establish a
single set of standards for the consideration of future merg-
ers . . . under the antitrust laws . . .," and in the section 2(d)

\(^{221}\) United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963) (foot-
note omitted).

\(^{222}\) According to the Supreme Court, the sole function of the courts is to enforce a
statute according to its terms when the statute's language is plain. Plain language
is not to be expanded or contracted by statements of individual legislators or com-


\(^{224}\) See Comment, *The 1966 Amendment to the Bank Merger Act*, 66 COLUM. L.
REV. 764, 786 (1966).
H.R. 12173 defines the antitrust laws as those now in existence. Thus, there is a clear implication that the antitrust provisions have not been changed.225

Subsequent Supreme Court decisions have confirmed Representative Todd's interpretation of legislative intent behind the BMA of 1966.226 For example, in United States v. First City National Bank,227 the Justice Department brought its action under the antitrust laws and failed to even mention the BMA in its complaint.228 The defendants argued that the Supreme Court should remand the case and require the Justice Department to allege a claim under the BMA rather than the antitrust laws.229 The Court rejected this argument,230 holding that "an action challenging a bank merger on the ground of its

225. H.R. REP. NO. 1221, supra note 170, at 21, reprinted in 1966 U.S.C.C.A.N. at 1884 (statement of Rep. Todd) (citation omitted). Examples in the legislative history of the BMA of possible future actions by the Justice Department demonstrate the way in which Congress envisioned the BMA would operate under the 1966 amendments. See, e.g., id. at 1, reprinted in 1966 U.S.C.C.A.N. at 1860. Critics of state antitrust enforcement use these examples to argue that Congress intended to repeal impliedly private and state standing to enforce the antitrust laws and intended to permit only the Justice Department to challenge bank mergers. Greene & MacDonald, supra note 10, at 507-09. This argument ignores the historical context of congressional action to amend the BMA. In 1960, when the BMA was passed and in 1966, when it was amended, the Department of Justice was the only party that had ever challenged a bank merger under the antitrust laws, and at the time of the 1966 amendments, it was actively pursuing several bank merger challenges. See, e.g., H.R. REP. NO. 1221, supra note 170, at 3, reprinted in 1966 U.S.C.C.A.N. at 1863; S. REP. NO. 299, supra note 169, at 2; S. REP. NO. 196, supra note 148, at 3. Naturally, in this historical context, Congress would assume that the Justice Department would be the most likely party in future bank merger challenges and, therefore, would use the Justice Department in any examples of how it expected the BMA to operate. From these examples, however, one cannot simply assume that Congress intended to repeal impliedly private and state rights of action under the antitrust laws. Indeed, even Greene & MacDonald concede that the BMA's sponsor, Rep. Patman, made the only reference to private rights of action in the legislative history when suggesting that private rights of action would continue. See Greene & MacDonald, supra note 10, at 508 n.38.
227. 386 U.S. 361 (1967).
228. Id. at 363.
229. Id.
230. Id. at 363-64.
anticompetitive effects is brought under the antitrust laws and, therefore, the plaintiff need make no reference to the BMA. According to the Court, "there is no indication [in the statute or its legislative history] that an action challenging a merger on the ground of its anticompetitive effects is bottomed on the Bank Merger Act rather than on the antitrust laws." Rather, the Court determined that the BMA simply provided defendants with the affirmative defense that the convenience and needs of the community required the approval of an otherwise anticompetitive merger. According to the Court, this defense under the BMA must be pleaded and proved by the defendants.

In United States v. Third National Bank, the Court reaffirmed the full applicability of the antitrust laws to bank mergers:

We find in the 1966 Act, which adopted precisely that § 7 Clayton Act phrase ["substantially to lessen competition"], as well as the "restraint of trade" language of Sherman Act § 1, no intention to adopt an "antitrust standard" for bank cases different from that used generally in the law. Only one conclusion can be drawn from the exhaustive legislative deliberations that preceded passage of the Act: Congress intended bank mergers first to be subject to the usual antitrust analysis.

Consistent with the Supreme Court holdings that the antitrust laws remain unchanged by the BMA of 1966 and the clear language of the BMA itself, lower courts have permitted private rights of action under federal antitrust laws challenging bank mergers. In First Midland Bank & Trust Co. v. Chemical Financial Corp., a Michigan banking corporation challenged an

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231. Id. at 363.
232. Id. at 363-64.
233. Id. at 364.
234. Id.
235. Id.
237. Id. at 181-82 (citation omitted).
acquisition by Chemical Financial, a bank holding company. Although the court denied an automatic stay of the planned merger, it permitted the plaintiff to proceed with an action under the antitrust laws. According to the court:

A decision that a private lawsuit does not invoke the automatic stay, however, does not foreclose a private action; it merely means that such an action is not conducted under shelter of an automatic stay. Lifting the automatic stay, however, does not mean that plaintiff cannot thereafter seek preliminary injunctive relief. As circumstances change, the anticompetitive impact of the proposed merger or acquisition may become more apparent, and the resulting injury to competitors may warrant judicial intervention. Certainly, should the impact of the merger be such as to threaten plaintiff's ability to continue to maintain the suit, this Court, provided the other requirements for injunctive relief were met, would not hesitate to order divestiture pending the outcome of litigation.

Alternatively, in Southwest Mississippi Bank v. FDIC two banks, which were denied the right to merge by the FDIC on the grounds that the merger was anticompetitive, challenged that agency's decision in a declaratory judgment action in federal court. The district court held that because the sole issue before the court was an antitrust claim, the Administrative Procedure Act did not apply, the FDIC's decision was entitled to no presumptive weight, and the plaintiffs were entitled to full de novo review of the antitrust issues. The court held that de...
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no**vo** review was appropriate under the BMA for antitrust challenges to agency approval of a merger because, "[n]othing in the language of the Act or its legislative history persuades this Court that a different standard should apply or that the scope of review should be different depending upon who loses or wins before the administrative agency, where, as here, the antitrust issue is the only issue."245

Finally, state antitrust enforcement is not "plainly repugnant" to the congressional purposes behind the BMA of 1966, but rather helps to ensure that these purposes are achieved. As noted above, a fundamental purpose of the BMA and BHCA is to prevent undue concentration in the banking industry.246 Indeed, the 1966 amendments to the BMA and BHCA intended to make preserving competition in the banking industry the preeminent goal of government enforcement and regulation.247 Historically, Congress has sought the assistance of state attorneys general in achieving its antitrust enforcement goals.248 Antitrust enforcement efforts by state attorneys general thus help to ensure that the congressional goal of effective antitrust enforcement reflected in the BMA and BHCA is achieved,249 and are certainly not "plainly repugnant" to this congressional purpose.

A second goal of Congress in passing the 1966 amendments to the BMA and BHCA was to achieve uniform standards in antitrust enforcement involving the federal banking system.250 Antitrust enforcement by state attorneys general is essential to achieving this goal. The regulatory system devised by Congress requires the federal banking agencies, the Department of Justice, and the appropriate state supervisory authority to confer in an attempt to achieve uniform enforcement standards.251 However, Congress gave the courts the ultimate authority to assure uniformity through de **no**vo review of agency decisions regarding

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246. See supra notes 146, 186 and accompanying text.
248. See supra notes 54-60 and accompanying text.
249. See supra notes 176, 186 and accompanying text.
250. See supra note 173 and accompanying text.
proposed bank mergers.\textsuperscript{252}

In practice, the federal agencies have often disagreed with each other\textsuperscript{253} and with the courts\textsuperscript{254} on the proper antitrust methodology for analyzing bank mergers. Where such disagreements result in enforcement action by the Department of Justice, the courts can properly fulfill their role of assuring uniformity.\textsuperscript{255} However, when federal agencies fail to enforce the antitrust laws properly, or when policy changes in federal agencies or the executive branch result in "rubber stamping" of proposed mergers, courts are powerless on their own to fulfill their role of ensuring uniformity over time.\textsuperscript{256} Antitrust actions brought by state attorneys general ensure that courts may fulfill their congressionally mandated role to enforce uniform antitrust standards in bank merger cases where federal agencies' departure from these standards results in no enforcement action.\textsuperscript{257}

Finally, in passing the amendments to the BMA and BHCA, Congress intended to grant the banking industry a partial immunity from the antitrust laws if the merging parties could establish that an otherwise anticompetitive merger nonetheless served the "convenience and needs of the community."\textsuperscript{258} Because banks that defend antitrust actions brought by state attorneys general are free to raise the "convenience and needs of the community" defense in the same way and to the same extent as in an action brought by the Department of Justice, state antitrust enforcement is not "clearly repugnant" to this congressional purpose.

\textsuperscript{252} 12 U.S.C. §§ 1828(c)(7), 1849(b).
\textsuperscript{255} See supra notes 252-53 and accompanying text.
\textsuperscript{256} See supra notes 105-06 and accompanying text.
\textsuperscript{257} See supra note 173 and accompanying text.
\textsuperscript{258} United States v. First City Nat'l Bank, 386 U.S. 361, 363-64 (1967).
D. The BMA and BHCA Create New Opportunities and Remedies for States

The provisions of the BMA and the BHCA create new remedies and enforcement opportunities for state attorneys general who oppose proposed anticompetitive bank mergers. Among the provisions utilized are those permitting the automatic stay of proposed mergers, state intervention in federal enforcement actions, and comment requirements in both statutes.

1. Automatic Stay Provisions of the BMA

The legislative history of the BMA of 1966 establishes that when Congress passed the amendments it was deeply concerned that successful antitrust enforcement might cause the unscrambling of two or more banks after their merger. Congress believed that such a process would be difficult and would create serious problems for the banks' customers and the community. Therefore, it provided for an automatic stay of any merger approved by an agency under the BMA upon the filing of an antitrust action. According to the BMA:

Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order.

Despite the plain language of the statute, courts have consistently denied automatic stays to private plaintiffs. The courts have held that Congress intended the automatic stay provision to apply to the United States Justice Department

259. Id. at 370-71 (discussing the legislative history of the automatic stay provisions of the BMA of 1966).
260. Id.
262. Id. (emphasis added).
because the provision could be used to stop "any merger, good or bad" and such power should be limited to an "agency committed to acting in the public good." The courts reasoned that private plaintiffs did not always act in the public interest and that any "man on the street" could not be the intended beneficiary of the extraordinary relief provided in the statute. Moreover, the courts concluded that because there is no bond requirement as a condition of an automatic stay under the BMA, Congress could not have intended such a provision to apply to private parties.

Although the courts' conclusions are not unjustified with respect to private parties, their reasoning does not apply to state attorneys general. To the contrary, granting state attorneys general the right to an automatic stay not only comports with the plain language of the statute but better fulfills the intent of Congress.

Unlike private plaintiffs, Congress has recognized that state attorneys general act in the public interest when instituting antitrust actions. According to a Senate report:

[A] State attorney general is an effective and ideal spokesman for the public in antitrust cases. A primary duty of the state is to protect the health and welfare of its citizens; and a State attorney general is normally an elected and accountable and responsible public officer whose duty it is to promote the public interest.

Thus, state attorneys general are different from private plaintiffs for standing purposes when seeking relief under the antitrust laws. Moreover, unlike private parties, when public

265. Id. at 667; see also First Midland Bank, 441 F. Supp. at 421-22.
266. Vial, 564 F. Supp. at 666-67; see also First Midland Bank, 441 F. Supp. at 421-22.

The contours of antitrust standing as it relates to a state in its
bodies seek injunctions in the actions on behalf of the public good, courts may waive bonds or set bonds of nominal amounts.\textsuperscript{270} Finally, the automatic stay provisions of the BMA of 1966 were passed because Congress "aborred" the unscrambling of banks after divestiture and feared the potential adverse effects divestiture might have on the community.\textsuperscript{271} Granting state attorneys general this relief would better fulfill the intent of Congress but would not create the problems associated with granting this relief to private individuals.

2. Intervention in Pending Antitrust Challenges to Bank Mergers

Under the BMA, state attorneys general may intervene as of right in any antitrust action challenging a bank merger, whether brought by a private party or the government.\textsuperscript{272} The BMA provides in pertinent part:

In any action brought under the antitrust laws arising out of [a merger transaction] approved by [a federal supervisory agency pursuant to this subsection] . . . any State banking supervisory agency having jurisdiction within the state involved, may appear as a party of its own motion and as of right, and be represented by counsel.\textsuperscript{273}

The BMA does not define "State banking supervisory agency" and there are no court decisions interpreting this provision. However, state attorneys general customarily represent state agencies in most states and in some states they are authorized

\textit{parens patriae} capacity are perhaps different from antitrust standing as it applies to other private parties. Precedent involving standing of individual private parties may not control the issue of \textit{parens patriae} standing as those cases do not implicate quasi-sovereign interests. Although the state is considered a private party, to some extent, when it brings an action \textit{parens patriae}, [there are] possible nuances between an individual and a state which are relevant to the issue of antitrust standing.

\textit{Id. at 70,089.}


\textsuperscript{271} United States v. First City Nat'l Bank, 386 U.S. 361, 370-71 (1967).


\textsuperscript{273} \textit{Id.}
by statute or common law to act as unitary plaintiffs representing all government agencies.\textsuperscript{274}

This provision clearly benefits the states. There are some instances where a state may not have the need or ability to bring its own action to challenge a proposed merger except when the state's interests diverge from the Department of Justice or a private plaintiff. For example, states often agree with federal agencies that a particular merger as structured is anticompetitive but disagree on the nature and extent of divestitures needed to make the proposed merger acceptable under the antitrust laws.\textsuperscript{275} With a right to intervene, states can adequately protect their special needs and interests without expending the resources to challenge the merger on their own.\textsuperscript{276}

3. Regulatory Comments

Under the BMA and BHCA, the responsible federal agency must give notice of a proposed merger and request comments from interested parties\textsuperscript{277} and, under the BHCA, must notify the "appropriate State supervisory authority" as well.\textsuperscript{278} These

\textsuperscript{275} See Antitrust Implications, supra note 9 (testimony of Maine Assistant Attorney General Steve Wessler).
\textsuperscript{276} Critics suggest that if state attorneys general had a private right of action, then the intervention provisions of the BMA and BHCA would be meaningless. Greene & MacDonald, supra note 10, at 507. However, states may not have the resources, ability or need to challenge every anticompetitive bank merger that affects them. For example, as noted above, a state may decide not to bring an action because the merger was being challenged by the Department of Justice. However, the Department may seek divestitures with which the state disagrees, and the state may seek intervention solely for the purpose of challenging the proposed divestitures. Prior to the BMA of 1966, states did not have the right to intervene under such circumstances. In United States v. El Paso Natural Gas Co., 37 F.R.D. 330 (D. Utah 1965), the court denied the State of California the right to intervene for this very purpose. The states' right to intervene was not clearly established until after the BMA of 1966, when the Supreme Court reversed El Paso Natural Gas, sub nom. Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129 (1967).
\textsuperscript{278} 12 U.S.C. §§ 1842(b), 1849(b) (1988).
provisions provide state attorneys general with an additional opportunity to oppose an anticompetitive merger. State attorneys general have used these procedures successfully to block anticompetitive aspects of a number of proposed mergers, without the need for litigation in state or federal court.

III. CONCLUSION

Ongoing bank mergers and the related increase in concentration in the banking industry substantially impact states’ economies, businesses, and people. Traditional antitrust enforcement by state attorneys general protects states’ vital interests and is consistent with long established principles of federalism. Accordingly, the BMA and BHCA do not preempt state antitrust enforcement and do not impliedly repeal the right of state attorneys general to enforce parens patriae federal antitrust laws.

279. See supra note 9.