THE NEW ANTITRUST PARADOX:

POLICY PROLIFERATION IN THE GLOBAL ECONOMY

PANEL II: VERTICAL COORDINATION

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4:00 p.m.

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DISCUSSION

RICHARD EPSTEIN: In many ways, one of the key decisions with respect to Federal-state elections is *Parker v. Brown*, concerning the ability of state organizations to immunize certain local cartels from antitrust activity. Would you undo that decision? Would you try to do it through judicial action? Or would you try to do it through some form of direct regulation? And if so, would there be any kind of special exemption for any state agency with respect to the application of the antitrust laws to its own activities?

MICHAEL DEBOW: At the risk of getting into an extended debate with Richard Epstein on this, I don't like the policy result of *Parker v. Brown*. But I'm enough of a federalist to think that if the state of Maine wants to have a policy that encourages the fishery industry there to look a certain way, that's their problem, and to paraphrase Justice Holmes, if they want the state to go to hell, I'm here to help them. Sometime you just have to trust the political process to lead to some sensible discussion of these options. To have the Federal antitrust statute come in and wipe that out of the states' police power seems to me a really drastic step.

BILL ADKINSON: I have some concern, given that it's not 1890. If we had proper respect for what was truly intrastate and not this “affecting interstate commerce” language, then I would be much less concerned about intrusion.

MICHAEL GREVE: The first thing to understand is that when the *Parker* decision came in, it was an implied exemption from the Sherman Act. There was no deliberate state or federal judgment to exempt states from this activity. And I do not believe that the political economy is going to function particularly well. This was a raisin cartel of California growers, and 80–90 percent of their sales were out of state. Generally, export cartels have difficulty because they don't control enough of a market; but in this particular case, they did. In a situation in which spillovers take place in the national market with no authorization, wouldn't one want to have at least some federal oversight, given the externalities involved?

MICHAEL DEBOW: I took the question to be the broader one of whether or not to eliminate a state’s immunity for actions that it takes that otherwise interest federal antitrust enforcers. But limiting the question to one of export cartels, I wouldn't disagree with you at all.

MICHAEL GREVE: Arguably in these sort of externality cases, a company might bill itself as the raisin cartel of California, knowing full well that it actually serves a national market. You could argue that the sister states are the most impacted parties, and if there is any argument whatsoever for *parens patriae* authority for state AGs, it's in those kinds of cases. Consumers in the other states are unlikely to band together and take apart the California raisin cartel, whereas that's arguably what state AGs are there to do, to protect their citizens. If that means protecting them against aggression from out of state, let them do that.

I have actually been over dormant Commerce Clause cases which, if you drive the hard Frank Easterbrook line on this, are coterminous with the antitrust rules in these kinds of cases. Do you know how many state complaints there have been under the dormant Commerce Clause in the past two decades? The answer is six out of 70 or 80 cases. States never complain because they want to be the aggressor next time around, and my guess is that the pattern is the same here. There will be very few antitrust complaints in whatever form—judicial or complaint procedures or agency procedures in Washington—by one state against another. Am I right?

MICHAEL DEBOW: Yes, with one caveat: the short staffing of state AG offices in these areas. For a state to get actively involved in antitrust at all takes more than most states are willing to put into it.

There's a joke in my paper about when West Virginia announced it was going to continue to fight the Microsoft settlement. The state AG announced proudly that he was going to assign his antitrust lawyer—the only one in the office—to work full time on the appeal.

That's the kind of staffing you're looking at in most states. There are exceptions; Florida's AG office has a $2.5 million a year antitrust budget. Pretty well funded. New York, California, those states could gear up to do what Michael [Greve] is suggesting with the *parens patriae* suits, but most states can't, and we are not likely to see it happen.

BILL ADKINSON: States can gear up for individual cases, but one thing I have not mentioned is the importance of judges and the importance of antitrust law becoming engrained to a certain degree. Even if there are cases in which massive amounts of effort produce the wrong results, over time there is hope that the system will keep the path of law free from too much influence from state efforts.

RICHARD EPSTEIN: When the court decided *Parker*, they decided that Congress, when it enacted the Sherman Act, was enacting it in view of the 1890 concept of the Commerce Clause. So that part of the statute froze in time as the other affirmative part of the statute expanded on out with the ever-increasing scope of the Commerce Clause in the first half of the 20th century. That's where you get some of the anomalies we have seen.

Frank Easterbrook wrote an article in 1983, called "Antitrust and the Economics of Federalism," in which he contrasted *Hoover v. Ronwin* with *Parker v. Brown*. In *Parker*, as we've discussed, 90 percent of the raisins were exported to other places, and there was no political pressure on the California legislature to stop the cartel. They liked it. It brought revenue into the state. They were never going to get in its way.

Hoover v. Ronwin, on the other hand, was about restricting access to the Arizona bar. The only people who were hurt by that restrictions were people in Arizona. Easterbrook's view was if Arizona wants to tax itself that way, fine. But if the state wants to effectively tax its sister states' citizens, it has no authority to do so.

I would add that given the difficulty in suing states, which the Supreme Court has been underscoring these days, nobody is going to do this through the courts.

HON. STEPHEN WILLIAMS: Isn't the answer to Easterbrook and Epstein on raisins the same as it is for severance taxes? A problem exists only when a state has market power in a product, in which case the other states ought to be able to go to Congress. The other states must have a heck of a lot of representatives who would be in a position to oppose the state with the cartel.

RICHARD EPSTEIN: Stephen is dead right to say that the Montana severance tax case (*Montana v. Crow Tribe of Indians*) is exactly the same question as *Parker*. If you didn't have the grotesque history of the affirmative Commerce Clause, and the Federal government were limited to what are today dormant Commerce Clause actions, those guys in Washington would have nothing else to do, so they might actually get something right.

When Walter Hellerstein wrote his dreadful but very elegant defense of the Montana severance case, he indicated that the number of times in which Congress was prepared to reverse a state decision was vanishingly small because the coordination efforts are prohibitively time-consuming. When you're worried about defense budgets and plant location issues and tariff questions and various other kinds of domestic jurisdiction, problems of state overreach tend not to get solved.

My sense about it is that we ought to just reverse the presumption: first recognize plenary federal power, and then let California rally the forces in Congress and see if it can get the raisins moving again. Unless we invoke takings arguments, we can still have the interplay of jurisdictions in moving the opposite direction. And the cases where it does matter, for example, in Commerce Clauses cases, where they had prohibitions against the exclusion of waste and it became disastrous, they actually did act on that statute, and it wasn't even as unintelligent as one might have feared.

MICHAEL DEBOW: Two points. First, the other half of the *Parker* opinion dealt straightforwardly with dormant Commerce Clause analysis. The Court found that Congress had implicitly dealt with the question of whether the state agency could regulate in matters of local origins but national effects. It is possible that the Commerce Clause analysis in that case would no longer hold water today, but at the time it was a substantial piece of the case.

Regarding state enforcement, if the Justice Department brings an antitrust action and then settles it by a consent decree under the Sherman Act, there has to be an anticompetitive or competitive impact statement accompanying the consent decree for the judge to analyze.

When the state AGs bring a case and settle, they do so with impunity. They can strike any kind of deal they want without having to submit a competitive impact statement or

have a judge analyze it from an antitrust perspective with an eye to the effects it will have in the marketplace.

If we are going to allow state enforcement to continue, state AGs—who may not have an economist or experienced antitrust attorneys on staff—must be subject to the same standard that a Department of Justice attorney, a U.S. attorney, or any other regulatory authority would be subject to under the same circumstances.

BONNIE WACHTEL: [Michael DeBow], I understood your conclusion to be that the tobacco litigation was bad, and Microsoft litigation was bad, but that two bad cases do not an epidemic make. I would argue that when you consider how many big juicy targets have been available and how have the state AGs reacted when those targets were in place, a disturbing pattern does begin to emerge.

After the Microsoft litigation—and some people would say partially in reaction to it—we had a stock market crash. In the aftermath of that, we learned, courtesy of the New York attorney general, that virtually everything the securities industry had been doing was illegal.

That was completely driven from beginning to end by New York state AG Eliot Spitzer, and I believe that we would have seen a coordinated state effort along the same lines if the SEC had not put a stranglehold on Spitzer and said, we're going to handle this now.

The Commission managed, for the moment, at least, to capture the other state AGs and tell them to cool it, perhaps with the threat of a greater debate about preemption. On the other hand, though, some people would say that they are fans of Eliot Spitzer, and of what he did. There is considerable debate inside the industry as to whether the industry was in fact doing anything wrong.

What do you say to that kind of state AG "activism"? Aren't there times when it may be beneficial?

MICHAEL DEBOW: I take a back seat to no one in my fear of state attorneys general. But I don't think that antitrust is going to turn out to be a particularly important vector for the state AGs to zero in on. In the vast majority of states, the state courts view federal antitrust case law as the authority. If Eliot Spitzer wakes up tomorrow morning and wants to bring back the entire corpus of the Warren Court antitrust case law, he's just not going to be able to do that. I don't care how much he tries, or how many other AGs he can line up.

If you look at the historical record for 1993–2003, the record does not give much ammunition to the folks who want to address, in Congress, the scope of the states' antitrust powers. I'm not trying to minimize the importance of Microsoft and its use in tobacco cases, but I do not believe that that precedent will carry the day.

I do agree with you, though, that the place of the state AGs in the constitutional arrangement has been upset by the tobacco litigation and by this pursuit of more and more nationwide coordination among AGs. It is one of the most significant developments in the law right now.

RICHARD EPSTEIN: How concerned should a corporate counsel be about state enforcement or state law enforcement proceedings that function as end runs around *Illinois Brick*? Are they a serious development? Or are they long on talk but short on enforcement?

BILL ADKINSON: Unfortunately, there is very little that is published about this. California was the first state to enact a law essentially repealing *Illinois Brick*. Then New York enacted one in 1998. (New York did not apply that law in *Microsoft* because it would have been a retroactive application.) These "repealers" are now commonplace, as are the indirect purchaser state actions that they allow.

Indirect purchaser-plaintiffs try to avoid being sent to Federal court by pleading that they are not injured to the level of $75,000 a person. While there have been efforts to get supplemental jurisdiction to cover these actions, those efforts have generally failed.

Professor Andy Gavil [Howard University Law School] has said that we are experiencing a wave of indirect purchaser antitrust suits filed in state courts, and he is not a man prone to excessive claims. One fellow at a recent ABA meeting (who asked to be kept anonymous) said that his rule of thumb is now that an indirect purchaser will get about a third of the actual damages. End runs around *Illinois Brick* are happening, and the consequences are beginning to shape policy.

MICHAEL DEBOW: I don't know if this is common in *Illinois Brick* cases, but there has been some confusion over the use of the word "indirect." In Minnesota, Blue Cross/Blue Shield got in on the state tobacco litigation by claiming to be "indirect victims" of the alleged antitrust conspiracy. Alarmingly, the Minnesota Supreme Court confused the idea of "indirect purchaser" (someone in the chain of distribution) with "indirect victim," (a third party with an incidental claim) resulting in a decision that is just horrible.

BOB HERSHEY: If Congress did pass a law getting states out of the antitrust business, couldn't the states do some of the things that they did to protect themselves in their ordinary fraud statutes, like going after milk pricing?

BILL ADKINSON: It would be extremely difficult to get the states out of antitrust altogether. You could attempt to preempt their antitrust statutes. They all have FTC acts, maybe common law fraud or something like it could be an alternative ground. Also (as Michael [Greve] has noted), when you block one path, the states have a knack for finding alternate routes. Getting them completely out of antitrust would be a very tall order.

RICHARD EPSTEIN: Is it true, then, that this idea of getting the federal government—Congress—to pass a statute which essentially makes *Illinois Brick* binding on the states is an impossibility?

As for the case that validated the *Illinois Brick* repealers, *California v. ARC America Corp*, it seems to me that you could make a solid argument that, with respect to bonafide interstate transactions, Congress' antitrust statute has to be treated as though it occupied the field—and any state law to the contrary should be preempted. How did Justice White handle that question when it was raised?

BILL ADKINSON: *Illinois Brick* was about Federal law; it was not meant to be about anything other than Federal damages. But then—and with much more difficulty—White tried to make a policy argument that just didn't work. He essentially said, this is happening in state courts, so we don't need to worry about it. That's exactly backwards, and it's exactly the wrong way to make policy.