

AMERICAN ENTERPRISE INSTITUTE
FOR PUBLIC POLICY RESEARCH

THE NEW ANTITRUST PARADOX:
POLICY PROLIFERATION IN THE GLOBAL ECONOMY

Keynote Address

IS FEDERALISM OVERRATED?

The Honorable Richard Posner

Monday, April 21, 2003

Washington, D.C.

INTRODUCTION

CHRIS DEMUTH

It is an honor that Judge Richard Posner of the Seventh Circuit Court of Appeals in Chicago would address this conference this evening.

In the beginning, there was Assistant Professor Posner, antitrust reformer. His first book, "Antitrust Law: An Economic Perspective," in 1976, laid out the Chicago School's economic critique of then-regnant antitrust doctrines with great force. It was one of the key documents that incited the antitrust revolution in the law schools, the courts, and government enforcement agencies, that began a few years later. Even before that practical success, the intellectual success of his initial foray in the economics of antitrust law was no doubt what led Judge Posner to move on to other, more fortified and resistant fields of law.

Judge Posner has recently, in his book "Public Intellectuals," decried the jeremiad style of policy argument—favored, he says, by some people at AEI. But in the second edition of his antitrust treatise published in 2001, he describes the first edition of that book as a jeremiad. This is proof, I guess, that jeremiads are sometimes justified--antitrust law at the time was an intellectual scandal--and also that they are sometimes effective, because antitrust law has improved profoundly since then.

The second edition is a well-deserved victory lap around the antitrust course Judge Posner laid down in the first edition. But in it he notes that for all of the improvements at the level of doctrine, there are many problems in antitrust procedure, enforcement, and remedies still to be addressed, and I gather that one of those issues is one that he will address tonight in his lecture, which is entitled: "Is Federalism Overrated?"

I know that the room is bristling with tension over Judge Posner's answer to that question, and it will soon be relieved. Please give a warm welcome to Richard Posner.

FEDERALISM AND THE ENFORCEMENT OF ANTITRUST LAWS BY STATE ATTORNEYS GENERAL

RICHARD A. POSNER¹

I will first offer an analysis—an economic analysis, naturally—of federalism, which I will then apply to two, related questions. The first question, to which I will devote the bulk of my attention, is whether state attorneys general should be permitted, as they are under existing law, to enforce federal antitrust laws in suits brought on behalf of the state's residents.² The second is whether they should be permitted, as they also are under existing law, to enact and enforce their own, state antitrust laws. First, though, some framing thoughts about the theory of federalism.

Imagine some industry—composed of a single firm (a monopolist) or, at the other extreme, of 50 separate firms. (My reason for choosing the number 50 is obvious.) A monopolist would be able to internalize certain costs and benefits that would be externalized under a competitive organization of the industry. On the benefits side are new, imitable inventions and ideas, where monopoly is a substitute for patents, copyrights, and trade secrets as methods of internalizing the benefits from innovation. On the costs side are competitive costs that do not generate net social welfare gains, such as advertising and marketing expenditures that primarily merely affect the market shares of firms selling essentially identical products; manufacturing facilities that have excess capacity; and other respects in which competition creates duplication without fully offsetting benefits.

The competitive organization of the industry, by contract and comparison, would give consumers more choices (at lower prices, assuming that the avoidable costs of competition noted above are not too great), while also promoting diverse approaches to inventive activity. That is important to those who believe, as I do, that Darwinian theories of the inventive process, which model it as a trial and error process that is optimized by diversity among inventors in the same way that biological evolution is promoted by genetic diversity, are the best theories that we have of the inventive process.

Now it might seem that a monopolist could offer whatever product variety consumers wanted, and achieve whatever diversity in research and development was optimal—in short provide all the benefits that competition affords (except low prices!)—simply by decentralizing its marketing and research activities. But this is incorrect, especially with regard to research. No organization can tolerate as much diversity as a competitive market can, because there must be a considerable degree of uniformity, of structure, of rules and reporting, of cultural conformity—a considerable degree of, in a word, bureaucracy—in any large organization. That is an imperative

¹ Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. I thank Adele Grignon for her helpful research assistance, and Frank Easterbrook for his helpful comments on a previous draft.

² When the state itself, in its propriety capacity—for example, as a purchaser of road-building materials—is injured by a federal antitrust violation, its suing the violator for redress is not problematic. Problems arise only when it sues in an essentially public capacity, as a substitute for or a competitor of the federal antitrust enforcement authorities.

of management. Without considerable uniformity, the organization ceases to *be* an organization; centripetal forces dominate. The fact that so many mergers disappoint investors illustrates how combining different corporate cultures under the same roof, like combining different ethnic cultures in the same nation, is a trick that is extremely difficult to pull off.

This analysis transfers pretty well to the question of federalism. There are unitary, monopolistic governments such as France and until recently the United Kingdom (to speak only of democracies), and, on the other hand, federal systems such as those of the United States, Germany, Switzerland, and Canada. The monopolistic governments are “efficient” in the same sense as the monopoly supplier of some good or service; they internalize externalities and (what is actually an aspect of cost internalization) minimize duplication. But they fall down in their encouragement of variety and innovation. France is over-centralized, because the imperatives of management limit the degree to which it can achieve through bureaucratic subdivisions the benefits of decentralization. In contrast to local and regional government units in a country such as France, U.S. states exhibit considerable variety in the services they offer their residents. This variety reflects both cultural, economic, and demographic differences among the populations of the different states, and the tugs and hauls of competition, since it is relatively easy for individuals and especially firms to relocate from one state to another. (Emigration from a nation is of course more difficult and costly.) Justice Brandeis long ago aptly described the states as isolated laboratories for social experiments. What he meant was that a state could experiment with some novel form of regulation, or of configuring the extent or delivery of state services. The results of the experiment would be observed by other states and, if the experiment was successful, it could be emulated by other states or adopted by the federal government within its domains. There are innumerable examples from our history of social experiments conducted at the state level. These experiments range from early antitrust and regulatory law, “progressive” social welfare legislation, abortion reform, and novel sanctions for sex offenders to voucher systems, the privatization of prisons, and the state welfare reforms in Wisconsin and elsewhere that led up to the national welfare reform of the 1990s. The analogy to Darwinian theories of innovation is very close.

But the considerable advantages of federalism coexist with considerable disadvantages, namely negative externalities (external costs as distinct from external benefits) that tend to be greater than the negative externalities created by competitive markets. Individuals and even firms cannot move from state to state with the same ease with which they can switch from buying one product to buying another. To an extent, states have a captive market, and as a result there is less competitive pressure on them than there is on private business firms. States also have opportunities to export costs, in much the same way that a polluting firm can in the absence of legal liability export costs. For example, a state that contains valuable mineral resources can, by imposing a severance tax on them, shift some of the costs of the state’s government from the state’s taxpayers to the consumers of the resources in other states or nations (assuming that demand for the resources by nonresidents is not perfectly elastic.) State taxes on interstate users of its highways could have similar effects. So do state tort rules slanted in favor of residents—for example a rule that exempted negligent in-state manufacturers from liability to nonresidents injured by their negligence, or a rule that imposed strict liability on nonresidents who injured state residents however careless the residents were. State antitrust suits, which are a form of tort suits, can have the same result.

But just as there are legal rules against unwarranted cost externalization by private firms—for example, rules against pollution (or at least pollution that is not cost-justifiable)—so Congress has the power to prevent states from trying to shift the costs of government to other states, or other costs from the shoulders of residents to those of nonresidents, by legislating under the Constitution’s commerce clause. And, the Supreme Court has long interpreted the clause to forbid of its own force, without need for congressional legislation, unreasonable state burdens on interstate commerce. This rule forbids, approximately at least, shifting costs without justification from local taxpayers to taxpayers in other states or in foreign nations, or more broadly from residents to nonresidents. This “negative” or “dormant” interpretation of the commerce clause is enforced by the courts, mainly the U.S. Supreme Court. It is (one is tempted to say, therefore) rather toothless in application: it is difficult to determine, by the methods of litigation, either the costs of government services or the incidence of taxes and other measures to which a state might resort in an effort to recoup—or shift—those costs.

It is tempting (to return to an earlier point) to suppose that a much cleaner solution—cleaner than federalism—to the problem of optimal decentralization of American government would be a unitary government that, like any efficient large enterprise, organized itself into divisions, subdivisions, etc. on functional or geographical (or both) lines, designed to strike the optimal balance between the advantages of centralization and those of decentralization.³ But this would be unsatisfactory for the same reason that a monopolist’s decentralizing its operations would fail to generate the same product variety and innovative progress as a competitive organization of the industry would do. A unitary government would have to insist upon a considerable uniformity among all its divisions and subdivisions; otherwise, it would lose control. The large differences in the political cultures and institutions of the 50 states would be unthinkable if there were no states, but merely regional and local offices of a unitary federal government.

Against this it can be argued that decentralization can have negative effects, for example by increasing the likelihood of corruption, because of the loss of control over subordinate officials; and also that it would be pure accident if our federal system represented the optimal amount and pattern of decentralization, since it is a historical accident that the states have the size, population, and configuration that they do.⁴ The case for federalism remains somewhat conjectural.

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All this is by way of background to the specific problem posed by the authority conferred of state attorneys general, conferred in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act, to bring *parens patriae* suits on behalf of the residents of their states under federal antitrust law. The effect, in principle at least, is to make of public enforcement of federal antitrust law a competitive rather than monopoly “market.” We should consider the pros and cons as they are illuminated by the theory of federalism sketched above.

³ See Frank B. Cross, “The Folly of Federalism,” 24 *Cardozo Law Review* 18–29 (2002).

⁴ Both points are argued strongly in *id.*

The first thing to note is that the state attorneys general are not the states. They are separately elected from the governor. This is significant in three related respects. First, state attorneys general are politicians, that is, elected rather than appointed officials. Second, the natural ambition of a politician who holds high state office is to be elected governor. Hence, there is often a built-in tension between the attorney general and the governor of a state, as well as an incentive on the part of the attorney general to bring suits that confer a political benefit on him—for example, suits that benefit powerful local business or other constituencies. Third, because the attorney general is not part of the governor’s administration, he lacks leverage in seeking appropriations from the state legislature. As a result, state attorneys general are chronically underfunded. They cannot afford large staffs and so they cannot reap the benefits of specialization. Nor can they afford to hire top-quality lawyers. These resource-related handicaps are particularly serious in a highly technical, expert-witness-intensive, specialized field of law such as federal antitrust law.

The coalescence of these factors suggests a strategy for a state attorney general that is in fact observed. That strategy consists in bringing high-profile lawsuits that attract publicity to the attorney general and that promote the interests of politically influential state residents (including corporations that have headquarters or extensive operations in the state) at the expense of nonresidents, including nonresident competitors of resident enterprises. The strategy is constrained, however, by the fact that the resources available for such litigation are likely to be very limited unless the litigation has a realistic prospect of generating a large money judgment or settlement for the state, or unless several states join in the litigation, enabling a pooling of resources. The latter is often the more feasible method of economizing on litigation expenses even when damages are the relief sought. The reason is that judgments or settlements obtained in *parens patriae* litigation generally are distributed to the state residents on whose behalf the suit was brought and, if there is money left over, to charities designated by the state attorney general,⁵ although the court may award attorney’s fees to him.

It is easy to see why antitrust *parens patriae* suits might be attractive to state attorneys general. Firms headquartered or operating within the state are likely to face competition from nonresidents, and they will be grateful if the state’s attorney general incurs the expense of suing those competitors. (The attorney general may also have somewhat greater credibility with the courts than a competitor-plaintiff would have.) And, major antitrust violations are likely to have effects in multiple states, facilitating joint action and therefore resource pooling by state attorneys general. What is more, as shown by the Microsoft case, if the U.S. Department of Justice brings an antitrust suit, the state attorneys general may be able, by bringing parallel suits that are then consolidated with the Justice Department’s suit, to take a free ride on the Department’s investment in the litigation.

The antitrust strategy of state attorneys general that I have just sketched obviously has a potential to generate socially perverse consequences. The use of the antitrust laws to harass competitors is an old story but a true one. Given the political incentives of state attorneys general, the risk is great that in deciding whether to bring an antitrust suit against a competitor of a resident enterprise, a state attorney general will not be scrupulous in the exercise of his

⁵ See Susan Beth Farmer, “More Lessons from the Laboratories: Cy Pres Distributions in *Parens Patriae* Antitrust Actions Brought by State Attorneys General,” 68 *Fordham Law Review* 361 (1999).

enforcement discretion and will bring and press the suit even if unconvinced of its merit. This is a form of protectionism. In addition, I worry that state attorney generals will try to channel the moneys recovered in their suits to charitable uses that advance their political agenda.

If there are multiple state plaintiffs, coordination costs will make it more difficult to settle the case than it would be if there were only a single plaintiff. This was a factor in the length of time that it took to settle the Microsoft litigation, where there were initially 18 state plaintiffs as well as the U.S. Department of Justice. Indeed, that case is still not fully settled, because some of the state plaintiffs are appealing the district judge's rejection of their position.⁶

So there is a considerable downside to *parens patriae* antitrust. Is there a significant upside? I think not. Because of the resource constraints that I have mentioned, it is unlikely that state attorneys general will be sources of innovative antitrust doctrines or methods of proof; and in fact I know of no examples where they have been. A separate question, which I'll discuss shortly, is the contribution to antitrust thinking made by the enactment or interpretation of state antitrust laws.

In principle, by offering competition in public enforcement of federal antitrust laws to the U.S. Justice Department, the state attorneys general could keep the Department on its toes and offer alternatives that a monopoly would foreclose. When the 2000 Presidential election resulted in a change in personnel in the Justice Department that resulted in a willingness to settle the case on terms more favorable to Microsoft than the Clinton Administration had been prepared to do, several of the states, as I noted earlier, refused to accede to the settlement and thus offered to the courts a competitive alternative to the Justice Department. But there are three reasons to doubt the value of such competition.

The first is its one-way character. The state attorneys general can only offer harsher antitrust enforcement than the Justice Department. They cannot, by not suing, offer the courts a gentler alternative to the Department's enforcement policies, because their decision not to sue does not bind anyone. They can pile on but they cannot remove the Department from the pile. It's as if the only permitted competition with General Motors were making cars with more horsepower than GM cars. The danger is that interstate businesses will be forced to conform their business

⁶ In an article defending the role of state attorneys general in federal antitrust litigation, the former chief of antitrust in the New York attorney general's office makes certain representations concerning my activity in the mediation of that case. See Harry First, "Delivering Remedies: The Role of the States in Antitrust Enforcement," 69 *George Washington Law Review* 1004, 1032-1034 (2001). His representations are inaccurate, except in one respect: I was indeed appalled by the unreasonable and irresponsible position taken by several of the state attorney generals in the mediation. He is incorrect, however, in stating that I "did not deal directly with the states until the near the end of the mediation process." *Id.* at 1032. I did not deal much with Mr. First because he attended only one of my meetings with the plaintiffs' side of the litigation. I did deal continuously with Tom Miller, the attorney general of Iowa, and the lead representative of the state attorneys' general in the mediation. Thus it is also false that "the states were not actively consulted for a substantial part of the mediation process." *Id.* at 1033. Mr. First says that apparently I "thought that the mediation was hopeless once it was clear that the states intended to play an active role, coming forward with views somewhat at variance with the Justice Department's." *Id.* At the last moment, the states upped the ante, making demands that, it was plain, Microsoft would never accept. He accuses me of "impatience" in terminating the mediation when the states unexpectedly escalated their demands, *id.* It was only after four months of almost full-time mediation that, faced with the intransigence and incompetence of the states, I decided the case would not settle, and threw in the towel.

practices to the most restrictive state interpretation of federal antitrust law.⁷ In fairness to the state attorneys general, their national association has issued horizontal-merger and vertical-restraint guidelines, thus providing some uniformity of enforcement policy; but, not so commendably, the guidelines are harsher than the corresponding guidelines of the Justice Department and the FTC.⁸

Second, even if the states could not bring *parens patriae* antitrust suits, private individuals and firms harmed by antitrust violations would be able to bring suits under federal antitrust law for redress of the injury. Competitors and customers of Microsoft are not bound by the Justice Department's settlement and can—and have—sued Microsoft on their own. The class action device enables the aggregation in a single suit of antitrust injuries too slight to warrant the expense of individual suits. The *parens patriae* suit is in effect a class action, and while class actions have plenty of problems, I know of no evidence that *parens patriae* suits solve them.

Third, there is competition in antitrust enforcement at the federal level by virtue of the overlapping jurisdictions of the Justice Department and the Federal Trade Commission; increasingly there is competition at the international level as well.

To summarize, I don't find anything in the theory of federalism to support state attorneys' general *parens patriae* suits under federal antitrust law. But I acknowledge that the case against them would be weakened if state attorneys general were appointed rather than elected officials, a reform that is independently desirable.

Let me move now to the question of allowing states to have their own antitrust laws. Here the case for federalism is stronger. For one thing, there is no necessary connection between a state antitrust law and enforcement by the state attorney general, since private enforcement of state antitrust law is possible and indeed common. For another thing, if antitrust violations that did not affect interstate or foreign commerce were not actionable under state law, there would be a law enforcement vacuum, because the commerce clause of the federal constitution would not authorize federal action against such violations either. To that extent, state antitrust law is secure. But Congress could preempt state antitrust law insofar as applicable to interstate or foreign commerce; such preemption, in areas as various as securities law and pensions, is commonplace and of unquestioned constitutionality. We should consider the pros and cons.

On the one hand, dual enforcement (as I remarked earlier in reference to state enforcement of federal antitrust law) provides a competitive alternative to the U.S. Justice Department's monopoly of antitrust enforcement; but as we have also seen, the Department would not have a monopoly even if there were no state antitrust laws because of private suits under federal antitrust law and also because of the FTC. Unlike dual or multiple enforcement of the same laws, though, state antitrust law provides an opportunity for doctrinal competition—and the states have taken that opportunity, notably in the widespread rejection by the states of the *Illinois Brick*

⁷ Donald L. Flexner and Mark A. Racanelli, "State and Federal Antitrust Enforcement in the United States: Collision or Harmony?" 9 *Connecticut Journal of International Law* 501, 532 (1994).

⁸ See National Association of Attorney General, antitrust protocols, www.naag.org. The NAAG has been called "a modern heir to the populist tradition" of antitrust law. Jonathan Rose, "State Antitrust Enforcement, Mergers, and Politics," 41 *Wayne Law Review* 71, 126 (1994).

doctrine. That doctrine, an interpretation of federal antitrust law by the Supreme Court, precludes antitrust suits by indirect purchasers (for example, consumers who purchase from the dealers or distributors that are the direct purchasers from the antitrust violators and that pass on much of the overcharge caused by the violation to the consumers). Although personally I think the *Illinois Brick* doctrine is sound, this is far from certain. Its contours, moreover, are controversial. It is valuable to have diversity and experimentation in this area, from which a consensus may someday emerge.

But there is a downside to permitting states to reject *Illinois Brick*, and that is the danger of double recovery. In a suit by direct purchasers under federal antitrust law, there is no passing-on defense; that is the *Hanover Shoe* corollary of *Illinois Brick*. Suppose the total overcharge to direct purchasers is \$1 million, and of this \$500,000 is passed on to indirect purchasers. The total damages are only \$1 million (\$3 million after trebling), but if direct purchasers sue under federal law and indirect purchasers sue under state law, the defendant may be forced to pay total damages of \$4.5 million after trebling. I assume, however, that the courts would hold that an antitrust defendant cannot be forced to pay total damages in excess of three times the total cost that he has imposed, which is to say the sum of the portion of the overcharge that the direct purchasers did not pass on and the portion that was passed on to indirect purchasers.⁹

Given that most antitrust enforcement nowadays is private, the significance of state antitrust law that overlaps with federal law is not so much multiple suits against the same defendant as multiple theories in the same case to the extent that federal and state antitrust law differ; and this form of duplication is relatively costless. The *Illinois Brick* issue is an exception, since rejection of the doctrine of that case enables additional suits. The exception has both an offsetting benefit in constructive legal competition and a cost in potential overdeterrence. I would be inclined, therefore, to forbid the states to apply their antitrust laws to violations that occur in or affect interstate or foreign commerce.¹⁰

I am even more convinced that Congress should repeal the provision of the Hart-Scott-Rodino Act that authorizes *parens patriae* antitrust suits by the states. As a second best solution, I would like to see state attorneys general converted from elected to appointed officials. This is not, I hasten to add, because I expect governors to be less politically motivated than other elected officials. Attorneys general would exercise some discretionary authority even if they were appointed. That discretion, though, would be exercised in a more professional manner if attorneys general were not politicians. In addition, state antitrust enforcement activities would be better funded, which would (I hope) increase the quality of the enforcement.

QUESTION AND ANSWER SESSION

⁹ See Stephen Calkins, "An Enforcement Official's Reflections on Antitrust Class Actions," 39 *Arizona Law Review* 413, 427 n. 79 (1997); Ivy Johnson, "Restitution on Behalf of Indirect Purchasers: Opening the Backdoor to *Illinois Brick*," 57 *Washington and Lee Law Review* 1005, 1037 (2000).

¹⁰ The case against permitting states to bring enforcement actions under either state or federal law is even greater in the case of international transactions. See Edward T. Swaine, "The Local Law of Global Antitrust," 43 *William and Mary Law Review* 627 (2001).

QUESTION: Judge Posner, I don't quite understand your argument—which seems to me pretty central to your point—that the state attorneys general have to always ratchet up the penalties and the counts. Take the Microsoft case. What if the attorney general of, say, Ohio, had come in and said “We filed a brief, we don't like what Microsoft did to Java, but, on the other hand, we don't want to distort exclusive dealing law, and so we think the court ought to grant summary judgment in favor of Microsoft on the exclusive dealing counts.” What prevents that from happening?

JUDGE POSNER: Well, of course that's peculiar, because in the case you put it would be surprising if the State of Ohio joined the suit, if they thought it was too broad.

QUESTION: But what if Ohio agreed with part of the suit, but not the entire suit?

JUDGE POSNER: Then they'd bring their own little suit—right?

QUESTION: Ohio would join the suit but focus on particular complaints. They say something like, “We don't want to break up Microsoft. We don't think Microsoft illegally monopolized the browser market. We don't think there is a distinguishable browser market. But we think that Microsoft—I'm making this up of course—did bad things to Java.”

JUDGE POSNER: You want to distinguish two cases. One, states jump on the bandwagon but focus on particular issues. In that case, if you want to share resources with your co-plaintiffs, I think it is unlikely that you would bad-mouth them.

So some of the plaintiffs will peel off and settle separately, as happened, but I don't think you're going to have them actually as co-plaintiffs arguing against each other. I don't think they would consider that an attractive litigation strategy.

In the normal case—Microsoft being unique in its complexity and importance—the state attorney general who takes a conservative view of antitrust enforcement just won't be suing as much. Eighteen states joined the Microsoft case; that meant thirty-two didn't. A lot of them were pro-Microsoft. The State of Washington, I assume, was one. But they don't get to be heard in the antitrust administration process. They can't grant any kind of privilege to Microsoft.

QUESTION: [Inaudible question concerning the relative merits of class actions and *parens patriae* suits.]

JUDGE POSNER: If you think that the normal purpose of a class action is to obtain attorneys fees for the class action lawyers, then you can see how a defendant would rather be faced with a class action than by a state attorney general who not really having a significant financial stake sees the case as a platform for something dramatic before he settles.

I'm not totally cynical about the class action. I do think that plaintiff class action lawyers—certainly in the antitrust field—have a high degree of professionalism, and they'll bring these—I think we've had a big series of cases, and appeals arising out of massive class actions against brand name pharmaceutical manufacturers, with actually some trials of pieces of those. Obviously, there was something to those cases. The lawyers who handled them were very good, and substantial judgments were obtained.

I may be unduly influenced by my experience with the Microsoft case, where the states did play such a significant role, at least as spoilers, but I do know that states have been increasingly active in antitrust, and I believe they have taken on certain cases the class action bar was not interested in.

QUESTION: How can you have a Darwinian model of state competition if states can't die? It seems to me the central part of any Darwinian model is the fact that survival is predicated on success. Whether it's private industry or biological organism, something has to die.

JUDGE POSNER: No, I think you only need death in a pure Darwinian system, because an animal that is losing out in competition with another animal can't just adopt the winner's characteristics. But in the case of human competition, you can emulate, you can imitate. If a state sees that another state's governor or legislature is getting a lot of credit for some reform, that state, even though it's not faced with extinction, can imitate. Also there's a difference between the state and the individuals running the state, and the individuals can face political extinction by failing to imitate the successful innovation.

The same qualification necessarily applies with regard to innovation in industrial markets. I'm not talking about death in the literal sense. But if your firm is going to shrink and your stock options are going to become worthless because you're not "on the ball," that exerts a salutary pressure on people.

QUESTION: Judge Posner, do you think there's any realistic chance of repealing the *parens patriae* provision? Also, if you might comment more generally on an analogy Professor Ken Elzinga made at the ABA antitrust meeting the other week, between antitrust and public good.

JUDGE POSNER: On your first question, I don't know anything about the feasibility of repealing that provision of Hart Scott. I approach this as an intellectual question because I'm supposed to talk about federalism and antitrust, so there it is. I don't know whether anybody cares sufficiently about the problem to want to do something. Whether antitrust is a public good—it's a public good in the technical sense that it's a good, the benefits of which do not depend on being someone who incurred the cost of obtaining antitrust laws.

If there's a movement to repeal the provision of Hart, Scott and Rodino, you and I might think it'd be a very good idea. But we may also feel that as far as contributing to a

politician who makes it his project to repeal it, our contribution will not make any real difference in the likelihood of success. Therefore, we will "free ride" on whoever does contribute.

In that sense, it is the public good character of legislation that makes it so difficult to attain good reform, because the groups that get legislation tend to be the ones that can overcome free rider problems. That is not necessarily an indication that social welfare, as a whole, would be benefited by their success.

QUESTION: Judge, just one quick observation about the difference between class actions and *parens patriae* actions. From a plaintiff's perspective, there are no limitations under *parens patriae*, whereas the class action rules pose all kinds of limitations and hurdles that need to be overcome.

JUDGE POSNER: That's a good point. I'm not really familiar with the details of *parens patriae* damages, actions, at all.

QUESTION: In *Commonwealth of Massachusetts v. Mellon*, the Supreme Court held that states lack *parens patriae* ability to sue the Federal Government on the theory that the Federal Government has a superior claim to represent the citizenry over those of the states.

There's a circuit split now on the meaning and extent of that ruling. Is the option of constitutionalizing that limitation on *parens patriae*, and then extending it into this area, a way to hold that the Hart, Scott, Rodino provisions are unconstitutional? In other words, if the Justice Department is in the suit and it's representing the citizenry of the United States, what claim does the state attorney general have to be adding anything to the lawsuit as a constitutional matter?

JUDGE POSNER: Well, the Justice Department can obtain damages for individuals or firms injured by antitrust violations. It can obtain damages in its own proprietary capacity. So there's a gap there.

If the Federal Government were empowered to bring *parens patriae* antitrust suits and distribute the proceeds to individuals, which is similar to the kind of authority that the EEOC exercises in enforcing the age discrimination law, for example, then your question would arise. For the EEOC, it's not called a *parens patriae* suit, but the Commission brings suit on behalf of specific victims of age discrimination and if it wins a judgment or a settlement, it distributes the money among them.

In fact, if someone has already brought a suit and the EEOC decides it's going to jump in and bring this kind of representative suit, it actually displaces the private suit. So Congress clearly can do that in antitrust, and if it did, there certainly would be a very dramatic duplication. But at present, the Justice Department, or the FTC, cannot bring a suit of that sort for money.

QUESTION: You made an analogy between externalities (pollution, for example) and royalties used by states on a natural resource. I wonder if you could clarify that. Look at Alaska, for example: the cost of extraction of oil is very low and the world price is substantially higher. I don't see any externality.

It seems to me the question is “Does the resource belong to the state?” In that case, there's no particular externality. On the other hand, you can say the resource doesn't belong to the state, it belongs to the country. But, again, I don't see what the externality is—unless you say that, *prima facie*, everything belongs to the country, and therefore anything that is extracted by the state is an externality.

JUDGE POSNER: No, the externality is that you're shifting the costs of government from the people who benefit from government in Alaska, to people in other states who derive no benefits from Alaska government services.

So if you say, “Alaskans own the oil and should be able to do what they want with it,” you could say the same thing about a factory that bought the coal that it's burning, and therefore that it should be able to do whatever it pleases. If that causes pollution downstream, that's just a privilege of ownership.

How you allocate the right is a political or social judgment. The reason why I don't think it's healthy for Alaska to be deemed the owner of the oil is that it's a formula for irresponsibility. They can have a wonderfully luxurious, wasteful state government because the cost is being paid by people who don't vote in the state. So you're going to have a very skewed allocation of resources.

I don't think there's a problem if people in Alaska—individuals—have shares in the Alaska Oil Company or something like that. But if the government of Alaska is using all the oil revenues to finance itself, I'd say that's a recipe for government extravagance.

One of the downsides of a federal system is to enable government entities to export the costs of their operations. If we had a unitary system, no one would suppose that the amount of oil in Alaska should bear any relation to the allocation of governmental resources to Alaska. It's only when you treat states as owners, as individuals, that these problems arise.

QUESTION: Isn't the constitutional question, “Who owns the natural resources?” Is it the state or is it the nation? If it's the state, then the fact that Alaska gets the rent is what the Constitution says. If the resources belong to the nation, not to the state, then they should go to the nation.

JUDGE POSNER: Right. But I haven't tried to evaluate the federal system from a legal standpoint. Obviously, Alaska does have a certain constitutional status by virtue of the provision of the Constitution that new states are admitted on the same terms as the existing ones. So it has rights. I don't know if they actually extend to the oil underground, but it seems to me a disadvantage of the federal system that the

subordinate units become viewed as owners with the kind of temptations that owners have--try to shift their costs on to other people.

QUESTION: Judge Posner, you mentioned, repeatedly, the similarity between private class actions and *parens patriae* suits. Do you think that state AG actions are problematic in ways in which private class actions are not? After all, you could also argue that private class actions are more problematic in some sense. It's true that private trial lawyers don't run frequently or routinely for governor, but they run for the Senate and they purchase governors—

JUDGE POSNER: They also run for President now and then.

QUESTION: And for President. State AGs operate under budget constraints, as you mentioned. They're at least accountable to somebody, and while I agree that that's a danger, it's also at least some constraint on them. That doesn't really operate on the private trial bar, which in class actions is completely unconstrained by any client.

In light of the comparative advantages or disadvantages between private class actions and *parens patriae* actions, where do you come out?

JUDGE POSNER: That's a good question. I hadn't actually thought about it. I simply treated class actions as part of the background, and now you ask whether adding *parens patriae* suits to that existing institution is a good thing. In a more comprehensive analysis, I would say yes, but then one thing you have to consider is that you don't Rule 23 for *parens patriae* suits. They may get out of hand in a way that class action don't.

You're raising a question about situations in which we actually think a monopoly of public enforcement is a good thing. We could auction tax collection and have tax collection done by private entities; you'd negotiate with Service, and say, "Let us collect the tax and give you \$100 billion." It would be possible, but we don't think that's correct. The Internal Revenue Service gives very modest rewards for informers. It could give much greater rewards, and have much more private involvement in tax collection.

The argument would be that public enforcement can control the level of enforcement; whereas, if you have private enforcement and you have money at stake, you would get a much higher level. The class action lawyer will expend resources on bringing suits up to the point where another dollar in his time and effort will yield just a dollar in expected gain from the litigation.

But if you have just a few people in the state attorney general's office, and they can't expand their activities, and they're tightly constrained, they're going to bring fewer suits. By giving a public agency a monopoly in enforcement and limiting the resources you give the agency, you can automatically reduce the level of enforcement.

So if you think there's too much antitrust enforcement, one remedy would be to replace the class action with the *parens patriae* suit. I think that was what you're suggesting.

QUESTION: We heard a panel on this topic before dinner. One of the speakers argued that Microsoft was a bad situation but also an anomaly: the states are really toothless, and they don't get into these situations very often. You had a very close personal relationship with a number of state AGs, and I don't know if you were writing on the subject before you had that personal experience. I'm curious as to whether it inspired you or even affected your interest in this topic, in any way, apart from just reading a newspaper account of what was coming out of the cases.

JUDGE POSNER: It poisoned my mind. [Laughter.]

JUDGE POSNER: But when you say the states are "toothless," there's a strength and a weakness. Having so little commitment to the suit, and having so little involvement, the states weren't giving up much if they said, "We'll settle." They weren't going to get anything anyway. I think just the power to make yourself a party to a litigation can be quite a significant impediment.

Now the way in which the Microsoft case has worked out, I don't think it really tenders an invitation to the states to try a lot of this. But if it had ended in a triumph of some sort, as the tobacco litigation did for the states, you could see how the idea of jumping on the band wagon could spread. If five states have sued X for Y, let's be number six. We'll spend ten or twenty thousand dollars but we'll have a seat at the table. We can make speeches and we can take credit for success, and if there's a failure, we can blame it on the other states.

That's grandstanding, it's politicking. You're quite right: I wouldn't have thought about the problem if I hadn't observed it, and the Microsoft case is not representative. But when I did do some background reading for this talk, I realized that the states have become much more active in antitrust enforcement in recent years than I had realized, and I think that means that the dangers that I've described are real ones.