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State Antitrust Enforcement and Coordination With Federal Enforcement

By Stanley Mosk*

In the field of antitrust enforcement, perhaps the most significant development of the past four years has been the rekindling of public interest in state antitrust laws. A dozen or more states have accelerated the pace of their enforcement activities. Last year the newly emerging State of Hawaii and the State of Washington enacted their first antitrust statutes. Meanwhile, the already established activities of the federal Anti-Trust Division have continued unabated. My topic of state-federal coordination of antitrust enforcement is, therefore, a timely one.

In speaking on this subject I am naturally influenced by the background of our own experience here in California.

Judged from the viewpoint of the thirteen original colonies, California is still a young state, albeit a lusty one. Happily, we have not been too proud to borrow from the experience of our older sisters. And so, just as the common law concept of antitrust was transplanted into our colonial law at an early date, so in California did our court give common law relief to a business man harassed by a restraint of trade as far back as 1888.1

In many ways, the experience of California in antitrust enforcement is typical. As early as 1907 our legislature enacted the comprehensive statute known to us as the Cartwright Act.2 For half a century its public enforcement was nearly non-existent. So much so, that it was christened by an editorial writer as “Cali-

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* Attorney General of California. Mr. Mosk presented this paper to the American Bar Association Section of Antitrust Laws, August 7, 1962.
1 Santa Clara Valley Co. v. Hayes, 76 Cal. 387, 18 Pac. 391 (1888).
fornia's Sleeping Beauty.” Indeed, one California attorney who was asked about a proposed price-fixing scheme wrote to the president of the company, saying: “As general counsel for the company, I conclude that the proposed plan is illegal. In my role as a member of the Board of Directors, however, I feel there is very little chance it will be discovered.”

Prior to 1959, only four public cases were brought under the Cartwright Act. In part, this was due to the fact that it was not until 1946 that our Supreme Court held unconstitutional one section of the act that had crippled its enforceability. Also responsible, however, was the absence of funds for the employment of necessary staff to prosecute violations.

In 1959, during the first year of Governor Brown’s administration and my own incumbency as Attorney General, the first specific appropriation to finance enforcement of the act was obtained from the legislature.

During the past three years we have initiated ten civil actions and one criminal proceeding under the Cartwright Act. For the most part, they involved the suppression of competition in supplying public agencies of state and local governments with the commodities and services which they require.

Those of you who come from other parts of the country may ponder the size and shape of California. Transplanted, it would cover an area from Norwalk, Connecticut to Jacksonville, Florida, and as far west as the Allegheny Mountains. Stretched another way, it would reach from Springfield, Massachusetts to Indianapolis, covering the area between the Great Lakes and the Ohio River. The natural barriers of the mountains to our East and the ocean to our West channel within our own boundaries trade and commerce worth billions in annual value. No two metropolitan centers comparable to Los Angeles and San Francisco are so remote from the boundaries of another state.

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3 The Cartwright Act—California’s Sleeping Beauty, 2 Stan. L. Rev. 200 (1949).
5 Cal. Bus. & Prof. Code §16723 (repealed by Cal. Stats. 1961, ch. 798) was held unconstitutional first in, Speegle v. Board of Fire Underwriters, 29 Cal. 2d 34, 172 P.2d 887 (1946), and then in People v. Building Maintenance Contractors’ Ass’n, supra note 4,
These geographic considerations required that California protect its business enterprise from illegal restraints. An enormous volume of commerce confined within the state is still beyond reach of the Sherman Act, notwithstanding the extension of its jurisdiction in recent years.

The converse, however, is not true. That is to say, a transaction in California that falls within reach of the Sherman Act is equally subject to the jurisdictional scope of the Cartwright Act. For example, an agreement upon the price at which goods shipped into California are to be sold after arrival would violate both state and federal laws.

And so there exists a broad area of concurrent antitrust jurisdiction. Coordination of state and federal activity in areas of concurrent jurisdiction is nothing new in the annals of law enforcement. We found it necessary during the prohibition era. It remains with us today in the important field of controlling the traffic in narcotics.

Where concurrent state and federal laws are harmoniously directed to a common end, having in mind their complementary function, the coordination of their administration is essentially a practical problem. It involves a series of specific situations as they arise from time to time, each of which deserves individual attention. Considerations germane to their resolution are largely pragmatic. The efficient use of available manpower, the effectiveness of investigative procedures, the type of relief to be sought, the minimizing of travel and other expenses in the light of the location of prospective defendants and probable venue—such mundane factors as these are prominent in the minds of those who must coordinate at the staff level. They are inherent in the meaning of the word "coordinate" as applied to the federal-state relationship.

Coordination also requires that thought be given to the possibility of jurisdictional conflict. Conceivably, this could be of two distinct types, and the distinction between them is important.

On the one hand, there could be administrative conflict between state and federal officials, each vying with the other to usurp the limelight and to make a record at the expense of the other. Whatever may be the experience in other fields of government, such conflict does not exist in the field of antitrust. In my opinion, the extent of the existing and foreseeable workloads that
confront both state and federal agencies effectively preclude any
duplication of effort or severe inter-agency rivalry within the area
of concurrent jurisdiction.

Here in California, we have repeatedly sought federal take-over
of cases having interstate ramifications simply in order to let our
staff concentrate on matters within our own bailiwick. Conversely,
a representative of the Department of Justice has expressed the
view that the states may be better equipped to deal with those
restraints which, although within the federal jurisdiction, are
primarily of local impact. It is also said that: “The Department
of Justice necessarily must give priority in assigning its limited man-
power to practices affecting multistate markets.”6 Consistent with
this understandable policy, federal authorities have turned over to
us several cases involving local restraints. Already we have success-
fully prosecuted one of them to completion under the Cartwright
Act. Others are pending. They have called to our attention at least
one matter which directly involved foreign commerce whose magni-
tude in the overall picture did not warrant the diversion of their
manpower from more important assignments.

And so, based on our experience to date, I for one have no fear
of internecine warfare between my office and the federal Antitrust
Division. Moreover, as a member of the Antitrust Committee of
the National Association of Attorneys General, I am confident that
this view is that of all State Attorneys General who are active in
antitrust enforcement.

I turn now to the other type of possible jursdictonal conflict
that I mentioned a moment ago. This is the question of whether
the jurisdiction over antitrust offenses has been preempted by the
federal government. A lively interest in this question has recently
been awakened.7 It is timely, therefore, that we consider it in some
detail.

Parenthetically, to date I know of no responsible federal or state
official who thinks that state antitrust activity represents an
intrusion by the states into an area where they have been forbidden
to tread. Were it not for the astuteness of our legal brethren on
the other side of the counsel table, I doubt the question would even

7 E.g., Pollock, Federal Preemption and State Antitrust Enforcement 43 Chu.
be raised. In the past it has usually been raised as a defense, a challenge by a defendant that the wrong sovereignty has brought him into a court of law to answer for his conduct.

None of the federal antitrust statutes contains pre-emptive language. Hence, it is pertinent to inquire into the state of the law when federal cognizance was first taken of monopolies and restraints of trade.

The concept of antitrust did not begin with the enactment of the Sherman Act in 1890. Indeed, it did not even originate in anything as recent as the common law of England. As far back as the 5th century, the Emperor Zeno issued a remarkable edict to the Praetorial Prefect of Constantinople that bore strong resemblance to a modern antitrust statute.8

As we know it today, however, antitrust is the hand-maiden of our traditional economic system—call it free enterprise, competitive capitalism, or what you will. Its development coincided with the birth of maritime and commercial enterprise in England. As commerce grew, the law evolved to control its practices in the public interest. One early statute9 denounced the interception of goods (forestalling) on their way to market because of the resulting ability to command a monopoly price. Another10 denounced the injection into the chain of distribution of an unnecessary middleman. It shrewdly pointed out that the more hands merchandise passes through, the dearer its price becomes. From the common law came the tenet that commercial acts lawful when performed by an individual businessman could become unlawful in cases of confederation and concerted action.11

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8 We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be; nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they may have agreed upon among themselves. [If any one shall presume to practice a monopoly, let his property be forfeited and himself condemned to perpetual exile. And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay 40 pounds of gold. (Code IV 59.) Note, 23 Amer. L. Rev. 261 (1889).


10 3 Coke's Institutes 195 (1630). According to Coke this resolution was passed in 1602, but the law was far older. It seems first to have been made statutory in 51 Hen. III, St. 6 (1266), as reported in Great Britain, Stat. at L., 1 Pickering 47, 50 (1762).

These concepts were transplanted into the American colonies almost immediately upon their founding. The distance separating them from the mother country and the uncertainties of transportation made it easy to corner the market on the limited supply of imports brought from overseas.

Only a few years after the founding of Jamestown in 1607 difficulty was experienced with forestallers who intercepted vessels on their way up the river. To prevent such practices, it was ordered that the master of an incoming vessel should hold her cargo ten days in port before selling it. Such time was needed to enable the colonists to journey to Jamestown and have equal opportunity to compete for their needed purchases. That was in 1626.

This colonial recognition of common law concepts was a significant indication that the ancient antagonisms to monopoly had not been left behind in England. Our forefathers rejected the concentration of economic power in the hands of a few to the same extent that they rejected centralism of political power. They postulated that diversity of effort and diversity of power are good for the economy. And they adhered to a strong belief that preservation of competitive conditions in the market place was best left to local government.

Small wonder, then, that it was the states and not the federal government that first reacted to the aftermath of the industrial revolution that swept the country after the civil war—the trusts, the corporate combinations and consolidations that were formed to eliminate or restrict competition. Such arrangements were first invalidated by the states. One of the earliest of these actions was brought here in California. In 1889, the Attorney General of California obtained a forfeiture of the corporate franchise of the American Sugar Refining Company for having joined the Sugar Trust. By the terms of its charter, the object of this company was to engage in the business of sugar refining and trade. It was held that such a charter could be valid only so long as the business was carried on independently—that is, in competition with other

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13 Two legal theories were prevalent in the early cases. One invoked the corporate doctrine of ultra vires, holding that the participating corporations had acted beyond their charter powers. The other involved application of common law doctrines against restraints of trade and monopolies. See Thorelli, op. cit. supra note 11, at 53.
refiners. By accepting it, the defendant was bound to observe the state policy underlying the grant, which was to promote trade in sugar. The court said:

[The promotion of trade necessarily denotes the encouragement of rivalry in the business—competition on equal terms is conceded to be the life of trade, and to invite and promote that competition is the established policy of our laws. Whatever the rules prevailing in other jurisdictions upon this subject, in ours such a business—the maintenance of such a monopoly—is distinctly an unlawful business.]

By the time Congress passed the Sherman Act some twenty-one states already had either constitutional or statutory prohibitions against monopolies and restraints of trade. Others, like California, had judicially adopted common law doctrine to the same effect.

It was no accident that Congress did not insert in the Sherman Act language that would preempt the antitrust field for exclusive federal occupancy. The Congressional debates make it clear that the Act was intended only to supplement, and not to displace, state regulation.

Considering that the Sherman Act embodies the undefined common law terms of "monopoly" and "restraint of trade," and recalling that there was no common law within the federal jurisdiction, it has been aptly said that the Sherman Act is simply a jurisdictional statute. It merely authorizes federal application of common law antitrust concepts within the constitutional area of federal concern.

The Supreme Court has long since ruled that in the Sherman

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15 See Seager & Gulick, Trust and Corporations Problems 841-42 (1929); N. Y. State Bar Ass'n, Report of the Special Committee to Study the New York Antitrust Laws 6a (1957).
16 Senator Sherman stated: "This bill has for its object to invoke the aid of the courts of the United States to deal with the combination when they affect injuriously our foreign and interstate commerce and in this way to supplement the enforcement of the established rules of the common law and statute law by the courts of the several states in dealing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limits of their constitutional power that they may cooperate with the state courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." (Emphasis added.) 21 Cong. Rec. 2457 (1890).
Act, Congress exhausted its powers under the Commerce Clause.\textsuperscript{17} It is now accepted as doctrine that it covers not only transactions \textit{in} commerce, but also transactions, local in nature, which are shown to \textit{affect} an antecedent commerce.\textsuperscript{18} Today, even this distinction has begun to blur. Business practices evolve, and with them so does the law. The distribution cycle of modern business is now such that retail sales have been held to be "in commerce" in at least two cases.\textsuperscript{19}

In these circumstances, it is well to ask whether a state can now enforce its antitrust laws against conduct that would also violate the Sherman Act?

The position that it may not rests on the argument that Congress has preempted the field by leaving in force during the period of expansion of the commerce power an act that has expanded along with that power.\textsuperscript{20} The argument seems thin. It assumes that congressional silence implies an intent to preempt, whereas such silence is equally compatible with congressional satisfaction with the concurrent jurisdiction which has developed.

I come now to the court decisions dealing with antitrust preemption. In every case we have found, the right of a state to apply its antitrust laws to interstate commerce entering the state has been upheld.

As far back as 1910 the Supreme Court upheld the application of the Tennessee antitrust statute to restraints upon the sale of a commodity shipped in from other states.\textsuperscript{21} Nowadays we are prone to forget the long struggle to eliminate what Theodore Roosevelt called "the twilight zone." This was the dimly outlined and narrow view then held of the federal jurisdiction under area between state limitations with respect to interstate commerce.

\textsuperscript{17} Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).
\textsuperscript{18} \textit{E.g.}, United States v. Food \\& Grocery Bureau, 43 F Supp. 968, 971 (S.D. Cal. 1942), \textit{affd} 139 F.2d 973 (9th Cir. 1944).
\textsuperscript{19} \textit{Las Vegas Merchant Plumbers Assn v. United States}, 210 F.2d 732 (9th Cir. 1954), \textit{cert. denied} 348 U.S. 817 (1954); \textit{Northern California Pharmaceutical Assn v. United States}, 1962 CCH Trade Cas. \#70373 (9th Cir. 1962).
\textsuperscript{21} Standard Oil Co. v. Tennessee, 217 U.S. 413 (1910), \textit{affirming} State \textit{ex rel. Cates v. Standard Oil Co.}, 110 S.W. 565 (Tenn. 1908). The Tennessee act covered "the importation or sale of articles imported into this State" as well as wholly domestic commerce. It had been held valid by the Tennessee Supreme Court against the claim it isolated the commerce clause 705, on the interpretation that it applied only to articles already imported and which were no longer in interstate commerce.
the commerce clause. Within this twilight zone antitrust violations occurred with impunity. To those of you who are interested in the origin of today's concurrent jurisdiction, I recommend a reading of the opinion of the state court in *Standard Oil Co. v. Tennessee* before the case went up on appeal. It said:

A combination affecting interstate commerce is none the less a violation of the federal anti-trust statute, and punishable under it, where the agreement made *incidentally* affects intrastate commerce; and the same rule will apply to combinations made in violation of the statute of the state upon the same subject, where interstate commerce is *incidentally* affected. *If it were otherwise, neither the federal nor the state laws could be enforced in any case.* \(^{22}\) (Emphasis added.)

Before the Supreme Court it was again claimed that the statute violated the commerce clause. Denying the contention, Mr. Justice Holmes said:

The mere fact that [the state act] may happen to remove an interference with commerce among the States as well as with the rest does not invalidate it. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law at least that excludes the States from a familiar exercise of their power. \(^{23}\)

More recent cases in the federal circuit courts have *not* involved state prosecutions for violation of their antitrust laws. Instead, they have spoken of preemption only in connection with antitrust defenses raised in suits for breach of contract. \(^{24}\) A sophisticated point of view raises doubts as to the weight to be given judicial

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\(^{23}\) *Standard Oil Co. v. Tennessee*, 217 U.S. 413, 422. Holmes cited in support, *Field v. Barber Asphalt Co.*, 194 U.S. 618, 623 (1904), wherein it was said, "in this day of multiplied means of intercourse between the states there is scarcely any control which cannot in a limited or remote degree be said to affect interstate commerce. But it is only direct interferences with the freedom of such commerce that bring the case within the exclusive domain of Federal legislation."

\(^{24}\) "The states are not preempted of the right to legislate with reference to contracts in restraint of trade." Matthews Conveyor Co. v. Palmer-Bee Co., 135 F.2d 73, 82 (6th Cir. 1943); the Illinois act "is applicable only to intrastate commerce." *Kosuga v. Kelly*, 257 F.2d 48 (7th Cir. 1958).
Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the [Antitrust] Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.'

State courts presented with the question of preemption have emphatically answered it in the negative. In 1950 it was pointed out by the Massachusetts court in Commonwealth v McHugh:

[State antitrust] enactments are outgrowths of long established common law doctrines and were designed to extend and adapt those doctrines to the needs of the time and locality as seen by the local law making bodies. These needs still exist, notwithstanding the Sherman Act. If State laws have no force as soon as interstate commerce begins to be affected, a very large area will be fenced off in which the States will be practically helpless to protect their citizens without any corresponding contribution to the national welfare. (Emphasis added.)

State courts have repeatedly held that interstate activities are subject to antitrust regulations by the states. Appellate courts in Ohio, Michigan and Wisconsin have granted injunctive relief against monopolistic contracts and conspiracy in restraint of trade in the drug, banking, and chemical industries, respectively. A New York court declined to act concerning nationally distributed motion pictures only because no violation of the state

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26 These cases are collected in, Note, 61 Colum. L. Rev. 1469, at 1485-86 (1961).
28 Oliver v. All-States Freight, Inc., 156 N.E.2d 190 (Ohio Ct. App. 1957), aff'd, 167 Ohio St. 299, 147 N.E.2d 856 (1958), rev'd on other grounds sub nom. Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959). A labor contract allegedly creating a monopoly in the leasing of trucking equipment was held to violate the state antitrust law, Ohio Rev. Code Ann. §§1331.01-.14 (1960), although the scheme operated in interstate commerce. The court stated: "We find no federal statute ordering, nor in fact any federal case which holds that the federal government retains exclusively to itself the right to remedy the evils resulting from contracts and agreements between interstate carriers and unions found to be in restraint of trade. Federal legislation does not occupy the entire field, to the exclusion of state laws." Oliver v. All-State Freight, Inc., supra at 196.
29 Peoples Savings Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777 (1960) (Federal antitrust and banking laws do not preclude action under state antitrust statute against national bank for attempt to monopolize banking within a Michigan city.)
statute was shown. Private litigants have recovered antitrust damages against bankers in Michigan and insurance underwriters in California. Sanctions have been imposed by Massachusetts and California courts upon parties to union-management conspiracies that restrained competition in the fishing and food industries.

The leading California case is Speegle v Board of Fire Underwriters, decided in 1946. It presented squarely the question of whether the Sherman Act precluded application of state antitrust law to conduct having interstate aspects. Our Supreme Court recognized that the applicable test was that set forth in the South-Eastern Underwriters case. Simply stated, the test is whether concurrent demands of state and national interests conflict with each other in their application and enforcement, or whether they can be accommodated, each with the other. In the Speegle case the court concluded that:

Since there is no conflict between the law of this state and the Sherman Act, plaintiff may invoke the state law even if interstate commerce is involved.

Our most recent appellate decision on this subject is Alfred M. Lewis, Inc. v Warehousemen, Teamsters, Chauffeurs, and Helpers Local Union No. 542. This is an interesting case because it involved consideration of federal labor law as well as antitrust in its relationship with the California statute. After a careful consideration of the numerous factors involved in the doctrine of federal preemption, again the court firmly concluded that there was none.

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32 Peoples Savings Bank v. Stoddard, 359 Mich. 297, 102 N.W.2d 777 (1960). (This was a consolidation of state and private action.)
36 29 Cal. 2d 34, 172 P.2d 867 (1946).
39 163 Cal. App. 2d 771, 330 P.2d 53 (1958). The court said: "As there is no conflict between the state and federal policies encompassed by the legislation under consideration; no conflict between the state and federal acts; no need for a single statute to effect uniformity of policy or procedure; the local law is within the tradition of 'the usual police powers' of the state; and Congress has not indicated its intent to preempt the field, it is our opinion that the Cartwright Act may be applied to the situation at bar in the state courts." Id. at 790.
Last year the Supreme Court of Wisconsin considered the question of preemption and arrived at a similar conclusion.\(^{40}\) Directly in point is a decision of the Texas Court of Civil Appeals decided in June of this year. In *Texas v National Elec. Contractors' Ass'n*,\(^{41}\) it was held that there was no federal preemption and that Texas could proceed under its own statute, without reference to a pending federal action, even though the same parties and the same subject matter were involved. The Federal Antitrust Division filed an amicus brief, denying preemption and asserting that state antitrust law is complementary rather than repugnant to the federal regulatory scheme.

In conclusion, I wish to suggest a word of caution in evaluating the language of these cases. To preserve the state jurisdiction over antitrust offenses committed within its boundaries, we still find prevalent in state court opinions a definition of intrastate commerce that is outmoded when the extent of federal jurisdiction under the commerce clause is under consideration by the federal courts. In *United States v South-Eastern Underwriters Ass'n*, the Supreme Court said that "legal formulae devised to uphold state power cannot uncritically be accepted as trustworthy guides to determine Congressional power under the Commerce Clause."\(^{42}\)

This does not mean, however, that they have lost their utility in establishing the limits of state power within constitutional bounds. We have here an almost classic example of how the terminology of the law varies according to context. An understanding of this point is essential to any evaluation of the question of preemption. The critical eye looks for points of possible conflict in the administration of state and federal laws. The cases emphasize that state laws must neither discriminate against nor impose undue burdens upon interstate commerce. Granted this, there is no federal hindrance to the right of the states to protect their residents from trade restraints pursuant to their police powers, regardless of whether or not such restraints may also fall within the federal jurisdiction. All that remains is need for sensible coordination of state and federal forces and this, as I have said, is a practical and not a legal problem.

\(^{40}\) State v. Allied Chem. & Dye Corp., 9 Wis. 2d 290, 101 N.W.2d 133 (1960).

\(^{41}\) Docket No. 13960, Tex. Cir. Ct. of App., June 12, 1962.

\(^{42}\) 322 U.S. 533, 545 (1944).
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