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POLICY BRIEF

One National Market, Fifty Antitrust Vetoes: A Law-and-Economics Case for Complementary State Enforcement

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Introduction

American antitrust federalism has real virtues. State attorneys general can discover local cartels, represent residents who would otherwise be dispersed and undercompensated, and alert federal officials to facts that a Washington-centered investigation might miss. A state can also provide a useful check when federal enforcement is plainly inattentive. None of that, however, requires treating every nationally integrated transaction or business practice as subject to 51 independent and potentially inconsistent antitrust policies.

The emerging problem is not ordinary cooperation. It is sequential contradiction: The Justice Department or Federal Trade Commission investigates a national matter, reaches a settlement or closes the investigation, and a coalition of states then attempts to keep the same transaction or course of conduct in litigation. The firm has not received a final answer after receiving the federal decision; it has merely cleared the first gate. The resulting "veto stack" converts federalism from a source of information into an option for perpetual relitigation. State antitrust enforcement should complement federal policy by addressing genuinely local harms and supplying useful evidence—not operate as a serial veto over firms' federally sanctioned actions.

In a previous *Truth on the Market* commentary (see also legal scholar Babette Boliek, here[1]), I frame the sounder ideal: State enforcement should complement well-grounded federal initiatives and concentrate scarce resources on competitive problems particular to that state.[2] My account candidly recognizes that public-choice incentives and rent seeking can distort both state and federal choices. The point is institutional, not partisan. The question is which allocation of authority minimizes the combined cost of anticompetitive conduct and erroneous intervention.

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The Breakaway Docket

Recent antitrust litigation illustrates several distinct forms of state-federal divergence. They should not be collapsed into one story, because the institutional objections differ. But together they show that federal clearance of antitrust litigation increasingly may be only provisional.

The Live Nation case might be viewed as the strongest caution against an overbroad claim that state continuation of federal antitrust actions is always wasteful. After all, while the Department of Justice (DOJ) announced a proposed settlement shortly after the trial began, most state plaintiffs stayed in the case[3] and won a jury verdict.[4] That result could be viewed as a policy mistake, if one accepts Live Nation's assertions that its combination of promotion, venue operations, and ticketing via Ticketmaster was a form of efficient vertical integration that yields cost-saving synergies.[5] But even assuming the jury verdict was correct, a verdict in one case does not answer the system-design question. The ex ante cost of overlapping authority is borne in every case—including matters in which the second, state-level prosecution produces no offsetting consumer gain—and the remedial conflict can persist even after liability.

The HPE–Juniper merger presents a different problem. DOJ first challenged the $14 billion acquisition, then settled for the divestiture of HPE's Instant On business and licensing commitments involving Juniper's AI-operations source code.[6] States did not bring a new Clayton Act

TABLE 1. The Breakaway Docket

Matter	Federal disposition	State continuation
Live Nation–Ticketmaster	The Department of Justice (DOJ) settled after trial began in March 2026; six states joined the proposed decree.	A much larger state coalition continued; on April 15, the jury found unlawful monopolization in primary ticketing services.
HPE–Juniper	DOJ settled in June 2025 with divestiture and source-code licensing commitments.	Twelve states and DC intervened in Tunney Act review and urged rejection of or substantial skepticism toward the decree.
Nexstar–Tegna	Federal regulators approved the broadcast transaction, which closed in March 2026.	States independently sued and obtained preliminary relief, extending uncertainty after federal clearance.
Paramount Skydance–WBD	DOJ closed its investigation on June 12, 2026, explaining why asserted theories against the merger did not show consumer harm.	Twelve states led by California sued in July to block the transaction under federal antitrust law.

Sources: Department of Justice, National Association of Attorneys General, California Department of Justice, and Paul, Weiss; see notes 3–12.

case; instead, 12 states and the District of Columbia intervened in the Tunney Act proceeding, which allowed them to submit the settlement to federal district court for review, and pressed the court to reject or scrutinize the federal decree.[7] John Yun's analysis had emphasized what the original complaint underplayed: Combining Juniper's AI-powered networking capabilities with HPE could create a stronger challenger to Cisco and thus intensify competition rather than diminish it.[8] Enhanced international competition could also strengthen national security.[9] The states' intervention prolonged uncertainty over a consummated integration whose competitive rationale was bound up with AI networking, scale, and a more credible third platform.

The results in Nexstar–Tegna and Paramount–Warner Bros. Discovery go further. In Nexstar,[10] state plaintiffs sued after federal regulatory approval and the transaction's closing. In Paramount, DOJ publicly closed an eight-month investigation,[11] explaining that asserted theories of possible antitrust violations appeared to confuse harm to competitors with harm to consumers; a 12-state coalition nevertheless filed a federal antitrust suit the next month.[12] Whatever the merits of each challenge, the institutional message to firms is unmistakable: A federal resolution may not resolve anything.

The Economics of Duplicative Sovereigns

Antitrust is an error-cost enterprise.[13] False negatives—in which the government allows activities that are really antitrust violations—permit market power to persist; false positives—in which the government prohibits activities that are legally permissible—deter conduct that lowers costs, improves products, or creates new competitive constraints. The economically relevant objective is not to maximize cases, remedies, or the number of officials with a vote. It is to minimize the expected social cost of both kinds of error, including administrative and compliance costs.

Sequential state prosecution increases those costs in at least four ways:

1. **It destroys the settlement value of federal enforcement.** A firm cannot reliably trade concessions for closure when nonsettling states can continue toward inconsistent relief. That uncertainty raises the price of settlement, reduces the government's leverage to obtain efficient remedies, and encourages defensive litigation.
2. **It delays integration.** Merger efficiencies are often time-sensitive: Engineers leave, product road maps diverge, capital budgets freeze, and customers postpone adoption while the legal status remains uncertain.
3. **A veto stack magnifies uncertainty.** The relevant business question becomes not whether conduct satisfies a coherent consumer-welfare rule, but whether any one politically salient jurisdiction may characterize it under a more elastic standard. Expected liability is then determined by the most aggressive enforcer, not the best-informed one. A national company rationally responds by designing its actions to comply with the strictest state rule,

abandoning marginal investments or avoiding business models whose legality depends on a fact-intensive assessment of efficiencies.

4. **Fragmented enforcement creates remedy externalities.** A state may seek divestiture, access, data sharing, compulsory licensing, or conduct restrictions whose costs fall mostly outside its borders. State-level officials receive political credit for a visible intervention while nationwide consumers, workers, and shareholders absorb the lost scale or innovation. This is a familiar federalism problem: The jurisdiction making the decision does not internalize the full national cost.

The concern is especially acute in high technology. Dynamic competition turns on uncertain investments, complementary assets, learning effects, and rapid quality improvements that static market shares measure poorly. My dynamic-consumer-welfare approach urges attention to innovation and long-run consumer gains.[14] The International Center for Law and Economics' (ICLE's) work on state laws with national spillovers similarly stresses that state experimentation becomes harmful when one jurisdiction exports costs to the interstate economy.[15] A rule that waits for every state sovereign to become comfortable with an unfamiliar technology will systematically favor incumbency over experimentation.

Public Choice Is a Feature of the Model, Not a Bug

Why are national technology firms attractive targets for antitrust challenges? Public-choice analysis supplies a parsimonious answer without alleging corruption or bad faith.[16] State attorneys general are elected or politically visible generalists. Large technology cases provide publicity, coalition leadership, fundraising narratives, and a platform for higher office. At the same time, competitors, organized constituencies, and plaintiffs' lawyers have strong incentives to supply complaints, studies, and political support. The diffuse beneficiaries of innovation—future customers, small businesses, and users who value free or improved services—are harder to organize.

Empirical scholarship does not establish that any particular prosecution is politically motivated, but it does identify structural incentives. Political scientist Colin Provost's study asked when "AG" is short for "aspiring governor" and found a relationship between multistate litigation activity and later campaigns for higher office.[17] Political economist John Dove's work on state antitrust enforcement likewise examines electoral cycles and institutional political considerations.[18] These findings counsel humility: Expanding discretionary standards throughout the states does not create a disinterested public-interest machine; it increases the returns to political entrepreneurship, incentivizing officials to allege antitrust violations even when such allegations have little evidentiary support.

Technology markets intensify the bias. Their products are complex, their harms are easy to describe in populist language, and their benefits are often nonprice, probabilistic, or delayed. A prosecutor can point to size, data, vertical integration, or a disappointed rival; for a defense

attorney, it is harder to demonstrate that integration lowered latency, improved security, accelerated model development, or created a stronger platform competitor. The political payoff arrives when the complaint is filed, while the innovation lost to delay is largely invisible.

A State-Level Retreat from Consumer Welfare

The risk of conflicting enforcement is compounded by a substantive divergence. For roughly four decades, the consumer-welfare framework disciplined antitrust by asking whether challenged conduct is likely to reduce output, raise quality-adjusted prices, suppress innovation, or otherwise harm the competitive process. It is not a laissez-faire immunity rule. It is a screen that distinguishes competition law from an open-ended power to reallocate economic advantage among firms and constituencies.

Several state initiatives point toward broader and less predictable mandates. New York's Twenty-First Century Antitrust Act,[19] which passed the state senate in May 2026 and remained pending in the assembly, would add an abuse-of-dominance regime, restrictions on certain vertical conduct, expanded premerger requirements, and private causes of action. My critique of an earlier version of this statute warned that such a standard could protect competitors at consumers' expense and interfere with national policy.[20] California's pending A.B. 1776 would expand single-firm liability under the Cartwright Act.[21] Babette Boliek's July 2026 ICLE critique argues that the bill would replace objective consumer-welfare analysis with protection of favored trade participants.[22] New Jersey's S. 451 would make specified uses of algorithmic rent-coordination systems into violations of the New Jersey Antitrust Act.[23] These proposals differ in scope and may be amended or defeated, but together they reveal an appetite for state-specific antitrust theories that can govern conduct far beyond state borders.

The expertise problem is comparative, not absolute. Many state antitrust lawyers are excellent, and federal agencies also make mistakes. But DOJ and the Federal Trade Commission (FTC) maintain larger bodies of economists, technologists, merger specialists, and institutional learning devoted to national markets. A state coalition assembled for a high-profile matter may borrow federal evidence and outside counsel while pursuing a different political objective. When the dispute concerns AI infrastructure, cloud architecture, enterprise networking, algorithmic pricing, or multisided platforms, the marginal cost of analytical error rises sharply.

A broad "fairness" or dominance standard also invites rent seeking. Rivals can recast requests for protection as antitrust complaints; regulated intermediaries can seek rules that preserve their position; and local interests can externalize costs onto national consumers. Recent *Truth on the Market* commentary has aptly described this shift as the "nanny state" substituting regulator preferences for demonstrated consumer harm.[24] The law-and-economics objection is not that every nonprice concern is illegitimate. It is that a standard untethered from measurable competitive effects supplies too little discipline to officials who face asymmetric political incentives.

The Constitutional and Statutory Reality

Reform cannot proceed as though state authority were merely delegated by Washington. States may sue under their own antitrust statutes, and Congress has expressly authorized state attorneys general to bring *parens patriae* actions for damages under federal antitrust law.[25] The Supreme Court's 1989 decision in *California v. ARC America* held that federal limits on indirect-purchaser recovery did not preempt state statutes allowing such recovery.[26] The court emphasized that the federal antitrust laws did not occupy the field and that federal policy did not, by itself, define what states could permit under their own law.

ARC America is therefore a serious obstacle to casual claims that federal antitrust law implicitly preempts state laws on the topic. But it is not a constitutional command that Congress preserve overlapping state remedies forever. It interpreted the statutes Congress had enacted. Congress may regulate interstate commerce and expressly preempt conflicting state rules, provided it legislates clearly and respects anti-commandeering principles.[27] The cleaner approach is not to dictate to states how to govern; it is to create a federal rule governing private conduct and transactions in national markets, together with an express preemption clause and a carefully drawn savings clause for genuinely local enforcement.

Courts acting without Congress face a narrower path. Modern dormant-commerce-clause doctrine is skeptical of free-floating judicial invalidation of nondiscriminatory state laws merely because they have upstream effects.[28] *National Pork Producers Council v. Ross* underscores that caution. Conflict preemption remains available where compliance with both sovereigns is impossible or state law obstructs a clearly stated federal objective, but *ARC America* makes it difficult to infer that objective from antitrust policy alone. Judicial reform would thus require either a stronger statutory signal from Congress or a modest doctrinal reorientation toward nationally uniform federal resolutions.

A Reform Agenda for One National Market

1. Express congressional preemption, with a local-conduct savings clause

Congress should consider establishing that antitrust challenges to behavior or transactions with substantial, nonincidental effects across state lines are governed exclusively by federal substantive standards once DOJ or the FTC has completed a defined review and issued a reasoned disposition. A qualifying federal consent decree, litigated judgment, or published closing statement could preempt a later state action seeking inconsistent prospective relief. States should remain free, however, to participate in the federal investigation, present evidence, seek compensation for residents, and challenge conduct whose competitive effects are predominantly intrastate.

The line should be functional rather than size-only. Relevant factors could include nationwide pricing or product design, a multistate network, integration of data or infrastructure across jurisdictions, or a remedy that necessarily changes operations nationwide. A savings clause should

preserve state cases against local bid rigging, regional cartels, occupational restraints, hospital or funeral-home conspiracies confined to a state, and small mergers whose assets and customers are overwhelmingly local. The goal is subsidiarity: Assign a matter to the lowest level of government that internalizes its costs and possesses adequate expertise.

To guard against federal underenforcement, preclusion—the inability to reopen a matter after a final judgment—should attach only after a transparent process. Federal enforcers should explain the theories investigated, the competitive evidence evaluated, and why the disposition protects consumers. States could obtain a short period for consultation and judicial review of whether statutory conditions were met—but not a second trial on the merits. Congress could also require periodic reporting on matters in which federal resolution displaced a proposed state action.

2. A stronger conflict-preemption rule for inconsistent national remedies

Even without full field preemption, Congress could instruct courts to displace state remedies that materially frustrate a federal resolution of national conduct. A state damages claim based on distinct local injury may coexist with a federal decree; a state injunction that forces divestiture after DOJ accepted a licensing remedy may not. The key is remedial inconsistency, not disagreement in the abstract. Courts should ask whether the state remedy would nullify the bargain, efficiencies, or nationwide operating plan that the federal disposition affirmatively preserved.

Absent legislation, courts should be cautious but not inert. Where a state invokes federal antitrust law after a federal agency has issued a detailed competitive assessment, courts can treat that federal assessment as highly persuasive on market definition, efficiencies, and remedy design. This would not eliminate state standing. It would reduce the oddity of one sovereign securing federal relief that defeats an expert federal agency's articulated national policy.

3. Systematic DOJ and FTC statements of interest

The immediate reform requires no new statute. DOJ already files statements of interest in private and state litigation.[29] DOJ and the FTC should adopt a published protocol for filing when a state case threatens a federal settlement, relies on a theory the federal agency rejected, or seeks a remedy with large interstate spillovers. The filing should identify the federal consumer-welfare analysis, explain the national costs of contradictory relief, and address technical issues that a generalist court may otherwise receive only from adversarial experts.

Such filings would be especially valuable in Tunney Act proceedings. States should be heard, but the public-interest inquiry should not become an invitation to retry the government's entire case or substitute a coalition's preferred remedy whenever federal enforcers settle. A clear federal explanation of uncertainty, litigation risk, innovation benefits, and remedial tradeoffs would help courts distinguish meaningful defects from mere political disagreement.

4. Federal leadership, coordination, and oversight

Federal officials should state publicly that cooperation is welcome but that serial prosecution of nationally integrated conduct imposes real economic costs. Congressional hearings could require federal and state enforcers to explain divergent theories, staffing, outside-counsel arrangements, and estimates of interstate spillovers. Transparency changes incentives: A state official should have to defend not only the alleged harm but also why a separate action adds value after federal review.

DOJ and the FTC could condition joint investigations on ex ante coordination agreements covering information sharing, settlement consultation, and remedy design. A state would remain sovereign and could withdraw, but it should not be able to enjoy all the benefits of a federal investigation and then surprise the parties with a contradictory national remedy. Published best practices could encourage state offices to conduct cost-benefit analysis and reserve independent action for demonstrable local harm or a clearly deficient federal process.

5. An AI and frontier-technology fast track

AI-related conduct will test the system first. Training, cloud compute, chips, networking, data centers, model distribution, and enterprise deployment are interstate by design. State injunctions aimed at model access, data use, interoperability, or vertical integration can reshape a national product even when brought under a nominally local statute. Congress could create expedited federal review and presumptive federal primacy for AI cases with substantial interstate effects, while preserving ordinary state authority to govern fraud, privacy, contract laws, and local cartels.

This is not a plea to immunize "national champions." Actual exclusion, collusion, or acquisitions that threaten consumer harm should be prosecuted. But the error-cost balance must account for global dynamic competition. As competition policy scholar Mario Zúñiga recently argued,[30] antitrust narratives that omit China miss a consequential rival in AI development. HPE–Juniper likewise illustrates that integration of AI-enabled networking can strengthen a challenger. The United States will not out-innovate strategic competitors by making every national technology investment contingent on the most economically expansive state theory of antitrust.

The Necessary Guardrail: Federal Primacy Must Be Earned

The strongest objection to this paper's argument is that federal enforcers can be captured, politicized, or simply wrong. Live Nation's jury verdict gives that objection concrete force. A reform that converted any terse federal closing letter into blanket immunity would replace one institutional error with another. Federal primacy should therefore depend on process: adequate investigation, a reasoned public explanation, disclosure of remedy logic, and judicial review where a consent decree is required.

Nor should preemption erase state damages for residents where federal law expressly preserves them, unless Congress clearly chooses that result. Prospective relief and transaction blocking

create the greatest national spillovers and deserve the strongest uniformity. Compensation for localized injury, enforcement against local conspiracies, and state participation in federal cases can remain robust. The principle is not centralization for its own sake. It is matching jurisdiction to the geographic scope of the market and the remedy.

A disciplined federalism would also improve state enforcement. Freed from nationally prominent litigation over every major technology company, state offices could devote more resources to procurement cartels, local licensing restraints, noncompete abuses where applicable law permits, healthcare consolidation with genuinely regional effects, and anticompetitive state regulation. Those are areas where local knowledge is an advantage rather than a pretext for exporting one state's preferred policy nationwide.

Complementarity, Not Contradiction

Antitrust federalism should increase information and accountability, not guarantee that a national firm can never obtain repose. When states continue to prosecute after a reasoned federal settlement or clearance, they impose costs that extend well beyond lawyers' fees: delayed integration, lost investment, inconsistent remedies, reduced settlement incentives, and a bias against unfamiliar innovation. Those costs are particularly damaging in AI and other technologies in which speed, scale, and experimentation shape long-run consumer welfare and national competitiveness.

The answer is neither to abolish state antitrust nor to romanticize federal expertise. Congress should preserve state authority over genuinely local restraints while expressly restoring federal primacy over conduct with substantial interstate effects. Courts should police inconsistent remedies where federal policy is clear. DOJ and the FTC should file statements of interest, coordinate early in the legal process, and explain publicly when state actions threaten consumer welfare. Congressional oversight can expose the political economy of serial prosecution.

One national market cannot function efficiently under 51 final decision makers. The sound division of labor is straightforward: States should be energetic where their knowledge is local and the costs are local; federal enforcers should be accountable where markets and remedies are national. That is not hostility to federalism. It is federalism designed for economic growth.

About the Author

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