The Federal Government's Antitrust Immunity—Trade As I Say, Not As I Do: Sea-Land Service, Inc. v. Alaska Railroad

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COMMENTS

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Proponents of the Sherman Act were faced with the paradox inherent in the legislation that Congress was promoting free trade by obstructing it. See Standard Oil Co. v. United States, 221 U.S. 1, 53 (1911). Nevertheless, Senator Sherman, the sponsor of the legislation, insisted that the Act would not interfere with legitimate trade. See 21 Cong. Rec. 2456-57 (1890) (remarks of Sen. Sherman). He stated that “[i]t is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination.” Id. at 2457.

titrust violation may obtain both treble damages and injunctive relief. Traditionally, however, these remedies have been unavailable when the United States is a named defendant because the doctrine of sovereign immunity has shielded the federal government.

foreign country. 15 U.S.C. § 7 (1976). The statute encompasses not only corporations, but individuals and partnerships as well. 3 J. von Kalinowski, supra note 1, § 11.01[3]. Construing this language as "very broad," Chief Justice Taft concluded that labor unions fell within section 8. United Mine Workers v. Coronado Coal Co., 259 U.S. 344, 392 (1922). He observed that through this definition Congress intended that no "persons or combinations of persons should escape its application." Id. Accordingly, courts have held corporate officers and directors to be liable individually for antitrust violations committed on behalf of their corporate employers. 4 J. von Kalinowski, supra note 1, § 24.02[3]. The Clayton Act uses an identical definition for its provisions. See 15 U.S.C. § 12(a) (1976).


* The English maxim that "[t]he King can do no wrong," is regarded by many as the source of the sovereign immunity doctrine. See, e.g., Jacoby, Roads to the Demise of the Doctrine of Sovereign Immunity, 29 A.B.A. AD. L. REV. 265, 265 (1977). Some commentators have observed, however, that this maxim originally was understood to mean that the King must do no wrong because he was not considered to be above the law. See, e.g., Borchard, Government Liability in Tort, 34 YALE L.J. 1, 2 n.2 (1924); Fox, The King Must Do No Wrong: A Critique of the Current Status of Sovereign and Official Immunity, 25 WAYNE L. REV. 177, 193 (1979); Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1, 3-5 (1963). Nevertheless, the maxim evolved into the principle that the sovereign cannot be sued unless consent to suit is granted. See, e.g., Jaffe, supra, at 1. Justice Holmes explained the existence of sovereign immunity without resorting to the English maxim, stating that "there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Irrespective of its theoretical underpinnings, the doctrine has been regarded as an anomaly, and as anachronistic in light of the modern policy favoring redress for every legal wrong. See Hartke v. Federal Aviation Admin., 369 F. Supp. 741, 746 (E.D.N.Y. 1973); Fox, supra, at 196-98; Jaffe, supra, at 2; Smith, Government Accountability, 2 VILL. L. REV. 16, 16 (1956); Comment, Sovereign Irresponsibility, 20 J.B.A. KAN. 275, 283 (1952). Nevertheless, it is a well-established principle that absent an express waiver of immunity by Con-
from incurring any form of antitrust liability. Notably, in 1976, Congress amended the Administrative Procedure Act (APA) to eliminate the defense of sovereign immunity in all actions seeking nonmonetary relief instituted against the United States, its agencies and its officers. Notwithstanding the APA’s abrogation of the immunity defense, recently, in Sea-Land Service, Inc. v. Alaska
the Court of Appeals for the District of Columbia Circuit held that the federal government is not amenable to suit for equitable relief in antitrust actions. In reaching this conclusion, the court reasoned that there is no cause of action for the government's anticompetitive conduct because "Congress did not place the United States or its instrumentalities under the governance" of the antitrust laws.

In Sea-Land, the plaintiffs filed suit against two private corporations and three federal agencies, alleging that the defendants had violated various provisions of the Sherman Act by, inter alia, forming a conspiracy to monopolize the Alaska shipping industry. Reasoning that the doctrine of sovereign immunity precluded any award of damages or injunctive relief, the district court dismissed the plaintiffs' claims against the federal agencies.

On appeal, the D.C. Circuit affirmed, holding that the United States is not exposed to liability for conduct violative of the antitrust laws, regardless of whether the relief sought is legal or equitable in nature. Initially, the court observed that sovereign immunity would not bar an award of equitable relief because of the

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10 659 F.2d at 244.
11 Id.
12 Sea-Land Serv., Inc. v. Alaska R.R., [1980-2] Trade Cas. ¶ 63,481, at 76,523 (D.C. Cir. 1980). The two private corporations in the action were Crowley Maritime Corporation and Alaska Hydro-Train Corporation, a subsidiary of Crowley. Id. at 76,523 n.1.
13 Id. at 76,523. The government defendants were the Alaska Railroad, the Federal Railroad Administration, the Department of Transportation and the chief officers of these agencies. Id. at 76,523 & n.2.
14 Id. at 76,525. The plaintiffs alleged that the defendants violated the antitrust laws by entering exclusive dealing contracts, establishing predatory shipping rates, conducting an illegal boycott, and entering illegal tying arrangements. Id. In addition to seeking monetary damages, the plaintiffs sought to enjoin the performance of two executory contracts as well as the future solicitation of such contracts. Id.
16 Id. The district court determined that the other members of the unanimous panel were Judges Wright and MacKinnon.
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waiver embodied in the APA. Since the APA states that relief can be denied on "any other appropriate legal or equitable ground," however, the court examined the antitrust laws to determine whether the United States falls within their intended scope.

Primarily, the Sea-Land court relied on United States v. Cooper Corp., in which the Supreme Court held that the federal government was not a "person" qualified to sue for treble damages. In Cooper, the Court intimated that if the United States was entitled to maintain a treble damage suit, it would also qualify as a person subject to liability under the antitrust laws. The Sea-Land court opined that Congress was aware of this dictum when it subsequently amended the antitrust laws to accord the government an action for actual damages. Because Congress, after "discrete consideration" of the federal government's status...
under the Sherman Act, addressed only the direct holding of *Cooper* but left its dictum intact, the *Sea-Land* panel concluded that it would be improper to hold the United States subject to liability.\(^{26}\)

Although it appeared that government accountability would be enhanced with respect to equitable relief after Congress amended the APA,\(^{26}\) the *Sea-Land* court appears to have dampened these hopes in the area of antitrust.\(^{27}\) This Comment will examine the D.C. Circuit's reasons for reconstructing the immunity wall, and will suggest an alternative to the "do as I say, not as I do" contradiction into which the *Sea-Land* court has breathed new life.

### The *Sea-Land* Court's Extension of *Cooper*

The foundation for the D.C. Circuit's construction of the Sherman Act was its reliance upon the Supreme Court's *Cooper* opinion as precedential authority.\(^{28}\) Indeed, the *Sea-Land* court has merged *Cooper*'s statement of law, that the federal government is not a person entitled to sue, with its dictum, that liability is also precluded, concluding that the United States is wholly without the reach of the antitrust laws. It is submitted, however, that this broad interpretation of the *Cooper* decision is unjustified in light

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\(^{25}\) See Jacoby, supra note 5, at 266.

\(^{26}\) See *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d at 246. Although this Comment will posit that the federal government should be considered subject to the antitrust laws, it will not be suggested that the federal government should be susceptible to suit for treble damages under 15 U.S.C. § 15 (1976 & Supp. IV 1980). Since the APA waives immunity only from equitable relief, see note 8 supra, the defense of sovereign immunity remains available when treble damages are sought, cf. *Jaffee v. United States*, 592 F.2d 712, 719 (3d Cir.), cert. denied, 441 U.S. 961 (1979) (monetary relief unavailable under APA waiver even if claim couched in equity).

\(^{27}\) *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d at 245-46.
of other Supreme Court precedent.

When assessing the impact of precedent, a court is given two options. It can adhere to the doctrine that a case “holds” only so much as is necessary to sustain the judgment, or it can apply the “equally impeccable and correct” principle that the prior decision “holds” with authority the broad rule upon which the judgment is based. Although neither approach is “wrong,” the exercise of this option must reflect judicial temperament, manifested through intervening cases. Thus, the cogency of the Sea-Land court’s decision to derive from Cooper the broad legal principle that the federal government is not a person for all antitrust purposes requires an examination of the Cooper decision as well as intervening judicial thought.

In determining that the federal government is not a person entitled to bring a treble damage action, the Cooper Court examined “[t]he purpose, the subject matter, the context, the legislative history, and the executive interpretation” of the antitrust laws. Applying this standard, the Supreme Court observed that

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3 Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed, 3 VAND. L. REV. 395, 395 (1950); cf. Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry., 385 U.S. 182, 187 (1966) (Douglas, J., dissenting) (“we need not be slaves to a precedent by treating it as standing for more than it actually decided”). Discussing the “theory of appellate decision,” Professor Llewellyn observed that an opinion can be interpreted to say only so much “as is absolutely necessary” to uphold a judgment. Llewellyn, supra, at 395. Professor Llewellyn noted that such an approach is “impeccable and correct” since statements which go beyond the specific holding of a case are unnecessary. Id.

3 United States v. Cooper Corp., 312 U.S. 600, 605 (1941). The Cooper Court initially noted that “there is no hard and fast rule of exclusion” under which the government could not benefit from “person” status. Id. at 604-05. Rather, the Court stated that an interpretation of the word “person” requires a deeper examination of legislative intent. Id. at 606. Rejecting a strict construction of the Act, the Court chose to read the language of the statute in its ordinary sense, resolving doubts by referring to the policy of the statute and canons of statutory construction. See id. at 605. After determining that the Act’s language alone was an insufficient basis upon which to reach a conclusion, id. at 606, the Court examined the meaning of the term “person” in other portions of the Act, see id. at 606-07, the scheme and structure of the legislation, see id. at 607-08, enactments supplementing the Sherman Act, see id. at 608-09, prior precedent, see id. at 610-11, and the legislative history,

30 Llewellyn, supra note 29, at 395. Professor Llewellyn noted that although precedent properly may be distinguished or confined to a narrow holding, it is also “correct” to view a prior case as enunciating broad rules which cover, “with full authority, cases which are plainly distinguishable on their facts . . . whenever the reason for the rule extends to cover them.” Id.; see, e.g., Canada Packers, Ltd. v. Atchison, Topeka & Santa Fe Ry., 385 U.S. 182, 184 (1966) (per curiam).

31 Llewellyn, supra note 29, at 395-96.

32 Id. at 396.

33 Id. at 396.
the Sherman Act envisioned two means of enforcement, namely, the prosecutorial authority granted the federal government, and the treble damages action available to "persons." The Cooper Court reasoned that since the numerous sections of the Act provided various methods for the prosecution of violations by the government, it would be unsound to hold that the provision granting a private right of action also applied to the United States. The Court concluded, therefore, that the federal government was not a person entitled to sue for treble damages.

A year after Cooper was decided, the Supreme Court, in Georgia v. Evans, encountered the issue of a state's status as a person under the treble damages provision. Noting that Cooper espoused a standard based on "legislative environment," the Evans majority rejected the contention that the word "person" excludes all

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4 Id. at 608. The Cooper Court observed that sections 1, 2 and 3 of the Sherman Act impose criminal sanctions, see id. at 607, and that section 4 provides for injunctive relief sought by United States attorneys, see id. The Court then noted that section 5 deals with service of process, and section 6 authorizes governmental seizure of goods that are the fruits of an antitrust violation. See id. The Court then focused upon the remaining provision, section 7, see note 80 infra, and emphasized that this section was the only one which granted a private right of action. 312 U.S. at 608. Since section 7 evidently was of a different nature than the other provisions, the Court concluded that a "fair construction of the Act" indicated that Congress intended to detail separate remedial schemes. See id.

5 312 U.S. at 608.

6 Id. at 614. After examining the remedial scheme of the Sherman Act, see note 34 supra, the Cooper Court looked to other considerations tending to militate against inclusion of the federal government within the scope of the term "person." First, the Court observed that since the word was used to describe criminal liability, it seems "obvious" that the term was not intended to encompass the United States. 312 U.S. at 607. The Court then looked to other legislation enacted to supplement the Sherman Act. Id. at 608-10. Section 5 of the Clayton Act, ch. 323, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 16 (1976 & Supp. IV 1980)), which discusses the collateral estoppel effect of equitable actions upon subsequent proceedings, was viewed by the Court as evincing a distinction between governmental proceedings and private actions. 312 U.S. at 609-10. Finally, the Court examined the original statutory scheme as introduced by Senator Sherman. Under this version of the Act, the Court observed, section 1 would have enabled the United States to bring various civil actions. Id. at 611. Conversely, section 2 would have entitled "any person" to sue a "person" or "corporation" for antitrust violations. Id. The Court reasoned that these proposed sections indicated a congressional intention not to provide the United States with a civil action for damages. Id.

7 316 U.S. 159 (1942).

8 Id. at 160. In Evans, the defendants allegedly had engaged in price fixing in the sale of asphalt. Id. The State of Georgia, a purchaser of large quantities of asphalt, sought treble damages under section 7 of the Sherman Act. Id. The district court dismissed the complaint, and the Fifth Circuit affirmed, relying upon the Supreme Court's holding in Cooper. Id. at 161; see notes 33-36 and accompanying text supra.

9 316 U.S. at 161.
governmental bodies.¹⁰ Indeed, the Evans Court observed that, unlike the federal government, states do not have access to the prosecutorial provisions of the Sherman Act.¹¹ Reasoning, therefore, that “[t]he considerations which led [to the Cooper holding] are entirely lacking” when a state’s status as a person entitled to sue is in issue,¹² the Evans Court concluded that state governments may sue for treble damages.¹³

Similarly, in Pfizer Inc. v. Government of India,¹⁴ a foreign government sought person status in an action for treble damages.¹⁵ Significantly, the Supreme Court in Pfizer did not detect a conflict between Cooper’s holding that the sovereign is not a person and the Evans Court’s view that sovereign states enjoy person status.¹⁶ Indeed, the Pfizer Court observed that the two major cases were analytically consistent because neither engaged in a “bare analysis of the word ‘person,’” and both employed the same general approach to the problem of statutory construction.¹⁷ Hence, the Court embarked upon a similar examination of the Sherman Act’s legislative purpose and remedial scheme, concluding that foreign governments are persons qualified to sue.¹⁸ Notably, although the Court in Pfizer considered the analyses of Evans and Cooper dispositive, neither holding was accorded talismanic significance.¹⁹

¹⁰ See id. The Supreme Court rejected the contention that Cooper controlled the question whether state governments were entitled to sue. Id. at 161-62. The Court emphasized that “[i]t was not held [in Cooper] that the word ‘person,’ abstractly considered, could not include a governmental body.” Id. at 161.

¹¹ Id. at 162.

¹² Id. The Evans Court observed that a contrary holding “would deny all redress to a State, when mulcted by a violator of the Sherman Law, merely because it is a State.” Id. at 162-63.

¹³ Id. at 162.


¹⁵ Id. at 309. In Pfizer, the governments of India, Iran and the Philippines brought actions against six pharmaceutical manufacturing companies. Id. The complaints alleged that the defendants violated sections 1 and 2 of the Sherman Act “in the manufacture, distribution, and sale of [a] broad spectrum of antibiotics.” Id. at 309-10. The Eighth Circuit, after examining the Supreme Court’s decisions in Cooper and Evans, determined that foreign governments are persons entitled to maintain a treble damage action under the Sherman Act. Pfizer Inc. v. Government of India, 550 F.2d 396, 399 (8th Cir. 1976), aff’d, 434 U.S. 308 (1978).


¹⁷ Id. at 317. The Pfizer Court observed that both the Cooper and Evans decisions rested upon “the entire statutory context” of the antitrust laws. See id.

¹⁸ See id. at 318.

¹⁹ Id. at 318-19; 27 Emory L.J. 815, 830 (1978). The Pfizer Court found that the reasoning of Evans was controlling since foreign and state governments are similarly situated
Further, courts have declined to extend the *Evans* and *Pfizer* holdings to enunciate the principle that state and foreign governments are "persons" when governmental liability is in issue. Although the *Pfizer* Court determined that foreign nations are persons entitled to sue, these entities are not accorded the same status for purposes of incurring liability. One court faced with the question of such liability remarked that notwithstanding *Pfizer*, prior precedents, holding that foreign sovereigns are not persons subject to suit, remain binding. Similarly, when faced with

under the antitrust enforcement scheme. 434 U.S. at 318. Indeed, the Court stated:

The reasoning of [*Evans*] leads to the conclusion that a foreign nation, like a domestic State, is entitled to pursue the remedy of treble damages when it has been injured in its business or property by antitrust violations. When a foreign nation enters our commercial markets as a purchaser of goods or services, it can be victimized by anticompetitive practices just as surely as a private person or a domestic State. The antitrust laws provide no alternative remedies for foreign nations as they do for the United States.

*Id.* (footnote omitted).

50 See Parker v. Brown, 317 U.S. 341, 352 (1943) (despite *Evans* holding that state governments are persons, their "act[s] of government" are not prohibited); International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 572 (C.D. Cal. 1979), aff'd, 649 F.2d 1354 (9th Cir. 1981) (notwithstanding *Pfizer* holding that foreign governments are persons entitled to sue, those governments are not persons subject to suit). Compare Webster County Coal Corp. v. TVA, 476 F. Supp. 529, 532 (W.D. Ky. 1979) (TVA not liable under the antitrust laws) with United States v. General Elec. Co., 209 F. Supp. 197, 205 (E.D. Pa. 1962) (TVA is person and therefore may sue for treble damages). In Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906), the Supreme Court held that cities are persons entitled to sue for treble damages. *Id.* at 396. In Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Supreme Court, addressing the issue of municipal liability, accorded a great deal of deference to the *Chattanooga* holding. *Id.* at 397. Indeed, the Court observed that the *Chattanooga* case appeared to indicate that the term "person" should include municipalities whether suing as plaintiffs or named as defendants. *Id.* Nevertheless, the *Lafayette* Court qualified its apparent deference by noting that a countervailing policy consideration could lead to a contrary conclusion. The Court stated:

[T]he conclusion that the antitrust laws are not to be construed as meant by Congress to subject cities to liability under the antitrust laws must rest on the impact of some overriding public policy which negates the construction of coverage, and not upon a reading of "person" or "persons" as not including them.

*Id.* (footnote omitted).

51 *Pfizer* Inc. v. Government of India, 434 U.S. 308, 320 (1978); see notes 45-49 and accompanying text *supra*.


53 International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553, 572 (C.D. Cal. 1979), aff'd, 649 F.2d 1354 (9th Cir. 1981). Notably, after examining the *Pfizer* decision, the *OPEC* court chose to "refrain from extending the *Pfizer* ruling beyond the
the issue of state governmental liability, the Supreme Court has refused to extend its holding in *Evans*, that states are persons entitled to sue, beyond its narrow legal sphere. Rather, the Court has resolved the question of liability by looking to "the purpose, the subject matter, the context, and the legislative history" of the antitrust laws in light of the state activity in issue. Thus, notwithstanding its status as a person when acting as a plaintiff, a state will be subject to suit only in limited factual contexts.

It is submitted that the decisions bridging the temporal gap between the *Cooper* and *Sea-Land* opinions militate against the D.C. Circuit's view that a person analysis, predicated upon the specific holding in *Cooper*, can supplant a thorough examination of the antitrust laws. It is further suggested that if a general rule is to emerge from *Cooper*, it is that the courts must approach the question of governmental liability by looking to the various indicators of statutory construction enunciated by the Supreme Court. Significantly, however, the *Sea-Land* court did not rely on *Cooper* and its progeny for the general principles of statutory interpretation espoused therein. Rather, the D.C. Circuit appears to have disregarded these principles, choosing instead to elevate the specific holding of *Cooper*, that the United States may not sue for treble damages under the Sherman Act, to the rubric that the federal government is not subject to any of the proscriptions of the anti-

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strict confines of that case." *Id.* Recognizing the surface anomaly in holding that foreign governments may be plaintiffs but not defendants, the OPEC court nevertheless regarded its conclusion as consistent with analogous holdings of the Supreme Court. *Id.* at 572 & n.19.


55 *Id.* at 351; accord, Missouri v. National Org. for Women, 620 F.2d 1301, 1320 (8th Cir.) (Gibson, J., dissenting), *cert. denied*, 449 U.S. 842 (1980); New Mexico v. American Petrofina, Inc., 501 F.2d 363, 365 (9th Cir. 1974). Faced with the question of a state's liability under the antitrust laws, the *Parker* Court did not give dispositive effect to the *Evans* holding that states are persons entitled to sue. *See* Parker v. Brown, 317 U.S. at 351. Indeed, the Court indicated that the liability of state governments must not be measured by "the literal meaning of the words 'person' and 'corporation.'" *Id.* Rather, the Court followed the general standard of statutory interpretation enunciated in *Cooper*, see note 33 and accompanying text *supra*, by examining the purpose and legislative history of the Sherman Act. 317 U.S. at 351. Concluding that the legislation was designed to affect only business practices, the *Parker* Court held that notwithstanding *Evans*, a state's sovereign activities are not within the ambit of the Act. *Id.* at 352.


57 *See* Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d at 245-46.

58 *See* United States v. Cooper Corp., 312 U.S. 600, 614 (1941).
In relying upon the fact that "Congress addressed only the direct holding" of the Cooper decision by amending the Clayton Act in 1955 to grant the United States a right of action for actual damages, the Sea-Land court apparently regarded Congress as acquiescing in the Supreme Court’s dictum that the federal government is not subject to antitrust liability. Although Congress did not address this dictum directly, the legislative history of the 1955 amendment contains statements voicing extreme disapproval of the Cooper decision. Indeed, some members of Congress noted that it was always assumed that the federal government was a person, and that the legislation was considered a means to return the United States to that status.

Moreover, the Sea-Land court’s reliance upon congressional acquiescence seems tenuous, for it has been recognized that legislative silence provides only a dubious means of ascertaining legisla-

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61 Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d at 245.
62 See 101 Cong. Rec. 5130 (1955) (remarks of Rep. Keating); id. at 5131 (remarks of Rep. Rogers); id. at 9165 (remarks of Sen. Kilgore). Representative Keating denounced the "absurd" situation that the United States, "by far the largest single purchaser of goods and services," was not entitled to sue for treble damages. Id. at 5130 (remarks of Rep. Keating). He referred to the Cooper holding as a "loophole in our antitrust laws [that] must be closed immediately." Id.
63 See id. at 5130 (remarks of Rep. Keating); id. at 5131 (remarks of Rep. Rogers); id. at 9165 (remarks of Sen. Kilgore). Senator Kilgore stated, "[i]t was believed, up until [the Cooper decision], that the existing statute, in referring to 'any person,' included the Government of the United States." Id. at 9165 (remarks of Sen. Kilgore). Representative Rogers was equally explicit in expressing his desire to return the federal government to its original status as a person:

[T]he Committee on the Judiciary has recommended that the Federal Government be given the position of a person so that they may institute suit against individuals and corporations who may have engaged in a conspiracy to violate the Sherman-Clayton antitrust laws. That is the first objective of this legislation . . . .

Id. at 5131 (remarks of Rep. Rogers).
tive intent. The questionable nature of legislative inaction is enhanced when an explanation for such silence is supplied. It is suggested that the legal principles surrounding sovereign immunity provide an explanation at least as plausible as that proffered by the Sea-Land court.

One principle firmly imbedded in the common law is that waivers of sovereign immunity from actions for money damages must be express; courts will not imply such waivers. When the Cooper Court “assumed the United States was not exposed to liability under the Sherman Act” for treble damages, it was mindful of this legal principle. Indeed, one ground for the Court’s refusal to render the government a person entitled to sue was its fear that

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64 See, e.g., United States v. Price, 361 U.S. 304, 310-11 (1960). Frequently, courts have criticized the practice of relying upon legislative inaction as a means to ascertain congressional intent. See Winston v. United States, 305 F.2d 253, 272 (2d Cir. 1962); Aleut Corp. v. Arctic Slope Regional Corp., 421 F. Supp. 862, 866-67 (D. Alaska 1976). Indeed, the Supreme Court has noted that this type of analysis “affords the most dubious foundation for drawing positive inferences,” 361 U.S. at 310-11, and serves as “a poor beacon to follow in discerning the proper statutory route.” Zuber v. Allen, 396 U.S. 168, 185 (1969). On one occasion, the Court went so far as to remark that it “is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.” Girouard v. United States, 328 U.S. 61, 69 (1946); accord, Jones v. Liberty Glass Co., 332 U.S. 524, 533-34 (1947).

Because of the unreliable nature of legislative silence, courts have refused to regard Congress’ failure expressly to reject administrative interpretation as acquiescence in the agency’s interpretation, see, e.g., Sierra Club v. EPA, 540 F.2d 1114, 1126 (D.C. Cir. 1976), unless it is clear that Congress was aware of the administrative policy. Chisholm v. FCC, 538 F.2d 349, 362 (D.C. Cir.), cert. denied, 429 U.S. 980 (1976); Thompson v. Clifford, 408 F.2d 154, 166 (D.C. Cir. 1968). Similarly, when legislation is proposed which would overrule case law, the legislature’s failure to enact the proposal cannot be regarded as supportive of the prior judicial action. United States v. Price, 361 U.S. 304, 310-11 (1960); accord, Helvering v. Reynolds, 313 U.S. 428, 432 (1941).

65 Aleut Corp. v. Arctic Slope Regional Corp., 421 F. Supp. 862, 867 (D. Alaska 1976); see, e.g., Zuber v. Allen, 396 U.S. 168, 185 (1969) (silence paved “two different roads” of interpretation); United States v. Price, 361 U.S. 304, 311-12 (1960) (alternative meaning provided by congressional subcommittee discussion); Girouard v. United States, 328 U.S. 61, 70 (1946) (congressional silence was as consistent with “a desire to leave the problem fluid as . . . with an adoption” of a rule of law); Pacific Legal Foundation v. Goyan, 500 F. Supp. 770, 775 (D. Md. 1980) (court will not venture to speculate in either of two directions of interpretation).


68 Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d at 246; see United States v. Cooper Corp., 312 U.S. 600, 606 (1941).

69 312 U.S. at 606; id. at 619 n.5 (Black, J., dissenting).
such a determination would have signified that the government was a person susceptible to suit.\(^7\) Clearly, if the Court had bestowed person status upon the government, such a decision would have constituted an implied waiver of sovereign immunity.\(^7\) Similarly, Congress may have chosen not to affirmatively confer person status upon the federal government in 1955 because it was not prepared to waive sovereign immunity by expressly making the government subject to antitrust liability.\(^7\) Notably, the Cooper Court

\(^{70}\) Id. at 606. Noting that the term “person” applied to both the defendant and plaintiff provisions in the antitrust laws, the Cooper majority reasoned that unless Congress intended this word to mean different things in the same sentence, the federal government “would not only be entitled to sue but would be liable to suit for treble damages.” Id. In his dissenting opinion, Justice Black challenged this conclusion, observing that “[o]ther principles [would] be material if such a question ever should be presented . . . the most important [being] that of sovereign immunity.” Id. at 619 n.5 (Black, J., dissenting). Thus, it seems that the Cooper Court’s reluctance to hold that the federal government qualified as a person entitled to sue stemmed from its belief that such a determination also would mean the government would be a person susceptible to suit, and in light of sovereign immunity, this could not have been what the legislature intended, for the waiver was not express. See notes 66 & 67 and accompanying text supra.

\(^{71}\) See Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 632 F.2d 680, 687 (7th Cir. 1980). In Champaign-Urbana, the Seventh Circuit addressed the antitrust liability of the Army and Air Force Exchange Service. Id. at 681. The court initially noted that sovereign immunity barred the relief sought absent statutory consent to suit which would not be found by implication. Id. at 687. After examining the legislative history of the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1976), the court determined that this statute was not intended to include the federal government. 632 F.2d at 688. Hence, the court concluded that the Act did not embody a waiver of sovereign immunity. Id. at 687-89. Through this analysis, it appears that the Seventh Circuit equated creation of governmental liability under the antitrust laws with a waiver of sovereign immunity. Thus, the court’s reluctance to find that the federal government fell within the scope of the Act appears to have been predicated upon a belief that such a holding would have amounted to an implied waiver of immunity.

\(^{72}\) The Supreme Court, in United States v. Testan, 424 U.S. 392, 399-400 (1976), addressed the issue of whether a federal employee could maintain an action against the United States under the Classification Act, Pub. L. No. 89-554, 80 Stat. 443 (1966) (codified at 5 U.S.C. § 5101 (1976)). 424 U.S. at 393. The statute stated that its purpose was “to provide a plan for classification of positions whereby . . . the principle of equal pay for substantially equal work [would] be followed.” 5 U.S.C. § 1501(1)(A) (1976). The plaintiffs claimed that they had been classified improperly, 424 U.S. at 393-94, and, therefore, sought reclassification of their civil service positions and backpay for the period of their alleged wrongful classification. Id. at 394. Initially, the Court reiterated the long-standing principle that waivers of sovereign immunity will not be implied. Id. at 399. It then determined that the Classification Act did not expressly make the United States liable. Id. Thus, it appears that the Court concluded that Congress simultaneously had created no substantive right of action under the Act and had not waived sovereign immunity. See id. at 399; Hill v. United States, 571 F.2d 1098, 1102 n.7 (9th Cir. 1978); Collyard v. Washington Capitals, 477 F. Supp. 1247, 1253 n.11 (D. Minn. 1979).

Although many courts regard the creation of a substantive right as independent of a
appeared to treat these two concepts—a waiver of immunity and person status—as functional equivalents.\(^7\) It seems futile, therefore, to speculate as to which of these two notions motivated congressional silence. Nevertheless, the Sea-Land court has engaged in such speculation, holding that Congress' silence proceeded from an affirmative desire to withhold person status from the government.\(^7\)

It is suggested that a wiser course would have been to concede that the inaction of the 1955 Congress could have been motivated by sovereign immunity, and that, in light of the APA waiver, the basis for such silence may have been removed. This change in circumstances, therefore, seems to necessitate a de novo examination of congressional intent with respect to the government's status as a person.\(^7\) It is submitted that the legislative purpose, context and history of the Sherman Act demonstrate that the United States is within the reach of the antitrust laws.

waiver of immunity, see, e.g., Collyard v. Washington Capitals, 477 F. Supp. at 1253, such independence can occur only after the legislature waives sovereign immunity. Hill v. United States, 571 F.2d 1098, 1102-03 n.7 (9th Cir. 1978). The Ninth Circuit has explained these concepts by referring to the Testan decision:

The Court in Testan . . . interpret[ed] Congress' failure to grant the substantive right as synonymous with a refusal to waive sovereign immunity. In many suits . . . [these concepts] are not identical. For example, with respect to certain intentional torts . . . sovereign immunity bars a cause of action that otherwise states a claim . . . Similarly, Congress can waive sovereign immunity as to a category of actions without also granting the substantive right . . . . This appears to be the precise import of the [APA waiver].

These two, normally distinct concepts . . . merge in cases such as Testan where there is neither a blanket waiver of sovereign immunity . . . nor specific, legislatively sanctioned rights . . . In such cases, relief is available only if Congress by statute creates a substantive right. Such a statute can be said simultaneously to create a substantive right and to waive sovereign immunity as to the action appropriate to enforce it.

Id. at 1102 n.7 (citations omitted). It seems apparent, therefore, that since the 1955 amendment to the antitrust laws preceded the APA waiver of immunity, making the government a person in 1955 would have simultaneously created a right of action under the antitrust laws and waived sovereign immunity. It is submitted that this concern may have spurred congressional reluctance to amend the definition of person to include the federal government in 1955. See generally notes 70 & 71 and accompanying text supra.

\(^7\) See United States v. Cooper Corp., 312 U.S. 600, 606 (1941); see notes 33-36 and accompanying text supra.

\(^7\) See Sea-Land Serv., Inc. v. Alaska R.R., 659 F.2d at 245.

\(^7\) See generally note 64 and accompanying text supra.
The Sherman Act was designed to curb the rapid and rampant growth of corporate superstructures after the Civil War. It was aimed at the inequality of wealth, opportunity and living conditions which grew out of the concentration of capital. It is clear that the paramount concern of Congress in passing the Sherman Act was to prohibit those commercial practices which fostered this accumulation of wealth. Thus, Senator Sherman, the sponsor of the legislation, stated that "[t]he object of [the] bill . . . [was] 'to declare unlawful trusts and combinations in restraint of trade and production.'" It appears that anticompetitive activity, the evil sought to be eliminated by the Act, was the prime consideration of Congress in enacting the legislation.

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76 1 H. TOULMIN, A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES v (1949). The Sherman Act was a legislative response to the surge of American industrialization and the rise of the corporate structure occurring between the years 1830 and 1890. Id. Among these corporate powers were the Beef Trust, the Standard Oil Trust, the Steel Trust, the Sugar Trust and the Whiskey Trust. United States v. Trans-Missouri Ass'n, 166 U.S. 291, 319 (1897). In addition, there were a number of corporate superstructures that were not known as trusts, but nonetheless caused the same anticompetitive effects. Id. at 319-20. Included among these entities were the railroad and transportation conglomerates. See Northern Sec. Co. v. United States, 193 U.S. 197, 329-32 (1904). The Sherman Act was designed to harness these corporate powers while serving as a "charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958). In defending his bill, Senator Sherman emphasized that combinations tending to frustrate competition, effectively destroying the small, "humble" businessman, were the focal points of the legislation's aims. 1 E. KINTNER, FEDERAL ANTITRUST LAW § 4.8, at 177 (1980) (quoting 21 CONG. REC. 2569 (1890) (remarks of Sen. Sherman)).


78 Standard Oil Co. v. United States, 221 U.S. 1, 59-60 (1911). In Standard Oil, Chief Justice White traced the common-law history of the antitrust laws, concluding that the statute evolved because existing economic conditions gave birth to undue restraints of trade, and therefore embraced every conceivable class of activity which had such a restraining effect. Id.

79 1 H. TOULMIN, supra note 76, at 7 (quoting 21 CONG. REC. 2456 (1890) (remarks of Sen. Sherman)).

80 Cantor v. Detroit Edison Co., 428 U.S. 579, 604 (1976) (Burger, C.J., concurring); see Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 419-20 (1978) (Burger, C.J., concurring). Chief Justice Burger has stressed that the nature of the anticompetitive activity in issue appears to have been of greater concern to the Sherman Act Congress than the governmental status of potential defendants: It strikes me as somewhat remarkable to suggest that the same Congress which "meant to deal comprehensively and effectively with the evils resulting from con-
To further its procompetitive purpose in the context of an ever-changing economic environment, the legislature consciously employed the broadest of language. Indeed, the language employed in the antitrust laws is so comprehensive, it has been characterized as "more nearly [that of] a constitutional provision than a statute." The use of such sweeping language indicates that the legislature, unable to foresee all potential situations, used words of general import in order to encompass every scheme that might be devised to accomplish an unlawful end. Quite clearly, the legislature considered the judicial branch of government an active partner in this statutory scheme by entrusting to the courts the duty to mold the antitrust laws to accommodate the needs of a dynamic economy.

tracts, combinations and conspiracies in restraint of trade," would have allowed [municipalities] to complain of such economic damage while baldly asserting that any similar [economic] harms they might unleash upon competitors or the economy are absolutely beyond the purview of federal law.

Id. at 419; cf. Cantor v. Detroit Edison Co., 428 U.S. at 604 (Burger, C.J., concurring) (Supreme Court "has heretofore focused on the challenged activity, not upon the identity of the parties to the suit").

Legislation enacted subsequent to the Sherman Act appears to have placed even greater emphasis on anticompetitive activity. For example, although section 7 of the Sherman Act provided that a person injured by anticompetitive activity could maintain an action against "any other person," see Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890), the Clayton Act liability provisions are framed in terms of activity, see Clayton Act, ch. 323, § 4, 38 Stat. 731 (1914). Since section 7 of the Sherman Act was repealed and replaced by the broader Clayton Act provision, see Act of July 7, 1955, ch. 283, 69 Stat. 282, under the present antitrust remedial scheme, a person may obtain monetary relief when injured "by reason of anything forbidden in the antitrust laws . . . ." See 15 U.S.C. § 15 (1976) (emphasis added). Similarly, an aggrieved party may obtain injunctive relief "against threatened loss or damage by a violation of the antitrust laws . . . ." See 15 U.S.C. § 26 (1976) (repealed 1978) (emphasis added). Notably, neither the treble damage provision nor the section providing for injunctive relief mandates that a potential defendant be a "person." It is significant, therefore, that the express language of the antitrust laws recognizes activity as the gauge of liability, thus permitting an interpretation inclusive of any entity that engages in anticompetitive conduct. Lafayette v. Louisiana Power & Light Co., 435 U.S. at 398; United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).

81 Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 & n.10 (1940); E. CURTIS, MANUAL OF THE SHERMAN LAW § 131, at 64 (1915).


83 1 H. TOULMIN, supra note 76, at 75; see Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944).

84 E. CURTIS, supra note 81, § 131, at 64.

85 Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940); W. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 6 (1914); H. THORELLI, THE FEDERAL ANTITRUST POLICY 228-29 (1955). As recently as 1978, the Supreme Court noted that the Sherman Act "established a broad policy, to be administered by neutral courts, which would guarantee every enterprise the right to exercise 'whatever economic muscle it can muster . . . .'" Lafayette v. Louisi-
It is not surprising, therefore, that courts have executed this responsibility through principles of construction conducive to flexible application of the antitrust laws. The courts have interpreted the provision describing "persons" subject to the antitrust laws, for example, as "inclusive rather than exclusive," and have eschewed a semantic approach to the term "person" as not comporting with the laws' expansive legislative purpose. It is against this background that the federal government's liability must be assessed.

When the Sherman and Clayton Acts were enacted, the government was much less involved in proprietary activity than it is today, and, thus, it is likely that Congress never anticipated that the United States would violate the antitrust laws. Nevertheless, it appears settled that the courts have been given the power to apply the antitrust laws to situations which were unforeseen at the

\(^8\) National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978); see Carlton, supra note 77; Slater, Antitrust and Government Action: A Formula for Narrowing Parker v. Brown, 69 Nw. U.L. Rev. 71, 83-84 (1974). A prime example of judicial action which fosters flexibility with respect to the Sherman Act is the rule of reason, 435 U.S. at 688, which provides that a commercial activity can "be taken out of the prohibitions of the statute upon the theory of its reasonableness," Standard Oil Co. v. United States, 221 U.S. 1, 67 (1911). This flexible approach is deemed necessary because a literal interpretation of the statute's language, that every contract or combination that restrains trade is illegal, "would outlaw the entire body of private contract law," since every agreement restrains trade. 435 U.S. at 687-88; accord, Chicago Bd. of Trade v. United States, 246 U.S. 231, 241 (1918) (nearly every trade organization imposes restraints on its members' business affairs).

\(^7\) Pfizer Inc. v. Government of India, 434 U.S. 308, 312 n.9 (1978); see Georgia v. Evans, 316 U.S. 159, 162 (1942); cf. Commissioner v. Morgan's, Inc., 293 U.S. 121, 125 n.1 (1934) (under Revenue Act of 1926, use of verb "include" in definitional section connotes that the class embodies more than has been enumerated).

\(^6\) White, Participant Governmental Action Immunity from the Antitrust Laws: Fact or Fiction?, 50 TEx. L. Rev. 474, 498-99 (1972). Governmental enterprises take the form of public ownership, but usually are operated independently of governmental policy. A. WALSH, THE PUBLIC'S BUSINESS 1 (1978). These businesses commonly take the form of public authorities, such as the Tennessee Valley Authority, and provide water, gas, electricity, and transportation services and facilities. Id. By the latter part of the 1940's, approximately 100 enterprises were owned or financed by the government. F. GHERVASI, BIG GOVERNMENT 142 (1949). The number of such government businesses has been growing steadily for the past 50 years. A. WALSH, supra, at 1. See generally A. MILLER, THE MODERN CORPORATE STATE 113-42 (1976).

date of enactment. It seems, therefore, that just as the courts find that certain novel anticompetitive activities can fall within the ambit of the Sherman Act, the judiciary should not hesitate to find that an entity can, by its conduct, bring itself within the antitrust laws.

Finally, the Supreme Court has observed that "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress." Thus, it is manifest that to excuse the federal government from impending or continuing anticompetitive conduct by immunizing it from the injunctive power of the courts would thwart the very purposes of the antitrust laws. It is submitted that this is perhaps the strongest argument for permitting plaintiffs to obtain equitable relief, for "the general purpose [of a statute] is a more important aid to [its] meaning than any rule which grammar or formal logic may lay down."
EXTENT OF LIABILITY

It is not suggested that the United States should be amenable to suits for injunctive relief for all forms of governmental activity. Since the antitrust laws are designed to proscribe only commercial practices having anticompetitive effects, logic would dictate that the federal government's sovereign activities should remain beyond the reach of the antitrust laws. The Supreme Court has made a similar distinction in the area of state action, articulating standards for gauging the liability of states and municipalities.

Under the state action doctrine, the conduct of a state is regarded as immune when it is viewed as the act of a sovereign.

"[s]tatutes in derogation of the common law will not be extended by construction," it is also true that "[s]uch acts will be liberally construed if their nature is remedial." Id. at 401. Notwithstanding this amalgam, the underlying purpose of a statute is at the forefront of any question of statutory interpretation or construction. See Panama Ref. Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting); Commissioner v. Guggenheim, 288 U.S. 280, 285 (1933) (Cardozo, J.); California v. EPA, 511 F.2d 963, 967 (9th Cir. 1975), rev'd on other grounds, 426 U.S. 200, 227-28 (1976). Indeed, Justice Frankfurter once stated:

Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose.

F. Frankfurter, SOME REFLECTIONS ON THE MEANING OF STATUTES 20 (1947). This appears to be true particularly when the antitrust laws are construed. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 489 (1940); E. CURTIS, supra note 81, §§ 121 & 130.

"See notes 78-80 and accompanying text supra.


98 Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 399 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773, 777 (1978); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963); Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963); White, supra note 89, at 479. Although the terms "exemption" and "immunity" have been used interchangeably by both courts and commentators, Saveri, The Applicability of the Antitrust Laws to Public Bodies, 4 U.S.F.L. Rev. 217, 227-28 (1970); White, supra note 89, at 476; see, e.g., Crocker v. Padnos, 483 F. Supp. 229, 232 (D. Mass. 1980) (use of "exempt" where "immune" would be more accurate), these words embody distinct concepts. Saveri, supra, at 218. Antitrust immunity describes activities or parties which were never intended by Congress to come within the scope of the antitrust laws. White, supra note 89, at 476. Antitrust exemption describes conduct or parties which ordinarily would fall within the Sherman Act but have been declared to be exceptions. Id.

While many exemptions to the antitrust laws exist, see, e.g., 7 U.S.C. § 608b (1976) (agreements between the Secretary of Agriculture and private citizens are exempt); 46 U.S.C. § 814 (1976) (certain agreements in shipping industry are exempt), they are not to be implied lightly. Silver v. New York Stock Exch., 373 U.S. 341, 359 (1963). For a comprehensive list of cases in which the courts have refused to imply exemptions, see Alabama Power Co. v. Alabama Elec. Cooper., 394 F.2d 672, 681-82 (5th Cir.) (Godbold, C.J., dissenting), cert.
government, and the acts of a municipality are similarly shielded when they are sanctioned by a state policy of displacing competition with regulation or "monopoly public service." In *Parker v. Brown*, for example, the Supreme Court upheld a marketing program organized pursuant to a California statute designed to "conserve [the] agricultural wealth of the [s]tate." The Court determined that "the Sherman Act did not undertake to prohibit" the exercise of such legislative programs since they can be considered the acts of a sovereign state. Because the *Parker* opinion appeared to grant blanket immunity to states committing antitrust violations, it was severely criticized. In a later case, however, the Court rejected the contention that a governmental entity automatically will escape liability under the state action doctrine by virtue of its status. The Court held that a state agency can fall within the scope of the Sherman Act when it voluntarily joins in what is essentially a private anticompetitive activity. Subsequently, this approach was extended to municipalities, when the Court held that these entities are liable for antitrust violations unless the challenged activity is authorized or directed by a state. Thus, the standard embodied in the state action doctrine appears to preclude liability when the allegedly illegal activity occurs pursuant to a

denied, 393 U.S. 1000 (1968).


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100 317 U.S. 341 (1943).

101 Id. at 346. The California Agricultural Prorate Act authorized the establishment of programs which would restrict competition among growers. *Id.*

102 Id. at 352.

103 See, e.g., *Slater*, supra note 86, at 73.


105 Id. at 790.

“clearly articulated and affirmatively expressed . . . state policy.”107 It is suggested that this doctrine would provide a useful framework within which the federal government’s proprietary activities can be scrutinized in accordance with the antitrust laws.108

CONCLUSION

When the federal government enters the marketplace, it divests itself of its sovereignty and, in essence, becomes a trader.109 The government’s role in the commercial sphere increasingly has projected the United States into the dominion of the antitrust laws. To effectuate the purposes of those laws, it seems that the courts must adopt an enlightened approach to statutory interpretation. Indeed, Professor Llewellyn has urged that when “a statute is to be merged into a going system of law . . . the court must do the merging, and must in so doing take account of the policy of the statute—or else substitute its own version of such policy. Creative reshaping of the net result is thus inevitable.”110

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107 435 U.S. at 410 (Brennan, J., plurality opinion).
108 In 1974, a presidential task force was established to investigate the various immunity and exemption doctrines promulgated under the antitrust laws. Antitrust Exemptions and Immunities: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 95th Cong., 1st Sess. 1880 (1977). This group was formed to scrutinize the exclusions from antitrust coverage and to discern which were suitable for reform. Id. In its report, the task force recognized the tremendous increase in governmental proprietary activity, at the local, state and federal levels. Id. at 1889. The group acknowledged the conflict between governmental enterprises and the antitrust laws, id., observing that “the government owner regards its corporation’s activities as ‘political,’ and hence completely outside the scope of laws regulating business conduct, while the federal government regards the enterprise’s activities as ‘commercial,’ and thus subject to the antitrust laws.” Id. After citing the United States Postal Service as a prime example of “plainly commercial activity,” id. at 1889, the task force concluded that

[The] more reasoned approach to the question whether government enterprise should be exempt from antitrust laws is to ask whether the state-run enterprise is engaged in a plainly commercial activity or business. . . . If the activity is “political,” it should be exempt without regard to corporate form. However, if the activity is “commercial,” the enterprise ought to be subject to ordinary commercial rules, including the antitrust laws.

Id. at 1890 (footnotes omitted).
110 Llewellyn, supra note 29, at 400.