

# LEVELING THE PLAYING FIELD: MAKING FEDERAL MARKET PARTICIPANTS ACCOUNTABLE FOR THEIR ANTITRUST VIOLATIONS

## I. INTRODUCTION

Historically, our nation's fundamental economic policy has been to foster competition in the market so that businesses have equal opportunity to seek access to the market on their merits.<sup>1</sup> At the same time, however, our nation has granted a privileged status to one market participant, itself. When the federal government engages in trade or commerce in the United States, it enjoys the competitive advantage of not being held accountable for its antitrust violations.<sup>2</sup> Quite simply, the government allows itself to act anticompetitively when it enters the "free" market. The result is an imbalance in opportunities to compete on the merits and a practice which directly contradicts our society's economic philosophy. This inconsistency between policy and practice creates an unlevel playing field for private firms and undermines the notion of a capitalist economy to the detriment of consumers.

This Article will argue that federal market participants should face judicial accountability for their alleged antitrust violations in order to realize the benefits of a truly competitive

---

1. *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general . . . are the Magna Carta of free enterprise. . . . And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."); *see also* *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992) (emphasizing that "preservation of the free market and of a system of free enterprise without price fixing or cartels" is a national policy of a "pervasive and fundamental character"); *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978) (citations omitted) (stating that Congress intended for antitrust policies to "establish a regime of competition as the fundamental principle governing commerce in this country").

2. *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981) ("The Sherman Act, we conclude, does not expose United States instrumentalities to liability, whether legal or equitable in character, for conduct alleged to violate antitrust constraints.").

national marketplace. Part II analyzes the problems arising out of the judicially created doctrine of federal antitrust immunity.<sup>3</sup> In Part III, this Article addresses the possibility of congressional action in making the laws consistent regarding who may be a party to antitrust actions.<sup>4</sup> Part IV argues that judicial consistency in applying antitrust policies to both governmental and private market participants will result in the truly free market economy envisioned by the antitrust lawmakers.<sup>5</sup>

## II. THE PROBLEM OF FEDERAL ANTITRUST IMMUNITY

The common law doctrine of sovereign immunity, a reminder of our legal system's English origins, is a concept deeply woven into our country's jurisprudence.<sup>6</sup> To the British, sovereign immunity meant no party was able to drag the King into the courtroom without his consent.<sup>7</sup> In America, the privileges of this judicially created doctrine reside with the states and the federal government.<sup>8</sup> Lack of jurisdiction over the federal government in particular extends to governmental agencies and officers, those entities and individuals through whom the federal government acts.<sup>9</sup> An action nominally against an agency or an official is, in fact, against the government when the judgment sought would affect public funds, property, or administration or would require the government to act or refrain from acting.<sup>10</sup> The policy behind the doctrine of sovereign immunity has long been that judicial interference with government functions could potentially hamper government performance.<sup>11</sup> Therefore,

---

3. See *infra* text accompanying notes 6-42.

4. See *infra* text accompanying notes 43-66.

5. See *infra* text accompanying notes 67-116.

6. See *United States v. Lee*, 106 U.S. 196, 207 (1882).

7. *Lee*, 106 U.S. at 205.

8. See *id.* at 205-06.

9. See *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-89 (1949).

10. *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

11. William Cohen, Comment, *The Sovereign Immunity Doctrine and Judicial Review of Federal Administrative Action*, 2 UCLA L. REV. 382, 383 (1955). But see Jeremy Travis, Note, *Rethinking Sovereign Immunity After Bivens*, 57 N.Y.U. L. REV. 597, 617-18 (1982). Travis presents a thorough discussion of the history of the doctrine of sovereign immunity but criticizes courts for continuing to invoke it despite its outdated rationales and its failure to provide a remedy for the government's

courts do not require the United States to defend itself in its own courtrooms unless it consents to suit through a congressional dictate waiving its sovereign immunity.<sup>12</sup>

Although Congress has stripped the United States of some portions of the sovereign immunity it once enjoyed,<sup>13</sup> the federal government remains entirely beyond the grasp of antitrust liability.<sup>14</sup> Application of this doctrine to matters arising from performance of governmental functions is easily understood.<sup>15</sup> Where, however, the government is acting in the role of a commercial participant in a market, the rationale is problematic because it is inconsistent with Congress's policy of promoting competition in the free market. Nonetheless, the law appears clear that even when the federal government itself engages in interstate commerce, it is free to and indeed often does both impose unreasonable restraints upon competition and monopolize or attempt to monopolize trade.<sup>16</sup> This conduct, if practiced by private market participants, would violate the federal antitrust laws.<sup>17</sup>

The *per curiam* decision in *Medical Association of Alabama*

---

abridgment of constitutionally protected interests. *Id.* at 604-17. He argues that because the doctrine is not derived from the Constitution and is not statutorily prescribed, the Supreme Court may circumvent (and has circumvented) the doctrine's harsh result that federal governmental entities escape liability for the injuries they inflict. *Id.* at 600.

12. *United States v. Testan*, 424 U.S. 392, 399 (1976).

13. *See, e.g.*, Administrative Procedure Act, 5 U.S.C. § 702 (1994) (waiving sovereign immunity in suits for judicial review of agency conduct where plaintiff seeks nonmonetary damages); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2672 (1994) (waiving sovereign immunity for certain recognizable causes of action in tort committed by the government).

14. *See generally* *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981) (holding that in amending § 702 of the APA to waive sovereign immunity for nonmonetary actions against federal agencies, Congress did not intend for the United States to be subject to antitrust liability); *Williams Elec. Co. v. Honeywell, Inc.*, 772 F. Supp. 1225, 1229 (N.D. Fla. 1991) (noting that it is "well-settled that federal agencies and their officials acting in their official capacity are immune from federal antitrust liability").

15. Nevertheless, in cases involving municipalities engaged in proprietary functions, the Court has refused to accept the arguments that acting for the welfare of its citizens and that being subjected to political control are adequate substitutes for the regulatory forces of the antitrust laws. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 403-06 (1978).

16. *See* *Sea-Land Serv., Inc.*, 659 F.2d at 245.

17. Sherman Act, 15 U.S.C. §§ 1, 2 (1994).

*v. Heckler*<sup>18</sup> provides an example of the judicial practice of exempting the United States from accountability for antitrust violations.<sup>19</sup> In *Medical Association of Alabama*, the Eleventh Circuit, in a mere five sentences, upheld a district court's dismissal of the plaintiff's antitrust claim against federally funded rural health care centers.<sup>20</sup> The lower court explained that in ruling on motions to dismiss, federal courts accept as true the facts alleged in the complaint.<sup>21</sup> Because the defendants named in the complaint were federal officials and private parties acting at the direction of federal officials, the lower court refused even to consider any claims that the defendants' conduct stifled competition among physicians in Alabama.<sup>22</sup> Therefore, the federal agency which controlled the rural health community centers was entitled to violate the antitrust laws, resulting in injury to competition, without fear of judicial sanction. In *Medical Association of Alabama*, conduct by private market participants which would be scrutinized and possibly condemned by the court as a violation of the law received the Eleventh Circuit's tacit approval because the federal government was the actor. Such inequality in the highly competitive health care market is merely one example of an area of commerce damaged by inconsistent application of the antitrust laws.

Congress is silent on the issue of federal government exemption from antitrust suit.<sup>23</sup> Furthermore, judicial precedent provides little guidance for understanding why federally owned businesses are exempted from suits for antitrust violations because in the few cases in which the Supreme Court has mentioned its reasons for granting immunity, its explanations have expressed deference to Congress.<sup>24</sup> The Court has explained

---

18. 714 F.2d 107 (11th Cir. 1983), *aff'g* *Medical Ass'n of Ala. v. Schweiker*, 554 F. Supp. 955 (M.D. Ala. 1983).

19. *Medical Ass'n*, 714 F.2d at 108.

20. *Id.*

21. *Medical Ass'n of Ala. v. Schweiker*, 554 F. Supp. 955, 966 (M.D. Ala. 1983).

22. *Medical Ass'n*, 554 F. Supp. at 966.

23. The Sherman Act and the Clayton Act do not mention the United States as a defendant to antitrust suits, and in defining "person" for purposes of describing who may be sued, the statutes specifically omit the federal government. 15 U.S.C. §§ 1, 2, 7, 12, 15 (1994).

24. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961) (stating that whether a law should be enacted or enforced is

that where Congress granted a governmental entity the authority to engage in trade or commerce, any antitrust violation the entity commits is the "result of valid governmental action," so it is shielded from judicial review.<sup>25</sup> This judicial interpretation of Congress's grant of authority implies that when Congress gives federal entities the general power to participate in the market, the specific power to engage in anticompetitive conduct accompanies the general power. Rather than conducting further statutory interpretation to determine whether Congress specifically granted antitrust immunity to federal entities engaged in commercial enterprises, the Court has routinely applied a blanket grant of antitrust immunity.<sup>26</sup> While the doctrine of sovereign immunity is rational for political systems in which there is, in fact, a sovereign, it is a judicially constructed principle that is heavily criticized and arcane in the United States.<sup>27</sup>

A doctrine related to the judicially created doctrine of federal antitrust immunity is the state action doctrine,<sup>28</sup> which both private and state or local government-owned businesses may

---

the responsibility of the legislative and executive branches as long as the law is constitutional).

25. *Noerr*, 365 U.S. at 136. The Court has, however, refused to allow certain governmental entities to completely ignore the anticompetitive effects of their public functions as this would be at odds with Congress's antitrust policies. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1978) (dictum).

26. *Noerr*, 365 U.S. at 136; see also *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 245 (D.C. Cir. 1981) (affirming summary judgment based on the practice of granting antitrust immunity to "United States instrumentalities"); Travis, *supra* note 11, at 620-21 (explaining that the Court's tendency to find congressional support for governmental exemptions from suit in Congress's silence is a dangerous practice). Travis asserts that the judicial implication that Congress waived immunity under certain conditions because it implicitly intended immunity to attach in others erroneously assumes that "both houses of Congress concurred in that exception." *Id.* at 621.

27. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 42 (1992) (Stevens, J., dissenting); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 19-39 (1963); Travis, *supra* note 11, at 618-19.

28. This Article expresses no opinion as to the validity of the state action doctrine as a means of excusing conduct which restrains trade. It seeks only to point out that this doctrine provides defendants with a defense to their anticompetitive conduct and is not absolute. Therefore, it affords injured parties the opportunity to address the court with their challenges without being summarily dismissed with the mere pronouncement that the defendants are cloaked with the blanket of immunity. Such a process falls more closely in line with our nation's fundamental policy of preserving the free market, effected in part by antitrust laws.

raise as a defense to antitrust challenges.<sup>29</sup> Under this defense, defendants must prove their allegedly anticompetitive conduct was "truly the product of state regulation"<sup>30</sup> by meeting the Supreme Court's two-prong test<sup>31</sup> of proving the challenged action was (1) "clearly articulated and affirmatively expressed as state policy" and (2) "actively supervised" by the state.<sup>32</sup> A "clearly articulated" state policy is one which either "expressly *permits*" or compels a restraint<sup>33</sup> and which has a regulatory function of paramount value to the injured market.<sup>34</sup> The second prong is more difficult for defendants to meet because it requires they prove the state "exercise[s] ultimate control over the challenged

---

29. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). *Midcal* expanded the rule enunciated in *Parker v. Brown* that states could, through legislative commands, restrain trade without violating the federal antitrust laws. 317 U.S. 341, 352 (1943). The Court grounded its ruling on constitutional principles of federalism: because the Constitution grants states sovereignty, Congress may "constitutionally subtract from their authority" only through express statutory language. *Parker*, 317 U.S. at 351. The Sherman Act expressed no intention to limit state action. *Id.* The *Midcal* Court's expansion of the *Parker* doctrine was to private businesses, establishing that they could be found to be immune from antitrust liability if a state regulatory policy displaced competition in the market. See *Midcal*, 445 U.S. at 105 (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978)).

30. *Patrick v. Burget*, 486 U.S. 94, 100 (1988); see also *Midcal*, 445 U.S. at 105 (holding that a California statute establishing a retail price maintenance scheme was a clearly articulated state policy, but that because the scheme was not implemented with adequate state supervision, the defendant's conduct was not regulated by the state so not immune).

31. *Midcal*, 445 U.S. at 105. The state action doctrine two-prong test was clearly articulated in *Midcal*, but the parameters of the doctrine were shaped by previous Supreme Court decisions. See, e.g., *Parker*, 317 U.S. at 351-52 (establishing the foundation for the state action doctrine by holding that state legislative mandates which regulate the challenged conduct displace federal antitrust laws); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 590-92 (1976) (holding that *Parker* immunity could be afforded to state officials but refusing to extend it to private electric utility company); *Midcal*, 445 U.S. at 105 (concluding that a private business can avail itself of the state action defense); see also *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 65 (1985) (immunizing the price-fixing conduct of a group of privately owned motor carriers organized and acting pursuant to a clearly articulated state policy).

32. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978); accord *Midcal*, 445 U.S. at 105.

33. *Southern Motor Carriers*, 471 U.S. at 61; see also *FTC v. Tico Title Ins. Co.*, 504 U.S. 621, 633 (1992) (holding that a clearly articulated state policy displaces competition).

34. See *Tico*, 504 U.S. at 633 (citing *Midcal*, 445 U.S. at 105).

anticompetitive conduct.<sup>35</sup> This requirement ensures that the state action defense immunizes only that conduct for which the state has considered the possibility of anticompetitive conduct and has condoned in order to further its regulatory function.<sup>36</sup> Thus, the state has "played a substantial role in determining the specifics of the economic policy" and the potential antitrust violation before deliberately intervening to substitute its regulation for competition in the market.<sup>37</sup> In the Supreme Court's words, "[t]he question is not how well state regulation works but whether the anticompetitive scheme is the *State's own*."<sup>38</sup>

The difference between the state action doctrine and federal antitrust immunity is that defendants must raise, argue, and prove by meeting a rigid two-prong test that they are entitled to state action immunity. In contrast to cases in which federal market participants are defendants, plaintiffs in cases in which defendants assert the state action defense *do* receive judicial review of their challenge.<sup>39</sup> The court analyzes the disputed conduct in light of the state regulatory policy to determine whether the state has deliberately intervened to substitute a paramount regulation for competition on the merits.<sup>40</sup> In other words, for defendants to prevail on the state action defense, the judiciary must determine that the state's legislative body considered the potential for anticompetitive conduct but found that its harm did not outweigh the benefit accruing from the state law.<sup>41</sup> The state action doctrine affords no blanket grant of im-

---

35. *Patrick*, 486 U.S. at 101.

36. *Ticor*, 504 U.S. at 634 (quoting *Patrick*, 486 U.S. at 100-01).

37. *Id.* at 634-35.

38. *Id.* at 635.

39. See AMERICAN BAR ASS'N, SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1082 (4th ed. 1997) (stating that the doctrine requires the court to thoroughly examine the state's regulatory scheme before reaching its holding).

40. See *Ticor*, 504 U.S. at 634-35.

41. See *id.* In this manner the state action doctrine resembles the Court's rule of reason method of analyzing allegedly anticompetitive conduct. See *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). Pursuant to the rule of reason, the court considers the nature, purpose, intent, and effects of the defendant's conduct to determine whether the actions are likely to regulate and promote competition or restrain and suppress competition (i.e., be more procompetitive than anticompetitive). *Chicago Board of Trade*, 246 U.S. at 238. The conduct, although it may restrain trade, will not be held to violate the Sherman Act (i.e., will not be an "illegal restraint of trade") if the procompetitive effects outweigh the anticompetitive ones. *Id.*

munity, as does the principle of federal antitrust immunity, so in this respect it is a more valid exercise of judicial power than the judicially created immunity afforded federal market participants.

Congress's inconsistencies in granting antitrust party privileges and the courts' inconsistencies in applying government policies have led to inefficiency in the free market when the conduct of federal market participants is at issue. Consistency can be achieved by requiring the federal government to defend itself in court against its antitrust accusers. The most effective way to ensure market forces regulate all market participants is through equal application of the antitrust laws to all market participants. Only if all suppliers of goods and services anticipate the possibility of sanctions for engaging in anticompetitive conduct will all be subject to the same regulatory forces of competition. Only if all market participants are equally subject to competition's regulatory influence will all use their resources most efficiently to remain competitive. Efficient competitors are the key to maximizing consumer welfare, the underlying policy goal of the antitrust laws.<sup>42</sup> Because currently the federal government is not threatened by the possibility of defending itself against claims of antitrust violations when it buys and sells goods and services, it has become an inefficient market participant causing injury to consumers.

### III. THE NEED FOR CONSISTENT PARTY PRIVILEGES IN ANTITRUST ACTIONS

When federal courts have considered who may be parties to antitrust actions, they have held that Congress did not intend for the United States and its agents to be defendants in suits for antitrust violations.<sup>43</sup> The courts interpret statutes and probe legislative history to arrive at this conclusion. For example, the United States Supreme Court held in *United States v. Cooper Corporation*<sup>44</sup> that the federal government was not a "person"

---

42. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 51 (1978).

43. *E.g.*, *Sea-Land Serv., Inc. v. Alaska R.R.*, 659 F.2d 243, 244 (D.C. Cir. 1981).

44. 312 U.S. 600 (1941).



within the language of the Sherman Act.<sup>45</sup> The issue presented in *Cooper* was whether section seven of the Sherman Act<sup>46</sup> allowed the United States to bring an action for treble damages against a private entity.<sup>47</sup> Noting that Congress used the word "person" to describe parties who were allowed to sue in the same sentence as the word "person" to describe parties who could be sued, the Court relied on the plain language of the statute to reason that it was "hardly credible" that Congress intended the same word in the same sentence to be applied differently.<sup>48</sup> The doctrine of sovereign immunity precluded the Court from interpreting section seven to mean that the United States was a person for purposes of being a defendant in antitrust cases; therefore, the Court inferred consistency in the statute by holding that Congress did not intend to include the United States when it used the same language to refer to antitrust plaintiffs in treble damage actions.<sup>49</sup>

In *Cooper*, the Court supported its reading of the actual language of section seven of the Sherman Act with a discussion of the overall scheme of remedies the Act provided.<sup>50</sup> It seemed clear to the Court that Congress intended to authorize separate private and governmental causes of action for antitrust injuries.<sup>51</sup> The proceedings the Act permitted the United States to pursue were criminal and injunctive, both for the purpose of vindicating public rights.<sup>52</sup> On the other hand, private parties were entitled to recover three times the actual damages they

---

45. *Cooper*, 312 U.S. at 606.

46. Act of July 2, 1890, ch. 647, § 7, 26 Stat. 210, *superseded by* Act of July 7, 1955, ch. 283, § 3, 69 Stat. 283 (current version at 15 U.S.C. § 15 (1994)). The earliest statute provided:

Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover *threefold the damages* by him sustained, and the costs of suit, including a reasonable attorney's fee.

*Id.* (emphasis added).

47. *Cooper*, 312 U.S. at 603.

48. *Id.* at 606.

49. *Id.*

50. *Id.* at 607.

51. *Id.* at 608.

52. *Cooper*, 312 U.S. at 607-08.

proved in a successful antitrust suit, a remedy designed to be an incentive for injured private parties to expend the time and resources necessary to make out an antitrust violation.<sup>53</sup> Just as in earlier cases the Court had denied private parties the opportunity to sue for injunctive relief because Congress had not explicitly provided them that right,<sup>54</sup> so now it held that Congress had not explicitly provided the United States the privilege it had afforded to private parties.<sup>55</sup> In both its interpretation of the word "person" and its review of the statute's provisions, *Cooper* implied that Congress intended to be consistent in its statutory construction.

Congress responded to *Cooper* by expressing an inconsistent intent. With the addition of section 4A to the Clayton Act,<sup>56</sup> Congress granted the United States permission to sue for actual damages arising out of injuries sustained from antitrust law violations.<sup>57</sup> The statute still distinguished between private persons and the federal government for purposes of recovery, but only by allowing private parties to sue for three times the amount of actual damages and restricting the United States's recovery to damages actually incurred.<sup>58</sup> The policy behind treble damages was to give private parties adequate incentive to bring antitrust suits to ensure the protection of competition.<sup>59</sup> This policy was not served by extending the privilege of three-fold recovery to the United States whose preexisting duty it was to enforce the law. Nonetheless, Congress believed that "as a buyer of goods" the United States should be entitled to compensation for injuries it received in the market.<sup>60</sup>

Congress failed, however, to extend this principle to suits against the government as the "seller of goods." The Government argued in *Cooper* that as a "large procurer of goods and services,

---

53. *Id.* at 608; see also S. REP. NO. 84-619, at 3 (1955), reprinted in 1955 U.S.C.C.A.N. 2328, 2330; H.R. REP. NO. 84-422, at 2-5 (1955), reprinted in 1955 U.S.C.C.A.N. 2328, 2330 [hereinafter *Clayton Legislative History*].

54. *Cooper*, 312 U.S. at 608 n.9.

55. *Id.* at 608.

56. Clayton Act, ch. 283, § 1, 69 Stat. 282 (1955) (codified as amended at 15 U.S.C. § 15a (1994)).

57. *Id.*

58. *Clayton Legislative History*, supra note 53.

59. *Id.*

60. *Id.*

[it] is as likely to be injured by the denounced combinations and monopolies as is a natural or corporate person."<sup>61</sup> It reasoned that the policy considerations for affording private antitrust plaintiffs treble damage remedies applied "with equal force" to the federal government when it was a market participant.<sup>62</sup> Congress found this argument to have some merit because it amended the Clayton Act to allow the federal government to sue for actual damages incurred from antitrust injury.<sup>63</sup> However, Congress failed to see that the argument has a direct corollary, namely that as a seller of goods, the government is as likely to *cause injury* by committing antitrust violations as it is to *be injured* by antitrust violations. The antitrust statutes should apply with equal force to the federal government when it is a seller of goods because the same policy considerations are in force. There is no rational basis for Congress's inconsistency in allowing the United States to be a plaintiff but not requiring it to be a defendant in antitrust suits.

To compound this inconsistency, Congress amended section 4A of the Clayton Act in 1990 to allow the United States to recover treble damages for antitrust violations.<sup>64</sup> According to Congress, "[i]t makes little sense" for United States governmental entities to be a "more profitable target for antitrust violations than private parties" because of the lesser penalty.<sup>65</sup> Congress failed to see that it likewise makes little sense to allow the government to be rewarded by antitrust laws but not to have to suffer the consequences of violating them. Thus, the federal government became a "person" under the antitrust laws for the purpose of bringing suit, thereby eliminating the disparity in recovery allowances between private and federal government

---

61. *Cooper*, 312 U.S. at 605.

62. *Id.*

63. Clayton Act § 4A, ch. 283, § 1, 69 Stat. 282 (1955) (codified as amended at 15 U.S.C. § 15a (1994)).

64. Antitrust Amendments of 1990, Pub. L. No. 101-588, § 5, 104 Stat. 2880. Under the new statute:

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court . . . and shall recover *threefold* the damages by it sustained and the cost of suit.

15 U.S.C. § 15a (1994) (emphasis added).

65. S. REP. NO. 101-288, at 1 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4118, 4119.

antitrust plaintiffs.<sup>66</sup> Remaining, however, is the judicially created disparity that refuses to consider the federal government a "person" for purposes of being an antitrust defendant.

#### IV. THE NEED FOR CONSISTENT APPLICATION OF ANTITRUST POLICY

Courts have recognized that regulated private industries may be immune from antitrust complaint if their conduct is required by the state.<sup>67</sup> Moreover, where federal law regulates private conduct, Congress may provide immunity from antitrust behavior in the statutes establishing the regulation.<sup>68</sup> However, this grant of freedom from antitrust exposure is tempered by the rule that "[i]mmunity from the antitrust laws is not lightly implied."<sup>69</sup> Courts invoke this rule of statutory construction when a federally regulated private party defends itself in an antitrust action by claiming that Congress *impliedly* bestowed antitrust immunity on it through a regulatory statute controlling its conduct.<sup>70</sup> Based on the rule that immunity is not implied lightly, courts have held that Congress must *expressly*

---

66. *Id.*

67. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943) (holding that when a state legislative command imposes a restraint of competition, that legislative authority is a governmental act the Sherman Act does not prohibit); *see also* *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632-33 (1992) (noting that the "doctrine [set out in *Parker*] that federal antitrust laws are subject to supersession by state regulatory programs" is based on principles of federalism); *supra* text accompanying notes 28-41 (discussing the state action doctrine).

68. *See, e.g.*, 49 U.S.C.A. § 10706 (1997 & Supp. 1997) (granting railroad companies antitrust immunity when they are parties to rate agreements).

69. *California v. Federal Trade Comm'n*, 369 U.S. 482, 485 (1962); *see also* *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348 (1963) (stating that immunity from antitrust accountability is not freely granted because the antitrust laws play an "indispensable role" in maintaining a free economy).

70. *See generally* *National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross*, 452 U.S. 378, 393 (1981) (holding that the purposes promoted by the National Health Planning and Resources Development Act did not conflict with sections one and two of the Sherman Act, so respondents' conduct in furtherance of these purposes was not immune from scrutiny under the antitrust laws); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975) (holding that section 22(d) of the Investment Company Act of 1940 mandating price maintenance on the sale of mutual fund shares to a specific class of people could not be extended to allow price maintenance on all broker transactions in violation of the antitrust laws).

grant immunity for a party to enjoy it.<sup>71</sup> The rationale for this approach is that antitrust's policy of protecting free markets overrides the interest in shielding a single business from the law.<sup>72</sup> Furthermore, even in instances in which Congress has granted limited antitrust immunity to regulated industries, it has done so cautiously and sparingly.<sup>73</sup> This congressional desire to emphasize laws which protect competition in free markets illustrates the importance of the United States's "fundamental national economic policy."<sup>74</sup>

The importance of this policy should not be diminished in industries in which the United States has chosen to become a market participant for the mere reason that the United States is a market participant. Since Congress enacted the Sherman Act in 1890, the illegality of engaging in restrictive commercial activity or monopolization of trade has been well-settled.<sup>75</sup> Judicial refinement of what constitutes a restrictive trade practice or an unlawful monopoly has depended largely on judicial inferenc-

---

71. *Philadelphia Nat'l Bank*, 374 U.S. at 348.

72. *See id.*

73. *See Alabama Power Co. v. Alabama Elec. Coop.*, 394 F.2d 672, 680-85 (5th Cir. 1968) (Godbold, J., dissenting). Godbold surveys Congress's limited relinquishment of antitrust immunity in specific areas of certain industries. His review includes, *inter alia*, a discussion of the fact that although the Interstate Commerce Act permits competitors in the transportation industry to merge or agree to fix rates, this congressionally authorized anticompetitive behavior is constrained by the Interstate Commerce Commission's duty to consider how these actions affect competition in the national transportation industry. *Alabama Power*, 394 F.2d at 681. With respect to Congress's intentions to remove only specific aspects of antitrust liability from the transportation industry, the Supreme Court stated that it is the Commission's responsibility to preserve competition among independent common carriers. *McLean Trucking Co. v. United States*, 321 U.S. 67, 87 (1944). Thus, in considering whether conduct among common carriers was within the permissible scope of antitrust immunity afforded to the industry, Congress intended for the Commission to balance the advantages of the conduct with the injury to competition to determine whether the conduct would be consistent with the overall transportation policy. *McLean Trucking*, 321 U.S. at 86-87. In the current transportation policy, Congress explicitly mandates that the Surface Transportation Board promote and encourage fair competition in order to meet consumers' needs. 49 U.S.C.A. § 13101(a)(2)(A), (C) (1997).

74. *National Gerimedical*, 452 U.S. at 388 (quoting *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966)).

75. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7, 36 (1966). Bork notes that while common law precedents existed and the legislators who drafted and argued for the passage of the Sherman Act claimed to have relied on these precedents, the laws were contradictory and confusing. *Id.*

es of Congress's goals in enacting the antitrust statutes.<sup>76</sup> Not surprisingly, courts have changed their view regarding the goals the laws seek to achieve.<sup>77</sup> At the very least, however, the fundamental policy behind the antitrust laws is the protection of competition.<sup>78</sup> The competitive environment that the antitrust laws envision is a free market economy in which businesses have equal opportunity to participate on the merits unimpeded by private or governmental restraints.<sup>79</sup> As long as the federal government gives itself an unfair competitive advantage by exempting the businesses it owns and operates from antitrust liability, the goal of equal opportunity to the free market will never be realized.<sup>80</sup> At this point, the judicially constructed doctrine of sovereign immunity<sup>81</sup> is inconsistent with the congressionally articulated policy of protecting competition, a conflict which should be resolved in favor of antitrust policy.

The injuries to the free market caused by federal antitrust immunity manifest themselves in the facts and judicial resolutions of cases brought by private market participants. Governmental antitrust immunity allegedly created an insurmountable market barrier and injured competition when the plaintiff businesses in *Sakamoto v. Duty Free Shoppers, Ltd.*<sup>82</sup> were precluded from delivering pre-purchased goods to departing passengers

---

76. *Id.* at 7.

77. *Id.*

78. *American Column & Lumber Co. v. United States*, 257 U.S. 377, 400 (1921) (stating that the Court has repeatedly held that the purpose of the Sherman Act is to "maintain free competition in interstate commerce"); see also Bork, *supra* note 75, at 15 (quoting Senator Sherman whose intent was to make illegal any agreement which tended to "prevent full and free competition").

79. *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972); Charles A. Ramsay Co. v. Associated Bill Posters, 260 U.S. 501, 512 (1923); Charles F. Rule & David L. Meyer, *An Antitrust Enforcement Policy to Maximize the Economic Wealth of All Consumers*, in *THE POLITICAL ECONOMY OF THE SHERMAN ACT* 210, 212 (E. Thomas Sullivan ed., 1991).

80. KENNETH M. PARZYCH, *PUBLIC POLICY AND THE REGULATORY ENVIRONMENT* 100 (1993). Parzych argues that congressional grants of immunity to businesses in regulated industries causes a diminution in competitive intensity and a promotion of monopolistic features within the businesses. *Id.* Because the exemption of federally owned businesses brings about the same results, Parzych's argument is equally applicable to governmental entities themselves.

81. See *supra* text accompanying notes 6-12.

82. 764 F.2d 1285 (9th Cir. 1985).

at the Guam airport.<sup>83</sup> The Government of Guam and the Guam Airport Authority, both federal instrumentalities, awarded the defendant business an exclusive contract to sell concessions in the airport, a contract which the plaintiffs claimed unreasonably burdened interstate commerce.<sup>84</sup> Arguably, because they were unable to offer the same services to customers that the defendant business could offer, the plaintiffs suffered antitrust injury in the lost opportunity to participate in the market on the merits.<sup>85</sup> However, that issue was never addressed. Without reaching the antitrust issue, the court dismissed the action on the grounds that the government was exempt from antitrust liability and left the plaintiffs with no chance to receive a judicial determination of whether the government's conduct was illegal.<sup>86</sup> In effect, the judicial system condoned the plaintiffs' foreclosure from the market and the government's injury to competition by allowing the government to act without fear of review.

Protection of competition is the most basic premise behind the promulgation of the antitrust laws, and many scholars and judges argue that a competitive market is essential for maximizing consumer welfare.<sup>87</sup> Maximization of consumer welfare is the paramount antitrust policy because it comports with the country's democratic social, political, and economic policies.<sup>88</sup> Further, the way to maximize consumer welfare in a competitive market is to promote efficiency.<sup>89</sup> Businesses which use resources efficiently to produce the goods and services consumers demand can offer those goods and services at prices close to marginal cost.<sup>90</sup> However, as long as the federal government is al-

---

83. *Sakamoto*, 764 F.2d at 1286.

84. *Id.*

85. *Id.*

86. *Id.* at 1289.

87. *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) ("A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with th[e] fundamental goal of antitrust law."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.'" (citing BORK, *supra* note 42, at 66); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1182 (1981); Rule & Meyer, *supra* note 79, at 212.

88. BORK, *supra* note 42, at 51.

89. Rule & Meyer, *supra* note 79, at 214.

90. *Id.* at 212-13.

lowed to do business inefficiently and outside the bounds of the antitrust laws, the underlying goal of maximizing consumer welfare can never be met.

Government-owned businesses were typically created for purposes other than to make money. Generally, the major rationale for their existence is the provision of some traditionally recognizable public service such as flood control, navigation of waterways, and providing recreational opportunities.<sup>91</sup> This rationale existed, for instance, in the creation of federally owned electric utilities; the sale of electricity was a secondary, by-product activity of the agency.<sup>92</sup> Much of this type of activity was initiated during the New Deal Era of the 1930s.<sup>93</sup> For example, the Tennessee Valley Authority (TVA) was created in 1935 to provide resource development for an economically deprived area.<sup>94</sup> Its principal function was to harness the rivers to avoid flooding and aid navigation, and Congress authorized TVA to sell electricity as a by-product of this public function.<sup>95</sup> Despite the initial congressional purpose, electric sales soon became its principal business.<sup>96</sup> Through its contractual relations with its distributors and without any expressed authorization by Congress, TVA has become a monopoly provider of electric service in Tennessee and parts of six other states.<sup>97</sup>

Five other federal power marketing administrations (PMAs) housed in the Department of Energy have likewise been authorized to sell electricity generated as a by-product of other services.<sup>98</sup> These federal businesses account for over \$8.7 million in electric sales each year, a significant amount of the nation's electric sales.<sup>99</sup> Furthermore, these agencies, particularly TVA,

---

91. PARZYCH, *supra* note 80, at 86.

92. UNITED STATES CONGRESSIONAL BUDGET OFFICE, SHOULD THE FEDERAL GOVERNMENT SELL ELECTRICITY? 3 (1997) [hereinafter CBO].

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. UNITED STATES GENERAL ACCOUNTING OFFICE, FEDERAL ELECTRICITY ACTIVITIES: THE FEDERAL GOVERNMENT'S NET COST AND POTENTIAL FOR FUTURE LOSSES 31 (1997) [hereinafter GAO].

98. CBO, *supra* note 92, at 3.

99. DEPARTMENT OF ENERGY, FINANCIAL STATISTICS OF MAJOR U.S. PUBLICLY OWNED ELECTRIC UTILITIES: 1995 SUMMARY (visited Dec. 18, 1998) <[http://www.eia.doe.gov/cneaf/electricity/public/pub\\_sum.html](http://www.eia.doe.gov/cneaf/electricity/public/pub_sum.html)>.



have been able to dominate sales in the markets where they provide electric service.<sup>100</sup> The tactics used to achieve these results have been alleged to be anticompetitive.<sup>101</sup> Although the public origin of these agencies has long been fulfilled, the federal government continues to operate these power facilities, unfortunately at a loss, which harms rather than promotes consumer welfare.<sup>102</sup> However, because they are federal instrumentalities, these power agencies are immune from liability for their antitrust violations.<sup>103</sup>

Specific conduct the federal power agencies engage in that would constitute antitrust violations were they subject to antitrust liability includes refusals to deal, output restrictions, and predatory pricing.<sup>104</sup> PMAs engage in conduct that, if committed by a private company, would be considered unlawful refusals to deal, such as selling power at below-market prices to public entities and cooperatives but not to private entities and individuals.<sup>105</sup> In addition, PMAs allegedly have denied other potential competitors access to their transmission lines, refusals to deal which may constitute antitrust violations.<sup>106</sup> Finally, the PMAs' inefficiencies have compelled them to have to sell power at prices below cost, thereby incurring a loss that, by virtue of being governmental entities, they do not have to recoup at a later date.<sup>107</sup> Courts have held that predatory pricing tactics adopted by private businesses may constitute anticompetitive conduct in violation of the antitrust laws, so allegations of such

---

100. GAO, *supra* note 97, at 6.

101. *The Application of the Antitrust Laws to the Tennessee Valley Authority and the Federal Power Marketing Administrations: Hearing before the Comm. on the Judiciary*, 105th Cong. (1997) (statement of David L. Sanders, General Counsel, 4-County Electric Power Association).

102. GAO, *supra* note 97, at 7-8 (estimating their costs to have been about \$600 million in 1996, a figure exceeding their revenues).

103. *Id.*

104. *The Application of the Antitrust Laws to the Tennessee Valley Authority and the Federal Power Marketing Administrations: Hearing before the Comm. on the Judiciary*, 105th Cong. (1997) (statement of Katherine E. Sasseville, General Counsel, Otter Tail Power Company) (statement of S. Bradley Van Cleve, Industrial Customers of Northwest Utilities).

105. *Id.*

106. *Id.*

107. *Id.*

conduct merit judicial review.<sup>108</sup>

In a recent Ninth Circuit decision, the court, in effect, authorized Bonneville Power Administration (BPA), a PMA, to conduct its business in violation of the antitrust laws.<sup>109</sup> The court upheld the federally owned power company's "Market-Driven" business plan despite allegations that it contained anticompetitive, discriminatory, and ultra vires provisions.<sup>110</sup> As authorized by its statutory mandate, the agency developed a competitive strategy which allowed it to "function more like a business than a governmental regulatory agency."<sup>111</sup> After finding that Congress granted to BPA unusually broad discretion to conduct itself with a "business-oriented philosophy,"<sup>112</sup> the court engrafted upon this competitive philosophy protection from competition by holding that BPA was not required to consider the effects of certain of its decisions on competition.<sup>113</sup> In other words, the federal business could participate in the electricity sales market as a private competitive business, but, unlike private electric companies, it enjoyed the privilege of exemption from antitrust suit. The result is an unlevel playing field where BPA is unaccountable for its anticompetitive conduct and, therefore, is unregulated by the competitive forces of the market.

The Depression is over, and whatever rationale once existed for giving federal agencies the authority to participate in the electric power market without hindrance from antitrust laws has expired. Today, the government should be concerned with consistency in its economic principles by requiring all of its market participants to be accountable for their antitrust violations. Until federally owned businesses are compelled to compete in the free market under the same rules as private businesses, the inefficiencies which result from their anticompetitive conduct

---

108. See, e.g., *Cargill, Inc. v. Montfort of Colo., Inc.*, 479 U.S. 104, 117-18 (1986).

109. *Association of Pub. Agency Customers, Inc. v. Bonneville Power Admin.* 126 F.3d 1158 (9th Cir. 1997).

110. *Bonneville Power Admin.*, 126 F.3d at 1169.

111. *Id.* at 1170.

112. *Id.* at 1171.

113. *Id.* at 1172. The court stated that "BPA has an obligation to consider some federal antitrust policies when allocating its excess transmission capacity." *Id.* (emphasis added). Nevertheless, it held that BPA had no obligation "to consider the impact of its allocation decision on competition in the relevant markets." *Bonneville Power Admin.*, 126 F.3d at 1172.

will continue to harm consumer welfare.

It is possible that in the current era of antitrust policy, the courts may find some of the allegedly anticompetitive activities of federal agencies to be procompetitive because of their potential to maximize consumer welfare.<sup>114</sup> The plaintiff's burden of proof in antitrust cases is high, thus requiring a defendant to have committed egregious anticompetitive acts to be found liable for an antitrust violation.<sup>115</sup> To defeat a summary judgment motion, if a plaintiff cannot prove that the facts of the case make the claim economically plausible, it "must come forward with more persuasive evidence to support [the] claim than would otherwise be necessary."<sup>116</sup> In short, if an antitrust plaintiff could not prove the governmental entity's action either was economically irrational or actually resulted in harm to consumer welfare, the United States would be successful in its summary judgment motion. Is this too high a burden to require the government to meet? Is the government truly conducting its businesses in the best interest of the public if its economic strategies are irrational or so anticompetitive that they injure consumers? Requiring federal entities to defend themselves against their antitrust accusers would serve not only the policies of the antitrust laws but also the ideals inherent in a democratic society.

## V. CONCLUSION

Private businesses which are injured by federally owned businesses engaging in anticompetitive practices have no legal remedies. Even worse, free market competition injured by anticompetitive governmental conduct is irreparably damaged. For the antitrust laws to have the effect Congress intended them

---

114. See *State Oil Co. v. Khan*, 118 S. Ct. 275, 277-78 (1997) (refusing to hold that vertically imposed maximum price fixing arrangements are per se unlawful because low prices benefit consumers, a goal of antitrust policy); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594-95 (1986) (granting summary judgment to defendants whose challenged conduct included drastic price cutting, behavior which was "the very essence of competition;" possibility that prices were predatory was insignificant because such conduct would harm the actor not consumers).

115. *Matsushita*, 475 U.S. at 587.

116. *Id.*

to have, all market participants, including the federal government, must be regulated by the same market forces, one of which is accountability for the antitrust laws. Otherwise, the inefficiencies which arise when all competitors in a market economy are not playing on a level field will creep into the exempt businesses, and consumers who must purchase goods in an uncompetitive market will be the overall losers.

The Supreme Court has pointed out the inconsistency in the United States's privilege of being allowed to sue for injuries arising out of antitrust violations but not being liable for them.<sup>117</sup> Furthermore, the Court has criticized the argument that antitrust immunity for municipal entities is acceptable simply because the entity is serving a public welfare function, choosing instead to emphasize the "fundamental national policy" of competition in the economic marketplace.<sup>118</sup> The next logical step is to achieve consistency in both antitrust party privileges and national economic policy by abrogating the practice of granting antitrust immunity to federal market participants.

*Jennifer Marie Buettner*

---

117. *United States v. Cooper Corp.*, 312 U.S. 600, 606 (1941).

118. *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 403-07 (1978).