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STUDENT COMMENTS

Parens Patriae Antitrust Suits by Foreign Nations

RUSSELL L. CAPLAN*

I. INTRODUCTION

Three consolidated cases, *Pfizer, Inc. v. Lord*,¹ *Pfizer, Inc. v. Republic of Vietnam*,² and *Pfizer, Inc. v. Government of India*,³ are among the first cases in which foreign governments have sought antitrust relief in the United States.⁴ The India case in particular represents the first *parens patriae* suit brought by a recognized foreign government in the United States.⁵ Although the *parens patriae* suit for treble damages

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1. 522 F.2d 612 (8th Cir. 1975), *cert. denied*, 424 U.S. 950 (1976).

2. *Id.*

3. *Id.*

4. *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971). See Note, *Antitrust-Standing-Foreign Nation Has Standing to Sue for Treble Damages*, 5 VAND. J. TRANS. L. 531 (1972); Note, *The Capacity of Foreign Sovereigns to Maintain Private Federal Antitrust Actions*, 9 CORNELL INT'L L.J. 137 (1975) [hereinafter cited as *Foreign Sovereigns*]; Note, *The Capacity of a Foreign Government to Bring an Action for Treble Damages Under the Federal Antitrust Laws*, 44 GEO. WASH. L. REV. 287 (1976) [hereinafter cited as *Foreign Government Antitrust Capacity*].

India and Israel previously sought antitrust relief as part of the *Electrical Equipment Co.* cases over a decade ago, but since neither suit reached the stage of decision on the merits, neither case has precedential value. *When Foreign Nations Sue Under Antitrust*, BUS. WEEK, Feb. 24, 1975, at 26; *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315, 316 n.3 (S.D.N.Y. 1971).

5. In addition to India and Vietnam, governments involved in this appeal are Iran and the Philippines. Other governments filed similar suits after the commencement of the litigation and are not included in the instant cases. *Pfizer, Inc. v. Lord*, 522 F.2d at 613 n.1. The Vietnam case is complicated by the fact that the United States no longer recognizes the government of Vietnam. "The rule is that unrecognized governments may not maintain suits in state or federal courts." *Id.*, n.3. See *Guaranty Trust Co. v. United States*, 304 U.S. 126, 136-41 (1938); *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); *accord*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408-12 (1964). Thus, although Vietnam was technically the first government to file an amended complaint as *parens patriae* (Mar. 26, 1974), India's complaint (Oct. 11, 1974) represents the first *parens patriae* suit brought by a recognized foreign government and, hence, the first suit with a claim to formal validity.

has received little attention in the past,⁶ it has recently been the subject of Congressional inquiry culminating in its inclusion in the Antitrust Improvements Act of 1976.⁷ In the international context the *parens patriae* suit is of major significance. When combined with a treble damages recovery, *parens patriae* can serve as an instrument of economic redistribution to underdeveloped nations.

The South Vietnam case was dismissed by the district court after receipt of advice that the United States no longer recognized any government as sovereign in the former territory of that republic. *Republic of Vietnam v. Pfizer Inc.*, No. 4-71 Civ. 402 (D. Minn. Dec. 2, 1976), *aff'd*, No. 77-1093 (8th Cir. June 15, 1977).

6. As distinct from the variety of *parens patriae* which involves minors, the insane, and other legally incompetent persons, the type of *parens patriae* in which the state acts on a broader political scale is specifically discussed by only a very few published works. See Alioto, *Toward a More Effective Enforcement of the Antitrust Laws: Suits by the State as Parens Patriae*, 1969 BEVERLY HILLS B.J. 12 (1969); Malina & Blechman, *Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 65 NW. U.L. REV. 193 (1970) [hereinafter cited as Malina & Blechman]; Comment, *State Protection of its Economy and Environment: Parens Patriae Suits for Damages*, 6 COLUM. J.L. & SOCIAL PROBLEMS 411 (1970) [hereinafter cited as *State Protection*]; Note, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages Under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970). See also *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 468-90 (1945) (dissenting opinion of Stone, C.J.); M. FORKOSCH, *ANTITRUST AND THE CONSUMER* 311-34 (1956); Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 YALE L.J. 626 (1976) [hereinafter cited as Handler & Blechman]. The best recent discussion of the general concept of *parens patriae*—the Latin refers to the sovereign's role as "parent of the country"—is in Comment, *State Standing to Challenge Federal Administrative Action: A Re-Examination of the Parens Patriae Doctrine*, 125 U. PA. L. REV. 1069 (1977). See also Note, *The Proposed Antitrust Parens Patriae Act: Overdue Antitrust Relief for Ultimate Consumers*, 45 U. CIN. L. REV. 219 (1976).

7. *Hearings on H.R. 12528 and H.R. 12921 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974); *Hearings on H.R. 38 and H.R. 2850 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975) [hereinafter cited as *Hearings on H.R. 38 and H.R. 2850*]; *Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. (1975). See also AMERICAN ENTERPRISE INSTITUTE, *ANTITRUST PARENS PATRIAE BILL: CONSUMER DAMAGE SUITS BY STATE ATTORNEYS GENERAL* (1975) [hereinafter cited as *PARENS PATRIAE BILL*]. For favorable editorial comment on the proposed legislation, see *Washington Post*, Feb. 29, 1976, at G6, cols. 1-2. For a more reserved endorsement, see *N.Y. Times*, June 17, 1976, at 34, col. 2. The bill became law as the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976). Title III, governing *parens patriae* actions by state attorneys general, constitutes additions immediately following and amending Clayton Act § 4B, 15 U.S.C. § 15B (1970). The practical effect of the bill may have been severely limited, however, by the recent Supreme Court decision, *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977).

The potential impact of this redistributive function therefore requires a close examination of both *parens patriae* and the damages recoverable thereunder. After briefly surveying the history of the antibiotics litigation, this article will examine the history and doctrine of *parens patriae* and employ some of the conclusions reached therein to help answer questions concerning India's capacity to sue under American antitrust law, its preferable litigation posture in the instant case, and its recoverable damages. The article concludes that since India does have capacity to sue, it has a choice from among *parens patriae*, class action, or a suit on its own behalf in its proprietary capacity, and that *parens patriae* is the most effective strategy. Recovery is to be limited to actual damages, preferably to be realized through reduced prices on goods or services sold in the future.

II. BACKGROUND OF THE ANTIBIOTICS LITIGATION

The suit by India⁸ stems from a group of over 150 civil and criminal antitrust suits,⁹ now mostly settled, against Pfizer, Inc., and four other drug companies¹⁰ for violations of the Sherman Antitrust Act¹¹ and related regulations. The actions grow out of proceedings brought by the Federal Trade Commission beginning in 1958¹² and criminal antitrust proceedings starting

8. *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975). For a general history of the antibiotics litigation through May 1975, see Wolfram, *The Antibiotics Class Actions*, 1976 A.B.F. Res. J. 251; for journalistic commentary, see von Hoffman, *Operation Moneyback: Of Price Fixing and Antibiotics*, Washington Post, May 10, 1976, at C1, col. 1.

9. See also *Pfizer, Inc. v. Lord*, 456 F.2d 532 (8th Cir.), cert. denied, 406 U.S. 976 (1972); *United States v. Chas. Pfizer & Co.*, 426 F.2d 32 (2d Cir. 1970); *Chas. Pfizer & Co. v. FTC*, 401 F.2d 574 (6th Cir. 1968); *American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966); *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), aff'd 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971); *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315 (S.D.N.Y. 1971); *In re Antibiotic Drugs*, 320 F. Supp. 586 (J.P.M.L. 1970); *In re Antibiotic Drug Litigation*, 309 F. Supp. 155 (J.P.M.L. 1970), 303 F. Supp. 1056 (J.P.M.L. 1969), 301 F. Supp. 1158 (J.P.M.L. 1969), 299 F. Supp. 1403 (J.P.M.L. 1969), 295 F. Supp. 1402 (J.P.M.L. 1968); *American Cyanamid Co.*, 3 CCH TRADE REG. REP. ¶ 16,527 (FTC 1963), final order entered, id. at ¶ 16,699 (FTC 1963). For a discussion of the last case, see Note, *Improperly Procured Patents: FTC Jurisdiction and Remedial Power*, 77 HARV. L. REV. 1505 (1964) [hereinafter cited as *Patents*].

10. *American Cyanamid Co.*, *Bristol-Myers Co.*, *Squibb Corp.*, and the *Upjohn Co. Olin Corp.*, formerly *Squibb's* parent company, however, appears as a defendant in the present litigation.

11. 15 U.S.C. §§ 1, 2 (1970).

12. *In re American Cyanamid Co.*, Civ. No. 7211 (July 28, 1958), order vacated

in 1961.¹³ The indictments charged: (1) combination and conspiracy in restraint of trade and (2) actual monopolization.¹⁴

Pfizer claimed the discovery in June 1952 of tetracycline, a broad spectrum antibiotic, generally regarded as greatly superior to any of the other "wonder drugs" then on the market, such as chlortetracycline, chloramphenicol, or oxytetracycline.¹⁵ In October, Pfizer applied for a patent. Early in 1953, Cyanamid also claimed discovery of tetracycline and applied for a patent. In succeeding months, Bristol-Myers and other companies filed patents for tetracycline based on a different manufacturing process. It was then determined that for Pfizer to produce tetracycline commercially processes patented by Cyanamid had to be used.¹⁶

At two meetings between Pfizer and Cyanamid held in November 1953, it was agreed that Cyanamid would license Pfizer under the patents Cyanamid held and that proofs of priority on tetracycline would be exchanged. The party found not to have priority on tetracycline would yield its claim to the other; the company granted the tetracycline patent would then

and remanded, 363 F.2d 757 (6th Cir. 1966), *order after remand aff'd sub. nom.* Chas. Pfizer & Co. v. FTC, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

13. *United States v. Chas. Pfizer & Co.*, 61 Cr. 772 (indictment returned Aug. 17, 1961), *rev'd for new trial*, 426 F.2d 32 (2d Cir. 1970), *prior en banc hearing order vacated, opinion of panel modified, and petition for rehearing denied*, 437 F.2d 957 (2d Cir. 1970), *new trial determination aff'd by an equally divided court*, 404 U.S. 548 (1972), *on remand*, 367 F. Supp. 91 (S.D.N.Y. 1973); *see also* *North Carolina v. Chas. Pfizer & Co.*, 384 F. Supp. 265 (E.D.N.C. 1974), *aff'd* 1975-2 Trade Cas. ¶ 60,663 (4th Cir. 1976).

14. *See United States v. Chas. Pfizer & Co.*, 426 F.2d 32 (2d Cir. 1970). In substance the alleged conspiratorial agreements were that: (a) the manufacture of tetracycline be confined to Pfizer, Cyanamid, and Bristol; (b) the sale of tetracycline products be confined to Pfizer, Cyanamid, Bristol, Upjohn, and Squibb; (c) the sale of bulk tetracycline be confined to Bristol and bulk tetracycline be sold by Bristol only to Upjohn and Squibb; and (d) the sale of broad spectrum antibiotic products by the defendant companies and the coconspirator companies be at substantially identical and noncompetitive prices. *Id.* at 33.

15. *Pfizer, Inc. v. Lord*, 456 F.2d 532, 534 (8th Cir. 1972); *United States v. Chas. Pfizer & Co.*, 426 F.2d 32, 35 (2d Cir. 1970). For further analysis of the early historical background with special attention paid to the scientific and technical aspects of the case, *see West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 773-74 (6th Cir. 1966); *Patents*, *supra* note 9.

16. The Duggar and Niedercorn patents for the mold fermentation process. *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 714 (S.D.N.Y. 1970). (Pfizer held the Conover patent.)

license the other. When the proofs were made, Cyanamid yielded to Pfizer, and Pfizer was issued a patent for tetracycline in January 1955.¹⁸ Later in the year Pfizer granted licenses under its patent to Bristol-Myers, Squibb, and Upjohn.¹⁹

From 1951 to 1958 the Federal Trade Commission conducted an investigation of the pricing policies of Pfizer and the other drug companies. The FTC alleged that Pfizer had obtained its tetracycline patent by conspiracy and fraud, that all of the participating drug companies had withheld relevant information from the Patent Office, and that they were guilty of monopolistic practices in the production and sale of antibiotic drugs.²⁰ The bulk of the litigation was over by 1969, ending inconclusively with respect to findings of illegal activity.²¹

The actions by India, Vietnam, and the other foreign governments involved are among the less than 30 remaining antibiotic actions still pending.²² In the present Pfizer litigation, the foreign governments prosecuted claims against the drug companies based on three theories of recovery: (1) as sovereigns with proprietary interests with regard to their own purchases; (2) as *parens patriae* or "official representative" with respect to the foreign nationals, institutions, and corporations who purchased the drugs; and (3) as representatives of the class of

17. "If a patent on [Pfizer's tetracycline] invention were issued to Pfizer, then neither Cyanamid nor Pfizer could make tetracycline except by agreement between them. Each would be blocked by a patent of the other." *Id.*

18. *Pfizer Inc. v. Lord*, 456 F.2d at 534-35; *United States v. Chas. Pfizer & Co.*, 426 F.2d at 35-36; *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. at 714. During this time Bristol had begun to manufacture and market tetracycline, selling it in bulk to Squibb and Upjohn. Cyanamid brought suit against Bristol in September 1954, claiming infringement of its fermentation patents. The matter was settled when Cyanamid agreed to license Bristol, as well as Squibb and Upjohn, for the use of its Duggar and Niedercorn processes. *Pfizer Inc. v. Lord*, 456 F.2d at 535; *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. at 714.

19. *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. at 714.

20. *Pfizer, Inc. v. Lord*, 456 F.2d at 535.

21. There was, however, a finding of misconduct as to Pfizer and Cyanamid before the Patent Office. *Pfizer, Inc. v. Lord*, 456 F.2d at 535; *West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. at 715-18. At one point the government pleaded that "in those seven years [November 1953-September 1961, the alleged conspiratorial period] Bristol made approximately \$57 million in profits [\$69 million minus production costs of \$12 million] In 1954 [100 tetracycline capsules] cost Cyanamid \$2.26, in 1955 it cost them \$1.57. That listed [retail to the consumer] for \$51. The druggist paid \$30.60 — 2,000% mark-up." *United States v. Chas. Pfizer & Co.*, 426 F.2d at 38.

22. See Joint Brief for Petitioners-Appellants at 6; Joint Brief for Respondents at 3; *Pfizer, Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975).

all their citizens who have treble damage claims against the companies.²³ Defendant companies sought reversal of the district court's interlocutory rulings²⁴ that (1) foreign governments are "persons" entitled to sue for teble damages under the anti-trust laws and (2) that foreign governments can sue to collect the damage awards of their citizens as *parens patriae* without meeting the requirements of Rule 23 of the Federal Rules of Civil Procedure regulating the conduct of class action suits.²⁵

The question whether foreign governments have capacity to sue under our antitrust laws was originally left undecided by the Court of Appeals for the Eighth Circuit.²⁶ The issue had been presented to the Eighth Circuit on a writ of mandamus, since the district court had declined to certify the question for interlocutory appeal under 28 U.S.C. § 1292(b).²⁷ Holding that mandamus was appropriate for review only when abuse of judicial discretion so warranted,²⁸ the court ruled that mandamus would not lie merely to challenge the decision of a court when the question was in its jurisdiction.²⁹ Thus the court did not reach the merits of the question, "since in our view mandamus does not lie to review this ruling of the district court."³⁰

On the subject of *parens patriae*, the circuit court held that "[t]he plaintiff governments assert no quasi-sovereign interest, their only interest is proprietary in nature."³¹ "We reverse [the district court], and hold that the plaintiff governments may not sue on behalf of their citizens' antitrust damage claims as *parens patriae*."³² Following the reasoning of the Supreme Court in *Hawaii v. Standard Oil of California*,³³ the court held that such injuries to the state as now contested

23. *Pfizer, Inc. v. Lord*, 522 F.2d 612, 614 (8th Cir. 1975).

24. The orders were not reported, but are reproduced in part in the briefs of the foreign governments, *passim*.

25. *Pfizer, Inc. v. Lord*, 522 F.2d at 614.

26. The district court held in the affirmative. 522 F.2d at 614, 617 n.8, *comment in* 16 VA. J. INT'L L. 437 (1976).

27. 522 F.2d at 614.

28. *Id.*

29. *Id.* "Even if [the court's] decision were erroneous (and we intimate no view on the merits), under the circumstances of this case it would not constitute a clear abuse of discretion." *Id.* at 615.

30. *Id.* at 614.

31. *Id.* at 617.

32. *Id.* at 616.

33. 405 U.S. 251 (1972).

(denominated "injuries to the general economy") were not susceptible of measurement, being rather the sum total of injuries to individuals;³⁴ thus a class action and not a *parens patriae* suit was the correct approach.³⁵ To the foreign governments' argument that such a class action would be financially impossible in the wake of the notice requirements set out in *Eisen v. Carlisle & Jacquelin*,³⁶ the court's response was simply:

While there are no reported decisions on the right of a foreign government to prosecute such an action, in several recent instances domestic state governments have attempted to do so. So far none has been permitted to recover on that theory, and the Supreme Court has expressed a strong preference for class actions instead.³⁷

In the most recent major development,³⁸ the Court of Appeals for the Eighth Circuit on interlocutory appeal affirmed the holding of the District Court for the District of Minnesota, that foreign governments are "persons" entitled to sue for treble damages under section 4 of the Clayton Act.³⁹

The Supreme Court has yet to pass definitively on the legal status of foreign countries under American antitrust laws,⁴⁰ but even if foreign countries are granted capacity to sue, as case law now stands, they could only bring class action suits or suits in their proprietary capacity. But analysis of the principles involved in *parens patriae* doctrine suggests that a *parens*

34. *But see* text accompanying notes 200-15, *infra*.

35. *Pfizer, Inc. v. Lord*, 522 F.2d at 617. "A *parens patriae* action cannot be brought to collect the damage claim of one legally entitled to sue in his own right. . . . In our view, plaintiffs may represent their citizens' damage claims only if they can do so within a Rule 23 class action." *Id.* at 616.

36. 417 U.S. 156 (1974). "[The foreign governments] ask that we expand the concept of *parens patriae* to permit them to sue on behalf of persons legally entitled to sue on their own behalf, but as a practical matter generally unable to do so." *Pfizer, Inc. v. Lord*, 522 F.2d at 617.

37. 522 F.2d at 617.

38. *Pfizer, Inc. v. Government of India*, 1976-1 Trade Cas. ¶ 60,892 (8th Cir., May 19, 1976), *aff'd en banc* 1976-2 Trade Cas. ¶ 61,175 (8th Cir. 1976), *cert. granted*, 45 U.S.L.W. 3690 (U.S. Apr. 18, 1977) (No. 76-749).

39. 15 U.S.C. § 15 (1970). The court also remanded to the district court the question of the viability of Vietnam's suit.

40. This may be an issue of increasing importance; in addition to the governments already mentioned, West Germany, Spain, Colombia, and South Korea have begun or have been involved in suits against Pfizer and the other drug companies. Kuwait's suit ended in a settlement and dismissal without prejudice. *BNA ANTITRUST & TRADE REG. REP.*, No. 697, A-23 (Jan. 21, 1975). The suits by South Korea and Spain have also been withdrawn.

patriae suit is the best solution in such circumstances and should be seriously considered despite the Supreme Court's denial of certiorari on that question.⁴¹

III. THE THEORY OF PARENS PATRIAE

A. *English Origins*

The power of *parens patriae* reflects the tension between the two contradictory attributes traditionally ascribed to sovereign dignity—unfettered liberty and the duty to maintain the general welfare. In modern terms, the uncertainty lies in whether *parens patriae* actions involve right or only privilege. Blackstone, writing in the latter half of the eighteenth century,⁴² defines the scope of *parens patriae* actions by saying that the sovereign is “the general guardian of all infants, idiots and lunatics”⁴³ and “has the general superintendence of all charitable uses in the kingdom.”⁴⁴ The single purpose underly-

41. 424 U.S. 950 (1976). The fact that the *parens patriae* question has been considered apart from foreign governments' legal status as a whole indicates fundamental confusion as to what is meant by *capacity* and what is meant by *standing* to sue. Capacity refers to the right of access to a court generally, the option of presenting a claim for adjudication should the occasion arise. Capacity to sue is an entitlement which may be granted or revoked on various prudential or political grounds whose bases have nothing to do with the criteria for proving standing. Mental incompetents and unrecognized foreign governments, for instance, lack the legal capacity to sue in United States courts, although, since mental incompetents have cognizable rights, alternative methods have been devised by which parties possessing capacity may sue on their behalf. See note 5, *supra*; text accompanying notes 45, 79-90, *infra*.

Standing, by contrast, is less concerned with the identity of the parties than it is with the nature of the alleged offense. Standing therefore assumes capacity and refers to the determination of whether the actual injury complained of is contemplated by the statute or whether the litigating party has a sufficient interest in or nexus to the outcome of the case. *Ass'n of Data Processing Serv. Organizations, Inc. v. Camp*, 397 U.S. 150, 153-54 (1970); *Flast v. Cohen*, 392 U.S. 83, 98-103 (1968); *Baker v. Carr*, 369 U.S. 186, 204 (1962); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 152 (1951) (Frankfurter, J., concurring). Thus the central thesis of this essay is that when a *parens patriae* suit represents the only means of fulfilling the requirements of standing and practicality, especially when capacity has been specifically granted by treaty (see note 205 *infra*), denial of the *parens patriae* claim forecloses all possibility of obtaining relief, and renders “capacity” an empty concept. If an entity such as a foreign nation legally has access to the courts, then to cut off all avenues of access is flatly inconsistent.

42. Blackstone began his law lectures at Oxford University in 1753. These lectures formed the basis of the COMMENTARIES, published in 1765-69. Holdsworth, *Some Aspects of Blackstone and His Commentaries*, 4 CAMB. L.J. 261, 262, 268 (1932).

43. 2 W. BLACKSTONE, COMMENTARIES 47 (T. Cooley ed. 1872) [hereinafter cited as BLACKSTONE]. See Malina & Blechman, *supra* note 6, at 197.

44. 2 BLACKSTONE at 47. The conflation of the power over charitable uses and power over lunatics, idiots, and other legal incompetents under *parens patriae* as

ing the combining of these two powers under the *parens patriae* doctrine would seem to be that of helping those who are legally (and in some cases actually) incompetent to help themselves.

[T]he authority [over charitable uses] thus exercised arises, in part, from the ordinary power of the court of chancery over trusts, and, in part, from the right of the government, or sovereign, as *parens patriae*, to supervise the acts of public and charitable institutions in the interests of those to be benefited by their establishment; and, if their funds become *bona vacantia*, or left without lawful charge, or appropriated to illegal purposes, to cause them to be applied in such lawful manner as justice and equity may require.⁴⁵

Blackstone is inconsistent as to whether the exercise of the *parens patriae* power is discretionary or required by duty. On the one hand,

as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace though not upon compulsion.⁴⁶

exercised by the chancellor was well established by Blackstone's time. 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 474 (1938) [hereinafter cited as HOLDSWORTH]. Originally, however, "[j]urisdiction over those of unsound mind . . . was vested in the Exchequer." *Id.* By the time of Elizabeth the chancellor had already assumed jurisdiction to enforce a charitable legacy by the statutes of charitable uses. See 39 Eliz. I. c. 6 (1597); 43 Eliz. I. c. 4 (1601); G. JONES, HISTORY OF THE LAW OF CHARITY 1532-1827, at 18 (1969).

45. *Mormon Church v. United States*, 136 U.S. 1, 56 (1890).

The common thread that runs through the history of the *parens patriae* concept is the belief that where citizens have been injured, but are not capable of obtaining relief for themselves, the State should act on their behalf.

Originally, the *parens patriae* concept was employed on behalf of persons unable to protect their own interests because of mental incapacity; today, we use the doctrine to protect those who, although injured, are unable to seek relief because of lack of legal standing or adequate financial resources.

Hearings on H.R. 38 and H.R. 2850, *supra* note 7, at 21 (statement of James T. Halverson).

46. 1 BLACKSTONE, *supra* note 43, at 241 (emphasis added). On the perquisites of sovereignty, Blackstone writes:

And, first, the law ascribes to the king the attribute of *sovereignty*, or pre-eminence. . . . His realm is declared to be an *empire*, . . . by many acts of parliament, . . . which at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. . . . [T]he person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary.

On the other hand,

[t]he principal duty of the king is, to govern his people according to law. . . . "The king," saith Bracton, . . . "ought not to be subject to man, but to God, and to the law; for the law maketh the king. . . . [H]e is not truly king, where will and pleasure rules, and not the law."⁴⁷

The "duties" that a monarch "owes" his people are expressed in the coronation oath: "to govern according to law; to execute judgment in mercy; and to maintain the established religion."⁴⁸ A sovereign subject to law in matters pertaining to the dispensing of justice is in fact the crucial element of a constitutional, as opposed to an absolute, monarchy,⁴⁹ but this concept of sovereignty is incompatible with purely discretionary exercise of the *parens patriae* power.⁵⁰

The traditions which ultimately came to be embodied in the doctrine of *parens patriae* arose from political controversies in which the legal principles were directly and deeply rooted.⁵¹ Blackstone, less an original theorist than a codifier of the law, was profoundly influenced by these controversies.⁵² Hobbes, for instance, whose treatise on government, *Leviathan*, appeared in 1651, had argued that men organize, or can justify their organizing, into political units out of inherent weakness:⁵³ without strong central authority civilization would be internecine struggle,⁵⁴ "and the life of man, solitary, poore, nasty, brutish,

Id. See also Malina & Blechman, *supra* note 6, at 198.

47. 1 BLACKSTONE, *supra* note 43, at 233-34. Bracton died in 1268.

48. *Id.* at 235.

49. *Id.* at 233, 234.

50. "Discretion" implies a choice on the part of the chancellor to recognize the power of *parens patriae* or not, as he sees fit. But "law implies governance through a system of rules that are generally applicable." O. FISS, INJUNCTIONS 74 (1972). See also K. DAVIS, DISCRETIONARY JUSTICE (1969); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9-10 (1959).

51. "The contest between King and Parliament for predominance in the state occupies the greater part of this [seventeenth] century; and the victory of the Parliament resulted in the settlement of the law of the constitution upon its modern basis." 6 HOLDSWORTH, *supra* note 44, at 3.

52. Blackstone's debt (and hence that of subsequent Anglo-American jurisprudence) to preceding political theorists, especially Hobbes and Locke, as well as to preceding legal scholars, is manifest throughout the COMMENTARIES. See 6 HOLDSWORTH, *supra* note 44, at 273-301 (*The Influence of Political Theories on the Development of English Public Law*).

53. T. HOBBS, LEVIATHAN 40-41 (C. Macpherson ed. 1968) [hereinafter cited as LEVIATHAN].

54. *Id.* at 41.

and short."⁵⁵ Out of aversion to death and social chaos and desire to enjoy the amenities of civilization,⁵⁶ men contract with a sovereign who is invested with absolute power to look after their interests.⁵⁷ The absoluteness of the sovereign Hobbes sees as the lesser of two evils, the greater evil being civil war,⁵⁸ the closest historical approximation to the hypothetical state of nature.⁵⁹ The function of the sovereign, Hobbes says, is "the procuration of *the safety of the people*. . . . But by Safety here, is not meant a bare preservation, but also all other Contentments of life" ⁶⁰ Thus the sovereign comes into being expressly for the benefit of the subjects, including those for some reason unable to cope for themselves:

And whereas many men, by accident inevitable, become unable to maintain themselves by their labour; they ought not to be left to the charity of private persons; but to be provided for (as far forth as the necessities of Nature require) by the laws of the Commonwealth. For as it is uncharitableness in any man, to neglect the impotent; so it is in the sovereign of a commonwealth, to expose them to the hazard of such uncertain charity.⁶¹

As early as Hobbes, then, the care of the weaker or otherwise less capable members of society was entrusted to the sovereign less as a matter of the sovereign's "grace" than as a condition of contract.

Locke followed Hobbes in all the essentials, except that where Hobbes made the contract binding in perpetuity, Locke made it revocable by the consent of the people.⁶² The increased cohesiveness and stability of the middle class made political disintegration upon termination of the social contract⁶³ less likely, so that the bargaining power between sovereign and

55. *Id.* at 186.

56. *Id.* at 41, 223.

57. *Id.* at 41, 232, 260-61. The state is simply "organised force," L. STEPHEN, HOBBS 211, *quoted in* 6 HOLDSWORTH, *supra* note 44, at 298.

58. LEVIATHAN, *supra* note 53, at 47, 233.

59. *Id.* at 41, 224.

60. *Id.* at 376 (emphasis in original). *See also id.* at 48, 385.

61. *Id.* at 387.

62. In his SECOND TREATISE OF GOVERNMENT, published in 1690, Locke sought to justify the Glorious Revolution of 1688, "to establish the throne of our great Restorer, our present King William, and make good his title in the consent of the people." J. LOCKE, TWO TREATISES OF CIVIL GOVERNMENT vii (W. Carpenter ed. 1940) [hereinafter cited as LOCKE].

63. *See* LEVIATHAN, *supra* note 53, at 55, 58.

subjects shifted to the latter.⁶⁴ Locke was thus able to confirm the notion that power “shall be made use of for the good of the nation.”⁶⁵ For Locke, as for Hobbes, the safety and general welfare of the people was the government’s paramount concern.⁶⁶ Since the purpose of political organization was to avoid the confusion and inconvenience of each citizen’s taking the law into his own hands,⁶⁷ and to preserve one’s possessions,⁶⁸ a government which failed to achieve these ends ceased to have a reason for existence.

It was Locke’s analysis of the function of sovereignty that Blackstone followed more closely. For the jurist, as for Hobbes and Locke, government has its origins in men’s perception of their individual weakness. “The only true and natural foundations of society are the wants and fears of individuals.”⁶⁹ The contract between the governed and the government is not rooted in any particular historical event, but rather is the theoretical justification for obedience to the king and the king’s duty to serve his subjects.⁷⁰ The king’s gross abuse of power constitutes breach of contract on his part, and the arrangement may therefore be dissolved.⁷¹

Locke’s analysis of political incompetency similarly foreshadows Blackstone’s discussion of legal incompetency. Locke states that a child “is in an estate wherein he has no under-

64. “For all power given with trust for the attaining an end being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security.” LOCKE, *supra* note 62, at 192.

65. *Id.* at 202.

66. “*Salus populi suprema lex* [the welfare of the people is the supreme law] is certainly so just and fundamental a rule, that he who sincerely follows it cannot dangerously err.” *Id.* at 197.

67. *Id.* at 181-82.

68. *Id.* at 180.

69. 1 BLACKSTONE, *supra* note 43, at 46.

70. *Id.* at 47.

71. “Indeed, . . . whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides, and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty When King James the Second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown.” *Id.* at 244-45. Recall the conflict between sovereign liberty and sovereign duty, and see Blackstone’s comments at note 46, *supra*.

standing of his own to direct his will"—*i. e.*, the ability to understand and follow the law⁷²—and so needs someone who will understand for him, to prescribe and regulate his actions.⁷³ Children and madmen are not free under the law; only he who truly knows and is capable of following the law is legally competent.⁷⁴ Similarly for Blackstone the task of the guardian is to take care of someone who can not (yet) manage his own affairs and thus needs a substitute to act for him. "The guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune."⁷⁵ By Blackstone's time, then, the weight of authority indicated that an incompetent has some sort of right at law—not merely a privilege—to be fully represented. The sovereign himself is simply the last alternative substitute at bar, after the possibilities of kin and guardians have been exhausted.⁷⁶ It is no longer an option for the king to care for his subjects or not, as he chooses; the king *must* step into the breach.⁷⁷ The upshot of the duty-privilege debate over the *parens patriae* power for present day American law is that *parens patriae* as a duty is outside the Executive's discretion; although the power of *parens patriae* resided long in the Chancery, it is not in this respect like a pardon, which is within the Executive's discretion.⁷⁸

72. LOCKE, *supra* note 62, at 144.

73. *Id.*

74. *Id.* at 144-45.

75. 1 BLACKSTONE, *supra* note 43, at 460.

76. "The government itself is, in a sense, the supreme guardian, whom the individual guardian represents in its solicitude for the welfare of the wards. Guardianship, therefore, is a trust of the highest and most sacred character." 12 R.C.L. *Guardian and Ward* § 60 (1916) (footnotes omitted). See text accompanying note 90, *infra*.

77. And so it remains in English law to this day:

[T]he inherent jurisdiction of the court over minors is derived from the sovereign as *parens patriae*. Traditionally the sovereign is interested in the welfare of his minor subjects who because of tender years are incapable of looking after themselves. "It is in the interest of the sovereign that children should be properly brought up and educated; and according to the principle of our law, the sovereign, as *parens patriae*, is bound to look at the maintenance and education (as far as it has the means of judging) of all of his subjects." The sovereign accords protection to all who owe him allegiance

DICEY AND MORRIS ON THE CONFLICT OF LAWS 401 (J. Morris ed. 1973) (footnotes omitted).

78. U.S. CONST. art. II, § 2 ("[The President] shall have Power to grant Reprieves

As a matter of explicit legal doctrine, the *parens patriae* developed as a trust between the guardian and the ward. The guardian was acting on behalf of, that is, presumptively furthering the welfare of, his charge, the guardian himself having no material interest and acquiring no unfair gain from his services.⁷⁹

For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust.⁸⁰

Originally, "the lord [of the manor] was entitled to the wardship of the lands and person of those of unsound mind. The crown acquired this wardship, to the exclusion of the lord, probably by virtue of some statute or ordinance of the latter end of the reign of Henry III [died 1272]."⁸¹ Although early English law divided the mentally unsound into idiots and lunatics,⁸² "the 'clemency of the crown and the pity of the juries' gradually assimilated the condition of idiots to that of lunatics."⁸³ Jurisdiction was eventually given to the chancellor,⁸⁴ perhaps again because he represented the king's moral sensibility.⁸⁵ The governing principle is that the king's agent, the chancellor, acts in the lunatic's interest and on his behalf.⁸⁶ The

and Pardons for Offences against the United States, except in Cases of Impeachment."').

79. 2 BLACKSTONE, *supra* note 43, at 426-27; *see also* Beverley's Case (1603) 4 Co. Rep. at f. 126 a; Tourson's Case (1611) 8 Co. Rep. 170 a; 1 HOLDSWORTH, *supra* note 44, at 475.

80. 1 BLACKSTONE, *supra* note 43, at 461.

81. 1 HOLDSWORTH, *supra* note 44, at 473.

82. *Id.* at 474. "The idiot is one that hath had no understanding from his nativity;" the lunatic "is one who hath had understanding, but . . . hath lost the use of his reason." 1 BLACKSTONE, *supra* note 43, at 292, 294. The significance of the distinction was that guardianship in the case of idiots "was a profitable right analogous to the right of wardship: in the [case of lunatics] it was in the nature of a duty, and no profit could be made from it." 1 HOLDSWORTH, *supra* note 44, at 474. Why the distinction ever arose at all is a mystery, unless the idiot, who was deemed never to have had any mental ability at all, was regarded as inferior, somehow less a person, and so less worthy of protection than the lunatic, who had once enjoyed the use of his faculties.

83. 1 HOLDSWORTH, *supra* note 44, at 474: citation is to POPE, LUNACY 24 (1877).

84. *Id.* at 475. *See also* G. SPENCE, AN INQUIRY INTO THE ORIGIN OF THE LAWS AND POLITICAL INSTITUTIONS OF MODERN EUROPE, PARTICULARLY THOSE OF ENGLAND 561 (1826).

85. *But see* 1 HOLDSWORTH, *supra* note 44, at 475.

86. *Id.* at 476.

situation was analogous in the case of equitable jurisdiction over infants.⁸⁷

The incapacity of the infant was not supplemented to any very large extent by the powers of the guardian. The general principle seems to be that the guardian must preserve the property in statu quo, and strictly account.⁸⁸

By 1467 the essential notion behind suits in *parens patriae* had already become settled case law. In that year, in a case tried in Chancery,⁸⁹ defense argued that if the plaintiff had not taken care to follow the rules of covenants, and if he thereby suffered injury, it was injury justly incurred through the plaintiff's own foolishness. Nevertheless, the Chancellor proclaimed, *Deus est procurator fatuorum* (God acts as attorney for fools), and granted a subpoena against the defendant.

The maxim bears the stamp of rough and ready mediaeval clericalism, and it opened the way for the Chancery to look behind the external regularity of all sorts of transactions with a view to the redress of wrongs committed by skillful miscreants who had taken advantage of weakness of intellect, insufficient knowledge, or casual negligence.⁹⁰

But whether it is God, the Chancellor, or the Attorney General who brings suit on behalf of the incompetent, the doctrine of *parens patriae* represents in essence the rectification of perceived asymmetry or imbalance in the allocation of legal rights and obligations.⁹¹

Thus the fundamental elements of the *parens patriae* doctrine in English law seem to be: (1) the party is incompetent in law (and often in fact) to secure his rights; (2) there is no other alternative than the sovereign or his representative; (3) the sovereign has a duty to minister to his subjects' welfare; (4) the sovereign as champion acts on someone else's behalf and has no personal interest in the matter whatsoever.

87. 6 HOLDSWORTH, *supra* note 44, at 648-50.

88. *Id.* at 649.

89. Y.B.P. 8 Edw. IV, f. 4, 11 pl., reported in Vinogradoff, *Reason and Conscience in Sixteenth-Century Jurisprudence*, 24 L.Q. REV. 373, 380 (1908), reprinted in 2 P. VINOGRADOFF, COLLECTED PAPERS 190, 198-99 (1928).

90. Vinogradoff (1908), *supra* note 89, at 380.

91. See *Attorney General v. Dublin (Mayor of)*, 1 Bligh N.S. 312 (1827), 4 Eng. Rep. 888 (1901); *Shaftsbury (Earl of) v. Shaftsbury*, Gilb. Rep. 172 (1725), 25 Eng. Rep. 121 (1903).

B. *American Doctrine*

The American transformation of sovereignty under the 1787 Constitution was radical in two respects: it divided the sovereign power between a federal government and its subordinate states,⁹² and the sovereign thereby became no longer identifiable with a single individual or well-defined institution, but rather became a totally corporate entity.⁹³

Dissolution of union with England brought to the fore novel problems in redefining sovereignty as related to the union of the thirteen states.⁹⁴ In the pre-Constitutional era, the newly-independent states governed themselves more as separate commonwealths than as individual members of one nation.⁹⁵

Under the changing exigencies of their polemics and politics, Americans needed some new contractual analogy to explain their evolving relationships among themselves and with the state. Only a social agreement among the people, only such a Lockean contract, seemed to make sense of their rapidly developing idea of a constitution as a fundamental law designed by the people to be separate from and controlling of all the institutions of government.⁹⁶

The Federal Constitution, seen as a Lockean compact between the member states and the central government,⁹⁷ solved the

92. B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 198ff., 224-29 (1971); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 282ff. (1969) [hereinafter cited as WOOD]. "In America the powers of sovereignty are divided between the government of the Union and those of the States." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1812).

93. See E. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957). The trend toward dissociation of the king's private from his public or political status had been going on for some time and was recognized by Blackstone. 1 BLACKSTONE, *supra* note 43, at 155-57. The process of separating out the sovereign's various legal capacities was continued into American law. In an important American case the Supreme Court noted that "Georgia [had] sought to sue in four slightly different capacities: its sovereign capacity . . . ; as a quasi-sovereign . . . ; its proprietary capacity . . . ; and as protector of a general class of its citizens" *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 259 n.13 (1972), discussing *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945).

94. WOOD, *supra* note 92, at 282, 283.

95. *Id.* at 356-57. James Madison himself said: "Who are the parties to [the Constitutional Convention]? The people. Not the people as composing one great body, but the people as composing thirteen sovereignties." *Quoted in* C. WARREN, *THE SUPREME COURT AND SOVEREIGN STATES* 34 (1924) [hereinafter cited as WARREN].

96. WOOD, *supra* note 92, at 283 (footnote omitted).

97. LOCKE, *supra* note 62, at xvii-xviii; WOOD, *supra* note 92, at 283-84ff.

problem of allotting sovereign power by implicitly recognizing that the purpose of federation was not to detract from, but to enhance and supplement, each state's governance of its own citizens.⁹⁸

In accordance with the Lockean scenario, then, the states entered into the Federal Constitution out of perceived weakness in the existing scheme of government, as exemplified in the Articles of Confederation. On May 29, 1787, Governor Edmund Randolph of Virginia introduced his proposal to the Constitutional Convention for a new constitution, arguing that "the federal government could not check the quarrels between states."⁹⁹ In return for the protection afforded by having a supreme central tribunal for resolving disputes,¹⁰⁰ the states forfeited their rights to wage economic and military war.¹⁰¹ In return for acquiring some of the sovereign prerogatives of the states, *e.g.*, levying embargoes and armies, the central government, for its part, accepted a duty to ensure the general welfare of the states.¹⁰² Thus "[t]he state has a *duty* to its inhabitants to provide for and protect their health, comfort and welfare";¹⁰³ this duty, moreover, "is not merely a remote or ethical interest but one which is immediate and recognized by law."¹⁰⁴

Although a state could condescend to be brought before a national court, by no means could a state be *forced* to so submit. The liability of a state to suits by citizens of another state or a foreign country had in fact been promulgated by the Su-

98. The thinking of the colonial period had been heavily influenced by the theory of Emmerich de Vattel: "[S]everal sovereign and independent states may unite themselves together by a perpetual confederacy without each in particular ceasing to be a perfect state The deliberations in common will offer no violence to the sovereignty of each member." E. DE VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE* (1759-60), *quoted in* WOOD, *supra* note 92, at 355.

99. 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 19 (1911). *See generally* THE FEDERALIST Nos. 6, 7, 8, 9, 15, 16, 17 (A. Hamilton), 10, 44 (J. Madison); Woods & Reed, *The Supreme Court and Interstate Environmental Quality: Some Notes on the Wyandotte Case*, 12 ARIZ. L. REV. 691, 705 (1970).

100. U.S. CONST. art. III, § 1; WARREN, *supra* note 95, at 4-5.

101. WARREN, *supra* note 95, at 34-35. *See also* *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 450 (1945); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Hans v. Louisiana*, 134 U.S. 1, 21 (1890); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 728 (1838); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 406-07 (1821).

102. *See State Protection*, *supra* note 6, at 431.

103. *Id.* (emphasis added).

104. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923).

preme Court in *Chisholm v. Georgia*,¹⁰⁵ a decision which "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment to the Constitution was almost unanimously proposed, and was in due course adopted by the legislatures of the States."¹⁰⁶ Thus the United States at first retained the ancient tension between sovereign duty and sovereign liberty.¹⁰⁷

A corollary of the American transformation of royal sovereignty into federal supremacy was the depersonification of the sovereign under the separation of functions doctrine. The Chief Executive retained a few of the prerogatives of the sovereign,¹⁰⁸ the Attorney General or his delegate represented the sovereign in court,¹⁰⁹ and the judiciary became the American successors of the English courts of equity.¹¹⁰ In this way the notion of a sovereign indulging in caprice where matters of individual rights were concerned was rapidly to become obsolete in the American scheme of government. Thus the first distinctive American contribution to *parens patriae* doctrine was the transmutation of sovereignty from monarch and parliament to a federal state system, each state as "quasi-sovereign" enjoying some of the governmental powers once exercised only by the central sovereign.¹¹¹

105. 2 U.S. (2 Dall.) 419 (1792).

106. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890). "This amendment, expressing the will of the ultimate sovereignty of the whole country . . . reversed the decision of the Supreme Court." *Id.* U.S. CONST. amend. XI, ratified in 1798, provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." See generally Tribe, *Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism*, 89 HARV. L. REV. 682 (1976).

107. See text accompanying notes 46-47.

108. For example, the pardon and appointive power, U.S. CONST. art. II, § 2.

109. In the case of *parens patriae*, see, e.g., *Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. (4 Wheat.) 1 (1819); *Kansas v. American Standard, Inc.*, 1970 Trade Cas. ¶ 73,013 (E.D. Pa. 1969).

110. *Mormon Church v. United States*, 136 U.S. 1, 51-58 (1890); *Fontain v. Ravel*, 58 U.S. (17 How.) 369, 389 (1854).

[I]n this country, there is no royal person to act as *parens patriae*, and to give direction for the application of charities which cannot be administered by the court. . . . [In the United States,] the legislature is the *parens patriae*, and, unless restrained by constitutional limitations, possesses all the powers in this regard which the sovereign possesses in England.

Mormon Church v. United States, 136 U.S. 1, 56-57 (1890).

The next task was to determine exactly what the exercise of sovereign power now entailed. This the Supreme Court began to do in *Louisiana v. Texas*.¹¹² Texas had set up a quarantine as a reaction to a single case of yellow fever reported in New Orleans, an action which in effect placed an embargo on commerce being shipped from New Orleans. Invoking the eleventh amendment,¹¹³ the Court held that a suit in *parens patriae* could not be brought for the relief of particular individuals. The harm or benefit involved must be public in nature, although it is concededly difficult to distinguish a large number of particular individuals from a segment of the public at large.

In order then to maintain jurisdiction of this bill of complaint as against the State of Texas, it must appear that the controversy to be determined is a controversy arising directly between the State of Louisiana and the State of Texas, and not a controversy in the vindication of grievances of particular individuals. . . .

. . . [I]n *Debs, Petitioner*, 158 U.S. 564, . . . it was observed: "That while it is not the province of the Government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as affect the public at large, and are in respect of matters which by the Constitution are intrusted to the care of the Nation, and concerning which the Nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the Government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts or prevent it from taking measures therein to fully discharge those constitutional duties."

It is in this aspect that the bill before us is framed. Its gravamen is not a special and peculiar injury such as would sustain an

111. [W]hen this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. And this power still remains with them, except so far as they have delegated a portion of it to the federal government. The sovereign will is made known to us by legislative enactment. The State, as a sovereign, is the *parens patriae*. *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384 (1854). See also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972); *California v. Frito-Lay, Inc.*, 474 F.2d 774, 776 (9th Cir.), cert. denied, 412 U.S. 908 (1973); 4 J. KENT, COMMENTARIES ON AMERICAN LAW 536 (W. Lacy ed. 1889); Wagner, *The Original and Exclusive Jurisdiction of the United States Supreme Court*, 2 ST. LOUIS U.L.J. 111, 147-52 (1952); Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 671-80 (1959).

112. 176 U.S. 1 (1900).

113. *Id.* at 16.

action by a private person, but the State of Louisiana presents herself in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens. . . . [T]he State [of Louisiana] is entitled to seek relief in this way because the matters complained of affect her citizens at large.¹¹⁴

Thus a further major requirement for *parens patriae* suits is that the state have some overriding transcendent interest, so that "the State, as the representative of the public, has an interest apart from that of the individuals affected."¹¹⁵ The state's interest is in fulfilling its duty to secure and maintain the general welfare.

In two cases decided in succeeding years, *Missouri v. Illinois*¹¹⁶ and *Kansas v. Colorado*,¹¹⁷ the Supreme Court sustained a state's claim to injunctive relief as *parens patriae* in order to protect not only the property but the actual health and comfort of its citizens. These cases suggest the wide scope of legitimate concerns which the state might have as *parens patriae*, a range of interests certainly broader than the overseeing of individual incompetents and charitable establishments recognized in English law. In the twin cases

no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. . . . The health and comfort of the large communities inhabiting those parts of the State situated on the Mississippi River are not alone concerned, but contagious and typhoidal diseases introduced in the river communities may spread themselves throughout the territory of the State. . . .

114. *Id.* at 16, 19. For other suits denied *parens patriae* status on this criterion, see *North Dakota v. Minnesota*, 263 U.S. 365 (1923); *Oklahoma v. Atchison, Topeka & Santa Fe Ry.*, 220 U.S. 277 (1911); *Kansas v. United States*, 204 U.S. 331 (1907); *New Hampshire v. Louisiana*, 108 U.S. 76 (1883). See also *Massachusetts v. Missouri*, 308 U.S. 1, 17 (1939) (state may not invoke original jurisdiction of Supreme Court to enforce rights of individual citizens); accord, *Oklahoma ex rel. Johnson v. Cook*, 304 U.S. 387 (1938); *Republic of Iraq v. First Nat'l Bank*, 350 F.2d 645, 648-49 (7th Cir. 1965) ("Federal courts will not entertain a suit at the instance of the United States if the suit is in reality one between private individuals." *Id.* at 648.).

115. *Pennsylvania v. West Virginia*, 262 U.S. 553, 592 (1923). "In [the quasi-sovereign capacity of *parens patriae*] the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain." *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907); see generally J. MOORE, COMMENTARY ON THE UNITED STATES JUDICIAL CODE 624-25 (1949).

116. 180 U.S. 208 (1901).

117. 185 U.S. 125 (1902).

[S]ubstantial impairment of the health and prosperity of the towns and cities of the State situated on the Mississippi River . . . would injuriously affect the entire State.

That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument.¹¹⁸

In this holding a third fundamental principle of American *parens patriae* emerges: the generous conception of what the common welfare includes.¹¹⁹

Since the state as *parens patriae* can sue to protect the welfare of its citizenry as a whole, a *parens patriae* claim could actually oppose the interests of some of the state's citizens. This possibility was appreciated by Justice Holmes in *Georgia v. Tennessee Copper Co.*,¹²⁰ a case in which Georgia as *parens patriae* sought injunctive relief against a factory in Tennessee which was pouring noxious fumes into Georgia from across the state line. Though some workers from Georgia at that factory stood to lose their jobs, "[i]t is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale. . . . Whether Georgia by insisting upon this claim is doing more harm than good to her own citizens is for her to determine."¹²¹ The state's interest as *parens patriae*, then, is a constructive, presumptive interest applied to the major or most acutely affected portion¹²² of the class concerned—a class whose interests may in fact conflict. The interests of a small group, therefore, may be subordinated to the more compelling interests of the populace as a whole, under this reading of the *parens patriae* capacity.

The doctrine of *parens patriae* in American law, therefore, while retaining the essential elements of its English fore-

118. *Kansas v. Colorado*, 185 U.S. 125, 141-42 (1902); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901). See also *New York v. New Jersey*, 256 U.S. 296, 301-02 (1921).

119. The extent to which such broad protection may be construed is indicated by recent dicta: "Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society . . ." *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). See also *Association of Data Processing Service Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970).

120. 206 U.S. 230 (1907).

121. *Id.* at 238, 239. See also *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

122. See *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). *Land O'Lakes Creameries, Inc. v. Louisiana State Bd. of Health*, 160 F. Supp. 387, 389 (E.D. La. 1958), implies that "Minnesota [would have] the right to sue as *parens patriae* in behalf of all, or a substantial number, of her citizens." (emphasis added).

bears,¹²³ developed four additional basic principles: (1) devolution of part of the sovereign's duty of protection to the states as "quasi-sovereigns"; (2) protection not to be extended on behalf of particular individuals; (3) extension of the scope of protection to the various economic and noneconomic components of the public good; (4) state's interest as *parens patriae* presumptively, but not necessarily actually, coincides with all the members of the *patria*.

Having seen how the seminal decisions in American case law enlarged upon English policies, it remains to observe how the American version of *parens patriae* has fared in subsequent invocations of the doctrine. Only two *parens patriae* cases seeking treble damages for antitrust violations have reached the Supreme Court: *Georgia v. Pennsylvania R.R.*,¹²⁴ and *Hawaii v. Standard Oil Co.*¹²⁵ In the earlier case, Georgia sued defendant railroads for fixing noncompetitive and discriminatory rates in (*inter alia*) her capacity as a quasi-sovereign or *parens patriae* and in her proprietary capacity as the owner of a railroad and railroad facilities. Citing *Georgia v. Evans*,¹²⁶ the Court first ruled that Georgia, suing for her own injuries, is a "person" within the meaning of section 16 of the Clayton Act,¹²⁷ additionally, "she is authorized to maintain suits to restrain violations of the anti-trust laws or to recover damages by rea-

123. For early cases in America depending primarily on English doctrine, see *Fontain v. Ravenel*, 58 U.S. (17 How.) 369 (1854); *In re Turner*, 94 Kan. 115, 145 P. 871 (1915); *Sporza v. German Sav. Bank*, 192 N.Y. 8, 84 N.E. 406 (1908); *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917 (1922); *In re Hughes' Estate*, 231 Pa. 475, 80 A. 1104 (1911).

124. 324 U.S. 439 (1945), *comment in* 32 VA. L. REV. 157 (1945).

125. 405 U.S. 251 (1972), *aff'g* 431 F.2d 1282 (9th Cir. 1970), *rev'g* 301 F. Supp. 982 (D. Hawaii 1969). See Handler, *Twenty-Five Years of Antitrust*, 73 COLUM. L. REV. 415, 423-30 (1973); Comment, *Hawaii v. Standard Oil Co.: Aloha to Parens Patriae?*, 22 CATH. U.L. REV. 156 (1972) [hereinafter cited as *Aloha*]; Comment, *State Recovery of Money Damages*, 22 CASE W. RES. L. REV. 789 (1971). See also Case Comment, 15 ST. LOUIS U.L.J. 311 (1970).

126. 316 U.S. 159 (1942).

127. The Clayton Act § 16 provides in relevant part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity

15 U.S.C. § 26 (1970).

son thereof."¹²⁸ The injury, moreover, was serious enough to invoke the Court's jurisdiction.

If the allegations of the bill are taken as true, the economy of Georgia and the welfare of her citizens have seriously suffered as the result of this alleged conspiracy. Discriminatory rates are but one form of trade barriers. They may cause a blight no less serious than the spread of noxious gas over the land or the deposit of sewage in the streams. They may affect the prosperity and welfare of a State as profoundly as any diversion of waters from the rivers. . . . They may arrest the development of a State or put it at a decided disadvantage in competitive markets. . . . These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote; it is immediate. If we denied Georgia as *parens patriae* the right to invoke the original jurisdiction of the Court in a matter of that gravity, we would whittle the concept of justiciability down to the stature of minor or conventional controversies. There is no warrant for such a restriction.¹²⁹

The Court let the *parens patriae* suit lie. Georgia's complaint was consistent with the criteria of public (as opposed to private) protection, a presumptive interest in the welfare of its citizens as an integral whole, and a grave problem falling under the state's police power to resolve.¹³⁰ However, the Court declined to decide whether a *parens patriae* suit will support a treble damage claim, here following *Keogh v. Chicago & N.W. Ry.*¹³¹ to the extent that "damages under the anti-trust laws may not be recovered against railroad carriers though the rates approved by the [Interstate Commerce] Commission were fixed pursuant to a conspiracy."¹³² By all but eliminating treble damages as a remedy in a *parens patriae* antitrust suit, the Court strongly suggests that injunctive relief is indeed available, though the Court never explicitly says as much.¹³³ Just as *Georgia* strongly suggests (but does not conclusively prove) that injunctive relief is available in *parens patriae* suits, so

128. 324 U.S. at 447.

129. *Id.* at 450, 451.

130. *Massachusetts v. Mellon*, 262 U.S. 447 (1923), added the qualification that a state could not act as *parens patriae* on behalf of its citizens against the United States. *Id.* at 485-86. *Accord*, *Pennsylvania v. Kleppe*, 533 F.2d 668 (D.C. Cir.), *cert. denied*, 97 S. Ct. 485 (1976).

131. 260 U.S. 156 (1922).

132. 324 U.S. at 452.

133. *Id.* at 460.

does *Georgia* strongly suggest that treble damages in *parens patriae* antitrust suits may *not* be recovered. In the only *parens patriae* claim considered in the opinion, Count 2 of Georgia's bill of complaint,¹³⁴ Georgia did not seek treble damages under the antitrust laws; where it did seek such damages was in Count 3, in its proprietary capacity.¹³⁵

There matters stood until *Hawaii*. Like *Georgia*, the later case was a *parens patriae* suit against defendant corporations, seeking monetary and injunctive relief under the federal antitrust laws—not section 16 of the Clayton Act this time, but section 4.¹³⁶ Nevertheless the Court ruled expressly that “Hawaii plainly qualifies as a person under both sections of the statute. . . .”¹³⁷ The Court rejected Hawaii's suit, emphasizing the fact that section 4's requirement of injury to “business or property” was not repeated in section 16, which suggested, at least to the five-man majority, that Congress intended different remedies to lie for the two provisions.¹³⁸

Thus, § 4 permits Hawaii to sue in its *proprietary* capacity for three times the damages it has suffered from respondents' alleged antitrust violations. . . . When the State seeks damages for injuries to its commercial interests, it may sue under § 4. But where, as here, the State seeks damages for other injuries,¹³⁹ it is not properly within the Clayton Act.¹⁴⁰

To allow Hawaii to recover treble damages “for injury to its general economy, [would be to] open the door to duplicative

134. Georgia sought treble damages as *parens patriae* on behalf of a limited class of citizens in Count 4, but only Counts 2 and 3 were discussed by the Court.

135. Brief for Plaintiff at 11, *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). Ultimately, the Court, relying on *Keogh*, denied damages to Georgia, on the purely technical ground that the allegedly excessive freight charges were in fact legal because already approved by the ICC. 324 U.S. at 453.

136. The Clayton Act § 4 provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1970).

137. 405 U.S. at 261. The Court relied, as did the State of Hawaii, on *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). See also *Georgia v. Evans*, 316 U.S. 159 (1942).

138. 405 U.S. at 261-62.

139. That is, to its general economy, and not to its business or property as defined by the Court. *Id.* at 263 n.14.

140. *Id.* at 262, 264.

recoveries."¹⁴¹ The Court said that both individuals and the state could seek injunctive relief for the same violation: "[O]ne injunction is as effective as 100, and, concomitantly, . . . 100 injunctions are no more effective than one."¹⁴²

Two points about the *Hawaii* decision need to be made. First, the opinion notes that "[t]he District Court dismissed Hawaii's class action . . . because it was unwieldy,"¹⁴³ but it fails to mention any alternative to the class action as an effective method of obtaining relief. The *parens patriae* posture was rejected, but with the jettisoning of the class action suit as well the parties are apparently without remedy. Recall that the sovereign as *parens patriae* is the champion of those parties who would otherwise be without remedy¹⁴⁴—if there is a just complaint, there should be a way of vindicating it. Second, even if treble damages are not awarded,¹⁴⁵ the Court says nothing in *Hawaii* or elsewhere about the possibility of other forms of monetary awards, for example, actual damages.

IV. FOREIGN GOVERNMENTS' STANDING TO SUE

The Eighth Circuit has now held that foreign governments are "persons" entitled to sue for treble damages under section 4 of the Clayton Act.¹⁴⁶ Noting that a foreign government's standing turns solely on statutory interpretation and hence Congressional intent, the opinion contains a comment concerning the paucity of pertinent material: "Two decisions of the United States Supreme Court offer guidance, but beyond these we find little relevant help in construing the statute."¹⁴⁷ The two cases mentioned are *United States v. Cooper Corp.*¹⁴⁸ and *Georgia v. Evans*;¹⁴⁹ the latter case was found controlling. The

141. *Id.* at 263-64. According to the Court, this is because individuals in their private capacity could sue the same companies for the same offense.

142. *Id.* at 261.

143. *Id.* at 266. See also *id.* at 254, 256 n.6; 431 F.2d at 1282 n.3.

144. See text accompanying notes 76-77, *supra*.

145. Treble damages were intended to induce private parties to participate in the enforcement of antitrust legislation. 405 U.S. at 275.

146. *Pfizer, Inc. v. Government of India*, 1976-1 Trade Cas. ¶ 60,892 (8th Cir., May 19, 1976), *aff'd en banc* 1976-2 Trade Cas. ¶ 61,175 (8th Cir., Sept. 3, 1976), *cert. granted* 45 U.S.L.W. 3690 (U.S. Apr. 18, 1977) (No. 76-749).

147. *Pfizer, Inc. v. Government of India*, 1976-1 Trade Cas. ¶ 60,892, at 68,877 [hereinafter cited as *Pfizer*].

148. 312 U.S. 600 (1941). See note 157, *infra*.

149. 316 U.S. 159 (1942). See note 157, *infra*.

court relied on Justice Frankfurter's majority opinion in *Evans*, which stated that *Cooper* did not mean that a governmental body could not be included in the word "person."¹⁵⁰ This was, nevertheless, a virtual about-face, since *Cooper* had held that the United States Government was not entitled to sue for treble damages because it had alternative sanctions given uniquely to it.¹⁵¹ Foreign governments, according to the recent Eighth Circuit decision, are analogous to domestic states in lacking these alternative sanctions and so have standing under section 4 of the Clayton Act.¹⁵²

Two points in the decision are especially remarkable: first, the admission of the lack of articulate antitrust policy with respect to foreign nations and, second, the desire to ensure that a foreign government has redress against American corporations through one provision or another. To take up the first point, India's capacity to sue for treble damages depends on whether or not it is a "person" under section 4 of the Clayton Act.¹⁵³ Generally speaking, the construction of key terms in antitrust, as in other, legislation turns on the particular policy Congress has decided to effect.¹⁵⁴ Yet Congressional policy with

150. Pfizer, *supra* note 147, at 68,878, quoting *Georgia v. Evans*, 316 U.S. at 161.

151. Pfizer, *supra* note 147, at 68,878.

152. *Id.* at 68,879.

153. 522 F.2d at 614 n.3. See also *Foreign Sovereigns*, *supra* note 4, at 139. See generally W. FUGATE, *FOREIGN COMMERCE AND THE ANTITRUST LAWS* (2d ed. 1973); E. KINTNER & M. JOELSON, *AN INTERNATIONAL ANTITRUST PRIMER* (1974); Kintner, Joelson & Vaghi, *Groping for a Truly International Antitrust Law*, 14 VA. J. INT'L L. 75 (1973); Velvel, *Antitrust Suits by Foreign Nations*, 25 CATH. U. L. REV. 1 (1975) [hereinafter cited as Velvel]; Note, *Extraterritorial Application of United States Laws: A Conflict of Laws Approach*, 28 STAN. L. REV. 1005, 1017-20 (1976).

It is well established that phrases such as "any person" (as in Clayton Act §§ 4, 16) and "every person" in a statute need not extend the statute's applicability beyond the nation's borders *ad infinitum*. "The words 'any person or persons,' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them." *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 631 (1818); accord *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 576-79 (1953).

154. "[The antitrust] statutes do not provide a precise description of prohibited activities. They are couched in broad terms and, for the most part, the terms are undefined. A basic provision, for example, prohibits combinations 'in restraint of trade,' but Congress has left it to the courts to decide case by case what particular business practices fall under this rubric." PARENS PATRIAE BILL, *supra* note 7, at 3. "Arguably, the words 'any person' appearing in section 4 of the Clayton Act evidence an intent by Congress to confer a remedy upon every juristic entity injured by the

regard to foreign governments' status under American antitrust laws is virtually nonexistent:¹⁵⁵ from the Sherman Act to the present, there has been no major and definitive discussion by Congress of American antitrust policy vis-a-vis foreign sovereigns.¹⁵⁶ Not until 1941,¹⁵⁷ in fact, did the Supreme Court have

antitrust laws. The term 'any person' has been broadly interpreted; as the Supreme Court has pointed out, 'The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'" *Foreign Sovereigns*, *supra* note 4, at 150, quoting *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

Since, in common usage, the term 'person' does not include the sovereign, statutes employing the phrase are ordinarily construed to exclude it. But there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.

United States v. Cooper Corp., 312 U.S. 600, 604-05 (1941) (footnotes omitted). "[T]he most important thing to keep in mind is the *result orientation* with which the Court has approached the whole area of private treble-damage litigation." *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1087 (2d Cir. 1971) (emphasis added).

The pivotal concepts in antitrust law are thus defined functionally, *i.e.*, based on legislative decisions as to who and what to protect: who will constitute a "person" and what will constitute "business or property" for purposes of the legislation. For definition of "person" as founded on legislative policy, see 139 A.L.R. 1019-20 (1942). For open-ended concept of "business" as employed by the *Hawaii* court, 405 U.S. at 264, see *Roseland v. Phister Mfg. Co.*, 125 F.2d 417, 419 (7th Cir. 1942). For definition of "property," see *Waldron v. British Petroleum*, 231 F. Supp. 72 (S.D.N.Y. 1964): "The word 'property' is, in a sense, a conclusory term, *i.e.*, an interest which the law protects. A determination whether plaintiff has 'property' involves a value judgment as to whether that which plaintiff factually possesses should be legally protected." 231 F. Supp. at 86.

155. "The most effective argument that can be made against permitting foreign sovereign antitrust suits is that there was no such legislative intent. Nowhere in the legislative history of the antitrust laws is there any indication that Congress contemplated foreign governments asserting treble-damage actions" *Foreign Sovereigns*, *supra* note 4, at 144. Silence, however, has generally been considered an unreliable guide to legislative intent. *Girouard v. United States*, 328 U.S. 61 (1946). ("It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Id.* at 69); *Helvering v. Hallock*, 309 U.S. 106, 119-21 (1940). *But see United States v. United Mine Workers*, 330 U.S. 258 (1947) ("The absence of any comparable provision [in the Norris-LaGuardia Act] extending the term ["person"] to sovereign governments implies that Congress did not desire the term to extend to them." *Id.* at 275).

156. Though the Congressional hearings on the *parens patriae* legislation, *supra* note 7, contain over a thousand pages of prepared statements and personal testimony, there is not a single extended analysis of how the then pending legislation would affect foreign governments suing in *parens patriae* capacity.

157. In *United States v. Cooper Corp.*, 312 U.S. 600 (1941), the Supreme Court decided that the United States was not a "person" for purposes of the Sherman Act § 7, which grants the right of action for treble damages to "any person" injured in his

to decide whether the United States itself *qua* sovereign was a "person" for purposes of section 7 of the Sherman Act.¹⁵⁸

The Sherman Act and its succeeding legislation were enacted to achieve two basic goals: (1) to protect and promote the interests of Americans by providing the best products at the lowest possible prices¹⁵⁹ and (2) to make sure that American corporations were managing their businesses fairly.¹⁶⁰ Until the current *Pfizer* litigation,¹⁶¹ these two objectives were seen in the

business or property by practices forbidden in the Act. In *Georgia v. Evans*, 316 U.S. 159 (1942), the Court found the State of Georgia to be a person under the same provision of the Sherman Act, since "[t]he State of Georgia, unlike the United States, cannot prosecute violations of the Sherman Law. . . . If the State is not a 'person'. . . , the Sherman Law leaves it without any redress for injuries resulting from practices outlawed by that Act." 316 U.S. at 162. See also *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906), holding that a city is a person under Sherman Act § 7.

158. The decision was based on two factors: (1) If Congress had meant to include the United States in the coverage of the provision, it would have done so explicitly. 312 U.S. at 607. (2) The remedy of treble damages would be "more appropriate for a private litigant than for the United States." 312 U.S. at 606. Yet the Court implies that the terms referred to both natural and artificial persons, *i.e.*, individuals and corporations, without remarking that Congress did not make this interpretation explicit by incorporating it into the Act. The appropriateness of treble damages for a foreign sovereign is thus left unresolved. On the one hand, it can be argued that foreign governments have sufficient resources not to require treble damage awards. On the other hand, this assumption is severely strained with respect to the small—geographically and economically—governments of the "emerging" nations.

In 1955, the United States was expressly declared a "person" under the Clayton Act by Pub. L. No. 137, ch. 283, *amending* Clayton Act § 4 and *repealing* Sherman Act § 7.

159. "[The Sherman Act's] best effect will be a warning that all trade and commerce, all agreements and arrangements, . . . must be governed by the universal law that the public good must be the test of all." 21 CONG. REC. 2462 (1890) (Remarks of Senator Sherman). "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress. . . . This system depends on strong competition for its health and vigor . . ." *Hawaii v. Standard Oil Co.*, 405 U.S. at 262. See also *House Report 3-4*, quoted in *PARENS PATRIAE BILL*, *supra* note 7, at 9.

160. "A basic purpose of the [*parens patriae*] bill is to deter violations by preventing 'unjust enrichment' of offenders." *PARENS PATRIAE BILL*, *supra* note 7, at 13. Thus the Supreme Court limited the "passing-on" defense in antitrust litigation, because "[t]hose who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one [would be] available [to] bring suit against them." *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968). See also *PARENS PATRIAE BILL*, *supra* note 7, at 14. See generally Schaefer, *The Passing-On Theory in Antitrust Treble Damage Actions: An Economic and Legal Analysis*, 16 WM. & MARY L. REV. 883 (1975). But see *Illinois Brick Co. v. Illinois*, 45 U.S.L.W. 4611 (U.S. June 9, 1977).

161. The question whether a foreign sovereign is a "person" under American antitrust laws is "apparently" a case of first impression. *In re Antibiotic Antitrust Actions*, 333 F. Supp. 315, 316 (S.D.N.Y. 1971).

single context of domestic regulation and were parallel and complementary to one another. But by barring a foreign sovereign from American courts under our antitrust laws, the one goal does not necessarily follow from the other. That is, the American economy and balance of payments can actually be improved, at least in the short run, by allowing American companies to keep all their revenues from their foreign operations. This was seen, however dimly, as early as the Webb-Pomerene Act of 1918,¹⁶² which was enacted only four years after the Clayton Act. It permitted the existence of "an association entered into for the . . . purpose of engaging in export trade, . . . or an agreement made or act done in the course of export trade by such association,"¹⁶³ as long as this (conceivably monopolistic) combination does not act to restrain trade within the United States proper. The historical background of this bill¹⁶⁴ suggests that "[t]he dominant theme of the congressional debates . . . was that American corporations should get the highest prices possible for their products overseas, regardless of what foreigners were made to pay."¹⁶⁵

Characteristically, and in this case probably prudently, the Court of Appeals for the Eighth Circuit left to the legislature the resolution of the broad policy issues involved in granting capacity to foreign governments,¹⁶⁶ not even mentioning the

162. 15 U.S.C. §§ 61-65 (1970). See *United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945); Simmons, *The Webb-Pomerene Act and Antitrust Policy*, 1963 Wisc. L. REV. 426; Chapman, *Exports and Antitrust: Must Competition Stop at the Water's Edge?*, 6 VAND. J. TRANS. L. 399 (1973) [hereinafter cited as Chapman].

163. 15 U.S.C. § 62 (1970).

164. The term typically used by the federal courts in connection with ascertaining congressional intent in antitrust legislation is "legislative environment," *i.e.*, the context from which the policy conclusions are to be derived. *Georgia v. Evans*, 316 U.S. 159, 161 (1942), citing *Ohio v. Helvering*, 292 U.S. 360, 370 (1934).

165. *Foreign Sovereigns*, *supra* note 4, at 147. Thus Congressman Webb stated: "I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it." 55 CONG. REC. 3580 (1917). In a similar vein, Senator Pomerene said, "[W]e have not reached that high plane of business morals which will permit us to extend the same privilege to the people of the earth outside of the United States that we extend to those within the United States." *Id.* at 2787. See also the remarks of a contemporary member of Congress: "I have no sympathy with what a foreigner pays for our products; I would like to see the American manufacturer get the largest price possible. . . ." *Hearings on H.R. 16707 Before the House Comm. on the Judiciary*, 64th Cong., 1st Sess. 7 (1916).

166. Pfizer, *supra* note 147, at 3 n.4. For discussion of some of the policy issues involved, see *Foreign Sovereigns*, *supra* note 4, at 150-52; Velvel, *supra* note 153.

familiar doctrine of comity of nations.¹⁶⁷ In thus deferring to the legislature, the court correctly hints that it is high time to settle these issues, issues which are bound to figure even more prominently in the near future. The court also correctly recognizes that there is no legitimate reason for a foreign nation to be deprived of a remedy against admitted wrongs committed by American corporations under American antitrust laws: to this point we now turn.

V. PARENS PATRIAE OR CLASS ACTION?

Since India has capacity to sue, it faces a choice of litigation strategy from among a *parens patriae* suit, a rule 23 class action, and a suit in its proprietary capacity. The last possibility is not important given the circumstances, since India could

However, the Supreme Court has adumbrated a position that would seem to favor the granting of standing to foreign governments:

[T]he provisions in the Sherman Act against restraints of foreign trade are based on the assumption, and reflect the policy, that export and import trade in commodities is both possible and desirable. Those provisions of the Act are wholly inconsistent with appellant's argument that American business must be left free to participate in international cartels, that free foreign commerce in goods must be sacrificed in order to foster export of American dollars for investment in foreign factories which sell abroad.

Timken Roller Bearing Co. v. United States, 341 U.S. 593, 599 (1951). See A. NEALE, *THE ANTITRUST LAWS OF THE U.S.A.* 342-72 (2d ed. 1970) and cases therein cited.

167. The doctrine of comity of nations might ironically be used against India's cause: "[W]e should expect that other nations and communities will use *their* antitrust laws to protect their consumers against those who restrain competition in *their* markets." Baker, *Antitrust and World Trade: Tempest in an International Teapot?*, 8 CORNELL INT'L L.J. 16, 41 (1974) (emphasis in original). See Chapman, *supra* note 162, at 403, and see Judge Lord's narrow ground of decision:

A conspiracy among domestic producers of antibiotic drugs to reduce or eliminate competition as to foreign sales would certainly have an adverse effect on domestic competition. Not only would it enable the domestic manufacturers to build up a substantial "war chest" from excessive profits from foreign sales but such a conspiracy might prevent either a domestic or a foreign manufacturer from entering into the foreign market in order to build up its strength to enter into the restricted domestic market. In an age of expanding world trade, a truly successful monopoly requires control of both domestic and foreign markets. For these reasons, this court is convinced that the fundamental goal of the antitrust laws could be seriously frustrated by not permitting Kuwait to maintain a treble damage action for damages resulting from the alleged conspiracy.

In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions, 333 F. Supp. 315, 316-17 (S.D.N.Y. 1971).

The *locus classicus* of American comity of nations doctrine is *The Sapphire*, 78 U.S. (11 Wall.) 164 (1870).

bring a suit in its proprietary capacity only for drugs brought by the government itself, not for antibiotics bought by private individuals or organizations. In a proprietary suit, the government is not acting as a public representative but as a private plaintiff appearing on its own behalf or as a guardian *ad litem*.¹⁶⁸

The choice thus is finally between utilizing *parens patriae* or class action to vindicate the rights of Indian citizens. The federal courts have demonstrated a marked preference for the class action suit;¹⁶⁹ indeed the Supreme Court in *Hawaii* was surprisingly unresponsive to the argument that a class action suit was impractical under the circumstances.¹⁷⁰ Yet there is nothing sacrosanct about a class action. The class action suit itself was originally a concession to practicality and convenience in the consolidation of similar and related claims.¹⁷¹ The same considerations of prudence and practicality should likewise obtain here, where the *Hawaii* and *Pfizer* cases have so dramatically shown the limitations of the class action's usefulness.

The *Hawaii* court in effectively eliminating the *parens patriae* suit as an alternative to the class action ignored its previous sound reasoning:

The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of government it is often the one and only place where effective relief can be obtained. . . . [W]here wrongs to individuals are done by viola-

168. *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir.), *cert. denied*, 412 U.S. 908 (1973). See generally Fraenkel, *The Juristic Status of Foreign States, Their Property and Their Acts*, 25 COLUM. L. REV. 544, 549-50 (1925). If India sought to bring a class action suit (assuming foreign governments have capacity and standing to sue under Clayton Act § 4), it would have to meet the typicality requirement of FED. R. CIV. P. 23 (a)(3), and, thus, in any event would have to allege damage to a proprietary interest. *Pfizer, Inc. v. Lord*, 522 F.2d at 617. (Hereinafter "India" will be used for illustrative purposes to designate a foreign country which has been found to have both capacity and standing; under present treaty arrangements, only Iran among the named plaintiffs in the current *Pfizer* case possesses both capacity and standing to sue, see note 216, *infra*.)

169. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); see also Velvel, *supra* note 153, at 1. For an appraisal of the comparative merits of the *parens patriae* and class action suits from the economic point of view, see Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEG. STUD. 47, 64-66 (1975).

170. 405 U.S. at 266.

171. Z. CHAFEE, *SOME PROBLEMS OF EQUITY* 200-01 (1950); Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515 (1974).

tion of specific guarantees, it is abdication for courts to close their doors.¹⁷²

The *parens patriae* suit is a valuable supplement to the class action as a consumer remedy, especially in a transnational context. In fact the only feature *parens patriae* and class action suits have in common is the requirement of numerous wronged parties.¹⁷³ Unlike the *parens patriae* suit, the class action (or more specifically the federal rules of procedure for a class action)¹⁷⁴ requires: (1) homogeneous interests;¹⁷⁵ (2) best possible notification;¹⁷⁶ (3) a minimum jurisdictional amount.¹⁷⁷ Fur-

172. *Flast v. Cohen*, 392 U.S. 83, 111 (1968).

173. See *Land O'Lakes Creameries v. Louisiana*, 160 F. Supp. 387 (E.D. La. 1958); Fed. Rules Advisory Comm. Report on Rule 23(a); cf. *Smith v. Swormstedt*, 57 U.S. (16 How.) 288 (1853) (one of the first class action suits recognized by the Supreme Court). On the problems concerning the size of the class, see Grossman, *Manageability and the Fluid Recovery Doctrine*, 47 LAB. BULL. 415 (1972); Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U.L. REV. 477 (1972); Comment, *Manageability Problems of the Class Action Under Rule 23(b)(3)*, 6 U. SAN FRAN. L. REV. 313 (1972); Comment, *Administrative Problems*, 60 Nw. U.L. REV. 1000 (1974). See also Kalven & Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684 (1941). See generally 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1751 *et seq.* (1969); 3B J. MOORE, MOORE'S FEDERAL PRACTICE, 23-1 *et seq.* (1975).

174. Class action suits are authorized and governed by FED. R. CIV. P. 23. See generally *Developments in the Law of Federal Class Action Litigation — Catch 22 in Rule 23*, 10 HOUSTON L. REV. 337 (1973); *Developments in the Law — Class Actions*, 89 HARV. L. REV. 1319 (1976).

175. FED. R. CIV. P. 23(a)(2), (b)(1)(B), (b)(3). Homogeneity of interest ensures that any plaintiff member of the class will fairly and accurately reflect the interests of all the members of the class, whether present or absent. This is important since the absent plaintiffs' interests are decided by the class suit as *res judicata*. *Pennoyer v. Neff*, 95 U.S. 714 (1878); under revised rule 23(c)(3), the decision in a class action suit is *res judicata* as to all members of the class who did not act to exclude themselves from the suit. That such homogeneity was required by due process was stressed by the Supreme Court in *Hansberry v. Lee*, 311 U.S. 32 (1940), and subsequent cases.

176. The adequacy of notice requirement of due process was first articulated in *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). The case did not involve a rule 23 class action, but did involve judicial settlement of a trust fund with numerous beneficiaries. The court ruled that notice would have to be mailed to those beneficiaries whose addresses could be readily ascertained, and for those whose addresses were not known notice by publication was sufficient. 339 U.S. at 317-20.

For further commentary on the issues of due process raised by *Mullane*, see Comment, *Adequate Representation, Notice and the New Class Action Rule: Effectuating Remedies Provided by the Securities Laws*, 116 U. PA. L. REV. 889 (1968); Note, *Constitutional and Statutory Requirements of Notice Under Rule 23(c)(2)*, 10 B.C. IND. & COM. L. REV. 571 (1969). See generally 7A WRIGHT & MILLER § 1786.

The recent major case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), a rule 23 class action against the two major odd-lot dealers on the New York Stock Exchange, interpreted rule 23(c)(2) to require that "[i]ndividual notice must be sent to all class

ther, the class action in general differs from the *parens patriae* suit in that a class action seeks to protect individual and particular interests.

Two major issues in class action litigation deserve comment with respect both to the present India suit and to *parens patriae* suits in general. One is the binding effect of the notice requirement; the other is the problem of financing such a suit. The first issue revolves around the question: Is it fair to bind all the members of the class on the basis of one decision?¹⁷⁸ The class action arose as a measure in equity to ensure fairly and efficiently the rights of plaintiffs too numerous to appear in court, and also too numerous to inform adequately using the average individual plaintiff's private means.¹⁷⁹ But the courts have generally come to hold, in a manner analogous to their answer to the problem of conflicting interests within the group represented by the *parens patriae*,¹⁸⁰ that the utilitarian calcu-

members whose names and addresses may be ascertained through reasonable effort," despite the cost to petitioner. 417 U.S. at 173-75. For commentary, see Note, *Notice and Due Process in Federal Class Actions: A Requiem for Revised Rule 23?*, 2 HAST. CONST. L. Q. 479 (1975) [hereinafter cited as *Requiem*]; Note, *Managing the Large Class Action: Eisen v. Carlisle & Jacquelin*, 87 HARV. L. REV. 426 (1973); Note, *Manageability of Notice and Damage Calculation in Consumer Class Actions*, 70 MICH. L. REV. 338 (1972). See also *Schroeder v. City of New York*, 371 U.S. 208 (1962).

177. This brings to light another shortcoming in the class action as an effective remedy for consumer grievances. In many class actions, the damage to the individual is minimal. . . . Under the Supreme Court's holding in *Snyder v. Harris*, 394 U.S. 332 (1969), individual claims may not be aggregated in order to satisfy the in-excess-of-\$10,000 jurisdictional-amount requirement in federal-question and diversity-jurisdiction cases. 28 U.S.C. § 1331, 1332. The effect of *Snyder* in the antitrust field is not felt because under 28 U.S.C. § 1337, the jurisdictional-amount requirement is waived in cases arising under the antitrust laws. In actions in which the jurisdictional amount is required, *Snyder* is a real problem and reduces the effectiveness of the class action device.

Aloha, *supra* note 125, at 166. See also *Hawaii v. Standard Oil Co.*, 405 U.S. at 266. The jurisdictional amount requirement was tightened still further in *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), in which the Supreme Court held that the claim of each member of the class must meet the dollar requirement. But see *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *Pinel v. Pinel*, 240 U.S. 594 (1916).

178. FED. R. CIV. P. 23(c)(3).

179. In *Eisen*, it was estimated that individual notification of the 2,000,000 "easily ascertainable" class members would cost over \$200,000, while the plaintiff himself had only a \$70 stake in the outcome. 417 U.S. at 175-77. See also *Requiem*, *supra* note 176, at 490.

180. *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907).

lus of efficiency and benefit to the wronged class outweighs the possible harm to the interests of the nonrepresented parties in the class action suit.¹⁸¹ As Judge (then Professor) Weinstein wrote, class actions constitute an exception to two basic principles of procedural law:

[The first is that] each person is free to determine whether, when and how to enforce his substantive rights; [the second is that] each person is entitled to his day in court before his rights are affected by a judgment. Powerful as they are, the abstract objections to being bound by the actions of others yielded long ago . . . to the practicalities of life and the law, to the need to afford an effective remedy for the protection of rights and to the reduction of repetitive litigation.¹⁸²

The second issue, that of the cost of notification and prosecution, is raised most acutely by *Eisen v. Carlisle & Jacquelin*,¹⁸³ where the petitioner balked at bearing the cost of notification,¹⁸⁴ contending *inter alia* that

the prohibitively high cost of providing individual notice to 2,250,000 class members would end this suit . . . and effectively frustrate petitioner's attempt to vindicate the policies underlying the antitrust and securities laws.¹⁸⁵

The problem of financing such suits, stressed by Mr. Eisen, tends to increase as the number of people involved increases.¹⁸⁶ The class size in *Eisen* was ultimately determined to be about 6 million worldwide;¹⁸⁷ the problems in financing a class action on behalf of an entire country (especially a less

181. Rule 23 provides an "opt-out" clause, FED. R. CIV. P. 23(c)(2). Recall also that most members of a class have individually small or negligible claims.

182. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFFALO L. REV. 433, 433-34 (1960).

183. 417 U.S. 156 (1974).

184. *Id.* at 175-76.

185. *Id.* at 156.

186. The more parties involved, the closer the class comes to fulfilling the *parens patriae* criterion of "substantial number." *Land O'Lakes Creameries v. Louisiana*, 160 F. Supp. 387 (E. D. La. 1958). In addition, the closer the class comes to including the entire state, the more the interest shifts from that of private individuals to that of the public at large.

Significantly, New York, where *Eisen* arose, recently enacted a liberal class action statute which rejects the federal requirement of mandatory individual notice to all reasonably identifiable class members. N.Y. CIV. PRAC. LAW & RULES §§ 901-09 (McKinney Supp. 1975-76). The court may dispense with notice of pendency entirely, or require only "reasonable notice . . . in such manner as the court directs." *Id.* at § 904.

187. *Eisen v. Carlisle & Jacquelin*, 52 F.R.D. 253, 257-58 (S.D.N.Y. 1971).

prosperous country) are plain. Hence the state as *parens patriae* ought to be competent to step in to vindicate the rights of those who would otherwise be left without remedy. The more obvious the inability of the present rule 23 class action suit to meet certain acknowledged needs, the more essential it is for the *parens patriae* to be recognized in appropriate cases as a legitimate alternative strategy.¹⁸⁸

But perhaps most importantly, the India suit points up a vital but hitherto overlooked¹⁸⁹ aspect of class action suits—the culture-bound nature of the notice requirements.¹⁹⁰ An *Eisen-*

188. This idea seems to underlie the recent ruling by the Fifth Circuit that, under common law and Florida statutes and case law, the state attorney general has the power to bring antitrust suits to recover for injuries sustained by administrative agencies and other subdivisions of the state government, without obtaining their specific authorization. Florida *ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976). The attorney general of a state would be here taking the role of *parens patriae*, since he is not recovering on behalf of specific individuals, but exercising "all such authority as the public interest requires." *Id.* at 268 (footnote omitted). The decision rendered into law some of the major provisions of the Antitrust Improvements Act of 1976, then before Congress. The notion of the government as most able bearer of cost is all the more apt for countries with low per capita private wealth, such as India. In 1914, however, Congress rejected proposed legislation that would have enabled the attorney general of any state to institute criminal proceedings under the antitrust laws in the name of the United States. 51 CONG. REC. 14519, 14527 (1914).

All this is not to say, however, that there will be no large-scale cases falling between the acceptability standards of a class action and a *parens patriae* suit. For example, the United States could not assume the expenses of Mr. Eisen's suit as *parens patriae* because only 6 million individuals (not all of them from the same country) would be involved, nor would such pecuniary interest be likely to outweigh in compelling importance the relatively small numbers involved. These would then qualify only as private, particular interests. A stronger case for a *parens patriae* suit could be made if 200 million Americans had a direct interest in the outcome. By the same token, if the *Eisen* case had occurred in a country not much larger than 6 million (and observing the same standards for *parens patriae* relief), a *parens patriae* suit could be brought with the original class size. This suggests two observations: first, that a suit may emerge as a class action or a *parens patriae* depending on the size of the country; second, that some cases because of the size of the class involved may not meet either class action or *parens patriae* requirements. However, *parens patriae* as a supplement to class action guarantees that most cases of acute or widespread importance can in fact be litigated.

For comment on the *Exxon* case, see 1976 So. ILL. U.L.J. 527. See also *Burch v. Goodyear Tire & Rubber Co.*, 554 F.2d 633 (4th Cir. 1977), *aff'g* 420 F. Supp. 82 (D. Md. 1976) (state attorneys general have standing to seek injunctive relief under Clayton Act § 16).

189. Necessarily, since India's is a case of first impression.

190. FED. R. CIV. P. Rule 23 (c)(2), (d). See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950). That is, the notice requirement more naturally developed in countries where the quality of living was generally high. *Cf.*,

type class action, in which the petitioner was required to send individual notice "to all class members whose names and addresses may be ascertained through reasonable effort,"¹⁹¹ is meaningless in a country whose literacy rate is under 30 percent.¹⁹² Moreover, even among the literate in India, access to information is extremely limited: for every 1,000 inhabitants, there are only 16 individual copies of any daily newspaper.¹⁹³ As for other means of communication, for every 100 Indians, there are 0.3 telephones¹⁹⁴ and 2.3 radio receivers.¹⁹⁵ And, even

Pakistan's Prime Minister, Zulfikar Ali Bhutto . . . advanced the general thesis during a recent discussion of events here that "the political system is the servant of the conditions," meaning that the democratic system might not be able to coexist with extreme national poverty.

N.Y. Times, Feb. 18, 1976 at 10, col. 3. Thus the notice requirement and similar legal practices may be peculiarly appropriate in highly industrialized, prosperous, and literate societies, like England or the United States, but unlike India, Iran, Vietnam, and so forth. Consequently, the same rule of law promulgated in two different cultures may achieve radically different results. See Seidman, *The Communication of Law and the Process of Development*, 1972 Wisc. L. REV. 686. Seidman's "Law of the Nontransferability of Law" states: "A rule that induces one sort of activity in a particular social, political, and economic milieu will not induce the same activity in another social, political, and economic milieu, save fortuitously." *Id.* at 697.

191. 417 U.S. at 173.

192. UNESCO, *INTERNATIONAL YEARBOOK OF EDUCATION* 190-91 (1967). As late as 1949, only 18% of India's total population of then over 500 million were literate. *ALL-INDIA EDUCATION YEAR BOOK* 1 (1952). See also the latest UNESCO report on illiteracy, which is on the increase around the world. N.Y. Times, Feb. 5, 1976, at 1, col. 1. See generally E. FAURE ET AL., *LEARNING TO BE: THE WORLD OF EDUCATION TODAY AND TOMORROW* (1972).

193. *UNITED NATIONS STATISTICAL YEARBOOK* 1974, at 856 (UNESCO figures) [hereinafter cited as U.N. YEARBOOK]. The corresponding figures for the United States, Sweden, and Paraguay are, respectively, 297, 534, and 38. *Id.* at 857. A journal is considered "daily" if it appears at least four times a week; the size of a newspaper may range from one sheet to 50 or more pages. *Id.* at 858.

The abysmal state of communications in India is dramatically illustrated by a recent report from that country's hinterlands, which begins:

Roop Narain Shanti, a sinewy bare-chested villager who earns 36 cents a day plus one meal by tilling other people's fields, was surprised today to learn of the Government's suspension of civil liberties eight months ago.

"All I know is that it is so hard to earn enough to live on," he said. N.Y. Times, Mar. 3, 1976, at 2, col. 4.

194. U.N. YEARBOOK, *supra* note 193, at 535. Corresponding figures for the United States, Israel, and England are, respectively, 65.7, 20.8, and 34. *Id.* at 535-36.

195. *Id.* at 865. Corresponding American figure: 175.2. *Id.* at 864. In 1973, there were fewer than 0.1 television receivers per 1,000 Indians. *Id.* at 865. Furthermore, in India's antitrust suit against the drug companies, those with the most at stake in the outcome, the sickest and the poorest, are those least likely to be literate or have sufficient access to information. See also Leibowitz, *The Applicability of Federal Law to Guam*, 16 VA. J. INT'L L. 21 (1975), and authorities therein cited.

if all could read and understand, consider the other countries pressing suits, like Vietnam and Iran, that are not heirs of the common law tradition; only experts in comparative law would grasp the implications of a class action notification.

If a substantial number of people are denied necessary resources, then, and a rule 23 class action is impossible because of some of the considerations just mentioned, then it seems that a *parens patriae* suit ought to be allowable¹⁹⁶ not only because justice requires it but also because it is consonant with expressly enunciated policies within our legal tradition.

Ironically, it was at the turn of the century, when American jingoistic fervor was at its height, that the Supreme Court most clearly recognized the necessity of modifying constitutional procedural requirements when prevailing cultural conditions so dictated. In *Downes v. Bidwell*,¹⁹⁷ the Court upheld a duty tax on a shipment of oranges from Puerto Rico to New York on the theory that the newly acquired territory was not exactly foreign soil, but nevertheless was not so integral a part of the United States that the uniformity clause of the Constitution¹⁹⁸ became applicable. Justice Brown, writing for the Court, based this dual classification of American territory on the difference between "natural" or basic rights guaranteed to all inhabitants of American territories, and "artificial" or instru-

Moreover, not even widespread literacy, if it is recently achieved, would make a notice requirement truly workable. People newly come to literacy will not necessarily appreciate all the possibilities and implications of literacy; they may not think immediately of newspapers or radio as a regular reliable source as to their legal rights and obligations. A *tradition* of literacy, as well as its bare acquisition, is needed for such a skill to be exercised to its potential in all its various channels. See, e.g., J. TEBBEL, *THE MEDIA IN AMERICA* (1974).

This argument of course holds equally with regard to the recent *parens patriae* legislation, which contains notice requirements without provision for modification. See, e.g., Antitrust Improvements Act of 1976, tit. III, § 4C(b)(1); and PARENS PATRIAE BILL, *supra* note 7, at 10. For discussions recognizing the culture-relative nature of traditional readings of the American Constitution in alien settings, see Baralt, *The Origins of the Extension of the Constitution to the Territories Ex Proprio Vigore*, 12 PHIL. L.J. 481 (1933); Note, *El Derecho de Aviso: Due Process and Bilingual Notice*, 83 YALE L.J. 385 (1973); McBride, *The Application of the American Constitution to American Samoa*, 9 J. INT'L L. & ECON. 325 (1974).

196. See Velvel, *supra* note 153, at 31-33.

197. 182 U.S. 244 (1901).

198. U.S. CONST. art. I, § 8 provides:

The Congress shall have power to lay and collect taxes, duties, imposts and excises, . . . but all duties, imposts and excises shall be uniform throughout the United States.

mental rights, which were devised to safeguard basic rights, but which may vary depending on the cultural community involved.

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws and customs of the people, and from differences of soil, climate and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence.¹⁹⁹

India of course is not an annexed territory, but dominion is irrelevant to the Court's main point, which is that alien cultures and mores ought not to bar prosecution and recovery for wrongs recognized as such under American law.

VI. THE QUESTION OF RECOVERY

Assuming a foreign government does sue as *parens patriae* and is victorious, the next issue centers on the relative merits of injunctive relief, financial awards in some amount, and in some cases repayment in kind. That injunctive relief is obtainable by foreign sovereigns is fairly clear, both from precedent²⁰⁰ and policy²⁰¹ considerations. But an injunction is valuable to a

199. 182 U.S. at 282. See also *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Hawaii v. Mankichi*, 190 U.S. 197, 217-18 (1903) (certain rights, including the right to an indictment found by a grand jury, "are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the condition of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being." *Id.* at 218); *Glidden Co. v. Zdanok*, 370 U.S. 530, 544-47 (1962); *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 674 (1945); *Balzac v. Porto Rico*, 258 U.S. 298, 312-13 (1922); *Public Utility Comm'rs v. Ynchausti & Co.*, 251 U.S. 401, 406-07 (1920); *Ocampo v. United States*, 234 U.S. 91, 98 (1914); *Dowdell v. United States*, 221 U.S. 325, 332 (1911); *Dorr v. United States*, 195 U.S. 138, 143, 147-49 (1904); *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 940-41 (N.D. Cal. 1975). For early comment, see Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365, 371 (1899); Littlefield, *The Insular Cases*, 15 HARV. L. REV. 169, 281 (1901); Thayer, *The Insular Tariff Cases in the Supreme Court*, 15 HARV. L. REV. 164 (1901); Thayer, *Our New Possessions*, 12 HARV. L. REV. 464, 471, 473, 478-82 (1899).

200. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); accord *People ex. rel. Att'y Gen. v. Tool*, 35 Colo. 225, 236-37, 86 P. 224, 227 (1905).

201. See text at note 77, *supra*.

plaintiff only if there is an ongoing violation; it is of little use when the harm has been done. The relevant *parens patriae* legislation²⁰² and cases²⁰³ have dealt solely with treble damages as a monetary award. Treble damages, however, were instituted to provide incentive to *private* plaintiffs to share the cost of enforcing the antitrust laws with the government.²⁰⁴ Foreign governments, though often as not poorer than the United States Government, nevertheless are not private plaintiffs²⁰⁵

202. Antitrust Improvements Act of 1976, tit. III, § 4C (a)(2).

203. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945); *Pfizer Inc. v. Lord*, 522 F.2d 612 (8th Cir. 1975).

204. See *Hawaii v. Standard Oil Co.*, 405 U.S. at 275-76; *Georgia v. Evans*, 316 U.S. 159 (1942); *United States v. Cooper Corp.*, 312 U.S. 600 (1941). See also PARENS PATRIAE BILL, *supra* note 7, at 13, 17ff. See generally *Zenith Corp. v. Hazeltine*, 395 U.S. 100, 130-31 (1969); *Perma Mufflers v. International Parts Corp.*, 392 U.S. 134, 139 (1968); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 & n.40 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); J. VAN CISE, *THE FEDERAL ANTITRUST LAWS* (3d rev. ed. 1975); MacIntyre, *The Role of the Private Litigant in Antitrust Enforcement*, 7 ANTITRUST BULL. 113 (1962).

The remedy of actual damages for foreign sovereigns is of course only a recommendation; under Clayton § 4 as currently enacted, only the United States government may sue for single damages.

205. This is to make the state of India analogous to the state of Georgia in *Georgia v. Evans*, 316 U.S. 159 (1942), and *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). Such parity of litigation status is precisely the effect intended by the relevant international agreements. See, e.g., *Treaty of Amity & Economic Relations with Iran*, Aug. 15, 1955, [1957] 8 U.S.T. 899, T.I.A.S. No. 3853, of which article 3, paragraph 2 reads in pertinent part:

Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country.

Quoted in Pfizer, Inc. v. Lord, 522 F.2d at 619 n.9. This provision guarantees to foreign nationals access to American courts on the same terms as those available to United States nationals, "practical difficulties notwithstanding." *Id.* at 619. The explicit understanding on the subject is important, for the broad principle of comity of nations is relevant only when authoritative precedent suggests the appropriate ruling, but more importantly it is not a principle which courts are specifically bound to apply. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485 (1900). "Comity is not a rule of law, but one of practice, convenience and expediency. . . . Comity persuades; but it does not command." *Id.* at 488. See *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895). *But see* I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 572 (2d ed. 1973); *The Janko (The Norsktank)*, 54 F. Supp. 241, 244 (E.D.N.Y. 1944). Two cases sometimes cited for the proposition that a foreign country is entitled to sue as official representative on behalf of its citizens both involved arguments based on explicit treaty provisions. *French Republic v. Saratoga Vichy Spring Co.*, 191 U.S. 427 (1903); *United States v.*

when they sue as *parens patriae*, and should not require the active encouragement of the United States to bring suits. Such governments, after all, are acting at least theoretically out of duty and should need no incentive other than the lower prices which will result if they prevail. Respect, however, for the financial burden faced by many foreign governments might suggest that at least litigation fees should be recoverable²⁰⁶ as well as single damages.

Most discussions of damage recovery in a suit with the scope of a *parens patriae* action have focussed on two aspects of "general injury to the state's economy" (used, for example, in *Hawaii*) as an actionable wrong: (1) such abstract injury is not separable and distinct from individual wrongs to individual citizens, hence prosecutions and relief would be duplicative²⁰⁷ and (2) even if such injury were separate and distinct, it is a hopeless task to measure the damage in order to award accurate compensation.²⁰⁸

Diekelman, 92 U.S. 520 (1875) (common law unfair competition and trade-name infringement suits). See *Foreign Government Antitrust Capacity*, *supra* note 4, at 297 n.83; Velvel, *supra* note 153, at 25.

A provision relating to the rights of nationals in courts, similar to the one in the treaty with Iran, is contained in article 2, paragraph 2, of the Treaty of Amity & Economic Relations with Viet-Nam, April 3, 1961, 12 U.S.T. 1703, T.I.A.S. No. 4890. The United States does not have a treaty of amity and economic relations with either India or the Philippines, and a similar provision is apparently lacking in other treaties with these countries.

206. *But see* United States v. Cooper Corp.: "[T]he concluding words of [§ 7 of the Sherman Act] give the injured party, as part of his costs, a reasonable attorney's fee,—[sic] a provision more appropriate for a private litigant than for the United States." 312 U.S. at 606. However, the Supreme Court did not at this time contemplate antitrust suits by foreign sovereigns. See note 161, *supra*. When *Chisholm* was decided, it was feared by many state governments that their revenues would be depleted solely through litigation expenses. See text at note 105; C. WARREN, 1 THE SUPREME COURT IN U.S. HISTORY 99 (1922).

207. *Hawaii v. Standard Oil Co.*, 405 U.S. at 265; Handler, *Antitrust—Myth and Reality*, Senate Hearings on S. 1284, at 640, reprinted in 50 N.Y.U.L. REV. 211 (1975) [hereinafter cited as Handler, page citations to *Hearings*].

208. See Note, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448 (1972); *cf.*:

One need only ponder the myriad causes contributing to our current economic plight to imagine the futility of singling out and measuring in dollars the damage to a state's "general economy" purportedly attributable to an antitrust infraction. If, after years of study, eminent economists cannot agree on whether or to what extent concentration contributes to spiraling prices, how can we expect our courts, already strapped for time and limited in resources, to make the kind of judgments that this bill

The first criticism ignores the fact that *parens patriae* is a suit of last resort, to be used when other modes of litigation have been found impermissible or impractical.²⁰⁹ The *parens patriae* suit will be the only approach possible in such a situation, since the sovereign will be the only party with capacity and standing to bring the suit. As for the possibility of duplicative recovery, an appropriate statute of limitations could be instituted. As Professor Posner sensibly suggests:

Why not make the measure of recovery in such an action simply the sum of all of the overcharges paid by the residents of the state as a result of the violation, and provide that the bringing of the action is a bar to any separate actions by residents of the state growing out of the same violation?²¹⁰

The second criticism, concerning the difficulty of measurement, overlooks the fact that other areas of the law have for a long time awarded monetary relief for such unmanageable or unquantifiable injuries as pain and suffering, wrongful death, and loss of consortium.²¹¹ The Supreme Court has held, in *Bigelow v. RKO Radio Pictures*,²¹² that uncertainty as to the

contemplates? Where proof of injury is so attenuated that any evidentiary effort is doomed to failure, there is no reason, in my mind, why the assertion of the claim should be permitted at all.

Handler, *supra* note 207, at 641. See also Handler & Blechman, *supra* note 6, at 638-49. See generally Comment, *Due Process and Fluid Class Recovery*, 53 ORE. L. REV. 225 (1974).

209. The practical effect of Eisen is to eliminate the Rule 23 class action as a feasible means for recovery by a large class of individuals each of whom has sustained relatively minor damages. In situations where the costs of giving notice to the class are much greater than any individual class member's stake in the outcome of the action, it is unlikely that any suit will be brought. The person who deals in certain types of consumer goods, where each transaction may involve only a few dollars, can now fix prices, relatively free from the fear of substantial treble damage actions.

House Report, quoted in PARENS PATRIAE BILL, supra note 7, at 10.

210. R. POSNER, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 159 (1974). Posner's suggestion was taken up in the Antitrust Improvements Act of 1976, tit. III, § 4C (a)(1)(A).

211. W. PROSSER, *THE LAW OF TORTS* 880, 327-35, 905 (4th ed. 1971).

Juries, being gifted with the power to put a dollar value on a person's reputation, or his eyesight, or his wife's affections, or even his life itself, should have little trouble with so relatively simple a proposition as measuring in dollars the amount of injury a monopolist . . . or a conspirator has inflicted upon his victim's business or property.

Rowley, *Proof of Damages in Antitrust Cases*, 32 A.B.A. ANTITRUST L.J. 75, 75 (1966).
212. 327 U.S. 251 (1946).

exact amount of damages should not preclude recovery; the wrongdoer is to bear the risk of the uncertainty, provided the jury can make a reasonable estimate based on reliable and adequate data.²¹³ The criticism has even less point in a transnational context, where, in fairness, perhaps it was never meant to apply. For where, as in the antibiotics litigation, the amount of overcharge is known through domestic investigation, the domestic operation serves as a "control" against which to measure the exorbitance of prices set abroad. Thus the difficulties attendant upon proving the pass-on of an overcharge, as described in the leading case of *Hanover Shoe, Inc. v. United States Shoe Machinery Corp.*,²¹⁴ disappear in cases like the foreign governments' drug suits.

213. *Id.* at 262-66. *Cf.* *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555 (1931); *Eastman Kodak Co. v. Southern Photo Co.*, 273 U.S. 359 (1927).

In each case we held that the evidence sustained verdicts for the plaintiffs, and that in the absence of more precise proof, the jury could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.

327 U.S. at 264.

See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 260-63 (5th Cir. 1974); Shapiro, *Processing the Consumer's Claim*, 41 A.B.A. ANTITRUST L.J. 257, 270-73 (1972); *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co.*, 1973-1 Trade Cas. ¶ 74,593 (2d Cir. 1973) (formula used to distribute settlement fund).

214. 392 U.S. 481 (1968). *See Handler & Blechman, supra* note 6, at 638-39; note 160 *supra*. Moreover, despite the argument that foreign operations or subsidiaries of American businesses are largely autonomous and should therefore be immune from American antitrust laws, the courts have been liberal in extending the reach of the antitrust statutes. In *United States v. Aluminum Co. of America*, 20 F. Supp. 13 (S.D.N.Y. 1937), a Canadian holding corporation was found to be within American jurisdiction under Clayton Act § 12, which provides that process in an antitrust case may be served in the district in which the corporation is an inhabitant or wherever it may be found. The Canadian corporation maintained large offices in New York and was "actively and continuously engaged in transacting business for which it was incorporated through its principal executive officers and a permanent organization." *Id.* at 19. In *United States v. Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D.N.Y. 1955), a Swiss watch cartel composed entirely of foreign companies operating in a foreign country under the terms of an agreement negotiated in Switzerland was held to have been "continuously present" and thus "found" in the United States under Clayton Act § 12, through the activities of an American advertising agency which had undertaken an advertising campaign for the cartel and its New York information center, though the information center engaged in no business of its own. *See generally Kaiser, Conflict of Laws and the Extraterritorial Effect of Commercial Regulation*, 1 QUEEN'S L.J. 384, 393-94 (1972); Rahl, *American Antitrust and Foreign Operations: What is Covered?*, 8 CORNELL INT'L L.J. 1 (1974).

Actual damages plus fees, then, would seem to be the appropriate award. Some sort of fluid recovery system could also be instituted, for the most equitable remedy in India's case would involve distribution of the gross damages to the class as a whole.²¹⁵ Damages in kind (additional antibiotics) or proportionately reduced prices on future drug shipments appear the most logical alternatives. Obviously Congress can change the scope and procedure of the *parens patriae* suit; but the present analysis and recommendations are based on existing acknowledged legal doctrine, the doctrine which would be applicable to the remnants of the *Pfizer* litigation. It is to be hoped that any changes made in the *parens patriae* suit would not diminish its usefulness but in keeping with both deep-rooted principles and enlightened policy, on the contrary, enhance it.

VII. CONCLUSION

Next Term the Supreme Court will decide the question of whether a foreign country is a "person" under section 4 of the Clayton Act. An appropriate line of reasoning, in light of the foregoing analysis of the issues involved, would be as follows:

- (1) The relevant provisions in treaties with foreign nations—Iran and South Vietnam,²¹⁶ among the named plaintiffs—give foreign nationals the same rights under American law when suing in United States courts as American nationals have.²¹⁷ Capacity to sue is, thus, granted by treaty and safeguarded by the *parens patriae* suit.²¹⁸

215. Comment, *Due Process and Fluid Class Recovery*, 53 ORE. L. REV. 225, 227 (1974). But see Blechman, *Class Actions—A Reappraisal in Light of Hawaii v. Standard Oil*, 38 J. AIR L. & COM. 389 (1972).

216. See note 205 *supra*. Since Vietnam's suit has been dismissed, note 5 *supra*, Iran is the only one of the named plaintiffs to have capacity under present treaty arrangements.

217. See note 205 *supra*.

218. See note 41 *supra*. Whether a foreign nation can ever raise a § 4 claim at all (*i.e.*, is a "person" under that section) is a question of capacity; whether the particular injury alleged is protected by § 4 is a question of standing. The Supreme Court recognized this distinction in *Hawaii* when it stated: "The question in this case is not whether Hawaii may maintain its lawsuit on behalf of its citizens, but rather whether the injury for which it seeks to recover is compensable under § 4 of the Clayton Act." 405 U.S. at 259.

Acknowledging, moreover, that matters of foreign capacity are determined by treaty and diplomatic agreement, while questions of standing are decided by domestic case law and statutory enactment, restores the proper allocation of functions under the separation of powers doctrine. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *accord*, *Powell v. McCormack*, 395 U.S. 486, 518 (1969); *Baker v. Carr*, 369 U.S. 186,

(2) A foreign state is analogous either to a national state (the United States federal government) or to a subnational state, *e.g.*, Hawaii. The latter alternative is the more likely, since the distinction between the two types of state for purposes of antitrust legislation turns on the federal government's uniquely-given sanctions to enforce the antitrust laws.²¹⁹

(3) In either case, there is ample authority for holding both the federal government and subnational states as "persons" under the Clayton Act. The United States was expressly declared a "person" under Clayton § 4 by statute in 1955,²²⁰ and "Hawaii plainly qualifies as a person under both sections [4 and 16] of the statute [Clayton Act]."²²¹

Even though Iran thus has capacity under Clayton § 4, such a plaintiff must still clear the standing hurdle, a feat made more difficult by recent decisions such as *Illinois Brick*²²² and *Pennsylvania v. New Jersey*,²²³ only then can the actual merits of the case be litigated. It is nevertheless important to realize that once capacity has been granted with one hand, it should not be taken away with the other by refusing to allow a plaintiff to contest an alleged injury in at least one of the traditionally accepted standing postures—proprietary claim, class action, or *parens patriae*. One injunction is as good as 100,²²⁴ but only if that one injunction is available.

The *parens patriae* suit is a viable and valuable alternative to the class action as a means of vindicating consumer rights on a large scale, especially in the international arena. Traditional due process objections are irrelevant to countries without a common law jurisprudence or without the resources to make the conventional wisdom of American constitutional law meaningful. A perceptive and flexible approach to antitrust suits by foreign governments suggests that serious reconsideration be given to the *parens patriae* suit as an effective strategy.

217 (1962) (political questions not justiciable primarily because of separation of powers).

219. See text accompanying notes 151-52 *supra*.

220. See note 158 *supra*.

221. 405 U.S. at 261.

222. See note 7 *supra*.

223. 426 U.S. 660 (1976) (Pennsylvania's motion to file suit as *parens patriae* on behalf of its citizens against allegedly unfair tax burden imposed by New Jersey on nonresidents' New Jersey-derived income, denied).

For a review of recent trends in standing requirements in antitrust cases, see Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U.L. REV. 374 (1976); Berger & Bernstein, *An Analytical Framework for Antitrust Standing*, 86 YALE L.J. 809 (1977).

224. See note 142 *supra*.