



# APPLAUSE

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## I. INTRODUCTION

In 2017, Professor Alexandra Lahav of the University of Connecticut School of Law published an impressive book entitled *In Praise of Litigation*.<sup>2</sup> She argues that private civil litigation in the United States is an important tool for democracy. In the preface and introduction, she explains how private civil litigation promotes American democracy:

Lawsuits *enforce* the law by forcing wrongdoers to answer for their conduct; they increase *transparency* by eliciting information from their adversaries that often benefits the public, and in doing so, they help people *participate* in self-government. All of this is possible when courts treat litigants as *social equals* before the law.<sup>3</sup>

She is not blind to the costs of the civil litigation system, but contends that those costs are often exaggerated, and the societal benefits usually underappreciated. She emphasizes that disputes about the institutions and procedure of litigation are often merely a proxy for disagreements about the proper types of regulation of potentially harmful conduct.

Antitrust is only a minor aspect of Lahav's arguments and discussions.<sup>4</sup> She focuses on the more general mix of civil litigation in state and federal court and showcases a variety of examples involving civil rights, employment discrimination, and tort cases.

Professor Lahav's arguments are an excellent jumping off point for how private antitrust litigation has been systematically undervalued and how private claims contribute to the proper functioning of competition policy.<sup>5</sup> In this essay, I argue that private treble damage litigation promotes the four values identified by Lahav: enforcement, transparency, participation, and equality before the law. I also argue that the preference for public over private antitrust enforcement cannot be justified in the text, history, or policy goals of antitrust with the rare exception of a case involving major structural relief or substantial harm to the foreign policy or the national interests of the United States. I end with a brief look at a likely future where private enforcement continues to be restricted and underserved in the United States, encouraged and nurtured abroad, and how we can do better.

2 ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* (Oxford University Press 2017).

3 *Id.* at vii (emphasis in original). See also *id.* at 1-2.

4 *Id.* at 33, 27, 104, 128, 130, 168 n.10, 188 n. 41.

5 See generally Spencer Weber Waller, *Antitrust and Democracy*, *forthcoming* 46 FLA. ST. L. REV. (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3086260](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3086260).

## II. PRIVATE ANTITRUST LITIGATION AND ENFORCING THE LAW

Lahav lays out three basic models for enforcing any given body of substantive rules. She examines direct regulation, government lawsuits, and private litigation and considers their pros and cons. Applying this model to the antitrust world is simplified by the relative absence of direct formal regulation. While both the Antitrust Division and the Federal Trade Commission have many regulatory-type tasks, they both pride themselves on functioning primarily as law enforcers (public litigators). The FTC has the power, but not the inclination, to issue substantive rules in the area of competition law, as it does from time to time in the consumer protection area. The Antitrust Division has few similarly direct regulatory powers, outside of minor niche areas.

Nevertheless, the modern trend in both agencies is toward a more regulatory approach to competition enforcement.<sup>6</sup> Outside the criminal area, both agencies spend an enormous amount of time and resources choosing not to proceed with civil merger and non-merger matters with no judicial review, and at best a short press release or closing statement as to their reasoning. Consent decrees face the most deferential standards of judicial review and can rarely be challenged by non-parties. The agencies develop enforcement guidelines internally and only later circulate them for an informal version of notice and comment. Other enforcement initiatives are conducted through business review letters and advisory opinions which are insulated from judicial review by their technically non-binding nature. Hearings, speeches, and the occasional retrospective study, represent a final avenue of priority setting and policy development with a distinctly regulatory flavor.

Other aspects of competition policy are subject to more formal regulation, just not by the DOJ or the FTC. The change in FCC policy regarding net neutrality has significant implications for competition policy, but the FCC drove those changes. Similarly, the DOT, FCC, and other traditional agencies conduct public interest reviews of certain mergers, joint ventures, and strategic alliances. But for better or worse, the bulk of competition policy in the United States is a combination of public and private antitrust litigation.

## III. GOVERNMENT ANTITRUST LITIGATION

Unfortunately, public antitrust litigation does little directly to provide compensation to the parties injured by violations.<sup>7</sup> Criminal litigation produces prison sentences for the individual guilty parties and whopping fines for the corporate defendants found guilty or who plead guilty. These fines are paid to the general Treasury of the United States and cannot be used for restitution. There is a victims and witness fund for such purposes which is rarely, if ever, used in criminal antitrust litigation. Guilty defendants are required to provide restitution under the general criminal sentencing law of the United States, but such restitution is generally assumed to come through subsequent private civil litigation. As a result, the sentencing court is rarely involved in ensuring that compensation to antitrust victims takes place or the adequacy of any such compensation that ensues. The FTC and the Antitrust Division only rarely seek equitable remedies including disgorgement and restitution, despite the statutory basis for doing so being reasonably well established.

## IV. PRIVATE RIGHTS OF ACTION

Private rights of actions for both treble damages and injunctive relief have been a co-equal part of the antitrust laws since the enactment of the Sherman Act. Section 4 of the original Sherman Act<sup>8</sup> originally provided these private remedies now found in Sections 4 and 16 of the Clayton Act.<sup>9</sup>

Persons injured in their business or property may sue for treble damages plus attorneys' fees and costs. They may also sue for injunctive relief when they meet the full criteria for temporary or permanent injunctions or other types of equitable remedies. Since the 1970s, state attorneys general also have been allowed to sue for treble damages and injunctive relief on behalf of the natural persons in their states.

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6 Spencer Weber Waller, *Prosecution by Regulation*, 77 ORE. L. REV. 1383 (1998); Richard Steuer, *Counselling Without Caselaw*, 63 ANTITRUST L.J. 823 (1995).

7 Final verdicts in government criminal and civil antitrust litigation under the Sherman and Clayton Acts do produce findings of fact and law that are conclusive to subsequent private antitrust litigation. 15 U.S.C. § 16a.

8 38 Stat. 731.

9 15 U.S.C. §§ 4, 15.

In recent years, the amount of private antitrust litigation (including state attorneys *parens patriae* suits) has substantially exceeded that brought by the Antitrust Division and the Federal Trade Commission. Private antitrust litigation usually exceeds agency litigation by a ten-to-one ratio. For example, in 2017, there were a total of 631 antitrust cases filed, of which 603 were private cases, amounting to over 95 percent of total new antitrust claims.

There is no textual or historical basis to prioritize either public or private enforcement of antitrust laws. Rather they were intended to work as equal partners.

The Kinter treatise notes the importance of private treble damage remedies:

Although the treble damage provision is now found in the Clayton Act, the original Sherman Act already provided for the mechanism of monetary relief, including costs and attorney's fees, for injured private parties. Three principal reasons animated the adoption of this device. First and primarily, it was deemed important to compensate persons who were injured by an antitrust violation, with much the same concern as is given to victims of other unlawful conduct. Second, it was hoped that the imposition of substantial monetary penalties would act as a deterrence to anticompetitive activity. Third, providing for private lawsuits would increase the number of potential plaintiffs, *thereby offsetting the limited enforcement resources available to the government* and giving the opportunity to attack misconduct to the very persons most likely to have information thereof.<sup>10</sup>

The Supreme Court similarly has recognized the co-equal role of private rights of action. In *California v. American Stores Co.*, the court held that private actions for injunctions could seek to block a merger even after it had been cleared with conditions by the FTC. The Court stated: "Private enforcement of the Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition."<sup>11</sup> The Court previously spoke in *Reiter v. Sonotone* of the importance of treble damages noting:

Congress created the treble-damages remedy of Section 4 precisely for the purpose of encouraging private challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.<sup>12</sup>

As recognized by Congress and the Court, private enforcement allows those most directly affected by unlawful behavior to seek a remedy. Such private remedies do not depend on electoral results or require any governmental permission or expenditure other than access to the general courts supported by tax payer dollars.

The existence of a robust private right of action further lends stability to the system. For ideological, resource, and other reasons, the federal agencies have brought few recent cases in entire categories of antitrust law including price discrimination, resale price maintenance, vertical non-price restraints, tying, monopolization, boycotts, and other areas of the antitrust laws that do not fit their enforcement priorities. Without private enforcement, many market practices would become effectively *per se* legal without any intervening legislative or judicial decision.

For example, the Supreme Court in *Leegin* determined that all allegations of resale price maintenance should be governed by the rule of reason with the majority offering rules of thumb to guide the application of the rule of reason in future cases.<sup>13</sup> Neither the Justice Department nor the FTC have brought subsequent litigation in this area. Private litigation is rare because of the high expense, legal risk, uncertainty, and limited expected value of such claims under the rule of reason. At most, there has been sporadic state enforcement in this area. As a result, we have the abandonment, rather than the evolution, of a body of law which can violate antitrust laws when the anticompetitive harm outweighs any legitimate procompetitive justifications.

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<sup>10</sup> EARL W. KINTNER et. al.11 ECONOMIC THEORY, COMMON LAW, AND AN INTRODUCTION TO THE SHERMAN ACT § 78.2 (2017) (emphasis added).

<sup>11</sup> *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990).

<sup>12</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

<sup>13</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

In other areas there has been more robust private enforcement (with or without agency cases). These cases have produced important precedents and a steadily evolving body of law, rather than an effective abandonment of an entire area of competition law. Any such significant changes in the future should come from direct efforts to change the law through the democratic branches of government, rather than merely the enforcement priorities of agencies.

Private litigation is also necessary whether one favors a more progressive or conservative application of antitrust law. Without private litigation, there would be little for the Supreme Court to opine on in the antitrust area. Neither criminal cartel enforcement nor mergers are likely to generate significant circuit splits (or even many appellate opinions at all) or deemed worthy of the Supreme Court granting certiorari in the seventy-five cases which it hears in any given year. As a result, virtually all of the Supreme Court docket on substantive antitrust doctrine (as opposed to matters of procedure, jurisdiction, or immunities) are private cases. Without private litigation, the law becomes either static or de facto lawful when the agencies pursue other priorities.

## V. WHEN THE GOVERNMENT SHOULD GET PRIORITY

A handful of situations exist where government enforcement does, and should, get priority in the competition law arena. Some of these situations arise because of the special status of the United States government in general civil litigation and a few are unique to competition law. However, such situations are few and far between. Any resulting tensions between public and private enforcement normally can be minimized, rather than exacerbated, as is the government's current tendency.

First, the government as a plaintiff is presumed to meet the public interest requirement in seeking temporary and permanent injunctions. To oversimplify, all forms of injunctive relief require proof of:

- 1) An imminent threat of harm from the defendant;
- 2) No adequate remedy at law (that an award of damages will fail to protect the plaintiff);
- 3) The balancing of equities which favors the plaintiff; and
- 4) The injunction serving the public interest, including the rights of third parties and public policy.<sup>14</sup>

Injunctive requests by the government are presumed to meet this fourth criteria. This is more a function of the general nature of injunctions rather than anything specific to competition policy. The rule played an important role in high stakes government injunctive antitrust litigation such as the *Microsoft* case and certain mergers.<sup>15</sup>

Major structural relief will probably remain the province of public, rather than private, litigation. The Supreme Court has made clear that private parties can seek injunctive relief in Section 7 cases in addition or instead of whatever the federal government chooses to do.<sup>16</sup> But there is a dearth of such cases. It appears that the first such case just occurred in October 2018.<sup>17</sup>

It would be similarly rare that a purely private injunctive case under Section 2 would (or should) result in the divestiture or restructuring of a firm or industry. Structural relief in a Section 2 case is a rarely sighted creature, even in the occasional government civil Section 2 litigation. Such relief was overturned on appeal in *Microsoft* and abandoned (over the objections of the state attorneys general) in the settlement ultimately approved by the court.<sup>18</sup> While there is no legal reason why such relief could not be sought or granted in a purely private case, it would bear a very high burden of satisfying the balance of equities and public interests tests of all injunctive relief. It seems likely that granting such relief would

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<sup>14</sup> TRACY THOMAS, ET AL, REMEDIES: PUBLIC AND PRIVATE 61-62 (6<sup>th</sup> ed. 2017).

<sup>15</sup> *United States v. Microsoft Corp.*, 253 F. 3d 34 (DC Cir. 2001).

<sup>16</sup> *California v. ARC America Corp.*, 490 U.S. 93 (1989).

<sup>17</sup> Christopher Cole, *Factory Ordered Sold in Groundbreaking Merger Breakup*, Law360 (October 9, 2018), <https://www.law360.com/articles/1090126/factory-ordered-sold-in-groundbreaking-merger-breakup>.

<sup>18</sup> ANDREW I. GAVIL & HARRY FIRST, *THE MICROSOFT CASES* (2014).

necessitate, as a practical matter at least, tacit support of the government to ultimately prevail in the district court and on appeal.

There will be similarly rare cases where the bringing or reaching the merits of any antitrust dispute (damages or injunctions) threatens the fundamental foreign policy or national interest of the United States. It seems suboptimal if either a public or private antitrust case were to trigger an armed conflict, ruin diplomatic relations with an important ally, or jeopardize a critical national interest at home. There have been a handful of times when the federal government has refrained from bringing a likely meritorious case for such reasons, and the courts have developed a variety of special defenses in international cases to deal with instances where a public or private plaintiff persists.<sup>19</sup> Even here, the exercise of sound discretion by the government and the sensitive application of special defenses such as comity will better serve the enforcement of competition law than a prioritization of public versus private enforcement.

## VI. THE ASSAULT ON PRIVATE RIGHTS OF ACTION

The assault on private rights of actions has occurred in both Democratic as well as Republican administrations. Much of the damage has come from the Supreme Court with a healthy assist from Congress and the federal enforcement agencies themselves. They combine to contribute to the marginalization of private enforcement to a second-class status at odds with the language, history, and intent of the drafters of the Sherman and Clayton Acts.

### A. The Supreme Court's Narrowing of Private Antitrust

The Supreme Court has created numerous hurdles to private enforcement in antitrust. The Court has created or enhanced barriers to private antitrust litigation involving standing, antitrust injury (Brunswick), and the direct purchaser doctrine (*Illinois Brick*). It has created judicial exemptions for damage actions in regulated industries (filed rate doctrine), lobbying all branches of the government for anticompetitive conduct (*Noerr-Pennington*), and anticompetitive conduct by state and local governments (state action immunity).

The Court has reinterpreted and arguably amended general civil procedure and class action rules involving pleading (*Twombly*) and summary judgment (*Matsushita*) in the context of antitrust litigation, and then explicitly expanded their application to all civil litigation (*Iqbal*, *Liberty Lobby*). The court has enhanced the general requirements for demonstrating commonality for liability and damages in the certification of antitrust class actions (*Behrend*), as well as class actions in general (*Dukes*). There remain open issues regarding standing, mootness, ascertainability, and the availability of *cy pres* awards where the Court may limit future antitrust and general class actions.

In addition, the general trend of moving entire categories of conduct from *per se* to rule of reason destroys much of the incentive and practical ability to bring and certify class actions for such conduct. In one instance, the Court was forthright enough to acknowledge that it had created new virtually unscalable burdens for proving actionable predatory pricing because of a fear that plaintiffs would otherwise prevail at trial (*Brooke Group*). All of these actions were done by the Court on its own initiative without resort to either the statutory process for the amendment of the Federal Rules of Civil Procedure or the passage of a statute through normal Congressional processes.

### B. Congress Attacks Class Actions

Congress has joined in on the narrowing of private rights of actions both in antitrust and in civil damage litigation more generally. While this combines with the Court and agency action to produce pernicious results, such Congressional actions at least carry with it the legitimacy of duly enacted legislation rather than dubious policy choices by the wrong institutional actors.

There are a variety of statutory exemption and immunity doctrines which bar normal court challenges. While the wisdom of such immunities is frequently challenged, Congress has the power to enact such legislation and hopefully the wisdom to weigh the value of competitive markets and other values in a democratic and open process.<sup>20</sup>

<sup>19</sup> ANDRE FIEBIG & SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD ch. 9 (4<sup>th</sup> ed. 2018).

<sup>20</sup> AMERICAN BAR ASSOCIATION, SECTION OF ANTITRUST LAW, FEDERAL STATUTORY EXEMPTIONS FROM ANTITRUST LAW (2007).

Congress has further required single damages and erected additional procedural hurdles to private litigation at the margins, rather than the core, of antitrust law. These include export trading companies, standard setting organizations, certain joint ventures, and successful leniency applicants.

Over the years, Congress has gone further and considered the total or discretionary elimination of treble damages in individual cases, but taken no action in that regard. Further, Congress has limited class actions as a whole in the Class Action Fairness Act and is contemplating further restrictions in the pending Fairness in Class Actions Act.

### ***C. The Agencies Pile On***

The government has a legitimate, but somewhat overblown, interest in protecting its criminal enforcement of antitrust laws. There may be instances where a pending grand jury will affect a simultaneous private damage action. Examples include a high stakes secret grand jury investigation that is not yet publicly known, a cooperating informant, or an actual protected witness, whose safety or effectiveness would be jeopardized depending on the scope and timing of discovery in a related civil case. Grand jury materials themselves normally will not be available to aid private civil litigation.<sup>21</sup> Most of the remaining issues can be dealt with a matter of timing, rather than a matter of priority, or exclusive rights, of the government in the enforcement of competition law.

The Justice Department tends to overreact to the very concept of private rights of actions as an existential threat to its leniency program. This reaction is short-sighted at several levels. Having about seventy percent of all cartel cases derive from the leniency program suggests an over-reliance on this tool and an underinvestment in other detection and investigation tools common in other areas of white-collar criminal investigations.<sup>22</sup>

The Antitrust Division also overstates the threat posed to the deterrence and disclosure facilitated by the leniency program, particularly after the 2004 ACPERA legislation.<sup>23</sup> Under ACPERA a successful leniency applicant and its cooperating employees receive criminal immunity, automatic detrebling, and pays single damages only on its own sales (rather than the full size of the conspiracy), but must cooperate with the plaintiff in any resulting civil litigation. While there is almost always follow-on private litigation, it is unclear whether this prospect affects the incentives of a past or future successful leniency applicant under ACPERA.

The cost benefit analysis for the applicant is that freedom from criminal fines, immunity from prosecution for cooperating employees, and the almost certain payment of single damages on a smaller base is worth self-reporting versus the risk of another defendant choosing to do so or the possibility that the cartel will never be discovered. The possibility that the government will be required to disclose a leniency application or supporting materials in subsequent civil discovery should already have been priced into the defendant's decision to proceed with its leniency application.

Opposing such disclosure may also violate the private defendant's obligation under ACPERA to assist the plaintiffs in follow on litigation. The bargain that ACPERA contemplates is further jeopardized when the government fails to develop meaningful cooperation standards for defendants following acceptance into the amnesty program and remains silent or complicit when defendants fail to adequately cooperate or compensate in the ensuing private litigation.

The Agencies also participate on occasion as amicus in private antitrust litigation where the government has no direct interest at stake. This has meant, from time to time, amicus support for civil defendants, even where the government has brought criminal enforcement actions against those same defendants, as was the case in the *Empagran* litigation.<sup>24</sup> The government in the *Motorola FTAIA* litigation threw the private plaintiffs under the bus arguing that the court should carve out the government from any jurisdictional hurdles the court might impose on the private plaintiffs.<sup>25</sup>

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21 Fed. R. Crim. Pro. 6(e).

22 Spencer Weber Waller, *The Temple of Leniency: Thoughts Inspired by the Work of Laura Guttoso*, 37 U. QUEENSLAND L. REV. 169 (2018).

23 Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Public Law 108-237/Title II/Subtitle A.

24 *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155 (2004).

25 *Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816 (7<sup>th</sup> Cir. 2015).

Most recently, there is no legitimate reason for the government to participate in the pending *Apple* antitrust litigation in the Supreme Court on the scope of the indirect purchaser doctrine in private antitrust litigation.<sup>26</sup> Neither the Antitrust Division nor the FTC bring such cases, nor are they affected by their outcome, and therefore should be indifferent to the resolution of such issues in private litigation.

## VII. A BETTER PUBLIC-PRIVATE PARTNERSHIP FOR ANTITRUST ENFORCEMENT

The unfortunate tendency to diminish the vital role played by private litigation in a healthy antitrust ecosphere continues to expand.<sup>27</sup> The following steps would be helpful in restoring a more balanced role for the agencies and private parties in a democratically functioning antitrust community.

The Department of Justice should follow through on the pledge by Assistant Attorney General Delrahim to enforce the provisions of Section 5 of the Clayton Act allowing private treble damage actions by the United States as a buyer of goods and services. In doing so, the government would develop valuable expertise on issues currently only the province of the private bar.

The government should go further and partner with the plaintiff bar which is the most experienced enforcers of these type of suits. The government should make a detailed factual record as to market impact in plea agreements and sentencing proceedings to ensure the maximum claim and issue preclusion in any follow-on private or public treble damage litigation. The government further should partner with private plaintiffs using Federal Rule of Civil Procedure 20(a) to jointly seeking such damages as co-plaintiffs in consolidated civil cases.

The Justice Department should insist on meaningful restitution from all guilty criminal defendants through express provisions in guilty pleas and sentences, monitoring of such restitution, and affirmative revocation of leniency single damage status for failure of the leniency recipient to cooperate adequately with private plaintiffs in subsequent litigation. Finally, the agencies should develop a model cooperation agreement with the private bar covering the type of non-confidential information sharing issues currently laid out in numerous agreements with foreign enforcement agencies. DOJ should develop model restitution plans that would satisfy the requirements of ACPERA and provide meaningful single damage restitution to injured plaintiffs and class members who do not opt out of the follow-on class actions.

The agencies further should limit amicus participation to direct government interests as a public enforcer. It is in the government's own self-interest as an enforcer to support plaintiffs on issues like class certification where full restitution has not been made, suits involve recidivist industries that collude, or the conditions of ACPERA have not been satisfied. The agencies otherwise should remain neutral in private litigation unless the plaintiffs seek major structural relief or the case poses a significant threat to foreign policy or national interests of the United States.

The Antitrust Division is currently involved in a major initiative to promote procedural fairness in competition enforcement.<sup>28</sup> While this effort is focused on public enforcement and aimed primarily at foreign enforcement agencies, I would suggest adding the development and protection of meaningful private enforcement to the best practices standards and agreements being negotiated on the international level. More generally, the federal agencies should join the major competition law systems around the world in promoting, rather than restricting, private enforcement. This includes the development, rather than the restriction, of class actions and other collective litigation mechanisms so that large numbers of parties are compensated in small damage scenarios.

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26 No. 17-204, *Apple Inc., v. Pepper*, On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Brief for the United States as Amicus Curiae Supporting Petitioner, <https://www.justice.gov/sites/default/files/briefs/2018/08/20/17-204tsacunitedstates.pdf>.

27 Spencer Weber Waller, *Towards a Constructive Public-Private Partnership to Enforce Competition Law*, 29 *WORLD COMP. L. & ECON. REV.* 367 (2006).

28 ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement, <http://www.internationalcompetitionnetwork.org/uploads/library/doc1148.pdf>.

## VIII. CONCLUSION

Too often the courts, Congress, and the federal antitrust agencies have viewed private treble damage actions as a distraction, or an active threat, to appropriate competition policy. While such an adversarial relationship may be justified in extremely rare circumstances, the more likely scenario is that both public and private enforcement of competition law are necessary partners to provide an optimal mix of punishment, deterrence, and compensation.

Professor Lahav's innovative book is an excellent starting point for a discussion on how private rights of action operate in the competition law space. Private antitrust rights of action for both damages and injunctions are a vital source of law enforcement, disclosure of information, civic participation, and treatment of all parties as equals before the law. This brief essay develops some ways these values play out in the anti-trust world, with gratitude to Professor Lahav for her study of the broader questions of the benefits of the general private litigation system in the United States.



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