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ANTITRUST VIOLATIONS AS PRIVATE ENFORCEMENT

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On the whole, the dismantling of monopolies relies heavily on public enforcement. While the opportunity for private enforcement exists in the antitrust context, it is limited, as not all so-called "monopolies" commit antitrust violations.[1] For example, where barriers to entry in a particular industry are high—such as in the case of phone carriers or airlines, both of which must build an infrastructure to support their business[2]—sufficient competition may not exist to create options for the consumer. In situations like these, the federal government generally must step in to break up the monopoly. However, this interference happens infrequently, and these efforts are not always successful.[3] Thus, public enforcement in the monopoly context might benefit from additional private enforcement. However, traditional private enforcement will not be available to break up effective monopolies which have not committed antitrust violations. One possible solution could be a form of private enforcement engineered via intentional monopoly breakup, where many smaller companies work in concert to undercut the price of the functional monopoly and later to disseminate its market share. Unfortunately, "private enforcement" of this type is likely to violate antitrust law in itself.[4] However, from a policy standpoint, such violations ought to be permissible, because they achieve antitrust law's "fundamental goal of . . . protect[ing] consumer[]" welfare.[5]

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1 Indeed, the layman's term "monopoly," as used here, does not necessarily implicate a violation of 15 U.S.C. § 2, which criminalizes monopolization. *See* 15 U.S.C. § 2 (2012).

2 *See generally* J.B. Maverick, *How Strong Are the Barriers to Entry for New Companies in the Telecommunications Sector?*, INVESTOPEDIA (July 15, 2015), https://www.investopedia.com/ask/answers/071515/how-strong-are-barriers-entry-new-companies-telecommunications-sector.asp; Jad Mouawad, *The Challenge of Starting an Airline*, N.Y. TIMES (May 25, 2012), https://www.nytimes.com/2012/05/26/business/start-up-airlines-face-big-obstacles.html.

3 *See infra* Part I.

4 *See, e.g.*, 15 U.S.C. § 1 (2012).

5 John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 192 (2008).

This Essay will argue that total reliance upon public enforcement to break up monopolies or effective monopolies is insufficient to protect consumer welfare and that the Department of Justice's Antitrust Division ("DOJ" or "DOJ Antitrust") and the Federal Trade Commission (FTC) should consider "private enforcement" via intentional monopoly breakup a complete defense to any antitrust violations. This argument will proceed in four main parts. First, it will develop the background of the eBooks industry's history as context for the *United States v. Apple*[6] decision. Next it will discus the *United States v. Apple* case, which highlights the consequences for corporations who try to privately break up existing monopolies under current law. This Essay will then examine some of the shortcomings of public enforcement in the antitrust sphere before detailing ways in which private enforcement through intentional monopoly breakup could be a preferable mechanism for prevention of monopolies.

I. THE EBOOK INDUSTRY LEAD-UP

Amazon released the Kindle in late 2007.[7] The eReader was enormously popular amongst consumers despite its hefty price tag of $399, but the pricing structure Amazon formulated behind the scenes was disruptive to the publishing industry.[8] To encourage consumers to purchase eBooks, Amazon would buy books at their wholesale prices from publishing companies, and then sell them at a loss to consumers, notoriously for $9.99.[9] This pricing scheme meant that Amazon lost money on many sales, especially new releases, but gained market power, as consumers flocked to purchase eBooks at a lower price than physical books and bought into the Amazon eBooks infrastructure by purchasing Kindles.[10] By 2010, Amazon's Kindle had a ninety percent share of the eBooks market.[11]

Traditional publishing companies felt threatened by Amazon's approach to eBook sales.[12] Their concerns were twofold: first, that the sales of physical books,

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6 791 F.3d 290, 316 (2d Cir. 2015).

7 *See* Brian Heater & Anthony Ha, *A Decade of Amazon Kindle*, TECHCRUNCH (Nov. 19, 2017), https://techcrunch.com/2017/11/19/a-decade-of-amazon-kindle/?guccounter=1&guce_referrer_us=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_cs=mOCLpbVcBy-oHuFA-V5SvA.

8 *Id.* (discussing the "precipitous[]" drop in sales of physical books following the Kindle's release).

9 *See* Vauhini Vara, *Did Apple Fix E-Book Prices for the Greater Good?*, NEW YORKER (Dec. 16, 2014), https://www.newyorker.com/business/currency/apple-claiming-virtue-e-book-price-fixing-case.

10 *See id.*

11 Rory Maher, *Here's Why Amazon Will Win the eBook War: Kindle Already Has 90% eBook Market Share*, BUS. INSIDER (Jan. 13, 2010), https://www.businessinsider.com/amazon-selling-90-of-all-e-books-2010-1.

12 *See* Ylan Q. Mui & Hayley Tsukayama, *Justice Department Sues Apple, Publishers over e-Book Prices*, WASH. POST (Apr. 11, 2012), https://www.washingtonpost.com/business/technology/justice-department-files-suit-against-apple-publishers-report-says/2012/04/11/gIQAzyXSAT_story.html?utm_term=.11e7eb398135.

upon which they depended for "much" of their revenue, would continue to decline, with consumers ultimately demanding lower prices for books altogether.[13] Second, publishers feared that Amazon would one day be able to "bypass publishers altogether" by working directly with authors to sell their content.[14] Publishing company Hachette called Amazon the real industry predator, claiming that the underpricing of eBooks was an "effort to exclude competitors."[15] The Big Six publishing companies began meeting in fall 2008 to decide what to do about "the $9.99 problem."[16]

In 2009, prior to the release of the iPad, Apple and five of the Big Six publishing companies designed a plan that was intended to loosen Amazon's stranglehold on the eBook market.[17] Together they formulated a business model wherein publishers would set the price of the Apple-offered eBooks, up to a maximum price of $14.99.[18] However, if Apple discovered that another eBook provider was selling that publication for a lower price, Apple was permitted to adjust the price to match that lower value.[19] Once the iPad launched in 2010, the publishers presented the same deal to Amazon, and threatened to pull their eBooks from Amazon listings if the deal was not accepted.[20] Amazon accepted the deal, and eBook prices rose as a result.[21]

II. *UNITED STATES V. APPLE* AND ITS ANTITRUST IMPLICATIONS

Once uncovered, the business model designed by Apple and the five publishing companies was found to contain both horizontal and vertical violations of antitrust law.[22] As a result, the Second Circuit imposed a four-part injunction upon Apple, which severely limited its ability to gain a comparable foothold in the eBook market.[23] Since the ruling in 2015, Amazon's dominance of the eBook market has

13 Vara, *supra* note 9; *see also, e.g.*, Mui & Tsukayama, *supra* note 12.

14 Mui & Tsukayama, *supra* note 12. Publishers have seen this fear recognized with the advent of Kindle Direct Publishing, which allows authors to self-publish eBooks and paperbacks for free through Amazon. *See* Kindle Direct Publishing, *Self-Publishing*, AMAZON, https://kdp.amazon.com/en_US/ (last visited Aug. 28, 2019).

15 Mui & Tsukayama, *supra* note 12.

16 *See id.*

17 VERONICA ROOT, ETHICAL COMPLIANCE 327–29 (unpublished manuscript) (on file with author).

18 *See* Vara, *supra* note 9.

19 *See id.*

20 *Id.*

21 *Id.*

22 *See* Roger Parloff, *US v. Apple Could Go to the Supreme Court*, FORTUNE (June 5, 2013), https://fortune.com/2013/06/05/us-v-apple-could-go-to-the-supreme-court/.

23 ROOT, *supra* note 17, at 332–33; *see also* United States v. Apple, 791 F.3d 290 (2d Cir. 2015).

risen from seventy-four percent of market share to approximately eighty-three percent.[24]

It would be difficult to argue that Apple had not committed an antitrust violation in the course of the business model's development: the agreement pertained to interstate commerce, required concerted action on behalf of the publishing companies and Apple, and placed an unreasonable restraint upon trade, as it interfered with previously accepted industry norms.[25] However, whether this antitrust violation is truly *wrongful* is debatable. Apple's behavior was not geared toward heightening eBook prices unreasonably; instead, their intent was to work with the publishing companies to carve out a space large enough for Apple to compete in the eBook market.[26] Some who followed the case felt sympathetic toward Apple and the publishers, who were seen as attempting to break up Amazon's effective monopoly.[27] Even the panel of Second Circuit judges who heard oral argument in the case seemed to consider Apple's position credible, with Judge Raymond Lohier Jr. asking the Justice Department how Apple and the publishers could have broken up Amazon's monopoly *without* committing an antitrust violation.[28]

Amazon, for its part, is unlikely to have committed an antitrust violation. While the eBook sales constitute interstate commerce, there was no external agreement with publishers that placed an unreasonable restraint upon trade.[29] Although Amazon's business operations harmed publishers, who worried that the scheme would impact their ability to sell paper books in brick-and-mortar stores,[30] Amazon's near-monopoly does not appear to violate antitrust law.[31]

It is appropriate, then, to ask whether the outcome of *United States v. Apple* is one with which the public should be comfortable. Apple's attempt to enter the

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24 *See* Mark Gurman, *Apple's Getting Back into the E-Books Fight Against Amazon*, BLOOMBERG (Jan. 25, 2018), https://www.bloomberg.com/news/articles/2018-01-25/apple-is-said-to-ready-revamped-e-books-push-against-amazon.

25 *See* 15 U.S.C. § 1 (2012).

26 *See* ROOT, *supra* note 17, at 328. Indeed, the prices of some eBooks fell after Apple entered the market. *See* Vara, *supra* note 9.

27 *See* Parloff, *supra* note 22 ("While the publishers' motivations may have been unusual—some would argue laudable—there is much evidence that they did, in fact, collude.").

28 *See N.Y. Court Weighs Apple, Amazon eBook Arguments*, COLUMBIAN (Dec. 15, 2014), https://www.columbian.com/news/2014/dec/15/ny-court-weighs-apple-amazon-e-book-arguments/. In answer, the attorney for the DOJ indicated that Apple could have "let the competitive forces of the market with a powerful new entrant play out naturally or could have filed a lawsuit" with the DOJ. *Id.* However, in order to file a lawsuit with the DOJ against Amazon, a colorable case that Amazon was committing antitrust violations would have needed to exist. This Essay concludes that it did not.

29 ROOT, *supra* note 17, at 327 (discussing Amazon's business plan to sell eBooks at a loss).

30 *Id.* at 327–28.

31 For an excellent discussion of Amazon's conglomerate dominance and the issues it poses for traditional antitrust application, see Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

market resulted in numerous injunctions, while Amazon's effective monopoly was preserved.[32] Is this how antitrust law is intended to operate?

When monopolies become too large, the government can step in and force a breakup, even without the corporation having committed an antitrust violation.[33] Examples of this include the breakups of American Tobacco, Standard Oil, and AT&T.[34] However, such government interventions are infrequent, despite the clear intent of antitrust law to prevent monopolies.[35] Because of the government's hesitancy to involve itself, public enforcement alone may be insufficient to protect consumers in the antitrust sphere, who will be harmed if the monopoly chooses to unilaterally raise prices.[36]

In compliance literature, the benefits and detriments of both public and private enforcement have been extolled.[37] Some industries tolerate both public, governmental enforcement and private, litigant-driven enforcement.[38] Antitrust is one such industry—private litigants are entitled to bring Sherman Act allegations against a corporation.[39] However, antitrust is a fairly esoteric area of the law, so it is unlikely many private individuals would bring such lawsuits.[40] Even the DOJ, in its informational pamphlet on antitrust law, encourages consumers simply to provide pertinent information to the agency, rather than attempt a lawsuit.[41] The pamphlet further mentions the difficulty in "detect[ing] and prov[ing]" antitrust violations, suggesting inexperienced private litigants might struggle to bring suit.[42] Additionally, individual use of the court system is time-consuming and not always successful. In the Amazon context, even if an individual had brought suit against the corporation, it is unlikely that an antitrust violation would have been found.[43] Instead of relying on individual litigants, private enforcement via direct monopoly breakup might be more effective in the long run, because it could allow corporations

32 *See* Gurman, *supra* note 24.

33 *See* Andrew Beattie, *A History of U.S. Monopolies*, INVESTOPEDIA (Jan. 15, 2018), https://www.investopedia.com/insights/history-of-us-monopolies/.

34 *See id.*

35 *See id.*

36 For example, Microsoft was found to be a monopoly that should be broken up, but it "never actually" was. *Id.*

37 *See, e.g.*, Stephen B. Burbank et al., *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637 (2013).

38 *Id.* at 661 (calling the regimes tolerating both public and private enforcement "hybrid").

39 DEP'T OF JUSTICE, *Antitrust Enforcement and the Consumer*, https://www.justice.gov/atr/file/800691/download (last visited Nov. 3, 2018).

40 *Id.* ("Many consumers have never heard of antitrust laws . . . ."). *But see generally* Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675 (2010) (claiming that private enforcement of antitrust is actually the majority approach in the United States, but calling for an overhaul of the system to improve its effectiveness).

41 *See* DEP'T OF JUSTICE, *supra* note 39.

42 *Id.*

43 *See supra* notes 29–31 and accompanying text.

like Apple to make agreements that intentionally interfere with the monopoly's market share.[44]

As above, agreements of this nature that involve multiple actors are generally criminalized under antitrust law.[45] In order to allow private enforcement of this type to take place, DOJ Antitrust and the FTC should consider treating such "private enforcement" as a complete defense to an antitrust violation in very limited situations.[46] For example, private enforcement via monopoly breakup should be allowable where seventy-five percent of the market share belongs to one corporation that operates in such a manner that no other business could financially afford to compete. In *Apple*, Amazon would have qualified as a corporation with a monopoly whose breakup would be allowable, even if the breakup violated antitrust law.[47] With the defense of private enforcement successfully raised, Apple would have been allowed to enter the market, and the publishing companies would have been absolved of the fear that Amazon would put them out of business. Amazon's eBooks monopoly likely would have slackened somewhat, with the end result that private enforcement by Apple had pro-competitive effects, despite being a textbook violation of antitrust law.[48]

It is necessary to acknowledge a few potential shortcomings of this version of private enforcement. First, one troubling possibility could be private enforcement leading to revolving door monopolies, wherein two main competitors gather allies to interfere with the other's market share repeatedly. One possible way to temper this could be to require clean hands in the raising of the private enforcement defense, similar to the requirement of having clean hands in equity.[49] Beyond this, it would be critical to set an appropriate quantitative limit on the percentage of the market a functional monopoly must occupy before private enforcement could occur. If the number is too high—such that the monopoly owns ninety percent of the market share—this theory of private enforcement likely cannot prevail, as the monopoly owns so much of the market as to be overwhelming, even when competitors work in concert against it. On the other hand, if the number is too low, this theory of private enforcement has the potential to be abused, either via revolving door monopolies, as

44 For the remainder of the Essay, I will not use scare quotes around the term private enforcement, though I acknowledge the type of private enforcement being encouraged here differs substantially from the typical conceptualization of the term. *See generally* Burbank et al., *supra* note 37.

45 *See* 15 U.S.C. § 1 (2012).

46 I suggest use of a complete defense mechanism rather than mitigation credit, as one would want to incentivize private enforcement. If a private enforcer would still run the risk of accumulating fines and sanctions, these types of monopoly-interfering agreements are less likely to occur.

47 *See* Gurman, *supra* note 24.

48 *See* Parloff, *supra* note 22 ("Apple brought competition to a market that was, prior to its arrival, dominated by an 80% to 90% near-monopolist, Amazon.").

49 *See, e.g.*, 13 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 65.06[5][a] (3d ed. 2019) (discussing how the "clean hands" doctrine may bar an award of injunctive relief if the party seeking an injunction has acted in bad faith).

above, or simply by sanctioning what ought to be an antitrust violation. If this theory were to be put into practice, it would likely behoove regulators to choose a more conservative (higher) percentage of the market share, with the knowledge that they could always lessen the number later if needed to incentivize the use of this mechanism. Beyond this, authorizing the concerted competition of rivals, even though the monopoly has not violated antitrust law, may seem fundamentally unfair.[50] However, if one accepts that the paramount policy goal of antitrust law is to promote consumer welfare, allowing concerted private enforcement to interfere with the monopoly is likely to achieve the ultimate aim.

III. SHORTCOMINGS OF PUBLIC ENFORCEMENT

This Essay takes the position that a private enforcement mechanism is needed in the antitrust sphere because there are a number of ways in which public enforcement fails to successfully prevent monopolies. First, prosecutorial discretion plays a role in deciding which monopolies ought to be broken up.[51] This is problematic because it likely allows some corporations whose market shares are near-monopolistic to evade breakup, while other similarly-situated corporations are subject to "Sherman's hammer,"[52] causing issues of uniformity in enforcement.[53] Relatedly, public enforcement in the antitrust space generally occurs through DOJ Antitrust or the FTC's decision to pursue an action.[54] However, due to historical relationships between these agencies and the biggest players in their target industries, DOJ Antitrust or the FTC may be vulnerable to capture.[55] This could lead to the exercise of prosecutorial discretion to play favorites or to characterize some monopolies as necessary, even where they are harmful to consumers and competition.[56] In the same vein, Daniel Crane argues that "[t]hose who distrust private economic monopolies should also distrust public governmental

50 Circuit Judge Dennis Jacobs would at least be inclined to consider this type of competition permissible, as he wrote that a "pervasive error" in the *United States v. Apple* majority opinion was its "implicit assumption that competition should be genteel, lawyer-designed, and fair under sporting rules." 791 F.3d 290, 342 (Jacobs, J., dissenting). He further suggested that antitrust law would not be offended by "gloves-off competition." *Id.*

51 This is true of public enforcement more generally as well. *See* Burbank et al., *supra* note 37, at 667–68.

52 *See* Beattie, *supra* note 33.

53 Issues of uniformity in enforcement also derive from the fact that jurisdiction over antitrust cases is split between the DOJ and the FTC, though this is beyond the scope of this Essay.

54 *See* Press Release, House Judiciary Comm., Goodlatte Statement at Markup of Smarter Act (Apr. 5, 2017), https://republicans-judiciary.house.gov/press-release/goodlatte-statement-markup-smarter-act/.

55 *See* Miriam Hechler Baer, *Governing Corporate Compliance*, 50 B.C. L. REV. 949, 981 (2009). This concern is geared more so toward the FTC, as Baer notes that DOJ attorneys make names through prosecutions, not failures to exercise discretion. *Id.* at 982.

56 *See* Burbank et al., *supra* note 37, at 665 ("[A]dministrators may face pressure to under-enforce from executives or legislatures who may be motivated by . . . the desire to protect specific constituents in particular.").

monopolies."[57] Some exercise of prosecutorial discretion is needful, but tempering its use with successful private enforcement would help to ensure enforcement decisions appropriately address areas of concern and minimize fears about nepotism.

Second, the lag time inherent in public enforcement is harmful to consumers, which cuts against the animating principles of antitrust law. Of course, the time lapse between the formation of a monopoly and its government-mandated breakup is inevitable: it will take time for the monopoly to be recognized, time for the government to decide the monopoly is worth acting upon, and possibly time before prosecutorial personnel or financial resources can be dedicated to the problem. However, as this time passes, consumers are forced to pay higher prices due to the continued existence of the monopoly, which should elevate the monopoly's conduct to an enforcement priority.[58]

Finally, even where public enforcement occurs, there is no guarantee of its effectiveness. AT&T is a prime example of this: although the company was broken up into eight separate pieces by the government in 1984, "almost all those companies are once again part of AT&T."[59] Indeed, the corporation is "more than twice the size it was before."[60] This may be due to a lack of prosecutorial resources on the part of the DOJ or the FTC, who perhaps cannot afford to keep close tabs on corporations post-breakup.[61] More concerningly, this could also be a deliberate decision by the DOJ or the FTC to allow the company to persist as a functional monopoly—whether due to capture or otherwise. Whatever the reason, the AT&T breakup caused by public enforcement did not prevent the company from being a monopoly for long, and thus did not ultimately remedy the problem.

IV. THE POTENTIAL OF PRIVATE ENFORCEMENT

In their paper *Private Enforcement*, Stephen Burbank, Sean Farhang, and Herbert Kritzer detail seven potential benefits of private enforcement as compared to public enforcement, noting that each of these benefits' expression will vary across industry and policy domains.[62] This Essay will consider each advantage in the context of private enforcement via intentional monopoly breakup in turn, using the *Apple* case as a factual scenario.

First, the authors point to the increased amount of resources available to private enforcement actors, as well as the ability to shift costs away from the beleaguered

57 Crane, *supra* note 40, at 677.

58 *See* Victoria Buchholz & Todd Buchholz, *In the Age of Uber and Snapchat, Antitrust Law Needs an Update*, L.A. TIMES (Feb. 9, 2017), http://www.latimes.com/opinion/op-ed/la-oe-antitrust-att-time-warner-20170209-story.html.

59 Matthew Stuart, *How AT&T Conquered All Forms of Communication After the Government Forced It to Break Up*, BUS. INSIDER (Mar. 5, 2018), https://www.businessinsider.com/att-breakup-1982-directv-bell-system-2018-02.

60 *Id.*

61 Burbank et al., *supra* note 37, at 662.

62 *Id.*

administrative state.[63] Both of these advantages hold true in the *Apple* case. The resources—both personnel-wise and financially—available to Apple are vast and likely to outstrip those dedicated to even the most vigorous of antitrust enforcement actions by the DOJ or FTC. This comports with *Private Enforcement*'s characterization of private enforcement regimes as "self-funding."[64] Apple attorneys would also likely have fewer matters competing for their attention. While DOJ and FTC attorneys have many different issues to juggle, it is plausible that Apple could dedicate a number of individuals solely to the task of interrupting a monopoly like Amazon's. In the same vein, private enforcement actors have another resource in plentiful supply compared to the government—information.[65] Agency specialization is often used as a justification for why particular agencies handle particular tasks, but even the most informed bureaucrat is unlikely to possess better information about a market than one of the competitors actually entrenched in the market.[66] Because of its many conversations with the Big Six publishing companies, one can infer that Apple was uniquely poised to compile information about the Amazon monopoly, its effects on direct competitors, the concerns of suppliers, and the reaction of consumers.[67]

In addition to resource considerations, the authors suggests that private enforcement actors may be able to "encourage legal and policy innovation,"[68] essentially because their attorneys may be willing to pursue riskier strategies at trial.[69] The *Apple* case does not provide many facts relevant to this purported benefit, so it is unclear whether private enforcement in the antitrust context would actually encourage such innovation.

Beyond this, *Private Enforcement* identifies three more advantages: first, that private enforcement signals that enforcement in the applicable area of law will occur, even in the event that public enforcement fails or is "subverted."[70] Second, and relatedly, it postulates that private enforcement limits the need for public enforcement agencies to be seen acting in the applicable legal arena,[71] likely because private enforcement is occurring faithfully. Finally, it suggests that private enforcement can help "facilitate participatory and democratic governance."[72] Each of these advantages is likely to materialize from an implementation of the private enforcement defense to antitrust violations. The government's express tolerance for intentional agreement among corporations to disrupt another's monopoly in a particular market would send a strong signal that monopolies will not be tolerated,

63 *Id.*
64 *Id.* at 663.
65 *Id.*
66 *See id.* at 663–64.
67 *Cf.* ROOT, *supra* note 17, at 328–29.
68 *See* Burbank et al., *supra* note 37, at 662.
69 *Id.* at 664.
70 *Id.* at 662.
71 *Id.*
72 *Id.*

though the mechanism for dismantling them differs significantly from the one used at present. Saliently, competitors in the same industry are unlikely to allow a monopoly to re-form, as in the case of AT&T.[73] This could lead to even stronger enforcement overall than government-mandated breakup. If this is the case, there would be less need for the DOJ or FTC to intervene in the area.[74] While flowery, the final alleged benefit of private enforcement is also likely applicable—private enforcement actors may be more willing to buy into a system of antitrust compliance that allows them the agency to regulate competitors.

On the whole, the advantages of private enforcement, particularly with respect to the availability of personnel, financial, and informational resources, are overwhelming in the antitrust context.

CONCLUSION

This Essay has argued for the availability of a complete defense to antitrust violations where corporations act in concert to restrain trade with the intent of breaking up an existing monopoly by characterizing such behavior as private enforcement. An analysis of the benefits of private enforcement, as identified in *Private Enforcement*, leads to the conclusion that private enforcement via intentional monopoly breakup is likely preferable to the current scheme of public enforcement perpetuated by the FTC and DOJ Antitrust. While public enforcement could still play a valuable role as a backstop in the event that concerted action could not dismantle an existing monopoly, private enforcement actors should be tolerated even where their actions would constitute a violation of antitrust law.

73 *See supra* notes 59–60.

74 This could circularly increase the amount of resources available to the FTC and DOJ Antitrust—a useful backstop in the event of a monopoly too large to be broken by concerted competitor effort.