

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this edition we note a paper by Daniel Crane that examines the American tradition of opposition to federal incorporation and its consequences for antitrust policy. Send comments and suggestions for papers to review to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Daniel A. Crane, Antitrust Antifederalism, 95 CAL. L. REV. ____ (forthcoming 2007)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976711

In this paper, Daniel Crane attempts to link various “pathologies” of modern antitrust to Congress’s decision in 1890, reaffirmed many times since, to address the monopoly problem by a system of public and private rights of action (a “crime-tort” model) rather than by a centralized system of federal incorporation and administrative regulation. Crane argues that this congressional choice was an expression of the American tradition of “antitrust antifederalism,” a hostility to federal incorporation that long predates the antitrust movement of the late 19th century. The antifederalists of the 18th century associated governmental charters with monopoly and royal privilege. In part because of this antipathy, the framers of the constitution rejected James Madison’s proposal that Article I grant Congress a power to charter corporations. The Supreme Court later discovered the same power in the Necessary and Proper clause of Article I § 8, but political opposition to special federal incorporation remained strong. The most dramatic expression of this opposition was Andrew Jackson’s veto in 1832 of a bill that would have renewed the charter of the second Bank of the United States. Instead, Jackson supported state general incorporation laws, which would (in William Letwin’s words) “reduce the privilege of incorporation, not by taking it from the few, but by opening it to the many.”¹

In the late 19th century, however, firms like Standard Oil exploited liberal state incorporation laws to form the trusts. Some states sought to void the charters of trusts using quo warranto proceedings, but with little success. In framing a federal response to the trusts, Congress, according to Crane, “might well have chosen to require all corporations operating in interstate commerce to be federally chartered by competition law bureaucrats in Washington.” Instead, it chose to “divorce antitrust and corporate law” by adopting the “crime-tort” enforcement model, condemning restraints and monopolistic acts in the language of the common law, but with the crucial addition of public and private rights of action. This choice, according to Crane, is the source of “a number of systemic problems for antitrust enforcement that have persisted, and in some instances become aggravated, over time.”

Crane details efforts over the ensuing decades to enact a regime of federal incorporation that would include direct federal supervision of corporations. Proposals along these lines garnered significant support during the Progressive and New Deal eras, but were always fended off by

¹ WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 65 (1965).

renewals of commitment to the crime-tort model, accompanied by new legislation or by more aggressive enforcement. Congress did choose to intervene in corporate law by enacting the Securities Acts in the early 1930s, but these statutes were focused most directly on the interests of investors rather than consumers. Even during the 1960s and 1970s, when economists widely believed that market structure was more important than conduct in determining the competitiveness of markets, there were no serious proposals for federal incorporation accompanied by direct regulation of market structures.

Crane suggests that a regime of federal incorporation might have emerged had events played out slightly differently over the past two centuries. In such a system

the corporation and its capital-concentrating effects would be the justification for federal antitrust regulation and its focus. The corporation operating in interstate commerce would owe its existence and privileges to the federal government, whether through chartering, licensure, or regulation. Federal regulators would play an active role in specifying *ex ante* corporate structures and behaviors compatible with competition values and would check anticompetitive behavior through rule-making and injunctive intervention. Antitrust decisions would be made primarily by expert lawyers, economists, and administrative tribunals. Federal competition standards would preempt any inconsistent state regulations thus creating competitive channels of interstate commerce.

In a system of federal incorporation, the chartering authority could prescribe rules of conduct without regard to violation of competitive norms and could revoke the charters of firms regardless of their conduct.

The rejection of such a regime in favor of a crime-tort model, according to Crane, has produced a number of pathologies in the American antitrust system. In the crime-tort model, courts must identify a competitive “sin” before they can intervene. They must, for example, find an “agreement” before punishing parallel conduct, even though parallel conduct in the absence of agreement may be just as harmful to consumers. Similarly, they must find inefficient exclusionary conduct before punishing monopolies, even though monopolies that emerge for other reasons may be just as harmful to consumers. The search for clear standards of conduct has been fruitless, and is likely to be vain because “there is no conceptually satisfying, *ex ante* way to define a social norm of industrial competition.”

These problems are aggravated by the crime-tort model’s reliance on generalist judges and lay juries that are ill-equipped to understand the kinds of issues that normally decide antitrust cases. The fear of incompetent juries has led courts to shape substantive antitrust rules and accompanying standards of evidentiary sufficiency in ways that limit the risks of “false positives,” that is, erroneous findings of liability for efficient competition. Because of this characteristic of the crime-tort system, courts have decided more and more cases on summary judgment rather than on a complete record.

The crime-tort model, Crane argues, has elevated private litigation over public, even though private plaintiffs have their own interests, not those of the consumers, at heart. Courts have shaped antitrust rules to prevent perverse private enforcement, but these same rules have burdened public enforcement actions. The Antitrust Division, for example, lost the *American Airlines* predatory pricing case, and the FTC has lost collusive patent settlement cases, under restrictive criteria developed in private litigation.

The reliance on a litigation model has also given states undue regulatory power. The state action doctrine allows clearly articulated and actively supervised state regulatory regimes to displace antitrust rules. If antitrust were regulatory to begin with, there would be less reason to prefer state regulatory choices over federal ones. Furthermore, state attorneys general have brought antitrust actions, like the state *Microsoft* case, that have interfered with a coherent federal antitrust policy.

Against these pathologies of the litigation model, Crane sets the experience of the Hart-Scott-Rodino (HSR) system of premerger notification and review, the primary instance in which antitrust law has adopted a regulatory model. The HSR procedures have

shattered most vestiges of antitrust antifederalism in the merger review area by promoting structure over conduct, delegating authority primarily to expert bureaucrats and virtually never to juries, making merger control an almost exclusively public function, focusing solely on large corporations, and giving the federal government partial preemptive authority in merger cases.

Despite the relative success of the HSR regime, its approach has only rarely been used in other antitrust domains. The National Cooperative Research and Production Act, for example, allows ex ante review of prospective joint ventures. The FTC has also recently received authority to review proposed pharmaceutical patent settlements. Congress, Crane argues, might adopt similar models in other areas of antitrust, without creating a system of federal incorporation. He suggests, for example, that private damage actions might be limited to instances in which federal regulators have found a violation.

Crane concedes that his article does not propose any particular system of corporate regulation as an alternative to our present system of public and private enforcement of antitrust rules in the federal courts. He addresses only two objections that would be raised to any more overtly regulatory system. First, any such proposal would require a greatly increased antitrust budget. He suggests, however, that the program could be funded by fees, in much the same way as premerger review. Second, he recognizes that any “corporate regulatory model may have its own pathologies, such as the possibility of agency capture, a self-aggrandizing tendency, and volatility in enforcement due to centralization and political control.” He does not, however, address these concerns in the article. He also does not compare the American system of public and private antitrust enforcement to the far more regulatory European system.

Crane has provided an interesting history of proposals for federal incorporation that have, at various times in American history, provided lawmakers with a model of competition policy very different from the one chosen by Congress in the Sherman Act and later legislation. One might argue, however, that Congress’s longstanding preference for the crime-tort model of antitrust reflects something more basic than hostility to federal incorporation. The requirement of a competitive “sin” as a prerequisite for federal intervention seems to reflect an ideological belief that free exchange in markets framed by common law rules of property and contract, maximizes social wealth except when a demonstrable competitive sin occurs. Congress may well have authorized only sporadic and temporary intervention in markets because it believed that, once intervention removed the sin that impeded market functions, competition would once again legitimate the outcomes of market transactions more certainly than the choices of experts.

Even if courts cannot identify competitive sin very well, it does not follow that Congress has been wrong to be skeptical that regulatory supervision of the entire economy by competition experts would achieve better outcomes. As Crane recognizes, federal enforcement officials as recently as the 1960s regularly brought cases and made arguments that revealed that they had little more expertise than the courts. Premerger review in the hands of the 1960s-era FTC, for example, might have been more harmful to consumers than the status quo of that time, bad as it was. Even today, it is difficult to conceive of a much more regulatory form of antitrust that would be demonstrably preferable to our present system, for all its pathologies. ●