Antitrust Antifederalism

Daniel A. Crane†

Abstract

U.S. antitrust law has been profoundly influenced by a historical aversion to direct federal superintendence of corporations. This ideological impulse began with Antifederalist opposition to James Madison's proposal to grant Congress a general incorporation power and carried over to the Progressive Era, where it defeated a proposed federal corporate regulatory model of antitrust. The antitrust antifederalist impulse thus enabled the rise of the competing crime-tort model, in which antitrust law creates a freestanding norm of industrial competition rather than a regulatory apparatus for policing the capital-concentrating effects of incorporation statutes. Combined with the U.S. civil litigation apparatus, this conceptualization has produced various pathologies, including an excessive focus on locating a "bad act" rather than specifying appropriate corporate structure; delegation of adjudicatory decision making to generalist judges and juries rather than industrial policy specialists; the predominance of private enforcement over public enforcement; extension of...
antitrust law to non-corporate subjects, particularly unions; and interference with federal competition policy by parochially interested state regulators. The effect has been inconsistent and ineffective decision making. The one major exception to antitrust antifederalism's continuing dominance—the pre-merger notification system adopted in 1976—reveals the advantages of the corporate regulatory model and suggests some steps that could be taken to rationalize the institutional structure of antitrust law.

INTRODUCTION

The founders of U.S. antitrust law\(^1\) chose between two institutional models of antitrust: the corporate regulatory model and the crime-tort model. Under the corporate regulatory model, the capital-concentrating effects of general incorporation statutes\(^2\) would have been considered the subject of antitrust regulation. Corporations participating in interstate commerce would have been required to receive a federal charter or license and antitrust law would have been considered a subset of corporate law. The goal of antitrust enforcement would have been to optimize market performance by specifying appropriate corporate structures and behavior. Specialized federal bureaucrats, wielding broad regulatory and injunctive powers, would have had primary responsibility for mandating the structure of interstate corporations and for policing their behavior ex ante. Federal corporate law would have displaced state corporate law as to interstate corporations.

The founders rejected this corporate regulatory model and instead chose the competing crime-tort model. Rather than focus on the corporation as the subject of antitrust regulation, the crime-tort model conceived of antitrust as a freestanding norm of industrial competition. Instead of concentrating on optimizing market structure, the crime-tort model focused on deterring and compensating for prohibited conduct. This model committed complex questions of industrial policy not to specialized bureaucrats with wide equitable and regulatory powers, but primarily to private plaintiffs, generalist judges, and economically unsophisticated juries. By divorcing antitrust law from corporate law, the crime-tort model unleashed antitrust law on non-corporate subjects, including labor, sole proprietors, and professional associations, that would not have been antitrust subjects in the corporate regulatory model. Finally, compared to the corporate regulatory model, the crime-tort model created

---

1. As discussed further in Part I, the founders of U.S. antitrust institutions include not only the Congressmen and Presidents responsible for the Sherman Act in 1890 and the Clayton and Federal Trade Commission Acts in 1914, but also various actors who preceded and followed them in shaping attitudes and precedents toward governmental regulation of corporations.

2. In contradistinction to incorporation by special act of the legislature—which was the practice prior to the rise of general incorporation statutes—a general incorporation statute allows for the creation of a corporation merely by the filing of forms, payment of fees, and conformity to other statutory requirements. See Susan Pace Hamill, From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations, 49 AM. U. L. REV. 81, 97-121 (1999).
uncertainty as to the hierarchy between state and federal regulation of competition. As the legal doctrine developed, the states were allowed to reverse-preempt the federal competition norm by claiming that state bureaucrats were implementing an alternative regulatory regime—even though the alternative state scheme was often nothing more than parochial protectionism. Meanwhile, the states were given a role equal to that of the federal government in enforcing the federal norm. This has led to interference with federal enforcement objectives and strategy.

The founders' choice of the crime-tort model over the corporate regulatory model, and the persistence of that model over time despite its disadvantages, owes a great deal to historical forces that I shall call antitrust antifederalism. In recent years, there has been voluminous scholarship about "antitrust federalism"—the extension of general federalist principles to the relationship between state and federal enforcement of the antitrust laws. Missing from this scholarship is an appreciation of how deeply the structure, substance, and culture of U.S. antitrust law have been shaped by a single antifederalist idea that has persisted for over two hundred years: the idea that the national government should have no direct regulatory power over corporations qua corporations for purposes of effectuating national industrial policy.

The central impulse of antitrust antifederalism is the assumption that a
corporate regulatory model of antitrust would require a federal general incorporation statute or similar interstate corporation licensing regime, and that such a regime would give the federal government dangerous power to create and destroy monopolies. This idea emerged as a kernel in the Philadelphia Constitutional Convention’s rejection of Madison’s proposal to grant Congress an incorporation power. It has been reinforced over the years through a process of successive reiteration and rejection of proposals to give federal agencies structural powers over national corporations. The anti-incorporationist position gained strength when Andrew Jackson allowed the Second Bank of the United States’ charter to expire on antimonopoly grounds; struck a decisive blow when the framers of the Sherman Act chose a crime-tort model of antitrust and rejected the possibility of a corporate regulatory model; entrenched itself firmly when Woodrow Wilson put an end to Progressive Era aspirations to a federal incorporation statute; and won a perhaps final battle following the rejection of the Borah-Mahoney Bill and the enactment of a federal securities regulation regime during the New Deal. At each turn, the federalist vision of federal and state sovereigns, each granting general charters of incorporation, appeared, engaged its antifederalist nemesis, and receded, weakened and less probable. Although the conceptual nexus between the need for a federal incorporation statute and a corporate regulatory model of antitrust has weakened over time, the institutional structure of U.S. antitrust law remains heavily influenced by the antifederalist assumption.

This Article argues that antitrust antifederalism has exerted a profound and previously undiagnosed influence on virtually every aspect of U.S. antitrust policy and enforcement. This influence shapes the foundational assumptions, institutional apparatuses, and legal culture of antitrust.

Part I traces the provenance of antitrust antifederalism. It locates this impulse in a deep-seated antifederalist fear that a national incorporation power would become the tool of an economically activist federal government associated with first a mercantilist (to the original Antifederalists) and later a socialist (to their twentieth-century progeny) political-economic regime. Antitrust antifederalism views direct federal superintendence of corporations as setting the stage for regulatory capture by large commercial interests, ensuring exclusionary privileges and monopolies for politically powerful businesses.

Part II diagnoses the pathologies of antitrust antifederalism. It shows that many of the essential features of U.S. antitrust culture are traceable to antifederalist influences. In the broadest sense, the effect of the antifederalist influence is the divorce of corporate law and antitrust law. By charting its own course as a freestanding branch of public policy drawing on but radically modifying common law principles, rather than serving as a limitation on the capital-concentrating effects of general incorporation statutes, antitrust law has assumed a number antifederalist pathologies. These include the need to identify anticompetitive conduct rather than focusing on corporate power and market
structure; an adjudicatory system where private enforcement predominates over public enforcement; the allocation of primary adjudicatory authority to generalist judges and juries rather than specialized antitrust tribunals or agency experts; legal equivalence between the actions of individuals or small professional or business associations whose activities and influence are primarily local and large corporations whose influence is national and international; and confusion over the proper role of state policy in "antitrust federalism" cases. As the crime-tort model has interacted with the general features of the U.S. civil litigation system it has created suboptimal institutions and cultures of antitrust enforcement.

Part III considers an exception to the rule. It shows that U.S. antitrust law has made one major departure from antitrust antifederalist dominance in the Hart-Scott-Rodino Antitrust Improvements Act of 1976.\(^5\) The Act imposes a notification requirement and waiting period for large national mergers. By creating a regime of disclosure and ex ante engagement with government antitrust experts, Hart-Scott has avoided many of the pathologies of antitrust antifederalism. It has refocused antitrust law on corporate actors and the impact of their structure on market performance instead of elusive forbidden conduct; federalized and governmentalized merger law; virtually eliminated the adjudicatory role of juries in merger cases; and diminished the states' ability to reverse-preempt the federal competition norm for parochial reasons.

The institutional success of merger policy under Hart-Scott reveals the advantages of a corporate regulatory model over the crime-tort model. Whether the corporate regulatory model entails its own unique pathologies is beyond the scope of this Article. Recognizing the systemic consequences of the crime-tort model's adoption—and that choice's antifederalist motivations—is a critical first step in rationalizing the antitrust enterprise.

I. THE PROVENANCE OF ANTITRUST ANTIFEDERALISM

Scholars often try to explain the institutional features of U.S. antitrust enforcement by examining the legislative history of the Sherman Act. This approach usually leads to frustration—the Sherman Act's legislative history is notoriously tortured and unhelpful.\(^6\) Moreover, the founders of antitrust must

---

6. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 59 (2d ed. 2000) ("Taking the legislative history of the antitrust laws as a whole, we would give it relatively little weight on the fundamental question whether economic efficiency, injury to competitors, or some alternative 'populist' goal should guide antitrust policy."); E. THOMAS SULLIVAN, THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS 20-160 (1991); Robert H. Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.L. & ECON. 7 (1966); Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation
be understood as a broader set of actors than the Fifty-first Congress that passed the Sherman Act. By 1890, the contest between rival American ideas about federal power over monopoly, competition, and corporations had already played out for over a hundred years. Additionally, the heavy lifting in the intellectual and ideological battle between the crime-tort and corporate regulatory models of antitrust did not occur primarily during the debate over the passage of the Sherman Act. Rather, it occurred during the early Progressive Era in the run-up from Theodore Roosevelt’s trustbusting to the passage of the Federal Trade Commission and Clayton Acts under Woodrow Wilson. During the Progressive Era, when the institutional structure of antitrust remained plastic, antitrust antifederalism etched its indelible mark on U.S. antitrust law. This Part traces the development of the antitrust antifederalist impulse from the founding of the republic to the present.

A. The Anti-Monopoly Tradition at the Founding

At the Constitution’s framing, the former colonies inherited from British common law a suspicion of corporate charters based on the view that such special privileges generally led to monopoly.7 Further, since many of the foreign trading companies that colonized the reaches of the British Empire were explicitly granted monopoly rights—exclusive trading privileges in specified regions—in their charters, the American colonists tended to associate the corporation with explicit monopoly.8 Abhorrence of monopoly became an American tradition early on, and monopoly was associated almost entirely with the business corporation. Hence, most pre-constitutional corporations were non-commercial—charitable, educational, or religious institutions like Dartmouth College, whose 1754 charter from George III and the Governor of New Hampshire gave rise to the famous *Dartmouth College* case that established corporate charters as inviolable contracts.9 Before the adoption of the Constitution, the colonies chartered only twenty-one business corporations, which consisted of thirteen canal, navigation, or bridge companies, six banks or trading companies, and only one manufacturing company.10 The dominant business model remained the sole proprietorship or general partnership.11

---

8. LETWIN, supra note 7, at 63.
11. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 190 (2d ed. 1985). Although the Continental Congress had chartered The Bank of North America without any express delegation of power to do so in the Articles of Confederation, the Bank raised little criticism because it was perceived as critical to the war. See Janet A. Riesman, *Money, Credit, and Federalist Political Economy, in Beyond Confederation: Origins of the Constitution and*
The federalist framers of the new Constitution were dissatisfied with the pace of growth in the agrarian, localized economy under the Articles of Confederation. They aimed for a far more interventionist federal government. The Federalists’ economic architect-in-chief, Alexander Hamilton, envisioned a mercantilist federal government stimulating growth through subsidies, tariffs, and grants of monopoly privileges to specially chartered business corporations. Hamilton’s vision was bound to collide with the Jeffersonian vision of an agrarian nation of yeoman farmers, and the power to incorporate was to become one of the defining friction points in the confrontation between the mercantilist Federalists and the classicist Antifederalists.

The earliest skirmish between the opposing views—between what I will anachronistically call antitrust federalism and antitrust antifederalism—occurred almost by accident during the Philadelphia Constitutional Convention during the summer of 1787. On August 18, Madison moved to refer to the Committee of Detail a series of additional enumerated powers. Among these were the precursors to the copyright and patent clauses and a power “[t]o grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent.”

Madison may have meant to propose a fairly limited federal incorporation power, and certainly reinterpreted his views as classicist, Republican, and anti-mercantilist in his later Jeffersonian incarnation. The “Public good” caveat could have limited the federal incorporation power to common carriers or other firms “affected with the public interest” and performing public or quasi-governmental functions. Madison probably did not imagine that Congress would charter manufacturing or commercial corporations, which were still rare.

American National Identity 128, 138-49 (Richard Beeman et al. eds., 1987). Indeed, seven states enacted legislation granting the Bank monopoly status and assuring that no competitive state bank would be chartered for the duration of the war. Joseph Stancliffe Davis, 2 Essays in the Earlier History of American Corporations 38 (2006). After 1784, the Bank’s charter was repealed and replaced with a Pennsylvania-specific bank. Id. at 41-43.


13. Later in life, Madison wrote:
Monopolies tho’ in certain cases useful ought to be granted with caution, and guarded with strictness against abuse. The Constitution of the U.S. has limited them to two cases, the authors of Books, and of useful inventions, in both which they are considered as a compensation for a benefit actually gained to the community as a purchase of property which the owner otherwise might withhold from public use.

14. On the “affected with the public interest” idea the colonies inherited from British common law, see Martin Loughlin, The Idea of Public Law 6, 77-80 (2003). In Munn v. Illinois, the Supreme Court justified rate regulation of an unincorporated grain elevator firm on the ground that it was affected with the public interest, and traced this distinction to common law. 94 U.S. 113, 125-26 (1876).

15. In response to Madison’s proposal, Charles Pinkney offered a list of ten additional proposed powers, which included a broader power “[t]o grant charters of incorporation.” Farrand’s Records, supra note 12, at 325.
Madison's proposal went nowhere until, during a meeting of the full Convention a month later, Benjamin Franklin moved to add "a power to provide for cutting for canals where deemed necessary" following the clause that became Article I, Section 8, Clause 7 (establishment of post offices and post roads). In the debate that ensued, Roger Sherman expressed concern that the federal government would bear all of the cost of the canals and that local interests would receive all of the benefits. Madison responded by reintroducing his incorporation proposal, this time as an "enlargement" on Franklin's canals motion. Instead of bearing the costs of cutting canals directly, the federal government could incorporate private firms to undertake this and other interstate commercial ventures at the firms's own risk and expense. Thus, Madison proposed to add a power "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent." Whether intentionally or not, Madison had removed from his original proposal the language that could have limited federal corporations to common carriers and other enterprises "affected with the public interest."

Madison's proposal engendered two very different kinds of reactions in the Convention. James Wilson—a strong Federalist—supported the proposal on the ground that granting Congress such an incorporation power was necessary "to prevent a State from obstructing the general welfare." Wilson apparently had in mind the use of federal incorporations to preempt provincial state legislation and other local impediments to free trade. On the other hand, Massachusetts delegate Rufus King expressed concern that the Antifederalists would seize on the clause as permitting the incorporation of a national bank and mercantile monopolies. In a lapse into inadvisable candor, Wilson responded that the power to incorporate "mercantile monopolies" was already included in the commerce clause power. Wilson's admission drew a rise out of Antifederalist George Mason, who "was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson." Having reached an impasse on the general incorporation power, the Convention returned to Franklin's original proposal for a canals power.

Scholars sometimes interpret the defeat of Madison's proposal as an Antifederalist victory against mercantilist monopolies. Opposing the
incorporation of the First Bank of the United States a few years later, Madison interpreted the defeat of his proposal as entailing the absence of federal power to incorporate.\textsuperscript{25} But the Antifederalists eventually lost that fight in \textit{McCulloch v. Maryland}.\textsuperscript{26} Even at the moment that Madison’s proposal was abandoned, the reason for its failure was inconclusive. Was it because federal incorporations could become monopolistic and therefore should be rejected? Or, alternatively, was it because Congress had an incorporation power anyway and spelling this out explicitly would merely raise red flags for Antifederalists?

The Antifederalists chose to believe the latter. George Mason refused to sign the proposed Constitution because “[u]nder their own Construction of the general Clause at the End of the enumerated Powers, the Congress may grant Monopolies in Trade & Commerce.”\textsuperscript{27} Elbridge Gerry withheld his signature for the same reason.\textsuperscript{28} A slew of Antifederalist writers attacked the proposed Constitution as setting up a congressional power to grant mercantile monopolies.\textsuperscript{29} The ratifying conventions of Massachusetts, New Hampshire, and North Carolina requested, in their proposed bill of rights, an amendment providing “[t]hat Congress erect no Company of Merchants with exclusive advantages of commerce.” New York proposed a similar provision.\textsuperscript{30} After the ratification, Thomas Jefferson, in private correspondence to Madison, expressed the need for an anti-monopoly provision in the Bill of Rights.\textsuperscript{31}

\textsuperscript{25} See The Bank Bill (Feb. 2, 1791), in 13 \textsc{The Papers of James Madison} 377-78 (Robert A. Rutland et al. eds., 1984); see also \textsc{David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801}, at 78-80 (1997) (“An anti-monopolistic sentiment was present during the Convention’s debates, which seems to be the reason why the Framers rejected other proposals by Madison and Pinckney for a federal incorporation power.”).

\textsuperscript{26} See infra text accompanying notes 40-41.

\textsuperscript{27} \textsc{8 The Documentary History of the Ratification of the Constitution of the United States of America} 45 (Merrill Jensen ed., 1976) [hereinafter \textsc{Documentary History}].

\textsuperscript{28} \textsc{4 Documentary History, supra note 27, at 14}.

\textsuperscript{29} See \textsc{A Son of Liberty}, 13 \textsc{Documentary History} 481, supra note 27, at 482 (“Monopolies in trade [will be] granted to the favourites of government, by which the spirit of adventure will be destroyed, and the citizens subjected to the extortion of those companies who will have an exclusive right to engross the different branches of commerce.”); \textsc{Agrippa}, 4 \textsc{Documentary History, supra note 27, at 428 (“The unlimited right to regulate trade, includes the right of granting exclusive charters. . . . We hardly find a country in Europe which has not felt the ill effects of such a power.”); \textsc{Centinel, I The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles, and Letters During the Struggle Over Ratification} 89 (Bernard Bailyn ed. 1993) (complaining that the proposed Constitution failed to specify that “monopolies in trade or arts, other than to authors of books or inventors of useful arts, for a reasonable time, ought not to be suffered”).

\textsuperscript{30} \textsc{2 Documentary History, supra note 27, at 95, 142, 274}.

\textsuperscript{31} Letter from Jefferson to Madison (Aug. 28, 1789), in 15 \textsc{The Papers of Thomas Jefferson} 368 (Julian P. Boyd ed., 1958) (proposing a provision that “[m]onopolies may be
In sum, Madison’s proposal was a catalyst for the antitrust antifederalist impulse. The Antifederalists had seen the possibility of federal charters with exclusive privileges when Madison, perhaps unintentionally, had blundered into it. They were even more troubled by Wilson’s admission that the Federalists would pursue a mercantilist incorporationist agenda with or without an express incorporation power. The ambiguous skirmish over Madison’s proposal in Philadelphia set the stage for a much more heated battle over Hamilton’s national bank.

B. Jacksonianism and the Second Bank of the United States

The Antifederalist prediction that powerful federal corporations would arise despite the rejection of Madison’s federal incorporation proposal proved correct. In 1791, at Hamilton’s insistence, Congress chartered the Bank of the United States with a capitalization of $10 million, five times the total capitalization of the three existing state banks. Hamilton designed the Bank as a private commercial corporation “under a private not a public direction – under the guidance of individual interest, not of public policy.” Just as alarming to the Antifederalists–turned Republicans, shortly to become Democrats—was Hamilton’s argument that the Constitution implied a virtually unlimited right to incorporate national corporations: “A power to regulate trade, is a power to make all needful rules and regulations concerning trade. Why may it not, then, include that of erecting a trading company?”

The charter of the first Bank of the United States expired after twenty years. By 1811, the Federalist Era had long ended and neo-Antifederalism was politically ascendant. Madison, however, had shifted from pro-incorporationist framer to anti-incorporationist Representative to pro-incorporationist President. He instructed Albert Gallatin, his Treasury Secretary, to seek renewal of the charter. The bill failed in the Senate when Vice President George Clinton bucked Madison’s will and cast the tie-breaking vote against it. But, saddled with a fiscal crisis resulting from the War of 1812, Congress finally gave Madison the Second Bank of the United States in 1816.

allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding – years but for no longer term and for no other purpose”).

33. Id. (emphasis in original).
35. GORDON, supra note 32, at 46.
36. Id. at 46-47.
37. Id. at 47.
38. Id.
39. Id. at 53.
The Second Bank's charter gave rise to a decisive battle over the constitutionality of federal incorporations and the scope of Congress's enumerated powers more generally. In *McCulloch v. Maryland* the Hamiltonian-Federalist vision prevailed as a matter of constitutional law. The Supreme Court held that incorporating a bank was within Congress's "necessary and proper" powers. Since *McCulloch*, it has become clear that "Congress . . . may create corporations as appropriate means of executing the powers of government, as, for instance, a bank for the purpose of carrying on the fiscal operations of the United States, or a railroad corporation for the purpose of promoting commerce among the states." Congress could charter corporations as "necessary and proper" to the exercise of its enumerated powers, to which the Supreme Court eventually gave a broad construction. The Court thus effectively granted Congress the broad power to incorporate business firms despite the defeat of Madison's proposal for an enumerated power to that effect.

But if *McCulloch* served the Hamiltonian-Federalist vision a constitutional law victory, it also handed it a long-term political defeat. Citing the powers of the "monster" Bank to "make money plenty or scarce at its pleasure, at any time and in any quarter of the Union," Andrew Jackson vetoed the renewal charter of the Second Bank of the United States in 1836. The bank embodied old Antifederalist fears of a monopolistic, mercantilist, nationally dominant corporation. Antifederalism had lost on the constitutional law question but nonetheless defeated the Bank and established an important political precedent against federal incorporations. A new national bank—the federal reserve—would not be created until 1913 during the Progressive Era, by which time its symbolic importance as the embodiment of the federal incorporation power had long since passed. By 1913, general incorporation had become, perhaps irretrievably, a state law prerogative.

However, the triumph of Jacksonianism did not result in fewer incorporations. Indeed, Jackson supported state general incorporation statutes on the ground that they were a necessary antidote to the corrupting influence of the special charter system that favored established and politically powerful commercial incumbents at the expense of newcomers. The policy of

---

40. CURRIE, supra note 25, at 160-68.
42. TONY A. FREYER, PRODUCERS VERSUS CAPITALISTS: CONSTITUTIONAL CONFLICT IN ANTEBELLUM AMERICA 83 (1994).
44. HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW: 1836-1937, at 37 (1991) [hereinafter HOVENKAMP, ENTERPRISE AND AMERICAN LAW]. Hovenkamp notes that "Jackson's outspoken opposition to reincorporation of the Second National Bank was based on his hatred of hard money and the National Bank's dominance over state banks, not on any general hostility toward the corporation as a method of doing business." *Id.*
Jacksonianism became to reduce the privilege of incorporation, not by taking it from the few, but by opening it to the many.45

Jackson's administration marked an ideological shift from the mercantilism of the Federalist Era to the classicism that would prevail until the turn of the century. One of the important attributes of the emerging classicism was an emphasis on equality of access to incorporation privileges granted by the state. In the antebellum and Reconstruction eras, the general corporate charter would become the dominant means of doing business on a medium or large scale.

The expansion of the corporate charter, and the eventual liberalization of its terms, facilitated increasingly large aggregations of capital which, in turn, contributed to the rise of the "trusts" problem in the late nineteenth century.

C. Corporatism and the Sherman Act

Jacksonianism gave a boost to general incorporation statutes, but it took some time for the states to liberalize corporate law to the point that large, and potentially monopolistic, aggregations of capital were frequent. At the time of the Civil War, most business corporations still were limited by their corporate charter to a single line of business.46 Following the Civil War, however, states began to liberalize their incorporation statutes, with an eye toward attracting firms to incorporate in their state. Thus began the "race to the bottom" in state corporation law, characterized by interstate competition driving legal standards down to the lowest common denominator. States competing to become incorporation havens eventually permitted corporations to own stock of other companies; granted favorable tax treatment for out-of-state earnings; allowed corporate charters for any lawful business purpose whatsoever; dispensed with requirements that directors be state residents and that corporate meetings be held within the state; allowed unlimited capitalization; eliminated shareholder liability for corporate debts; and stopped requiring public disclosure of annual reports.47

The incentives on state legislatures to liberalize their own corporate statutes were extraordinarily powerful. New Jersey became known as the "traitor state" for its Holding Company Act of 1891, which facilitated the Standard Oil and Northern Securities trusts, among others.48 But even rival state legislatures found it hard to fault New Jersey when they considered the

extent to which the state benefited from its new incorporation regime. From 1896 to 1901, corporate filing fees and franchise taxes swelled from $800,000 to $2,189,000, accounting for 60% of the state’s revenues.49 By 1901, 95% of the nation’s large corporations were incorporated in New Jersey.50 By 1902, New Jersey had earned so much from corporate filing fees and franchise taxes that it had paid off the state debt and abolished property taxes. By 1905, it had a surplus of nearly $3 million in the treasury, mostly attributable to its corporate liberalization initiative.51 It was little wonder that, despite grumbling about the “traitor state,” most other states soon followed suit.52

Even as state incorporation law began to move along an inexorable path toward liberalization, an array of voices across the political spectrum began to complain about these laws’ capital-concentrating effects. General incorporation laws made it easier for the capitalist class to consolidate the management of large enterprises into a few hands, by acquiring assets under common ownership or placing the shares of the corporations into “trusts” administered by common management. As early as 1874, the conservative judge and future Interstate Commerce Commission member Thomas Cooley warned that “the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations actually [have] greater influence in the country at large and upon the legislation of the country than the States to which they owe their corporate existence.”53 Such warnings became increasingly dire as the race to the bottom and the formation of the great industrial trusts of the Gilded Age accelerated. In 1895, the German economist Ernst Von Halle noted the irony of the simultaneous liberalization of corporate law and adoption of antitrust law when he asserted that “[w]e now had the strange spectacle of the enactment of the most severe laws against trusts and combinations on the one hand, and on the other of a transformation of the corporation law which facilitated a remodeling of the trusts, and their continued transaction of business in the state.”54 In 1900, the treatise-writer Christopher Tiedeman would blame the entire trust problem on state corporate law and propose a return to incorporation by special legislation only.55

The absence of a federal incorporation statute and, hence, the absence of

49. Urofsky, supra note 46, at 164.
50. Id.
51. Id.
53. Thomas M. Cooley, A treatise on the Constitutional Limitations which Rest Upon the Legislative Power of the United States of the American Union 279 n.2 (3d ed. 1874).
54. Von Halle, supra note 47, at 95.
55. Christopher G. Tiedeman, A Treatise on State and Federal Control of Persons and Property in the United States 609-610 (1900).
many federal corporations, made early antitrust control an exclusively state matter. During the Reconstruction era, state attorneys general began to use state corporation law as a form of crude antitrust law to resist the capital-intensifying trends accompanying postbellum economic expansion. State enforcers employed the *quo warranto* writ to challenge as *ultra vires* the corporate charter various activities, such as doing business outside the state, conducting business outside the scope of the charter, and owning the shares of other corporations. Although the attorneys general met with success in some individual cases, *quo warranto* enforcement of state corporate law proved to be an abysmal failure in the long run. At least two reasons account for this failure. First, clever corporate lawyers frustrated state regulators by inventing sophisticated common law trusts that replicated the structure of multistate, conglomerate or vertically-integrated corporations through contract rather than direct corporate structuring. Second, the interstate competition previously discussed created incentives for state legislatures to "cheat" on their neighbors and liberalize the very corporate rules that their attorneys general sought to rely on to control the power of large corporations.

Thus, it was not surprising that by the end of the nineteenth century, states had shown themselves incapable of dealing with the problem as a matter of corporate law and calls for a federal response to the "trust" problem intensified. As Herbert Hovenkamp has argued, Congress had a choice of two models. First, it could follow a structural model similar to the state *quo warranto* approach, but without the inconvenience of interstate competition driving legal standards down to the lowest common denominator. At the time of the Sherman Act's adoption in 1890, there had already been calls for a federal incorporation statute, and those calls intensified significantly during the two decades following the Act's passage. Congress might well have chosen to require all corporations operating in interstate commerce to be federally chartered and subject to direct regulation by competition law bureaucrats in Washington. As discussed in the next section, such proposals were nearly adopted during the Progressive Era.

The second approach—the one actually adopted in the 1890 Sherman

Act—was to divorce antitrust law from corporate law and model it instead on
the common law’s prohibition on restraints of trade. As discussed in Part II.A,
Congress in fact went far beyond the common law by making restraints of trade
not merely void or unenforceable, as they were at common law, but a species of
wrong against others and against the state—a tort and a crime. The Sherman
Act contains two prohibitory sections: Section 1 prohibits “[e]very contract,
combination in the form of trust or otherwise, or conspiracy, in restraint of
trade,” and Section 2 prohibits monopolizing, attempting to monopolize, or
conspiring to monopolize. The statute applies to all “persons” rather than
simply to corporations; far from being targeted at corporate regulation, the
statute goes out of its way to make clear that corporations and associations are
covered as well.

The Sherman Act’s legislative history is notoriously tortured and
unilluminating, and what motivated individual Congressmen to support the
crime-tort model instead of the corporate regulatory model is debatable. A
corporate regulatory model was never formally proposed during the legislative
maneuvering that brought about the 1890 statute. Hovenkamp, however,
argues that Congress chose its model wisely because the corporate regulatory
model was subject to significant weaknesses. In particular, Hovenkamp notes
that the corporate law rules limiting corporate activities to state boundaries,
prohibiting ownership of shares of other corporations, and prohibiting mergers
by stock transfer trust indiscriminately prohibited many efficient practices and
were not tailored to the problem of anticompetitive trusts.

To be sure, many of the corporate regulatory rules used by state attorneys
general in the formative era of antitrust were not designed to advance
competition values and were ill-suited for promoting market efficiency. That
does not mean, however, that divorcing antitrust from corporate law in favor of
a crime-tort model was a preferable solution. Replacing the corporate
regulatory model with the crime-tort model created a number of systemic
problems for antitrust enforcement that have persisted, and in many cases
worsened, over time. As the Progressive Era began, some of these
disadvantages of the crime-tort model became apparent, and Progressives
returned to the possibility of a federal incorporation statute and direct federal
superintendence of corporations.

64. See infra text accompanying notes 152-161.
66. Id. at § 2.
67. Id. at § 7.
68. See supra note 6 and accompanying text.
69. The leading study of the Sherman Act’s legislative history is HANS B. THORELLI, THE
70. HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra note 44, at 247-48.
D. Anti-Corporatism in the Progressive Era

Progressive era lawyers, economists, and politicians were dissatisfied with the federal judiciary’s interpretation of the Sherman Act. During its first decade, the Act was rarely used and, when it was, its axe most often fell on labor rather than capital. Many Progressives felt that Congress had chosen a weak conceptual model for antitrust by patterning it on the common law’s restraint of trade jurisprudence instead of adopting a direct corporate control model. Congress needed a more robust and interventionist model.

Around the turn of the century, the possibility of a federal incorporation statute became a popular topic among academics and prominent members of the bar. The voices in favor of such legislation included James Dill, the author of New Jersey’s much-maligned Holding Company Act, who denied that he had unleashed a trust-building race to the bottom. Dill nonetheless argued that “[t]he country demands uniform corporate legislation, formulated upon the good of the country as a whole, and not sectional legislation, state against state.” Dill and other proponents of federal incorporation argued that the trust problem was created by the diversity of state incorporation law and the absence of a national regulatory force that could supervise the activities of the gigantic interstate trusts and prevent them from exercising monopolistic power.

Opponents of federal incorporation, led by Yale Law Professor Thomas Thacher, invoked old antifederalist themes. Thacher worried that ceding incorporation power to the government would be to “bid farewell to the fundamental theory of the Federal Constitution and to call the wisdom of the [founding] Fathers folly when applied to the conditions of to-day.” Responding to Attorney General Philander Knox’s argument that an incorporation power was necessary to prevent fraud, Thacher noted that corporate fraud such as overcapitalization “affects only those who become participants in corporate enterprises,” not the general public. Since Thacher

71. See Friedman, supra note 11, at 1391-96.
72. See infra note 235 and accompanying text.
74. Dill, supra note 73, at 274.
75. See id.
76. See Thacher, supra note 73.
77. Id. at 305.
78. Id. at 307.
did not believe that the federal incorporation and corporate disclosure model would make the trusts more competitive, he worried that proponents of the plan had an ulterior motive. Contextualizing for an early twentieth century audience, Thacher warned that the incorporation proposal was "a long step toward Federal socialism." Thacher and others feared, perhaps with good reason, that Roosevelt's ultimate goal was to use federal incorporation to wrest federal control over the national economy. The economy would be "socialized" not in the conventional sense that the state would own and operate the means of production but rather in the looser sense that federal regulators—in tandem with corporate managers—would oversee the management of vast, dominant corporate enterprises.

Outside of academic circles, calls for a federal incorporation statute grew louder as disappointment with the ineffectiveness of the Sherman Act increased. An 1899 Chicago Conference on Trusts, sponsored by the Chicago Civic Federation, led a number of prominent public figures to call for direct federal control of the trusts. William Jennings Bryan, the 1896 Democratic presidential candidate, led the charge, advocating mandatory federal incorporation for corporations doing business outside their home state and stringent requirements regarding capitalization and business policies. Soon, federal incorporation became a widely favored strategy in the political mainstream.

Despite personal misgivings about the value of antitrust law and conservative opposition from within his own party, Teddy Roosevelt made corporate control legislation the keynote of his first annual message to Congress. Even before assuming the presidency upon McKinley's assassination, Roosevelt had come to believe that "[m]ore and more it is evident that the State, and if necessary the nation, has got to possess the right of supervision and control as regards the great corporations which are its creatures." In his 1901 message, he identified the trusts problem as one of corporate law:

It is not limitation upon property rights or freedom of contract to require that when men receive from government the privilege of doing business under corporate form . . . they shall do so upon absolutely truthful representations . . . Great corporations exist only because they are created and safeguarded by our institutions; and it is therefore our right and duty to see that they work in harmony with these institutions.

This "creatures of the state may be regulated by the state" justification for

79. Id. at 311.
80. SKLAR, supra note 63, at 207.
81. Id.
82. EDMUND MORRIS, THEODORE REX 30 (2001) (emphasis in original).
83. Id. at 73.
antitrust regulation advanced by Roosevelt found a home in antitrust jurisprudence. When the Supreme Court upheld Roosevelt's antitrust suit against J.P. Morgan's railroad merger, Justice Brewer noted in his concurrence that a "corporation . . . is not endowed with the inalienable rights of a natural person. It is an artificial person, created and existing only for the convenient transaction of business."  

84 Even the Northern Securities dissenters agreed with that proposition. 85 The freedom of contract arguments that prevailed the following year in Lochner 86 found no traction as applied to efforts to curtail the harms created by large aggregations of capital occasioned by the liberalization of corporate law. 87

But if the corporate control model of antitrust found a place in constitutional rhetoric, it found little success in antitrust reform, despite broad political support. Even prior to Roosevelt's charge to Congress, Congressmen began to introduce proposals for a federal incorporation statute that would have placed corporate control at the center of federal antitrust policy. 88 Beginning in 1900, Congressmen introduced a series of bills that would have required firms operating in interstate commerce to be federally licensed and comply with certain requirements. Roosevelt threw his considerable weight behind such corporate control legislation. For example, in his December 3, 1907 Annual Message to Congress, Roosevelt advocated the adoption of a general incorporation statute under which a federal board or commission would decide whether an applicant for a federal charter was already in violation of federal law, and if the charter was issued assume jurisdiction over the corporation to enforce federal law. 89 The proposed legislation would have also added further content to the antitrust laws, somewhat along the lines eventually adopted in the Clayton Act, by prohibiting pricing at a loss to drive out competitors, entering into exclusive dealing or tying contracts, and defrauding investors and gouging consumers. 90 But by 1907, six such bills had died in committee. 91

Roosevelt did achieve a modest step toward direct federal superintendence of large corporations operating in interstate commerce in a 1903 act of Congress that created a Bureau of Corporations as an agency of the newly formed Department of Commerce. 92 The new Bureau was charged with investigating and reporting on interstate corporations. Between 1906 and 1913,

85. See id. at 398 (White, J., dissenting) (conceding that "the corporation is created by the state, and holds rights subject to the conditions attached to the grant, or to such regulations as the creator, the state, may lawfully impose upon its creature, the corporation").
88. See Hovenkamp, Antitrust Policy, supra note 4, at 77.
89. SKLAR, supra note 63, at 216-17.
90. Id.
the Bureau investigated and issued reports on the petroleum, tobacco, steel, and farm implement industries.\footnote{See FTC v. Gratz, 253 U.S. 421, 433 (1920).} However, the Bureau lacked enforcement or regulatory authority and insisted that its only authority was investigatory, with an eye toward proposing new legislation.\footnote{H.R. Rep. No. 165, at 34 (1904) (Comm'r of Corps. Rep.).}

In the meantime, Roosevelt continued to press for antitrust legislation giving the federal government direct supervisory authority over interstate corporations. Even after his administration scored a major victory in \textit{Northern Securities}, Roosevelt fumed that antitrust litigation was too slow and cumbersome a means of regulatory control and that "[n]o judicial tribunal has the knowledge or the experience to determine in the first place whether a given combination is advisable or necessary in the interest of the public."\footnote{Theodore Roosevelt, Special Message to Congress the Senate and House of Representatives (Apr. 27, 1908), in 16 \textit{A Compilation of the Messages and Papers of the Presidents} 7189, 7193 (1897).} True to the spirit of the Progressive Era, Roosevelt argued that the crime-tort model of the Sherman Act, committed as it was to the care of the federal courts, needed to be replaced with a regulatory model where complex decisions about the propriety of "trusts" could be made by specialized bureaucrats. Between 1906 and 1908, Roosevelt's annual message repeatedly urged Congress to "grant [] supervisory power to the government over these big concerns engaged in interstate business."\footnote{\textit{LETWIN}, supra note 7, at 246.}

Roosevelt came closest to getting a corporate control bill—and breaking the reign of antitrust antifederalism—when, on March 23, 1908 Congressman William Hepburn of the Committee on Interstate Commerce introduced what became known as the Hepburn Bill.\footnote{H.R. 19745, 60th Cong. (1908).} The bill provided that corporations could, at their option, register with the Commissioner of Corporations.\footnote{\textit{SKLAR}, supra note 63, at 232.} To register, the corporation would have to make full disclosure of its finances and business methods. Registered companies could file any potentially anticompetitive agreements with the Commissioner.\footnote{\textit{Id}.} Within thirty days, the Commissioner could declare the contract an unreasonable restraint of trade and void, but if he did not do so, the contract would become immune from attack by the Government.\footnote{\textit{Id}.} The bill also cut back on private rights of action by deterbling damages as to any registered contract and prohibiting any private or public suits as to contracts predating 1908.\footnote{See \textit{LETWIN}, supra note 7, at 248-49.} In effect, the Hepburn Bill would have replaced much of the Sherman Act's model of antitrust with a corporate regulatory model, albeit a voluntary one.\footnote{See \textit{SKLAR}, supra note 63, at 228-85.
At first, the Hepburn Bill enjoyed strong support from a wide array of constituencies, including Roosevelt, business, labor, and Progressive reformers. But as the bill languished in committee, big business began to push for revisions that would have reduced the power of the Commissioner of Corporations, and Roosevelt and labor reformers worried that the bill was becoming diluted. Eventually, both labor and business began to grumble against the bill. When Roosevelt left office in 1909, the bill was dead.

Roosevelt's successor, William Howard Taft, continued to promote the need for a federal incorporation bill. His proposal, however, would have made federal incorporation and regulatory superintendence mandatory for businesses operating in interstate commerce. Taft's proposal, however, was lost in the furor surrounding the Supreme Court's Standard Oil decision in 1911. Although the Court ordered Rockefeller's trust disbanded, Justice White's opinion squarely affirmed that the Sherman Act prohibited not all restraints of trade, but only unreasonable ones. Many Progressives thought Standard Oil gutted the Sherman Act and opened the door to large combinations of capital. For example, the 1912 Democratic Party platform lamented that the opinion had deprived the Sherman Act "of much of its efficacy." The Party proposed legislation to "restore to the statute the strength of which it has been deprived by such interpretation."

In the 1912 election, Democrat Woodrow Wilson defeated the reinvented Roosevelt and his plan for direct federal regulation of corporations, paving the way for the major antitrust legislation of 1914. Louis Brandeis, who served as Wilson's chief antitrust advisor, argued that Roosevelt proposed to "regulate monopoly" whereas Wilson aimed to regulate competition." In Wilson's view, the Rooseveltian model of direct federal creation and regulation of corporations was a recipe for government-created monopoly. Unlike Brandeis, however, Wilson did not share the Progressive Era infatuation with government by experts. Reacting to a proposed antitrust commission in 1912,

103. Id.
104. Id. at 249-50.
105. See LETWIN, supra note 7, at 252.
110. On shifts in Roosevelt's thinking on antitrust matters during the Taft administration and 1912 election cycle, see SKLAR, supra note 63, at 359-64.
111. LETWIN, supra note 7, at 269.
he caustically remarked: "I don’t want a smug lot of experts to sit down behind closed doors in Washington and play providence to me."\textsuperscript{112} Further, Wilson distinguished between proper prohibitory regulation—for example, a law against anticompetitive behavior by trusts—and improper "direct administrative regulation"—for example, structuring corporations to facilitate competition—which, like Thacher, he equated with socialism.\textsuperscript{113} Thus, when Senator Cummins issued a report proposing various powers for the soon-to-be created Federal Trade Commission, Wilson objected to only one of them: the power directly to structure interstate corporations through regulation.\textsuperscript{114} Although Cummins argued that such prophylactic "quasi-judicial" power would allow the Commission to make competition policy "vastly more effectual" than could the courts, Wilson saw this as merely Roosevelt’s model of an unholy partnership between the Government and the trusts. Wilson declared that although "the opinion of the country" supported a commission, "it would not wish to see it empowered to make terms with monopoly or in any sort to assume control of business, as if the government made itself responsible."\textsuperscript{115} The Commission’s powers would have to be prohibitory, not structural.

Two significant pieces of antitrust legislation were adopted in 1914. The Clayton Act strengthened and expanded the substantive reach of the Sherman Act while the Federal Trade Commission (FTC) Act replaced the Bureau of Corporations with an independent and powerful antitrust enforcement agency.\textsuperscript{116} But despite the FTC’s independence, it lacked the corporate-regulatory powers that many Progressives had envisioned for the new antitrust commission. It received powers to enforce a new competitive norm created by statute,\textsuperscript{117} not to regulate corporations, and its decisions were ultimately reviewable by Article III courts.\textsuperscript{118} The FTC reflected Wilson’s vision of "regulating business methods through a mix of commission and judicial enforcement of a common-law based antitrust law, with ultimate judicial supremacy in the process as a whole."\textsuperscript{119}

In 1914 antitrust antifederalism became even more politically entrenched. Just as the Antifederalists had before him, Wilson feared that direct federal regulatory power over corporations would lead to industrial monopolies as the

\textsuperscript{112} Woodrow Wilson, A Campaign Address in Sioux City, Iowa (Sept. 17, 1912), in \textit{25 The Papers of Woodrow Wilson} 148, 154 (Arthur S. Link et al. eds., 1978).
\textsuperscript{113} Winerman, \textit{supra} note 48, at 42.
\textsuperscript{114} See \textit{Letwin}, \textit{supra} note 7, at 272.
\textsuperscript{115} \textit{Id.} at 273.
\textsuperscript{117} \textit{Id.} at § 45(a)(1) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").
\textsuperscript{118} \textit{Id.} at § 45(c) (allowing for judicial review of FTC decisions in any circuit court of appeals where the method of competition or act in question was used).
\textsuperscript{119} \textit{Sklar}, \textit{supra} note 63, at 381.
corporations captured their regulators and turned regulation to their advantage. Safer, then, to retain antitrust policy as a prohibition on bad conduct delegated to generalist courts.

E. Securities and Corporations in the New Deal

Wilson's rejection of a federal incorporation statute and the passage of the Clayton and FTC Acts ended any serious possibility of a federal incorporation statute in the Progressive Era, and probably for a very long time thereafter. Antitrust law had been irrevocably set on the modified common law path chosen by the framers of the Sherman Act, as reinforced by the 1914 statutes. Nonetheless, the possibility of federal incorporation resurfaced during the New Deal in connection with post-Depression calls for securities regulation.

The connection between securities regulation and antitrust dates back to the nineteenth century. In 1898, Congress created an Industrial Commission to investigate combinations in restraint of trade. When the Commission published its report in 1902, its recommendations made the trust problem sound primarily like one of investor deception rather than harm to consumers. The Commission stated that its primary objective was "to prevent the organizers of corporations or industrial combinations from deceiving investors and the public, either through suppression of material facts or by making misleading statements." It recommended that "the larger corporations—the so-called trusts—should be required to publish annually a properly audited report, showing in reasonable detail their assets and liabilities, with profit and loss; such a report and audit under oath to be subject to government regulation."

The Commission apparently failed to understand that the trust "restraint of trade" problem was a very different one than fraud on investors. As a class, investors benefit from anticompetitive restraints of trade, which tend to create monopoly rents and thereby inflate the value of their shares. On the other

120. Wilson's concerns were not frivolous. Although much of the external momentum for direct federal control of corporations came from populist voices, much of the proposed legislation was shaped by corporate interests, as was the Sherman Act itself. For instance, the House of Morgan apparently drafted the Hepburn Bill. See Kolko, supra note 91, at 134.

121. On the causes of the failure of federal incorporation proposals during the Progressive Era, see Davis, supra note 60, at 625-29.


123. Id. at 185.

124. Id.

125. Defenders of the corporate disclosure model of trust control typically argued that public disclosure of the inner workings of the trusts was necessary for the public to understand how to deal with the trusts. See, e.g., Dill, supra note 73, at 290 ("Publicity will give a clear insight into the operation and workings of a trust and when this is fully known the public will know how to deal with the proposition as a whole.").

126. Of course, some shareholders will lose from anticompetitive restraints if their corporation is anticompetitively excluded from a market. On balance, however, the returns to shareholders from anticompetitive conduct tend to be positive, except to the extent that costly
hand, consumers as a class tend to be harmed by anticompetitive conduct. Shareholders, as a class, may be benefited by disclosure of corporate finances, but consumers are little helped against monopolistic practice by such disclosure, except to the extent that it helps regulators identify and countermand unlawful conduct.

Nonetheless, the idea of a financial disclosure model gained some traction during the founding era of antitrust when the Bureau of Corporations requested the power "to directly inspect corporate accounts to protect the public interest." The Bureau's proposal, however, was linked to more specifically antitrust-oriented proposals to require federal incorporation and licensing of the trusts, and shared the fate of those proposals during the Progressive Era.

The Great Depression reinvigorated the idea of federal incorporation and licensing of large corporations. Already during the brief era of the National Industrial Recovery Act, a group within the Department of Justice began to investigate the potential of a federal incorporation statute to solve a variety of social ills attendant to large aggregations of capital, including anticompetitive conduct, fraud on shareholders, and labor and employment abuses. The passage of the Securities Acts of 1933 and 1934, which created a regime of registration and disclosure for nationally traded securities and created a new agency to oversee corporate financial disclosure obligations, encouraged various New Deal factions to believe that a more comprehensive federal incorporation scheme was possible. A significant piece of the Progressive agenda for direct federal regulation of corporations, dating back to the Industrial Commission's 1902 report, had been realized. Just as Congress had found state blue sky laws inadequate to protect investors, so too Congress might now find state incorporation law combined with the crime-tort-modeled Sherman Act insufficient to protect consumers and small businessmen from the overwhelming power of large corporations.

With the demise of the National Industrial Recovery Act's associationalist regime in 1935, a Brandeisian wing took control of the Antitrust Division of the Justice Department and gained strength within the Roosevelt efforts to obtain monopoly profits eat into the monopoly rents or management internally consumes the monopoly rents through lack of industry or innovation.


The new antitrusters were troubled by the laxity of state incorporation laws, and believed that "this 'competition in laxity' had produced giant 'tramp' corporations, great sprawling empires with more power than the states that created them." Eventually, they found a sympathetic ear in Congress. In 1937, Senators William Borah and Joseph C. O'Mahoney introduced a joint bill that required corporations engaged in interstate commerce to be licensed with the FTC, and imposed a variety of restrictions on licensed corporations, including child labor and anti-gender-discrimination provisions, prohibitions on anti-union activities, a requirement that they maintain their principal place of business in the state where they were organized, and a requirement that they observe all antitrust law, eliminate all non-voting stock, and refrain from practices that were designed to inflate their capital structure or deceive their shareholders.

Despite some initial momentum, the Borah-Mahoney Bill never had profound support in Congress. Several factors contributed to its failure. First, the passage of the Securities Acts of 1933 and 1934 created a form of direct federal superintendence of large interstate corporations, and any significant appetite for further intrusions on traditional state prerogatives may have been lacking. Second, the Robinson Patman Act of 1936 responded to the New Deal's political need for some form of new antitrust legislation to show that it was responding to competitive abuses. Third, Robert Jackson and Thurman Arnold's reinvigoration of antitrust enforcement as successive heads of the Justice Department's antitrust division showed that the current laws could work to curb competitive abuses. Arnold's influential book, *The Bottlenecks of Business*, argued that the existing antitrust laws could be effectively used to promote competition, thus undermining any claim that the laws needed a more radical displacement of traditional state prerogatives with respect to corporations. Finally, Franklin Roosevelt did not have as great an appetite for antitrust enforcement as Jackson or Arnold, particularly when the war began and various dominant national industries became critical to the war effort.

Once again, a version of the Madisonian proposal had reared its head only to be defeated. The state incorporation system survived untouched by Congress, except to the extent that investor protection became a regulatory function of the newly minted Securities and Exchange Commission. The corporate

133. HAWLEY, supra note 128, at 371.
134. Id. at 371-72.
135. See id. at 427 n.5.
138. HAWLEY, supra note 128, at 426 n.5.
139. The Commission was established by the Securities Exchange Act of 1934, 15 U.S.C.
regulatory model had found a home in federal law, but only to the extent of
investor protection. Antitrust law remained a statutory crime and tort,
equally applicable to the large corporation and the small sole proprietorship.

F. Structuralism and Antitrust Inertia

The Borah-Mahoney Bill was the last serious congressional attempt at a
federal incorporation proposal designed to remedy the antitrust problem. Since
then, the voices advocating federal regulation as a competition law measure
have been relegated to the margins of American political discourse. In the
1970s, a vigorous discussion emerged about the possibility of federal
incorporation, or at least minimum federal standards for state incorporation
law, but it focused almost entirely on problems of shareholder protection and
corporate governance. In 1976, the Senate Committee on Commerce held six
days of hearings on why present arrangements of state chartering of
corporations should continue, but antitrust concerns were not the focus.

In one way, it is surprising that direct federal superintendence of
corporations as an antitrust solution did not emerge as a conversation topic
during the structuralist heydays of the 1960s and 1970s. Following the
economist Joe Bain's seminal work, a structuralist school of thought often
called the Harvard School asserted that a market's structure almost always
dictated the competitive conduct of its participants, whose conduct invariably
determined the performance of the market. Structuralism's important

---

140. See Steven A. Bank, Tax, Corporate Governance, and Norms, 61 Wash. & Lee L. Rev. 1159, 1162 n.5 (2004) ("In large part, the securities laws enacted in 1933 and 1934 served as a de facto federal corporations law.") [hereinafter Bank, Tax]; Robert B. Thompson & Hillary A. Sale, Securities Fraud as Corporate Governance: Reflections upon Federalism, 56 Vand. L. Rev. 859, 869 (2003) ("The government response to the excesses of the 1920s and to the pain of the Great Depression again led to calls for federal corporations law, but the New Deal Congress that passed securities legislation in 1933 and 1934 chose less intrusive means.").


144. JOE S. BAIN, INDUSTRIAL ORGANIZATION (2d ed. 1968).

145. See James W. Meehan, Jr. & Robert J. Larner, The Structural School, Its Critics, and
implication for antitrust law was to diminish the importance of anticompetitive conduct in antitrust analysis, since anticompetitive results were assumed to follow invariably from concentrated markets.\footnote{146}{For example, structuralists generally assumed that concentrated markets result in higher prices, even in the absence of seller collusion. See Weiss, supra note 145, at 106-15.} Although the ascendant Chicago School attacked structuralism's assumptions in the 1970s,\footnote{147}{On the debate over structuralism, see Meehan & Larner, supra note 145.} structuralism received a boost as late as in 1979. That year, the National Commission for the Review of Antitrust Laws and Procedures unsuccessfully advocated amending Section 2 of the Sherman Act to permit the government to seek equitable structural relief to dissolve persistent monopoly power, even absent any showing of wrongdoing by the monopolist.\footnote{148}{See Nat'l Comm'n for the Review of Antitrust Laws & Procedures, Report to the President and the Attorney General 151-63 (1979).}

Structuralism would seemingly have provided a natural segue back into discussions about a federal incorporation power or a federal regulatory role in superintending large, interstate corporations. When the framers of the Sherman Act chose the crime-tort model, they elevated the importance of conduct in antitrust analysis and rejected the alternative regulatory possibility that would have focused instead on corporate structure. But if direct federal regulation of interstate corporations would have been a logical complement to structuralism, its absence from the range of proposals suggested by structuralists can be explained by the dominance of the antitrust antifederalist impulse in American political discourse. Antifederalist opposition to a federal regulatory role in structuring and supervising corporations had weathered so many challenges over the preceding two centuries that its continued dominance as an American political idea seemed inevitable.

In a twist of historical fate, by the time that structuralism arose as a political possibility, the logic behind the antitrust antifederalist impulse had dissipated. From 1787 through the early twentieth century, most commentators assumed that federal incorporation and federal corporate regulation were mutually necessary: federal regulation of corporations could only be justified as to federal incorporations and federal incorporation would require federal regulation to prevent monopolistic aggregations of capital.\footnote{149}{See supra note 73 and accompanying text.} By the second half of the twentieth century, alternate models of federal corporate regulation were available—particularly the securities acts of the 1930s—\footnote{150}{See supra note 136.} but there was insufficient political interest in the institutional structure of antitrust to force a major reexamination of foundational principles.\footnote{151}{See supra notes 135-138 and accompanying text.}
implicit contentment with the institutional structure of antitrust enforcement or, more likely, it reflects the fact that whatever the pathologies of antitrust enforcement, discussed next, they were not sufficiently severe or politically salient to force the expenditure of the political capital necessary to revisit the questions decided in 1890 and 1914. For better or worse, antitrust antifederalism won its battles during early framing moments in the institutional development of U.S. antitrust and has maintained its sway since then through inertia.

II. THE PATHOLOGIES OF ANTITRUST ANTIFEDERALISM

To critique antitrust antifederalism's pathologies, it is necessary to imagine an alternative state unaffected by the antitrust antifederalist impulse. In this alternative world—which could plausibly have arisen at various points during the development of American economic policy and legal institutions—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.

By rejecting this corporate regulatory model, federal antitrust law has assumed a diffuse set of often suboptimal institutional features and enforcement apparatuses. Most fundamentally, antitrust law has been conceptually divorced from corporate law and framed as a freestanding norm of industrial competition. The antitrust violation is a crime and a tort to be vindicated by prosecutors and, even more, by aggrieved private plaintiffs. It is processed through ordinary adjudicatory civil and criminal channels by generalist judges and lay juries. Antitrust norms apply equally to natural persons and large corporations, and antitrust has frequently been turned on non-corporate subjects, such as labor organizations, professional associations, and sole proprietors. Because federal antitrust is a norm of conduct and not a specification of the structural parameters of federal incorporations, states are often allowed to displace the federal norm with alternative norms in a sort of anticompetitive reverse-preemption.

These manifestations of the crime-tort model prevent antitrust from achieving maximum effectiveness as a regulatory tool for achieving consumer welfare and productive and distributional efficiency. They delegate antitrust
decision making to inferior institutional actors, create opportunities for exploitation of antitrust adjudication by interests adverse to those of consumers, distract antitrust from its proper focus, and paralyze antitrust from performing its mission.

To be sure, all of these institutional features—here identified as antitrust antifederalist pathologies—have been influenced by forces other than antifederalism, even as this article capaciously defines that influence. In particular, the crime-tort model—with its emphasis on civic participation through lay juries, apprehension of wrong-doers, compensation of injured persons, and states’ involvement in decision making—is more easily reconciled than the corporate regulatory model with some of the populist currents that underlie antitrust law. But the antifederalist abhorrence of direct federal control over corporations lies at the root of all of these pathologies and continues, now mostly through inertia, to exert a profound influence generations after antifederalism has otherwise waned as an ideological commitment.

A. Antitrust as Crime-Tort

For reasons discussed earlier, the corporate regulatory model, when practiced on a state-by-state basis, was an abysmal failure that prompted Congress to look outside of corporate law for an alternative conceptual framework to stem the anticompetitive effects of rising corporate power. The framers of the Sherman Act claimed that the model they chose was the common law’s prohibition on restraints of trade and monopolization. Whether or not the framers understood the common law remains doubtful and the federal courts have not consistently embraced the common law as a tool for interpreting the Sherman Act’s sparse and unrevealing text. In any event, the Sherman Act and its statutory progeny—the Clayton Act and Robinson-Patman Acts in particular—departed from the common law in at least one significant way.

With limited exceptions, the common law’s pro-competition policy was a defense to the enforcement of anticompetitive contractual terms or other legal entitlements, not a source of independent liability. In the great English

152. See supra notes 56-67 and accompanying text.
155. See, e.g., HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra note 44, at 274 (“Although completely voluntary agreements to eliminate competition, such as price-fixing, were not generally enforceable in court, neither were they indictable offenses or even challengeable by third parties in civil actions.”). William Letwin’s survey of English common law and statutory law on various competitive offenses suggests a few ways in which the common law may have gone beyond merely voiding anticompetitive agreements. See LETWIN, supra note 7, at 18-52. The
common law cases like *Mitchel v. Reynolds* and *The Case of Monopolies*, what some would think of today as the antitrust claim was raised as a defense to the enforcement of other legal rights, such as covenants not to compete or letters patent. Thus, for example, in the *Mogul Steamship* case, the House of Lords held that a shipping association’s agreement to engage in a number of exclusionary acts against a rival shipping company was possibly unlawful in the sense that courts would not enforce the agreement, but that the agreement itself was not “contrary to law.” The excluded competitor, a stranger to the association’s agreement, had no legal recourse.

Under the common law model chosen by the founders, however, the antitrust violation became an affront to a freestanding norm of industrial competition and, hence, both a crime and a statutory tort. Sherman Act violators are potentially felons, although criminal prosecution of antitrust cases is reserved for serious cartel behavior. Violators are also subjected to treble damages liability to injured private parties.

This approach contrasts sharply with the corporate regulatory model, in which the incorporating sovereign could pursue a pro-competition policy based on industrial status alone without the need to identify prohibited conduct. A charter-granting regulatory body like the Bureau of Corporations envisioned by Theodore Roosevelt might have prohibited, whether through injunction or rule, particular corporate practices or structures on the grounds that they tended toward monopoly and were therefore socially undesirable, whether or not they violated some preexisting legal norm. Indeed, so long as it clearly reserved the right to do so ex ante, the sovereign could have revoked a corporation’s privileges simply because the corporation became a monopolist, however benignly it assumed that status. Unlike the corporate regulatory model where the bounds of liability would be established with reference to the corporate powers granted by the sovereign, the “common law” model requires the identification of an act that is wrongful because it violates a social norm. Punishment can only be meted out to sinners, and U.S. antitrust law is

---

156. 1 Peere Wms. 181 (1711).
160. See SKLAR, supra note 63, at 381 (describing Roosevelt’s vision of a “government-directed public-service economy enforced by executive commission with minimal judicial review”).
161. If a state granted corporate powers but later attempted to revoke them without explicitly reserving the right to revoke them, it would violate the constitutional proscription on retroactive impairments of the obligation of contracts. See HOVENKAMP, ENTERPRISE AND AMERICAN LAW, supra note 44, at 125-30.
principally a search for the sin of anticompetitive behavior.

The fundamental problem with the sin-based approach is that there is no conceptually satisfying, ex ante way to define a social norm of industrial competition. We have learned this in more than a century of trying to encapsulate the two principal prohibitions of the Sherman Act—agreements in restraint of trade and monopolization—in universally applicable verbal formulations.\(^\text{162}\) While courts and scholars have succeeded in identifying paradigmatic examples of each of the prohibitions (i.e., a price fixing cartel or the exclusion of a competitor through some nakedly tortious act like blowing up his factory), we are still very far from generally accepted formulations of the relevant prohibitions that can be plainly articulated and clearly explained to business people. This creates not only a failure to give adequate notice of the norm's substance, but also adjudicatory results that rest on formalistic conceptions of the social norm rather than meaningful efforts to achieve efficient industrial practices.

Two illustrations of this difficulty in formulating the relevant norms may be helpful. First, the economic purpose of Section 1 of the Sherman Act is to prevent two or more firms from suppressing competition and coordinating behavior in a manner that replicates the market power of an integrated monopolist.\(^\text{163}\) It often does not take an explicit cartel agreement to produce such coordinated results. Independent decision making in a repeat-game concentrated market where each oligopolist limits its own output based on an understanding that its competitors will be similarly disciplined—what antitrust lawyers call "conscious parallelism"—can be just as effective as an explicit price-fixing cartel at suppressing output and increasing price.\(^\text{164}\) But despite calls from prominent scholars such as Richard Posner to make conscious parallelism a sufficient condition for illegality,\(^\text{165}\) the courts view collusion as illegal only when it is the product of agreement.\(^\text{166}\) Judges draw the liability line between conscious parallelism and agreement, not so much because they believe that there is any significant economic difference in the effect of the two


\(^{163}\) See AREEDA & HOVENKAMP, supra note 6, at 11 (1986).


practices, but because agreeing to suppress competition can be identified as a "bad act" while merely following business instincts cannot.

Section 1 litigation, therefore, is often the search for the "bad act"—the agreement that violates the social norm and requires punishment and compensation. Except in the rare smoking-gun case, the lawyers usually do not uncover direct evidence of agreement in cartel cases. Accordingly, the law has developed to allow proof of the agreement inferentially, from so-called "plus factors" that tend to exclude the possibility of independent action. While this economic test for collusion may make proving agreement more feasible, it shifts the focus of economic evidence from the economically important question—did the pattern of parallel behavior replicate the output-reducing power of an integrated monopolist?—to the formalist legal question—does the defendants’ behavior suggest agreement? Because it is essential in the crime-tort model to identify a "bad act," Section 1 trials often are consumed by matters that have little relevance to the social welfare effects of the defendants’ behavior or corporate structure.

A second illustration involves Section 2 of the Sherman Act, which prohibits monopolizing without defining that offense. Early precedent made clear that merely being a monopolist could not subject one to Section 2 liability. It probably would be unconstitutional to punish a firm based solely on its industrial status. Thus, Section 2 cases often turn on whether the alleged monopolist obtained its monopoly power in an unlawful way—whether it "competed on the merits" or acted in a "predatory or exclusionary" manner. The search for the relevant "bad act" has engendered a fiercely conceptual and abstract debate over how to articulate the monopolization offense. Must the defendant’s conduct have amounted to a sacrifice of profits for the purpose of excluding a rival? Must the defendant have excluded

167. 6 AREEDA & HOVENKAMP, supra note 6, at 213.
168. 15 U.S.C. § 2 (making it illegal to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize” without defining what it means to “monopolize”).
169. See United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920) (holding that “the law does not make mere size an offense”); United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) (holding that monopoly obtained by "superior skill, foresight, and industry" or historical accident is not unlawful).
a competitor on some ground other than efficiency? Must the challenged act have decreased a rival’s efficiency without increasing the defendant’s efficiency?

The search for the platonic definition of the monopolization offense has relatively little to do with the social cost of monopoly pricing by a dominant firm, which will often be the same regardless of how the monopoly was obtained. The deadweight loss from a monopoly overcharge is the same however the monopoly arose. To be sure, there are good reasons to treat the monopolist who built a better mousetrap more favorably than the one who blew up the competitor’s factory. But most monopolists do not fall neatly into one category or the other. Most secured and maintained their position through some complex combination of skill, foresight, industry, accident, luck, shrewdness, strategic behavior, manipulation, and interrelated industry features such as government-sponsored entry barriers, first-mover advantages, network effects, entrenched customer preferences due to risk-aversion and switching costs, and so forth. Even if one could define the monopolization offense in a conceptually satisfying way, one lacks the tools to apply the standard reliably given the complexity of industrial markets.

Rather than think of monopolization as a criminal and tortious affront to some competition norm, one could think about how to manage the behavior and structure of dominant corporations so as to capture the efficiencies inherent in large aggregations of capital while minimizing the inefficiencies attendant to market power. As discussed in Part III, that is largely what is done today with respect to merger review. But merger is the exception to the rule—the one area of antitrust law that managed to escape antitrust antifederalism’s abhorrence of direct federal control of corporations and its insistence on a search for prohibited conduct. Most antitrust litigation remains a search for the elusive “bad act.”

The crime-tort model is comparatively ill-suited for advancing consumer welfare and economic efficiency. Many commercial practices can simultaneously help and hurt consumers. For example, tying contracts that require a customer to purchase a patented product together with an unpatented product can be good for some sets of consumers but not for others since they can entail raising the price to some consumers and lowering the price to others.173 Asking after the fact whether such price discrimination conformed to some ephemeral legal norm and awarding damages if it did is unhelpful. What is needed is a technical appraisal of the practice and expertly designed rules to make its implementation as efficient and consumer-friendly as possible.

B. Adjudicatory Delegation to Juries and Generalist Judges

The Sherman Act framers’ choice to invoke the common law rather than a corporate regulatory model entailed a delegation of adjudicatory responsibility to Article III judges and juries, even in civil cases. The civil antitrust jury is a particularly suboptimal manifestation of antitrust antifederalism, first because juries are usually not competent to decide the highly technical issues that modern civil antitrust law involves and secondly because, fearing what will happen if a case reaches the jury, courts contort the rules of civil antitrust procedure to avoid jury trials.

The Seventh Amendment preserves a right to jury trial in “suits at common law,” and, as noted earlier, the framers of the Sherman Act repeatedly asserted that they were merely enacting the common law of restraints of trade as a federal statute. Although the Supreme Court has never directly ruled that the Seventh Amendment entitles the litigants to a jury trial in all treble damages actions under the antitrust laws, it has assumed that the Seventh Amendment right attaches in antitrust cases and described jury trial as “an essential part of the congressional plan for making competition rather than monopoly the rule of trade.” With one notable exception discussed below, the federal courts have generally assumed that antitrust plaintiffs have a right to a jury trial in civil antitrust cases.

By contrast, the quo warranto action against the trusts sought to dissolve the defendant corporation or impose a fine but usually entailed neither damages nor a jury. In the federal incorporation proposals floated during the Progressive and New Deal eras, a federal corporations bureau would have received prophylactic powers to structure corporations so as to promote competition, impose ex ante conditions on corporate behavior in order to minimize the opportunities for anticompetitive behavior, and enjoin anticompetitive conduct through regulatory proceedings. Such proceedings probably would have been regulatory actions, perhaps including legislative rule

174. See Bork, supra note 153, at 20.
176. See Standard Oil Co. of Cal. v. Arizona, 738 F.2d 1021, 1028-30 (9th Cir. 1984) (summarizing cases and commentary and upholding plaintiffs’ entitlement to jury trial of civil antitrust action). Defendants have the same right, although defendants often would prefer a bench trial and it is plaintiffs that insist on jury trials.
178. See supra notes 97-102 and accompanying text.
making, rather than civil litigations, and, even if civil litigations, actions at equity and not at law. Either way, the action would not have entailed a jury. The regulatory model, at least, would not have entailed generalist Article III judges, but only appellate review of the kind that currently exists from decisions of the Federal Trade Commission.

The antitrust antifederalist impulse prevented the adoption of a corporate regulatory model of antitrust. In its place arose the crime-tort model wherein a jury, guided by a generalist Article III judge, is entrusted with ultimate determinations of fact. And since antitrust adjudication tends to be highly fact-specific, juries are theoretically granted a considerable role in antitrust cases.

Antitrust experts frequently bemoan the substitution of juries for regulators and criticize juries as unsuited to determining complex antitrust matters. Many of these criticisms go beyond scholars' common lamentations about the incompetence of juries in complicated commercial cases more generally. Since the Chicago School revolution in the 1970s, antitrust law has been almost entirely divorced from norms of fairness or distributive justice that lie within the ken of the average layperson. The antitrust jury is not called upon to serve as the moral compass of the community, since antitrust is no longer thought to be a moral enterprise. Nor is the jury usually asked to lend its competence on matters involving basic human nature, such as the truthfulness of witnesses or the intent of the parties. Often, the critical evidence is documentary or interpretive and there is not so much a dispute as to the occurrence of facts (i.e., whether someone attended a meeting or what a firm’s revenues were) but instead as to their economic significance. Similarly, many courts have dismissed subjective intent as relatively unhelpful in determining antitrust cases. Instead, antitrust has become focused almost entirely on a technical conception of economic efficiency. In this vision, antitrust is designed to encourage economic rivalry as a means of preventing output reduction attendant to collusive or exclusionary conduct. Intent, truthfulness, and moral responsibility—three topics that juries might have some comparative

179. See, e.g., HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 4, 63, 80-81 (2005) [hereinafter HOVENKAMP, ANTITRUST ENTERPRISE] (opining that “[j]ury trials in front of intelligent but nonspecialist judges is a truly miserable way to make economic policy,” that “juries remain a very weak link in a system where most of the relevant evidence is economic and technical,” and that juries are usually unqualified to distinguish between competent and incompetent expert testimony). See also Douglas W. Ell, The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment, 10 CONN. L. REV. 775, 775-76 (1978).

180. A collection of proposals to limit the jury’s role in complex civil cases can be found in Developments in the Law: The Civil Jury, 110 HARV. L. REV. 1408, 1493-1503 (1997).

181. See HOVENKAMP, ANTITRUST ENTERPRISE, supra note 179, at 54 (arguing that antitrust law is no longer considered a moral enterprise).


183. See HOVENKAMP, ANTITRUST ENTERPRISE, supra note 179, at 15-20 (explaining antitrust’s model of consumer harm).
advantage at divining—have been relegated to the margins of antitrust adjudication.

Given the technocratic substance of antitrust, it is not surprising that juries often fail in their assigned task. Although no comprehensive empirical study of the performance of juries in antitrust cases has been undertaken, casual empirical studies suggest that juries misunderstand essential economic concepts, fail to comprehend their instructions, and make decisions based on fairness intuitions that are irrelevant to antitrust analysis. Indeed, it would be surprising if the average layperson understood the complex econometrics, statistics, and economic theory that are the bread and butter of the modern antitrust trial. As antitrust has become economically more sophisticated, generalist trial judges struggle to keep up as well.

If trial by jury is an unappealing way to handle antitrust cases, the good news is that very few antitrust cases ever reach juries. The federal government files an average of fewer than 50 criminal cases a year and the majority of these terminate in a pre-trial plea bargain. Very few criminal antitrust cases are tried by juries. The same is true on the private side. Although a far greater number of private antitrust actions for damages are filed than criminal antitrust actions, only a small fraction of those cases ever find their way to a jury. There are on average only nine antitrust civil jury trials a year in the federal courts, only about one percent of the total dispositions of civil antitrust cases.

But that does not mean that the jury is irrelevant to modern antitrust adjudication. On the contrary, the fact that a jury awaits any case not dismissed or settled before trial explains a great deal about antitrust's adjudicatory structure. Both the substantive rules of antitrust liability and the procedural culture of antitrust litigation are geared toward avoiding jury trials.

On the substantive side, courts often frame antitrust liability rules to be deliberately underinclusive at least partly to prevent many antitrust cases from reaching juries. Many judges probably do not trust juries to render competent

188. Between 2001 and 2005, 3,766 private antitrust cases were terminated in the federal courts. 861, or about 23 percent, were terminated through voluntary dismissal or private settlement. 2,828, or about 75 percent of the cases, were dismissed by order of the court before trial, most often in response to a defendant's motion to dismiss or for summary judgment. Only 77 cases, about 2 percent of the cases, went to trial and of these only 45 cases were tried to juries. See id.
antitrust decisions and suspect they will tend to err in favor of plaintiffs due to populist prejudices against large businesses. For example, in its Trinko decision, the Supreme Court noted that it was curtailing liability for unilateral refusals to deal with a rival partly because of the risk of "false positives," a risk that the Court stopped just short of attributing to the delegation of fact-finding to juries. In Brooke Group, the Supreme Court, which usually grants certiorari to decide abstract questions of general applicability, took the extraordinary step of conducting sufficiency of the evidence review to reverse a predatory pricing jury verdict in favor of the plaintiff. As in Trinko, the Court justified its decision based on a fear of false positives. Although the Justices may be reluctant to directly question the competence of antitrust juries, their increasingly stringent liability rules reflect an unstated distrust of juries as fact-finders.

Even stronger evidence of antitrust jury-avoidance appears in the culture of motions to dismiss and, especially, summary judgment practice. The Supreme Court's Matsushita decision directs trial courts to inquire into the economic plausibility of the plaintiff's claims before allowing them to go to a jury. Lower courts even speak of a presumption in favor of summary judgment in antitrust cases. Critics of the Supreme Court's summary judgment jurisprudence argue that Matsushita and similar cases have deprived the jury of many of its traditional functions. This may be exactly what the

189. See Barbara S. Swain & Dan R. Gallipeau, Juror Attitudes in Antitrust Cases, 9 Antitrust 14, 15-17 (1994) (reporting that "[i]n some venues, as many as 75 percent of the jurors think that large corporations regularly use unethical and unfair tactics to bully smaller competitors and squeeze them out of the marketplace").


192. In a predatory pricing case, the plaintiff claims that the defendant priced below its cost in order to drive a rival firm out of the market and thereafter recoup the costs of predation through supracompetitive pricing.


195. Id. at 587. Citing concerns about the cost and complexity of discovery, the Supreme Court recently appeared to extend this economic rationality inquiry back to the motion to dismiss stage. See Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007) (holding that complaint alleging violation of Section 1 of the Sherman Act must allege facts sufficient to create "plausible grounds to infer an agreement").

196. See, e.g., Thompson Everett, Inc. v. Nat'l Cable Adver., L.P., 57 F.3d 1317, 1322 (4th Cir. 1995) (stating that summary judgment may be a particularly appropriate and useful tool for sorting out the "unusual entanglement of legal and factual issues frequently presented in antitrust cases"); Valley Liquors, Inc. v. Renfield Imp., Ltd., 822 F.2d 656, 660 n.4 (7th Cir. 1987) (stating that "summary judgment should be a favored practice in antitrust cases"); Merck-Medco Managed Care, Inc. v. Rite Aid Corp., 22 F. Supp. 2d 447 (D. Md. 1998) (same); Healthco Int'l, Inc. v. Adec, Inc., 1989-2 Trade Cas. (CCH) ¶ 68,703, at 61,689 (D. Mass. 1989) (summary judgment in antitrust actions is "a desirable means of securing the just and speedy resolution of such actions").

Supreme Court intended. The litigation history of the *Matsushita* case suggests a direct linkage between a fear of incompetent juries and an aggressive summary judgment standard in antitrust cases.198

The statistics—three-quarters of all federal antitrust cases are dismissed on a motion to dismiss or for summary judgment199—and the rhetoric of motion to dismiss and summary judgment practice reveal that judicial jury-avoidance has become a dominant characteristic of private antitrust litigation. The effect on antitrust decision making is pernicious. Many important decisions that would best be made following the give-and-take of cross-examination and expert testimony in a courtroom or administrative proceeding are instead made under the artificial strictures of procedural rules that were not designed with the complexity of industrial policy making in mind. For instance, on a summary judgment motion, the district judge is supposed to ask whether the plaintiff’s theory is economically plausible in light of the undisputed facts.200 This requires a generalist judge (or, often, her clerk)—who is usually not trained in economics—to speculate about the economic plausibility of the plaintiff’s assertions based on a dense paper record collected, sifted, and spun by the lawyers. In making this determination, the judge cannot take live testimony, ask clarifying questions of witnesses, or rely on recommendations by neutral experts, who generally are only employed at trial.201 The dynamics of the courtroom and its truth-seeking structure are replaced by the mismatch of a mundane pre-trial mechanism and an esoteric economic inquiry that most judges are ill-equipped to make in a vacuum.


198. *Matsushita* involved a claim by American television manufacturers that their Japanese competitors had engaged in a prolonged conspiracy to price predatorily in the U.S. The case was factually dense and economically complex—the very kind of matter that a lay jury would be hard pressed to understand. During the course of the litigation, the Third Circuit entertained an appeal from a pretrial order of the district court holding that parties to antitrust cases have an automatic right to a jury trial. While not deciding whether there was a jury trial right in the *Matsushita* case, the Third Circuit held that a party does not have a Seventh Amendment right to jury trial in an antitrust case if the trial would be so complex that the jury could not rationally perform its function. See In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980). That provocative decision never reached the Supreme Court, because it was preempted by another way of avoiding jury trial in complex antitrust cases. After rejecting the defendants’ motion to strike the plaintiffs’ jury trial demand, the district court entered summary judgment for the defendants on the merits. See Zenith Radio Corp. v. Matsushita Elecs. Indus. Co., 494 F. Supp. 1190 (E.D. Pa. 1980).

199. See supra note 188 and accompanying text.

200. See supra note 195.

201. See Hovenkamp, Antitrust Enterprise, supra note 179, at 89-90 (advocating greater use of neutral experts in antitrust trials); Posner, Antitrust Law, supra note 165, at 277-78 (suggesting the use of a neutral expert agreed upon by each party’s expert); Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40, 56 (1901) (advocating for “a board of experts or a single expert, not called by either side, who shall advise the jury of the general propositions applicable to the case which lie within his province”); John E. Lopatka & William H. Page, Economic Authority and the Limits of Expertise in Antitrust Cases, 90 Cornell L. Rev. 617, 628 (2005) (discussing use of neutral experts in antitrust cases).
Neither the jury, nor the culture of jury-avoidance, serves antitrust adjudication very well. The antitrust jury is a direct legacy of antitrust antifederalism's rejection of the corporate regulatory model and its embrace of the crime-tort model. Its influence works its way upstream and corrodes the entire process of antitrust adjudication.

C. The Predominance of Private Enforcement

The conceptualization of antitrust as a form of crime and tort—the violation of a social norm—entailed the creation of a private right of action for damages. Thus, although most scholars today would justify antitrust in purely instrumental, deterrence-oriented terms, the practice of antitrust regulation is primarily oriented toward compensation and distributive justice for an individually aggrieved person. Between 1996 and 2005, the Department of Justice Antitrust Division ("Department of Justice") initiated an average of only 17.3 civil cases and 45.4 criminal cases per year. The Federal Trade Commission ("FTC" or the "Commission") initiates a similarly small number of non-merger civil enforcement actions and no criminal cases. Private litigants, on the other hand, file over 800 federal antitrust cases a year, almost all of them seeking damages for past violations. Antitrust laws incentivize private litigants to bring such actions by awarding successful plaintiffs treble damages. Antitrust enforcement is therefore overwhelmingly a private enterprise.

The privatization of antitrust enforcement has many negative consequences. Private litigants often have interests that conflict with those of the intended beneficiaries of antitrust law—i.e. consumers—and can misuse antitrust to facilitate rather than thwart anticompetitive behavior. Further, judges tend to limit their decisions in private litigation to the facts specific to each case. Thus, the fact that most antitrust liability rules are created in private litigation where courts err on the side of deliberate underinclusion tends to dilute the strength of antitrust norms in public litigation.

1. The Fox Guarding the Henhouse

According to the prevailing view today, antitrust law exists to advance consumer welfare. However, relatively few antitrust cases are consumer

class actions. About two-thirds of private enforcers of antitrust are aggrieved competitors or other businesses vertically related to the defendant (which I shall refer to as the competitor-distributor class); fewer than 20 percent are consumers. Many consumer cases are simply tag-alongs to federal prosecutions brought by class action lawyers seeking to reap the rewards of an already unearthed violation. Cases brought by business interests play a far greater role in shaping antitrust law and molding business behavior.

In theory, the business interests that account for the vast majority of private plaintiffs might advance consumer welfare by promoting competition values and deterring conduct that harms both the competitor-distributor class and consumers. To prevail in litigation, a business-interest plaintiff must tell a story of consumer harm. Yet, although the competitor-distributor class may incidentally advance consumer welfare in some cases, its interests are the opposite of those of consumers. Consumers benefit from markets shorn of monopoly rents while the competitor-distributor class benefits from markets laden with them. The competitor-distributor plaintiff who claims to prefer a competitive market is almost inherently dishonest. Competitive markets yield zero economic profits, and all but the most altruistic firms are in business to earn economic profits.

It would be foolish to expect that an antitrust system primarily driven by the competitor-distributor class would tend toward consumer welfare. To the extent that litigants shape the content of liability rules, the competitor-distributor class will tend to promote rules that favor its class—generally smaller business interests—over the business interests of the defendant class, which usually consists of larger business interests. The competitor-distributor class tends to advance liability rules that stress a “level playing field,” even though this often means a set of protectionist rules designed to prevent larger firms from exploiting efficiency advantages. Further, even if the competitor-distributor class cannot shape liability rules to its advantage, it can strategically

---


206. Lawrence J. White, The Georgetown Study of Private Antitrust Litigation, 54 ANTITRUST L.J. 59, 62 (1985) (noting that the Georgetown Study conducted on a sample of 2,500 antitrust cases from 1973-1983 found that one-third of private plaintiffs were defendant’s competitors, another 30 percent were dealers or distributors, and less than 20 percent were customers or otherwise consumers).

207. See Schor v. Abbott Labs., 457 F.3d 608, 612 (7th Cir. 2006) (“[I]f a manufacturer cannot make itself better off by injuring consumers through lower output and higher prices, there is no role for antitrust law to play.”).


209. Indeed, publicly traded firms have a fiduciary obligation to seek to maximize shareholder profits. See Einer Elhauge, Sacrificing Corporate Profits in the Public Interest, 80 N.Y.U. L. REV. 733 (2005) (describing this view as “canonical” but challenging it theoretically).
muse antitrust litigation to prevent procompetitive behavior by the defendant class by raising the defendant's costs and exploiting the defendant's aversion to the uncertainty of litigation outcomes.\textsuperscript{210}

Antitrust defendants do not have the interests of consumers at heart either. Like the competitor-distributor plaintiff class, antitrust defendants seek to promote market conditions conducive to reaping monopoly rents—economic profits earned in less than perfectly competitive markets. The only disagreement between the plaintiff and defendant classes is over who should have the rents. The litigants often find a way to allocate the surpluses of trade among themselves without even involving a court in the decision. About a quarter of all antitrust cases settle, usually without the supervision of the courts.\textsuperscript{211} Antitrust settlements are prime opportunities for the competitor-distributor and defendant classes to make industrial peace, often at the expense of consumers.\textsuperscript{212}

Because of the privatization of antitrust resulting from the rejection of the corporate regulatory model, the majority of antitrust cases are nominally fought for the benefit of consumers, but without anyone truly interested in consumer welfare involved in the litigation.

2. Spillover Effects on Public Litigation

Proponents of private antitrust enforcement often justify their support on the grounds that governmental enforcers lack the time and resources to catch and prosecute every violation and, hence, private attorneys general advance the deterrent goals of antitrust by providing additional layers of private enforcement.\textsuperscript{213} In this vision, private enforcers complement public enforcement by filling in the gaps that public enforcers cannot fill. However, the statistics suggest that the opposite is true—private litigation by far predominate over public litigation and public enforcers simply fill in small gaps in private enforcement.\textsuperscript{214} Far from complementing public enforcement, private enforcement overwhelms it.

Simply counting public and private cases does not tell the entire story,

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{211} See supra note 188 and accompanying text.
  \item \textsuperscript{212} On the potential for collusive settlements, see Susan P. Koniak & George M. Cohen, \textit{Under Cloak of Settlement}, 82 Va. L. Rev. 1051 (1996).
  \item \textsuperscript{214} See supra notes 186-1188 and accompanying text.
\end{itemize}
\end{footnotesize}
since public enforcement may be better funded, taken more seriously by the courts, and more likely to have a lasting impact. Thus, proponents of private antitrust enforcement may argue that although public enforcement accounts for a small numerical percentage of all antitrust litigation, it accounts for the cases that make the most significant impact on antitrust regulation. On the other hand, the sheer numerical disparity between public and private cases has had at least one serious deleterious effect on the success of public litigation. Because private litigation is frequent and public litigation is rare, courts often create antitrust liability rules in private litigation. The content of these liability rules is shaped by concerns peculiar to private litigation, such as abusive competitor suits, the risk that treble damage awards will chill vigorous competition, and the fear that setting the bar too low will encourage litigiousness. Thus, at least in recent years, courts have often established sharply underinclusive liability norms in private antitrust cases.²¹⁵ Logically, the liability rules might very well be less stringent in public litigation where those limiting concerns are absent. Yet, because courts often must construe the same statute in both public and private cases,²¹⁶ the courts have tended to apply private litigation liability rules to public litigation as well. Hence, the predominance of private antitrust litigation has stymied public antitrust enforcement by precipitating the creation of restrictive liability norms that are then applied in public lawsuits as well.

Predatory pricing law provides a useful illustration. During the 1980s and 90s, the federal courts sharply constricted the right of action for predatory pricing.²¹⁷ The courts justified restrictive predation liability rules by claiming that opportunistic private plaintiffs could chill rivals' aggressive pricing by bringing predatory pricing lawsuits for treble damages.²¹⁸ During the years that the courts were developing these restrictive liability norms, the FTC and the Department of Justice brought few, if any, any predatory pricing lawsuits.²¹⁹


²¹⁶. The Federal Trade Commission does not enforce the Sherman Act, but as discussed below, the courts have held the FTC Act's antitrust provisions to be generally coextensive with the Sherman Act. The FTC describes its own powers as “for the most part[ ] co-extensive with the Sherman Act.” In re Schering-Plough Corp., 2003 WL 22989651, at 48 n.107 (F.T.C. December 08, 2003).

²¹⁷. See Crane, The Paradox, supra note 210, at 3.

²¹⁸. Id.

²¹⁹. Michael L. Denger & John A. Herford, Predatory Pricing Claims After Brooke Group,
The liability rules were created solely with the institutional limitations of private litigation in mind. Then, in 1999, the Justice Department brought its first predatory pricing lawsuit in decades, against American Airlines. The government lost the case on summary judgment in the district court and again in the Tenth Circuit largely because the courts applied off-the-rack predatory pricing liability rules designed to avoid abusive private litigation. For example, the Tenth Circuit relied on earlier precedent from predatory pricing cases that justified underinclusive liability norms because of the high costs of false positives. Such concerns are far greater in private actions for treble damages than in injunctive actions by the government seeking to interdict future misbehavior. If the law of predatory pricing had developed with the institutional parameters of public enforcement in mind, it is doubtful that the resulting liability rules would have been so deferential to pricing decisions by dominant firms.

Even the FTC’s prophylactic power to enjoin deceptive and unfair trade practices has been diluted by the predominance of private enforcement and its requirement of bad conduct. The framers of the FTC Act claimed that they were giving the Commission the power to enjoin practices that might not yet arise to the level of Sherman Act violations—to stop incipient anticompetitive behavior in its tracks. But despite a few occasions on which the courts have recognized the FTC’s prophylactic powers, precedents created in private Sherman Act litigation have often thwarted the Commission’s efforts to advance a competition agenda through a future-oriented injunctive proceeding. For example, in the 1970s, the Commission lost injunctive actions against the unilateral adoption of basing point pricing in concentrated oligopolies. Under the court’s reasoning, the Commission had not shown that the practice arose by collusive agreement among the oligopolists. This approach makes the FTC’s substantive powers in this area identical to those of private litigants and, thus,

220. U.S. v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).
221. For example, the Tenth Circuit relied on earlier precedent from predatory pricing cases that justified underinclusive liability norms because of the high costs of false positives. See id. at 1114. Such concerns are far greater in private actions for treble damages than in injunctive actions by the government seeking to interdict future misbehavior.
222. See id. at 1114.
226. See Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980). Conversely, in Cement Institute, the FTC prevailed in an action against basing point pricing because it was able to show sufficiently that the practice was adopted by agreement among the cement manufacturers. FTC v. Cement Inst., 333 U.S. 683 (1948).
renders the FTC’s prophylactic powers ineffectual. More recently, the Commission lost an action to enjoin collusive patent settlements after the Eleventh Circuit applied a restrictive liability rule that it had recently constructed to determine treble damages liability in private damages actions.227

In its antitrust enforcement capacity, the FTC usually operates under liability rules designed for private litigation. By contrast, its consumer protection role has no antitrust analog, and Congress has been willing to grant the FTC broad prophylactic consumer protection powers. For example, the wildly popular “Do Not Call Registry” is founded on the FTC’s consumer protection rule-making power under a specific grant of congressional authority.228 Although the FTC may have general rule-making power over antitrust matters as well,229 any rule made pursuant to that power would have to be justified as a proper enforcement mechanism for the statutory norm of competition, the meaning of which remains heavily shaped by private litigation.230 Thus, again, the predominance of private litigation tends to dull antitrust liability rules, which is a serious drawback for public enforcement.

D. Natural Persons as Antitrust Subjects

The primitive framework of antitrust enforcement from the Reconstruction Era to the passage of the Sherman Act was based on the boundaries of the corporate charter.231 Hence, it was solely directed against corporations and persons connected to corporations, such as officers, directors, and controlling shareholders. When Congress rejected the corporate regulatory model and instead created a freestanding norm of industrial competition, it swept all commercial actors—whether corporate or natural persons—into the domain of federal antitrust law. The sole proprietor, labor union, and professional association were just as capable of violating this new federal norm as the business corporation. As time passed and economic concepts were formalized in antitrust jurisprudence, a finding of market power—which usually does not exist outside of large aggregations of capital—became necessary to some antitrust violations.232 Still, many core antitrust violations—

227. See Schering-Plough Corp. v. FTC, 402 F.3d 1056 (11th Cir. 2005); Valley Drug Co. v. Geneva Pharm., Inc., 344 F.3d 1294, 1303-04 (11th Cir. 2003).
229. See Nat’l Petroleum Refiners Ass’n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).
231. See supra notes 56-58 and accompanying text.
those subject to a per se rule of liability—require no market power at all, and antitrust has been turned on many subjects far-removed from the capital-concentrating effects of general incorporation laws.

The impetus for the Sherman Act arose from widespread public apprehension over the increasing power of the capitalist class. Yet, the capitalist class swiftly turned the Sherman Act on its head and effectively used it to resist labor combinations. Of the first thirteen successful antitrust cases, only one involved a combination of capitalists. The other twelve found antitrust violations by labor combinations. Antitrust enforcement against labor persisted well into the Progressive Era.

It is unclear whether Congress intended the Sherman Act to apply to labor. An amendment that would have restricted the Act from applying to labor agreements was adopted in the Senate by a voice vote but removed, with other amendments, by the judiciary committee. Whatever the intent of the Fifty-first Congress, Progressives took the view that the Sherman Act had been put to perverse uses in controlling labor rather than capital. The Hepburn Bill would have rectified matters by refocusing antitrust law on corporations operating in interstate commerce and explicitly immunizing labor from antitrust law. But the Progressives succeeded in only half of their agenda. The Clayton Act, which replaced the Hepburn Bill, provided that "[t]he labor of a human being is not a commodity or article of commerce;" provided that labor organizations were not to be "construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws;" and prohibited federal courts from enjoining strikes. The general text of the Sherman Act and then the Clayton and FTC Acts, however, remained equally applicable to all commercial actors and was not limited to corporations and those connected with them.

The choice of a non-corporate-specific antitrust norm accompanied by a labor exception instead of a corporate-specific antitrust norm allowed continued use of antitrust law to reign in labor. Despite the Clayton Act, the

233. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("[A] conspiracy to fix prices violates § 1 of the Act . . . though it is not established that the conspirators had the means available for accomplishment of their objective.").


235. Hovenkamp, Enterprise and American Law, supra note 44, at 229.


237. See Hovenkamp, Enterprise and American Law, supra note 44, at 229; see also Edward Berman, Labor and the Sherman Act 11-51 (1930).

238. See Friedman, supra note 11, at 1427.

239. See Kolko, supra note 91, at 136.

Supreme Court continued to sanction injunctions against labor picketing.\textsuperscript{241} Congress responded in 1932 with the Norris LaGuardia Act,\textsuperscript{242} categorically prohibiting federal injunctions against peaceful labor activities, and in 1935 with the National Labor Relations Act,\textsuperscript{243} which intended to take labor disputes entirely out of the province of antitrust. Nonetheless, businesses have continued to find ways to turn antitrust law against labor.\textsuperscript{244}

The choice of the crime-tort model instead of the corporate regulatory model interferes not only with traditional collective bargaining and other union activity, but also with the activities of other natural persons who make their living primarily by selling their labor. A fairly recent example of this is the FTC's enforcement action against the Superior Court Trial Lawyer's Association, a loose association of trial lawyers paid by the District of Columbia court system to represent indigent criminal defendants.\textsuperscript{245} The trial lawyers agreed among themselves not to accept any further representations until they received a pay increase.\textsuperscript{246} A conservative FTC, having at last found a pleasing set of antitrust defendants—criminal defense lawyers—sued to enjoin the agreement as a per se illegal boycott and price fixing agreement. Although the trial lawyers had no market power and raised none of the concerns that motivated the adoption of the antitrust laws,\textsuperscript{247} the Commission prevailed in the Supreme Court on the strength of the per se rule.\textsuperscript{248}

The only plausible justification for enforcement actions such as the Trial Lawyers case is that the competition norm must be uniformly upheld regardless of the nature of the defendants. This "rule of law" justification assumes that the law creates a generally applicable norm of competition. If, instead, the law created a regulatory apparatus to supervise the capital-concentrating effects of incorporation laws, there would be no occasion to harass the working class with a competition norm ill-suited to their circumstances.

Although market power is far more common in corporations than outside corporations,\textsuperscript{249} market power sometimes exists in non-corporate entities such

\textsuperscript{243} Id. at §§ 150-169.
\textsuperscript{246} 493 U.S. at 416.
\textsuperscript{247} See Baker, supra note 245.
\textsuperscript{248} 493 U.S. at 423-25.
\textsuperscript{249} For example, corporations are far more likely than individual inventors to possess highly valuable, and market-power-conferring, patents. See F.M. Scherer, The Innovation Lottery,
as professional and trade associations. Federal antitrust may have a particularly beneficial role to play in policing intra-state cartel-type behavior by professional groups, such as bar associations, that might otherwise go unchecked because states often allow professional groups to regulate themselves. Yet the institutional structure of the crime-tort model, which was designed to break the power of dominant corporations, is ill-equipped to play this role. Lawsuits challenging anticompetitive ethics rules or other exclusionary norms implemented by professional or industry associations are never criminally prosecuted, nor is there usually any deep pocket that a plaintiff may sue for treble damages. Usually, such actions seek to void and enjoin the operation of the anticompetitive associational rule in the future, which is the role that the common law of restraints of trade was performing even prior to the adoption of the Sherman Act.

The choice of a generally applicable competition norm instead of a corporate-specific regulatory regime has unnecessarily extended antitrust law to the activities of natural persons who raise none of the concerns that animated the adoption of the antitrust laws. This overextension misallocates enforcement and judicial resources by applying the heavy artillery of antitrust to circumstances where market power—or at least market power affecting interstate commerce—is lacking. However, the courts feel compelled to uphold the competition norm for consistency's sake. The need for antitrust arose largely because of the capital-concentrating effects of general incorporation statutes, and extending the enterprise beyond those boundaries distracts antitrust from its proper focus.


251. See supra notes 155-158 and accompanying text.
E. Confusion over Federalism Principles

The relationship between state and federal specification of competition norms and state and federal enforcement of antitrust law has generated much uncertainty and, hence, much scholarship and litigation as well. ²⁵² Lying at the root of the uncertainty is the crime-tort model of antitrust, which creates a malleable norm of competitive behavior and then invites competing sovereigns to wrestle for control of the norm to advance their own interests. Because of the institutional delegation of federal antitrust to courts rather than to regulatory agencies, states have been able to trump the federal policy of competition with parochial policies favoring local interests. States have also frustrated federal efforts to structure interstate corporate behavior by advancing competing goals in litigation.

To be sure, one of the dominant movements of antitrust federalism has reflected the triumph of nationalism over localism. Although the Supreme Court took an early antifederalist turn when it held that manufacturing is not interstate commerce, ²⁵³ the pendulum quickly swung back. ²⁵⁴ Following the constitutional revolution that occurred in the midst of the New Deal, the jurisdictional reach of the Sherman Act came to be virtually synonymous with commercial activity. ²⁵⁵ Today, federal antitrust law is essentially unbounded and reaches even local activities—for example, a price-fixing agreement for local home sales among New Orleans real estate agents ²⁵⁶—that have little relation to federal interests in maintaining efficient national commercial markets. ²⁵⁷

Yet, antifederalist tendencies continue to pervade antitrust law. Far from stifling state creation of competition norms, federal law accommodated independent and competing state versions of competition in two significant ways. First, contemporaneously with the expansion of the Sherman Act to even local commercial activity, the Supreme Court formulated the state action doctrine, which allowed states to effectively preempt the Sherman Act by specifying an anticompetitive norm for commercial activity within their state.

²⁵². See supra note 4 and accompanying text.
²⁵⁷. The federal courts’ exclusive jurisdiction over federal antitrust claims reflects another federalist orientation in federal antitrust law. See Michael E. Solimine, Rethinking Exclusive Federal Jurisdiction, 52 U. PITT. L. REV. 383, 429-31 (1991). However, federal antitrust law does not preempt or displace state antitrust law. California v. ARC Am. Corp., 490 U.S. 93, 105-06 (1989) (holding that a federal standing ruling prohibiting suits by indirect purchasers did not preempt a state law antitrust claim by indirect purchasers). Thus, while state courts do not shape the meaning of federal antitrust law, the states may create different antitrust norms in their own courts.
As a result, states could specify an anticompetitive norm even if the primary burden of the anticompetitive regime fell on out-of-state interests that were unable to participate in the formulation of the state's regulatory policy or other politically disadvantaged groups participating in interstate markets. Under the state action doctrine, states are free to reverse-preempt federal antitrust law by trumping the federal competition norm and mandating anticompetitive behavior so long as they clearly articulate the anticompetitive policy and actively supervise its implementation.

A priori, it is difficult to justify a system where localist interests can trump federal competition policy at the expense of unrepresented out-of-state interests. The root cause of this institutional design is the choice of a crime-tort model over a corporate regulatory model. Once antitrust was conceived of as a freestanding norm, it was bound to conflict with other norms, such as business planning and the protection of local firms from larger foreign companies. The courts, which had jurisdiction over the antitrust norm, were ill-positioned to mediate between the various norms. To the extent that the federal policy remained unchallenged by any state regulatory regime, the courts could claim the supremacy of the federal competition norm. But when a state asserted a policy that clashed with the federal competition norm—for example, an agricultural proration regime designed to favor local farmers at the expense of out-of-state consumers—the courts lacked the tools to mediate between the conflicting policies. This was particularly true when the state policy was presented as a reticulated regulatory design implemented by specialized state bureaucrats, and the federal competition policy remained the spare words of the Sherman Act as fleshed out by the generalist courts through common law adjudication—hence the "active supervision" requirement. So long as the states could claim bureaucratic expertise in implementing the regulatory policy, the generalist federal courts would defer, even at the expense of federal competition norms.


260. See, e.g., United States v. Joint-Traffic Ass'n, 171 U.S. 505, 576 (1898) (rejecting argument that courts should balance firms' need to avoid "ruinous competition" against general federal pro-competition norm).


262. See AREEDA & HOVENKAMP, supra note 6, at 365-67.

263. Id. at 379-87. See supra note 19 and accompanying text.
Matters would be quite different in a regime where a federal agency had direct superintendence powers over interstate corporations. Recall that the Federalists argued for giving Congress a general incorporation power in order "to prevent a State from obstructing the general welfare."264 If a federal agency had structural and rule-making powers over federal corporations, the supremacy question—the federal competition norm versus the localist state regime—would have played out as the clash of competing industrial specialists. The regulatory choices of the federal agency that created and supervised the behavior of interstate corporations would likely have superseded the localist choices of the states. As things stand, however, the federal antitrust agencies are merely enforcers of the amorphous competition norm and have no regulatory jurisdiction to clear the channels of interstate commerce of parochial obstacles erected by the states. Their only hope is to prove that a particular anticompetitive state policy is not clearly expressed by the state or actively supervised by its agents, a burden which they often cannot meet.265

Second, the Clayton Act gave state attorneys general authority to assert their own injunctive federal antitrust claims,266 which gave the states the opportunity to mold antitrust law according to their own preferences. States thus compete with the federal government to specify federal competition norms. Creating an additional set of enforcers is sometimes thought to advance federal competition norms by adding resources and institutions to discover and prosecute violations.267 But this view continues to conceive of competition policy as a norm whose violation must be detected and punished. As noted earlier, the concept of antitrust as a freestanding norm creates insurmountable difficulties because there is no satisfying ex ante way to specify the relevant norm.268 If, instead, antitrust is best understood as the technocratic function of specifying the optimal structure and behavior of large corporations, then having

---

265. Compare S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) (rejecting the Department of Justice's price-fixing claim against truckers on the grounds that the state action doctrine immunized the truckers' conduct) with FTC v. Ticor Title Ins. Co., 504 U.S. 621, 637 (1992) (finding that the state did not adequately supervise rate-setting activities of insurance companies and that they therefore did not qualify for state action defense). Other cases in which the agencies have unsuccessfully opposed state action immunity defenses include FTC v. Hospital Board of Directors of Lee County, 38 F.3d 1184 (11th Cir. 1994), and Massachusetts Furniture & Piano Movers Association, Inc. v. FTC, 773 F.2d 391 (1st Cir. 1985).


268. See supra notes 166—173 and accompanying text.
more than one technocratic designer is not any more desirable than having separate designers create a sophisticated airplane based on an amalgamation of plans.\textsuperscript{269}

The Microsoft litigation provides a case in point. Twenty state attorneys general brought their own separate \textit{parens patriae} claims in tandem with the federal action.\textsuperscript{270} Richard Posner, who attempted to mediate a settlement, later complained that the participation of the states made it more difficult to coordinate a settlement and interfered with the federal government's efforts to resolve the matter.\textsuperscript{271} Whether the participation of the states in such proceedings is warranted despite the cost depends on whether antitrust is primarily concerned with redressing violations of a socio-political norm. If so, allowing various injured constituencies to be represented at the bargaining table seems reasonable. On the other hand, if antitrust is more concerned with applying technical regulatory knowledge to limit the inefficiencies of monopolies without deadening incentives to compete and innovate, having more than one governmental regulatory team at the table seems foolish.

The solution to the antitrust federalism quagmire is not simply more federal preemption. The states may very well have a superior claim to regulating local markets, and a corporate regulatory approach to antitrust would reduce some of the clash between federal and state norms by limiting the focus of federal antitrust policy to interstate corporations. Still, vigorous enforcement of antitrust law in national markets would produce procompetitive effects in even local markets by facilitating the flow of capital to any monopoly rents created by local anticompetitive conditions. And a corporate regulatory approach would lessen the twin evils of reverse-preemption of the federal competition norm by parochial localist regulations and state frustration of the federal bureaucratic function of optimizing the structure and behavior of interstate corporations. Federalism concerns would not disappear under the corporate regulatory model, but many suboptimal features of the federal antitrust system would be minimized.


\textsuperscript{271} References to Judge Posner's complaints are collected in Michael DeBow, \textit{State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal}, in \textit{COMPETITION LAWS IN CONFLICT} 267, supra note 261, at 282. See also Hahn & Layne-Farrar, supra note 4, at 878 (arguing that the involvement of the state Attorneys General in the Microsoft litigation "lengthened the lawsuit, complicated the settlement process, and increased both legal uncertainty and litigation costs"); Richard A. Posner, \textit{Federalism and the Enforcement of Antitrust Laws by State Attorneys General}, in \textit{COMPETITION LAWS IN CONFLICT} 252, supra note 261.
III. THE NEW FEDERALIST PARADIGM

The antitrust antifederalist impulse has receded to the point of extinction. Direct federal superintendence of corporations happens on a routine basis in pursuit of a variety of regulatory objectives, such as shareholder protection and labor-management mediation. The federal government regularly creates commercial corporations and some of the most powerful business entities are federally chartered, including 28 percent of all insured commercial banks in the United States, lending institutions like Fannie Mae, Sallie Mae, and Freddy Mac, powerful industrial corporations like the Tennessee Valley Authority, and technological investment firms such as the Telecommunications Development Fund. The antifederalist fear that giving the federal government a direct role in structuring commercial corporations would lead to monopoly has largely been mooted by the capital-concentrating effects of state incorporation statutes, the expanded Commerce Clause powers of Congress in the post-Depression era, and the fact that state governments have proven themselves capable of conferring monopolistic commercial advantages without bestowing special corporate privileges.

But despite the demise of antitrust antifederalism as an ideological impulse, its effects persist in the institutional structure of antitrust law. The crime-tort model, adjudicatory delegation to juries, the preponderance of private enforcement, the reach of antitrust to non-corporate subjects, and suboptimal performance in antitrust federalism cases are all features of the antitrust system that would change a great deal if antitrust law became part of a federal corporate regulatory regime. To see this most clearly, it is only necessary to consider an exception to the rule, the one area where antitrust law has effectively become a technocratic federal corporate-regulatory regime—merger control.

A. Hart Scott and the New Federalist Paradigm

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 amended the federal antitrust laws in three ways. Two of them—giving the Department

275. See Bradford C. Mank, Are Public Facilities Different From Private Ones?: Adopting a New Standard of Review for the Dormant Commerce Clause, 60 SMU L. REV. 157, 175 (2007) (listing different commercial sectors in which states have granted exclusive franchises).
of Justice the power to issue civil investigative demands and enabling state attorneys general to sue as parens patriae on behalf of their citizens—affected the institutional structure of antitrust relatively little.\textsuperscript{277} The third—a premerger notification requirement—had an enormous impact on the institutional structure of U.S. merger law.\textsuperscript{278} In brief, it 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.

The statute itself does not expressly do any of these things. Facially, it is merely procedural. It specifies that, as to certain classes of stock and asset acquisitions, the acquiring and/or acquired person must file a premerger notification with the Department of Justice and Federal Trade Commission.\textsuperscript{279} Unless the agencies give early termination, the merger or acquisition cannot close for thirty days following the filing.\textsuperscript{280} Prior to the termination of the thirty-day waiting period, the agencies can issue a “second request,” a species of subpoena for categories of documents and information additional to those that must automatically accompany the initial filing.\textsuperscript{281} The agencies can then extend the waiting period for thirty days following satisfaction of the second request.\textsuperscript{282} Formally, compliance with Hart-Scott does not mean that a merger is approved or that the merger is deemed legal as a matter of law.\textsuperscript{283} It is simply a procedural prerequisite to closing a merger or asset acquisition.

But despite its cosmetically procedural tone, Hart-Scott has dramatically reshaped not only the institutional practice but also the substance of merger practice. It has created a de facto regulatory regime of merger approval by government economists and antitrust lawyers who consider, ex ante, the likely structural consequences of a merger and negotiate with the merging parties for divestiture packages or conduct commitments sufficient to alleviate competitive concerns.\textsuperscript{284} Merger practice, if not merger law, has become a quasi-scientific

\textsuperscript{277} For an account of the legislative history and general content of Hart Scott, see Scher, \textit{supra} note 266.


\textsuperscript{279} 15 U.S.C. § 18a(a).

\textsuperscript{280} \textit{Id.} at § 18a(b)(1).

\textsuperscript{281} \textit{Id.} at § 18a(e).

\textsuperscript{282} \textit{Id.} at § 18a(e)(2).

\textsuperscript{283} Nor does the agency’s negotiation of a divestiture package preclude private parties from arguing that the agencies did not go far enough to ensure a competitive market. \textit{See} Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., 2000 WL 264295, at *23 (S.D.N.Y. 2000).

\textsuperscript{284} \textit{See} Sullivan, \textit{supra} note 278, at 1025-42.
and comparatively predictable regulatory enterprise conducted by federal industrial policy experts with broad powers to specify the structure and competitive behavior of interstate corporations.

Hart-Scott has ameliorated, for merger cases, each of the antitrust antifederalist pathologies described in the previous Part. First, it has largely erased the need to search for prohibited conduct. Before 1976, enforcement of Section 7 of the Clayton Act—285—the portion of the antitrust laws prohibiting anticompetitive mergers—usually happened years after the merger had closed.286 The Government often relied on post-merger evidence of supracompetitive pricing by the merging firms to prove that the merger had injured the competitiveness of the market.287 Merging parties also attempted to rely on post-merger evidence of competitive pricing and innovation to show that they were behaving honorably despite the merger.288 Merger trials were often lengthy, expensive, and factually dense proceedings about the relevance of the merging parties' conduct over the course of many years.289 Today, suits about post-merger conduct still occur,290 but are rare.291 Most merger review occurs prior to the consummation of the merger before there is any potentially bad conduct to assess.292 Merger analysis is almost entirely an ex ante prediction about the likely effects of structural changes in the market.

Second, Hart-Scott has largely delegated decision making in merger cases to federal bureaucrats and competition law experts. Before Hart-Scott, many merger cases were civil litigations in which the government sought an equitable divestiture remedy.293 Private damages suits by parties allegedly injured by anticompetitive mergers were common as well.294 Although Hart-Scott does

286. See Charles L. Freed, Hart-Scott Revisited, 16 ANTITRUST 36 (2002) (noting that prior to Hart-Scott, the agencies usually learned about mergers after they had closed).
289. See William J. Baer, Reflections on Twenty Years of Merger Enforcement under the Hart-Scott-Rodino Act, 65 ANTITRUST L.J. 825, 827 (1997) (discussing the length, complexity, and expense of merger litigation prior to Hart Scott).
292. The one exception is that the agencies do consider past antitrust violations in relevant market as evidence of a market structure that is conducive to future anticompetitive behavior. See Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.1 (1997).
293. See Baer, supra note 289, at 828-29 (describing pre-Hart-Scott frustrations of antitrust enforcement agencies at not learning of mergers until they had already closed).
not bar such actions, and private plaintiffs continue to advance the occasional Clayton Act Section 7 claim, today the merger claim is almost invariably part of some broader allegation of anticompetitive conduct. Hart-Scott rendered the pure private merger challenge obsolete.

Despite its facially procedural nature, Hart-Scott recast merger control as a corporate-regulatory function by giving the federal antitrust agencies a powerful trump card that forces parties proposing borderline mergers to meet at a regulatory bargaining table or even to abandon the merger. The trump card is the agencies’ power to issue a second request delaying the parties’ right to close the merger until satisfaction of an information-production obligation that can cost millions of dollars and take months—what Hart-Scott critics have called the regulators’ implicit power to impose an automatic stay of the merger.295

Mergers tend to be highly time-sensitive—even a few months’ delay can sound a merger’s death knell because the putatively merging parties must freeze their business planning while they wait to find out whether they will be partners or competitors. Moreover, capital markets punish the uncertainty that attends lengthy regulatory investigations. As a result, very few merging parties choose to satisfy second requests and then litigate over mergers. Instead, the parties accept that the agencies have de facto regulatory authority to block undesirable mergers, require divestitures, or conduct commitments. Parties therefore often seek to settle with the agencies.296

In practice, merger control unfolds in conference rooms in Washington with teams of lawyers, economists, and business executives poring over econometric data and negotiating over what concessions, if any, will suffice to allow the merger to proceed. It is bureaucratic regulation of the most technical, informal, expert, and fact-specific kind.297 Jury avoidance and its related

(reversing jury verdict for plaintiff in pre-Hart Scott Clayton Act Section 7 case); Hearttransfer Corp. v. Volkswagenwerk, A.G., 553 F.2d 964 (5th Cir. 1977) (affirming jury decision to award damages for violation of Section 7).


296. The agencies’ merger enforcement statistics reveal that merger litigation after the issuance of a second request is extremely rare. For example, in 2000 the Department of Justice challenged 48 mergers. Of these, only one was litigated in court (and the Antitrust Division prevailed). 16 were restructured to meet the Division’s objections and 13 were abandoned. Mark C. Schechter & Howard T. Rosenblatt, Trends in Government Antitrust Enforcement, ANTITRUST REV. OF AM. (2003), available at http://www.howrey.com/docs/ArticleGovEnforcement.pdf.

297. Although the antitrust agencies have issued formal merger guidelines, the agencies’ own data suggest that they do not rigidly follow them. See HOVENKAMP, ANTITRUST ENTERPRISE,
adjudicatory pathologies are nowhere in sight. Nor are most merger decisions committed to generalist Article III judges who often lack the necessary tools to ascertain whether a merger is likely to cause competitive harm and, if so, to specify an appropriate remedy. Merger control has become the province of experts.

Third, Hart-Scott takes merger control out of the paradigm where violations of a social norm injure rights-bearing agents and create compensatory obligations. Because agency review prevents most anticompetitive mergers, and private plaintiffs usually do not consider it to be worth their while to challenge mergers that the government has allowed, merger policy is uncorrupted by the shadow of private enforcement that influences antitrust more generally. The regulatory norms that prevail in merger review are not shaped by concerns over encouraging excessive litigation or strategic misuse of antitrust law or chilling beneficial competitive behavior.

Fourth, Hart-Scott refocuses antitrust enforcement on the large interstate corporation. Although the statute could theoretically apply to asset acquisitions by natural persons and therefore regulate conduct unconnected to a corporation, given the dollar thresholds necessary to trigger the statutory reporting requirement, it effectively governs only stock and asset acquisitions by corporations. Hart-Scott merger control picks up where Reconstruction era state corporation law left off by seeking to create a species of federal corporate regulation capable of controlling the market-distorting effects of corporate aggregations of capital.

Finally, Hart-Scott ameliorates some of the antitrust federalism problems created by the delegation of a freestanding competition norm to the federal courts. Outside the merger context, antitrust federalism is a two-way ratchet in the hands of the states. The states can both loosen antitrust in contravention of the federal norm—for example, by implementing an anticompetitive regulatory policy—and tighten antitrust in contravention of the federal government’s litigation strategies—for example, by pushing for more aggressive remedies after the federal government settled Microsoft. In the merger context, however, Hart-Scott makes the ratchet work one way only. Since it is not formally an approval statute, Hart-Scott does not give the federal government preemptive power over state merger enforcement actions. States can continue to challenge mergers that the federal government clears or is negotiating to clear, thus conflicting with the federal government’s enforcement objectives and interfering with the agencies’ ability to negotiate divestiture and conduct remedies. Hence, the states can continue to “tighten” antitrust beyond the

supra note 179, at 213.


299. See supra note 271 and accompanying text.

300. See David A. Zimmerman, Why State Attorneys General Should Have a Limited Role
point that the federal agencies would prefer. On the other hand, Hart-Scott's coercive second request and merger stay rules give the federal agencies the power to veto anticompetitive mergers that states might push for parochial reasons.

Although the state action immunity doctrine has sometimes been applied in litigation to anticompetitive mergers approved by states, the states have no power to prevent second requests or the filing of injunctive complaints that can effectively kill a merger. In this sense, the federal agencies have a limited de facto preemptive power over anticompetitive mergers approved by parochially interested state regulators. The states cannot loosen federal merger policy as they can in other areas of antitrust law.

Merger control has become a decidedly federalist regime—the sort of regime that Alexander Hamilton cherished and Woodrow Wilson feared. The federal agencies, not the states, now play the primary role in determining national industrial organizational policy by approving and disapproving structural changes in large interstate corporations. Hart-Scott represents the practical triumph of antitrust nationalism over its antifederalist opponents. Recall Woodrow Wilson's two primary objections to a corporate-charter-controlling Bureau of Corporations. First, Wilson feared giving power to a "smug lot of experts to sit down behind closed doors in Washington and play providence," preferring instead a delegation of antitrust decision making to generalist courts. Hart-Scott marginalizes the role of courts and allows for expert decision making in exactly the way Wilson feared—"behind closed doors" through an informal and non-public technocratic review process. Second, Wilson disfavored allowing federal agencies "to make terms with monopoly or in any sort to assume control of business, as if the government made itself responsible." Prior to Hart-Scott, the government never looked publicly accountable for anticompetitive mergers since it did not play a role in their approval. Since Hart-Scott, the government is taken to task for approving mergers that turn out to be unpopular. Witness, for instance, attributions of


302. Wilson, supra note 112, at 154.

303. Letwin, supra note 7, at 273.
recent gasoline price increases to the government’s clearance of large oil
company mergers in the last decade.\footnote{304}

Merger control is strikingly different from other forms of civil antitrust
enforcement, whether public or private. With some exceptions, Hart-Scott
merger control suggests the institutional shape that all of antitrust law might
have assumed if the founders of U.S. antitrust law had chosen the corporate
regulatory model. And it provides a model for breaking free of the dead-hand
influence of antitrust antifederalism.

\section*{B. Beyond Antitrust Antifederalism}

One of the important lessons of Hart-Scott is that a federal corporate
regulatory model of antitrust need not entail a formal system of federal
incorporation or licensing. The proposals for a corporate control model of
antitrust during the Progressive Era and New Deal erred in intertwining
multiple regulatory objectives—such as shareholder protection, corporate
governance, and competition policy—in single legislative schemes under the
broad rubric of federal incorporation or licensing.\footnote{305} The optimal mix of state
and federal engagement with corporations may differ considerably by subject.
Competition between incorporating jurisdictions may be optimal for specifying
corporate governance norms, but not for protecting shareholders or promoting
efficient market structure.\footnote{306} It would be feasible to recast some of the antitrust
enterprise as a species of federal superintendence of the structure and behavior
of interstate corporations without altering the state charter system.

Addressing the pathologies of antitrust antifederalism need not entail

\footnote{304. See Public Citizen, Mergers, Manipulation, and Mirages: How Oil
Companies Keep Gasoline Prices High, and Why the Energy Bill Doesn’t Help 1 (2004),
http://www.citizen.org/documents/oilmergers.pdf (“The United States has allowed multiple large,
vertically integrated oil companies to merge over the last five years, placing control of the market
in too few hands. The result: uncompetitive domestic gasoline markets.”).}

\footnote{305. See supra notes 97-102, 122-127, 134 and accompanying text.}

\footnote{306. Whether states do, in fact, compete for incorporations is another matter. Compare
Lucian A. Bebchuk & Assaf Hamdani, Vigorous Race or Leisurely Walk: Reconsidering the
Competition over Corporate Charters, 112 Yale L.J. 553, 580 (2002) (arguing only Delaware
actively pursues incorporations), and Marcel Kahan & Ehud Kamar, The Myth of State
Competition in Corporate Law, 55 Stan. L. Rev. 679, 684 (2002) (same), with Mark J. Roe,
Delaware’s Competition, 117 Harv. L. Rev. 588, 607 (2003) (arguing that Delaware’s real
competition is the federal government), and Roberta Romano, Is Regulatory Competition a
Problem or Irrelevant for Corporate Governance?, 21 Oxford Rev. Econ. Pol’y 212, 217-23
(2005) (arguing that all states pursue incorporations). Whether or not competition for
incorporation is desirable is also debatable. Compare Fischel, supra note 142, at 921 (arguing that
competition produces efficient law), Roberta Romano, Law as a Product: Some Pieces of the
Incorporation Puzzle, 1 J.L. Econ. & Org. 225, 279-81 (1985) (same), and Ralph K. Winter, Jr.,
State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251, 290
(1977) (same), with Lucian A. Bebchuk, Federalism and the Corporation: The Desirable Limits
on State Competition in Corporate Law, 105 Harv. L. Rev. 1435, 1509 (1992) (arguing that
competition harms shareholders), and Cary, supra note 142 (arguing that interstate competition
results in deteriorating corporate standards).}
wholesale adoption of a corporate regulatory model of antitrust and a concomitant dissolution of the crime-tort model. Even apart from Hart-Scott, U.S. antitrust policy has taken some modest steps toward an ex ante regulatory approach to corporate competitive behavior. For example, the National Cooperative Research and Production Act307 allows firms to avoid treble damage liability by providing ex ante notification of research and production joint ventures. Like the failed Progressive Era proposal to give the Bureau of Corporations the authority to register large corporate contracts,308 this statute provides the regulatory agencies the opportunity to investigate and, if necessary, enjoin the operation of anticompetitive joint ventures before they damage consumers.309 Similarly, in response to the conceptual difficulty of adjudicating the legality of pharmaceutical patent settlements after the fact,310 Congress recently passed a statute requiring settling pharmaceutical companies to give the FTC ex ante notice of their settlements.311 Like Hart-Scott, notification provisions such as these have the potential to transform segments of the antitrust enterprise into a technocratic ex ante regulatory regime.

Other piecemeal corrections to antitrust antifederalism's pathologies are possible. For instance, some foreign jurisdictions only permit a private right of action for damages after the state's competition agency has found the defendant guilty of an antitrust violation.312 Such an approach limits private litigation while still providing for compensation in deserving cases. More modest means of lessening the deleterious effects of private enforcement include detrebling damages as to certain categories of offense and limiting standing to consumers. Similarly, the reverse-preemption pathology could be mitigated by a statute providing that the federal agencies have preemptive power over state regulations or enforcement actions.313

While such tinkering with the institutional apparatuses of the crime-tort model could improve the present system, some of the influences of antitrust antifederalism are so deeply ingrained that a piecemeal approach would be ineffective. In particular, the formulation of antitrust as a freestanding norm ostensibly modeled on the common law creates a constitutional right to jury

---

308. See supra notes 97-102 and accompanying text.
310. See supra note 227 and accompanying text.
312. For example, this is the rule in Japan. See Harry First, Antitrust Law in Japan: The Original Intent, 9 PAC. RIM L. & POL’Y J. 1, 68 (2000).
313. See POSNER, ANTITRUST LAW, supra note 165, at 281-82 (proposing that federal government should be given a preemptive right of first refusal over state and private suits).
trials and the need to search for an abstract definition of the norm. This conceptualization lies at the root of most of antitrust antifederalism's pathologies and a deep re-conceptualization of antitrust would be needed to root out its many influences. So long as we continue to think about antitrust as creating an industrial competition norm, the pressures in favor of broad private compensatory litigation, jury trials, application to non-corporate subjects, and displacement of the federal norm by competing state norms will remain powerful. The conceptual choices made during antitrust's formative era will continue to affect the institutional structure of antitrust until they are replaced by a new conceptual model.

This Article has primarily critiqued the crime-tort model of antitrust; it has not outlined the specific mechanisms of a modern corporate regulatory alternative or responded to the many criticisms that such a proposal would raise. In closing, it is worth raising and briefly foreshadowing two likely lines of argument that a proposal to shift toward a corporate regulatory model would entail.

First, were the corporate regulatory model to replace the private-litigation-driven system of antitrust regulation with a public-driven system, it would require significant expansion of the amount of public resources devoted to antitrust enforcement.\textsuperscript{314} The total budget of the Justice Department Antitrust Division is around $140 million\textsuperscript{315} and the FTC's antitrust budget is around $98 million.\textsuperscript{316} The total direct cost of antitrust enforcement in the U.S. has been estimated at $1 billion annually,\textsuperscript{317} an estimate that seems quite low considering that there are around 800 new private federal antitrust cases filed every year.\textsuperscript{318} In any event, even assuming that the current level of antitrust enforcement is too high given distorted private incentives, and that a system of predominantly public enforcement would correct this defect, the agencies' enforcement expenditures would have to be substantially increased under a corporate regulatory model.

However, an increase in enforcement expenditures would not necessarily

\begin{itemize}
\item \textsuperscript{314} At the same time, there would be cost savings to the federal courts since the number of private suits would be reduced.
\item \textsuperscript{317} Jonathan B. Baker, The Case for Antitrust Enforcement, 17 J. ECON. PERSP. 27, 42-43 (2003) (estimating that "the total direct costs for the government and private parties are approximately $1 billion annually . . . [and] that . . . indirect costs, while possibly substantial, do not exceed the direct costs. If so, the total annual costs of antitrust enforcement in the United States are no more than $2 billion each year").
\item \textsuperscript{318} See supra note 204 and accompanying text.
\end{itemize}
require any increase in the public funding of antitrust enforcement. Hart-Scott filing fees already cover the agencies’ antitrust enforcement activities. The FTC and Department of Justice each collect around $120 million per year in Hart-Scott filing fees for a total of $240 million, which is roughly the same amount that they collectively spend on all antitrust enforcement activities—merger and non-merger. Federal antitrust enforcement is already self-funded. Similarly, in an expanded corporate regulatory model of antitrust, the agencies could support their enforcement activities by mandating other kinds of corporate filing fees related to antitrust policing, for example, a filing fee for all joint venture agreements for corporations with a specified level of capitalization or revenues. While such an approach would impose an additional tax on corporations to pay for expanded public antitrust enforcement, the cost of private antitrust litigation is itself a sort of unevenly distributed business tax that would be largely replaced in the corporate regulatory model. The net effect of the corporate regulatory model could well be to lower business costs.

The second likely objection to a bureaucratic expertization of antitrust is more serious: Whatever the downsides of the privately-driven, generalist-court-adjudicated crime-tort model, does the corporate regulatory model enjoy a net comparative advantage? During the 1960s, focusing solely on the question of expertise, Richard Posner argued that the Federal Trade Commission enjoyed no institutional advantage over the generalist Article III courts. Improvements in the staffing and institutional culture of the agency since then have provided the missing advantage.

Still, mere comparative competence does not suffice. The 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. The leading public choice work on antitrust finds that antitrust has historically been used not to advance competition norms but instead to serve politically powerful interests. To the extent that the corporate regulatory model involves greater consolidation and centralization of antitrust decision making, it is entirely possible that these


abuses would worsen.

The optimal solution may turn out to be a movement toward a corporate regulatory model for some aspects of antitrust enforcement but not others. Hard-core price fixing cartels and similar naked restraints of trade that lack any redeeming efficiency explanations may be best kept within the crime-tort model. Such offenses are the only antitrust violations that are criminally prosecuted today.\(^{324}\) They are already part of a predominantly criminal law antitrust culture that is institutionally separated from the more economically nuanced branches of antitrust dealing with such matters as monopolies, joint ventures, essential facilities, tying arrangements, and mergers.\(^{325}\) Hard-core price-fixing is also the type of antitrust violation that is hardest to detect, and hence most appropriate for deterrence-oriented criminal sanctions and treble damages. Further, since cartel cases are mostly about whether the parties reached a secret agreement, they are more like ordinary conspiracy cases that are within the ken of the average juror and less like economically dense antitrust cases that require ascertaining the efficiency consequences of various industrial practices. Finally, given the clear harm to consumer interests of cartel behavior, cartels present a strong case for a vigorous compensation-oriented private enforcement regime.

On the other hand, there may be many advantages to pursuing a corporate regulatory approach to non-cartel behavior. In a corporate regulatory antitrust regime, an expanded set of federal antitrust enforcers might scrutinize potentially troubling corporate contracts on an ex ante basis, adjudicate competitor and customer complaints through an administrative process, and promulgate rules on a variety of industrial practices. While some private enforcement might still be allowed, standing rules might be contracted as federal enforcers took up the regulatory slack.

These issues deserve to be explored. The antitrust antifederalist impulse may contain both outdated assumptions and deep wisdom. Careful reexamination of the choices that brought us the crime-tort model and reconsideration of the alternatives is warranted.

CONCLUSION

To understand the structure, culture, and institutional features of U.S. antitrust law, it is necessary to appreciate the ideological clash between


\(^{325}\) Criminal enforcement of antitrust is often handled by generalist prosecutors from outside the Antitrust Division. See ANTITRUST DIVISION MANUAL, ch. 7, sec. B, available at http://www.usdoj.gov/atr/foia/divisionmanual/ch7.htm#b. Criminal antitrust cases are often consumed with incidences of ordinary criminal adjudication, such as the suppression of illegally obtained evidence, leniency agreements with co-conspirators in order to obtain cooperation, plea bargaining, and sentencing guidelines issues.
federalist and antifederalist ideas about federal structuring of corporations that began in Philadelphia in 1787 and continued to play out until the institutional features of U.S. antitrust gelled during the Progressive Era. Since that time, U.S. antitrust has been profoundly shaped by the choice of the crime-tort model over the corporate regulatory model. Many of the consequences of that choice were not deliberately planned, but arose by virtue of the interaction of the crime-tort model with the more general features of the U.S. civil litigation system. With the benefit of hindsight and experience, many of the effects of the choice appear pathological. The result has been an allocation of adjudicatory responsibility to ill-equipped institutional actors, exploitation of antitrust adjudication by rent-seeking interests inimical to consumers’ interests, distraction from antitrust’s proper focus by the introduction of extraneous juridical considerations, and paralysis of progress by involvement of too many decision makers.

This is not necessarily to criticize the choices of U.S. antitrust’s founders. The founders were right not to approach the trust problem simply by adopting a federal incorporation statute that would have displaced all state incorporation statutes as to interstate corporations and, hence, amalgamated a variety of different regulatory objectives into a single, undifferentiated set of corporate rules. Competition policy requires a set of regulatory tools that the corporate structural rules of the late nineteenth century—and indeed early twenty-first century—lacked entirely. To the extent that antitrust’s founders failed, their failure was one of imagination—of believing that the choice presented was between the failed quo warranto approach of the state attorneys general and the common law’s vague prohibition on monopolies and restraints of trade.

Antitrust antifederalism continues to exert its influence long after antifederalism’s more general influence has waned. It is time to reexamine antitrust’s foundational assumptions with an eye on the historical impulses that produced the status quo and an imagination unbounded by assumptions that have lost their vitality.