

# Michigan Law Review

---

Volume 110 | Issue 6

---

2012

## The Institutions of Antitrust Law: How Structure Shapes Substance

William E. Kovacic  
*George Washington University Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Antitrust and Trade Regulation Commons](#), and the [President/Executive Department Commons](#)

---

### Recommended Citation

William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019 (2012).

Available at: <https://repository.law.umich.edu/mlr/vol110/iss6/7>

This Review is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# THE INSTITUTIONS OF ANTITRUST LAW: HOW STRUCTURE SHAPES SUBSTANCE

William E. Kovacic\*

THE INSTITUTIONAL STRUCTURE OF ANTITRUST ENFORCEMENT.  
By Daniel A. Crane. New York: Oxford University Press. 2011. Pp.  
xvi, 243. \$75.

## INTRODUCTION

Forty years ago, Graham Allison wrote the *Essence of Decision*<sup>1</sup> and transformed the study of foreign policy and public administration.<sup>2</sup> Allison's analysis of the Cuban Missile Crisis appeared amid profound concerns about the competence of U.S. government institutions. "Few issues about the American government," he wrote, "are more critical today than the matter of whether the federal government is capable of governing."<sup>3</sup> To Allison, better performance required greater insight into how the structure and operations of public institutions shaped policy results. "[B]ureaucracy is indeed the least understood source of unhappy outcomes produced by the U.S. government,"<sup>4</sup> Allison wrote. "If analysts and operators are to increase their ability to achieve desired policy outcomes, . . . we shall have to find ways of thinking harder about the problem of 'implementation,' that is, the path between preferred solution and actual performance of the government."<sup>5</sup> *Essence of Decision* quickly appeared on reading lists in political science departments and schools of public administration, and its analytical orientation and vocabulary have become enduring elements of academic discourse.<sup>6</sup>

---

\* Global Competition Professor of Law and Policy, George Washington University Law School. Professor Kovacic served as a member of the Federal Trade Commission from January 2006 to October 2011 and chaired the agency from March 2008 to March 2009. The views expressed here are the author's alone.

1. GRAHAM T. ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (Little, Brown and Co. 1971).

2. See, e.g., Steve Smith, *Allison and the Cuban Missile Crisis: A Review of the Bureaucratic Politics Model of Foreign Policy Decision-Making*, 9 *MILLENNIUM: J. INT'L STUD.* 21, 21 (1980) ("Allison's work on conceptual models of decision-making and the Cuban missile crisis has been one of the seminal studies in the history of international relations. The work is now summarised in most American textbooks on international relations and virtually all monographs on foreign policy analysis refer to it.").

3. ALLISON, *supra* note 1, at 265.

4. *Id.* at 266.

5. *Id.* at 267–68.

6. See Barton J. Bernstein, Book Review, *FOREIGN POL'Y*, Spring 1999, at 121 (discussing impact of *Essence of Decision* on the analysis of bureaucratic decisionmaking).

Daniel Crane's *The Institutional Structure of Antitrust Enforcement* ("Institutional Structure")<sup>7</sup> may do for antitrust law what *Essence of Decision* did for public administration. Unlike most literature on antitrust law, this superb volume does not address pressing issues of substantive analysis (e.g., when can dominant firms offer loyalty discounts?).<sup>8</sup> Instead, *Institutional Structure* studies the design and operation of the institutions of U.S. antitrust enforcement. Professor Crane skillfully advances a basic and powerful proposition: to master analytical principles without deep knowledge of the policy implementation mechanism is dangerously incomplete preparation for understanding the U.S. antitrust system, or any body of competition law. "Institutions," Professor Crane observes, "are a critical and underappreciated driver of an antitrust policy that interacts in many subtle ways with substantive antitrust rules and decisions" (p. xi). *Institutional Structure* demonstrates that the causes of observed policy outcomes, good and bad, often reside in the institutional framework. Seemingly potent conceptual insights may fizzle, or create mischief, if the institutions that must apply them are deformed. Good policy results depend on the strength of what Allison called "the path between preferred solution and actual performance." In the language of modern technology, one cannot deliver broadband-quality policy outcomes through dial-up institutions.

The emphasis in *Institutional Structure* on institutional arrangements helps correct a serious imbalance in the study of antitrust law. A substantial body of economic literature has examined how institutional quality affects public policy.<sup>9</sup> A number of economists have concentrated on the structure and operations of antitrust authorities,<sup>10</sup> including recent work that explores how the integration of economists into the agency decisionmaking process affects the development of cases.<sup>11</sup> Political scientists long have emphasized the significance of institutional design on government performance<sup>12</sup> and

---

7. Professor of Law, University of Michigan Law School.

8. Three single-volume landmarks that deal mainly with substantive standards are ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (Free Press 1993) (1978); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* (1st paperback ed. 2008); and RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001).

9. For example, a major influence in the economic literature has been the work of Douglass North and others associated with what is called the "New Institutional Economics." E.g., DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); Douglass C. North, *Economic Performance Through Time*, 84 *AM. ECON. REV.* 359 (1994).

10. See, e.g., *PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION* (Robert J. MacKay et al. eds., 1987) (collecting essays, most authored by economists, on structure, operation, and performance of the FTC).

11. E.g., Luke M. Froeb et al., Essay, *The Economics of Organizing Economists*, 76 *ANTITRUST L.J.* 569 (2009) (discussing how the placement of economists within an antitrust agency affects their influence on enforcement decisions).

12. See JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* (1991) (describing the influence of organizational arrangements on the performance of U.S. government agencies); see also MARC ALLEN EISNER, *ANTITRUST AND THE TRIUMPH OF ECONOMICS: INSTITUTIONS, EXPERTISE, AND POLICY CHANGE* 119–83

have used antitrust enforcement to show how institutional arrangements shape policy.<sup>13</sup> By contrast, the antitrust legal literature is rich in substantive concepts and lean in the study of institutions. Influential exceptions (such as the volumes of the antitrust treatise published by Phillip Areeda and Donald Turner in 1978)<sup>14</sup> are islands in a vast ocean of discourse on doctrine and analytical principles. The typical law school antitrust syllabus consigns the operational framework of antitrust enforcement to the oblivion of optional readings.

This Review proceeds by exploring Professor Crane's treatment of five distinct subject areas and suggesting fruitful topics for further study by scholars. Part I introduces the book and opens this exploration by examining the framework that Professor Crane uses for his analysis; it concludes by noting potential shortcomings in some of his choices. Part II tracks Professor Crane's discussion of antitrust enforcement's development and specifically looks at the continuing relevance of the strains of enforcement philosophy that he identifies. Part III examines Professor Crane's critique of the dual federal enforcement mechanism that engages the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC" or "the Commission") in the implementation of competition policy. Part IV considers the role of state governments in antitrust enforcement, and Part V discusses the use of private rights of action to enforce the antitrust laws.

---

(1991) (describing how institutional adjustments at the DOJ and the FTC in the 1960s and 1970s increased the role of economists in decisionmaking in the two U.S. antitrust agencies); STEPHEN WILKS, *IN THE PUBLIC INTEREST: COMPETITION POLICY AND THE MONOPOLIES AND MERGERS COMMISSION* (1999) (discussing the evolution of the competition policy system in the United Kingdom ("UK") from late 1940s through late 1990s).

13. See, e.g., ROBERT A. KATZMANN, *REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY* (1980) (examining the structure and operations of the FTC); SUZANNE WEAVER, *DECISION TO PROSECUTE: ORGANIZATION AND PUBLIC POLICY IN THE ANTITRUST DIVISION* (1977) (examining the structure and operations of DOJ's Antitrust Division).

14. 1-3 PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* (1978). There are other noteworthy scholarly contributions by lawyers. For example, in the early 1980s, Kenneth Clarkson (an economics professor) and Timothy Muris (a law professor) coauthored an influential examination of the structure, management, and operations of the FTC. Kenneth W. Clarkson & Timothy J. Muris, *Commission Performance, Incentives, and Behavior*, in *THE FEDERAL TRADE COMMISSION SINCE 1970*, at 280 (Kenneth W. Clarkson & Timothy J. Muris eds., 1981). In chapter eight of the first edition of their administrative law casebook, *Administrative Law and Regulatory Policy*, Stephen Breyer and Richard Stewart presented a detailed case study of the FTC that focused on the agency's organization and management. STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 725-858 (1979). Recent papers by scholars such as Daniel Sokol, Michael Trebilcock, and Edward Jacobucci have focused needed attention on institutional arrangements and the globalization of antitrust policy. See, e.g., D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 *BERKELEY BUS. L.J.* 37 (2007); Michael J. Trebilcock & Edward M. Jacobucci, *Designing Competition Law Institutions: Values, Structure, and Mandate*, 41 *LOYOLA U. CHI. L.J.* 455 (2010).

## I. ANTITRUST POLICY AS A SYSTEM OF INTERDEPENDENT INSTITUTIONS

The subject of inquiry in *Institutional Structure* is a regulatory regime with astonishing, distinctive characteristics. No system of U.S. law (maybe no body of law in any jurisdiction) decentralizes the decision to prosecute more than the antitrust regulatory regime.<sup>15</sup> The roster of potential plaintiffs includes two national competition bodies (the Antitrust Division of the DOJ and the FTC), state governments, and aggrieved private parties, including customers and rivals of the alleged violator. The three principal U.S. antitrust laws (the Sherman Act, Clayton Act, and Federal Trade Commission Act) contain relatively open-ended commands, and their interpretation is largely dedicated to the federal courts—a delegation without equal in U.S. regulatory law.<sup>16</sup>

*Institutional Structure* examines this remarkable system in three parts. Professor Crane sets out the origins and chief elements of the U.S. antitrust institutions, discusses possible improvements, and places the United States' experience in a global context. The volume's materials on "Comparative and International Perspectives" describe foreign systems at a relatively high level of generality, but *Institutional Structure* uses international experience to make informative comparisons with U.S. practices and suggest areas for improvements in the U.S. regime.

---

15. The special features of the U.S. system stand out by comparison in Professor Crane's chapters on the European competition regime, chapter 10, and the development of new competition systems over the past forty years or so, chapter 11. The U.S. system is unique in its diversity of prosecutorial mechanisms. Many jurisdictions feature some multiplicity of authority to prosecute the law, but none match the elaborateness of the U.S. framework. Consider four of the oldest competition systems. Canada has a single national competition agency and private rights of action. Canada's provinces and territories lack power to enforce the national competition laws. The UK has two national competition agencies (the Office of Fair Trading and the Competition Commission), and private rights of action are available for victims of infringements to recover damages and seek interim relief. The two UK competition agencies do not have concurrent, overlapping competence to prosecute violations, and the UK antitrust laws do not delegate enforcement powers to political subdivisions. The European Union ("EU") has a single prosecutorial authority (the Directorate for Competition, or "DG Comp"). Germany, the oldest competition system among the original EU member states, has one national competition enforcement agency and permits private parties to pursue claims for relief. The German system gives the country's provinces a role in monitoring compliance with the national law.

16. The extent of the discretion of federal judges to determine the reach of the Sherman Act through their interpretations of its open-ended terms was apparent from the earliest decades of the antitrust system. In *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Supreme Court concluded that the Sherman Act's seemingly categorical prohibition of "every" agreement that restrained trade only forbade compacts that unreasonably restrained trade. *Id.* at 59. The origins and significance of this ruling are discussed in James May, *The Story of Standard Oil Co. v. United States*, in *ANTITRUST STORIES* 7 (Eleanor M. Fox & Daniel A. Crane eds., 2007). It is no accident that various Supreme Court decisions have noted the constitutional quality of the antitrust statutes. See *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.").

One major challenge in taking on these subjects is to identify the relevant implementation mechanisms. “Institutions” can encompass a staggering range of formal and informal arrangements, and Professor Crane seeks to capture both the formal, visible structures and procedures of the U.S. system and less readily observable customs and habits that determine how the DOJ and the FTC operate in practice.<sup>17</sup> As one expert in institutional economics observes,

[Institutions] can be organizations or sets of rules within organizations. They can be markets or particular rules about the way a market operates. They can refer to the set of property rights and rules governing exchanges in a society. . . . They may include cultural norms of behavior. The rules can be either formally written down and enforced by government officials or unwritten and informally sanctioned.<sup>18</sup>

To discuss antitrust law (or any other subject), how is one to choose among these vast possibilities?<sup>19</sup> A truly comprehensive (and daunting) treatment of the U.S. system might examine the behavior of and interaction among the public antitrust agencies, the Congress and state legislatures, the office of the president, regulatory commissions with concurrent antitrust jurisdiction over specific sectors, private litigation, executive departments that administer trade policy, authorities that grant rights in intellectual property, the private bar, the business community, universities, think tanks, lobbyists, economic consultancies, public interest organizations, advocacy groups, media organizations, and foreign competition authorities—just to name a few.

Professor Crane makes a choice that is both reasonable and debatable. He focuses on “antitrust enforcement,” an activity ordinarily understood to consist of prosecuting prohibitions against anticompetitive business arrangements, such as producer cartels. Yet, as Professor Crane recognizes, law enforcement is not the only (or always the most effective) way for agencies to make antitrust policy:

“Enforcement” is the *bête noire* of my title because it implies that antitrust is a system of legal sanctions that must be wielded against recalcitrant subjects. . . . But there are alternative approaches to achieving antitrust’s regulatory goals, many of which I will argue are preferable to the “enforcement” model. (p. xv)

17. As Professor Crane explained,

The deliberate design features of the FTC tell us relatively little about the FTC’s real structure as an institution. . . . [T]he way that the FTC functions in the antitrust arena is a product of its history and development, its interaction with other legal and economic institutions, and its molding by external political, social, and economic forces.

P. xiii.

18. Christopher Clague, *The New Institutional Economics and Economic Development*, in *INSTITUTIONS AND ECONOMIC DEVELOPMENT: GROWTH AND GOVERNANCE IN LESS-DEVELOPED AND POST-SOCIALIST COUNTRIES* 13, 18 (Christopher Clague ed., 1997).

19. See p. xii (“In economic theory, the category ‘institution’ is so capacious as to include virtually everything that a law student would study in an antitrust course.”).

*Institutional Structure* does address nonenforcement tools such as rulemaking, which Professor Crane sees as an underused and potentially useful element of the FTC's portfolio of instruments (pp. 141–43). The attention in *Institutional Structure* to nonenforcement measures (especially in discussions about the role of the FTC) is useful as far as it goes but deserves expansion. There is growing recognition that the proper measure of a competition agency is not its output of cases, but its demonstrated ability to solve competition problems.<sup>20</sup> This goes to the very heart of conceptions about what antitrust agencies ought to do and how their effectiveness ought to be measured. The prosecution of cases may be an inferior means to address problems most effectively, and a well-equipped agency can apply a flexible set of policy instruments that includes law enforcement, advocacy, research, and the publication of studies.<sup>21</sup> This portfolio enables the agency to use the right tool, or combination of instruments, to achieve first-best solutions. A report that inspires improvements in the process for granting intellectual property rights may be the best way to cure competition policy problems that stem from failures of rights-granting agencies to apply sufficiently rigorous standards to applications for intellectual property rights.<sup>22</sup> An agency competent only to bring cases will file lawsuits that deal with symptoms of the competition problem (e.g., a refusal by a dominant firm to license its intellectual property rights) rather than the root causes of the problem (e.g., the issuance of patents that do not satisfy standards of patentability).<sup>23</sup>

As noted above, Professor Crane is aware of this consideration. *Institutional Structure* proposes increased reliance on tools other than the prosecution of cases. These alternatives include more extensive FTC rulemaking to establish norms of behavior and greater recourse to an “administrative model of antitrust” that uses “informal solutions and negotiated agreements” to solve competition policy problems (p. 103). These are useful

---

20. See, e.g., John Fingleton, Chief Exec., Office of Fair Trading, UK Competition Policy: The First Decade, Speech at the 40th Anniversary of the Cleary Gottlieb Steen & Hamilton LLP London Office (May 11, 2011), available at [http://www.of.gov.uk/shared\\_of/speeches/2011/0911.pdf](http://www.of.gov.uk/shared_of/speeches/2011/0911.pdf) (discussing the prioritization process that emphasizes development of cases with high economic impact).

21. This is a central theme of the dialogue between two former FTC chairmen, Timothy Muris and Robert Pitofsky, in *More than Law Enforcement: The FTC's Many Tools—A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773 (2005).

22. See, e.g., FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf> (proposing reforms to U.S. system of patent law and policy).

23. These possibilities are considered in William E. Kovacic & Andreas P. Reindl, *An Interdisciplinary Approach to Improving Competition Policy and Intellectual Property Policy*, 28 FORDHAM INT'L L.J. 1062, 1064–67 (2005). The abuse of dominance litigation in the EU involving Magill and IMS Health can be characterized as an effort to use competition law enforcement to protect an improvident grant of copyright protection. The antitrust cases involving Magill and IMS Health are discussed in Christian Ahlborn et al., *The Logic & Limits of the “Exceptional Circumstances Test” in Magill and IMS Health*, 28 FORDHAM INT'L L.J. 1109 (2005).

avenues for improvements, and they recognize that an antitrust agency with a larger portfolio of policy tools has valuable flexibility to formulate strategies that have the best prospects for successful problem solving.

To introduce these proposals, *Institutional Structure* might have offered a more structured and centralized taxonomy of possible and desirable competition agency policy functions, perhaps as part of Chapter Five (“Regulation, Adjudication, and Administration”), that a state of the art competition authority should possess. The volume mentions different policymaking tools in various places, but no single section of the text pulls them together in one place. A volume on institutional structures might take a stab at suggesting the range of capabilities that the ideal competition agency would possess, and then benchmark the DOJ and the FTC, individually and collectively, against this standard. Such a framework could be used in Chapter Eleven (“Emerging Antitrust Institutions Around the World”) to provide an approach to evaluating other competition agencies according to the completeness of their portfolios of policymaking instruments. This might have been part of a fuller exposition of a normative framework for deciding what a competition agency ought to do and by what means it should do it. The mapping out of the two agencies’ nominal policymaking tools and actual competencies also would provide a starting point for Professor Crane’s examination in Chapter Seven (“Enhancing Federal Enforcement”). The taxonomy of policymaking tools, the listing of powers assigned to the DOJ and the FTC, and an accounting of how nominal powers are used in practice would help identify gaps in the responsibilities of the U.S. national agencies, illuminate overlapping mandates and capabilities, and highlight complementarities between the two institutions. This research would provide a valuable foundation for future discussions about how to reconfigure the basic architecture of the national competition authorities.

One additional element of orientation could have improved the volume’s efforts to show the connections between institutional arrangements and substantive policy outputs. A core, important insight of *Institutional Structure* is that the U.S. antitrust regime is a system of interdependent elements.<sup>24</sup> Changes in one aspect of the antitrust system tend not to take place in isolated, watertight compartments. Instead, they tend to influence the operation of other features of enforcement and policymaking. These “spillovers” can have profound systemwide effects that may not be immediately apparent in contemplating a single change to a single variable of the existing regime.<sup>25</sup>

To consider possible adjustments to an existing antitrust system, the analyst must understand the intricate, elaborate, and often-hidden circuitry that connects the entire enforcement framework. By a process of what

---

24. See pp. 56–63 (describing judicial “backlash” to perceived excesses of private litigation).

25. P. 63 (describing doctrinal spillovers from judicial decisions in private cases into the resolution of antitrust cases filed by public agencies).



Professor Stephen Calkins calls “equilibration,”<sup>26</sup> adjustments in one element of the antitrust system can be accentuated or offset by changes in another element. A measure intended to alter variable *A* may affect variables *B* and *C* in ways that negate or diminish the adjustment anticipated for *A*. If courts perceive that private rights of action create serious risks of overdeterrence, they will strive to find ways to make corrections. Some features of the antitrust legal regime are mandated by statute and may appear at first glance to be impervious to judicial efforts at recalibration. Nonetheless, judges can adjust other elements of the antitrust system that are within their control to counteract the perceived deficiencies. The U.S. antitrust statutes delegate expansive discretion to judges to develop and adjust the operational criteria for determining what it means to “monopolize” or create a contract in “restraint of trade.”<sup>27</sup> If a judge wants to blunt the perceived excesses of the private rights remedial scheme (e.g., mandatory trebling), she can do so by ensuring that the case dies before the remedies phase begins. *Institutional Structure* recounts that courts have used a number of techniques to do exactly this. Among other measures, the federal courts since the mid-1970s have increased the requirements that plaintiffs must satisfy to establish liability and have imposed more demanding standards with respect to pleading and standing (pp. 59–61).

A more complete framework of the institutional elements of antitrust law enforcement might organize the examination of the system around the following questions:

- What is the purpose of the statutes?
- What do the statutes prohibit?
- By what means are infringements detected and evidence gathered?
- Which entities have authority to prosecute violations?
- Which body decides guilt or innocence?
- What sanctions are imposed for wrongdoers?

A classification scheme cast along these lines would help identify more clearly the volume’s examination of the U.S. antitrust system and assist in illuminating connections among its elements.

## II. THE U.S. ANTITRUST SYSTEM: FORMATIVE INFLUENCES

*Institutional Structure* introduces the U.S. antitrust institutions with a “whirlwind tour of two centuries . . . of American political, legal, and economic history” (p. 25). Chapter One (“Antifederalism and Corporate Regulation”) describes a basic tension that shaped congressional delibera-

---

26. Stephen Calkins, *Summary Judgment, Motions To Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065, 1067 (1986).

27. Section 1 of the Sherman Act proscribes “[e]very contract, combination . . . or conspiracy, in restraint of trade.” 15 U.S.C. § 1 (2006). Section 2 of the statute provides that “[e]very person who shall monopolize . . . shall be deemed guilty of a felony.” *Id.* § 2.

tions in the late nineteenth and early twentieth centuries about how to intervene in the market economy. Two philosophies dating back to the eighteenth century (“antitrust federalism” and “antitrust antifederalism”) contended for acceptance. The antitrust federalists advocated direct federal control of the formation and operation of corporations and contemplated a national system of chartering and oversight (pp. 4–8). The antitrust antifederalists distrusted the centralization of corporate oversight and strove to detach what became known as antitrust law from corporate law and to ground antitrust law on the common law’s ban against restraints of trade. Unlike the common law, which refused to enforce only certain restrictive agreements, the new antitrust regime forbade such agreements and monopolistic practices and deemed them “a species of wrong against others and against the state” (p. 13). In enacting the Sherman Act in 1890, Congress embraced the “tort and a crime” model and separated antitrust law from corporate law (p. 13). This approach would supply the principal foundation for the U.S. antitrust regime. The model would be implemented through the DOJ’s public enforcement (including the prosecution of antitrust offenses as crimes) and private rights of action. These choices entailed an “implicit delegation of authority to generalist judges, juries, and private litigants” (p. 26).

At the same time, the federalist impulse to establish more direct oversight of corporations would inspire major additions to the federal regulatory framework (e.g., through the enactment of national securities regulation in the 1930s). It also influenced the formation of the second major institution for federal public enforcement, the FTC. The FTC was a hybrid with the capacity to function within the tort and crime model and held mandates to use administrative adjudication to develop standards of fair competition (although not to prosecute crimes) and to use nonlitigation policy tools (including research, reports, and publicity) to influence business behavior.<sup>28</sup>

Professor Crane’s discussion of the philosophical lineage of the U.S. antitrust laws and the views of how the national government ought to respond to the emergence of the modern corporation brings out several important features of the development of the U.S. system and the forces that will shape it in the future. The first is to show how competing visions of regulatory policy have influenced U.S. antitrust policy and will contend for preeminence in determining the future role of government in the economy. *Institutional Structure* frames the establishment of the U.S. antitrust system as the product of a contest between the federalist preference for more direct

---

28. Section 5 of the FTC Act authorizes the Commission to proscribe “[u]nfair methods of competition” and sets the framework for the agency’s administrative process. FTC Act § 5, 15 U.S.C. § 45 (2006); see also D. Bruce Hoffman & M. Sean Royall, Developments, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 ANTITRUST L.J. 319 (2004) (describing FTC’s administrative adjudication authority). Section 6 of the FTC Act allows the Commission to “gather and compile information” that concerns persons subject to the FTC Act and “[t]o make public from time to time such portions of the information” that are “in the public interest.” FTC Act § 6, 15 U.S.C. § 46(a), 46(f); see also James C. Cooper et al., *Theory and Practice of Competition Advocacy at the FTC*, 72 ANTITRUST L.J. 1091 (2005) (discussing FTC’s authority to collect information, issue reports, and perform advocacy functions).

and substantial federal oversight of corporations and the antifederalist preference for less direct and encompassing federal intervention, which shaped conceptions about how the antitrust system should function. This dialectic may be an excessive simplification of the intellectual forces that forged U.S. antitrust institutions (where in this framework should we place the associationalism movement of the 1910s through the 1930s, with its preference for elaborate government-business cooperation to guide the economy?<sup>29</sup>), yet attention to origins is valuable and has continuing significance. As Neil Duxbury writes in describing the history of American jurisprudence, “Ideas—along with values, attitudes and beliefs—tend to emerge and decline, and sometimes they are revived and refined. But rarely do we see them born or die.”<sup>30</sup> Although the antifederalist philosophy has come to govern the antitrust system, the federalist preference for more direct oversight to correct apparent competition policy problems remains alive, especially in times of economic crisis, such as the U.S. economic collapse that began in late 2008.

The historical survey in *Institutional Structure* also underscores a major difficulty that new competition agencies face in building programs amid widely divergent views about what they ought to accomplish. Professor Crane recounts the turmoil of competing policy perspectives during the quarter century between the adoption of the Sherman Act and enactment of the Clayton and FTC Acts. Antitrust figured prominently in the campaign for the presidency in 1912, during which the presidential candidates (Theodore Roosevelt, William Howard Taft, and Woodrow Wilson) disagreed about the appropriate mix of direct government supervision and antitrust oversight through the prosecution of cases.<sup>31</sup> In the guise of the “New Nationalism,” Roosevelt proposed an agency that would preserve fair competition by controlling business practices of large enterprises (even to the point of setting prices for monopolists that had achieved their stature by largely honest methods); regulating the issuance of securities; establishing hours, wages, and other conditions of labor; and reviewing and clearing mergers.<sup>32</sup> Taft endorsed the antitrust enforcement program he championed as president: prosecute Sherman Act cases in the courts and dissolve dominant firms that use improper practices.<sup>33</sup> Wilson wanted a new legislation to define antitrust offenses precisely and to impose harsh sanctions (including imprisonment) for violators. He disapproved the dismemberment of large firms (in 1911 he opposed the dissolution of Standard Oil) and expected the

---

29. See Ellis Hawley, *Three Facets of Hooverian Associationalism: Lumber, Aviation, and Movies, 1921–1930*, in *BUSINESS-GOVERNMENT COOPERATION 1917–1932: THE RISE OF CORPORATIST POLICIES* 213 (Robert F. Himmelberg ed., 1994) (describing associationalism movement).

30. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 2–3 (1995).

31. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 *ANTITRUST L.J.* 1, 15–54 (2003).

32. *Id.* at 15–27.

33. *Id.* at 27–32.

prohibition of harsh practices to give entrants enough breathing room to prosper and to erode existing positions of dominance.<sup>34</sup> Wilson disliked commissions (least of all the industrial oversight body proposed by Roosevelt) and scorned government by a “smug lot of experts.”<sup>35</sup>

Which of these visions animated the legislative process that yielded the Clayton Act and Federal Trade Commission Act in 1914? All of them. The 1914 legislative package offered something for everyone: a more specific list of forbidden acts (the Clayton Act);<sup>36</sup> stronger means for merger control (the Clayton Act);<sup>37</sup> and an administrative body to elaborate norms of business conduct,<sup>38</sup> to prepare studies,<sup>39</sup> and to help courts design dissolution remedies for Sherman Act violations (the FTC Act).<sup>40</sup> The extensive possibilities inherent in the FTC’s powers, especially the agency’s authority to proscribe “unfair methods of competition,” was sufficiently broad to attract the endorsement of a divergent collection of legislators, including different variants of progressives who hoped that the new commission would evolve in ways that matched their own competition policy preferences.<sup>41</sup> Descendants of both the federalist and antifederalist philosophies of government intervention had divergent expectations for the FTC, but all could see something to like in the institution they had just founded.

This ambiguity of purpose has had major implications for the FTC. First, it was inevitable that the agency’s early decades would be marked by turmoil over what it should do and how it should operate: How is it possible to formulate a coherent program and still remain even roughly faithful to the varied aims advanced by those who founded the agency? The agency did itself no favors in its early period through clumsy implementation (early Commission decisions usually did not explain the economic or legal reasons for actions taken—a bad start for a body intended to specialize in what Professor Crane calls “norms-creation”),<sup>42</sup> but its uneven performance in this period was an inevitable consequence of the conflicts embedded in its mandate. It would be left to the Commission to reconcile the contradictory

---

34. *Id.* at 46–48.

35. *Id.* (citation omitted) (internal quotation marks omitted).

36. 15 U.S.C. §§ 13, 14 (2006) (prohibitions on price discrimination and agreements not to use the goods of a competitor).

37. 15 U.S.C. § 18 (prohibition against anticompetitive mergers).

38. 15 U.S.C. § 45 (providing for establishing of the FTC).

39. 15 U.S.C. § 46 (providing power to conduct investigations and prepare reports).

40. 15 U.S.C. § 48 (authorizing the FTC to advise federal courts on the formulation of remedies in antitrust cases).

41. Regarding the multiplicity of legislative preferences reflected in the measure adopted as the FTC Act, see Winerman, *supra* note 31, at 74–88. On the legislative compromises embedded in the 1914 legislation, see Marc Winerman & William E. Kovacic, *Outpost Years for a Start-Up Agency: The FTC from 1921–1925*, 77 ANTITRUST L.J. 145, 150–55 (2010).

42. See Winerman & Kovacic, *supra* note 41, at 178, 181, 202–03 (describing the failure of the early FTC to provide well-reasoned rationales for its administrative decisions).

purposes of its founders, a process that would take decades and continues to challenge the agency from time to time today.

Closely related to the question of goals was the issue of how to apply the FTC's broad substantive mandate and portfolio of policy tools. As intended, the original FTC mandate provided considerable flexibility and adaptability. The Commission has used this on a number of occasions with great effect. What we today call the FTC's consumer protection program was an unintended consequence of the 1914 legislation. The Commission began challenging false advertising and deceitful marketing practices on the theory that such tactics distorted competition by drawing trade from honest vendors to unscrupulous firms.<sup>43</sup> Only in 1938 did Congress give the agency express authority to ban such conduct by showing simply that the misconduct misled consumers but without also having to prove that rivals were damaged.<sup>44</sup> The FTC's early studies of "blue sky" securities transactions<sup>45</sup> set an important foundation for the national securities laws of the 1930s. In a key respect, the FTC was the incubator for the Securities and Exchange Commission, whose functions Congress nearly decided to assign to the FTC in lieu of creating a dedicated securities regulator.<sup>46</sup> In a similar fashion, the FTC would serve as an incubator for the formation of the Consumer Financial Protection Board. The Dodd-Frank financial services reforms of 2009 involves a partial spin-off of FTC functions and a model of operations that borrows from FTC practice.<sup>47</sup>

---

43. One of the Commission's first reported cases challenged supplier deception as an unfair method of competition. The Commission observed that when deception occurs, "there also results a damage to the trade and manufacturers who deal in silk products." *Circle Cilk Co.*, 1 F.T.C. 13, 15 (1916); *see also* *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922) (affirming FTC's challenge to untruthful advertising as unfair method of competition and emphasizing that misrepresentations about the content of clothing diverts trade from honest manufacturers). For an analysis of the development of the FTC's early program to challenge false advertising, *see* Richard Tedlow, *From Competitor to Consumer: The Changing Focus of Federal Regulation of Advertising, 1914-1938*, 55 *BUS. HIST. REV.* 35 (1981).

44. The Wheeler-Lea Act of 1938 gave the FTC authority to condemn "unfair or deceptive acts or practices in commerce." Wheeler-Lea Act, ch. 49, sec. 3, § 5(a), 52 Stat. 111 (1938) (amending FTC Act § 5(a), 15 U.S.C. § 45(a)); *see also* Sidney M. Milkis, *The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism*, 72 *ANTI-TRUST L.J.* 911, 913-14 (2005) (discussing enactment of Wheeler-Lea legislation).

45. *See, e.g.*, FEDERAL TRADE COMMISSION, *BLUE SKY REPORT: FEDERAL AND STATE REGULATION OF THE SALE OF SECURITIES* (1921) (discussing FTC and other efforts to control misrepresentation in the sale of securities).

46. *See* Marc Winerman, *The FTC at Ninety: History Through Headlines*, 72 *ANTI-TRUST L.J.* 871, 880 n.44 (2005) (reviewing the creation of Securities and Exchange Commission and debates over the FTC's role in securities regulation).

47. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010). Title X of the legislation creates a new Bureau of Consumer Financial Protection and transfers most FTC rulemaking responsibilities and some reporting duties under various consumer financial laws to the new Bureau. The establishment and operations of the new institution are examined in John E. Villafranco & Kristin A. McPartland, *New Agency, New Authority: What You Need To Know About the Consumer Financial Protection*

Each regulatory system whose creation the FTC helped foster resembles the federalist model of regulation that Professor Crane sets out. The establishment and divestiture of new fields of regulation show how the FTC was a hybrid body and noticeably different from the crime-tort institution that became the DOJ's Antitrust Division.<sup>48</sup> In ways that Congress may not fully have anticipated in 1914, the FTC would facilitate the development (and, in many instances, the expansion) of the regulatory state by testing precursors of mechanisms that Congress later would codify as distinct statutory entities. Such a process could continue in the future with the possible development of a stand-alone data protection and privacy regulator, whose powers also would spin off from FTC programs developed since the 1960s and early 1970s with the adoption of privacy measures such as the Fair Credit Reporting Act.<sup>49</sup> The power of the federalist vision of more intrusive regulatory control remains vibrant in other policy domains related to the FTC's work.

A disadvantage of the FTC's broad substantive mandate and diversified portfolio of policy tools is that it makes the Commission an attractive solution to all economic problems with a competition or consumer protection dimension. In the past decade, Congress has exhorted the FTC to take steps to address increases in the price of petroleum products. Legislators have proposed that the Commission use its existing powers to punish "price gouging," "market manipulation," and other asserted causes of price spikes.<sup>50</sup> In these and other deliberations, the recurring legislative expectation is that somewhere in the FTC's elastic substantive mandate and

---

*Bureau*, ANTITRUST SOURCE (Dec. 2010), available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/Dec10\\_FullSource.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_FullSource.authcheckdam.pdf).

48. Compared with the DOJ's Antitrust Division, the FTC has a more diversified, elastic mandate and a more diversified range of policymaking tools. The relatively open-ended mandate of section 5, with its prohibitions against unfair methods of competition and unfair or deceptive acts or practices, gives the Commission a more adaptable platform to address emerging commercial phenomena and demands for new forms of government intervention. The combination of prosecutorial, adjudicative, rulemaking, investigative, and reporting powers gives the agency more flexible means to shape policy, including the issuance of studies that recommend or inspire new legislative measures. The significance and application of these capabilities is analyzed in WILLIAM E. KOVACIC, *THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY; THE CONTINUING PURSUIT OF BETTER PRACTICES* 110–43 (Jan. 2009), available at <http://www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf>.

49. The FTC is the principal U.S. national data protection and privacy authority. This role originated in the adoption in the 1960s and early 1970s of federal credit practices statutes such as the Fair Credit Reporting Act. See FED. TRADE COMM'N, *40 YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT: AN FTC STAFF REPORT WITH SUMMARY OF INTERPRETATIONS* (July 2011), available at <http://www.ftc.gov/os/2011/07/110720fcrareport.pdf> (discussing implementation of the Fair Credit Reporting Act). The FTC's privacy and data protection program is described in FED. TRADE COMM'N, *PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS* (Dec. 2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>.

50. See, e.g., *FTC Asked To Probe Gas Price Gouging*, FOX NEWS Sept. 2, 2005, <http://www.foxnews.com/story/0,2933,168272,00.html> (describing requests by legislators for the FTC to conduct an investigation of gasoline price increases).

policymaking portfolio lay measures for correction. In 2007, Congress enacted legislation prohibiting market manipulation and authorizing the FTC to adopt rules to implement the prohibition.<sup>51</sup> The FTC adopted a rule in 2009<sup>52</sup> and, amid gasoline price increases in 2011, has faced legislative demands that it use this power to retard market developments that depend on the price of crude oil, a variable the FTC has little power to influence.<sup>53</sup> This experience exemplifies how the agency's expansive authority can serve to undermine its stature and effectiveness: the mandate creates expectations that the Commission can solve all problems, and such expectations cannot possibly be fulfilled.

### III. THE FEDERAL ANTITRUST AGENCIES

Overlapping authority is common in the federal government. Pick any area of federal endeavor and you are likely to find two or more agencies that occupy the same policy domain or share (and contest) jurisdictional boundaries. Even when related functions are housed inside a single institution, severe rivalries can emerge. The Air Force, Army, Marine Corps, and Navy all reside within the Department of Defense, yet they compete fiercely for resources and missions.<sup>54</sup> As *Institutional Structure* points out, an unusual feature of the duality of federal antitrust enforcement is its deliberateness (pp. 27–28). Core elements of the common antitrust tenancy of the DOJ and the FTC arose through conscious legislative choice, not by accident. In 1914, Congress expressly gave the DOJ and the new Commission authority to enforce the Clayton Act and prescribed no principle or process for allocating tasks between the two institutions to carry out this mandate.<sup>55</sup> By the

---

51. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, §§ 811–815, 121 Stat. 1492, 1723–24 (2007) (codified in 42 U.S.C. §§ 17301–05) (prohibiting the manipulation of wholesale petroleum markets).

52. Prohibitions on Market Manipulation, 74 Fed. Reg. 40,686 (Aug. 12, 2009) (codified at 16 C.F.R. pt. 317) (forbidding the manipulation of petroleum wholesale markets).

53. In 2011, the FTC began an investigation into possible violations of the rule in response to letters from members of Congress who insisted that the Commission apply its new authority. Ayesha Rascoe & Roberta Rampton, *US FTC Probes Possible Oil Market Manipulation*, REUTERS, June 20, 2011, available at <http://www.reuters.com/article/2011/06/20/us-oil-ftc-probe-idUSTRE75J6J020110620>.

54. There are many accounts of interservice rivalry among the U.S. armed forces. For an account that underscores the tension between the Air Force and the Navy, see John Melchner, *Managing the Budget Process*, J. PUB. INQUIRY, Fall/Winter 1998, at 11, 13, available at <http://www.ignet.gov/randp/jpifw98.pdf>. On the use of interservice rivalry to spur competition to devise superior solutions to defense mission needs, see THOMAS L. McNAUGHER, *NEW WEAPONS, OLD POLITICS: AMERICA'S MILITARY PROCUREMENT MUDDLE* 38–48 (1989).

55. Section 7 of the Clayton Act authorizes the DOJ and the FTC to challenge anti-competitive mergers. The Clayton Act is silent on the question of which agency should review a transaction over which both have jurisdiction. In the first decades of the Clayton Act, there was at least one instance in which both agencies conducted independent, concurrent reviews of the same transaction. See Marc Winerman & William E. Kovacic, *The William Humphrey and Abram Myers Years: The FTC from 1925 to 1929*, 77 ANTITRUST L.J. 701,

mid-twentieth century, the breadth of the jurisdictional duality was complete, following Supreme Court rulings that the FTC's power to proscribe unfair methods of competition encompassed the ability to prosecute conduct that would constitute an infringement of the Sherman Act.<sup>56</sup>

To examine the federal duality, Professor Crane sketches the history of the two national agencies, considers factors offered to justify duality, presents the disadvantages of the status quo, and considers why duality has endured, despite recurring doubts about its value (pp. 27–48). The chapter on duality does a good job of questioning tenets of the “noble narrative” featured in the formative case of *Humphrey's Executor v. United States*,<sup>57</sup> in which the Supreme Court declared that President Franklin Roosevelt lacked the power to dismiss the clamorous FTC Commissioner William Humphrey without cause. *Institutional Structure* raises important qualifications to the Court's assumptions about the value of the FTC as a second element of the federal government's antitrust enforcement mechanism. The Commission is said to be a useful complement to the DOJ because it enjoys “political independence,” but the FTC is no less beholden to the Congress than the DOJ is to the executive branch.

Professor Crane convincingly questions the view that duality provides diversification that tends to ensure that one agency enforces areas of law that the other agency foregoes (pp. 36–38). He does not, however, note the disparity of programs from 2001 through 2008 when the DOJ brought no cases involving single-firm conduct and when the FTC brought nearly one per year.<sup>58</sup> Nor is it easy to scan the roster of those who have governed the DOJ and the FTC, or to study the quality of the agencies' professional staffs, and conclude that the FTC has consistently achieved a higher level of technical expertise. On this point, Professor Crane could have punched harder by observing that only three of the eighty-one individuals to serve as commissioners have been economists, a weak showing for an agency whose board Congress expected to feature diverse professional backgrounds.<sup>59</sup> Nor has the Commission delivered especially strong results on the possibility that it might use administrative litigation and the issuance of trade regulation rules to fulfill its intended role in norms creation. Distinctive

---

717–18 (2011) (discussing concurrent DOJ and FTC reviews of the Continental Bread merger).

56. In *FTC v. Cement Institute*, 333 U.S. 683 (1948), the Supreme Court made clear that the FTC had power to use section 5 to prosecute conduct proscribed by the Sherman Act. This development is documented in Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227 (1980).

57. 295 U.S. 602 (1935).

58. These enforcement trends are reviewed in William E. Kovacic, Remark, *Rating the Competition Agencies: What Constitutes Good Performance?*, 16 GEO. MASON L. REV. 903, 911–12 (2009).

59. Data on FTC appointments from 1915 to 1997 are reviewed in William E. Kovacic, *The Quality of Appointments and the Capability of the Federal Trade Commission*, 49 ADMIN. L. REV. 915 (1997). These data are updated through 2009 in KOVACIC, *supra* note 48, at 28. The three economists who have served as FTC commissioners are James C. Miller III, George Douglas, and Dennis Yao. All three of these individuals were appointed in the 1980s.



accomplishments through nearly a century of litigation in the application of section 5 of the FTC Act can be counted on two hands. This is a sobering record for nearly 100 years of operations.

The FTC's capacity to guide the elaboration of standards under the Sherman and Clayton Acts is limited by the method of appellate review. Commission decisions that find liability on the basis of the Sherman Act or the Clayton Act are appealable to the federal courts of appeals. Even when a court of appeals affirms the Commission, however, it seldom does so simply on the basis of the FTC's decision. The court of appeals may adopt some or much of the FTC's reasoning, but this intermediate filtering limits the FTC's ability to use administrative decisions to shape norms, unless the FTC's decision dismisses a complaint and thus stands as the final word on the case.<sup>60</sup> Against these possible benefits are a number of costs: uncertainties in the allocation of matters (especially where the agencies contest the right to review a matter); the subdivision between the DOJ and the FTC of enforcement activity in certain sectors given the danger that both agencies lack the cumulative experience to advance as fast down the learning curve as they would if a single body examined all relevant matters; inconsistencies that may arise when the agencies apply dissimilar standards to review business conduct; and the loss of policy coherence and squandering of resources that occur when the agencies wrestle for control of specific matters or the larger policy agenda.

The chapter has a strongly FTC-centric (though hardly FTC-friendly) orientation. *Institutional Structure* does not overlook the DOJ's role in the development of the U.S. system. Nonetheless, the experience of the FTC anchors the narrative, and the assessment of the existing federal agency framework takes place largely by reference to the asserted institutional advantages of the Commission. This method of organization is understandable for several reasons. One is that, in light of the philosophical contest between federalist and antifederalist visions that introduces the volume, the FTC is the far more interesting of the two federal antitrust authorities. The DOJ "corresponds entirely to the crime-tort conceptualization" favored by the antifederalists, while the FTC "represents a hybrid" of the federalist and antifederalist visions (p. 27). Compared to the Antitrust Division, the Com-

---

60. Recent FTC horizontal restraints cases illustrate this point. In the past decade, the agency has devoted considerable effort to refine the legal standards governing the application of the rule of reason to horizontal restraints. In three cases, the courts of appeals have affirmed the FTC's finding of liability and generally have endorsed the analytical framework used by the Commission to assess the behavior in question. *See* *Realcomp II, Ltd v. FTC*, 635 F.3d 815 (6th Cir. 2011); *Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008); *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). None of these decisions simply affirmed the FTC on the basis of the agency's decision. All involved some degree of reformulation and selection by the court of appeals. Only when the Commission dismisses one of its complaints is the agency's decision the last word on the case, and the agency's reasoning undergoes no further interpretation or qualification by reviewing courts. *See, e.g.*, *Beltone Elecs. Corp.*, 100 F.T.C. 68 (1982) (dismissing a complaint alleging illegal exclusive dealing); *DuPont E.I. de Nemours & Co.*, 96 F.T.C. 653 (1980) (dismissing a complaint alleging attempted monopolization).

mission's hybrid nature and the myriad intellectual influences that shaped its hybrid institutional arrangements are likely to yield a wider array of policy experiments. The agency will be buffeted by conflicting external demands and will experience more inner turmoil as appointees whose collective perspectives mirror the diverse expectations of the FTC's founders wrestle with basic decisions over what this wishing well of an agency should do. At some basic level, a multidimensional (and, at times, schizophrenic) personality is a more interesting subject for biographers than a one-dimensional (and, at times, more stable) individual.

In short, the FTC has given better material to potential authors, and the volume of their scholarship shows it. Another reason for an FTC-centric approach is, as Professor Crane points out, the disparity in the sheer volume of literature on the two agencies (pp. 28–29). Scholarly and popular accounts (articles, books, and dissertations) about FTC and its institutional arrangements easily eclipse comparable works on the DOJ. There is, however, a literature that *Institutional Structure* might have addressed in considering the development of the U.S. system. Important omissions include studies of the Antitrust Division by Theodore Kovaleff and Suzanne Weaver,<sup>61</sup> modern proceedings that have reflected on the Division's history,<sup>62</sup> the reports of most of the blue ribbon commissions (such as the Hoover Commission of the late 1940s) that have evaluated the performance of the FTC,<sup>63</sup> and other influential commentaries that have done side-by-side comparisons of the antitrust programs of the DOJ and the FTC.<sup>64</sup>

Reflection on these studies might have led *Institutional Structure* in other useful directions. The noble narrative might have been expanded to model the DOJ and the FTC as rivals and to consider whether rivalry between the agencies has generated results that a single federal agency model could not have attained. For example, did the FTC's development of its program involving health care and the professions in the 1970s result from a rivalrous effort to address competition issues that the Antitrust Division had neglected? Or did some combination of rivalry and an imperative for differentiation cause the FTC to pursue shared monopolization cases that badly damaged the agency's reputation and raised doubts about the sobriety of the U.S. antitrust system? To model the agencies as rivals also would provide an

---

61. THEODORE PHILIP KOVALEFF, *BUSINESS AND GOVERNMENT DURING THE EISENHOWER ADMINISTRATION* (1980); WEAVER, *supra* note 13.

62. Such proceedings include the DOJ's celebration of the twentieth anniversary of the 1982 merger guidelines, the details of which are available at <http://www.justice.gov/atr/public/hmerger.html>, and the proceedings of a celebration of the tenth anniversary of the creation of the Antitrust Division's Economic Policy Office, see U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ECON. POLICY OFFICE DISCUSSION PAPER 83-13: TENTH ANNIVERSARY SEMINAR ON ECON. & ANTITRUST (Oct. 19, 1983) (on file with *Michigan Law Review*).

63. Comm. on Indep. Regulatory Comm'ns, *Task Force Report on Regulatory Commissions*, in COMM'N ON ORG. OF THE EXEC. BRANCH OF THE GOV'T, *THE INDEPENDENT REGULATORY COMMISSIONS: A REPORT TO THE CONGRESS* app. n (1949).

64. *E.g.*, JAMES M. LANDIS, *REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960).

interesting perspective on the U.S. institutions and the relationship between them and with the rest of the world. Until the relatively recent past, the DOJ was seen as the unmistakably dominant force in national and global competition policy.<sup>65</sup> The FTC was regarded as a minor league franchise, and, as late as the early 1980s, only a handful of jurisdictions outside the United States (mainly the European Union (“EU”) and a few of its member states) had competition systems of any significance. The DOJ was absolutely preeminent, and subsequent entry or expansion by other institutions (such as the FTC, state governments, and the European Union) has eroded the DOJ’s paramount status.<sup>66</sup> This adjustment arguably has been hard for the DOJ to swallow, and tensions observed periodically within the United States and abroad reflect the difficulty with which the DOJ, like many dominant enterprises before it, has dealt with the emergence of major rival institutions.<sup>67</sup>

---

65. As recently as forty years ago, a broad range of commentators raised basic questions about the FTC’s continued usefulness. In the late 1960s, the FTC received vehement criticism from a Ralph Nader-sponsored study and from a blue ribbon panel convened by the American Bar Association. AMERICAN BAR ASSOCIATION COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION (1969); EDWARD F. COX ET AL., THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969). No such opprobrium was visited upon the Antitrust Division.

66. Fifteen years ago, I concluded that if there were to be only one federal antitrust agency, the Antitrust Division should be the survivor. William E. Kovacic, *Downsizing Antitrust: Is It Time To End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505, 540 (1996). Since then, the FTC has made great strides toward realizing the full potential inherent in its institutional design. See, e.g., William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE U. L. REV. 319 (2007) (discussing the multifaceted FTC approach to addressing competition policy issues involving intellectual property). As a consequence, the matter of what configuration the U.S. system should take in the future is an extremely difficult question. How does the FTC measure up today with the DOJ as a competition policy institution? Some years ago, during a trip to St. Petersburg, I recall reading an interview in a local guide book with the curator of the Hermitage Museum. The curator was asked if the Hermitage had the greatest collection of art in the world. He answered that the question was very hard to answer, because there were so many magnificent museum collections across the globe. Although I cannot reconstruct his remarks exactly, I recall him ending the interview by saying, “I can assure you one thing. We are not the second.” In the field of competition law in the United States, the FTC is not the second.

67. Since 2000 there have been three noteworthy transatlantic scrapes involving the DOJ. In 2001, the DOJ rebuked the European Commission for its decision to block General Electric’s attempt to acquire Honeywell. Press Release, Dep’t of Justice, Statement by Assistant Attorney General Charles A. James on the EU’s Decision Regarding the GE/Honeywell Acquisition (July 3, 2001), available at [http://www.justice.gov/atr/public/press\\_releases/2001/8510.htm](http://www.justice.gov/atr/public/press_releases/2001/8510.htm). In 2007, the DOJ chastised the EU’s Court of First Instance for upholding the ruling of the European Commission that Microsoft had violated the EU’s prohibition on abuse of dominance. Press Release, Dep’t of Justice, Assistant Attorney General for Antitrust, Thomas O. Barnett, Issues Statement on European Microsoft Decision (Sept. 17, 2007), available at [http://www.justice.gov/atr/public/press\\_releases/2007/226070.htm](http://www.justice.gov/atr/public/press_releases/2007/226070.htm). In 2009, the DOJ issued a peevish press release commenting on the decision of DG Comp to open a second phase inquiry of Oracle’s proposed acquisition of Sun Microsystems. Press Release, Dep’t of Justice, Department of Justice Antitrust Division Issues Statement on the European Commission’s Decision Regarding the Proposed Acquisition between Oracle and Sun (Nov.

The missing literature also might have set up another comparison of the two federal agencies. Professor Crane compares their operations mainly with data on budgets and cases (pp. 30–32, 36–38). Both comparisons suffer from the failure of existing data sets to differentiate between cases committed to what we would call “consumer protection matters” when accounting for the FTC’s use of resources. A fuller and more interesting comparison, qualitative in nature, might have considered which agency has made the greatest contribution to the development of U.S. and international competition policy. From the perspective of contemporary standards and enduring accomplishments, what are each agency’s greatest hits (enforcement and nonenforcement matters), and how do they measure against one another? Is there anything about the unique institutional features of either agency (governance by a hierarchy versus management by a board, administrative adjudication versus litigation in the federal courts), or the rivalry between the agencies, that accounts for such results?

*Institutional Structure* suggests improvements in the U.S. system, as noted above, but it is silent on some of the larger questions of organization going forward. Should the United States maintain two national agencies? If some realignment is appropriate, what is the ideal configuration? Professor Crane is ideally suited to address these difficult questions, which he properly indicates are not going away.

#### IV. THE STATES AND ANTITRUST POLICY

*Institutional Structure* deals with two areas in which decisions taken by state governments affect the operation of the U.S. antitrust system. The first is the ability of states to enact legislation that overrides the national antitrust laws. In a series of decisions beginning in 1943 with *Parker v. Brown*,<sup>68</sup> the Supreme Court has recognized the ability of states to displace competition in favor of other economic policies. Such measures confer immunity from antitrust liability on the state, its political subdivisions, and private economic actors so long as the state has clearly articulated the policy to suppress competition (e.g., through a state statute) and has created administrative machinery through which the state “actively supervises” the implementation of the restrictions. One might accept these deviations from the competition principles of the federal antitrust laws if the costs of such measures fell entirely, or mainly, within the borders of the state that enacted the measures. If the state’s citizens grow weary of the consequences of restricting competition, they can use the political process to reset the state policy.

Professor Crane convincingly points out that the effects of state dispensations on competition can and do spill over into other jurisdictions (pp. 146–49). Subject to the relatively frail limitations of the Commerce

---

9, 2009), available at [http://www.justice.gov/atr/public/press\\_releases/2009/251782.htm](http://www.justice.gov/atr/public/press_releases/2009/251782.htm). Shortly after the announcement on the Oracle-Sun transaction, the DOJ cancelled the annual bilateral discussions, which were scheduled to take place in Washington, D.C. in mid-November, between DG Comp and the two U.S. federal agencies.

68. 317 U.S. 341 (1943).

Clause, states have the ability to externalize costs on nonvoters (i.e., the citizens of other states) and confer benefits on producers within the state. Negative spillovers from individual state restrictions promise to become ever more substantial as the ongoing revolution in communications (and the ascent of electronic commerce) unifies previously discrete local or regional markets into multistate or national commercial networks. Unlike the operation of a purely private cartel, which must struggle in the shadow of the law to punish defections from an agreement to restrict output and coerce suppliers that did not join the conspiracy, the state-imposed restraints on rivalry are enforced by the machinery of the state itself. Without state action immunity, a cartel participant faces severe sanctions under the federal antitrust laws, including imprisonment for individuals. With state action immunity, a firm that fails to abide by a state-imposed output restriction faces severe sanctions, including criminal punishment by state law. As the federal campaign to prosecute private cartels as crimes intensifies and criminal sanctions for infringements become more powerful (including a maximum sentence of ten years for individuals), firms will have increasingly strong incentives to devote more effort to persuade state legislatures to approve measures that compel the conduct that national policy vehemently denounces.<sup>69</sup>

Professor Crane proposes an entirely sensible solution to this problem: an amendment to the national antitrust laws that makes state action immunity available only when the state-sanctioned restriction does not create monopoly spillovers to nonvoters (pp. 149, 159–61). This exercise of national supremacy would help ensure that the nation realizes the full benefits of economic integration, especially as electronic commerce facilitates transactions that cross state borders. As *Institutional Structure* points out, a narrowing of the zone of state action immunity would align U.S. policy more closely with the skeptical view that the competition policy of the European Union takes toward efforts by member states to restrict competition (pp. 203–04). “On the federalism front,” Professor Crane observes, “the United States . . . has much to learn from the EU” (p. 204).

States affect the operation of the national competition laws in one other major respect. They have independent competence to enforce the federal antitrust laws, and they can enact state antitrust laws that impose restrictions more expansive than those created by the federal statutes or the antitrust jurisprudence of the federal courts. Modern Supreme Court decisions have underscored these features. The Court has endorsed the ability of states to bring suits under the Clayton Act’s antimerger provision and obtain relief beyond what the federal agencies have achieved by settlement in the same matter. The Court has also ruled that states may adopt statutes that permit indirect purchasers to recover damages under the state antitrust laws—a

---

69. For an examination of these phenomena, see James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1561–67 (2010).

remedy the Court has disallowed in cases based on the federal antitrust laws.<sup>70</sup>

Both of these forms of state intervention are significant. States have used their enforcement authority under federal law to become routine participants in merger enforcement<sup>71</sup> and, on occasion, in matters involving dominant firm conduct, such as the prosecutions of Microsoft and Intel and the current investigations involving Google. *Institutional Structure* correctly asks what gain there is for the U.S. system of competition law from state participation in these matters (pp. 150–55). The chief benefits claimed for state involvement are that state activism serves to offset federal inactivity and that state participation in matters where the federal agencies have joined battle have produced better results than the federal agencies could have achieved on their own.<sup>72</sup> State merger enforcement during the 1980s is presented as an example of the former, and the states' participation in the *Microsoft* case is given as an illustration of the latter (pp. 150–55).

Professor Crane examines *Microsoft* in some detail. As he mentions, it is difficult to draw large conclusions from cases such as *Microsoft* (pp. 151–55). Accounts of the role of the states in *Microsoft* are so varied and conflicting that it is difficult for an outsider to decide whether the states advanced or hindered the development and resolution of the case. I have heard it both ways, from state officials who say their early investigation of the matter provided vital stimulus to the DOJ to begin its own investigation, and from DOJ officials who depict the states as quarrelsome interlopers who undermined the pursuit of the case.<sup>73</sup> As Professor Crane points out, inquiries of this magnitude are so relatively rare that there is no “strong federal interest in tweaking the structure of antitrust federalism” to avoid interagency frictions and unnecessary costs to affected parties that might flow from state involvement (p. 154).

Professor Crane spends relatively little time discussing merger enforcement, where actual or potential intervention by the state attorneys general is more likely to occur. He does draw, however, an informative comparison to EU practice. The Treaty on the Functioning of the European Union gives the European Commission exclusive authority to review all mergers that affect several member states and to exercise sole competence to consider

---

70. See *California v. Am. Stores Co.*, 495 U.S. 271 (1990) (states enjoy right under Clayton Act to obtain divestiture to remedy anticompetitive mergers); *California v. ARC Am. Corp.*, 490 U.S. 93 (1989) (upholding validity of state statutes to override limits on recovery by indirect purchasers).

71. On the emergence of states as important participants in merger control, see Lloyd Constantine, *The Mission and Agenda for State Antitrust Enforcement*, 36 ANTITRUST BULL. 835 (1991).

72. See *id.* at 838–39.

73. This observation is based on my experience as a commentator on the *Microsoft* litigation, when I had many conversations with officials from the state attorney general offices and the DOJ, as well as many discussions with journalists who shared with me what they had heard from the same officials about the development of the prosecution's case.

nonmerger matters than have a significant community-wide dimension.<sup>74</sup> The EU also maintains a European Competition Network (“ECN”), which serves as a coordinating mechanism among the national competition authorities of the member states and the European Commission’s Directorate General for Competition.

*Institutional Structure* correctly suggests that the United States might usefully consider European experience in designing the relationship between the federal and state competition agencies. At a minimum, the United States might form the equivalent of an ECN to permit the national antitrust agencies and the state governments to meet regularly to coordinate activities and take steps toward the formulation of a coordinated strategy. There also would be value in considering legislation that would permit the national agencies to assert exclusive jurisdiction over matters considered to have broad national significance and to exclude or restrict the participation of the states.

In his discussion of the distribution of federal and state enforcement powers, Professor Crane points to what may prove to be an increasingly serious weakness in the U.S. antitrust system: the difficulty of achieving coherence with a multiplicity of possible prosecutors.<sup>75</sup> Specifically, how does one build consensus around competition policy norms in which decisions by one actor do not forestall another actor from a more aggressive form of intervention? The preferences of the most intervention-minded prosecutor will set national standards until there is a court ruling that sets a binding principle applicable to all prosecutors. This problem becomes more acute when an existing norm is unduly restrictive and some relaxation is appropriate.

## V. PRIVATE RIGHTS OF ACTION

The operation of private rights of action illustrates the link that Professor Crane draws between substantive policy results and institutional arrangements. Antitrust doctrine since roughly the mid-1970s has become decidedly less welcoming to interpretations of the antitrust statutes that would severely circumscribe business behavior (pp. 59–63). Much commen-

---

74. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 2010 O.J. (C 83) 1. The competition articles of the Treaty, Articles 101–09, may be found at <http://ec.europa.eu/competition/antitrust/legislation/articles.html>.

75. Professor Crane observes the following: “In contrast to the relative unruliness of American antitrust federalism, [the EU] system achieves decentralization and power sharing even while ensuring that a single supranational authority can speak in a unified voice for the executive function of EU antitrust enforcement.” P. 203. This coherence is important both for articulating policy within the EU and presenting the EU’s views in various international fora in which nations discuss possible standardization of procedures and liability rules for competition policy. Pp. 229–41 (discussing the development of international standards). Without means for building consensus among the U.S. public prosecutors at the national and state levels, the United States will find this coherence elusive, and its voice overseas may be less effective.

tary attributes this shift almost entirely to the influence on the courts of non-interventionist substantive precepts developed by the “Chicago School” after World War II.<sup>76</sup> To those who disfavored this trend, the problem flowed from uncritical acceptance of Chicago School views and poor awareness of possibilities for competitive harm.<sup>77</sup> By this view, a key solution was the development and application of a “post-Chicago” scholarship that would make doctrine more accommodating for plaintiffs.<sup>78</sup>

*Institutional Structure* provides a fuller, more convincing explanation for the doctrinal retrenchment of the past forty years. Professor Crane underscores the significance of another factor—judicial perceptions that the U.S. style of private rights of action (with, among other features, mandatory trebling of damages, class actions, and jury trials) posed serious risks of overdeterrence, especially in cases in which the merits of a claim were ambiguous and a finding of liability likely would yield large damage awards (pp. 59–63). At the urging of modern Harvard School figures such as Professors Areeda and Turner, the courts accepted the proposition that U.S. private rights overreached, and they adopted a variety of techniques to curb the zone of liability.<sup>79</sup> They imposed stronger substantive demands on plaintiffs, strengthened pleading requirements, toughened standing rules, and expanded the availability of measures, such as motions to dismiss and motions for summary judgment, to see that claims never reached, or even approached, resolution by a jury.<sup>80</sup> Moreover, limitations on intervention

---

76. E.g., Christian Ahlborn et al., *Bridging the Transatlantic Divide? The Reform of Europe's Policy Regarding Dominant Firms*, in *RETHINKING* ARTICLE 82, 90–92 (Bill Allan et al. eds., 2006) (“Over the last 30 years, the interpretation of Section 2 [of the Sherman Act] has undergone significant changes since the high watermark of intervention by the Supreme Court in the 1960s. This change was triggered by the ‘Chicago School’ which led to a more rigorous and economics-based approach.”); see also TONY A. FREYER, *ANTITRUST AND GLOBAL CAPITALISM, 1930–2004*, at 6 (2006) (remarking that from 1970s through end of twentieth century, “advocates of the Chicago School of Economics remade antitrust”).

77. See Stephen D. Susman, *Business Judgment vs. Antitrust Justice*, 76 *Geo. L.J.* 337, 337 (1987) (“We have sold the soul of competition to the devil, no question about that. As for the devil, there are several to choose from: the Chicago School, certain opinions of the Supreme Court, and [the Reagan] Administration’s antitrust policies are chief among them.”); see also John J. Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 *Sw. U. L. REV.* 335, 344 (1981) (portraying the Chicago School as a “church” and depicting its views as a “theology. . . out of touch with its own empirical and moral roots, detached from present-day realities”).

78. See, e.g., Robert H. Lande, Comment on *Kodak, Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 *ANTITRUST L.J.* 193 (1993).

79. The crucial role of Areeda and Turner in the repositioning of antitrust doctrine also is examined in HOVENKAMP, *supra* note 8, at 35–38, and William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 *ANTITRUST BULL.* 909 (1996).

80. Professor Crane recounts the landmarks in this judicial retrenchment of the U.S. antitrust system. Pp. 59–60. These include *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (strengthening pleading requirements that antitrust plaintiffs must satisfy to avoid a motion to dismiss); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (increasing the availability of summary judgment as a means of dispensing with



inspired by concerns with private rights yielded doctrine with serious limiting effects on cases brought by public agencies (pp. 63–67). Other scholars, such as Justice Breyer, in their role as commentators and as judges, cautioned against decisionmaking that assumed the superiority of antitrust oversight as an alternative to public utility regulation and other forms of government intervention.<sup>81</sup> Both strands of thought, suspicion of private rights and greater confidence in the operation of collateral regulatory regimes, reflect basic concerns about the quality of institutions. Proposals to extend the zone of liability by advancing new forms of substantive analysis would not change outcomes if the root causes of judicial nonintervention resided in institutional arrangements.

### CONCLUSION

In the 1990s, I worked in Ukraine on an antitrust project with the University of Maryland Center for Institutional Reform and the Informal Sector (“IRIS”). IRIS was the creation of Mancur Olson, who believed that sound institutions were essential to market-oriented reforms in centrally planned economies. I once met with a member of the Ukraine Antimonopoly Committee to discuss the U.S. antitrust enforcement system. The commissioner wanted to see if she understood the U.S. process to review mergers of telecommunications companies. The dialogue went like this: Does the U.S. have two national competition agencies? That’s right. Does the DOJ review telecommunications transactions? That’s right. And the Federal Communications Commission (“FCC”) conducts a separate review of competition and other factors? That’s right. And an antitrust unit in each state government can conduct its own review if the state is inside the service area of the companies? That’s right. And the state government’s equivalent of the FCC can conduct its own competition review, subject to the same condition? That’s right. And regardless of the decision taken by the national and state public authorities, private lawsuits to challenge the merger also are permitted? That’s right. The commissioner paused. Transition economy antitrust officials often assume that the United States, with over a century’s experience, has solved the key institutional design problems correctly. Then she asked, “But isn’t that irrational?” “That’s right, too,” I replied.

Professor Crane’s effort to bring institutional arrangements more directly into the discussion about competition law is most timely. As noted above, roughly 120 jurisdictions have competition laws, and some ninety of these have appeared since 1990.<sup>82</sup> *Institutional Structure* ought to motivate the

---

antitrust claims); and *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (establishing a requirement that a plaintiff demonstrate an antitrust injury as a condition of obtaining damages for asserted antitrust violations).

81. See pp. 61–63; see also John E. Lopatka, *Stephen Breyer and Modern Antitrust: A Snug Fit*, 40 ANTITRUST BULL. 1 (1995) (describing Justice Breyer’s antitrust opinions during his tenure on the U.S. Court of Appeals for the First Circuit).

82. I have compiled the estimate of 120 jurisdictions in the following manner: I began by examining membership data compiled by the International Competition Network (“ICN”).

U.S. competition policy community to consider whether the existing configuration of U.S. institutions is performing as well as it could at a time when many older and newer systems outside the United States are striving to place their enforcement systems on the strongest possible footing. Periodic efforts to upgrade existing institutional arrangements are increasingly common, and these include some basic restructurings of the existing enforcement framework. For example, over the past ten years, France, Portugal, and Spain have reduced the number of national competition authorities from two to one.<sup>83</sup> Brazil has adopted legislation that consolidates the law enforcement functions of three public antitrust units into one agency.<sup>84</sup> The United Kingdom is embarked on a fundamental reconsideration of its institutional framework, and numerous other jurisdictions are considering adjustments in the structure of their enforcement bodies, the adoption or augmentation of private rights of action, and the framework of remedies.<sup>85</sup> By contrast, the U.S. competition policy community of academics, advocacy groups, enforcement agencies, practitioners, and think tanks generally takes a blasé attitude to questions about the soundness of the U.S. enforcement system.<sup>86</sup>

---

*See Interview with John Fingleton, Chair of the Steering Group of the International Competition Network, 25 ANTITRUST 71 (2010) (reviewing ICN membership data). I then reviewed the list of nations that participated in the International Gathering of Experts on Competition Law convened by the United Nations Conference on Trade and Development in November 2010 and in 2011. U.N. Conference on Trade and Dev., Geneva, Switz., Nov. 8–12, 2010, Report of the Sixth United Nations Conference To Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices 21–22, U.N. Doc. TD/RBP/CONF.7/11, Annex II (Jan. 25, 2011). I spoke with attendees at both UN conferences to identify countries that had adopted competition laws and were not ICN members.*

83. On the restructuring in France, see *Reform of the French Competition Regulatory System: The Conseil de la Concurrence Becomes the Autorité de la Concurrence* (Competition Authority), AUTORITÉ DE LA CONCURRENCE, [http://www.autoritedelaconcurrence.fr/user/standard.php?id\\_rub=317](http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=317) (last visited Sept. 10, 2011). On the restructuring in Portugal, see *About Us—Mission*, AUTORIDADE DA CONCORRÊNCIA, [http://www.concorrenca.pt/vEN/A\\_AdC/About\\_Us\\_mission\\_and\\_functions/Pages/About-Us-mission-and-functions.aspx](http://www.concorrenca.pt/vEN/A_AdC/About_Us_mission_and_functions/Pages/About-Us-mission-and-functions.aspx) (last visited Sept. 10, 2011) (describing unification of Competition Council and the Directorate of Competition and Trade in 2003). On the restructuring in Spain, see *Who We Are*, COMISIÓN NACIONAL DE LA COMPETENCIA, <http://www.cncompetencia.es/Inicio/ConocerlaCNC/QueeslaCNC/tabid/77/Default.aspx> (last visited Sept. 10, 2011) (describing Comisión Nacional de la Competencia and noting absorption of the former Tribunal for Defense of Competition).

84. The reforms to Brazil's competition law system are described in Krisztian Katona & Diego Herrera Moraes, *Reforms Achieved, But Challenges Ahead: Brazil's New Competition Law*, INT'L ANTITRUST BULL., no. 3, 2011 at 11, available at <http://www.ftc.gov/oia/speeches/2011katona-brazil.pdf>.

85. The initiative to reconsider the UK's framework of competition policy implementation is described in DEP'T FOR BUS. INNOVATION & SKILLS, *A COMPETITION REGIME FOR GROWTH: A CONSULTATION ON OPTIONS FOR REFORM* (2011), available at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf>.

86. The most recent comprehensive effort to examine the institutional arrangements of the U.S. antitrust system was the Antitrust Modernization Commission, which published its report in 2007. ANTITRUST MODERNIZATION COMM'N, *REPORT AND RECOMMENDATIONS*

Through contentment with the status quo (“It’s quaint, old, and ours.”) or resignation (“Nothing can be done.”), the United States is missing a big game. The global institutional ferment has large stakes. Jurisdictions whose institutional arrangements achieve superior policy results will confer important economic advantages on their citizens. By pioneering advances in enforcement structure and procedure, a nation can also influence other systems, which may emulate effective measures adopted and tested elsewhere.<sup>87</sup> *Institutional Structure* has the potential to disturb the American complacency. Professor Crane does great and, one expects, lasting service by bringing questionable features of the U.S. system into sharp relief, proposing specific reforms, and spurring debate about the future of the U.S. antitrust regime.

*Institutional Structure* also provides a valuable lesson by revealing the necessary foundations for meaningful comparative study. Professor Crane places the development of U.S. antitrust institutions in their historical context and identifies the political, economic, and legal forces that formed the U.S. regime. It is impossible to understand modern developments in any single system without this context. Much in the way that David Gerber’s studies of the history and development of competition policy in Europe provide essential insights into the establishment of competition law in the European Union and its member states,<sup>88</sup> Professor Crane’s volume is a necessary element in the education of scholars, practitioners, and policymakers who aspire to understand the U.S. regime.

---

(2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf). The panel proposed relatively few adjustments to the framework of U.S. enforcement. *Id.* at 129.

87. See William E. Kovacic, *Dominance, Duopoly and Oligopoly: The United States and the Development of Global Competition Policy*, GLOBAL COMPETITION REV., Dec./Jan. 2011, at 39 (describing the means by which individual jurisdictions can influence the content of international antitrust standards).

88. See DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (1998).