

Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press 2011)

Professor Daniel Crane of the University of Michigan Law School has synthesized and expanded his prior work on the institutional structure of antitrust enforcement in the United States to create this slim elegant volume. Crane persuasively argues that institutional design is as important, if not more so, than the formal rules of competition law.

Part I of the book focuses on the origins and development of U.S. antitrust institutions. These historical chapters trace the evolution of competition policy from the founding of the United States and how it assumed a “crime-tort” mode relying on generalist judges, juries, and private litigants, rather than a more centralized national corporate regulatory framework. Crane examines the curious case of dual enforcement split between the Antitrust Division of the Justice Department and the Federal Trade Commission, each with partially overlapping powers. He next examines private enforcement, the dominant form of antitrust enforcement in the U.S. and the backlash it has produced and the accompanying spillover effects on public enforcement. Finally, he analyzes closely the shift toward “technocracy” and the rise of highly specialized institutions to administer antitrust which are mismatched with antitrust’s remaining populist institutions.

Part II seeks to optimize institutional performance given this history and mismatch between the technocracy of the present and the populism of the past. Crane’s offers an alternative he calls “administration” in lieu of the traditional dichotomy of regulation and adjudication. As he states:

Like the regulatory model, the administrative model is characterized by an emphasis on problem solving rather than assigning blame for norm violation. Yet, like the adjudicatory model, it seeks to avoid top-down, command-and-control governmental commands. It is geared toward informal solutions and negotiated agreements rather than formal adjudication or rule making (103)

While not suggesting that such a model works for all competition law issues, he offers merger control in the post Hart-Scott-Rodino era as an example of one area where it works well.

The rest of Part II critiques the panoply of players in the U.S. antitrust system from this perspective and offers suggestions for improvement. The role of juries and private enforcement is discussed primarily in terms of the overall negative effect on legal doctrine and public enforcement as the legal system seeks to compensate for concern over jury competence and the costs and uncertainties of private litigation. In general, Professor Crane would strengthen the role of the federal agencies in creating and enforcing antitrust norms, particularly that of the Federal Trade Commission, diminish somewhat the role of private enforcement, and rationalize the relationship between federal and state competition enforcement and exemptions.

Part III concludes with relatively brief looks at the institutional structures of the EU, other key jurisdictions around the world, and the prospects and value for true international antitrust institutions. This brief survey is aimed both at U.S. readers seeking to understand other

institutional models and international readers seeking to better understand how U.S. experience may inform debates in their jurisdiction about the future of public and private enforcement.

Crane argues convincingly that institutions matter and that history matters as much as logic in designing workable structures. However, the real value in his work is his meticulous analysis of how the current world no longer fully matches up with that history and of the need to do better.

Spencer Weber Waller

Loyola University Chicago

School of Law