MERCANTILISM, CORPORATIONS, AND LIBERTY: THE FALLACIES OF "LOCHNERIAN" ANTITRUST

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A STRONG ANTITRUST POLICY has long been a cornerstone of progressive belief, and progressive U.S. Presidents such as Teddy Roosevelt actively pursued antitrust prosecutions. In the late 20th and early 21st centuries, however, antitrust law and policy have been increasingly challenged by a resurgent group of libertarian scholars, and after a century of experience with antitrust prosecutions, even many moderates in the economics profession are showing diminished enthusiasm.[1] Perhaps sensing a shift in the ideological winds, which often lead a shift in policy, some modern progressives have attempted to rekindle enthusiasm for antitrust.

Libertarian Antitrust?

In a recent contribution to a symposium devoted to issues surrounding the famous Supreme Court case *Lochner v. New York*,[2] Daniel Crane, a noted professor of law, has made an aggressive effort to convince libertarians to accept antitrust law as not just consistent with, but a legitimate expression of, libertarian principles.[3] Crane's central argument is hinted at early in his paper, when he notes that the kinds of economic power with which the antitrust laws are concerned usually arise due to privileges granted by the state. Few libertarians will disagree with that general point. The specific privileges and immunities Crane thinks to be crucial, however, are in his view bestowed on

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CITE THIS ARTICLE AS: James Rolph Edwards, "Mercantilism, Corporations, and Liberty: The Fallacies of "Lochnerian" Antitrust," *Libertarian Papers* 1, 30 (2009). ONLINE AT: libertarianpapers.org.

[1]See, for example, Robert W. Crandall and Clifford Winston, "Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence," *Journal of Economic Perspectives* 17 no. 4 (Fall 2003).

[2]198 U.S. 45 (1905).

[3]Daniel A. Crane, "Lochnerian Antitrust," *NYU Journal of Law & Liberty* 1 no. 1 (2005): 496–514.

corporations *as such,* which he (mistakenly, as I will show) terms "the state's artificial creatures."[4]

What has *Lochner* to do with this? Crane's discussion of *Lochner* is interesting not least because it concedes the libertarian view of the case. He shows that the bakery industry in New York at the turn of the 19th to the 20th century was *not* concentrated. It consisted of many small firms with low entry costs. Journeymen employees of many of the bakeries were unionizing and pressing for shorter work weeks, but having trouble recruiting many immigrant workers, who often *wanted* to work long hours. The union pressed for the maximum hours provision of the New York Bakeshop Act, and it was they (not Schmitter) who prompted the indictment of Joseph Lochner for employing Schmitter for more than the allowed number of weekly hours. Crane admits that the Supreme Court's decision throwing out the maximum hours provision as a violation of Schmitter and Lochner's liberty of contract looks less like institutionalization of Spencer's *Social Statistics,* as Justice Holmes described it in his dissenting opinion, and more like a modern attempt to stifle special interest legislation.[5] So far so good, but since *Lochner* was *not* about preventing exploitation by giant corporations (the bakeries, after all, were small proprietorships), it is hard to see how this supports Crane's case for antitrust law at all.

Libertarians tend to distinguish sharply between concentrated markets, and actual monopolized or cartelized industries. A concentrated market means that either one or a relatively small number of firms comes to own some relatively large fraction of industry assets and obtain a similar share of total industry sales, in competition with a competitive fringe composed of (often many) smaller firms. The fringe competitors prevent the dominant firm(s) from restricting output or raising unit price above the competitive level, since doing so would result in rapid loss of sales and market share as customers switched to fringe suppliers.[6] *A key tenet of libertarian belief is that dominant firms in such markets nearly always obtain that status simply through superior*

[4]Crane, "Lochnerian Antitrust," p. 497.

[5]Crane, pp. 498–501.

[6]Yale Brozen, "The Attack on Concentration," in Yale Brozen, *Is Government The Source Of Monopoly? And Other Essays* (Washington DC: The Cato Institute, 1980): 50, cites the American Sugar Refining Company from 1892–94 and American Can in 1901 as the classic cases of dominant firms in the progressive era trying to restrict output and raise price, with resulting loss of sales to other existing and entering firms, decline of market share, and erosion of price back to the competitive level.

Of course, one might suspect such *ad hoc* examples of exhibiting selection bias. For systematic data on the erosion of economic profits (and losses!) in concentrated industries over time, however, one need only see Brozen, "Are U.S. Manufacturing Markets Monopolized?" pp. 23–42 in the same volume.

efficiency at providing high quality-low cost products, so that consumers *choose* to buy more from them, and they grow relative to their competitors (some of which will quit business). Such firms maintain their dominance only as long as they are able to continue such superior performance at satisfying the public, being replaced by other, more efficient firms when they fail.[7]

Actual monopolized or cartelized markets, having *only* one or a small number of colluding firms controlling *all* assets and sales, with no competitive fringe, must have barriers to entry by such competing firms, effectively allowing the monopoly or colluding oligopolists to restrict output and fix price permanently above the competitive level. Lacking such barriers, monopoly rates of return will attract entrants, who will add to supply and cause price to fall until the monopoly profits are eliminated, and the competitive rate of return again prevails. *It is a second tenet of libertarian belief that by far the most effective and frequent barriers establishing and protecting monopolies and cartels consist of exclusive legal grants of such monopoly or cartel status by various governments*, which then use their police to suppress competitive entry. This belief finds enormous historical and empirical support.[8]

The process begins when government officials—mostly legislators—assume (usually unconstitutionally) the authority to use the law in a *partial* rather than impartial way, to benefit some at the *expense* of others rather than simply enforcing law and contracts neutrally. This is always done on some 'public interest', 'market failure', or 'social justice' rationale, such as those offered by the progressives Crane is defending. The authorities then begin secretly auctioning off the use of the power so assumed to the highest bidder. In a particular instance that bidder may be a powerful interest group with many votes. Or it may be group of corporate businessmen seeking to be granted a legal monopoly or cartel over some line of business (such as the Federal Reserve, state electrical power monopolies, natural gas utilities, municipal taxicab monopolies, etc.). Or it could be a professional group seeking onerous education and licensing requirements to restrict entry to their business (medical doctors, lawyers, realtors, beauticians, etc.), or a group

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[7]In heavy industry, consider the replacement in 2006 of GM by Toyota as the world's largest automotive manufacturer. In retailing, many people (including this author) remember when Sears and J.C. Penny were the giants, considered to be beyond competition. But they were replaced by K-Mart, which has since been displaced by Wal-Mart. The loss of dominance in internet service provision by AOL since 1998 is yet another example.

[8]See the discussion of mercantile practices in Europe and early America below.

of domestic business firms seeking tariff protection from foreign competitors, etc. ad infinitum.[9]

Crane oversimplifies this second libertarian tenet (while showing no awareness of the first), by describing it as a suspicion that monopoly power is a product of government intervention in the market. He briefly sketches its intellectual pedigree, quoting both Adam Smith and Sir Edward Coke. He also shows that delegates at the constitutional convention rejected a proposal by Madison to give the federal government authority to grant charters of incorporation because they thought (quite rightly) that it would result in the establishment of mercantile monopolies.[10] Crane then rhetorically asks how all this provides support for the Sherman act. His answer is that the "antitrust problem," which he defines loosely as the *over aggregation* of economic power, was a result of a particular *kind* of government intervention. It stemmed from the liberalization, by state legislatures, of incorporation statutes following the Civil War, which, in his words, "facilitated the rise of the great industrial trusts." In short, federal antitrust law was necessary to deal with a problem created by the state governments when they passed the General Incorporation Acts.

As Crane tells it, there was a "stampede" among the state legislatures after the Civil War away from a *special* (my emphasis) corporate charter model toward increasingly liberalized *general* incorporation statutes, resulting from competition among the states to attract large industrial firms to incorporate domestically. This involved various states granting corporations special privileges such as limited shareholder liability for corporate debts, the right to own stock in other corporations, elimination of requirements that directors be state residents, removal of limits on stock issuance, allowing incorporation "for any lawful business or purpose whatsoever," favorable tax treatment for out of state earnings, and so on. All this facilitated, in Crane's view, the ensuing corporate consolidation that the federal antitrust laws were then instituted to cure.[11]

Crane notes that antitrust laws were aimed at monopolies and trusts, and not at corporations *per se*. In his opinion, however, without the General

[9]The classic article on such political rent-seeking is Gordon Tulloch, "The Welfare Costs of Tariffs, Monopolies, and Theft," *Western Economic Journal* 5 (June 1967): 224–32.

[10]Crane, pp. 505–506.

[11]In fact, state legislatures began passing antitrust laws before the Sherman Act passed congress in 1890. The pressure came *not* from consumers hurt by monopolistic price *increases,* but from smaller firms (and agricultural interests) who could not compete with the price *reductions* generated by large efficient producers in their markets. See Donald J. Budreaux & Tom DiLorenzo, "The Protectionist Roots of Antitrust," *Review of Austrian Economics* 6 no. 2 (1993): 81–96.

Incorporation Acts allowing corporations to own stock in other corporations and holding companies, "the complex systems integrations achieved by the Rockefellers, Dukes, Morgans, and other industrial magnates of the Guilded Age could not have succeeded."[12] This *government* dislocation of market conditions, according to Crane, should thus motivate libertarians to accept antitrust law. He terms this view *Lochnerian* antitrust.

Escape from Mercantilism

It can be shown that Crane has virtually all of this backwards. Starting with the history, many scholars are aware that the late medieval monarchies in Europe had mercantile economies, in which the Crowns systematically franchised various industries and lines of trade out as exclusive monopolies and cartels to favored individuals and producer groups in exchange for bribes and payments, using the police powers of the state to protect them from both internal and external (foreign producer) competition.[13] Mercantile France and England were monopoly ridden to degrees that the U.S. economy has never *remotely* approached. England began to remove mercantile shackles—and experienced an industrial revolution. Adam Smith, David Ricardo and the British Classical School of economics, by showing how voluntary exchanges in free markets could coordinate economic activities and allocate scarce resources efficiently without government management, and by destroying the intellectual rationales for mercantile grants of monopoly and international trade restrictions, strongly aided that trend.

As for America, much of its economic history, from before the revolution on, is best seen as a struggle to escape mercantile shackles, allow open entry, and develop a free market economy, or rather as a struggle between those wishing to escape and those determined to employ mercantile practices. The British Navigation Acts and tax policies against which the colonists revolted, were typical mercantile policies.[14] Yet after the revolution,

[12]Crane, pp. 506–508.

[13]For an introduction to the modern literature on Mercantilism, see Robert B. Ekelund & Robert D. Tollison, "Economic Regulation in Mercantile England: Hecksher Revisited," *Economic Inquiry* 18 no. 4 (1980): 567–99, and various papers in James M. Buchannan et al. (Eds.),*Toward a Theory Of The Rent-Seeking Society* (Texas A&M University Press, 1980).

[14]The British Townshend Acts, including a heavy tax on tea, resulted in a thriving black market in Dutch tea supplied by colonial smugglers. To counter this, Britain granted an import monopoly over tea to the East India Company in 1773. It was this mercantile act, and the threat it implied of similar future franchised private monopolies being used to punish the colonies, that motivated colonial rebels to hold the Boston Tea Party. See Charles Adams, *Those Dirty Rotten Taxes: The Tax Revolts That Built America* (New York: The Free Press, 1998).

many states began practicing some of the same mercantile policies, including putting up barriers restricting imports from other states. Inability of the central government under the Articles of Confederation to stop this was one of several important factors motivating the Philadelphia convention. Crane himself has told us what the Founders there thought about the government franchising monopolies.

The struggle continued after ratification of the Constitution, however. Albert Gallatin and Henry Clay's plans for high federal tariffs and subsidies for "internal improvements" to be built by franchised corporate monopolies were mercantile programs, which, fortunately, were mostly stymied by strict constructionist southern Senators. Likewise, Jeffersonian opposition to congressional establishment of the first Bank of the United States was based on their perception that it was a privileged mercantile monopoly. That opposition is why the bank was sunsetted with a 20-year charter at its incorporation in 1791, and why, with Madison in office, its charter was allowed to lapse in 1811. Likewise, the second Bank of the U.S., which was franchised by congress in 1816, came under intense criticism as a dangerous mercantile institution when its monetary manipulations generated a financial panic in 1819."[15] President Andrew Jackson, elected in 1828 and reelected in 1832, vetoed a bill renewing its charter that year, and began withdrawing federal deposits in 1833.[16]

Jacksonian Democracy, which long transcended Jackson's tenure in office, is well understood by scholars as not just a political party, but a powerful and popular democratic reform movement aimed at removing legal privilege of all kinds, including mercantile monopoly franchises. Three important expressions of that effort need mention. One I shall say little about was the free banking movement beginning in New York in 1837, which aimed at extending competition in banking by making it easier for aspiring

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[15]See William M. Gouge, A Short History Of Paper Money And Banking in The United States (New York: A. M. Kelley, 1969 [1833]).

[16]When Jackson began drawing down federal deposits at the bank for expenditures while depositing current tax and land sale revenues in state banks, the second bank was forced to restrict its note issues. It continued doing so for several years afterwards, however, with apparently deliberate intent of hurting the economy and forcing congress to renew its charter. In 1837, when the resulting business contraction became severe, Nicholas Biddle, Director of the Bank, who had obtained a Pennsylvania charter, tried to reinflate by borrowing extensively in Europe and using the proceeds to corner the U.S. cotton market. These efforts failed, and so did the bank, in 1841. Many modern historians gloss over this sordid behavior, so revealing of the corrupt and manipulative character of this mercantile institution and its officers. See Glyndon G. Van Deusen, *The Jacksonian Era: 1828–1848* (New York: Harper and Brothers, 1959) for a fairly accurate account.

competitors to obtain a state charter to enter the business.[17] A second was a huge constitutional reform movement that began about 1842, in which angry citizens led by Jacksonian reformers forced state after state to adopt constitutional amendments forbidding their legislatures from granting subsidies to private firms for infrastructure investment. This resulted from massive corruption of state legislatures and huge state debts (eight states were in default by 1842, and five admitted bankruptcy by repudiating their debts) generated by mercantile policies of franchising and subsidizing private incorporated monopolies to build and operate what mostly turned out to be unprofitable canals and turnpikes (and after 1830, railroads) between urban centers.[18]

Perhaps the culminating expression of Jacksonian antimonopoly reform, however, was the General Incorporation Acts. Corporations had their origins in the British joint stock companies of the 16th century. The selling of ownership shares in a business enterprise was one of the greatest inventions in history, allowing many people to *voluntarily* pool resources and hire professional managers, to undertake large scale projects for mutual benefit.[19] Previously, only governments could amass the resources necessary for large projects, through taxation, confiscation, enslavement (thus, the pyramids), and other *coercive* methods. This discovery inherently threatened much of the power of the state, by providing a mechanism through which many things previously thought to be state functions simply because they were so costly could now be performed privately by contract in the market.

The monarchs, however, recognizing the fund raising power of selling ownership share in a potentially profitable business enterprise, and sensing

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[17]See Ignacio Briones and Hugh Rockoff, "Do Economists Reach a Conclusion on Free Banking Episodes?" *Econ Journal Watch* 2 no. 2 (August 2005): 279–324, Arthur Rolnick and Warren E. Webber, "Inherent Instability in Banking: The Free Banking Experience," *The Cato Journal* 5 no. 3 (Winter 1986): 877–890, and Rolnick and Webber, "New Evidence on the Free Banking Era," *American Economic Review* 73 no. 5 (December 1983): 1080–91.

[18]John Joseph Wallis, "American Government Finance in the Long Run: 1790–1990," *Journal of Economic Perspectives* 14 no. 1 (Winter 2000): 61–82, Carter Goodrich, "The Revulsion Against Internal Improvements," *Journal of Economic History* 10 no. 2 (November 1950): 145–69, and Guy Stevens Callender, "The Early Transportation and Banking Enterprises of the States," *Quarterly Journal of Economics* 17 no. 1 (November 1902): 111–62.

[19]In stark contrast to the Legal Concession Theory that corporations are inherently creations of the state, unable to exist or function without state granted permission and special legal privileges, Robert Hessen, *In Defense Of The Corporation* (Stanford CA: Hoover Institution Press, 1979): 32–33, points out that *all* business methods, relationships, and forms of organization have been privately created and perfected in the market place, and *none* originated by decree of King, court, or legislature.

the threat to their power, took over the exclusive right to charter corporations, forbidding their private creation without a government franchise. With that control they could direct the use of incorporation toward state projects if they wished, or raise revenue for the Crown by selling exclusive corporate franchises over particular lines of manufacture, regional exploration, banking, or trade.[20] In Britain and the colonies, municipalities often franchised a corporation specifically to finance and undertake a public building project, such as a canal, harbor, wharf, or street improvement. Anciently, many mercantile cartels were also granted to organized groups of craftsmen (the medieval guilds). In the U.S., such medieval practices were continued in the state efforts at subsidizing the building of turnpikes, canals and railroads before the Civil War.

The first General Incorporation Acts passed were in Pennsylvania and Connecticut in 1836 and 1837. Britain passed a similar law in 1844, and six other U.S. states also followed in the 1840s. In the 1850s the trend accelerated, with fifteen more states passing General Incorporation Acts. Thus, most existing states had already passed such laws *before* the Civil War, contrary to Crane. The rest followed after the War. What these laws did was remove special privilege and monopoly status from incorporation by removing legislative enactment as a requirement. Henceforth, the state Commissioner of Corporations (or similar official) was required to *automatically,* without discretion, *register* corporations established *by private contract* (the Articles of Incorporation), for any legitimate business purpose chosen by the parties involved.[21]

While for some centuries it had been true that corporations were "creatures of the state" simply because governments had arrogated that power to themselves, they ceased being so immediately. As for Crane's claim (following many other equally confused authors) that the specific powers granted to corporations under these acts themselves constitute special privileges and immunities, there is neither time nor space here to explain the reasons for such provisions, so one simple observation must suffice. *Anything available to everyone is by definition not a special privilege or immunity,* even if some

[20]However, even with the political support of such franchised monopolists, eager to protect their monopoly grants, repeated efforts were necessary to suppress by law and decree the private, contractual formation of corporate business organizations. These efforts continued even after Parliament had wrested control of legislation from the Monarchy. The last gasp was the Bubble Act of 1720, forbidding companies without government charters from issuing transferable shares. The act failed, leaving the British authorities no option but to allow general incorporation. The same struggle occurred in the colonies and early U.S., with the same result. See Hessen, *In Defense of the Corporation*, pp. 29–30.

[21]Hessen, In Defense of the Corporation, pp. 25–26.

choose not to avail themselves of the option. It was precisely the nature of the General Incorporation Acts that they allowed *any* aspiring group of business associates to incorporate for any legitimate business purpose (or at least, any purpose on which there was no state entry restriction) whatsoever. Crane should reflect on the fact that many businessmen choose not to incorporate even though the option is available, but instead to operate as proprietorships or partnerships. Apparently there are some advantages to other forms of business organization, and *disadvantages* to incorporation.

Corporate Oppression, or Competition?

Demonstrating that the General Incorporation Acts were an *antimonopoly* reform does not, of course, prove that Crane is wrong in attributing monopoly at the end of the 19th century to those acts and the aggregations of private capital they facilitated. Actions, both public and private, often have unintended consequences. However, to Crane's assertion that the Acts gave rise to a 'monopoly problem' one must ask, in all seriousness, *what* monopoly problem? Earlier in the 19th century, with a rather dispersed, rural population subject to high transport costs, local monopoly power was frequent and meaningful, quite aside from the many mercantile monopolies created by the states. As market entrepreneurs developed and extended the transportation and communication systems, and those costs fell over the 19th century, markets were increasingly integrated and local monopoly power declined.

Larger integrated markets, however, required larger firms employing mass production methods with extensive distribution and sales networks. In the post Civil War period the General Incorporation Acts allowed this need to be met through large private capital investments financed by stock and bond sales to tens, if not hundreds of thousands of ordinary persons. Innovative technologies of production and whole new products introduced by daring entrepreneurs (many of whom worked their way up from the laboring classes) further aided the emergence of large business enterprises.

Now certainly it is true that some members of the public became fearful of such firms. Many people find it difficult to distinguish large efficient firms, competing against a fringe of smaller competitors, and hence having no capacity to fix product price above the competitive level, from legally protected monopolies and cartels, which actually have such power.[22]

[22]The revulsion against large successful corporations among some segments of the public in the late 19th century was less a spontaneous reaction to actual corporate abuses, however, than a result of a concerted propaganda campaign by a coalition of bitter fringe competitors, union organizers, and muckraking Progressive journalists and intellectuals

Indeed, corrupt public officials eager to accrue power and sell influence continued offering to franchise rapacious monopolies and cartels with some frequency even after the states began passing the General Incorporation Acts.

Perhaps the worst such case was the Central Pacific Railroad, legally franchised and protected by the California legislature for 30 years against competition from other railroads within California. Also witness the massive fraud, corruption in the U.S. Congress, bribery of the Vice President of the U.S., and waste of public resources surrounding the federal franchising and subsidization of the Central Pacific and the Union Pacific to build the first transcontinental railroad after the Civil War.[23] With such examples in their lives, people to whom large corporate enterprises were a new thing can be forgiven the erroneous belief that large size of a firm *per se* constitutes some horrible threat, but it is harder to forgive Crane and other progressive scholars of that particular prejudice.

Of course it is also true that some really huge enterprises were established by private merger or trust formation between firms that had already become large through internal growth, so we should seriously consider Crane's assertion that without the General incorporation Acts those combines could not have been successful. But none of the combines Crane cites actually were successful. Armentano has shown that the formations of Standard Oil (Rockefeller), American Tobacco (J. B. Duke), and U.S. Steel (J. P. Morgan) by trust or merger were all followed by ongoing *loss of market share* by the combines, relative to the sums of the pre-merger market shares of the formerly independent firms.[24] In addition, *none* of those combines were able to prevent subsequent entry of other competing firms into their markets. And in none of those cases does the actual record of price and output show that the firms acted in a monopoly fashion, either before or after merger. They had gained their dominant statuses, pre-merger, through superior productive efficiency. Merger and trust formation in each case seems to have actually *cost* them some of their competitive edge.[25]

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such as Ida Tarbell, Lincoln Stephens, Paul Kellog, Henry Demerest Lloyd, Jacob Riss, and John Spargo. Outright socialists also sang the same jarring and off-key song. Not everyone listened, however.

[23]On the Central Pacific, see Oscar Lewis, *The Big Four* (New York: Alfred A. Knopf, 1938). On the transcontinental railroads see Burton Folsom, *The Myth Of The Robber Barons* (Herndon VA: Young America's Foundation, 1991).

[24]Dominick T. Armentano, *Antitrust: Anatomy of a Policy Failure* (New York: Holmes & Meier, 1990). Crandall and Winston (note 1 above) find much the same evidence.

[25]This is not to say that merger can never establish a more efficient (combined) business enterprise. With some frequency, it can, and when it does, the public benefits. See James Rolph Edwards, "Corporate Raiders and Junk-Car Dealers: Economics and

Crane takes it as a given that monopoly power increased in the late 19th century. In fact, the effective monopoly power faced by ordinary people *decreased* while competition *increased,* as a direct cumulative result of the various Jacksonian reforms, despite the large, highly competitive corporate enterprises concentrating some markets, undercutting former local monopolies in the process.[26] For lack of data availability nobody has shown empirically that the large firms of the late 19th century were generally larger *relative to their* (larger, integrated) *markets* than was the case for the smaller firms in their more localized markets earlier in the century, so that markets became more concentrated on average. Nor have they shown that entry barriers increased, so that actual monopoly power was greater. Crane shows no such thing, and the historical evidence is the opposite: entry barriers were removed and/or reduced, by the Jacksonian reforms and other developments.

One serious effort, by Nutter and Einhorn, has been made to compare the extent of enterprise monopoly in 1899 with that in 1958.[27] Actually, what Nutter and Einhorn measured was market output concentration ratios, with arbitrary cutting points (usually 50 percent for the top four firms) above which an industry was simply *categorized* as monopolistic, an approach largely devoid of theoretical justification, but useful for intertemporal comparison. The fractions of national income generated in what they termed the 'workably competitive' industries, the 'monopolized' industries, and the regulated or government operated sectors, were then computed and compared for the different years. Nutter and Einhorn concluded that the overall extent of monopoly declined slightly over 1899-1958.[28] This was likely a continuation, at a much slower rate, of the trend toward increasing competition from the early to the late 19th century.

Oddly, Nutter and Einhorn nowhere cited the enormously influential paper published by Arnold Harburger in 1954. Harburger used a huge sample of industries to directly estimate all the deadweight losses (literally, the value

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Politics of the Merger Controversy," *The Journal of Libertarian Studies* 9 no. 2 (Fall 1990): 95–115.

[26]The concentration of the meat packing industry by the Big Four Chicago firms of Swift, Armour, Morris, and Hammond in the 1890s, for example, occurred through efficiency enhancing innovations such as (dis)assembly line methods and refrigerated rail cars allowing them to transport meat long distances and undercut the prices of local meat packers. See Charles R. Morris, *The Tycoons: How Andrew Carnegie, John D. Rockefeller, Jay Gould, and J. P. Morgan Invented The American Supereconomy* (New York: Henry Holt & Co., 2005).

[27]G. Warren Nutter and Henry Adler Einhorn, *Enterprise Monopoly In The United States: 1899–1958* (New York: Columbia University Press, 1969).

[28]Nutter and Einhorn, pp. 89–90.

of consumer surpluses lost rather than redistributed to investors in firms and industries where unit prices were above unit costs) attributable to monopoly power in the whole economy. He found the sum to be a mere one-tenth of one percent of national income.[29] That was an amount so small that it embarrassed the economics profession for having spent so much time worrying about what was obviously, in retrospect, a trivial matter. Deadweight losses due to monopoly in 1899, even had they been several times as large a fraction of national income as Harburger found for 1950 (which is unrealistic), would still have been trivial.

For another form of evidence on monopoly power and exploitation in the Progressive Era, one might look directly at measures of levels and trends in the well being of ordinary persons in the late 19th and early 20th centuries. No surprise, the actual data show nothing like the dismal picture of massive exploitation and immiseration of consumers and employees by giant corporations painted by progressives then and now. Here also, a little historical context is useful. By current estimates, over the 16th and 17th centuries roughly marking the terminus of the medieval period, real per-capita income in Europe grew at an annual compound rate of only 0.1 percent.[30] By my calculation, that rate of growth would take 694 years to double any initial level of real income per person, and in fact, those were relatively prosperous and progressive centuries. Angus Maddison has found that, over the prior millennium, from AD 500 to AD 1500, the annual rate of increase in output per capita averaged *zero*.[31] Between 1700 and 1820, with the industrial revolution starting in Britain and classical liberalism infecting the continent, European annual output growth per capita rose to a .2 percent compound rate per annum. That would still take 347 years to double people's real incomes.

In the U.S., real output and income rose at a rapid rate from the beginning of the constitutional republic, and did so *even more rapidly* during the

[29]Arnold C. Harburger, "Monopoly and Resource Allocation," *The American Economic Review* 44 no. 2 (May 1954): 77–87. Of course it is precisely the message of the rent-seeking literature stemming from Tulloch (note 9), that deadweight losses are *not* the only costs of monopoly, because the use of resources as lobbying expenses, bribes, campaign contributions, etc., in an effort to obtain a monopoly franchise (or other privilege) from government dissipates the anticipated profits as social costs. *Reducing such rent-seeking costs, however, requires not antitrust, but constitutional reforms removing government discretion to grant special legal privileges.*

[30]Oded Gaylor and David N. Weil, "Population, Technology, and Growth: From Malthusian Stagnation to the Demographic Transition and Beyond," *The American Economic Review* 90 no. 4 (September 2000): 806–28.

[31]Angus Maddison, *Phases of Capitalist Development* (New York: Oxford University Press, 1982).

late 19th century. Douglas North, the famous Nobel prize winning economic historian, estimates that real income per capita grew at a 2 percent annual compound rate between the Civil War and World War I, and says there is probably not another period of similar length in U.S. economic history with growth rates that high.[32] That is twenty times faster than the growth rate cited above for Europe during the 16th and 17th centuries. If North is correct, that would double a person's real income in just over 35 years, well within his or her normal work life at that time.

Recently I calculated, from data in *U.S. Historical Statistics*, that the mean real hourly wage of manufacturing employees increased 37.7 percent from 1890 to 1914. In the same period, by my estimate, annual work time of those employees decreased by nearly eleven and a half percent, while their free time rose by over 30 percent.[33] All this occurred as a simple consequence of capital investment and technical advance rapidly raising productivity during the *Lochner* era. Little or none of it can be attributed to unions or to state laws mandating reduced work hours. Unions were too weak and their membership too small. As for the reduced hours laws, they were too few, their coverage was too partial, and many of those that were passed were declared unconstitutional by the courts.[34]

Virtually every other measure of human well being, whether caloric intake per day, mean height and stature of adults, infant and adult mortality rates, and so on, also showed rapid improvement in this period of alleged rampant robber barons, excessive laissez faire, and systematic corporate exploitation and immiseration of consumers and employees. Mean life expectancy of Americans, which was only 35 years in 1800, had risen to 48 years by 1900, and was well over 50 before World War I. It is no accident that Progressives such as Crane seldom make any reference to this historical record. It is difficult to make the case, to persons even remotely aware of such facts, that giant corporations were systematically oppressing workers and consumers in the Progressive Era, when those corporations themselves

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[32]Douglas North, et al., *Growth and Welfare in the American Past: A New Economic History* (3rd ed. Englewood Cliffs, NJ: Prentice Hall, 1983): 123. It is generally estimated that over the span of U.S. history, real income per capita has risen at an average annual compound rate of about 1.5 percent.

[33]Computed from part 1 series D 845–76. Nominal wage numbers were adjusted by the 1967 base year Consumer Price index from series E 135–66 to obtain real wage rates. See James Rolph Edwards, "The Decline in Work Time and the Increase in Free Time of Manufacturing Employees From 1890 to World War I," working paper, MSU-Northern, 2007.

[34]See Clyde E. Jacobs, *Law Writers and the Courts* (Berkely CA: University of California Press, 1955): 78–84.

were among the primary engines of capital investment, technical innovation, and mass production.

Conclusion

From the perspective developed in this paper it is hard to credit Crane's argument that the General Incorporation Acts generated a monopoly problem requiring federal antitrust policy. Quite the opposite: as intended by their Jacksonian proponents, they helped *relieve* a monopoly problem that had existed for centuries, and had been abating all too slowly. It is simply no accident that the period from the Civil War to World War 1 of rapid growth in both the number and size of corporations, of massive industrialization, and of intense competition following state adoption of the General Incorporation Acts, was precisely the period of most rapid improvement in the well being of ordinary persons in all of U.S. history.[35]

The brief historical review above should make one thing clear: those periods in which corporations were exclusive instruments of government—Crane's "*special* corporate charter model" to which he wishes us to return—were precisely the periods in which monopolies and cartels were rampant. That inherently medieval model was an essential component of mercantile institutions and policy, and in practice it aided and extended medieval economic stagnation for over three centuries. Crane's arguments therefore provide no justification at all that libertarians should find persuasive for antitrust law or policy. And if *Lochnerian antitrust* means returning to the special corporate charter model he favors, it would be a disaster.

[35]The mystery is how to square this progress, clearly apparent to most persons at the time, with the Populist and Progressive complaints expressed by so many others. For several insights on the matter see James Rolph Edwards, "Protests, Progress, and Democracy: Some Economics of Expressed discontent," *The Journal of Private Enterprise* 16 no. 2 (Spring 2001): 1–13.