Antimonopoly and State Regulation of Corporations in the Gilded Age and Progressive Era

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"The anti-trust law, which has been a harmless threat for 18 years, is suddenly being enforced," the prominent journalist Herbert N. Casson announced excitedly in 1908. Casson was not, as most current readers might suppose, talking about the Sherman Act or trumpeting the trust-busting activities of President Theodore Roosevelt. Rather he was extolling the antitrust laws of states like Texas, Missouri, Kansas, Arkansas, and Kentucky and the lawsuits their attorneys general were bringing against industrial behemoths like Standard Oil and International Harvester. These southwestern states, Casson asserted, had trusts on the run. Their laws had not only made the giant combine "an outlaw, but an outlaw with a bounty upon its head."[1]

Most histories of the period tell a very different story. According to the standard view, states responded aggressively to the rise of Standard Oil and other trusts in the 1880s, but by the early twentieth century had largely ceded the terrain to the federal government. Scholars have offered two main explanations for this shift, both of which turn on the limits of the United States' federal system of government. First, they claim, New Jersey's move in 1888 to amend its general incorporation law in the interests of big business set off a chartermongering competition for corporate tax revenues that induced other states to weaken their laws. Second, they argue,

[1] Herbert Casson, "Driving the Trusts Out of the Southwest," reprinted from *Broadway Magazine* by the *St. Louis Post-Dispatch* (Apr. 5, 1908), B6.

combinations that operated in national and international markets could punish states that pursued tough antitrust agendas by shifting their operations elsewhere. In an environment where capital could move easily across state boundaries, only the federal government could be an effective regulator of large-scale enterprises.[2]

This essay challenges this familiar account of antitrust history. I show, first of all, that the literature greatly exaggerates the extent to which there was a regulatory race to the bottom. Although some states responded to New Jersey's liberalization by quickly copying its innovations, most only gradually modernized their general incorporation laws, and when they did, their statutes retained considerable regulatory content. At the same time, most states took steps to assert their power over foreign corporations (corporations chartered by other states or governments) by insisting that they adhere to the same laws as domestic corporations. They also imposed new taxes on these outside companies. Indeed, rather than a race for chartering fees,

[2] See, for examples, Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Baltimore: Johns Hopkins Press, 1954); Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, MA: Harvard University Press, 1991); William G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton, NJ: Princeton University Press, 1997). I shared this view when I wrote *The Great Merger Movement in American Business, 1895-1904* (New York: Cambridge University Press, 1985). The great exception to this generalization about the literature is the pathbreaking work of James May on state antitrust initiatives, especially his "Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918," *University of Pennsylvania Law Review* 135 (Mar. 1987): 495-593; and "Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918," *Ohio State Law Journal* 50, no. 2 (1989): 257-395. See also Steven L. Piott, *The Anti-Monopoly Persuasion: Popular Resistance to the Rise of Big Business in the Midwest* (Westport, CT: Greenwood Press, 1985).

New Jersey's amendments encouraged states to enact a host of new corporate tax statutes that opened to them previously untapped sources of revenue.

If there was no regulatory race to bottom, then what happened to the states' antimonopoly efforts? The answer to that question varied from one state to the next. Some states played an important role in prosecuting Standard Oil and other trusts in the late nineteenth century, but then abandoned these efforts in the early twentieth. In other states, however, antitrust activity gathered steam over the same period. This variation, I show, is not consistent with the idea that states were helpless against combines that could shift their operations elsewhere. To the contrary, the states that were most likely to pare back their prosecutions were precisely those where large-scale enterprises had the largest sunk investments. Instead, what mattered most for the pattern of enforcement was the internal political economy of each state. Although there were always business groups lined up on both sides of the trust issue, it was mainly in the East, where most of the combines were headquartered, that state governments became more quiescent over time. By contrast, in the West, where agrarian groups were stronger, antimonopoly fervor had a greater and more long-lasting effect on policy. Although by the 1920s, governments in the West, like those elsewhere, had generally accommodated themselves to the increased scale of industry, their vigorous prosecutions over the preceding decades had significantly reshaped the competitive environment. Federal trust busting was only part of a larger story.

General Incorporation as Antimonopoly

One cannot understand the states' response to the rise of giant business corporations without appreciating the extent to which antimonopoly was baked into the general incorporation laws that states began to enact in the middle decades of the nineteenth century. Before the rise of Standard Oil in the late nineteenth century, the monopolies that most aroused public outrage were government creations. For centuries political elites had endeavored to entrench themselves in power by awarding special privileges, especially grants of monopolies, to their allies. Such practices had been common in England in the eighteenth century, and protests against them (for example, against the special tax breaks that gave the East India Company an effective monopoly on tea in the American colonies) were at the heart of the colonists' revolt against British rule.[3] But the practice of rewarding cronies with economically valuable privileges did not end with the Revolution. To the contrary, most of what state legislatures did in the half century following the creation of the United States was to enact bills that granted special favors to their supporters. Among the most important of these favors were corporate charters that bestowed advantages like limited liability that were not available to other businesses.[4]

This system of special legislation generated enormous discontent, but it was nonetheless remarkably persistent. Elites in power benefited from the ability to dispense charters to members of their coalitions. Those out of power complained bitterly about this "corruption," but they

[3] Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967); Arthur M. Schlesinger, *The Colonial Merchants and the American Revolution, 1763-1776* (New York: Columbia University, 1918). See also Richard John's essay in this volume.
[4] This argument, which is continued in the next several paragraphs, is from Naomi R. Lamoreaux and John Joseph Wallis, "Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy," *Journal of the Early Republic* 41, no. 3 (Fall 2021): 403-433.

behaved in exactly the same way when they were in office, handing out charters to supporters and freezing out opponents. Indeed, as the electoral franchise spread and American politics became more competitive in the early nineteenth century, political elites increasingly resorted to these favors. To do otherwise was to risk losing control of the government and, with that, access to corporate privileges and other special advantages.

What finally made reform possible was a crisis in public finance in the early 1840s that led eight states and one territory to default on their bonded debt and a number of other states to teeter on the brink of default. In the wake of the crisis, five of the defaulting states wrote new constitutions, as did three of the states that narrowly avoided default. Delegates to the conventions that drafted these documents aimed to prevent future crises by limiting their governments' ability to borrow. But they also took advantage of the political upheaval caused by the defaults to curb legislators' power to hand out privileges. As a result, all of the new constitutions included provisions that prohibited special charters of incorporation, stipulating that corporations could only be formed under general laws that gave everyone access to the same privileges. Although other states did not similarly amend their constitutions during this period, most responded to the clamor for reform by enacting general incorporation statutes. These statutes were of only limited consequence, however. Without constitutional bans on special charters, legislatures continued to dole out privileges to supporters that were not available under the general laws. Hence relatively few companies organized under them. Pennsylvania is a good example. Five years after the enactment of its 1849 general incorporation law for manufacturing less than a dozen companies had actually used it to incorporate, although in 1855 alone the legislature passed 196 special bills to charter or amend the charters of for-profit business corporations.[5] Discontent thus continued to mount until another wave of constitutional revisions after the Civil War spread the prohibition on special charters to most of the remaining states, including Pennsylvania. By 1880, 24 of 38 states had such prohibitions in their constitutions, and almost all the rest would adopt them over the next couple of decades.[6]

Because the constitutional revisions of mid-nineteenth century restricted the powers of state legislatures, scholars have often viewed them as marking a shift toward laissez-faire.[7] This is a mischaracterization, however. Shaped by resentment of the privileges that legislators had conferred on political favorites, the reforms were anti-government in the sense that they aimed to stop legislators from manipulating the economy for their own ends. But they also reflected real fears that the same wealthy and powerful businesses that had benefited from legislative largess would reap disproportionate gains from the general laws. As a result, when the states revised their constitutions to ban special charters, they took pains to assert their ongoing regulatory

[5] Louis Hartz, *Economic Policy and Democratic Thought: Pennsylvania, 1776-1860* (Cambridge, MA: Harvard University Press, 1948), 39-41; Naomi R. Lamoreaux, "Revisiting American Exceptionalism: Democracy and the Regulation of Corporate Governance: The Case of Nineteenth-Century Pennsylvania in Comparative Context," in *Enterprising America: Businesses, Banks, and Credit Markets in Historical Perspective*, ed. William J. Collins and Robert A. Margo (Chicago: University of Chicago Press, 2015), 25-71 at 40.

[6] The laggards were in New England and the South. Connecticut, Massachusetts, New Hampshire, and Rhode Island would never prohibit the practice, but all the other states adopted the ban by the early twentieth century.

[7] This is the implication of Hartz's *Economic Policy and Democratic Thought*. See also James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville: University of Press of Virginia, 1970); and Ronald E. Seavoy, "Laissez-Faire: Business Policy, Corporations, and Capital Investment in the Early National Period," in *Encyclopedia of American Political History*, ed. Jack P. Greene (New York: Charles Scribner's Sons, 1984), Vol. 2, 728-737.

authority over corporations. In the wake of the Supreme Court's decision in *Dartmouth College v. Woodward* (1819) that corporate charters were contracts that governments could not unilaterally abrogate, states had learned to insert clauses into charters in which they reserved the right to alter or even revoke them. Now that corporations were to be chartered under general laws, the new constitutions declared, these laws had to be conditional on the states' absolute power to revise their terms.[8]

Responding to the same concerns about concentrated economic power as the constitutional conventions, legislatures enacted general incorporation statutes in the 1840s and 1850s that aimed to level the economic playing field and keep it as flat as possible. As Table 1 documents for seven important industrial states, many aimed to limit the size to which any individual corporation could grow by imposing ceilings on the amount of capital a company could raise or the amount of money it could borrow.[9] Some made shareholders doubly or even unlimitedly liable for corporate debts, and all imposed extra liabilities on them in at least some circumstances, usually to insure that workers got paid when corporations failed. Officers and directors were also personally liable if they failed to follow the law, for example by paying out

[8] *Dartmouth College v. Woodward*, 17 U.S. 518 (1819). See Naomi R. Lamoreaux, "The Dartmouth College Decision as a Pillar of the Regulatory State," *HistPhil*, https://histphil.org/2019/07/11/the-dartmouth-college-decision-as-a-pillar-of-the-regulatory-state/. An important exception was Illinois, whose 1848 constitution omitted this clause.
[9] Delaware, which in the twentieth century would become the corporate home of most of the nation's largest corporations, is not included in the table because, for all practical purposes, it did not have a general incorporation statute until the state's 1897 constitution banned special charters, at which point it simply enacted New Jersey's law. S. Samuel Arsht, "A History of Delaware Corporation Law," *Delaware Journal of Corporate Law* 1, no. 1 (1976): 1-22; Russell Carpenter Larcom, *The Delaware Corporation* (Baltimore: Johns Hopkins Press, 1937).

dividends in excess of earnings. All the statutes also mandated specific governance structures, with some imposing voting rules that curbed the power of the wealthiest shareholders. Most denied corporations perpetual life but insisted instead that they periodically secure the approval of their shareholders to extend their existence. And most required corporations to submit regular financial reports.

Table 1: Restrictions on Manufacturing Companies in Early General Incorporation Statutes

State	Year of statute	Restrictions on capital stock	Ceiling on borrowing	Restrictions on duration	Annual filing required	Voting rule	Liability rules
Massachusetts	1851	Minimum \$5,000; maximum \$200,000	Capital stock	None	Yes	None	Shareholders personally liable to workers; officers personally liable if fail to follow law
New York	1848	None	Capital stock	50 years	Yes	One vote per share	Shareholders personally liable to workers; directors personally liable if fail to follow law
New Jersey	1846	None	Capital stock	None	Yes	None	Shareholders personally liable if reduce capital or company fails to publish annual statement of condition; officers personally liable if fail to follow law
New Jersey	1849	Minimum \$10,000	Capital stock	50 years	Yes	None	Shareholders liable for amount of any reduction of capital or excess dividend they receive; officers personally liable if fail to follow law
Pennsylvania	1849	Minimum \$20,000	Three times capital stock	20 years	Yes	One vote per share up to maximum one third of total	Directors personally liable if fail to follow law

Ohio	1846	Minimum $5,000; maximum $200,000	None	40 years	Yes	One vote per share	Shareholders personally liable to workers; directors personally liable if fail to follow the law
Ohio	1852	None	None	None	Yes	None	Shareholders have unlimited liability
Illinois	1849	None	Capital stock	None	Yes	One vote per share	Shareholders personally liable to workers; trustees personally liable if fail to follow the law
Illinois	1857	Minimum $10,000; Maximum $500,000	Capital stock	50 years	No	One vote per share	Directors personally liable if fail to follow the law.
California	1850	None	Capital stock	50 years	Yes	One vote per share	Shareholders have unlimited liability
California	1853	None	Capital stock	50 years	No	One vote per share	Shareholders have unlimited liability[10]

[10] Unless otherwise noted, all statutes are from the session laws library in HeinOnline, https://heinonline.org/HOL/Index?index=sslusstate&collection=ssl.
Massachusetts: "An Act relating to joint stock companies," approved May 15, 1851; and "Manufacturing Corporations," *Revised Statutes* (Boston: Dutton & Wentworth, 1836), Ch. 38.
New York: "An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed Feb. 17, 1848.
New Jersey: "An Act to authorize the establishment, and to prescribe the duties of manufacturing companies," approved Feb. 25, 1846; "An Act to authorize the establishment, and to prescribe the duties of companies for manufacturing and other purposes," approved March 2, 1849.
Pennsylvania: "An Act to encourage manufacturing operations in this commonwealth," approved April 7, 1849.
Ohio: "An Act Relative to incorporations for manufacturing, and other purposes," Feb. 9, 1846; "An Act to provide for the creating and regulation of incorporated companies in the State of Ohio," May 1, 1852.
Illinois: "An Act to authorize the formation of corporations for manufacturing, agricultural, mining or mechanical purposes," approved Feb. 10, 1849; "An Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," approved Feb. 18, 1857.
California: "An Act concerning Corporations," passed April 22, 1850; "An Act to provide for the formation of corporations for certain purposes," approved April 14, 1853.

Many states revised their first-wave general incorporation statutes in the 1870s, at the height of what scholars have seen as the laissez-faire policies of the gilded age. Although, in some ways, the second-wave statutes were less regulatory than their predecessors, in other respects they were stricter. As Table 2 shows, ceilings on capital and duration tended to be relaxed, but most states still had them, and most states continued to limit corporate borrowing, require annual financial reports, and impose additional liabilities on shareholders under specific circumstances. Most states now mandated specific voting rules for electing directors, with an increasing number requiring that shareholders be allowed to cumulate their votes (a measure that aimed to increase the power of small shareholders).[11] Most also imposed detailed procedures that corporations had to follow to declare dividends and increase or decrease their capital, typically making directors personally liable if they did not follow the rules.

[11] Under cumulative voting rules, shareholders received as many votes as there were directors being elected and had the option of spreading them over an equal number of candidates, casting all of them for one candidate, or anything in between. By 1900, seventeen states had such rules. Charles M. Williams, *Cumulative Voting for Directors* (Boston, MA: Graduate School of Business Administration, Harvard University, 1951), 20.

Table 2. Restrictions on Manufacturing Companies in 1870s Wave of General Incorporation Statutes

State	Year of statute	Restrictions on capital stock	Ceiling on borrowing	Restrictions on duration	Annual filing required	Voting rule	Liability rules
Massachusetts	1870	Minimum $5,000; maximum $500,000	Capital stock	None	Yes	None	Shareholders personally liable to workers and liable to all if reduce capital; officers personally liable if fail to follow law
New York	1875	Maximum $2,000,000	One half the value of corporate property	50 years	Yes	One vote per share; cumulative voting	Directors personally liable if fail to follow law
New Jersey	1875	Minimum $2,000	None	50 years	No	None	Shareholders liable for amount of any reduction of capital they receive; directors personally liable if fail to follow law
Pennsylvania	1874	Maximum $5,000,000	Capital stock	None	Yes	One vote per share; cumulative voting	Shareholders personally liable to workers, if they reduce capital, and if they issue special stock; directors personally liable if fail to follow law
Ohio	1879	None	Capital stock.	None	Yes	One vote per share; cumulative voting	Shareholders have double liability
Illinois	1872	None	Capital stock.	99 years	No	One vote per share; cumulative voting	Directors personally liable if fail to follow law
California	1870	None	Capital stock	50 years	Yes	One vote per person	Shareholders have unlimited liability[12]

[12] Unless otherwise noted, all statutes are from the session laws library in HeinOnline.
Massachusetts: "An Act concerning manufacturing and other corporations," approved May 9, 1870.
New York: "An Act to provide for the organization and regulation of certain business corporations," approved June 21, 1875.
New Jersey: "An Act concerning corporations," approved April 7, 1875.
Pennsylvania: "An Act to provide for the incorporation and regulation of certain corporations," approved April 29, 1874.
Ohio: *The Revised Statutes and Other Acts of a General Nature in Force January 1, 1880* (Columbus, Ohio: H. W. Derby & Co., 1879), Vol. I, Title II, "Corporations," 836-978.
Illinois: "An Act concerning corporations," approved April 18, 1872.
California: "An Act to provide for the formation of corporations for certain purposes," approved April 4, 1870.

In the decades following the Civil War, moreover, many states added provisions to their constitutions that regulated corporations. During this period, it became more and more common for the constitutions to include separate articles devoted to corporations. This practice had begun during the 1840s and 1850s, when states began to ban special charters.[13] Although the early articles focused for the most part on banks and other special types of corporations, they sometimes included regulatory measures that applied more generally. For example, Michigan's 1850 constitution forbade corporations from acquiring real state beyond what was needed for their business purpose and made stockholders individually liable for workers' wages.[14] Ohio's 1851 constitution mandated that stockholders be subject at least to double liability.[15] California's

[13] See Illinois, 1848 Constitution, Article 10; Indiana, 1851 Constitution, Article 11; Iowa, 1846 Constitution, Article 8; Kansas, 1859 Constitution, Article 12; Michigan, 1850 Constitution, Article 15; Minnesota, 1857 Constitution, Article 10; New York, 1846 Constitution, Article 8; Ohio, 1851 Constitution, Article 13; Oregon, 1857, Article 11; and Wisconsin 1847 Constitution, Article 12. Unless otherwise noted, all references to state constitutions in this chapter are from the NBER/Maryland State Constitutions Project, http://www.stateconstitutions.umd.edu/index.aspx. The Oregon 1857 constitution is from Oregon State Archives: Transcribed 1857 Oregon Constitution, chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fsos.oregon.gov%2Farchives%2Fexhibits%2Fconstitution%2FDocuments%2Ftranscribed-1857-oregon-constitution.pdf&clen=358686&chunk=true. The Wisconsin 1848 constitution is from "Constitution of the State of Wisconsin," Wisconsin Historical Society, https://content.wisconsinhistory.org/digital/collection/tp/id/71777.

[14] Michigan, 1850 Constitution, Article 15, Sections 7 and 12.

[15] This provision was repealed only in 1903. In 1913 it was reinstated for banks and then repealed again during the Great Depression. Ohio, 1851 Constitution, Art. 13, Sec. 3, Amend. 12 (1903), Amend. 65 (1913), and Amend. 109 (1937).

1849 was went further and made all corporate shareholders unlimitedly liable for corporate debts according to their proportion of total capital.[16]

Not only did most of these provisions persist, but as more states added articles on corporations to their constitutions, they also added more regulatory content. Thus Article 16 of Pennsylvania's 1874 constitution ("Private Corporations") contained thirteen sections that, among other things, mandated that corporations adopt cumulative voting in elections for directors, limited corporations to the lines of business "expressly authorized" by their charters, prohibited corporations from issuing stocks or bonds except in exchange "for money, labor done, or money or property actually received," declared fictitious capital void, and specified the procedures that corporations had to follow to increase their capital or indebtedness.[17] California's 1879 constitution included essentially the same set of regulations. In addition, it targeted speculation in corporate shares by declaring void "[a]ll contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day." It also ordered the legislature "to regulate or prohibit the buying and selling of the shares of the capital stock of corporations in any stock board, stock exchange, or stock market under the control of any association."[18] Wyoming's 1889 constitution required corporations to limit their operations to a single line of business: "No Corporation shall have power to engage in more than

[16] This provision was reiterated in California's 1879 constitution and then repealed in 1930. California, 1849 Constitution, Art. 4, Sec. 36, 1879 Constitution, Art. 12, Sec. 3 and Amend. 203 (1930).
[17] Pennsylvania, Constitution of 1874, Article 16, Sections 4, 6, and 7.
[18] California, 1879 Constitution, Art. 4, Sec. 26; Art. 12, Sec. 3, 9, 11, and 12.

one general line or department of business, which shall be distinctly specified in its charter of incorporation."[19]

The continued—actually increasing—regulatory content of many state constitutions and general incorporation statutes attests to the ongoing determination of political leaders in these jurisdictions to keep the corporate playing field level. Perhaps the most significant restrictions on big business resulted, however, from what was missing from these instruments: any provisions that allowed corporations to invest in the stocks or bonds of other corporations or that set up procedures for two or more corporations to merge. Under the common law, corporations could only exercise powers that they were explicitly granted or that were required to carry out their primary purpose. Purchasing stock in other companies was not considered a necessary ancillary power, and as a result, without specific legal authorization, corporations could not do it.[20] Similarly, mergers were governed by the common-law rule that any change in the fundamental nature of the firm had to receive the unanimous approval of the shareholders. Thus even a single dissenting shareholder could dramatically raise the cost of what otherwise would have been a profitable combination.[21]

[19] Wyoming, 1889 Constitution, Art. 10, Sec. 5.

[20] For a discussion of the common-law rule, see *People v. Chicago Gas Trust*, 130 Ill. 268 (1889), where the Illinois Supreme Court dissolved the Chicago Gas Trust on the grounds that holding stock in other companies was not a legal business purpose.

[21] Controlling shareholders in one corporation could personally buy enough shares in another to secure control, but that method of consolidating two companies required the principals to devote a considerable proportion of their own wealth to the project. During the late nineteenth century courts in some jurisdictions moved away from the strict unanimity rule, especially for transportation mergers that received state blessings, but considerable uncertainty remained until New Jersey amended its general incorporation law in 1888 to permit holding companies and facilitate mergers. William J. Carney,

Regulation during the Chartermongering Era

Although the general incorporation laws that states enacted in the mid-nineteenth century contained numerous regulatory provisions, states did not initially create administrative structures tasked with ensuring that corporations adhered to them. For the most part, applications for charters received little or no review. In some states, local officials simply filed them along with deeds in county record books. In others, state officials ostensibly checked them for conformity with the law, but even in those cases there was little real oversight.[22] Indeed, none was thought to be necessary, for the penalties that could be assessed for violations were thought to be a sufficient deterrent: corporations faced the threat of dissolution; and their officers risked being held personally liable for corporate debts. Firms found ways to evade the law legally, however, and the workarounds they devised forced states to enact new laws and to invest in building the capacity to enforce them.

The most important workaround was the trust contract, whose use for the purpose of horizontal combination was pioneered by the Standard Oil Company in the 1870s and early '80s. Standard accounted for only about 4 percent of the nation's refining capacity in 1870, but by

"Fundamental Corporate Changes, Minority Shareholders, and Business Purposes," *American Bar Foundation Research Journal* 1980 (Winter 1980): 69-132.

[22] For example, Massachusetts' 1870 general incorporation act created the office of Commissioner of Corporations, but this official seems to have been primarily concerned with collecting taxes from active corporations, and the office was merged with that of the Commission of Taxes in 1890. See Massachusetts General Court, "An Act concerning manufacturing and other corporations," approved May 9, 1870; and "An Act relative to the offices of tax commissioner and commissioner of corporations …" approved April 2, 1890. Unless otherwise noted, all statutes are from the session laws library in HeinOnline, https://heinonline.org/HOL/Index?index=sslusstate&collection=ssl.

1873 it had taken over the competing petroleum refineries in its home city of Cleveland and was on its way toward controlling most of the other firms in the industry.[23] As an Ohio corporation, chartered under that state's general incorporation statute, Standard had no easy way to assert managerial authority over these acquisitions. Ohio law barred corporations from holding stock in other corporations and also made it difficult for two or more corporations to merge, especially with out-of-state companies. To solve this problem, Standard's lawyers made novel use of the voting trust, a type of private contractual arrangement generally accepted by the courts as a legitimate way of stabilizing a corporation's management. Stockholders in the firms that Standard acquired transferred their shares to a board of trustees dominated by Standard's officers, receiving in exchange certificates from the trust. In this way, Standard was able to assert control over about 90 percent of the nation's refiners by the early 1880s.[24]

The ease with which Standard circumvented Ohio's corporation law set off a political counter reaction that grew stronger when it became apparent that other combinations were copying Standard's example. A number of states, then the federal government, and then still more states, enacted antitrust laws that aimed, in the language of Kansas's 1889 statute, to make

[23] Elizabeth Granitz and Benjamin Klein, "Monopolization by 'Raising Rivals' Costs': The Standard Oil Case," *Journal of Law and Economics* 39 no. 1 (1996): 1-47.

[24] For the development of the agreement, see Allan Nevins, *Study in Power: John D. Rockefeller, Industrialist and Philanthropist* (New York: Charles Scribner's Sons, 1953), Vol. I, Ch. 21; Harold F. Williamson and Arnold R. Daum, *The American Petroleum Industry: The Age of Illumination, 1859-1899* (Evanston, Ill.: Northwestern University Press, 1959), 466-70; and Ralph W. Hidy and Muriel E. Hidy, *Pioneering in Big Business, 1882-1911* (New York: Harper & Brothers, 1955), 40-49. For the text of "The Standard Oil Trust Agreement," see William W. Cook, *"Trusts": The Recent Combinations in Trade, their Character, Legality and Mode of Organization …* (New York: L. K. Strouse & Co., 1888), 78-89.

unlawful "all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view or which tend to prevent full and free competition."[25] At the same time, state attorneys general began to file *quo warranto* suits to revoke the charters of corporations that participated in trusts. All that prosecutors had to do to win these cases was document the *ultra vires* character of the agreement—that is, how it violated the terms of the charter, not the extent to which it restrained trade—and, as a result, these suits were usually successful.[26] Standard itself came close to being dissolved by the Ohio Supreme Court in 1892, but the justices instead required it to sever its ties to the trust, a condition that Standard successfully evaded.[27]

Clearly the trusts needed another workaround, and New Jersey came to their rescue by amending its general incorporation law to legalize holding companies and facilitate mergers.[28]

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[25] Kansas Legislature, "An Act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor," approved March 2, 1889. For an overview of state antitrust laws, see Morris D. Forkosch, *Antitrust and the Consumer (Enforcement)* (Buffalo, NY: Dennis, 1956), 220-31, 412-32; Henry R. Seager and Charles A. Gulick, Jr. *Trust and Corporation Problems* (New York: Harper, 1929), 51, 339-66.

[26] For an overview of state *quo warranto* suits, see May, "Antitrust Practice and Procedure"; and Paul Nolette, "Litigating the 'Public Interest' in the Gilded Age: Common Law Business Regulation by Nineteenth-Century State Attorneys General," *Polity* 44 (July 2012): 373-399.

[27] *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892); Bruce Bringhurst, *Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890-1911* (Westport, CT: Greenwood Press, 1979), Ch. 1.

[28] New Jersey's 1875 general incorporation statute was more liberal than that of neighboring states and already in the 1880s a growing trickle of companies located elsewhere were taking out charters in the state. The influx attracted legislators' notice, and seeking new sources of tax revenue, the state moved consciously in 1888 to increase New Jersey's attractiveness as a corporate domicile for large out-of-state businesses. Charles M. Yablon, "The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey, 1880-1910," *Journal of Corporation Law* 32, no. 2 (2007): 323-380;

Gradually, most of the combines took advantage of these provisions and reorganized as New Jersey corporations. As New Jersey's revenues from chartering out-of-state corporations increased, several other states (most notably Delaware, but also West Virginia, Maryland, Maine, and New York) revised their statutes to attract (or retain) corporate charters.[29] Many scholars have argued that the result of this chartermongering competition was a race to the bottom that undermined states' ability to regulate large-scale corporations.[30] As Roberta Romano has pointed out, however, only small states stood to gain enough revenue relative to their budgets to make chartermongering worthwhile.[31] Following up on that insight, Harwell Wells advanced the view that states were less intent on competing with New Jersey and Delaware for charters than they were with modernizing their statutes. The scale of enterprise had increased over the last third of the nineteenth century, so in part this modernization effort required states to remove the limits they had imposed on corporate size. It also required them to modify their rules governing capital

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Christopher Grandy, "New Jersey Corporate Chartermongering," *Journal of Economic History* 49, no 3 (1989): 677-692.

[29] Grandy, "New Jersey Corporate Chartermongering"; Henry N. Butler, "Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges," *Journal of Legal Studies* 14 no. 1 (1985): 129-166.

[30] See, for examples, US Commissioner of Corporations, "Report," House Doc. 165, 58th Cong., 3rd Sess. (Washington, DC: Government Printing Office, 1904), 40; William L. Cary, "Federalism and Corporate Law: Reflections upon Delaware," *Yale Law Journal* 83, no. 4 (1974): 663-705; Daniel A. Crane, "Antitrust Antifederalism," *California Law Review* 96 no. 1 (Feb. 2008): 1-62. There is also a literature arguing that the chartermongering competition sparked a race to the top that improved regulatory efficiency. See especially Ralph K. Winter, Jr. "State Law, Shareholder Protection, and the Theory of the Corporation," *Journal of Legal Studies* 6, no. 2 (1977): 251-292; and Roberta Romano, *The Genius of American Corporate Law* (Washington, DC: AEI Press, 1993).

[31] Roberta Romano, "Law as a Product: Some Pieces of the Incorporation Puzzle," *Journal of Law, Economics, and Organization* 1, no. 2 (1985): 225-283.

structure, with most states first allowing the creation of multiple classes of shares and then later jettisoning the idea that shares had to have a par value.[32]

As Table 3 suggests, the evidence from state statutes is more consistent with Wells's modernization argument than with the race-to-the-bottom argument. In the first place, most states were quite slow to write modern third-wave general incorporation statutes in response to New Jersey's amendments, with four of the seven states in the table waiting as long as three to four decades to enact comprehensive new laws. A couple of these lagging states amended their second-wave statutes in the interim to facilitate mergers (Pennsylvania in 1901) or allow corporations to own shares in other companies (Pennsylvania in 1901 and Ohio in 1902).[33] All told, however, relatively few states rushed to follow New Jersey's lead. As late as 1903—that is, fifteen years after New Jersey threw down the gauntlet—nationwide only thirteen had revised their laws to enable mergers and a mere six allowed corporations to hold other corporations' stock. By way of contrast, twenty-two states still limited the duration of corporate charters, twenty-one regulated corporate borrowing, and seven retained ceilings on capitalization.[34]

[32] Harwell Wells, "The Modernization of Corporation Law, 1920-1940," *University of Pennsylvania Journal of Business Law* 11 (2009): 573-629.
[33] Pennsylvania Legislature, "An Act supplementary to an act, entitled 'An Act to provide for the incorporation and regulation of certain corporations,'" approved May 29, 1901; and "An Act authorizing corporations, organized for profit, to purchase … capital stock of … any other corporation," approved July 2, 1901; Ohio Legislature, "An Act to amend section … 3256 of the Revised Statutes of Ohio," approved May 6, 1902.
[34] The counts are from Massachusetts, *Report of the Committee on Corporation Laws* (Boston: Wright & Potter, 1903), 157-204. According to the report, the thirteen states that made mergers easier (at least for manufacturing corporations) were Alabama, Colorado, Connecticut, Delaware, Kentucky, Louisiana, Maryland, Missouri, Nevada, New York, Ohio, Pennsylvania, and Utah. The six that allowed corporate stockholding were Connecticut, Delaware, Maine, New York, Pennsylvania, and Wyoming. Ohio seems to have been categorized incorrectly. At the time of the report, it permitted corporate stockholding but had not revised its merger rules.

Table 3. Changes in State Incorporation Laws in Response to the Mobility of Charters

	Massachusetts	New York	New Jersey	Pennsylvania	Ohio	Illinois	California
Year changed law to facilitate mergers	1903	1890	1888	1901	1929	1919	1929
Year changed law to enable corporations to hold stock in other corporations	1903	1890	1888	1901	1902	1919	1931
Year required foreign corporations to obey laws restricting what domestic corporations could do	1894	1892	1873	1891	1893	1897	1879
Year began to tax foreign corporations	1903	1895	1904	1889	1894	1897	1905
Year of first modern general incorporation statute	1903	1890	1896	1933	1929	1919	1931
Modern statute imposed ceiling on capital stock?	No	No	No	No	No	No	No
Modern statute imposed ceiling on borrowing?	No	Yes, greater of capital stock or two-thirds of value of corporate property	No	No	No	Yes, capital stock	No
Modern statute imposed limit on duration?	No	50	No	No	No	No	No
Modern statute required annual filing?	Yes	Yes	No	Yes	No	Yes	Yes

Modern statute imposed voting rule?	Yes, one vote per share	Yes, one vote per share	No	Yes, one vote per share; cumulative voting	Yes, one vote per share; cumulative voting	Yes, one vote per share; cumulative voting	Yes, one vote per share; cumulative voting
Modern statute imposed liability rule?	Shareholders personally liable to workers and to all if reduce capital; directors personally liable if fail to follow law	Shareholders personally liable to workers; directors personally liable if fail to follow law	Shareholders personally liable for reductions in capital if fail to follow the law; directors personally liable if fail to follow law	Shareholders personally liable to workers up to the value of stock; directors personally liable if fail to follow law	Directors personally liable if fail to follow law	Directors personally liable if fail to follow law	Directors personally liable if fail to follow law
Modern statute included antimonopoly language?	No	Yes	No	No	No	Yes	No[35]

[35] Unless otherwise noted, all state statutes are from the session laws library in HeinOnline.
Massachusetts: "An Act relative to the admission of certain foreign corporations …" approved May 12, 1894; "An Act relative to business corporations," approved June 17, 1903.
New York: "An Act in relation to corporations," approved June 1, 1890; "An Act in relation to stock corporations," approved June 7, 1890; "An Act in relation to business corporations," approved June 7, 1890; "An Act to amend the general corporation law, approved May 18, 1892; "An Act to provide for licensing foreign stock corporations," approved April 4, 1895.
New Jersey: "A Supplement to an act … to authorize the establishment, and to prescribe the duties of companies for manufacturing and other purposes," approved March 28, 1873; "An Act relating to the consolidation of corporations …" approved April 17, 1888; "An Act to authorize corporations … to purchase and hold stock in any one or more of said corporations in certain cases," approved April 17, 1888; "An Act concerning corporations," approved April 21, 1896.
Pennsylvania: "A Further Supplement to 'An act … to provide revenue by taxation' …" approved June 1, 1889; "A Supplement to an act … authorizing companies incorporated under the laws of any other state …" approved April 30, 1891; Pennsylvania Legislature, "An Act supplementary to an act, entitled 'An Act to provide for the incorporation and regulation of certain corporations,'" approved May 29, 1901; and "An Act authorizing corporations, organized for profit, to purchase … capital stock of … any other corporation," approved July 2, 1901; "An Act relating to business corporations," approved May 5, 1933.
Ohio: "An Act to regulate foreign stock corporations …" approved April 25, 1893; "An Act to amend section … 3256 of the Revised Statutes of Ohio," approved May 6, 1902; "An Act to emend section 1504 of the Revised Statutes …" approved May 16, 1894; "An Act to revise the general corporation act," approved April 24, 1929.
Illinois: "An Act to require every foreign corporation … to file … and pay certain taxes …" approved May 26, 1897; "An Act in relation to corporations for pecuniary profit," approved June 28, 1919.
California: 1879 Constitution, Article 12, Section 15; "An Act … providing for a license tax upon corporations …" approved March 20, 1905; "An act to amend … the Civil Code …" approved June 6, 1929; "An act substituting for the existing title … relating to corporations," approved June 12, 1931.

Second, even the modernized statutes retained significant regulatory content. As Table 3 indicates, most of the laws continued to mandate specific voting rules, with stockholders in four of the seven states retaining the right to cumulate their shares. Corporations in most places still had to file annual statements, and the statutes mandated new elaborate procedures for increasing and decreasing capital, creating new classes of shares, and other similar changes. About half the states still imposed some liabilities on shareholders beyond the amounts they had originally invested, and directors who failed to follow mandated procedures still risked being held personally liable for corporate debts.

The race-to-the-bottom argument is also not consistent with other actions that the states took during this period. As growing numbers of big businesses moved their corporate domiciles to New Jersey and then to Delaware, legislatures elsewhere stepped up their regulation of "foreign corporations"—that is, corporations that obtained their charters in other states or in foreign countries. The US Supreme Court had upheld the states' powers over foreign corporations in *Paul v. Virginia* 1869, and it reiterated that decision two decades later in *Pembina Consolidated Silver Mining v. Pennsylvania*. Writing for the court in both cases, Justice Stephen J. Field ruled that the privileges and immunities guaranteed by Article Four of the US Constitution did not extend to the "special privileges" that states granted in the form of corporate charters. The framers had never intended "to give to the laws of one State any operation in other States." Hence a corporation, "being the mere creation of local law," could have "no legal existence beyond the limits of the sovereignty" that created it. States might allow foreign corporations to do business in their jurisdictions "upon such terms and conditions" as they thought "proper to impose." They could even, if they wished, exclude them altogether. "The whole matter rest[ed] in their discretion."[36]

In the late nineteenth century some states began to write these principles into their constitutions. Arkansas's 1874 constitution allowed foreign corporations to "do business in this State, under such limitations and restrictions as may be prescribed by law," specifying further that "they shall be subject to the same regulation, limitations, and liabilities as like corporations of this State, and shall exercise no other or greater powers, privileges, or franchises than may be exercised by like corporations of this State."[37] This limitation could also be found in constitutions adopted by California in 1879, Montana in 1889, Idaho in 1890, Kentucky in 1891, Utah in 1895, and Arizona in 1912.[38] Other states wrote statutes that accomplished the same ends. Starting in 1884, for example, Massachusetts required each foreign corporation to register with the state commissioner of corporations and name that official as its lawful attorney "upon whom all lawful processes in any action or proceeding against it may be served." In 1894 it prohibited foreign corporations from engaging "in any kind of business the transaction of which by domestic corporations is not permitted by the laws of the Commonwealth." When

[36] *Paul v. Virginia*, 75 U.S. 168 (1869) at 180-182. See also *Pembina Consolidated Silver Mining v. Pennsylvania*, 125 U.S. 181 (1888) at 187-188. States could not use their powers over corporations to interfere with interstate commerce, but that limitation was interpreted narrowly during this period. See Ruth H. Bloch and Naomi R. Lamoreaux, "Corporations and the Fourteenth Amendment," in *Corporations and American Democracy*, ed. Lamoreaux and William Novak (Cambridge, MA: Harvard University Press, 2017), 268-325 at 295-296.
[37] Arkansas, 1874 Constitution, Art. 12, Sec. 11.
[38] California, 1879 Constitution, Art. 12, Sec. 15; Montana, 1889 Constitution, Art. 15, Sec. 11; Idaho, 1890 Constitution, Art. 11, Sec. 10; Kentucky, 1891 Constitution, Sec. 202; Utah, 1895 Constitution, Art. 12, Sect. 6; Arizona, 1912 Constitution, Art. 14, Sec. 5.

Massachusetts modernized its corporation statutes in 1903 in response to New Jersey's chartermongering, it reiterated and expanded these principles.[39] All of the states included in Table 3 had similar rules in place by the turn of the century.[40]

The requirement that foreign corporations conform to the same regulations as domestic firms meant that they had to obey the antitrust laws.[41] Some states reinforced the point by adding provisions to their general incorporation laws that barred corporations from merging with, or holding stock in, other corporations if the result was to restrain competition or tend to create a monopoly. When New York enacted a new law in 1892 that copied New Jersey's liberalized merger provisions, it added the proviso, "No stock corporation shall combine with any other corporation or person for the creation of monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life."[42] Ohio amended its statute in 1902 to allow

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[39] Massachusetts General Court, "An Act concerning foreign corporations having a usual place of business in this Commonwealth," approved June 4, 1884; "An Act relative to the admission of certain foreign corporations to do business in this Commonwealth," approved May 12, 1894; and "An Act Relative to Business Corporations," approved June 17, 1903.

[40] As did most other states. For a comprehensive summary of such provisions, see US Commissioner of Corporations, *Report on State Laws Concerning Foreign Corporations* (Washington: Government Printing Office, 1915), 49-54. New Jersey, Delaware, and Nevada enacted retaliatory statutes that imposed the same constraints on other states' corporations that were imposed on theirs (pp. 54-56).

[41] Most states made this point explicit. See US Commissioner of Corporations, *Report on State Laws Concerning Foreign Corporations*, 145-147.

[42] New York Legislature, "An Act to amend the stock corporation law," approved May 18, 1892. A version of this clause first appeared in "An Act in relation to stock corporations …" approved June 7, 1890. The provision was explicitly applied to foreign corporations in "An Act to amend the stock corporation law …," approved May 7, 1897. The same language would be repeated in the stock corporation act of 1909. See Thomas Gold Frost, *A Treatise on the Business Corporation Law of the State of New York* (Albany: Mathew Bender & Co., 1909), 568.

corporations to acquire stock in other corporations, but it stipulated that the corporations could be "kindred but not competing" and that the amendment "shall not authorize the formation of any trust or combination for the purpose of restricting trade or competition."[43] Even New Jersey followed suit when it enacted its so-called "Seven Sisters" antitrust laws in 1913, though fear of losing chartering revenues to Delaware caused it quickly to backtrack.[44] A number of states went further and embedded these restrictions in their constitutions. Georgia's 1877 constitution declared, "The General Assembly of this State shall have no power to authorize any corporation to buy shares, or stock, in any other corporation in this State, or elsewhere, or to make any contract, or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void."[45] Wyoming's 1889 constitution prohibited all combinations in restraint of trade, declaring "There shall be no consolidation or combination of corporations of any kinds whatever to prevent competition, to control or influence productions or prices thereof, or in any other manner to interfere with the public good and general welfare."[46] Arizona's 1912 constitution flatly stated,

[43] Ohio Legislature, "An Act to amend section …3256 of the Revised Statutes of Ohio," approved May 6, 1902.
[44] F. A. Updyke, "New Jersey Corporation Laws," *American Political Science Review* 7, no. 4 (1913): 650-652; Seager and Gulick, *Trust and Corporation Problems*, 361-365.
[45] Georgia, 1877 Constitution, Art. 4, Sec. 2, Par. 4., chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/viewer.html?pdfurl=https%3A%2F%2Fia800503.us.archive.org%2F1%2Fitems%2Fconstitutionofst00geor%2Fconstitutionofst00geor.pdf&clen=5056643&chunk=true.
[46] Wyoming, 1889 Constitution, Art. 10, Sec. 8.

"Monopolies and trusts shall never be allowed in this state."[47] Other states had similar prohibitions, and Arkansas, Illinois, Missouri, Texas, and Wisconsin required foreign corporations to file affidavits as a condition of doing business in the state attesting that they were not involved in such combinations.[48]

States also began to create regulatory bodies tasked with enforcing their incorporation laws. Most of the new states that entered the union in the early twentieth century included provisions in their constitutions mandating new oversight boards called corporation commissions. Dozens of states had already formed similar commissions to regulate railroads and other public service corporations, and the new corporation commissions took on similar duties. But they were also responsible for ensuring that all corporations, foreign as well as domestic, conformed to state law.[49] Oklahoma, for example, insisted in its 1907 constitution that "[t]he records, books, and files of all corporations shall be, at all times, liable and subject to the full visitarial and inquisitorial powers of the State, notwithstanding the immunities and privileges in this Bill of Rights secured to the persons, inhabitants and citizens thereof." It vested oversight authority in a corporation commission that had the power "of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, … and to enforce

[47] Arizona, 1912 Constitution, Art. 14, Sec. 15.
[48] Washington, 1889 Constitution, Art. 12, Sec. 22; South Dakota, 1889 Constitution, Art. 17, Sec. 20, Amend. 4 (1896); Alabama, 1901 Constitution, Art. 4, Sec. 103; Oklahoma, 1907 Constitution, Art. 5, Sec. 44; New Mexico, 1911 Constitution, Art. 4, Sec. 38; Louisiana, 1913 Constitution, Sec. 190; and Louisiana, 1921 Constitution, Art. 19, Sec. 14. On the affidavits, see US Commissioner of Corporations, *Report on State Laws Concerning Foreign Corporations*, 45, 93, 100.
[49] Oklahoma, 1907 Constitution, Art. 9, Sec. 15 and 43; New Mexico, 1911 Constitution, Art. 11, Sec. 1, 6 and 11; Arizona, 1912 Constitution, Art. 14, Sec. 8 and 17.

compliance with any of its lawful orders."[50] Out-of-state corporations that failed to make the requisite filings faced financial penalties. More importantly, they risked having all contracts with citizens of the state be declared void and could not "maintain any suit or action, either legal or equitable, in any of the courts of this State."[51]

Older states took similar steps to enforce their laws on foreign corporations. Massachusetts made the officers of foreign corporations personally liable for corporate debts and contracts if they knowingly made false statements on their filings.[52] Illinois barred foreign corporations that failed to obtain the requisite licenses from filing lawsuits in its courts.[53] In Pennsylvania, agents who did business on behalf of corporations that did not conform to the state's registration requirements risked imprisonment and/or fines, and the corporations involved could not enforce their contracts in state courts until they rectified the situation and paid a fine.[54] Although the Supreme Court ruled in 1914 that a similar South Dakota statute (denying foreign corporations that did not conform to its registration law access to state courts) unconstitutionally

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[50] Oklahoma, 1907 Constitution, Art. 2, Sec. 28, Art. 9, Sec. 19.
[51] Oklahoma Corporation Commission, *Corporation Commission Laws of Oklahoma, 1917* (Oklahoma City: Warden Co., 1918), 202-203.
[52] Massachusetts General Court, "An Act Relative to Business Corporations," approved June 17, 1903, Sec. 70.
[53] Illinois General Assembly, "An Act to require every foreign corporation doing business in this State to have a public office …," approved May 26, 1897. This provision was later written into the state's revised general incorporation act: "An Act in relation to corporations for pecuniary profit," approved June 28, 1919, Sec. 94.
[54] Pennsylvania General Assembly, "An Act Relating to business corporations," approved May 5, 1933, Sec. 1014.

impeded interstate commerce, it upheld absolute states' right to exclude foreign corporations.[55] Thus, Kansas created a "charter board" in 1898 to determine which foreign corporations satisfied the state's legal and licensing requirements. During the 1920s, the board famously refused to grant the Ku Klux Klan, a Georgia corporation, permission to operate in the state.[56]

The race-to-the-bottom argument needs correcting in another important way as well. According to the literature, states weakened their general incorporation laws in order to attract (or retain) chartering revenues. But states whose corporations shifted their domiciles to New Jersey, Delaware, or other chartermongering states generally did not suffer revenue losses. Corporations whose chartering homes were elsewhere still had to pay taxes on the property they owned in the state. Before the 1890s, moreover, most states did not in fact charge much in the way of fees for corporate charters. Only after New Jersey's amendments did they learn that charters could be an important revenue source, but at the same time they also learned that they could charge foreign corporations similar fees for the privilege of doing business in the state. In addition, they discovered they could levy taxes on foreign corporations in the form of annual licensing fees in order to keep those privileges alive. Vermont, for example, countered Maine's chartermongering by taxing foreign corporations on the full value of their capital stock, so that

[55] *Sioux Remedy Co. v. Cope*, 235 U.S. 197 (1914). In upholding the states' right to exclude foreign corporations, the Court went back and forth on whether states could impose discriminatory licensing fees on foreign corporations. Compare, for example, *Lincoln Nat'l Life Ins. Co. v. Read*, 325 U.S. 673 (1945); and *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949).

[56] On the creation and purpose of the Charter Board, see Kansas Attorney General, *Biennial Report* (1899-1900), 13-14. On the Charter Board and the Klan, see Charles William Sloan, Jr., "Kansas Battles the Invisible Empire: The Legal Ouster of the KKK from Kansas, 1922-1927," *Kansas Historical Quarterly* 40 no. 3 (1974): 393-409.

Vermont companies that moved their corporate domiciles to Maine were taxed twice each year on their capital, once by Maine and a second time by Vermont.[57] By 1915, when the US Commissioner of Corporations published a survey of these taxes, thirty-three states had adopted them, with some taxing the entire capital of the foreign corporation, some an amount adjusted by the proportion of the corporation's business in the state, and some a flat rate.[58] More importantly—and in direct contradiction to the literature's claim that states were primarily motivated by the fear of driving corporations to other jurisdictions—most states increased their taxes and fees on domestic corporations as well.[59]

How these changes affected revenues can be seen from the case of Illinois. In the 1880s, the state charged very little for corporate charters—so little that the total fees the secretary of state collected from all sources (not just corporations) in 1887 and 1888 amounted to just over $21,000.[60] In the wake of New Jersey's amendments, the state raised its fees for domestic corporations and also imposed them for the first time on foreign corporations. As a result, in 1905 and 1906, the secretary was able to collect about $613,000 from domestic corporations. Although the amount he raised from foreign corporations was substantially less (about $90,000), that was still more four times the amount his office had garnered from all sources in 1887 and

[57] Vermont's revenues from this tax were significantly less than Maine's, but the point is that both states' corporate tax revenues grew steeply over time. US Commissioner of Corporations, *Taxation of Corporations, Part I—New England* (Washington: Government Printing Office, 1909), 35-36, 41-43, 46-47, 77-79, 81-82.
[58] US Commissioner of Corporations, *Report on State Laws Concerning Foreign Corporations*, 16.
[59] For an overview, see the six-part study of the US Commissioner of Corporations, *Taxation of Corporations*, published over the years 1909-1915.
[60] Illinois Secretary of State, *Biennial Report* (1887-1888), 1.

1888. Intriguingly, of the 581 companies that paid foreign-corporation fees in 1905-1906, only 92 (16 percent) were chartered in New Jersey. The rest were sprinkled across the country (a few were in Canada), and it is doubtful that many of them would ever have been chartered in Illinois, even in the absence of chartermongering. Yet Illinois was now able to levy a tax them all.[61]

States could still, of course, benefit financially from watering down their general incorporation laws to attract corporate charters. But the increasing amounts of revenue they were earning from the taxes they had learned to impose on both domestic and foreign corporations is good evidence that there were other ways besides chartermongering to compensate for the losses of chartering fees. Moreover, the content of the new general incorporation laws they enacted in the wake of New Jersey's liberalization suggests that the extent of any race to the bottom has been greatly exaggerated by the literature.

Patterns of Enforcement

If states did not all race to the bottom in response to New Jersey's liberalization of its general incorporation laws, they also did not react in any uniform way to the growing market power of large-scale business organizations. Attorneys general were elected officials, and in a number of states they responded to popular agitation against monopolies by stepping up their

[61] Illinois Secretary of State, *Biennial Report* (1905-1906), 3, 134-144. Illinois secured much greater revenues from its taxes on railroads and other franchise corporations, but these fees were large relative to the property taxes it secured from corporations more generally. In 1909, for example, they were almost three times as large, even though property taxes on corporations had also increased over time. US Commissioner of Corporations, *Taxation of Corporations: Part III—Eastern Central States* (Washington: Government Printing Office, 1911), 59.

enforcement activities, but in other states they were relatively quiescent.[62] In general, the pattern of the responses followed an east-west gradient. Although business groups lined up on both sides of the issue, antimonopoly activity was strongest and persisted longest where agrarian groups were most powerful.[63] In the Northeast, antitrust enforcement largely faded by the early twentieth century, to the extent that it ever existed. In Western states, however, it often continued for decades. The Middle West was more of a battle ground, and in some ways what happened there best illuminates how the history of antitrust policy might be rewritten as a political economic story rather than simply as a tale of superior federal authority. This section uses case studies of three states—New York, Illinois, and Kansas—to illustrate the basic pattern.

New York

Even in the heyday of the antimonopoly movement in the late nineteenth century, attorneys general in the leading industrial states of the Northeast were reluctant to prosecute trusts. Massachusetts' top lawyer resisted a concerted newspaper campaign to push him to take action. Pennsylvania's attorney general was similarly apathetic; aside from an early *quo warranto* suit against Standard Oil financed by a producers' organization, the state made little

[62] On the importance of elected state attorneys general in the antitrust arena, see Nolette, "Litigating the Public Interest."
[63] My argument runs parallel to that of Elizabeth Sanders in *Roots of Reform: Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999). Sanders sees Western radicalism as driving reform at the federal level. On antimonopoly business groups, see Richard R. John, "Proprietary Interest: Merchants, Journalists, and Antimonopoly in the 1880s," in *Media Nation: The Political History of News in Modern America*, ed. Bruce J. Schulman and Julian E. Zelizer (Philadelphia: University of Pennsylvania Press, 2017), 10-35.

effort to break up large-scale combinations. Although New York's attorney general filed suit against the American Sugar Refining Company when it sought to close down a refinery in the state, he did not challenge any of the other trusts that, like Standard Oil and the Cotton Oil Trust, had their headquarters in New York City.[64] Indeed, compared to other states, the annual reports of the New York attorneys general are remarkable for their absence of references to anti-trust initiatives. Charles F. Tabor, the Democrat who held the office from 1888 to 1891, did not even use his report to showcase his win against the sugar trust.[65]

New York's elected officials were not completely immune to the kinds of political pressures that spurred antimonopoly activity in other states. In response to popular agitation, the state senate directed that body's Committee on General Laws to hold hearings on the trust problem in 1888. The committee called John D. Rockefeller and other heads of trusts to testify and induced them to make public for the first time the agreements that governed their combinations.[66] That in itself was an important achievement because the revelations spurred action in other states. When, for example, Ohio Attorney General David K. Watson read the Standard Oil trust agreement, he immediately concluded that the Standard Oil Company's participation was *ultra vires* and filed a lawsuit charging that the company had "forfeited its

[64] Nolette, "Litigating the 'Public Interest," 395; Wayne D. Collins, "Trusts and the Origins of Antitrust Legislation," *Fordham Law Review* 81, no. 5 (2013): 2279-2348 at 2327-2328. On the Pennsylvania suit, see Chester M. Destler, *Roger Sherman and the Independent Oil Men* (Ithaca, NY: Cornell University Press, 1967), 83-193.
[65] New York Attorney General, *Annual Report* (1889), 29; and (1891), 8-9. All dates cited for the reports of state attorneys general and secretaries of state are for the year covered, not the year of publication.
[66] New York Senate, *Report of the Committee on General Laws on the Investigation Relative to Trusts* (New York: Troy Press, 1888).

corporate rights, powers and franchises" and should be dissolved by the court.[67] In other states there were a rash of similar, mostly successful, *quo warranto* suits, but in New York the response was more muted.[68] The senate investigating committee "respectfully" called the attorney general's attention to the evidence it had compiled of violations of the common-law prohibitions against restraints of trade.[69] Tabor took action against the sugar trust, as already noted, and later filed suit to dissolve the Milk Exchange on the grounds that it had formed an illegal combination, but he does not seem to have followed up on the evidence the committee collected about combinations in the rubber, cotton-seed oil, envelope, elevator, oil cloth, meatpacking, glass, and furniture industries.[70] His successors, regardless of party, were similarly reticent. Not until 1907, when William Schuyler Jackson, another Democrat, took office, did any New York attorney general make anti-trust enforcement a priority.[71]

Nor was the state legislature much more proactive. Concluding that "the end, if not the purpose of every combination, is to destroy competition and leave the people subject to the rule of a monopoly," the senate committee forwarded a bill to the assembly in 1888 that it thought would "modify, if it does not prevent, the great evils complained of." But the legislation did not

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[67] As noted above, the trust agreements obtained by the New York senate committee were republished in an appendix to Cook's treatise on *Trusts*, and that apparently is where Watson read them. See Bringhurst, *Antitrust and the Oil Monopoly*, 12-15. Watson's "Amended Petition" is reprinted in William M. McKinney, *The American and English Corporation Cases*, Vol. 36 (Northport, NY: Edward Thompson Co, 1892), 2-15. See also *State v. Standard Oil Co.*, 49 Ohio St. 137 (1892).
[68] May, "Antitrust Practice," 510-517; Nolette, "Litigating the Public Interest," 384-393; Collins, "Trusts and the Origins of Antitrust Legislation," 2327-2328.
[69] New York Senate, *Report of the Committee on General Laws*, 14.
[70] New York Attorney General, *Annual Report* (1889), 29; and (1891), 8-9, 26.
[71] See the annual reports of the New York Attorneys General for these years.

even make it to a final vote.[72] In 1890, antimonopolists succeeded in embedding in the state's New Jersey-style stock corporation law a provision that prohibited corporations from combining "for the prevention of competition." As noted above, that provision was retained and even expanded when the legislature further liberalized the merger rules in 1892.[73] The assembly also enacted weak antitrust bills in 1893 and 1896.[74] Pressures mounted for stronger measures, however, and the legislature held another set of hearings on the trust question in 1897. The joint committee that conducted the investigation embraced the moderate idea that bigness was not in itself bad, that it often resulted from technological superiority rather than the suppression of competition, and that the job of the state was to encourage the former and prevent the latter.[75] This conclusion provoked two minority reports from opposite ends of the political spectrum. The first, from the right, asserted that trusts had been good for the state, "developing our commerce, increasing our taxable property and benefiting our people."[76] The second, from the left, proposed a number of measures to restrain corporate power, including absolute limits on the amount of capital that could by employed by a corporation and on the number of corporations an individual

[72] New York Senate, *Report of the Committee on General Laws*, 13; New York Senate, *Journal* (1888).
[73] New York Legislature, "An Act in relation to stock corporations …," approved June 7, 1890; and "An Act to amend the stock corporation law," approved May 18, 1892.
[74] New York Legislature, "An Act to prevent monopolies in articles of general necessity," approved May 17, 1893; and "An Act to amend … 'An Act to prevent monopolies …'" approved April 15, 1896. For an overview of New York's antitrust laws, see New York State Bar Association, *Report of the Special Committee to Study the New York Antitrust Laws* (1957), Appendix I, 1a-14a.
[75] New York Legislature, "Report of the Joint Committee of the Senate and Assembly Appointed to Investigate Trusts," *Report and Proceedings of the Joint Committee* … (New York: Wynkoop Hallenbeck Crawford, 1897), 3-39.
[76] P. H. McCarren, "Minority Report," in New York Legislature, *Report and Proceedings*, 40-43.

or group could organize, in order that "the term 'equality before the law,' [would not be], as it is now, an antiquated figure of speech."[77] Its author, in other words, sought to return to the original purpose of general incorporation laws—that is, to open access to the corporate form in a way that kept the playing field level and prevented vast accumulations of capital

The legislature followed up on the committee's report by enacting an antitrust bill that declared contracts, agreements, and combinations that restrained competition or created a monopoly "illegal and void."[78] The statute authorized the attorney general to bring actions against violators, but it placed obstacles in his way by requiring him, among other things, to secure the permission of a court to interrogate witnesses. Attorney General Theodore E. Handcock, a Republican, immediately ran into roadblocks when he attempted to apply the law and concluded that the court's interpretation of the statute rendered it "entirely ineffectual."[79] The legislature revised the act in 1899 to remove some of the procedural obstacles, but he attorney general still had to seek court permission to examine witnesses.[80]

In the first decade of the twentieth century New York's attorneys general were marginally more active than they had been in the 1890s, but the need for court permission remained a significant hurdle. In 1900, for example, Attorney General John C. Davies, a Republican, followed up on a complaint (submitted by William Randolph Hearst) charging that

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[77] Thomas J. Barry, "Minority Report," in New York Legislature, *Report and Proceedings*, 45-51.
[78] New York Legislature, "An Act to prevent monopolies …," approved May 7, 1897.
[79] New York Attorney General, *Report* (1897), 23-24, 29.
[80] New York Legislature, "An Act to prevent monopolies …," approved May 25, 1899. The bill passed the senate with only two dissenting votes, observers reported, because it was unlikely to make a difference. See New York State Bar Association, *Report of the Special Committee*, Appendix I, 14a.

the American Ice Company had monopolized the ice trade in the City of New York. He obtained a court order allowing him to depose a set of witnesses, but the company challenged the order. After a long series of appeals, reversals, and more appeals, New York's high court declared the state's antitrust statute constitutional and allowed the case to proceed. The company made a final appeal to the US Supreme Court, which dismissed its complaint in 1902, ratifying the New York court's determination that the 1899 statute should stand.[81] The company then tried to delay the litigation in other ways, including pleading that the statute of limitations had been exceeded, but it was finally convicted of a criminal violation of the antitrust law in 1909. After additional appeals and negotiations, the company was ousted from the state in 1911 and its illegal contracts annulled.[82]

Davies may have had political reasons for acting on Hearst's complaint about American Ice. A number of top New York City officials associated with the Democratic Tammany Hall machine had invested in the company, and the Republican governor, Theodore Roosevelt, was making political hay by linking Tammany Hall to the trust.[83] In the absence of such motives, Davies proved much more reluctant to take action. He and his successor, Democrat John Cunneen, denied petitions from complainants (including Hearst) to proceed against a combination of gas producers in New York City, against a conspiracy of railroads in the coal regions of Pennsylvania who were alleged to have fixed the price of coal in New York, and

[81] New York Attorney General, *Annual Report* (1900), 6-7; (1901), 7-8; (1902), 7-8.
[82] New York Attorney General, *Annual Report* (1909), 21-22; (1911), 17-18.
[83] See "Van Wyck's Reply Ready for Davies," *Atlanta Constitution* (October 1, 1900), 1

against the Associated Press.[84] Cunneen did agree to investigate a complaint from a dealer in photographers' supplies charging that Eastman Kodak "and several other corporations have conspired together and formed 'a monopoly'" in these products.[85] Apparently, he decided not to proceed against these companies because two years later Attorney General Julies M. Mayer, a Republican, rejected the petition, quoting Cunneen's finding that the Eastman Kodak did not have a monopoly and that its market dominance owed to the superiority of its product—even though the evidence showed that Kodak offered dealers discounts conditional on agreeing not to handle competitors' products.[86] Mayer also denied petitions asking him to take action against a combination of transit companies in New York City and an association of fire insurers in the Buffalo region.[87]

This reluctance to proceed against corporations accused of restraining trade was temporarily reversed during Jackson's two-year term of office. Jackson began his first annual report as attorney general with the announcement that he had asked the legislature to provide him with extra funds to "investigate violations of the Anti-Monopoly Law," and then proceeded to boast about the enforcement activities he had already undertaken. The legislature provided him

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[84] The coal case was complicated by with a miners' strike in Pennsylvania, by Roosevelt's move (now as president) to create a commission to mediate the situation, and by the intervention of the Interstate Commerce Commission. The attorney general did not reject Hearst's petition to proceed against the companies but rather postponed his response until the federal investigations were completed. Jackson revived the investigation in 1908 but another federal investigation again took precedence. New York Attorney General, *Annual Report* (1902), 6, 143, 445-446; (1903), 42-44, 198; (1904), 181, 531-536; (1908), 92.
[85] New York Attorney General, *Annual Report* (1904), 556-560.
[86] New York Attorney General, *Annual Report* (1906), 228-232.
[87] New York Attorney General, *Annual Report* (1906), 191-195, 199-204.

with at least some of the resources he had requested, and the next year he again touted his accomplishments and requested $15,000 more.[88] By his own account, Jackson not only revived the investigation of the American Ice Company, but proactively prevented the consolidation of the telephone industry in the state, blocked a merger of electric and gas companies in the city of Lockport, moved against price-fixing in the telegraph industry, and challenged gas and transit combinations in the City of New York.[89] He still ran into significant trouble with the courts, however. Although a judge granted him permission to proceed with his investigation of price-fixing by the Western Union Telegraph Company and the Postal Telegraph-Cable Company, the order was countermanded by a second judge. Jackson appealed, only to have a higher court rule that the antitrust law did not apply to telegraph companies. In the meantime, he had commenced an action against the companies to vacate their charters, but lost that case too on the grounds that the court's recent ruling on the scope of the antitrust law meant that the companies had not done anything illegal.[90] Similarly, his petitions to annul the charters of New York City's Consolidated Gas Company and the Interborough-Metropolitan (transit) Company, were denied. Jackson appealed but got nowhere, in large part because the combinations had been approved by the City of New York.[91]

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[88] New York Attorney General, *Annual Report* (1907), 7-8; (1908), 149.
[89] New York Attorney General, *Annual Report* (1907), 44-50. The ice prosecution was derailed by a nasty dispute between Jackson and William Travers Jerome, the district attorney for New York County, who did not want the case to proceed. Jackson details his side of the dispute in his *Annual Report* (1908), 52-91, 155-156, 715-716.
[90] New York Attorney General, *Annual Report* (1907), 51-53; (1908), 92-94.
[91] Jackson did, however, succeed in getting the US Supreme Court to uphold the constitutionality of a New York statute regulating the price of gas in New York City. These cases seem to have been part of a

The attorneys general who followed Jackson reverted to inactivity, but New Yorkers were not completely dependent on their state officials to enforce competition policy. The strictures that antimonopolists had succeeded in inserting into the stock corporation law meant that private parties had standing to challenge anticompetitive mergers on their own. I have found nine appellate-level cases decided before 1920 that turned on this provision of the law. Two were the failed actions filed by Jackson to revoke the charters of the gas and transit companies, and four others were brought against the same combinations by private shareholders. Three of those four shareholder suits also failed, but these cases were special in the sense that they involved combinations that had been ratified by city ordinances.[92] Two very different cases succeeded. One was brought by a company punished by the National Harrow Company for breaking a price-fixing agreement, and another by a news dealer squeezed by a combination of publishers.[93]

These successful uses of the stock-company statute were important signals that corporations that violated its antimonopoly provisions could face threats from private lawsuits, even if state attorneys general were quiescent. Although the balance of economic and political interests in New York meant that official antitrust enforcement was relatively weak,

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larger political fight between state officials the New York City machine that also disrupted the ice investigation. New York Attorney General, *Annual Report* (1907), 40-41, 44-47; (1908), 16-23, 113.

[92] *Burrows v. Interborough Metropolitan Co.*, 156 F. 389 (1907); *Attorney General of New York v. Consolidated Gas Co.*, 108 N.Y.S. 823 (1908); *In re Attorney General*, 110 N.Y.S. 186 (1908); *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 F. 845 (1908); *Continental Securities Co. v. Interborough Rapid Transit Co.*, 203 F. 521 (1913); and *Continental Securities Co. v. Interborough Rapid Transit Co.*, 221 F. 44 (1915).

[93] *National Harrow Co. v. E. Bement & Sons*, 47 N.Y.S. 462 (1897); and *Sultan v. Star Co.*, 174 N.Y.S. 52 (1919). In another case, *Alexandria Bay Steamboat Co. v. New York Cent. & H.R.R. Co*, the plaintiff lost because the court decided the company involved did not have a monopoly. 45 N.Y.S. 1091 (1897).

antimonopoly forces in the legislature had succeeded in empowering shareholders to act. Most shareholders, of course, stood to benefit from whatever monopoly profits their companies obtained. But statutes like New York's encouraged action by a new breed of opportunistic investors who bought shares in corporations that violated the law solely with the aim of profiting from suing them.[94] Monopolies could face threats from private actors as well as public officials.

Illinois

Illinois Attorney General George Hunt oversaw a tiny office in the mid-1880s. His staff consisted of a single clerk at a salary of $1,800 and a porter/messenger (who also worked for the Supreme Court Reporter) at a salary of $700. In addition, he had an allocation of just $2,000 to spend on supplies, telegraph, postage, and other operating costs.[95] As he noted laconically in his biennial report for 1886, the "general law of this State for the formation of corporations is a source of frequent controversy between the State department and persons desiring to form corporations under said law," but his role seems to have been limited to providing occasional advice, when requested, to the Secretary of State about the legality of particular charters.[96] He

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[94] The most notorious of these professional litigants was Clarence H. Venner, who repeatedly took on combinations organized by J. P. Morgan and other major financiers. For more on Venner, see J. A. Livingston, *The American Stockholder* (Philadelphia: J. B. Lippincott, 1958), 49-55; John C. Coffee, Jr.., *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Cambridge, Mass: Harvard University Press, 2015), 34-36; and Naomi R. Lamoreaux and Laura Phillips Sawyer, "Voting Trusts and Antitrust: Rethinking the Role of Shareholder Litigation in Public Regulation, from the 1880s to the 1930s," *Law and History Review* 39, no. 3 (2021): 569-600 at 582-583, 589-591.
[95] Information on the attorney general's budget comes from the annual appropriation bills enacted by the Illinois state legislature, available in the state's session laws through HeinOnline.
[96] Illinois Attorney General, *Biennial Report* (1885-1886), 3.

was thus taken by surprise when members of the Chicago Civic Association (CAC) asked him to take action against the Chicago Gas Trust Company, which had been incorporated in 1887 for the illegal purpose of buying up the stock of all the competing gas companies in the city of Chicago. Hunt later claimed that the Secretary of State did not submit the filing to him for review but that, if his advice had "been asked and followed, no such charter would have been issued."[97] Regardless, with financial assistance from the CAC, he brought a *quo warranto* suit against the trust in 1888 and won an important victory in the Illinois Supreme Court.[98]

Hunt, a Republican, did not file any additional suits against combinations during the remainder of his term in office, but the Democrat who replaced him in 1893, Maurice T. Moloney, was more active, even though he was equally strapped for funds. When Moloney left office in 1897, his budget for staff and office expense still barely exceeded $9,000 (he groused that the attorney for the city of Chicago had an appropriation of $30,000 for incidental expenses, compared to his own $2,000), so he was forced to piggyback on others' work wherever possible.[99] For example, his *quo warranto* suit against the United States School Furniture Company depended on evidence turned up by a legislative investigation of the company, and his effort to dissolve the National Linseed Oil Company drew almost verbatim on a shareholder's

[97] Illinois Attorney General, *Biennial Report* (1889-1890), 93.
[98] Illinois Attorney General, *Biennial Report* (1889-1890), 34-41; *People ex. Rel. Peabody v. Chicago Gas Trust*, 130 Ill. 268 (1889). See Laura Philips Sawyer, "Democratic Protest in an Age of Market Consolidation: A Case Study on the Chicago Gas Trust and the Illinois Antitrust Act of 1891," unpublished conference paper (June 2017).
[99] Illinois Attorney General, *Biennial Report* (1895-1896), 26-27. By contrast, New York's relatively inactive attorney general already in 1890 had a budget of over $28,000. See the appropriations detailed in the New York session laws for 1890.

action that had been dismissed for lack of standing by the Illinois Supreme Court.[100] Despite his want of financial resources and staff, he also brought *quo warranto* suits against the Distilling and Cattle Feeding Company (otherwise known as the Whiskey Trust), the American Tobacco Company, and the Western White Sand Company, and he claimed to have half a dozen other antimonopoly suits in preparation.[101]

The Republican attorneys general who followed Moloney in office seem to have shared his interest in trustbusting, but they were increasingly hamstrung by lawsuits challenging the state's antitrust statutes. The Illinois legislature had enacted an antitrust law in 1891 which outlawed combinations to fix the price or quantity of goods sold in the state and prohibited corporations from issuing trust certificates or participating in trusts.[102] It amended the law in 1893 to require corporations to file affidavits about their involvement in anticompetitive combinations. Also in 1893, it enacted a second, somewhat overlapping, statute. The new law included a clause, reflecting the strength of agricultural interests in the legislature, that exempted from its provisions "agricultural products or live stock while in the hands of the producer or raiser."[103] Moloney warned in 1896 that this exemption was likely "to render the entire act

[100] Illinois Attorney General, *Biennial Report* (1893-1894), 94-101; and (1895-1896), 182-195; *Coquard v. National Linseed Oil Co*., 171 Ill. 480 (1898); "Illinois Corporations in Court," *Paint, Oil and Drug Review* 21 (Jan. 15, 1896), 11.
[101] See Moloney's *Biennial Reports* for 1893-1894 and 1895-1896.
[102] Note that the act applied to corporations "organized under the laws of this or any other State or country." Illinois Legislature, "An Act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts or combines …" approved June 11, 1891.
[103] Illinois Legislature, "An Act to amend … 'An act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and combines …,'" approved June 20, 1893; and "An Act to define trusts and conspiracies against trade …," approved June 20, 1893.

unconstitutional," and that is what ultimately happened.[104] In the meantime, however, rather than remedy the situation, the legislature further qualified the 1891 act in 1897 in response to labor demands for relief from antitrust prosecutions. The new amendment, which exempted arrangements "the principal object or effect of which is to maintain or increase wages," raised fears that the 1891 law would be ruled unconstitutional as well and that the state would be left without an antitrust law.[105]

The 1893 amendment to the 1891 act had made it the "duty" of the secretary of state to send out a questionnaire annually to each corporation, whose officers had to declare under oath whether they were participating in any combination "with the intent to limit or fix the price or lessen the production and sales of any article of commerce."[106] Many corporations ignored the query, and Moloney did not follow up, perhaps for lack of time and resources. But his successor did. Attorney General Edward C. Akin sent the names of corporations that were not in compliance to the state attorneys in each county to collect penalties, and he threatened to nullify the charters of those that still failed to respond. The cases ran into problems, however, when judges in Cook County decided in 1900 that the 1897 amendment rendered the 1891 law unconstitutional.[107] Shortly thereafter the US Supreme Court ruled that the provision of the 1893

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[104] Illinois Attorney General, *Biennial Report* (1895-1896), 19-20.
[105] Illinois Legislature, "An Act to amend … 'An act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and combines …,'" approved June 10, 1897; Illinois Attorney General, *Biennial Report* (1901-1902), 15-18.
[106] Illinois Legislature, "An Act to amend … An act to provide for the punishment of persons, copartnerships or corporations forming pools, trusts and combines …," approved June 20, 1893.
[107] Illinois Attorney General, *Biennial Report* (1897-1898), 4-5; and (1899-1900), 4.

law exempting agriculturalists unconstitutionally discriminated among different groups of producers. That decision invalidated the entire 1893 statute because, as Justice John Marshall Harlan explained in the accompanying opinion, "the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and livestock dealers were excluded from its operation, and thereby protected from prosecution."[108] Whether the 1891 statute was unconstitutional as well remained uncertain until the Illinois Supreme Court finally decided the issue in 1903. The court struck down the 1897 amendment on the grounds that it was discriminatory, but left the original statute in place because it had been enacted separately by the legislature, without the discriminatory provision.[109]

After the 1893 antitrust act was declared unconstitutional, Howland J. Hamlin, a Republican who served as attorney general from 1901 to 1905, repeatedly yet unsuccessfully recommended that the legislature take steps to bolster the 1891 law, most importantly by giving his office direct authority to enjoin anticompetitive behavior.[110] A number of bills seeking to amend the antitrust law were introduced in each legislative session, but they faced opposition from business interests and most either died in committee or were never brought to a final vote. In 1905 two such measures finally made it to the floor of the House of Representatives where they passed by large margins. One of these secured a vote in the Senate, where it received

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[108] *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902) at 565. This decision seems to have had much to do with the particular circumstances of the case because the Court upheld or declined to invalidate other state antitrust statutes with similar provisions. See May, "Antitrust Practice," 527-530.
[109] *People ex re. Akin v. Butler St. Foundry & Iron Co.*, 201 Ill. 236 (1903).
[110] Illinois Attorney General, *Biennial Report* (1901-1902), 15-18; and (1903-1904), 8-9.

unanimous support, but the governor (a Republican) did not sign it into law.[111] In 1907 the legislature amended the 1891 act to reduce the burden of the affidavit requirement on small business, but that was all. Not until 1965 would Illinois enact a revised antitrust law.[112]

The uncertainty that hung over the Illinois statutes encouraged Hamlin to defer to federal prosecutors. Although almost immediately on taking office he had launched a major investigation of the Chicago meatpackers, when the federal government began its own suit in 1902 he decided that "the public interests could be best subserved by co-operating with the federal authorities" and turned over the evidence he had collected to them.[113] The uncertainty also encouraged him to look for ways to bolster his own powers against combinations. For example, in a case against an insurance combine, he turned to the common law rather than rely on the state's weakened antitrust laws. That way he thought he could secure an injunction against the companies, something that would not have been possible under state law, even if the 1893 act had been held constitutional. Indeed, Hamlin's broader ambition in this case was to free his office from the limitations of the antitrust statutes: "If the contention of the Attorney General shall be sustained," he strategized, "such combinations … can be restrained at common law in any character of business or commerce which affects the interests of the public."[114] He did not

[111] Illinois House of Representatives, *Journal* (1901), 258, 345-346, 615; (1903), 124, 142, 172, 399, 505, 722-723, 798, 801; and (1905), 316-317, 482, 579-580, 626-627, 643, 680, 682, 691-692, 775, 1082, 1119-1120, 1277; Illinois Senate, *Journal* (1905), 502, 652, 948, 953, 1014, 1058.
[112] Illinois Legislature, "An Act to amend section 7a …," approved May 25, 1907; John T. Soma, "Enforcement under the Illinois Antitrust Act," *Loyola University of Chicago Law Journal* 5 (Winter 1974): 25-44.
[113] Illinois Attorney General, *Biennial Report* (1901-1902), 19.
[114] Illinois Attorney General, *Biennial Report* (1901-1902), 18-19

succeed in this goal either. The case went on for years and was finally brought to a close by Hamlin's successor in 1908. The defendant companies had challenged Hamlin's demand for information and, when they were finally ordered by an appellate court to respond, they refused. The state thus won the case by default. Although the companies were enjoined not to participate in the insurance combination, the general principal under which Hamlin had brought his suit—and that he hoped would improve on the state's antitrust statutes—was consequently never established by the court as law.[115]

Hamlin and his successor, William H. Stead, complained vociferously in their biennial reports to the governor about the attorney general's growing workload and inadequate funding. Although their budgets increased steadily over time, quadrupling over the period 1897-1907, the legislature also piled on additional duties.[116] Stead's 1908 biennial report was more than double the length of the last one Moloney submitted, but he did not pursue any new antitrust initiatives. Indeed, a search of the report for the word "anti" turns up no references whatsoever to "anti-trust" but nearly one hundred references to a word that had not shown up in previous reports, "anti-saloon."[117] Reformers had turned to state government in the late nineteenth century in the hopes that it would protect them from monopolies, but in the early twentieth century they were

[115] Illinois Attorney General, *Biennial Report* (1903-1904), 10; (1905-1906), x; and (1907-1908), xxxiii.
[116] These amounts, again from the session laws, do not include additional appropriations that the legislature earmarked for specific purposes and therefore could not be used for antitrust prosecutions.
[117] Illinois Attorney General, *Biennial Report* (1907-1908).

increasingly preoccupied with prohibition. Attorneys general were elected officials, and not surprisingly alcohol-related matters absorbed more and more of their attention.[118]

It would not, however, be correct to conclude from this shift in focus that antimonopoly was dead in Illinois—that the state had completely ceded the terrain to the federal government. To the contrary, when the state revised its general incorporation law belatedly in 1919 to adopt New-Jersey style merger and holding company provisions, as the price of their support progressive legislators were able to embed antimonopoly language in the text:

> Section 7 (1). No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation, where the effect of such acquisition may be substantially to lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain trade in this State or in any section or community thereof, or tend to create a monopoly….
> Section 66 (2). It shall be unlawful for two or more corporations to merge or consolidate where the effect of such consolidation or merger would be illegally to regulate or control the price of, or illegally to limit the quantity of, or illegally to establish a monopoly in any article, commodity or merchandise manufactured, mined, produced or sold in this State.[119]

Not only did these provisions give the attorney general license to block anticompetitive combinations, but they gave shareholders and other stakeholders standing to challenge them in court.[120] The language in Section 7 came verbatim from the Clayton Antitrust Act that Congress

[118] Although the anti-alcohol movement had an antimonopoly dimension, in Illinois attention to the former seems to have distracted from the latter. As will be discussed below, however, this effect was much less present in Kansas.
[119] Illinois General Assembly, "An Act in relation to corporations for pecuniary profit," approved June 28, 1919.
[120] It is impossible to know the extent to which private parties took advantage of the act, but two cases reached the Illinois Supreme Court during the next two decades: *Hall v. Woods*, 325 Ill. 114 (1927); and *Moody & Waters Co. v. Case-Moody Pie Corp.*, 354 Ill. 82 (1933). Shareholders also challenged

had enacted in 1914 and that made federal antitrust decisions relevant for interpreting the Illinois law. Thus in *Moody & Waters Company v. Case-Moody Pie Corporation* (1933), Illinois's high court used the US Supreme Court's decision in *International Shoe Co. v. Federal Trade Commission* to define what it meant "substantially to lessen competition."[121] In this way, federal antitrust law fed back into state incorporation and antitrust law rather than simply superseding it.

Kansas

Illinois, of course, was just one state, but its experience was similar to that of Ohio and other states in the Midwestern part of the manufacturing belt, where once strong antimonopoly forces ran into increasing political opposition in the early twentieth century. As activity was declining in that region, however, it was increasing further west. Texas, for example, embarked upon an antimonopoly crusade against Standard Oil after the discovery of the Spindletop oil field in 1901, and its antitrust suits, which continued for decades, were arguably of greater consequence in shaping the oligopolistic structure of the petroleum refining industry than the US Supreme Court's decision breaking up the Standard Oil trust.[122] Texas's activism was driven in

combinations on other grounds. For a discussion of the importance of private enforcement for competition policy, see Lamoreaux and Phillips Sawyer, "Voting Trusts and Antitrust."

[121] In that particular case the merger did not meet the standard. *Moody & Waters Co. v. Case-Moody Pie Corp.*, 354 Ill. 82 (1933) at 96-97; *International Shoe Co. v. FTC*, 280 U.S. 291 (1930).

[122] According to Jonathan W. Singer, Texas brought at least fourteen antitrust-related actions against oil companies over the decades before 1940. See *Broken Trusts: The Texas Attorney General versus the Oil Industry, 1889-1909* (College Station: Texas A&M University Press, 2002), 5. See also Joseph A. Pratt, "The Petroleum Industry in Transition: Antitrust and the Decline of Monopoly Control in Oil," *Journal of Economic History* 40, no. 4 (1980): 815-837; Pratt and Mark E. Steiner, "'An Intent to Terrify': State Antitrust in the Formative Years of the Modern Oil Industry," *Washburn Law Journal* 29, no. 2 (1990):

large measure by its political economy—by local producers' determination to keep Standard out of the state's oil fields—and its vast reserves gave its efforts a clout that other states did not have. Nonetheless, Texas did not face Standard Oil alone. Kansas, another oil producing state, launched a multi-pronged attack on the combine in 1904. When Standard responded by threatening to boycott Kansas oil, the state doubled down on its legal assault and other states piled on. The Illinois House of Representatives resolved in 1905 to lend Kansas $100,000 to build a state-owned refinery (it was later in the same session that the House passed the two antitrust bills). At the same time, anti-trust and anti-Standard legislation gained momentum in Indiana, Missouri, Iowa, Colorado, and Texas. Perhaps more importantly, Missouri and Ohio joined Kansas and Texas in filing *quo warranto* suits against the combine. Prosecutors from states taking action against Standard met in St. Louis in the summer of 1906 to coordinate their legal strategy, founding for this purpose the National Attorneys General Conference, which held its first annual meeting in St. Louis the following year. Standard's bullying also helped to spur a federal investigation by the Bureau of Corporations, as well as the federal antitrust suit that ultimately resulted in the US Supreme Court's 1911 decision to break the company up.[123]

Kansas's action against Standard Oil was provoked by a sharp fall in the price of crude oil that the state's hard-hit producers blamed on the company's monopsony power.[124] But the state had a long history of antimonopoly activism on which it could build. As already noted, the

270-289; William R. Childs, *The Texas Railroad Commission: Understanding Regulation in America to the Mid-Twentieth Century* (College Station: Texas A&M University Press, 2005).
[123] Piott, *Anti-Monopoly Persuasion*, Ch. 6; Nollette, "Litigating the 'Public Interest,'" 392-393.
[124] Piott, *Anti-Monopoly Persuasion*, 110-111.

Kansas legislature had enacted an antitrust law as early as 1889, and it reinforced that act with a second in 1897.[125] Populist Attorney General John Thomas Little got the prosecution ball rolling in 1894, pushing for action against the "paper trust," and the attorneys general who succeeded Little over the next three decades (all Republicans) were with but one exception vigilant enforcers of the antitrust laws. In 1905 Chiles Crittendon Coleman, the attorney general who launched the *quo warranto* suit to oust Standard Oil, successfully defended Kansas's antitrust law before the US Supreme Court against the charge (made by wheat dealers accused of conspiring to fix the price of grain) that it unconstitutionally infringed on the Fourteenth Amendment's guarantee of freedom of contract.[126] That same year he won another suit before the Supreme Court involving a Fifth Amendment challenge. He had charged a local combination of coal mine operators with price fixing and had jailed one of the operators for contempt for refusing to answer questions in response to a subpoena. Justice David Brewer noted in his opinion that the Court had recently upheld the constitutionality of the Kansas statute and affirmed the state high court's ruling that the man had to answer the attorney general's questions.[127]

As these two cases suggest, Kansas officials actively pursued local violators of the antitrust laws as well as big national combines like Standard Oil. The reports submitted by

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[125] Kansas Legislature, "An Act to declare unlawful trusts and combinations in restraint of trade and products …," approved March 2, 1889; and "An Act defining and prohibiting trusts …," approved March 8, 1897.
[126] *Smiley v. Kansas*, 196 U.S. 447 (1905).
[127] *Jack v. Kansas*, 199 U.S. 372 (1905); Kansas Attorney General, *Biennial Report* (1905-1906), 4-5.

attorneys general during the first decade of the twentieth century detail actions against combinations ranging from International Harvester to the Kansas City Live Stock Exchange to local millers' associations and fire insurance companies.[128] These prosecutions were costly, and the attorneys general complained continuously about their lack of funds. The state tackled the problem of its limited enforcement capacity by making it "the duty of county attorneys to diligently prosecute" violations, and it imposed penalties (fine, imprisonment, and loss of office) on any county attorney who should "fail, neglect or refuse to faithfully perform" this obligation.[129] Thus the case against International Harvester began with local investigations in Topeka and Hutchinson, and legal action against the company took the form of a criminal indictment in Shawnee County's district court, as well as a *quo warranto* suit in Kansas's supreme court to oust the company from the state.[130] Attorney General John S. Dawson followed up the state's big win in its *quo warranto* suit against Standard Oil in 1911 by organizing all the county attorneys to file civil antitrust suits against the combine. As a consequence, Standard had to pay fines in fifty counties—$500 per county, totaling $25,000, all paid into the school fund.[131] Scholars have viewed such fines as trivial from the standpoint of the company, but they do not look so trivial from the standpoint of the state. In 1920, the Charter Board was collecting about

[128] Kansas Attorney General, *Biennial Report* (1901-1902 through 1909-1910).
[129] The act imposed analogous obligations on sheriffs, deputy sheriffs, constables, mayors, marshals, police judges and police officers, and enabled private parties to sue for damages under the law. See also Kansas Legislature, "An Act to declare unlawful trusts and combinations in restraint of trade and products …," approved March 2, 1889; and "An Act Defining and Prohibiting Trusts," approved March 8, 1897.
[130] Kansas Attorney General, *Biennial Report* (1905-1906), 27.
[131] Kansas Attorney General, *Biennial Report* (1911-1912), 12.

$40,000 a year in corporate taxes and fees (also paid into the school fund), so the fines represented a substantial addition in percentage terms.[132] The entire budget for the attorney general's office in 1920 was just about $25,000.[133]

Clearly the state had a financial incentive to pursue trusts, and it continued to do. Prohibition was a major political issue in Kansas, and the state's attorneys general were deeply involved in alcohol-related prosecutions—probably more than their counterparts in Illinois—but those activities do not seem to have crowded out antitrust pursuits. Coleman, for instance, aggressively enforced Kansas's strict liquor laws, even to the extent of filing ouster and contempt suits against local officials he regarded as lax. But it was also Coleman who responded to popular agitation about Standard Oil by starting *quo warranto* proceedings.[134] Similarly, Dawson worked vigilantly to enforce the liquor laws, cracking down on rural areas where violations were especially rampant.[135] Yet he never slacked on the antitrust front. As he crowed in 1912, after bringing the ouster case against Standard Oil to a successful conclusion, "I believe that the fact that it was well known that the state was on the alert and ready and willing to prosecute offenses under the antitrust law has had a wholesome and moral influence in checking and restraining the tendency to such unlawful gain in this state in violation of the antitrust

[132] Kansas Attorney General, *Biennial Report* (1919-1920), 3.
[133] Kansas Attorney General, *Biennial Report* (1917-1918), 3.
[134] "Chiles Crittendon Coleman," https://ag.ks.gov/about-the-office/history; Kansas Attorney General, *Biennial Report* (1905-1906).
[135] "John Shaw Dawson," https://ag.ks.gov/about-the-office/history; Kansas Attorney General, *Biennial Report* (1911-1912).

law."[136] He was at that time involved in prosecutions of "trusts" in the insurance, ice, plumbing, gas, and cement industries, and over the next decade and a half he and his successors would take on combinations (mostly successfully and often with the aid of county attorneys) in these and other industries, including bridge building, coal dealing, bricks, and wholesale groceries.[137]

During this period Kansas's attorneys general repeatedly recommended strengthening the antitrust laws. Dawson noted in 1914 that Kansas producers were victimized by a number of what he called "unfair" trading practices, and he urged the legislature enact a new law that would be modeled on the Clayton and Federal Trade Commission Acts that Congress has just passed but that would go farther and ban, for example, the operation of "bogus" independent concerns and "all forms of coercion, blacklisting, use of detectives and intimidations" for anticompetitive purposes.[138] Subsequent attorneys general continued to ask for more protection against unfair trade practices, and, alert to changes in the anticompetitive toolkit in the 1920s, they also asked for measures that would combat the growing use of open-price associations for the purpose of price fixing.[139] Although Kansas's legislature did not give the attorney general everything he wanted, it continued throughout the first two decades of the twentieth century to pass new legislation banning particular types of unfair competition and enhancing the attorney general's enforcement powers. The last of these acts, passed in 1919, gave the attorney general greater power to issue and enforce subpoenas to investigate "trusts, monopolies, combinations in

[136] Kansas Attorney General, *Biennial Report* (1911-1912), 12.
[137] See Kansas Attorney General, *Biennial Report* (1911-1912 through 1925-1926).
[138] Kansas Attorney General, *Biennial Report* (1913-1914), 37-39.
[139] Kansas Attorney General, *Biennial Report* (1919-1920), 6-7; and (1921-1922), 6-7.

restraint of trade, unlawful discrimination, unfair trade or the unlawful buying, selling and dealing in commodities without the intention of delivering the same."[140]

Again, Kansas is only one state. In an argument that resonates strongly with Richard White's in this volume, Steven Piott has contended that the antimonopoly impulse in neighboring states like Missouri was "co-opted" by the second decade of the twentieth century. Focusing in particular on the change by 1908 in the views held by Missouri Attorney General Herbert S. Hadley, Piott claims that, rather than oust monopolistic combinations, states increasingly sought to regulate their behavior—to turn bad trusts into good ones.[141] Even if Piott is correct, this interpretation is very different from the standard narrative. It suggests that states had not abandoned the field to the federal government, but rather had simply changed their tactics. It is not clear, however, that Piott's account of Missouri applies more generally. As he admits, other state attorneys general refused to hop on Hadley's band wagon. He quotes Texas's Robert V. Davidson as denying that there was any difference between "good" trusts and "bad" trusts: "A

[140] Kansas Legislature, "An Act relating to trusts, monopolies, unlawful combinations …," approved February 24, 1919. See also "An Act to prohibit discriminations between different sections, communities, or localities …," approved March 4, 1905; "An Act relating to unlawful monopolies, trusts and combinations in restraint of trade …," approved March 12, 1909; and "An Act relating to trade, and to prevent unfair discriminations and unfair trade …," approved March 22, 1915. The legislature also amended the state's general incorporation laws to bolster the charter board's enforcement powers and often to raise fees: "An Act relating to private corporations …," approved March 5, 1901; "An Act concerning private corporations," approved March 7, 1903; "An Act relating to private corporations …," approved March 10, 1907; "An Act to amend section 23 of chapter 140 …," approved February 2, 1911; "An Act providing for the forfeiture of the charters of dormant and delinquent corporations …," approved March 10, 1911; "An Act prescribing a penalty against corporations …," approved March 13, 1911; and "An Act to require corporations to file annual reports …," approved February 24, 1913.
[141] Piott, *Anti-Monopoly Persuasion*, Ch. 7.

white horse is the same as a black horse; they both kick." Similarly, Kansas Attorney General Fred C. Jackson avowed, there was "no such thing as a good combination," continuing "[a]s well might you refer to a 'good' burglar! Every combination was 'conceived in sin and born in iniquity.'"[142] The antimonopoly impulse was not only alive and well in these states but still shaping policy.

Conclusion

The evidence on state antitrust activity presented in this chapter is not consistent with the view that states raced to the bottom in response to New Jersey's liberalization of its general incorporation laws. Nor is it consistent with the idea that states ceded the regulatory ground to the federal government in the early twentieth century because they lacked the economic power needed to confront large-scale businesses. Although many states followed New Jersey in amending their general incorporation laws to facilitate mergers and legalize holding companies, as a general rule these statutes remained highly regulatory and often included provisions that prohibited combinations for the purpose of monopoly. States also enacted new laws regulating foreign corporations, requiring them to register with a state authority and obey the same rules as domestically chartered corporations. Some even created new commissions tasked with monitoring both domestic and foreign corporations to ensure conformity with the law. Although states lost some revenues from chartering corporations to New Jersey, Delaware, and a few other

[142] Piott, *Anti-Monopoly Persuasion*, 148.

chartermongering states, they compensated for those losses by imposing new taxes on foreign corporations that did business in their jurisdictions. Rather than cut taxes on domestic corporations out of fear of driving them to other domiciles, they often increased those levies at the same time.

States responded to the rise of big businesses and the resulting fears of monopoly power in a variety of ways. Some states did little or nothing; others repeatedly challenged the legality of large-scale enterprises. Some of the states that were the most vociferous challengers in the 1890s abandoned their antimonopoly activities in the early twentieth century; others were only just then taking up the gauntlet. These differences across states were not a simple function of their administrative capacity—of the resources they had available to fight the trusts. New York's attorneys general had more funds at their disposal than their counterparts in Illinois or Kansas, but prosecuted fewer trusts. Kansas's attorneys general were the most underfunded of the three but the most active. The budget of Illinois's top lawyer increased quite substantially over time, but prosecutions of monopolies nonetheless fell off. Nor can the pattern of enforcement be explained by party politics. Kansas's attorneys general were mainly Republicans and so were New York's, but they could not have been more different in their stances on trusts. Illinois's attorneys general took strong antimonopoly positions in the 1890s regardless of party, and regardless of party they all backed off in the twentieth century.

Whether they were Democrats or Republicans, well-funded or not, the attorneys general in these three states seem to have been responding more than anything else to the relative strength in their jurisdictions of big business versus oppositional groups. The stronger the former, the less antitrust activity; the stronger the latter, the more. Although there were certainly business groups that supported action against the trusts, the general pattern suggests that the strength of agrarian organizations mattered more than anything else. As a result, the states' response to trusts can be arrayed on a rough East-West gradient. In the East, where big-business interests were strongest politically, attorneys general were least active in fighting monopolistic combinations. In the West, where agrarian interests were strongest, the opposite was the case. The Midwestern part of the manufacturing belt was more of a battleground, with the antimonopoly movement losing ground over time, along with agrarian interests.

Although, on the surface, the experience of Midwestern states like Illinois might seem to fit the standard narrative of states giving up on antitrust and looking to the federal government to take charge, the change was less a matter of the state's lack of economic power than of its internal political economy. Illinois's attorney general handed over the evidence he had collected about collusion among giant meatpackers to the federal government because he could not get the legislature to fix the problems with the state's antitrust law. Moreover, even though the legislature failed to revise its antitrust laws after significant parts of them were declared unconstitutional, in 1919 progressive legislators were able to imbed antimonopoly language into the new general incorporation law as a price of their support for its New-Jersey style merger and holding company provisions. That achievement meant that, even if state officials neglected to take action against an anticompetitive merger, stockholders and other private parties still had standing to file a lawsuit to block it.

One trend that the standard antitrust narrative overlooks is the extent to which Americans in the early twentieth century were looking to government at all levels to solve a broad array of social as well as economic problems. For many, the most pressing concern was the abuse of alcohol. State governments responded to popular agitation for prohibition with new legislation to curb the sale of alcohol, and of course the Eighteenth Amendment made prohibition a federal matter as well. At the national level, enforcing prohibition took up the lion's share of the government's enforcement resources and energies in the 1920s, and it is not surprising that it had a similar effect at the state level. As late as 1911 the president of the National Attorneys General Conference, Charles West of Oklahoma, gave a rousing antimonopoly address to the assembled state officials declaring that "it is the states which must solve … the trust problems" and calling for more joint action to that end: "Is there anyone amongst us who does not realize that co-operation is the secret of our success …?"[143] Over the next few years, however, concerns about monopoly power mostly disappeared from the conference's agenda as the organization shifted its focus to cooperating on other issues, particularly alcohol restriction.[144] In some places, like Illinois, attorneys general reduced their activity on the antitrust front at the same time as they upped it on the prohibition front. However, there were other states, like Kansas and Texas, where

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[143] Charles West, "President's Annual Address," *Annual Meeting of the National Association of Attorneys General* (1911), 3-4.
[144] See the *Annual Meeting of the National Association of Attorneys General* (1913 and 1915).

enforcement of the liquor laws does not seem to have crowded out antitrust enforcement, perhaps because the anti-alcohol movement in some places had an important antimonopoly side.[145]

How much the western states' ongoing antimonopoly activities ultimately mattered is an important question but one that is difficult to answer. The journalist Herbert Casson, with whose words I began this essay, certainly thought they did. One reason to believe he was correct is that businesses kept challenging the constitutionality of state actions in federal court.[146] They mostly lost these cases (*Connelly v. Union Sewer Pipe* was a notable exception), but they nonetheless kept trying—to the frustration of the justices on the Supreme Court. Writing with unconcealed irritation, Justice Joseph McKenna demolished a challenge to a Missouri prosecution that International Harvester brought in 1914 on Fourteenth Amendment grounds, pointing out sarcastically that the corporation was implying that a "combination of all the great industrial enterprises … could not be condemned unless the law applied as well to a combination of maidservants or to infants' nurses."[147] Moreover, these losses forced Standard Oil, International Harvester, and other large firms to fold up their operations in a number of western states, creating space for competitors to take root and thrive. Cyrus McCormick, grandson of the

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[145] See Mark Lawrence Schrad, *Smashing the Liquor Machine: A Global History of Prohibition* (New York: Oxford University Press, 2021).

[146] A number of these cases reached the US Supreme Court. See, for examples, *Waters-Pierce Oil Co. v. Texas*, 177 U.S. 28 (1900); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902); *National Cotton Oil Co. v. Texas*, 197 U.S. 115 (1905); *Smiley v. Kansas*, 196 U.S. 447 (1905); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909) and 212 U.S. 112 (1909); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909); *Standard Oil Co. of Kentucky v. Tennessee*, 217 U.S. 413 (1910); *Standard Oil Co. of Indiana v. Missouri*, 224 U.S. 270 (1912); *International Harvester Co. of America v. Kentucky*, 234 U.S. 216 (1914); *International Harvester Co. v. Missouri*, 234 U.S. 199 (1914).

[147] *International Harvester Co. v. State of Missouri*, 234 U.S. 199 (1914) at 213.

famous inventor, later recalled that as a western branch manager for International Harvester he "used to stand by the border of forbidden Texas and long to explore it."[148]

During the 1920s this stream of challenges petered out, in part because the states reached accommodations with firms like International Harvester that allowed them to return and in part because the Court gained control of its caseload and could now refuse to hear them. Whether the accommodations were evidence that antimonopoly fervor was declining in the West—giving way, as it already had elsewhere and at the federal level, to a more pragmatic antitrust agenda—is beyond the scope of this paper to determine. However, the accommodations were only possible because businesses were changing their behavior. Large-scale enterprises were learning how to compete effectively in oligopolistically structured industries. They were also learning how to live within the constraints of the antitrust laws and refrain from doing the kinds of things that would get them prosecuted: soliciting rebates from railroads; forcing downstream firms to agree to tying contracts; engaging in discriminatory pricing to force competitors out of business. Antitrust scholars have recognized the importance of these adjustments, but they have attributed them to the increased effectiveness of federal antitrust enforcement. As the evidence presented in this chapter shows, however, it is impossible to disentangle the effects of state and federal

[148] In addition to Texas, International Harvester had to quit Arkansas and Kentucky for a number of years and fought lengthy legal battles to avoid ouster in Kansas and Missouri. Cyrus McCormick, *The Century of the Reaper* (Boston: Houghton Mifflin, 1931), 166-167.

action in reshaping businesses' behavior. We can no longer simply assume that all that mattered was the federal government.[149]

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[149] A final example to underscore the point: Kansas's high court conditioned International Harvester's continued presence in the state on its abandonment of anticompetitive practices like exclusive-dealing contracts and price discrimination. Missouri's settlement was similar. In several other states, litigation led either to ouster or the company's withdrawal from the state, leaving local markets open to competitors. These developments occurred three to four years before International Harvester entered into a consent decree with the federal government in 1918 that forbade the company from contracting with more than one dealer in each town. International Harvester's share of the market for harvesting machines fell from 77 percent in 1911 to 67 percent in 1919 to 64 percent in 1923. In other words, most of the decline occurred before the federal consent decree could have had any effect. These details are from Simon N. Whitney, *Antitrust Policies: American Experience in Twenty Industries* (New York: Twentieth Century Fund, 1958), Vol. II, Ch. 17. Whitney nonetheless paid little attention to the states' efforts.