Voting Trusts and Antitrust: Rethinking the Role of Shareholder Rights and Private Litigation in Public Regulation, 1880s to 1930s

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Abstract: Scholars have long recognized that the states' authority to charter corporations bolstered their antitrust powers in ways that were not available to the federal government. Our paper contributes to this literature by focusing attention on the relevance for competition policy of lawsuits brought by minority shareholders against their own companies, especially lawsuits challenging voting trusts. Historically judges had been reluctant to intervene in corporations' internal affairs and had been wary of the potential for opportunism in shareholders' derivative suits. By the end of the nineteenth century, however, they had begun to revise their views and see shareholders as useful allies in the struggle against monopoly. Although the balance between judges' suspicion of and support for shareholders' activism shifted back and forth over time and eventually provoked a legislative response, over the long-run shareholders' lawsuits helped to make devices like voting trusts unsuitable for the purposes of economic concentration.

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In recent years, the literature on American regulatory design has highlighted what political scientist Sean Farhang calls "private enforcement regimes"—that is, provisions written into regulatory statutes that empowered private litigants to enforce public regulations.[1] This literature builds on historian William J. Novak's critique of the "myth" of the weak American state, particularly his claim that scholars have been misled by Max Weber's conception of the state as a distinct, rationalized, bureaucratic entity. Federalism in the United States meant that power tended to be "separated and divided rather than integrated." Although the resulting welter of overlapping jurisdictions might seem from a Weberian perspective to be a sign of weakness, Novak argues to the contrary that it facilitated an "extraordinary penetration of the state through civil society," simultaneously enabling and legitimating regulatory interventions.[2] Farhang sees the private enforcement regime in similar terms. Developed in response to the fragmented nature of American state structures, it was nonetheless a "deliberate and effective" form of state intervention that enlisted broad public support and yet has been largely overlooked by the scholarship on American state capacity.[3]

The literature on the private enforcement regime situates its development in the context of the late-twentieth-century expansion of government into new areas of regulation, such as civil rights and environmental protection.[4] In fact, however, this type of regulatory design has a much

[1] Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton: Princeton University Press, 2010).

[2] William J. Novak, "The Myth of the 'Weak' American State," *American Historical Review* 113 (Jun. 2008): 752-772 at 766-767.

[3] Farhang, *Litigation State*, 7.

[4] In addition to Farhang, *Litigation State*, see Joseph DiMento, "Citizen Environmental Legislation in the States: An Overview," *Journal of Urban Law* 53 (Feb. 1976): 413-461; David Freeman Engstrom, "Harvesting the

longer history, going back at least to the False Claims Act of 1863, which authorized private citizens to sue and collect damages against individuals who defrauded the government.[5] It also played an important role in antitrust enforcement from the very beginning. The Sherman Act of 1890 gave any person or company injured by anticompetitive behavior the right to sue in federal court and recover treble damages, and most state antitrust statutes included similar inducements. Although the number of private antitrust suits filed over the next couple of decades was small by the standards of the late twentieth century, it surpassed contemporary prosecutions by federal and state officials combined.[6]

Important though private antitrust actions were in the late nineteenth and early twentieth centuries, they were only part of the story of how private litigants advanced competition policy. Lawsuits brought by shareholders under the states' general incorporation laws also played a significant role in limiting anticompetitive conduct and extending state regulatory capacity, though one that has gone unnoticed in the literature. In these lawsuits, minority shareholders asked judges to exercise their equitable powers and enjoin monopolistic business decisions by their boards. As we show in this paper, judges who were concerned about large firms' exercise of market power increasingly supported, and sometimes even directly encouraged, these actions. Because not all judges followed suit, however, the result was an increase in legal uncertainty to which legislatures often responded by reinforcing judges' pro-competition leanings.

Private Attorney General: Evidence from Qui Tam Litigation," *Columbia Law Review* 112 (Oct. 2012): 1244-1325; and Karen Tani, "Training the Citizen-Enforcers of Disability Rights, 1978-1982: A Case Study in Law and Democracy," unpublished working paper (2019).

[5] John C. Coffee, Jr., *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Cambridge, Mass: Harvard University Press, 2015), 14.

[6] "An Act to protect trade and commerce against unlawful restraints and monopolies," (commonly known as the Sherman Act) approved July 2 1890, https://www.ourdocuments.gov/doc.php?flash=false&doc=51&page=transcript; Joseph E. Davies, *Trust Laws and Unfair Competition* (Washington, DC: Government Printing Office, 1916), 211-216; James May, "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): 494-593 at 503 n. 61; Richard A. Posner, "A Statistical Study of Antitrust Enforcement," *Journal of Law and Economics* 13 (Oct. 1970): 365-419 at 371.

We begin, in the next section, with a brief review of the multilayered state and federal response to the rise of Standard Oil and other trusts. The strengths and limitations of the statutes enacted to curb concentrations of market power, as well as the steps taken by both state attorneys general and the US Department of Justice to enforce the laws, have been well covered by the literature. What has not been adequately understood is the way the rise of these combines reshaped judicial attitudes more generally and thus affected adjacent areas of the law. In the second section of the paper we develop this observation by examining judges' receptivity to shareholders' derivative suits that targeted mergers. Fearing that shareholders would exploit derivative actions opportunistically, judges historically had erected substantial evidentiary barriers to the success of these lawsuits. By the 1890s, however, some were coming to the conclusion that shareholders could be useful allies in the struggle against monopoly, and they took pains to help litigants shape these suits in ways that thwarted anticompetitive mergers and acquisitions. Several states subsequently encouraged this alliance by imbedding antitrust language in their general incorporation statutes, thus transforming derivative suits against mergers into direct legal actions that did not face the same high evidentiary bar.

The third section extends this analysis of stockholders' lawsuits to cases involving voting trusts. Voting trusts were agreements by which stockholders transferred their shares in a corporation to one or more trustees who then voted them on the transferees' behalf. These agreements could serve legitimate purposes—for example, insuring managerial stability or inducing bankers to rescue a company in financial distress.[7] By the late nineteenth century, however, it had become clear that Standard Oil and other large firms were using voting trusts to evade state laws that forbid corporations from owning stock in other companies. Once New

[7] For an overview of voting trusts and their uses, see Harry A. Cushing, *Voting Trusts: A Chapter in Modern Corporate History* (New York: Macmillan, 1927), Ch. 1.

Jersey liberalized in statutes to permit holding companies, this use of voting trusts abated, but by the 1910s charges resurfaced that the device was being used by prominent bankers (the so-called "Money Trust") to control major sectors of the American economy.[8] Both sets of revelations encouraged judges to rethink the legal rules governing voting trusts and to insist that shareholders must be able to withdraw from such agreements at will—a change that undermined the utility of voting trusts for legitimate purposes as well as for anticompetitive ends.

Not all judges followed the trend, and the resulting increase in legal uncertainty highlighted an important drawback to the system of private enforcement. In the final section of the paper, we show that legislatures in most states intervened to resolve the uncertainty by enacting laws that allowed voting trusts to be irrevocable but only for finite periods of time. These laws restored the utility of such agreements for purposes traditionally regarded as legitimate. At the same time, however, they made it much more difficult for the devices to be used for monopolistic purposes. Our paper thus highlights an important way in which the fragmented nature of American institutions facilitated a broad-based response to perceived threats to competition. By harnessing private litigants' complaints, judges helped infuse corporate law with antitrust objectives and limit businesses' anticompetitive conduct.

Nineteenth-Century Federalism and the Challenge of the Trusts

Standard Oil sparked the antitrust movement during the 1880s with its innovative use of a voting trust to dominate the US petroleum industry. Although courts had generally allowed majority shareholders to use the device to consolidate control over their own companies, its

[8] See U.S. House of Representatives, "Report of the Committee Appointed … to Investigate the Concentration of Control of Money and Credit," Report 1593, 62nd Cong., 3d Sess. (Washington: Government Printing Office, 1913).

exploitation as a tool of horizontal combination was something new.[9] Standard first tried it out in 1872, when it arranged for stockholders in the Long Island Oil Company of New York to transfer their shares in trust to one of Standard's officers. The experiment seemed to work and Standard acquired additional refineries in the same way. However, executives began to worry about complications that could arise if a trustee died or, worse, had a falling out with the other officers. To avoid these potential problems, they restructured the arrangements in 1879, replacing the individuals with boards of three trustees. Then in 1882 they consolidated the agreements into a single overarching trust contract that brought all the company's acquisitions under the control of an expanded board of trustees with powers very similar to those of directors of a holding company, a form that was not then legal under state incorporation law.[10]

Standard's innovation inspired imitators in a number of other industries, ranging from sugar to cottonseed oil to whisky to lead. It also provoked a political backlash. Even before Congress passed the Sherman Antitrust Act in 1890, more than a dozen states had enacted laws criminalizing such combinations if they restrained trade or aimed to create a monopoly, and most of the rest would follow suit over the next decade.[11] At the same time, state attorneys general began to launch *quo warranto* suits to revoke the charters of corporations that participated in trusts. Literally meaning "by what authority," *quo warranto* proceedings allowed state courts to dissolve corporations that joined combines on the grounds that the arrangements violated the

[9] For a summary of the precedents, see *Griffith v. Jewett*, 9 Ohio Dec. Reprint 627 (1886).

[10] 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), 466-470; Ron Chernow, *Titan: The Life of John D. Rockefeller* (New York: Random House, 1998), 224-227. 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.

[11] Morris D. Forkosch, *Antitrust and the Consumer (Enforcement)* (Buffalo, NY: Dennis & Co., 1956), 220-231, 412-432; Henry R. Seager and Charles A. Gulick, *Trust and Corporation Problems* (New York: Harper & Bros., 1929), 51, 339-366.

terms of their charters. All that prosecutors had to document was the *ultra vires* character of the agreement—not the extent to which it restrained trade. As New York's high court declared in a case involving the sugar trust, "[T]he defendant corporation has violated its charter and failed in the performance of its duties…. Having reached that result it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade…."[12]

The ability to bring *quo warranto* suits meant that states had a powerful weapon to wield against combines that the federal government did not possess. Some contemporaries believed the states' regulatory powers over corporations took precedence over, and hence constrained, those of the federal government. Others worried that federal intervention would undermine states' authority over their corporate creatures. As legal historian Charles McCurdy has shown, Chief Justice Melville Fuller's infamous distinction between manufacturing and commerce in *United States v. E. C. Knight* (1895), a federal antitrust suit against the sugar trust, was a deliberate effort to preserve the states' power to regulate corporations, including to prevent companies they had chartered from joining combines. If the Supreme Court had invoked the Constitution's commerce clause to break up the trust, it would have preempted state law, leaving what Fuller feared would be a legal vacuum. Contemporaries tried several times to resolve the problem by securing a federal incorporation law, but these efforts failed.[13]

[12] *People v. North River Sugar Refining*, 121 N.Y. 582 (1890) at 626. 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.

[13] Charles W. McCurdy, "*Knight* Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903," *Business History Review* 53 (Autumn 1979): 304-342. See also Naomi R. Lamoreaux, *The Great Merger Movement in American Business* (New York: Cambridge University Press, 1985), Ch. 6; Melvin Urofsky, "Proposed Federal Incorporation in the Progressive Era," *American Journal of Legal History* 26 (Apr. 1982): 160-183; Arthur M. Johnson, "Antitrust Policy in Transition, 1908: Ideal and Reality," *Mississippi Valley Historical Review* 48 (Dec. 1961): 415-434; Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge: Cambridge University Press, 1988), 228–285; Daniel A. Crane, "The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal," in *Corporations and American Democracy*, ed. Naomi R. Lamoreaux and William J. Novak (Cambridge, Mass.: Harvard University Press, 2017), 109-138.

Notwithstanding Fuller's concern, the locus of antitrust activity shifted during the early twentieth century from the states to the federal government. Scholars have advanced three related arguments for this jurisdictional change, emphasizing New Jersey's liberalization of its general incorporation laws and the resulting regulatory race to the bottom, states' reluctance to inflict harm on their domestic economies by prosecuting combines chartered in other states, and their increasing inability to control businesses operating in broader national or even international markets.[14] Although the heightened importance of federal antitrust initiatives was certainly very real, more recent scholarship has cast doubt on these explanations, highlighting the ongoing vigor with which at least some states continued to pursue antitrust agendas and suggesting that the literature has exaggerated the extent to which states raced to the bottom. What emerges from this newer research is not a simple story of a shift from state to federal authority, but rather a more complex political-economic analysis that points to the persistence of variation across states in the extent and significance of antitrust activity.[15]

State attorneys general exercised considerable discretion about whether or not to proceed against trusts. Most were popularly elected, and they responded to the enormous political pressures to which they were subject in heterogeneous ways. At one extreme, Ohio's attorney general filed suit to dissolve the Standard Oil Company despite overt threats to his political

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[14] U.S. Commissioner of Corporations, "Report," House Doc 165, 58th Cong. 3d Sess. (Washington, DC: Government Printing Office 1904), 40; Lamoreaux, *Great Merger Movement*, Ch. 6; Herbert Hovenkamp, *Enterprise and American Law, 1836-1937* (Cambridge, MA: Harvard University Press, 1991), esp. Ch. 20; William G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton, NJ: Princeton University Press, 1997).

[15] Bruce G. Carruthers and Naomi R. Lamoreaux, "Regulatory Races: Effects of Jurisdictional Competition on Regulatory Standards," *Journal of Economic Literature* 54 (Mar. 2016): 52-97 at 70-76; May, "Antitrust Practice and Procedure"; Steven L. Piott, *The Anti-Monopoly Persuasion: Popular Resistance to the Rise of Big Business in the Midwest* (Westport, CT: Greenwood Press, 1985); Joseph A. Pratt and Mark E. Steiner, "'An Intent to Terrify': State Antitrust in the Formative Years of the Modern Oil Industry," *Washburn Law Journal* 29 (Winter 1990): 270-289; Jonathan W. Singer, *Broken Trusts: The Texas Attorney General versus the Oil Industry, 1889-1909* (College Station: Texas A&M University Press, 2002); William R. Childs, *The Texas Railroad Commission: Understanding Regulation in America to the Mid-Twentieth Century* (College Station: Texas A&M University Press, 2005).

future from Republican Party bosses.[16] At the other, Massachusetts' top lawyer resisted a concerted newspaper campaign to push to take action against the trusts.[17] Although New York's attorney general went after the American Sugar Refining trust when it sought to close down a company in the state, no other official had previously taken any action against the combine even though it had existed for some years and controlled all the sugar refineries in the state. Nor did New York officials challenge any of the other trusts that, like Standard Oil and the Cotton Oil Trust, had their headquarters in New York City.[18]

This variation continued through the first several decades of the twentieth century. Some of the states that pursued *quo warranto* actions in the 1880s and 1890s became relatively quiescent in the new century (Pennsylvania is a good example), but other states stepped up their activities.[19] Texas's antitrust initiative in petroleum, which has been credited with playing a major role in restructuring that industry, began after the discovery of the Spindletop oil field in 1901 and continued for several decades after the US Supreme Court broke up the Standard Oil Company in 1911.[20] Missouri and Kansas joined Texas's attack on Standard and then took on other trusts, most notably International Harvester.[21] As many as thirteen state attorneys general met in St. Louis in 1907 with the aim of coordinating their antitrust prosecutions.[22] These ongoing state lawsuits were sufficiently bothersome that International Harvester and other affected companies repeatedly appealed them (mostly unsuccessfully) to the US Supreme Court,

[16] Bruce Bringhurst, *Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890-1911* (Westport, CT: Greenwood Press, 1979), 14.

[17] Nolette, "Litigating the 'Public Interest," 395.

[18] Wayne D. Collins, "Trusts and the Origins of Antitrust Legislation," *Fordham Law Review* 81 (April 2013): 2279-2348 at 2327-2328.

[19] For general surveys of state activity, see J. J. Speight and Nathan B. Williams, *Laws on Trusts and Monopolies: Domestic and Foreign, with Authorities* (Rev. edn.; Washington, DC: Government Printing Office, 1914); Marketing Laws Survey, *State Antitrust Laws* (Washington, DC: Government Printing Office, 1940).

[20] Singer, *Broken Trusts*; Pratt and Steiner, "An Intent to Terrify."

[21] Piott, *The Anti-Monopoly Persuasion*.

[22] Nolette, "Litigating the 'Public Interest," 392-393.

claiming the prosecutions violated the Fourteenth Amendment's due process and equal protection clauses.[23]

Regardless of their determination to challenge the trusts, state attorneys general commonly lacked the funds and administrative capacity needed to enforce the law effectively. As a result, some of the early *quo warranto* suits depended on private parties to initiate the complaint, coordinate the investigation, and/or fund the proceedings. Illinois's victory against the Chicago Gas Trust, for example, owed much to the activism of the Citizens' Association of Chicago (CAC), a municipal reform league. The state's 1872 general incorporation law stipulated that corporations could only be formed for legal purposes and required them to declare their purpose along with other information when registering with the secretary of state.[24] Yet no official in that office seems to have noticed when the Chicago Gas Trust Company was organized in 1887, contrary to law, to control all the gas companies in the city. Francis Peabody, the CAC's president, brought this fact to the attention of the attorney general, George Hunt, in 1888 and asked him to bring suit against the illegal corporation. Hunt agreed with Peabody's assessment, and when the CAC also offered to pay for a special assistant, he brought a *quo warranto* suit against the company and won.[25] Taking the CAC's position, Justice Benjamin Magruder of the Illinois Supreme Court declared, "[t]o create one corporation that it may destroy

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[23] Ruth H. Bloch and Naomi R. Lamoreaux, "Corporations and the Fourteenth Amendment," in *Corporations and American Democracy*, ed. Lamoreaux and Novak, 286-325 at 296-297.

[24] Illinois General Assembly, "An Act concerning corporations," in force July 1, 1872, §1-2. Unless otherwise noted, all citations to laws are from the State Session Laws collected by Heinonline, https://www.heinonline.org/HOL/Index?index=sslusstate&collection=ssl.

[25] Illinois Attorney General, *Biennial Report* (Springfield, IL: State Printer, 1890), 35. Pennsylvania similarly obtained assistance from an association of independent oil producers in bringing its suit against Standard Oil. See Chester M. Destler, *Roger Sherman and the Independent Oil Men* (Ithaca, NY: Cornell University Press, 1967), 83-193.

the energies of all other corporations of a given kind, and suck their life-blood out of them, is not a 'lawful purpose.'" The court ordered the company dissolved.[26]

Over time most states took steps to build up their antitrust capabilities. Budgets and staff sizes for the office of Attorney General increased.[27] Some states also created new administrative bodies to scrutinize corporate charters and enforce conformity with the general incorporation and antitrust laws. For example, Kansas in 1898 created a Charter Board whose duties were to pass on applications for domestic charters and also all requests by foreign (out-of-state) corporations to do business in the state.[28] Some states even wrote provisions mandating the creation of what were called "Corporation Commissions" into their constitutions. These commission were responsible for regulating railroads and utilities, but also for overseeing corporations more generally. For example, Oklahoma's 1907 constitution mandated that "[t]he records, books, and files of all corporations shall be, at all times, liable and subject to the full visitorial and inquisitorial powers of the State." It vested these visitorial powers in a commission, to which any resident could submit grievance.[29]

Despite these investments, attorneys general complained their budgets were not sufficient for effective enforcement, and they probably were not. Even in Texas, a state with many successful antitrust prosecutions, the office of attorney general seems to have been woefully underfunded. Texas compensated for the lack of administrative capacity at the top by granting

[26] *People v. Chicago Gas Trust*, 130 Ill. 268 (1889) at 298.

[27] These increases can be tracked in the regular reports filed by state attorneys general, most of which are available on Hathitrust.org.

[28] Kansas Attorney General, *Twelfth Biennial Report* (Topeka: W. Y. Morgan, 1900), 13-14.

[29] See the complaint form in Paul A. Walker, *Corporation Commission Laws*, 1917 (Oklahoma City: Warden Co., 1918), 280. For the constitutional mandates, see Oklahoma, 1907 Constitution, Art. 1, Sec. 28, and Art. 9, Sec. 15 and 43. For similar provisions, see New Mexico, 1911 Constitution, Art. 11, Sec. 1, 6 and 11; Arizona, 1912 Constitution, Art. 14, Sec. 8 and 17, Art. 15, Sec. 1. Unless otherwise noted, all citations to state constitutions are to the NBER/Maryland State Constitutions Project, http://www.stateconstitutions.umd.edu/index.aspx.

district and county attorneys a share of any damages from antitrust suits, thus providing "an undersized attorney general's department with investigators."[30] Other states imposed statutory obligations on local officials to aid in antitrust enforcement, and most states also included incentives in their antitrust laws for private parties injured by anticompetitive behavior to sue.[31] In addition, as we will show in the next section, shareholders might be enlisted as allies in the struggle against the trusts.

The Antitrust Applications of Shareholders' Derivative Suits

If state attorneys general lacked the capacity (or the will) to ensure that corporations conformed to the law, and if aid from voluntary associations or private antitrust suits was only sporadically forthcoming, there was still the possibility that shareholders would take action under state incorporation statutes or more general principles of law and equity. Shareholders had two basic ways to proceed. They could bring *direct action* suits in a court of law if the corporation's officers had violated their rights, for example, by preventing them from voting at a general meeting or by denying them access to the corporation's books. Shareholders could also file *derivative* suits in a court of equity if they had evidence that the corporation's officers and directors had engaged in illegal or fraudulent activities to the detriment of the firm. In the latter case the injured party was technically the corporation itself, but shareholders had legal standing to sue if they could show that the corporation was under the control of the alleged wrongdoers.[32] Although most shareholders' suits involved disputes over internal business decisions that had

[30] Singer, *Broken Trusts*, 219-220, 293 n25.

[31] "A Collection and Survey of State Anti-Trust Laws," *Columbia Law Review* 32 (Feb. 1932): 347-366 at 361-362; Davies, *Trust Laws and Unfair Competition*, 211-216.

[32] See J.B., "Distinguishing between Direct and Derivative Shareholder Suits," *University of Pennsylvania Law Review* 110 (Jun. 1962): 1147-1157.

nothing to do with competition policy, during the merger waves of the late nineteenth and early twentieth centuries combines often acquired businesses with the aim of shutting them down. Shareholders who were adversely affected by the closings sometimes launched derivative suits to block the mergers as *ultra vires* actions, claiming that the majority was using its voting control for purposes that were illegal under the antitrust laws. In this way, private suits about corporate governance intersected with—and sometimes advanced— broader issues of competition policy.

Nineteenth-century policymakers understood that shareholders could serve important public policy goals by acting as a check on those in control of corporations, and for this reason many states imposed voting rules that boosted the power of minority shareholders.[33] But policymakers also worried that some opportunistic shareholders might use their power to extract more than their fair share of corporate revenues. Mergers were particularly problematic in this respect. Under common-law rules they required shareholders' unanimous consent and hence gave unscrupulous owners the ability to block profitable deals unless they were paid off. Following New Jersey's lead in 1888, most states solved this problem by enacting statutes that routinized the merger process, setting a voting threshold for approval and providing a procedure for buying out dissenting stockholders. The voting threshold could be lower or higher depending on where policymakers wanted to set the balance of power between shareholders and directors. New Jersey's law required only a simple majority vote, but Massachusetts, Illinois, and California mandated two-thirds.[34]

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

[34] New Jersey General Assembly, "An Act relating to the consolidation of corporations …," approved Apr. 17, 1888; Massachusetts General Court, "An Act relative to business corporations," approved June 17, 1903, §40; Illinois General Assembly "An Act in relation to corporations for pecuniary profit," approved June 28, 1919, §67; California General Assembly, "An Act substituting for the existing title one of part four of division first of the Civil

Derivative suits posed similar trade-offs. On the one hand, judges recognized that the purpose of these suits was to provide shareholders with a remedy against exploitation by corporate directors. On the other, they worried that shareholders would use “strike suits” opportunistically or that the courts would be deluged with cases of shareholders challenging directors’ business strategies. These concerns led them to impose high evidentiary requirements for such actions. Not only did shareholders have to demonstrate that they had no means of addressing the problem through normal corporate governance procedures, but they also had to show that they directors’ behavior was illegal or fraudulent. If the disagreement was simply a matter of the directors’ “business judgment,” then the courts would not intervene, even if the corporation sustained heavy losses.[35]

In the early years of the antitrust movement, judges’ skepticism of stockholders’ motives spilled over to cases involving anticompetitive mergers. In 1891, for example, a Louisiana court rebuffed a minority shareholder in the Bienville Oil Works, who sued to recover damages after the company was dissolved and its assets sold to the American Cotton Oil Trust. A district court in the Parish of Orleans had issued an injunction prohibiting the trust from doing business in the state because it had not incorporated under state laws, paid no taxes, and aimed to monopolize Southern oil mills.[36] Piggybacking on this ruling, the Bienville shareholder claimed that the directors had, “by a secret and fraudulent combination and bargain with the American Oil Trust, an alleged unlawful organization,” transferred their stock to the trust “to subserve its own

Code …,” approved June 12, 1931, §361. See also William J. Carney, “Fundamental Corporate Changes, Minority Shareholders, and Business Purposes,” *American Bar Foundation Research Journal* 1980 (Winter 1980): 69-132.

[35] *Hodges v. New England Screw Co.*, 1 R.I. 312 (1850) and 3 R.I. 9, 18 (1853); *Brewer v. Boston Theatre*, 104 Mass. 378 (1870); *Wardell v. Railroad Company*, 103 U.S. 651 (1880); *Dunphy v. Traveller Newspaper Assoc.*, 146 Mass. 495 (1888); *Leslie v. Lorillard*, 110 N.Y. 519 (1888); *Edison v. Edison United Phonograph Co.* 52 N.J. Eq. 620 (1894); *Burden v. Burden*, 159 N.Y. 287 (1899); *Hawes v. Oakland*, 104 U.S. 450 (1881).

[36] See *State v. American Cotton Oil Trust*, 40 La. Ann. 8 (1888), upholding the lower court’s dismissal of an injunction against a brokerage firm for selling the trust’s securities, as reported in *State v. American Cotton Oil Trust*, *Railway and Corporate Law Journal* 1 (1887): 509-513.

interests, and in disregard of their obligations to the other stock holders and in violation of their rights, ... thereby destroying the value of its stock other than that held by the trust."[37] The Louisiana Supreme Court determined, however, that the plaintiff—"an unfortunate and improvident loser"—could have followed the other stockholders' example and exchanged his shares for certificates in the trust. "Had he done so, he would have realized the fabulous profits which he says they have … reaped." Even after the deadline for the exchange expired, he was offered some money for his shares, but he held out for a higher price. His losses were his own fault, and he had "no occasion legally to complain." In the absence of any express statutory prohibition or fraud, the requisite majority of stockholders had "absolute" discretion to wind up the corporation's affairs "for reasons by them deemed sufficient," and the court had no authority to second-guess their decision.[38]

Judges were willing to limit shareholders' "absolute" discretion in cases where government officials, rather than minority shareholders, challenged a merger as *ultra vires*. For example, in an action brought by Nebraska's attorney general to revoke the charter of a corporation whose shareholders had sold its property to another corporation as a step toward being acquired by a trust, the court ruled that "the fact that the corporation has authority to put an end to its existence by a vote of a majority of its stockholders … does not authorize it to terminate its existence by a sale and disposal of all its property and rights."[39] Judges were reluctant, however, to allow shareholders to usurp the attorney general's powers and make claims on the basis of public policy. Thus Illinois's supreme court dismissed a suit by a

[37] *Trisconi v. Winship*, 43 La. Ann. 45 (1891) at 47-48.

[38] *Trisconi v. Winship*, 43 La. Ann. 45 (1891) at 49-50. For cases in other states brought by minority shareholders that had similar outcomes, see *Ellerman v. Chicago Junction Railways*, 49 N.J. Eq. 217 (1891); *Rafferty v. Buffalo City Gas Co.*, 56 N.Y.S. 288 (1899).

[39] *State v. Nebraska Distilling Co.*, 29 Neb. 700 (1890) at 719.

shareholder who sought the dissolution of the National Linseed Oil Company on the grounds that it was an illegal combination, insisting that "only the State can complain of injury to the public or that public rights are being interfered with, and enforce a forfeiture of defendant's franchise for that reason."[40] In this case, the state's activist attorney general, Maurice Moloney, followed up on the shareholder's action by filing a *quo warranto* suit, which National Linseed belittled in a statement as just "a rehash of a bill previously filed" by a stockholder.[41]

As the great merger movement gained momentum in the late 1890s, some judges began to lay out a legal justification for private derivative suits that served public antitrust objectives. Only one year after the Illinois Supreme Court dismissed the shareholder's case against National Linseed, it permitted a shareholder in another corporation to block the sale of a factory to the American Glucose Company, a consolidation organized as a New Jersey corporation.[42] Justice Magruder, who had earlier written the decision dissolving the Chicago Gas Trust, delivered the opinion in the case. A thrice-elected Republican jurist, he would be remembered, posthumously, for his "righteous indignation at the schemes of fraud and indiscretion by which some of the great enterprises of modern business life have been accomplished."[43] After a detailed recounting of the glucose combination's scheme to have "six corporations shut down their manufactories, and abandon their business" for the purpose of reducing competition in the industry, Magruder ruled that the stockholder who brought the case had standing to sue because the value of his shares would be adversely affected by the planned closure. "If the purpose of such dissolution is

[40] *Coquard v. National Linseed Oil Co*., 171 Ill. 480 (1898) at 484. The plaintiff had another strike against him because he had been a party to the trust.

[41] "Illinois Corporations in Court," *Paint, Oil and Drug Review* 21 (Jan. 15, 1896), 11. See also *People v. National Linseed Oil Co.*, as reported in *Biennial Report of the Auditor of Public Accounts to the Governor of Illinois, Nov. 1896* (Springfield, IL: State Printer, 1897), 182-194.

[42] *Harding v. American Glucose Co.*, 182 Ill. 551 (1899).

[43] "Memorial of the Late Benjamin Drake Magruder of the Illinois Supreme Court," *Chicago Legal News*, 43 (1910): 85.

not the *bona fide* discontinuance of the business, but is the continuance of the business by another new corporation, . . . the dissolution is practically a fraud on dissenting stockholders."[44] That declaration would normally have been enough to decide the case, but Magruder went further. Citing William Cook's treatise on corporations, he asserted that selling the company to the combine exceeded the powers of the corporate directors, not only violating public policy and law but also shareholders' rights.

> [A]ny act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the expressed or implied powers of the charter of incorporation, or of association—in other words, any *ultra vires* act—is a breach of the contract between the corporation and each one of its stockholders."

Therefore, "any one or more of the stockholders may object thereto, and compel the corporation to observe the terms of the contract as set forth in the charter."[45]

This ruling granted shareholders formidable powers to challenge anti-competitive combinations. That the court intended to embolden shareholders to contest mergers was confirmed a few years later in *Dunbar v. American Telephone and Telegraph Company* (AT&T), in an opinion written by another long-serving Republican jurist on the Illinois Supreme Court, Jacob W. Wilkin. Shareholders in the Kellogg Switchboard and Supply Company had brought suit to prevent AT&T from acquiring their firm.[46] As in the *American Glucose* case, the court held that AT&T had purchased the company's stock with "the unlawful purpose and intention of putting the Kellogg company out of business or so using and controlling it as to prevent rivalry

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[44] *Harding v. American Glucose Co.*, 182 Ill. 551 (1899) at 601, 628, 632.

[45] *Harding v. American Glucose Co.*, 182 Ill. 551 (1899) at 631. The citation was to William W. Cook, *A Treatise on the Law of Corporations Having a Capital Stock* (4th edn; Chicago: Callaghan, 1898), Vol. 2, §69-70.

[46] *Dunbar v. American Telephone and Telegraph Co.*, 224 Ill. 9 (1906) at 26. For another similarly decided case, see *Bigelow v. Calumet & Hecla Mining Co.*, 155 F. 869 (1907).

in business and creating a monopoly."[47] The acquisition "was an attempt to exercise a power which [AT&T] did not have"; to allow it go ahead "would be against the law of this State and its public policy." If AT&T's purchase furthered monopoly, "then it would seem to follow that each and every stockholder" in the switchboard company had the right to sue to restrain AT&T from voting "stock which it did not and could not legally own."[48] In short, every individual shareholder was potentially a weapon in the struggle against monopoly.

Judges nonetheless remained wary of opportunistic shareholders and, especially where antitrust concerns were not involved, continued to impose high barriers to derivative suits. The very next year after the Illinois Supreme Court found against AT&T in *Dunbar*, an appeals court in the same state dismissed a suit by shareholders in the Universal Voting Machine Company who charged that the directors had "fraudulently contrived to wreck" their company by transferring its property to an out-of-state corporation. The court distinguished the case from *Dunbar*, which also involved a foreign corporation, on the grounds that the transfer did "not appear to have been performed for the furtherance of any illegal trust or combination." Because the acquisition was not "contrary to the general public policy of the state of Illinois," the court would not intervene. "To grant the relief prayed would be clearly an interference with the internal management of a foreign company" and therefore beyond the court's jurisdiction.[49] Nonetheless, the *Dunbar* and *American Glucose* cases show how judges' concerns about anticompetitive mergers could override their reservations about derivative suits. Whether they were opportunistic or not, shareholders offered jurists a valuable ally in an environment where

[47] *Dunbar v. American Telephone and Telegraph Co.*, 224 Ill. 9 (1906) at 22. The judge cited the *Chicago Gas Trust* and *American Glucose* cases, as well as the U.S. Supreme Court's decision in *Northern Securities v. U.S.*, 193 U.S. 197 (1905).

[48] *Dunbar v. American Telephone and Telegraph Co.*, 224 Ill. 9 (1906) at 25-26.

[49] *Sprague v Universal Voting Machine Co.*, 134 Ill. App. 379 (1907) at 380, 384-385.

attorneys general often lacked either the capacity or the will to move against monopolistic combinations.

When state legislatures revised their general incorporation laws, they often added anti-monopoly provisions that expanded the grounds on which shareholders, as well as state attorneys general, could challenge anticompetitive mergers. For example, when New York liberalized its merger provisions in response to New Jersey's enactments, it added the proviso that "[n]o stock corporation shall combine with any other corporation for the prevention of competition."[50] A number of other states, including Ohio and Illinois, similarly amended their general incorporation laws to facilitate ordinary mergers but prohibit them for anticompetitive purposes.[51] Even New Jersey followed suit when it enacted its so-called "Seven Sisters" antitrust laws in 1913, though the loss of its chartering revenues caused it quickly to backtrack.[52]

That these statutes facilitated shareholders' suits can be seen from the experience of Clarence H. Venner, a professional litigant who made a career of filing derivative suits against deep-pocket financiers and major public corporations.[53] Venner used the prohibition against anticompetitive mergers in New York's stock company law to bring a complaint against the Interborough Rapid Transit Company and the financiers associated with it, including August Belmont. Venner ultimately lost the case. He was not able to convince the federal judge who heard it that Interborough was an illegal monopoly, perhaps in part because he was exactly the

[50] "An Act in relation to stock corporations …" approved June 7, 1890, §7.

[51] Davies, *Trust Laws and Unfair Competition*, 199-202; Illinois, "Corporations for Pecuniary Profit," approved June 28, 1919, §7.

[52] F. A. Updyke, "New Jersey Corporation Laws," *American Political Science Review* 7 (Nov. 1913): 650-652: Seager and Gulick, *Trust and Corporation Problems*, 361-365.

[53] For a brief overview of Venner's place in the history of twentieth-century derivative suits, see Coffee, *Entrepreneurial Litigation*, 34-36. See also J. A. Livingston, *The American Stockholder* (Philadelphia: J. B. Lippincott, 1958), 49-55; "Old Sue-&-Settle Man," *Time*, Nov. 21, 1932, 39; "Extortionate Corporate Litigation: The Strike Suit," *Columbia Law Review* 34 (Nov. 1934): 1308-1321 at 1308, n1. One of his frequent targets was J. P. Morgan. In addition, a search through LexisNexis shows that, between 1889 and 1927, Venner brought suit as a stockholder against numerous railroads, as well as U.S. Steel, American Telephone & Telegraph, Amalgamated Copper, Bethlehem Steel, and American Hide & Leather, to name a few.

kind of plaintiff judges distrusted. Indeed, the judge went so far in his opinion as to observe sarcastically that "much time has been devoted to picturing the evil result of monopoly, but nothing has been done toward showing that complainant has lost a dollar by exactly what Mr. Venner knew was going to be done when he caused the stock to be purchased."[54] Nonetheless, without the existence of New York law it is doubtful Venner would have gotten his day in court. In an earlier proceeding, the transit company had tried to block the lawsuit, but another federal judge allowed it to proceed on the grounds that the complainants had properly alleged the company to be an unlawful monopoly under the merger section of New York's stock company law.[55]

Shareholders' Challenges to the Use of Voting Trusts as Tools of Monopoly Control

Just as judges' openness to shareholders' derivative suits waxed and waned in response to the perceived threat of monopolistic combinations, so too did their receptivity toward corporate voting trusts. Traditionally judges had seen nothing wrong with voting trusts and had looked with disfavor on shareholders' suits to invalidate them. However, the growing use of the device as a tool of horizontal combination seems to have spurred them to rethink the matter, and by the late 1880s judges had begun to question the validity of voting trusts in which stockholders *irrevocably* transferred control over their shares to a group of external trustees—precisely the kinds of agreements that companies like Standard Oil were using to engineer horizontal combinations. Once Standard and other trusts reorganized as New Jersey holding companies, the

[54] Quoted in "Venner Loses Suits against Interboro," *New York Times* (4 Jun. 1913), 7. See *Continental Securities v. Interborough Rapid Transit Co.*, 207 F. 467 (1913) at 472. The decision was affirmed by the Second Circuit Court of Appeals in 221 F. 44 (1915).

[55] *Continental Securities Company v. Interborough Rapid Transit Co.*, 165 F. 945 (1908) at 958. The judge cited a similar ruling in *Burrows v. Interborough Metropolitan Co.*, 156 F. 389 (1907) at 391-392.

issue lost much of its urgency, and judges increasingly reverted to their original position. But their concerns would revive after Congress's "money trust" investigation of 1912-1913, when investigators charged J. P. Morgan and other bankers with using voting trusts to control broad swaths of the American economy.

The first judicial turn against irrevocable voting trusts had its origin in a series of disputes among railroad tycoons that raged in Standard's home state of Ohio during the 1880s. Investors allied with Collis P. Huntington had sought to withdraw the shares they held in the Cincinnati, Hamilton & Dayton Railroad from a voting trust controlled by Hugh J. Jewett, former president of the Erie Railroad. When they were refused permission, they sued and won.[56] The local Ohio judge who heard the case, *Griffith v. Jewett*, thought there was nothing illegal about such agreements *per se*, but he insisted that they had to be revocable. Citing precedents that "the right to vote is an incident of the ownership of stock, and can not exist apart from it," he ruled that shareholders could not be prevented from withdrawing from the arrangement if they so desired. Otherwise "it may come to pass that the ownership of a majority of the stock of a company may be vested in one set of persons, and the control of the company irrevocably invested in others." Such a state of affairs, he declared, would be "intolerable" and contrary to the "universal policy" of law that "the control of stock companies shall be and remain with the owners of the stock."[57] Of course, this "intolerable" state of affairs was exactly what was happening at that very moment in the companies acquired by Standard Oil and the other trusts, although the judge did not make the connection in his opinion.

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[56] *Griffith v. Jewett*, 9 Ohio Dec. Reprint 627 (1886). For background on the case, see Simeon E. Baldwin, "Voting-Trusts," *Yale Law Journal* 1 (Oct. 1891): 1-15 at 6-8. See also "The E., H. and D.-Erie Contract," *Cincinnati Enquirer*, April 24, 1885, 5; "Taking Mr. Jewett's Side," *New York Times*, May 19, 1885, 5; "Progress in the C., H. and D. Case," *Cincinnati Enquirer*, June 9, 1886, 6.

[57] *Griffith v. Jewett*, 9 Ohio Dec. Reprint 627 (1886).

The decision in *Griffith v. Jewett* was reported in the *Weekly Law Bulletin* and, perhaps through that publication, came to the attention of Simeon E. Baldwin, a prominent professor at the Yale Law School and later chief justice of the Connecticut Supreme Court.[58] Baldwin had agreed to represent a group of shareholders seeking to withdraw from the voting trust organized to transfer control over the Shepaug, Litchfield & Northern Railroad to the Mercantile Trust Company of New York, and most likely it was he who brought the *Griffith* case to the attention of the Connecticut judge who heard the resulting suits, combined as the *Shepaug Voting Trusts Cases*. The judge not only cited the Ohio decision in his opinion invalidating the trust but elaborated on the ruling:

> It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and . . . this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation.[59]

Voting was a duty that the shareholder owed to other members of the corporation. The shareholder "may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty."[60]

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[58] "Simeon Eben Baldwin," Museum of Connecticut History, https://museumofcthistory.org/2015/08/simeon-eben-baldwin/, accessed Feb. 27, 2019. Baldwin footnoted the *Weekly Law Bulletin* as his source for the case in his article "Voting Trusts," 10. He also observed that the case had been cited approvingly by a federal circuit-court judge (in *Woodruff v. Dubuque & S.C.R Co.*, 30 F. 91 [1887]), who allowed a shareholder to revoke a power of attorney granting Drexel, Morgan & Co. the authority to sell his stock and vote it in the interim.

[59] *Shepaug Voting Trust Cases,* 60 Conn. 553 (1890) at 579.

[60] *Shepaug Voting Trust Cases,* 60 Conn. 553 (1890) at 579-580.

The following year Baldwin publicized this case in the *Yale Law Journal*, where he summarized the *Shepaug* decision and the cases that preceded it with the explicit purpose of making these rulings "accessible to the profession."[61] He seems to have succeeded; just two years later the Connecticut judge's words found their way into a New Jersey chancery court decision, *White v. Thomas Inflatable Tire Company*.[62] The New Jersey court had already come to the conclusion (in *Cone v. Russell and Mason* [1891]), that voting trusts could not be irrevocable, but it had decided that case without reference to the Connecticut or Ohio litigation.[63] The two streams of case law thus came together in the *White* case, and a flurry of similar decisions followed based on the Connecticut and New Jersey precedents.[64]

There were still, however, some contrary cases being decided that upheld shareholders' contractual freedom to enter into voting-trust agreements, whether they were revocable or not.[65] After Standard and other combines abandoned voting trusts in favor of New Jersey charters, concerns about the misuse of these kinds of agreements seem to have ebbed, and as Figure 1 shows, decisions upholding voting trusts increased in frequency relative to those invalidating them.[66] Judge James Keith of the Virginia Supreme Court reflected on this shift in a 1910 decision, *Carnegie Trust Co. v. Security Life Insurance Co.*, upholding an irrevocable twenty-

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[61] Baldwin, "Voting-Trusts," 14.

[62] *White v. Thomas Inflatable Tire Co.*, 52 N.J. Eq. 178 (1893). On the chronology and importance off these cases, see Marion Smith, "Limitations on the Validity of Voting Trusts," *Columbia Law Review* 22 (Nov. 1922), 627-637 at 628.

[63] *Cone v. Russell & Mason*, 48 N.J. Eq. 208 (1891). This case had no antitrust dimension. It involved the use of a voting trust to entrench a particular stockholder in a managerial position.

[64] *Harvey v. Linville Improvement Co.*, 118 N.C. 693 (1896); *Kreissl v. Distilling Co. of America*, 61 N.J. Eq. 5 (1900); *Warren v. Pim*, 66 N.J. Eq. 353 (1904); *Morel v. Hoge*, 130 Ga. 625 (1908); *Sheppard v. Rockingham Power Co.*, 150 N.C. 776 (1909); *Bridgers v. First National Bank*, 152 N.C. 293 (1910); and *Luthy v. Ream*, 270 Ill. 170 (1915). In another case, *State v. O. & M.R.R. Co.*, 3 Ohio Cir. Dec. 518 (1892), the court upheld a voting trust but noted that it would have been invalid if irrevocable.

[65] *Mobile & Ohio Railroad v. Nicholas*, 98 Ala. 92 (1893); *Smith v. San Francisco & North Pacific Railway Co.*, 115 Cal. 584 (1897); *Brightman v. Bates*, 175 Mass. 105 (1900).

[66] *Chapman v. Bates*, 61 N.J.Eq. 658 (1900); *Boyer v. Nesbitt*, 227 Pa. 398 (1910); *Bowditch v. Jackson*, 76 N.H. 351 (1912); *Carnegie Trust Co. v. Security Life Insurance Co. of America*, 111 Va. 1 (1910); *Thompson-Starrett Co. v. Ellis Granite Co.*, 86 Vt. 282 (1912); *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62 (1911).

five-year voting trust: "[I]t is impossible not to be impressed with the change of opinion which has taken place with respect to the true nature of such contracts." Whereas "a very strong sentiment" against voting trusts had once prevailed, "experience has demonstrated their usefulness, and the hostility evinced toward them has by degrees diminished."[67] For Keith, the cases of the preceding decade had clarified the legal parameters of voting trust agreements and, in the absence of a statute regulating them, he thought voting trusts should be judged by the reasonableness of their objectives. "Where the object of the trust is legitimate … the trust should be upheld and carried out."[68]

How the case law would have evolved in the absence of Congress's "Money Trust" hearings is impossible to say, but the investigating committee's unequivocal conclusion that bankers were using voting trusts for the purpose of monopolistic control renewed concerns about such devices and increased judges' propensity to invalidate them. Headed by Louisiana Representative Arsène Pujo, the committee focused on the activities of J. P. Morgan & Company and allied banking houses and detailed the ways in which these financiers used interlocking directorates and voting trusts to assert control over important sectors of the American economy.[69] Although scholars have since challenged the validity of the committee's findings, the hearings were enormously influential, dominating newspaper headlines whenever prominent witnesses like J. P. Morgan were called to testify and also when the committee issued its final report in 1913.[70] The investigation's impact was magnified, moreover, by a series of polemical

[67] *Carnegie Trust Co. v. Security Life Insurance Co.*, 111 Va. 1 (1910) at 20.
[68] *Carnegie Trust Co. v. Security Life Insurance Co.*, 111 Va. 1 (1910) at 23.
[69] See U.S. House of Representatives, "Report of the Committee."
[70] See Vincent P. Carosso, "The Wall Street Money Trust from Pujo through Medina," *Business History Review* 47 (Winter 1973): 421-437; J. Bradford DeLong, "Did J. P. Morgan's Men Add Value? An Economist's Perspective on Finance Capitalism," in *Inside the Business Enterprise: Historical Perspectives on the Use of Information*, ed. Peter Temin (Chicago: University of Chicago Press, 1991): 205-250; and Mary A. O'Sullivan, *Dividends of Development: Securities Markets in the History of U.S. Capitalism, 1866-1922* (Oxford: Oxford University Press, 2016), Ch. 7.

essays that Louis Brandeis published in *Harper's Weekly* in late 1913 and early 1914 under the title "Breaking the Money Trust." The essays were subsequently collected and published, along with a few other pieces on the same subject, in a popular book entitled *Other People's Money and How the Bankers Use It*, which echoed the Pujo Committee's findings.[71]

According to the Pujo Committee's report and Brandeis's exposé, bankers had extended their dominance over a myriad of other businesses—financial and industrial—by means that included direct investments, interlocking directorates, and voting trusts. Because voting trusts did not require the bankers to make any substantial investment outlays, they were a particularly attractive way of controlling non-financial companies. Morgan had first experimented with the device in 1886 to reorganize the bankrupt Philadelphia and Reading Railroad, shifting oversight of the railroad's business to a board of trustees, which he headed. The board not only monitored the internal operation of the road but negotiated a division of the market with the Pennsylvania Railroad and organized a pool among anthracite coal producers, the railroad's main source of freight. From the beginning, therefore, the use of the device to reorganize an insolvent railroad was coupled with initiatives to reduce competition.[72] The experiment was so successful that Morgan repeated it again and again, and his example was widely copied by other bankers. At the time of the Pujo hearings, Morgan and his allies were using voting trusts to assert managerial authority over a wide variety of concerns, including the Bankers Trust Company, the Guaranty Trust Company, the Southern Railway Company, the Chicago Great Western Railroad, the

[71] Louis D. Brandeis, *Other People's Money and How the Bankers Use It* (New York: Fredrick A. Stokes, 1914).

[72] Vincent P. Carosso, *The Morgans: Private International Bankers, 1854-1913* (Cambridge, Mass.: Harvard University Press, 1987), 260-262. Morgan was not the first to use voting trusts for the purpose of reorganizing a railroad. See Cushing, *Voting Trusts*, 4-10.

Cincinnati, Hamilton & Dayton Railway, the International Mercantile Marine Company, William Cramp Ship & Engine Building Company, and the International Agriculture Corporation.[73]

Although the Pujo committee was primarily concerned with documenting the ways in which the Money Trust had extended its control over major sectors of the economy, the investigation also emphasized the dire effects that banker-dominated voting trusts could have on minority shareholders in the affected companies. The report accused Morgan and other bankers of abusing their positions of control by extracting high fees for their underwriting services and acquiring securities at prices below their fair market value.[74] The investigators also accused Morgan of more direct forms of minority oppression. When the voting trust formed to reorganize the Southern Railway expired in 1902, for example, Morgan asked certificate holders to extend the agreement. A majority agreed and obtained new trust certificates to replace the old. The new certificates were then listed on the New York Stock Exchange and the old ones delisted. Only the railroad's trust certificates traded on the exchange, not its shares. As a result, the holders of 183,938 shares who had voted against joining the new trust "found themselves with a security not listed on the exchange, and, therefore, without a ready market and not available as collateral."[75] Accounts from the time treated the delisting as punishment for the "stubborn" shareholders' refusal to support the renewal of the trust. As one newspaper put it, "recalcitrant stockholders" were "feeling the iron hand of the financial autocrat."[76] When the Pujo committee revisited these events a decade later, the situation for these shareholders had not materially improved, and Morgan's voting trust still controlled the railroad.

[73] U.S. House of Representatives, "Report of the Committee," 57-91.

[74] U.S. House of Representatives, "Report of the Committee," 133-35. Another theme of the report was the lack of benefit to depositors who put their savings in the commercial banks involved in the Money Trust. See, for example, p. 133. See also Brandeis, *Other People's Money*, Ch. 1.

[75] U.S. House of Representatives, "Report of the Committee," 40-41.

[76] "No Market on 'Change for 'Stubborn' Southern Stockholders: Morgan Shows his Hand: Opponents of Voting Trust Are Punished: Litigation May Follow," Louisville, Kentucky *Courier-Journal* Nov. 12, 1902, 8.

The commission's revelations of minority oppression prompted judges to rethink their acquiescence in voting trusts. Their rulings do not provide a smoking gun in the form of an explicit mention of the Pujo hearings or Brandeis's writings, which of course would have represented an inappropriate intrusion of politics into the cases they were deciding. That there was a change in their views, however, can be seen by contrasting two decisions about voting trusts handed down by the Illinois Supreme Court in 1913 and 1915, both written by the court's chief justice, Frank K. Dunn—a Republican who succeeded Justice Wilkin on the bench. The first, *Venner v. Chicago City Railway Company*, was a derivative suit that targeted Morgan directly, charging him with using a voting trust to combine Chicago's street railway lines into an illegal monopoly. In this case, the court upheld the agreement, in part because the suit was brought by exactly the kind of opportunistic litigant who raised judges' suspicions.[77] The second case, *Luthy v. Ream* (1915), involved a single firm, the Peru Plow Company, and had no antimonopoly implications. Nonetheless, the suit turned on the same issues that the Pujo hearings had made notorious, including claims that the voting trust was a cover for insider dealing. Not only did the plaintiffs win, but Chief Justice Dunn used his decision to attack the very idea of voting trusts as a tool of corporate control, insisting that they must be made revocable at the will of participating shareholders.[78]

The plaintiff in the suit against the Chicago City Railway Company (CCRC) was none other than Clarence H. Venner, whose unsavory reputation we have already discussed. Venner had acquired a minority interest in the CCRC and used his status as a shareholder to challenge the legality of the voting trust, which had been formed to coordinate it operations and those of four other street railway lines in the city of Chicago. In his filing, Venner named Morgan, along

[77] *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913).
[78] *Luthy v. Ream*, 270 Ill. 170 (1915).

with the CCRC, as a defendant, charging that the trust agreement "irrevocably deprived" shareholders of their "deliberative powers and duties" and transferred management of the railway to "the hands of strangers." He further claimed that the effect of the trust agreement was to create an illegal transit monopoly in the city of Chicago.[79]

In his opinion for the Illinois Supreme Court, Chief Justice Dunn systematically rejected each of Venner's claims. Reaching back for precedent to an earlier Illinois case, *Faulds v. Yates*, decided in 1870—long before *Griffith v. Jewett*, *Shepaug*, or any of the other cases invalidating irrevocable voting trusts—he ruled that voting trusts were an acceptable means of centralizing managerial or financial control in corporations. He bolstered this assertion by citing two of the most prominent decisions that had spearheaded the turn-of-the-century trend back toward validating voting trusts, *Smith v. San Francisco and North Pacific Railway Company* (California, 1897) and *Brightman v. Bates* (Massachusetts, 1900).[80] Dunn recognized that there had been an important string of contrary decisions between *Faulds* and these later cases, and he even affirmed them in *dicta*. However, he dismissed their relevance to Venner's suit. The contrary cases had been brought by shareholders seeking to withdraw their securities from voting trusts, but since Venner was not a party to the CCRC trust agreement, those precedents did not apply. "A majority of the stockholders may . . . confer upon an agent unlimited discretion to vote their stock, and there is no policy of the law to prevent their transferring the stock to a trustee with the like unrestricted power."[81]

[79] *Venner v. Chicago City Railway Co*., 258 Ill. 523 (1913) at 539-543. To the press, Venner also charged that the purpose of the merger was to deflect the CCRC's earnings to shore up the "tottering properties of the other companies," but he seems not to have made this case to the court, perhaps because there was as yet no track record for him to cite. After Venner lost his suit, however, a group of discontented minority shareholders waged a proxy fight for control of the railroad and made essentially the same complaint. See "Opposes Chicago Merger," *New York Times*, Jan. 23, 1910, 5; "Protest Against Car Merger Plan," *Chicago Daily Tribune*, Oct. 11, 1913, 9.

[80] *Venner v. Chicago City Railway Co*., 258 Ill. 523 (1913) at 539. See *Faulds v. Yates*, 57 Ill. 416 (1870).

[81] *Venner v. Chicago City Railway Co*., 258 Ill. 523 (1913) at 540-541.

Dunn's position in his CCRC opinion was the same as that of Virginia Supreme Court Justice Keith in *Carnegie Trust Company*. If voting trusts were not illegal *per se*, "[i]t is the purpose for which the trust was created which must determine its legality."[82] Dunn found Venner's claim that Morgan was creating an illegal transit monopoly unconvincing because most of the details of the consolidation had been approved by a city ordinance, which Venner had unsuccessfully challenged.[83] The one exception was the proposed merger of the elevated with the street railway lines, which still required enabling legislation from the state legislature as well as approval by the city. The railways denied they were proceeding with the plan without this authorization, and Dunn dismissed Venner's charges as "mere apprehension." Although "anticipated unlawful acts of the directors of a corporation may furnish ground for an injunction, fear, alone, of such illegal action is not sufficient."[84]

Two years later, however, in the wake of the Pujo report and Brandeis's influential writings about the machinations of the Money Trust, Dunn took a very different position, severely limiting the use of voting trusts regardless of the legality of their purpose. *Luthy v. Ream* involved charges of self-dealing levied against officers of the Peru Plow Company, who, minority shareholders complained, had used their control of a voting trust to set their own salaries. The trial court declared the trust void, but the appeals court overturned the decision, quoting extensively from Dunn's opinion in *Venner v. Chicago City Railway*.[85] In siding with the trial judge, Dunn could have simply ruled that the plow company's voting trust served an illegal purpose and was therefore invalid. However, he went on to quote extensively from the opinion of the local Connecticut judge in the *Shepaug Voting Trust Cases*, declaring that shareholders could

[82] *Venner v. Chicago City Railway Co*., 258 Ill. 523 (1913) at 540.
[83] Venner v. Chicago City Railway Co., 236 Ill. 349 (1908).
[84] *Venner v. Chicago City Railway Co*., 258 Ill. 523 (1913) at 550.
[85] *Luthy v. Ream*, 190 Ill. App. 315 (1914).

not irrevocably commit their shares to voting trusts and laying out the blanket rule that shareholders could not "be deprived or deprive themselves" of their voting power. "It matters not whether the end be beneficial," Dunn opined, "because it is not always possible to ascertain objects and motives, and if such a severance were permissible it might be abused."[86]

Dunn acknowledged that in *Venner* he had previously held it "legitimate for the owners of a majority of the stock of a corporation to combine" through a voting trust or other similar arrangement.[87] But he attempted to hide the extent to which he had reversed his opinion by claiming that the Peru Plow agreement went "much farther than any case which has heretofore arisen in this court" because it separated the voting power of the stock from its ownership for a fixed term of ten years, "so that the real owners of the property are for that time entirely divested of its management and control."[88] By contrast, the agreement in the CCRC case had specified a complicated mechanism whereby shareholders in the trust voted annually for a committee of eight who then instructed the trustees on the choice of directors, maintaining at least the appearance of shareholders' control.[89] The decision in Luthy, however, turned on the issue of revocability, and it is not at all clear that the CCRC agreement was any different in this respect. The court had simply refused to look into the matter on the grounds that Venner was not a party to the agreement: "Whether the agreement binds all the shareholders so that they cannot withdraw from it is a question which does not concern the appellant. So long as the shareholders are satisfied and continue to act in accordance with it no one else has any right to complain."[90] Regardless, Dunn admitted that *Luthy* represented a reversal when he acknowledged that the

[86] *Luthy v. Ream*, 270 Ill. 170 (1915) at 178-180. Dunn was quoting from Charles Fisk Beach, *Commentaries on the Law of Private Corporations* (Chicago: T. H. Flood, 1891), Vol. 1, §306.

[87] *Luthy v. Ream*, 270 Ill. 170 (1915) at 177.

[88] *Luthy v. Ream*, 270 Ill. 170 (1915) at 178.

[89] *Luthy v. Ream*, 270 Ill. 170 (1915) at 181; *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 541.

[90] *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 541-542.

Virginia Supreme Court's assertion of a rule of reason, as well the California and Massachusetts cases he had cited as precedents in *Venner*, were "inconsistent with the views we have expressed" and hence with "the true rule."[91]

Although Dunn made no reference to the Pujo report in his *Luthy* decision, some contemporary observers blamed it for the shift in his attitude and his resuscitation of precedents from the 1890s. In an often-cited review essay, for example, Fordham University law professor I. Maurice Wormser disapprovingly summarized the findings of Pujo committee, asserting that its "agitation was not without its effect upon the courts" and citing *Luthy v. Ream* as an "unprogressive and reactionary" decision that reflected "the popular whim and caprice of the passing moment." Moreover, he implied, a similar influence was at work in the 1916 decision of the Missouri Public Service Commission to reject a plan to use a "just and reasonable" voting trust to reorganize the St. Louis & San Francisco Railroad.[92]

Other legal scholars applauded the new trend. Responding directly to Wormser, Marion Smith saw *Luthy* as the culmination of a set of decisions that began with the *Shepaug Voting Trust Cases* in 1890 and established the now "prevailing doctrine" that "a voting trust whereby the beneficial ownership in stock is separated from the voting power is contrary to public policy and illegal, except under certain circumstances."[93] The problem, in Smith's view, was to define the "certain circumstances" under which the courts would find voting trusts permissible. He attempted to articulate some basic principles in his article, and others made similar efforts to

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[91] *Luthy V. Ream*, 270 Ill. 170 (1915) at 182.

[92] Wormser also cited disapprovingly a 1916 decision by the Missouri Public Service Commission that rejected a plan. See I. Maurice Wormser, "The Legality of Voting Trusts and Pooling Agreements," *Columbia Law Review* 18.2 (1918): 123-136 at 127, 132. See also Vincent Dougherty and John J. Berry Jr., "The Voting Trust—Its Present Status," *Georgetown Law Journal* 28 (May 1940): 1121-1128 at 1122. Cushing, however, downplayed the effect of the Pujo investigation in *Voting Trusts*, 26-30.

[93] Marion Smith, "Limitations on the Validity of Voting Trusts," *Columbia Law Review* 22 (Nov. 1922), 627-637 at 630.

summarize the state of the law.[94] But considerable legal uncertainty remained. As Figure 1 shows, in the absence of statutory guidance, judges continued to be divided on the issue of whether voting trusts could be irrevocable.

Statutory Relief

With the legal status of irrevocable voting trusts increasingly unclear, state legislatures began to take steps to resolve the situation. Two states had responded to the first wave of judicial concern about voting trusts, but they had taken opposite positions on the issue. New York had come to the rescue of bankers who used voting trusts to reorganize bankrupt railroads by amending the state's general corporation law in 1901 to permit any stockholder to enter into a written agreement to "transfer his stock to any person or persons for the purpose of vesting in him or them the right to vote thereon for a time not exceeding five years."[95] California, by contrast, made all voting trusts revocable. Responding to decision by its high court to enforce an irrevocable agreement, the legislature in 1905 enacted a "clarifying" amendment to its general incorporation law that limited the terms of such arrangements and mandated that they must always be revocable at the will of the shareholder.[96] Maryland followed New York's lead in 1908, but no other state adopted either the New York or California model until fallout from the

[94] Smith, "Limitations on the Validity of Voting Trusts," 630-633. For roughly contemporaneous efforts to summarize the state of the law, see "Corporate Voting Trusts—Validity—Banks," *St. John's Law Review* 1 (Dec. 1926): 65-71; "Corporations—Validity of Voting Trusts," *Southern California Law Review* 1 (July 1928): 479-483; Robert W. Miller, "Voting Trusts," *Indiana Law Journal* 4 (June 1929): 600-607; and Cushing, *Voting Trusts*, Ch. 3.

[95] New York Legislature, "An Act to amend … the general corporation law," approved Apr. 16, 1901. New York later extended the term of a voting trust to ten years. New York Legislature, "An Act to amend the stock corporation law, generally," approved May 24, 1923.

[96] The case was *Smith v. San Francisco & North Pacific Railway Co.*, 115 Cal. 584 (1897), the decision cited by Dunn in the CCRC case. See California Legislature, "An act … relating the giving and use of proxies to vote corporate stock," approved Feb. 27, 1905. For a case invalidating a voting trust on the basis of this act, see *Simpson v. Nielson*, 77 Cal. App. 297 (1926).

Pujo hearings induced an increasing number to adopt a statute like New York's. By 1940, twenty states (California now included) had enacted legislation legalizing irrevocable voting trusts but restricting their duration (usually to ten years), and by 1960 the number had increased to thirty-nine. The Model Business Corporation Act adopted by the American Bar Association in 1950 also included such a provision.[97]

These statutes made it possible for business people to use voting trusts for purposes that had long been regarded as legitimate, such as incentivizing lenders to come to the aid of corporations in financial difficulty. For example, when the United States Food Products Corporation was reorganized as the National Distillers Products Company in 1924, the bankers who underwrote the rescue created voting trusts for both classes of the new enterprise's shares.[98] Similarly, voting trusts formed a key part of the plan to refinance the Fox Film Corporation and the Fox Theatres Corporation in 1930.[99] In some cases, the courts themselves played an important role in setting up the trusts. For example, a 1937 plan to salvage the New York Title and Mortgage Company proposed placing the capital stock of the reorganized company in a voting trust, whose trustees would be appointed by a state judge.[100]

At the same time as the new statutes preserved voting trusts' traditional utility, however, the requirement that shareholders vote regularly to renew the agreements reduced their attractiveness for anticompetitive purposes. If promoters wanted shareholders to vote to continue the trust, they would have to pass along more of the monopoly gains to them or risk shareholder

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[97] Wormser, "Legality of Corporate Voting Trusts," 125; Dougherty and Berry, "Voting Trust," 1124; American Bar Foundation, *Model Business Corporation Act Annotated* (St. Paul, Minn.: West Publishing Co., 1960), §32, 559-61. The Model Act excluded a sentence, written into the New York law from the beginning and copied by ten other states, requiring all shareholders to have the right to join voting trust agreements. California, in a major reversal, allowed voting trusts to have a duration of 21 years. California Legislature, "An act … relating to corporations," approved June 12, 1931.

[98] "New Products Co. Lists Its Stock," *New York Times*, Aug. 28 1924, 25.

[99] "Fox Boards Adopt New Financing Plan," *New York Times*, 19 Feb. 19, 1930, 22.

[100] "New Plan to Save New York Title Co.," *New York Times*, Dec. 3, 1937, 35.

withdrawal. Not only that, but given the courts' changing views, it would no longer be advisable to limit the benefits to participants because disadvantaged minority shareholders were likely to sue.[101] The courts, moreover, seem to have strictly enforced both the statutory time limits on voting trusts and the legal procedures for renewing the agreements. In one important decision, Delaware's chancery court held that a voting trust whose duration exceeded the statutory limit was invalid, even for the part of the term that was within the bounds of the law.[102] The same court invalidated a vote to extend a trust on the grounds that the members voted several years in advance of the trust's expiration, whereas the statute required the vote to occur within a year of the agreement's terminal date.[103] A New York court similarly invalidated a provision in a voting trust allowing the trustees to extend the agreement automatically at the end of its term.[104]

One indication of the effectiveness of the change is that reformers who railed against the use of voting trusts for monopoly control were no longer able to find many examples to criticize. William O. Douglas, a member of the newly-formed Securities and Exchange Commission, declared at a Bankers Club luncheon in 1937 that voting trusts were "little more than a vehicle for corporate kidnapping," but he furnished no evidence to support his claim.[105] Adolph Berle and Gardiner Means complained about the use of voting trusts as a tool for separating ownership from control in their 1933 book, but they were able to muster few examples, and only one was really on the mark: the voting trust set up by Morgan to control the much-litigated Interborough Rapid Transit Company, which included an automatic renewal arrangement of the type that the

[101] Derivative actions soared during the 1930s, as revelations of bad business behavior in the run-up to the Crash made judges more sympathetic to shareholders' challenges. Coffee, *Entrepreneurial Litigation*, 36-40.

[102] *Perry v. Missouri-Kansas Pipe Line Co.*, 22 Del. Ch. 33 (1937).

[103] *Belle Isle Corp. v. Corcoran*, 29 Del. Ch. 554 (1946).

[104] *Kittinger v. Churchill Evangelistic Assn.*, 151 Misc. 350 (N.Y. 1934).

[105] "End of Banks' Rule in Industry Hinted," *New York Times*, Mar. 24 1937, 37.

courts would very soon invalidate.[106] Nor did the massive investigations of the late 1930s and early 1940s conducted by the Temporary National Economic Committee (TNEC) into "The Concentration of Economic Power" uncover much more. Although committee members interrogated the country's leading investment bankers, as well as other witnesses, about voting trusts whenever they caught wind of them, they turned up almost none. The committee questioned witnesses extensively about a ten-year voting trust that the Harrimans had created to pool stock held by family members and their associated companies in the private bank of Harriman Ripley & Company. It also reproduced documents about a deal in which members of the banking house of Ladenburg, Thalmann resigned from the voting trusts that managed a group of Pittsburgh utilities in order to sell their shares in those companies.[107] But that was all the TNEC managed to come up with. Voting trusts, it seemed, were no longer an important tool for bankers or anyone else to use to concentrate economic power.[108]

Conclusion

Scholars have long recognized that the states' authority over their corporate creatures bolstered their antitrust powers in ways that were not available to the federal government. Our paper adds to this literature by moving beyond the traditional focus on government statutes and enforcement to highlight the ways in which lawsuits brought by minority shareholders against

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[106] Adolph Berle and Gardiner Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933), 73, 83.

[107] There are three volumes of hearings devoted to investment banking. The Harriman voting trust was probed in Temporary National Economic Committee, *Hearings* (Washington, DC: Government Printing Office, 1940), Part 22: 11403-25, 11519; and the Ladenburg, Thalmann deal, in Part 24: 12553, 12860-65. Part 23 contains no references to voting trusts.

[108] The New York Stock Exchange put another nail in the coffin for voting trusts in 1957 by refusing to allow voting trust certificates to be listed any more. Joel Seligman, "Stock Exchange Rules Affecting Takeovers and Control Transactions," in *Knights, Raiders, and Targets: The Impact of the Hostile Takeover*, ed. John C. Coffee, Jr., Louis Lowenstein, and Susan Rose-Ackerman (New York: Oxford University Press, 1988), 467, 485.

their own companies were harnessed to further antitrust goals. Historically, judges had been reluctant to intervene in corporations' internal affairs and were particularly wary of shareholders' challenges to directors' business decisions. By the end of the nineteenth century, however, they had come to view shareholders' private actions as potentially useful checks on anticompetitive conduct. Concerned to forestall further concentrations of economic power, judges who normally would not have allowed shareholders to challenge the business judgment of corporate officers found ways to encourage them to block anticompetitive mergers.

They also reconsidered the legitimacy of voting trusts. Traditionally the courts had seen nothing wrong with such agreements; if a majority of shareholders wanted to combine their interests for the purposes of control, there was nothing to prevent them, so long as they did not exploit their power to oppress minority shareholders. However, evidence that the device was being used for anticompetitive purposes—first by Standard Oil and other industrial trusts and then by J. P. Morgan and allied bankers in the so-called Money Trust—led judges to rethink the relationship between shareholders and the corporations in which they owned stock. Increasingly regarding the enforcement of shareholders' voting rights as a critical tool of public policy, they moved to invalidate voting trusts that irrevocably transferred control to a set of trustees.

In addition to highlighting the role that shareholders' suits played in competition policy, our paper contributes to the literature on private enforcement regimes more generally. This body of scholarship sees private enforcement as a deliberate legislative strategy to enhance the effectiveness of public regulation by giving individuals both the legal standing and economic incentive to monitor and sue violators. Antitrust statutes are good early examples of this strategy, but the provisions for private enforcement built into these laws comprise only part of the anti-monopoly tradition in American litigation. As we have shown, the same developments that led legislatures to enact these laws in the first place increased judges' receptivity to private actions in adjacent areas of law—particularly shareholders' lawsuits to block anticompetitive mergers and overturn irrevocable voting trusts. Thus, where the literature on private enforcement regimes emphasizes deliberate legislative enactments, our findings underscore the extent to which these regimes were also rooted in the dynamics of the judicial decision-making.

Because the case law develops in a piecemeal fashion, with some judges pushing the legal rules in novel directions and others adhering to older precedents, this type of private regulatory enforcement was a source of legal uncertainty that could stimulate additional litigation and trigger a statutory reaction. Farhang and other scholars have argued that the explosion of litigation in the late twentieth century provoked a backlash that led legislatures to curb access to the courts, undermining the effectiveness of private enforcement.[109] Something similar happened in the 1940s, when legislatures reacted to the rise in derivative suits (and opposition coordinated through the New York Chamber of Commerce) by making them more difficult to bring.[110] In our case, however, that was only part of their response. Legislators intervened to clarify the law, but they did not erase the victories that private litigants had secured through adjudication. A number of states rewrote their general incorporation laws to make it illegal for corporations to take actions that prevented competition or furthered monopoly, effectively giving shareholders clear standing to sue. Moreover, most states enacted legislation in the early twentieth century that legalized irrevocable voting trusts for finite periods. These statutes restored the utility of voting trusts for legitimate purposes, such as reorganizing companies in financial distress, but at the same time reduced the possibility that they could be used to consolidate economic power. These

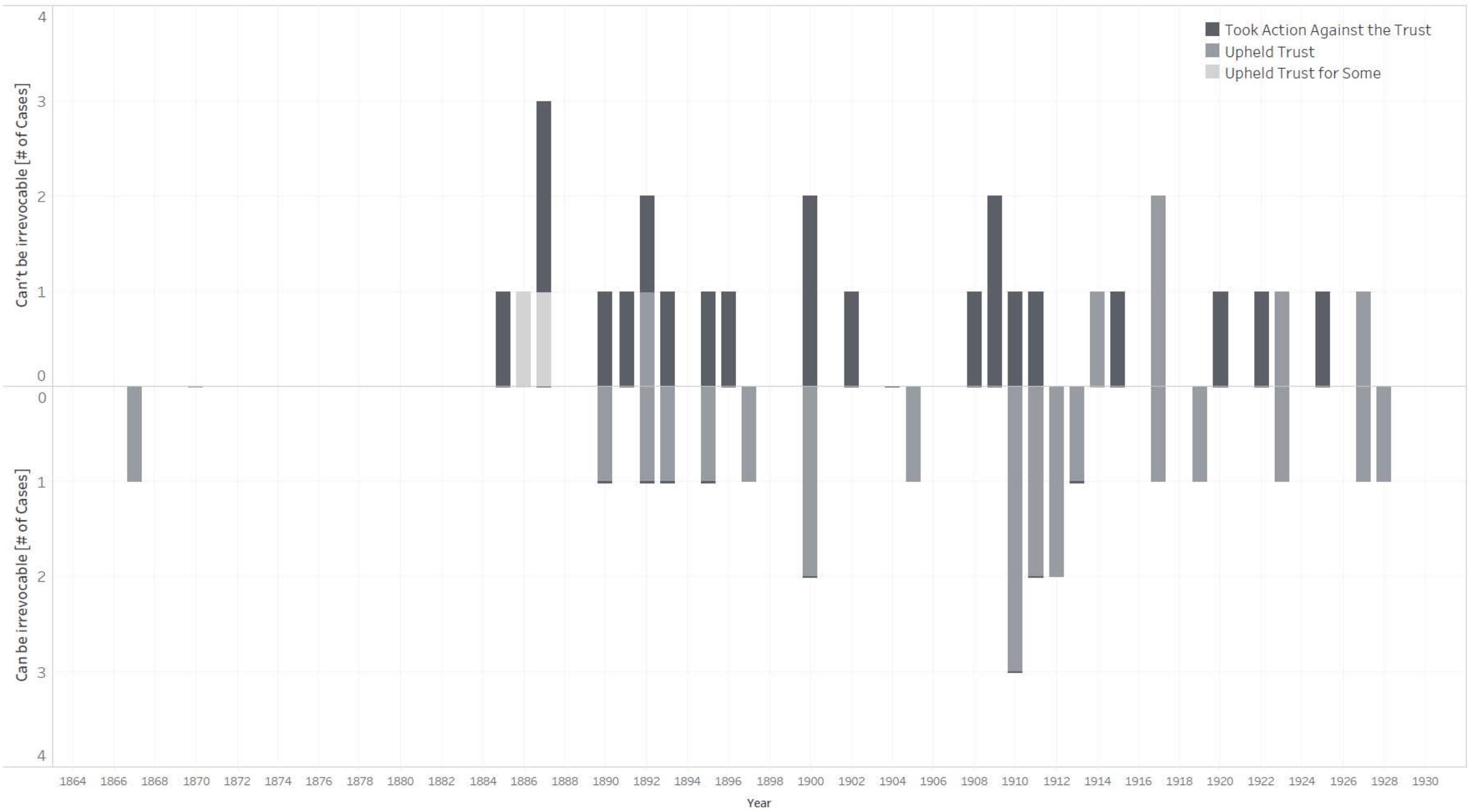
[109] Stephen B. Burbank and Sean Farhang, *Rights and Retrenchment: The Counterrevolution against Federal Litigation* (New York: Cambridge University Press, 2017).

[110] See Coffee, *Entrepreneurial Litigation*, 40-1. In 1946, the New York legislature amended corporate laws to require a "securities for expenses" bond as a precondition to filing a derivative action.

legislative responses show how the more informal aspects of private enforcement that we have emphasized in this paper could have permanent effects on adjacent areas of statutory law—effects that reinforced rather than undermined the regime of private enforcement.

Antitrust scholars have long appreciated the complex matrix of enforcement regimes that arose at both national and state levels and through public and private lawsuits, but they have neglected the ways in which shareholder suits and developments in state corporation law and equity jurisprudence shaped and reinforced competition policy. Our study of the suits brought by shareholders to challenge anticompetitive mergers and irrevocable voting trusts has allowed us to begin to redress this imbalance by showing how litigation in these areas could matter over the long run—how it could reduce the arsenal of weapons that the wealthy and powerful might deploy for anticompetitive purposes. Our paper thus expands the range of actors, motivations, and legal strategies that influenced competition policy, and thus the American regulatory tradition more broadly.

Figure 1. Judicial Rulings on Voting Trusts



Sources: See Appendix.

Notes: The length of the bars represents the number of cases in each category. Cases above the horizontal line are those where judges ruled that voting trusts could not be irrevocable. Below the line the rulings supported irrevocability. In some cases, judges declared that voting trusts could not be irrevocable but refused to invalidate the particular voting trust at stake in the case. In other instances, they supported irrevocability but invalidated the trust on other grounds. Dark shadings indicate cases where the voting trust was invalidated or not enforced. Light shadings indicate that the trust was upheld or enforced. The medium gray is for cases where the trust was upheld for some shareholders but not others.

Appendix:

List of Cases for Figure 1

Year	Case	Citation	Ruling supports irrevoca-bility?	Ruling overturns voting trust?
1867	*Brown v. Pacific Mail Steamship Co.*	4 F. Cas. 420	yes	no
1870	*Faulds v. Yates*	57 Ill. 416	unclear	no
1885	*Hafer v. N.Y., L.E. and W. R.R.*	1885 Ohio Misc. Lexis 125	no	yes
1886	*Griffith v. Jewett*	1886 Ohio Misc. Lexis 96	no	in part
1887	*Woodruff v. Dubuque and S. C. R. Co.*	30 F. 91	no	in part
1887	*Vanderbilt v. Bennett et al.*	6 Pa. Co. Ct. 193	no	yes
1887	*Moses v. Scott*	84 Ala. 608	no	yes
1890	*Shelmerdine v. Welsh*	47 Leg. Int. 26	yes	no
1890	*Shepaug Voting Trust Cases*	60 Conn. 553	no	yes
1891	*Cone v. Russell and Mason*	48 N.J.Eq. 208	no	yes
1892	*Clarke v Central Railroad & Banking Co.*	50 F. 338	no	yes
1892	*Railway Co. v. State*	49 Ohio St. 668	no	no
1892	*Greene v. Nash*	85 Me. 148	yes	no
1893	*Mobile and Ohio R.R. Co. v. Nicholas*	98 Ala. 92	yes	no
1893	*White v. Thomas Inflatable Tire Co.*	52 N.J.Eq. 178	no	yes
1895	*Hey v. Dolphin*	92 Hun. 230	yes	no
1895	*Gage v. Fisher*	5 N.D. 297	no	yes
1896	*Harvey v. Linville Imp. Co.*	118 N.C. 693	no	yes
1897	*Smith v. San Francisco and North Pacific Railway Co.*	115 Cal. 584	yes	no
1900	*Brightman v. Bates*	175 Mass. 105	yes	no
1900	*Clowes v. Miller*	60 N.J. Eq. 179	no	yes
1900	*Kreissl v. Distilling Co. of Am.*	61 N.J. Eq. 5	no	yes
1900	*Chapman v. Bates*	61 N.J.Eq. 658	yes	no
1902	*Sullivan v. Parkes*	74. N.Y.S. 787	no	yes
1904	*Warren v. Pim*	66 N.J. Eq. 353	unclear	yes
1905	*Gray v. Bloomington & N. Railway*	120 Ill. App. 159	yes	no
1908	*Morel v. Hoge*	130 Ga. 625	no	yes
1909	*Bridgers v. Stanton*	150 N.C. 216	no	yes
1909	*Sheppard v. Rockingham Power Co.*	150 N.C. 776	no	yes

1909	*White v. Snell*	35 Utah 434	unclear	no
1910	*Carnegie Trust Co. v. Security Life Ins. Co. of America*	111 Va. 1	yes	no
1910	*Boyer v. Nesbitt*	227 Pa. 398	yes	no
1910	*Bridgers v. First Nat. Bank*	152 N.C. 293	no	yes
1910	*Hall v. Merrill Trust Co.*	106 Me. 465	yes	no
1911	*Ecker v. Kentucky Refining Co.*	144 Ky. 264	yes	no
1911	*Winsor v. Commonwealth Coal Co.*	63 Wash. 62	yes	no
1911	*Commonwealth ex rel. Clark v. Roydhouse*	233 Pa. 234	no	yes
1912	*Bowditch v. Jackson Co.*	76 N.H. 351	yes	no
1912	*Thompson-Starrett Co. v. Ellis Granite Co.*	86 Vt. 282	yes	no
1913	*Colonial Coal v. Ream*	114 Va. 800	unclear	yes
1913	*Venner v. Chicago City Railway Co.*	258 Ill. 523	yes	no
1914	*Gleason v. Earles*	78 Wash. 491	no	no
1915	*Luthy v. Ream*	270 Ill. 170	no	yes
1917	*Clark v. Foster*	98 Wash. 241	yes	no
1917	*Craig v. Bessie Furnace Co.*	27 Ohio Dec. 471	no	no
1917	*Thompson v. Thompson Carnation Co.*	279 Ill. 54	no	no
1919	*Frost v. Carse*	91 N.J.Eq. 124	yes	no
1920	*Billings v. Marshall Furnace Co.*	210 Mich. 1	no	yes
1922	*English v. Rosenkrantz*	152 Ga. 726	no	yes
1923	*Bullivant v. First Nat. Bank of Boston*	246 Mass. 324	yes	no
1923	*Felt v. United States Mortg. & Trust Co.*	231 Ill. App. 110	no	no
1925	*Thibadeau v. Lake*	40 Idaho 456	no	yes
1927	*Babcock v. Chicago Rys. Co.*	325 Ill. 16	no	no
1927	*Abbot v. Waltham Watch Co.*	260 Mass. 81	yes	no
1928	*Mackin v. Nicollet Hotel, Inc.*	10 F.2d 375	yes	no

Notes: The figure is restricted to reported cases challenging voting trusts that were decided either before the enactment of a state statute regulating the duration and revocability of voting trusts or before 1930, whichever was earlier. In the cases marked as unclear on the issue of revocability, the principle both did not factor in the court's decision and was not clearly addressed.