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## Trusts and the Origins of Antitrust Legislation

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## TRUSTS AND THE ORIGINS OF ANTITRUST LEGISLATION

Wayne D. Collins\*

*Between 1888 and 1890, thirteen states and the federal government enacted antitrust legislation criminalizing combinations among competitors intended to control prices in the marketplace. These laws were a reaction to the increasing formation of horizontal combinations, large and small, throughout the economy in the wake of dramatically changing economic conditions since the Civil War. Through most of this period, combinations struggled to find structures that would enable them to operate effectively. Simple combinations of independent firms, although neither criminal nor tortious, were often undermined because state common law refused to enforce the contractual arrangements that would prevent members from deviating from the rules that would give a combination the power to control price. Nor could early combinations avail themselves of a unitary ownership structure, since state corporation law restricted the corporate form in ways that made it largely unworkable as a combination structure.*

*In the early 1880s, however, some combinations, beginning with Standard Oil, adopted a new form of organization, the trust proper, which had the command and control attributes of a corporation without being subject to the restrictions of state corporation law. Shortly thereafter, some states, notably New Jersey, liberalized their corporation laws, making corporations suitable as a vehicle for housing a business combination. States and the federal government responded with legislation that adopted the common law prohibitions against combinations in restraint of trade, extended these prohibitions to combinations organized as trusts proper and holding companies, and criminalized violations in order to enable government challenges. Despite these extensions of the law, early enforcement was virtually nonexistent, even against most combinations that had achieved widespread public notoriety. After the turn of the last century, however, the new laws set the stage for an aggressive enforcement policy following a massive horizontal consolidation movement that began in 1895.*

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\* Partner, Shearman & Sterling LLP; Adjunct Professor of Law, New York University School of Law. My colleagues Vittorio Cottafavi and John Mellyn, as well as David Merkin in the Shearman & Sterling LLP law library, have been extraordinarily tenacious and successful in locating many of the sources and economic data used in this Article. I am in their debt, although they bear no responsibility for any errors in the final product.

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## INTRODUCTION

For much of antitrust history, conventional wisdom has held that the Sherman Act was passed because of overwhelming popular agitation for federal legislation to restore a balance in the marketplace between “big business,” on the one hand, and consumers, farmers, and small businesses, on the other. When we examine the actual conditions of the time, the state and federal legislative responses to calls for antitrust regulation, and how these new statutes were enforced immediately after their enactment, it becomes apparent that large firms as such were not a target. In both the years preceding the passage of the Sherman Act in 1890, as well as the immediate years following its enactment, there was not a single identifiable case brought under the common law or the new state and federal antitrust laws that challenged an organically grown firm simply because it was big, even if it displaced—as many large firms did—smaller competitors. Rather, the focus was on the combinations of competitors, whether large or small, that were able to raise the prices at which they sold their output (or lower the prices at which they purchased their inputs) to an extent regarded as injurious to the public interest. Regardless of their technical legal form, these combinations came at the time to be called “trusts.” This Article examines the economic conditions that gave rise to a pervasive number of these so-called trusts, the various legal structures in which these combinations were housed, and the laws in effect prior to the enactment of state and federal antitrust legislation that attempted to regulate them.

Part I surveys the macroeconomic conditions in the United States in the two decades prior to the passage of the Sherman Act. The years between 1870 and 1890 were a period of enormous economic growth brought about by fundamental changes in transportation, communications, population

growth, production technology, business organization, and finance. During this period, the country shifted from a predominately agrarian economy to an industrial one.

Part II examines the microeconomic implications of these changes. While for some industries, technological innovations resulted in large increases in optimal firm size and significant displacements of smaller, less efficient firms, the emergence of large firms and an accompanying increase in industrial concentration does not appear to be a motivating factor behind the antitrust laws. Rather, throughout the economy, rapidly expanding output, coupled with a broadening market reach, put more firms in competition with one another. This competition, together with the monetary policies of the day, resulted in a significant decline in price levels and led to what became known at the time as “ruinous” or “excessive” competition, that is, competition that prevented producers in the market from recovering their costs or at least from earning what they considered a fair profit. In an effort to control excessive competition—and no doubt, in most cases, to exercise market power and earn supracompetitive profits—numerous groups of competitors attempted to coordinate their operations to limit competition, curtail output, and return prices to “reasonable” if not supracompetitive levels. This marked the beginning of the “trust movement.”

Part III explores the various means available to competitors to coordinate their activities, ranging from simple agreements and pools, to corporations, trusts proper, and holding companies. Regardless of their technical legal structure, all of these various vehicles became known colloquially at the time as trusts. This Article also examines the pre-Sherman Act law that regulated the use of these legal vehicles, most importantly the common law restrictions on contracts, combinations, and conspiracies in restraint of trade.

Part IV looks briefly at the thirteen state antitrust statutes and the federal Sherman Act that were passed in the brief period from 1888 to 1890 in the wake of the nascent trust movement. All of these statutes had a dominant single purpose: the criminalization of combinations of competitors that would have the power to control price in the marketplace. Although the statutory language varies, the import of each of these laws was to adopt (but not expand) the substantive common law prohibitions against combinations in restraint of trade, to extend these prohibitions to combinations organized as trusts proper and holding companies to ensure that they were reachable, and to create a criminal cause of action in order to enable government enforcement. Two state statutes and the Sherman Act also provided for a private cause of action by injured third parties.

Part V offers a few concluding observations.

#### I. A CHANGING ECONOMY: ECONOMIC CONDITIONS PRIOR TO 1890

Until the 1870s, businesses largely served an agrarian economy, and most industrial firms either processed agricultural products or supplied

farmers with food, clothing, and farming inputs. With a few exceptions, most notably the railroads and some large textile mills, firms were organized as sole proprietorships or partnerships with a single location producing a limited line of labor-intensive goods and services.<sup>1</sup> For the most part, the lack of a reliable, inexpensive, high-speed transportation network confined a firm's operation to the local area and correspondingly limited demand for the firm's product.<sup>2</sup> When a business sold in distant markets, it did so through commissioned merchants or agents that handled the business of multiple firms.<sup>3</sup> No cadre of professional managers existed; rather, the owners personally managed the business and supervised the firm's few employees.<sup>4</sup> Nor was there the financial incentive or wherewithal to create large firms. Production technologies yielding significant economies of scale either did not exist or were overshadowed by the high costs of broader geographic distribution.<sup>5</sup> Markets for raising investment capital had yet to emerge, and investment resources were limited largely to what a family or a small group of partners were willing to invest.<sup>6</sup>

Beginning in the 1870s, however, fundamental changes in transportation, communications, population growth, production technology, business organization, and finance led to rapid economic growth and a shift from a predominately agrarian economy to an industrial one. This shift started before the Civil War, but it was particularly pronounced for several decades beginning in 1870.

A rapidly expanding transportation network and declining real freight rates made it increasingly possible and economical to reliably ship products over long distances for distribution and sale. This, in turn, enlarged the effective geographic area a single firm could serve from its local vicinity to regional or even national markets. After connecting the coasts in 1869 by linking the tracks of the Union Pacific Railroad Company and the Central Pacific Railroad Company at Promontory Point, Utah, the railroads increased their track mileage by a factor of three from 52,922 miles in 1870 to 166,703 miles by 1890.<sup>7</sup> But this was hardly the whole story. Since

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1. See JEREMY ATACK & PETER PASSELL, *A NEW ECONOMIC VIEW OF AMERICAN HISTORY* 191–93 (2d ed. 1994); CHRISTOPHER J. SCHMITZ, *THE GROWTH OF BIG BUSINESS IN THE UNITED STATES AND WESTERN EUROPE, 1850–1939*, at 31 (1993).

2. See SIDNEY RATNER, JAMES H. SOLTOW & RICHARD SYLLA, *THE EVOLUTION OF THE AMERICAN ECONOMY 183–84* (1979).

3. See GLENN PORTER & HAROLD C. LIVESAY, *MERCHANTS AND MANUFACTURERS* 15–17 (1971); Alfred D. Chandler, Jr., *The Role of Business in the United States: A Historical Survey*, 98 *DÆDALUS*, WINTER 1969, at 26.

4. See GLENN PORTER, *THE RISE OF BIG BUSINESS, 1860–1910*, at 11–12 (1973).

5. See ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 49 (1977); SCHMITZ, *supra* note 1, at 54–55.

6. See PORTER, *supra* note 4, at 8; SCHMITZ, *supra* note 1, at 44.

7. U.S. BUREAU OF CENSUS, *HISTORICAL STATISTICS OF THE UNITED STATES, EARLIEST TIMES TO THE PRESENT: MILLENNIAL EDITION 4-916 ser. Df874* (2006) [hereinafter *HISTORICAL STATISTICS*]. The underlying data for most of the statistics cited in this Article come from *Historical Statistics*, which is widely regarded as collecting the best time series statistics available. Even so, given the problems of systematic data collection as we go back

railroads did not have to follow meandering rivers, they could, in many cases, cut effective travel distances for bulk transportation by large margins. A trip from New York to Philadelphia could take a week to ten days by road in 1800, while the same trip took less than a day by rail in the late 1850s.<sup>8</sup> Railroads also were not subject to the vicissitudes of rivers freezing over or roads made impassable by rain or snow and could reliably deliver passengers and freight in all but the most extreme weather. Freight rates also dropped precipitously. Nominal freight rates averaged \$0.15 per ton/mile by road in the 1830s, \$0.04 per ton/mile by rail in 1850, and \$0.015 per ton/mile by rail by 1880.<sup>9</sup>

Growing alongside the railroads was an equally expanding communications network. The broadening communications system not only permitted the railroads to manage their train traffic but also allowed suppliers to better understand and respond to current market conditions in distant markets.<sup>10</sup> Samuel F.B. Morse built the first electromagnetic telegraph demonstration line in 1844, connecting Washington and Baltimore.<sup>11</sup> By the beginning of the Civil War, the telegraph network was essentially nationwide; by 1870, multiplexing allowed multiple telegraph messages to be sent simultaneously over the same line.<sup>12</sup> For the most part, telegraph companies built their lines on the railroad rights-of-way, and most communications occurred between railroad stations.<sup>13</sup> The early telegraph companies, however, were plagued by bankrupting competition between parallel lines and incompatible technologies and coordination problems when messages were transmitted over the interconnecting lines of different operators, so that, by the mid-1850s, they had largely consolidated into six major companies.<sup>14</sup> In 1857, these six companies, in what became known as the “Treaty of the Six Nations,” divided the eastern half of the United States among themselves into six disjoint exclusive regions and then

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in time, the early statistics in this Article (say, those for years prior to 1900) generally should only be considered indicative and not exact. The notes in *Historical Statistics* provide the underlying source of each data series.

8. SCHMITZ, *supra* note 1, at 11.

9. HISTORICAL STATISTICS, *supra* note 7, at 4-781 ser. Df17 & Df21. For more on the development of railroads during this period, see ATACK & PASSELL, *supra* note 1, at 427-56; ROBERT FOGEL, RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY (1964); JOHN F. STOVER, AMERICAN RAILROADS (2d ed. 1997); ALBERT FISHLOW, AMERICAN RAILROADS AND THE TRANSFORMATION OF THE ANTE-BELLUM ECONOMY (1965); Albert Fishlow, *Productivity and Technological Change in the Railroad Sector, 1840-1910, in* OUTPUT, EMPLOYMENT, AND PRODUCTIVITY IN THE UNITED STATES AFTER 1800 (Dorothy S. Brady ed., 1966), available at <http://www.nber.org/chapters/c1578.pdf>.

10. See Alexander James Field, *The Magnetic Telegraph, Price and Quantity Data, and the New Management of Capital*, 52 J. ECON. HIST. 401, 411 (1992).

11. DAVID HOCHFELDER, THE TELEGRAPH IN AMERICA, 1832-1920, at 2 (2012).

12. *Id.* at 2-3, 42-43.

13. See CHRISTOPHER H. STERLING, PHYLLIS W. BERNT & MARTIN B.H. WEISS, SHAPING AMERICAN TELECOMMUNICATIONS: A HISTORY OF TECHNOLOGY, POLICY, AND ECONOMICS 41-42 (2006); ROBERT LUTHER THOMPSON, WIRING A CONTINENT: THE HISTORY OF THE TELEGRAPH INDUSTRY IN THE UNITED STATES, 1832-1866, at 203-16 (1947).

14. THOMPSON, *supra* note 13, at 187-202.

ultimately consolidated into a single company, Western Union, in 1866.<sup>15</sup> From 1870 to 1890, Western Union increased the miles of wire from 112,000 to 679,000 and its number of offices from 3,972 to 19,382.<sup>16</sup> During the same period, Western Union increased the number of messages it handled more than five-fold from 9.1 million to 55.9 million a year.<sup>17</sup> The telephone, which was invented in 1876, was also rapidly developing. By 1890, the American Telephone and Telegraph Company, which had acquired the patent rights to the telephone, had 332,000 miles of telephone lines and 227,900 telephones in operation and handled an average of 1.4 million local calls daily.<sup>18</sup>

Between 1870 and 1890, the U.S. population almost doubled from 38.6 million to 63.0 million, for a compound average growth rate of 2.5 percent over the twenty-year period.<sup>19</sup> This population growth increased both the supply of labor as well as aggregate demand for goods and services. Net immigration during the period was 7.1 million people, or about 30 percent of the population growth.<sup>20</sup> Increasing population density and urbanization also helped to concentrate demand and further reduced the costs of serving distant markets. From 1870 to 1890, the urban population more than doubled from 9.9 million to 22.1 million, and rose from 25.7 percent to 35.1 percent of the total U.S. population.<sup>21</sup> The rural population, while still increasing from 28.7 million to 40.9 million, declined from 74.3 percent to 64.9 percent of the total U.S. population.<sup>22</sup> Overall, population density increased from 13.0 per square mile in 1870 to 21.2 per square mile in 1890.<sup>23</sup>

The growth in the economy is also reflected in total energy consumption. From 1870 to 1890, energy consumption from fossil fuel sources in the United States rose from 1,059 trillion BTU to 4,475 trillion BTU, for a compound average growth rate over the period of 7.5 percent.<sup>24</sup> Leaving fuel wood aside, the vast bulk of energy consumed in the United States

15. *Id.* 310–30, 406–26.

16. HISTORICAL STATISTICS, *supra* note 7, at 4-1001 ser. Dg11 & Dg13. Thompson is the leading authority on the early development of the telegraph. THOMPSON, *supra* note 13. For other treatments, see HOCHFELDER, *supra* note 11; RICHARD R. JOHN, NETWORK NATION: INVENTING AMERICAN TELECOMMUNICATIONS 24–199 (2010); Richard B. Du Boff, *Business Demand and the Development of the Telegraph in the United States, 1844–1860*, 54 BUS. HIST. REV. 459 (1980).

17. HISTORICAL STATISTICS, *supra* note 7, at 4-1001 ser. Dg9.

18. *Id.* at 4-1008 ser. Dg39 (miles of telephone lines); *id.* ser. Dg34 (telephones); *id.* at 4-1013 ser. Dg51 (average daily local conversations).

19. *Id.* at 1-26 ser. Aa2. Throughout this Article, I have calculated annual averages for multiyear time periods using the geometric mean. For quantities (such as population or GDP) as opposed to rates of change (such as the unemployment rate), the geometric mean is the same as the compound average growth rate (CAGR).

20. *Id.* at 1-547 ser. Ad22.

21. See U.S. BUREAU OF THE CENSUS, URBAN AND RURAL POPULATIONS: TABLE 4 (POPULATION: 1790 TO 1990), available at <http://www.census.gov/population/censusdata/table-4.pdf>.

22. See *id.*

23. HISTORICAL STATISTICS, *supra* note 7, at 1-26 ser. Aa3.

24. *Id.* at 4-338 ser. Db164 (total fossil fuels).

during this period was from fossil fuels, almost entirely coal.<sup>25</sup> The discovery of abundant new coal sources, new mining methods, the emergence of railroad networks that could provide cheap and reliable transportation, and the development of new, more efficient coal energy technologies both reduced the real cost of energy and freed energy-consuming businesses to locate away from rivers (which provided hydropower) and closer to other factors of production (including labor and transportation). Moreover, since hydropower could be subject to interruptions caused by limited waterfall, ice, and other weather-related conditions, firms demanding a steady, reliable source of power often switched to coal energy technologies even when hydropower was available.<sup>26</sup>

New innovations in production technology, such as the Bessemer process of steelmaking, new distillation methods in petroleum refining, and Hungarian reduction techniques in flour milling, lowered average production costs and created substantial economies of scale.<sup>27</sup> At the same time, new economies of integration led to vertical growth within the chain of manufacturing and distribution, especially in industries where new product developments found no existing system for their distribution or after-sales support or where new process developments or economies of scale overwhelmed the existing distribution system with increased production rates.<sup>28</sup> Some industries also vertically integrated into raw materials to ensure the inputs necessary for large-scale production.<sup>29</sup> Finally, apart from economies from new technologies and vertical

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25. Compare *id.*, with *id.* ser Db165 (coal).

26. See Jeremy Atack, *Industrial Structure and the Emergence of the Modern Industrial Corporation*, 22 EXPLORATIONS ECON. HIST. 29, 38 (1985). For more on the development of energy during the period, see ATACK & PASSELL, *supra* note 1, at 197–201; SAM H. SCHURR & BRUCE C. NETSCHERT, *ENERGY IN THE AMERICAN ECONOMY, 1850–1975* (1960); Jeremy Atack, Fred Bateman & Robert A. Margo, *Steam Power, Establishment Size, and Labor Productivity Growth in Nineteenth Century American Manufacturing*, 45 EXPLORATIONS ECON. HIST. 185 (2008).

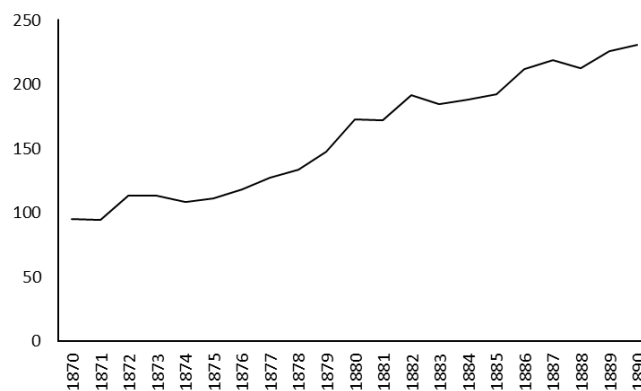
27. For an excellent brief survey of the technical developments of the late nineteenth century, see John A. James, *Structural Change in American Manufacturing, 1850–1890*, 43 J. ECON. HIST. 433 (1983). See generally ALFRED D. CHANDLER, JR., *STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE AMERICAN INDUSTRIAL ENTERPRISE* (1962); PETER GEORGE, *THE EMERGENCE OF INDUSTRIAL AMERICA: STRATEGIC FACTORS IN AMERICAN ECONOMIC GROWTH SINCE 1870* (1982); H.J. HABAKKUK, *AMERICAN AND BRITISH TECHNOLOGY IN THE NINETEENTH CENTURY: THE SEARCH FOR LABOUR-SAVING INVENTIONS* (1967); PORTER, *supra* note 4.

28. See CHANDLER, *supra* note 5, at 302–12, 364. Most progressive and revisionist historians, as well as contemporary observers, have focused on horizontal integration as the foundation of big business. The first historian to emphasize the important role played by vertical integration was Alfred D. Chandler, Jr. See Alfred D. Chandler, Jr., *The Beginnings of “Big Business” in American Industry*, 33 BUS. HIST. REV. 1 (1959). See generally ALFRED D. CHANDLER, JR., *SCALE AND SCOPE* (1990); CHANDLER, *supra* note 27; CHANDLER, *supra* note 5; *MANAGERIAL HIERARCHIES* (Alfred D. Chandler, Jr. & Herman Daems eds., 1980).

29. See NAOMI R. LAMOREAUX, *THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895–1904*, at 38, 144–47 (1985) (examining vertical integration at the Carnegie steel plants).

integration, significant productivity gains and scale economies resulted from a shift in production from artisan shops to factories.<sup>30</sup> The larger-scale factory operations enabled labor efficiencies from learning-by-doing by increasing repetition through the subdivision of tasks and increased specialization. This specialization, in turn, later opened opportunities for additional efficiencies by mechanizing many tasks. The larger workforces also required monitoring and supervision to ensure performance, which resulted in the emergence of salaried managers responsible for improving productivity.<sup>31</sup>

Figure 1: United States Real GDP (in billions of 2005 dollars)<sup>32</sup>



The rapid pace of industrialization is reflected in real gross purchases of structures and equipment used in manufacturing, which increased (in 2005 constant dollars) from \$2.2 billion to \$11.0 billion between 1880 and 1890, a factor of five for a compound average growth rate of 17.5 percent over the ten-year period.<sup>33</sup> Manufacturing production, according to the commonly

30. See Jeremy Atack, *Economies of Scale and Efficiency Gains in the Rise of the Factory in America, 1820–1900*, in *QUANTITY & QUIDDITY: ESSAYS IN U.S. ECONOMIC HISTORY* 286 (Peter Kilby ed., 1987); Kenneth L. Sokoloff, *Productivity Growth in Manufacturing During Early Industrialization: Evidence from the American Northeast, 1820–1860*, in *LONG-TERM FACTORS IN AMERICAN ECONOMIC GROWTH* 679 (Stanley L. Engerman & Robert E. Gallman eds., 1986).

31. See Atack, *supra* note 30.

32. HISTORICAL STATISTICS, *supra* note 7, at 3-24 to -25 ser. Ca9 (data originally reported in 1996 dollars).

33. See *id.* at 4-680 ser. Dd687 (data originally reported in 1958 constant dollars). Unfortunately, the data series for this period does not include depreciation or the real net value of assets. Throughout this Article, real dollars refer to 2005 dollars. When the data was originally reported in constant dollars other than 2005 dollars, I converted to 2005 dollars by multiplying the reported data by the ratio of the GDP deflator for 2005 to the GDP deflator for the constant dollar year of the reported data:

used Frickey index, grew by over 50 percent and had a compound average growth rate of 4.4 percent.<sup>34</sup> By 1885, the United States had replaced Great Britain as the world's largest manufacturing nation, accounting for 29 percent of the world's industrial production.<sup>35</sup>

Agricultural production also soared, aided by the development of the western lands and an efficient transportation network, new mechanized technologies, and driven by a rapidly expanding population.<sup>36</sup> With the increasing cultivation of land in the West, the number of farms increased by 71.6 percent from 2.7 million in 1870 to 4.6 million in 1890,<sup>37</sup> while the amount of land in farms increased by 52.8 percent from 407.7 million acres to 623.2 million acres.<sup>38</sup> During this period, agricultural production increased 70.8 percent, for a compound average growth rate of 2.9 percent.<sup>39</sup> During the same period, the agricultural labor force increased from 6.8 million to 10 million, for a compound average growth rate of 1.9 percent.<sup>40</sup> This suggests that labor productivity grew at about 1.0 percent per year, which was probably due largely to increased mechanization. The total capital stock used in agriculture increased from \$218 billion to \$379 billion, for a compound average growth rate of 2.8 percent.<sup>41</sup> Land employed in agriculture increased at about the same rate, but machinery and equipment grew from \$0.6 billion to \$1.3 billion, for a compound average growth rate of 3.9 percent, again consistent with the idea that increased mechanization significantly increased farm labor productivity.<sup>42</sup>

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Year	GDP Deflator	Conversion Ratio (to 2005 dollars)
1929	10.593	9.4402
1958	18.157	5.5075
1996	83.154	1.2026
2005	100	1

The relevant GDP deflators are reported in U.S. DEPT. OF COMMERCE, BUREAU OF ECONOMIC ANALYSIS tbl.1.1.4 (Price Indexes for Gross Domestic Product, with 2005=100), available at [www.bea.gov/itable/](http://www.bea.gov/itable/). For example, to convert \$100 in constant 1958 dollars to 2005 dollars, multiply \$100 by the conversion ratio of 5.5075 to yield \$550.75.

34. See HISTORICAL STATISTICS, *supra* note 7, at 4-652 ser. Dd497. *Historical Statistics* uses the data series developed in EDWIN FRICKEY, PRODUCTION IN THE UNITED STATES, 1860-1914, at 54 (1947).

35. W.W. ROSTOW, THE WORLD ECONOMY: HISTORY & PROSPECT 52 (1978).

36. For a review of the post-Civil War agricultural technologies, see RATNER ET AL., *supra* note 2, at 264-65 (1979).

37. HISTORICAL STATISTICS, *supra* note 7, at 4-43 ser. Da16.

38. *Id.* ser. Da17.

39. See *id.* at 4-204 ser. Da1117.

40. See *id.* at 2-110 ser. Ba817. *Historical Statistics* uses the data series developed in Stanley Lebergott, *Labor Force and Employment, 1800-1960*, in OUTPUT, EMPLOYMENT, AND PRODUCTIVITY IN THE UNITED STATES AFTER 1800, *supra* note 9, at 117, available at <http://www.nber.org/chapters/c1567.pdf>.

41. See JOHN W. KENDRICK, PRODUCTIVITY TRENDS IN THE UNITED STATES 367 tbl.B-III (1961), available at <http://www.nber.org/books/kend61-1>.

42. See *id.*

These changes introduced a period of extraordinary economic growth for the nation. Between 1870 and 1890, real annual GDP more than doubled, increasing from \$113.0 billion to \$277.3 billion (in 2005 dollars), for an impressive compound average growth rate of 4.5 percent.<sup>43</sup> Even with a rapidly growing population, real annual per capita GDP during the same period increased from \$2,856 to \$4,397, for an average annual growth rate of 2.2 percent.<sup>44</sup> Real total net capital stock of capital consumption, including capital for industry, agriculture, and housing, grew from \$255 billion to \$642 billion, for a compound average growth rate of 4.7 percent.<sup>45</sup> On a per laborer basis, net capital stock grew from \$26,600 to \$37,900, for a compound average growth rate of 1.8 percent.<sup>46</sup> Over the period, overall output per unit of labor input increased by 43.4 percent, for a compound average growth rate of 1.8 percent, while output per unit of capital increased by 26.3 percent, for a compound average growth rate of 1.2 percent.<sup>47</sup>

Table 1: Economic Indicators for 1870–1890

Indicator	CAGR 1870–1890
Real GDP	4.5%
Real GDP per capita	2.2%
Population	2.5%
Manufacturing output	5.2%
Agricultural output	2.9%
Real net capital stock	4.7%
Real net capital stock per laborer	1.8%
Output per unit of labor	1.8%
Output per unit of capital	1.2%

## II. THE “TRUST” MOVEMENT

But these were also turbulent economic times. Notwithstanding the enormous increases in production and productivity, the period from 1870 to 1890 was marked by deep recessions and declining prices. The Warren-Pearson wholesale price index for all commodities fell from 135 to 82, for a compound average rate of decline of 2.5 percent.<sup>48</sup> Certainly much of this

43. See HISTORICAL STATISTICS, *supra* note 7, at 3-24 to -25 ser. Ca9 (data originally reported in 1996 dollars).

44. See *id.* at ser. Ca11 (data originally reported in 1996 dollars).

45. SIMON KUZNETS, CAPITAL IN THE AMERICAN ECONOMY: ITS FORMATION AND FINANCING 64 tbl.3 (1961) (data originally reported in 1929 constant dollars).

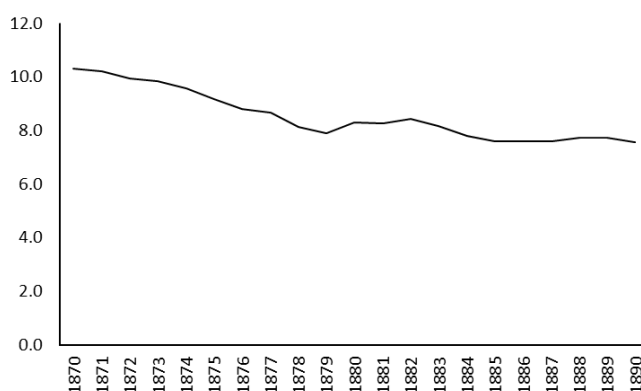
46. *Id.*

47. KENDRICK, *supra* note 41, at 332 tbl.A-XXI.

48. HISTORICAL STATISTICS, *supra* note 7, at 3-182 to -183 ser. Cc113.

price decline was due to the tight monetary policy that the United States followed, at least until 1879, as part of the return to the gold standard from the “greenback” standard after the Civil War.<sup>49</sup> In the Long Depression from 1873 to 1879, this caused an asset price deflation even as unit production was increasing. Between 1873 and 1878, nominal GDP declined 2.5 percent while real GDP increased 17.9 percent.<sup>50</sup> After 1879, when specie payments resumed, the price deflator exhibited a much slower, but still downward, trend until around 1896.

Figure 2: GDP Price Deflator (2005 = 100)<sup>51</sup>



But at least some of the price decline during the period was due to rapidly expanding aggregate output, which exceeded the rate of population and export growth, coupled with broadening geographic markets that brought more firms into competition with one another. David A. Wells, a prominent popular economist at the time, believed that the primary cause of declining prices was overproduction and underemployment, both caused by technological advances.<sup>52</sup> Moreover, where an increasingly large investment was necessary to build minimum efficient scale factories, it was in the interest of profit-maximizing firms to continue to produce as long as price exceeded variable costs, even if the firm could not cover its fixed

49. See MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, *A MONETARY HISTORY OF THE UNITED STATES*, 1867–1960, at 15–88 (1963).

50. See HISTORICAL STATISTICS, *supra* note 7, at 3-24 ser. Ca13 (price deflator with 1996 = 100); *id.* ser. Ca10 (nominal GDP); *id.* ser. Ca9 (real GDP).

51. *Id.* ser. Ca13 (data originally reported with 1996 = 100).

52. See David A. Wells, *The Economic Disturbances Since 1873* (pts. 1–5), 31 *POPULAR SCI. MONTHLY* 289, 433, 577, 768 (1887), 32 *POPULAR SCI. MONTHLY* 1 (1887). Other contemporary analyses, while acknowledging the popular strength of Well’s argument, more properly identified the problem. See, e.g., MORETON FREWEN, *THE ECONOMIC CRISIS* 165–94 (1888) (responding to Well’s argument).

costs.<sup>53</sup> These factors gave rise to what became popularly known as “ruinous,” “destructive,” or “excessive” competition, that is, competition that drives prices below a level that permits the producer to make a fair return on its productive efforts, assuming that it can stay in business at all.<sup>54</sup>

The sugar industry provides a vivid illustration of the problem. In 1867, there were about fifty-two firms operating sixty refineries in the United States and collectively producing about 421,000 short tons of refined sugar.<sup>55</sup> Over the next twenty years, the introduction of new batch processing technology reduced the length of the refining process from two weeks to twenty-four hours or less, depending on the type of sugar being refined.<sup>56</sup> By 1890, total production increased by almost a factor of four to 1,617,000 short tons, far in excess of population and export growth.<sup>57</sup> As production increased, supply soon significantly outstripped demand at existing prices, competition among the sugar refineries became heated, and prices rapidly declined. Profit margins reportedly dropped by almost 80 percent from \$0.03 per pound in 1876 to \$0.00685 in 1887.<sup>58</sup> Despite production tripling, some thirty-six refineries went out of business.<sup>59</sup> The companies that survived had invested in large-scale production technologies, with the largest producing about 8,000 barrels a day, while the refineries that failed produced only about 75 to 400 barrels daily. Moreover, as the turn of the decade approached, it was obvious that some of the remaining refineries would not survive. Reserving for the moment whether it was in the public interest to allow the remaining refineries to consolidate and coordinate which plants would continue to operate, the private incentive to achieve some central coordination was compelling.<sup>60</sup>

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53. See PORTER, *supra* note 4, at 10–11; see also Chandler, *supra* note 3, at 28 (noting the expense of shutting down a factory and observing that from the mid-1870s to the mid-1890s the supply of goods outstripped the demand and prices fell sharply). This is the well-known “empty core” problem. See LESTER G. TELSER, *ECONOMIC THEORY AND THE CORE* 41–87 (1978). See generally Abigail McWilliams & Kristen Keith, *The Genesis of the Trusts: Rationalization in Empty Core Markets*, 12 INT’L J. INDUS. ORG. 245 (1994).

54. Later, in some contexts “destructive” competition came to mean primary or secondary line price discrimination designed to competitively disadvantage rivals if not drive them out of business. This is the sense in which the Industrial Commission used the term at the turn of the century. See, e.g., 19 U.S. INDUS. COMM’N, FINAL REPORT OF THE INDUSTRIAL COMMISSION 660–62 (1902) (supplemental statement of Thomas W. Phillips).

55. PAUL L. VOGT, *THE SUGAR REFINING INDUSTRY IN THE UNITED STATES* 9–11 (1908) (number of refineries); see also HISTORICAL STATISTICS, *supra* note 7, at 4-627 ser. Dd369 (refined sugar production).

56. VOGT, *supra* note 55, at 17.

57. See HISTORICAL STATISTICS, *supra* note 7, at 4-627 ser. Dd369.

58. VOGT, *supra* note 55, at 18.

59. *Id.*

60. For more on the sugar industry in the late nineteenth century, see generally ALFRED S. EICHNER, *THE EMERGENCE OF OLIGOPOLY: SUGAR REFINING AS A CASE STUDY* (1978); VOGT, *supra* note 55; David Genesove & Wallace P. Mullin, *Testing Static Oligopoly Models: Conduct and Cost in the Sugar Industry, 1890–1914*, 29 RAND J. ECON. 355, 368 (1998); John E. Searles, *American Sugar, in ONE HUNDRED YEARS OF AMERICAN COMMERCE* 257 (Chauncey M. Depew ed., 1895); Richard Zerbe, *The American Sugar Refinery Company, 1887–1914: The Story of a Monopoly*, 12 J.L. & ECON. 339 (1969).

Table 2: Changing Conditions in the Sugar Industry

Year	Number of Refineries	Industry Output (000 short tons)	Average Output per Plant
1860	41	394	9.6
1870	59	598	10.1
1880	49	994	20.3
1887	24	1507	62.8

There was considerable sympathy at the time regarding the problem of excessive competition, and many saw merit in allowing businesses to organize to prevent excessive competition.<sup>61</sup> Classical economic thinking, then prevalent, held that in normal markets the law of supply and demand would set a natural price at a reasonable and remunerative level, while excessive competition drives the price below remunerative levels. Under this view, although excessive competition benefits customers temporarily through lower prices, competitors who cannot survive exit the market, and when enough competitors have left, the remaining firms raise prices above remunerative levels until new entry appears and the cycle repeats itself.<sup>62</sup>

But even apart from declining prices and profits, competing firms had yet another reason to consolidate: the prospect of supracompetitive profits. Once scale economies had been exhausted and the markets reequilibrated with a smaller number of firms (albeit larger ones), the ability to control market supply can result in supracompetitive profits. Where other firms are present in the marketplace, the ability to control supply is limited by the competitive interactions of the firms. If one firm attempts to decrease production in an effort to reduce supply, other firms in the market have an incentive to take up some or all of the slack. As a result, it is seldom in the interest of one firm in a defragmented, multi-firm market to reduce supply below its competitive level. But, at least in principle, if firms supplying a sufficient amount of the market supply cooperate in reducing production, they can decide upon a joint profit-maximizing strategy that would significantly increase each of their profits above the competitive level. Likewise, while firms in some industries may face incentives to vertically integrate into raw materials or distribution channels because of lower costs through economies of integration, a firm that obtains control over essential raw materials or distribution channels may be able to create barriers to entry

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61. See REPORT OF THE COMMITTEE ON GENERAL LAWS RELATIVE TO COMBINATIONS COMMONLY KNOWN AS TRUSTS, S. 112-64, at 5 (N.Y. 1889) [hereinafter NEW YORK 1889 REPORT] (“Such contests [from excessive competition] often result in wounds which it takes long years to heal, and from them the public not only receive no real benefit, but positive injury rather, for sooner or later the public are expected to make good the losses which such ruinous policies entail.”).

62. See *id.* at 6.

to new competition and enable the firm to earn supracompetitive profits even in the absence of economies of integration.<sup>63</sup>

### III. FORMS OF COMBINATION AND PRE-ANTITRUST REGULATION

The increasing competition among firms and the decline in nominal prices and the threat to producers' profits, if not survival—so-called excessive competition—created strong incentives in many industries to coordinate and centralize operations in order to reduce capacity, control overproduction, and reduce competitive pricing pressure. A New York State Senate committee studying trusts at the time reported that “[c]ombination rarely exists except as the result of excessive competition.”<sup>64</sup> Similarly, although outside of our period of study, at the turn of the century, the U.S. Industrial Commission cited excessive competition as the most important factor in prompting mergers and acquisitions among competitors in the merger wave beginning in 1895.<sup>65</sup> But given these incentives to coordinate, there remained the question of the means of coordination.

Prior to 1879, there were three vehicles for competitors wishing to coordinate their operations: simple combinations, pools, and corporations. As discussed below, simple agreements and pools suffered from serious incentive compatibility problems that could not be overcome by contract, since almost all U.S. courts refused to enforce a combination's underlying agreements. Housing the combination in a corporation would have solved the enforceability problem by eliminating the independence of the member firms and substituting a command-and-control management structure. But at the time, corporations were strictly limited by state law in their size, scope of operations, and ability to hold stock in other corporations, and hence were unsuitable for combinations of any size and geographic scope. In 1879, the Standard Oil combination created the trust proper, which enabled the combination to exercise command and control over its operations much like a corporate holding company but without being hindered by the constraints imposed on corporations by state corporation laws. Within the next decade, several major, and an unknown number of more minor, combinations had emulated Standard Oil and adopted a trust structure. But the trust structure was soon attacked by several states that sought to revoke the charters of corporations organized under their laws for participating in a trust. Just at the same time, however, New Jersey began to significantly liberalize its corporation laws, which enabled large

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63. Economies of scale were probably not a reason to combine, at least in “loose” combinations where member firms remained separate albeit collaborating entities. For the most part, economies of scale occur at the plant or factory level. SCHMITZ, *supra* note 1, at 57. Since loose combinations did not integrate the facilities of their members, there probably were little or no economies of scale to be gained.

64. NEW YORK 1889 REPORT, *supra* note 61, at 6.

65. See 19 U.S. INDUS. COMM'N, *supra* note 54, at 604. For a modern analysis drawing the same conclusion, see LAMOREAUX, *supra* note 29, at 87.

combinations to adopt a corporate form. Collectively, these four vehicles became known as “trusts,” and they were the vehicles at which the coming antitrust legislation was aimed.

#### A. Simple Combinations

The simplest form of combination is an agreement among firms that remain otherwise legally independent of one another. These agreements tend to have simple terms, such as not selling below a certain price, producing above a certain level, or allocating customers or sales territories to particular participating firms. To allow the agreement to be more flexible and enable the participating firms to respond to changing market conditions, sometimes the contracting members would form an unincorporated association and use its governance mechanism to centrally fix prices and perhaps allocate sales quantities or customers among the members.<sup>66</sup> The idea behind these simple combinations is that if the contracting members adhere to the agreement, they will make more profits than they would in the absence of the agreement. Each member, however, remains individually responsible for operating its own business and the profits it earns are the profits generated by that business (that is, it does not share in the profits of other combination members). We recognize these arrangements today as garden-variety horizontal cartels.

A significant problem that contractual combinations face is cheating on the combination’s rules. Each participating firm has an incentive to breach its agreement by secretly shaving prices, increasing production above the agreement’s allocation limits, or making sales to customers that have been allocated to other members. After all, if everyone else in the combination follows the rules, a firm that breaches the agreement can undercut its competitors and sell more output at less than the combination’s price (but still at higher prices than would exist with unregulated competition) and make much higher profits than it could if it followed the rules. Since all participants face similar incentives, this can make the combination very unstable.<sup>67</sup>

This incentive incompatibility is the well-known prisoner’s dilemma problem for cartels.<sup>68</sup> The obvious solution to the cheating problem is to

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66. The Articles of Association of the Manufacturers of Gunpowder, adopted on April 23, 1872, provides an example. *See* INDUSTRIAL COMBINATIONS AND TRUSTS 2 (William S. Stevens ed., 1913) (reprinting articles of association). A variation is where one of the firms, rather than an association, attempts to corner a market by entering into agreements with its competitors, whereby the competitors would agree over the term of the contract to supply the cornering firm with a certain quantity at a fixed (and presumably supracompetitive) price and not to sell to any other person. *See, e.g.,* Santa Clara Valley Mill & Lumber Co. v. Hayes, 18 P. 391, 391–92 (Cal. 1888).

67. For more on cheating as the central problem in cartels, see ROBERT C. MARSHALL & LESLIE M. MARX, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS 105–06 (2012).

68. In addition to incentive incompatibility in following the rules, simple combinations also face a coordination problem: they have to reach agreement on the particular cartel rules

make the combination rules somehow enforceable. A common method would be for the combination to create a contract with remedies for breach.<sup>69</sup> For example, the contract could provide that each participating firm deposit a bond that the firm would forfeit to the other members if it breached the rules<sup>70</sup> or for the recovery of liquated damages by compliant members from a member that breaches the contractually specified rules.<sup>71</sup> But to the extent that the enforcement mechanism was an action in court—say, for recovery on a bond, liquated damages, actual damages, or even specific performance—most courts of the day would not intervene and grant relief. With relatively rare exceptions, U.S. courts held that combination agreements that were designed to raise prices or reduce output were contrary to public policy and hence unenforceable as a matter of contract law.

This rule had its origin in the early English common law of *contracts in restraint of trade*. The early courts originally saw noncompetition covenants in connection with a master-apprentice relationship and in contracts for the sale of a business at a time when all business was essentially local. Employers, then as now, often develop special skills in the business as well as a detailed knowledge and close rapport with their customers. These employers did not wish for their employees, after learning the business and the customers, to go into competition against them when the employees left their employment. To guard against this, employers often required their employees to agree not to compete against them for some number of years after the employee left their service. Similarly, if a seller of a business opened a nearby competing establishment, the seller could attract his old customers away from the buyer and deprive the buyer of the benefit of his bargain. To deal with this problem of retained goodwill, buyers included covenants in their purchase agreements that prevented the seller from competing with his old business at least for a certain period of time. These noncompetition covenants became known as *ancillary restraints*, since they were connected to the creation of an employment relationship or to the sale of a business.

Courts initially were hostile to ancillary noncompetition covenants. *Dyer's Case*,<sup>72</sup> decided when the Black Death made labor scarce, is the first

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they propose to follow. Even if the rules are followed, since different rules can have different profit consequences for the members individually, reaching agreement on the rules can be a major hurdle in cartel formation. For more on problems of cartel formation, see, for example, MICHAEL D. WHINSTON, LECTURES ON ANTITRUST ECONOMICS 20–26 (2006). See generally George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964).

69. Contracts are not the only cartel enforcement mechanism. Another possibility is preagreed reaction strategies by the conforming cartel members to punish members that breach the cartel rules. See, e.g., Robert H. Porter, *Optimal Cartel Trigger Price Strategies*, 29 J. ECON. THEORY 313 (1983).

70. See, e.g., *Palmer v. Stebbins*, 20 Mass. (3 Pick.) 188, 188 (1825); *Diamond Match Co. v. Roeber*, 13 N.E. 419, 420 (N.Y. 1887); *De Witt Wire-Cloth Co. v. N.J. Wire-Cloth Co.*, 14 N.Y.S. 277, 278 (C.P. 1891).

71. See, e.g., *Cent. Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, 668 (1880).

72. Y.B. 2 Hen. 5, fol. 5, Pasch, pl. 26 (1414) (Eng.).

reported case on contracts in restraint of trade. Although the report of the case is meager, it appears that the court refused to enforce a debt on a bond when the defendant allegedly broke his agreement not to practice the trade of dyeing in his hometown for half a year.<sup>73</sup> As late as 1602, English courts held that it was against the law to prohibit any lawful trade at any time or at any place.<sup>74</sup> Very likely, this hostility had its origins in the English law of apprenticeship. No one without an exemption could practice a regular trade or craft without serving a long apprenticeship and obtaining membership in the appropriate guild or company. At a time when guilds were local in their jurisdiction and very reluctant to admit strangers to their membership, a covenant not to compete, even when confined to a limited geographic area, was tantamount to a ban on employment within the profession. This not only deprived the community of the services of a skilled laborer but also threatened the community with an additional welfare burden.

As the English economy became more developed, the opportunities for employment and trade expanded and competition increased, causing the reasons for the original strict rule against contracts in restraint of trade to gradually disappear.<sup>75</sup> By the beginning of the eighteenth century, some courts were enforcing these ancillary restraints when they were supported by adequate consideration and were reasonable under the circumstances to balance the interests of the contracting parties and the community. The first innovation on the old rule came in the 1614 case of *Rogers v. Parrey*.<sup>76</sup> The plaintiff had leased a house in London to the defendant for a term of twenty-one years, for which the defendant paid ten pounds and promised not to allow the adjoining shop to be used for the trade of a joiner.<sup>77</sup> After

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73. *See id.*

74. *See Colgate v. Bacheler*, (1602) 78 Eng. Rep. 1097 (K.B.) 1097 (voiding a bond given by a haberdasher to abstain in the County of Kent on the cities of Canterbury and Rochester from the use of his trade for four years or pay a bond of twenty). For other cases between 1414 and 1601, see, for example, *Anonymous*, (1587) 72 Eng. Rep. 555 (K.B.) 555 (voiding a bond on a noncompetition covenant by one blacksmith to another in Southmins not to compete in the town), and *Anonymous*, (1578) 72 Eng. Rep. 476 (K.B.) 477 (holding unenforceable a covenant by an apprentice not to exercise his craft in Nottingham for four years, a period longer than the law of apprenticeship recognized). Both cases cite *Dyer's Case* as the supporting authority. *See Anonymous*, 72 Eng. Rep. at 476; *Anonymous*, 72 Eng. Rep. at 555.

75. This common law evolutionary process was recognized, at least retrospectively, in the cases. *See, e.g.*, *Nat'l Benefit Co. v. Union Hosp. Co.*, 47 N.W. 806, 807 (Minn. 1891); *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] 1 A.C. 535 (H.L.) 547; 8 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 56 (1925) (observing that "the law as to contracts in restraint of trade has, more than any other class of contracts, been moulded by changing ideas of public policy").

76. (1613) 80 Eng. Rep. 1012 (K.B.). The case is also reported at (1613) 79 Eng. Rep. 278 (K.B.). *Rogers* was also the earliest recorded action of assumpsit on a contract in restraint of trade. *See ALFRED W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT* 522 (1975).

77. *Rogers*, 80 Eng. Rep. at 1012-13.

the defendant broke his covenant, the plaintiff sued on assumpsit.<sup>78</sup> Edward Coke, then chief justice of the Court of King's Bench, held that the restrictive covenant was valid, since the restrictions were reasonable in light of the circumstances and limited "for a time certain, and in a place certain."<sup>79</sup>

The most detailed and influential analysis of the relaxed rule appeared almost a century later in the celebrated 1711 case of *Mitchel v. Reynolds*.<sup>80</sup> Mitchel leased a bakehouse from Reynolds in a parish of London for five years, and Reynolds agreed that if he worked anywhere in that parish as a baker during that time he would pay the plaintiff £50 and posted a bond to secure his promise.<sup>81</sup> When Mitchel sued Reynolds to collect on the bond for breach of his covenant, Reynolds, in defense, pleaded that, since he had served his apprenticeship as a baker and had been admitted to the guild, no private person could lawfully prevent him from working at that trade and that he should not be required to pay the £50.<sup>82</sup> Chief Justice Parker disagreed and ordered that the debt on the bond should be paid.<sup>83</sup> To Parker, a covenant not to compete was reasonable and therefore enforceable as a matter of contract law, since it restricted the business opportunities of the covenantor no more than necessary to achieve the legitimate business objective of ensuring that Mitchel obtained the benefit of his bargain.<sup>84</sup> On the other hand, Parker opined, if the restraint prohibited Reynolds from competing throughout England, the restraint would have been unlawful since it reached beyond areas in which Mitchel had a legitimate need for protection.<sup>85</sup>

Courts quickly construed *Mitchell* to apply different rules depending on whether the challenged restraint was general or partial. *General restraints of trade*, that is, restraints that prohibited the covenantor from competing anywhere in the jurisdiction at any time, were always void and unenforceable since they both deprived the public of the restricted party's industry as well as prevented him from pursuing his occupation and supporting himself and his family.<sup>86</sup> *Partial restraints of trade*, which were limited in time and place and so provided the covenantor some opportunity to work, were presumptively illegal, but the presumption could be rebutted where the party seeking to enforce the restriction (or collect damages for a

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78. *Id.* Assumpsit is a form of action for the recovery of damages for the nonperformance of a simple contract (that is, a contract not under seal or of record). See 1 JOSEPH CHITTY, A TREATISE ON PLEADING 111 (5th ed. 1831).

79. *Id.* at 1013.

80. (1711) 24 Eng. Rep. 347 (K.B.).

81. *Id.* at 347.

82. *Id.*

83. *Id.* at 348.

84. *Id.*

85. *Id.*

86. See, e.g., *Or. Steam Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64, 68 (1873); *Alger v. Thacher*, 36 Mass. (19 Pick.) 51, 53–54 (1837) (also noting that general restraints can "prevent competition and enhance prices" and "expose the public to all the evils of monopoly"); *Lange v. Werk*, 2 Ohio St. 520, 532 (1853).

breach) could demonstrate that the restraint was ancillary to a legitimate business purpose and was reasonable in light of its scope, the business purpose it furthered, and the interest of the public. The seminal statement of the common law reasonableness test was provided by Chief Judge Tindal for the Court of Common Pleas in *Horner v. Graves*<sup>87</sup>:

[W]e do not see how a better test can be applied to the question whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party, can be of no benefit to either, it can only be oppressive; and if oppressive, it is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy.<sup>88</sup>

Many American courts, as well as English courts, adopted the *Horner* formulation.<sup>89</sup> Over time—as markets continued to broaden, businesses grew bigger, and labor mobility generally improved—some (but not all) courts moved away from the strict distinction between general and partial restraints and relied more on the reasonableness test to determine the enforceability of ancillary restraints.<sup>90</sup> Courts first began to apply a

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87. (1831) 131 Eng. Rep. 284 (C.P.).

88. *Id.* at 287.

89. For American cases following the *Horner* formulation, see, for example, *Or. Steam Navigation*, 87 U.S. at 67 & n.†; *Craft v. McConoughy*, 79 Ill. 346, 349–50 (1875); *Mandeville v. Harman*, 7 A. 37, 39 (N.J. Ch. 1886); *Brewer v. Marshall*, 19 N.J. Eq. 537, 547 (1868); *Diamond Match Co. v. Roeber*, 13 N.E. 419, 421 (N.Y. 1887); *Grasselli v. Lowden*, 11 Ohio St. 349, 357 (1860); *Lange*, 2 Ohio St. at 528–29; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 185 (1871); *French v. Parker*, 14 A. 870, 871 (R.I. 1888).

90. In *Diamond Match*, a leading case at the time, the New York Court of Appeals explored the decline of the distinction between general and partial restraints in detail. *Diamond Match*, 13 N.E. at 419. On the facts, *Diamond Match* sued William Roeber for liquidated damages and an injunction for violating a noncompetition covenant to which Roeber had agreed when he sold his New York match manufacturing business. *Id.* at 419–20. The covenant restricted Roeber from engaging directly or indirectly in the sale of friction matches for a period of ninety-nine years anywhere in the United States except in Nevada and Montana. *Id.* at 419. *Diamond Match* sought to enforce the covenant when Roeber became the superintendent of a rival match manufacturing company in New Jersey. *Id.* at 420. The court found the restraint on Roeber to be reasonable and enforceable. *Id.* at 423. Although the restraint was essentially general in nature (although technically partial because of the exclusions), the purchaser sold to dealers in multiple states using traveling salesmen and the restraint was designed to ensure the purchaser of the full benefit of its bargain. *Id.* at 420. The court also found that the restraint only bound the individual seller and did not exclude third parties from entering the business, and that there was “little danger that the public will suffer harm from lack of persons to engage in a profitable industry.” *Id.* at 422. For other cases rejecting the rule that general restraints are always unenforceable and relying solely on the reasonableness test, see, for example, *W. Wooden-Ware Ass’n v. Starkey*, 47 N.W. 604 (Mich. 1890) (finding restraint overly broad and hence unreasonable and unenforceable); *Leslie v. Lorillard*, 18 N.E. 363, 365–66 (N.Y. 1888); *Herreshoff v. Boutineau*, 19 A. 712, 713 (R.I. 1890) (same).

reasonableness test to restraints that were unlimited in duration.<sup>91</sup> Courts were more reluctant to apply a reasonableness test to “unlimited” territorial restraints.<sup>92</sup> Indeed, some jurisdictions defined general restraints to include those that covered the entire territory of the jurisdiction (such as a state) even when they permitted the restricted party to operate outside of the jurisdiction.<sup>93</sup> Eventually, however, even those restraints became subject to the reasonableness test<sup>94</sup> and the distinction between general and partial restraints began to diminish in favor of a pure reasonableness test.<sup>95</sup>

Over time, in applying the reasonableness test, courts also began to defer increasingly to the contracting parties. The point of departure in a reasonableness analysis is whether the restriction is overly broad in the sense that it goes beyond the legitimate protectable interests of the restriction’s beneficiary. Courts increasingly held that the parties, rather than the courts, were in the best position in the give and take of their bargaining to draw the right balance between these opposing interests.<sup>96</sup>

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91. See, e.g., *Cook v. Johnson*, 47 Conn. 175, 178 (1879); *Bowser v. Bliss*, 7 Blackf. 344, 346 (Ind. 1845); *Guerand v. Dandeleit*, 32 Md. 561, 567 (1870); *Webster v. Buss*, 61 N.H. 40, 40 (1881); *French*, 14 A. at 871.

92. See, e.g., *Wiley v. Baumgardner*, 97 Ind. 66, 68 (1884); *Bishop v. Palmer*, 16 N.E. 299, 303–04 (Mass. 1888).

93. See, e.g., *More v. Bonnet*, 40 Cal. 251 (1870); *Wright v. Ryder*, 36 Cal. 342, 359 (1868); *Taylor v. Blanchard*, 95 Mass. (13 Allen) 370, 374–75 (1866); *State v. Neb. Distilling Co.*, 46 N.W. 155, 160 (Neb. 1890); *Dunlop v. Gregory*, 10 N.Y. 241, 244–45 (1851) (dictum); *Lange*, 2 Ohio St. at 530. The idea was that a noncompetition covenant deprived a state’s citizens of the restricted party’s productive endeavors as would a covenant that covered the entire county which drove the restricted party to another state. *Taylor*, 95 Mass. at 374–75.

94. See, e.g., *Or. Steam Navigation*, 87 U.S. at 64 (upholding noncompetition restraint that covered California and other areas); *Morse Twist Drill & Mach. Co. v. Morse*, 103 Mass. 73 (1869) (upholding unlimited territorial restriction); *Beal v. Chase*, 31 Mich. 490 (1875) (upholding a noncompetition covenant in connection with the sale of a printing business that covered the entire state); *Bailey v. Collins*, 59 N.H. 459 (1879); *Diamond Match*, 13 N.E. at 421–23 (upholding a covenant in connection with the sale of a New York match factory not to compete in the sale of friction matches anywhere within the United States except Nevada and Montana); *Herreshoff*, 19 A. at 713 (holding noncompetition covenant in connection with employment not void simply because it covered the entire state). Some courts were also willing to view the territorial restriction as divisible, so if a contract named a smaller area that was reasonable and a larger area that was overly broad (e.g., “the City of Jacksonville, or anywhere in the United States”), the court would enforce the restriction as to the smaller area but not the larger one. See, e.g., *Wiley*, 97 Ind. at 69 (1884) (noting rule); *Peltz v. Eichele*, 62 Mo. 171, 173 (1876) (reducing covered territory from “any other place” to St. Louis); *Lange*, 2 Ohio St. at 531 (reducing covered territory from the United States to one county).

95. See, e.g., *Gibbs v. Consolidated Gas Co.*, 130 U.S. 396, 409 (1889) (“The question is whether, under the particular circumstances of the case and the nature of the particular contract involved in it, the contract is or is not unreasonable.”); *W. Wooden-Ware Ass’n*, 47 N.W. at 604; *Herreshoff*, 19 A. at 713; *Leslie*, 18 N.E. at 365–66; *Diamond Match*, 13 N.E. at 421. In England, the House of Lords eliminated the distinction in 1894. *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] 1 A.C. 535.

96. See, e.g., *Beal*, 31 Mich. at 523 (Christiancy, J.) (“[W]here such a contract is the result of fair bargaining, the reasonable presumption is, that each party, in view of all the circumstances which were within his own intimate knowledge, was able to see how the bargain was to result to his advantage, and that the party resigning the business did not do so

The idea was that the beneficiary would have to pay the restricted party more consideration as the restriction became broader, and that a beneficiary therefore would not seek a restrictive covenant that was broader than his legitimate interest.<sup>97</sup> So by the 1890s, the case results were heavily weighted toward enforcing ancillary restraints negotiated by the parties, at least in the typical situation of the sale of a business.

But it is important to keep in mind that the litigants in these cases were almost always the contracting parties, not the state or injured third parties. An action on the condition of a bond, assumpsit, or specific performance could only be brought by a party with an enforceable contractual right. The existence of an enforceable obligation necessitated a valid contract, which in turn required mutuality of consideration. The early courts did not recognize executory obligations on the part of the covenantee to be legally sufficient consideration. Consequently, the purchase of a business and the employment for pay were two of the few types of nonexecutory consideration that could support the covenantee's side of the bargain for a noncompetitive covenant from the other party.<sup>98</sup> In these cases, a decision not to enforce a restrictive covenant would have relieved the restricted party from an obligation that it had freely accepted at the time the contract was entered or would otherwise work a significant injustice to an essentially innocent party.<sup>99</sup>

Enforcing a noncompetition covenant in connection with the sale of a business or an employment contract also was unlikely to threaten the public interest by reducing competition, raising prices, or reducing market output. The buyer replaced the seller in the operation of the business, and the employer continued to work in the town training apprentices, with the graduating apprentices moving elsewhere to work. In these cases, although the effect on the public interest remained part of the reasonableness test, there was no reason for courts to take competitive effects (as we understand them today) into the analysis. There was the rare case where an agreement could adversely affect competition, but in these cases the courts could rely on the public interest leg of the test to find the contract unenforceable. For example, a company could buy up all of its competitors, bind each one of them to a noncompetition covenant, and (at least temporarily) become the only seller in the marketplace allowing it to raise prices. This was the situation in *Richardson v. Buhl*,<sup>100</sup> where the Michigan Supreme Court refused to enforce a noncompetition covenant in connection with the sale of a business, since the purchase and the covenant were part of a broader

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without being fully satisfied that he was receiving full equivalent, which would be more advantageous to him than the property and the business sold.”)

97. *See id.* at 522–23.

98. Occasionally, a case would arise when the covenantee would simply pay the restricted party not to compete. *See, e.g., Leslie*, 18 N.E. at 364 (where a new competitor allegedly engaged in predatory conduct in order to coerce a payment in return for exiting business from the incumbent steamship company).

99. *See, e.g., Manchester & L.R.R. v. Concord R.R.*, 20 A. 383 (N.H. 1890).

100. 43 N.W. 1102 (Mich. 1889).

scheme to monopolize the U.S. market for matches by purchasing the assets of most match manufacturing companies in the country.<sup>101</sup> Courts also opposed ancillary restraints that indirectly imposed restrictions on third parties.<sup>102</sup> As a general rule, courts held that public policy favored competition because competition tended to provide consumers with the lowest possible prices, and opposed monopolies, which tended to raise prices.<sup>103</sup>

Courts began to see more contracts that could substantially affect competition once the courts accepted reciprocal executory commitments as valid consideration for the purposes of mutuality in the eighteenth century. This created the possibility of contracts consisting of reciprocal noncompetition covenants: the commitment of *A* not to compete with *B* could be the requisite consideration for *B*'s commitment not to compete with *A* and vice versa. These reciprocal noncompetition commitments, which did not promote capital mobility or labor training, made the elimination of competition the primary, if not only, purpose of the contract between the parties. To distinguish them from restraints ancillary to business sales or employment relationships, some courts called arrangements involving these reciprocal, noncompetition covenants *combinations or conspiracies in restraint of trade*, although many courts drew no distinction and continued to call these restraints simply contracts in restraint of trade. However denominated, the distinguishing factor was that these restraints were *nonancilliary* in the sense that they did not promote the sale of a business, the hiring of employees, or any other primary business purpose; rather, their primary purpose was to eliminate competition among the covenantors.

When confronted with nonancilliary reciprocal noncompetition covenants that threatened to raise prices and reduce output, courts generally refused to enforce them. By 1890, most courts in the United States agreed that, when the challenged restraints encompassed all or materially all of the competitors in a trading area and completely determined the members' manner of trade, the restraints were void as contrary to public policy and hence unenforceable. Courts often reached this result after finding that the purpose of the combination was to artificially enhance prices, often through limiting supply either by reducing their own production or sales or by

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101. *Id.* at 1110.

102. *See, e.g.*, Crawford & Murray v. Wick, 18 Ohio St. 190 (1868) (declaring unlawful a covenant in a contract for the lease of coal lands that obligated the lessee to require his employees to purchase all of their supplies at the lessor's store).

103. *See, e.g.*, Anderson v. Jett, 12 S.W. 670, 672 (Ky. 1889) ("That public policy that encourages fair dealing, honest thrift, and enterprise among all the citizens of the commonwealth, and is opposed to monopolies and combinations, because unfriendly to such thrift and enterprise, declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in utterly void."); Cent. Ohio Salt Co. v. Guthrie, 35 Ohio St. 666, 672 (1880) ("Public policy, unquestionably, favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public.").

contracting with third parties not to sell into the area.<sup>104</sup> Then, as today, courts were reluctant to engage explicitly in a balancing analysis under the reasonableness test for a restraint of trade, so they almost always decided cases at the corners: they found these types of restraints unenforceable because they were general restraints of trade<sup>105</sup> or because the restraint was not ancillary to any legitimate business purpose and deprived the public of the benefits of competition.<sup>106</sup> On the other hand, courts typically upheld restraints that were partial, involved less than all of the sellers in the market, had a legitimate business purpose, and did not restrict third parties from competing with the contracting parties.<sup>107</sup>

In addition to analyzing noncompetition agreements among combinations under a reasonableness test for restraints of trade, many courts also characterized the ability of a combination to raise prices or restrict market

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104. See, e.g., *Anderson*, 12 S.W. at 670 (finding void a combination to eliminate all competition and pool profits between two rival steamboat companies on the Kentucky river); *India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168 (1859) (summarily finding unenforceable an agreement whereby eight firms agreed for a period of three months not to sell their holdings of India bagging without the consent of the majority); *Pittsburgh Carbon Co. v. McMillin*, 23 N.E. 530 (N.Y. 1890) (combination of nine carbon companies that consolidated their management and control of their respective businesses in a trustee); *Arnot v. Pittston & Elmira Coal Co.*, 68 N.Y. 558 (1876) (holding that a contract providing that P&E would purchase up to a fixed amount of coal per month from its competitor and that the competitor would not sell coal into the Elmira market was in furtherance of a corner by P&E designed to create artificially high prices in the Elmira market and hence illegal); *Stanton v. Allen*, 5 Denio 434 (N.Y. Sup. Ct. 1848) (finding void for public policy a pooling agreement among all transportation lines on the Erie and Oswego canals).

105. See, e.g., *W. Union Tel. Co. v. Am. Union Tel. Co.*, 65 Ga. 161, 163 (1880) (“Such contracts are not favored by the law; they are against the public policy, because they tend to create monopolies, and are in general restraint of trade.”); *Cent. Ohio Salt*, 25 Ohio St. at 672–73 (refusing to enforce a voluntary association agreement among salt manufacturers in a large trading area where the association could regulate member production, and all produced salt, when packed in barrels, became the property of the association to be sold only at retail and at fixed prices); see also *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 525 (Ct. App. 1880) (characterizing restraints held void and unenforceable in *Craft*, *Morris Coal*, *Arnot*, and *Stanton* as “restraints in the general sense”).

106. See, e.g., *Craft v. McConoughy*, 79 Ill. 346 (1875) (finding illegal an agreement to form a secret partnership of all grain dealers in the town and surrounding area to pool profits in the sale of grain in Rochelle, Illinois); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173 (1871) (finding illegal an association agreement among five coal companies to allocate coal regions that they controlled and to sell coal only in amounts and at prices set by the association).

107. See, e.g., *People's Gaslight & Coke Co. v. Chi. Gaslight & Coke Co.*, 20 Ill. App. 473 (1886) (noting actual competition from other sellers and enforcing mutual noncompetition covenants between two gas companies), *rev'd on other grounds*, 13 N.E. 169 (1887) (finding restraints, although partial, prejudicial to the public interest and hence unenforceable given the public nature of the services involved and also finding noncompetition covenants outside of the authority of the corporate charters of the contracting parties); *Hubbard v. Miller*, 27 Mich. 15, 20–21 (1873) (holding that a partial restraint is “not specially injurious to the public” where “every other person except the [covenantor] is still at liberty to engage in the same business within the same limits”); see also *Chappel v. Brockway*, 21 Wend. 157, 163 (N.Y. Sup. Ct. 1839) (finding no monopoly where the noncompetition covenant “only secures the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside are left at full liberty to enter upon the same enterprise”).

supply as creating a *monopoly* and held that agreements in furtherance of schemes to monopolize the market were void and unenforceable.<sup>108</sup> These courts analogized a de facto exclusive right to sell goods or services in an area to a monopoly created by a prerogative or legislative grant and held that the contracts that furthered a private monopoly were void and unenforceable in the absence of a legislative grant.<sup>109</sup> Still other courts analogized these restraints to forestalling, regrating, and engrossing—old English statutory crimes with a long and storied history that some nineteenth century observers equated with “cornering” a market.<sup>110</sup> Whether or not forestalling, regrating, or engrossing technically remained

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108. See, e.g., *W. Union Tel. Co.*, 65 Ga. at 162–63 (finding that agreements “entered into to cripple and prevent competition, and that they thereby enable the plaintiff in error to fix its tariff of rates at a maximum . . . are not favored by the law; they are against the public policy, because they tend to create monopolies, and are in general restraint of trade”); *Craft*, 79 Ill. at 349 (characterizing a combination of all of the grain merchants in a town to fix prices and pool profits as an illegal attempt “to control and monopolize the entire grain trade of the town and surrounding country”); *Richardson v. Buhl*, 43 N.W. 1102 (Mich. 1889) (finding that the purpose of the Diamond Match Company was to monopolize the manufacture and sale of friction matches in the United States and holding that contracts in furtherance of this scheme were void and unenforceable); *Arnot*, 68 N.Y. at 567–69 (holding that where a defendant’s purpose was to obtain control over the sale of all anthracite coal in the Elmira market in order to raise prices, and where the plaintiff had knowledge of this purpose, a contract between the plaintiff and defendant that prevented the plaintiff from selling coal in Elmira was void and unenforceable); *Cent. Ohio Salt*, 35 Ohio St. at 672 (finding that the “clear tendency” of an agreement among essentially all of the territory’s salt manufacturers to fix prices and control production through an association was “to establish a monopoly, and to destroy competition in trade, and for that reason, on grounds of public policy” refusing to enforce the agreement); see also *State v. Neb. Distilling Co.*, 46 N.W. 155, 161 (Neb. 1890) (finding that the purpose of the Whiskey Trust was “to control prices, prevent production, and create a monopoly of the most offensive character”).

109. See, e.g., *W. Union Tel. Co.*, 65 Ga. at 162–63 (holding void and unenforceable contracts providing Western Union the exclusive right to erect telegraph lines along the rights of way of the contracting railroads); FREDERICK H. COOKE, *THE LAW OF TRADE AND LABOR COMBINATIONS* 94–95 (1898) (“Within a comparatively recent period, the conception of a monopoly has been extended from a right created by government to a condition produced by the acts of mere individuals; thus, where, within a given area, all sales of a given article are made by a single individual or set of individuals.” (footnote omitted)).

110. See, e.g., *Raymond v. Leavitt*, 9 N.W. 525, 526 (Mich. 1881). Originally, forestalling was the buying or selling of foodstuffs and other necessities of life outside of an officially established fair or other marketplace and then reselling them in the market, presumably at higher prices; regrating was a form of arbitrage: the buying of necessities in one fair and reselling them in the same area; engrossing was a form of forward contract: the buying of crops in the field with the intent to resell them once harvested. See 5 & 6 Edw. 6, c. 14 (1552) (Eng.), reprinted in 5 Stat. 377 (1763) (Eng.) (defining terms). Higher prices, while often incidental to these practices, were not the harm the English statutes sought to prevent. Rather, in the medieval period when these laws emerged, local authorities such as manors, cities, and guilds had legally enforceable prerogative grants or customary rights to organize local markets, set conditions of trade, and collect taxes on goods sold. Forestalling, regrating, and engrossing almost surely were declared crimes more to protect the rights of market organizers than to protect consumers from monopoly pricing. Later economic and political changes made these crimes obsolete, and by the early 1700s they had largely fallen into disuse and many of the statutes were repealed. Even so, some later English courts held that these practices violated the common law if not statutory law. See *R v. Waddington*, (1800) 102 Eng. Rep. 56 (K.B.) 65; *Rex v. Rusby*, (1799) 170 Eng. Rep. 241.

indictable common law crimes under state law,<sup>111</sup> the idea that cornering the market to increase prices above reasonable levels was against public policy and that the implementing restraints should not be enforceable retained traction.

Overall, by the time of the passage of the Sherman Act in 1890, the common law governing contracts, combinations, and conspiracies in restraint of trade in the United States was reasonably uniform in application, if not in principle.<sup>112</sup> Restrictive covenants that were freely negotiated, ancillary to a legitimate business purpose, and did not threaten higher prices, reduced output, and other “evils of monopoly”<sup>113</sup> were generally enforced, while those that restricted enough competitors to enable a contracting party or combination to harm the public interest by raising prices or reducing output were almost always held to be void as contrary to public policy. But there are four aspects of the late nineteenth century common law worthy of note.

First, for ancillary restraints in nonexecutory agreements (such as in the sale of a business), there was a tendency for courts to view, if not legally presume, freely negotiated restraints as reasonable and enforceable, regardless of how they constrained the contracting parties, in the absence of a showing that the effects of the restraints went beyond the parties and materially harmed the public interest.<sup>114</sup> A reading of the cases at the time

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111. In 1844, Parliament passed legislation reaffirming the repeal of all statutes prohibiting forestalling, regrating, and engrossing and declaring that these activities were not to be found criminal at common law. 7 & 8 Vict., c. 24 (1844) (U.K.). The old notions of these crimes did not entirely disappear in the United States. See *Taggart v. City of Detroit*, 38 N.W. 714, 718 (Mich. 1888) (noting that the charter of the City of Detroit always had the authority to prevent forestalling and regrating and that the city always had ordinances on these practices with respect to the city-operated public market to ensure that consumers could always deal directly with farmers and not through middlemen); NEW YORK 1889 REPORT, *supra* note 61, at 7 (suggesting that forestalling, regrating, and engrossing were still indictable as common law misdemeanors in New York State). For more on forestalling, regrating, and engrossing, especially as it relates to antitrust law, see Edward A. Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act*, 31 HARV. L. REV. 246, 251–63 (1917); Wendell Herbruck, *Forestalling, Regrating and Engrossing*, 27 MICH. L. REV. 365 (1929).

112. See *Tex. & Pac. Ry. Co. v. S. Pac. Ry. Co.*, 6 So. 888, 891 (La. 1889) (“We have been at great pains, and have devoted long and tedious labor, to examine all the authorities, consisting mainly of decisions rendered on the point by courts of last resort in this country, which were submitted to us by counsel in the case, and we reach the conclusion that American jurisprudence has firmly settled the doctrine that all contracts which have a palpable tendency to stifle competition, either in the market value of commodities or in the carriage or transportation of such commodities, are contrary to public policy, and are therefore incapable of conferring upon the parties thereto any rights which a court of justice can recognize or enforce.”).

113. See, e.g., *Alger v. Thacher*, 36 Mass. (19 Pick.) 51, 54 (1837); see also *Bishop v. Palmer*, 16 N.E. 299, 304 (Mass. 1888) (citing *Alger*, 36 Mass. at 54); *Newell v. Meyendorff*, 23 P. 333, 334 (Mont. 1890) (quoting *Alger*, 36 Mass. at 54).

114. See *Leslie v. Lorillard*, 18 N.E. 363, 366 (N.Y. 1888) (“[C]ourts should refrain from the exercise of their equitable powers in interfering with and restraining the conduct of the affairs of individuals or of corporations, unless their conduct, in some tangible form, threatens the welfare of the public.”).

indicates that the burden of proving harm to the public interest from an ancillary restraint was a heavy one. Significantly, however, no such presumption appears in combination cases for reciprocal, nonancillary noncompetition restraints. If anything, just the opposite was true.<sup>115</sup>

Second, harm to the public interest almost always meant significant harm to competition reflected through increased prices and reduced output. The judicial analysis of a restraint's effect on prices and output, however, was not particularly sophisticated. Courts depended on rather rudimentary notions of competitive constraint. If, for example, the court found that there was sufficient actual rivalry between the combination and independent third parties to ensure price competition so that the combination could increase prices, the restraint did not threaten the public interest and hence was enforceable. Even if actual competition from third parties was not present, if the court found that barriers to entry were low, and the challenged restraints did not affect third parties, the court could uphold the combination on the ground that a new entry would occur to protect the public if the combination raised prices above reasonably remunerative levels.<sup>116</sup> Conversely, where the combination comprised most, if not all, of the competitors in the market, barriers to entry were high, and prices were fixed at levels not reflecting a competitive market, courts tended to find the restraints contrary to the public interest and unenforceable.<sup>117</sup>

Third, and somewhat relatedly, courts did not regard all price increases and output reductions as necessarily contrary to the public interest. As discussed in the beginning of this section, there was significant concern in

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115. See, e.g., *Cleveland, C., C. & I. Ry. Co. v. Closser*, 26 N.E. 159, 163 (Ind. 1890) (observing that the justification for a horizontal price-fixing combination "must be upon an affirmative showing, and one so full, complete, and clear as to remove the presumption (to which its existence of itself gives rise) that it was formed to do mischief to the public by repressing fair competition"). England did adopt the presumption that a freely negotiated horizontal combination was reasonable. See *Mogul Steamship Co. v. McGregor*, [1892] 1 A.C. 25.

116. See, e.g., *Goodman v. Henderson*, 58 Ga. 567, 570 (1877) ("It was argued that it tended to a monopoly, as the contracting parties were the only active parties engaged in purchasing such hides; but any others, we suggest, could engage, if they wished, and, if prices warranted, they certainly would do so."); *Leslie*, 18 N.E. at 366 (finding a noncompetition clause enforceable where it restricted only the covenantee and did not exclude other competition); *Diamond Match Co. v. Roeber*, 13 N.E. 419, 422 (N.Y. 1887) ("To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege."). The Northern District of Ohio applied similar reasoning when it rejected an application for removal of the defendant to stand trial in the District of Massachusetts in a Sherman Act challenge to the Whiskey Trust, finding that the indictment was insufficient, as it did not allege that the Whiskey Trust exerted any control over production or prices of the 25 percent of distilleries in the country that it did not own. *In re Corning*, 51 F. 205, 210-11 (N.D. Ohio 1892).

117. See, e.g., *Anderson v. Jett*, 12 S.W. 670 (Ky. 1889); *Cent. Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880); *Craft v. McConoughy*, 79 Ill. 346 (1875); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173 (1871); *India Bagging Ass'n v. B. Kock & Co.*, 14 La. Ann. 168 (1859); *Stanton v. Allen*, 5 Denio 434 (N.Y. Sup. Ct. 1848).

the years prior to the passage of the Sherman Act about “ruinous,” “destructive,” or “excessive” competition, that is, competition that reduced prices to a level at which many producers in the market could not cover their costs or at least could not earn a fair or reasonable profit on their business. Some courts observed that restraints designed to eliminate excessive competition and stabilize prices at a “reasonable” level among competitors served a legitimate public purpose and supported the reasonableness of a restrictive combination.<sup>118</sup> While many of these same

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118. See, e.g., *Cleveland*, 26 N.E. at 163 (assuming without deciding that there is a defense for a horizontal price-fixing combination, “it can only be so where it is affirmatively shown that its object was to prevent ruinous competition, and that it does not establish unreasonable rates, unjust discriminations, or oppressive regulations”); *Sayre v. Louisville Union Benevolent Ass’n*, 62 Ky. (1 Duv.) 143, 147 (1863) (“The public interest does not, we believe, forbid carriers from guarding themselves against undue competition, reducing freights below the standard of fair compensation; and we should hesitate to condemn an agreement between carriers not to carry goods for less than a certain, reasonable price.”); *Cent. Shade-Roller Co. v. Cushman*, 9 N.E. 629, 631 (Mass. 1887) (overruling a demurrer to enforce an agreement among three competing patentee-manufacturers to combine their patents and charge a uniform fixed price where the purpose of the arrangement was allegedly “to prevent the injurious effects, both to producers and consumers, of fluctuating prices caused by undue competition”); *Skrainka v. Scharringhausen*, 8 Mo. App. 522, 523–24, 527 (Ct. App. 1880) (finding an agreement of twenty-three stone quarry operators in a district of St. Louis that did not embrace all competitors in St. Louis and was limited in time to be a partial restraint of trade and reasonable, where its purpose was to “secure a fair, proportionate sale of the produce of all quarries at uniform prices and living rates” and did not apparently tend “to deprive men of employment, unduly raise prices, cause a monopoly, or put an end to competition”); *Manchester & L.R.R. v. Concord R.R.*, 20 A. 383, 384 (N.H. 1890) (observing that “the lessons of experience, as well as the deductions of reason, amply demonstrate that the public interest is not subserved by competition which reduces the rate of transportation below the standard of fair compensation”); see also *Beal v. Chase*, 31 Mich. 490, 521 (1875) (Christiancy, J.) (“The public is quite as much interested in the prosperity of its citizens in their various avocations as it can possibly be in their competition. The latter may bring low prices to purchasers, but may also bring them so low that capital becomes unprofitable and business men fail, to the general injury of the community.”); *Leslie*, 18 N.E. at 366 (“I do not think that competition is invariably a public benefaction, for it may be carried on to such a degree as to become a general evil.”); ELISHA GREENHOOD, *THE DOCTRINE OF PUBLIC POLICY IN THE LAW OF CONTRACTS* 683 (1886) (stating that the elimination of ruinous competition is a legitimate purpose of a restraint); 2 VICTOR MORAWETZ, *A TREATISE ON THE LAW OF PRIVATE CORPORATIONS* § 1131, at 1096–97 (2d ed. 1886) (same with respect to competing railroads). Interestingly, Chief Judge Parker in *Mitchel v. Reynolds* arguably recognized destructive competition as legitimate grounds for a noncompetition covenant, at least when connected to the sale of a business. *Mitchel v. Reynolds*, (1711) 24 Eng. Rep. 347 (K.B.) 350 (finding as the fourth grounds for upholding the restraint “to prevent a town from being overstocked with any particular trade”); *accord Holmes v. Martin*, 10 Ga. 503 (1851). For an early American view, see *Palmer v. Stebbins*, 20 Mass. (3 Pick.) 188, 192 (1825) (“I am rather inclined to believe, that in this country at least, more evil than good is to be apprehended from encouraging competition among rival tradesmen or men engaged in commercial concerns.”). The court qualified its view in *Palmer*, which involved a contract providing for the exit of a rival boatman and an exclusive dealing covenant, by supposing that the beneficiary of the restrictive covenants would not enter into so many contracts as to obtain a monopoly. *Id.*; see also NEW YORK 1889 REPORT, *supra* note 61, at 5 (“Such contests [from excessive competition] often result in wounds which it takes long years to heal, and from them the public not only receive no real benefit, but positive injury rather, for sooner or later the public are expected to make good the losses which such ruinous policies entail.”).

courts recognized that a combination could raise prices above a reasonable price and that the restrictive covenants underlying such combinations should not be enforced,<sup>119</sup> the idea that firms could legitimately combine to mitigate ruinous competition and raise prices minimally provided at least a moral justification for many combinations of the day. But very few cases raised the defense that the combination was justified on the grounds of mitigating ruinous competition, and the common law did not develop any standard to determine whether a combination's increased prices were within a permissible range.

Fourth, despite the increasing dominance of the reasonableness test and its expansion to include the public's interest in competition, the common law of contracts, combinations, and conspiracies in restraint of trade, the test never lost its mooring to the protection of the covenantor from unreasonably broad restraints limiting its freedom of action in the marketplace. As a result, contracts that imposed an unreasonable restraint on trade, while void and unenforceable, were not criminal, and therefore not subject to challenge by the state, nor did they give rise to a cause of action for damages or injunctive relief by injured third parties.<sup>120</sup> It is difficult to find common law actions by a competitor excluded from the market due to restrictive covenants or by customers who paid higher prices than they would have in the absence of the restraint. Although several jurisdictions, including New York, had enacted general conspiracy laws making it a misdemeanor for two or more persons to conspire to commit any act "injurious to . . . trade or commerce,"<sup>121</sup> these statutes were rarely used to challenge anticompetitive combinations.<sup>122</sup>

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119. See, e.g., *Cleveland*, 26 N.E. at 163; *Sayre*, 62 Ky. at 146–47; *Cent. Shade-Roller Co.*, 9 N.E. at 631 (suggesting in dictum that if the purpose of the combination was to "unduly raise the price" above a fair level to the public detriment the combination would not be enforceable); see also *Skrainka*, 8 Mo. App. at 523–24, 527 (noting that restraint did not "unduly raise prices, cause a monopoly, or put an end to competition").

120. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 279 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *In re Greene*, 52 F. 104, 111 (C.C.S.D. Ohio 1892). For a contemporary review of the case law concluding that unlawful restraints of trade were generally not indictable at common law, see Arthur M. Allen, *Criminal Conspiracies in Restraint of Trade at Common Law*, 23 HARV. L. REV. 531 (1909). *But cf.* *Raymond v. Leavitt*, 9 N.W. 525, 526 (Mich. 1881) (noting that forestalling and engrossing were indictable misdemeanors under early English common law).

121. See Act of Dec. 10, 1828, § 8(6) (originally codified at 2 N.Y. REV. STAT. 689, 691–92 (1829)); see also Act of Mar. 9, 1885, ch. 240, § 138 (originally codified at MINN. STAT. § 6423(6) (1894)); An Act Concerning Crimes and Punishments, ch. 28, § 110, 1861 Nev. Stat. 79 (originally codified at NEV. GEN. STAT. § 4660 (1885)); An Act for the Punishment of Crimes (originally codified at N.J. REV. STAT. 256, 275, § 61 (1847), and recodified at N.J. REV. STAT. 121, 185, § 191 (1874)); Penal Code § 225(6) (1877) (originally codified at N.D. REV. CODE § 7037(6) (1895)); OKLA. STAT. ch. 25, § 2071(5) (1890); Act of Feb. 17, 1877 (originally codified at S.D. COMPILED LAWS § 6425(5) (1887)); Tenn. Code §§ 4789(7), 4825(6) (1858); Penal Code § 84 (originally codified at UTAH COMPILED LAWS § 1914(5) (1876)). Mississippi enacted a similar statute in 1892. See Act of Apr. 2, 1892 (originally codified at MISS. CODE ANN. § 1006 (1892)).

122. For cases brought under the New York statute, see, for example, *Leonard v. Poole*, 21 N.E. 707 (N.Y. 1889); *Stanton v. Allen*, 5 Denio 434 (N.Y. Sup. Ct. 1848); *Hooker &*

There were also various artifacts in the laws of some jurisdictions lingering from much older English cases. For example, some courts held that restrictive covenants among competitors could be void for public policy and unenforceable only if they were unreasonable and involved a staple or prime necessity.<sup>123</sup> Some courts held that an otherwise valid partial restraint of trade would be unlawful and unenforceable if it involved goods or services with a “public” nature and the restraint was prejudicial to the public interest.<sup>124</sup> But cases of this type do not detract from the central tendency of courts as a whole to refuse to enforce noncompetition covenants in combination agreements designed to increase prices and perhaps reduce output, even though the courts almost always enforced noncompetition agreements in connection with the sale of a business. The upshot is that combinations could not depend on contracts to solve their enforceability problems.

### B. Pools

A special type of contractual combination is a pool. In a pool, as in a simple combination, the contracting parties retain ownership of their properties and other assets and merely agree to abide by the rules laid down by the pool contract in conducting their respective business affairs. What makes pools unique is that they aggregate some common attributes related to production, typically profits or output, and then reallocate the common factor to the pool members in agreed proportions, independently of what any individual firm may have actually contributed. In the late nineteenth century, pools were used extensively by the railroads and other businesses, some national and some local, including cordage, anthracite coal, meatpacking, cast iron pipe, steel rails, whiskey, sandpaper, wallpaper, and bagging.<sup>125</sup>

The Michigan Salt Association provides an excellent example of a pool’s operation.<sup>126</sup> In 1860, salt production began in the extensive brine fields

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Woodward v. Vandewater, 4 Denio 349 (N.Y. Sup. Ct. 1847); *People v. Fisher*, 14 Wend. 9 (N.Y. Sup. Ct. 1835); *see also* *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173 (1871) (holding that a contract entered into in New York, between Pennsylvania coal companies, that violates the New York statute will not be enforced by Pennsylvania courts). In interpreting the New York statute, New York courts looked to the common law. *See* N.Y. STATE BAR ASS’N, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS 3a (1957).

123. *See* *Cent. Shade-Roller Co. v. Cushman*, 9 N.E. 629, 631 (Mass. 1887); *see also* *Raymond v. Leavitt*, 9 N.W. 525, 526 (Mich. 1881) (noting the sensitivity of the common law to restraints on wheat and other “indispensable” articles).

124. *See, e.g.*, *Chi. Gaslight & Coke Co. v. People’s Gaslight & Coke Co.*, 13 N.E. 169, 175 (Ill. 1887); *W. Va. Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 620 (1883).

125. A number of early pooling agreements are reprinted in *INDUSTRIAL COMBINATIONS AND TRUSTS*, *supra* note 66, at 4–10 (agreement between distillers); *id.* at 10–12 (agreement between envelope manufacturers).

126. A detailed analysis of the operation of the Michigan salt pool is contained in J.W. Jenks, *The Michigan Salt Association*, 3 POL. SCI. Q. 78 (1888).

around Saginaw.<sup>127</sup> Salt production involves pumping the brine out of the ground and refining it into purified product. Capital costs of a production facility were relatively small, making entry easy. Operating costs were also small, since the primary variable cost was energy, which most salt-well operators obtained from burning sawdust and other waste products from the Michigan sawmills.<sup>128</sup> Production was limited only by the capacity to pump and refine, since the brine was virtually inexhaustible in the underground brine fields. As a result of these conditions, over time competition among salt-well operators became intense and prices fell to levels around marginal costs, making it difficult for producers to make a meaningful profit or perhaps even cover their fixed costs. To deal with this situation—a paradigmatic case of what was viewed at the time as excessive competition—in 1876, the Michigan producers organized the Michigan Salt Association.<sup>129</sup> Under the Association's bylaws, shares in the association could be held only by member salt manufacturers, with one share issued for each barrel of the member's average daily production.<sup>130</sup> Upon becoming a member, each manufacturer was required to contract to sell its entire production to the Association, which would then be responsible for selling it.<sup>131</sup> Members received profits from the Association's sales as dividends on their shares. This pooling of sales mitigated each member's incentive to increase production and increased the incentive to cooperate with other members to reduce production in order to increase the market price.

Pools suffer from the same incentive compatibility problems as simple agreements: each individual member has an incentive to cheat on the pool's rules by producing extra product and selling outside of the pool while taking advantage of the higher prices that the pool created. The apparent advantage of a pool is that cheating is easier to detect, since individual members have ostensibly less independence. Even so, the collective effect of several cheaters caused many pools to disintegrate.<sup>132</sup> But, as in the case of simple combinations designed to restrict output and raise prices, courts were hostile and almost always found pooling agreements void and unenforceable as contracts or combinations restraining trade under the common law.<sup>133</sup> Indeed, pools were found by some courts to be even more

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127. *See id.* at 79–80.

128. *See id.* at 86.

129. *See id.* at 83–84.

130. *See id.* at 85.

131. *See id.* at 85–86.

132. For one example, see *ELIOT JONES, THE ANTHRACITE COAL COMBINATION IN THE UNITED STATES* 40–58 (1914).

133. *See, e.g.*, *Craft v. McConoughy*, 79 Ill. 346, 346–47 (1875) (entering a profit pooling agreement among grain dealers); *Anderson v. Jett*, 12 S.W. 670 (Ky. 1889) (profit pooling among competing riverboats on the Kentucky River); *Tex. & Pac. Ry. Co. v. S. Pac. Ry. Co.*, 6 So. 888 (La. 1889) (pooling between two competing railroads); *Stanton v. Allen*, 5 Denio 434 (N.Y. Sup. Ct. 1848) (pooling among all transportation lines on the Erie and Oswego canals); *Emery v. Ohio Candle Co.*, 24 N.E. 660 (Ohio 1890) (*per curiam*) (pooling agreement among candle manufacturers); *Cent. Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880) (pooling agreement among Ohio salt manufacturers); *Hoffman v. Brooks*, 3 Ohio

nefarious than price-fixing combinations: when an agreement fixes only the prices to be charged, rivals can compete away excess profits by engaging in non-price competition; however, the common property resource nature of a pool eliminates much of the incentive to engage in either price or non-price competition.<sup>134</sup>

### C. Corporations

Nor was the corporation generally available as a vehicle in which to organize combinations. A corporation is an artificial legal person created by the state distinct from the persons who own or operate it. As an artificial person, a corporation has only the powers and attributes that the state confers on it, either expressly in the corporation's charter or incidental to the corporation's express powers.<sup>135</sup> In creating corporations, states typically permitted them to hold property, sue and be sued, adopt rules for their internal governance, exist independently of the persons that created it, and, in many states by the mid-nineteenth century, limited the liability of shareholders to the corporation's creditors.<sup>136</sup> Corporations, with ownership interests that are readily divisible, transferable, and expandable and an existence that is defined by a charter without regard to the lives of the shareholders, are especially attractive vehicles for businesses that require large amounts of investment capital and pay returns over long periods of time. Individuals and even partnerships typically could not muster the resources to engage in many capital intensive enterprises, particularly in transportation and finance. Unless the state found some other private vehicle to undertake the activity, it would be forced into providing the service itself. Private corporations provided the vehicle. Private corporations could raise the required capital in private markets, assume the business risks of the endeavor, and relieve state and local governments from the need for providing financing and operating the enterprise. To aid private corporations in their public endeavors, states often included in the early corporation charters such benefits as a favorable tax status or exemption from taxation altogether, exclusivity rights to shield the corporation from competition, and particularly in the case of public

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Dec. Reprint 517 (Super. Ct. 1884) (pooling agreement among Cincinnati tobacco warehousemen) (full report in 23 Am. L. Reg. (N.S.) 648 (1884)); *McBirney & Johnston White Lead Co. v. Consol. Lead Co.*, 9 WKLY. CINCINNATI L. BULL. 258 (Super. Ct. 1883); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173, 175-78 (1871) (pooling agreement among five coal companies).

134. See, e.g., *Anderson*, 12 S.W. at 671.

135. The seminal expression is in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."); accord *Horn Silver Mining Co. v. New York*, 43 U.S. 305, 312 (1892) ("A corporation being the mere creature of the legislature, its rights, privileges, and powers are dependent solely upon the terms of its charter.")

136. See Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 592-94 (1986).

utility and transportation companies, an award of designated state police powers such as eminent domain.<sup>137</sup> These benefits enabled the corporation more easily to attract investment and lower its costs of money and operation.<sup>138</sup>

For the same reasons that corporations were attractive for use in “public” enterprises, they were distrusted for use in pursuing private interests. Corporations were suspect in the mind of the public because of their universally large size and their taint of state prerogative.<sup>139</sup> The corporate form provided opportunities for the accumulation and concentration of wealth that were not available to natural entities, and which threatened a fundamental shift in the balance of economic and political power from individual to business enterprises. The special powers conferred on some corporations in their charters added insult to injury, for while many used their state-granted powers for good, there undoubtedly were other instances when special corporations either obtained benefits that were not indispensable or took untoward advantage of those that were required.

Originally, corporations were individually created by the grant of a corporate charter by the incorporating state legislature.<sup>140</sup> Corporations created by a tailored, individual charter are known as “special corporations.” For most of the history of special business corporations, these special charters were rarely granted and were always issued to enable the new corporation to perform a quasipublic function that required significantly more capital than a family or group of associates could raise.<sup>141</sup> Special corporations were typically chartered to operate banks, insurance companies, transportation companies, and public works.<sup>142</sup> The function of a special corporation was specifically identified in the corporation’s charter, and a corporation was not authorized to engage in activities that were not reasonably incidental to the corporation’s chartered functions. Given the public nature of their functions, special corporations were often granted special powers and privileges, which could include quasigovernmental powers. In the case of a transportation company, for example, the charter might provide the corporation with the power of

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137. See, e.g., Hugh L. Sowards & James S. Mofsky, *Factors Affecting the Development of Corporation Law*, 23 U. MIAMI L. REV. 476, 480–81 (1969); see also EDWIN MERRICK DODD, *AMERICAN BUSINESS CORPORATIONS UNTIL 1860*, at 44 (1954).

138. See, e.g., Sowards & Mofsky, *supra* note 137, at 480–81; see also DODD, *supra* note 137, at 202–41 (1954).

139. See J. WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES, 1780–1970*, at 30–47 (1970).

140. See JOHN W. CADMAN, JR., *THE CORPORATION IN NEW JERSEY: BUSINESS AND POLITICS, 1791–1875*, at 6–7 (1949) (recounting the New Jersey experience); DODD, *supra* note 137, at 196.

141. See HURST, *supra* note 139, at 15, 17–18; SEAVOY, *THE ORIGINS OF THE AMERICAN BUSINESS CORPORATION, 1784–1855*, at 47–48, 73–74 (1982).

142. See *Leslie v. Lorillard*, 18 N.E. 363, 365 (N.Y. 1888) (“In the granting of charters the legislature is presumed to have had in view the public interest, and public policy is (as the interest of stockholders ought to be) concerned in the restriction of corporations within chartered limits, and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public or to the stockholders.”).

eminent domain and the authority to set toll rates.<sup>143</sup> With the increasing use of the power loom in the early nineteenth century, some states, notably Massachusetts, began granting charters to manufacturing corporations to enable the creation of capital-intensive factories, presumably to increase the wealth and employment in local economies.<sup>144</sup>

Gradually, states began to recognize that, by making corporate vehicles more freely available and eliminating any special powers, corporations would lose any advantages associated with their scarcity and positions of privilege. States first began granting increasing numbers of special corporation charters, taking care not to include in these charters provisions that would confer monopoly privileges. To this end, states often chartered multiple corporations to build competing gas lines or other public works in a given city or chartered multiple railroads to build competing lines.<sup>145</sup> Courts also construed these charters narrowly and refused to find monopoly rights by implication.<sup>146</sup>

Once the demand for special charters began to overwhelm state legislatures, some states started to dispense with the need for individually enacted charters and instead made corporate charters with standardized powers and limitations automatically available upon request.<sup>147</sup> Corporations created in this manner are known as “general corporations” and are created pursuant to a general corporation law. In 1811, New York

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143. *See, e.g.*, *Bonaparte v. Camden & A. R. Co.*, 3 F. Cas. 821 (C.C.D.N.J. 1830) (No. 1617) (upholding eminent domain powers of railroad corporation); *Chesapeake & O. Canal Co. v. Key*, 5 F. Cas. 563 (C.C.D.D.C. 1829) (No. 2649) (upholding eminent domain power granted to canal corporation); *State v. Town of Hampton*, 2 N.H. 22 (1819) (upholding eminent domain powers granted to a turnpike corporation).

144. For more on the power loom, see 1 VICTOR S. CLARK, *HISTORY OF MANUFACTURES IN THE UNITED STATES* 428–30 (1916); CAROLINE F. WARE, *THE EARLY NEW ENGLAND COTTON MANUFACTURE: A STUDY IN INDUSTRIAL BEGINNINGS* 63–64 (1931). For more on the history of Massachusetts manufacturing in the wake of the mechanization of the textile industry, see E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1355–56 (1948).

145. *See, e.g.*, *Chic. Gaslight & Coke Co. v. People’s Gaslight & Coke Co.*, 13 N.E. 169, 174 (Ill. 1887) (noting that the Illinois state legislature specially chartered two gas companies to supply gas to Chicago in order to end a monopoly). *But cf.* *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (upholding a twenty-five-year monopoly grant by the Louisiana legislature for slaughter-houses as a valid exercise of the state’s police power).

146. *See, e.g.*, *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 548–49 (1837) (construing the corporate charter for Charles River Bridge to not preclude construction of Warren Bridge over the Charles River); *see also* *People ex rel. Peabody v. Chi. Gas Trust Co.*, 22 N.E. 798, 804 (Ill. 1889) (noting the Illinois policy after 1870 of not granting exclusive privileges to corporations of any kind).

147. The burden on the legislature could be substantial. Larcom reports that between 1885 and 1897, when Delaware adopted a constitutional provision prohibiting special incorporation, acts authorizing special incorporations and those granting divorces accounted for roughly half of the laws passed by the Delaware legislature. RUSSELL CARPENTER LARCOM, *THE DELAWARE CORPORATION* 7 (1937). Political influence in obtaining special incorporation and the powers and privileges granted also appeared to be a problem. *See* CADMAN, *supra* note 140, at 10–11; LARCOM, *supra*, at 5–7 (1937); Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 141 (1985).

passed the first general corporation law, although it was limited to certain types of manufacturing (principally in textile, glass, metal, and paint industries) and imposed a maximum capitalization of \$100,000.<sup>148</sup> In 1837, Connecticut dispensed with the purpose limitations when it passed a general incorporation statute enabling anyone to form a corporation for any “lawful business.”<sup>149</sup> By 1875, twenty-five of the then thirty-seven states had adopted constitutional provisions either prohibiting special charters altogether or granting them with only rare exceptions.<sup>150</sup> By the end of 1890, thirty-four of the then forty-four states had adopted similar constitutional provisions.<sup>151</sup>

The emerging general corporation laws, however, did not satisfy the needs of most large multistate business combinations. The original idea of a general corporation was limited: general corporations were conceived not as massive business enterprises but rather as local “incorporated partnerships.”<sup>152</sup> Corporations formed under these laws were typically subject to low capitalization limitations. New York had one of the highest maximum capitalization limits, but it was only \$2 million in 1875 and \$5 million in 1881.<sup>153</sup> Many states limited the duration of corporate

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148. Act of Mar. 22, 1811, ch. 67, 1811 N.Y. Laws 151; see *Slee v. Bloom*, 19 Johns. 456, 457 (N.Y. 1822). See generally W.C. Kessler, *A Statistical Study of the New York General Incorporation Act of 1811*, 48 J. POL. ECON. 877 (1940); Ronald E. Seavoy, *Laws To Encourage Manufacturing: New York Policy and the 1811 General Incorporation Statute*, 46 BUS. HIST. REV. 85 (1972).

149. Act of June 10, 1837, ch. 63, 1837 Conn. Pub. Acts 49, § 2.

150. See *Liggett Co. v. Lee*, 288 U.S. 517, 550 n.5 (1932) (Brandeis, J., dissenting) (collecting provisions); LARCOM, *supra* note 147, at 3 n.7 (listing adoptions of state constitutional provision by year). New York, in its Constitution of 1846, appears to be the first state to adopt a constitutional provision requiring incorporation under the general laws and prohibiting special incorporation except under limited circumstances. See N.Y. CONST. of 1846, art. VIII, § 1. The constitutions of Maine and Maryland also permitted special incorporation when the objects of incorporation could not be obtained through general incorporation. See LARCOM, *supra* note 147, at 3 n.7.

151. *Liggett*, 288 U.S. at 550 n.5; LARCOM, *supra* note 147, at 3 n.7. For more on the development of general incorporation laws, see, for example, JOSEPH STANCLIFFE DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* (1917); HURST, *supra* note 139; SEAVOY, *supra* note 141; Butler, *supra* note 147, at 154–56; E. Merrick Dodd, Jr., *Statutory Developments in Business Corporation Law, 1886–1936*, 50 HARV. L. REV. 27, 28 (1936); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1 (1945); Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. CORP. L. 323 (2007).

152. See *Slee*, 19 Johns. at 473 (“The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes, was, in effect, to facilitate the formation of partnerships, without the risks ordinarily attending them, and to encourage internal manufactures.”).

153. Act of May 18, 1881, ch. 295, § 11, 1881 N.Y. Laws 400, 400 (increasing maximum to \$5 million); General Business Corporation Act of June 21, 1875, ch. 611, § 11, 1875 N.Y. Laws 755, 758 (increasing maximum to \$2 million); *Liggett*, 288 U.S. at 550–54 & nn.5–26 (reviewing state capitalization limitations).

existence to periods of twenty to fifty years.<sup>154</sup> Many states also limited the indebtedness of a corporation to an amount not to exceed the corporation's capital stock or, in some states, even a lower amount.<sup>155</sup> To ensure that corporations were not undercapitalized, the "trust fund" doctrine denied shareholders limited liability by making them personally responsible for the acts of the corporation in cases of insolvency to the extent that they had failed to pay the full value for their shares, and some states imposed double liability on shareholders until the corporation was fully capitalized.<sup>156</sup> States retained the power to revoke the charter of a corporation that the state created if the corporation operated in violation of state law or beyond the scope of its charter.

Moreover, until the late nineteenth century, corporations were effectively unable to conduct any substantial operations outside of their state of incorporation.<sup>157</sup> Businesses for the most part were local and, when incorporated, states expected their corporations to operate within their jurisdictions. Some states simply did not permit their corporations to conduct out-of-state operations, and those that did often imposed restrictions on how much business could be conducted in a foreign state.<sup>158</sup> The Supreme Court spoke to the ability of states to regulate corporations operating within their jurisdiction in 1839 in the landmark case of *Bank of Augusta v. Earle*.<sup>159</sup> Chief Justice Roger Taney observed that a corporation "can have no legal existence out of the boundaries of the sovereignty by which it is created,"<sup>160</sup> and, assuming that its charter permits so, it may operate in another state but only with the authorization of the host state.<sup>161</sup> The Court also rejected the argument that a corporation was entitled to the protections of the Privileges and Immunities Clause of Article IV of the Constitution<sup>162</sup> as the corporation's incorporators would themselves be.<sup>163</sup> In 1851, in the equally significant case of *Cooley v. Board of Wardens*,<sup>164</sup> the Supreme Court reaffirmed that states had broad discretion in regulating businesses within their jurisdiction, so long as the regulated conduct was so local in nature as to admit diverse treatment and not impinge on interstate

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154. In 1903, twenty-two of the then forty-five states limited corporate existence to periods of twenty to fifty years, although some states permitted renewals. See REPORT OF THE COMM. ON CORP. LAWS OF MASS. 162–64 (1903) [hereinafter MASS. CORP. REPORT].

155. See *id.* at 165–67.

156. 1 CHARLES FISK BEACH, JR., COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS § 116 (1891).

157. See, e.g., MASS. CORP. REPORT, *supra* note 154, at 18 (noting that the operation of foreign corporations in Massachusetts was "not general" until after 1893 or so).

158. In 1865, for example, New Jersey amended its general incorporation law to permit its corporations to operate in part out of the state, but required that "a majority of the persons associated in the organization of such company shall be citizens and residents of this state." Act of Mar. 16, 1865, 1865 N.J. Laws 354, ch. 201, § 1.

159. 38 U.S. (13 Pet.) 519 (1839).

160. *Id.* at 588.

161. *Id.* at 588–89.

162. U.S. CONST. art. IV, § 2, cl. 1.

163. *Bank of Augusta*, 38 U.S. at 586–87.

164. 53 U.S. (12 How.) 299 (1851).

commerce.<sup>165</sup> The clearest statement of the state's authority to regulate foreign corporations came in *Paul v. Virginia*,<sup>166</sup> decided in 1868, when the Supreme Court unanimously held that a foreign corporation was not a "citizen" of any state for the purposes of the Privileges and Immunities Clause of the Fourteenth Amendment<sup>167</sup> and therefore was not protected by that clause from discriminatory licensing and bonding requirements favoring domestic corporations.<sup>168</sup> *Paul* reaffirmed that the recognition of foreign corporations was purely a matter of comity and not required as a matter of federal law. As a result of these cases, through most of the time prior to the passage of the Sherman Act in 1890, state and local officials acted freely to improve the competitive positions of local businesses relative to foreign firms by enacting appropriately restrictive, if not outright discriminatory, inspection, consumer protection, licensing, and even tax laws.<sup>169</sup>

Nor could corporations circumvent the problems by creating domestically incorporated subsidiaries. During the 1870s and 1880s, states continued to restrict corporations in their ability to hold stock in other corporations, so that a multistate combination could not use a holding company structure to secure the advantages of domestic incorporation for its operating subsidiaries. The law was well-settled that corporations had no implied right to purchase or hold shares in another corporation for the purpose of controlling its management or even as an investment,<sup>170</sup> and explicit charter authorizations to hold shares were rare.<sup>171</sup> In addition, where a consolidation was to be effected through the acquisition of assets

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165. *See id.* at 320–21.

166. 75 U.S. (8 Wall.) 168 (1868).

167. U.S. CONST. amend. XIV, § 1.

168. *Paul*, 75 U.S. at 168.

169. For a discussion of local protectionist legislation of the period, see, for example, Stanley C. Hollander, *Nineteenth Century Anti-drummer Legislation in the United States*, 38 BUS. HIST. REV. 479 (1964); Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631 (1978). For an excellent review of the doctrinal problems confronting corporations operating outside their state of incorporation, see Note, *The Adoption of the Liberal Theory of Foreign Corporations*, 79 U. PA. L. REV. 956 (1931). For an account of corporate tax obligations at this time, see THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 486 (1868).

170. *See, e.g.*, *Sumner v. Marcy*, 23 F. Cas. 384 (C.C.D. Me. 1847) (No. 13,609); *Cent. R.R. Co. v. Collins*, 40 Ga. 582, 620–21 (1869); *People ex rel. Peabody v. Chi. Gas Trust Co.*, 22 N.E. 798 (Ill. 1889); *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43, 45 (1877); *Cent. R.R. of N.J. v. Pa. R.R.*, 31 N.J. Eq. 475, 494 (1879); *Franklin Bank of Cincinnati v. Commercial Bank of Cincinnati*, 36 Ohio St. 350 (1881). *See generally* CHARLES T. BOONE, A MANUAL OF THE LAW APPLICABLE TO CORPORATIONS § 107 (1881); I MORAWETZ, *supra* note 118, §§ 431, 433; WALTER CHADWICK NOYES, A TREATISE ON THE LAW OF INTERCORPORATE RELATIONS § 264 (2d ed. 1909).

171. Some corporations also were expressly granted the right to have their stock subscribed to by other corporations. For an account of the permissibility of stock ownership by special corporations prior to 1888, see William Randall Compton, *Early History of Stock Ownership by Corporations*, 9 GEO. WASH. L. REV. 125 (1940).

rather than voting securities, states could hold the acquisition contract void and unenforceable if the state determined that the acquisition was made in furtherance of a scheme of monopolization.<sup>172</sup> While a corporation might be useful as a vehicle for a local combination, all state general corporation laws restricted the operation of a corporation to “lawful purposes” and a corporation used to coordinate a combination was subject to attack as operating *ultra vires*.<sup>173</sup> The general rule was that a corporate purpose that had the effect of creating a monopoly of the type void under common law was equally void under state corporation law.<sup>174</sup> Moreover, another form was required to accommodate the demands for a business vehicle capable of combining and managing large multistate business operations.

#### D. Trusts

The necessary legal innovation for large multistate combinations came in 1879 with the creation of the original Standard Oil Trust, which was rewritten in 1882.<sup>175</sup> The creation of the Standard Oil Trust is usually regarded as the beginning of the trust movement.

Trusts are creations of the law of equity that separate the legal and beneficial interests in a group of assets. The basic notion is that one or more trustees hold the legal title to the trust property (the trust “*res*”) for the benefit of one or more beneficiaries. As a matter of property law, the trustees have the full legal authority to deal with third parties with respect to the trust *res*, but at the same time have a fiduciary obligation to exercise a high standard of care and selflessness in managing the *res* for the benefit of the beneficiaries. The interests of the beneficiaries can be defined at the trust’s creation, and the trustees’ duty to act as directed in the trust instrument—or, in the absence of explicit direction, in the best interests of the beneficiaries—are enforceable in courts of equity. Applied to the world of business, the trust, like a corporation, is a vehicle in which a large number of individuals can aggregate their resources in order to create and manage a large enterprise, with the trustees acting much like the directors of

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172. See, e.g., *W. Wooden-Ware Ass’n v. Starkey*, 47 N.W. 604 (Mich. 1890) (voiding an asset purchase contract, where the contract contained a covenant restricting seller from reentering wooden-ware business for five years in any one of seven states); *Richardson v. Buhl*, 43 N.W. 1102 (Mich. 1889) (voiding a contract to acquire a friction match plant where the defendant’s Diamond Match Company had been organized for the purpose of acquiring all such plants in the United States).

173. See, e.g., *Peabody*, 22 N.E. at 798, 802–03 (describing a general corporation organized to hold and sell the capital stock of gas or electric companies operating in Chicago or elsewhere in Illinois and in fact holding a majority of the stock of all four Chicago operating gas companies).

174. *Id.* at 803 (“If contracts and grants, whose tendency is to create monopolies are void at common law, then where a corporation is organized under a general statute, a provision in the declaration of its corporate purposes, the necessary effect of which is the creation of a monopoly, will also be void.”).

175. The 1879 and 1882 trust agreements are reprinted in *INDUSTRIAL COMBINATIONS AND TRUSTS*, *supra* note 66, at 14–27. The 1882 trust agreement is also reprinted in *State ex rel. Att’y Gen. v. Standard Oil Co.*, 30 N.E. 279, 281–84 (Ohio 1892).

a corporation. But since a trust was not technically a corporation, it did not require a state grant to exist, was not subject to the state regulation of corporations, and was not prohibited from holding stock in multiple corporations in multiple states.

The 1882 Standard Oil Trust, which became the model for other trusts, illustrates the formation and operation of a trust.<sup>176</sup> The 1882 agreement was joined by all of the stockholders and members of fourteen corporations and limited partnerships, the controlling stockholders and members of an additional twenty-six corporations and limited partnerships, and forty-six individuals, all of whom would be the beneficiaries of the trust. The trust agreement contemplated that separate corporations would be organized initially in Ohio, New York, Pennsylvania, and New Jersey. Each trust beneficiary would transfer its assets to the Standard Oil Company in the state in which the assets were located, and in return the beneficiary received stock of the recipient Standard Oil Company equal at par to the appraised value of the transferred assets. The beneficiaries would then deliver the stock they received in the constituent corporations to a board of trustees to be held in trust, and in turn the beneficiary would receive one “Standard Oil Trust” certificate for every \$100 of stock it contributed. Dividends paid on the constituent Standard Oil Company stock would be received by the trustees—the legal owners of the stock—who in turn would pay dividends on the trust certificates. The nine-member board of trustees (each member to be elected for a staggered three-year term by a majority of votes representing the outstanding trust certificates) was given full power to vote the stock of the various Standard Oil Companies in its discretion and thereby control the operations of these companies. The trust was to terminate twenty-one years after the death of the last survivor of the original nine trustees, unless dissolved beforehand by a specified supermajority vote of the outstanding trust certificates.<sup>177</sup> When the Standard Oil Trust was formally dissolved in 1892, there were some 972,500 trust certificates

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176. The details of the 1882 Standard Oil Trust first became public as the result of a New York State Senate investigation. See REPORT OF THE COMMITTEE ON GENERAL LAWS ON THE INVESTIGATION RELATIVE TO TRUSTS, S. 111-50, at 8-10 (N.Y. 1888) [hereinafter NEW YORK 1888 REPORT]. As a result, it is common to see 1882 as the year in which the trust movement started even though there was an earlier trust agreement in 1879. The history of the Standard Oil Trust is examined in detail in IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1904). For other treatments of the Standard Oil Trust, see, for example, *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911); *State ex rel. Att’y Gen.*, 30 N.E. at 279; INVESTIGATION OF CERTAIN TRUSTS: REPORT IN RELATION TO THE SUGAR TRUST AND STANDARD OIL TRUST, H.R. REP. NO. 50-3112 (1888); GILBERT HOLLAND MONTAGUE, THE RISE AND PROGRESS OF THE STANDARD OIL COMPANY (1903); Elizabeth Granitz & Benjamin Klein, *Monopolization by “Raising Rivals’ Costs”: The Standard Oil Case*, 39 J.L. & ECON. 1 (1996); John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958).

177. The drafters clearly had the rule against perpetuities in mind when drafting the trust agreement.

outstanding, representing a beneficial ownership in assets valued far more than the \$97,250,000 represented by the face value of these certificates.<sup>178</sup>

A true trust organized along the lines of the Standard Oil Trust model is known as a “trust proper.” Once the Standard Oil Trust structure became known, it was soon emulated in several other manufacturing industries.<sup>179</sup> Before the beginning of the next decade and the passage of the Sherman Act, groups of competitors had created at least five other major national trusts proper<sup>180</sup>:

*American Cotton Oil Trust*, organized in 1884 with authorized capital of \$40 million.<sup>181</sup>

*Linseed Oil Trust*, organized in 1885 with authorized capital of \$18 million<sup>182</sup>

*National Lead Trust*, organized in 1887 with authorized capital of \$90 million<sup>183</sup>

*Distillers and Cattle Feeders Trust* (the Whiskey Trust), organized in 1887 with authorized capital of \$30.726 million.<sup>184</sup>

*Sugar Refineries Company* (the Sugar Trust), organized in 1887 with authorized capital of \$50 million.<sup>185</sup>

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178. For the number of outstanding certificates upon dissolution, see *U.S. Trust Co. v. Heye*, 181 A.D. 544, 583 (N.Y. App. Div. 1918) (Dowling, J., dissenting), *aff'd as modified*, 120 N.E. 645 (N.Y. 1918).

179. See Norbert Heinsheimer, *The Legal Status of Trusts*, 2 COLUM. L. TIMES 51, 53–54 (1888) (describing the typical legal structure of trusts proper).

180. The amount of authorized capital is reported in Luther Conant, Jr., *Industrial Consolidations in the United States*, 53 PUBLICATIONS AM. STAT. ASS'N 1, 2–3 (1901). Seager and Gulick provide a description of the operations of the major trusts organized in the 1880s. See HENRY R. SEAGER & CHARLES A. GULICK, JR., TRUST AND CORPORATION PROBLEMS (1929).

181. See NEW YORK 1888 REPORT, *supra* note 176, at 6–7.

182. For a description, see JOHN MOODY, THE TRUTH ABOUT THE TRUSTS 54–55 (1904).

183. For a description of the formation and operation of the National Lead Trust, see *Nat'l Lead Co. v. S.E. Grote Paint Store Co.*, 80 Mo. App. 247, 250–51 (Ct. App. 1899); *Unckles v. Colgate*, 72 Hun 119, 119–23 (N.Y. Sup. Ct. 1893) (reprinting National Lead Trust agreement).

184. A description of the formation and operation of the Whiskey Trust is found in *State v. Neb. Distilling Co.*, 46 N.W. 155, 156–59 (Neb. 1890). The trust deed is reprinted in INDUSTRIAL COMBINATIONS AND TRUSTS, *supra* note 66, at 36–42. For contemporary accounts of the Whiskey Trust, see 1 U.S. INDUS. COMM'N, PRELIMINARY REPORT ON TRUSTS AND INDUSTRIAL COMBINATIONS 74–93, 813–48 (1900); Jeremiah W. Jenks, *The Development of the Whiskey Trust*, 4 POL. SCI. Q. 296 (1889). For a modern economic analysis, see Karen Clay & Werner Troesken, *Further Tests of Static Oligopoly Models: Whiskey, 1882–1898*, 51 J. INDUS. ECON. 151 (2003); Karen Clay & Werner Troesken, *Strategic Behavior in Whiskey Distilling, 1887–1895*, 62 J. ECON. HIST. 999 (2002); Werner Troesken, *Exclusive Dealing and the Whiskey Trust, 1890–1895*, 58 J. ECON. HIST. 755 (1998).

185. The trust deed of The Sugar Refineries Company, dated as of August 16, 1887, is set forth in *People v. N. River Sugar Refining Co.*, 24 N.E. 834 (N.Y. 1890). For a description of the trust, see NEW YORK 1888 REPORT, *supra* note 176, at 5–6; U.S. INDUS. COMM'N, *supra* note 184, at 59–74.

The deed of the Sugar Trust set forth its five purposes, which were not atypical of the public positioning of the major trusts:

(1) To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit. (2) To give each refinery the benefit of all appliances and processes known or used by others, and useful to improve the quality and diminish the cost of refined sugar. (3) To furnish protection against unlawful combinations of labor. (4) To protect against inducements to lower the standard of refined sugars. (5) Generally to promote the interests of the parties hereto in all lawful and suitable ways.<sup>186</sup>

A variety of more minor consolidations were also created in the late 1880s, including the Southern Cotton Oil Company, the National Cordage Company, the American Biscuit and Manufacturing Company, and the American Tobacco Company.<sup>187</sup>

The trust proper solved one of the most serious problems undermining consolidations in the form of simple agreements or pools: enforceability. As discussed, combinations designed to raise prices and reduce output face an incentive compatibility problem. The members of the combination each have a profit-maximizing incentive to cheat on the combination by shaving prices or increasing output, even though they will all make more profits if they abide by the combination's pricing and output rules. Since the common law did not enforce contracts to implement these simple combinations and pools, they were often plagued by cheating problems. Trusts proper did not have this problem, since they did not rely on the restrictive contracts with legally independent firms as the means of controlling price and output. Rather, trusts proper relied on control through ownership. Although their constituent corporations may have been legally separate corporations or other entities, the trusts proper controlled the voting rights that elected the governing bodies of these entities. While technically, as a shareholder, a trust could not command its constituent corporations to raise their prices, reduce their production, or cease operation, the trust could ensure that each constituent corporation's directors—which the trust elected and which often were the trustees of the

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186. *People v. N. River Sugar Refining Co.*, 121 N.Y. 582, 586 (N.Y. 1890).

187. *See* Conant, *supra* note 180, at 2–3. While each of these “trusts” was a consolidation of some form since they issued certificates at the holding company level, I have not confirmed that they were all organized as trusts proper. Some of them were organized as corporations, such as the American Tobacco Company, while others may have been unincorporated associations. There are also common references at the time to a variety of other trusts, such as the Preservers Trust, the Envelope Trust, the Salt Trust, the Oil-Cloth Trust, the Paving-Pitch Trust, the School-Slate Trust, the Chicago Gas Trust, the St. Louis Gas Trust, the New York Meat Trust, and the Paper-Bag Trust. While some of these, including the Preserver's Trust, were in fact trusts proper, most of them were likely to have been simple combinations. The Preservers' Trust agreement is reprinted in *Bishop v. Am. Preservers Co.*, 41 N.E. 765, 768–71 (Ill. 1895).

trust<sup>188</sup>—would implement the trust's directions. Noncooperative directors were simply replaced by more compliant ones. This same feature also increased the ability of the trust and its members to respond rapidly and effectively to changing business conditions.

Moreover, on the supply side, trusts could take advantage of expanded trading areas, disseminate new technologies, and exploit new economies of scale in ways that were difficult if not impossible for simple combinations and pools. When a trust proper decreased capacity, it could close the least efficient facilities in the trust network. A common feature, at least of the major trusts proper, was a reduction in production levels, which was accomplished by closing the most inefficient facilities until the desired production level was achieved. To this end, trusts often shut down many facilities after their acquisition. For example, the Standard Oil Trust closed thirty-one of its fifty-two refineries within three years after its 1882 reorganization, which reduced its average cost of production of refined oil from \$0.15 to \$0.005 per gallon.<sup>189</sup> The Cotton Oil Trust, formed in 1884, closed thirteen of its fifty-two crude oil mills and three of its seven refineries.<sup>190</sup> The Linseed Oil Trust, formed in 1885, closed twenty-one refineries.<sup>191</sup> The Sugar Trust, formed in 1887 with eighteen members, quickly closed and dismantled seven refineries; combined eight other refineries into four, larger plants; and intermittently operated three additional plants to handle peak load demands or cover for plants that were closed for maintenance.<sup>192</sup>

Finally, through careful coordination of its operations, trusts could attempt to exercise monopsony power to suppress the prices of inputs. Just as a trust could contract production to raise prices of its output, the same contraction in output also reduced demand for inputs. When a trust controlled enough purchases in the markets for its production inputs, this lowered the price of inputs, shifting wealth from suppliers to the trust. Moreover, even when the trust faced significant competition from third parties, it could bargain for discriminatorily lower prices than its competitors paid. The canonical case is where the trust's competitors were individually small, but collectively possessed a meaningful share of the input market, and where there were several suppliers with excess capacity from which the trust could purchase. By threatening to move its large volume purchases from one supplier to another, the trust could successfully obtain significantly lower prices for its inputs than could its competitors.

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188. When the Whiskey Trust acquired control of the Nebraska Distilling Co, for example, the trust replaced the Nebraska company's board with three Whiskey Trust trustees and two former shareholders. *See, e.g., Neb. Distilling Co.*, 46 N.W. at 157.

189. ATACK & PASSELL, *supra* note 1, at 483.

190. 2 VICTOR S. CLARK, HISTORY OF MANUFACTURES IN THE UNITED STATES, 1860–1893, at 520–21 (1929).

191. WHITNEY EASTMAN, THE HISTORY OF THE LINSEED OIL INDUSTRY IN THE UNITED STATES 31 (1968).

192. EICHNER, *supra* note 60, at 114–15.

Finally, an interesting feature of some, if not most trusts proper, is the issuance of stock or trust certificates as consideration when acquiring the stock or assets of the original independent trust members. Simple combinations and pools did not acquire businesses or assets, so they had no need for a means of financing acquisitions. Trusts proper, on the other hand, could issue certificates representing an equity interest in the assets held by the trust and an entitlement to a portion of the trust's profits. Trusts could simply create new certificates when they wished to make an acquisition without the need for seeking outside financing. As long as the entitlements associated with the new stock did not dilute the interests of the existing trust certificates given the business or assets that the trust was acquiring, the existing trust certificate holders should be comfortable if not supportive of issuing new stock. There were two reasons to believe that the acquisition would be accretive. First, the major trust certificate holders were almost always the trustees, who would not want to dilute their own interests. Second, to the extent that the acquisition increased the market power and hence the profitability of the trust, the acquisition would be accretive to existing trust certificate holders even if the trust paid fair value or even slightly above fair value for the acquisition.

Moreover, the trusts could make their certificates more valuable to holders who might sell them in the secondary market if the certificates were "watered." Stock in corporations at the time was issued with a stated par value, that is, a value stated on the face of the certificate that purportedly represented the minimum capital that had been paid into the firm, and trust certificates also stated a par value. In the early nineteenth century, the usual practice was for a subscriber to a corporation's stock to only pay a small fraction of the par value initially for their subscribed shares, but the corporation had a call right for additional payments until the subscriber had paid the stock's full par value.<sup>193</sup> Moreover, under the "trust fund" doctrine, shareholders could be liable for the difference between the par value of the outstanding stock and the actual capital of the corporation.<sup>194</sup> While assessing whether par value was fully paid was straightforward when the stock was purchased for cash, it was much less certain and subject to abuse when the consideration was in kind, such as when a business or factory was sold for stock.

Stock that was sold or exchanged by the corporation for a total consideration of less than par value was called "watered stock," signifying that the increase in the corporation's capital was less than the par value of

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193. See DODD, *supra* note 137, at 74–84.

194. The trust fund doctrine was first enunciated by Justice Story in *Wood v. Dummer*, 30 F. Cas. 435 (C.C.D. Me. 1824) (No. 17,944), and recognized by the Supreme Court in *Sawyer v. Hoag*, 84 U.S. 610, 620–21 (1873). As long as the capital paid into the firm was equal or greater than the aggregate par value of its outstanding stock, however, the stock was not considered watered and the shareholders not liable even if the original capital had been depleted or become worthless.

the stock.<sup>195</sup> For example, if one share of stock newly issued by a corporation had a par value of \$100 and was sold by the corporation for cash, then the corporation should have received at least \$100. If it received less than \$100, then the stock was watered. Trusts typically issued watered certificates. A New York State Senate committee reported, for example, that the Sugar Trust had issued certificates with a par value representing capital of \$45 million, four times the nominal amount of the stock in the member companies that the trust purchased.<sup>196</sup> In purchasing the North River Sugar Refining Company, the trust exchanged certificates in the Sugar Refineries Company (an unincorporated association that served as the vehicle for the Sugar Trust) with a par value of \$700,000 for North River stock for which the North River shareholders had negotiated a sales price of \$325,000.<sup>197</sup> Similarly, when the shareholders transferred their stock in the Nebraska Distilling Company (NDC), which had a negotiated value of \$100,000, to the Distillers' & Cattle Feeders' Trust, they received trust certificates in return with a face value of \$285,700.<sup>198</sup> Under the corporate law of the day, watered stock was a serious problem. Par value, in effect, was a representation by the corporation and its management to its shareholders, creditors, and potential investors in the secondary market of the minimum value of the corporation. While the original sellers to the trust may have been aware of the watered nature of the trust certificates they received in exchange (as the North River shareholders surely were), trust certificates were transferrable and purchasers in the secondary market could unknowingly pay highly inflated values for the certificates. In any event, whatever protections a state's corporation law tried to create for creditors and investors in the secondary market did not apply to trusts proper, which were not corporations. As a result, watered trust certificates were an open invitation to fraud for which there was little recourse. Many also believed that watered stock resulted in higher prices for the products of the trusts, the idea being that investors expected a return on their capital, which was represented by the par value of their trust certificates, and to make up for the phantom capital in the watered certificates the trust would have to charge higher prices.<sup>199</sup>

State attorneys general, and then state legislatures, were the first to respond to the emergence of trusts proper.<sup>200</sup> The loss of employment from shuttered plants, outrage from local competitors threatened with the

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195. See WILLIAM W. COOK, A TREATISE ON STOCK AND STOCKHOLDERS AND GENERAL CORPORATION LAW §§ 21–22, at 28–30 (2d ed. 1889); ARTHUR L. HELLIWELL, A TREATISE ON STOCK AND STOCKHOLDERS §§ 145–56, at 243–79 (1904).

196. NEW YORK 1888 REPORT, *supra* note 176, at 5–6.

197. See *N. River Sugar*, 24 N.E. at 838.

198. *Neb. Distilling Co.*, 46 N.W. at 157.

199. See EDWARD SHERWOOD MEADE, TRUST FINANCE 295 (1903).

200. Stimson, in an article in the first volume of the *Harvard Law Review*, collected a number of arguments that states might use against the trust device and urged the states to prosecute vigorously these enterprises. Frederick J. Stimson, "Trusts," 1 HARV. L. REV. 132 (1887); see also William F. Dana, "Monopoly" *Under the National Antitrust Act*, 7 HARV. L. REV. 338, 348–49 (1894) (collecting citations of state prosecutions).

destruction of their businesses, and at least the perception of higher prices charged to customers (and at times lower prices paid to suppliers) made the successful trusts an attractive target, at least in those states where the targeted trust had not been successful in coopting the political machinery. Since the typical trust structure organized corporate operating companies at the state level, states initially turned to state corporation law as the means to attack the trusts. As discussed earlier, corporations are creatures of the state, and the state is free to prescribe the conditions under which they will be created and will continue to exist. In principle, if not in everyday practice, states held corporate management to a high fiduciary duty of care to operate the corporation consistent with the corporate charter and in the interests of the shareholders. As a corollary, state corporation law required corporate management to operate the corporation themselves without outside interference. Among other things, this meant that corporations could not enter into partnerships or other similar arrangements with third parties that would require them to subordinate the corporation's interests to another entity<sup>201</sup> or cease operating the business for which they were chartered at another entity's direction.<sup>202</sup> Corporations that abused their franchise to the public detriment, failed to pursue their stated purposes, and failed to operate solely in the interests of their shareholders could have their franchises revoked by the state in a judicial quo warranto proceeding brought on behalf of the state by the state's attorney general.<sup>203</sup>

Several states responded to public demands for actions against the trusts by initiating quo warranto proceedings to revoke the charters of domestic corporations participating as trust members. These constituent corporations could be attacked on one or more of three distinct theories. First, as a

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201. *See, e.g.,* Whittenton Mills v. Upton, 76 Mass. (10 Gray) 582 (1858) (declaring void a longstanding putative partnership between a corporation and an individual as outside the powers of the corporation); *N. River Sugar*, 24 N.E. at 841 (affirming the revocation of a corporate charter where the corporation violated its charter and failed to perform its corporate duties by joining and subordinating its interest to the Sugar Trust and closing its facilities pursuant to the trust's instruction); *Mallory v. Hananer Oil Works*, 8 S.W. 396, 399 (Tenn. 1888) (holding that it was unlawful for Hananer, a Tennessee corporation, to become a member of a partnership with three other Memphis-based corporations, independently of whether the partnership constituted an illegal combination to fix prices and control production of cottonseed oil in Memphis). *See generally* HELLIWELL, *supra* note 195, § 375, at 703–05.

202. *See, e.g.,* *Neb. Distilling Co.*, 46 N.W. at 161.

203. *See* *Ward v. Farwell*, 97 Ill. 593, 607 (1881) (“So, every private corporation, in accepting its charter, impliedly undertakes and agrees, upon condition of forfeiture, that it will exercise the rights and privileges conferred upon it in furtherance of the objects and purposes of its creation, and not otherwise, and that it will so manage and conduct its affairs that it shall not become dangerous or hazardous to the safety or well being of the State or community in and with which it transacts its business.”). A writ of quo warranto is an order to the corporation to show by what authority it has exercised some power or performed some action. For a discussion of the history of the quo warranto writ and its contemporary usage in the late nineteenth century, see, for example, JAMES L. HIGH, *A TREATISE ON EXTRAORDINARY LEGAL REMEDIES, EMBRACING MANDAMUS, QUO WARRANTO AND PROHIBITION* §§ 647–77a (2d ed. 1884); 5 SEYMOUR D. THOMPSON, *COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS* ch. 157 (1895).

member of a trust thought to be operating contrary to the public interest—if not unlawfully—as a combination in restraint of trade or a monopoly, a corporate member could be deemed to have abused its corporate charter to the public detriment.<sup>204</sup> Even the most liberal corporation enabling acts limited a corporation's activities to lawful purposes, and a corporation that participated in such an unlawful combination in restraint of trade would have exceeded its powers and jeopardized its charter. Second, many trusts closed down facilities they acquired, and if the plants of a corporate member were shuttered, the corporation could be found to have abandoned its chartered purposes.<sup>205</sup> Third, in trust arrangements, the management of participating corporations took its directions from the trust administrators. Notwithstanding any efficiencies that may have resulted from the trust arrangement, or for that matter any benefits that may have accrued to the current shareholders of the participating corporations (the controlling trustees), the participation of a corporation in a trust had the effect of subordinating the interests of the corporation to the interests of trust organization as a whole contrary to state corporation law, which required corporations to be controlled by a board of directors acting independently of outside influence.<sup>206</sup>

The first quo warranto action challenging participation in a trust was brought by Louisiana against a member of the American Cotton Oil Seed Trust.<sup>207</sup> Following closely behind were attacks by New York in 1889 and California in 1890 against the Sugar Trust,<sup>208</sup> by Ohio in 1890 against the Standard Oil Trust,<sup>209</sup> and by Nebraska in 1890 against the Whiskey Trust.<sup>210</sup>

New York's challenge to the North River Sugar Refining Company illustrates the use of state corporation law to revoke the charter of a state

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204. See, e.g., *N. River Sugar*, 24 N.E. at 839–41.

205. See, e.g., *Neb. Distilling Co.*, 46 N.W. at 156 (observing that of the seventy-five to eighty distilleries under the control of the Whiskey Trust only fourteen were kept in operation and finding that the defendant violated its charter by closing its distillery pursuant to trust direction).

206. The use of quo warranto proceedings challenging corporate participation in the trusts was presaged by cases such as *Whittenton Mills v. Upton*, 76 Mass. (10 Gray) 582 (1858). In that case, the court in a detailed analysis declared void a longstanding putative partnership between a Massachusetts manufacturing corporation and an individual as outside the powers of the corporation, since under partnership law the individual could commit its corporate partner but under the corporation's charter only the officers could bind the corporation. See *id.*

207. *State v. Am. Cotton Oil Trust*, 1 RY. & CORP. L.J. 509 (La. Civ. Dist. Ct. 1887) (finding a cause of action to exist and allowing it to proceed to trial).

208. *People v. N. River Sugar Refining Co.*, 3 N.Y.S. 401 (Cir. Ct. 1889), *aff'd*, 7 N.Y.S. 406 (N.Y. Gen. Term 1889), *aff'd*, 24 N.E. 834 (N.Y. 1890) (ordering the forfeiture of a franchise and the dissolution of the corporation); *People ex rel. Att'y Gen. v. Am. Sugar Refining Co.*, 7 RY. & CORP. L.J. 83 (Cal. App. Dep't Super. Ct. 1890) (ordering forfeiture of the franchise).

209. *State ex rel. Att'y Gen. v. Standard Oil Co.*, 30 N.E. 279 (1892) (ordering the severance of the relationship to Standard Oil Trust).

210. *Neb. Distilling Co.*, 46 N.W. at 155 (annulling franchise); see also *Distilling & Cattle Feeding Co. v. People*, 41 N.E. 188 (Ill. 1895).

corporation participating in a trust. North River, a corporation organized under New York's general manufacturing corporation act, was one of sixteen companies that signed the original deed of the Sugar Refineries Company, which created the Sugar Trust.<sup>211</sup> On April 22, 1887, North River's stockholders authorized its secretary to negotiate and sign the necessary papers for participating in the Sugar Trust.<sup>212</sup> The North River secretary signed the trust deed in September, which was dated as of August 16, 1887, and became effective on October 1, 1887.<sup>213</sup> Perhaps having second thoughts about the wisdom of involving the corporation formally in the creation of the trust, the North River stockholders on November 4, 1887, passed a resolution denying any authorization to the company officers to enter into any agreement with Sugar Refineries and declaring that North River was not part of the trust.<sup>214</sup> Just three weeks later, however, on November 25, the shareholders formally resolved to sell their shares in North River for \$325,000 to John Searles, who was incidentally the treasurer of the Havemeyer Sugar Refining Company (an anchor member of the Sugar Trust).<sup>215</sup> After Searles became the sole shareholder of North River, he conveyed the stock to the trustees of Sugar Refineries in exchange for trust certificates with a par value of \$700,000, or a little more than double the price Searles paid for the stock.<sup>216</sup> The Sugar Refineries board appointed a new set of directors for North River, which continued in operation until its facilities were permanently closed several months later in January 1888.<sup>217</sup>

In reviewing the New York Attorney General's petition to revoke the North River charter, the New York Court of Appeals first found that North River had become a constituent part of the Sugar Trust combination.<sup>218</sup> In support of their finding, the court noted that the new directors served at the sufferance of the trustees, and through the control of the new directors Sugar Refineries could cause all North River earnings to be distributed through dividends and could mortgage North River properties in order to supply funds for the Sugar Refineries to obtain capital to acquire other sugar refineries.<sup>219</sup> By the direction of the trustees acting through the new directors, North River closed its facilities.<sup>220</sup> The court dismissed North River's argument that it was a mere bystander and that it continued to respond to its shareholders and board of directors, whomever they might happen to be. Not only did North River, through its treasurer, originally

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211. The deed is reprinted in *People v. N. River Sugar Refining Co.*, 121 N.Y. 582, 585-95 (1890).

212. *People v. N. River Sugar Refining Co.*, 24 N.E. 834, 837 (N.Y. 1890).

213. *Id.*

214. *Id.* at 837-38.

215. *Id.* at 838.

216. *Id.* There is no record of what Searles did with the trust certificates. *Id.*

217. *People v. N. River Sugar Refining Co.*, 121 N.Y. 582, 599 (N.Y. 1890).

218. *N. River Sugar*, 24 N.E. at 835.

219. *Id.*

220. *Id.* at 839.

sign the trust deed, it acquiesced to participating in the trust, though the actions of its original management, by registering the stock transfers, seating a new replacement board of Sugar Refineries designees, and paying its earning to the new stockholders of record.<sup>221</sup>

It remained for the court to determine whether this membership was illegal under New York corporation law and, if so, whether this worked to the public injury so as to make revocation of its charter an appropriate remedy. The court considered both questions together.<sup>222</sup> As a matter of state corporation law, North River had abandoned its responsibilities as a corporate body to make decisions solely in its own interests.<sup>223</sup> Its “real” stockholders had been separated from their voting rights given to them by the state, its directors served at the sufferance of the Sugar Trust’s board, it had no discretion to declare dividends and retain earnings, and its property could be mortgaged for interests other than its own.<sup>224</sup> At the direction of the Trust, North River ceased to do business for the purpose of lessening market supply.<sup>225</sup> Most egregious to the court, however, was North River’s participation in the creation of a trust that circumvented New York’s regulations of large the aggregation of capital through the state’s corporation laws.<sup>226</sup> The court concluded that it was unnecessary to determine whether the Sugar Trust was an unlawful combination in restraint of trade or monopoly.<sup>227</sup> It was enough that North River abandoned its corporate responsibilities imposed on it by law, much less that it evaded state supervision of capital aggregations by forming an unsupervised trust or partnership.<sup>228</sup> The court affirmed the judgment of dissolution.<sup>229</sup>

Nebraska’s suit to revoke the charter of the Nebraska Distilling Company proceeded on a somewhat different theory.<sup>230</sup> In 1887, NDC became part of the Distillers and Cattle Feeders Trust, better known as the Whiskey Trust.<sup>231</sup> The stockholders of NDC, whose assets the trust assessed at \$100,000, exchanged their stock in return for trust certificates valued at par at \$285,700 (yet another example of stock watering), whereupon NDC

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221. *Id.*

222. *Id.*

223. *Id.* at 839–40.

224. *Id.* at 840.

225. *Id.*

226. *Id.*

227. *Id.* at 841.

228. Similarly, in its action to declare the American Cotton Oil Trust illegal and enjoin it from doing business in the state, the Louisiana attorney general alleged, among other things, that the trust operated as if it were a corporation but was not incorporated in the state nor was it subject to state corporate law regulation. In its opinion, the court noted that the absence of proper regulation could harm persons who purchased Cotton Oil Trust certificates and those who deal with it and become its creditors. The court found the allegations sufficient to state a cause of action that the trust was operating in the state illegally, overruled the demurrer, and ordered the case to proceed to trial. *State v. Am. Cotton Oil Trust, 1 RY. & CORP. L.J. 509, 510–11 (La. Civ. Dist. Ct. 1887).*

229. *N. River Sugar*, 24 N.E. at 839.

230. *State v. Neb. Distilling Co.*, 46 N.W. 155 (Neb. 1890).

231. *Id.* at 156.

issued new stock to the trustees, who in turn installed a new board of directors for the company.<sup>232</sup> The Whiskey Trust, which was started after the failure of a series of pools, was formed for the purpose of reducing the industry production of alcohol, spirits, and liquor.<sup>233</sup> The trust's method of controlling production was simple: it centralized production in the most efficient plants and mothballed the rest.<sup>234</sup> By 1890, of the roughly 90 to 110 distilleries located north and west of the Ohio River, 75 to 80 had become members of the trust.<sup>235</sup> Of these, the trust kept fourteen in operation.<sup>236</sup>

Within a few months after joining the trust, the NDC plant was closed.<sup>237</sup> The plant stayed shuttered but apparently operational until January 1890.<sup>238</sup> At that time, the NDC's shareholders (that is, the trustees of the Whiskey Trust) voted to liquidate NDC's plant and equipment and surrender NDC's corporate charter to the state of Nebraska.<sup>239</sup> It is likely that the trustees were concerned about the possibility of a quo warranto proceeding, which could result not only in the revocation of NDC's charter but also in the appointment of a receiver for its assets and possibly the reopening of production. The trustees authorized NDC's president to convey without restriction the plant's equipment to Weston Arnold, a trust operative, who five days later assigned his interest in all but two cookers and a mash pump to George Woolsey, one of NDC's original stockholders and later a trust-appointed officer of NDC.<sup>240</sup> Woolsey, who wished to use the plant for the manufacture of cereals, agreed with Arnold not to use any part of the equipment for distilling purposes for a period of roughly twenty years and to include a restrictive covenant to the same effect for the benefit of Arnold in the event Woolsey ever sold the plant to someone else.<sup>241</sup> In making these assignments, the Whiskey Trust sought to dissolve NDC before a quo warranto proceeding could revoke its charter and to ensure that NDC's plant would not resume production.<sup>242</sup> In addition, the reservation of the two cookers and mash pump by Arnold was designed to destroy the plant's usefulness as a distillery regardless of what Woolsey did with the other equipment.<sup>243</sup>

The scheme did not work. Within days after the assignment to Woolsey the state initiated its action.<sup>244</sup> Although NDC's charter stated that it was organized for the purpose of the manufacture and sale of alcohol, spirits,

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232. *Id.* at 157.

233. *Id.* at 156.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 157.

238. *Id.* at 157–59.

239. *Id.*

240. *Id.* at 158.

241. *Id.* at 158–59.

242. *Id.* at 155.

243. *Id.* at 158.

244. *Id.* at 155.

and other liquors, the court did not cite the NDC's takeover by the trust or the failure of NDC to stay in business as the grounds for revoking the charter (probably because the attorney general was really after the equipment, which was already out of NDC's hands, before it could be rendered useless for distilling purposes). Rather, the court noted that the general corporation statute under which NDC had been organized restricted the operations of Nebraska corporations to those with a lawful purpose; acts done in furtherance of an unlawful purpose were unauthorized and in excess of the corporation's powers, and therefore illegal and void. The court found that NDC's purpose in originally joining the Whiskey Trust was to suppress competition and create a monopoly, and that all contracts and conveyances in furtherance of this purpose—including the conveyance of the equipment to Arnold and Woolsey—were null and void.<sup>245</sup> Since the equipment was within the jurisdiction of the court, the court could take control of it and dispose of it as the ends of justice required. Moreover, NDC's unauthorized contracts and conveyances also provided the grounds for the court annulling NDC's corporate franchise.<sup>246</sup>

The quo warranto actions by New York, California, Nebraska, and Ohio against their respective state corporations for participating in a trust proper, and the action by Louisiana to enjoin the Cotton Oil Trust from operating in the state for lack of incorporation, are often regarded as the first antitrust actions against the trusts. While harm to customers and suppliers and the tendency to monopoly may have been a consideration in bringing the actions, and certainly were noted when the states argued that participation in the trusts were not only ultra vires but also against the public interest, competition concerns were probably secondary at best. In the New York and Nebraska actions, the quo warranto actions were brought against corporations whose facilities were closed down by the controlling trust,<sup>247</sup> while Louisiana directly challenged the operation of the Cotton Oil Trust, which had shut down two mills in the state.<sup>248</sup> At least in New York and perhaps in the other states as well, the closure of a plant and the concomitant loss of employment appear to be the determinative factor. It is worth noting that the base of the Sugar Trust was in New York, yet the only quo warranto proceeding that the state brought was against a constituent corporation whose facilities were closed almost immediately upon joining the trust. For many years, New York left the Sugar Trust unmolested, although the Sugar Trust was one of the most notorious combinations in the country, controlling 85 percent of the refining capacity on the East Coast, and probably the most significant combination operating in New York, since it controlled all of the sugar refineries in the state.<sup>249</sup> Nor did New

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245. *Id.* at 159.

246. *Id.* at 161.

247. *See* *People v. N. River Sugar Refining Co.*, 121 N.Y. 582, 599 (1890); *see also* *Neb. Distilling Co.*, 46 N.W. at 157.

248. *See* *State v. Am. Cotton Oil Trust*, 1 RY. & CORP. L.J. 509, 510 (La. Civ. Dist. Ct. 1887).

249. NEW YORK 1888 REPORT, *supra* note 176, at 6.

York challenge the participation of its domestic corporations, notably including the Standard Oil Company of New York, in other trusts proper. Certainly the New York authorities were aware of the operation of a number of trusts proper within its jurisdiction. Not only were these reported with some frequency in *The New York Times*, but a committee of the state senate charged with investigating the trusts compiled an extensive record and issued reports in 1888 and 1889.<sup>250</sup> There were countervailing considerations. As the New York State Senate committee noted, some of the major trusts (such as the Standard Oil Trust or the Cotton Oil Trust that Louisiana attacked) had their headquarters located in New York City and therefore contributed “to the wealth and prosperity of the great commercial center of the country.”<sup>251</sup>

It is also not clear to what extent the quo warranto proceedings, even if successful, would have impeded the operation of the trusts. When the appeal was pending on Louisiana’s challenge to the operation of the Cotton Oil Trust, the trust dissolved the constituent Louisiana corporations and transferred their assets to a Rhode Island corporation the trust had set up for that purpose.<sup>252</sup> When the appeal was heard, counsel for the Cotton Oil Trust informed the appellate court that since the corporations no longer existed the case was moot.<sup>253</sup> Likewise, after a writ of quo warranto had issued in the trial court against the Nebraska Distilling Company and while the case was pending appeal, the Whiskey Trust arranged for the assets of the company to be sold to a purchaser who ostensibly would use the facilities for a cereal mill and under a sale and purchase agreement that contained a restrictive covenant that prohibited the purchaser and any successors or assigns from manufacturing spirits at the facility for a number of years.<sup>254</sup>

In any event, the actions by New York, California, Nebraska, and Louisiana—and the prospect of similar actions by other states—caused the trusts to look for another legal vehicle. Some fundamental changes in corporation law, especially in New Jersey, caused the major trusts proper and other large multistate combinations to look again at incorporation.

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250. *See id.* at 4 (investigating the Sugar Trust, the Milk Trust, the Rubber Trust, the Cotton Seed Oil Trust, the Envelope Trust, the Elevator Trust, the Oil Cloth Trust, the Standard Oil Trust, the Butchers’ Trust, the Glass Trust, and the Furniture Trust); NEW YORK 1889 REPORT, *supra* note 61, at 3 (investigating the Copper Trust, the Sugar Trust, the Jute Bagging Trust, the Milk Trust, the Elevator Trust, and the Wholesale Grocers’ Trust). As the reports noted, many of these “trusts” were almost surely in the form of simple agreements and not trusts proper.

251. NEW YORK 1888 REPORT, *supra* note 176, at 7.

252. *See* ARTHUR H. DEAN, WILLIAM NELSON CROMWELL, 1854–1948, AN AMERICAN PIONEER IN CORPORATION, COMPARATIVE AND INTERNATIONAL LAW 99 (1957).

253. *Id.*

254. *See* *State v. Neb. Distilling Co.*, 46 N.W. 155, 157–58 (Neb. 1890).

*E. Holding Corporations and the Liberalization of Incorporation Laws*

As general incorporation statutes became more common and the number of general corporations grew, some states began competing with one another in the reform of their general corporation laws to attract new incorporations, including those sponsored by out-of-state capital, in order to increase employment in the states as well as increase the state's revenues from registration and franchise fees and other corporate taxes.<sup>255</sup> New Jersey was already a leader in the race among states to liberalize incorporation laws.<sup>256</sup> A major turning point occurred in 1888, when the state amended its general incorporation law to permit corporations to hold stock and bonds in other corporations chartered under the laws of other states.<sup>257</sup> Equally important, in 1892 New Jersey explicitly authorized its corporations to operate and hold property outside of the state, requiring only that they have an office in New Jersey.<sup>258</sup> In 1893, another amendment cleared up an ambiguity in the earlier law and expressly declared that it was lawful for any New Jersey general corporation to purchase, hold, and sell the stock or bonds of any other corporation.<sup>259</sup> When New Jersey revised and restated its general corporation law in 1896, it had eliminated nearly all of the remaining common law restrictions on corporate structure and activity, including time limits on the duration of corporate charters, constraints on the number and scope of permissible lines of business, and limitations on capitalization of the issuance of nonvoting shares and shares without par value.<sup>260</sup> The more relaxed laws also conferred substantial

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255. The bulk of New Jersey revenues had come historically from railroad taxes. In 1884, New Jersey extended its tax reach to other corporations. *See generally* CHRISTOPHER GRANDY, *NEW JERSEY AND THE FISCAL ORIGINS OF MODERN AMERICAN CORPORATION LAW* (1993); Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869–1903*, 53 *BUS. HIST. REV.* 304, 317 (1979).

256. For an account of the various machinations of the New Jersey legislature during this time, see Harold Stoke, *Economic Influences upon the Corporation Laws of New Jersey*, 38 *J. POL. ECON.* 551 (1930). For further background, see also GRANDY, *supra* note 255, at 39–45; Christopher Grandy, *New Jersey Corporate Chartermongering, 1875–1929*, 49 *J. ECON. HIST.* 677 (1989); Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 *HARV. L. REV.* 198 (1899); Lincoln Steffans, *New Jersey: A Traitor State*, 24 *MCCLURE'S MAG.* 649, 650 (1905). New Jersey had substantially liberalized its general incorporation act once before in 1875, although there was no significant increase in the number of incorporations in the state until the second liberalization in 1889. *See* CADMAN, *supra* note 140, at 155–60; GEORGE H. EVANS, JR., *BUSINESS INCORPORATIONS IN THE UNITED STATES, 1800–1943*, app. A, at 125–32 (1948) (New Jersey general incorporation statistics); Keasbey, *supra*, at 205–07; Melvin I. Urofsky, *Proposed Federal Incorporation in the Progressive Era*, 26 *AM. J. LEGAL HIST.* 160, 163–64 (1982). *See generally* JAMES B. DILL, *THE STATUTORY AND CASE LAW APPLICABLE TO PRIVATE COMPANIES UNDER THE GENERAL CORPORATION ACT OF NEW JERSEY AND CORPORATE PRECEDENTS* (3d ed. 1901).

257. Act of Apr. 4, 1888, ch. 269, 1888 N.J. Laws 385–86 (authorizing New Jersey and other corporations operating in the state, and so authorized by their law of incorporation, to own and hold stock and bonds of corporations chartered in other states).

258. Act of Mar. 10, 1892, ch. 56, § 1, 1892 N.J. Laws 90.

259. Act of Mar. 14, 1893, ch. 171, § 1, 1893 N.J. Laws 301; *see* Act of Mar. 8, 1893, ch. 67, § 1, 1893 N.J. Laws 121 (consolidation or merger).

260. *See* Act of Apr. 21, 1896, ch. 185, 1896 N.J. Laws 277.

discretion on corporate directors in deciding what information must be conveyed to shareholders and in utilizing proxy votes to make basic corporate decisions.<sup>261</sup> Other states soon followed with their own liberalizations, including New York in 1892,<sup>262</sup> Connecticut<sup>263</sup> and Pennsylvania in 1895,<sup>264</sup> and Delaware in 1899.<sup>265</sup>

Authorization by the incorporating state for its corporations to buy stock in other corporations, operate out of state, and hold property in other jurisdictions, coupled with the elimination of restrictions on corporate duration, lines of business, and capital structures, of course, solved only half the problem in providing a corporate vehicle for combinations and other large business enterprises. At least in principle, state legislatures could have attempted to limit, if not preclude, foreign corporations from doing business within their respective jurisdictions. States also could have continued to use quo warranto proceedings to prohibit their domestic corporations from becoming part of a foreign holding corporation just as some of them did when their corporations became part of a trust proper. But most states moved in just the opposite direction, perhaps because of some intervening Supreme Court decisions.

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261. See Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 266 (1976).

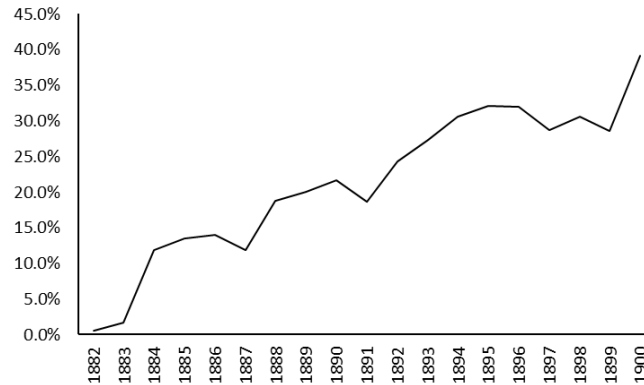
262. Act of May 18, 1892, ch. 688, 1892 N.Y. Laws 1834.

263. Act of May 17, 1895, ch. 138, 1895 Conn. Pub. Acts 514–15.

264. Act of June 26, 1895, ch. 261, 1895 Pa. Laws 369–70.

265. Act of Mar. 10, 1899, ch. 273, 21 Del. Laws 445 (1899). Delaware essentially copied the New Jersey Revised Statute of 1896, although Delaware's fees were lower. See LARCOM, *supra* note 147, at 14–15, 17–25; *Little Delaware Makes a Bid for the Organization of Trusts*, 33 AM. L. REV. 408, 419 (1899). In 1913, the New Jersey state legislature, with the guidance and encouragement of Governor Woodrow Wilson, reformed the general corporation law through the so-called “Seven Sisters” acts. See Acts of Feb. 19, 1913, chs. 13–19, 1913 N.J. Laws 25–33. Apparently stung by Theodore Roosevelt's attacks in the 1912 presidential election on Wilson's failure to do anything about New Jersey as a haven for trusts, Wilson sought and obtained state legislation that eliminated most of the attractive features of the New Jersey general corporation statute. See ARTHUR S. LINK, WILSON: THE NEW FREEDOM 32–34 (1956). Two years later, Delaware adopted a new General Corporation Law and became the state of choice for new incorporation. See LARCOM, *supra* note 147, at 9–10, 155. In 1917, the New Jersey legislature reversed course, largely to stem the loss of revenue in franchise fees, and substantially weakened or repealed the Seven Sisters Acts. See Act of Mar. 28, 1917, ch. 195, 1917 N.J. Laws 566. By then, however, it was already too late, since Delaware already replaced New Jersey as the state of choice for large corporations.

Figure 3. New Jersey Corporation Taxes  
(as a percentage of total New Jersey tax receipts)



In 1876, the Supreme Court began to pull back from its earlier suggestions that states could discriminate arbitrarily against foreign corporations, or at least discriminate against the sale of goods by foreign corporations in the course of interstate commerce. In *Welton v. Missouri*,<sup>266</sup> the Court used the Commerce Clause to invalidate a discriminatory licensing fee imposed on traveling wholesale salesmen, known as “drummers,” representing out-of-state manufacturers but not on those representing in-state manufacturers.<sup>267</sup> Welton, an agent of the Singer Sewing Machine Company who was indicted and convicted for failing to obtain the requisite license to sell goods produced out of state, claimed that the license fee constituted a tax on the sale of goods in interstate commerce and therefore an unconstitutional restraint.<sup>268</sup> The Court, despite a history of sustaining state taxes on the in-state sales activities of foreign corporations, agreed.<sup>269</sup> A decade later, in *Robbins v. Shelby County Taxing District*,<sup>270</sup> the Court held that even nondiscriminatory drummer license fees are invalid if they impede interstate commerce.<sup>271</sup> While *Welton* and *Robbins* paved the way for the expansion of firms such as Singer and McCormick that used demonstration agents who required no local facilities to market their products, *Cooley* and *Paul* continued to permit states complete freedom to regulate foreign corporations producing out-of-state goods or services that required local manufacturing, warehouses, sales, or

266. 91 U.S. 275 (1875).

267. *Id.* at 277.

268. *Id.* at 276. For more background on the case, see Charles W. McCurdy, *American Law and the Marketing Structure of the Large Corporation, 1875–1890*, 38 J. ECON. HIST. 631, 639–41 (1978).

269. *Id.* at 282.

270. 120 U.S. 489 (1887).

271. *Id.* at 497–98, 502.

service facilities.<sup>272</sup> These were considered intrastate business operations that could be discriminatorily taxed, regulated, or even prohibited.<sup>273</sup> In 1886, in *Santa Clara County v. Southern Pacific Railroad*,<sup>274</sup> the Court held that a corporation was a “person” within the meaning of the Fourteenth Amendment, thus beginning the breakdown of the constitutional distinction between the mobility of foreign goods and the mobility of foreign corporations.<sup>275</sup>

In the wake of the liberalization of general incorporation laws, and the Supreme Court’s decisions making it more difficult for states to prohibit or discriminate against foreign corporations, many large business enterprises, especially those organized as trusts proper (and subject to possible future quo warranto attacks), quickly reconfigured themselves as corporations. In the few years before the passage of the Sherman Act, these included the National Cordage Company (1887), the American Tobacco Company (1890), the Diamond Match Company (1890), the Distilling and Cattle Feeding Company (1890) (reorganized in 1895 into the American Spirits Manufacturing Company), and the National Starch Manufacturing Company (1890).<sup>276</sup> Perhaps because of a fear that some states would view a domestic corporation’s participation as a subsidiary to a holding company the same way as they viewed participation in a trust proper, almost all reorganizing trusts originally consolidated their constituent companies through merger or purchase into a single corporation and eschewed the holding company form. Typically, the trust would organize a new corporation, which would then purchase the plant and equipment of its members at an agreed-upon value (often very inflated) in exchange for the corporation’s stock of equal par value. In addition, the seller would agree not to reenter the business, usually for a considerable length of time, and would often execute a considerable bond to secure the obligation.

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272. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183–85 (1868); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 321 (1851).

273. *See, e.g., Horn Silver Mining Co. v. New York*, 143 U.S. 305, 313–15 (1892) (noting the absolute right to exclude foreign corporations from intrastate business activities); *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 189–90 (1888) (upholding a discriminatory tax on in-state offices of foreign corporations); *Cooper Mfg. Co. v. Ferguson*, 113 U.S. 727 (1885).

274. 118 U.S. 394 (1886).

275. *See* Morton J. Horowitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 173 (1985).

276. *See* ELIOT JONES, *THE TRUST PROBLEM IN THE UNITED STATES* 40 (1921). Within a few years after the passage of the Sherman Act, other significant enterprises, including the American Sugar Refining Company (1891), the National Lead Company (1891), the General Electric Company (1892), the United States Rubber Company (1892), the National Wall Paper Company (1892), the United States Leather Company (1893), and the American Malting Company (1897), reorganized into corporations. *Id.*; GLENN D. BABCOCK, *HISTORY OF THE UNITED STATES RUBBER COMPANY* (1966); ARTHUR STONE DEWING, *CORPORATE PROMOTIONS AND REORGANIZATIONS* 19–20 (1914) (formation of the United States Leather Company); CLIFFORD DYER HOLLEY, *THE LEAD AND ZINC PIGMENTS* 24–25 (1909) (formation of the National Lead Company); MOODY, *supra* note 182, at 248 (formation of the General Electric Company).

The reorganization of the Match Trust into a single corporation provides a good example.<sup>277</sup> The promoters of the Match Trust organized the Diamond Match Company under the laws of Connecticut on December 3, 1880.<sup>278</sup> The capital stock of the company consisted of \$2,225,000, divided into \$1,400,000 of common stock and \$850,000 of preferred stock.<sup>279</sup> Members transferred their real estate, plants, machinery, patents, and goodwill to the Diamond Match Company at agreed-upon valuations in exchange for common stock of equal par value.<sup>280</sup> Each proprietor also would transfer its matches and match materials to Diamond in exchange for preferred stock or, if the par value of the preferred stock was insufficient, preferred stock and cash.<sup>281</sup> Selling companies also agreed not to reenter the business of manufacturing friction matches for a period of years and executed bonds that provided for payment of liquidated damages to Diamond in the event of a breach.<sup>282</sup> Controlling shareholders of corporate sellers were also required to enter into similar noncompetition agreements in their individual capacities and execute bonds.<sup>283</sup> Finally, presumably to provide Diamond with some operating capital, sellers were required to purchase for cash at par value one-half as much preferred stock as they received in common stock for its property.<sup>284</sup> The Richardson Match Company, a Detroit concern, for example, sold its plant and equipment to Diamond for \$190,000 in common stock and subscribed for preferred stock in the amount of \$95,000.<sup>285</sup> The company entered into a twenty-year noncompetition covenant and executed a \$50,000 bond, while David Richardson, the majority shareholder and general manager, also signed a twenty-year noncompetition agreement and executed a \$25,000 bond.<sup>286</sup> In this manner, Diamond was able to purchase the plant and equipment of thirty-one manufacturers, comprising essentially all of the friction match manufacturing facilities in the United States, of which all but thirteen were quickly closed.<sup>287</sup>

Of the ten largest corporate consolidations chartered between 1887 and 1897, only the American Cotton Oil Company (1889) organized itself originally as a holding company.<sup>288</sup> The Standard Oil Trust, perhaps gunshy from its defeat in the Ohio courts and wary of the legality of transforming a trust proper into a holding company, operated under the

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277. See *Richardson v. Buhl*, 43 N.W. 1102 (Mich. 1889).

278. *Id.* at 1111.

279. *Id.* at 1103.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 1104.

286. *Id.* at 1103.

287. *Id.* at 1111. For a discussion of the reorganization of the National Lead Trust into the National Lead Company, see *Nat'l Lead Co. v. S.E. Grote Paint Store Co.*, 80 Mo. App. 247 (Ct. App. 1899).

288. JONES, *supra* note 276, at 40.

control of its nine principal shareholders acting in their individual capacities until 1899, when it finally overcame its reluctance and reorganized as a New Jersey holding company.<sup>289</sup> By 1899, all of the trusts that had been attacked by state quo warranto prosecutions had reorganized themselves as corporations,<sup>290</sup> while some 280 other combinations with capitalizations exceeding \$10 million had incorporated in New Jersey by 1894.<sup>291</sup>

#### IV. THE LEGISLATIVE RESPONSE

As the 1880s progressed, there was growing political pressure to do something about the dramatic social dislocations, the perceived suppression of individual opportunity, and the shifts in income distribution that accompanied the rapid industrialization of the decade. The call for action against the trusts was part of this movement. Trusts, in the mind of the public and most contemporary commentators, were combinations of competitors, regardless of their technical legal form, that sought to increase prices and regulate production levels, although there was also concern, especially in the agricultural states, that trusts also suppressed the prices they paid for raw materials and other inputs.<sup>292</sup> A report by a New York State Senate committee charged with investigating the operation of the trusts within the state observed:

[T]he main purpose, management and effect of all upon the public is the same, to wit: The aggregation of capital, the power of controlling the manufacture and output of various necessary commodities; the acquisition or destruction of competitive properties, all leading to the final and conclusive purposes of annihilating competition and enabling the industries represented in the combination to fix the price at which they would purchase the raw material from the producer, and at which they would sell the refined product to the consumer.<sup>293</sup>

U.S. Senator David Turpie expressed a similar view to Congress:

[A] trust, in the most recent acceptance of the term, is a union or combination, rarely of individuals, usually of corporations, dealing in or producing a certain commodity, of the total amount of which belonging to them a common stock is made with the intention of holding and selling

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289. See MOODY, *supra* note 182, at 125.

290. 19 U.S. INDUS. COMM'N, *supra* note 54, at 598–99.

291. See GEORGE H. EVANS, JR., BUSINESS INCORPORATION IN THE UNITED STATES, 1800–1943, at 126–31 (1948).

292. See, e.g., *Chi., Wilmington & Vermillion Coal Co. v. People*, 114 Ill. App. 75, 112 (App. Ct. 1904) (“A pool or trust is a combination having the intention and power, or tendency, to monopolize business, or to control production, or to interfere with trade, or to fix and regulate prices, and the like. The primary object of a pool or trust is to secure a monopoly, since from that point of advantage it can destroy its competitors, and can control production, sales and prices.”); CHARLES FISK BEACH, A TREATISE ON THE LAW OF MONOPOLIES AND INDUSTRIAL TRUSTS 4 (1898) (“[The term ‘trust’] is used to designate any corporation, association or other combination, the object of which is to create a monopoly, either complete or partial, with a view to increasing prices by suppressing competition and obtaining control of the market.”).

293. NEW YORK 1888 REPORT, *supra* note 176, at 5.

the same at an enhanced price, by suppressing or limiting the supply and by other devices, so that the price of such trust commodity shall depend merely upon the agreement made about it by those in the combination, without reference to the cost of its production, the quantity of the article held for consumption, or the demand therefor among buyers.<sup>294</sup>

Many citizens, encouraged by an increasing number of newspaper articles and other reports in the popular literature, focused their discontent on the large combinations that directly or indirectly touched almost everyone, whether as a customer, employee, supplier, or competitor.<sup>295</sup> At the same time, there was a general recognition that the country had evolved beyond the agrarian economy of the pre-Civil War days; that technological, transportation, and managerial developments had enormously increased the nation's productivity by creating large economies of scale and scope; that large, highly capitalized businesses were a necessary consequence; and that there would be no returning to an era when only small businesses existed. As a result, the difference between combinations of independent firms and large unitary business enterprises that had grown organically became critical.

#### A. State Antitrust Legislation

The states reacted first to the calls for antitrust legislation. By and large, states are more homogeneous than the country as a whole, and it was natural that the citizens of some states would be disproportionately adversely affected by perceived trust activities. Moreover, this same relative homogeneity made it easier for the affected citizens in these states to obtain protective legislation from their state legislatures. Finally, in the 1880s, states were the regulators of first instance of microeconomic activities. Consistent with the prevailing notions of federalism, the responsibility for regulating economic activities and preserving competition originally fell to the individual states. Prior to the passage of the Sherman Act in 1890, thirteen states had enacted their own antitrust law: Iowa (1888), Kansas (1889), Maine (1889), North Carolina (1889), Nebraska (1889), Texas (1889), Tennessee (1889), Missouri (1889), Michigan (1889), Mississippi (1890), North Dakota (1890), South Dakota (1890), and Kentucky (1890).

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294. 21 CONG. REC. 137 (1889) (remarks of Sen. David Turpie).

295. One admittedly incomplete survey identified fifteen treatises or reports of official investigations and over thirty-five articles addressing the trust issue written between 1887 and 1890. Charles J. Bullock, *Trust Literature: A Survey and a Criticism*, 15 Q.J. ECON. 167, 168 (1901).

Table 3: State and Federal Antitrust Legislation to the Sherman Act

Iowa	Act of April 16, 1888, ch. 84, 1888 Iowa Acts 124
Maine	Act of March 7, 1889, ch. 266, 1889 Me. Laws 235
Kansas	Act of March 9, 1889, ch. 257, 1889 Kan. Sess. Laws 389
North Carolina	Act of March 11, 1889, ch. 374, 1889 N.C. Sess. Laws 372
Nebraska	Act of March 29, 1889, ch. 69, 1889 Neb. Laws 516
Texas	Act of March 30, 1889, ch. 117, 1889 Tex. Gen. Laws 141
Tennessee	Act of April 6, 1889, ch. 250, 1889 Tenn. Acts 475
Missouri	Act of May 18, 1889, 1889 Mo. Laws 96
Michigan	Act of July 1, 1889, no. 225, 1889 Mich. Pub. Acts 331
Mississippi	Act of February 22, 1890, ch. 36, 1890 Miss. Laws 55
North Dakota	Act of March 3, 1890, ch. 174, 1890 N.D. Laws 503
South Dakota	Act of March 7, 1890, ch. 154, 1890 S.D. Sess. Laws 323
Kentucky	Act of May 20, 1890, ch. 1621, 1890 Ky. Acts 143
Federal	Act of July 2, 1890, ch. 674, 26 Stat. 209 (1890)

As discussed, state courts in the United States applied the common law to find void and unenforceable the agreements underlying combinations of competitors organized for the purpose of raising prices and limiting production. Although some of the fine points vary, each of the thirteen state antitrust statutes contains a broad prohibition against combinations designed to raise price or reduce production. Although some courts raised the possibility that combinations could regulate prices and output to the extent necessary to control excessive competition, I could find no reported court decisions that enforced a combination implementing agreements on this ground. North Carolina, however, appears to have recognized this defense by prohibiting only price increases “beyond the price that would be fixed by the natural demand for or the supply of” the products in question.<sup>296</sup> Six state statutes—Kansas, North Carolina, Tennessee, Mississippi, Texas, and South Dakota—explicitly prohibited collective activity to reduce prices (presumably of inputs),<sup>297</sup> although many statutes had catch-all provisions prohibiting the restriction of “full and free competition” or something to a similar effect that might be used to reach collective monopsony pricing.<sup>298</sup> The North Carolina and Tennessee

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296. Act of Mar. 11, 1889, ch. 374, § 2, 1889 N.C. Sess. Laws 372, 373.

297. Act of Mar. 9, 1889, ch. 257, § 1, 1889 Kan. Sess. Laws 389; Act of February 22, 1890, ch. 36, § 1, 1890 Miss. Laws 55; Act of Mar. 11, 1889, ch. 374, § 2; Act of Mar. 7, 1890, ch. 154, § 1, 1890 S.D. Sess. Laws 323 (farm and agricultural products); Act of Apr. 6, 1889, ch. 250, § 1, 1889 Tenn. Acts 475; Act of Mar. 30, 1889, ch. 117, § 1, 1889 Tex. Gen. Laws 141.

298. Act of Mar. 9, 1889, ch. 257, § 1 (“full and free competition”); Act of July 1, 1889, no. 225, § 1, 1889 Mich. Pub. Acts 331 (“free competition”); Act of Feb. 22, 1890, ch. 36, § 1, 1890 Miss. Laws 55 (“free and unrestricted competition”); Act of Mar. 7, 1890, ch. 154,

statutes also contained early predatory pricing provisions, with North Carolina prohibiting pricing “for less than actual cost for the purpose of breaking down competitors”<sup>299</sup> and Tennessee prohibiting dumping products on the market to create an “undue depression in the price of such article, and by such means to destroy or limit legitimate competition.”<sup>300</sup>

In addition to codifying the basic common law prohibitions against combinations in restraint of trade, five states—Kansas, Maine, Missouri, North Dakota, and Kentucky—prohibited corporations and other persons from forming or participating in a trust (broadly defined, usually as a combination to fix prices or reduce production), issuing trust certificates, or placing the management or control of their companies in the hands of trustees.<sup>301</sup> Maine and Missouri also required their respective secretaries of state to send a letter of inquiry to each corporation organized under the laws of the state to ascertain whether the corporation is a member of a trust or other prohibited combination and required a senior officer to respond under oath or else the corporate charter would be revoked.<sup>302</sup> In 1892, however, the Missouri Supreme Court declared the provision unconstitutional under the Missouri Constitution, since the Missouri antitrust statute subjected officers and directors of a violating corporation to criminal sanctions.<sup>303</sup> Maine did not subject officers and directors of a violating corporation to criminal penalties.

As noted earlier, the common law made contracts and combinations in restraint of trade void and unenforceable as a matter of contract law, but they were not criminal offenses that the state could challenge or torts for which an injured party could seek redress. All thirteen of the state statutes made violations criminal offenses. The penalties varied widely, both across and within states. Nine states provided for incarceration. On the low end, Kansas and Nebraska provided for a maximum term of six months,<sup>304</sup> while Missouri, North Dakota, and Kentucky had maximum terms of one year.<sup>305</sup> South Dakota provided for a maximum term of 3 years.<sup>306</sup> North Carolina,

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§ 1 (“free, fair and full competition”); Act of Mar. 30, 1889, ch. 117, § 1 (“free and unrestricted competition”).

299. Act of Mar. 11, 1889, ch. 374, § 5.

300. Act of Apr. 6, 1889, ch. 250, § 1.

301. Act of Mar. 9, 1889, ch. 257, § 2; Act of May 20, 1890, ch. 1621, § 2, 1890 Ky. Acts 143; Act of Mar. 7, 1889, ch. 266, § 1, 1889 Me. Laws 235; Act of May 18, 1889, § 2, 1889 Mo. Laws 96; Act of Mar. 3, 1890, ch. 174, § 2, 1890 N.D. Laws 503, 504; *see also* Act of Feb. 22, 1890, ch. 36, § 1 (defining combinations as trusts but not explicitly the issuance of trust certificates or the subordination to trust management); Act of Mar. 11, 1889, ch. 374, § 3 (same); Act of Mar. 30, 1889, ch. 117, § 1 (same).

302. Act of Mar. 7, 1889, ch. 266, § 4; Act of May 18, 1889, § 6.

303. *See State ex rel. Att’y Gen. v. Simmons Hardware Co.*, 18 S.W. 1125, 1127 (Mo. 1892). The experience under the statute is recounted in Steven L. Piott, *Missouri and Monopoly? The 1890s As an Experiment in Law Enforcement*, 74 MO. HIST. REV. 21 (1979).

304. Act of Mar. 9, 1889, ch. 257, § 3; Act of Mar. 29, 1889, ch. 69, § 6, 1889 Neb. Laws 516, 519.

305. Act of May 20, 1890, ch. 1621, § 3; Act of May 18, 1889, § 3; Act of Mar. 3, 1890, ch. 174, § 3.

306. Act of Mar. 7, 1890, ch. 154, § 1, 1890 S.D. Sess. Laws 323.

Texas, and Mississippi each provided for a maximum term of ten years.<sup>307</sup> Iowa, Maine, and Tennessee did not provide for imprisonment.

On criminal fines, Michigan and Tennessee appear on the low end. Depending on the section violated, Michigan provided for a criminal fine range of \$50 to \$300 or \$500 and imprisonment of not more than six months to one year.<sup>308</sup> Tennessee provided for a criminal fine of not less than \$250 for the first offense and not less than \$500 for subsequent offenses, together in both cases with a \$50 tax to be paid to the state attorney general as costs.<sup>309</sup> Kansas, Nebraska, and South Dakota provided for a maximum criminal fine of \$1,000.<sup>310</sup> Iowa, Texas, Missouri (individual only), Mississippi, North Dakota (individual only), and Kentucky provided a maximum fine of \$5,000,<sup>311</sup> while Maine (organizational only) and North Carolina had maximum fines of \$10,000.<sup>312</sup> In addition, Missouri and North Dakota provided for organizational fines of between 1 percent and 20 percent of the corporation's capital stock or the amount invested otherwise.<sup>313</sup> Interestingly, in addition to a criminal fine, Mississippi also provided for a forfeiture of \$50 for each day of a violation to be paid into the state treasury to the credit of the common school fund.<sup>314</sup>

Nebraska, Texas, Tennessee, Michigan, Mississippi, North Dakota, and Kentucky all provided for the revocation of the charter through a quo warranto proceeding of any domestic corporation that violated their antitrust laws,<sup>315</sup> although the other states undoubtedly had this option under their respective corporation laws.

Most states simply ordered their respective attorney general and subordinate state attorneys to enforce the law. Some states, however, clearly were concerned about incentives to enforce the law. Missouri incentivized its attorney general and prosecuting attorneys by entitling them to one-fifth of any fine collected if prosecuting alone or one-fourth if prosecuting together.<sup>316</sup> Similarly, Tennessee provided that the attorney general would receive 50 percent of any fine as well as a taxed fee of

307. Act of Feb. 22, 1890, ch. 36, § 2, 1890 Miss. Laws 55, 56; Act of Mar. 11, 1889, ch. 374, § 3; Act of Mar. 30, 1889, ch. 117, § 6, 1889 Tex. Gen. Laws 141, 142.

308. Act of July 1, 1889, no. 225, §§ 1, 3, 1889 Mich. Pub. Acts 331, 332.

309. Act of Apr. 6, 1889, ch. 250, § 2, 1889 Tenn. Acts 475.

310. Act of Mar. 9, 1889, ch. 257, § 3, 1889 Kan. Sess. Laws 389, 390; Act of Mar. 29, 1889, ch. 69, § 6, 1889 Neb. Laws 516, 519; Act of Mar. 7, 1890, ch. 154, § 1.

311. Act of Apr. 16, 1888, ch. 84, § 2, 1888 Iowa Acts 124; Act of May 20, 1890, ch. 1621, § 3, 1890 Ky. Acts 143, 144; Act of Feb. 22, 1890, ch. 36, § 2; Act of May 18, 1889, § 3; Act of Mar. 3, 1890, ch. 174, § 3, 1890 N.D. Laws 503, 504; Act of Mar. 30, 1889, ch. 117, § 6.

312. Act of Mar. 7, 1889, ch. 266, § 3, 1889 Me. Laws 235, 236; Act of Mar. 11, 1889, ch. 374, § 3.

313. Act of May 18, 1889, § 3; Act of Mar. 3, 1890, ch. 174, § 3.

314. Act of Feb. 22, 1890, ch. 36, § 7, 1890 Miss. Laws 55, 57.

315. Act of May 20, 1890, ch. 1621, § 5; Act of July 1, 1889, no. 225, § 5, 1889 Mich. Pub. Acts 331, 333; Act of Feb. 22, 1890, ch. 36, § 10; Act of Mar. 29, 1889, ch. 69, § 5; Act of Mar. 3, 1890, ch. 174, §§ 6-7; Act of Apr. 6, 1889, ch. 250, § 4, 1889 Tenn. Acts 475, 476; Act of Mar. 30, 1889, ch. 117, § 3.

316. Act of May 18, 1889, § 8.

\$50.<sup>317</sup> Kansas provided that county attorneys that fail to prosecute and officials with knowledge of a violation who fail to come forward and notify the county attorney were subject to fines between \$100 and \$500 and forfeiture of office.<sup>318</sup>

Surprisingly, only Nebraska and Kansas provided for a private right of action by persons injured as a result of a violation of the state's antitrust law. Nebraska provided for the recovery of the "full amount of damages sustained" plus a reasonable attorney's fee.<sup>319</sup> Kansas provided for a private right of action to recover the full purchase price paid by the plaintiff to any illegal combination.<sup>320</sup> Missouri and Kentucky provided that a purchaser from an illegal combination was not liable for the purchase price and could interpose the illegality of the combination as a defense in a failure to pay contract action but it does not explicitly provide for a private right of action to recover a purchase price that had already been paid.<sup>321</sup> South Dakota permitted "any person" to file a complaint for any violation of its antitrust law and instructed its courts to proceed with the case "the same as though the State's Attorney had made the complaint."<sup>322</sup> The language of the statute is ambiguous as to whether it applied to criminal complaints as well as petitions for injunctive relief.

#### B. Federal Antitrust Legislation

As enacted, the Sherman Act was signed by President Harrison on July 2, 1890.<sup>323</sup> A statute was necessary if the federal government was to address the problem of combinations, since federal courts have no criminal jurisdiction over common law crimes.<sup>324</sup>

The Sherman Act took a somewhat different tack than the state antitrust statutes. Rather than specifically targeting trusts and other combinations, the Sherman Act adopted the language of the common law. Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations,"<sup>325</sup> while section 2 makes it unlawful to "monopolize,

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317. Act of Apr. 6, 1889, ch. 250, § 2.

318. Act of Mar. 9, 1889, ch. 257, §§ 7–8, 1889 Kan. Sess. Laws 389, 390–91.

319. Act of Mar. 29, 1889, ch. 69, § 3.

320. Act of Mar. 9, 1889, ch. 257, § 4.

321. Act of May 20, 1890, ch. 1621, § 4, 1890 Ky. Acts 143, 144; Act of May 18, 1889, § 4.

322. Act of Mar. 7, 1890, ch. 154, § 4, 1890 S.D. Sess. Laws 323, 325.

323. Act of July 2, 1890 (Sherman Act), ch. 647, 26 Stat. 209 (1890). The act was officially designated the Sherman Act by the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 305(a), 90 Stat. 1397.

324. *See, e.g.*, *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812); *see also* *United States v. Britton*, 108 U.S. 199, 206 (1883); *United States v. Coolidge*, 14 U.S. (1 Wheat.) 415, 416 (1816); *In re Greene*, 52 F. 104, 111 (C.C.S.D. Ohio 1892). For a modern affirmation of this rule, *see* *United States v. Kozminski*, 487 U.S. 931, 939 (1988).

325. Sherman Act § 1.

or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce.”<sup>326</sup>

The appeal of the common law to the framers of the Sherman Act resided in both the particular restrictions that the common law imposed at the time but also the fact that the law could be adjusted by the courts using the common law process continuously through time to cope with new, emerging business practices. Senator Sherman, commenting on an earlier version of the bill, explicitly noted that the language was intended to provide the federal courts a body of law from which it could draw in making decisions:

This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to . . . supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States.<sup>327</sup>

To this end, Senator Sherman also argued that the bill “does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government.”<sup>328</sup> On numerous occasions, backers of the Sherman Act assured the floor of the Senate that they were merely seeking to enable federal courts to apply the common law to anticompetitive business activities<sup>329</sup> and early federal cases are full of citations to English and state common law.<sup>330</sup> But equally important, the Sherman Act’s use of common law terminology empowered the federal courts to use a common law approach to continue to develop and refine antitrust law as the courts gained familiarity with various business practices and their consequences, as business practices continued to evolve and economics learning developed.

As did the state antitrust statutes, the Sherman Act made violations criminal offenses. The original act made violations misdemeanors punishable by a fine not to exceed \$5,000,<sup>331</sup> about the middle of the range provided by the state statutes. The Sherman Act also provided for

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326. *Id.* § 2. Section 3 essentially applies the prohibitions of section 1 to commerce within or with any territory or the District of Columbia. *Id.* § 3. Interestingly, there is no counterpart to section 2 for territories or the District of Columbia.

327. 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman).

328. *Id.* at 2456.

329. *See, e.g., id.* at 2456, 2457, 2561, 2563 (statement of Sen. Sherman); *id.* at 3146, 3152 (statement of Sen. Hoar).

330. *See, e.g., United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 278–91 (6th Cir. 1989), *aff’d*, 175 U.S. 211 (1899) (comprehensively surveying common law cases as a means of construing the Sherman Act); *In re Greene*, 52 F. 104, 111 (C.C.S.D. Ohio 1892) (noting that the Sherman Act “does not undertake to define what constitutes a contract, combination, or conspiracy in restraint of trade, and recourse must therefore be had to the common law for the proper definition of these general terms”); *In re Corning*, 51 F. 205, 210 (N.D. Ohio 1892) (“These terms, as used in the act of congress under consideration, are well defined at common law, and must be considered with reference to such established meaning.”).

331. Sherman Act §§ 1–2.

imprisonment not exceeding one year, on the lower end of the state imprisonment statutes.<sup>332</sup> The criminal provisions of the Sherman Act were enforceable by the U.S. Attorney General and the U.S. district attorneys.<sup>333</sup>

The Sherman Act also provided the federal circuit courts with jurisdiction in equity to prevent and restrain violations of the Act and authorized the Attorney General and the district attorneys to bring proceedings to enjoin on-going and imminent violations.<sup>334</sup> Moreover, the Sherman Act provided the United States with a remedy of forfeiture, so that property owned under any illegal contract or by any illegal combination that was in the course of being transported in interstate or foreign commerce could be condemned and forfeited to the United States.<sup>335</sup>

Finally, and unlike the state antitrust statutes, the Sherman Act provides persons injured by an antitrust violation in their business or property with a private right of action to recover treble damages (three times actual damages) plus reasonable attorney's fees.<sup>336</sup> The legislative history of the treble damage remedy is sparse, although it appears that the remedy was to be available not only to customers who purchased goods or services from a combination member at fixed prices but also to competitors who may have been driven out of business by a combination's efforts to control the market.<sup>337</sup> On multiple damages, the legislative path was convoluted. Sherman originally introduced a bill providing that customer could sue for double the amount of actual damages resulting from increased prices charged pursuant to an illegal combination.<sup>338</sup> When the bill was reported by the Senate Finance Committee, which Sherman chaired, the bill had been amended to provide, as did the Nebraska and Kansas antitrust statutes, that purchasers could recover the full consideration paid for any goods or merchandise purchased from a combination member at an increased

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332. *Id.*

333. *Id.* § 4.

334. *Id.* The United States circuit courts were established by the Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73. The U.S. circuit courts had original jurisdiction over civil actions based on diversity jurisdiction and over most federal crimes and appellate jurisdiction over U.S. district courts. *Id.* §§ 11, 22. The Judiciary Act of 1891 transferred appellate jurisdiction to the newly created U.S. circuit courts of appeals, which are now known as the U.S. courts of appeals. ch. 517, §§ 2, 4, 26 Stat. 826. In 1912, the Judicial Code of 1911 abolished the circuit courts and transferred their remaining original jurisdiction to the U.S. district courts. Pub. L. No. 61-475, §§ 289-292, 36 Stat. 1087, 1167.

335. Sherman Act § 6. The United States has only rarely sought forfeiture and then mostly in consent decrees rather than litigated relief. *See, e.g.,* United States v. Steinhardt Mgmt. Co., No. 94 Civ 9044, 1995 WL 322772 (S.D.N.Y. May 5, 1995) (consent decree); United States v. Certain Property Owned by Salomon Bros., No. 92 Civ. 3700, 1992 WL 295221 (S.D.N.Y. Sept. 14, 1992) (consent decree providing for a \$27.5 million asset forfeiture to settle in part a charge that Salomon Bros. cornered the market for certain two-year Treasury notes); *see also* United States v. Addyston Pipe & Steel Co., 85 F. 271, 301 (6th Cir. 1898) (denying as a matter of law a petition in equity for forfeiture and holding that forfeiture actions must be tried at law before a jury), *aff'd on other grounds*, 175 U.S. 211 (1899).

336. Sherman Act § 7.

337. *See* 21 CONG. REC. 2569 (1890) (statement of Sen. Sherman).

338. S. 3445, 50th Cong. (as introduced, Aug. 14, 1888).

price.<sup>339</sup> The full Senate amended the bill, retaining the committee's purchaser cause of action to recover the full consideration and adding a new cause of action for actual damages for firms that were compelled to join or sell out to a combination or were forced out of business.<sup>340</sup> When the 50th Congress ended without further action on the bill and the 51st Congress convened, Sherman reintroduced the bill as reported earlier by the Senate Finance Committee, retaining the purchaser cause of action for the full purchase price but eliminating the competitor cause of action that the full Senate had introduced.<sup>341</sup> When the Finance Committee reported the bill, it returned to Sherman's original idea of double damages, but the language of the amendment appeared to broaden the private action to include all injured persons and not just purchasers.<sup>342</sup> After being reported to, and debated and amended by, the Senate,<sup>343</sup> double damages and the broadened cause of action remained in the bill through the floor debate. Unexpectedly, and undoubtedly to Sherman's dismay, the bill was referred to the Senate Judiciary Committee, which rewrote the bill in its entirety in six days. The Judiciary Committee increased the recovery to treble damages,<sup>344</sup> where it remained through enactment. No doubt the multiple damages were provided not only to compensate victims, but also as an inducement to bring what were likely to be expensive and risky law suits,<sup>345</sup> as well as a further deterrent to committing violations in the first instance.<sup>346</sup> Even so, both critics and supporters voiced skepticism that, given the difficulties and expense of proving a violation, especially against a well-financed adversary, there would be much private enforcement of the Sherman Act.<sup>347</sup>

#### V. SOME CONCLUDING OBSERVATIONS

The state and federal antitrust statutes passed between 1888 and 1890 were enacted to deal with the increasing number of horizontal combinations—what would be called price-fixing cartels today—that had emerged throughout the economy in the 1870s and 1880s. In the course of an enormous economic expansion, broadening geographic markets, intensifying competition, and falling prices, it had become commonplace

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339. S. 3445, 50th Cong. § 2 (as reported by the S. Comm. on Finance, Sept. 11, 1888).

340. S. 3445, 50th Cong. § 3 (as amended by the Senate, Jan. 25, 1889); *see* 20 CONG. REC. 1167 (1889) (motion by Sen. Hoar to add competitor cause of action).

341. S. 1, 51st Cong. § 2 (as introduced, Dec. 4, 1889).

342. S. 1, 51st Cong. § 2 (as reported by the S. Comm. on Finance, Jan. 14, 1890); *see* 21 CONG. REC. 1767–68 (1890) (statement of Sen. George).

343. *See* S. 1, 51st Cong. § 2 (as amended by the Senate, Mar. 26, 1889) (retaining double damages).

344. S. 1, 51st Cong. § 7 (as reported by the S. Comm. on the Judiciary, Apr. 2, 1890).

345. *See* 21 CONG. REC. 2569 (1890) (statement of Sen. Sherman) (expressing concern that even double damages is “too small” to induce private enforcement).

346. *See* 21 CONG. REC. 3146–47 (1890) (statement of Sen. Hoar) (characterizing treble damages as a “penalty”).

347. *See* 21 CONG. REC. 1768 (1890) (remarks of Sen. George) (“I do not hesitate to say that few, if any, of such suits will ever be instituted and not one will ever be successful.”); *id.* at 2569 (1890) (statement of Sen. Sherman); *id.* at 2615 (1890) (statement of Sen. Coke).

for competitors to band together in an effort to control production and halt the decline in the prices that they charged for their products, if not to increase prices to supracompetitive levels. These efforts were widespread, ranging from local grain dealers trying to control the market in a city or a town to nationwide combinations trying to control prices across the nation for such necessities as oil, sugar, or spirits. Although much less frequent, in other sectors, combinations arose in an effort to exercise monopsony power and lower the prices that combination members paid for their production inputs.

The early antitrust statutes were narrowly focused. Although the language of the individual statutes varied considerably, the primary import of each of these laws was to adopt the substantive prohibitions in the common law against combinations in restraint of trade, extend the application of the prohibitions beyond simple combinations and pools to include trusts proper and holding companies, and criminalize violations in order to enable government enforcement.

Notably, none of the statutes expanded their substantive prohibitions to make combinations unlawful under the statute that would have been lawful under the common law. Although some states did use the legislation to codify the state's ability to use a quo warranto proceeding to revoke a domestic corporation's corporate charter for participating in a trust proper, each state also surely had that right without further statutory authorization. Nor did the statutes address conduct other than combinations. Anticompetitive exclusive and reciprocal dealing, tying arrangements, group boycotts, resale price maintenance, non-price vertical restraints, and mergers outside of the context of price-fixing combinations were not within the ambit of the original antitrust laws at the time they were passed, although they later became unlawful under the Sherman Act as the law evolved under the common law approach enabled by the statute.

The extension of the now-statutory prohibitions to trusts proper and holding companies was unremarkable. The common law held that simple combinations of independent competitors that were intended and had the ability to control prices in the marketplace to the injury of customers (or suppliers) were unlawful—at least in the sense of being void and unenforceable—and there was no reason to believe that the common law would not extend its prohibitions in the normal course to reach combinations organized more tightly in trusts proper, corporations, and holding companies. Indeed, the legality of combinations of these types under the common law was challenged in several pre-1890 quo warranto proceedings.

The criminalization of what before were simply unenforceable horizontal price-fixing arrangements is much more noteworthy. Prior to the passage of the original antitrust laws, combinations in restraint of trade were neither criminal nor tortious, and so could operate without fear of challenge by the state (apart from quo warranto actions). Notwithstanding the prospect that a combination could harm the community by raising price, reducing output,

and inflicting other “evils of monopoly,” the only recourse under the law was to hope that the combination fell apart because enough of its members cheated on the combination’s rules. The new antitrust legislation changed this. State and federal prosecutors now had the ability to challenge combinations directly.

Curiously, however, only two states and the federal government passed statutes that provided injured private parties—a customer, for example, that purchased products or services from a combination member at a supracompetitively fixed price or a competitor that was excluded from the marketplace by a combination’s exclusive dealing restraints—with a private cause of action against the combination. One would think that more states would have concluded that private parties were entitled to redress and vindication for their injuries or even that private parties could deter violations and advance the public interest by adding another means of enforcing the law to supplement limited state enforcement resources. It remains a mystery why more states did not create a private cause of action, although certainly one possibility is that the states saw some combinations as furthering the state’s economic interest and so wanted to maintain exclusivity over which combinations would be challenged under state law.

In any event, early enforcement of the antitrust statutes was sparse at best. In the electronic case databases, only a handful of cases appear through the end of 1893 under the various state statutes and the Sherman Act. Nor does there appear to be any significant number of material unreported cases, since there is little mention of additional cases in the treatises or the newspapers of the day. What reported decisions there are, however, all pertain to the legality of horizontal combinations.

The electronic case databases contain only four cases under the thirteen state antitrust laws, all brought by the state. The most interesting of these is *State ex rel. Attorney General v. Simmons Hardware Co.*<sup>348</sup> The Missouri attorney general brought an action against the Simmons Hardware Company alleging (1) that Simmons was a member of a trust organized with other corporations to regulate the price of hardware in violation of the Missouri antitrust law and (2) that the Simmons managing officers failed to respond to the letter of inquiry sent by the secretary of state under the state antitrust law to confirm that the company was not a member of an illegal trust.<sup>349</sup> On appeal, the Missouri Supreme Court declared the letter of inquiry provisions of the Missouri antitrust statute unconstitutional as compelling self-incrimination, since as the law was structured an affirmative response would subject the responding officers (as well as the corporation) to criminal penalties, a negative response would subject them to prosecution for perjury, and a failure to respond would result in the immediate revocation of the corporation’s charter.<sup>350</sup> The remaining cases

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348. 18 S.W. 1125 (Mo. 1892).

349. *Id.* at 1125.

350. *Id.* at 1127. After the lower court found the law unconstitutional but before the Missouri Supreme Court had acted, the Missouri legislature amended the statute to eliminate

involved two decisions in Kansas holding that the selling of insurance was “trade” and so covered by the Kansas antitrust statute,<sup>351</sup> and a decision in Texas holding that insurance is not “commerce” and therefore not covered by the Texas antitrust act.<sup>352</sup>

The records of federal prosecutions are more complete.<sup>353</sup> Only seven cases—four bills in equity and three criminal cases—were brought by the United States during the two and a half years that President Harrison remained in office after the passage of the Sherman Act.<sup>354</sup> All seven cases were brought by U.S. district attorneys in the field with only mild encouragement from William H.H. Miller, Harrison’s Attorney General. Even so, some of the targets were substantial: the Sugar Trust,<sup>355</sup> the Whiskey Trust,<sup>356</sup> the Cash Register Trust,<sup>357</sup> a major railroad trust in the Midwest,<sup>358</sup> and a large lumber trust in the Northwest.<sup>359</sup> The government also obtained a temporary injunction against the labor unions and union

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the prospect of criminal indictments, reallocate the power to revoke the charters of violating corporations from the secretary of state to a court of competent jurisdiction, and require affirmative proof in court of a state antitrust violation. Act of Apr. 2, 1891, 1891 Mo. Laws 186 (Apr. 2, 1891) (repealing chapter 128). The law was revised once again in 1885. Act of Apr. 11, 1895, 1895 Mo. Laws 237. For the early saga of the Missouri antitrust law, see Piott, *supra* note 303, at 21.

351. *State v. Phipps*, 31 P. 1097 (Kan. 1893) (affirming the convictions of two insurance agents for violating laws prohibiting unlawful trusts and combinations in restraint of trade); *In re Pinkney*, 27 P. 179, 180–81 (Kan. 1891).

352. *Queen Ins. Co. v. State*, 24 S.W. 397, 404 (Tex. 1893).

353. For a complete list of Department of Justice prosecutions under the Sherman Act through 1911, see GOV’T PRINTING OFFICE, *SHERMAN ANTITRUST LAW WITH AMENDMENTS* (1911).

354. For a review of antitrust enforcement during Harrison’s tenure as president, see HOMER CUMMINGS & CARL MCFARLAND, *FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE* 317–21 (1937); William Letwin, *The First Decade of the Sherman Act: Early Administration*, 68 *YALE L.J.* 464, 468–76 (1959).

355. No. 38 (C.C.E.D. Pa. filed Mar. 4, 1892), *dismissed*, 60 F. 306 (C.C.E.D. Pa.), *aff’d*, 60 F. 934 (3d Cir. 1894), *aff’d*, *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

356. *United States v. Greenhut*, No. 461 (D. Mass. filed Feb. 23, 1892), *indictment dismissed*, 50 F. 469 (D. Mass. 1892). There were three associated cases where the government sought removal of out-of-state defendants to Boston to answer the indictment. In each case, the petition for removal was denied. See *In re Greene*, 52 F. 104 (C.C.S.D. Ohio 1892); *In re Terrell*, 51 F. 213 (C.C.S.D.N.Y. 1892); *In re Corning*, 51 F. 205 (N.D. Ohio 1892).

357. *United States v. Patterson*, No. 1215 (C.C.D. Mass. filed July 2 and Oct. 5, 1892), *indictment dismissed in part*, 55 F. 605 (C.C.D. Mass. 1893), *nolle prosequi*, (C.C.D. Mass. Nov. 10, 1894), *reprinted in* DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, JULY 2, 1890–JANUARY 1, 1918, at 680 (Roger Shale ed., 1918).

358. *United States v. Trans-Mo. Freight Ass’n*, No. 6799 (C.C.D. Kan. filed Jan. 6, 1892), *dismissed*, 53 F. 440 (C.C.D. Kan. 1892), *aff’d*, 58 F. 58 (8th Cir. 1893), *complaint reinstated and combination enjoined*, 166 U.S. 290, *combination dissolved and enjoined*, (C.C.D. Kan. June 7, 1897), *reprinted in* DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, *supra* note 357, at 6.

359. *United States v. Nelson*, No. 1408 (C.C.D. Minn. filed Jan. 20, 1892), *dismissed*, 52 F. 646 (D. Minn. 1892).

leaders involved in the General Strike of 1892 in New Orleans.<sup>360</sup> By the time Harrison left office, however, the government had succeeded on the merits in only one minor price-fixing case,<sup>361</sup> although the Supreme Court later reversed the dismissal of one civil case and enjoined the respondent's continued operation.<sup>362</sup>

Federal antitrust enforcement continued at this very slow pace through the next two administrations. The Department of Justice initiated eight actions in the Cleveland Administration (1893–1897) and only three in the McKinley Administration (1897–1901). It was not until the Roosevelt Administration (1901–1909) that there was a meaningful increase in Sherman Act enforcement actions.

Table 4. Department of Justice Actions by Administration<sup>363</sup>

		Indictments	Equity	Other	Total
Benjamin Harrison	1889–1893	3	4		7
Grover Cleveland	1893–1897	2	4	2	8
William McKinley	1897–1901		3		3
Theodore Roosevelt	1901–1909	25	18	1	44
William Howard Taft	1909–1913	39	27		66

Why was the number of Department of Justice actions so low in the early years? One factor was certainly the limitation on subject matter jurisdiction imposed by the contemporary judicial interpretation of the Commerce Clause, especially after the Supreme Court's decision in *United States v. E.C. Knight Co.*<sup>364</sup> But this fails to explain why prosecutors did not attempt a more artful pleading of restraints on interstate commerce in more cases given the large number of combinations operating across state lines. Another factor may have been the perceived limitations on applying the prohibitions of the Sherman Act in an ex post facto manner, which concerned the court in *In re Greene*.<sup>365</sup> Here, too, one would think that aggressive prosecutors would bring more cases to try to find ways to plead around the problem and establish more favorable precedent, even if in the end they were unsuccessful.

360. *United States v. Workingmen's Amalgamated Council of New Orleans*, No. 12143 (C.C.E.D. La. filed Nov. 10, 1892), *injunction entered*, 54 F. 994 (C.C.E.D. La. 1893), *aff'd*, 57 F. 85 (5th Cir. 1893).

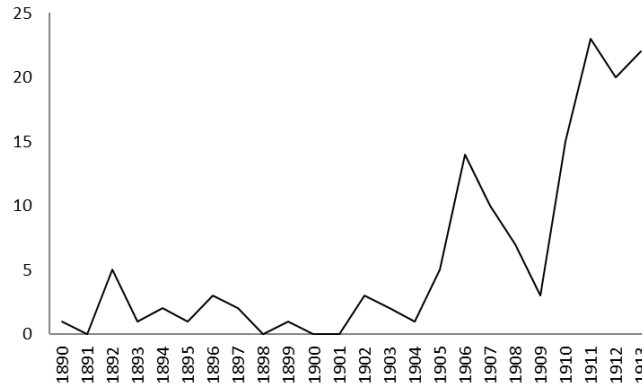
361. *United States v. Jellico Mountain Coal & Coke Co.*, No. 2820 (M.D. Tenn. filed Oct. 13, 1890), *declared illegal*, 46 F. 432 (C.C.M.D. Tenn. 1891), *enjoined*, (C.C.M.D. Tenn. June 17, 1891), *reprinted in* DECREES AND JUDGMENTS IN FEDERAL ANTI-TRUST CASES, *supra* note 357, at 1.

362. *Trans-Mo.* 166 U.S. 290.

363. These statistics were compiled largely from COMMERCE CLEARING HOUSE, INC., THE FEDERAL ANTI-TRUST LAWS WITH SUMMARY OF CASES INSTITUTED BY THE UNITED STATES 1890–1951 (1952).

364. 156 U.S. 1 (1895); *see In re Greene*, 52 F. 104, 112–13 (C.C.S.D. Ohio 1892).

365. *See In re Greene*, 52 F. at 112.

Figure 4. Department of Justice Actions Initiated by Year<sup>366</sup>

Limited enforcement resources, no doubt, were a major problem. When Congress passed the Sherman Act it created no special unit to enforce the antitrust laws and appropriated no funds specifically for antitrust enforcement.<sup>367</sup> In 1890, for example, there were eighteen lawyers in the Department of Justice in Washington, D.C., overwhelmed with cases.<sup>368</sup> Although there were many more district attorneys, they were paid a fixed salary of \$200 per year plus fees paid by the government based on their caseload.<sup>369</sup> Antitrust cases, which presented difficulties simply because of their novelty, were unlikely to attract much enthusiasm under this incentive structure. Moreover, especially when the large combinations were likely to vigorously defend against any antitrust action, as they did in the actions against the Whiskey, Sugar, and Cash Register Trusts, neither state nor federal enforcement officials had much incentive to devote their limited time and resources to challenging combinations in the absence of any material public pressure.<sup>370</sup> And while some newspapers continued to rail against the trusts, for the most part the public was relatively acquiescent.<sup>371</sup>

366. See COMMERCE CLEARING HOUSE, *supra* note 363; Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366 (1970).

367. See Letwin, *supra* note 354, at 466–68 (describing the “poverty” of the Department of Justice in resources and manpower in the 1890s). See generally 1893 ATT’Y GEN. ANN. REP.; 1892 ATT’Y GEN. ANN. REP.; 1891 ATT’Y GEN. ANN. REP.

368. Letwin, *supra* note 354, at 466.

369. *Id.*

370. *Id.* at 467. For a criticism of the fee system by former a attorney general, see CUMMINGS & MCFARLAND, *supra* note 354, at 493 (“However, by far the greatest evil which beset the administration of federal justice in the nineteenth century was the fee system for the compensation for local federal officers.”). The fee system was abolished in 1896. *Id.* at 494.

371. On the public perceptions of the trusts at the time, see LOUIS GALAMBOS, *THE PUBLIC IMAGE OF BIG BUSINESS IN AMERICA, 1880–1940*, at 47–78 (1975).

371. Of course, another possibility was that the Department of Justice and the district attorneys simply shirked their responsibilities. See *Mr. Edmunds on Trusts*, N.Y. TIMES, Nov. 25, 1892, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F00C15>

This all changed by the beginning of the next decade. Beginning with the Panic of 1893, the country entered into its most severe economic depression to that date.<sup>372</sup> Marked by violent strikes and unemployment rates that exceeded 10 percent in at least five years,<sup>373</sup> the decade saw an enormous number of business failures. These same pressures brought a further round of combinations. In the aftermath of the depression, over 1800 firms were absorbed into horizontal consolidations of at least five competing firms.<sup>374</sup> This merger wave produced such giants as U.S. Steel, American Tobacco, International Harvester, Du Pont, Corn Products, Anaconda Copper, and American Smelting and Refining.<sup>375</sup> Antitrust enforcement, which became funded in 1903, responded with a new vigor, but that is another story.

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F93C5F1B738DDDAC0A94D9415B8285F0D3 (quoting Senator Edmunds as saying that “[t]he law is all right, the courts are all right, and the people are all right. Let the officers charged with the enforcement of the law do their full duty and Trusts and combinations will go to pieces as quickly as they sprang into existence”).

372. See generally ROBERT HIGGS, *THE TRANSFORMATION OF THE AMERICAN ECONOMY, 1865–1914* (1971); CHARLES HOFFMANN, *THE DEPRESSION OF THE NINETIES: AN ECONOMIC HISTORY* (1970); DOUGLAS STEEPLES & DAVID O. WHITTEN, *DEMOCRACY IN DESPERATION: THE DEPRESSION OF 1893* (1998).

373. Christina Romer, *Spurious Volatility in Historical Unemployment Data*, 94 J. POL. ECON. 1, 31 (1986).

374. LAMOREAUX, *supra* note 29, at 2.

375. RALPH L. NELSON, *MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895–1956*, at 34 (1959).