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Abstract: Scholars have long recognized that the states' authority to charter corporations bolstered their antitrust powers in ways that were not available to the federal government. But they have also argued that the growth of large-scale enterprises operating in national and even international markets forced states to stop prosecuting monopolistic combinations out of fear of doing serious damage to their domestic economies. Our paper has revised this conventional view by focusing attention on the lawsuits that minority shareholders brought against their own companies in state courts of law and equity, especially suits that challenged the anticompetitive use of voting trusts. Historically judges had been reluctant to intervene in corporations' internal affairs and had displayed a particular wariness of shareholders' private actions. By the end of the nineteenth century, however, they had begun to revise their views and to see shareholders' private actions as useful checks on economic concentration. Although the balance between judges' suspicion of and support for shareholders' activism shifted back and forth over time, the long-run effect was to make devices like voting trusts unsuitable for the purposes of economic concentration.

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

According to the conventional history of American antitrust policy, states took the lead in prosecuting monopolistic combinations in the late nineteenth century but then largely ceded the field to the federal government. Before Congress enacted the Sherman Act in 1890, a number of states had passed antitrust statutes, and their attorneys general actively deployed those laws against large-scale combinations.¹ Those prosecutions usually succeeded because the states could draw as well on their power to charter corporations. Indeed, most state-level antimonopoly cases in the late nineteenth century were actually *quo warranto* suits. Literally meaning “by what authority,” *quo warranto* proceedings allowed state courts to dissolve corporations that joined combines on the grounds that they had violated the terms of their state-granted charters.² Revocation of a corporation’s charter was, however, a drastic remedy that could hurt the economies of states that pursued it. Especially after New Jersey liberalized its general incorporation law in 1888, consolidations could relocate their corporate homes to a friendlier jurisdiction, leading to the loss of tax revenues and perhaps also production facilities and jobs. As a consequence, once the federal government began to pursue a more active antitrust policy in the early twentieth century, state initiatives waned.³

¹ Henry R. Seager and Charles A. Gulick, Jr., *Trust and Corporation Problems* (New York: Harper & Bros., 1929), Ch. XVII.

² James May, “Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918,” *University of Pennsylvania Law Review* 135 (Mar. 1987): 495-593; May, “Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918,” *Ohio State Law Journal* 50.2 (1989): 257-395; Paul Nolette, “Litigating the ‘Public Interest’ in the Gilded Age: Common Law Business Regulation by Nineteenth-Century State Attorneys General,” *Polity* 44 (July 2012): 373-399.

³ Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* (Baltimore: Johns Hopkins Press, 1955), 36-50, 235-368; Charles W. McCurdy, “The *Knight Sugar* Decision of 1895 and the Modernization of American Corporation Law, 1869-1903,” *Business History Review* 53 (Autumn 1979): 304-42;

That conventional history is fine as far as it goes, but, as we argue in this paper, it fails to capture some of the most distinctive features of the American regulatory system that emerged in the late nineteenth and early twentieth century. Even as states abandoned their direct challenges to trusts, they continued to use their powers over corporations to enforce competition. The difference was that the techniques they exploited were more subtle and relied to a much greater extent on litigation by private actors. We are not referring here to private antitrust suits; these were certainly important, but their contribution is well known.⁴ Rather, we seek to focus attention on the lawsuits that shareholders brought against their own companies. Derivative suits, for example, had emerged earlier in the century to provide minority investors in a corporation with a remedy against exploitative behavior by the majority in control. Fearing that shareholders would exploit such suits opportunistically, judges had viewed them with suspicion and had erected substantial barriers to their success. By the 1890s, however, judges who supported an antitrust agenda had come to realize that shareholders could be useful allies in the struggle against monopoly, and they took pains to help them shape these suits in ways that served competitive ends.

Lawsuits involving voting trusts were a particularly important part of this story. Voting trusts were agreements by which stockholders transferred their shares in a corporation to one or more trustees who then voted them on the transferees' behalf.⁵ Voting trusts could serve legitimate purposes. For example, they could be used to insure managerial stability or to induce

Naomi R. Lamoreaux, *The Great Merger Movement in American Business, 1895-1904* (New York: Cambridge University Press, 1985), Ch. 6.

⁴ Private antitrust suits have attracted significant attention because their numbers soared after the Second World War. See Steven C. Salop and Lawrence J. White, "Economic Analysis of Private Antitrust Litigation," *Georgetown Law Journal* 74 (Apr. 1986): 1001-1064; Daniel A. Crane, *Institutional Structure of Antitrust Enforcement* (New York: Oxford University Press, 2011), Ch. 3.

⁵ For an overview of voting trusts and their uses, see Harry A. Cushing, *Voting Trusts: A Chapter in Modern Corporate History* (New York: Macmillan, 1927), Ch. 1.

bankers to rescue a company in financial trouble. By the late nineteenth century, however, it had become clear that they could also serve more nefarious purposes. An investigation by the New York legislature in 1888 revealed that the Standard Oil Company and other large firms were using voting trusts to structure horizontal combinations.⁶ Although this use of the device faded after New Jersey's liberalized general incorporation law made it possible for consolidations to reorganize as holding companies, a couple of decades later the U.S. Congress's "Money Trust" hearings exposed the use of voting trusts by J. P. Morgan and allied bankers to control broad swaths of the American economy.⁷ Both revelations encouraged judges to rethink the legal rules governing voting trusts in ways that undermined their utility by ensuring that shareholders could withdraw from them at will. Ultimately, most state legislatures intervened by revising their statutes to permit voting trusts to be irrevocable for finite periods of time. They thus restored the device's usefulness for purposes traditionally regarded as legitimate, at the same time as they prevented voting trusts from being used as tools of monopoly control. This combination of juridical rethinking and statutory revision, we suggest, helps to explain the waning power of finance capital in the American economy.

Although we endeavor in this paper to broaden the understanding of the array of forces that states employed in service of antitrust policy, we also aim to contribute to the more general literature on American regulatory design, particularly the history of what political scientist Sean Farhang has called the "private enforcement regime."⁸ Most scholars who write about "the

⁶ New York, *Report of the Committee on General Laws on the Investigation Relative to Trusts* (Albany, New York: Troy Press, 1888)

⁷ See U.S. House of Representatives, "Report of the Committee Appointed ... to Investigate the Concentration of Control of Money and Credit," Report 1593, 62nd Cong., 3d Sess. (Washington: Government Printing Office, 1913).

⁸ Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton: Princeton University Press, 2010). See also David Freeman Engstrom, "Harvesting the Private Attorney General: Evidence from Qui Tam Litigation," *Columbia Law Review* 112 (Oct. 2012): 1244-1325. This literature focuses on the statutory provisions that empower private enforcement of the law in much the same way as the Sherman Act's

state” assess its performance through Weberian eyes and track its growth through the development of formal institutions that allowed officials to assert regulatory oversight over the economy.⁹ States began to build such institutions for antitrust purposes in the late nineteenth century, but they soon largely abandoned them in the face of economic pressures. Rather than giving up on competition policy, however, they pursued it in more indirect ways, relying increasingly on private shareholders’ suits to achieve antitrust ends. These efforts have been largely invisible to scholars. We thus offer this paper in the spirit of Brian Balogh’s *A Government Out of Sight*. Much of state competition policy in the early twentieth century was “hidden in plain sight,” but that did not make it any less important.¹⁰

Nineteenth-Century Federalism and the Challenge of the Trusts

Standard Oil sparked the antitrust movement when it embarked in the 1870s on an ambitious campaign to dominate the petroleum industry, making novel use of voting trust agreements to evade the restrictions on mergers imposed by state law.¹¹ Standard was an Ohio corporation and Ohio law, like that of other states at the time, prohibited corporations from holding stock in other companies. Standard could take over refineries within Ohio by buying their assets, but acquiring companies elsewhere posed legal difficulties, so Standard’s principals

treble-damages provision sought to stimulate private antitrust suits. We depart from this literature by highlighting the role played by enforcement mechanisms that were not anticipated by or embodied in statute.

⁹ The classic account of the slow development of formal regulatory institutions in the United States is Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (New York: Cambridge University Press, 1982).

¹⁰ Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America* (New York: Cambridge University Press, 2009), 380.

¹¹ The best account of Standard’s rise in the 1870s from 4 percent to 90 percent of the industry is Elizabeth Granitz and Benjamin Klein, “Monopolization by ‘Raising Rivals’ Costs’: The Standard Oil Case,” *Journal of Law and Economics* 39 (Apr. 1996): 1-47. But see also George L. Priest’s critique, “Rethinking the Economic Basis of the Standard Oil Refining Monopoly,” *Southern California Law Review* 85 (Mar. 2012): 499-557, and Klein’s convincing response in the same issue, “The ‘Hub-and Spoke’ Conspiracy that Created the Standard Oil Monopoly,” 459-498.

instead negotiated exchanges of stock with the owners of important out-of-state refineries, who in turn acquired competing producers in their home states. This arrangement, however, made it difficult for Standard's executives to assert managerial control over the acquisitions. To solve that problem, the company turned to the device of the voting trust. Although courts generally allowed majority shareholders within companies to use voting trusts to ensure managerial control, the device was untested as a tool of horizontal combination.¹² Standard first tried it out in 1872 when it arranged for stockholders in the Long Island Oil Company of New York to transfer their shares in trust to one of Standard's officers. Over the next few years Standard continued to make acquisitions in this way, but executives began to worry about complications that might arise if a trustee died or, worse, had a falling out with other officers. To avoid these potential problems, they restructured the arrangements in 1879 to substitute boards of three trustees for the individual officers. These agreements were then consolidated into one overarching contract in 1882 that brought all of the company's holdings under the control of an expanded board of trustees with powers very similar to those of the directors of a holding company.¹³

Standard's novel use of the voting trust inspired imitators in a number of other industries, ranging from sugar to cottonseed oil to whisky to lead.¹⁴ But it also provoked states to take action to prohibit this means of evading the law. More than a dozen states had already enacted

¹² For cases supporting such arrangements among shareholders, see *Faulds v. Yates*, 57 Ill. 416 (1870); and *Brown v. Pacific Mail Steamship Co.*, 4 F. Cas. 420 (1867). For a summary of the precedents, see *Griffith v. Jewett*, 9 Ohio Dec. Reprint 627 (1886).

¹³ For the details of the acquisitions and the various iterations of the trust agreement, see Allan Nevins, *Study in Power: John D. Rockefeller, Industrialist and Philanthropist* (New York: Charles Scribner's Sons, 1953), Vol. I, Ch. 21; Harold F. Williamson and Arnold R. Daum, *The American Petroleum Industry: The Age of Illumination, 1859-1899* (Evanston, Ill.: Northwestern University Press, 1959), 466-70; and Ralph W. Hidy and Muriel E. Hidy, *Pioneering in Big Business, 1882-1911* (New York: Harper & Brothers, 1955), 40-49. For the text of "The Standard Oil Trust Agreement," see William W. Cook, "Trusts": *The Recent Combinations in Trade, their Character, Legality and Mode of Organization* ... (New York: L. K. Strouse & Co., 1888), 78-89.

¹⁴ Seager and Gulick, *Trust and Corporation Problems*, 51.

antitrust laws before Congress passed the Sherman Antitrust Act in 1890, and additional states followed thereafter. By the end of the century twenty-seven (out of forty-five) states had criminalized combinations in restraint of trade or with intent to monopolize, and the number would rise to thirty-five by 1915.¹⁵

State attorneys general also began in the late 1880s to launch *quo warranto* suits to revoke the charters of corporations that participated in trusts.¹⁶ Ohio's took direct aim at the Standard Oil Company in 1888, seeking a court order to dissolve it on the grounds that shareholders had signed over control and management to the trust in clear violation of the company's charter.¹⁷ Although Ohio's supreme court agreed that Standard had violated its charter, instead of dissolving the company it simply ordered it to sever its relationship to the trust.¹⁸ At about the same time, however, attorneys general in four other states (California, Illinois, Nebraska, and New York) filed similar actions against other combines, and in each of these cases the courts ordered the companies dissolved. In addition, Louisiana secured an injunction prohibiting the cotton oil trust from doing business in the state.¹⁹ Because these cases were brought under state incorporation law, prosecutors had to show only that the companies had violated the terms of their charters or that "foreign" corporations (those chartered by other states)

¹⁵ U.S. Bureau of Corporations, *Trust Laws and Unfair Competition* (Washington, DC: Government Printing Office, 1916), 178; Seager and Gulick, *Trust and Corporation Problems*, 341-43; "Legislation: A Collection and Survey of State Antitrust Laws," *Columbia Law Review* 32 (1932): 347.

¹⁶ On the history of such actions and their broader use in the late nineteenth century, see Nolette, "Litigating the 'Public Interest.'"

¹⁷ According to Allan Nevins, Watson learned about the agreement from Cook's 1888 book, *Trusts*, which, in addition to reprinting the Standard Oil Trust Agreement, argued that the companies involved had violated their charters and challenged government officials to take appropriate action. See *Study in Power*, Vol. II, 229-230. Watson's "Amended Petition" is reprinted in William M. McKinney, *The American and English Corporation Cases*, Vol. 36 (Northport, NY: Edward Thompson Co, 1892), 2-15. On the filing of the suit, see also Bruce Bringhurst, *Antitrust and the Oil Monopoly: The Standard Oil Cases, 1890-1911* (Westport, CT: Greenwood Press, 1979), 12-15.

¹⁸ Bringhurst has convincingly criticized the court's lesser penalty as ineffectual. See *Antitrust and the Oil Monopoly*, Ch. 1.

¹⁹ For information on these and later suits, see Nolette, "Litigating the 'Public Interest,'" 384-393; and May, "Antitrust Practice and Procedure," 500-501.

did not conform to state law. There was no need even to explore the extent to which the agreements restrained trade. As New York's high court declared in a case involving the sugar trust, "[T]he defendant corporation has violated its charter and failed in the performance of its duties.... Having reached that result it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade...."²⁰

As scholars have noted, the simple fact that the corporations involved in trusts were created and governed by charters granted by their states of domicile, in turn, gave those states a powerful antitrust weapon that the federal government did not possess.²¹ A state could dissolve a corporation it had authorized if the company was proven to have violated its charter; it could also exclude corporations chartered in other states that did not conform to its laws. The federal government, by contrast, was limited to the remedies of fines and imprisonment authorized by the Sherman Act. Some contemporaries thought that the regulatory powers of the states took precedence over, and hence constrained, those of the federal government.²² Others worried that federal intervention would undermine the states' authority over their corporate creatures. As legal historian Charles McCurdy has shown, Chief Justice Melville Fuller's infamous distinction between manufacturing and commerce in *United States v. E. C. Knight* (1895) was a deliberate effort to preserve the states' regulatory capacity to prevent companies that operated within their bounds from joining combines. If the Court had applied the U.S. Constitution's commerce clause, it would have preempted state law, and Fuller did not want to take such a step if he could

²⁰ *People v. North River Sugar Refining*, 121 N.Y. 582 (1890) at 626.

²¹ See McCurdy, "Knight Sugar Decision"; and Lamoreaux, *Great Merger Movement*, Ch. 6.

²² See, for example, the views of President Grover Cleveland's attorney general, Richard Olney, in U.S. Attorney General, *Annual Report* (Washington, DC: Government Printing Office, 1893), xxvi-xxvii. See also Cleveland's assertion that states had sufficient prosecutorial powers to rein in the trusts in his "Fourth Annual Message," (Dec. 7, 1896) in *Addresses and Papers of President Grover Cleveland*, ed. Albert Ellery Bergh (New York: Unit Book Publishing Co., 1909), 392.

avoid it.²³ Subsequent attempts to remedy the federal government's lack of authority over corporations by securing a federal incorporation law failed.²⁴

State authority did not, however, necessarily translate into action. State attorneys general exercised prosecutorial discretion about whether or not to proceed against trusts, and they were subject to political pressure on both sides of the issue.²⁵ At one extreme, Ohio's attorney general filed suit against Standard Oil despite overt threats to his political future from Republican Party bosses.²⁶ At the other, Massachusetts' attorney general refused to take action despite a concerted newspaper campaign demanding that he move against the trusts.²⁷ Although New York's attorney general filed a *quo warranto* suit against the American Sugar Refining trust when it sought to close down a plant in the state, no official had previously taken any action against the combine, even though it had been in existence for some years and controlled all the sugar

²³ McCurdy, "Knight Sugar Decision." The case was *United States v. E. C. Knight*, 156 U.S. 1 (1895). See also Justice Stephen J. Field's decision in *Paul v. Virginia*, refusing to grant corporations the privileges and immunities of citizens out of fear of provoking a race to the bottom that would enable "[t]he principal business of every State" to be "controlled by corporations created by other States." The case involved insurance, and to come to this determination, Field had to rule that "[i]ssuing a policy of insurance is not a transaction of commerce." 75 U.S. 168 (1868) at 182-183.

²⁴ Melvin Urofsky, "Proposed Federal Incorporation in the Progressive Era," *American Journal of Legal History* 26 (Apr. 1982): 160-183; Arthur M. Johnson, "Antitrust Policy in Transition, 1908: Ideal and Reality," *Mississippi Valley Historical Review* 48 (Dec. 1961): 415-434; Martin Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, the Law, and Politics* (Cambridge: Cambridge University Press, 1988), 228-285; Daniel A. Crane, "The Dissociation of Incorporation and Regulation in the Progressive Era and the New Deal," in *Corporations and American Democracy*, ed. Naomi R. Lamoreaux and William J. Novak (Cambridge, Mass.: Harvard University Press, 2017), 109-138.

²⁵ Most attorneys general were popularly elected during this period. Nolette, "Litigating the 'Public Interest,'" 377, 394. Roscoe Pound argued that state attorneys general had ample statutory authority to investigate *quo warranto* abuses, yet they rarely exercised that power. See "Visitatorial Jurisdiction over Corporations in Equity," *Harvard Law Review* 49 (Jan. 1936), 369-395.

²⁶ Marcus Hanna put the threat on paper in a letter to Attorney General David K. Watson: "From a party standpoint, interested in the success of the Republican party, and regarding you as in the line of political promotion, I must say that the identification of your office with litigation of this character is a great mistake." A later attorney general claimed that Watson had been offered bribes on six different occasions to drop the case. Bringham, *Antitrust and the Oil Monopoly*, 14.

²⁷ Nolette, "Litigating the 'Public Interest,'" 395.

refineries in the state. Nor did it challenge any of the other trusts that, like Standard Oil and the Cotton Oil Trust, had headquarters in New York City.²⁸

Even when attorneys general had the political will to bring a *quo warranto* suit, moreover, they might lack the administrative capacity. Some of the early suits relied on private parties to initiate the complaint, coordinate the gathering of evidence, and/or fund the proceedings. For example, the Illinois case against the Chicago Gas Trust hinged on the activism of the Citizens' Association of Chicago. The state's 1872 general incorporation law stipulated that corporations could only be formed for legal purposes and required them to declare their purpose along with other information when registering with the secretary of state.²⁹ Yet no one in that office seems to have noticed that, contrary to law, the Chicago Gas Trust Company had been organized in 1887 to control all the companies distributing gas in that city. Francis Peabody, the president of the Citizens' Association of Chicago (CAC), a municipal reform league founded after Chicago's great fire of 1874, brought this fact to the attention of the state attorney general, George Hunt, in 1888 and requested that he bring suit against the illegal corporation.³⁰ Hunt agreed with Peabody's assessment, but lacked funds to prepare the case. At its last session, the legislature had made only the most meager appropriation for his office: \$2,500 for a clerk, \$800 for a stenographer, \$700 for a porter and messenger (who also worked for the Supreme Court Reporter), and \$2,000 for all other expenses.³¹ The CAC responded to Hunt's plea for help by

²⁸ Wayne D. Collins, "Trusts and the Origins of Antitrust Legislation," *Fordham Law Review* 81 (April 2013): 2279-2348 at 2327-2328.

²⁹ Illinois General Assembly, "An Act concerning corporations," in force July 1, 1872, §1-2. Unless otherwise noted, all citations to laws are from the State Session Laws collected by Heinonline, <https://www.heinonline.org/HOL/Index?index=sslusstate&collection=ssl>.

³⁰ On the founding of the Citizens' Association of Chicago, see "Address by President Franklin MacVeagh," (Sept. 11, 1874) in *Addresses and Reports of the Citizens' Association of Chicago, 1874-1876* (Chicago: Hazlitt & Reed, 1876), 3, 8. On the CAC complaint to Hunt, see Illinois Attorney General, *Biennial Report* (Springfield, IL: State Printer, 1890), 35.

³¹ "An Act to provide for the ordinary and contingent expenses of the State government . . .," approved June 15, 1887.

paying for a special assistant, and with this aid the attorney general brought a *quo warranto* suit against the company.³² The CAC's money was well spent. Writing for the Illinois Supreme Court, Justice Benjamin Magruder affirmed the CAC's position, ruling that the Chicago Gas Trust Company had used "the General Incorporation Law to secure a special privilege, immunity, or franchise ... for a purpose forbidden by the Constitution." "To create one corporation that it may destroy the energies of all other corporations of a given kind, and suck their life-blood out of them, is not a 'lawful purpose,'" Magruder declared, and he ordered the company dissolved.³³

Although the *Chicago Gas Trust* suit had a successful outcome, the litigation had depended on the willingness, and capacity, of a private voluntary association to initiate and fund the effort. Pennsylvania similarly obtained help from an association of independent oil producers to bring its *quo warranto* suit against Standard Oil.³⁴ As a general rule, however, state officials could not depend on such associations to help them enforce the antitrust laws. The members of most organizations were too diverse both in their interests and in their financial means to overcome the collective action problems involved in committing significant resources to what many regarded as a governmental responsibility.

According to the conventional narrative, the *quo warranto* suits initiated in the late 1880s marked the highpoint of state antitrust activity. State officials increasingly recognized that dissolving a corporation and banning a foreign corporation from the state were penalties too drastic—too threatening to jobs and tax revenues—to be much used, and they began to rely on

³² Illinois Attorney General, *Biennial Report*, 41.

³³ *People v. Chicago Gas Trust*, 130 Ill. 268 (1889) at 298.

³⁴ See Chester M. Destler, *Roger Sherman and the Independent Oil Men* (Ithaca, NY: Cornell University Press, 1967), 83-193.

essentially the same remedies as the federal government.³⁵ As a result, when federal authorities stepped up their enforcement efforts in the early twentieth century, state activity waned.³⁶

According to the conventional narrative, moreover, the powers that states exercised over their corporate creatures had already been weakened by New Jersey's 1888 amendments to its general incorporation law. The amendments enabled corporations to hold stock in other corporations, rendering voting trusts unnecessary for the purposes of consolidating managerial control. As combines abandoned the trust form in favor of New Jersey charters, other states responded by engaging in what many scholars have termed a race to the bottom, rushing to enact similar legislation to prevent companies from relocating their corporate domiciles.³⁷

Although this account is consistent with the evidence in its broad outlines, it is misleading in two important ways. First, it overstates the extent to which the chartermongering competition undermined the regulatory provisions embedded in state antitrust and corporation law.³⁸ Although many states followed New Jersey's lead and enacted legislation permitting corporations to hold stock in other enterprises, their antitrust laws continued to prohibit such combinations if they restrained trade or tended to create a monopoly. New Jersey itself backtracked in 1913, enacting a set of strict antitrust statutes known as the "Seven Sisters" that

³⁵ By Nolette's count ("Litigating the 'Public Interest,'" 388), there were only four more *quo warranto* suits against "trusts"—two successful ones in Illinois that dissolved the United States School Furniture Company (1894) and the Distilling and Cattle Feeding Company (1895), one in Missouri against the Armour Packing Company (1902) that was settled with a fine, and one in Colorado (1902) against the American Smelting and Refining Company (1902) that was dismissed by the court on procedural grounds.

³⁶ Thorelli, *Federal Antitrust Policy*, 36-50, 235-368; McCurdy, "Knight Sugar Decision"; Lamoreaux, *Great Merger Movement*, Ch. 6.

³⁷ This point was made as early as 1904 in U.S. Commissioner of Corporations, "Report," House Doc 165, 58th Cong. 3d Sess. (Washington, DC: Government Printing Office 1904), 40. But see also Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933); William L. Cary, "Federalism and Corporate Law: Reflections upon Delaware," *Yale Law Journal* 83 (Mar. 1974): 663-705; and William G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton, NJ: Princeton University Press, 1997).

³⁸ On this point, see Bruce G. Carruthers and Naomi R. Lamoreaux, "Regulatory Races: Effects of Jurisdictional Competition on Regulatory Standards," *Journal of Economic Literature* 54 (Mar. 2016): 52-97 at 70-76.

prohibited mergers for the purpose of restraining competition.³⁹ Illinois even imbedded such a prohibition in its general incorporation law in 1919, when the legislature revised the statute to permit holding companies:

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation, where the effect of such acquisition may be substantially to lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain trade in this State or in any section of community thereof, or tend to create a monopoly.⁴⁰

As we will show, this complementarity of state corporation laws and antitrust policy would continue to constrain large firms' anticompetitive behavior long after states supposedly abandoned the field to the federal government.

Second, the conventional story misses the ongoing role of private lawsuits (as opposed to private support for public lawsuits) in enforcing the antitrust policy. As is well known, both the state and federal statutes included provisions that encouraged private suits. Section 7 of the Sherman Act gave a person injured by anticompetitive behavior the right to sue in federal court and "recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."⁴¹ State statutes varied, but a considerable number included similar inducements. According to one tally, nine states allowed recovery of actual damages, two double damages, and nine treble damages.⁴² Counts of cases filed under the Sherman Act show that the number of private suits increased from 16 in the 1890s to 74 in the first decade of the twentieth

³⁹ These provisions were rigorous enough to spur large companies to take out Delaware charters instead. See Christopher Grandy, "New Jersey Corporate Chartermongering, 1875-1929," *Journal of Economic History* 49 (Sept. 1989): 677-92 at 689.

⁴⁰ "An Act in relation to corporations for pecuniary profit," approved June 28, 1919, §7.

⁴¹ "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2 1890, <https://www.ourdocuments.gov/doc.php?flash=false&doc=51&page=transcript>, consulted 19 Aug. 2018.

⁴² U.S. Bureau of Corporations, *Trust Laws and Unfair Competition*, 216.

century.⁴³ Although no one has made a comprehensive count of filings at the state level, the legal scholar James May estimated that the number of state-level private antitrust suits increased from slightly more than 70 in the 1880s to nearly 200 in the first decade of the twentieth century.⁴⁴ As we show in the next section, moreover, private antitrust enforcement was only the tip of the iceberg. Private litigation under state incorporation law also played an important role in advancing competition policy.

The Antitrust Applications of Shareholders' Derivative Suits

If state attorneys general lacked the capacity (or the will) to ensure that corporations conformed to the law, and if voluntary associations were only sporadically forthcoming with aid, there was still the possibility that shareholders would take action. Shareholders could bring *direct action* suits in a court of law if the corporation's officers had violated their rights, for example, by preventing them from voting in a general meeting, or by denying them access to the corporation's books. Shareholders could also file *derivative* suits in a court of equity if they had evidence that the corporation's officers and directors had engaged in illegal or fraudulent activities to the detriment of the firm. The injured party in such suits was technically the corporation itself, but if it could be demonstrated that the corporation was under the control of the wrongdoers, shareholders had legal standing to take action.⁴⁵ Most shareholders' suits

⁴³ Richard A. Posner, "A Statistical Study of Antitrust Enforcement," *Journal of Law and Economics* 13 (Oct. 1970): 365-419 at 371.

⁴⁴ May used the number of private cases reported under the subheading "Restraint of Trade or Competition in Trade" in the "Contracts" chapter of the *American Digest* and the *First* and *Second Decennial Digests* as a proxy for the trend. May, "Antitrust Practice and Procedure," 503 n. 61. According to the New York State Bar Association's "Report of the Special Committee to Study the New York State Antitrust Laws" (1957), "most reported adjudications" under the state's 1899 antitrust law, known as the Donnelly Act, "have been private actions," even though the Act included "no express authorization" for such suits and no provision for multiplying damage awards (46a).

⁴⁵ See J.B., "Distinguishing between Direct and Derivative Shareholder Suits," *University of Pennsylvania Law Review* 110 (Jun. 1962): 1147-1157.

involved disputes over internal business decisions and hence had nothing to do with competition policy. However, during the merger waves of the late nineteenth and early twentieth centuries, combines often acquired businesses with the aim of shutting them down. When shareholders who were adversely affected by the closings launched derivative suits, they bolstered their cases by claiming that the majority were using their control for illegal purposes under the antitrust laws. In this way, private suits about corporate governance could implicate broader issues of competition policy.

Nineteenth-century policy makers were always of two minds about shareholders' powers. On the one hand, they thought shareholders could serve important public policy goals by acting as a check on those in control of corporations. On the other, they worried that shareholders might pursue their own opportunistic ends, or that they might clog the courts with disputes that were really just differences of opinion about business strategy. This ambivalence is apparent in the laws governing shareholders' voting rights. In the late nineteenth century, for example, a number of states sought to bolster the power of minority shareholders in corporate decision-making by mandating cumulative voting for directors.⁴⁶ Under a cumulative voting regime, shareholders received as many votes as there were directors being elected and had the option of spreading them over an equal number of candidates, voting them all for one candidate, or anything in between. The idea was that cumulative voting increased the likelihood that minority shareholders would have representation on the board. But legislatures also moved to curb shareholders' ability to block decisions, like mergers, that under the common law had required

⁴⁶ For examples of requirements for cumulative voting, see Illinois General Assembly, "An Act concerning corporations," in force July 1, 1872, §3; New York Legislature, "An Act to provide for the organization and regulation of certain business corporations," passed June 21, 1875, §26; and Pennsylvania General Assembly, "An Act to provide for the incorporation and regulation of certain corporations, approved Apr. 29, 1874, §10. By 1900, 17 states had such rules. See Charles Williams, *Cumulative Voting for Directors* (Boston, MA: Graduate School of Business Administration, Harvard University, 1951), 7-8 and Ch. 2.

unanimous consent. Following New Jersey's lead in 1888, states routinized the merger process by setting a voting threshold for approval and providing a procedure for buying out objecting stockholders at the going market price for the company's shares. The voting threshold could be lower or higher depending on where policy makers wanted to set the balance of power between shareholders and directors. New Jersey's law required only a simple majority vote, but California, Illinois, and Massachusetts mandated two-thirds.⁴⁷

Judges displayed a similar ambivalence in their handling of derivative suits. The purpose of the suits was to provide shareholders with a remedy in equity against exploitation by corporate directors.⁴⁸ Judges worried, however, that shareholders would use them to extract additional income for themselves or that the courts would be deluged with cases challenging directors' business decisions, and so they imposed high evidentiary requirements for such actions. Not only did shareholders have to demonstrate that they had no means of addressing the problem through normal corporate governance procedures, they also had to show that there was illegal or fraudulent conduct on the part of the directors. If the disagreement was simply a matter of "business judgment," or the directors' discretion, then the courts would not intervene even if the corporation had sustained heavy losses.⁴⁹ The courts were particularly concerned with preventing

⁴⁷ New Jersey General Assembly, "An Act relating to the consolidation of corporations . . .," approved Apr. 17, 1888; California General Assembly, "An Act substituting for the existing title one of part four of division first of the Civil Code . . .," approved June 12, 1931, §361; Illinois General Assembly "An Act in relation to corporations for pecuniary profit," approved June 28, 1919, §67; Massachusetts General Court, "An Act relative to business corporations," approved June 17, 1903, §40.

⁴⁸ The concept of a derivative suit was first laid out by New York Chancellor James Kent in *Robinson v. Smith*, 3 Paige 222 (1832). According to Bert S. Prunty, Jr., Kent had earlier hinted at a similar idea in a dictum in the 1817 case of *Attorney General v. Utica Ins. Co.* Prunty also traces the notion to two other New York chancery cases that preceded *Robinson v. Smith* and to an Ohio case in 1831. See "The Shareholders' Derivative Suit: Notes on its Derivation," *New York University Law Review*, 32 (issue 5, 1957): 980-994 at 986-988. See also the citations in *Dodge v. Woolsey*, 59 U.S. 331 (1856) at 341, in which the U.S. Supreme Court confirmed the jurisdiction of equity courts in such cases.

⁴⁹ See *Hodges v. New England Screw Co.*, 1 R.I. 312 (1850) and 3 R.I. 9, 18 (1853); *Brewer v. Boston Theatre*, 104 Mass. 378 (1870); *Wardell v. Railroad Company*, 103 U.S. 651 (1880); *Dunphy v. Traveller Newspaper Assoc.*, 146 Mass. 495 (1888); *Leslie v. Lorillard*, 110 N.Y. 519 (1888); *Edison v. Edison United*

opportunistic shareholders from holding up deals that corporate officers identified as financially necessary or potentially lucrative.⁵⁰

Especially in the early years of the antitrust movement, judges' skepticism about derivative suits carried over into cases involving anticompetitive mergers. In 1891, for example, a Louisiana court rebuffed a minority shareholder in the Bienville Oil Works, who sued to recover damages after the company was dissolved and its assets sold to the American Cotton Oil Trust. A district court in the Parish of Orleans had issued an injunction prohibiting the trust from doing business in the state because it had not incorporated under state laws, paid no taxes, and aimed to monopolize Southern oil mills.⁵¹ Piggybacking on this case, the Bienville shareholder claimed that the directors had, "by a secret and fraudulent combination and bargain with the American Oil Trust, an alleged unlawful organization," transferred their stock to the trust "to subserve its own interests, and in disregard of their obligations to the other stock holders and in violation of their rights, ... thereby destroying the value of its stock other than that held by the trust."⁵² The Louisiana Supreme Court determined, however, that the plaintiff—"an unfortunate and improvident loser"—could have followed the other stockholders' example and exchanged his shares for certificates in the trust. "Had he done so, he would have realized the fabulous profits which he says they have ... reaped." Even after the deadline for the exchange expired, he was offered some money for his shares, but he held out for a higher price. His losses were his own fault, and he had "no occasion legally to complain." In the absence of any express statutory

Phonograph Co. 52 N.J. Eq. 620 (1894); *Burden v. Burden*, 159 N.Y. 287 (1899); *Hawes v. Oakland*, 104 U.S. 450 (1881).

⁵⁰ William J. Carney, "Fundamental Corporate Changes, Minority Shareholders, and Business Purposes," *American Bar Foundation Research Journal* 1980 (Winter 1980): 69-132.

⁵¹ See *State v. American Cotton Oil Trust*, 40 La. Ann. 8 (1888), upholding the lower court's dismissal of an injunction against a brokerage firm for selling the trust's securities, as stated in *State v. American Cotton Oil Trust*, 1 *Railway and Corporate Law Journal* 1 (1887): 509-513.

⁵² *Trisconi v. Winship*, 43 La. Ann. 45 (1891) at 47-48.

prohibition or fraud, the requisite majority of stockholders had “absolute” discretion to wind up the corporation’s affairs “for reasons by them deemed sufficient,” and the court had no authority to second-guess their decision.⁵³

Despite this blanket assertion of the court’s lack of authority, judges were willing to limit shareholders’ “absolute” discretion in cases where government officials, rather than minority shareholders, challenged a merger as *ultra vires*. For example, in an action brought by Nebraska’s attorney general to revoke the charter of a corporation whose shareholders sold its property to another corporation as a step toward acquisition by a trust, the court ruled that “the fact that the corporation has authority to put an end to its existence by a vote of a majority of its stockholders ... does not authorize it to terminate its existence by a sale and disposal of all its property and rights.”⁵⁴ Similarly, New York’s successful *quo warranto* suit against the sugar trust was triggered by the acquisition and immediate closure of a refinery within the state.⁵⁵

Judges were reluctant, however, to allow shareholders to usurp the attorney general’s powers and make claims on the basis of public policy. Thus Illinois’s supreme court dismissed a suit by a shareholder who sought the dissolution of the National Linseed Oil Company on the grounds that it was an illegal combination, ruling that “only the State can complain of injury to the public or that public rights are being interfered with, and enforce a forfeiture of defendant’s franchise for that reason.”⁵⁶ In this case, the state’s activist attorney general, Maurice Moloney,

⁵³ *Trisconi v. Winship*, 43 La. Ann. 45 (1891) at 49-50. For cases in other states brought by minority shareholders that had similar outcomes, see *Ellerman v. Chicago Junction Railways*, 49 N.J. Eq. 217 (1891); *Rafferty v. Buffalo City Gas Co.*, 56 N.Y.S. 288 (1899).

⁵⁴ *State v. Nebraska Distilling Co.*, 29 Neb. 700 (1890) at 719.

⁵⁵ Collins, “Trusts and the Origins of Antitrust Legislation,” 2327-2328. Collins argues that many of the *quo warranto* suits were responses to plant closures.

⁵⁶ *Coquard v. National Linseed Oil Co.*, 171 Ill. 480 (1898) at 484. In this case, the plaintiff had another strike against him—he had been a party to the trust.

followed up on the shareholder's action by filing a *quo warranto* suit, which National Linseed belittled in a statement as just "a rehash of a bill previously filed" by a stockholder.⁵⁷

Nonetheless, as the great merger movement gained momentum, judges who supported the anti-monopoly agenda began to lay out a legal justification for allowing private derivative suits that served public antitrust objectives. Only one year after it dismissed the shareholder's case against National Linseed, the Illinois Supreme Court permitted a shareholder to block a state-chartered corporation from disposing of its factory to a combine, the American Glucose Company (a New Jersey corporation).⁵⁸ Justice Magruder wrote the opinion in the case. A thrice-elected Republican jurist, he had earlier penned the decision dissolving the Chicago Gas Trust, and he would be remembered, after his death, for his "righteous indignation at the schemes of fraud and indiscretion by which some of the great enterprises of modern business life have been accomplished."⁵⁹ After a detailed recounting of the glucose combination's scheme to have "six corporations shut down their manufactories, and abandon their business" for the purpose of reducing competition in the industry, Magruder ruled that the stockholder who brought the case had standing to sue because the value of his shares would be adversely affected by the planned abandonment of the plant. "If the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of the business by another new corporation, ... the dissolution is practically a fraud on dissenting stockholders."⁶⁰ That declaration would normally have been enough to decide the case and allow the dissenting shareholders to prevent the dissolution, but Magruder went further. Citing William Cook's treatise on corporations, he

⁵⁷ "Illinois Corporations in Court," *Paint, Oil and Drug Review* 21 (Jan. 15, 1896), 11. See also *People v. National Linseed Oil Co.*, as reported in *Biennial Report of the Auditor of Public Accounts to the Governor of Illinois*, Nov. 1896 (Springfield, IL: State Printer, 1897), 182-194.

⁵⁸ *Harding v. American Glucose Co.*, 182 Ill. 551 (1899).

⁵⁹ "Memorial of the Late Benjamin Drake Magruder of the Illinois Supreme Court," *Chicago Legal News*, 43 (1910): 85.

⁶⁰ *Harding v. American Glucose Co.*, 182 Ill. 551 (1899) at 601, 628, 632.

asserted that selling the company to the combine exceeded the powers of the corporate directors and violated public policy and law.⁶¹

[A]ny act or proposed act of the corporation, or of the directors, or of a majority of the stockholders, which is not within the expressed or implied powers of the charter of incorporation, or of association—in other words, any *ultra vires* act—is a breach of the contract between the corporation and each one of its stockholders.”⁶²

Therefore, “any one or more of the stockholders may object thereto, and compel the corporation to observe the terms of the contract as set forth in the charter.”⁶³

This ruling granted shareholders formidable powers to challenge anti-competitive combinations. That the court intended to embolden shareholders to contest mergers was confirmed a few years later in *Dunbar v. American Telephone and Telegraph Company* (AT&T), an opinion written by another long-serving Republican jurist on the Illinois Supreme Court, Jacob W. Wilkin. Shareholders in the Kellogg Switchboard and Supply Company had brought suit to prevent AT&T from acquiring it.⁶⁴ As in the *American Glucose* case, the court held that AT&T had purchased the company’s stock with “the unlawful purpose and intention of putting the Kellogg company out of business or so using and controlling it as to prevent rivalry in business and creating a monopoly.”⁶⁵ The acquisition “was an attempt to exercise a power which [AT&T] did not have”; to allow it go ahead “would be against the law of this State and its public

⁶¹ See, for example, *Harding v. American Glucose Co.*, 182 Ill. 551 (1899) at 615.

⁶² *Harding v. American Glucose Co.*, 182 Ill. 551 (1899) at 631. The citation is to William W. Cook, *A Treatise on the Law of Corporations Having a Capital Stock* (4th edn; Chicago: Callaghan, 1898), Vol. 2, §69-70.

⁶³ *Harding v. American Glucose Co.*, 182 Ill. 551 (1899) at 631.

⁶⁴ *Dunbar v. American Telephone and Telegraph Co.*, 224 Ill. 9 (1906) at 26. For another similarly decided case, see *Bigelow v. Calumet & Hecla Mining Co.*, 155 F. 869 (1907).

⁶⁵ *Dunbar v. American Telephone and Telegraph Co.*, 224 Ill. 9 (1906) at 22. The judge cited the *Chicago Gas Trust* and *American Glucose* cases, as well as the U.S. Supreme Court’s decision in *Northern Securities v. U.S.*, 193 U.S. 197 (1905).

policy.”⁶⁶ If AT&T’s purchase furthered monopoly, “then it would seem to follow that each and every stockholder” in the switchboard company had the right to sue to restrain AT&T from voting “stock which it did not and could not legally own.”⁶⁷ In other words, every individual shareholder was potentially a weapon in the struggle against monopoly.

Judges nonetheless remained wary of opportunistic shareholders and, especially where antitrust concerns were not involved, continued to impose high barriers to derivative suits. The very next year after the Illinois Supreme Court found against AT&T in *Dunbar*, an appeals court in the same state dismissed a suit by shareholders in the Universal Voting Machine Company who charged that the directors had “fraudulently contrived to wreck” their company by transferring its property to an out-of-state corporation. The court distinguished the case from *Dunbar*, which also involved a foreign corporation, on the grounds that the transfer did “not appear to have been performed for the furtherance of any illegal trust or combination.” Because the acquisition was not “contrary to the general public policy of the state of Illinois,” the court would not intervene. “To grant the relief prayed would be clearly an interference with the internal management of a foreign company” and therefore beyond the court’s jurisdiction.⁶⁸ Nonetheless, the *Dunbar* and *American Glucose* cases show how judges’ concerns about anticompetitive mergers could override their worries about derivative suits. Whether opportunistic or not, shareholders offered jurists a valuable ally in an environment where attorneys general often lacked either the capacity or the will to move against monopolistic combinations.

⁶⁶ *Dunbar v. American Telephone and Telegraph Co.*, 224 Ill. 9 (1906) at 25.

⁶⁷ *Dunbar v. American Telephone and Telegraph Co.*, 224 Ill. 9 (1906) at 26.

⁶⁸ *Sprague v Universal Voting Machine Co.*, 134 Ill. App. 379 (1907) at 380, 384-385.

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

Just as legal thinking about shareholders' derivative suits evolved in response to large-scale combinations, so too did the rules governing shareholders' rights with respect to corporate voting trusts. Traditionally judges had seen nothing wrong with voting trusts and had generally been unreceptive to shareholders' suits to invalidate them. The rise of Standard Oil and other similar combines, however, seems to have subtly changed their views and by the late 1880s, judges began to question the validity of voting trusts in which stockholders *irrevocably* transferred control over their shares to a set of trustees—precisely the kinds of agreements that companies like Standard were using to assert managerial authority over their acquisitions. Once the trusts moved to reorganize as New Jersey corporations this shift in judicial thinking lost much of its momentum. It revived, however, after revelations during the Pujo “money trust” hearings that bankers like J. P. Morgan were using voting trusts to control key sectors of the American economy, and the resurgence of this view threatened to make voting trusts unusable even for purposes generally regarded as legitimate.

The first judicial turn against irrevocable voting trusts began with a local court decision, handed down in Standard's home state of Ohio during a period when concern about horizontal combinations was rising. The case, *Griffith v. Jewett* (1886), had its origins in a battle for control of the Cincinnati, Hamilton & Dayton Railroad waged by representatives of the Erie railroad; the Erie's former president, Hugh J. Jewett; and other railroad interests.⁶⁹ The suit was

⁶⁹ This case was actually the second of two. In the first case, a trust was formed to transfer control of the Ohio railroad to the New York, Lake Erie & Western Railroad in exchange for a guarantee to participating shareholders of dividends of six percent a year. In 1885, a shareholder not in the trust brought suit to have the agreement declared void. The court complied, finding that the trust had illegally transferred control of an Ohio corporation to a New York corporation. Additionally, the shareholders in the trust had violated their duty to fellow stockholders “to vote for directors of the company with an eye singly to its best interests.” Those shareholders had effectively “sold their power to vote” their stock to New York financiers. Such a sale was illegal “for much the same reason” as would be the “sale of his vote by a citizen at the polls.” The trust was subsequently reconstituted to meet

brought by investors allied with Collis P. Huntington after they were refused permission to withdraw from a voting trust that Jewett controlled. Although the judge, following precedent, found nothing illegal about the trust agreement *per se*, he broke new ground by ruling that shareholders could not be prevented from pulling out of it if they so desired. Voting trusts could not be irrevocable, he asserted, because otherwise “it may come to pass that the ownership of a majority of the stock of a company may be vested in one set of persons, and the control of the company irrevocably invested in others.” Such a state of affairs would be “intolerable” and contrary to the “universal policy” of law that “the right to vote is an incident to the ownership of stock, and [cannot] exist apart from it.”⁷⁰ This “intolerable” state of affairs, of course, was exactly what was happening at that very moment in the companies acquired by Standard Oil and the other trusts, although the judge did not make the connection in his opinion.

The decision in *Griffith v. Jewett* was reported in the *Weekly Law Bulletin* and, either in through that publication or through press coverage of the conflict, it came to the attention of Simeon E. Baldwin, a prominent professor at the Yale Law School and later chief justice of the Connecticut Supreme Court.⁷¹ Baldwin agreed to represent a group of shareholders seeking to withdraw from a voting trust formed to transfer control over the Shepaug, Litchfield & Northern Railroad to the Mercantile Trust Company of New York, and he probably brought the *Griffith*

the court’s objections, leading to the second case. Simeon E. Baldwin, “Voting-Trusts,” *Yale Law Journal* 1 (Oct. 1891): 1-15 at 6-8. For the first case, see *Hafer v. New York, Lake Erie & Western Railroad Co.*, *Weekly Law Bulletin* 15 (27 July 1885), 68-72 at 71. The disputes received extensive coverage in the press, in both New York and Cincinnati. See, for examples, “The E., H. and D.-Erie Contract,” *Cincinnati Enquirer*, April 24, 1885, 5; “Taking Mr. Jewett’s Side,” *New York Times*, May 19, 1885, 5; “Progress in the C., H. and D. Case,” *Cincinnati Enquirer*, June 9, 1886, 6.

⁷⁰ *Griffith v. Jewett*, 9 Ohio Dec. Reprint 627 (1886).

⁷¹ “Simeon Eben Baldwin,” Museum of Connecticut History, <https://museumofcthistory.org/2015/08/simeon-eben-baldwin/>, accessed Feb. 27, 2019. Baldwin footnoted the *Weekly Law Bulletin* as his source for the case in “Voting Trusts,” 10, but he also mentioned that the case had been cited approvingly by a federal circuit court judge in *Woodruff v. Dubuque & S.C.R Co.*, 30 F. 91 (1887). In that case, the judge allowed a shareholder to revoke a power of attorney that granted Drexel, Morgan & Co. the power to sell his stock and vote it in the interim.

case to the attention of the Connecticut judge hearing his suit. In any event, the judge not only cited the Ohio decision in his opinion invalidating the trust but elaborated on the court's ruling:

It is the policy of our law that ownership of stock shall control the property and the management of the corporation, and ... this good policy is defeated, if stockholders are permitted to surrender all their discretion and will in the important matter of voting, and suffer themselves to be mere passive instruments in the hands of some agent who has no interest in the stock, equitable or legal, and no interest in the general prosperity of the corporation.⁷²

Voting was a duty that the shareholder owed to other members of the corporation. The shareholder "may shirk it perhaps by refusing to attend stockholders' meetings, or by declining to vote when called upon, but the law will not allow him to strip himself of the power to perform his duty."⁷³

Baldwin followed up his win in this case with an article in the 1891 volume of the *Yale Law Journal* in which he summarized the *Shepaug* decision and the cases that preceded it with the explicit purpose of making them "accessible to the profession."⁷⁴ He seems to have succeeded in his purpose for, just two years later, the Connecticut judge's words found their way into a New Jersey chancery court decision, *White v. Thomas Inflatable Tire Company*.⁷⁵ The New Jersey court had already come to the conclusion that voting trusts could not be irrevocable in *Cone v. Russell and Mason* (1891), but it had decided that case without knowledge of the

⁷² *Shepaug Voting Trust Cases*, 60 Conn. 553 (1890) at 579. For similar decisions from around the same time, see also *Woodruff v. Dubuque & S.C.R. Co.*, 30 F. 91 (1887); and *Vanderbilt v. Bennett*, a case in a Pennsylvania county court also described in Baldwin, "Voting-Trusts."

⁷³ *Shepaug Voting Trust Cases*, 60 Conn. 553 (1890) at 579-580.

⁷⁴ Baldwin, "Voting-Trusts," 14.

⁷⁵ *White v. Thomas Inflatable Tire Co.*, 52 N.J. Eq. 178 (1893). On the chronology and importance of these cases, see Marion Smith, "Limitations on the Validity of Voting Trusts," *Columbia Law Review* 22 (Nov. 1922), 627-637 at 628.

Connecticut litigation.⁷⁶ The two streams of case law thus came together in the *White* case, and a flurry of similar decisions followed based on the Connecticut and New Jersey precedents.⁷⁷

There were still, however, some contrary cases that upheld shareholders' contractual freedom to enter into voting-trust agreements, whether they were revocable or not.⁷⁸ After *Standard* and other combines abandoned the voting trust in favor of New Jersey charters, concerns about the misuse of these agreements ebbed, and decisions that enforced voting trusts increased in frequency relative to those that invalidated them.⁷⁹ Judge James Keith of the Virginia Supreme Court reflected on this shift in a 1910 decision upholding a voting trust: "[I]t is impossible not to be impressed with the change of opinion which has taken place with respect to the true nature of such contracts." Whereas "a very strong sentiment" against voting trusts had once prevailed, "experience has demonstrated their usefulness, and the hostility evinced toward them has by degrees diminished."⁸⁰ For Keith, the preceding decade of private action suits had clarified the legal parameters of voting trust agreements and, in the absence of a statute regulating such agreements, he thought voting trusts should be judged by the reasonableness of their objectives. "Where the object of the trust is legitimate ... the trust should be upheld and carried out."⁸¹

⁷⁶ *Cone v. Russell & Mason*, 48 N.J. Eq. 208 (1891). This case had no antitrust dimension. It involved the use of a voting trust to entrench a particular stockholder in a managerial position.

⁷⁷ *Harvey v. Linville Improvement Co.*, 118 N.C. 693 (1896); *Kreissl v. Distilling Co. of America*, 61 N.J. Eq. 5 (1900); *Warren v. Pim*, 66 N.J. Eq. 353 (1904); *Morel v. Hoge*, 130 Ga. 625 (1908); *Sheppard v. Rockingham Power Co.*, 150 N.C. 776 (1909); *Bridgers v. First National Bank*, 152 N.C. 293 (1910); and *Luthy v. Ream*, 270 Ill. 170 (1915). In another case, *State v. O. & M.R.R. Co.*, 3 Ohio Cir. Dec. 518 (1892), the court upheld a voting trust but noted that it would have been invalid if irrevocable.

⁷⁸ *Mobile & Ohio Railroad v. Nicholas*, 98 Ala. 92 (1893); *Smith v. San Francisco & North Pacific Railway Co.*, 115 Cal. 584 (1897); *Brightman v. Bates*, 175 Mass. 105 (1900).

⁷⁹ *Chapman v. Bates*, 61 N.J. Eq. 658 (1900); *Boyer v. Nesbitt*, 227 Pa. 398 (1910); *Bowditch v. Jackson*, 76 N.H. 351 (1912); *Carnegie Trust Co. v. Security Life Insurance Co. of America*, 111 Va. 1 (1910); *Thompson-Starrett Co. v. Ellis Granite Co.*, 86 Vt. 282 (1912); *Winsor v. Commonwealth Coal Co.*, 63 Wash. 62 (1911).

⁸⁰ *Carnegie Trust Co. v. Security Life Insurance Co.*, 111 Va. 1 (1910) at 20.

⁸¹ *Carnegie Trust Co. v. Security Life Insurance Co.*, 111 Va. 1 (1910) at 23.

How the case law would have evolved in the absence of the so-called “Money Trust” hearings is impossible to tell, but the 1913 Congressional investigation, which concluded that bankers were using voting trusts for the purpose of monopolistic control, renewed concerns about such devices and increased judges’ propensity to invalidate them. Headed by Louisiana Representative Arsène Pujo, the committee focused on the activities of J. P. Morgan & Company and allied banking houses and detailed the ways in which these financiers used interlocking directorates and voting trusts to assert control over important sectors of the American economy.⁸² Although scholars have challenged the validity of the committee’s findings,⁸³ the hearings were enormously influential, dominating newspaper headlines whenever prominent witnesses like J. P. Morgan were called to testify and also when the committee issued its final report in 1913. The investigation’s impact was magnified, moreover, by a series of polemical essays that Louis Brandeis published in *Harper’s Weekly* in late 1913 and early 1914 under the title “Breaking the Money Trust.” The essays were subsequently collected and published, along with a few other pieces on the same subject, in a popular book entitled *Other People’s Money and How the Bankers Use It*, which echoed the Pujo Committee’s findings.⁸⁴

According to the Pujo Committee’s report and Brandeis’s exposé, the bankers extended their dominance over a myriad of other businesses, financial and industrial, by means that included direct investments, interlocking directorates, and voting trusts. Because voting trusts did

⁸² See U.S. House of Representatives, “Report of the Committee.”

⁸³ See, for examples, Vincent P. Carosso, “The Wall Street Money Trust from Pujo through Medina,” *Business History Review* 47 (Winter 1973): 421-437; J. Bradford DeLong, “Did J. P. Morgan’s Men Add Value? An Economist’s Perspective on Finance Capitalism,” in *Inside the Business Enterprise: Historical Perspectives on the Use of Information*, ed. Peter Temin (Chicago: University of Chicago Press, 1991): 205-250; and Mary A. O’Sullivan, *Dividends of Development: Securities Markets in the History of U.S. Capitalism, 1866-1922* (Oxford: Oxford University Press, 2016), Ch. 7.

⁸⁴ Louis D. Brandeis, *Other People’s Money and How the Bankers Use It* (New York: Fredrick A. Stokes, 1914). On the book’s publication history, see Paul P. Abrahams, “Brandeis and Lamont on Finance Capitalism,” *Business History Review* 47 (Spring 1973): 72-94 at 73.

not require the bankers to make any substantial investment outlays, they frequently resorted to them to manage non-financial companies. Morgan had first experimented with the device in 1886 to reorganize the bankrupt Philadelphia and Reading Railroad, using a voting trust to shift oversight of the railroad's business to a board of trustees that he headed. The trustees not only monitored the internal operation of the road but negotiated a division of the market with the Pennsylvania Railroad and organized a pool among anthracite coal producers, the railroad's main source of freight. From the beginning, therefore, the use of the device to reorganize an insolvent railroad was coupled with initiatives to reduce competition among the roads and also among their most important customers.⁸⁵ The experiment turned out to be so successful that Morgan repeated it again and again, and his example was widely copied by other bankers. At the time of the Pujo hearings, Morgan and allied bankers were using voting trusts to assert managerial authority over a wide variety of concerns, including the Bankers Trust Company, the Guaranty Trust Company, the Southern Railway Company, the Chicago Great Western Railroad, the Cincinnati, Hamilton & Dayton Railway, the International Mercantile Marine Company, William Cramp Ship & Engine Building Company, and the International Agriculture Corporation.⁸⁶

Although the Pujo committee was primarily concerned with documenting the ways in which the Money Trust had extended its control over major sectors of the economy, the investigation also emphasized the dire effects that banker-dominated voting trusts could have on minority shareholders in the affected companies. The report accused Morgan and other bankers of abusing their positions of control by extracting high fees for their underwriting services and

⁸⁵ Vincent P. Carosso, *The Morgans: Private International Bankers, 1854-1913* (Cambridge, Mass.: Harvard University Press, 1987), 260-262. Morgan was not the first to use voting trusts for the purpose of reorganizing a railroad. See Cushing, *Voting Trusts*, 4-10.

⁸⁶ U.S. House of Representatives, "Report of the Committee," 57-91.

acquiring securities at prices below their fair market value.⁸⁷ The investigators also accused Morgan of more direct forms of minority oppression. For example, when the voting trust that had originally been formed to reorganize the Southern Railway expired in 1902, Morgan asked certificate holders to extend the agreement. A majority agreed to the extension and obtained new trust certificates to replace the old. The new certificates were then listed on the New York Stock Exchange, and the old ones delisted. Only the railroad's trust certificates traded on the exchange, not its shares. As a result, the holders of 183,938 shares who had voted against joining the new trust "found themselves with a security not listed on the exchange, and, therefore, without a ready market and not available as collateral."⁸⁸ Accounts from the time treated the delisting as punishment for the "stubborn" shareholders' refusal to support the renewal of the trust. As one newspaper put it, "recalcitrant stockholders" were "feeling the iron hand of the financial autocrat."⁸⁹ When the Pujo committee revisited these events a decade later, the situation for these shareholders had little improved, as Morgan's voting trust still controlled the railroad.

Revelations of this kind of minority oppression provoked judges to rethink their acquiescence in voting trusts. There is no smoking gun in their rulings in the form of an explicit mention of the Pujo hearings, which is not surprising. That there was a rethinking, however, can be seen in two contrasting decisions about voting trusts handed down by the Illinois Supreme Court in 1913 and 1915, both written by the court's chief justice, Frank K. Dunn. The first, *Venner v. Chicago City Railway Company*, made its way through the courts at the same time as the Money Trust investigation was going on.⁹⁰ It was a derivative suit that targeted Morgan

⁸⁷ U.S. House of Representatives, "Report of the Committee," 133-35. Another theme of the report was the lack of benefit to depositors who put their savings in the commercial banks involved in the Money Trust. See, for example, p. 133. See also Brandeis, *Other People's Money*, Ch. 1.

⁸⁸ U.S. House of Representatives, "Report of the Committee," 40-41.

⁸⁹ "No Market on 'Change for 'Stubborn' Southern Stockholders: Morgan Shows his Hand: Opponents of Voting Trust Are Punished: Litigation May Follow," Louisville, Kentucky *Courier-Journal* Nov. 12, 1902, 8.

⁹⁰ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913).

directly and charged him with using a voting trust to combine Chicago's street railway lines into an illegal monopoly. In this case, the court upheld the agreement, in part because the suit was brought by just the kind of opportunistic litigant calculated to raise judges' suspicions. The second case, *Luthy v. Ream* (1915), involved a single firm, the Peru Plow Company and had no antimonopoly implications.⁹¹ Nonetheless, the suit turned on issues that the Pujo hearings had made notorious, including charges that the voting trust was a cover for insider dealing. Not only did the plaintiffs win, but Chief Justice Dunn used his decision to attack the very possibility of using voting trusts as a tool of corporate control, insisting that they must be made revocable at the will of the shareholders.

The plaintiff in the suit against the Chicago City Railway Company (CCRC), Clarence H. Venner, had already established an unsavory reputation as a serial litigant by filing numerous derivative actions against deep-pocket financiers such as J. P. Morgan and major public corporations such as U.S. Steel, AT&T, and New York Life Insurance Company.⁹² *Time Magazine* later described him as a "private profiteer":

He first buys a few shares in a company, then ploughs his way through charters, bylaws, reorganization plans, indentures, until he turns up a crop of legal weeds. Company officials are duly informed of irregularities. If they do not see fit to buy up his stock at a thumping good price, into the courts goes Old Man Venner, pleading the cause of a poor, downtrodden minority stockholder.⁹³

⁹¹ *Luthy v. Ream*, 270 Ill. 170 (1915).

⁹² For a brief overview of Venner's place in the history of twentieth-century derivative suits, see John C. Coffee, Jr., *Entrepreneurial Litigation: Its Rise, Fall, and Future* (Cambridge, Mass: Harvard University Press, 2015), 34-36. See also J. A. Livingston, *The American Stockholder* (Philadelphia: J. B. Lippincott, 1958), 49-55. A search through LexisNexis shows that, between 1889 and 1927, Venner brought suit as a stockholder against U.S. Steel Corp., numerous railroads, American Telephone & Telegraph Co., Amalgamated Copper Co., New York Life Ins., Bethlehem Steel Corp., and American Hide & Leather Co., to name a few.

⁹³ "Old Sue-&-Settle Man," *Time*, Nov. 21, 1932, 39.

Even when he lost in court, which he mostly did, he would continue his campaign of legal harassment until the company bought him out. According to a later count, for example, Venner's actions against the New York Central Railroad, "extended over 14 years, involved 12 suits in 4 jurisdictions, employed 4 nominal plaintiffs, left 29 cases in the reports, and reached the United States Supreme Court 5 times."⁹⁴ Similarly, an attorney for U.S. Steel reported in 1902 on the "extremely disagreeable" series of negotiations he had with Venner over a period of two years, until Venner finally agreed to sell his five thousand shares of U.S. Steel common stock for \$100,000—an exorbitant sum in the attorney's view.⁹⁵ By the time of the CCRC case, this kind of behavior had so tarnished Venner's reputation that a federal judge in a parallel New York City lawsuit, also involving a transit consolidation, accused him of buying shares in one of the companies simply to have standing to sue: "Much time has been devoted to picturing the evil result of monopoly," he observed sarcastically, "but nothing has been done toward showing that complainant had lost a dollar by exactly what Mr. Venner knew was going to be done when he caused the stock to be purchased."⁹⁶

Venner bought a minority interest in the Chicago City Railway Company and used his status as a shareholder to challenge the legality of the voting trust formed to coordinate the operations of the CCRC and four other street railway lines in the city of Chicago. Morgan, whose bank controlled a majority interest in the CCRC, tried to engineer the deal in a way that

⁹⁴ "Extortionate Corporate Litigation: The Strike Suit," *Columbia Law Review* 34 (Nov. 1934): 1308-1321 at 1308, n1.

⁹⁵ See the account in Robert T. Swaine, *The Cravath Firm and Its Predecessors, 1819-1947* (New York: privately printed, 1948), Vol. 1, 692, pertaining to *Venner v. U.S. Steel Corp.*, 116 Fed. 1012 (1902). We do not know how much profit Venner earned on this transaction, but in another case against the Great Northern Railway, he got \$513,000 for shares that had cost him \$188,587. See Livingston, *American Stockholder*, 50. Another account has him receiving \$300,000 for \$70,000 worth of Union Pacific Railroad Stock and earning somewhere between one and two million dollars off the Great Northern. See "Extortionate Corporate Litigation," 1308, n1.

⁹⁶ Quoted in "Venner Loses Suits against Interboro," *New York Times* (4 Jun. 1913), 7. See *Continental Securities v. Interborough Rapid Trans Co.*, 207 F. 467 (1913) at 472, affirmed by the Second Circuit Court of Appeals in 221 F. 44 (1915).

made it seem to outsiders as if he were being bought out by local interests and barely breaking even on the sale.⁹⁷ Later revelations showed, however, that Morgan was still very much involved.⁹⁸ At the time of the agreement, two of his representatives held a controlling interest in the CCRC, as well as all the stock and bonds of the other four railways in the agreement. The trust itself was run by people from Morgan's circle, including Judge Elbert Gary of the United States Steel Corporation, and the lead underwriter for the trust's bonds, the First Trust and Savings Bank of Chicago, was an affiliate of the First National Bank of Chicago, a Morgan ally.⁹⁹ Venner filed his suit almost immediately after the deal was announced, naming Morgan, along with the CCRC, as a defendant and charging that the trust agreement "irrevocably deprived" shareholders of their "deliberative powers and duties" and transferred management of the railway to "the hands of strangers." He further charged that the effect of the trust agreement was to create an illegal transit monopoly in the city of Chicago.¹⁰⁰

In his opinion for the Illinois Supreme Court, Chief Justice Dunn systematically rejected each of Venner's charges. Reaching back for precedent to an earlier Illinois case, *Faulds v. Yates*, decided in 1870—long before *Griffith v. Jewett*, *Shepaug*, or any of the other cases invalidating irrevocable voting trusts—he ruled that voting trusts had long been recognized by the courts as an acceptable means of centralizing managerial or financial control in

⁹⁷ "Home Rule Unites South Side Lines," *Chicago Daily Tribune*, Dec. 27, 1909, 1; "Morgan Gets Out of Chicago Traction," *New York Times*, Dec. 27, 1909, 1.

⁹⁸ "Traction Merger Wind and Water?" *Chicago Daily Tribune*, Dec. 31, 1909, 1.

⁹⁹ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 535-536. On Morgan's connections with the First National Bank of Chicago, see Jerry W. Markham, *A Financial History of the United States: From J. P. Morgan to the Institutional Investor (1900-1970)* (Armonk, NY: M. E. Sharpe, 2002), Vol. 2, 24.

¹⁰⁰ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 539-543. To the press, Venner also charged that the purpose of the merger was to deflect the CCRC's earnings to shore up the "tottering properties of the other companies," but he seems not to have made this case to the court, perhaps because there was as yet no track record for him to cite. After Venner lost his suit, however, a group of discontented minority shareholders waged a proxy fight for control of the railroad and made essentially the same complaint. See "Opposes Chicago Merger," *New York Times*, Jan. 23, 1910, 5; "Protest Against Car Merger Plan," *Chicago Daily Tribune*, Oct. 11, 1913, 9.

corporations.¹⁰¹ He bolstered that assertion by noting that *Faulds* had “been sustained by later decisions of this court” and also by the courts of other states, citing in particular two prominent cases that had spearheaded the trend back toward validating voting trusts, *Smith v. San Francisco and North Pacific Railway Company* (California, 1897) and *Brightman v. Bates* (Massachusetts, 1900).¹⁰² Dunn recognized that there had been an important string of contrary decisions in between *Faulds* and these turn-of-the-century cases, and he even affirmed them in *dicta*. However, he dismissed their relevance to Venner’s suit. The contrary cases had been brought by shareholders seeking to withdraw their securities from voting trusts, but since Venner was not a party to the CCRC trust agreement, those precedents did not apply.¹⁰³ “A majority of the stockholders may ... confer upon an agent unlimited discretion to vote their stock, and there is no policy of the law to prevent their transferring the stock to a trustee with the like unrestricted power.”¹⁰⁴

If voting trusts were not illegal *per se*, “[i]t is the purpose for which the trust was created which must determine its legality.”¹⁰⁵ Dunn found Venner’s claim that Morgan was creating an illegal transit monopoly unconvincing because most of the arrangements for the consolidated operation of the street railway system had been mandated by a city ordinance and, indeed, Venner had previously challenged the legality of the ordinance before the same court and lost.¹⁰⁶ The one exception was the proposed merger of the elevated with the street railway lines, which still required enabling legislation by the state as well as approval by the city. The railways denied they were proceeding with the plan without such authorization, and Dunn dismissed

¹⁰¹ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 539. See *Faulds v. Yates*, 57 Ill. 416 (1870).

¹⁰² *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 539.

¹⁰³ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 541.

¹⁰⁴ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 540.

¹⁰⁵ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 540.

¹⁰⁶ *Venner v. Chicago City Railway Co.*, 236 Ill. 349 (1908).

Venner's charges as "mere apprehension." Although "anticipated unlawful acts of the directors of a corporation may furnish ground for an injunction, fear, alone, of such illegal action is not sufficient."¹⁰⁷

Just two years later, however, in the wake of the Pujos report and Brandeis's influential writings about the machinations of the Money Trust, Dunn took a position in *Luthy v. Ream* that severely limited the use of voting trusts, whether their purpose was illegal or not. *Luthy* involved charges of self-dealing against officers of the Peru Plow Company, who, minority shareholders complained, had used their control of a voting trust to set their own salaries. The trial court declared the trust void and the salaries illegally set. The appeals court agreed about the salaries but, quoting extensively from Dunn's opinion in *Venner v. Chicago City Railway*, overturned the trial court's ruling that the trust was invalid.¹⁰⁸ The plaintiffs then appealed to the Illinois Supreme Court, which sided with the trial judge on both issues. In his opinion for the court, Chief Justice Dunn could have simply ruled that the plow company's voting trust served an illegal purpose and was therefore invalid. He went much further, however. Quoting extensively from the opinion of the local Connecticut judge in the *Shepaug Voting Trust Cases*, he declared that shareholders could not irrevocably commit their shares to voting trusts, laying out the blanket rule that shareholders could not "be deprived or deprive themselves" of their voting power. "It matters not whether the end be beneficial," he continued, "because it is not always possible to ascertain objects and motives, and if such a severance were permissible it might be abused."¹⁰⁹

¹⁰⁷ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 550.

¹⁰⁸ *Luthy v. Ream*, 190 Ill. App. 315 (1914).

¹⁰⁹ *Luthy v. Ream*, 270 Ill. 170 (1915) at 178-180. Dunn was quoting from Charles Fisk Beach, *Commentaries on the Law of Private Corporations* (Chicago: T. H. Flood, 1891), Vol. 1, §306.

Dunn acknowledged that he had previously held, in *Venner*, that it was “legitimate for the owners of a majority of the stock of a corporation to combine” through a voting trust or other similar arrangement.¹¹⁰ He justified his different ruling in *Luthy* by claiming that the Peru Plow agreement went “much farther than any case which has heretofore arisen in this court” by separating the voting power of the stock from its ownership for a fixed term of ten years, “so that the real owners of the property are for that time entirely divested of its management and control.”¹¹¹ The agreement in the CCRC case, by contrast, had specified a complicated mechanism whereby shareholders in the trust voted annually for a committee of eight who then instructed the trustees on the choice of directors, maintaining at least the fiction of shareholders’ control.¹¹² However, the decision in *Luthy* turned on the issue of revocability, and it is not at all clear that the Peru Plow agreement was different in this respect from the voting trust in the CCRC case. In the earlier case, the court had simply refused to look into the matter on the grounds that *Venner* was not a party to the agreement: “Whether the agreement binds all the shareholders so that they cannot withdraw from it is a question which does not concern the appellant. So long as the shareholders are satisfied and continue to act in accordance with it no one else has any right to complain.”¹¹³ For all practical purposes, moreover, Dunn admitted that *Luthy* represented a reversal when he acknowledged that *Smith v. San Francisco and North Pacific Railroad* and the other pro-voting trust cases, which he had cited as precedents in *Venner*, were “inconsistent” with the “the true rule” as stated in the *Luthy* decision and cases like *Shepaug*.

¹¹⁰ *Luthy v. Ream*, 270 Ill. 170 (1915) at 177.

¹¹¹ *Luthy v. Ream*, 270 Ill. 170 (1915) at 178.

¹¹² *Luthy v. Ream*, 270 Ill. 170 (1915) at 181; *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 541.

¹¹³ *Venner v. Chicago City Railway Co.*, 258 Ill. 523 (1913) at 541-542.

Although Dunn made no reference to the Pujo report in his *Luthy* decision, contemporary legal observers blamed the hearing for the shift in the court's attitude and its resuscitation of precedents from the 1890s. In an often-cited review essay, for example, Fordham University law professor I. Maurice Wormser disapprovingly summarized the findings of Pujo committee, asserting that its "agitation was not without its effect upon the courts" and citing *Luthy v. Ream* as an "unprogressive and reactionary" decision that reflected "the popular whim and caprice of the passing moment."¹¹⁴ Other legal scholars, however, applauded the new trend. Responding directly to Wormser, Marion Smith saw *Luthy* as the culmination of a set of decisions that began with the *Shepaug Voting Trust Cases* in 1890 and established "the prevailing doctrine" that "a voting trust whereby the beneficial ownership in stock is separated from the voting power is contrary to public policy and illegal, except under certain circumstances."¹¹⁵ The problem, in Smith's view, was to define the "certain circumstances" under which the courts would find a voting trust permissible. Smith made a stab at laying out some basic principles in his article, but the effort could not be taken as definitive because Wormser and other scholars disagreed with his about the so-called prevailing doctrine.¹¹⁶

¹¹⁴ Wormser also disapproved of a 1916 decision by the Missouri Public Service Commission that rejected a plan to create a voting trust as part of the reorganization of the St. Louis & San Francisco Railroad. To Wormser's chagrin, the Commission again cited the *Shepaug Voting Trust Cases* for its finding that such a trust would be "against the public policy of this State." I. Maurice Wormser, "The Legality of Voting Trusts and Pooling Agreements," *Columbia Law Review* 18.2 (1918): 123-136 at 127, 132. See also Vincent Dougherty and John J. Berry Jr., "The Voting Trust—Its Present Status," *Georgetown Law Journal* 28 (May 1940): 1121-1128 at 1122. Cushing, however, downplayed the effect of the Pujo investigation in *Voting Trusts*, 26-30.

¹¹⁵ Marion Smith, "Limitations on the Validity of Voting Trusts," *Columbia Law Review* 22 (Nov. 1922), 627-637 at 630.

¹¹⁶ Smith, "Limitations on the Validity of Voting Trusts," 630-633. For roughly contemporaneous efforts to summarize the state of the law, see "Corporate Voting Trusts—Validity—Banks," *St. John's Law Review* 1 (Dec. 1926): 65-71; "Corporations—Validity of Voting Trusts," *Southern California Law Review* 1 (July 1928): 479-483; Robert W. Miller, "Voting Trusts," *Indiana Law Journal* 4 (June 1929): 600-607. See also, Cushing, *Voting Trusts*, Ch. 3.

Statutory Relief

With the legal status of voting trusts once again unclear, state legislatures began to amend their general incorporation laws to permit shareholders to form irrevocable voting trusts for limited periods of time, restoring the device's utility for legitimate purposes but at the same time making it difficult to use them for monopoly control. Only two states had responded to the first wave of judicial concern about voting trusts, and they had taken opposite positions. In 1901 New York had come to the rescue of bankers who used voting trusts to reorganize bankrupt railroads by amending the state's general corporation law to permit any stockholder to enter into a written agreement to "transfer his stock to any person or persons for the purpose of vesting in him or them the right to vote thereon for a time not exceeding five years"¹¹⁷ California, however, had moved in the opposite direction in reaction to its high court's decision, in *Smith v. San Francisco & North Pacific Railway Company*, to uphold an irrevocable voting trust.¹¹⁸ The legislature enacted a "clarifying" statute requiring agreements that delegated the right to vote shares to have a specified term of no more than seven years, and more importantly, mandating that they must always be revocable at the will of the shareholder.¹¹⁹

Maryland followed New York's lead in 1908, but no other state adopted either the New York or California model before the Pujo hearings.¹²⁰ In the wake of the investigation and especially the Illinois high court's ruling in *Luthy* invalidating irrevocable voting trusts, more

¹¹⁷ New York Legislature, "An Act to amend . . . the general corporation law," approved Apr. 16, 1901. New York later extended the term of a voting trust to ten years. New York Legislature, "An Act to amend the stock corporation law, generally," approved May 24, 1923.

¹¹⁸ *Smith v. San Francisco & North Pacific Railway Co.*, 115 Cal. 584 (1897).

¹¹⁹ California Legislature, "An act . . . relating the giving and use of proxies to vote corporate stock," approved Feb. 27, 1905. For a case invalidating a voting trust on the basis of this act, see *Simpson v. Nielson*, 77 Cal. App. 297 (1926).

¹²⁰ Wormser, "Legality of Corporate Voting Trusts," 125.

and more states adopted a statute like New York's.¹²¹ By 1940, twenty states (including California) had enacted legislation legalizing irrevocable voting trusts but restricting their duration (usually to ten years), and by 1960 the number had increased to thirty-nine. The Model Business Corporation Act adopted by the American Bar Association in 1950 also included such a provision.¹²²

These statutes made it possible for business people to continue to use voting trusts for purposes that had long been regarded as legitimate, for example, inducing lenders to come to the aid of corporations in financial difficulty. Thus, when the United States Food Products Corporation was reorganized as the National Distillers Products Company in 1924, the bankers that underwrote the rescue created voting trusts for both classes of the new enterprise's shares.¹²³ Similarly, voting trusts formed a key part of the plan to refinance the Fox Film Corporation and the Fox Theatres Corporation in 1930.¹²⁴ In some case, the courts themselves played an important in setting up the trusts. For example, a plan devised to salvage the New York Title and Mortgage Company in 1937 proposed that all of the capital stock of the reorganized company would be placed in a voting trust, whose trustees would be appointed by a state judge.¹²⁵

At the same time as the new statutes preserved voting trusts' traditional utility, they reduced the device's usefulness for anticompetitive purposes. The requirement that shareholders

¹²¹ The Pujo committee did not recommend a ban of voting trusts. It did, however, conclude that their use in financial institutions was "highly inadvisable and prejudicial" and proposed that Congress prohibit voting trusts in national banks. U.S. House of Representatives, "Report of the Committee," 142. Congress did not act, but the New York legislature amended its general incorporation statute in 1925 to prohibit the use of voting trusts in banks. See New York legislature, "An Act to amend the stock corporation law," approved Mar. 12, 1925. New York's high court not only upheld the law but applied it retroactively. *In re Morse*, 247 N.Y. 290 (1928).

¹²² Dougherty and Berry, "Voting Trust," 1124; American Bar Foundation, *Model Business Corporation Act Annotated* (St. Paul, Minn.: West Publishing Co., 1960), §32, 559-61. The Model Act excluded a sentence, written into the New York law from the beginning and copied by ten other states, requiring all shareholders to have the right to join voting trust agreements. California allowed voting trusts to have a duration of 21 years. California Legislature, "An act ... relating to corporations," approved June 12, 1931.

¹²³ "New Products Co. Lists Its Stock," *New York Times*, Aug. 28 1924, 25.

¹²⁴ "Fox Boards Adopt New Financing Plan," *New York Times*, 19 Feb. 19, 1930, 22.

¹²⁵ "New Plan to Save New York Title Co.," *New York Times*, Dec. 3, 1937, 35.

vote regularly to renew the agreements made extending them an uncertain proposition, forcing promoters to pass on more of the gains from consolidation if they wanted shareholders to continue the trust. At the same time, it was no longer advisable to limit the benefits to those who agreed to participate because, given the courts' changing views, disadvantaged minority shareholders were more likely to sue. Indeed, derivative actions soared during the 1930s, as revelations of bad business behavior in the run-up to the crash made judges more receptive to shareholders who challenged managerial decisions.¹²⁶ The courts, moreover, seem to have strictly enforced both the statutory time limits on voting trusts and the legal procedures for renewing the agreements.¹²⁷

Despite the changes, reformers continued to rail against the use of voting trusts for purposes of monopoly control. There were no longer many nefarious examples for critics to seize upon, however. William O. Douglas, a member of the newly-formed Securities and Exchange Commission, declared at a Bankers Club luncheon in 1937 that voting trusts were “little more than a vehicle for corporate kidnapping,” but he gave no examples to support his allegation.¹²⁸ Adolph Berle and Gardiner Means complained about the use of voting trusts as a tool to separate ownership from control, but were able to muster few examples and only one was really on point: a voting trust set up to control the Interborough Rapid Transit Company, which included an automatic renewal arrangement of the type that the courts would very soon invalidate.¹²⁹

¹²⁶ See Coffee, *Entrepreneurial Litigation*, 36-40.

¹²⁷ See, for example, *Kittinger v. Churchill Evangelistic Assn.*, 151 Misc. 350 (N.Y. 1934), invalidating a voting trust that automatically extended at the end of its term; *Perry v. Missouri-Kansas Pipe Line Co.*, 22 Del. Ch. 33 (1937), invalidating a voting trust whose duration exceeded the statutory limit; *Belle Isle Corp. v. Corcoran*, 29 Del. Ch. 554 (1946), invalidating the extension of a voting trust because the vote had occurred several year prior to the trust's expiration and state law required a vote within one year of the expiration.

¹²⁸ “End of Banks' Rule in Industry Hinted,” *New York Times*, Mar. 24 1937, 37.

¹²⁹ Adolph Berle and Gardiner Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1933), 73, 83.

Nor did the massive investigations conducted by the Temporary National Economic Committee (TNEC) in the late 1930s and early 1940s into “The Concentration of Economic Power” uncover much more. When committee members called the country’s leading investment bankers to testify, they found a dramatically different situation from the one the Pujo hearings had uncovered a quarter century earlier. Although the investigators interrogated witnesses about voting trusts whenever they caught references to them, hardly any came up. The Harrimans had created a ten-year voting trust to pool the stock that family members and their associated companies held in the private bank of Harriman Ripley & Company, and the committee questioned witnesses extensively about those arrangements. It also reproduced documents about a deal in which members of the banking house of Ladenburg, Thalmann resigned from voting trusts they had organized in a group of Pittsburgh utilities in order to sell their shares in those companies.¹³⁰ But that was all the TNEC managed to come up with. Voting trusts were no longer an important tool that bankers or anyone else could use to concentrate economic power.

Conclusion

Scholars have long recognized that the states’ power to charter corporations bolstered their antitrust initiatives in ways that were not available to the federal government. But they have also argued that the growth of large-scale enterprises operating in national and even international markets forced states to abandon their efforts out of fear of doing serious damage to their domestic economies. Our paper has revised this conventional view by focusing attention on the

¹³⁰ There are three volumes of hearings devoted to investment banking. The Harriman voting trust was probed in Temporary National Economic Committee, *Hearings* (Washington, DC: Government Printing Office, 1940), Part 22, 11403-25, 11519; and the Ladenburg, Thalmann deal, in Part 24, 12553, 12860-65. Part 23 contains no references to voting trusts.

lawsuits that minority shareholders brought against their own companies in state courts of law and equity. Historically judges had been reluctant to intervene in corporations' internal affairs and had displayed a particular wariness of shareholders' derivative suits. By the end of the nineteenth century, however, they had begun to revise their views and to see shareholders' private actions as useful checks on economic concentration. Judges' reconsideration of voting trusts was a key part of this transformation. Initially courts had seen nothing wrong with the device. If a majority of shareholders wanted to combine their interests, there was nothing to prevent them—so long as they did not exploit their control to oppress minority shareholders. However, evidence that the device was being used for anticompetitive purposes, first by industrial trusts like Standard Oil and then by J. P. Morgan and the so-called Money Trust, led judges to rethink the relationship between shareholders and the corporations in which they owned stock, and to see the enforcement of shareholders' voting rights as a critical tool of public policy. When the courts went so far as to outlaw irrevocable voting trusts, however, state legislatures stepped in with a compromise, enacting laws that legalized such arrangements but only for limited periods of time. These statutes restored the utility of voting trusts for legitimate purposes, such as reorganizing companies in financial distress, but reduced the possibility that they could be used for the purposes of consolidating economic power.

Many scholars have noted that finance capitalism declined in the United States at the same time as it continued to thrive in other growing second-industrial-revolution economies such as Germany.¹³¹ We think the history of voting trusts is an important part of the story. We want to be careful here not to claim too much. Certainly, other changes helped bring finance capitalism to an end. The literature, for example, attributes considerable importance to the Clayton Act's

¹³¹ See, for example, Jeffrey Fear and Christopher Kobrak, "Banks on Board: German and American Corporate Governance, 1870-1914," *Business History Review* 84 (Winter 2010): 703-736.

prohibition of interlocking directorates, another outcome of the Pujo hearings.¹³² However, we do not want to claim too little either. After all, it was voting trusts that made it possible both for industrial combinations to evade the laws regulating mergers and for bankers to ensure their presence on corporate boards.

The literature on the response to large-scale monopolies has focused on developments at the national level—and on antitrust policy as conventionally defined—to the exclusion of private legal actions and developments in state corporation law and equity jurisprudence. Our study of derivative suits and challenges to voting trusts has allowed us to begin to redress this imbalance by showing how changes in these areas could matter over the long run—how they could reduce the arsenal of weapons that the wealthy and powerful might deploy for anticompetitive purposes. These developments may have been “hidden in plain sight,” but they nonetheless played a critical role in preserving the competitive structure of the American economy.

¹³² Fear and Kobrak, “Banks on Board”; Carola Frydman and Eric Hilt, “Investment Banks as Corporate Monitors in the Early Twentieth Century United States,” *American Economic Review* 107 (July 2017): 1938-1970; DeLong, “Did J. P. Morgan’s Men Add Value?”