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## Sherman's Missing "Supplement": Prosecutorial Capacity, Agency Incentives, and the False Dawn of Antitrust Federalism

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# **SHERMAN’S MISSING “SUPPLEMENT”: PROSECUTORIAL CAPACITY, AGENCY INCENTIVES, AND THE FALSE DAWN OF ANTITRUST FEDERALISM**

DANIEL E. RAUCH\*

## **ABSTRACT**

When the Sherman Act passed in 1890, it was widely expected that it would operate primarily as a “supplement” to vigorous state-level antitrust enforcement of state antitrust statutes. This did not happen. Instead, confounding the predictions of Congress, the academy, and the trusts themselves, state antitrust enforcement overwhelmingly failed to take root in the years between 1890 and the First World War. To date, many scholars have noted this legal-historical anomaly. None, however, have rigorously or correctly explained what caused it. This Article does.

Using historical and empirical research, this Article establishes that the best explanation for the early failure of state antitrust enforcement was prosecutorial incapacity: state attorneys general and local prosecutors simply lacked the incentives and resources to prosecute antitrust cases. Along the way, the Article also offers a rigorous rejection of each main alternative explanation proposed for the early failure of state antitrust enforcement, including those based on doctrinal constraints, state-statutory texts, and contemporary politics. Finally, the Article closes by suggesting implications this historical insight might have for the cutting-edge issues facing today’s state antitrust enforcers, from local efforts to control healthcare costs to multistate actions against Silicon Valley behemoths like Apple and Amazon.

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*“This bill, as I would have it, has for its single object to . . . supplement the enforcement of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens.”*

– John Sherman, United States Senator, 1890.<sup>1</sup>

*“We are in a world where state attorneys general need to step up for strong competition policy.”*

– Beau Buffier, New York State Antitrust Bureau, 2017.<sup>2</sup>

## I. INTRODUCTION

State attorneys general are having a moment. In recent years, they have been main players in some of the country’s most important legal and political dramas. They have checked the Trump Administration on abortion rights,<sup>3</sup> air quality,<sup>4</sup> and the United States Census.<sup>5</sup> They have checked the Obama Administration on water rights,<sup>6</sup> immigration policies,<sup>7</sup> and the Affordable Care Act.<sup>8</sup> They have formed a (very public) front line on issues from the opioid epidemic<sup>9</sup> to net neutrality.<sup>10</sup> And in a time of

<sup>1</sup> 21 CONG. REC. 2456-57 (1890) (statement of Senator Sherman).

<sup>2</sup> Can Celik, *State AGs Need to ‘Step Up’ for Rule of Law, NY Enforcer Says*, MLEX MARKET INSIGHT (Mar. 30, 2017), <https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/north-america/state-ags-need-to-step-up-for-rule-of-law-ny-enforcer-says>.

<sup>3</sup> Jessica Seaman, *Colorado to Join 19 States in Lawsuit to Stop Federal Abortion “Gag Rule”*, DENVER POST (Mar. 4, 2019), <https://www.denverpost.com/2019/03/04/colorado-title-x-abortion-gag-rule-lawsuit/>.

<sup>4</sup> Alexander C. Kaufman, *New York Just Sued The Trump EPA For Reversing Obama-Era Air Pollution Rule*, HUFFINGTON POST (Jan. 31, 2019), [https://www.huffpost.com/entry/epa-smog-pollution-lawsuit\\_n\\_5c5236e8e4b0ca92c6dd111f](https://www.huffpost.com/entry/epa-smog-pollution-lawsuit_n_5c5236e8e4b0ca92c6dd111f).

<sup>5</sup> Aaron Katersky, *18 Attorneys General and 6 Cities File Lawsuit Over Census Citizenship Question*, ABC NEWS (Apr. 3, 2019), <https://abcnews.go.com/US/18-attorneys-general-cities-file-lawsuit-commerce-department/story?id=54208211>.

<sup>6</sup> Neena Satija, *Texas Sues EPA Over Provision of Federal Water Law*, TEXAS TRIBUNE (June 29, 2015), <https://www.texastribune.org/2015/06/29/texas-sues-obama-administration-epa-water/>.

<sup>7</sup> Dara Lind, *United States v. Texas, The Biggest Immigration Case in a Century, Explained*, VOX (Apr. 15, 2016), <https://www.vox.com/2016/4/15/11424614/supreme-court-immigration-dapa-daca>.

<sup>8</sup> *Texas Attorney General Ken Paxton Sues the Feds Over Obamacare*, HOUSTON PUBLIC MEDIA (Oct. 22, 2015), <https://www.houstonpublicmedia.org/articles/news/2015/10/22/127024/texas-attorney-general-ken-paxton-sues-the-feds-over-obamacare/>.

<sup>9</sup> Berkeley Lovelace Jr., *Opioid Distributors Said to Propose \$10 Billion Settlement to End State Lawsuits, Stocks Fall*, CNBC (Aug. 6, 2019), <https://www.cnbc.com/2019/08/06/opioid-makers-said-to-propose-10-billion-settlement-to-end-state-lawsuits.html>.

<sup>10</sup> Associated Press, *Nearly Two Dozen Attorneys General Sue to Block FCC’s Repeal of Net Neutrality Rules*, USA TODAY (Jan. 16, 2018), <https://www.usatoday.com/story/tech/news/2018/01/16/nearly-two-dozen-attorneys-general-sue-block-fccs-repeal-net-neutrality-rules/1038532001/>.

federal-level gridlock, they are increasingly seen as critical sites of governance—offices that can still “get things done.”<sup>11</sup>

As their profile grows, many suggest state attorneys general ought to take a more central role in antitrust enforcement. Sometimes, these calls are motivated by concerns that the federal government is not vigorously enforcing antitrust laws, leaving a “void” to be filled.<sup>12</sup> Sometimes, the calls are motivated by the suggestion that states enjoy institutional advantages in antitrust enforcement, such as superior knowledge of “market-specific information,” that make them superior enforcers.<sup>13</sup> And sometimes, the calls are motivated by doctrinal differences between state and federal antitrust statutes, differences that might afford states greater freedom of action.<sup>14</sup> In any case, these calls point in the same direction: when it comes to American antitrust law, state attorneys general can, and should, be leaders.

Rhetorically, the suggestion that states should “step up” as leading antitrust enforcers is a powerful one. It is not, however, new. When the Sherman Act was passed in 1890, the states (as opposed to the federal government) were widely expected to take the lead in antitrust enforcement. John Sherman himself asserted that his Act’s “single object” was to “supplement the enforcement of the established rules of the common and statute law by the courts of the several States.”<sup>15</sup> Nor was he alone: at the time of the Act’s passage, scholars, politicians, and shareholders all shared Senator Sherman’s prediction that state enforcement agencies would be a central, if not decisive, force in American antitrust policy.<sup>16</sup>

What happened next defied this expectation. In the years following the Sherman Act’s passage, from 1890 until the First World War, state antitrust enforcement had remarkably little impact or efficacy. Many scholars have noted this unexpected failure.<sup>17</sup> None, however, have accurately or rigorously explained it.<sup>18</sup>

This Article does. Using novel historical and empirical research, I contend that the best explanation for the early failure of state antitrust enforcement was prosecutorial incapacity: state attorneys general and local prosecutors without the incentives or resources to handle antitrust cases. Along the way, I also provide a rigorous rejection

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<sup>11</sup> John Nichols, *The Most Important Office in the Trump Era Isn't at the Top of the Ballot*, THE NATION (Oct. 11, 2018), <https://www.thenation.com/article/the-most-important-office-in-the-trump-era-isnt-at-the-top-of-the-ballot/>; see Alan Greenblatt, *State AGs Are Increasingly Powerful -- and Partisan*, GOVERNING (Sept. 2016), <https://www.governing.com/topics/politics/gov-state-attorneys-general.html>.

<sup>12</sup> Celik, *supra* note 2.

<sup>13</sup> Erin C. Fuse Brown & Jaime S. King, *The Double-Edged Sword of Health Care Integration: Consolidation and Cost Control*, 92 IND. L.J. 55, 83 (2016).

<sup>14</sup> See, e.g., Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 377 (1983) (“[A]ctivities that are not illegal under federal law are condemned by the antitrust law of some states. Furthermore, some persons who have suffered injury because of antitrust violations have a damages action under various state antitrust laws while they have no such action under the federal statutes.”).

<sup>15</sup> 21 CONG. REC. 2456-57 (1890) (statement of Sen. Sherman).

<sup>16</sup> See *infra* notes 41–42 and accompanying text.

<sup>17</sup> See *infra* notes 47–52 and accompanying text.

<sup>18</sup> Though not for lack of trying. See *infra* Part IV.

of the leading alternative explanations for the states' early failure to act, including those based on doctrinal constraints, statutory text, and contemporary politics. Finally, I close by suggesting some implications that this first, failed era of antitrust federalism has for our own times, times where, once again, state enforcement agencies are held out as promising leaders in American antitrust enforcement.

The remainder of this work proceeds as follows. Part II provides historical context for the passage of the Sherman Act and for early state antitrust statutes, the role state enforcement was expected to play, and its unexpected failure to do so.

Part III then turns to the historical and empirical record to discern why state enforcement, widely expected to assume a central role, took almost no role at all. Analyzing a comprehensive and novel data set of state antitrust prosecutions, this Part quantitatively underscores the absence of state antitrust enforcement during this period. However, the data also reveals a critical nuance: a set of "high-enforcement states" in which state antitrust law was, in fact, enforced with at least some vigor.

Armed with this insight, Part IV returns to the initial question: why, as a general matter, did early state antitrust enforcement fail to take root? This Part assesses four prominent explanations that have been suggested as answers to the question: (1) doctrinal arguments on the legality of state-level enforcement; (2) economic arguments based on the practical efficacy of state-level enforcement; (3) institutional arguments that the federal government's Sherman Act authority somehow "displaced" state activity; and (4) political arguments that public opinion or elected officials lost interest in antitrust enforcement after passing their initial state statutes. Ultimately, this Part rejects each of these explanations.

Part V, however, considers and rigorously tests a different explanation: that the cost and complexity of antitrust litigation was simply beyond the capabilities of state prosecutors. On this account, the crucial factor was a lack of "prosecutorial capacity." To date, this explanation has never been systematically explored, examined or established.<sup>19</sup> This Part does so, analyzing the novel data set of state antitrust caselaw, the text of the states' early antitrust laws, the structure of each state's prosecutorial bureaucracy, and the workings of each state's budget processes.

Through this empirical and documentary analysis, a striking pattern emerges. In overwhelming measure, the "high-enforcement" states, those where at least some antitrust enforcement took place: (1) offered substantial personal financial rewards to prosecutors who won antitrust suits; (2) offered substantial personal financial punishment to prosecutors who failed to pursue antitrust litigation; (3) directed vastly supernatural resources to antitrust state prosecutors; or (4) pursued some combination of these strategies. In short, these states offered incentives or capabilities that would make it personally easier (or more lucrative) for resource-limited prosecutors to act.

By contrast, where such direct prosecutorial incentives and resources were absent, so was enforcement. Even in states that were politically progressive antitrust bastions. Even in states that imposed draconian statutory penalties for antitrust violations. Thus, the best explanation for the failure of early state antitrust enforcement was insufficient prosecutorial enforcement incentives and capacity.

Finally, Part VI turns to the ramifications that this historical insight has on our time, an era where, once again, we have seen greatly renewed interest in state antitrust enforcement. By understanding what caused antitrust federalism to falter at the

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<sup>19</sup> See *infra* note 118 and accompanying text.

starting gate, today's state antitrust enforcers will be better able to achieve a different outcome.

## II. HISTORICAL CONTEXT

The late nineteenth century saw a host of dramatic changes in America's economy and society.<sup>20</sup> Increased industrialization and urbanization brought vast wealth and new technologies to the nation. However, it was also a time when citizens were increasingly anxious about economic inequality and the concentration of power in the hands of an industrial elite.<sup>21</sup> This anxiety would, in time, give voice to a powerful set of political movements aligned against "trusts," those business combinations seen as emblematic of these oppressive social forces. Indeed, this "antimonopoly persuasion"<sup>22</sup> was deeply felt in the press,<sup>23</sup> popular literature,<sup>24</sup> and the nation's politics.<sup>25</sup>

In response to these shifts, various groups began calling for oversight and regulation of the great corporate concentrations. The dominant motivation behind such proposals, whether for consumer welfare, protection of small business, social justice, or some combination, is debated today.<sup>26</sup> Yet whatever the precise mix of motives, by the century's closing decades, many were passionately concerned with reigning in large businesses.

In addressing this challenge, the era's reformers would have been well advised to look to state law. The common law against combinations in restraint of trade had been applied in America's state courts throughout the nineteenth century.<sup>27</sup> States had long had the power to grant—and revoke—corporate charters, a capability that let them play a key role in the first major trust busting skirmishes.<sup>28</sup> Politically, many states

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<sup>20</sup> Descriptions of this period include David Millon, *The First Antitrust Statute*, 29 WASHBURN L.J. 141, 142; see Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust-Retrospective and Prospective: Where Are We Coming from? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 937–38 (1987).

<sup>21</sup> Millon, *supra* note 20, at 142.

<sup>22</sup> STEVEN L. PIOTT, *THE ANTI-MONOPOLY PERSUASION: POPULAR RESISTANCE TO THE RISE OF BIG BUSINESS IN THE MIDWEST* 10 (1985).

<sup>23</sup> William T. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 224 (1956).

<sup>24</sup> Rush H. Limbaugh, *Historic Origins of Anti-Trust Legislation*, 18 MO. L. REV. 215, 241 (1953).

<sup>25</sup> Letwin, *supra* note 23, at 235.

<sup>26</sup> For a sampling of this debate, see Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Thomas J. DiLorenzo, *The Origins of Antitrust: An Interest-Group Perspective*, 5 INT'L REV. L. & ECON. 73 (1985); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917, 919 (1987).

<sup>27</sup> Barry E. Hawk & Laraine L. Laudati, *Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison*, 20 FORDHAM INT'L L.J. 18, 19 (1996). See also MICHAEL TREBILCOCK, *THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS* 22–23 (1986).

<sup>28</sup> James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 497 (1987).

had electorates that were more hostile to trusts than the nation at large, especially as represented by the industrialists who peopled the “billion dollar” fifty-first Congress.<sup>29</sup> And even if that Congress could be persuaded to pass a law, federal policymaking was hamstrung by a restrictive view of federal government powers. To wit, the Sherman Act, when passed, was “only the second major exercise of the federal power,”<sup>30</sup> and even given its limited scope, many doubted its constitutionality.<sup>31</sup>

It is unsurprising, therefore, that the first moves toward antitrust enforcement came from the states. Dramatic demonstrations first came through *quo warranto* suits based on the early trusts’ corporate form. *Quo warranto* litigation involved states dissolving trusts for violations of a state’s “public policy.” On this legal theory that the corporate structure of defendant trusts violated state law, state prosecutors won several prominent victories against major trust entities.<sup>32</sup>

In the North River Sugar Trust cases, for example, New York’s Attorney General’s Office successfully sued to revoke the charter of an affiliate of the national Sugar Trust.<sup>33</sup> Along these lines, similar results were obtained by Louisiana in an early common-law suit against an affiliate of the Cotton-Oil Trust.<sup>34</sup>

In response to this initial salvo, the great corporations increasingly restructured themselves to avoid such corporate-form based *quo warranto* suits going forward, such as by reincorporating in states with relatively permissive forms of corporate governance.<sup>35</sup>

This did not mark the end of state-level antitrust agitation. To the contrary, across the country states began to shift from reliance on corporate-form based, common-law litigation to the adoption of new statutes aimed at corporate conduct: that is, they drafted the nation’s first antitrust legislation. Typical of such laws was that of Kansas, adopted in 1889, which stated:

That all arrangements, contracts, agreements, trusts or combinations between persons or corporations made with a view or which tend to

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<sup>29</sup> Robert L. Bradley, Jr., *On the Origins of The Sherman Antitrust Act*, 9 CATO J. 737, 739 (1990); see Werner Troesken, *Did the Trusts Want a Federal Antitrust Law? An Event Study of State Antitrust Enforcement and Passage of The Sherman Act*, in PUBLIC CHOICE INTERPRETATIONS OF AMERICAN ECONOMIC HISTORY 77, 80 (Jac. C. Heckelman et al. eds., 2000).

<sup>30</sup> Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469, 1474 (1961). The first such exercise was the Interstate Commerce Act of 1887.

<sup>31</sup> A doubt that would soon be affirmed in dramatic fashion by the Supreme Court. See *United States v. E. C. Knight Co.*, 156 U.S. 1, 13 (1895).

<sup>32</sup> For an excellent history and analysis of such *quo warranto* actions, see Benjamin Woodring, *Quo Warranto: The Structure and Strength of a Common Law Antitrust Remedy*, 96 U. DET. MERCY L. REV. 187, 187–88 (2019).

<sup>33</sup> *E.g.*, *People v. N. River Sugar Ref. Co.*, 24 N.E. 834, 838 (N.Y. 1890).

<sup>34</sup> *Louisiana v. American Cotton Oil Trust*, 1 RY. & CORP. L.J. 509 (La. 1887).

<sup>35</sup> Herbert Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: A Historical Perspective*, 59 ANTITRUST L.J. 75, 84–85 (1990); Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 12–13 (2008). That said, Benjamin Woodring has challenged this conventional view, raising an intriguing argument that had states vigorously and creatively pursued *quo warranto* suits, even such multi-state combinations might have been dismantled. See generally Woodring, *supra* note 32, at 187–88.



prevent full and free competition in the importation, transportation or sale of articles imported into this state, or in the product, manufacture or sale of articles of domestic growth or product of domestic raw material or for the loan or use of money, or to fix attorneys or doctors' fees, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance, or which tend to advance or control the rate of interest for the loan or use of money to the borrower, or any other services, are hereby declared to be against public policy, unlawful and void.<sup>36</sup>

Kansas was not alone. In the years before the Sherman Act's passage, at least 13 states had adopted antitrust laws,<sup>37</sup> laws dependent not on a trust's incorporation status, but rather on its economic conduct. The language of such acts, as discussed in greater detail in Part III.A.4, was at least as vigorous as that of the Sherman Act; sometimes, even more so.<sup>38</sup>

In this context, when moves were made toward federal antitrust legislation, they were heavily influenced by state-level legislation. At the outset, indeed, some even thought that federal legislation was unnecessary, claiming state enforcement efforts would sufficiently address the trust problem.<sup>39</sup>

Unsurprisingly, when congressional debate began in earnest in the late 1880s, state antitrust law took center stage. For his part, Senator Sherman's clearest statement on the subject was that:

This bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to . . . supplement the enforcement of the established rules of the common and statute law by the courts of the several States in dealing with combinations that affect injuriously the industrial liberty of the citizens of these States. It is to arm the Federal courts within the full limits of their constitutional power that they may co-operate with the State courts in checking, curbing, and controlling the most dangerous

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<sup>36</sup> Act of March 2, 1889, 1889 Kan. Sess. Laws 389. For more on early antitrust, see HANS B. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 215 (1955).

<sup>37</sup> Act of April 16, 1888, 1888 Iowa Acts 124; Act of March 2, 1889, 1889 Kan. Sess. Laws 389; Act of May 20, 1890, 1889 Ky. Acts 143; Act of March 7, 1889, 1889 Me. Laws 235; Act of July 1, 1889, 1889 Mich. Pub. Acts 331; Act of February 22, 1890, 1890 Miss. Laws 55; Act of May 18, 1889, 1889 Mo. Laws 96; Act of March 29, 1889, 1889 Neb. Laws 516-517; Act of March 11, 1889, N.C. Sess. Laws 372; Act of March 3, 1890, 1889-1890 N.D. Laws 503; Act of March 7, 1890, 1890 S.D. Sess. Laws 323; Act of April 4, 1889, 1889 Tenn. Pub. Acts 475; Act of March 21, 1889, 1889 Tex. Gen. Laws 141.

<sup>38</sup> For an insightful analysis of the text of these early state antitrust laws, see Charles S. Dameron, *Present at Antitrust's Creation: Consumer Welfare in the Sherman Act's State Statutory Forerunners*, 125 *YALE L.J.* 1072, 1084-85 (2016).

<sup>39</sup> Limbaugh, *supra* note 24, at 219; see also Letwin, *supra* note 23, at 245-46.

combinations that now threaten the business, property, and trade of the people of the United States . . .<sup>40</sup>

Or, as the Report of the House Judiciary Committee stated: “Whatever legislation Congress may enact on this subject within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.”<sup>41</sup>

This view was widely shared.<sup>42</sup> In contrast, the power of federal-level enforcement was seen as quite limited. Many legislators expressed hesitation, arguing that constitutional limits largely barred the federal government from any antitrust enforcement.<sup>43</sup> Tellingly, these same sources shared a faith that the states *did* have the constitutional power to address the problems of economic concentration—a sentiment that, as shown below, contemporary courts often shared.<sup>44</sup>

To be sure, Sherman Act’s drafters differed in their intentions and expectations. Even today, their overall purposes are hotly debated. Yet as the above discussion shows, to the extent legislative history is relevant, it suggests a Congress that expected the primary locus of antitrust enforcement to be the states.

Strikingly, this understanding was largely shared by the shareholders of the trusts themselves. As a path-breaking analysis by Werner Troesken makes clear, event studies show that share prices dropped far more from the advent of various state antitrust laws and state antitrust cases than from the passage of the federal Sherman Act, suggesting that capital feared the states more than the Sherman Act.<sup>45</sup> The era’s scholars, too, shared this view, as seen in the focus of leading contemporary treatises on state, as opposed to federal, antitrust laws and cases.<sup>46</sup> In sum, when Senator Sherman declaimed that his Act that would serve merely as a “supplement,” he echoed what politicians, businesspeople, and academics all believed to be the most plausible outcome.

What happened next was a surprise. Put simply, state-statutory antitrust enforcement was a bust. James Rahl, for example, notes that “even in the most exuberant formative years of American antitrust policy, few state laws were vigorously enforced.”<sup>47</sup> Roger W. Stone described the record of state antitrust

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<sup>40</sup> 21 CONG. REC. 2456-57 (1890).

<sup>41</sup> Millon, *supra* note 20, at 149. See Hovenkamp, *supra* note 14, at 378; May, *supra* note 28, at 503–04; Hawk & Laudati, *supra* note 27, at 20.

<sup>42</sup> See, e.g., 21 CONG. REC. 2614 (1890) (statement of Sen. Coke) (observing “Congress has not the power to deal fully with this subject” and that states will be drawn to pass similar legislation); *id.* at 2469-70 (statement of Sen. Reagan) (citing necessity of state enforcement to fully combat monopolistic practices); Bork, *supra* note 26, at 31–35.

<sup>43</sup> 21 CONG. REC. 1460 (1889) (statement of Sen. George); 21 CONG. REC. 1769 (1890) (statement of Sen. George); 21 CONG. REC. 2463-67 (1890) (statement of Sen. Vest); 21 CONG. REC. 2467-68 (1890) (statement of Sen. Hiscock).

<sup>44</sup> See *infra* Part IV.A.

<sup>45</sup> Troesken, *supra* note 29, at 80.

<sup>46</sup> May, *supra* note 28, at 504.

<sup>47</sup> James A. Rahl, *Toward a Worthwhile State Antitrust Policy*, 39 TEX. L. REV. 753, 753 (1961).

enforcement in this period as “meager,” adding “[s]tate antitrust enforcement efforts are remarkable for their absence.”<sup>48</sup> Hans B. Thorelli flatly wrote that states were “not very active in prosecuting combinations.”<sup>49</sup> Stephen Rubin notes that “as events were to prove . . . Sherman’s expectations of continuing state enforcement” did not survive “the enactment of the statute that carries his name.”<sup>50</sup> And Andrew Gavil observed that “State regulation of the trusts . . . quickly proved to be inadequate to the task.”<sup>51</sup> Or, as Benjamin Woodring pungently summarized: “[i]t is a commonplace that states in the late nineteenth century were unable to prosecute continuously successful antitrust policy.”<sup>52</sup>

Lawyers and historians are therefore left with a mystery: what accounts for such an unexpected outcome? Why did the states stay sidelined? We now turn to this question.

### III. THE EMPIRICAL PATTERN OF EARLY STATE ANTITRUST INACTION

Contrary to what contemporary politicians, scholars, and companies believed, state antitrust enforcement failed to take off in the era of the Sherman Act. Why? To begin answering this question, this Part presents and analyzes a novel and comprehensive data set of all relevant instances of state statutory antitrust prosecutions from 1889 to 1914. This data set, in turn, will form the foundation for a rigorous account of this early absence of state enforcement.

As a first step, it is important to set out the methodology I chose in generating this record: (1) what states were considered; (2) what time period was reviewed; (3) how cases were found; and (4) which cases were ultimately included.

The first question is what states to select. This analysis asks why the vigorous state-level enforcement envisioned by the Sherman Act’s drafters did not come to pass. To address this question, I limited the study to the nineteen states which were “present at the creation” of federal antitrust—that is, states that had active statutory or quasi-statutory<sup>53</sup> antitrust regimes at or around the time of the Sherman Act’s drafting.

Eighteen of these states had antitrust statutes in place by 1891. The first thirteen, Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, and Texas, had antitrust statutes that predated the enactment of the Sherman Act. A fourteenth, Montana, adopted a constitutional amendment in 1889 requiring the promulgation of such a law,<sup>54</sup> and

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<sup>48</sup> Roger W. Stone, *Reviving State Antitrust Enforcement: The Problems with Putting New Wine in Old Wine Skins*, 4 J. CORP. L. 547, 554 (1979).

<sup>49</sup> THORELLI, *supra* note 36, at 156.

<sup>50</sup> Stephen Rubin, *Rethinking State Antitrust Enforcement*, 26 U. FLA. L. REV. 653, 661 (1974).

<sup>51</sup> Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 658 (1993).

<sup>52</sup> Woodring, *supra* note 32, 187–88.

<sup>53</sup> See *infra* notes 56–59 and accompanying text.

<sup>54</sup> MONT. CONST., art. XV, § 20 (1889).

apparently did so soon after.<sup>55</sup> Four other states, Alabama, Illinois, Louisiana and Minnesota, adopted antitrust laws in the year following the Sherman Act's passage.<sup>56</sup>

The inclusion of the final state, New York, requires a bit more explanation. New York did not adopt its antitrust statute until 1897.<sup>57</sup> However, from 1889 on, the state had engaged in aggressive and sustained common-law antitrust prosecutions,<sup>58</sup> lawsuits which were important and much-discussed inspirations for the Sherman Act itself.<sup>59</sup> Given this prominent position, I treat New York as having a "quasi-statutory" regime as of the passage of the Sherman Act, and so include it in this study. That said, this work only analyzes the Empire State's (fully) statutory prosecutions. In any case, this decision is not of much analytic moment: even if New York were excluded, each of this Article's empirical and historical conclusions would still stand.

The second key question is what time period would be considered. This study focuses on the time period from the enactment of the first Sherman Act analogs in 1889 until the end of 1914, allowing for analysis of these statutes across a generation without needing to address the confounding variable of World War I, whose impact on state antitrust may well have superseded any of the dynamics this paper examines.<sup>60</sup> Notably, this coincides with what scholars frequently term the "Formative Period" of American antitrust enforcement.<sup>61</sup>

The third question is how to identify all prosecutions in which these states employed their Sherman-law analogues. To search for such cases, I first identified all cases in the target states that included "State," "People," "Commonwealth" or "Attorney General" as a party, and that also included some variant of the word "monopoly."<sup>62</sup> I then broadened my search to include all opinions in the target states that included both some variant of the word "trust" and some variant of the word "combination."<sup>63</sup>

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<sup>55</sup> Just how soon is not clear from the available historical record, but at the latest, the Montana antitrust statute was in force by 1895. 8 CODES AND STATUTES OF MONTANA § 321 (1895).

<sup>56</sup> Act of Feb. 7, 1891, 1891 Ala. Laws 438; Act of June 11, 1891, 1891 Ill. Laws 206; Act of July 5, 1890, 1890 La. Acts 90; Act of April 20, 1891, 1891 Minn. Laws 82–83.

<sup>57</sup> 1897 N.Y. Laws 313.

<sup>58</sup> *E.g.*, *People v. Duke*, 44 N.Y.S. 336 (N.Y. Ct. Gen. Sess. 1897); *People v. Milk Exch. Ltd.*, 39 N.E. 1062 (N.Y. 1895); *People v. Sheldon*, 34 N.E. 785 (N.Y. 1893); *People v. N. River Sugar Ref. Co.*, 24 N.E. 834 (N.Y. 1890).

<sup>59</sup> *E.g.*, 21 CONG. REC. 2459 (1890) (statement of Sen. Sherman) (discussing *People v. North River Sugar Refining Co.* as an example of successful state-level enforcement, while arguing that the existence of multi-state trusts also required a federal solution).

<sup>60</sup> Stone, *supra* note 48, at 554–55.

<sup>61</sup> *See, e.g.*, Rahl, *supra* note 47, at 753 (defining "formative years" of antitrust as ending with World War I); John C. Brinkerhoff Jr., *Note, Ropes of Sand: State Antitrust Statutes Bound by Their Original Scope*, 34 YALE J. ON REG. 353, 358 (2017) (same). *But see* James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust Policy*, 59 ANTITRUST L.J. 93, 97 (1990) (setting end of formative period as 1918); Stone, *supra* note 48, at 554, 619 (defining the end of the formative period as 1910).

<sup>62</sup> Search of the Westlaw database, conducted August 15, 2019.

<sup>63</sup> Search of the Westlaw database, conducted August 15, 2019.

After completing these searches, I then checked my results by using two other sources. First, I reviewed all state-law cases cited by Joseph E. Davies's 1915 treatise on antitrust enforcement, which was considered authoritative at the time.<sup>64</sup> I also reviewed the collection of state law cases gathered by Hans B. Thorelli in his seminal and exhaustive *The Federal Antitrust Policy: Origination of an American Tradition*.<sup>65</sup>

Finally, once I had generated search results through this process, I eliminated two types of cases not relevant to this study. First, because the focus of this work is on statutory prosecutions, I screened out those few prosecutions brought under common-law theories.<sup>66</sup> Second, in the early twentieth century, a number of states in the study adopted bans on price discrimination that were, to greater or lesser degrees, Clayton Act analogues, not Sherman Act analogues.<sup>67</sup> For analytical clarity, these, too, were excluded.

The end result of this process was a data set of 71 unique state antitrust prosecutions, which generated 105 opinions (as some complex cases generated more than one court ruling). The full set opinions and prosecutions, organized by state, is presented as this Article's Appendix. The summary, along with the number of federal antitrust prosecutions in the same period, is as follows:

**Table 1: Total State Antitrust Prosecutions and Related Judicial Opinions, 1889-1914**

<u>State</u>	<u>State Antitrust Statute Prosecutions</u>	<u>Number of State Antitrust Statute Opinions</u>
Missouri	14	15
Texas	12	17
Kansas	10	13
New York	7	12
Kentucky	6	21
Mississippi	6	7
Nebraska	4	6
Tennessee	4	5
Illinois	3	3
Michigan	2	2
Minnesota	2	3
Montana	1	1
Alabama	0	0
Iowa	0	0

<sup>64</sup> JOSEPH E. DAVIES, TRUST LAWS AND UNFAIR COMPETITION 466–72 (1st ed. 1916).

<sup>65</sup> THORELLI, *supra* note 36.

<sup>66</sup> *E.g.*, State v. Craft, 83 S.E. 772 (N.C. 1914) (notwithstanding the existence of a North Carolina antitrust law, prosecution was brought under a common-law theory).

<sup>67</sup> *E.g.*, State v. Fairmont Creamery Co., 133 N.W. 895 (Iowa 1911).

Louisiana	0	0
Maine	0	0
North Carolina	0	0
North Dakota	0	0
South Dakota	0	0
<b>Total State Prosecutions</b>	<b>71</b>	<b>105</b>
Federal Sherman Act prosecutions during same period	148 <sup>68</sup>	N/A

In Part V, these data will be explored in much greater detail. For now, however, two features are worth noting. On one hand, the prevailing view that state antitrust enforcement proved lackadaisical finds considerable support. Among these nineteen states—states that presumably were among the most committed to antitrust enforcement, because they passed the first state antitrust statutes—ten saw two or fewer prosecutions, and seven saw none.

Indeed, contrary to the then-prevailing wisdom, the overall enforcement rate of state antitrust lagged well behind that of federal antitrust, with only about half as many state prosecutions reported.<sup>69</sup> To be sure, the comparison is imperfect, since the available federal data capture “antitrust cases instituted by the Department of Justice,”<sup>70</sup> while presumably not all initiated state antitrust prosecutions resulted in reported opinions. Yet, even if state antitrust prosecutions were on par with federal suits, for at least six reasons this would still be striking:

(1) Many state electorates and polities were far more progressive than the federal government, suggesting the pressure would be for *more*, not *less*, vigorous enforcement;

(2) Many state statutes were more specific and targeted than the federal Sherman Act, appearing to grant more vigorous enforcement authority;

(3) Federal-level enforcement (and federal legislation generally) was comparatively novel (as noted, the Sherman Act was only the second such law to be passed);

(4) The constitutional validity of federal antitrust law was far from settled, while state-level economic enforcement had repeatedly been upheld as valid;

(5) In many states there were no recorded antitrust prosecutions whatsoever; and

(6) In large measure, contemporary observers from the drafters of the Sherman Act, to corporate shareholders, to legal scholars, *believed* that vigorous state-level enforcement would be forthcoming.

That said, notwithstanding this surprising pattern of inaction, an important nuance emerges: in some states, at least some state antitrust enforcement did take place. Six jurisdictions in particular, Missouri, Texas, Kansas, New York, Kentucky and

<sup>68</sup> Richard Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366 (1970).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

Mississippi, can be thought of as “high enforcement” states—places where six or more antitrust prosecutions took place during the period at issue. Some of the states on this list, like Texas, Missouri, and New York, have been identified as having relatively robust early antitrust regimes.<sup>71</sup> Others, like Kansas, come as something of a surprise.<sup>72</sup>

In any case, the upshot is a picture of two quite different antitrust regimes. In most of the country, vigorous state enforcement—the enforcement the Sherman Act had anticipated—simply did not happen. Yet in a few states, at least some such enforcement did occur. Armed with this insight, we must now consider what these data can tell us about our central problem: why did the expected vigorous state-level antitrust enforcement fail to take place?

#### IV. FOUR FAILED EXPLANATIONS

In the previous Part, I presented new empirical data that confirmed an old conclusion: while state-level enforcement was expected to play a vigorous and vibrant role in the wake of the Sherman Act, it seldom did. In this Part, I assess four prominent explanations that have been offered for this surprising outcome: (1) doctrinal arguments on the permissibility of state-level enforcement; (2) economic arguments based on the practical efficacy of state-level enforcement; (3) institutional arguments that the federal government’s Sherman Act authority had displaced state activity; and (4) political arguments that public opinion or political figures simply lost interest. None, however, survives scrutiny.

##### A. *Doctrinal Limits of State Enforcement?*

The first broad category of explanations for the failure of early state antitrust enforcement is doctrinal. Under such arguments, irrespective of states’ intentions, they lacked sufficient legal power to pursue meaningful antitrust enforcement. In turn, this category is divided into three lines of attack: (1) arguments that the dormant Commerce Clause prevented states from regulating the trusts; (2) arguments that the Fourteenth Amendment’s Due Process Clause precluded effective state antitrust enforcement; and (3) arguments that, on their own terms, the text of state statutes did not permit the effective prosecution of antitrust violations. Each of these claims is considered below.

##### 1. The Dormant Commerce Clause

A first doctrinal argument stems from the so-called “Dormant Commerce Clause.” Under Dormant Commerce Clause jurisprudence, states are forbidden from legislating when doing so would have a significant adverse effect on interstate commerce.<sup>73</sup> Analyzing this doctrine, some have argued that early state antitrust laws were in

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<sup>71</sup> See George F. Sieker, *The Role of the States in Antitrust Law Enforcement--Some Views and Observations*, 39 TEX. L. REV. 873 (1961); Rahl, *supra* note 47, at 754.

<sup>72</sup> *But see* Millon, *supra* note 20 (discussing Kansas’s early antitrust history)

<sup>73</sup> Martin Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L. J. 569, 570 (1987).

constitutional peril from the start, since enforcing them might impose unacceptable economic effects beyond state borders.<sup>74</sup>

There is no doubt that lawyers of the 1890s thought certain types of economic activity could be off-limits to state antitrust enforcement: indeed, this assumption is partially what motivated the passage of the Sherman Act.<sup>75</sup> However, these categories were not very broad and, therefore, would not have substantially reduced the capacity for state-level enforcement. To the contrary, the Commerce Clause jurisprudence of this period was, if anything, hostile to *federal*, not state, interventions. Perhaps the leading example of this tendency is the 1895 case of *United States v. E. C. Knight Co.*<sup>76</sup> There, the federal government brought a Sherman Act prosecution against a group of major sugar manufacturers, all operating within Pennsylvania. Although these manufacturers collectively possessed an enormous share of the sugar market, the Court found this challenge to be beyond the scope of the Commerce Clause, finding the factories were engaged merely in “manufacture,” and not in the transport of goods across state lines.<sup>77</sup> Yet in doing so, at least some believe that the Court was motivated not so much by a laissez-faire defense of corporate wealth, but by an effort to *buttress* state authority over the intrastate operations of interstate combinations.<sup>78</sup>

Accordingly, throughout the period at issue in this analysis, it would have been most logical to conclude, as a doctrinal matter, that state power to regulate the economy, even if such regulations impacted events beyond state borders, was quite robust. Indeed, this point would be confirmed by the Supreme Court in Justice Holmes’ opinion in *Standard Oil Co. of Kentucky v. Tennessee*.<sup>79</sup> In that case, a Kentucky-based corporation appealed from a conviction under Tennessee’s state antitrust statute, arguing that under the Constitution, a state’s courts could not levy criminal penalties against an out-of-state corporate entity.<sup>80</sup> In particular, it argued such penalties would violate the Dormant Commerce Clause because it would constitute one state imposing impermissible regulations across state lines.<sup>81</sup> The Court disagreed, instead finding that each state clearly had jurisdiction to regulate *economic effects* caused within its jurisdiction, even if caused by out-of-state actors:

The present statute deals with the conduct of third persons, strangers to the business. It does not regulate the business at all. It is not even directed against interference with that business specifically, but against acts of a certain kind that the state disapproves in whatever connection. The mere fact that it may happen to remove an

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<sup>74</sup> *E.g.*, Gavil, *supra* note 51, at 682–83 (“Although Congress responded directly to *Wabash* by enacting the Interstate Commerce Act, the implications of the case did not go unnoticed by advocates of antitrust legislation. If the states lacked the power under the dormant Clause to regulate rail rates, would they be permitted to regulate the trusts?”).

<sup>75</sup> May, *supra* note 28, at 509 n.85.

<sup>76</sup> 156 U.S. 1 (1895).

<sup>77</sup> *Id.*

<sup>78</sup> May, *supra* note 28, at 512 (emphasis added).

<sup>79</sup> 217 U.S. 413, 422; *see also* Rubin, *supra* note 50, at 671.

<sup>80</sup> *Standard Oil Co.*, 17 U.S. at 419.

<sup>81</sup> *Id.* at 422.



interference with commerce among the states as well with the rest does not invalidate it. It hardly would be an answer to an indictment for forgery that the instrument forged was a foreign bill of lading, or for assault and battery, that the person assaulted was engaged in peddling goods from another state. How far Congress could deal with such cases we need not consider, but certainly there is nothing in the present state of the law, at least, that excludes the states from a familiar exercise of their power.<sup>82</sup>

To be sure, this power would be limited since "Congress would have understood that state imposition or regulation of direct restraints of *interstate* commerce would violate the Dormant Commerce Clause."<sup>83</sup> However, on the whole, the power available would have been considerable, especially since, as discussed below, America's economy at this time was far more concentrated at the state level anyway.<sup>84</sup> Thus, the Dormant Commerce Clause jurisprudence of this era would not have seemed to be a fatal obstacle to effective state antitrust enforcement.

## 2. Fourteenth Amendment Arguments

Another set of doctrinal objections stem from the Fourteenth Amendment. This claim is that state antitrust laws might violate the Equal Protection Clause by arbitrarily discriminating among groups. Specifically, some litigants argued that state antitrust laws that exempted certain classes of economic actors, such as farmers, but not others, such as industrialists, violated the clause.

In Illinois, this sort of differential treatment did receive an initial rebuke in *Connolly v. Union Sewer Pipe Company*.<sup>85</sup> Here, the Supreme Court considered an 1893 amendment to Illinois's antitrust law that exempted the agricultural sector, stating "the provisions of this act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."<sup>86</sup> The Supreme Court struck down this provision, holding that under the Fourteenth Amendment, this special exemption for farmers was not reasonable.<sup>87</sup>

At first, this would seem to be a serious impediment to effective state antitrust regimes. After all, the political coalitions that pressed hardest for state antitrust statutes often wanted to exempt themselves. To wit, at least some states "wanted both agricultural associations and effective anti-trust laws."<sup>88</sup>

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<sup>82</sup> *Id.*

<sup>83</sup> Alan J. Meese, *Antitrust Federalism and State Restraints of Interstate Commerce: An Essay for Professor Hovenkamp*, 100 IOWA L. REV. 2161, 2181–82 (2015).

<sup>84</sup> See *infra* notes 1032–1043 and accompanying text.

<sup>85</sup> 184 U.S. 540 (1902).

<sup>86</sup> 1893 Ill. Laws 520; see also *id.* at 556 (discussing agricultural exemption).

<sup>87</sup> *Connolly*, 184 U.S. at 564–65; see Comment, *The Illinois Anti-Trust Law Disinterred*, 43 ILL. L. REV. 205, 211 (1948).

<sup>88</sup> *The Illinois Anti-Trust Law Disinterred*, *supra* note 87, at 212; see, e.g., 1897 Tenn. Pub. Acts 241–42 (exempting agriculture and livestock from state antitrust coverage); 1893 Ill. Laws 520 (same).

Ultimately, though, *Connolly* did not end up greatly reshaping state antitrust laws. For its part, Illinois' courts subsequently held that, though the 1893 amendment to the antitrust law had been struck down, the remainder of the law would stay in force.<sup>89</sup> Beyond Illinois, only Montana appears to have adopted the *Connolly* reasoning to strike down its antitrust statute, which it did in 1905.<sup>90</sup> Yet just a few years later, the Montana legislature, undeterred, passed essentially the same law, which this time stayed on the books.<sup>91</sup> By contrast, courts in most other states simply found ways to distinguish away the *Connolly* precedent.<sup>92</sup> And in any case, many of the most important state statutes included no such industry-specific exemptions at all: in those jurisdictions, *Connolly* would have no limiting impact whatsoever. Accordingly, while *Connolly* may have created some degree of "confusion" among the states for a time,<sup>93</sup> this seems insufficient to explain why so many states failed to effectively use their antitrust laws—or why a select few used such laws with relatively great frequency.

### 3. State Statutory Text

A final doctrinal argument is the state antitrust statutes themselves were simply insufficiently vigorous to allow for effective prosecution.<sup>94</sup> Proponents of this approach sometimes latch on to language perceived as unduly verbose or anachronistic to suggest that the statutes in question would not have offered a viable enforcement mechanism.<sup>95</sup> This interpretation, however, seems misguided. Instead, if anything, the language of early state antitrust statutes offered more efficacious redress than the federal analog. As Werner Troesken observes:

As for enforcement mechanisms, the Sherman Act was limited to authorizing the U.S. Attorney General to enforce the law. State antitrust laws threatened their attorneys general with imprisonment and fines for failure to enforce antitrust violations (Kansas); allowed attorneys general to keep a percentage of all fines won in antitrust cases (Iowa, Missouri, Nebraska, and North Carolina); and required all businesses in the state to regularly file affidavits swearing they were not associated with any illegal combinations (Illinois, Maine, Missouri, South Carolina, and Texas). If a business failed to file such an affidavit, it risked incurring a large fine or having its corporate charter revoked. One state (South Dakota) required its attorney general to file suit whenever they received a sworn affidavit

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<sup>89</sup> *The Illinois Anti-Trust Law Disinterred*, *supra* note 87, at 212.

<sup>90</sup> *State v. Cudahy Packing Co.*, 33 Mont. 179 (1905).

<sup>91</sup> Act of March 6, 1909, 1909 Mont. Laws 128.

<sup>92</sup> Rubin, *supra* note 50, at 662–63.

<sup>93</sup> *Id.* at 666.

<sup>94</sup> John J. Flynn, *Trends in Federal Antitrust Doctrine Suggesting Future Directions for State Antitrust Enforcement*, 4 J. CORP. L. 479, 481 (1979) ("Recognition of an independent responsibility to enforce state antitrust statutes has, in many states, raised at least two immediate problems. The first is the fact that many state antitrust statutes are inadequate in substantive scope, jurisdictional reach, enforcement tools and/or remedies.").

<sup>95</sup> Rahl, *supra* note 47, at 760 (noting, though ultimately rejecting, the argument that this sometimes-overwrought drafting waylaid state enforcement efforts).

from a private citizen declaring he had been harmed by a monopolistic combination . . . . *Where the Sherman Act was vague and narrow, state antitrust laws were precise and sweeping, expressly prohibiting a broad class of potentially anti-competitive [conduct].*<sup>96</sup>

It is thus highly unlikely that the specific language of state antitrust statutes account for such widespread state inactivity. Moreover, this conclusion is further supported by two crucial pieces of evidence. First, the data gathered in Part II does not reveal a pattern of total inactivity. Instead, it reveals that in at least some states, statutory prosecutions were both viable and consequential. Second, even as state enforcement languished, private suits brought under state antitrust law were brought considerably more frequently,<sup>97</sup> suggesting statutory text sufficient to viably address antitrust violations.

### B. *Practical Efficacy of State Prosecutions?*

Shifting away from doctrine, a second set of arguments is even if state antitrust litigation would have been legally viable, it would not, as a practical matter, be effective in breaking up the trusts. This argument takes several forms.

First, following early state successes using common-law *quo warranto* theories, various companies restructured their forms to immunize themselves from such litigation.<sup>98</sup> On this logic, some argue that state prosecutions would simply not be effective, since corporations could simply shift their form to avoid state jurisdiction.

Of course, the original form of *quo warranto* suits brought against entities like New York's Sugar Trust affiliate<sup>99</sup> were probably rendered non-viable by changes in corporate structure.<sup>100</sup> Yet, the new forms of antitrust enforcement embodied by the state statutes, enforcement that looked not to corporate form but to economic activity, proved effective against even the most complex and sophisticated trusts of the age,<sup>101</sup> often yielding substantial penalties.<sup>102</sup>

A variant on this argument is the claim that even if states did have power to regulate their internal economies, this power would not be efficacious given the interstate nature of the major trusts. As noted previously, however, state economic regulatory power during this time was generally given a wide berth, extending even to entities that were based well outside the state. And, notwithstanding the expansion in the size and scope of businesses, a substantial amount of economic activity unfolded within state borders, and so would be well within the state's reach even under this

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<sup>96</sup> Troesken, *supra* note 29, at 86–88 (emphasis added) (internal citations omitted); *see* May, *supra* note 28, at 499–500; Dameron, *supra* note 38.

<sup>97</sup> Stone, *supra* note 48, at 554; NEW YORK STATE BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE NEW YORK ANTITRUST LAWS 7A n.43 (1957).

<sup>98</sup> For a discussion of these suits, and the trusts' response, *see supra* notes 32–35 and accompanying text.

<sup>99</sup> *See supra* note 33 and accompanying text.

<sup>100</sup> Crane, *supra* note 35, at 14.

<sup>101</sup> *See infra* Part V.A.

<sup>102</sup> *See id.*

theory. Indeed, as late as the 1960's, most antitrust violations the Department of Justice prosecuted unfolded within a single state's jurisdiction.<sup>103</sup> Seventy years before, in an era of "relatively insignificant commercial intercourse between the states,"<sup>104</sup> this concentration would only have been more pronounced.

A final efficacy argument concerns the fear that antitrust enforcement, far from being too weak, was in fact too strong, and so risked scaring away businesses from the state. According to this argument, state antitrust enforcement failed because prosecutors were chary of driving large economic entities out of business or out of the community.<sup>105</sup>

While initially intuitive, this argument from business concerns faces several serious flaws. As a matter of political economy, much of the agitation for antitrust law, and many of the most potent political interest groups in states, were incumbent local business owners who feared national entrants.<sup>106</sup> Given this influence, it seems odd to assert that a prosecutor or governor's incentives would be to avoid antitrust enforcement to keep big businesses in-state. If anything, one would expect the opposite: that causing the exit of large out-of-state competitors would be viewed as a political victory.<sup>107</sup>

Moreover, as a matter of economics, vigorous antitrust enforcement, far from driving businesses away, would actually create superior competitive and economic conditions, and would arguably create more economic activity in the long run.<sup>108</sup> Last, the argument that state enforcement lagged due to fears of driving away business seems to presuppose that, if found liable, companies would be either ousted from the state or would leave voluntarily. Yet it is far from clear that this happened. To the contrary (and to the dismay of some prosecutors) courts seldom ordered complete ousters, but instead ordered massive fines against companies, suggesting that, at least in large measure, states that vigorously enforced antitrust could "have their cake and eat it too."<sup>109</sup>

### C. Federal Government "Displacement"?

A third argument, sometimes suggested but rarely precisely elaborated, is that federal antitrust law somehow "displaced" state enforcement. On this account, once state officials saw that the federal government had enacted the Sherman Act, they decided to stop enforcing their own statutes in response. Describing this approach, Werner Troesken writes:

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<sup>103</sup> Robert C. Fellmeth, *Antitrust Enforcement by Local Prosecutors: Impediments and Prospects*, 14 CAL. W. L. REV. 1, 3 (1978); see Rahl, *supra* note 47, at 759.

<sup>104</sup> Rubin, *supra* note 50, at 667.

<sup>105</sup> *The Commerce Clause*, *supra* note 30, at 1472; May, *supra* note 28, at 501–02.

<sup>106</sup> Troesken, *supra* note 29, at 84; see Donald J. Boudreaux et al., *Antitrust before the Sherman Act*, in *THE CAUSES AND CONSEQUENCES OF ANTITRUST-THE PUBLIC-CHOICE PERSPECTIVE* 255–70 (Fred S. McChesney & William F Shughart II eds., 1995).

<sup>107</sup> However economically wise or unwise such a decision might be.

<sup>108</sup> Stone, *supra* note 48, at 574.

<sup>109</sup> HENRY R. SEAGER & CHARLES A. GULICK, JR., *TRUST AND CORPORATION PROBLEMS* 361, 365 (1929).

The work of Gabriel Kolko suggests another way the trusts might have perceived a federal antitrust law as beneficial. According to Kolko, businesses of all kinds – railroads, banks, insurance companies, and so on – lobbied for increased federal regulation and control because they believed it would forestall more hostile forms of regulation taking place at the state and local level.<sup>110</sup>

On this reading, as one commenter asserted, the Sherman Act's passage, in and of itself, "sounded the death knell for state enforcement efforts."<sup>111</sup>

Such appeals to an ill-defined federal "displacement" of state law leave much to be filled in. It is possible the "displacement" they refer to is the formal displacement of federal preemption. If so, then the doctrinal arguments outlined earlier would seem to conclusively dispose of this. Yet in any case, once again, the data do not support such an interpretation, since if the federal government had broadly "displaced" state prosecutions, one would not expect to find so much of it in the "high enforcement" states. And, if the Sherman Act really was supposed to "displace" state antitrust laws, it proved an unambiguous failure, as a host of states adopted new antitrust laws or strengthening old ones in the decade following the Act's passage.<sup>112</sup>

#### D. *Shifting Political Interests?*

As a final possibility, some argue that the lack of enforcement can be explained by a change in political interests. Under this framework, the electorate's passion for trust busting culminated in the passage of antitrust statutes, both state and federal. Yet, by the time these laws were in place, public interest had waned, such that vigorous enforcement of said laws was not desired by the public, and was not pursued.<sup>113</sup>

One rough measure of public sentiment involves the partisan affiliations of the state legislators in question. Perhaps if antitrust statutes had been passed by one party, and then a second party took power, this would account for a policy of non-enforcement. Yet, this is not what happened.

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<sup>110</sup> Troesken, *supra* note 29, at 80 (internal citation omitted).

<sup>111</sup> David A. Upah, *State Anti-Merger Policy: Divesting the Federal Government of Exclusive Regulation*, 12 LOY. U. CHI. L. J. 533, 533 (1981).

<sup>112</sup> See, e.g., The Cartwright Act, 530 Stats. of Cal. §§ 1-12 (1907); Kan. Gen. Stat. § 30-67 (1897); Neb. Gen. Stat. § 162-22; Tex. Gen. Stat. § 146-5 (1899).

<sup>113</sup> See, e.g., Stone, *supra* note 48, at 552-53 ("The state antitrust laws and the Sherman Act were the catharsis of this public indignation. It was recognized by most astute politicians at the time that what was needed was 'a ceremonial concession to an overwhelming public demand for some kind of reassuring action against the trusts.'").

**Table 2: Legislative Control By Party Passing Initial State Antitrust Bill, 1889 - 1914**

	Years Both Houses Controlled by Same Party as Original Enactors	Years One House Was Controlled by Same Party as Original Enactors	Years Neither House Was Same Party as Original Enactors <sup>114</sup>
Alabama	24	0	0
Illinois	18	2	4
Iowa	24	0	2
Kansas	24	2	0
Kentucky	19	4	0
Louisiana	24	0	0
Maine	22	0	2
Michigan	22	0	2
Minnesota	0	22	2
Mississippi	24	0	0
Missouri	18	6	0
Nebraska	16	2	6
New York	13	2	2
North Carolina	20	2	2
North Dakota	24	0	0
South Dakota	24	0	0
Tennessee	24	0	0
Texas	24	0	0
<b>Total</b>	<b>364</b>	<b>42</b>	<b>22</b>

These data are a model of consistency: for 85% of the time of this study, both houses of a given state's legislature were controlled by the parties that held them when the first antitrust statute was passed. Another ten percent of the time, at least one house was held by the original party.

<sup>114</sup> Statistics here drawn from MICHAEL J. DUBIN, PARTY AFFILIATIONS IN THE STATE LEGISLATURES: A YEAR BY YEAR SUMMARY, 1796-2006 (2007). Table 2 omits Montana, however, since both its House and Senate passed antitrust law by legislatures divided equally by party. *See id.*

Further support for this conclusion is provided by the number of states that, throughout this period, enacted additional antitrust legislation aimed at strengthening the previous regime.<sup>115</sup>

In sum, an explanation based on shifting partisan allegiances cannot account for the failure of early state antitrust (or, for that matter, for the relative activity of the "high enforcement states").

#### V. PROSECUTORIAL CAPACITY AND AGENCY INCENTIVES

In this Part, I consider an alternative explanation for state inactivity, one that has at times been suggested, but that has yet to be systematically proven. This is the "prosecutorial capacity" explanation: state antitrust enforcement was shaped mainly by the structure, incentives and powers of state attorneys general and other local prosecutors. On this account, states failed to engage in vigorous antitrust enforcement because state prosecutors lacked the capacity, resources, and incentives to undertake antitrust prosecutions.

Antitrust prosecutions are famously resource-intensive, lasting years and costing substantial amounts of money.<sup>116</sup> These costs were very much present at the start of antitrust enforcement. Kentucky's case against International Harvester, for example, lasted five years, involved at least fourteen Commonwealth attorneys (including some from a private law firm), and generated thirteen reported opinions.<sup>117</sup>

Given these costs, some suggest state prosecutorial offices were simply not up to the task of enforcing antitrust law. As Hans Thorelli asserted:

That states were not very active in prosecuting combinations may be attributed to a number of reasons. Sheer inertia or lack of independence on the part of the prosecuting authorities, in addition to the lack of funds and personnel, generally played a large part. For an attorney general to mass sufficient data to secure a conviction of a large combination with practically unlimited resources was indeed a formidable task.<sup>118</sup>

Uncharacteristically though, Thorelli's mention of prosecutorial incapacity is not supported by any citations or corroborated by any other evidence. He is not alone: while others have made passing suggestions that structural constraints of prosecutorial offices could have limited state enforcement, a review of the literature reveals no support for this assertion beyond the authors' naked intuitions.<sup>119</sup>

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<sup>115</sup> See, e.g., 1897 Ill. Laws 153 ("Trusts, Pools, Combines, Etc."); 1901 N.C. Sess. Laws 820 ("An act to protect trade, commerce and transportation from combination, monopoly and conspiracy"); Act of March 13, 1905, 1905 N.D. Laws 336–40 ("Anti-trust law"); Act of March 23, 1903, 1903 Tenn. Laws 1726 (proposed act to "declare unlawful and void all arrangements and contracts, agreements, trusts or combinations made with a view to lessen or which tend to lessen free competition in the importation or sale of articles imported into this State.").

<sup>116</sup> Breck P. McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950).

<sup>117</sup> See *infra* Appendix.

<sup>118</sup> THORELLI, *supra* note 36, at 156.

<sup>119</sup> See Gavil, *supra* note 51, at 658 (stating, without citation, that "states proved no match for the trusts in their heyday."); John J. Miles, *Current Trends in Antitrust Enforcement*, 47 A.B.A. ANTITRUST L.J. 1341, 1344 (1979) (noting, among other "possible reasons" for state antitrust's

Of course, this is not to say that the intuition behind this prosecutorial capacity approach is unsound. To the contrary, as an initial matter, there are at least three reasons to suspect this account to be plausible.

First, a prosecutorial capacity theory is supported by the states' frequent hiring of private firms to help bring antitrust suits. In examining the newly-gathered empirical record, I identified 13 prosecutions (of 71 total) in which states indisputably hired private counsel,<sup>120</sup> a number that is almost surely an underestimate.<sup>121</sup> That these suits regularly drove states to hire (presumably costly) outside legal services strongly suggests the challenges of funding sufficient prosecutorial capacity.

Second, a capacity-based explanation would echo the well-documented claim that similar enforcement-resource difficulties explain the early apathy of *federal* antitrust regulators, who have likewise been accused of under-enforcement of the federal Sherman Act.<sup>122</sup>

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early failure, "lack of interest by the attorney general, lack of effective investigative tools, [and] lack of full-time personnel," but offering no citation for the point); Rubin, *supra* note 50, at 661 n.40 (citing only Thorelli's unsupported passage, discussed *supra* notes 113–14, to conclude that "among [the reasons early state antitrust law was not enforced was] . . . lack of funding of prosecuting offices"); Stone, *supra* 48, at 625 (stating, without citation, that "[t]he proper scope, procedures, and funding are preconditions to effective enforcement"); Upah, *supra* note 111, at 533 (asserting, without citation, that "explanations for the failure of state legislators and agencies to pursue an aggressive antitrust policy include perceived state resource limitations").

<sup>120</sup> *People ex rel. McIlhany v. Chicago Live-Stock Exch.*, 48 N.E. 1062 (Ill. 1897); *In re Bell*, 76 P. 1129 (Kan. 1904); *State v. Jack*, 76 P. 911 (Kan. 1904); *State v. Smiley*, 69 P. 199 (Kan. 1902); *Am. Seeding Mach. Co. v. Commonwealth*, 153 S.W. 972 (Ky. 1913); *Int'l Harvester Co. of Am. v. Commonwealth*, 147 S.W. 760 (Ky. 1912); *Commonwealth v. Int'l Harvester Co. of Am.*, 145 S.W. 400 (Ky. 1912); *Int'l Harvester Co. v. Commonwealth*, 145 S.W. 393 (Ky. 1912); *Commonwealth v. Int'l Harvester Co. of Am.*, 144 S.W. 1068 (Ky. 1912); *Int'l Harvester Co. of Am. v. Commonwealth*, 144 S.W. 1064 (Ky. 1912); *Int'l Harvester Co. of Am. v. Commonwealth*, 144 S.W. 1070 (Ky. 1912); *Att'y Gen. ex rel. James v. Nat'l Cash Register Co.*, 148 N.W. 420 (Mich. 1914); *State v. Creamery Package Mfg. Co.*, 126 N.W. 126 (Miss. 1910); *State v. Jackson Cotton Oil Co.*, 48 So. 300 (Miss. 1909); *S. Elec. Sec. Co. v. State*, 44 So. 785 (Miss. 1907); *State v. Omaha Elevator Co.*, 110 N.W. 874 (Neb. 1906); *State v. Omaha Elevator Co.*, 106 N.W. 979 (Neb. 1906); *State v. Chilhowee Woolen Mills*, 89 S.W. 741 (Tenn. 1905); *Fort Worth & Denver City Ry. Co. v. State*, 87 S.W. 336 (Tex. 1905); *Waters-Pierce Oil Co. v. State*, 106 S.W. 918 (Tex. Civ. App. 1907); *Waters-Pierce Oil Co. v. State*, 103 S.W. 836 (Tex. Civ. App. 1907); *Fort Worth & Denver City Ry. Co. v. State*, 88 S.W. 370 (Tex. Civ. App. 1905). Twelve of these prosecutions featured, as named counsel for the State, an entity with an ampersand in its name (i.e. Carroll & Carroll); the thirteenth, Michigan's *Attorney Gen. v. Nat'l Cash Register Co.*, was the subject of a contemporary government report describing the hiring of a private attorney to prosecute the litigation. See MICH. BOARD OF AUDITORS, ANNUAL REPORT OF THE BOARD OF STATE AUDITORS FOR THE STATE OF MICHIGAN FOR THE YEAR 1913, 16 (1913).

<sup>121</sup> For instance, W.A. Guild appeared as counsel for Tennessee in its Standard Oil litigation. *State ex rel. v. Standard Oil Co.*, 110 S.W. 565 (Tenn. 1908). A search for "W.A. Guild" in Tennessee reveals no other opinions in which he appeared as state's counsel. However, between 1905 and 1912, Guild does appear as counsel for various private litigants in at least five cases. Westlaw search, conducted January 18, 2016.

<sup>122</sup> *E.g.*, WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 103–06 (1981).



Finally, per Nicholas Parillo's insightful argument, state antitrust prosecutions may have netted local prosecutors less political payoff than more conventional suits, since antitrust crimes are against a relatively diffuse, amorphous class of victims, while traditional crimes have highly visible (and thus, perhaps, especially grateful) victims.<sup>123</sup> This observation meshes well with an explanation based around prosecutorial incentives and structures, since it suggests a further mechanism by which the design and incentives of a state's prosecutorial offices would impact its level of state antitrust enforcement.

Yet these arguments, however intuitive, are not sufficient to establish that prosecutorial capacity and incentives were, in fact, the cause for the early failure of state antitrust enforcement. To prove this point, we must look to the data.

The balance of this Part, therefore, offers the first rigorous and empirically-based analysis of exactly how the incentives and resource constraints facing state prosecutors impacted the prosecution of antitrust cases during the first decades after the Sherman Act's passage. In particular, I focus on whether there were meaningful differences between the antitrust-prosecutorial structures of the "high enforcement" states and those of the "low enforcement" states. Here, I examine contemporary state statutes, prosecutorial budgeting systems, and agency regulations. Based on this data, I conclude that state prosecutorial capacity and agency incentives furnish the most cogent explanation for why, in defiance of expectations, early state antitrust enforcement fizzled.

#### A. *The Big Picture: Prosecutorial Incentives and Resources Matter*

To engage in this study, I looked to several types of primary and historical sources including: the text of each state's initial antitrust statute passed, with the exception of New York, between 1888 and 1891; all amendments made to these statutes during the period at issue; generally applicable statutes regarding Attorney General incentives; generally applicable statutes regarding the incentives of local prosecutors;<sup>124</sup> and contemporary budget data of how much funding state Attorney General offices received through legislative appropriations. An overview of the results of this survey is presented as Table 3.

**Table 3: Prosecutorial Incentives, Agency Resources, and State Antitrust Suits: 1889-1914**

State	Prosecutions	Prosecutorial Incentives	Antitrust Resources
MO	14	1889: One-fifth of fine given to AG or local prosecutor; total fine is 1% to 20% of capital invested in corporation.	1895: If conviction, AG receives

<sup>123</sup> NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* 271–72 (2013).

<sup>124</sup> This analysis uses the generic "local prosecutor" to refer to any of the state's a regionally-based prosecutors, a position that all states shared but which, depending on the state, might be designated as a "Commonwealth's attorney," *e.g.*, 1898 Ky. Acts 214., "state's attorney," *e.g.*, 53 ILL. REV. STAT. § 8 (1898) or by some other title.

		<u>1895</u> : One-fourth of fine given to local prosecutor; fine measured as \$5 to \$100 <b>per day</b> of violation. Local prosecutor/AG also get \$25 to \$500 if charter forfeited.	all costs and actual expenses for prosecution of suits.
TX	12	<u>1889</u> : AG gets 10% of first \$1,000 of fine, 5% of fine above \$1,000, cap at \$2,000 per year. Local prosecutor gets 10% of first \$1,000 of fine, 5% of fine above \$1,000, for local prosecutor, no cap. Fine is \$50 <b>per day</b> . <u>1899</u> : 25% of fine to local prosecutor, no cap; AG — same as 1889; fine is \$200 to \$5,000 <b>per day</b> .	None.
KS	10	<u>1889</u> : 5% of all fines to local prosecutor, fine is \$100 to \$1,000 per party violating. Misdemeanor for local prosecutors to “fail, neglect or refuse” to prosecute trust; fined \$100-\$500, jailed 10-90 days, forfeit office <u>1897</u> : 5% of all fines collected to local prosecutor, fine is \$100 to \$1,000 per party violating, plus \$100 <b>per day</b> .	If AG prosecutes may “appoint as many assistants as sees fit” and “for such services he . . . shall receive the same fee” as local prosecutor.
NY	7	None.	<b>Extensive</b> [see Part V.B.5].
KY	6	\$250 to \$2500 per violation to local prosecutor, cap at \$3,500/year.	None.
MS	6	None.	None.
NE	4	<u>1891</u> : None. <u>1897</u> : \$25 to \$100 for local prosecutor.	<u>1891</u> : None. <u>1905</u> : \$10,000 for antitrust.
TN	4	<u>1889</u> : \$175 minimum for first offender to AG; \$300 minimum for second offender to AG. <u>1891</u> : Payments to AG removed from statute.	Only AG allowed to prosecute; no local prosecutor permitted.
IL	3	\$10 for local prosecutor.	None.
MI	2	None.	None.
MN	2	None.	None.
MT	1	None.	None.
AL	0	\$ 10 for local prosecutor.	None.

IA	0	<u>1890</u> : One-fifth of fine to AG or local prosecutor; total fine is 1% to 20% of capital invested in corporation. <u>1907</u> : \$100 to \$500 to AG or local prosecutor.	None.
LA	0	\$15 for local prosecutor; \$20 to \$65 to AG.	None.
ME	0	None.	None.
NC	0	<u>1889</u> : \$10 for AG <u>1899</u> : \$100 to \$500 for local prosecutor; \$10 for AG.	None.
ND	0	None.	None.
SD	0	None.	None.

Based on these data, several trends emerge. The most important, for our purposes, is that the high-enforcement states overwhelmingly featured: (1) large direct incentives for prosecutors who win antitrust suits; (2) direct penalties for prosecutors who fail to bring such suits; (3) special resources for bringing antitrust prosecutions; or (4) some combination of the above. In contrast, even a quick survey reveals that in low enforcement states, these conditions were not present. With this in mind, we can now turn in greater detail to each state, and see the degree to which questions of prosecutorial capacity and incentives shaped antitrust enforcement.

### B. Proof Points for Prosecutorial Capacity

Having painted the overall picture of where the data lead, I now look more closely at various states, both "high enforcement" and "low enforcement," to show in greater detail the ways that their prosecutorial incentive structures and administrative resources shaped antitrust enforcement behavior.

#### 1. Missouri

Missouri was the state that launched the most antitrust prosecutions in the study, at fourteen. These enforcement efforts are especially notable for the diversity of industries targeted: between 1889 and 1914, the state launched suits against insurers,<sup>125</sup> lumber companies,<sup>126</sup> tobacco manufacturers,<sup>127</sup> and others. Commentators have often noted this aggressive record of enforcement.<sup>128</sup>

In pursuing these prosecutions, Missouri's state attorneys were given powerful statutory incentives. In the initial 1889 statute, for each successful antitrust prosecution, the Attorney General or the local prosecutor would be entitled to one-fifth of the fine levied against the defendants: in the event that both the Attorney General and a local prosecutor brought the suit, they would each receive a one-eighth

<sup>125</sup> *State ex rel. Crow v. Firemen's Fund Ins. Co.*, 52 S.W. 595, 596 (Mo. 1899); *State ex rel. Crow v. Aetna Ins. Co.*, 51 S.W. 413 (Mo. 1898).

<sup>126</sup> *State ex rel. Att'y Gen. v. Ark. Lumber Co.*, 169 S.W. 145, 148 (Mo. 1913).

<sup>127</sup> *State ex rel. Crow v. Cont'l Tobacco Co.*, 75 S.W. 737 (Mo. 1903).

<sup>128</sup> *E.g.*, Sieker, *supra* note 71.

share. This fine, in turn, was measured as 1%-20% of capital invested in corporation.<sup>129</sup> Over the next six years, though, the state brought only one recorded prosecution.<sup>130</sup>

Perhaps in response, in 1895, Missouri changed its incentive structure: going forward, local prosecutors would receive one-fourth of the total fine, but the fine would be measured as \$5-\$100 per day of violation<sup>131</sup> (which, if a violation was found to have begun years previously, would yield a generous recovery indeed).<sup>132</sup>

Additionally, the 1895 legislation stated that the prosecuting attorney would receive between \$25-\$500 if the corporation's charter was forfeited.<sup>133</sup> Finally, while the Attorney General was no longer eligible to receive a fraction of the reward, he would have vastly extended capacity to bring suit: if a conviction was received, the Attorney General was to receive all costs and actual expenses for prosecution of suits.<sup>134</sup> The result? After the amendment, Missouri brought some 13 state antitrust prosecutions in the period at study, the most of any state in the union.

Accordingly, Missouri seems to be a strong example of a jurisdiction where the challenges of engaging in costly and time-intensive antitrust suits were greatly mitigated by prosecutorial incentives and resources, especially under the amended state antitrust law.

## 2. Texas

Texas is another state that has traditionally been recognized as having had a relatively strong antitrust enforcement program during this time.<sup>135</sup> The state's most prominent antitrust suits, a pair of prosecutions against various iterations of the Waters-Pierce Oil Company, spanned a decade and involved a substantial commitment of resources.<sup>136</sup> In total, the state saw twelve distinct prosecutions during the period under review.

To a greater degree than even Missouri, Texas created personal economic incentives for prosecutors. When its first antitrust statute was passed in 1889, Texas's bounty system was a fundamental part of its prosecutorial structure. To wit, for *any*

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<sup>129</sup> 1889 Mo. Laws 97 (setting out percentage of capital stock to be fined); *id.* at 97–98 (setting recovery fraction for local prosecutors and Attorney General).

<sup>130</sup> *State ex rel. Att'y. Gen. v. Simmons Hardware Co.*, 18 S.W. 1125 (Mo. 1892).

<sup>131</sup> 1895 Mo. Laws 238 (updating penalty provision to a per diem fine). *See* May, *supra* note 28, at 502 (“[B]y the end of 1915, courts in Missouri levied unsuspended fines of \$678,000 against defendants in five actions charging violations of that state’s antitrust standards.”).

<sup>132</sup> *See, e.g., Waters-Pierce Oil Co. v. State*, 106 S.W. 918, 921 (Tex. Civ. App. 1907) (noting, within a similar day fine regime, a jury instruction to the effect that a violation had been in effect for each day between May 31, 1900 and March 31, 1903). *See also id.* at 168 (state had originally argued for a start date of January 1, 1870).

<sup>133</sup> 1895 Mo. Laws 240 (updating recovery fraction for local prosecutors, removing fraction paid to Attorney General).

<sup>134</sup> 1895 Mo. Laws 239–40 (providing costs for Attorney General if successful in suit).

<sup>135</sup> THORELLI, *supra* note 36, at 595–96; SEAGER & GULICK, *supra* note 109, at 352.

<sup>136</sup> *Waters-Pierce Oil Co. v. State*, 106 S.W. 918 (Tex. Civ. App. 1907); *Waters-Pierce Oil Co. v. State*, 103 S.W. 836 (Tex. Civ. App. 1907); *State v. Waters-Pierce Oil Co.*, 67 S.W. 1057 (Tex. Civ. App. 1902); *Waters-Pierce Oil Co. v. State*, 44 S.W. 936 (Tex. Civ. App. 1898).

fine or penalty he recovered, an Attorney General was to receive 10% of the first \$1,000 of fine, and 5% of fines above \$1,000 (though subject to a cap of \$2,000 per year).<sup>137</sup> Local prosecutors were given a similar incentive package: \$1,000 of fines, and 5% of fines above \$1,000; they, however, faced no cap to recovery.<sup>138</sup>

Given this background mechanism, when the 1889 statute set the penalty at \$50 per day, it ensured a persuasive motive for prosecution.<sup>139</sup> And in 1899, the Texas legislature poured gasoline on the fire: going forward, the penalty for antitrust violations would be \$200-\$5,000 per day,<sup>140</sup> and local prosecutors would be entitled to receive 25% of the recovery, with no cap or maximum at all.<sup>141</sup> These incentives netted huge payoffs for winning prosecutors. In the prominent example, the second prosecution against Waters-Pierce Oil, the verdict netted Texas prosecutors a \$1.8 million fine, paid in dramatic fashion in the form of a wheelbarrow full of small bills walked to the state treasury.<sup>142</sup> Nor was this the only lucrative recovery.<sup>143</sup> Given the incredibly high possible rewards, it is thus unsurprising that Texas pursued state antitrust suits with such great energy.

### 3. Kansas

To date, commentators have largely overlooked Kansas's role in early state antitrust enforcement. As the data shows, however, this would be a mistake. While a relatively small state in terms of population and economic heft, Kansas brought ten statutory prosecutions during the period under study, including suits in industries from cement manufacturing<sup>144</sup> to grain harvesting.<sup>145</sup>

To provide the incentives and resources for prosecutors to bring such complex and demanding suits, Kansas offered both carrots and sticks. On one hand, like Missouri and Texas, it offered financial incentives for judicial victory. When its 1889 law was passed, local prosecutors were entitled to receive 5% of all fines collected during the course of their work.<sup>146</sup> As in Texas, this meant that when Kansas passed a damage provision of \$100 to \$1,000 per party violating,<sup>147</sup> it created a potentially important payoff. In 1897, the magnitude of this payoff increased exponentially when, in

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<sup>137</sup> Act effective Sept. 1, 1895, 24th Leg., R.S. tit. XLV, ch. 1, art. 2440, *reprinted* in Revised Civil Statutes of the State of Texas, at 482–83 (Austin, Eugene von Boeckmann 1895).

<sup>138</sup> *Id.* at 88.

<sup>139</sup> 1889 Tex. Gen. Laws 142.

<sup>140</sup> *Id.* at 247–48.

<sup>141</sup> *Id.* at 250–51.

<sup>142</sup> Susan Beth Farmer, *Introduction: Dual Enforcement of State and Federal Antitrust Laws*, 58 ANTITRUST L.J. 197, 198 (1989).

<sup>143</sup> Will Wilson, *The State Antitrust Laws*, 47 A.B.A. J. 160, 161 (1961) (“Again the state in 1909 recovered from seven oil companies a total sum of \$216,720, and in 1913 recovered another penalty of \$500,000 from another oil company.”).

<sup>144</sup> *State v. Monarch Portland Cement Co.*, 111 P. 487 (Kan. 1910).

<sup>145</sup> *State v. Int’l Harvester Co. of Am.*, 106 P. 1053 (Kan. 1910).

<sup>146</sup> Kan. Gen. Stat. § 30-67 (1897).

<sup>147</sup> 1889 Kan. Sess. Laws 390–91.

addition to a \$100 to \$1,000 fine, defendants would also be charged \$100 per day of violation.<sup>148</sup> As a result, at least as of 1897, Kansas local prosecutors could win a substantial personal reward for pursuing antitrust suits.

At the same time, however, the 1889 Kansas law also offered a unique *disincentive* for prosecutors who failed to zealously enforce the law:

It shall be the duty of the county attorneys to diligently prosecute any and all persons violating any of the provisions of this [antitrust] act . . . If any county attorney shall fail, neglect or refuse to faithfully perform any duty imposed upon him by this act, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than one hundred dollars nor more than five hundred dollars, and be imprisoned in the county jail not less than ten nor more than ninety days; and such conviction shall operate as a forfeiture of his office . . .<sup>149</sup>

This powerful sanction, unmatched in any of the other states in the study, created a very personal incentive for prosecutors to give priority to antitrust violations, lest they languish in jail.

Finally, in the event local prosecutors proved they were “unable or . . . neglect[ed] or refuse[d] to enforce provisions of this act,” the Kansas Attorney General was given both a duty to step into the fray and extensive additional resources to pursue such an action:

[W]henever the county attorney shall be unable or shall neglect or refuse to enforce provisions of this act in his county, or for any reason whatever the provisions of this act shall not be enforced in any county, it shall be the duty of the attorney-general to enforce the same in such county, and for that purpose he may appoint as many assistants as he shall see fit . . . and for such services he or his assistants shall receive the same fee that the county attorney would be entitled to for like services . . .<sup>150</sup>

In sum, Kansas offered antitrust prosecutors a unique combination of financial rewards for victory, financial and carceral punishment for failure, and extended prosecutorial capacities to pursue this complex class of cases. Given these dynamics, it becomes far less surprising that Kansas appears near the top of the enforcement list.

#### 4. Kentucky

Kentucky’s antitrust program features six suits brought over the period under study, including one of the most extensive and complex antitrust suits of the era: the *International Harvester* case.<sup>151</sup> As was true of Missouri, Texas and Kansas, the Bluegrass State offered personal financial incentives to local prosecutors [known as

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<sup>148</sup> 1897 Kan. Sess. Laws 483.

<sup>149</sup> 1889 Kan. Sess. Laws 390–91.

<sup>150</sup> *Id.*

<sup>151</sup> *Int’l Harvester Co. of Am. v. Commonwealth*, 147 S.W. 760 (Ky. 1912), *reversed* 234 U.S. 589 (1914).

"Commonwealth's Attorneys"]; a fine of \$250-\$2500 per violation,<sup>152</sup> with a cap at \$3,500/year.<sup>153</sup> Once again, a significant pecuniary reward went hand-in-hand with a relatively active antitrust program.

### 5. New York

The Empire State was undeniably an antitrust powerhouse. From 1897 (the year it passed an antitrust statute) to 1914, New York brought at least seven antitrust prosecutions, including complex, multi-year litigation against the American Ice Company.<sup>154</sup> This enforcement, in turn, continued a vigorous pre-statutory pattern of antitrust actions, including highly influential common-law suits against sugar, tobacco, and milk monopolies.<sup>155</sup>

Unlike the first four of the "high enforcement" states, New York did not offer any financial incentives for prosecutors who won antitrust suits (or punishments for failure to bring such litigation). It did, however, offer a set of prosecutorial resources unmatched anywhere else in the nation.

New York's Attorney General's office has, since the start of the Republic, been seen as an influential stepping-stone to higher office.<sup>156</sup> Whether because of this tradition or from other factors, by the 1890's, New York's Attorney General had dramatically more prosecutorial and investigatory resources than his counterparts in any other state. In 1893 for instance, New York's Attorney General had a staff budget of \$18,887<sup>157</sup> and a staff of ten.<sup>158</sup> In contrast, Illinois, the state with the next-most

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<sup>152</sup> Journal of the Senate of the Commonwealth of Kentucky 223 (1889), codified at Ky. Statutes §3917 (1889) (setting penalty for violations at \$500 to \$5,000); Ky. Statutes § 124 (1899) (Commonwealth's Attorney "shall receive . . . fifty per centum of all judgments for fines and forfeitures rendered in favor of the Commonwealth . . .").

<sup>153</sup> Ky Statutes, 1898, Ch. 8, §119, §125 (stating that Commonwealth attorney will receive \$500 in salary and that total compensation, combining fees and this salary, cannot exceed \$4,000).

<sup>154</sup> *People v. Am. Ice Co.*, 120 N.Y.S. 41 (App. Div. 1909); *People v. Am. Ice Co.*, 120 N.Y.S. 443 (Sup. Ct. 1909); *People v. Am. Ice Co.*, 104 N.Y.S. 858 (App. Div. 1907); *People v. Am. Ice Co.*, 105 N.Y.S. 650 (Sup. Ct. 1907).

<sup>155</sup> *People v. Duke*, 44 N.Y.S. 336 (Sup. Ct. 1897); *People v. Milk Exch.*, 39 N.E. 1062 (N.Y. 1895); *People v. N. River Sugar Ref. Co.*, 24 N.E. 834 (N.Y. 1890).

<sup>156</sup> Christopher Lucas, *The Triangle Shirtwaist Fire and the Merrill Lynch Analyst Ratings Scandal: Legislative and Prosecutorial Responses to Corporate Malfeasance*, 1 BROOK. J. CORP. FIN. & COM. L. 449, 455 (2007) ("In fact, New York State's third Attorney General was none other than the original publicity seeking politician: Aaron Burr.").

<sup>157</sup> For consistency, this analysis defines "staff budget" as the amount of money spent on Attorney General staff salaries, including all active personnel (i.e. both lawyers and stenographers, both full- and part-time), but excluding both money spent on pensions for former employees and the Attorney General's own salary.

<sup>158</sup> Annual Report of the State Treasurer, DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, 116<sup>th</sup> Sess. 119–120 (1893).

significant office, had a staff budget of \$6,400 for a staff of five.<sup>159</sup> Missouri, for its part, had a budget of \$4,000, used to hire a single attorney.<sup>160</sup>

Ten years later, at the time when New York was bringing many of its statutory antitrust prosecutions, the disparity had grown even starker: in 1902, New York's staff budget was around \$75,000, used to hire about 26 staff members.<sup>161</sup> In contrast, in 1903 Illinois allocated just \$15,600, used to hire seven staff.<sup>162</sup> As of 1901, Texas allocated \$8,500 for the hiring of just five staff members, while Kansas allocated \$5,500 to hire four.<sup>163</sup>

By 1912, New York's Attorney General office had reached relatively gargantuan proportions: that year, the office had a staff budget of \$176,204, used to hire 81 personnel.<sup>164</sup> That same year, Illinois allocated just \$40,000 for a staff of 17.<sup>165</sup> In 1913, Texas allocated \$27,980 for 13 staff members, while Kansas hired seven personnel with \$11,600.<sup>166</sup>

**Table 4: Attorney General Office Staff Funding**

	1892-93	1901-03	1911-13
NY	\$18,88 <sup>167</sup>	\$55,562 + ≈\$20,000 for Investigation Staff <sup>168</sup>	\$178,881

<sup>159</sup> 1893 Ill. Laws 57.

<sup>160</sup> 1889 Mo. Laws 15.

<sup>161</sup> Annual Report of the State Treasurer, DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, 116<sup>th</sup> Sess. 338–39 (1902).

<sup>162</sup> 1903 Ill. Laws 73.

<sup>163</sup> 1903 Kan. Laws 17.

<sup>164</sup> ANNUAL REPORT OF THE COMPTROLLER OF THE STATE OF NEW YORK, 164–165 (1912).

<sup>165</sup> 1911-1912 Ill. Laws 2nd Spec. Sess. 25–26.

<sup>166</sup> Data for Tables 4 and 5 came from these sources. 1911-1912 Ill. Laws 2nd Spec. Sess. 25–26; 1903 Ill. Laws 73; 1892 Ill. Laws 57.; 1913 Kan. Laws 3–4; 1903 Kan. Law 17; 1893 Kan. Law 49.; 1911 Mich. Acts 166; 1903 Mich. Acts, Pt. II, 47–48; 1893 Mich. Acts 215–16; 1913 Mo. Laws 41; 1901 Mo. Laws 47; 1889 Mo. Laws 15; 1913 Tex. Laws 122; 1901 Tex. Laws 14–15; 1893 Tex. Laws 130–131; COMPTROLLER'S OFFICE, ANNUAL REPORT OF THE COMPTROLLER OF THE STATE OF NEW YORK, 164–165 (1912); Annual Report of the State Treasurer, DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, 125<sup>th</sup> Sess. 338–339 (1902); Annual Report of the State Treasurer, DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, 116<sup>th</sup> Sess. 119-120 (1893).

<sup>167</sup> This figure is almost surely an underestimate, since the 1893 report only counts only those monies actually expended, whereas the other figures in table 4 are drawn from the total amount appropriated, a figure often larger than actually spending. Compare ANNUAL REPORT OF THE COMPTROLLER OF THE STATE OF NEW YORK, 164–165 (1912) with Annual Report of the State Treasurer, DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, 125<sup>th</sup> Sess. 338–339 (1902).

<sup>168</sup> The 1902 State Treasurer Report allocates \$28,111 to the "Investigation District Attorney's office New York City." Annual Report of the State Treasurer, DOCUMENTS OF THE SENATE OF THE STATE OF NEW YORK, 125<sup>th</sup> Sess. 338-339 (1902). However, it does not specify how much of this money was to be spent on staff, or how many staff this would account for. As 1912, however, it was confirmed that this New York City office had a staff of fourteen and a personnel



<b>IL</b>	\$6,400	\$12,120	\$40,000
<b>TX</b>	\$9,350	\$8,500	\$32,100
<b>MO</b>	\$4,000	\$5,000	\$31,500
<b>KS</b>	\$3,700	\$5,500	\$11,600
<b>MI</b>	\$2,500	\$10,000	\$12,000

**Table 5: Attorney General Office Staff Members**

	<b>1892-93</b>	<b>1901-03</b>	<b>1911-13</b>
<b>NY</b>	10	20 + ≈6 Investigation Staff	77
<b>IL</b>	5	8	17
<b>TX</b>	5	5	13
<b>MO</b>	1	1	≈10 <sup>169</sup>
<b>KS</b>	3	4	7
<b>MI</b>	n/a	n/a	n/a

In his 1900 Report, New York's Attorney General wrote "perhaps the most important matter of litigation" his office faced was an anti-trust suit—the prosecution of the American Ice Company.<sup>170</sup> When he made this statement, he did so as the head of an office with the ability to bring extraordinary resources to bear, resources sufficient to take on even the era's biggest cases. Accordingly, New York's experience counts as another point in favor of the prosecutorial capacity theory.

## 6. Nebraska

Another illustration of the role of prosecutorial capacity comes from Nebraska. Nebraska is technically a low-enforcement state, having pursued just four antitrust suits in the period under study. However, the timing of these suits is telling: from 1890 until 1905, Nebraska did not pursue any antitrust prosecutions. Then, in 1905, the Nebraska legislature made a substantial commitment to prosecutorial capacity, enacting the following statute:

[T]here is hereby appropriated . . . to be expended under the direction of the governor and attorney general of this state, the sum of *ten thousand dollars* for the enforcement of the provisions of this act in the employment of special counsel and agents by the governor and attorney general to conduct proceedings, suits and prosecution under this act, in the courts of this state.<sup>171</sup>

budget of \$37,800. COMPTROLLER'S OFFICE, ANNUAL REPORT OF THE COMPTROLLER OF THE STATE OF NEW YORK, 164–165 (1912). Conservatively, I assume that roughly \$20,000 of the \$28,111 allotment of 1902 was spent on personnel, and that this resulted in the hiring of six employees.

<sup>169</sup> The Missouri appropriations bill allocates funding for four assistant Attorney-Generals. It then allocates \$7,500 for "salaries of stenographers," but does not say how many individuals this will be. I have estimated the number at six. 1913 Mo. Laws 41.

<sup>170</sup> JOHN C. DAVIES, ANNUAL REPORT OF THE ATT'Y GEN. OF THE STATE OF N.Y. FOR THE YEAR ENDING IN DEC. 31, 1900, at 8 (1901).

<sup>171</sup> 1905 Neb. Laws 644–46 (emphasis added) (appropriating \$10,000 "to be expended under the direction of the governor and attorney general of this state, the sum of ten thousand dollars

Soon thereafter, four cases were brought in short order<sup>172</sup>—a pace which, had it been sustained throughout the period under review, would have put Nebraska squarely into the “high enforcement” camp.<sup>173</sup>

### 7. The Low Enforcement States

In the previous subsections, I considered the “affirmative” part of the prosecutorial capacity hypothesis: states with generous prosecutorial incentives and agency resources would see more antitrust prosecution activity. The “negative” corollary, of course, is that states that did not provide for such capacity would not pursue prosecutions. In the overwhelming majority of low-enforcement states, this was indeed the case.

The first low-enforcement state, Tennessee, did not establish robust incentives for antitrust enforcement. As of 1889, the Attorney General could collect only around \$300 per antitrust conviction.<sup>174</sup> Just two years later, even this limited incentive was removed.<sup>175</sup> Local prosecutors were ineligible to receive any payments at all; indeed, they were legally barred from bringing antitrust suits.<sup>176</sup> Among other things, this meant that in times when, for political or personal reasons, the Attorney General was reluctant to bring suit, no other party could step into the breach.<sup>177</sup> Given these structures, it is unsurprising that Tennessee pursued just four antitrust suits during the twenty-five years of this study.

North Carolina, another low-enforcement state, awarded a token \$10 bonus from 1889 through 1899 for antitrust convictions won by the Attorney General.<sup>178</sup> In 1899, it amended this bonus to give local prosecutors between \$100 and \$500 per successful conviction.<sup>179</sup> This incentive, however, was much lower than that the rewards offered

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for the enforcement of the provisions of this [antitrust] act in the employment of special counsel and agents by the governor and attorney general to conduct proceedings, suits and prosecution under this act, in the courts of this state.”).

<sup>172</sup> *State v. Am. Sur. Co.*, 135 N.W. 365 (Neb. 1912); *State v. Am. Sur. Co.*, 133 N.W. 235 (Neb. 1911); *Howell v. State*, 120 N.W. 139 (Neb. 1909); *State v. Adams Lumber Co.*, 116 N.W. 302 (Neb. 1908); *State v. Omaha Elevator Co.*, 110 N.W. 874 (Neb. 1906); *State v. Omaha Elevator Co.*, 106 N.W. 979 (Neb. 1906).

<sup>173</sup> Since Nebraska had four prosecutions in nine years, one would expect between eleven and twelve total over the full twenty-five year period, putting the state between Texas and Kansas.

<sup>174</sup> 1889 Tenn. Laws 475 (noting that, for any violation, the Attorney-General shall collect \$50, plus fifty percent of the overall penalty (\$250 for first offenders, \$500 for second offenders)).

<sup>175</sup> 1891 Tenn. Laws 428.

<sup>176</sup> 1889 Tenn. Laws 475 (stating Attorney General “shall prosecute all such cases ex officio, without any other prosecutor”).

<sup>177</sup> *E.g.*, Clark L. Hildabrand, *Interactive Antitrust Federalism: Antitrust Enforcement in Tennessee Then and Now*, 16 *TRANSACTIONS* 67, 84 (2014) (documenting personal political pressures deterring Tennessee’s Attorney General from antitrust enforcement).

<sup>178</sup> Revisal of 1905 of North Carolina, ch. 66, §2746 (noting that Attorney General shall receive \$10 for each conviction affirmed in the state Supreme Court).

<sup>179</sup> 1899 N.C. Sess. Laws 854 (noting local prosecutors will receive a fee between \$100 and \$500 for each conviction under antitrust statute).

by other states, and was unaccompanied by any special prosecutorial resources. As a result, it does not seem to have shifted the state's antitrust enforcement: North Carolina saw no antitrust prosecutions during the course of this study.

Nine other "low enforcement" states reflected the same dynamic. South Dakota, North Dakota, Maine, Montana, Minnesota, and Michigan offered no financial bonus for antitrust convictions at all. Three others offered only token bonuses: Alabama (\$7.50 for local prosecutors),<sup>180</sup> Illinois (\$5 to \$20),<sup>181</sup> and Louisiana (\$15, though a bonus of \$20 to \$65 if the Attorney General brought the suit himself).<sup>182</sup> None of these nine states offered any special prosecutorial resources or funding for antitrust suits.

In these states, the result was an almost total lack of enforcement. Alabama, Louisiana, Maine, North Dakota, and South Dakota brought no suits at all during the period under review. Montana brought one, Michigan and Minnesota brought two each, and Illinois, one of the nation's largest and richest states, brought just three. In total, these nine states brought nine antitrust prosecutions in the twenty-five year period of this study—fewer than Kansas alone. These states differed dramatically in their size, region and politics. Yet they were united in providing no special prosecutorial incentives or resources to pursue antitrust suits, and, as a result, they were united in their overall absence of state antitrust prosecutions.

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In sum, of the six "high enforcement" states, five (Missouri, Texas, Kansas, Kentucky, and New York) offered either powerful personal incentives for antitrust prosecution or extensive specialized resources to fund such prosecutions or both.

Meanwhile, of the thirteen "low enforcement states," eleven offered little to no incentive to prosecutors and no special resources to pursue such prosecutions. A twelfth, Nebraska, only offered substantial prosecutorial resources in 1905—and when it did, it prosecuted at a rate as fast as any of the "high enforcement states."

Before concluding this analysis, however, I consider the two outliers: The first, Iowa, is a state with seemingly generous incentives, without many prosecutions. The second, Mississippi, apparently offered no special incentive or resources, but still saw fairly vigorous enforcement.

### C. *The Outliers*

This subsection reviews the two seeming outliers to the prosecutorial capacity theory: Iowa and Mississippi.

#### 1. Iowa

From 1890 to 1914, Iowa prosecutors did not bring a single antitrust suit. Under the prosecutorial capacity explanation, this is an unexpected result, since Iowa's 1890 law initially seems to have allowed for a quite generous prosecutorial recovery:

§ 5062 . . . . [Any] corporation . . . , company, firm or association .  
 . . violat[ing any] of this act, . . . shall be punished by a fine of *not*

<sup>180</sup> ALA. CODE § 4561 (1897). ("For each conviction of a misdemeanor, not otherwise provided for . . .").

<sup>181</sup> 52 ILL. REVISED STAT. § 8 (1898).

<sup>182</sup> 1896 La. Acts 308; *id.* at 34 (noting Attorney General receives five per cent on all amounts collective by him); 1892 La. Acts 122 (violation punished by fine of between \$100 and \$1,000).

*less than one per cent of the capital . . . or amount invested in such [corporate entity] . . . and not to exceed twenty per cent . . .*

§ 5067 . . . . any prosecuting attorney, or the attorney general, securing a conviction under the provisions of this act, shall be entitled, in addition to such fee or salary as by law he is allowed for such prosecution, to *one-fifth of the fine* recovered.<sup>183</sup>

This provision would appear to offer a large potential windfall to state prosecutors. For instance, if a corporation had \$100,000 invested in an entity found guilty,<sup>184</sup> and the judge leveled a 20% fine, the prosecutor would be entitled to \$4,000. Why then, would this incentive have been ineffective?

While the issue is not entirely clear, it seems as though this percentage-based incentive simply proved much less enticing than it superficially seemed. Perhaps this is because, due to the vagaries of corporate structure, sophisticated (thus, larger) trusts would find ways to minimize in-state capital, reducing the amount of possible recovery. Moreover, percentage-based awards might be unpredictable, since they would depend on the corporation's size at any given time.

Might this explain why Iowa's incentives did not generate prosecutions? Two facts suggest it does. First, Missouri, in its original 1889 statute, adopted an incentive structure identical to Iowa's: a fine of 1% to 20% of the capital stock invested in the state, with prosecutors to receive one-fifth if successful.<sup>185</sup> Yet in the six years this structure was in effect, only one Missouri prosecution was brought.

Within just a few years, however, Missouri abandoned this system in favor of a more predictable and direct incentive: for each day of violation, whatever the corporate form, convicted corporations would be fined between \$5 and \$100.<sup>186</sup> And in the years following this switch, Missouri brought 13 of its 14 prosecutions.

Given the Missouri legislature's obvious interest in antitrust enforcement,<sup>187</sup> it is unlikely this shift was accidental, or that it was intended to dampen prosecutorial ardor. And indeed, under its second incentive regime, Missouri became the most active antitrust enforcer in the nation. Accordingly, Missouri's abandonment of the "1% to 20%" approach suggests a percent-based valuation, for whatever reason, was an insufficient call to action.

As importantly, in 1907, Iowa itself abandoned the "1% to 20%" approach in favor of fixed fines.<sup>188</sup> This, too, suggests that whatever its intuitive plausibility, the incentive model Iowa used was not compelling to prosecutors. Through this lens, Iowa's failure of enforcement is considerably less surprising than it initially appears.

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<sup>183</sup> 1890 Iowa Acts 42–44 (emphasis added).

<sup>184</sup> Not an implausible figure. *E.g.*, *S. Elec. Sec. Co. v. State*, 44 So. 785 (Miss. 1907) ("it was agreed that these parties should organize a securities holding company under the laws of the state of New Jersey, with a capital stock of \$100,000").

<sup>185</sup> 1889 Mo. Laws 97 (setting out percentage of capital stock to be fined); *id.* at 98 (setting recovery fraction for local prosecutors and Attorney General).

<sup>186</sup> 1895 Mo. Laws 237 (updating penalty provision to a per diem fine).

<sup>187</sup> For a description of the degree to which Missouri's various political groups supported such measures, *see* Boudreaux et al., *supra* note 106, at 262.

<sup>188</sup> 1907 Iowa Acts 185.

## 2. Mississippi

Mississippi poses a more difficult problem for the prosecutorial capacity approach. As a state with six antitrust prosecutions, it falls just within the range of the "high enforcement" states. However, Mississippi prosecutors were not given personal incentives to pursue antitrust prosecutions: indeed, local prosecutors were constitutionally forbidden from receiving any fees apart from their assigned salary.<sup>189</sup> Nor, apparently, were any special resources appropriated to antitrust cases. As a result, Mississippi is the only high-enforcement state to feature none of the institutional structures identified in this Part.

There are, of course, possible explanations for why Mississippi was nonetheless able to achieve a high rate of prosecution. For instance, four out of six of the prosecutions in this study occurred after 1906.<sup>190</sup> This suggests that the state's 1906 adoption of large day fines might have induced the state to act.<sup>191</sup> Ultimately, however, not enough is known to make any definitive conclusion, except to say the Magnolia State does not match the pattern.

At days end, however, even if Mississippi cannot be adequately explained by this Article's argument, this does not seem fatal to the overall project. Indeed, given the complex dynamics at work, the fact that eighteen of the nineteen states in the study can be well-explained as reflections of prosecutorial capacity is an important and analytically powerful result.

In sum, based on the empirical and historical record, prosecutorial incentives and agency capacity are the best explanation for the unexpected early failure of state antitrust law.

## VI. CONCLUSION AND IMPLICATIONS

One hundred and thirty years ago, state legislatures passed America's first antitrust laws. They did so in a time of deep economic instability,<sup>192</sup> of increasing concern over corporate power,<sup>193</sup> of unprecedented technological disruption,<sup>194</sup> of stark and rising

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<sup>189</sup> MISS. CONST. of 1890, art. VI, § 174.

<sup>190</sup> See *infra* Appendix.

<sup>191</sup> For confirmation that this provision was initially adopted in 1906, see MISSISSIPPI STATE BAR ASSOCIATION, ANNUAL MEETING OF THE MISSISSIPPI STATE BAR ASSOCIATION 78 (1906). For the provision as codified in 1906, see 1906 Miss. Laws ch.145, § 5004 (current version at MISS. CODE ANN. §75-21-7 (2019)).

<sup>192</sup> Fox & Sullivan, *supra* note 20, at 937–38.

<sup>193</sup> Millon, *supra* note 20, at 142.

<sup>194</sup> May, *supra* note 61, at 101.

inequality,<sup>195</sup> and of great frustration with government gridlock and inaction.<sup>196</sup> In this context, state attorneys general and local prosecutors had every reason to pursue, and were expected to pursue, a vigorous antitrust policy. But lacking the prosecutorial incentives or capacity to act, states largely left the field.

The parallels between these times and our own are manifest: once again, we live in a time of profound economic frustration. Surveys reveal the public to be deeply concerned about rising inequality, and to fear the increased power of large corporations.<sup>197</sup> Technological disruption and income inequality have produced deep public concern.<sup>198</sup> Some fear the federal government, bogged down by gridlock or by sheer inertia, will not act.<sup>199</sup> Against this backdrop, just as in the late nineteenth

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<sup>195</sup> Millon, *supra* note 20, at 142; notably, the period from 1890 to 1914 saw an increasing concentration of wealth among the wealthiest within American society, a trend not empirically matched until the present era. *See generally* Thomas Piketty & Emmanuel Saez, *Inequality in the Long Run*, 344 *Science* 838 (2014). That both this era, and our own, have been times of agitation for greater state antitrust law (even if, in the case of the earlier period, such agitation may not have produced the desired policy outcomes) intuitively suggests a potentially meaningful correlation between such inequality and the momentum for such actions to be taken. In any event, additional study of the empirical relationship between economic inequality and political activity regarding commercial concentration would be a welcome complement to the insights presented in this Article.

<sup>196</sup> Letwin, *supra* note 23, at 235.

<sup>197</sup> David Dayen, *Attacking Monopoly Power Can Be Stunningly Good Politics, Survey Finds*, THE INTERCEPT (Nov. 28, 2018), <https://theintercept.com/2018/11/28/monopoly-power-corporate-concentration/> (noting 2018 survey of general public in which “76 percent of respondents were either somewhat or very concerned that ‘big corporations have too much power over your family and your community.’ The figure grew when asked whether big corporations have too much power over politicians: a stunning 88 percent were at least somewhat concerned, with 71 percent very concerned.”).

<sup>198</sup> Thomas B. Nachbar, *Heroes and Villains of Antitrust*, 18 ANTITRUST SOURCE 1 (2019) (reviewing TIM WU THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)); *see also* Max Greenwood, *Majority Supports Antitrust Review of Tech Giants: Poll*, THE HILL (Aug. 5, 2019), <https://thehill.com/policy/technology/456221-majority-supports-antitrust-review-of-tech-giants-poll>.

<sup>199</sup> *See, e.g.*, Darren Bush, *President Trump’s Antitrust Division: An Essay on the Same Old, Same Old*, 70 MERCER L. REV. 671, 682–83 (2019).

century, scholars<sup>200</sup> and politicians<sup>201</sup> alike have called for new, vigorous approaches to antitrust enforcement.

In 2020, as in 1890, states attorneys general have much to offer antitrust enforcement. Illegal anticompetitive conduct is often concentrated locally, rather than nationally, making state-level enforcement especially appropriate.<sup>202</sup> Many states have antitrust statutes (or bodies of state law) that allow for prosecutions that the federal laws do not.<sup>203</sup> State governments often will have better knowledge of local economic conditions than distant agencies in Washington, making them natural choices for

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<sup>200</sup> For recent scholarly discussions of strategies to re-invigorate antitrust enforcement, *see generally* Tim Wu, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018); Jonathan B. Baker et al., *Unlocking Antitrust Enforcement*, 127 *YALE L.J.* 1916 (2018) (introducing collection of articles on how American antitrust enforcement might be “unlocked” and more actively applied); Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 *YALE L.J.* 710 (2017); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 *HARV. L. & POL’Y REV.* 235 (2017); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *CARDOZO L. REV.* 1621, 1624 (2018). *But see* Joshua D. Wright et al., *Requiem for A Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 *ARIZ. ST. L.J.* 293 (2019) (critiquing such efforts).

<sup>201</sup> John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 *B.U.L. REV.* 1169, 1170–71 (2018); Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, 127 *YALE L.J. FORUM* 960, 962–63 (2018) (noting “bipartisan” calls for antitrust enforcement against, among others, large technology companies).

<sup>202</sup> *See, e.g.*, STEPHEN D. HOUCK, NAT. ASS’N OF ATT’YS GENERAL, TRANSITION REPORT: THE STATE OF STATE ANTITRUST ENFORCEMENT, 4–5 (2009), <https://bit.ly/2HdMqFB> (noting that between 1995 and 2004, state attorneys general filed many more suits alone than in multistate coalitions, and that “the predominant focus of all the cases was industries characterized by local markets such as health care, retail gasoline, movie theaters, banking, retail pharmacy, department stores and asphalt.”).

<sup>203</sup> Hovenkamp, *supra* note 14, at 377 (noting “activities that are not illegal under federal law are condemned by the antitrust law of some states. Furthermore, some persons who have suffered injury because of antitrust violations have a damages action under various state antitrust laws while they have no such action under the federal statutes.”). *See* Richard A. Samp, *The Role of State Antitrust Law in the Aftermath of Actavis*, 15 *MINN. J.L. SCI. & TECH.* 149, 151 (2014) (noting that even where statutory language of state law is similar to federal law, state courts may have interpreted that law “in ways that diverge sharply from federal law.”); Robert A. Bick, *An Appropriate Role Under Our Federal System for A State Antitrust Enforcement Program*, 5 *ANTITRUST BULL.* 503, 505 (1960) (“And in situations where the [federal Department of Justice] does bring an action, adequate local relief can sometimes only be secured by state authorities under their own laws. Such state enforcement action may be needed either fully to correct local aspects of a more widespread combination, or to enable states as parties under the Federal antitrust laws, to collect damages arising out of injuries to themselves or their subdivisions.”). This dynamic may only become more important in the event that the broad reading of the Commerce Clause that has prevailed since the 1930’s is, as some expect it to be, pared back, potentially reducing the constitutional boundaries of what types of activity federal antitrust law might be permitted to prosecute. *See, e.g.*, *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 557 (2012) (finding Affordable Care Act’s “individual mandate” to have exceeded Congressional powers under the Commerce Clause, setting meaningful substantive limit); Meese, *supra* note 83, at 2184 (noting expansion of Sherman Act’s scope premised on broad post-New-Deal expansion of permitted powers under the Commerce Clause).

antitrust enforcement.<sup>204</sup> And if the federal government fails to enforce the antitrust laws, state attorneys general often have the ability and political incentives “step up” to “fill the void.”<sup>205</sup>

Yet, if the early failure of antitrust federalism holds a single lesson, it is that even such compelling political, historical, and economic imperatives are, without more, insufficient to spur state antitrust action. Unless state prosecutors have the capacity and incentives to take on the antitrust challenge, they will not act.

What does this mean for today’s state antitrust enforcers? On one hand, the years since 1890 have seen several innovations that substantially mitigate the problem of prosecutorial capacity. Multistate organizations like the National Association of Attorneys General (NAAG) have allowed for coordination and information sharing between attorneys general on antitrust matters, thus reducing the costs and burden of such cases.<sup>206</sup> Likewise, the rise of multistate antitrust suits brought jointly by dozens of states allows for cost-and-capacity-sharing.<sup>207</sup> Changes in federal law, like the Hart-Scott-Rodino Act of 1976, created an economic incentive for states to pursue antitrust cases by codifying the ability of state attorneys general to sue as *parens patriae* and by offering states treble damages when they prevail (a strong economic incentive if ever there was one).<sup>208</sup>

Going further, the federal government has sometimes expressly subsidized state antitrust efforts, as with the supplemental funding offered in the Crime Control Act of 1976.<sup>209</sup> And in some states, the capacity of the attorney general’s office has increased to levels inconceivable at the turn of the century: New York’s Attorney General, for instance, supervises over 1,800 employees,<sup>210</sup> while California employs a staggering

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<sup>204</sup> Brown & King, *supra* note 13, at 83.

<sup>205</sup> Celik, *supra* note 2; HOUCK, *supra* note 202, at 2–3 (describing efforts of state attorneys general to enforce antitrust law when Reagan Administration substantially deprioritized enforcement by federal agencies); *see also* Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1984, n.90 (2018) (noting “state attorneys general might fill the enforcement gap” in those cases where federal enforcement is not forthcoming). For a recent example of just such a case, in which the FTC declined to bar a merger but the State of Colorado intervened instead, leading to a settlement, *see* Kelsey Waddill, *CO Challenges, Settles UnitedHealth, DaVita Vertical Merger*, HEALTHPAYER INTELLIGENCE (June 25, 2019), <https://healthpayerintelligence.com/news/co-challenges-settles-unitedhealth-davita-vertical-merger>.

<sup>206</sup> Hawk & Laudati, *supra* note 27, at 19.

<sup>207</sup> *See, e.g.*, Saja Hindi, *Colorado Joins 43 Other States in Lawsuit Alleging Generic Drug Manufacturers Conspired to Inflate Prices*, DENVER POST (May 12, 2019), <https://www.denverpost.com/2019/05/12/colorado-states-lawsuit-teva-pharmaceuticals/> (noting 44 state effort).

<sup>208</sup> Act of Sept. 30, 1976, Pub. L. No. 94-435, tit. III, § 301, 90 Stat 1383 (improving and facilitating the expeditious and effective enforcement of the antitrust laws).

<sup>209</sup> Act of Oct. 15, 1976, Pub. L. No. 94-503, 90 Stat. 2407 (amending title I of the Omnibus Crime Control and Safe Streets Act of 1968); *see also* Flynn, *supra* note 94, at 481 (describing federal “seed money” for state attorneys general antitrust efforts).

<sup>210</sup> *Our Office*, N.Y. ATTORNEY GEN., <https://ag.ny.gov/our-office> (last visited Aug. 18, 2019).



4,500.<sup>211</sup> Perhaps because of these shifts, it is unsurprising that in recent times at least some state attorneys general have heeded the call to enforce state and federal antitrust laws, from local investigations of healthcare consolidation<sup>212</sup> to multistate actions against Silicon Valley behemoths like Apple and Amazon.<sup>213</sup>

Yet, despite these evolutions, the constraints of prosecutorial capacity remain a key factor in the vigor, or impotence, of state antitrust enforcement. This is especially salient given that many of the most important antitrust issues unfold in novel industries, demanding an unusual degree of economic and technological savvy and involving powerful and well-heeled entities like Amazon, Google,<sup>214</sup> and Apple.<sup>215</sup>

Moreover, the very trend of multistate suits that allows jurisdictions to pool antitrust resources might also allow states to “free ride,” appending their name to litigation that is largely carried out by other states or by the federal Department of Justice.<sup>216</sup> In this way, a state attorney general might reap most of the political dividends of being an “antitrust enforcement leader” without committing any substantial resources to combatting unlawful corporate concentrations.

Finally, while a small minority of state attorneys general offices have gargantuan staffs and budgets, many remain small, resource-starved offices whose capability to take on “the big case”<sup>217</sup> of a full-bore antitrust prosecution remains limited.<sup>218</sup>

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<sup>211</sup> *About the Office of the Attorney General*, STATE OF CAL. DEP'T OF JUSTICE, <https://oag.ca.gov/office> (last visited Aug. 18, 2019).

<sup>212</sup> John Ingold, *Colorado Attorney General Intervenes in \$4.3 Billion DaVita-UnitedHealth Merger Just as Deal is Finalized*, COLORADO SUN (June 19, 2019), <https://coloradosun.com/2019/06/19/davita-unitedhealth-merger-colorado-attorney-general/>.

<sup>213</sup> John D. McKinnon, *Group of AGs Has Been Discussing How to Address Antitrust-Related Concerns with Google, Facebook, Apple and Amazon*, WALL ST. J. (June 7, 2019), <https://www.wsj.com/articles/states-add-to-scrutiny-on-google-facebook-other-big-tech-11559918816>.

<sup>214</sup> *Id.*

<sup>215</sup> Garry A. Gabison, *Public Enforcement of Private Rights*, 18 FLA. COASTAL L. REV. 207, 231 (2017); Andrew Chung, *In Setback for Apple, U.S. Supreme Court Lets App Store Antitrust Suit Proceed*, REUTERS (May 13, 2019), <https://www.reuters.com/article/us-usa-court-apple/in-setback-for-apple-u-s-supreme-court-lets-app-store-antitrust-suit-proceed-idUSKCN1S11IR>.

<sup>216</sup> Richard Wolfram & Spencer Weber Waller, *Contemporary Antitrust Federalism: Cluster Bomb or Rough Justice?*, in ANTITRUST LAW IN NEW YORK STATE 1, 41 (Robert L. Hubbard & Pamela Jones Harbour eds., 2d ed. 2002); see also HOUCK, *supra* note 202, at 15 (noting defense counsel observed during multistate antitrust cases that “the states seemed to do little more than sit silently on telephone conference calls, and [defense counsel therefore] questioned whether this was a wise use of state resources.”).

<sup>217</sup> McAllister, *supra* note 116, at 27.

<sup>218</sup> North Dakota's entire Attorney General Office, for example, consists of 40 line attorneys and one part-time chief deputy. See Mike Nowatzki, *North Dakota AG's Office Face Staff Shortage*, GRAND FORKS HERALD (Apr. 23, 2016), <https://www.grandforksherald.com/news/4016508-north-dakota-ags-office-face-staff-shortage>.

Given this dynamic, what steps might be taken to ensure state prosecutors have the capacity and incentives to vigorously enforce antitrust laws?<sup>219</sup> Bringing back personal bounties as “conviction bonuses” paid to individual attorneys would, of course, be deeply problematic.<sup>220</sup> But as a modern “translation,” states might refine their antitrust statutes to ensure that where the office of the attorney general prevails in an antitrust case, any monies won remain in that office’s control and budget, as opposed to devolving to the legislature’s general fund.<sup>221</sup> Doing so would create a direct institutional incentive for state prosecutors to develop antitrust cases, knowing their office would get to retain the resources at issue. Likewise, revisiting state statutes to provide authorization for prosecutors to hire outside experts and counsel for assistance could help increase capacity.<sup>222</sup>

On the federal level, targeted subsidization, especially for states that may otherwise lack the capacity for independent antitrust action, could also pay antitrust dividends, providing a sustainable source of funds for state antitrust work. On this point, state legislatures might appropriate the funds for and designate attorneys to specifically work on antitrust matters, ensuring a steady minimum of capacity to address such cases. And of course, further multistate coordination, such as under the aegis of NAAG, might further reduce the sting of prosecutorial capacity constraints.<sup>223</sup>

To be sure, the full project of how today’s state antitrust enforcers might get the capacity and incentives needed to serve as effective antitrust enforcers extends well beyond this work’s tentative suggestions. But as even this brief sketch shows, if we start from the empirically-based insight that prosecutorial capacity and incentives are a key to state antitrust enforcement, we will find many paths to productive solutions. Applying these lessons, we can ensure that today’s rising era of state antitrust enforcement looks quite different from the first false dawn. In doing so, Senator Sherman’s prediction might, at long last, be fulfilled.

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<sup>219</sup> Of course, this question assumes that states in fact should engage in independent antitrust actions in the first place. That said, there are some scholars who suggest that the very concept of sub-federal antitrust enforcement is inherently flawed, as it leads to inefficient outcomes as compared to centralized, coordinated enforcement. *See generally* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 *GEO. J.L. & PUB. POL’Y* 5 (2004) (doubting efficacy of state attorneys general in enforcing federal antitrust law concurrently with the federal government). The question of rigorously justifying the overall enterprise of state antitrust enforcement is beyond the scope of this work. That said, based on the above discussion, there are at least strong intuitive reasons to believe that states should, at least in some cases, serve as vigorous antitrust enforcers.

<sup>220</sup> PARRILLO, *supra* note 123, at 256.

<sup>221</sup> *See, e.g.*, COLO. REV. STAT. § 24-31-108(3) (2019) (Colorado statute permitting state Department of Law to retain control over certain monies won in lawsuits as opposed to transmitting such monies into general legislative funds).

<sup>222</sup> *See, e.g.*, Kyle Barnett, *La. AG Hires Nine Private Law Firms, 17 Attorneys for Federal Antitrust Pharmaceutical Lawsuit*, WASH. EXAMINER (Aug. 18, 2019), <https://www.washingtonexaminer.com/la-ag-hires-nine-private-law-firms-17-attorneys-for-federal-antitrust-pharmaceutical-lawsuit>.

<sup>223</sup> For several suggestions of steps NAAG or other organizations might take for such coordination, *see* HOUCK, *supra* note 202, at 19 (suggesting, among other changes, joint antitrust trial training facilitated by NAAG or a similar organization).

## APPENDIX

The following is a data-set addressing state antitrust statutory prosecutions from 1889 to 1914. For reference, list also includes four New York State common-law decisions. Where multiple opinions address the same prosecution, they are marked by a common symbol (\*, \*\*, \*\*\*, etc.). In total, there were 71 prosecutions generating 105 opinions. Opinions reflecting state's confirmed hiring of private counsel to assist the prosecution are marked with a dagger (†).

**Illinois** (3 prosecutions, 3 opinions)

*People ex rel. Akin v. Butler St. Foundry & Iron Co.*, 66 N.E. 349 (Ill. 1903)  
*Distilling & Cattle Feeding Co. v. People ex rel. Moloney*, 41 N.E. 188 (Ill. 1895)  
 †*People ex rel. McIlhany v. Chicago Live-Stock Exch.*, 48 N.E. 1062 (Ill. 1897)

**Kansas** (10 prosecutions, 13 opinions)

*State v. Aikins*, 112 P. 605 (Kan. 1911)  
*State v. Monarch Portland Cement Co.*, 111 P. 487 (Kan. 1910)  
*State v. Glenn Lumber Co.*, 111 P. 484 (Kan. 1910)  
 \**State v. Int'l Harvester Co. of Am.*, 106 P. 1053 (Kan. 1910)  
 \**State v. Int'l Harvester Co. of Am.*, 99 P. 603 (Kan. 1909)  
 \*\**State v. Wilson*, 84 P. 737 (Kan. 1906)  
 \*\**State v. Wilson*, 80 P. 639 (Kan. 1905)  
 †\*\*\**In re Bell*, 76 P. 1129 (Kan. 1904)  
 †\*\*\**State v. Jack*, 69 Kan. 387 (1904)  
 †*State v. Smiley*, 69 P. 199 (Kan. 1902)  
*State v. Dreany*, 69 P. 182 (Kan. 1902)  
*State v. Phipps*, 31 P. 1097 (Kan. 1893)  
*In re Pinkney*, 27 P. 179 (Kan. 1891)

**Kentucky** (6 prosecutions, 21 opinions)

*Imperial Tobacco Co. of Ky. v. Commonwealth*, 170 S.W. 663 (Ky. 1914)  
 †*Am. Seeding Mach. Co. v. Commonwealth*, 153 S.W. 972 (Ky. 1913)  
 †\**Int'l Harvester Co. of Am. v. Commonwealth*, 147 S.W. 760 (Ky. 1912)  
 \**Int'l Harvester Co. of Am. v. Commonwealth*, 147 S.W. 1199 (Ky. 1912)  
 \**Int'l Harvester Co. of Am. v. Commonwealth*, 146 S.W. 12 (Ky. 1912)  
 †\**Commonwealth v. Int'l Harvester Co. of Am.*, 145 S.W. 400 (Ky. 1912)  
 †\**Int'l Harvester Co. v. Commonwealth*, 145 S.W. 393 (Ky. 1912)  
 †\**Commonwealth v. Int'l Harvester Co. of Am.*, 144 S.W. 1068 (Ky. 1912)  
 †\**Int'l Harvester Co. of Am. v. Commonwealth*, 144 S.W. 1064 (Ky. 1912)  
 †\**Int'l Harvester Co. of Am. v. Commonwealth*, 144 S.W. 1070 (Ky. 1912)  
 \**Int'l Harvester Co. of Am. v. Commonwealth*, 138 S.W. 248 (Ky. 1911)  
 \**Int'l Harvester Co. of Am. v. Commonwealth*, 126 S.W. 352 (Ky. 1910)  
 \**Commonwealth v. Int'l Harvester Co. of Am.*, 131 Ky. 768 (1909)  
 \**Commonwealth v. Int'l Harvester Co. of Am.*, 115 S.W. 703 (Ky. 1909)  
 \*\**Am. Tobacco Co. v. Commonwealth*, 115 S.W. 755 (Ky. 1909)  
 \*\**Am. Tobacco Co. v. Com.*, 115 S.W. 754 (Ky. 1909)

\**Int'l Harvester Co. of Am. v. Commonwealth*, 99 S.W. 637 (Ky. 1907)  
*Commonwealth v. Bavarian Brewing Co.*, 66 S.W. 1016 (Ky. 1902)  
 \*\*\**Commonwealth v. Grinstead*, 63 S.W. 427 (Ky. 1901)  
 \*\*\**Commonwealth v. Grinstead*, 55 S.W. 720 (Ky. 1900)  
 \*\*\**Commonwealth v. Grinstead*, 22 Ky.L.Rptr. 377 (1900)

**Michigan** (2 prosecutions, 2 opinions)

†*Att'y Gen. ex rel. James v. Nat'l Cash Register Co.*, 148 N.W. 420 (Mich. 1914)  
*Att'y Gen. ex rel. Wolverine Fish Co. v. A. Booth & Co.*, 106 N.W. 868 (Mich. 1906)

**Minnesota** (2 prosecutions, 3 opinions)

\**State v. Creamery Package Mfg. Co.*, 132 N.W. 268 (Minn. 1911)  
 †\**State v. Creamery Package Mfg. Co.*, 126 N.W. 126 (Minn. 1910)  
*State v. Duluth Bd. of Trade*, 121 N.W. 395 (Minn. 1909)

**Mississippi** (6 prosecutions, 7 opinions)

*Cumberland Tel. & Tel. Co. v. State*, 54 So. 670 (Miss. 1911)  
 \**Grenada Lumber Co. v. State*, 54 So. 8 (Miss. 1911)  
 \**Retail Lumber Dealers' Ass'n v. State*, 48 So. 1021 (Miss. 1909)  
 †*State v. Jackson Cotton Oil Co.*, 48 So. 300 (Miss. 1909)  
 †*S. Elec. Sec. Co. v. State*, 44 So. 785 (Miss. 1907)  
*State ex rel. Att'y Gen. v. Miss. Cotton Oil Co.*, 60 So. 609 (Miss. 1901)  
*Am. Fire Ins. Co. v. State*, 22 So. 99 (Miss. 1897)

**Missouri** (14 prosecutions, 15 opinions)

*State ex rel. Sager v. Polar Wave Ice & Fuel Co.*, 169 S.W. 126 (Mo. 1914)  
*State ex rel. Att'y Gen. v. Ark. Lumber Co.*, 169 S.W. 145 (Mo. 1913)  
*State ex rel. Barker v. Assurance Co. of Am.*, 158 S.W. 640 (Mo. 1913)  
*State ex rel. Jones v. Mallinckrodt Chem. Works*, 156 S.W. 967 (Mo. 1913)  
*State ex rel. Kimbrell v. People's Ice, Storage & Fuel Co.*, 151 S.W. 101 (Mo. 1912)  
*State ex rel. Major v. Int'l Harvester Co. of Am.*, 141 S.W. 672 (Mo. 1911)  
 \**State ex rel. Hadley v. Standard Oil Co.*, 116 S.W. 902 (Mo. 1908)  
*State ex rel. Att'y Gen. v. Kan. City Live Stock Exch.*, 109 S.W. 675 (Mo. 1908)  
 \**State ex rel. Hadley v. Standard Oil Co.*, 91 S.W. 1062 (Mo. 1906)  
*State ex rel. Crow v. Cont'l Tobacco Co.*, 75 S.W. 737 (Mo. 1903)  
*State ex rel. Crow v. Swartzschild & Sulzberger Co.*, 73 S.W. 1132 (Mo. 1903)  
*State ex rel. Crow v. Armour Packing Co.*, 73 S.W. 645 (Mo. 1903)  
*State ex rel. Crow v. Firemen's Fund Ins. Co.*, 52 S.W. 595 (Mo. 1899)  
*State ex rel. Crow v. Aetna Ins. Co.*, 51 S.W. 413 (Mo. 1899)  
*State ex rel. Att'y Gen. v. Simmons Hardware Co.*, 18 S.W. 1125 (Mo. 1891)

**Montana** (1 prosecution, 1 opinion)

*State v. Cudahy Packing Co.*, 82 P. 833 (Mont. 1905)

**Nebraska** (4 prosecutions, 6 opinions)

- \**State v. Am. Sur. Co.*, 135 N.W. 365 (Neb. 1912)  
 \**State v. Am. Sur. Co.*, 90 N.W. 235 (Neb. 1911)  
*Howell v. State*, 120 N.W. 139 (Neb. 1909)  
*State v. Adams Lumber Co.*, 116 N.W. 302 (Neb. 1908)  
 †\*\**State v. Omaha Elevator Co.*, 110 N.W. 874 (Neb. 1906)  
 †\*\**State v. Omaha Elevator Co.*, 106 N.W. 979 (Neb. 1906)

**New York** (7 prosecutions (11 with common-law), 12 opinions (19 with common law))

- \**People v. Am. Ice Co.*, 120 N.Y.S. 41 (App. Div. 1909)  
 \**People v. Am. Ice Co.*, 120 N.Y.S. 443 (Sup. Ct. 1909)  
*In re Att'y Gen.*, 100 N.Y.S. 186 (App. Div. 1908)  
 \*\**Att'y Gen. v. Consol. Gas Co. of New York*, 108 N.Y.S. 823 (App. Div. 1908)  
*In re Jackson*, 107 N.Y.S. 799 (Sup. Ct. 1907)  
*In re Interborough Metro. Co.*, 106 N.Y. 416 (Sup. Ct. 1907)  
 \*\**In re Consol. Gas Co. of New York*, 106 N.Y.S. 407 (Sup. Ct. 1907)  
 \*\*\**People v. Am. Ice Co.*, 105 N.Y.S. 650 (Sup. Ct. 1907)  
 \*\*\**People v. Am. Ice Co.*, 104 N.Y.S. 858 (App. Div. 1907)  
 \*\*\*\**People ex rel. Morse v. Nussbaum*, 67 N.Y.S. 492 (App. Div. 1900)  
 \*\*\*\**People ex rel. Morse v. Nussbaum*, 66 N.Y.S. 129 (Sup. Ct. 1900)  
*In re Att'y Gen.*, 47 N.Y.S. 20 (Sup. Ct. 1897)

**New York Common Law Suits**

- People v. Duke*, 44 N.Y.S. 336 (Sup. Ct. 1897)  
*People v. Milk Exch.*, 39 N.E. 1062 (N.Y. 1895)  
*People v. Sheldon*, 34 N.E. 785 (N.Y. 1893)  
 \*\*\*\*\**People v. N. River Sugar Ref. Co.*, 24 N.E. 834 (N.Y. 1890)  
 \*\*\*\*\**People v. North River Sugar Refining Co.*, 25 Abb. N. Cas. 1 (N.Y. 1890)  
 \*\*\*\*\**People v. N. River Sugar Ref. Co.*, 7 N.Y.S. 406 (Gen. Term 1889)  
 \*\*\*\*\**People v. N. River Sugar Ref. Co.*, 3 N.Y.S. 401 (Cir. Ct. 1889)

**Tennessee** (4 prosecutions, 5 opinions)

- \**State ex rel. Cates v. Standard Oil Co. of Ky.*, 110 S.W. 565 (Tenn. 1907)  
 \**Standard Oil Co. v. State*, 100 S.W. 705 (Tenn. 1907)  
*State v. Witherspoon*, 90 S.W. 852 (Tenn. 1906)  
 †*State v. Chilhowee Woolen Mills*, 89 S.W. 741 (Tenn. 1905)  
*State ex rel. Astor v. Schlitz Brewing Co.*, 59 S.W. 1033 (Tenn. 1900)

**Texas** (12 prosecutions, 17 opinions)

- State v. Racine Sattley Co.*, 134 S.W. 400 (Tex. Civ. App. 1911)  
*State v. Brady*, 118 S.W. 128 (Tex. 1909)  
 †\**Waters-Pierce Oil Co. v. State*, 106 S.W. 918 (Tex. Civ. App. 1907)  
 †\**Waters-Pierce Oil Co. v. State*, 103 S.W. 836 (Tex. Civ. App. 1907)  
 †\*\**Ft. Worth & D.C. Ry. Co. v. State*, 88 S.W. 370 (Tex. Civ. App. 1905)

- †\*\**Ft. Worth & D.C. Ry. Co. v. State*, 87 S.W. 336 (Tex. 1905)  
*Nat'l Cotton Oil Co. v. State*, 72 S.W. 615 (Tex. Civ. App. 1903)  
*State v. Laredo Ice Co.*, 73 S.W. 951 (Tex. 1903)  
\*\*\**State ex rel. Att'y Gen. v. Shippers Compress & Warehouse Co.*, 69 S.W. 58 (Tex. 1902)  
\*\*\**State ex rel. Att'y Gen. v. Shippers' Compress & Warehouse Co.*, 67 S.W. 1049 (Tex. Civ. App. 1902)  
\*\*\*\**State ex rel. Att'y Gen. v. Waters-Pierce Oil Co.*, 67 S.W. 1057 (Tex. Civ. App. 1902)  
*Crystal Ice & Mfg. Co. v. State*, 56 S.W. 562 (Tex. Civ. App. 1900)  
*San Antonio Gas Co. v. State*, 54 S.W. 289 (Tex. Civ. App. 1899)  
\*\*\*\**Waters-Pierce Oil Co. v. State*, 44 S.W. 936 (Tex. Civ. App. 1898)  
*Hathaway v. State*, 36 S.W. 465 (Tex. Crim. App. 1896)  
\*\*\*\*\**Queen Ins. Co. v. State*, 34 S.W. 397 (Tex. 1893)  
\*\*\*\*\**Queen Ins. Co. v. State ex rel. Att'y Gen.*, 22 S.W. 1048 (Tex. Civ. App. 1893)