WHILE the trust form of business organization offered a practical solution to the problem of how to unite diverse properties under a single management, it had yet to face the test of law and public opinion. When the test came, it failed—competition was still the unchallenged norm. A suit brought by the attorney general of New York to revoke the corporate charter of the North River Sugar Refining Company—on the grounds that its membership in the sugar trust was both a violation of the common-law prohibition against a partnership of corporations and contrary to the public interest in preserving competition—was successfully carried to the state's highest court, thereby destroying the legal basis of the trust device. This decision, which eliminated any need for federal action to fill the regulatory gap that was thought to exist in the case of trusts, was handed down just as Congress prepared to take final action on a revised antitrust law sponsored by Senator John Sherman. But though one legal basis for consolidation had been destroyed, another soon took its place. The Sugar Refineries Company, like many of the other trusts, subsequently reorganized itself as a holding company under the revised corporate statutes of New Jersey. This new legal entity, the American Sugar Refining Company, was in a position to exercise even stronger control over the various properties it commanded than had its predecessor.

The news of the sugar trust's formation in the summer of 1887 seemed to touch a raw public nerve, sending a shock through the body politic. That nerve had long been sensitive to the charge of monopoly. "As part of their Old World heritage," one historian has written, masses of Americans have been perenially obsessed with an ill-defined fear of monopolistic power. That fear was evident during colonial opposition to those exclusive privileges and royal patents which were granted in
accordance with the prevailing philosophy of mercantilism. It was ex-
pressed in continuing hostility to the banking, monetary, land and tariff
policies of Alexander Hamilton which drove many citizens into the ranks
of the Jeffersonian Republicans. In similar fashion a generation later, dis-
satisfaction with the privileges enjoyed by the Second Bank of the United
States caused the Jacksonians to raise the magnetic shibboleths of anti-
monopolism once more. Likewise, amidst the growing pressures for hom-
estead rights just before the Civil War, the cry against monopoly was
echoed again and again, along with the audible reverberations of the natu-
ral rights of Man to a fair share in the bounties of his Creator.¹

While those actively committed to these various crusades may have
been no more than a small minority, they nevertheless represented a
political force that candidates for elective office hesitated to offend.
In expressing their opposition to special privilege in all its forms, the
antimonopolists broadcast an appeal that met with a sympathetic
response far beyond their own ranks, for the belief in equal oppor-
tunity for all lay at the heart of the American ethos.

In the years following the Depression of 1873, the special targets
of those who rallied under the banner of antimonopolism were the
railroads and their affiliates, the storage and terminal companies. To
the farmer and his occasional urban allies, the common workingman
and small-business proprietor, it seemed that these "behemoth" corpo-
rations were engaged in a "vast conspiracy" to take from them "the
fruits of their labor."² The strategic position that many of these com-
panies occupied, enabling them in certain cases to charge "what the
traffic would bear," levy disproportionately higher rates for short
hauls, and discriminate among individual shippers, seemed to threaten
the economic freedom of those who found themselves dependent on
rail transportation. Although the underlying cause of these alleged
abuses—the large fixed investment that a railroad or terminal facility
required—was the same as that which soon was to lead to industrial con-
solidation on a grand scale, the focus of protest was, for the moment,
almost entirely on the railroads.

After 1882, this antimonopoly sentiment intensified—at least in the
Great Plains and southern cotton states—because of depressed condi-
tions in agriculture, the resulting discontent finding political expres-
sion in the Granger movement, and, to a lesser degree, in the Green-
back-Labor party.³ When efforts to regulate the railroads at the state
level broke down, the antimonopolists turned to Congress for relief.

² G. Lee Benson, Merchants, Railroads & Farmers.
³ John D. Hicks, The Populist Revolt, pp. 60–77; Chester M. Destler, Ameri-
can Radicalism, 1865–1901, pp. 17–19.
Although direct federal regulation of economic activity outside of banking was unprecedented, the railroads' opponents finally had their way. In 1887, after several years of studying and debating the matter, Congress passed the Interstate Commerce Act.4

Then came word of a new form of monopoly. In an article written for the March, 1881, issue of the Atlantic Monthly, Henry Demarest Lloyd told for the first time of how the Standard Oil Company of Ohio had succeeded in gaining control of an entire industry. The article, entitled "The Story of a Great Monopoly," was based for the most part on the testimony given two years earlier before the New York assembly's Hepburn committee. But, whereas that committee had concerned itself primarily with the reported abuses of railroads, probing into the affairs of the Standard Oil Company only insofar as they touched on that subject, Lloyd concentrated all his fire on what he termed the unprincipled drive of Rockefeller and his associates to destroy their competitors in the petroleum business. And while the Hepburn committee's five volumes of testimony had reached only a small, limited audience, Lloyd's article was read by thousands of influential persons across the nation. The issue in which it appeared ran through seven printings, with the London Railway News distributing reprints of the article throughout Europe. Many of the details were exaggerated, many of the accusations unwarranted, but the gist of the article—that the Standard Oil Company had succeeded in absorbing or otherwise eliminating all its rivals—could not be disputed. Perhaps almost as important, Lloyd had painted an indelible portrait of Rockefeller as a ruthless robber-baron.5

For the moment, however, the major thrust of political discontent was still directed at the railroads. Insofar as people were troubled by the reports of a monopoly in petroleum, they probably viewed the situation in that industry as merely one facet of the larger problem of

4 John D. Clark, in The Federal Anti-Trust Policy, pp. 17–26, presents the interesting thesis that the Interstate Commerce Act was actually the first effort to deal with the problem of industrial combination on a national scale, its aim being to prevent the instances of rate discrimination which tended to favor one competitor over another. This interpretation, while true in a certain sense, in my opinion places too great an emphasis on what was, in fact, only one of many factors that led to passage of the Interstate Commerce Act. Gabriel Kolko, in Railroads and Regulation, 1877–1916, for example, has argued that the act was finally approved by Congress only because the railroads, recognizing that the regulatory machinery which it provided could be used to deal with their own problems of competition, supplied the necessary votes to assure passage. Discrimination in railroad freight rates was, of course, one manifestation of competition among railroads.

5 Allan Nevins, Study in Power, 2: 140–41.
railroad regulation. Even after the Atlantic Monthly article appeared, not much was really known about the structure or organization of the Standard Oil empire—for example, that it was based on a new form of industrial organization, the trust device.

But then, just as Congress was preparing to enact the Interstate Commerce Act, the public began to hear of the formation of trusts in other industries. Late in 1886 it was revealed that seventeen cottonseed oil refiners, representing an alleged 88 per cent of the industry’s capacity, had secretly organized a trust two years earlier. In mid-summer of 1887, newspaper readers throughout the country learned that the nation’s whiskey distillers, meeting in a Chicago hotel, had voted to establish a trust in that industry. Soon the very word “trust” came to denote any combination of businessmen to control prices and output, whether it actually took the trust form or not. “These are the days of great combinations and monopolies,” warned the New York Times editorially. “The baneful example set by the Standard Oil Trust has been followed in many fields of industry. Only a few weeks ago a Trust for controlling the rubber trade was organized. Now it is announced that firms representing 90 per cent of the productive capacity of the envelope business and controlling all of the potential machinery used in the manufacture of envelopes have united in a great corporation whose name—the Standard—is ominously suggestive of monopoly and of oppression and persecution for manufacturers who desire to maintain their independence.”

The Times was aware that the combination of envelope manufacturers was not actually a trust. “But the motives and intentions of its constituent firms are those of the Trust. Prices are to be raised, and if an independent manufacturer shall refuse to demand the raised prices for his goods he is to be crushed by destructive competition in his own market, just as the Standard Oil Trust has crushed independent refiners who dared to continue the sale of oil.”

In some cases there seemed to be a direct link between the members of the Standard Oil trust and combinations in other industries. The cottonseed oil trust, for example, was said to have been sug-

6 The Commercial and Financial Chronicle had first reported the American Cotton Oil trust’s formation in September; see Commercial and Financial Chronicle, 43 (September 11, 1886): 302. By early 1887 the attorney general of Louisiana was already taking steps to limit the trust’s operations in that state; see Railway & Corporate Law Journal, 1 (April 23, 1887): 406–8.
7 Chicago Tribune, July 20, 1887; New York Times, July 21, 1887.
8 New York Times, July 16, 1887.
9 Ibid.
gested by Henry M. Flagler, one of Rockefeller's oldest associates in the petroleum industry and a stockholder in one of the cottonseed oil companies that were combined. Colonel Oliver H. Payne, another Rockefeller partner, was reported to be involved in the whiskey business. And when outside speculators began taking over control of Chicago gas and electric companies, it was rumored that Standard Oil money was behind the scheme. "The Oil Trust controls the supply of naphtha," the New York Times noted, "which is so largely used in modern processes of manufactured gas. By means of this product, it is said, the Oil Trust, or the millionaire holders of its certificates, propose to control the manufacture of gas through local Trusts, which seem to be independent but really are connected in some way with the present monopoly." But even when it proved impossible to establish a link—direct or indirect—to the Standard Oil group, there was still a tendency to view each new instance of combination as yet another attempt to emulate Rockefeller.

Each month seemed to provide further grounds for the suspicion that all of American industry might soon go the way of the petroleum industry. There were reports of "trusts" being organized in lead, school slates, paper bags, linseed oil, paving pitch, salt, and cordage, among other industries. "It is the aim of those who make these combinations," an editorial in the New York Times declared, "to kill competition at home, and to exact from consumers a price high enough to invite competition from abroad—to make them pay to protected home manufacturers almost as great a tax as they must pay the Government when they buy the same kind of goods from foreign manufacturers."

The very secrecy with which they conducted their affairs seemed to make the combinations all the more sinister. One advantage which the trust offered over the corporate form of organization was the fact that it required no charter or other form of approval by the state such as would have necessitated disclosure of its activities. As long as this secrecy could be maintained, it tended to avert public criticism, since what people do not know about they cannot fear. Once this secrecy was lost, however, the use of the trust form tended to have the opposite effect. What people know about only in part, they fear all the more.

10 John T. Flynn, God's Gold, p. 278. Flagler did eventually become president of the cottonseed oil trust; see New York Times, November 1, 2, 4, 5, and 7, 1889.
11 New York Times, July 8, 1887.
12 Ibid., December 26, 1887.
But beyond its secrecy, beyond its possible effect on prices, the trust aroused concern because it seemed to strike at the very heart of the prevailing business ethic. Competition, that ethic declared, was the order of life—the regulator of business activity as well as the arbiter of men’s fates. That businessmen might from time to time violate this fundamental tenet did not negate its importance, any more than a man’s having a mistress would necessarily belie his belief in the institution of marriage. Competition, like matrimony, was still the prevailing norm.\textsuperscript{13} Of course, some businessmen—most notably Rockefeller and the Havemeyers—had already come to the conclusion that, from a social point of view, the disadvantages of competition far outweighed the benefits.\textsuperscript{14} They were innovators, not only in the Schumpeterian sense, but in the Mertonian sense as well.\textsuperscript{15} But those who held such a view were as yet numerically insignificant; and so pervasive was the majority sentiment, that they kept their thoughts on competition to themselves and their close business associates—at least for the time being.

The belief in the sanctity of competition was perhaps even more strongly held by that amorphous group in society, the molders of public opinion—especially those concerned with economic affairs. This small coterie of academicians and journalists was unwavering in its devotion to the general principle of laissez faire.\textsuperscript{16} As Francis A. Walker later said, loyalty to that principle “was used to decide whether a man were an economist at all.”\textsuperscript{17} The state had no need to regulate economic activity, these laissez faireists would argue, because the market place would do the job better. Still, they recognized that such would be the case only if free competition were allowed to prevail. That is why they viewed the growth of “trusts” with such profound misgivings. If it were possible for a single firm to gain control of an entire industry, dictating the prices to be charged and the amounts to be produced, then competition could not be counted on

\textsuperscript{14} Nevins, \textit{Study in Power}, 2, chap. 24.
\textsuperscript{16} Support for tariff legislation marked the only heresy among the members of this group; however, the number of such heretics was small, especially among the academicians. See Fine, \textit{Laissez-Faire}, pp. 47–73.
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to regulate economic activity, and the intellectual foundations of laissez faire would collapse.

No event served to crystallize these fears so much as did the news of the sugar trust's formation. Perhaps it was the fact that seventeen previously independent firms had disappeared, firms which had been close to the large urban centers where these molders of public opinion were to be found. Perhaps it was the fact that prices had risen so quickly and sharply after the trust's formation. Perhaps it was the fact that sugar had become an important part of daily consumption. In any case, the news produced a sharp reaction. Previously, only the New York Times and Chicago Tribune had shown much interest in the “trust” problem. (Henry Lloyd was an editorial writer for the latter.) Now other newspapers began to express their concern. “Trusts ought to be investigated, thoroughly and unsparingly . . . ,” the New York Tribune declared. “The public needs light about them all, their origin and methods, their influence upon production and prices, and their part in politics.”

In Congress a similar demand was heard for the first time. Noting that “some of the necessaries of life, particularly coal and sugar, are placed at an unreasonable price, by what are known as ‘trusts’,” Congressman William E. Mason of Illinois, a Republican from Chicago, called for an investigation of “what effect said ‘trusts’ have upon the price of necessaries of life and whether the same are prejudicial to the interests of the people. . . .” In supporting this request, his colleague Congressman Henry Bacon, a Democrat from New York, declared, “But here is a crying abuse, something that everybody understands, which the newspapers tell us daily is committing a serious injury to the [public].”

As a result of this agitation, investigations were scheduled by both the Republican-controlled New York senate and the Democratic-controlled United States House of Representatives. The New York senate hearings, conducted by its Law Committee under the chairmanship of Frank S. Arnold, opened first. They began in New York City on February 20, 1888, and the leadoff witness was Henry O. Havemeyer.  

20 Ibid., p. 720.
21 A resolution to investigate trusts was first introduced in the New York Assembly on January 31 (New York Times, February 1, 1888). Two weeks later, the Times charged that lobbyists for the Standard Oil Company and several of the other combinations involved (though not the sugar trust) were
The sugar trust's chief officer proved to be most unco-operative. After almost every question he would turn to his lawyer, John Parsons, for instructions; and the committee counsel, Colonel George Bliss, a leading Republican figure, found it difficult to elicit information from him. The committee did learn that most, if not all, of the sugar refiners in New York State had signed an agreement whereby their stock was transferred to a board of trustees who exercised control over the properties in the name of all the stockholders. The committee even learned the names of the trustees. But when Colonel Bliss asked Havemeyer what companies outside of New York State were parties to the agreement, Havemeyer at first refused to answer, on the grounds that the committee had no jurisdiction to inquire into affairs beyond the state's borders. Later, when pressed by the full committee to answer Colonel Bliss's questions on that subject, Havemeyer reluctantly did so. But he steadfastly refused to turn over to the committee a copy of the trust deed. It was in Parsons' possession, he said, and Parsons would not release the document. Parsons was working behind the scenes to block any investigation, especially one by a special committee of the New York legislature, and that the sponsor of the resolution, Assemblyman Austin A. Yates of Schenectady, after being subjected to the pressure of these lobbyists, had lost his ardor for any probe (New York Times, February 16, 1888). In light of the Standard Oil Company's history, these charges may well have been true (see Nevins, Study in Power, 2: 95ff.), although Yates vehemently denied them on the assembly floor. The next day, February 17, after the New York World had joined the Times in criticizing the legislature's failure to investigate the trusts, the senate instructed its Law Committee to conduct its own probe (New York, Legislature, Legislative Journal, 111th sess., 1888, pp. 82, 159-200). Members of the senate undoubtedly were uneasy because of the disposition the electorate had shown in the last several elections to vote out of office any politicians prominently identified with the "corporate" interests (see Benson, Merchants, Railroads & Farmers). Since the hearings began only three days later, the committee and its counsel could not possibly have had adequate time to prepare. The hurried preparation probably explains, in part, why the committee was relatively unsuccessful in eliciting information from the witnesses called to testify before it. The best account of these hearings, aside from the committee's report itself (New York, Legislature, Senate, Committee on General Laws, Report on Investigation Relative to Trusts), is to be found in the New York Times. The New York Tribune also covered the hearings extensively.

Colonel Bliss had, incidentally, participated with the Havemeyers in the overthrow of the Tweed ring. The other counsel for the committee was Roger A. Pryor, but he did not play an important part in the sugar-trust portion of the hearings. He did, however, take a leading role in the later prosecution of the sugar trust. See pp. 132ff. below.


New York Senate Committee on General Laws, Investigation Relative to Trusts, pp. 36, 64-69.
then called to the witness stand, and proved just as recalcitrant. The trust deed had been given to him in confidence as a lawyer, he said, and to surrender it to the committee would violate professional ethics.25

The only other member of the sugar trust called to testify was William Sierck. The others, including John E. Searles, had left town hurriedly in order to avoid the committee’s subpoenas.26 Sierck proved no more co-operative than Havemeyer, and even less informative. But what those two witnesses were reluctant to disclose, George Moller, the former head of the North River Sugar Refining Company, was more than ready to tell. He even revealed how much had been paid in certificates for some of the refineries.27

After the second day of hearings, the Arnold committee turned its attention to other industries. Brief as the spotlighting of sugar refining had been, it had nonetheless provided a glimpse of features likely to arouse public opposition to the trust’s continued existence. Havemeyer had tried to make the point that the combination of sugar refineries was not intended to raise consumer prices, but the New York Times had only to call attention to the rise in sugar prices which had already taken place to cast doubt on that assurance.28

The sugar trust had probably followed the worst of possible courses. Although most of its salient features were brought out in the hearings, those members of the trust who testified gave the impression that there were still many more facts that had been concealed. The investigation seemed to show, the Times commented, “that if the sugar trust be the innocent organization that some of those

25 Ibid., pp. 70–74, 122–26. The trust deed was eventually surrendered to the Arnold committee, though not until the hearings had been completed and the amounts of certificates issued to the various refineries had been deleted (Ibid., p. 14). By then the issue had become somewhat academic, since the trust’s officials had already decided to turn a copy of the trust deed over to the House Committee on Manufactures (see p. 130 below). In reflecting on this decision many years later, Henry O. Havemeyer said, “All this litigation and all this fuss about trusts was based upon that deed; if that deed had not been produced there would have been nothing to fight about or investigate.” Havemeyer’s view, of course, must not be taken too seriously, since the Standard Oil Company had turned a copy of its trust deed over to the Arnold committee even before the sugar-trust hearings, and in any case it is unlikely that a copy of the document could have been concealed from the public for long, once its existence was known.

26 New York Senate Committee on General Laws, Investigation Relative to Trusts, pp. 48–49.
27 Ibid., pp. 102–15.
who are interested in it claim it to be, it has features with which they do not propose the public shall become acquainted."\(^{29}\) Rockefeller, in a later appearance before the same committee, was to create a much better impression, even if he could not dispel completely the feeling that trusts were synonymous with industrial monopoly.\(^{30}\)

The Arnold committee was under instructions to report back to the senate no later than March 1, 1888. Six days after that deadline, the committee finally issued its report. Speaking of trusts in general, it declared that,

however different the influences which gave rise to these combinations in each particular case may be, the main purpose, management and effect upon the public is the same, to wit: The aggregation of capital, the power of controlling the manufacture and output of various necessary commodities; the acquisition or destruction of competitive properties, all leading to the final and conclusive purposes of annihilating competition and enabling the industries represented in the combination to fix the price at which they would purchase the raw material from the producer, and at which they would sell the refined product to the consumer. In any event, the public at each end of the industry (the producer and consumer) is, and is intended to be, in a certain sense, at the mercy of the syndicate, combination or trust.\(^{31}\)

The committee also noted that trusts were merely the latest in a long series of threats posed by aggregations of capital to the freedom of New York's citizens. "Colossal fortunes," it said,

hastily accumulated, are always abhorrent and even in the hands of private individuals . . . are often considered a menace to good government. The people of this State have become alarmed at the constantly growing power of railroad, pipe-line, telegraph and other corporations; and the ease and boldness with which the great and powerful destroys or assimilates its weaker competitive neighbor, common carrier or manufacturer has become the scandal of the age. The end, if not the purpose of every combination, is to destroy competition and leave the people subject to the rule of monopoly.\(^{32}\)

Despite these alarming conclusions, the committee's only recommendation was that it be given more time to pursue its investigation.

\(^{29}\) Ibid., February 21, 1888.
\(^{32}\) New York Senate Committee on General Laws, *Investigation Relative to Trusts*, p. 13.
Two days after this report was issued, the U.S. House Committee on Manufactures, under the chairmanship of Congressman Bacon, began its own inquiry into the formation of trusts. Once again, officials of the Sugar Refineries Company were the first to testify. This time the hearings had been more adequately prepared. Also, the trust’s organizers by now realized that they had made a mistake by refusing to co-operate with the New York senate investigation. They answered all the questions put to them and turned over to the Bacon committee whatever documents were requested—including a copy of the trust deed. As a result of this closer co-operation and the greater length of time devoted to the sugar refining industry, the House investigators were able to bring out many more of the details surrounding the sugar trust’s formation. The same was true of the other trusts and combinations the Bacon committee looked into. But the over-all picture that emerged was not very different from that already revealed by the Arnold committee. From both investigations it was clear that, in a number of industries, businessmen had joined together to stifle competition and control prices. It was not clear, however, what, if anything, could be done to halt or reverse the trend.

Many members of Congress were particularly concerned by the growth of trusts proper. It now appeared that passage of the Interstate Commerce Act the year before had not been enough, that despite the elimination of one gap in governmental powers, another still existed. For the trust, unlike the corporation, was responsible to no sovereign political body.

These fears were reflected in the congressional discussions of the trust problem. Congressman Bacon, when explaining to his House colleagues earlier in January why the Manufactures committee had amended the original resolution calling for an investigation of trusts, to broaden its scope, had said that the members of his committee wished to make sure that the investigation would “embrace every

33 U.S. House Committee on Manufactures, Report on Trusts; New York Times, March 9, 1888. Counsel for the committee was Frank B. Gowan, the former president of the Philadelphia & Reading Railroad who had pioneered in the techniques of consolidating an industry when he helped to organize the anthracite-coal combination in the 1870’s. The retention of Gowan as counsel foreshadowed the committee’s eventual report, which, in the context of the day, was actually quite gentle toward the trusts. See, for example, the editorials in the New York Times, July 31 and August 1, 1888.

34 Perhaps, too, they sensed that they were now in much friendlier hands (see note 33 above). Of course, the issue of limited jurisdiction could not arise in the same manner. Still, Searles had again prudently left town to avoid being served with a subpoena (U.S. House Committee on Manufactures, Report on Trusts, p. 48).
such trust or combination which, owing to the fact that it is not
incorporated, is not within the reach, perhaps, of the laws of any
State."\textsuperscript{35} Certainly the objections that the members of the sugar trust
raised to the authority of a state body to inquire into their affairs did
not ease congressional fears on that score. Later, during the House
hearings themselves, several members of the Manufactures committee
pressed Parsons on just that point. Congressman Henry Smith, a
member of the People's party from Wisconsin, noted that the sugar
trust had not been incorporated by any state and declared, "It is
outside the pale of the law, a thing without a name." To which
Parsons replied, "It is a name without a thing—a mere convenient
description." Congressman Smith nonetheless was inclined to compare
the trust with wildcat banks in the West, while his Democratic
colleague Congressman William D. Bynum of Indiana likened it to
the proverbial flea. "When you want to put your finger on it," he said,
"you can't find it."\textsuperscript{36}

If it were true, as the evidence seemed to indicate, that the trust
was beyond the jurisdiction of any state legislature, Congress might
have no choice but to step in and fill the breach. This was not a
cheering prospect, especially since so many members of Congress
were reluctant to expand still further the powers of the federal
government. Yet, as Congress debated the issue through the summer
and on into the fall,\textsuperscript{37} some members began to hope that federal
legislation might not be necessary after all, that the states might
already have sufficient powers to cope with the problem of trusts.
The House Committee on Manufactures, in its report on July 30, 1888,
had alluded to this possibility. Although it had made no recommenda-
tions itself for new legislation, it had pointed out that the attorney
general of New York was then in the process of instituting a suit
against the sugar trust. Apparently the members of the committee
hoped that this would dispose of the matter.\textsuperscript{38}

\textsuperscript{35} House of Representatives, \textit{Congressional Record}, 50th Cong., 1st sess.,
1888, 19, pt. 1: 719.
\textsuperscript{36} \textit{New York Times}, March 9, 1888.
\textsuperscript{37} Since Congress was then primarily occupied with the issue of the tariff, the
time devoted to the trust problem was not very extensive. Yet, because of the
inevitable tendency to link the two issues, the problem of trusts did crop up
periodically. See House of Representatives, \textit{Congressional Record}, 50th Cong.,
10: 9074.
\textsuperscript{38} \textit{New York Times}, July 31, 1888.
From the moment it had begun to deplore the growth of trusts, the New York Times had insisted that the various states had more than adequate remedies for dealing with this new form of industrial organization. While the Times continued to argue in this vein during the many months of agitation over the trust question, it began to receive support for its view only after the Arnold committee hearings. When that investigation was concluded, the executive committee of Tammany Hall, the governing body of the Democratic party in Manhattan, requested that the attorney general of New York proceed against the Sugar Refineries Company and its thirteen trustees.

A petition signed by Richard Croker and other Tammany chieftains charged "that these directors are exercising all the powers of a corporation without having been duly incorporated under the laws of this State." It further charged that "the Sugar Trust is injurious to trade and commerce." Behind this petition lay the guiding hand of Roger A. Pryor, one of the leaders of Tammany Hall and Colonel Bliss's co-counsel on the Arnold committee.

The sixty-year-old Pryor had been born into a distinguished Virginia family that included among its forebears the names of Randolph and Bland. Moving to the North after serving as an officer in the Confederate army during the war, he had been admitted to the New York bar in 1866. The years that followed saw Pryor rise to a position of power within the Democratic party, his prewar contacts while a Virginia congressman serving him well. Although he held no elective office, he became one of the most influential members of Tammany Hall. Then, in 1888, his path crossed that of the sugar trust. Whether reflecting his Jeffersonian ancestry or indicating his political hopes, Pryor set his sights on destroying what had become in New York State the most notorious of consolidations.

On instructions from Tammany Hall, Pryor prepared to travel to Albany to press Attorney General Charles F. Tabor to take action against the sugar trust. That elected official, though a Democrat, was politically independent of the New York City machine and was

39 Ibid., July 8, 1887.
40 See ibid., November 28, 1887, and March 2 and 7, 1888.
41 Ibid., March 7, 1888.
42 Ibid., April 19, 1888.
43 This sketch is drawn from the Dictionary of American Biography, the article which appeared in the New York Times on Pryor's eightieth birthday (July 19, 1908), and the obituary which ran in that same newspaper upon his death (March 15, 1919).
44 Ibid., April 18, 1888.
noticeably reluctant to bring suit against the Havemeyer interests.\textsuperscript{45}

In addition to putting pressure on the attorney general, Pryor's purpose in going to Albany was to line up support for a bill "to suppress trusts" which he himself had drafted and which the Tammany leaders were supporting.\textsuperscript{46} Since the state legislature was then in the midst of a battle over antitrust legislation, the latter mission had first claim on his time.\textsuperscript{47}

The Pryor, or Tammany, bill had been introduced in both houses of the state legislature even before the Arnold committee hearings opened. It prohibited all agreements—especially trusts—whose purpose was to control prices. Those who violated its provisions could be fined up to $5,000 or imprisoned for two years. However, except for these stiffer penalties and their specific application to the organizers of trusts, the Tammany bill did not differ significantly from the law already on the books. The latter made it a misdemeanor for "two or more persons [to] conspire to commit any act injurious to trade or commerce,"\textsuperscript{48} and it was similar to the laws existing in a number of other states.\textsuperscript{49} Like those laws, the New York statute, except for a few minor prosecutions, had never been invoked, for the reason that as a practical matter it was extremely difficult to obtain convictions under it. Since both houses of the legislature were firmly in the control of the Republicans, the Tammany bill, which might have made this statute more enforceable, stood little chance of passage.

Soon after his committee issued its report, Senator Arnold had introduced his own bill for dealing with the trust problem. It closely resembled the Tammany bill, except that the penalties provided were not so severe.\textsuperscript{50} The only advantage it had over the Tammany measure was that it was sponsored by a Republican.

Still a third bill had been introduced by Senator Commodore P. Vedder, a Republican from Cattaraugus County. It took a different approach, proposing to tax all trusts and require them to file certain

\textsuperscript{45} Tabor, a resident of Buffalo, was a close friend and political ally of President Grover Cleveland, whose support had been instrumental in securing Tabor's nomination as attorney general on the Democratic ticket (\textit{New York Times}, September 29, 1887). As Democrats, the Havemeyers were also closely identified with the Cleveland wing of the party.

\textsuperscript{46} \textit{New York Times}, February 2, 1888, and July 3, 1888.

\textsuperscript{47} At the last minute, Pryor became ill and another Tammany official, T. C. T. Crain, went in his place.


\textsuperscript{49} Hans B. Thorelli, \textit{The Federal Anti-Trust Policy}, p. 155.

\textsuperscript{50} \textit{New York Times}, March 15, 1888.
information with the state's attorney general. His measure, Senator Vedder argued, would at least enable the state to tax away the trusts' monopoly profits. It would also, its opponents were quick to point out, legalize trusts; and that was the last thing the majority of legislators wanted to see happen.\footnote{Ibid., March 10 and 27, 1888.} This bill's chances of passage appeared slimmest of the three.

It soon became apparent that both the Democrats and the Republicans were interested only in putting themselves in the best possible political light—without necessarily enacting any legislation.\footnote{This legislative history is based on accounts which appeared in the New York Times, generally acknowledged by historians to be the most reliable source of information on the state legislature's activities during this period. See especially the May 3 and 9, 1888, issues.} Although it was questionable whether any new laws were needed, or even whether they would serve any useful purpose, the two parties were sensitive to the public clamor against trusts, and neither wanted to have it said that it had taken the trust's side against that of "the people." Antimonopoly sentiment was still a potent force in the state.\footnote{Benson, Merchants, Railroads & Farmers, pp. 174–203.}

The Democrats were perhaps somewhat more sincere in their efforts to obtain passage of an antitrust measure. Those from New York City, especially, were concerned by the inroads that various third-party candidates had been making in normally Democratic precincts, and they hoped that by sponsoring legislation to curb trusts they might prevent further defections from the party of Jefferson and Jackson. Even so, some of their fellow Democrats from upstate areas were to be found, on certain key votes, lined up with the opposition. In any case, since the Democrats were in the minority, they could not be held responsible for what the legislature did.

The Republicans, according to the usually accurate New York Times correspondent in Albany, had determined that no bill affecting the trusts would be enacted that session. Their problem, he pointed out, was how to kill the various measures that had been introduced without being tagged for doing so. In addition, Senator Arnold was honestly committed to the support of the bill that bore his name. The expedient the Republicans finally adopted was to permit the Arnold bill to reach the senate floor but to delay its passage until three days before the legislature adjourned so that the assembly would not have sufficient time to act on it. In that way, those senators who so wished could be recorded as voting against the trusts without any specific
measure becoming law. However, even Pryor was not unhappy to see the Arnold bill defeated. As he confided to a New York Times reporter, he felt that Attorney General Tabor already had all the power he needed to proceed against the trusts, and that a suit against the Sugar Refineries Company specifically, for usurping and abusing corporate privileges, would turn out to be the most effective weapon against such combinations.54

Apparently the attorney general was now more sympathetic to this view. Within a week after the legislature adjourned, he scheduled a hearing on the Tammany charges against the sugar trust.55 At that unusual session, both sides presented their arguments, with Pryor resting his case primarily on the evidence uncovered by the Arnold committee. When the hearing ended, Tabor said he would announce his decision after both sides had had a chance to submit additional briefs.56

Over a month passed without any word from the attorney general. The Times grew impatient, chiding Tabor for his lack of action.57 But finally, on July 2, 1888, the attorney general announced that he had decided to heed the Tammany leaders' plea and would institute a suit against the sugar trust.58 “. . . In view of the allegations contained in the petition before me,” Tabor said, “and of the report of the Senate . . . it is important to ascertain by judicial investigation whether these things alleged . . . are true. If they are, a great public wrong has evidently been committed by them.”59

The plan of legal attack ultimately decided upon was a suit by the attorney general to revoke the charter of the North River Sugar Refining Company on the grounds that, by becoming a member of the trust, it had usurped and abused its corporate franchise.60 That the suit was to be limited to this one company seems to have been part of a deal worked out by the opposing counsel.61 As their part of the bargain, lawyers for the trust appear to have agreed not to contest the attorney general's right to bring such a suit. In this way there

55 Ibid., May 15, 1888.
56 Ibid., June 26, 1888.
57 Ibid., July 3, 1888.
58 Ibid., July 4, 1888.
59 Ibid., July 3, 1888. At first it was decided to bring a second action against the sugar trust, enjoining the members of the board from exercising the functions of a corporation. However, this second action, which rested on far less solid legal grounds, was later dropped (ibid., November 13, 1888).
60 Ibid., July 3, 1888. At first it was decided to bring a second action against the sugar trust, enjoining the members of the board from exercising the functions of a corporation. However, this second action, which rested on far less solid legal grounds, was later dropped (ibid., November 13, 1888).
61 John Parsons, in testifying before the Hardwick committee in 1911, said: “I will tell you what Tammany Hall did in respect to that litigation [i.e., the North River suit]. It arranged to test that question in a way that would do no harm to anybody . . .” (Hardwick committee investigation, 1911, p. 2073). The actual events strongly suggest such a deal.
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could be a speedy court test of the main issue, that of the trust's legality, without directly jeopardizing the rights to the vast properties involved.

On the one hand, a suit against the North River Sugar Refining Company alone was sufficient to establish the legal precedent which the attorney general—or perhaps more accurately, Pryor—was seeking. For if that one company were dissolved, it would mean that the other members of the trust would be subject to similar proceedings, and thus the consolidation would not be able to continue under its current form of organization. On the other hand, it was to the trust's advantage to have the suit limited to the North River company. For if the suit were successful, dissolution of only that company, with its soon-to-be-dismantled refinery, would not have the same disruptive effect as simultaneous dissolution of all the trust's member corporations. Thus it was that the challenge to the trust's continued existence took the form of a suit to annul the charter of a single company which, for all practical purposes, had long since ceased to do business.

The ensuing legal battle, which opened in New York's Supreme Court on November 14, 1888, was fought on two levels. One, very technical, involved the question of whether the North River Sugar Refining Company itself had become a member of the trust, or whether its stockholders (actually Searles alone) had merely transferred their shares in the company to a board of trustees. The question was important, for common law prohibited any form of partnership among corporations. Parsons, as was to be expected, argued that it was the stockholders, not the company, who had joined the trust. The North River company could not, therefore, be said to have entered into a partnership with other corporations. Pryor, of course, took the opposite view. Under the trust deed, he pointed out, a company first had to become a corporation before it could become a member of the trust, and it was the company, not its stockholders, that had to execute the trust deed. Technicalities aside, it was clear

62 People v. North River Sugar Refining Co.: Appellants' and Respondents' Briefs, hereafter cited as People v. North River Sugar Refining Co., briefs; see also the accounts of the oral arguments which appeared in the New York Times on November 15 and December 5 and 6, 1888. The papers in the quo warranto action were served on Searles August 8, and the trial was subsequently set for November 13, 1888. Under the New York State judicial system, the Supreme Court was an initial trial court, while the Court of Appeals was the highest appellate body.
that the North River Sugar Refining Company and its shareholders were one and the same.

On a more philosophical level, the question involved the social desirability of the trust. The issue, both sides agreed, was whether or not such an “agreement tends to stifle competition and enhance prices, and therefore to work an injury to trade and commerce.” For common law also provided that, if a corporation could be shown to have committed actions “prejudicial to the public interest,” its charter could be revoked.

It was difficult for Parsons to argue that the formation of the sugar trust had not led to a decline in competition within the sugar refining industry. The evidence gathered by the two legislative investigations was overwhelming on this point. But he could, and did, argue that trade and commerce had not been injured thereby. The sugar trust, Parsons maintained, could not raise prices above their natural level without inviting new competition. Besides, competition already existed, for a number of refineries had remained outside the combination. The trust’s control of the market was therefore partial, not complete, and it should not be considered a monopoly.

The trust, Parsons further maintained, was merely a new way of bringing together large aggregates of capital, and the attacks against it were attacks against such aggregates. Said Parsons in his brief, “Objections to combinations of capital upon the grounds that they are opposed to the public interest are at variance with the views entertained by leading political economists . . . ,” and here he was able to cite the works of John Stuart Mill, Thorold Rogers, and Simon Newcomb. “Such combinations,” Parsons’ brief continued, “do not prevent competition. On the contrary, if they result advantageously, they stimulate, encourage and invite [competition].” They “enable producers to furnish a good article at a minimum of profit, and by reason of the scale upon which the business is done, at a remunerative return.” But even if it could be shown that trusts prevented competition, this would not necessarily mean that they were against the public interest; for, as Parsons pointed out, “competition may be the death of trade.” If such combinations of capital were to be declared illegal, he added, the same should be done to combinations of labor.

For Pryor, there was no doubt but that the sugar trust constituted a monopoly. Its board of trustees, he pointed out, had sole control.

63 People v. North River Sugar Refining Co., briefs, p. 36.
64 Ibid., pp. 5ff.
over all the sugar refineries in the state of New York. All competition between those refineries had been eliminated, and the profits and losses were to be shared equally among them. Moreover, the trust agreement provided for the purchase of any new refineries that might be built. Finally, high tariffs precluded the possibility of foreign competition. Citing the works of various economists to show what happened when a market was dominated by a single supplier, Pryor concluded, “Viewed in the light of these principles—axioms in the science of political economy—the agreement constitutes a strict and absolute monopoly.”65 Its effect, he said, was to raise prices at the consumers’ expense. Even if the trust had not done so already, this would be its inevitable effect. The trust’s undesirable character, he added, derived “from its organization, not necessarily from its operations.”66

Pryor discounted the importance of potential competition. “Even after outside refineries shall be established, equipped and in operation,” his brief said, “it by no means follows that they will compete with the combination in the reduction of prices . . . , and if they do, experience, notably of the Standard Oil Company, demonstrates that nascent rivals are invariably crushed by established and powerful combinations, which, for that purpose, reduce prices until their competitor is driven from the field, and then indemnify themselves by aggravated plunder of the public.”67 He also denied that economies of scale had resulted from the combination. “The combination does not bring a single additional dollar to the production of sugar. The principle of division of labor is not more available and operative than before. . . . The cost of running each company is precisely what it was before the combination, and the business of each is still under a separate and several management.”68

The contention that the trust could have accomplished the same objectives just as well by forming a single corporation was not relevant, Pryor’s brief went on to argue. For one thing, the legality of a single corporation did not make the trust itself legal. For another, a single large corporation controlling all the refineries in New York State would have been illegal for the same reason that the trust was—its effect would be to injure trade and commerce. Nor did labor’s right to organize give owners of capital a corresponding right. “The mischief of oversupply and inadequate value in commodities,” Pryor’s brief declared, “the producer can and will correct by a reduced

65 Ibid., pp. 36–51. 66 Ibid., pp. 32–34. 67 Ibid., p. 51. 68 Ibid.
supply, thus restoring the equilibrium of prices. But sentient labor cannot withdraw from the market. It must eat or die..."\(^69\)

These various arguments were presented first before a single judge and jury, then before New York's various appellate courts. On January 9, 1889, Judge George C. Barrett of the New York Supreme Court, First District, directed the jury sitting with him to bring in a verdict for the plaintiff in the case of *People v. North River Sugar Refining Company*.\(^70\) "It is the first time in the history of corporations," he declared in an accompanying opinion, "that we have heard of double trust in their management and control—one set of trustees elected formally to manage the corporate affairs, and a second set created to manage the first..."\(^71\)

On the narrow issue of whether the North River company or its stockholders had become members of the trust, Judge Barrett agreed with Pryor. "The accumulation of evidence," he said, "points irresistibly to the complete identity of shareholders and corporations, and it is quite impossible to sever the acts of the persons solely interested in these corporations from that of the corporations themselves. The form of the contract veil was thin enough, but the acts under it sweep away the gauze and leave the corporate body unclouded and in full view." Pointing out that common law prohibited any partnership between corporations, Judge Barrett declared: "It cannot be doubted that the arrangement in question amounted to a partnership between these corporations. Such was the effect of the massing of all the profits of all the corporations. Such, too, was the effect of uniting all the corporations under practically a single control."\(^72\)

On the much broader issue of the trust's social desirability, Judge Barrett also agreed with Pryor. "It is not a case," he said, "where a few individuals in a limited locality have united for mutual protection against ruinous competition. It is the case of great capitalists uniting their enormous wealth in mighty corporations, and utilizing the franchises granted to them by the people to oppress the people." And he referred to the sugar trust as a "gigantic and irresponsible power, furnished with every delegated facility for regulating and controlling at will, not only in the state, but throughout the entire country, the production and price of a particular and necessary article of commerce." By "irresponsible," Judge Barrett hastened to add, he

\(^{70}\) *People v. North River Sugar Refining Co.*, 3 N.Y. Sup. 401.
did not mean the individuals who had organized the combination, but rather the combination itself, since it was subject to the regulation of no duly constituted authority.  

In his opinion Judge Barrett took note of the argument that to declare the trust illegal would be to interfere with the natural economic order. "Unfortunately for this argument," Judge Barrett declared, "it is the combination which has resorted to what it calls the unnatural thing. It was not content with natural partnerships or associations of individuals, but resorted to the device of corporate artificiality to effect its ends. Having asked and accepted the favor of the law, it cannot complain that it is taken to task for grossly offending its letter and spirit."  

Judge Barrett's decision was immediately appealed to the General Term of the New York Supreme Court, although it was to be another ten months before a three-member panel of that appellate body would hand down its decision. That ruling, delivered on November 7, 1889, upheld in full the lower court's decision revoking the North River company's charter, both on the narrow grounds that the trust was an illegal partnership of corporations and on the broader grounds that it represented an undesirable form of business organization. This decision, too, was immediately appealed, this time to the Court of Appeals, the highest tribunal in New York; but the drift of judicial opinion was clear.

Even as the General Term of the Supreme Court was handing down its ruling, other states were following New York's lead in invoking common law to destroy the trust form of organization. California's attorney general, just as the case against the North River company was about to go to trial, had initiated a suit to annul the charter of the American Sugar Refinery, the one member of the sugar trust situated in his state. The suit, a reflection of Claus Spreckels' political influence, was actually part of the struggle between him and the sugar trust for control of the West Coast industry, but when Judge W. T. Wallace of California's Superior Court finally handed down his decision on January 6, 1890, the effect was to create another legal precedent for the suppression of trusts. Following the same line

73 Ibid., pp. 409-10.
74 Ibid., p. 413.
75 People v. North River Sugar Refining Co., 6 N.Y. Sup. 408.
77 Hardwick committee investigation, 1911, p. 2097.
of reasoning as his lower-court colleague from New York, Judge Wallace vacated the American Sugar Refinery’s charter.\textsuperscript{78}

Meanwhile, the attorney general of Louisiana had begun action in the spring of 1887 to rescind the charters of those Louisiana companies which were members of the cottonseed oil trust.\textsuperscript{79} When the companies involved proceeded to transfer all their property in Louisiana to a Rhode Island corporation, voluntarily surrendering their Louisiana charters, the attorney general sought and obtained an injunction barring the cottonseed oil trust from operating in his state.\textsuperscript{80} Even the Chicago gas trust, which was not really a trust but rather a duly chartered corporation, found itself under legal attack. The Illinois Supreme Court on November 26, 1889, ordered its charter forfeited on the grounds that by acting as a holding company and acquiring a number of gas and electric companies in Chicago, it had abused its corporate privileges.\textsuperscript{81}

By the spring of 1890 it was clear that the days of the trust as a legal means of consolidating an industry were numbered. Virtually all corporate lawyers recognized this fact. As Pryor commented when Judge Barrett handed down his decision in the \textit{People v. North River} case, “The effect summarily is to break up this [and every other] trust, for upon the principles adjudicated . . . every corporation in the ‘combine’ had forfeited its charter. Of course, if you destroy the constituents, you destroy the combination.”\textsuperscript{82} It was in this climate of opinion that Congress met that spring to consider a bill (Senate 1) introduced by Senator Sherman at the beginning of the new session, which would “declare unlawful, trusts and combinations in restraint of trade.”\textsuperscript{83}

\textsuperscript{78}\textit{New York Times}, January 7 and 8, 1890; \textit{Railway & Corporate Law Journal}, 7 (January 18, 1890): 41. Long before the decision was announced, and in anticipation of an unfavorable ruling, the American Sugar Refining Company’s properties had been transferred to the firm of Havemeyer & Elder. In that way, control of the refinery itself was not endangered. The litigation continued for many months until finally Spreckels and the sugar trust reached a \textit{modus vivendi} in their struggle for control of the industry (see below, pp. 165ff.).


\textsuperscript{81}\textit{People v. Chicago Gas Trust Co.}

\textsuperscript{82}\textit{New York Times}, January 10, 1889.

\textsuperscript{83}U.S., Congress, Senate, \textit{Congressional Record}, 51st Cong., 1st sess., 1890, 21, pt. 1: 96. For the text of this and the various other bills offered in Congress during this period to deal with the problem of trusts, see U.S., Attorney General, \textit{Bills and Debates in Congress Relative to Trusts}, pp. 69ff.; see also Thorelli, \textit{Federal Anti-Trust Policy}, pp. 174–210.
Like the courts, Congress was under considerable pressure to do something about the trusts. The issue was not a partisan one, for both major political parties at their most recent conventions had denounced trusts and similar combinations. Indeed, the trusts found few open advocates on the floor of Congress. The problem was how to devise an effective remedy which would, at the same time, stand up as constitutional under the scrutiny of the U.S. Supreme Court.

One question was thus whether it would be best to base legislation on the power of Congress to levy taxes, regulate interstate commerce, or set rules governing the judiciary. Closely related to this first question was a second one: what remedies would be most effective, given the chosen constitutional basis for legislative action? Senator Sherman's bill, relying on the power of Congress to tax and applying only to industries producing those goods from which the federal government derived revenue, provided that those who organized trusts and similar combinations might be fined or imprisoned, while those who were thereby injured might sue in the federal courts to recover full damages. The measure also empowered U.S. attorneys to bring civil suits against the trusts, although the nature of the suits was not specified. In the subsequent debate, after being persuaded that his bill failed to cover some of the most notorious trusts, Sherman decided to let the bill rest instead on the federal government's judicial powers, the basis of action now being whether or not the combination affected the citizens of more than one state. Convinced that the bill's criminal penalties were useless, Sherman eliminated them altogether; at the same time, however, he changed the damages clause so that injured parties could sue for not just full, but double, compensation. He hoped that this latter provision, by the encouragement it gave to private suits, would make the law largely self-enforcing.

But other senators, arguing that the amended bill lacked teeth, favored different remedies. The double-damages clause, they pointed out, was practically useless, since the group most directly injured by trusts, the consuming public, was in no position to undertake expensive litigation. Some senators preferred to see the criminal penalties
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reinstated; others wished to give federal officers the right to confiscate any goods in interstate commerce which had been produced by trusts. Still others proposed that the president be allowed to suspend the tariff on those articles which were manufactured by trusts, that the courts be empowered to issue injunctions prohibiting trusts from carrying on business, or that the trusts be barred from using the federal courts to collect their debts.

During the week that the revised bill was debated, it became so loaded with amendments (many of them bordering on the frivolous) that the measure was referred to the Judiciary Committee for redrafting. Reported six days later, the revised bill was barely recognizable as the measure Senator Sherman had originally introduced and then amended. Relying for its authority on the commerce clause of the Constitution, the committee draft declared illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." It retained both remedies Sherman had in the end advocated—the private suits for damages and the federal suits for equity relief—but it strengthened these provisions greatly. Injured parties were to be allowed to sue for triple rather than double damages, while U.S. attorneys were given the power to subpoena witnesses and obtain temporary restraining orders. Not satisfied that these remedies were sufficient, the Judiciary Committee added two others from the several that had been suggested. It wrote back into the bill the criminal penalties that Sherman had deleted, and it gave federal officials the right to confiscate any trust property that moved in interstate commerce.

The committee's bill, the work of the Senate's leading constitutional

88 Ibid., p. 2601. 89 Ibid., pp. 2613-14. 90 Ibid., p. 2661. 91 Ibid., pp. 2640-41. 92 Ibid., pp. 2657-58. 93 Thorelli, Federal Anti-Trust Policy, p. 194; Senate, Congressional Record, 51st Cong., 1st sess., 1890, 21, pt. 3: 2731. Attempts had been made previously to refer the bill to the Judiciary Committee in order that it might be put in more satisfactory shape, but this had been opposed by the more vigorous supporters of antitrust legislation on the grounds that the measure would thus be buried. As Senator Pugh said: "... As a member of the Committee on the Judiciary I simply desire to say that in my opinion a reference of the bill to that committee will be the last of it for this session. I think I have knowledge enough to enable me to say that the enemies of the bill can not adopt more efficient action to destroy it than to send it to that committee" (Ibid., p. 2606). That is why when the Senate finally did send the bill to the Judiciary Committee it took the unusual step of requiring that the committee report back an amended version within twenty days (Thorelli, Federal Anti-Trust Policy, p. 199, n. 81). 94 Senate, Congressional Record, 51st Cong., 1st sess., 1890, 21, pt. 3: 2901.
lawyers, was intended to provide the most effective means possible for dealing with trusts and similar combinations within the limitations of what was then thought to be the extent of federal power. With the support of both political parties, this revised measure then passed the Senate and House without a clause being changed and was subsequently signed into law by President Benjamin Harrison. As Senator Sherman himself said in support of the committee’s draft, while it was not “precisely what I want,” it was “the best under all circumstances that the Senate was prepared to give.”

Although the bill finally enacted into law differed from the measure Sherman had originally proposed, it carried out his principal objective—to write into the federal statutes common-law prohibitions on monopoly and restraint of trade, to declare them “a rule of public policy.” For Sherman the trusts represented a threat to the existing economic system. Fearing that the individual states might lack the jurisdiction to cope with this new form of business organization, the Ohio senator proposed to give the federal government sufficient power to fill the gap. “The bill, as I would have it,” he said in support of his own, earlier measure, “has for its single object to invoke the aid of the courts of the United States . . . to supplement the [efforts] of the several States. . . . It does not announce a new principle of law, but applies old and well-recognized principles of common law to the complicated jurisdiction of our State and Federal Government.” It was this purpose which marked the Sherman Act—named for the man who had pushed most vigorously for the passage of such a law—as essentially a conservative measure.

What Sherman did not realize—or, if he did, he did not let on—was that federal legislation to curb the trusts qua trusts was no longer needed. The state courts had already done the job. (This is not to say that the state courts had come to grips with the problem of industrial consolidation, whatever form it might take. It is only to say

95 Thorelli, Federal Anti-Trust Policy, pp. 210-14.
96 This is the opinion of Thorelli, who has written the most thorough legislative history of the Sherman Act within recent years: see ibid., pp. 220-21.
98 Senate, Congressional Record, 51st Cong., 1st sess., 1890, 21, pt. 4: 3145.
100 For Sherman’s major speech in support of antitrust legislation, see Senate, Congressional Record, 51st Cong., 1st sess., 1890, 21, pt. 3: 2456-62, esp. p. 2457. The first quotation has been changed slightly to put it in the plural rather than the singular.
101 That is why efforts to demonstrate Sherman’s insincerity with regard to antitrust legislation by pointing to his conservative voting record miss the mark.
that they had succeeded in dealing with a special type of legal arrangement which made consolidation possible. But then, it was this form of consolidation which the majority of those in Congress seemed to feel required federal legislation.) This fact may be one of the reasons why the Sherman Act met with so little legislative resistance. Those most likely to have opposed it—the Rockefellers, Havanekers, and their congressional minions—recognized that the battle already had been lost. For on June 24, 1890, just as both houses of Congress were completing action on what came to be known as the Sherman Antitrust Act, the New York Court of Appeals handed down its decision in the matter of the People v. North River Sugar Refining Company.\textsuperscript{102}

\begin{quote}
In its appeal to the higher courts, the sugar trust had decided to concentrate its defense on the broader issues involved. Recognizing the trust’s vulnerability to the charge that it was an illegal partnership of corporations, Parsons, as lawyer for the appellant, laid particular stress on the trust’s social desirability. To buttress his case, he quoted the works of various writers, including a speech by Gladstone which attributed England’s agricultural depression to the lack of combination among farmers. Among the other works that Parsons quoted was an article in the \textit{Political Science Quarterly} written by George Gunton, a well-known labor leader and economic writer.\textsuperscript{103} Gunton had argued, in one of the first learned discussions of the problem, that trusts were essentially no different from other forms of industrial organization. “In what, for instance,” he had asked, “do they differ, as industrial institutions, from corporations, individual capitalists, or even from hand workers? The more closely we examine the subject, the more clearly we shall see that they are fundamentally the same, that the difference is not one of principle, but solely of size and complexity of industrial organization.”\textsuperscript{104}

In its decision the New York Court of Appeals chose to ignore the broader questions entirely. Justice Francis M. Finch, speaking for a unanimous court, declared in upholding revocation of the North River Sugar Refining Company’s charter, “that in this state there can be

\textsuperscript{102} For another view of the Sherman Act’s legislative origins—one which parallels the above account but ignores the \textit{North River} case backdrop—see William Letwin, \textit{Law and Economic Policy in America}, chap. 3. Letwin’s volume appeared after the present chapter was first written.

\textsuperscript{103} George Gunton, “The Economic and Social Aspects of Trusts,” pp. 385–408.

\textsuperscript{104} \textit{Ibid.}, p. 386.
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no partnership of separate and independent corporations, whether directly or indirectly, through the medium of a trust. . . .” Having reached this conclusion, he said, “it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade, and the problems of political economy.”

Pryor, who was soon to be appointed to the bench himself, had every reason to be proud of his brief. In reprinting that document many years later, he spoke of the case which it had helped to win as “the first effort in any court of the country, by judicial decision, to break up a trust-combination.” It was especially important, he said, because “it established that the principles of the Common Law are adequate and effective to the destruction of such combinations.”

Although it meant the final death knell of the organization that for three years had enabled them to operate so successfully in concert, the members of the sugar trust were able to find some solace in the Court of Appeals’ decision. That tribunal had not held the combination of refiners to be contrary to the public interest as the lower courts had done. As the trustees subsequently pointed out in a circular to certificate-holders: the Court of Appeals “bases its decision upon technical grounds. [It] nowhere condemns a union of interests of persons concerned in a number of manufacturing corporations carrying on the same business.” As for the next step, a new union of interests would have to be formed, this time under the cover of a single corporation duly chartered by one of the states. Both the various court decisions and the legislative debates had pointed to this procedure as the one most likely to afford a legal basis for continued consolidation. The only question was, in which state should the new corporation be set up?

As a precautionary measure, a few months after Judge Barrett’s initial decision was announced, the leading figures in the sugar trust had secured a special charter from the Connecticut legislature. This charter, incorporating the Commonwealth Refining Company of New Haven, gave to its holders the right to own stock in other corporations, a privilege denied to corporations formed under the general statutes not only of Connecticut but virtually of every other state in the

106 Roger A. Pryor, Essays and Addresses, p. 151.
107 New York Times, July 1, 1890.
108 Ibid., January 22, 1890; Connecticut, Legislature, General Assembly, Special Acts and Resolutions of the General Assembly, 1889, pp. 1095–97. The charter was reportedly obtained by including among the incorporators the relatives of certain prominent legislators.
Union. Such a privilege was essential if the reconstituted sugar trust was ever to acquire any of the refineries in Philadelphia, for under Pennsylvania law no foreign corporation could hold real property in that state. Thus, the only way that control over the Philadelphia refineries could be achieved (assuming that their owners were willing) was through the purchase of their stock, the corporations themselves being left intact.

The members of the sugar trust were prevented from taking advantage of this special Connecticut charter, however, by an injunction issued by Judge Barrett which prohibited them from transferring control of their refining properties. This judicial order had created a legal impasse, for while the sugar trust was clearly unlawful as then constituted, it was at the same time barred from reconstituting itself in any other form.

In seeking the trust’s dissolution, Pryor and those who had urged him on had probably hoped that the competitive situation previously existing in the sugar refining industry could be re-created. This, they now began to realize, was unlikely. Refineries had closed down, capitalist-entrepreneurs had left the industry, employees had found work elsewhere, and customers had developed other sources of supply. Once destroyed, competition was not easily revived.

About the closest that it was possible to come to resurrecting the old competitive order was to declare the charters of the New York refining companies forfeit, sell the physical properties for whatever they would bring on the open market, distribute the proceeds among the current certificate-holders, and hope that a new competitive sugar refining industry would emerge from the ruins. The trouble with this approach, as Pryor pointed out, was that “such seizure and sale would not only involve a sacrifice of property but would be a serious

109 For an analysis of where the law stood in this respect in 1890, see Russell C. Larcom, The Delaware Corporation, pp. 53–58. Fred Freedland has argued that New York State permitted intercorporate stockholding at this time; see his “History of Holding Company Legislation in New York State,” pp. 369ff. But the provisions of the New York corporate statutes to which he refers were quite limited in scope and in general dealt with the types of investments that trust companies and similar financial institutions were permitted to make. Insofar as manufacturing companies were concerned, they were permitted only to hold stock in corporations “supplying or transporting materials required in the business of the holding company . . . .” (ibid., pp. 376–77). Needless to say, such a provision would not have given a reconstituted sugar trust the powers it would need to acquire stock in Philadelphia or other out-of-state corporations.

110 Larcom, The Delaware Corporation, p. 12.

111 New York Times, July 17, 1890.

112 This was, in fact, the approach demanded by several of the minority certificate-holders; see ibid., January 11, 1891.
detriment to the trade of New York..."\(^{113}\) For it was clear that as individual parcels the various sugar refining properties would bring only a fraction of their value as an integrated going concern. Thus, a forced sale might well lead to a large capital loss for the holders of sugar-trust certificates, many of whom had not taken part in the original consolidation but had merely purchased trust certificates during the intervening period. At the same time, it was by no means certain that it would be possible to find buyers for the properties who would be willing and able to operate them as separate and independent concerns. Many of the persons then employed by the refineries might therefore be thrown out of work, while the consuming public might ultimately find itself forced to pay higher prices for sugar. Neither Pryor, Tabor, nor any of the other public officials involved were willing to run those risks.

For this reason Attorney General Tabor began to think in terms of another approach. At a meeting with representatives of the sugar trust he let it be known that he would be willing to seek the removal of the injunction that was tying up the New York refining properties if the members of the trust in turn would agree to reorganize their companies under a single corporation chartered by the state. At least that way, if there was no alternative but to let the consolidation of the sugar refining industry continue, New York would be the tax beneficiary. When it was pointed out that under that state's laws one corporation was not permitted to own stock in another, Tabor promised to seek an end to that prohibition at the next session of the legislature.\(^{114}\) The attorney general's proposal seemed to have met with a favorable response from the representatives of the sugar trust; Tabor even carried out his part of the bargain. But before the plan could be fully acted upon, the refining properties became tied up once more in litigation, this time as a result of lawsuits brought by minority certificate-holders.\(^{115}\)

It was to take several more months for this latest legal snarl to be untangled. In the meantime, the members of the trust began seriously to consider a scheme for reorganizing their companies under the laws of another state.

New Jersey had by this time already acquired a reputation as a state friendly to corporate interests. As James Dill, the corporate

\(^{113}\) Ibid., July 18, 1890.  \(^{114}\) Ibid., July 17, 1890.  \(^{115}\) See note 125 below.
lawyer who was to persuade so many corporations to relocate in that state, later commented, “Since 1875 it has been the announced and settled policy of the State of New Jersey to attract incorporated capital to the State, by the enactment of laws first wise and then liberal, and by like legislation to protect capital thus invested against attacks from within and from without.” “The Legislature,” Dill added, “. . . has never hesitated to pass promptly any law which tended to improve the general scheme of incorporation.”

In line with this policy, New Jersey’s corporate statutes were revised in 1888 to permit a company chartered under the state’s general laws to hold stock in another corporation. The following year the statutes were further revised to permit a company chartered under the general laws of the state to purchase property outside the state with stock specially issued for that purpose. These changes gave rise to what soon came to be known as the New Jersey holding company, a corporation that was able to gain control of other corporations located throughout the country, not only through the traditional method of purchasing their assets outright, but also now through the new method of acquiring either all or a majority of their outstanding stock. Such a holding device was essential for permitting various firms throughout the country to be consolidated within a single organization; and it came just as the trusts, finding themselves under increasing attack, were looking for some way to reconstitute themselves, a way that would stand up under the scrutiny of the law.

The first trust to take advantage of this liberalization of the New

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118 Ibid., chap. 265.

119 Some historians have erroneously attributed this change in New Jersey’s corporate laws to James Dill: William E. Sackett, *Modern Battles of Trenton*, 2: 121; H. W. Stoke, “Economic Influences Upon the Corporation Laws of New Jersey,” pp. 510-11; Dictionary of American Biography, s.v. “Dill, James.” According to these accounts Dill persuaded Governor Leon Abbett of New Jersey, who was seeking to raise additional state revenue without increasing taxes, to liberalize the corporate laws so as to encourage corporations to obtain charters in that state. Since Abbett was out of office when the laws were changed in 1888 and 1889, it is questionable whether Dill played the role attributed to him. Actually, Dill seems to have been responsible for certain of the later changes in the New Jersey corporate statutes, as well as for the consolidation of the statutes into a single code in 1893. He also seems to have played a leading role in persuading large corporations to locate in New Jersey, having organized a special trust company to assist in that purpose. However, this still leaves unanswered the question of who, if anyone, was responsible for the 1888 and 1889 changes in New Jersey’s corporate statutes.
Jersey statutes was the cottonseed oil trust. In November, 1889, it was reorganized as a New Jersey corporation, the American Cotton Oil Company.\textsuperscript{120} Five months later the lead trust reconstituted itself as the National Lead and Oil Company of New Jersey.\textsuperscript{121}

As the leading figures in the sugar trust met throughout the summer of 1890 and on into the fall, pondering what course their own combination should take, a consensus began to emerge that it, too, should follow the example of the cottonseed oil trust by reorganizing as a New Jersey corporation. There were several advantages in doing so. Besides the ease with which a New Jersey charter could be obtained, there was no limit to the amount of stock which a New Jersey corporation could issue. The franchise fee was low, the directors could hold their meetings outside the state, and the company's property could not be taxed any more heavily than that of private individuals. Moreover, a New Jersey corporation was not required to divulge its financial condition either to the public or to its competitors—only to its own stockholders. Perhaps most important, as a contemporary noted authority on New Jersey law later pointed out, "Corporations were not considered as being hostile in any way to public interests."\textsuperscript{122} While other states offered some of these same advantages, none except New Jersey offered them all.\textsuperscript{123}

In the end, these considerations were overriding. As Henry Have- meyer later testified before a New York investigating committee: "there was less tax upon the franchise [in New Jersey]; and there was less scrutiny and investigating into corporate companies. There were many other advantages which the counsel [i.e., Parsons] stated."\textsuperscript{124} By late October the decision to incorporate in New Jersey had already been made, but it was not until January 10, 1891, when the last of the private legal suits was finally settled, that members of the sugar trust were able to act. On that day the American Sugar Refining Company received a charter from the state of New Jersey, and control of the various refining properties was immediately transferred to the new corporation.\textsuperscript{125}

\textsuperscript{120} \textit{Railway & Corporate Law Journal}, 6 (November 23, 1889): 420.
\textsuperscript{121} \textit{New York Times}, April 8 and 10, 1890.
\textsuperscript{123} Larcom, \textit{The Delaware Corporation}, p. 14.
\textsuperscript{124} Lexow committee investigation, 1898, p. 126.
\textsuperscript{125} \textit{New York Times}, October 31, 1890, and January 11, 1891. The latter describes the complicated legal procedure by which the sugar trust was reorganized in the face of opposition by certain of the minority certificate-holders. In brief, the original trustees had petitioned the courts to be relieved of their fiduciary responsibilities preparatory to transferring control of the various re-
The financial arrangements had been worked out by the investment banking firm of Kidder, Peabody & Company, which was able to draw on its experience in handling railroad reorganizations. Each holder of sugar-trust certificates was to receive in exchange an equal number of shares in the American Sugar Refining Company, half in the form of 7 per cent cumulative preferred shares and half in the form of common stock. The preferred shares were intended to represent the value of the new company’s tangible assets; the common stock, the capitalized value of its expected profits. In addition, bonds worth $10 million were authorized to provide working capital, though they were never issued.

Except for its new legal form, the combination of sugar refineries remained unchanged. Henry Havemeyer, the president of the trust, became president of the American Sugar Refining Company, while the former trustees became directors of the new company. If anything, the combination had been strengthened. Control over the various refining properties was now much more direct. All this had been accomplished while New York’s officials—particularly Attorney General Tabor and his special assistant, Pryor—were forced to stand by helplessly. On the one hand, they could think of no way to bring about a return to the previous state of competition without destroying a considerable amount of private property and disrupting an important branch of trade. On the other hand, they were required by the principle of interstate comity to respect any company organized under the laws of another state. The consolidation of the sugar refining industry emerged from its first politico-legal crisis stronger than ever.

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fining properties to a new corporation. The courts had granted this request, but then certain of the minority certificate-holders had intervened, obtaining an injunction to prevent the transfer of the properties. Eventually, these minority certificate-holders succeeded in having the courts appoint, in addition to Henry O. Havemeyer, two neutral receivers for the properties. Meanwhile, however, the original trustees had been soliciting proxies from the certificate-holders and when, in early January, it became apparent from the number of proxies obtained that the great majority of certificate-holders wished to see the trust reorganized as a New Jersey corporation, the minority certificate-holders withdrew their opposition, thereby permitting the reorganization to proceed.
