

**DIFFUSION AND DELEGITIMATION:  
THE GROWTH OF TRUSTS AND THE RISE OF ANTITRUST LAW, 1865-1930**

Mark Thomas Kennedy

*University of Southern California*

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**ABSTRACT.**

While the diffusion of organizational innovations usually contributes to legitimation, this is not always so. When innovations enrich one group at the expense of another through strategies that are arguably unfair, diffusion increases the risk of adverse publicity and policy debates that could lead to censure. Toward a more complete theory of the diffusion of organizational innovations, I argue that increasing prevalence contributes to widespread recognition of diffusing phenomena as social realities, but not necessarily to their legitimacy. I propose a political-cultural model of legitimation in which legitimacy is determined not just by prevalence, but also by precedent—that is, case-derived principles that guide appropriate action in similar future situations. To illustrate this argument, I present two views of the case of trusts, the organizational form that inspired antitrust law. First, I re-tell the history of trusts to explain how diffusion led to their delegitimation; then, I present analyses of trusts in NY, NJ and PA that show establishments and reorganizations are related to cumulative precedent regarding trusts. This research contributes to theory by linking the ultimate status of diffusing organizational innovations—whether legitimacy or censure—not only to prevalence, but also to precedent that shapes what prevalence means.

(199 words)

**KEYWORDS:** organization, innovation, diffusion, politics, institution, legitimacy, antitrust

“Nothing is illegal if a hundred businessmen decide to do it.”  
– Andrew Young, American Politician

When it comes to the diffusion of organizational innovations such as new forms, practices, and strategies, the conventional wisdom is that nothing is illegal if enough businesses start doing it, but business history suggests otherwise. In just the last decade, there have been three organizational strategies that diffused widely only to be later censured. In investment banking, there was the strategy of leveraging synergies between underwriting and research by paying analysts bonuses when their opinions helped secure contracts to underwrite dotcom IPOs. Similarly, there was the strategy of integrating auditing and management consulting and then rewarding cross-selling of the two services, a practice that led to several major auditing scandals and the unwinding of these structures. And again, in commercial and retail banking, there were disastrous strategies based on linkages between not only aggressive mortgage origination and ever-finer grained securitization, but also the selling of financial instruments to hedge against defaults, and trading in those instruments—even against their own clients. These innovations in organizational structure contributed to the dotcom crash, the corporate scandals that led to Sarbanes-Oxley reforms, and the Recession and Global Liquidity Crisis of 2008. Contrary to conventional wisdom, diffusion of these destructive innovations led to censure, not acceptance.

These cases challenge social theory, too. This is especially true for organizational studies that use diffusion and increasing prevalence as proxy for the social desirability, or legitimacy, of a wide variety of phenomena including organizational forms such as day care centers (Baum and Oliver 1991), newspapers and microbreweries (Carroll and Hannan 1989a; Carroll and Swaminathan 2000) and administrative practices such as civil service reforms (Tolbert and Zucker 1983), total quality management (TQM) programs in hospitals (Westphal, Gulati, and Shortell 1997), corporate takeover defenses called “poison pills” (Davis and Greve 1997) and executive severance agreements commonly

called golden parachutes (Davis and Greve 1997). As Colyvas and Jonsson (2011) argue, prevalence can be a misleading proxy for legitimacy because, as Owen-Smith and Powell (2008: 594) observe, it leads to research that “conflates ‘simple’ diffusion with ‘deep’ institutionalization.”

This conflation misleads in two ways. First, it tends to overstate legitimacy. Legitimacy is a collectively rather than individually determined standard of appropriateness resulting from shared understanding, pragmatic effectiveness, and moral evaluations (Suchman 1995: 574). Thus, linking legitimacy to prevalence within a population of potential adopters risks overstating its overall legitimacy in cases where innovations that work for adopters might well be censured by society more broadly if they were (a) open and (b) accountable to public scrutiny. Given the technical nature of many organizational innovations and the confidentiality concerns of adopters facing competitive pressures from imitators, many organizational innovations are relatively inaccessible to and beyond the purview of the general public. Diffusion changes this, however, when negative externalities created but not borne by adopters cascade to become economic burdens or social crises sharply felt by non-adopters. In the extreme, I will argue that controversial innovations attract attention and debate that can lead to re-writing the rules of business to redistribute the problematic externalities.

Second, conflating prevalence and legitimacy shifts research away from phenomena most likely to demand change, and this sample bias affects findings in organizational studies (Denrell and Kovács 2008). This becomes obvious when considering things that society’s upstanding members just will not put a price on—that is, things that threaten the constitutive values and “incommensurables” of a society (Espeland 1998; Espeland and Stevens 1998). Consider, for example, the resurgence slavery now called “human trafficking”, a practice that has come to light in recent years. When anti-trafficking activists

present data showing the extent of this criminal enterprise,<sup>1</sup> they are not expecting their audiences to view it as evidence of a new and increasingly legitimate growth industry in which to invest. Far from it! They expect others to see trafficking as abhorrent and to view numbers that present it as a growing problem as cause for alarm and that could lead people to join or support their cause. More generally, consider how differently prevalence figures into social movements research versus institutional studies of diffusion. If the institutionalization of organizational forms, practices and strategies shuts the door on change, movement activists look for an open window, so to speak, in “open moments” (Gourevitch 1986) and “policy windows” (Kingdon 1984), especially by using strategic framing of the relevant issues to heighten perceptions of “political opportunity” (Gamson and Meyer 1996). Such framing is particularly effective when it focuses on issues of accountability and injustice (Gamson 1992).

Looking beyond organization studies, the diffusion of all kinds of organizational innovations can also be viewed as a human herding process in which people rationally follow an emerging consensus (Hong, Kubik, and Solomon 2000; Welch 2000). While this theory helps explain how undirected behavior could lead to crises and crashes, I wish to focus in this research on cases in which apparently leaderless herd behavior is actually a case of, to twist the herding metaphor, the herd being driven off a cliff by herders unconcerned that their profits come at the cost of massive spoilage. As useful as the herding metaphor is, such predation is more a speciality of humankind than of hooved herds.

Toward a more complete theory of the diffusion of organizational innovations, therefore, I ask in this paper, what causes diffusion’s normally positive effect on legitimacy to reverse so that diffusion becomes a cause for alarm and even censure? In answer, I draw on discursive and political-cultural approaches to organizations and market institutions (Fligstein 1996; Philips and Malhotra 2008) to propose a new account of legitimation that breaks apart two distinct processes previously treated as one.

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<sup>1</sup> The National Human Trafficking Resource Center offers statistics showing, among other things, large numbers for

Specifically, I distinguish legitimation from reification, or the recognition of new social realities, and I argue that (1) prevalence supports reification but not necessarily legitimation, and (2) legitimacy is determined by legal and cultural precedents that give meaning to the growing prevalence of diffusing things. By precedents, I mean authoritative or widely held opinions that link the deeper rightness of a thing to principles derived from specific cases, typically using legal or moral frameworks for reasoning. Because precedents establish the rightness of things by arguments about principle rather than by number, they can be powerful regardless of how many cases they are based on, but the accumulated use of precedent does strengthen it. Rather than viewing the diffusion and legitimation of innovations as determined by prevalence, this more political-cultural model of diffusion allows for the possibility that publicity attracted by increasing prevalence could lead to censure by exposing adopters to multiple logics of evaluation and dissent that, in turn, could attract political support from coalitions needed for censure.

To illustrate this argument, I turn to the case of trusts, an organizational form and strategy that emerged and diffused a century ago only to be outlawed by the enactment and subsequent enforcement of antitrust law. I will define the trusts that inspired antitrust law more clearly later, but suffice it to say for now that these organizations were designed to monopolize industries. Compared to the usual dynamics of organizational populations (Carroll and Hannan 1989a, 2000), two facts about this “trust movement” (Moody 1904: xii)<sup>2</sup> stand out as anomalous. First, trusts diffused and changed American industry *after* a law was passed against them. As shown in Figure 1, both the establishment of new trusts and the total population peaked nearly a decade after the Sherman Antitrust Act of 1890 became law. Second, trust builders’ brazen defiance of the law was eventually trumped by an initially small but growing number of cases that yielded legal and cultural precedent for censuring trusts quite thoroughly.

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<sup>2</sup> These trusts should not be confused with bank-like “investment trusts” or the legal entities set up to manage the investments and land holdings of wealthy clientele and family dynasties (for an accessible history, see Fowler 1928).

This paper is organized as follows. After developing the political-cultural account of diffusion summarized briefly above, I illustrate it using two views of the trust movement. First, I re-tell the story of trusts and early antitrust law by focusing on voices and arguments that were influential in debates about whether trusts should be celebrated and replicated or censured and dismantled. Second, I present analyses of trusts established in New York, New Jersey and Pennsylvania in which I find that the increasing size of the trust population is (1) positively related to the number of federal lawsuits filed against trusts and (2) negatively related to establishment rates. Also, these analyses show that establishment and forced reorganization rates are related to the cumulative balance of wins versus losses in federal cases against trusts, but not to total wins alone or cases filed. In discussion of these findings, I elaborate the theoretical and methodological implications of shifting the focus of explanation from prevalence to precedent and translate these implications into directions for future research.

## **THEORY**

Extant theory is clear—and correct—in observing that diffusion and legitimacy usually co-occur, but cases where they do not raise an important theoretical and practical problem. When does “everybody’s doing it” flip from being a reason for following the crowd to being a reason for censure?

The answer to this question lies in the political and discursive foundations of legitimacy. Since, as just mentioned, legitimacy is a collectively rather than individually determined standard, the apparent legitimacy of a diffusing organizational innovation is subject to renegotiation as diffusion increases the likelihood that a wider community—not just adopters—will become aware and motivated enough to weigh in on its social desirability. Most organizational innovations are of little interest to the general public, but when they do become news outside the business community, they will be subjected to evaluation according to standards associated with other communities or “social spheres” defined around, for

example, politics, family, religion, or education (Friedland and Alford 1991). When a diffusing organizational innovation becomes important in multiple communities where institutionalized standards for judging legitimacy clash, the resulting contradictions create conditions that make institutional change more likely (Clemens and Cook 1999; Clemens 1997). These clashes are the stuff of political contests that shape what kinds of markets and organizations are legitimate (Fligstein 1996).

Understanding when they lead to censure versus acceptance requires looking beyond prevalence to what meaning is being made of it, especially in public discourse about legitimacy (Philips and Malhotra 2008).

Toward a more complete theory of the diffusion of organizational innovations, therefore, I propose two theoretical shifts. First, I relax the presumption that prevalence legitimates while affirming its importance by arguing that it supports the recognition of social realities that may or may not be legitimate. Second, I propose viewing the legitimacy of social realities as a function of cumulative precedent, not just increasing prevalence. The following sections explain each shift.

### **Prevalence Supports Recognition of Social Reality, but not Necessarily Legitimacy**

To avoid conflating diffusion and legitimation, I propose treating phenomena that are diffusing and growing in prevalence as potential social realities that may or may not become legitimate. By social reality, I mean any pattern of human relations, interactions or activities that is both widely perceived within a particular society and also widely acknowledged by its members as having an all but undeniable tendency to occur—even if generally punished when it does occur. Significantly, this definition includes everything from the legitimate to the contested to the illicit. Also, it is worth noting that this definition parallels but departs from the definition of reality given by Berger and Luckmann (1966:1), which is that to be real is to have existence that is independent of human knowledge or intention. Since *social* realities

cannot exist apart from humans, I define them not as having existence that does not depend on humans, but instead as having an existence that, according to members of a focal society, cannot be eliminated.<sup>3</sup>

Applied to organizational phenomena, social realities include forms, practices and strategies that are legitimate, contested, and illicit. For example, consider medical marijuana dispensaries in Los Angeles, where the sale of marijuana for medicinal use is permitted in licensed “dispensaries.” When the population of dispensaries grew to roughly 4 times its initial size, a coalition of community activists and law enforcement led a drive to tighten licensure and enforcement. Under revised rules, the city notified more than three quarters of the apparently legal dispensaries that they would be forced to close.<sup>4</sup> Lawsuits ensued. Obviously, the social desirability of the dispensary concept is controversial, and views about dispensary legitimacy vary depending on whom you ask. Nonetheless, few would argue that marijuana use would be eliminated even if all the dispensaries were closed. Rather, there is widespread acceptance of the idea that there will be demand for marijuana no matter what the rules are; moreover, many also believe that dispensary closures increase negative externalities associated with this demand.<sup>5</sup> According to the definition above, therefore, the marijuana business is a social reality—even though its legitimacy is contested and shallow, at best. To be clear, social realities also include organizations that range from the completely legitimate to the thoroughly illicit. Depending on the society, that encompasses everything from global pharmaceutical firms to murderous drug cartels.

While this definition implies that social realities are recognized—or even enacted—through a collective sensemaking process (Weick 1977, 1995), defining social realities as widely acknowledged in a particular society means that disagreements about social realities are to be expected between societies.

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<sup>3</sup> This is also a departure from Scarle’s (Scarle 1995) approach to social reality, which emphasizes recognition and acceptance of a thing, but not the inability to eliminate it.

<sup>4</sup> “Marijuana Dispensaries Told to Close.” *Los Angeles Times*, 5 May, 2010.

<sup>5</sup> “Putting Pot in its Place.” *Los Angeles Times* Editorial, 24 September, 2011.

Within societies, however, the ontological status of many social realities will be taken-for-granted aspects of culture. Even so, social realities need not be free of all within-society disagreement or denial. Though defined by widespread agreement, such agreements can be maintained in the face of controversies and denials as long as dissident factions lack the influence—whether by formal authority, size or respect—to enforce their views. Thus, social realities reflect both the culture and politics of societies.

### **Legitimacy is Determined by Precedent, not just Prevalence**

By precedent, I mean the standard definition of the word, which is a principle or rule, usually drawn from a specific event or case that then serves as a guide to appropriate action in similar future situations. Such rules dictate what to do, or what not to do, in certain situations. Precedents are often referred to by the names of events or cases from which such rules are distilled, but the essence of a precedent is the logic of the rule it furnishes and articulates. It is important to stress that precedent may be accepted as binding and authoritative even in situations where it is not the consensus view. This is because, as in court opinions, precedents are established not just by cases, but more fundamentally, by authorities with the power to dictate what they mean. Thus, precedents are not only set by courts, legislatures, or executive orders, but also by the formal governing bodies of industries, professions and individual organizations. Moreover, they can also be set by informal coalitions of actors who have the power to establish principles that determine the legitimacy or illegitimacy of things.

Using precedent to explain diffusion embraces, as just mentioned, the discursive and political-cultural determinants of the legitimacy of organizational innovations (Fligstein 1996; Philips and Malhotra 2008). While shared cognitive frameworks and industry norms are often quite enough to separate legitimate markets and organizations from illegitimate ones, that job gets complicated when innovations raise controversies that attract the attention of audiences outside the business community.

Examples of organizational innovations like this include golden parachutes, poison pills, hostile takeovers, offshoring, and strategies that leverage complementarities between related activities, especially professional services, in which independence is important and expected. When this kind of innovation spreads to become prevalent in the business community, the relatively shallow legitimacy of simple diffusion is subject to challenge from different kinds of communities and their distinctive logics of evaluation—communities centered around, for example, the family, religion, science, or the state (Friedland and Alford 1991). There are two reasons why such challenges sometimes succeed.

First and foremost, organizational innovations—especially controversial ones—diffuse and persist not only for legitimacy reasons, but also, as Davis and Greve (1997:7) observe, when “organizational decision makers regard them as acceptable solutions to the problems they are facing.” (See also Scott, 1995.) Thus, the diffusion of organizational innovations reflects both legitimacy and technical considerations, even among later adopters (Kennedy and Fiss 2009).

Second, when diffusing yet controversial organizational innovations attract the scrutiny of more pluralistic institutional influences, organizations are forced to address their “commitment to the norms, values, and beliefs of multiple social systems” (Kraatz and Block 2008). When this happens, not all arguments are created equal. While growing prevalence usually legitimates innovations, it can be trumped by injustice or accountability concerns (Gamson and Modigliani 1989). With arguments like these, even a single compelling case can turn the tide of public opinion against a diffusing innovation. This is because prevalence is not equivalent to what Owen-Smith and Powell (2008) call deep legitimacy.

As I will show with the case of trusts, attempts to contest or establish an innovation can make positive or negative contributions to precedent depending on outcomes, and precedent is the cumulative balance of these outcomes. Since some contests are more influential than others, precedent is at least

theoretically subject to change with each new challenge, but successful challenges obviously become harder to mount as challenges are increasingly decided with a consistent logic. As new logics of evaluation become institutionalized, arguments can fall out of discourse altogether as they acquire legitimacy or even taken-for-grantedness—the deepest kind of legitimacy (Green, Li, and Nohria 2009).

Besides precedent and prevalence, the factors that affect sensemaking about social realities are largely the same as those that affect legitimacy, which include, but are not limited to, how organizations structure and present themselves (Kennedy 2008; McKendrick, Carroll, Jaffee, and Khessina 2003; Navis and Glynn 2010), existing categories (Negro, Hannan, and Rao 2010), language and framing (Fiss and Hirsch 2005; Hirsch 1986), social movements (Weber, Heinze, and DeSoucey 2008), specialized critics (Lounsbury and Rao 2004), the media (Kennedy 2005; Khaire and Wadhvani 2010), embeddedness in various kinds of networks (Granovetter 1985; Porac, Thomas, Wilson, Paton, and Kanfer 1995; Stuart 1999; Zukin and DiMaggio 1990), and, more broadly and from a variety of perspectives, institutions and culture (Bourdieu 1984; DiMaggio 1997; Douglas 1986).

### **A Political-Cultural Model of Legitimation**

The two shifts just described provide a more politically oriented account of the legitimation of organizational innovations. First, prevalence supports the recognition of social realities that may or may not be legitimate. Second, if a nascent social reality generates controversy and becomes a site of political wrangling about its social desirability, its legitimacy will be determined by the cumulative balance of positive and negative precedent about what it means for society. Figure 3 illustrates this account in a model that relates interactions between these two aspects of diffusion to legitimacy outcomes in 3 stylized cases distinguished by an innovation's potential controversiality for the general public.

## **THE GROWTH OF TRUSTS AND THE RISE OF ANTITRUST LAW**

To illustrate the foregoing argument, I turn now to two complementary views of the trust movement. First, I re-tell the story of trusts with attention to influential voices of opposing views that trusts were, on the one hand, a natural and inevitable evolution of organizations and, on the other, an affront to nature that should be outlawed. This story reveals not only that the growth of trusts propelled the rise of antitrust sentiment, but also the less familiar story of how long it took for precedents to accumulate and overcome diffusion's ordinarily positive effect on organizational legitimacy. Second, I present analyses of establishments and forced reorganizations of trusts that combine to support my thesis for explaining why and how diffusion of new organizational forms, practices or strategies sometimes leads to censure rather than legitimation. Together, these qualitative and quantitative views of the case of trusts combine to show that savvy activists can lead to public policies that censure organizational phenomena that are diffusing yet controversial. That is, the combination of history and analysis explain how diffusion can lead to delegitimation and censure rather than legitimacy and taken-for-grantedness.

### **Background**

To set the stage for presenting these two views of the case of trusts, I explain what trusts and antitrust law have come to mean in the century or so since the early years of the trust movement, why the case of trusts serves the purpose of re-examining the relationship between diffusion and legitimacy, and the methods I used to develop this case.

### *Definitions*

In United States law, antitrust laws are laws designed to ensure competitive markets by proscribing organizational forms, practices and strategies that undermine competition. The first antitrust law was the Sherman Act of 1890, a law passed to “protect trade and commerce against unlawful

restraints and monopolies” (See Figure 2). In the first years of its usage, the compound word “antitrust” was more commonly written “anti-trust” to reflect the fact that this law was a judgment against trusts, an innovative organizational form and strategy developed to create monopolies by combining substantially all of the same type of production assets under centralized control, often coercively. While this central control was initially likened to investment trusts, US courts eventually ruled that this type of trust was a single organization and should be treated like a corporation. In both law and practice, therefore, “trust” came to mean a large organization that has monopolized its industry. Since antitrust law essentially abolished this type of trust, it is almost difficult to imagine that trust builders of the late 19<sup>th</sup> century proudly announced the establishment of trusts upon the completion of mergers that secured monopoly power within an industry.<sup>6</sup>

Though regulating monopolies might seem natural now, antitrust law was controversial in its early years, and its enforceability was in serious doubt. As mentioned already, this uncertainty can be seen in the fact that trust establishments peaked nearly a full decade after the Sherman Act was passed into law (see Figure 1). As pivotal wins in the 1890s and first years of the new century established strong arguments for antitrust law, however, the government win-loss ratio in antitrust cases improved dramatically, leading to high-profile reorganizations of several of America’s most powerful businesses.

### *Why Trusts?*

There are several reasons the trust movement is an excellent site for re-examining the relationship between organizational legitimacy and prevalence. First and foremost, it is a high profile case in which diffusion and increasing prevalence coincided with censure. Second, the antitrust

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<sup>6</sup> It is important to stress that trusts were special cases of the large corporations formed in the merger wave of the 1890s (for a history of this wave, see Ritter 1997). Whereas the large but not monopolistic organizations assembled in this period became templates for the modern corporation (Roy 1997), the “trust” designation came to be applied in the late nineteenth century only to mergers that resulted in monopolies, not to mergers in general.

considerations raised by the trust movement have become essential elements of corporate law in the United States and many other jurisdictions around the world. Third, the century or so that has passed since the trust movement flowered provides perspective to comment on whether the prevalence of trusts legitimated them or contributed to their censure. As I will explain in the story of trusts, the first federal law against trusts came almost a quarter century after the formation of Standard Oil, a famous template for later trusts, and it took another two decades for antitrust law become an effective tool against trusts.

Fourth, the case of trusts is much more than a story of long-dead organizations. Rather, it is a story of ideas still very alive today. One connection between today and that era is that a surprising number of today's large corporations descended from trusts. Besides US Steel, International Paper, and Westinghouse, this list also includes less obvious connections through Exxon, which descended from Esso and Standard Oil; Nabisco, which descended from the National Biscuit Company, or the Cracker Trust; Best Foods, which descended from Corn Products Co., also known as the Glucose Trust; and Chiquita Brands, which descended from the United Fruit Company.<sup>7</sup> More fundamentally, the living legacy of trusts is the ambition to dominate industries that, while usually not phrased that way because of antitrust considerations, has ironically become the *de facto* goal of modern corporate strategy (Porter 1980). Understanding how and why trusts were reined in offers lessons useful for distinguishing healthier expressions of this ambition from those likely to be censured.

### *Methods*

I follow the methods of historical sociology and analytical history by combining a narrative re-telling of the rise and repudiation of the trust movement with analyses that break this complex case down into simpler, more frequent events that contributed to it (Roehner and Syme 2002: 2). Narrative is

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<sup>7</sup> See William Roy's *Socializing Capital* (1997) for how the modern corporate form evolved from these and other kinds of large organizations—especially railroads—that co-evolved with investment banking practices.

important to this task because it brings an historical case back to life a bit and lays a foundation for judging the reasonableness of analyses. My narrative retelling of the trust movement is supported by primary sources and a selection of histories or commentaries written as events were unfolding; to distinguish these from cites to current literature, I use footnotes for primary sources, but sparingly.

I will say more about methods for the quantitative analyses in that section of the paper, but let me say here that these analyses relate the diffusion and delegitimation of trusts to precedent established gradually by the balance of wins versus losses in antitrust cases. Although the findings in these analyses speak to elements of the foregoing theoretical argument also echoed in the narrative, they do not, of course, address the potential generality of identified patterns. That is a task for future research.

## **History**

In deference to the many excellent histories of trusts already available<sup>8</sup>, let me stress that my purpose in re-telling this history here is merely to make two focused points. First, I wish to make it clear that the rise of antitrust law was a several decades-long process in which it was unclear for some time whether antitrust law would matter much and, if so, what it would mean. Second, I aim to show that the growth of trusts owes much to active efforts to conceal their dodgier aspects, and conversely, that “publicity” about trusts aided the rise antitrust law by exposing their inner workings to the public.

As an introduction to how different times were when the trust movement took off, consider this definition of trusts offered by S.C.T. Dodd, Chief Solicitor of the Standard Oil Company, in an 1893 Harvard Law Review article on the legality of trusts:

“The term ‘Trust’ in its more confined sense embraces only a peculiar form of business association effected by stockholders of different corporations transferring their stocks to

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<sup>8</sup> For readers interested in more detail than space permits here, I recommend Walker (1910), Jones (1921), Thorrelli (1955), Letwin (1958), and Posner (1976: esp. p. 3).

trustees. The Standard Oil Trust was formed in this way, and originated the name ‘Trust’ as applied to associations. ... The term ‘Trust’, although derived as stated, has obtained a wider signification, and embraces every act, agreement or combination of persons or capital believed to be done, made or formed with the intent, power or tendency to monopolize business, to restrain or interfere with competitive trade, or to fix, influence, or increase the prices of commodities” (Dodd 1893: 158).

While Dodd was chagrined that the courts had ruled that trusts were to be treated like corporations, he acknowledged that they were monopolies while maintaining, against *Sherman*, that “[T]he word ‘monopoly’ ... as ordinarily used in legal decisions ... means only a large business” (Dodd 1893: 159). To be clear, it meant businesses assembled to eliminate their competition, even if *not* spectacularly large.

To explain how the blueprint originated, spread and changed in meaning and social standing, I break the story of the trust movement into three parts: secrecy, uncertainty, and repudiation.

### *Secrecy (1865-1890)*

Understanding the rise of antitrust law is all but impossible without understanding something of The Standard Oil Company, the now infamous organization that was, more than any other, the blueprint for trusts as a class of organizations. Standard Oil was the company that grew out of the refining venture undertaken in 1862 by entrepreneur Samuel Andrews with investment from John D. Rockefeller and Maurice B. Clark, partners in a successful produce wholesaling business. At that time, Rockefeller was just 23 years old. When Rockefeller entered the refining business in 1862, there were only a handful of other refiners, but that number grew to 30 by 1865 and again to 50 by the next year. In that time, Rockefeller’s investment grew roughly 25-fold in value. Seeing still more potential, Rockefeller sold his share in the produce business and went “all in”, as they say in poker, on Rockefeller and Andrews, his oil business. Even as competition cut the number of refineries roughly in half by the early 1870s<sup>9</sup>, Rockefeller managed to build a second refinery with a new set of partners and grow market share in a

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<sup>9</sup> Ida Tarbell (1904: 63) reports 26 Cleveland refineries in 1862.

rapidly growing industry. By 1870, Rockefeller organized all of his oil interests into one company, the Standard Oil Company, or the Standard, as it was often called. The Standard was the largest refiner in Cleveland, which was soon to be the largest refining center in the country.

Although rivals admired and feared the superior efficiency and low costs for which Rockefeller and the Standard became famous, this fame was tainted by rumors that it received special “rebates” on rail shipping fees that gave it lower costs than other shippers. When a few competitors asked for and received similar “rebates”, Rockefeller reacted with a strategy that restored his advantage.

Specifically, Rockefeller organized the secretive Southern or “South” Improvement Company, a partnership with rail operators that gave Rockefeller a lever he could use to force rivals into selling out at fire-sale prices. In exchange for bringing traffic that would enable his rail partners to comfortably commit to building a line to the coast, Rockefeller received rebates not only on his transportation fees, but also on fees charged to his competitors. The line to the coast was a new toll road, and Standard Oil its toll-master. Standard then threatened rapacious fees to scare rivals into selling at prices that were tantamount to theft. In a period of three weeks, Rockefeller was able to buy 21 of his 26 competitors in Cleveland. Incredible.

To illustrate, consider the case of Hanna, Baslington and Company. In 1872, they rebuffed an offer to sell out to the Standard. According to Baslington<sup>10</sup>, Rockefeller countered with a threat: “If you refuse to sell, it will end in your being crushed.” When Baslington went to plead his case with representatives of the Southern Improvement Company, they confirmed it would be impossible to compete with the Standard given its preferential rates, but the reasons for this advantage—the essential features of the South deal—remained shrouded in secrecy. Seeing no other option, Hanna and Baslington agreed to sell out for only 60% of their investment in a profitable operation in a rapidly growing industry.

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<sup>10</sup> Ida Tarbell (1904: 67, also Appendix 7) collected this story in a sworn affidavit from Mr. Baslington.

Onlookers were in awe of all that Standard Oil was accomplishing, but also deeply suspicious. In her later exposé<sup>11</sup> of the company's brutal business practices, famed muckraker Ida Tarbell (1904: viii) observed the drive to get to the bottom of what today would be called Standard Oil's business model:

“In 1872 and again in 1876 it [Standard Oil] was before Congressional committees, in 1879 it was before examiners of the Commonwealth of Pennsylvania and before committees appointed by the Legislatures of New York and of Ohio for investigating railroads. Its operations figured constantly in the debate with led up to the creation of the Interstate Commerce Commission in 1887 ... In 1888, in the Investigation of Trusts conducted by Congress and by the state of New York, the Standard Oil Company was the chief subject for examination. In the state of Ohio, between 1882 and 1892, a constant warfare was waged against the Standard.”

The clamor to explain Standard's secretive strategy only intensified as the company continued to grow.

By the late 1880s, a crescendo of complaints and questions compelled Congress to convene hearings to investigate what was by then widely referred to as “the problem of trusts.” These hearings attracted comment from representatives of trusts themselves and others from the business community who were for and against trusts. Also, it attracted comment from dislocated labor, corporate attorneys and, naturally, elected politicians. Even before the hearings convened, an influential voice in the drive to hold them was that of William W. Cook<sup>12</sup>, a practicing attorney and author of an influential corporate law text (Cook 1887) whose essays on trusts did much to frame the issues raised in the hearings. Calling trusts “a monument to American genius and a symbol of American rapacity” (Cook 1888), Cook noted that trusts had “sprung into prominence” and “excited the alarm of thinking men” (1888: preface), much as I argued above can happen when controversial phenomena diffuse. Cook himself raised the alarm and gave a call for action in the form of a question:

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<sup>11</sup> Tarbell's history of Standard Oil first appeared as a series of eight articles in McClure's Magazine in 1902 and 1903. When these chapters were re-published as a, she wrote about her method (1904: xi) that the “Standard Oil Company, or perhaps I should say officers of the company, courteously offered to give me all the assistance in their power, an offer of which I have freely taken advantage. In accepting assistance from Standard men as from independents I distinctly stated that I wanted facts, and that I reserved the right to use them according to my own judgment of their meaning, that my object was to learn more perfectly what was actually done—not to learn what my informants thought of what had been done.”

<sup>12</sup> Cook's influence is endorsed by historian Thorelli (1955) and legal scholar Conard (1995). That Cook was successful enough to later be a major benefactor to the University of Michigan Law School also testifies to his influence.

“[i]s competition to disappear? Will the people acquiesce, or will they put down the combinations? Will the Courts uphold the ‘Trusts,’ or declare them to be illegal and void? These are the questions that are agitating the public mind” (Cook 1888: 2).

Cook answers his own questions with a review of precedent in which he concludes that protecting competition is a vital public interest because, in the words of a New York case, it is “the life of trade” (Cook 1888: 25). Following this logic, Cook argued that a monopoly “has ever been unjust, oppressive, and a thing of hatred” and that by allowing trusts, “the idea is made prevalent that unscrupulous methods and evil ends are justified, provided they are successful” (Cook 1888: 54). Defining a trust as “either a monopoly or an endeavor to establish a monopoly”, he urged that trusts be made illegal and void “because they are combinations in restraint of trade” (Cook 1888: 4, 20).

Beginning in 1889, Senator John Sherman of Ohio championed these arguments in a series of debates and bills that led to passage of the Sherman Antitrust Act of 1890. In these debates, Sherman took pains to explain his aim was not to attack combinations or corporations per se, nor to “single out any particular trust or combination”, but rather to attack a “system” he characterized as follows:

“a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president. The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. ... The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer.”<sup>13</sup>

Thus, while the new antitrust law reflected concerns raised by Standard Oil, it articulated the principle—or logic—for finding trusts to be illegal, which was they employed tactics for the “restraint of trade” to the

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<sup>13</sup> 21 Cong. Rec. 2457 (1889).

“endeavor to establish a monopoly.” (See Appendix A.) This is an important aspect of precedent: even when inspired by a salient case, it transcends the case by articulating the principle of the matter.

### *Uncertainty (1891-1900)*

Though Sherman declared trusts illegal, the question remained, would the law really have teeth? About this, Cook was prophetically pessimistic. He saw Sherman’s passage as only the “first campaign of the warfare with the trusts” and expressed concern that trusts were “entrenching themselves under the cover of corporate charters”; about whether they would be permitted to hide behind such cover, he said only, that “remains to be seen” (Cook 1891: 245). No confident prediction.

Cook’s skepticism was justified by several factors that undermined antitrust enforcement. First, the law was justifiably critiqued for being vague about what was wrong with trusts—a fact that reflected the secretive history of trusts and lawmakers’ relative ignorance about how trusts were built. Second, no matter how enthusiastic the US Attorney General might have been about enforcing Sherman, the office was limited by a paucity of resources and the autonomy of local U.S. Attorneys (Letwin 1958: 466). Third, antitrust enforcement was also hindered by cozy relationships between trusts and elected officials and their appointed Attorneys General.

To illustrate the factors that undermined antitrust enforcement, consider the experience of William H.H. Miller, Attorney General during the Harrison administration (1889-1993) and the first to try a case under Sherman. Miller came under public pressure to prosecute the Whisky Trust when one of its officers was indicted for planning to blow up a factory owned by one of its competitors. While Miller was eager to prosecute the Whisky Trust, that eagerness was lacking in the US Attorney for Chicago—not a jurisdiction famous for reining in its criminal element. After months of empty promises from his subordinate in Chicago, Miller shifted gears to pursue an indictment against a Whisky Trust officer in

Boston. When the decision in that case was handed down, it became clear that Miller had traded inaction for incompetence. The judge ruled against the government because their filing failed to make it clear that the Whisky Trust was involved in interstate commerce—a requirement of Sherman. The US Attorney in Boston blamed this on a typist but excused himself of “carelessness” (Letwin 1958: 474). Miller fared no better with a case against the Sugar Trust. Things proceeded so slowly in that case that it came to trial only after Miller left office with the administration change of 1893.

If antitrust enforcement started badly, things went from bad to worse when President Grover Cleveland, inaugurated in 1893, appointed Richard Olney as his administration’s Attorney General. Olney mocked *Sherman* in his first Annual Report to Congress, saying, “It would not be useful, even if it were possible, to ascertain the precise purposes of the framers of the statute.”<sup>14</sup> Although Olney based his dim view of *Sherman* on numerous state cases and a district court opinion by a newly appointed Supreme Court Justice, it was tainted by his ties to trusts he had defended in private practice (Letwin 1958: 477)—it was Olney who defended the Whisky Trust in Boston. Olney promised to “push for immediate hearing” a case that would prove Sherman’s value, or perhaps more accurately, a lack thereof.

Olney selected the Sugar Trust case initiated by Miller as his test case. Also widely known as *E.C. Knight*, the case sought to prevent the purchase of four large sugar refineries that would have given the Sugar Trust total control of North American production. Olney summarized the decision as follows:

“It was held that the purchase of certain sugar refineries in the city of Philadelphia on behalf of the so-called ‘Sugar Trust’ was not a violation of the provisions of that law, although a virtual monopoly of the business of refining sugar resulted, because interstate commerce was not thereby directly affected. Combinations and monopolies, therefore, although they may unlawfully control production and prices of articles in general use, cannot be reached under this

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<sup>14</sup> 1892-1893 Att’y Gen. Ann. Rep. xxvi (1893).

law merely because they are combinations and monopolies, nor because they may engage in interstate commerce as one of the incidents of their business.”<sup>15</sup>

Having inherited *Knight* from Miller, Olney was free to regard this loss as a victory for his dim view of the law’s aims and powers. In a review of antitrust law to that point, economist Ernst von Halle (1896:109) wrote, “No serious investigator attributes great weight to the anti-trust statutes in the present shape.” The Sugar Trust case set antitrust precedent all right, but it was positive for trusts, negative for antitrust. This is another important aspect of precedent: it is cumulative, and can be either positive or negative.

After a disastrous first five years, anti-trust enforcement took a step forward when President Cleveland appointed Judson Harmon as Attorney General. Harmon made cautious use of Sherman, but he selected test cases for the purposes of proving the law could and should be used. In particular, he selected and personally argued *Trans-Missouri Freight Association*, a case of price-fixing among 18 western railroads. Although the government had already lost the case twice, Harmon thought he could win on appeal. The Circuit Court for the District of Kansas and the 8<sup>th</sup> Circuit Court of Appeals had earlier found that (1) the Trans-Missouri Association was a restraint of trade, but not an unreasonable one; and that (2) Sherman did not apply to “common carriers” by rail, or rail transportation services open to the public. Under Harmon, however, the Supreme Court overturned these previous rulings just after McKinley took office in 1897, finding that Sherman applied to railroads and to *any* restraint of trade because, it argued, there is no such thing as a reasonable restraint of trade. Almost immediately, a University of Pennsylvania Law Review article noted the decision’s significance, as follows:

“The recent decision of the Supreme Court of the United States is of wide spread importance, not only by reason of the principle of law involved by the court, but because the enunciation thereof may seriously affect the value of securities of railways in the United States. ... In view of its importance, and of the general apprehension that it has caused, it may be of some value to consider carefully the decision, not only as to that which was actually decided with reference to

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<sup>15</sup> 1894-1895 Att’y Gen. Ann. Rep. xxxiii (1894).

the facts of the particular case, but also as to the principle of law, which will determine similar cases as they may arise in the future.” (Patterson 1897:307)

This is as clear an illustration of sensemaking about precedent as one could hope for. Note that it is a “principle” derived from a decision made “with reference to the facts of a particular case” that is then expected to “determine similar cases as they may arise in the future.” This appears to suggest that precedent depends on principle rather than prevalence, but the *Trans-Missouri* decision’s status as an important pivot point for antitrust law<sup>16</sup>, though perhaps clear to legal experts at the time, only became widely understood as precedent as it was used and upheld in subsequent cases. Thus, while precedent is based on principle, it is principle that must be confirmed by repeated affirmation—or prevalent usage.

Despite this major win, the rise of antitrust law therefore slowed under McKinley, a President widely seen as being in the back pocket of the trusts. Writing about Sherman in this time, legal scholar Letwin writes of the “disuse” of Sherman under McKinley and the “assiduity” with which McKinley’s Attorney General, John W. Griggs, “declined every opportunity except one to enforce the Sherman Act” (Letwin 1958: 493). Although the *Trans-Missouri* decision had put the railways on notice, the Sugar Trust case continued to provide cover for manufacturing-based trusts, and as Letwin puts it, Griggs “never tired” of using the Sugar Trust decision as the reason for not taking antitrust cases.

Things looked even bleaker for antitrust law in the late 1890s. As the economic depression that dominated the mid-1890s came to an end, the diffusion of trusts accelerated as capital availability combined with the lure of historic fortunes and the apparent impotence of antitrust law. As indicated in Figure 1, trust establishments grew dramatically, reaching their peak in 1899.

With this dramatic growth, however, trusts invited scrutiny from a wider set of perspectives. As Letwin (1958:494) observes,

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<sup>16</sup> Ironically, the government did use Sherman to apply for and win an injunction against a rail boycott led by workers of the Pullman Coach Company, but this decision has not stood the test of time.

“Newspapers, civic leaders and reformers, lawyers, economists and bankers suddenly took notice of this remarkable phenomenon and of the evils it threatened. Special conferences were organized in Chicago by the Civic Federation and in St. Louis by the governors and attorneys general of the states; addresses were presented at conventions of various bar associations, at the American Economic Association meetings, at the International Commercial Congress, and at People’s Institutes throughout the country; the United States Industrial Commission, a federal agency created to study economic conditions, collected evidence on the situation and its presumed causes.”

One effect of this diverse audience’s attention was that the Republican Party added a brief section on antitrust policy to its platform for McKinley’s 1900 re-election campaign. Although McKinley’s record of inattention to antitrust enforcement suggests this was mere lip service to an increasingly topical issue, the ideas did appeal to Theodore “Teddy” Roosevelt, a man whose reformer’s zeal earned him enemies enough in New York to be shunted off to become McKinley’s Vice Presidential running mate.

### *Repudiation (1901-1930)*

While McKinley’s victory and inauguration into a second term ought to have given the trusts hope that Sherman would not be much used against them, that hope gave way to fear when, just six months into the new term, McKinley’s untimely death by assassination put Teddy Roosevelt (TR) into the Oval Office. Only a few months later, Roosevelt the reformer addressed the topic of trusts directly and at some length in his first State of the Union Speech to Congress. Though TR praised large corporations for their contributions to American society, he also accused some of “great corporations known as trusts” of what he called “real and grave evils.” Whereas one might have expected this to be followed by an explication of the social costs of monopolies and restraints of trade, information disclosure was the central theme of TR’s complaint against trusts. He put it this way:

“It is no limitation upon property rights or freedom of contract to require that when men receive from Government the privilege of doing business under corporate form, which frees them from individual responsibility, and enables them to call into their enterprises the capital of the public, they shall do so upon absolutely truthful representations as to the value of the property in which

the capital is to be invested. ... The first essential in determining how to deal with the great industrial combinations is knowledge of the facts—publicity.”

Thus, TR’s distinctive contribution to antitrust law was to shift antitrust efforts from the project of defining *what* would be illegal to focus instead on *how* it would become known. As a weapon against the secrecy that had been essential to the rise of trusts, TR’s vision of “publicity” was to require information that would make guilt or innocence plainer to see.

As President, Roosevelt wasted no time turning his rhetoric into action. In December of 1901, he asked Attorney General Knox to look into the organization of Northern Securities Co., a rail holding company. By February, Knox acknowledged that TR had asked him for “an opinion as to the legality of this merger” and went on record to say, “in my judgment, it violates the provisions of the Sherman Act of 1890” (Meyer 1906:258). By May of 1902, Knox brought a second major case to trial—*U.S. v. Swift Co.* In marked contrast to the cautiousness and inaction that marked the past decade’s administrations approaches to antitrust enforcement, this was a quick start.

That said, complex cases do take time, and there were setbacks along the way. Although the Roosevelt administration won both cases, it took two years to get a verdict in *Northern Securities*, and the case’s progress through the Courts was complicated by appeals from both sides. The *Swift* decision came faster, in 1903. After his first antitrust victory but still in pursuit of his second, TR addressed antitrust concerns again in his 1903 State of the Union Speech, and again he stressed the need for more and better “publicity”, as follows:

“Publicity can do no harm to the honest corporation. The only corporation that has cause to dread it is the corporation which shrinks from the light, and about the welfare of such corporations we need not be oversensitive.”

TR made good on this agenda by working with Congress in early 1903 to pass legislation establishing the Department of Labor and Commerce, a move that included immediate transfer of personnel from a

existing agencies and government organizations into the newly created entity. By the end of 1903, the new department had almost 10,000 employees. TR acted quickly to provide the resources, infrastructure, and mandate that had been so sorely lacking in the 1890s antitrust efforts.

TR's belief that "publicity" could rein in trusts was confirmed by Ida Tarbell's blockbuster exposé, "The History of Standard Oil Company", the work I already cited and used to briefly describe Standard Oil, above. Tarbell's work first appeared in McClure's Magazine in serial form in 1902, 1903 and 1904. As a story about the rise of one of the world's wealthiest men, Tarbell had a tale or organizations that could appeal to a wide audience, and she told it well. Since Tarbell's work is extremely well known, I will note her influence only briefly. It is worth noting that her hometown of Hatch Hollow, Pennsylvania was one of those decimated by Rockefeller's *Southern Improvement* deal, and her family was hit hard, too. That this subject was personal for her makes her professionalism all the more impressive. In 1999, a panel of experts administrated by faculty of New York University ranked her work on Standard Oil 5<sup>th</sup> on a List of Twentieth Century Journalism's Top 100 Works.<sup>17</sup>

Further underscoring the importance of publicity in struggles, increasingly besieged trust builders finally found an advocate in John Moody, publisher and editor of "Moody's Manual of Corporation Securities" and one of the country's foremost information entrepreneurs. Moody defended trusts in a book whose full title was, *The Truth About the Trusts: A Description and Analysis of the Trust Movement* (Moody 1904). Moody's defense featured not only rhetoric to match Roosevelt's, but data, too. Informed by his work as publisher and editor of "Moody's Manual of Corporation Securities", Moody compiled data on 318 trusts in all. He broke this total into 7 trusts he classified as "Greater Industrial Trusts", 298 as "Lesser Industrial Trusts", and 13 as being in the midst of some sort of re-

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<sup>17</sup> "Journalism's Greatest Hits: Two Lists of a Century's Top Stories." *New York Times*, March 1, 1999.

organization. For each trust, Moody provided a description of its assets at the time of writing, its history, and what he called “a brief analysis of the subject” (Moody 1904). In addition, he also provided tables that list the dates and states of incorporation, number of plants or facilities controlled, and capitalization. Though primitive by today’s standards, these data were comprehensive for that time.

Moody’s defense of trusts presented them as a natural and inevitable evolution of the corporation. Drawing heavily on Dodd’s (1893) definition of trusts, as cited above, Moody did not argue that trusts were not so monopolistic, but instead by arguing that monopolies “are a fundamental and universal factor in modern life” (Moody 1904). Extending Smith’s ([1776] 1976) argument about self-interest, Moody argued that humans have a natural tendency to be “monopoly-seekers” and that this tendency is so “fundamental” to “civilization” that “any sentiment or agitation which does not reckon with this natural tendency will prove both futile and ineffective” (Moody 1904). This anti-regulation argument is of the type that Hirschman called (1991) a “futility” thesis for its assertion that the idea in question is a social reality that cannot be stamped out. Recall that social realities, as defined above, are phenomena generally seen as impossible to completely eliminate. This quote conveys that logic nicely:

“Instead of the growth of the Trust movement being an achievement to be laid at the door of Mr. Morgan or Mr. Rockefeller, or any other leader of men, it should be laid at the door of nature. For if anything in the world is true, the following proposition is: *The modern Trust is the natural outcome or evolution of societal conditions and ethical standards which are recognized and established among men to-day as being necessary elements in the development of civilization*” (emphasis in original). (Moody 494)

Implicitly, Moody’s defense is that there are a lot of trusts (which he lists) because they are a natural and inevitable outcome of evolution that no amount of regulation can eliminate. This explains Moody’s use of ontological language to argue (1904:xviii), “We may safely say that monopoly does exist.”

One final element of Moody’s argument for trusts (Moody 1904:497-498) is the government’s low win-loss ratio in antitrust cases:

“Of the twenty-six suits brought by the Federal government, nearly all have resulted in failure on the part of the prosecution. Out of the total, only ten were won by the government, and of these, four were against combinations of labor, the leaving six as the total number in which the United States has thus far prevailed in litigation against the Trusts. ... In view of the foregoing facts, it is plain to see that the Sherman Anti-Trust law has not been a success. As statistics show, nearly all the great Trusts, transportation and other, have been created since the passage of this anti-trust law, and in spite of it.”

In other words, if trusts were so illegitimate, how could they have grown as they had? Moreover, why then have would the courts have affirmed them—and undermined antitrust law—on so many occasions?

The answer is that Moody was looking backward, and the heyday of the trust movement had already passed. By 1904, the real truth about trusts was that new establishments in New York, New Jersey, and Pennsylvania had come to a complete halt (see Figure 1). After starting slowly and stuttering badly, antitrust enforcement efforts had begun to yield a positive balance of legal wins and losses and, even more importantly, a body of law and argument that, on balance, provided increasingly lopsided support to the idea that trusts as defined in Sherman were not only illegitimate, but illegal.

The Roosevelt Administration’s moves against trusts were but the beginning of trust busting. It was open season on trusts when William Howard Taft, Roosevelt’s hand-picked successor, won the 1908 election. Compared to the Roosevelt Administration, the Taft Administration initiated roughly twice as many antitrust cases in its one term in office as Roosevelt’s administration did in its two terms. In particular, it was Taft who presided over the victory that brings the story of trusts full circle: in 1911, the US government ordered the reorganization of The Standard Oil Company. Ironically, the original trust buster felt Taft had taken things too far, and this disapproval was one of the reasons he left the Republican Party in 1912 to run against Taft, which guaranteed Taft’s loss to Woodrow Wilson. Though the White House changed parties, President Wilson’s administration kept the pace of trust busting high, and even more significantly, elaborated the law by passing two major pieces of antitrust legislation in

1914: the Clayton Antitrust Act and the Federal Trade Commission Act. These laws combined to clarify the principles that would be used to prosecute “anti-competitive” tactics in markets—especially price discrimination tying arrangements of the kind used to prosecute Microsoft nearly 80 years later. Perhaps even more significantly, however, the Federal Trade Commission Act established the federal agency that goes by that name (FTC for short), ensuring a stabilizing influence on political mood swings that had already been so important to antitrust enforcement, or lack thereof.

In the 1920s, backlash over the tremendous cost of American participation in World War I shifted political mood away from Progressive ideals toward a decided lack of faith in government and a reaffirmation of a business community that had by that time been considerably reformed. For example, President Warren Harding (1921-1925) campaigned on the idea that it was time to have “less government in business and more business in government”, and it was Calvin Coolidge who famously said in 1925, “After all, the chief business of the American people is business.” In time, this quote has been repeated and simplified by many to, “The business of America is business.”

By then, however, the rise of antitrust law and the delegitimation of trusts were securely institutionalized in law and organizational routines of a federal agency. In the decades that followed the end of the first generation or so of antitrust enforcement, the logic of the law and the focus of prosecution efforts would continue to evolve and change, but as the set of principles that bound *laissez faire* in order to protect competition, antitrust law remains one of the central features of the American experiment’s handling of tensions between the ideals of liberty and justice for all.

## **Quantitative Analyses**

Following the methods of historical sociology, I now turn to quantitative analyses of the case of trusts. I present this aspect of the case by translating the foregoing theoretical argument and history into

hypotheses, describing the methods, data sources, variables and analyses I use to test these hypotheses, and summarizing the results.

### *Hypotheses*

My argument that prevalence establishes social realities which then may or may not be legitimated suggests the following general proposition as a framework for testable hypotheses: If the legitimacy or illegitimacy of a diffusing organizational innovation is determined not just by prevalence, but also by precedent, then prevalence and precedent should have separate effects on events indicating the legitimacy or illegitimacy of organizational innovations.

The ecological and institutional tradition of organizational analysis provides a good guide on how to translate a proposition of this form into hypotheses (Carroll and Hannan 2000). In that literature, scholars assess legitimacy by analyzing how the prevalence of a focal organizational population relates to founding and failure events. In the case of trusts, this translates into analyzing trust establishment and reorganization events, which are well enough defined and documented to permit reliable measures; I say more about this in “Variables and Measures”, below. Also, In particular, ecological studies of organizational populations theorize competing effects of the prevalence of an organizational form (Carroll and Hannan 1989a, b). When a new form is spreading, the increasing size or density of that population of organizations tends to legitimate it, accelerating growth and lowering failure rates. As population density continues to grow, however, intensifying competition lowers and raises founding and failure rates, respectively. Any effect of precedent should be over and above this effect of prevalence, which is commonly referred in the ecological literature to as density dependence.

To this basic study design, we need to add a measure of precedent that speaks to the legitimacy of a diffusing innovation. On one level, precedent is hard to measure because its essence has to do with the

logic of rules about what or what not to do. On another level, however, the inherently cumulative nature of precedent—especially when it comes to what not to do—provides a strategy for boiling complex arguments down to simpler indications of whether a thing is thoroughly censured, a gray area, or clearly accepted. That is, cases that test a law yield wins, losses and settlements that add up over time to establish not only the details of the law’s logic and jurisdiction, but also its relative strength—the degree to which it has teeth, so to speak. For antitrust law, the cumulative weight of precedent can be at least crudely measured in this way. When a diffusing innovation faces an increasing volume of legal challenges, this should cast increasing doubt on the innovation’s legitimacy. Moreover, the balance of wins versus losses in such cases—net wins, for short—also bears on an innovation’s legitimacy. Specifically, a growing number of net wins should have a negative effect on the innovation’s legitimacy. Completing the study design framework requires adding factors that control for changing awareness of trusts and shifts in legal and political climate that reflected popular and government disposition toward them; these are explained in “Variables”, below.

Controlling for density dependence and a broader set of controls for public awareness and political climate toward trusts, the yearly rates at which trusts are established and reorganized should reflect both the initial attractiveness of trusts to potential trust builders and the increasing controversy and disapproval that diffusion later attracted. This leads to the following specific hypotheses:

- H1: The growing body of federal antitrust cases filed by the end of the prior year should have a negative effect on trust establishments in the current year.
- H2: The growing balance of net wins— wins minus losses—in federal antitrust cases filed by the end of the prior year should have a negative effect on current year establishments.

H3: The growing body of federal antitrust cases filed by the end of the prior year should be positively related to current year reorganizations.

Note that the net wins hypothesis (H2) is not repeated for reorganizations because last year's net wins is conceptually similar to the lagged value of last year's reorganizations, which is used as a control; this is especially true for years in which the Justice Department's win-loss ratio was high.

### *Method and Data*

Following the methods of historical sociology (or analytical history), I combine statistical analyses with the narrative above to meld the best of each discipline in pursuit of a better explanation of not only “what it is that actually happened” in the case of trusts, but also why and how it came to pass (Hall 1992). The strength of this tradition, as Roehner and Symes (2002) argue in *Pattern and Repertoire in History*, is that the demands of statistical analyses push scholars to break complex events down into simpler contributing ones and patterns that could help explain the “why” behind what happened. Roehner and Symes (2002:48) suggest doing this well requires identifying “a sharply defined phenomenon” that occurs at least “several times” according to “accurate and possibly quantitative historical sources.” While statistical tests of patterns in a single case obviously cannot address their potential generality, but supportive findings can lend increased plausibility to hypotheses.<sup>18</sup>

Using this method in the case of trusts meant breaking the census of trusts down into data that relates trust establishment and reorganizations to federal cases against trusts, net wins in those cases, and the controls described above. This required painstaking analysis to identify not only an appropriate period and geographically focused population for analysis, but also key details of the history of each trust

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<sup>18</sup> Identifying and explaining patterns are not the only legitimate goal of social science (Ragin 1994, 1997).

in the population—establishment date, any and federal antitrust suits brought against it, and outcomes.<sup>19</sup>

The following paragraphs document the procedures used to produce this data set.

*Population.* I used Moody’s (1904) *The Truth About the Trusts* to select trusts “incorporated” in New York, New Jersey or Pennsylvania. While this geographic subset of all trusts included the preponderance of the nation’s largest and best-known trusts, it also included a number of organizations called “trusts” despite their small size. Because collecting the required information on these smaller organizations is all but impossible and because they stretch the definition of trust, I defined the population of trusts in this region to include only those with over \$10 million in “capitalization” and 10 or more “plants.”<sup>20</sup> This is roughly two-thirds of the total number of trusts in these three states, and these three states account for more than one-third of the total trust population documented by Moody. Since Moody and other primary sources emphasized ‘largeness’ as essential to trusts, this group of organizations is more consistent with popular understanding of trusts than Moody’s list. To assess the possible effects of this definition of the trust population, I used several alternative specifications as described in results, below.

*Establishment dates.* While establishment dates are analogous to founding dates, they are generally harder to identify. Rather than using the founding date for the oldest organization in a trust, I use the year of the deal—whether merger or acquisition deal—that completed the monopoly being attempted. Fortunately, such deals are often publicized in newspapers with articles that have headlines with the words “Trust Established” or “Trust Completed.” In such cases, establishment date is the year of the announcement article. In other cases, however, the trust is assembled through a series of deals, but

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<sup>19</sup> I am grateful to Neil Katsuyama, Esq., for his excellent research assistance in this sizeable task.

<sup>20</sup> It would be ideal to run sensitivity analyses on this cutoff, but that requires the data that is hard to get—another reason why there is reason to question Moody’s inclusive approach to building the list. The smallest and largest capitalization amounts were \$485K and \$1.37B, respectively, and the smallest and largest number of plants were 2 and 785, respectively.

never announced as having been completed. In those cases, establishment date is ascertained in one of several ways. If the company was defendant in an antitrust case or suit, establishment was gleaned from the company history section of the case proceedings or decision. If no such documentation can be found, I use the date of the last publicity of a large merger. While Moody (1904) lists incorporation dates, those dates are generally later—sometimes much later—because, as mentioned above, trusts used incorporation as a strategy for hiding information about their activities from the Justice Department.

*Period.* Based on the population and establishment dates collected as just described, I begin analysis of establishments in 1865, the year that Standard Oil was organized. Of course, reorganizations in response to antitrust actions, whether direct or anticipated, were not possible until after 1890's passage of the Sherman Antitrust Act, so I begin reorganization analysis in 1890. I continue both analyses until 1930 so that results are not dominated by the era of zealous trust busting 1903-1921.

*Antitrust Actions.* This process consisted of several steps. First, ProQuest's historical newspaper archive was used to collect articles that appeared in the major newspapers for New York, New Jersey and Pennsylvania. Second, the HeinOnline legal database was used to assemble a list of any and all Federal antitrust cases filed against each trust, and outcomes in each case. Third, establishment dates were determined by combining the case background with newspaper articles and, in some cases, additional Internet research. Fourth, Shepard's citations for each case were obtained from Lexis-Nexis to assess whether they are cited in later cases and if so, whether the opinion is supported, questioned or overruled.

### *Variables*

*Dependent variables.* For hypotheses 1 and 2, the dependent variable is "establishments", or number of trusts established in each year from 1865 until 1930, the end of the analysis period. For

hypothesis 3, the dependent variable is “reorganizations”, or the number of reorganizations in each year after the Sherman Act was passed until the end of the analysis period (1890-1930).

*Controls.* The separate analyses of establishments and reorganizations both control for year, density dependence, and the prior year’s value of the dependent variable. The establishment analyses use a dummy to control for the period after 1890 in which trusts were at least technically censured, even if not clearly so. Both sets of analysis use controls for public awareness of trusts, the inclination of presidential administrations to pursue antitrust enforcement vigorously, and Congressional support for this policy. Although admittedly crude, I control for public awareness of trusts by using the ProQuest historical newspaper database to obtain yearly counts of New York Times articles mentioning “antitrust.” To control for the relative zeal for antitrust enforcement seen in presidential administrations of Teddy Roosevelt (1901-1909), Taft (1909-1913) and Wilson (1913-1921), I use a dummy for this era of trust busting (1903-1921). Finally, I control for Congressional support of antitrust enforcement by using Posner’s (1976) data on Department of Justice appropriations designated for that purpose.

*Independent variables.* Precedent is measured as the prior year totals for the total number of Department of Justice (DOJ) cases filed and the number of net wins—wins minus losses—in those cases.

### *Analyses*

I use Poisson regression with robust standard errors in the analyses of establishments and reorganizations because both dependent are positive integer counts of variables. I did test for overdispersion in the dependent variable that would call for using negative binomial regression instead, but the test for this was rejected ( $p = 0.50$ ).

## *Results*

Tables 1a and 1b show descriptive statistics for the variables used in the establishment and reorganization analyses, respectively. As expected, correlations between the population size, or density, and its square are high. Although this is a common but generally unproblematic feature of density dependence analyses, I checked for stability of results due to possible multicollinearity problems by running the regressions using versions of DOJ Cases to Date and lagged population density squared that were residualized on year and population density, respectively. These models lower correlations and bring VIF scores well below model condition indices. Compared to the models with untransformed variables, significance levels for the transformed model coefficients were unchanged.

Table 2 shows results for the establishment analyses. Model 2 shows that establishments are not statistically significantly affected by the total number of DOJ Cases filed against trusts as of the prior period; hence, Hypothesis 1 is not supported. In contrast, Model 3 shows that the DOJ's cumulative net wins in antitrust cases has a negative affect on subsequent establishments, as predicted ( $p < .05$ ); model improvement is significant ( $p < .05$ ). This is good support for Hypothesis 2.

Table 3 shows results for the reorganization analysis. Model 2 shows that the total number of DOJ cases against trusts has the predicted positive effect on reorganizations ( $p < .05$ ), with marginally significant model improvement ( $p = 0.06$ ). This provides encouraging support for Hypothesis 3. Additionally, it is worth noting that prevalence, or population density, has a positive effect on reorganizations, which is the opposite of its normally negative effect on failure in survival analyses.

## **DISCUSSION**

Remarking on what the classics reveal about ethics and the law, scholar Martha Nussbaum (2006:308) has said, “Often, when you care deeply about more than one thing, the very course of life will bring you round to a situation where you can’t honor both of the commitments.” This is a formula for ethical dilemmas that command something different: a reversal of diffusion’s normally positive effect on legitimacy. This is what happened a century ago in the case of trusts, and it is also what happened again three times in the last decade with the destructive innovations mentioned in the introduction. And it suggests what the case of trusts ought to teach.

To explain, I explain the theoretical implications to be gleaned from the growth of trusts and the rise of antitrust law, note the study’s shortcomings, and translate those yet-to-be-addressed problems into an agenda for future research. Then, turning to the more practical considerations of policy makers and business leaders, I will briefly describe the “not so fast” problem and strategy that this research suggests. Finally, I’ll sum up what the case of trusts teaches with a provocation.

### **Contributions to Theory**

As I have argued, a more complete view of the diffusion of innovations requires unmaking the assumption that prevalence generally leads to legitimacy. Following the two-stage institutional model of institutional diffusion (Tolbert and Zucker 1983), many studies show diffusion leading to legitimation, but not all that diffuses and becomes prevalent within a population of potential adopters is ultimately viewed as socially desirable by society more broadly. This is because prevalence attracts attention that can bring a more pluralistic set of logics to bear on evaluating what has spread (Friedland and Alford 1991; Kraatz and Block 2008), which increases the risk of controversies that can lead, in the extreme, to reversing diffusion’s usually positive effect on legitimacy. This is what happened in the case of trusts.

Rather than just illustrating this reversal, however, the case of trusts also gives clues about when and why it occurs. In particular, it shows that diffusing innovations are likely to become controversial when they adversely affect non-adopters who, at least initially, have no say in what is happening to them. In such cases, the attention that diffusion and increasing prevalence attract can become a trial by public discourse—a media referendum, if you will. Moreover, the case of trusts also suggests why prior research has tended to conflate prevalence and legitimation. Especially for organizational scholars working in business schools, lessons on the history of now illegal organizational forms, practices, or strategies are not in high demand.

To explain how diffusion can lead to both legitimation and censure, therefore, I propose a new political-cultural approach to diffusion in which prevalence first contributes to reification, or the emergence and recognition of new social realities, and various kinds of precedents then determine what prevalence will mean for society. While the case of trusts illustrates the power of legal precedent as a factor for determining the social and cultural significance of prevalence, I propose understanding precedent as both a formal, legal accumulation of authoritative rulings and as an informal, cultural rules and norms shared by members of an organization, collective or society. This new approach has the advantage of allowing for divergent reactions to diffusion. Specifically, it allows for at least three basic outcomes of diffusion: legitimacy, uneasy truce-like acceptance of the prevalent but controversial, and taken-for-granted acceptance of social desirability. Examples that illustrate these three basic outcomes include TQM adoption in hospitals (Kennedy and Fiss 2009), golden parachutes (Fiss, Kennedy, and Davis 2012), and the current study of trusts.

Following Fligstein's (1996) political-cultural approach to markets, market institutions, and organizations, I call this account of social reactions to diffusion a political-cultural model of diffusion

because power and politics are essential ingredients in precedents that determine what the prevalence of a diffusing innovation means for society—whether it is a legitimating factor or a cause for alarm or even censure. Moreover, emphasizing the connection to Fligstein’s political-cultural view of market institutions makes sense since this research extends that perspective by showing that organizations and markets are shaped not only by private firms’ attempts to mitigate competition (Fligstein 1996: 657), but also by the public interest in protecting competition.

### **Limitations and Directions for Future Research**

In no way does the censure of trusts suggest that dodgy innovations are bound to be censured. Unfortunately, there are many examples of organizational forms or strategies that persist for long periods despite either widespread opinion that they are wrong or significant social and legal sanctions against them. Future research should seek to understand why extremely controversial organizational innovations sometimes persist despite their apparent lack of legitimacy, at least with society more broadly.

Whether diffusing innovations are censured or legitimated depends on meaning construction processes that are mentioned only briefly in the theory section, explored only indirectly in the history of trusts, and then glossed over completely in its quantitative analyses. A deeper understanding of the emergence, diffusion and legitimacy or censure of innovations requires further theorizing about meaning construction processes that underlie reality construction and legitimation (e.g., Kennedy 2008; Kennedy, Lo, and Lounsbury 2010; Khaire and Wadhvani 2010; Lounsbury and Rao 2004; Navis and Glynn 2010). In particular, comparative analysis of the public discourse of opposing factions can reveal the enlargement or disappearance of common ground between them, a process that can be studied using a relational style of content analysis (Kennedy, Chok, and Liu 2012).

## **The *Not so Fast* Problem and Strategy**

Innovations like trusts reveal a “not so fast” problem and a “not so fast” strategy. Both are worth the attention of scholars, policy makers and business leaders alike.

The “not so fast” problem is the opposite of the “not fast enough” problem seen when incumbents fall prey to creative destruction because they were too slow to respond to diffusing innovations (Schumpeter 1934). In contrast, the “not so fast” problem occurs when organizations are quick to embrace a diffusing innovation only to discover to their chagrin later that its appeal depended on externalities that adopters either overlooked or hoped to shirk. While cases where “everybody is doing it” create competitive pressures for following along, they also present opportunities to cut against the grain by refusing to adopt innovations that, as noted above, diffuse because their dodgier elements are either unknown to or not easily contested by those adversely affected by them. In the financial crisis that followed the mortgage meltdown of 2008, organizations that once appeared behind on hot trends are now lionized for having shied away from practices that we now know produced toxic assets that felled so many large banks that the bailout efforts became crises for not only wealthy countries, but whole economic regions. Early identification and appropriate redistribution of such externalities is surely one of the key topics for policy makers engaged in what Fligstein (1996) calls the politics of markets.

This research suggests a “not so fast” strategy reminiscent of the “slow and steady wins the race” wisdom made famous by Aesop’s fable of the tortoise and the hare. For most of the first decade of this century, there was big money to be made in aggressive mortgage origination, arcane securitization, and trading against buyers of these assets. Although firms that shied away from these practices looked anything but with it then, their more cautious strategies look quite wise now. Future research should look into whether the “not so fast” firms posted profits and growth that lagged more aggressive lenders.

## CONCLUSION

Censured innovations reveal tensions between commitments to the *laissez faire* principle and the ideals of freedom—both essential ingredients of the American political economy. When diffusing yet controversial innovations enable one faction of society to dominate others in ways that seem unfair, stepping in to change the rules after the fact means sacrificing *laissez faire*, but failing to step in sacrifices fairness in ways that are tantamount to institutionalizing the domination of one faction over others.

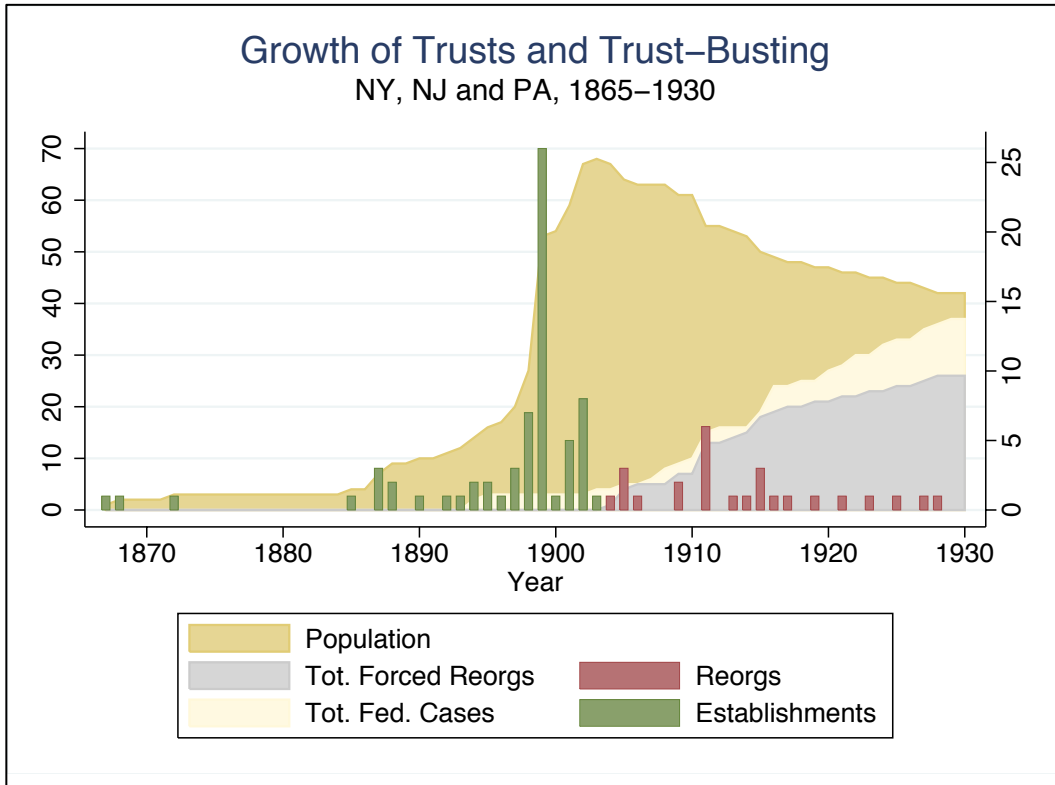
The case of trusts teaches that Madison was wise to embrace pluralism as a strategy for combatting the risk that democracy could be hi-jacked by powerful or resourceful “factions.”<sup>21</sup> Concerned with the problem of preventing one faction of society from unjustly oppressing others, Madison argued that “the increased variety of parties comprised within the Union, increase this security” against this risk and that “the extent of the Union gives it the most palpable advantage.” In other words, having a wider and more pluralistic conversation is the best defense against factional oppression. It is therefore a happy irony that the diffusion of controversial innovations invites publicity and, with it, the scrutiny of a more pluralistic community of voices and views. In a political economy where *laissez faire* is followed in many situations, collective standards of legitimacy handle a lot of the job of regulating markets, so to speak, which makes legitimacy quite important. For businesses and policy makers, taking the “not so fast” problem seriously means being more thoughtful about when a hundred businesses can legitimate something, and when that will be over-ruled by wider scrutiny that growing numbers invite. In the process, this study’s provocative insight for businesses is that the activists that generally annoy are in fact protecting the integrity of a system by driving out ideas that are otherwise difficult to combat. To Madison’s argument that pluralism is good for democracy, I would add that it is healthy for business, too.

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<sup>21</sup> See *Federalist Papers*, No. 10.

**FIGURES AND TABLES**

**Figure 1:** Population of Trusts in NY, NJ and PA, 1865-1930, with Yearly Federal Cases against Trusts and Forced Reorganizations



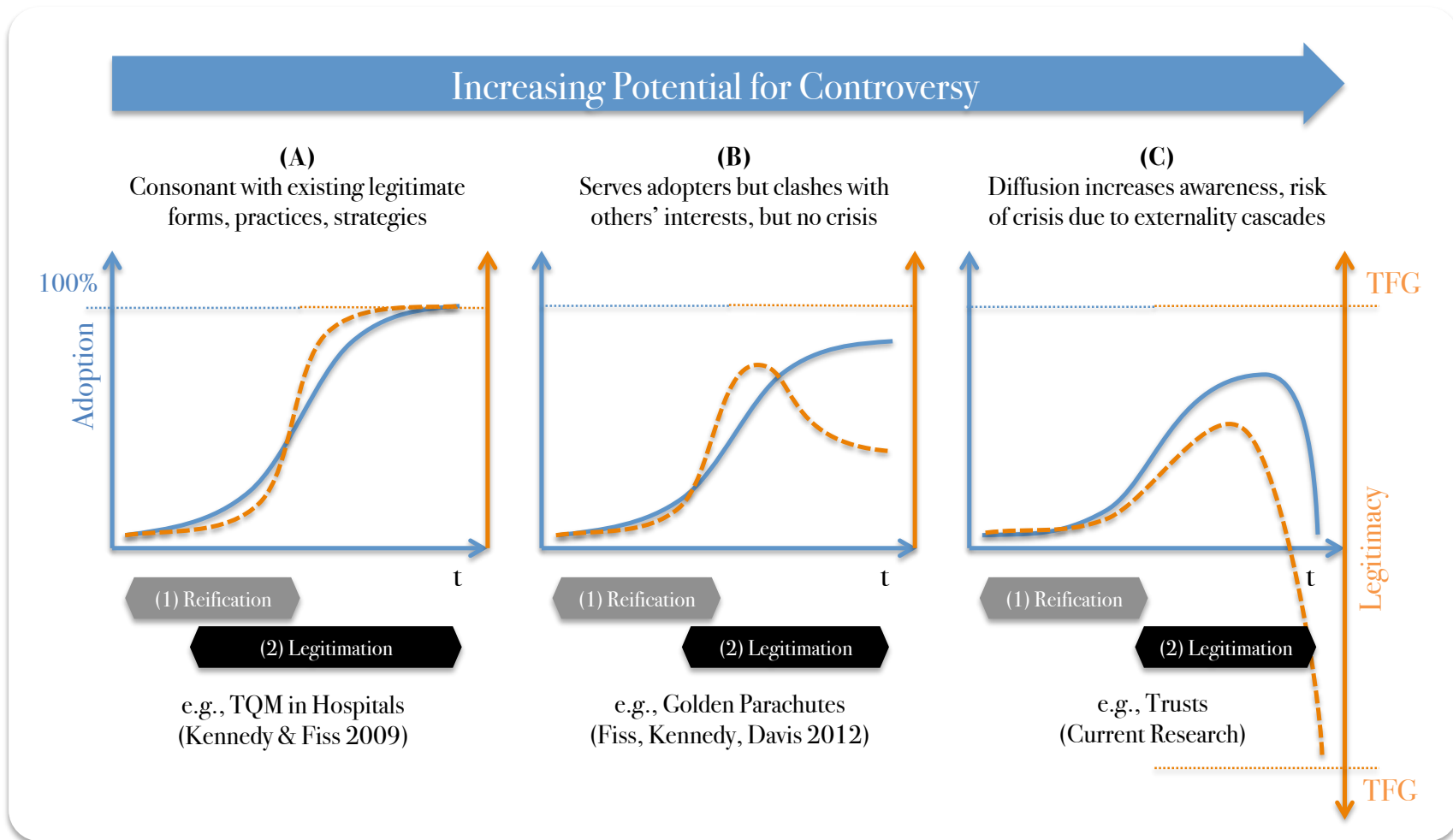
**Figure 2:** 1890 Sherman Act Excerpt

AN ACT                    To protect trade and commerce against unlawful restraints and monopolies

***Be it enacted***        *by the Senate and House of Representatives of the United States of America in Congress assembled,*

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade among the several States, or with foreign nations, is hereby declared to be illegal.

**Figure 3: A Political-Cultural Model of the Relationship Between Diffusion and Legitimacy, with 3 Stylized Cases**



**Table 1: Descriptive Statistics**

*Analysis of Establishments (N=63)*

Variable	Mean	S.D.	Min	Max	<i>Correlations</i>										
					1	2	3	4	5	6	7	8	9	10	
1. Establishments	1.06	3.52	0	26											
2. Establishments <sub>t-1</sub>	1.08	3.55	0	26	.293										
3. Year	1898.	18.6	1867	1930	-.035	-.028									
4. Sherman Antitrust Era (1890-)	0.62	0.49	0	1	.143	.148	.839								
5. Trust Busting Era (1902-1920)	0.30	0.46	0	1	-.110	-.064	.440	.503							
6. NYT Articles with Antitrust	104.	113.	0	452	.051	.081	.718	.704	.587						
7. DOJ Appropriations	85.3	108.	0	300	-.236	-.208	.802	.611	.625	.728					
8. Pop. <sub>t-1</sub>	29.6.	24.4	1	68	-.018	.135	.811	.815	.760	.773	.733				
9. (Pop. <sub>t-1</sub> ) <sup>2</sup>	1453.	1551.	1	4624	-.071	.125	.686	.713	.814	.720	.666	.977			
10. DOJ Cases to Date <sub>t-1</sub>	68.8	95.6	0	286	-.181	-.182	.865	.561	.175	.527	.776	.541	.401		
11. DOJ Net Wins to Date <sub>t-1</sub>	211.	441.	-4	2051	-.145	-.146	.680	.373	-.099	.361	.514	.316	.194	.862	

*Analysis of Reorganizations (N=40)*

Variable	Mean	S.D.	Min	Max	<i>Correlations</i>									
					1	2	3	4	5	6	7	8		
1. Reorganizations	0.65	1.17	0	6										
2. Reorganizations <sub>t-1</sub>	0.65	1.17	0	6	-.036									
3. Year	1910.	11.69	1891	1930	.158	.207								
4. NYT Articles	166.	102.	26	452	.393	.308	.350							
5. Trust Busting Era (1903-1920)	0.48	0.51	0	1	.376	.376	.041	.380						
6. DOJ Appropriations	136.48	109.54	0	300	.346	.383	.741	.531	.464					
7. Pop.	44.58	17.79	10	68	.378	.292	.421	.490	.707	.521				
8. (Pop. <sub>t-1</sub> ) <sup>2</sup>	2295.	1372.44	100	4624	.392	.264	.253	.442	.754	.418	.978			
9. DOJ Cases to Date <sub>t-1</sub>	110.	100.61	1	286	.060	.125	.964	.224	-.150	.661	.183	.008		

**Table 2: Establishments<sup>†</sup> in New York, New Jersey and Pennsylvania Trusts, 1865-1930**

<i>Model Factors</i>	(Model 1)	(Model 2)	(Model 3)
Establishments <sub><i>t-1</i></sub>	-0.056 (0.027)*	-0.057 (0.024)*	-0.108 (0.039)**
Year	-0.031 (0.083)	-0.022 (0.095)	-0.011 (0.091)
NYT Articles mentioning “antitrust”	-1.112 (0.875)	-1.154 (0.813)	-1.891 (0.817)*
Sherman Antitrust Era Dummy (1890-)	1.675 (0.515)**	1.947 (0.617)**	3.128 (0.705)**
Trust Busting Era Dummy (1903-1918)	0.005 (0.004)	0.003 (0.003)	0.005 (0.004)
Antitrust Appropriation	-0.045 (0.018)*	-0.013 (0.020)	0.002 (0.013)
Population <sub><i>t-1</i></sub>	0.398 (0.133)**	0.485 (0.163)**	0.422 (0.145)**
(Population <sub><i>t-1</i></sub> ) <sup>2</sup>	-0.006 (0.002)**	-0.007 (0.002)**	-0.005 (0.002)**
DOJ Cases to date <sub><i>t-1</i></sub>		-0.058 (0.050)	
DOJ Net Wins to date <sub><i>t-1</i></sub>			-0.148 (0.066)*
Constant	54.931 (155.055)	37.905 (177.994)	18.783 (170.739)
Observations	63	63	63
d.f.	8	9	9
LL	-45.729	-43.375	-42.510
Model Ch.		1.319	5.080*

<sup>†</sup> ML Estimation of negative binomial regression of yearly establishments;  
robust standard errors in parentheses.  
Significance: +  $p < .10$ ; \*  $p < .05$ ; \*\*  $p < .01$ ; \*\*\*  $p < .001$ .  
Hypothesis tests are 1-tailed; others, 2-tailed.

**Table 3: Reorganizations<sup>†</sup> of New York, New Jersey and Pennsylvania Trusts, 1865-1930**

<i>Model Factors</i>	(Model 1)	(Model 2)
Reorganizations <sub><i>t-1</i></sub>	-0.257 (0.190)	-0.114 (0.243)
Year	0.401 (0.140)**	0.199 (0.180)
NYT Articles mentioning “antitrust”	-0.001 (0.002)	-0.001 (0.002)
Trust Busting Era Dummy (1903-1918)	0.937 (0.806)	1.166 (1.071)
Antitrust Appropriation	-0.000 (0.003)	-0.003 (0.004)
Population <sub><i>t-1</i></sub>	1.684 (0.865)*	2.783 (1.023)**
(Population <sub><i>t-1</i></sub> ) <sup>2</sup>	-0.012 (0.007)*	-0.019 (0.008)**
DOJ Cases to date <sub><i>t-1</i></sub>		0.054 (0.029)*
Constant	-823.551 (285.366)**	-484.534 (349.795)
Observations	40	40
d.f.	7	8
LL	-31.630	-30.34
Model Ch.		3.518+

<sup>†</sup> ML Estimation of negative binomial regression of yearly establishments;  
robust standard errors in parentheses.  
Significance: + $p < .10$ ; \* $p < .05$ ; \*\* $p < .01$ ; \*\*\* $p < .001$ .  
Hypothesis tests are 1-tailed; others, 2-tailed.

## APPENDIX A

Sections 1 and 2 of The Sherman Antitrust Act of 1890, emphasis added

**Sec. 1.** 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, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.

**Sec. 2.** *Every person who shall monopolize, or attempt to monopolize,* or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

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