Unit 3: A Brief History of Antitrust Law

(with special attention to merger antitrust law)

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

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Topics

- The common law approach to antitrust law
- The evolution of antitrust law
- Modern critiques of merger antitrust law
- Some pending legislation

Source: New York Globe, 1907

The Common Law Approach to Antitrust Law

The common law approach to antitrust law

- Almost uniquely in American jurisprudence, the broad and largely uninformative language of the antitrust statutes means that the courts rather than Congress determine how the antitrust laws will be applied
  - This is an intentional part of the design of U.S. antitrust law from the beginning[1]
  - Framers of the Sherman Act used *common law terms of art*—"contracts in restraint of trade," conspiracies in restraint of trade," monopolization—to enable the federal courts to continue to develop antitrust rules through the common law process
  - The Clayton Act and the FTC Act, both enacted in 1914, added two more phrases requiring judicial construction: "may be substantially to lessen competition" and "unfair methods of competition," respectively

[1] *See* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 Tex. L. Rev. 661 (1982).

The common law approach to antitrust law

[S.1, the Sherman antitrust bill,] does not announce a new principle of law, but applies old and well recognized principles of common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union are now, by common law or statute law, null and void. . . .

. . . The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interest of the United States that have been applied in the several States to protect local interests.

Sen. John Sherman[1]

[1] 21 Cong. Rec. 2455 (Mar. 21, 1890) (remarks of Sen. John Sherman (R. Ohio)). For similar sentiments that the various iterations of the antitrust bill were all to enable the courts to apply the common law regarding business enterprises, see 20 Cong. Rec. 1167 (Jan. 25, 1889) (Sherman); 21 Cong. Rec. 2456, 2457, 2459 (Mar. 21, 1890) (Sherman); 21 Cong. Rec. 2729 (Mar. 27, 1890) (remarks of Sen. George F. Hoar (R., Mass); 21 Cong. Rec. 3149 (Apr. 8, 1890) (statement of Sen. Morgan);); 21 Cong. Rec. 3152 (Apr. 8, 1890) (Hoar).

Political value judgment

- How to operationalize the common law terms in antitrust law is a political value judgment
  - Determined by the courts in the absence of congressional direction
  - In the 130-year history of antitrust law, Congress has intervened in the common law process to change the law or the direction of the courts only four times:
    - 1912: The Clayton and Federal Trade Commission Acts[1]
    - 1936: The Robinson-Patman Act[2]
    - 1937: The Miller-Tydings Act and its subsequent repeal[3]
    - 1950: The Celler-Kefauver Act[4]

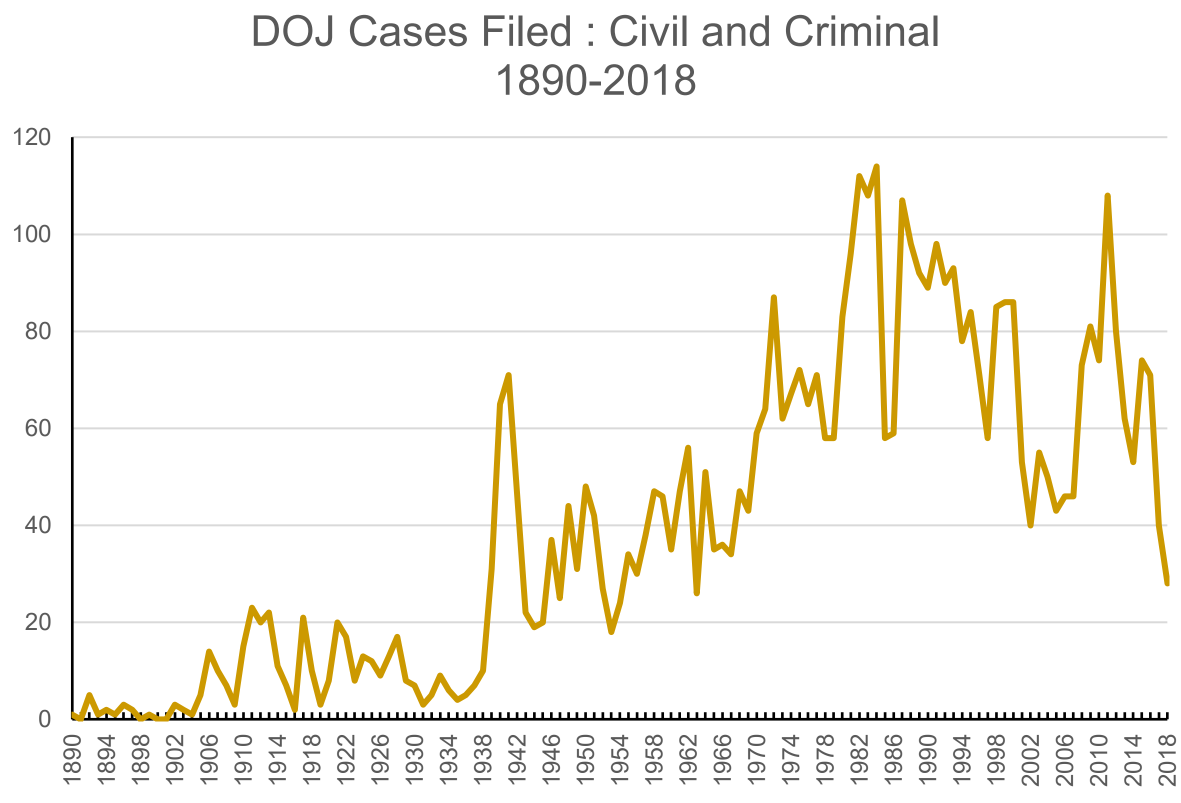
- Current prospects for legislative reform
  - We were as close in the last Congress as we have been in 70 years to amending the substantive prohibitions of the antitrust laws in very significant ways—but none of the bills reached a floor vote in either chamber
  - While perhaps some legislation will be enacted narrowly targeted to the dominant high-tech firms, efforts for a general overall of the antitrust laws appear to be dead

[1] Clayton Act, ch. 323, 38 Stat. 730 (1914) (current version at 15 U.S.C. §§ 12 to 27); Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-58).
[2] Ch. 592, § 1, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 13-13a).
[3] Ch. 690, 50 Stat. 693 (1937), *repealed*, Pub. L. 94-145, 89 Stat. 801 (1975).
[4] Ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (1976)).

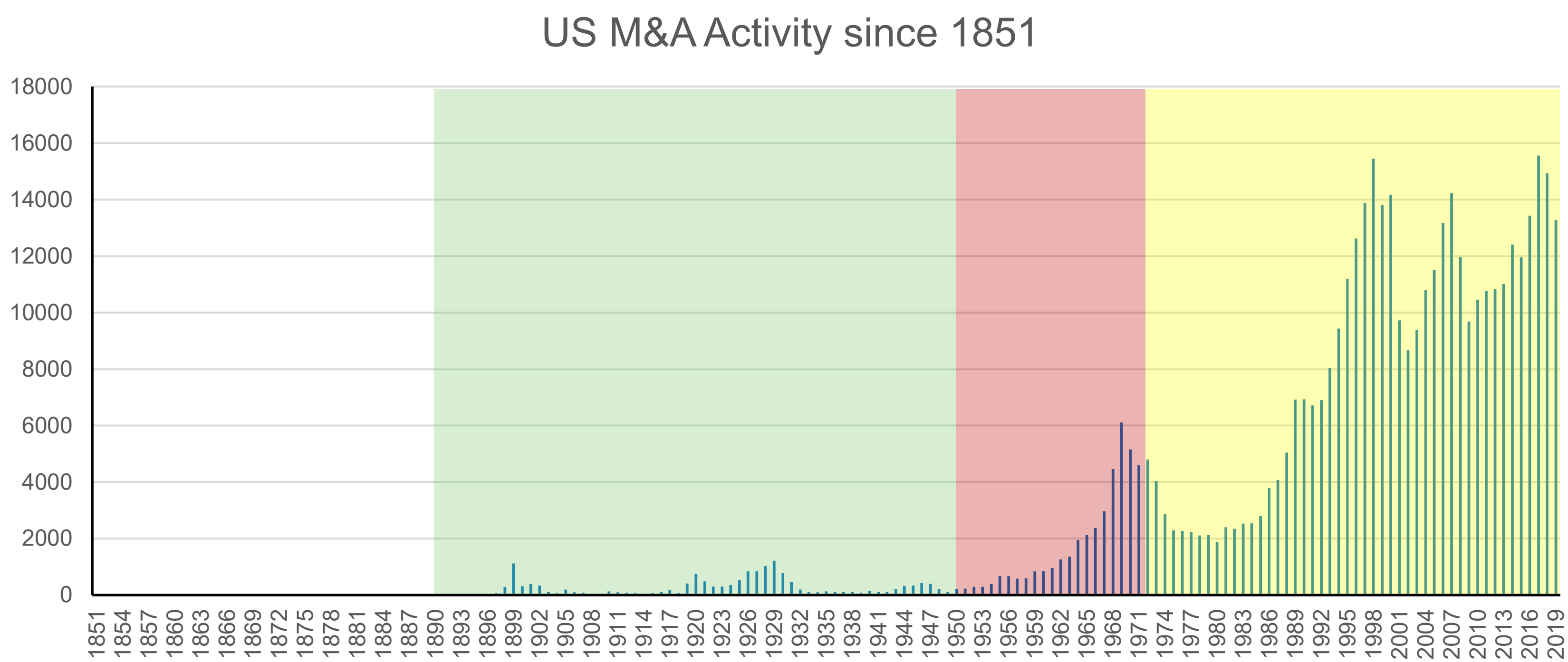
The Evolution of Antitrust Law

Antitrust law over time

- The goals of antitrust law in general—and the intensity of antitrust enforcement—have changed dramatically over the last 130+ years



Antitrust law over time



Essentially no enforcement

Very hostile toward horizontal and vertical mergers[1]

Moderate enforcement against horizontal mergers

Source: Institute for Mergers, Acquisitions and Alliances, M&A Waves in the United States since 1851 (for M&A activity)

[1] The uptick in M&A activity during this period was largely comprised of conglomerate mergers, which the agencies (with few notable and mostly unsuccessful exceptions) did not challenge.

The first decade (1890-1902)

- The Sherman Act
  - Enacted in 1890
  - Prohibitions
    - Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . . "
    - Section 2 provides that "[e]very 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" violates the law
  - Key questions for the courts
    1. Federal authority to enact the antitrust laws is provided by the Commerce Clause.[1] What conduct is within the reach of the Commerce Clause?
    2. Section 1 of the Sherman Act prohibits "*every* contract, combination . . or conspiracy" in restraint of trade. Should the text be read literally or are only unreasonable restraints of trade unlawful?

       NB: The meaning of "monopolize" was not a significant question for the courts. In common law and legislative history, monopolization meant cornering a market through predatory or exclusionary acts. This definition was accepted by the courts without controversy.

[1] U.S. const. art I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;").

The first decade (1890-1902)

- The Sherman Act
  - The reach of the Commerce Clause
    - In *United States v. E.C. Knight*,[1] the Supreme Court, in its first decision under the Sherman Act, rejected a challenge to the Sugar Trust's acquisition of its last four major competitors for lack of subject matter jurisdiction
      - The Court read the bill to allege an unlawful restraint of manufacturing
      - Held:
        - Manufacturing is not "commerce" within the meaning of the Commerce Clause
        - Commerce requires commercial "intercourse" across state lines
          - That is, the companies must be engaged "in commerce"
      - Sherman Act can reach—
        - Price fixing of interstate freight rates[2]
        - Price fixing of goods sold in interstate commerce[3]
        - Labor unions interfering with interstate transportation (e.g., railroad labor strikes)[4]
      - As a practical matter, halted the use of the Sherman Act against acquisitions
        - Section 7 of the Clayton Act of 1914 affirmed congressional intent that the antitrust laws prohibit anticompetitive mergers (to the extent they where "in commerce" and hence reachable)

[1] 156 U.S. 1 (1895).
[2] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898).
[3] Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), *abrogating* Hopkins v. United States, 171 U.S. 578 (1898), *and* Anderson v. United States, 171 U.S. 604 (1898).
[4] *E.g.*, Workingmen's Amalgamated Council v. United States, 57 F. 85 (5th Cir. 1893).

The first decade (1890-1902)

- The "every" restraint debate
  - In its first two price-fixing cases, the Supreme Court, in opinions written by Justice Rufus R. Peckham, held that the Section 1 prohibited *every* agreement that restrained trade within the reach of the Commerce Clause, regardless of whether the restraint was unlawful under the common law[1]
    - Edward Douglass White led the dissenters, who would have held that the Sherman Act's use of common law terms meant that only *unreasonable* restraints of trade were unlawful under the Sherman Act. (But this begs the question of when is a restraint unreasonable)
  - The tension arose because *Trans-Missouri*, the Supreme Court's first horizontal price-fixing case, was heard in a procedural posture ("bill and answer") that required the courts to accept that the prices fixed were "just and reasonable"[2]
    - If reasonableness was the test, did the setting of just and reasonable prices mean that the horizontal price-fixing arrangement was lawful? Peckham and the majority probably believed so, and so rejected reasonableness as the test of legality of a restraint.
    - The White-led minority would have applied the common law reasonableness test applied to a class of practices—here, horizontal price fixing—and that the reasonableness of any particular horizontally-fixed prices was irrelevant

[1] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898).
[2] *Trans-Missouri*, 166 U.S. at 304.

The Roosevelt/Taft era (1902-1912)

- The Sherman Act was used to dismantle a few (but not all) of the major trusts that had been created though acquisitions
  - Most notably, Standard Oil and American Tobacco
- *Northern Securities* (1904)[1]
  - Five months into his presidency, Roosevelt ordered his attorney general to bring suit against J.P. Morgan's attempt to consolidate the only two railroad trunk lines serving the northern part of the United States
    - This was the second antitrust case against an ownership consolidation
    - Shocked the business community, since from the beginning presidents had been largely hostile to enforcing the Sherman Act (at least in non-labor cases)
  - Made Theodore Roosevelt's reputation as a "trust buster"
  - Plurality opinion (Harlan): "[E]very combination or conspiracy which would extinguish competition between otherwise [competitors] . . . engaged in interstate trade or commerce, and which in that way restrain such trade or commerce, is made illegal by the act."[2]
    - Restored use of the Sherman Act against mergers involving companies that operated across state lines where the merger would restrain interstate trade

[1] Northern Securities Co. v. United States, 193 U.S. 197 (1904).
[2] *Id*. at 331 (emphasis in original).

The Roosevelt/Taft era (1902-1912)

- *Northern Securities* could be read as a per se rule against horizontal ownership combinations "in commerce"

- Roosevelt: Good trusts" vs. "bad trusts"
  - Did not apply *Northern Securities* to its fullest extent
  - Used prosecutorial discretion
    - to challenge only those business combinations that he thought increased prices, reduced output, or otherwise harmed competition ("bad trusts"),
    - while allowing combinations that increased productive efficiency and expanded output ("good trusts")

- Taft: Aggressive against all "trusts"
  - Rejected Roosevelt's distinction between "good" and "bad" trusts
  - Employed *Northern Securities* rule to the fullest extent
  - Resulted in one of the more aggressive periods of antitrust enforcement

Wilson reforms (1913-1914)

- Clayton Act of 1914
  - *Standard Oil*[1] and the "rule of reason"
    - Supreme Court found Standard Oil violated Section 1 and ordered it to be broken up
      - Challenged, among other things, numerous acquisitions made by the Standard Oil "trust"
      - Perhaps the most important of all antitrust cases
    - Chief Justice Edward Douglass White wrote the opinion for an all but unanimous Court[2]
      - White, who wrote the dissent in *Trans-Missouri*, became chief justice in 1910
      - Since *Northern Securities* was decided in 1904, four new members had joined the Court
    - *Held*, Section 1 only prohibited only *unreasonable* restraints (creating the "rule of reason")
      - To avoid overruling the Supreme Court cases holding that horizontal price-fixing agreements violated the Sherman Act even if the fixed rates were just and reasonable, White wrote that some restraints were per se unreasonable (thus creating the "per se rule")
  - Congress, uncertain of how the courts would apply the new "rule of reason," enacted the Clayton Act to identify certain specific business activities as antitrust violations
    - More to the point here, the Clayton Act in effect specified that the nature of the reasonableness test: whether the effect of the practice "may be to substantially lessen competition or tend to create a monopoly in any line of commerce"[3]

[1] Standard Oil Co. v. United States, 221 U.S. 1 (1911).
[2] Justice John Marshall Harlan, author of *Northern Securities*, wrote a separate opinion, concurring in part and dissenting in part.
[3] Ch. 323, § 2 (price discrimination), § 3 (exclusive dealing and tying arrangements), *see id.* § 7 (mergers).

Wilson reforms (1913-1914)

- Clayton Act of 1914
  - Section 7 of the Clayton Act was directed specifically at prohibiting mergers and acquisitions that were likely to be anticompetitive:

> [N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.[1]

- Congress enacted Section 7 out of concern that the courts would not find anticompetitive mergers violated Section 1 of the Sherman Act under the new judicial "rule of reason"

[1] Clayton Act § 7, ¶ 1, ch. 323, § 7, 38 Stat. 730, 731 (Oct. 15, 1914) (later amended).

Wilson reforms (1913-1914)

- Clayton Act of 1914 (con't)
  - But the narrow drafting of Section 7 severely constrained its application
    1. Applied only to "corporations" and not other types of persons
    2. Applied to only corporations engaged "in commerce," that is, in the flow of commerce that crossed state lines (consistent with the Commerce Clause jurisprudence at the time)
    3. Limited to stock acquisitions and did not apply to asset acquisitions
       - Commonly called the "asset loophole"
       - The limitation to corporate stock acquisitions was probably intentional: Congress' principal concern was with the activities of holding companies and specifically with the practice whereby corporations secretly acquired control of their competitors by purchasing the stock of those companies
    4. Widely viewed as limited to horizontal acquisitions
       - The provision prohibited acquisitions that would "substantially lessen competition *between* the corporation whose stock is so acquired and the corporation making the acquisition" (emphasis added)
       - This interpretation ignored the remaining language that prohibited acquisitions that would "restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce"[1]
  - Given the limitations read into the original Section 7, the provision became regarded as toothless (largely because of the asset loophole) and was rarely invoked by the agencies[2]

[1] This limited interpretation of the original act was ultimately but belatedly rejected by the Supreme Court in United States v. E.I. duPont de Nemours & Co., 353 U.S. 586 (1957).
[2] For more on the history of the enactment and its subsequent application by the courts, see DAVID DALE MARTIN, MERGERS AND THE CLAYTON ACT 3-221 (1959).

Wilson reforms (1913-1914)

- The FTC Act
  - History
    - President Wilson, consistent with the Democratic Party's election platform, initially favored a statutory solution clearly delineating those business practices to be prohibited
      - This became the Clayton Act. As he considered the problem, however, Wilson was also persuaded by the progressives in his party, particularly his influential adviser Louis D. Brandeis, that the addition of adaptable administrative regulation on top of a more precise statute offered the best means of regulating anticompetitive conduct as business practices and trade conditions changed in the future[1]
    - With Wilson's support, Congress passed both the Clayton Act[2] and the Federal Trade Commission Act[3] on October 15, 1914
  - Provisions
    - Substantively, Section 5 of the FTC Act broadly made unlawful all "[u]nfair methods of competition" in commerce.
    - The FTC Act also established a new independent regulatory agency—the Federal Trade Commission—and endowed it with discretion to define and enjoin deceptive trade practices and unfair methods of competition[4]
    - But Congress limited enforcement of the FTC Act to the FTC
      - Neither the DOJ nor private parties can bring an action under the FTC Act

[1] *See* II ARTHUR S. LINK, WILSON 433-40 (1956).
[2] Pub. L. No. 63-212, ch. 323, 38 Stat. 730 (Oct. 15, 1914) (current version at 15 U.S.C. §§ 12-27).
[3] Pub. L. No. 63-203, ch. 311, 38 Stat. 717 (Oct. 15, 1914) (current version at 15 U.S.C. §§ 41 et seq.)
[4] *Id*. at §§ 1, 5, 15 U.S.C. §§ 41, 45. The extent of this discretion is likely to be tested shortly in court with respect to a legislative rulemaking regarding noncompetitive covenants (which the NPRM would declare per se unlawful).

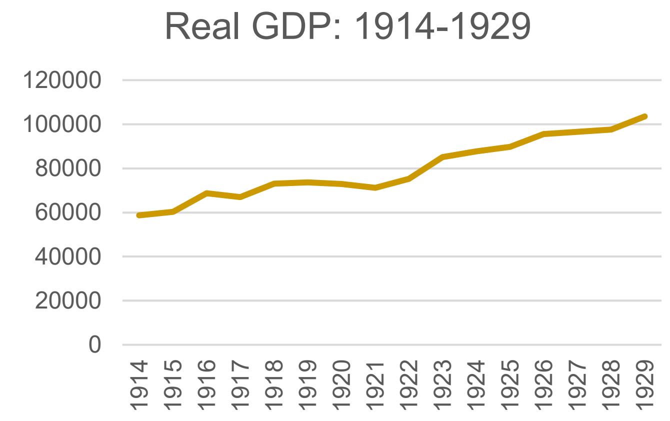
Wilson reforms (1913-1914)

- The FTC Act (con't)
  - Application of Section 5 to mergers
    - In principle, the FTC could have used its discretion under Section 5 to prohibit anticompetitive mergers that Section 7 could not reach
      - *Example*: A merger involving a noncorporate entity or, more likely, an acquisition of assets
      - Even so, "in commerce" jurisdictional requirement still had to be satisfied
  - But then World War I happened

World War I/Roaring Twenties (1914-1929)

- Antitrust enforcement generally, and merger antitrust enforcement in particular, took a hiatus
- WWI mobilization, much of which required extensive coordination among companies facilitated by the government, increased real GDP by 23% between 1914 and 1920[1]
  - Compound average growth rate (CAGR) = 3.5%
  - Suggested business coordination was a good thing
- After WWI, real GNP increased by 46.6% between 1921 and 1929 (CAGR = 4.9%)

Attitude: *The economy is not broken, so don't try to fix it by enforcing the antitrust laws*



[1] *See* U.S. Bureau of Census, Historical Statistics of the United States, Earliest Times to the Present: Millennial Edition 3-59 Ser. Ca191 (2006) (for real GDP statistics by year in 1996 dollars).

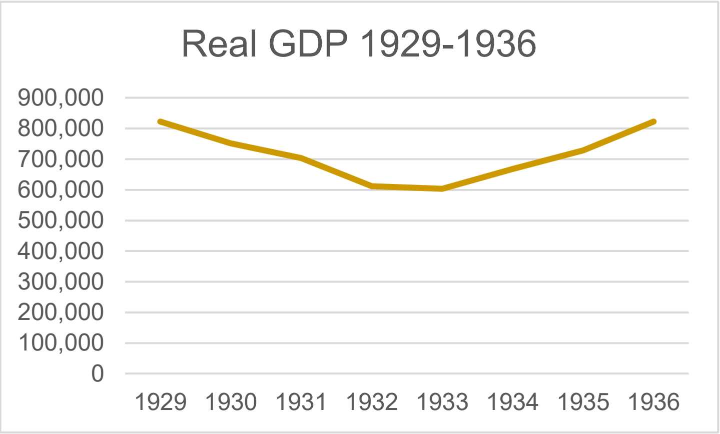
The Great Depression Era (1929-1936)

- The hiatus continues
- Real GDP fell by 18.7% between 1929 and 1934 (CAGR = -4.1%)

Attitude: *Firms need to cooperate in order to survive, so don't enforce the antitrust laws*

- Real GDP increased by 12.9% between 1935 and 1936 (CAGR = 12.9%)

Attitude: *The economy is improving; don't break it by enforcing the antitrust laws*

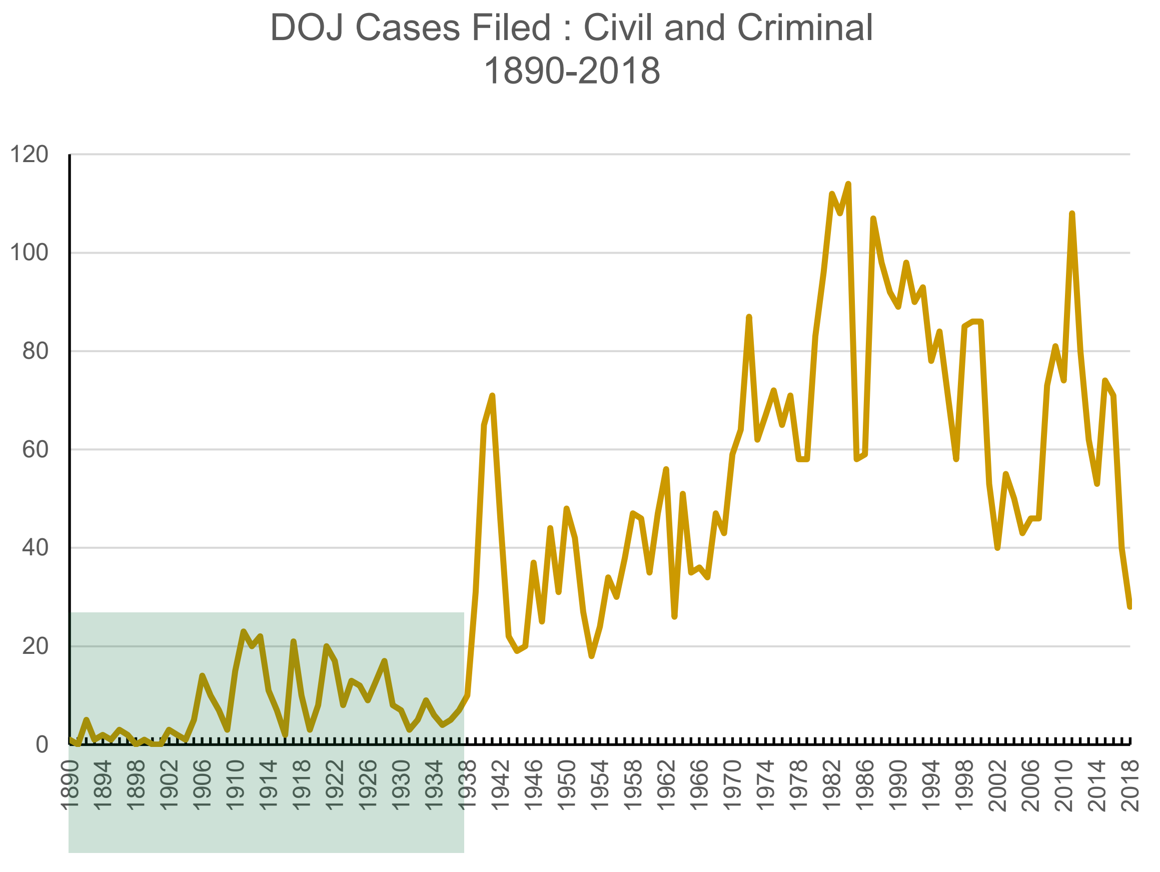


Summary: The first 47 years

- *Bottom line*: Antitrust law was largely non-interventionist from 1890 to 1937
  - Some blips in the second Roosevelt and Taft administrations and to a somewhat lesser extent in the Wilson administration
  - But overall—
    - Prior to WWI, antitrust enforcement was largely constrained the limited reach of the Commerce Clause, a restrictive view of antitrust law by the courts, and presidential reluctance (with the exception of Taft and the partial exception of Theodore Roosevelt)
    - Enthusiasm for more aggressive antitrust enforcement emerged in the Wilson administration, but was stymied by the onset of World War I
    - WWI mobilization, much of which required extensive coordination among companies, increased real GDP by 23% between 1914 and 1920[1]
      - Compound average growth rate (CAGR) = 3.5%
    - The economic boom in 1920s increased real GNP by 46.6% between 1921 and 1929
      - Compound average growth rate (CAGR) = 4.9%
    - The Crash in 1929 and subsequent Great Depression

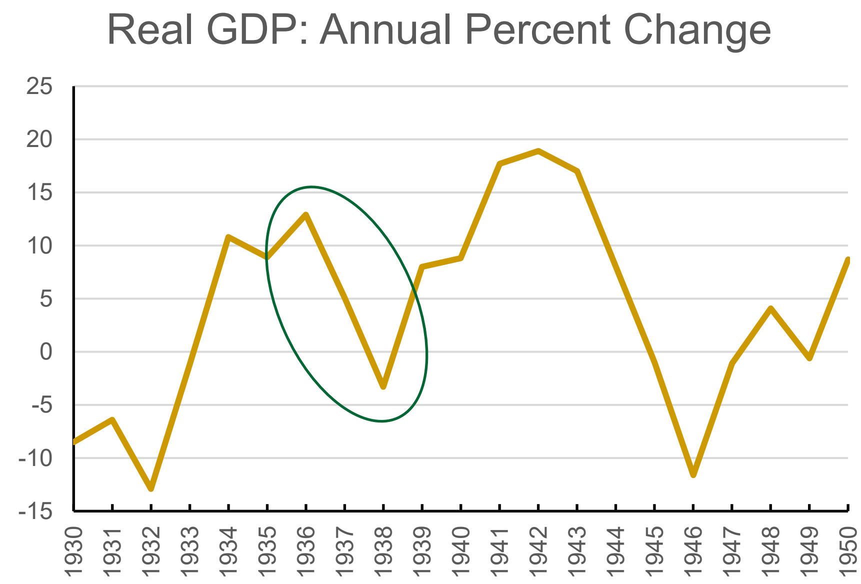
The result: *A "hands off" antitrust attitude throughout most of the entire period*

Summary: The first 47 years



The 1937-1938 recession and its aftermath

- Attitudes quickly changed in 1937 as a major recession hit
  - By early 1937, production, profits, and wages had regained their early 1929 levels
- But then a deep recession hit (May 1937-June 1938)
  - Third worst recession in the twentieth century
  - Real GDP dropped 10%
  - Industrial production declined by 32%
  - Unemployment rate jumped from 12.2% in May 1937 to 20.0% in June 1938
- The FDR administration came under assault in a very heated political environment



The 1937-1938 recession and its aftermath

- Roosevelt's response
  - Roosevelt argued that big businesses were trying to ruin the New Deal by causing another depression that voters would react against by voting Republican[1]
    - In fact, the recession was probably due to—
      - a reduction of the money supply caused by new Federal Reserve and Treasury Department policies, and
      - a contractionary fiscal policy due to an increase in taxes from the new Social Security program and a decrease in spending because of the expiration of the WWI veterans bonus[2]
  - As part of this campaign, Attorney General Homer Cummings and new Assistant Attorney General for Antitrust Robert Jackson began an aggressive enforcement program
    - Primarily against price-fixing cartels
    - ALCOA monopolization case filed in early 1937

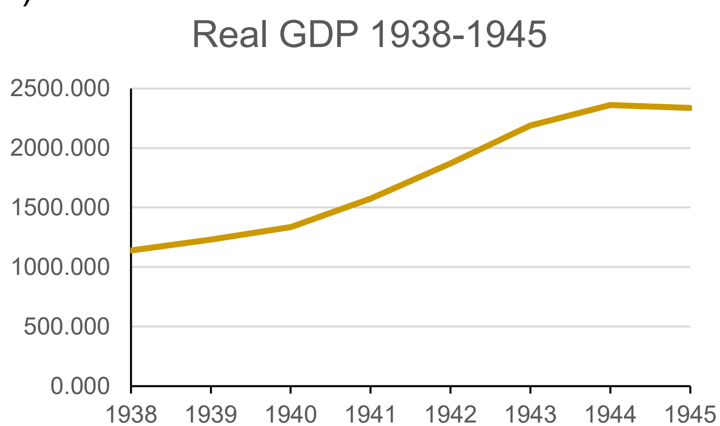
Mergers, however, did not appear to be a target

  - Aggressive antitrust enforcement continued through the 1940s
    - Thurman Arnold continued the program when he was appointed to replace Jackson in 1938
    - Jackson became Solicitor General and then Attorney General in 1940
  - Policy sustained with continued rapid economic growth created by WWII mobilization
    - Real GDP increased by 102.6% between 1938 and 1945 with war mobilization (CAGR = 10.6%)

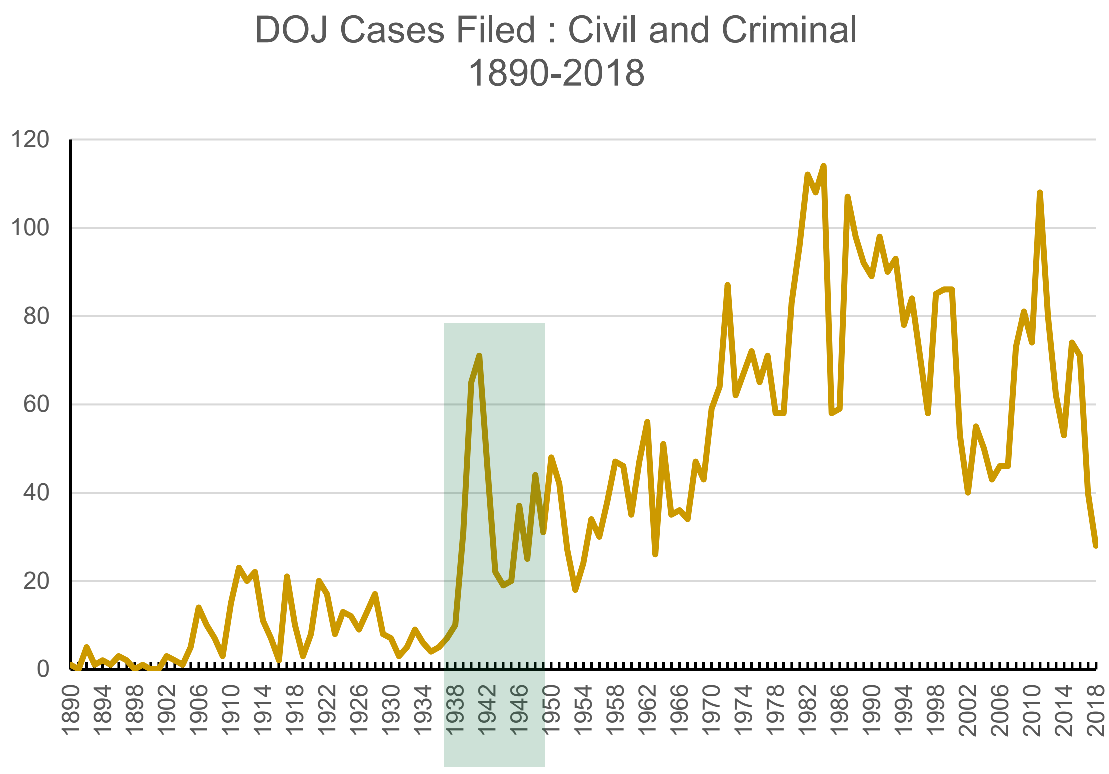
[1] *See, e.g.*, DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, at 352 (1999).
[2] See Christina Romer, *The Lessons of 1937*, THE ECONOMIST (June 18, 2009).

The 1937-1938 recession and its aftermath

- Roosevelt's response
  - Aggressive antitrust enforcement continued through the 1940s
    - AAG Thurman Arnold continued the program when he was appointed to replace Jackson in 1938
      - Jackson became Solicitor General in 1938, Attorney General in 1940, and Associate Justice of the Supreme Court in 1941
      - In 1945 and 1946, Jackson took a leave of absence from the Supreme Court to serve as first as U.S. Chief of Counsel for the prosecution of Nazi war criminals and then as United States Chief Prosecutor at the International Military Tribunal (the Nuremberg trials)
  - An aggressive enforcement policy was sustained by the continued rapid economic growth in the United States created by WWII mobilization
    - Real GDP increased by 102.6% between 1938 and 1945 with the war mobilization (CAGR = 10.6%)

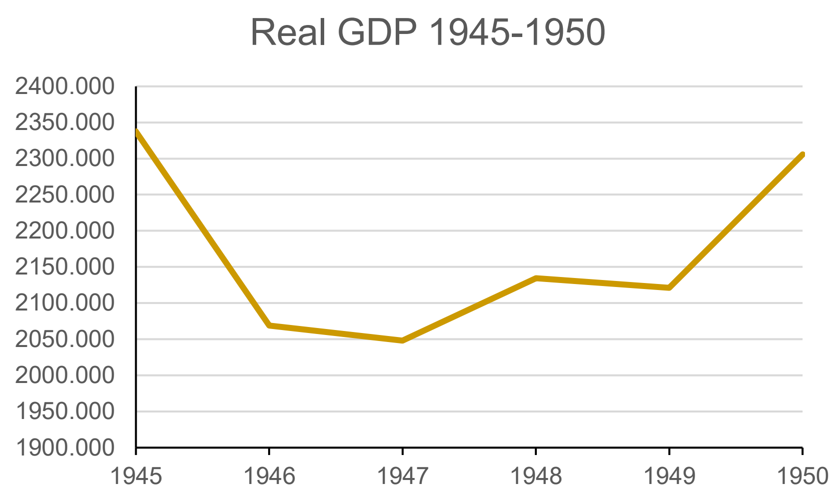


Late Depression/World War II (1937-1945)



Post-World War II (1946-1972)

- Following the end of WWII in 1945, the economy suffered a postwar recession with demobilization and decreased government spending



- Even so, the wartime's aggressive antitrust enforcement policy was sustained by the country's anti-big business attitude resulting from a continuing very negative reaction to the support given by large industrial enterprises to the Nazi Germany and Imperial Japanese regimes

Post-World War II (1946-1972)

- Very negative and widespread public reaction to the support by large industrial enterprises of the Nazi Germany and Imperial Japanese regimes
- Legislative change
  - Congress enacts the 1950 Celler-Kefauver Act[1] amendments to Section 7 to close some "loopholes" that had rendered Section 7 essentially meaningless
  - Equally if not more important than the specific changes in the statute, the legislative history of the amendments was aggressively hostile to business combinations
    - This is actually the aspect of the 1950 legislation that most influenced the courts
  - Major concerns expressed in the legislative history[2]—
    1. Fear of "the rising tide of economic concentration in the American economy"
    2. Loss of opportunity for small business when competing with large enterprises
    3. The spread of multistate enterprises and the loss of local control over industry

[1] Ch. 1184, 64 Stat. 1125 (1950) (amending Section 7 of the Clayton Act).
[2] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962).

Post-World War II (1946-1972)

- Congressional concerns were broadly shared by the public—and, apparently, by the courts
  - Supported a very restrictive merger antitrust regime
  - Did not require deep microeconomic analysis to implement
- Antitrust redirected: The new goals for the 1950s and 1960s—
  - Minimize industrial concentration beyond certain bounds
  - Maximize the prospects of survival of small businesses
  - Minimize restraints on freedom of choice of economic actors

Post-World War II (1946-1972)

- More on the 1950 Celler-Kefauver Act[1] amendments to Section 7 of the Clayton Act
  - Amended Section 7 to—
    - Expand coverage to asset acquisitions
    - Change anticompetitive effects language to current form (except for jurisdictional reach):

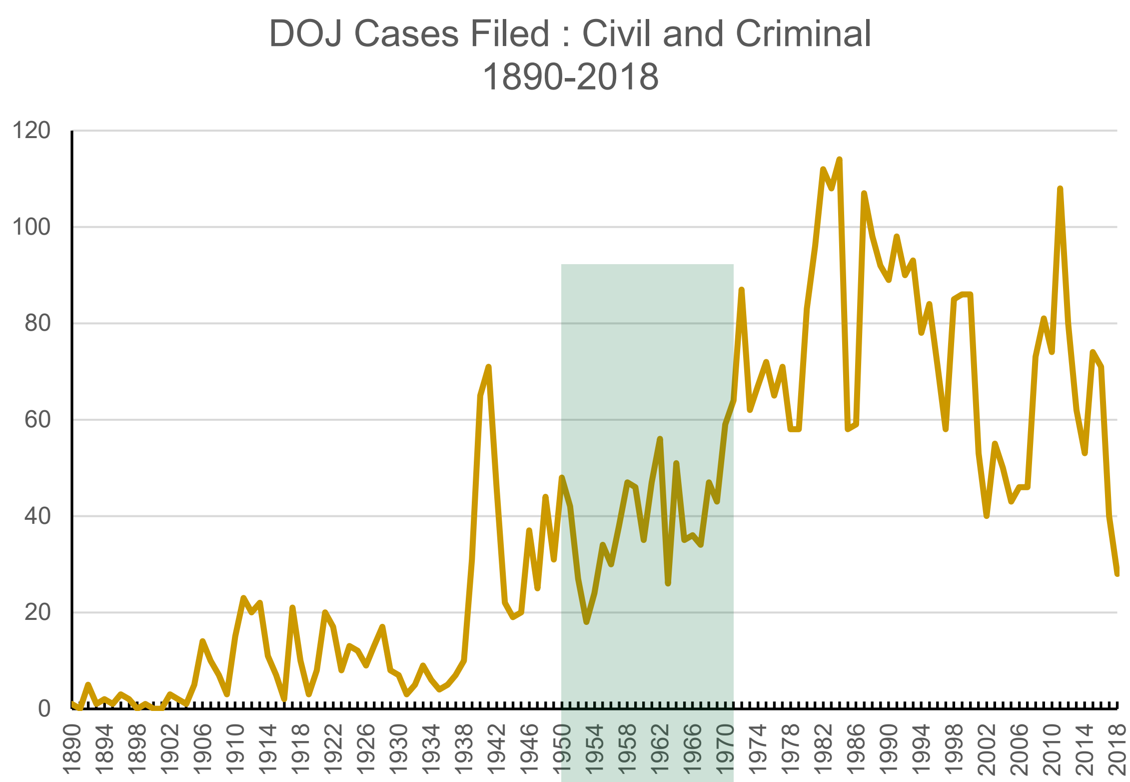
      > where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

  - The Supreme Court interpreted "may be" and "tend to" in the anticompetitive effects test to mean:
    - Only a *reasonable probability* that the proscribed anticompetitive effect will occur[2]
    - The plaintiff does not have to prove that an actual anticompetitive effect would occur
      - This is called the *incipiency standard*
  - Only two significant restrictions remained in Section 7 after the 1950 amendments
    - Applied only to "corporations" that are "in commerce"
    - Anticompetitive effect arguably had to be "in commerce"

[1] Ch. 1184, 64 Stat. 1125 (1950) (amending Section 7 of the Clayton Act).
[2] *See* United States v. E.I. duPont de Nemours & Co., 353 U.S. 586, 589 (1957); *accord* Brown Shoe Co. v. United States, 370 U.S. 294, 323 n.39, 325 (1962).

Post-World War II (1946-1971)

- The increasingly restrictive antitrust regime resulted in more prosecutions

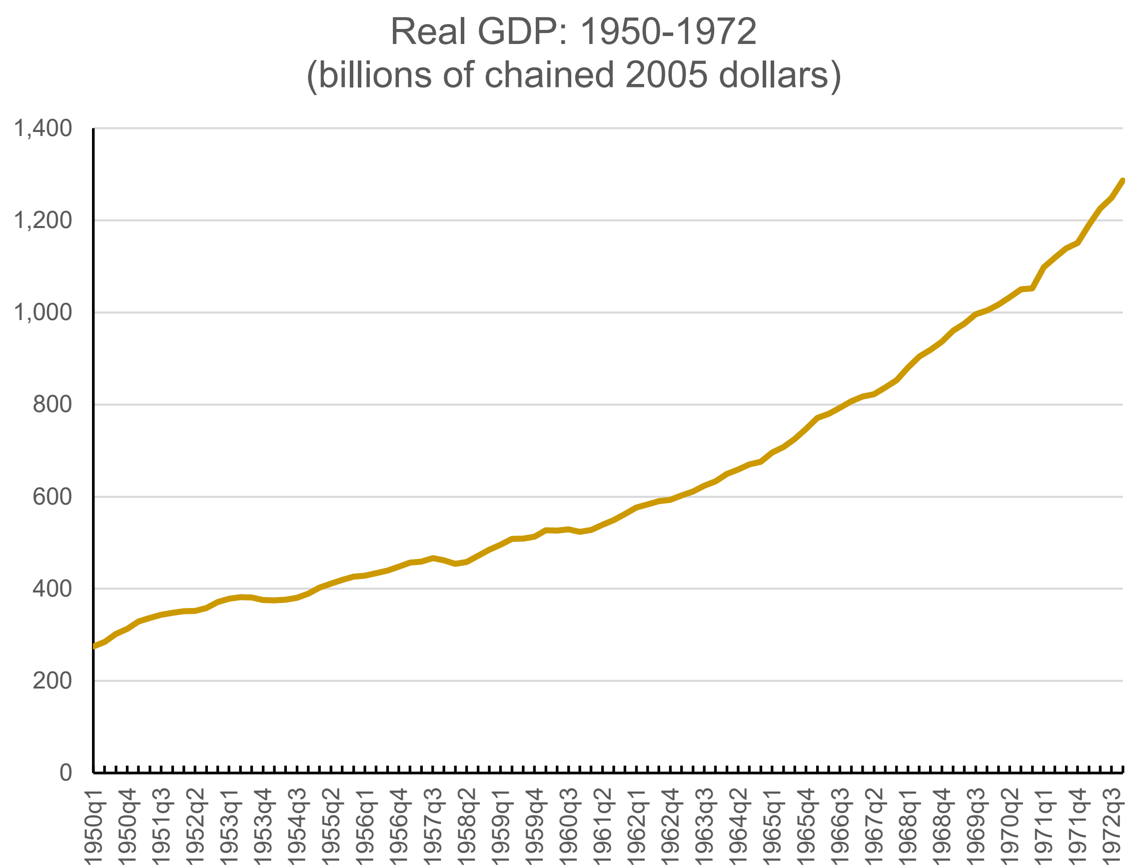


Post-World War II (1946-1972)

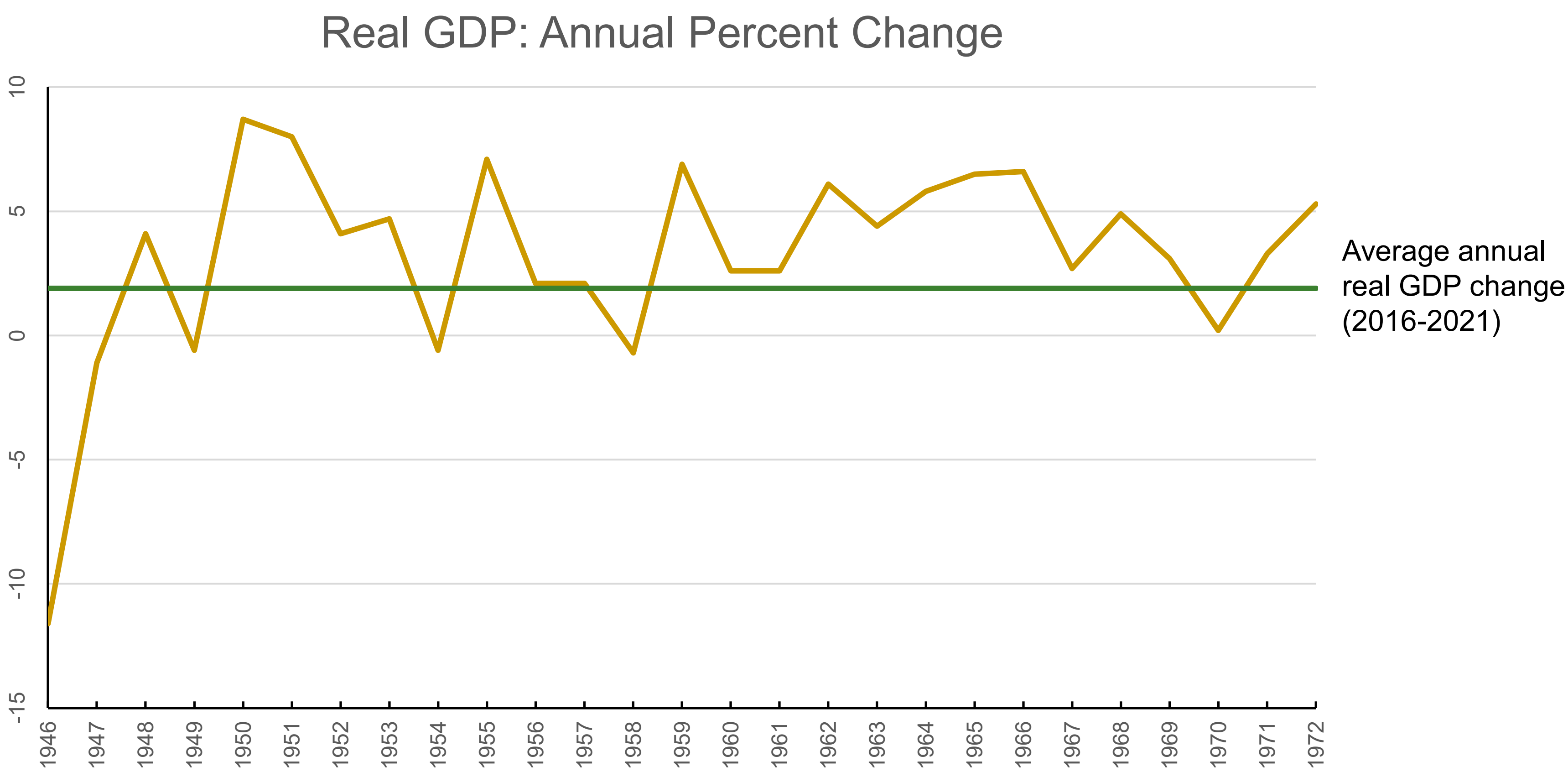
- To the extent this more aggressive antitrust enforcement policy reduced productive efficiency, neither Congress nor the public cared
  - Any inefficiencies became noise in the economic boom that followed WWI for two decades

Indicator	1950-1972
Real GDP (average annual growth)	4.1%
Nonfarm business productivity (average annual rate)	2.8%
Inflation (average annual change Dec. to Dec.)	2.6% Max = 6.2%
Bank prime loan rate (annual—data series starts in 1956)	5.8% Max =8.0%
Unemployment (average monthly rate)	4.6% Max = 7.5%
Median real family income (average annual change)	3.3%

Post-World War II (1946-1972)



Post-World War II (1946-1972)



Post-World War II (1946-1972)

- The post-WWII enforcement policy resulted in an increasingly restrictive antitrust regime
  - Further tightening on horizontal price fixing
    - Actually began somewhat earlier (*Socony-Vacuum* (1940))
    - Easing of rules to find concerted action (*Container Corp*. (1969))
  - Horizontal mergers—close to per se unlawful
    - E.g., *Brown Shoe* (1962), *PNB* (1963), *Pabst/Blast* (1966), *Von's Grocery* (1966), 1968 Merger Guidelines
  - Vertical mergers—close to per se unlawful
    - *DuPont/GM* (1957)
  - Conglomerate mergers seriously challenged
    - *P&G* (1958), *El Paso Natural Gas* (1964), *Falstaff* (1973), the DOJ potential competition campaign
  - Tightening of Section 2 prohibitions and enforcement
    - *Alcoa* (1945)
    - *Grinnell* (filed 1961), *IBM* (filed 1969), *AT&T* (filed 1974)
    - "Shared monopoly" theory

Post-World War II (1946-1972)

- The post-WWII enforcement policy resulted in an increasingly restrictive antitrust regime
  - Nonprice vertical restraints—per se unlawful
    - *Albrecht* (1968)
    - *Schwinn* (1967) (overruling *White Motor* (1963))
  - Reinforcement of tying arrangements as per se illegal
    - *Northern Pacific* (1958)
  - Tightening of rules on refusals to deal
    - *Associated Press* (1945) (horizontal boycott)
    - *Klor's* (1959) (secondary boycott)
  - Horizontal combinations/joint ventures
    - *Sealy* (1967)
    - *Topco* (1972)
  - Remedies and procedure
    - *DuPont* (1957): Essentially holding that the DOJ cannot be time-barred in a government injunctive action where there continued to be anticompetitive effects traceable to the challenged acquisition and permitting a challenge 30 years after acquisition to proceed on the merits
    - *Hanover Shoe* (1968): Holding that Clayton Act § 4 does not recognize a "passing on" defense

The "malaise" period (1973 to 1982)[1]

- "Stagflation" gripped the nation (know as the "Great Stagflation")[2]
  - Significant inflation resulting from the Mideast oil shocks in 1973 and 1979 and the expansionary monetary policy beginning in the late 1960s to finance the Vietnam War
  - "Productivity crisis" resulting from the obsolescence of "old economy" and equipment
- Substantial concern about U.S. competitiveness in the world market (especially against Japan) in areas that since WWII that had been traditional American strengths (e.g., automobiles, steel)
- Growing influx of imported manufacturing goods threatened some American industries in the domestic market (e.g., consumer electronics)
- Gasoline shortages/price controls resulting from OPEC output restrictions
- Economic growth significantly slowed down
  - Real GDP in the 20-year period up by only 20% (CAGR = 2.3%)

[1] My name for this period comes from a speech by President Carter. *See* Pres. Jimmy Carter, Crisis of Confidence, Televised Addressed to the Nation (July 15, 1979) (popularly known as the "Malaise Speech").

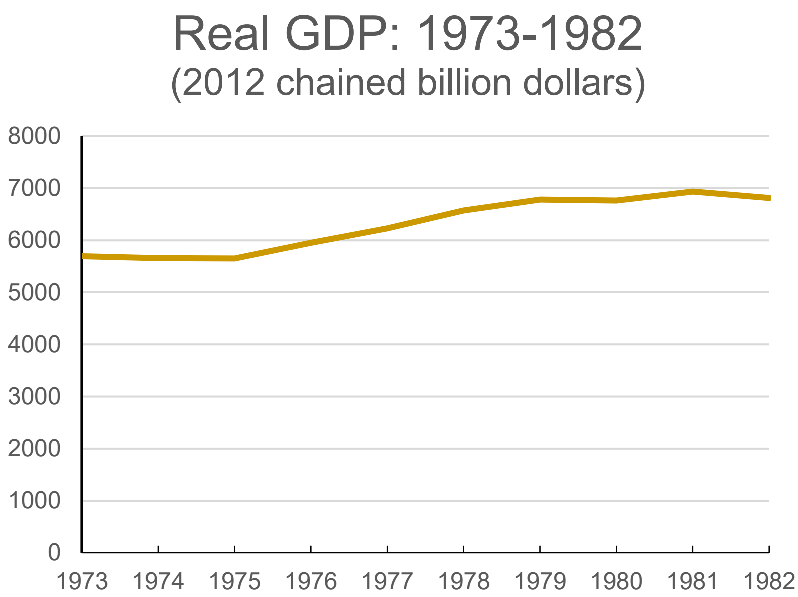
[2] "Stagflation" means low real growth and high inflation. *See generally* ALAN S. BINDER, ECONOMIC POLICY AND THE GREAT STAGFLATION (2013); PAUL M. SWEEZY, THE END OF PROSPERITY: THE AMERICAN ECONOMY IN THE 1970S (1977); Robert B. Barsky & Kilian Lutz, *Do We Really Know that Oil Caused the Great Stagflation? A Monetary Alternative*, *in* 16 NBER MACROECONOMICS ANNUAL 137 (2002).

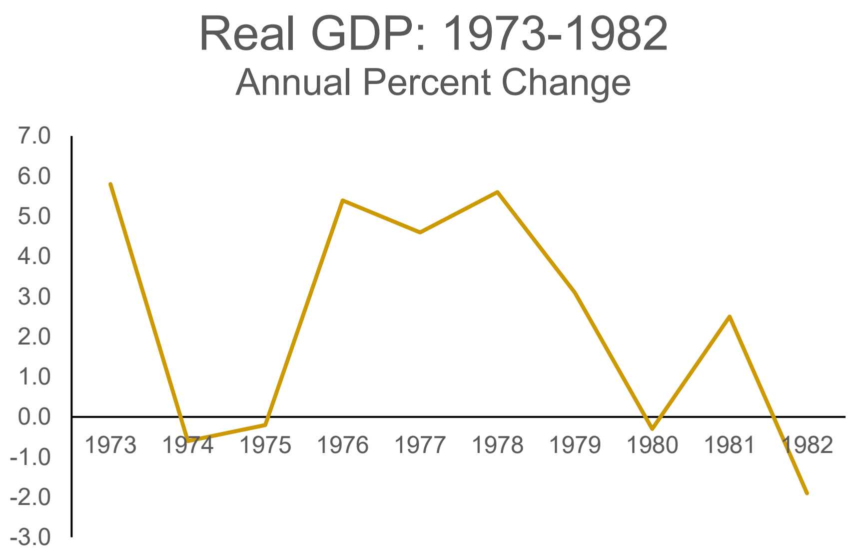
The "malaise" period (1973 to 1982)

- Economic conditions—Not good times
  - Especially compared to the last 22 years

Indicator	1950-1972	1973-1982
Real GDP (average annual growth)	4.1%	2.4%
Nonfarm business productivity (average annual rate)	2.8%	1.0%
Inflation (average annual change Dec. to Dec.)	2.6% Max = 6.2%	8.7% Max = 13.3%
Bank prime loan rate (annual—data series starts in 1956)	5.8% Max = 8.0%	11.10% Max = 18.9%
Unemployment (average monthly rate)	4.6% Max = 7.5%	7.0% Max = 10.8%
Median real family income (average annual change)	3.3%	-0.2%

The "malaise" period (1973 to 1982)





The "malaise" period (1973 to 1981)

- Emerging sentiment toward business
  - Government policies generally needed to be revised to:
    - Foster America's industrial competitiveness
    - Revive the nation's industrial base
    - Return to the country to the post-WWII standards of steady growth, low inflation, and low unemployment
  - WWII concerns about the evils of large industrial concentrations largely had dissipated
    - Could not afford to act on these concerns in any event, especially given the perceived success of the Japanese keiretsu
- Rapidly emerging perception/consensus that—
  - Many antitrust rules impeded efficient business operations and constrained competitiveness
  - Antitrust was a blunt and unnecessary instrument for achieving distributional goals
  - To the extent that distribution goals remain, other government instruments might be better suited to achieving them
- Strong political pressures to address these concerns

The “malaise” period (1973 to 1981)

- Strong political pressures to address these concerns at the end of the period
- Courts, and then reluctantly antitrust enforcement officials, responded to refocus antitrust law and enforcement on ensuring productive efficiency—
  - Courts began revising revised antitrust rules that were perceived as impeding productive efficiency (*General Dynamics* (1972), *GTE Sylvania* (1977))
  - Enforcement agencies (slowly) began to bring actions against business practices that impeded productive efficiency
  - Congress did not interfere with these changes

The “malaise” period (1973 to 1981)

- One legislative development: Antitrust Procedural Improvements Act[1]
  - Enacted in 1980 to expand and modernize the reach of Section 7
    1. Eliminated the limitation to corporations and made Section 7 applicable to acquisitions by and of any “person”
    2. Eliminated the requirement that the acquired and acquiring entities must be engaged “in commerce” and allowed Section 7 to reach entities “engaged in commerce or in any activity affecting commerce”
    3. Eliminated the requirement that the effect be “in any line of commerce” and expanded it to include effects in “any line of commerce or in any activity affecting commerce”
  - With the 1980 amendments, the reach of Section 7 became coextensive with the reach of the Commerce Clause
    - Just as with the Sherman Act

	Application	Subject matter jurisdiction	Type of acquisition	Type of transaction
Clayton Act (1914)	Corporations	“In commerce”	Stock	Horizontal
Celler-Kefauver Act (1950)			Stock and assets	All types
APIA (1980)	Persons	“In commerce” or any activity affecting commerce		

[1] Pub. L. No. 96-349, § 6(a), 94 Stat. 1157 (1980).

The "malaise" period (1973 to 1981)

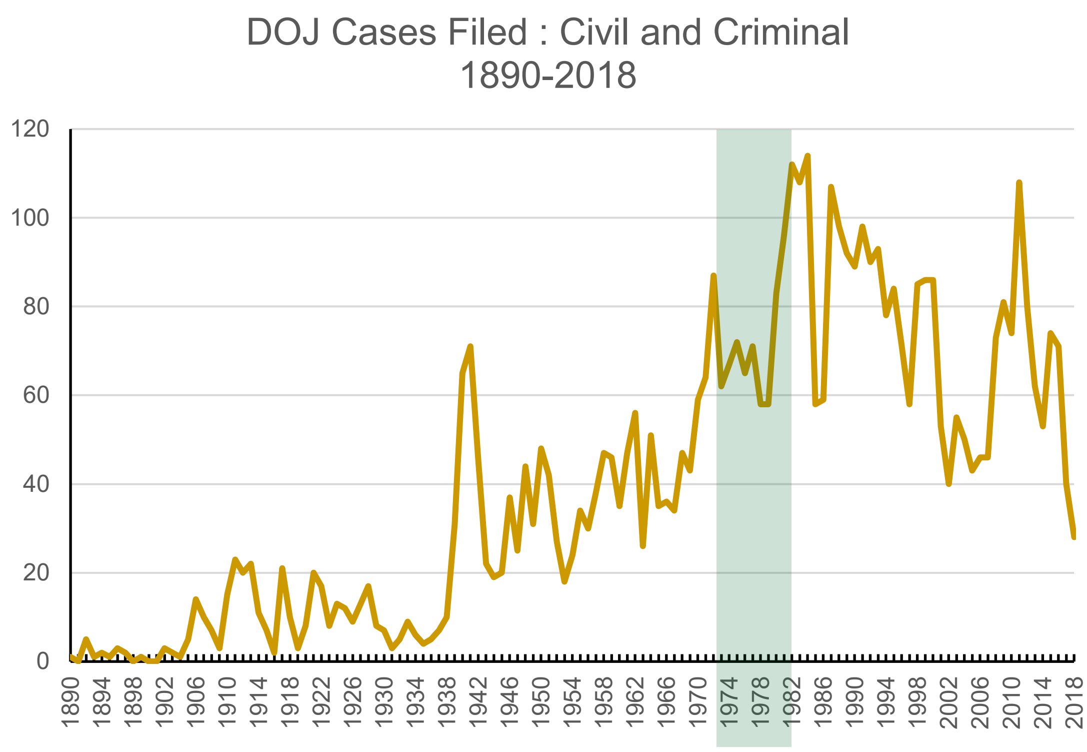
- As part of the response, courts begin to "loosen" antitrust restrictions to maximize output and industrial productivity
  - Antitrust narrowly limited to competition concerns
    - *Professional Engineers*
  - Explicitly adopt the "consumer welfare" standard
    - *Reiter*
  - Continued aggressive approach to horizontal price fixing
    - *Goldfarb*, *Gypsum*, *McLain*, *Catalano*, *Texas Industries*, *Hydrolevel*
  - Some loosening of Section 1 restraints on joint ventures
    - *Broadcast Music*
  - Horizontal mergers—near per se illegality being replaced by an economic effects analysis
    - *General Dynamics*
  - Vertical mergers—can be anticompetitive but increasingly remediated through "access" consent decrees
  - Potential competition mergers
    - Courts rejected DOJ's prosecution campaign

The "malaise" period (1973 to 1981)

- Courts begin to "loosen" antitrust restrictions to maximize output and industrial productivity
  - Section 2
    - General rejection of "shared monopoly" as an actionable theory of harm
    - But DOJ brought the *IBM* monopolization case in 1974
  - Nonprice vertical restraints—returned to rule of reason treatment
    - *GTE Sylvania*
  - Robinson-Patman Act
    - DOJ urges repeal, viewing the RPA as anticompetitive
    - DOJ and FTC essentially cease enforcing
  - Significant limitations on antitrust standing limited private parties' ability to sue
    - *Brunswick*, *Illinois Brick*, *J. Truett Payne*

Note: The DOJ and FTC resisted many of these changes throughout this period

The "malaise" period (1973 to 1981)



The modern period (1982 to present)

- Ronald Reagan elected president in 1980
  - Major emphasis on growing the economy by reducing government intervention in private affairs: The four Reagan economic planks—
    1. Reduce the growth of government spending
    2. Reduce the federal income tax and capital gains tax
    3. Reduce government regulation
    4. Tighten the money supply in order to reduce inflation
  - Stagflation brought under control—Economy starts to grow
- George Bush elected president in 1988
  - Largely continued Reagan's policies
  - DOJ and FTC issue 1992 Horizontal Merger Guidelines
- Bill Clinton elected president in 1992
  - After 1994 midterm election, adopted "triangulation" approach to policy-making
  - Somewhat more aggressive in antitrust enforcement, but did not materially alter antitrust enforcement goals

The modern period (1982 to present)

- Continued concern about increasing industrial output and productivity
  - Economic indicators during period have an upside-down “U” shape:
    - Recovering—not too gracefully—from the 1970s during 1983-1992
    - Reach affirmatively good times during 1993-2000 (which ended with the dot.com bust)
    - More stagnant times during 2001-2006 (with slow but steady recovery aided by an easy money policy and resulting in an asset bubble and significant overleveraging)
    - Financial crisis, deep recession, and very slow recovery since 2007
    - Just as business returned to doing well, COVID hit
  - But sustained growth, like that found in the post-WWII period, never returned to the U.S.
    - U.S. never politically regained the “luxury” of trading off output and efficiency for deconcentration/small business/freedom of economic choice concerns

The modern period (1982 to present)

- Introduces the modern consumer welfare standard
  - *New view*: Antitrust law should maximize output and industrial productivity to improve "consumer welfare"
    - The 1970s idea that antitrust law should maximize output and industrial productivity to restore America's competitiveness easily morphed into the "consumer welfare standard" in the 1980s
    - Robert Bork popularized the term "consumer welfare" in The Antitrust Paradox (1978):

> The only goal that should guide interpretation of the antitrust laws is the welfare of consumers. Departures from that standard destroy the consistency and predictability of the law; run counter to the legislative intent, as that intent is conventionally derived; and damage the integrity of the judicial process by involving courts in grossly political choice for which neither the statutes nor any other acceptable source provide any guidance.
>
> In judging consumer welfare, productive efficiency, the single most important factor contributing to that welfare, must be given due weight along with allocative efficiency. Failure to consider productive efficiency—or, worse, the tendency to view it as pernicious by calling it a "barrier to entry" or a "competitive advantage– is probably the major reason for the deformation of antitrust's doctrines.[1]

[1] ROBERT BORK, THE ANTITRUST PARADOX 405 (1978). WDC: I seriously question Bork's reading of the legislative intent in acting the Sherman Act. The Sherman Act was an anticartel statute and the framers almost surely were more concerned with wealth transfers between consumers and producers than any notion of economic efficiency. *See* Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 Fordham L. Rev. 2279 (2013).

The modern period (1982 to present)

- *New view*: Antitrust law should maximize output and industrial productivity to improve "consumer welfare"
  - Adoption by the Supreme Court
    - In 1979, the Supreme Court in *Reiter v. Sonotone Corp.* observed that "Congress designed the Sherman Act as a 'consumer welfare prescription'"[1]
    - Since *Reiter*, the Supreme Court has reaffirmed the consumer welfare standard as the goal of antitrust law in at least six other cases (including most recently in the 2021-2022 term)[2]
    - Today, at least six of the Supreme Court justices are firmly committed to the consumer welfare standard as the lens through which antitrust law should be interpreted and applied[3]

[1] 442 U.S. 330, 343 (1979) (citing ROBERT BORK, THE ANTITRUST PARADOX 66 (1978)).
[2] *See* Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2166 (2021); Ohio v. Am. Express Co., 138 S. Ct. 2274, 2290 (2018); Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 889, 902, 906 (2007); Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 324 (2007); Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993); Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 107 (1984).
[3] The Westlaw antitrust library lists also 500 cases that use the term "consumer welfare," but some of these are not strictly antitrust cases and in others the term may have appeared in something other than the majority decision.

The modern period (1982 to present)

- Antitrust rules refashioned under the consumer welfare standard
  - Continued reinforcement of the consumer welfare standard
    - *NCAA*, *Brooke Group*, *Weyerhaeuser*, *Leegin*, *American Express*, *Alston*
  - No change in strict prohibitions and aggressive enforcement against "garden variety" horizontal price fixing
  - But new limitations on finding concerted action
    - Single entities: *Copperweld* (1984), *American Needle* (2010)
    - From circumstantial evidence: *Matsushita* (1986), *Business Elecs*. (1988), *Brooke Group* (1993)
  - Significant loosing of restrictions on dominant firm behavior
    - *Spectrum Sports* (1993), *Trinko* (2004), *Linkline* (2009), *Weyerhauser* (2007), DOJ Section 2 Report (2008)
    - But see *Aspen Skiing* (1985), withdrawal of the DOJ's Section 2 report (2009)
    - Only episodic government actions (*Microsoft*, *American Airlines, Intel*)
  - Significant loosing of restrictions on distributional restraints
    - *Monsanto* (1984), *Kahn* (1997), *Leegin* (2007), *Amex* (2018)
    - But see *Kodak* (1992)
  - New requirement for finding illegal tying arrangements
    - *Jefferson Parish* (1984)
  - New law on remedies and procedure impose limitations on private actions
    - *Empagran* (2004), *Twombly* (2007)

The modern period (1982 to present)

- Merger antitrust enforcement radically changed
  - Market definition
    - Adopted the "hypothetical monopolist" concept of the 1982 DOJ Merger Guidelines
  - Horizontal mergers
    - Instituted a strong economic approach to analyzing competitive effects in mergers
      - 1982 DOJ Merger Guidelines
      - 1992 DOJ/FTC Horizontal Merger Guidelines
      - 1997 efficiencies amendment to the Horizontal Merger Guidelines
      - 2010 DOJ/FTC Horizontal Merger Guidelines
      - 2020 DOJ/FTC Vertical Merger Guidelines
    - Rejects market concentration or firm size as sufficient to deem a merger anticompetitive
      - This rejects the 1960s approach
    - Requires an affirmative finding of anticompetitive effect
    - Imposes reasonably high concentration and market share thresholds to establish a prima facie anticompetitive effect
    - But high thresholds for downward-pricing pressure defenses to overcome the government prima facie case of anticompetitive effect
  - Vertical mergers largely viewed as procompetitive
    - Only episodic government actions—essentially all settled through "access" consent decrees
  - Conglomerate merger theories of harm definitely rejected

The Consumer Welfare Standard: The Textbook Model

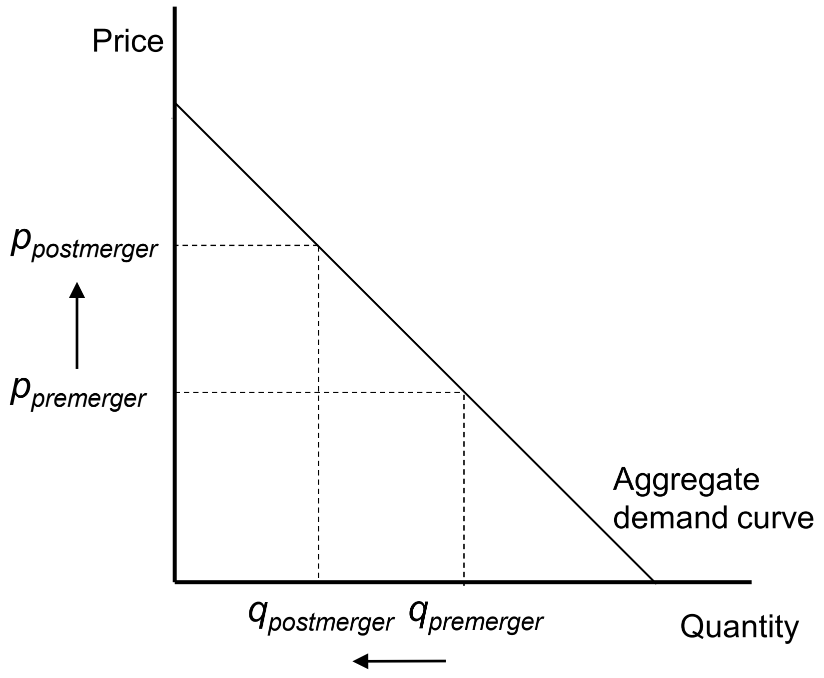
The consumer welfare standard in practice

- The consumer welfare standard as applied to mergers[1]
  - Mergers are socially bad when they harm consumers (customers) by—
    1. Increasing market price or decreasing market output;
    2. Shifting wealth from consumers to producers; or
    3. Creating economic inefficiency ("deadweight loss")
  - Other potential socially adverse effects when they harm consumers by—
    4. Decreasing marketwide product or service quality
    5. Decreasing the rate of technological innovation or product improvement
    6. Decreasing marketwide product choice

[1] The slides develop the consumer welfare standard in the context of mergers but the ideas apply generally to identify all types of anticompetitive conduct under the standard.

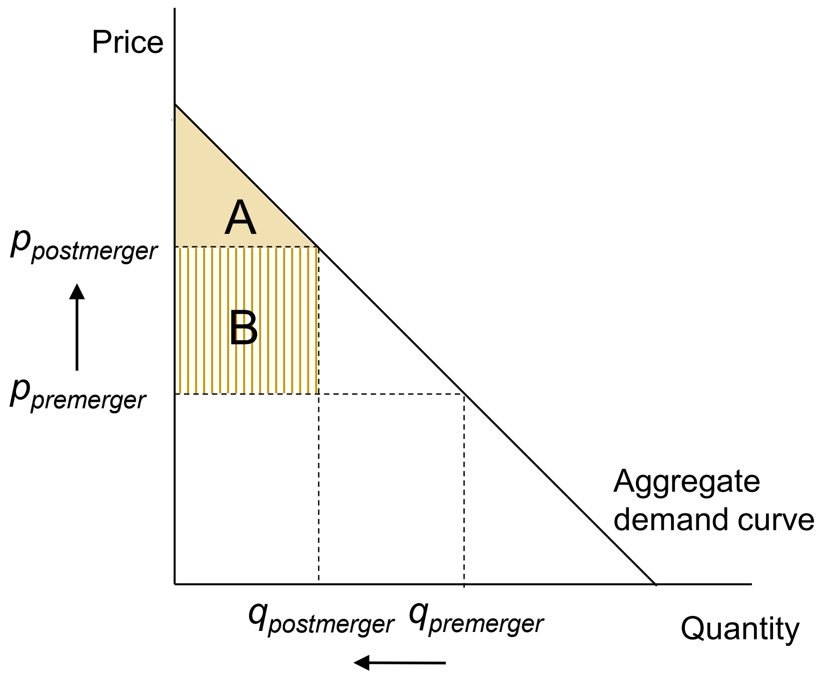
The consumer welfare standard: Textbook model

- The standard diagrams:
  1. Merger harms consumers by increases the market price or reducing the output available for consumers to purchase



The consumer welfare standard: Textbook model

- The standard diagrams:
  2. Merger harms consumers by shifting wealth from inframarginal consumers to producers*
     - Total wealth created ("surplus"): A + B
     - Sometimes called a "rent redistribution"



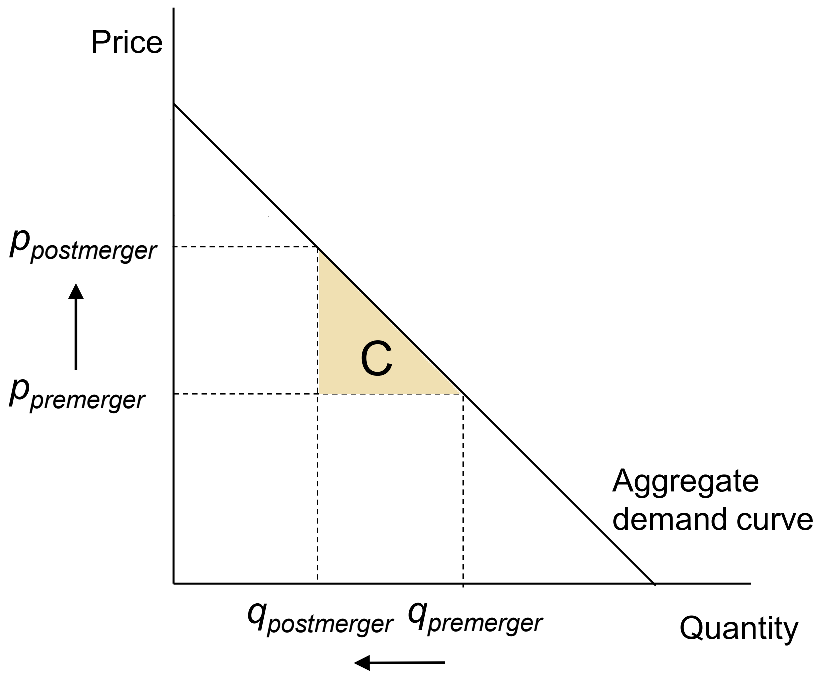
	Premerger	Postmerger
Consumers	A + B	A
Producers	0	B

Think about "consumer surplus" as the maximum amount consumers in the aggregate would be willing to pay above the price that they paid to obtain the product. This is the consumers "gains from trade" from their purchase transactions.

* Inframarginal customers here means customers that would purchase at both the competitive price and the monopoly price

The consumer welfare standard: Textbook model

- The standard diagrams:
  3. "Deadweight loss" of surplus of marginal customers*
     - Surplus C just disappears from the economy
     - Creates "allocative inefficiency" because it does not exhaust all gains from trade



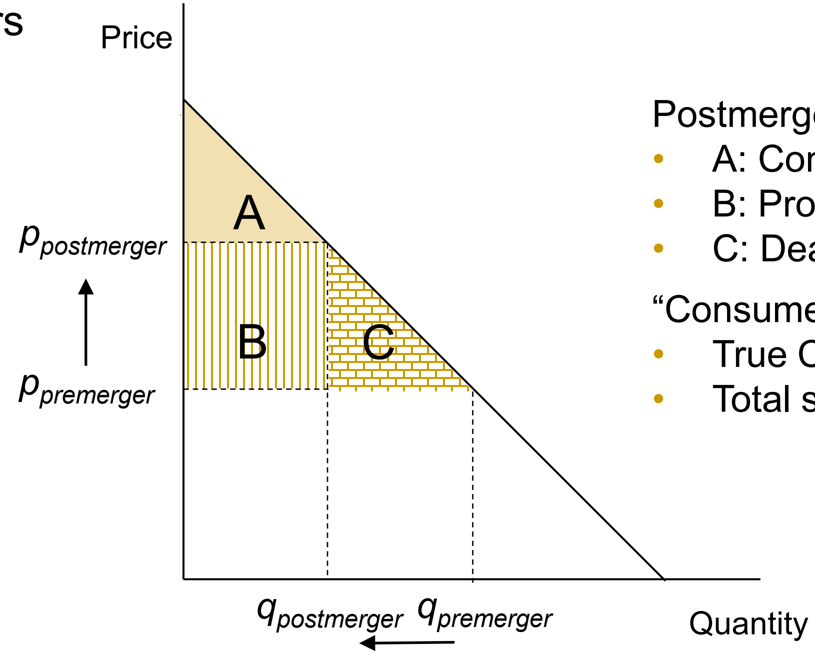
* Marginal customers here means customers that would purchase at the competitive price but not at the monopoly price

The consumer welfare standard: Textbook model

- Important note!
  - The textbook public policy explanation is NOT what courts and enforcement agencies use in applying the antitrust law or making enforcement decisions
    - There is no attempt to estimate consumer surplus (Area A in the diagram)
    - There is no attempt to estimate the deadweight loss (Area C) nor does the law provide a cause of action or relief to inframarginal customers harmed by an anticompetitive practice
  - Instead, the courts and the agencies focus on a more generalized notion of whether customers are worse off with the merger than without it
  - Some specific operational tests in practice: If the merger—
    - Expands market output, the merger is procompetitive regardless of price effects
    - Reduces market output, the merger is anticompetitive
    - Results in a price increase for some or all customers and no price decrease to any customers, the merger is anticompetitive (unless output expands, usually because of a product or service quality increase)
    - Increases price for some customers but decreases it for others, then the merger is anticompetitive if the wealth transfer to producers from the price increase is greater than the wealth transfer to customers from the price decrease
    - Reduces product or service quality in the market as a whole or reduces the rate of innovation, the merger is anticompetitive

The consumer welfare standard: Bork

- *Aside*: Robert Bork and the meaning of consumer welfare
  - Ironically, while Bork popularized the term “consumer welfare,” he measured welfare in terms of consumer and producer surplus, making producer profits part of the calculus
    - Bork’s measure is what economists call “total surplus,” and Bork’s misuse of the term “consumer surplus” has caused considerable confusion
  - Courts and the enforcement agencies, however, use “consumer welfare” to mean the welfare of consumers, regardless of any positive or negative effects on producers



Postmerger
- A: Consumer surplus
- B: Producer surplus (profits)
- C: Deadweight consumer surplus loss

“Consumer surplus”
- True CS: A
- Total surplus: A+B (Bork’s consumer surplus)

Modern Critiques of Merger Antitrust Law

The reformers' argument[1]

The economy is not working for average Americans and the current antitrust regime is a large part of the problem

- Corporate profits account for an increasing share of gross domestic income, while the labor share of gross domestic income has dramatically declined
- Real wages for average workers have largely stagnated and workers are not being compensated with productivity growth, while CEOs on average now make 278x more than typical workers
- Overall income inequality correspondingly has grown increasingly worse
- The "American dream" of advancement over generations is declining
- Wealth is even more concentrated than income, with wealth inequality approaching the level of the 1920s
- Industrial concentration has been steadily increasing since the mid-1990s, with acquisitions being a significant source of increased concentration while HSR Act merger investigations have disproportionately declined

[1] Some of these propositions are disputed and some of the underlying studies have methodological flaws. I am giving the reformers' argument, not a neutral view of the evidence or its implications.

The reformers' argument

The economy is not working for average Americans and the current antitrust regime is a large part of the problem

- At the same time, business start-up rates have been declining, while average markups have increased three-fold since 1980
- Corporations are becoming more politically powerful, increasing their political campaign spending and dramatically outspending labor, and corporate lobbying expenses greatly outstrip labor
- Bottom line:

The antitrust laws (along with many other laws) need to be reformed

  - Merger antitrust law is a focus of these criticisms, since critics believe that merger antitrust law—whether through judicial decisions or prosecutorial elections—failed to stop many mergers and acquisitions that are contributing to the perceived problems

Modern critiques of merger antitrust law

- There are two fundamentally different critiques of modern antitrust law—
  1. The progressive critique
  2. The Neo-Brandeisian antimonopoly movement

The progressive critique

- Basic ideas[1]
  1. Accepts the consumer welfare standard but broadened to include suppliers (especially labor)
  2. Assesses anticompetitive effect by comparing consumer welfare outcomes with the challenged conduct against consumer welfare outcomes in the “but for” world where the challenged conduct is prohibited
     - This is the defining difference between progressives and Neo-Brandeisians:
       - Progressives look to comparative market equilibrium outcomes—for example, prices, output, and the rate of technological innovation the product improvement—with and without the challenged conduct to assess whether the conduct is anticompetitive and hence actionable
       - Neo-Brandeisians look to whether the challenged conduct impairs the competitive process in the context of the market structure and do not compare market outcomes with and without the challenged conduct
  3. Believes that market power is typically durable and that markets do not adjust quickly—if at all—to eliminate market power over time
  4. Views historical enforcement outcomes as failing to identify and so permitting too many anticompetitive mergers and other types of anticompetitive conduct

[1] Progressives come in many varieties. These appear to me to represent the core beliefs of progressives generally.

The progressive critique

- Basic ideas
  5. Views the social harm of underenforcement of the antitrust laws to be greater than the social cost of overenforcement
     - That is, the social cost of Type 2 errors (underenforcement) is greater than the social cost of type 1 errors (overenforcement)
     - *Implication*: In close cases, prohibit the conduct
  6. Would create presumptions to make prima facie proof of an anticompetitive effect easier in certain types of cases (including mergers)
  7. Very skeptical of any downward pricing pressure defenses to a prima facie case of anticompetitive effect
  8. Would be very demanding in accepting consent decrees to negate anticompetitive harm—would rather reject a consent decree than accept one poses any material chance of not completely negating the anticompetitive harm

The progressive critique

- Implications for merger antitrust law and enforcement
  1. Would continue to focus on outcomes for consumers
  2. Would also focus on outcomes for suppliers (especially labor)
     - Unclear how progressives would balance consumer benefits from lower prices resulting from lower labor costs
  3. Probably would retain existing judicial tests for market definition
     - But where direct evidence of anticompetitive effects is available (most likely in consummated transactions), would not require rigorous proof of market definition
  4. Would lower thresholds for challenging horizontal and vertical mergers
  5. Would lower thresholds for challenging acquisitions of actual potential competitors and "nascent" competitors
  6. Would lower standards for finding acquisitions by monopolists violate Section 2
  7. Would likely shift the burden of proof to merging parties where the acquiring firm is sufficiently large ("superfirms")
     - That is, merging parties would bear the burden of persuasion in proving that the transaction is not anticompetitive

The progressive critique

- Implications for merger antitrust law and enforcement
  8. Would continue—and probably increase—hostility to defenses that offset anticompetitive effect
  9. Would continue practice of accepting consent decree to “fix” problem
     - BUT would impose a much heavily burden on the parties to prove that the “fix” will in fact negate the anticompetitive concerns, *and*
     - Would include provisions in consent decrees to make it easier for the government to obtain modifications if the agency concluded after the fact that the original relief did not completely negate the competitive problem

The Neo-Brandeisian “antimonopoly movement”

- Lina Khan’s five principles[1]
  1. “Antimonopoly is a key tool and philosophical underpinning for structuring society on a democratic foundation”
     - A functioning democracy depends on checking the political power that comes from private concentrations of economic power
  2. “Antimonopoly is more than antitrust”
     - Antitrust law is just one tool in the antimonopoly toolbox
     - Other tools include, for example, affirmative economic regulation, tax policy, federal spending, trade policy, securities regulation, and consumer protection rules
  3. “Antimonopoly does not mean ‘big is bad’”
     - Because of economies of scale or scope or network effects, some industries tend naturally to monopoly
     - In such cases, the answer is not to break these firms up, but to design a system of public regulation that—
       - Prevents the executives who manage this monopoly from exploiting their power, *and*
       - Creates the right incentives to ensure that companies provide the best value for customers and workers

[1] Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. Eur. Competition L. & Prac. 131 (2018). The five principles are verbatim from the article. The commentary is largely my interpretation. Khan is now Chair of the Federal Trade Commission. She has the strong support both the other Democrat commissioners, which gives Khan a working majority even if al five commissioner seats were filled. However, two seats are currently vacant.

The Neo-Brandeisian "antimonopoly movement"

- Lina Khan's five principles

4. "Antimonopoly must focus on structures and processes of competition, not outcomes"
    - The antitrust laws should focus on creating and maintaining a *competitive process*, which in turn will produce just outcomes
        - WDC: This is a very Rawlsian perspective[1]
    - A competitive process requires atomistically structured markets
    - Focusing on outcomes (such as consumer welfare) is fundamentally wrong
        - Cannot specify which outcome is the "right" ("just") outcome (that is, cannot identify the proper social welfare function)
        - Cannot reliably identify the relevant outcomes in the real world or predict them in the but-for world
5. "There are no such things as market 'forces'"
    - Markets are structured by law and policy, not economic "natural forces"
    - The legal regime could, for example, limit the size of firms—and hence their dominance in the marketplace—regardless of economies of scale or scope or network effects

The key driver for the Neo-Brandeisian approach is the elimination of significant political and economic power by firms in the economy—this focuses on maintaining competitive structures and processes, not competitive market outcomes

[1] *See* JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

The antimonopoly movement deconstructed[1]

- Premises
  1. The democracy premise
     - A functioning democracy depends on checking private political power
     - Private concentrations of economic power create political power and undermine democracy
     - Enormous corporations, in particular, wield political power through a variety of means, including lobbying, financing elections, staffing government, and funding research
     - Pursuing democratic values sometimes can require some sacrifice of economic efficiency and consumer welfare
  2. The economic premise
     - The competitive process provides the lowest prices, greatest output, highest quality, largest consumer choice, and highest rate of technological innovation
     - The competitive process also yields a fair and equitable distribution of surplus between consumers and producers and of profits among large and small firms
     - The competitive process depends on absence of private individual or collective concentrations of economic power

[1] *A caution*: Proponents of the Neo-Brandeisian antimonopoly movement are not completely homogeneous in their philosophies or policy prescriptions. These slides are my effort to distill the movement's central tenets recognizing that there remains considerable room for interpretation, especially in the policy prescriptions.

The antimonopoly movement deconstructed

- Premises
  3. The individual freedom premise
     - An atomistic economy provides—
       - Consumers with the maximum freedom to choose what products and services to buy and the suppliers from whom they deal
       - Workers with the maximum freedom to choose with whom to work and under what conditions and to earn a just wage
       - Small business (including new entrants) the maximum freedom to compete and innovate and to earn fair profits
     - Private concentrations of economic power limit this freedom
     - Maximizing individual freedom sometimes can require some sacrifice of economic efficiency and consumer welfare
  4. Line drawing
     - In principle, there should be a line that determines when private concentrations of economic power become unacceptable
     - In practice, wherever the line, some concentrations of economic power—including some in the hands of individual "superfirms"—are so over the line that they are readily identifiable
     - So deal with the egregious cases first and worry about line drawing and close cases later

The antimonopoly movement deconstructed

- Implications for merger antitrust law and enforcement
  - The standard of legality
    - The focus should be on market structure:
      - Preventing the creation of or increase in private concentrations of economic power and on reducing existing concentrations through breakups or otherwise
      - Concentration on the buy-side can be as problematic as concentration on the sell-side
    - Not on performance:
      - Unlawfulness should not depend on comparing outcomes with and without the challenged conduct, whether it is price, output, quality, or the rate of innovation
  - Market definition
    - Markets do not need to be identified rigorously—simple (noneconomic) tests akin to the *Brown Shoe* approach are sufficient to identify economic concentrations of power and dominant firms
    - In particular, the hypothetical monopolist test should be discarded
      - Much too narrow in focus: Only attempts to determine if firms can profitably increase price
      - Costly yet unreliable to implement in practice
      - Often determines the outcome of merger antitrust litigation
  - Economic concentration
    - Five meaningful firms in an industry is a lower bound for economic concentration for enforcement purposes

The antimonopoly movement deconstructed

- Horizontal mergers
  - 6-to-5 mergers should be presumptively unlawful
  - An acquisition by a firm with a 30% or greater market share of 1.67% or more should be presumptively unlawful without more (would yield an HHI change of at least 100)
- Potential competition
  - The time horizon for evaluating potential competition should be the foreseeable future, not 2 or three years
  - Dominant firms and the largest firms in a concentrated industry should be prohibited from acquiring either—
    - Actual potential competitors that have some prospect now or in the future of entering the market *or*
    - "Nascent" competitors
      - Nascent competitors are firms that have the prospect (usually because of the new technology they are developing), however small and however distance in the future, of significantly undermining the acquiring firm's dominance
      - The nascent competitor may do this on its own or through an acquirer or a third-party licensee
- Vertical mergers
  - Anticompetitive when the merger will enable the combined firm to deny or anticompetitively price an important input or output (such as a distribution channel) to competitors
  - Likely that the *incentive* of the combined firm to foreclose a competitor or raise its rivals' costs—an essential element under the consumer welfare standard—would not be relevant

The antimonopoly movement deconstructed

- Conglomerate mergers
  - Anticompetitive when the merger creates a sufficiently economically or politically powerful firm, regardless of consumer effects
- Modern entrenchment
  - "Entrenched" dominant firms with durable near-monopoly positions—think the high-tech MAMAA firms (Microsoft, Alphabet, Meta, Amazon, and Apple)—should be prohibited from acquiring any business, assets, or technology that has the potential of further entrenching the firm
- Efficiencies
  - Likely viewed as anticompetitive if they give the combined firm a competitive advantage over rivals and enable it to achieve or maintain sufficient economic or political power

Summary

	Conventional	Progressive	Neo-Brandeisian
Operative goal	Consumer welfare	Consumer and supplier welfare	Promotion of democratic values
Focus	Market outcomes	Market outcomes	Market structure
Metric	Primarily prices	All dimensions of consumer and supplier harm	Industrial concentration, firm size
Need for economic tools	Uses sophisticated tools	Uses sophisticated tools	Little need
More serious error	Overinclusiveness	Underinclusiveness	Underinclusiveness
Efficiencies	Rebuttably presumed to be significant	Rebuttably presumed to be small	Rebuttably presumed to be small
Intervention standards	Roughly where they were after 1992 and before the Biden administration	Much too lax (should have been much more intervention)	Extremely lax (should have been far more intervention)

Policy prescriptions (very much a work in progress)

	Conventional	Progressive	Neo-Brandeisian
Garden-variety price fixing	Hostile	Hostile	Hostile
Unilateral conduct	Unilateral behavior presumably procompetitive	Would be more interventionist + (?) Abuse of dominant position	Limits on industrial concentration, firm size + Abuse of dominant position
Unilateral refusals to deal	No unilateral duty to deal	May impose unilateral duty to deal in some situations	Would generally impose unilateral duty to deal on dominant firms
Horizontal merger	Presumably procompetitive	Decide on competitive effects, but close cases to plaintiffs	Limits on industrial concentration, firm size

Policy prescriptions (very much a work in progress)

	Conventional	Progressive	Neo-Brandeisian
Vertical mergers	Presumably procompetitive	Decide on competitive effects, but close cases to plaintiffs	Limits on industrial concentration, firm size + Hostile if significant potential for foreclosure
Conglomerate mergers	No theories of anticompetitive harm	No theories of anticompetitive harm	Limits on industrial concentration, firm size
Joint ventures	Presumably procompetitive	Wary but presumably procompetitive	Wary, with no presumption of being procompetitive
Distributional restraints	Presumably procompetitive	Wary but presumably procompetitive	Illegal if they significantly restrict 3P freedom of economic action

Policy prescriptions (very much a work in progress)

	Conventional	Progressive	Neo-Brandeisian
Private rights of action	Keep current rules in place	Expand to permit indirect purchaser actions	Expand to permit indirect purchaser actions + Section 5 private right of action
Civil penalties	No	Maybe (?)	Yes

A Concluding Thought on the Courts

The courts as a brake on antitrust reform

- Strong judicial precedent reinforces the current “consumer welfare” approach
  - Especially true in the D.C. Circuit with respect to mergers
  - The Areeda & Hovenkamp treatise—a book that almost defines the current approach—is by far the principal nonjudicial authority cited by the courts and adopts the consumer welfare standard
  - The reform movements have nothing comparable
- Generally, a conservative bench on antitrust
  - Almost all judges have grown up in the current antitrust regime
  - 6 of 9 (66.6%) Supreme Court justices were appointed by Republican presidents
  - 91 of 179 (50.1%) federal court of appeals judges were appointed by Republican presidents[1]
  - 341 of 677 (50.4%) district court judges were appointed by Republican presidents

[1] Data from Circuit Status, BallsandStrikes.com (as of July 18, 2023).

The courts as a brake on antitrust reform

- Most importantly, the Supreme Court is conservative with respect to antitrust
  - At least four justices are interested in antitrust cases and would be likely to vote for cert with respect to any significant doctrinal move in the lower courts (including in § 1292(b) appeals)
  - Could easily see six or more justices reaffirming the traditional approach
    - *AMG Capital* (June 21, 2021) (9-0): FTC Act § 13(b) does not authorize FTC to seek monetary relief[1]
    - *Alston* (Apr. 22, 2021) (9-0): Affirming judgment for college players in challenge to NCAA compensation restrictions using the traditional approach
    - *Amex* (June 25, 2018) (5-4): Affirming the Second Circuit's finding that the plaintiffs—the United States and several states—failed to make out a prima facie case of anticompetitive effect
      - Since *Amex* was decided, Justice Breyer, who wrote the dissent, and Justice Ginsberg, who joined the dissent, were replaced by Justices Jackson and Justice Barret
  - Conservative majority would likely grant cert and overturn any FTC rule making under Section 5 that departs materially from the current case law as contrary to the "major questions" or "non-delegation" doctrines

[1] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).
[2] NCAA v. Alston, 141 S. Ct. 2141 (2021).
[3] Ohio v. American Express Co., 138 S. Ct. 2274 (2018).

Appendix:
Selected Bills in the 117th Congress

The Klobuchar bill (S. 225)

- The bill
  - Formally, the Competition and Antitrust Law Enforcement Reform Act of 2021
  - Introduced by Sen. Amy Klobuchar (D-MN) in the 117th Congress on February 4, 2021
  - Referred to the Senate Judiciary Committee, where is remains pending as of July 3, 2021
- Would be a major rewrite of the antitrust statutes
  - Contains many reforms advocated by the progressives and some by the Neo-Brandeisians
    - Would amend Section 7 by—
      - Modifying the anticompetitive effects test
      - Creating rebuttable statutory presumptions establishing a prima facie case of anticompetitive effect for transactions exceeding certain market share, concentration, or size thresholds
    - Would create a new antitrust provision governing exclusionary conduct
    - Would create a private right of action for violations of Section 5 of the FTC Act
    - Would create sizeable civil penalties
      - *Query*: Whether these “civil penalties” are so large that the are actually criminal fines (which would mean that defendants have Fifth Amendment and other criminal law protections)
    - Would significantly increase the authorization of appropriations for the Antitrust Division and the FTC

The Klobuchar bill (S. 225)

- Some key merger provisions
  - Section 2. Findings and Purposes[1]

(a) FINDINGS.—Congress finds that—

(1) competitive markets, in which multiple firms compete to buy and sell products and services, are critical to ensuring economic opportunity for all people in the United States and providing resilience to the economy during unpredictable times; . . .

(7) the anticompetitive effects of monopoly power or buyer market power include higher prices, lower quality, lessened choice, reduced innovation, foreclosure of competitors, and increased entry barriers; . . .

(9) horizontal consolidation, vertical consolidation, and conglomerate mergers all have potential to increase market power and cause anticompetitive harm;

(10) extensive consolidation is reducing competition and threatens to place the American dream further out of reach for many consumers in the United States;

(11) since 2008, firms in the United States have engaged in over \$10,000,000,000,000 in mergers and acquisitions;

(12) the acquisition of nascent or potential rivals by dominant firms can present significant long term threats to competition and innovation;

[1] Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (Feb. 4, 2021) (as introduced; pending in Judiciary Committee as of August 19, 2021).

The Klobuchar bill (S. 225)

- Some key merger provisions
  - Section 2. Findings and Purposes

> (13) the acquisition, by one of its competitors, of a maverick firm that plays a disruptive role in the market—by using an innovative business model or technology, offering lower prices or new, different products or services products, or by other means that benefit consumers—can present a threat to competition;
>
> (14) section 7 of the Clayton Act (15 U.S.C. 15 18), is the primary line of defense against anticompetitive mergers;"
>
> (15) in recent years, some court decisions and enforcement policies have limited the vitality of the Clayton Act to prevent harmful consolidation by—
>
> (A) discounting previously accepted presumptions that certain acquisitions are anticompetitive;
>
> (B) focusing inordinately on the effect of an acquisition on price in the short term, to the exclusion of other potential anticompetitive effects;
>
> (C) underestimating the dangers that horizontal, vertical, and conglomerate mergers will lower quality, reduce choice, impede innovation, exclude competitors, increase entry barriers, or create buyer power, including monopsony power; and
>
> (D) requiring the government to prove harmful effects of a proposed merger to a near certainty; . . . .

The Klobuchar bill (S. 225)

- Some key merger provisions
  - Section 4. Unlawful Acquisitions
    - Section 4(a) adds a definition of “market power”:

> ‘T]the term “market power” in this Act means the ability of a person, or a group of persons acting in concert, to profitably impose terms or conditions on counterparties, including terms regarding price, quantity, product or service quality, or other terms affecting the value of consideration exchanged in the transaction, that are more favorable to the person or group of persons imposing them than what the person or group of persons could obtain in a competitive market.

  - S. 225, however, does not provide a test for defining a “market” or a method for determining terms and conditions in a “competitive market”
    - Presumably, the existing judicial tests would apply to defining a “market” (a “relevant market” in antitrust jargon)
    - Determination of the terms and conditions in a “competitive market” would be an issue of fact for the trier of fact and subject to judicial development

The Klobuchar bill (S. 225)

- Some key merger provisions
  - Section 4. Unlawful Acquisitions
    - Section 4(b) would amend Section 7 of the Clayton Act
      - Would amend the anticompetitive effects test
        - Would replace “substantially to lessen competition” with “to create an appreciable risk of materially lessening,” presumably to lower the threshold probability of harm required for an anticompetitive effect
          - *Query*: How would courts operationalize this change? Would it make any difference in merge antitrust outcomes?
      - In federal or state government cases, would create a presumption of an "appreciable risk of materially lessening competition" if the acquisition—
        1. Leads to a "significant increase in market concentration"
        2. Involves an acquiring person with a market share of 50% or more as a buyer or a seller
        3. If horizontal and the target is a “maverick” (without providing a definition of a "maverick")
        4. Materially increases unilateral effects or coordinal effects, *or*
           - Defines "materially" to be "more than a de minimis amount"
        5. Is HSR reportable and involves—
           - $5 billion+ acquisitions of any merger type
           - $100 billion+ companies acquiring $50 million+ companies

        unless the merging parties "establish, by a preponderance of the evidence, that the effect of the acquisition will not be to create an appreciable risk of materially lessening competition or tend to create a monopoly or a monopsony"

        Effectively shifts to the merging parties the burden of persuasion that the merger is have an anticompetitive effect)

        NB: Unclear from the drafting whether the shift in the burden of proof applies only to (5) or to (1)-(5), but it is probably the latter

The Klobuchar bill (S. 225)

- Prognosis:
  - Stalled in committee in the 117th Congress
  - Unlikely to be reintroduced in the 118th Congress—No chance of passage

Hawley bill (S.1074)

- S. 1074: Trust-Busting for the Twenty-First Century Act
  - Introduced by Sen. Joh Hawley (R-MO) (Apr. 12, 2021)
  - Would—
    - Ban all mergers and acquisitions by companies with market capitalization exceeding $100 billion
    - Empower the FTC to designate “dominant digital firms” exercising dominant market power in particular internet markets, which will be prohibited from buying out potential competitors
    - Reform the Sherman and Clayton Acts to make clear that direct evidence of anticompetitive conduct is sufficient to support an antitrust claim without need for market definition
    - Increase antitrust penalties by requiring companies that lose DOJ/FTC antitrust suits to forfeit all their profits resulting from monopolistic conduct
  - Died in Senate Judiciary Committee without a vote

Lee bill (S. 2039)

- Legislation (selected examples)
  - S. 2039: Tougher Enforcement Against Monopolists Act (TEAM Act)
    - Introduced by Sen. Mike Lee (R-UT) (June 4, 2021)
    - Would—
      - Consolidate antitrust enforcement at the Department of Justice
      - Codify and clarify the consumer welfare standard
        - Permitting courts to consider effects of challenged conduct or transaction on consumer welfare, including price, output, quality, innovation, and consumer choice
      - Creating new rebuttable statutory presumptions establishing a prima facie case of anticompetitive effect:
        - Transactions resulting in unilateral effects
        - transactions resulting in more than a 33% market share
      - Ban mergers that resulting in a market share greater than 66%, except when necessary to prevent serious harm to the national economy
      - Repeal *Illinois Brick* and *Hanover Shoe* to allow indirect purchasers to recover damages for antitrust violations
      - Allow DOJ to recover trebled damages on behalf of consumers
      - Provide for civil penalties knowing violations of the antitrust laws
        - Capped at 15% of annual revenues for each year in which the violation occurred
    - Died in the Senate Judiciary Committee without a vote

American Innovation and Choice Online Act

- All the legislative effort has shifted to the American Innovation and Choice Online Act (AICOA)[1]
  - Focuses more narrowly on the dominant tech platforms—primarily Google and Amazon and to a lesser extent Apple and Facebook (collectively known as “GAFA”)
    - Would prohibits certain large online platforms from, among other things—
      - Giving preference to their own products on the platform
      - Unfairly limiting the availability on the platform of competing products from another business, *or*
      - Discriminating in the application or enforcement of the platform's terms of service among similarly situated users
  - Legislative history
    - Introduced by Sen. Klobuchar on October 18, 2021, and referred to the Judiciary Committee
    - There was a companion bill in the House of Representatives, but the House is unlikely to act unless and until the Senate passed its version of the bill
    - Reported out of the Senate Judiciary Committee as amended on March 2, 2022, without a report
    - Died without a vote on the Senate floor

[1] S. 2992, 117th Cong. (as reported by the Senate Judiciary Committee, Mar. 2, 2022).

American Innovation and Choice Online Act

- All the legislative effort has shifted to the American Innovation and Choice Online Act (AICOA) (S. 2992)[1]
  - Supported by a coalition of progressives and far-right conservatives
    - The progressives like the substantive restrictions of the bill on the dominant tech platforms
    - The conservatives like the nondiscrimination provisions, which they apparently believe can be used to prohibit the content moderation they believe is currently being done against conservative views[1]
  - Opposed by the major platforms and many moderate members of Congress
    - Strong opposition by the major platforms was expected
      - The lobbying again the bill has been prodigious: the Wall Street Journal reports that GAFA-funded lobby groups have spent $36.4 million on advertising against the American Innovation and Choice Online Act (AICOA) antitrust law since January 1, 2021[2]
    - But also significant opposition by moderates
      - The provisions are largely ambiguous and there is no meaningful legislative history to guide interpretation
        - *Example*: Opponents say the bill would prohibit amazon from offering its Prime service; supporters say it would not, but the language in the bill could be interpreted with way

[1] *See* Republicans Announce That If Content Moderation Is Written Out of Antitrust Bills, They'll Pull Their Support, TechDirt.com (June 23, 2022).
[2] John D. McKinnon, Ryan Tracy & Chad Day, *Big Tech Has Spent $36 Million on Ads to Torpedo Antitrust Bill*. Wall St. J. (June 9, 2022).