Unit 3: A Brief History of Antitrust Law
(with special attention to merger antitrust law)

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August 28, 2024

A Brief History of Antitrust Law

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Source: New York Globe, 1907

The Common Law Approach to Antitrust Law

At the creation

- The Sherman Act has been criticized for employing vague, uninformative terms
- But this is a defining feature of antitrust law, *not* a bug
  - This is an intentional part of the design of U.S. antitrust law from the beginning[1]
  - The Sherman Act incorporated common law terms of art to provide a well-known body of law and precedent that enforcement officials and courts could immediately apply—
    - "Restraint of trade"
    - "Monopolization"
    - "Attempt to monopolize"
    - "Conspiracy to monopolize"
  - The common law also permitted courts to refine and modify the law with new learning and as new business practices emerged without the need for congressional action

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

At the creation

- The Sherman Act adopted a "common law approach" to antitrust law
  - There was a clear recognition that Congress could not write detailed, prescriptive legislation
  - From the beginning, the Sherman bill sought to deal with the trusts through the common law or, more precisely, a common law approach

> [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]

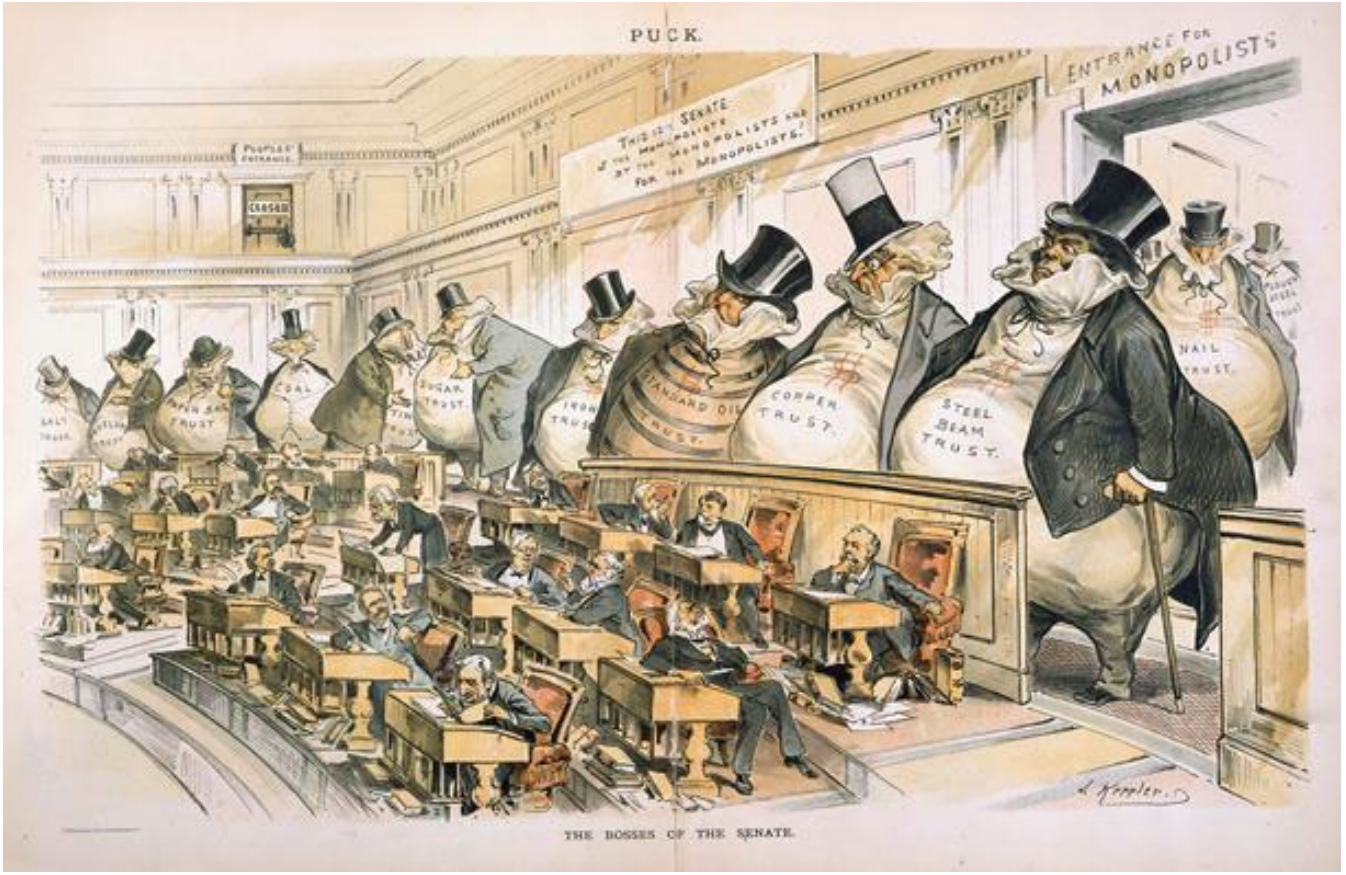
[1] 21 Cong. Rec. 2455 (Mar. 21, 1890) (remarks of Sen. John Sherman (R. Ohio)). For similar sentiments that the various iterations of the antitrust bill were all to enable the courts to apply the common law regarding business enterprises, see 20 Cong. Rec. 1167 (Jan. 25, 1889) (Sherman); 21 Cong. Rec. 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. 3146 (Apr. 8, 1890) (Hoar); 21 Cong. Rec. 3149 (Apr. 8, 1890) (statement of Sen. John T. Morgan (D. Ala.)); 21 Cong. Rec. 3152 (Apr. 8, 1890) (Hoar).

At the creation

- Historical aside
  - Sen. John Sherman (R., Ohio) introduced his antitrust bill on August 14, 1888, in the 50th Congress
    - One of several antitrust bills introduced by various members of Congress
  - *Query*: Why would Sherman—one of the most powerful members of the Senate and a very serious candidate for the Republican Party's nomination for president in 1880, 1884, and 1888—introduce an *antitrust* bill?
    - After all, the Republicans controlled the Senate, House, and Presidency
    - AND Republicans were said to be "bought and paid for" by the trusts
  - *Query*: Just as interesting, why were the most vehement opponents of the Sherman bill Democrats, the party of the South with supposedly the most to lose from the continued operation of the trusts?

At the creation

- Historical aside



Joseph Keppler, *The Bosses of the Senate*, Puck, Jan. 23, 1889

At the creation

- Historical aside
  - Sherman reintroduced his bill as S.1 on December 4, 1889, in the 51st Congress
    - Vigorous Senate floor debate on the six days between January 23 and February 4, 1890
    - Numerous amendments were offered, many of which were adopted
    - Referred to the Senate Judiciary Committee on March 27, 1890
  - Senate Judiciary Committee reports S.1 six days later as amended in the form of a substitute on April 2, 1890
    - Nothing in the amended bill contained Sherman's language—it was an entirely new bill
    - BUT retained the idea that the antitrust statute should be an enabling act to empower the federal courts to use a common approach to antitrust law
      - Defined offenses using terms of common law art
      - Reiterated in floor debate that the bill enabled a common law approach to antitrust law[1]

[1] *See, e.g.*, 21 Cong. Rec. 3146 (Apr. 8, 1890) (remarks of Sen. George F. Hoar (R., Mass)); 21 Cong. Rec. 3149 (Apr. 8, 1890) (statement of Sen. John T. Morgan (D. Ala.)); 21 Cong. Rec. 3152 (Apr. 8, 1890) (Hoar).

At the creation

- Historical aside
  - Enactment
    - April 8, 1890: Senate Judiciary Committee bill with amendments passed Senate 52-1 and sent to the House

      (including all those vocally opposed Democrats!)
    - May 1-2, 1890: House debates, amends, and passes S.1 in an unrecorded vote

      Conference Committee: House eventually recedes from its amendments to S.1
    - June 20, 1890: House debates and passes S.1 without amendments (242-0)
    - July 2, 1890: President Benjamin Harrison signs S.1 into law

What was going on here?

Political value judgment

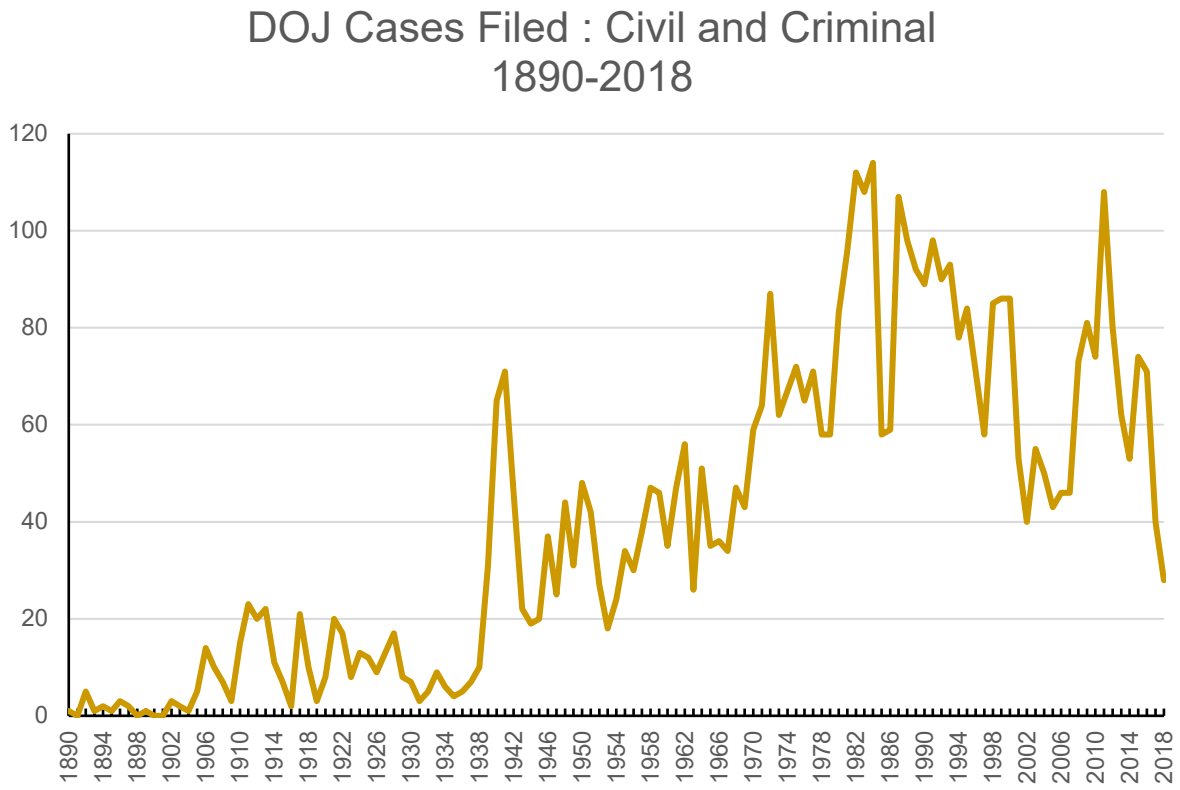
- How to operationalize the common law terms in antitrust law is a political value judgment
  - Determined by the courts in the absence of congressional direction
  - In the 130-year history of antitrust law, Congress has intervened in the common law process to change the substantive law or the direction 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)).

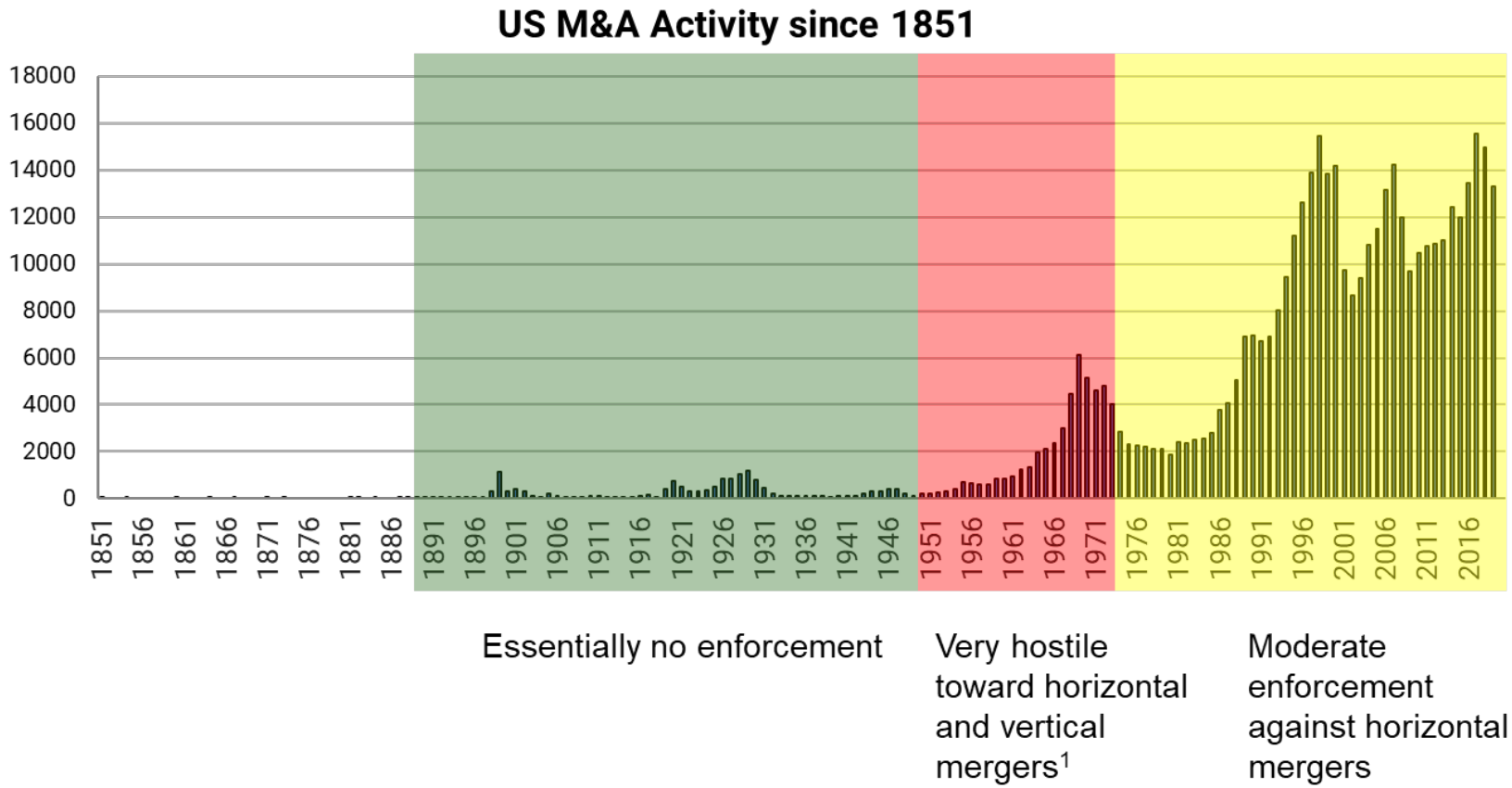
The Evolution of Antitrust Law

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



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

The first 47 years (1890-1937)

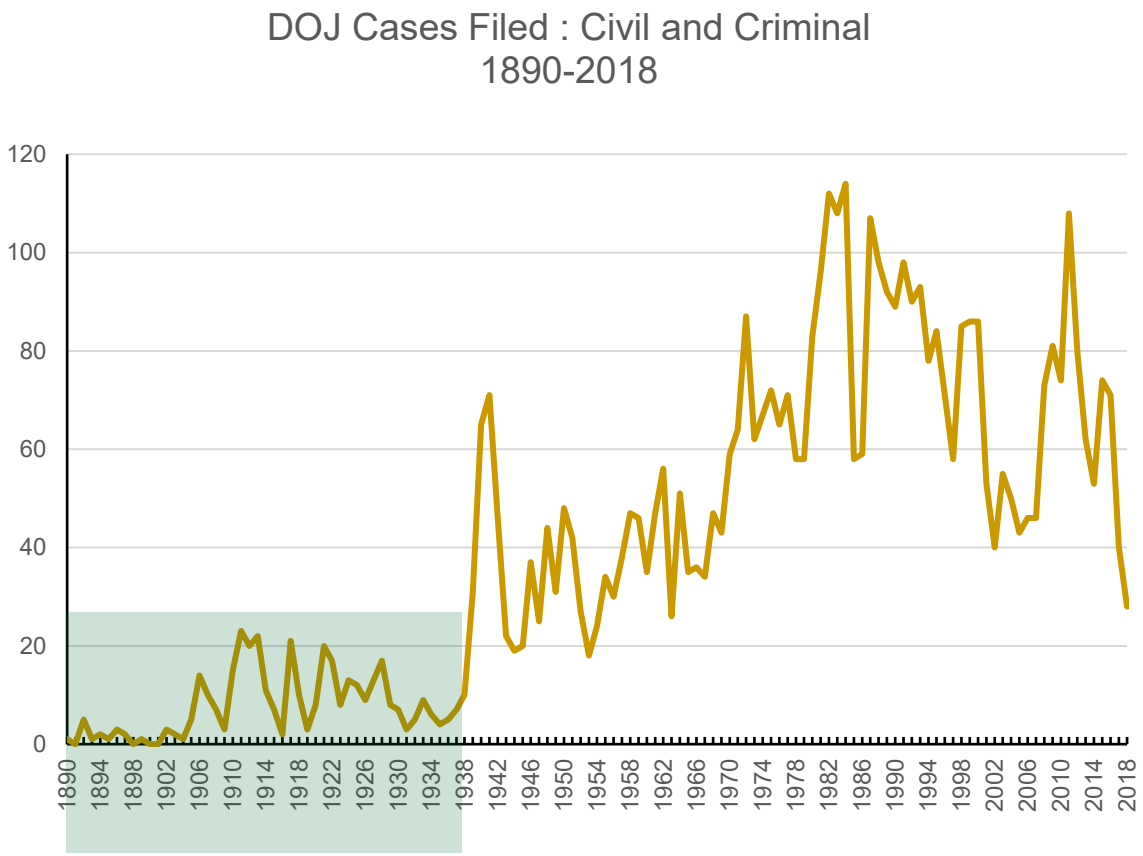
- Antitrust law was largely non-interventionist from 1890 to 1937
  - Some blips in the T.R. Roosevelt and Taft administrations and to a somewhat lesser extent in the Wilson administration
  - But overall—
    - World War I mobilization, much of which required extensive coordination among companies, increased real GDP by 23% between 1914 and 1920
      - 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

    resulted in an "hands off" antitrust attitude

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

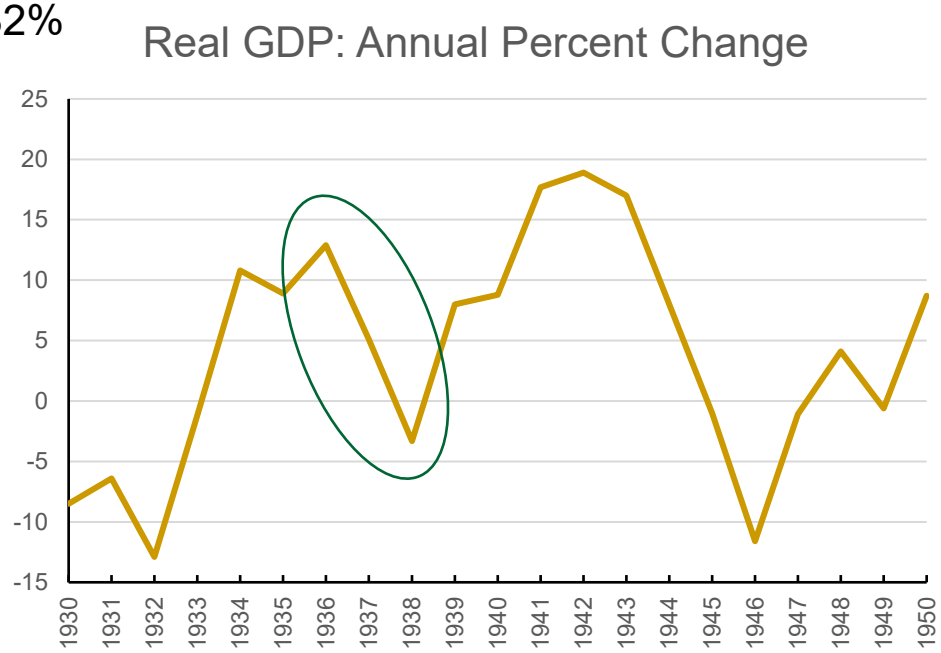
Attitude after the Great Depression: The economy is broken, but don't try to fix it by enforcing the antitrust laws

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

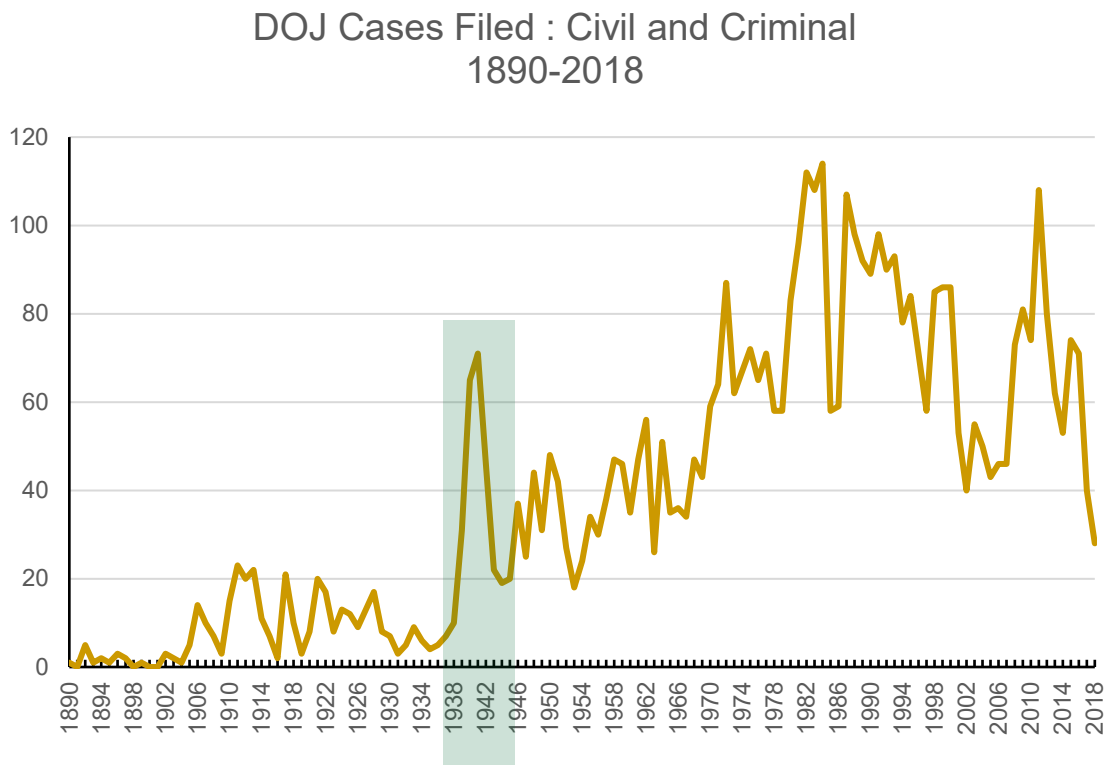


The 1937-1938 recession and its aftermath

- 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 in the 1938 midterm election[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
    - But also included the 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).

Late Depression/World War II (1937-1945)



Post-World War II (1946-1972)

- Widespread and very negative 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).

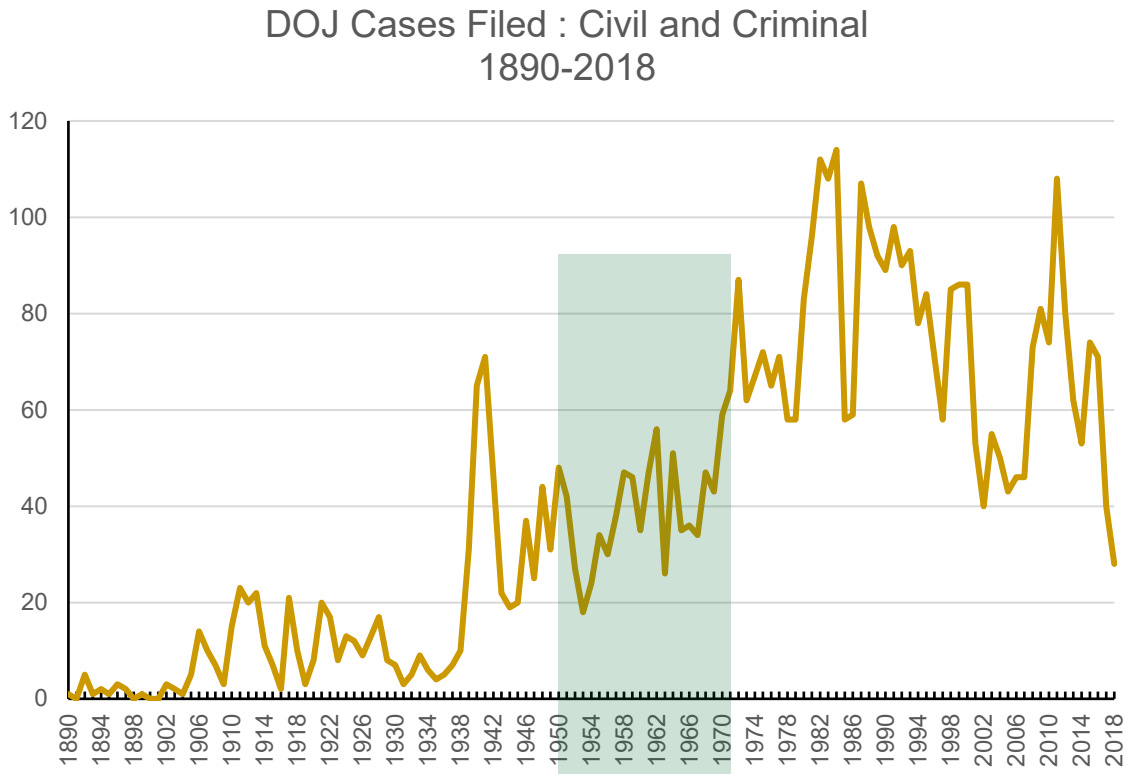
Post-World War II (1946-1972)

- 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—
  1. Minimize industrial concentration beyond certain bounds
  2. Maximize the prospects of survival of small businesses
  3. Minimize restraints on freedom of choice of economic actors

This resulted in an aggressively interventionist antitrust regime

Post-World War II (1946-1971)

- The increasingly restrictive antitrust regime resulted in more prosecutions

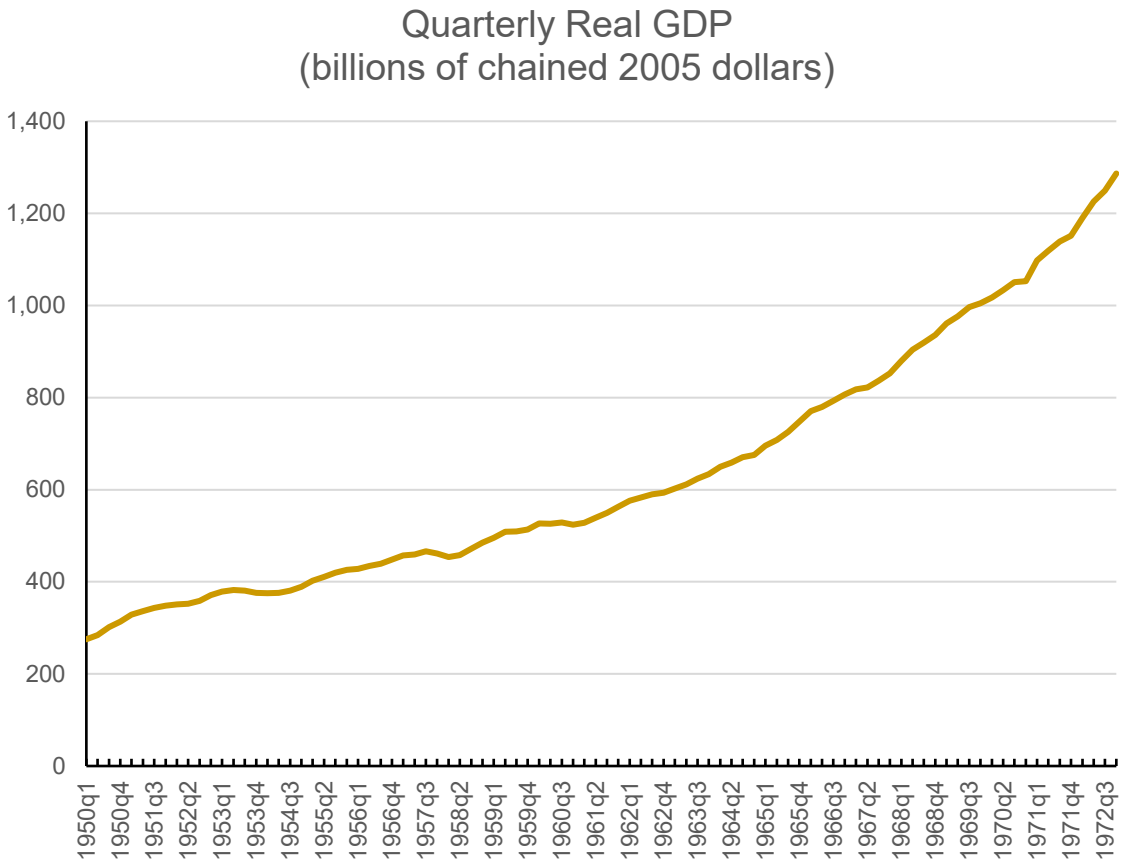


Post-World War II (1946-1972)

- 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)

- 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
    - *Brown Shoe* (1962), *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 1981)[1]

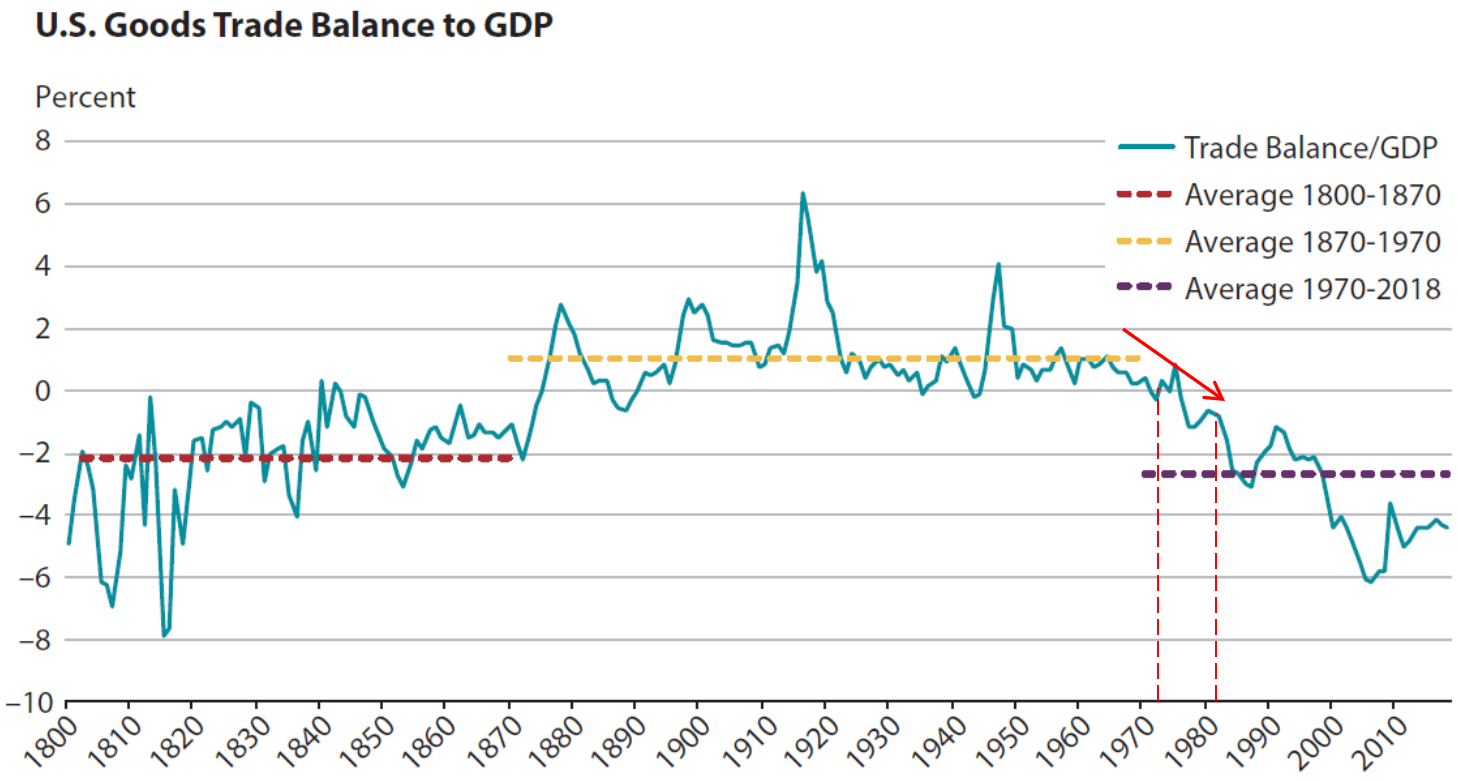
- "Stagflation" gripped the nation (known as the "Great Stagflation")[2]
  - Significant inflation resulting from the Mideast oil shocks in 1973 and 1979 and the expansionary monetary policy beginning in the late 1960s to finance the Vietnam War
  - "Productivity crisis" resulting from the obsolescence 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 20.4% (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 1981)

- U.S. Goods Trade Balance to GDP



Source: Brian Reinbold & Yi Wen, Historical U.S. Trade Deficits, Economic Synopses, No. 13, Fig. 1 (Fed. Res. Bank of St. Louis 2019).

The "malaise" period (1973 to 1981)

- Economic conditions—Not good times

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 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 had largely 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)

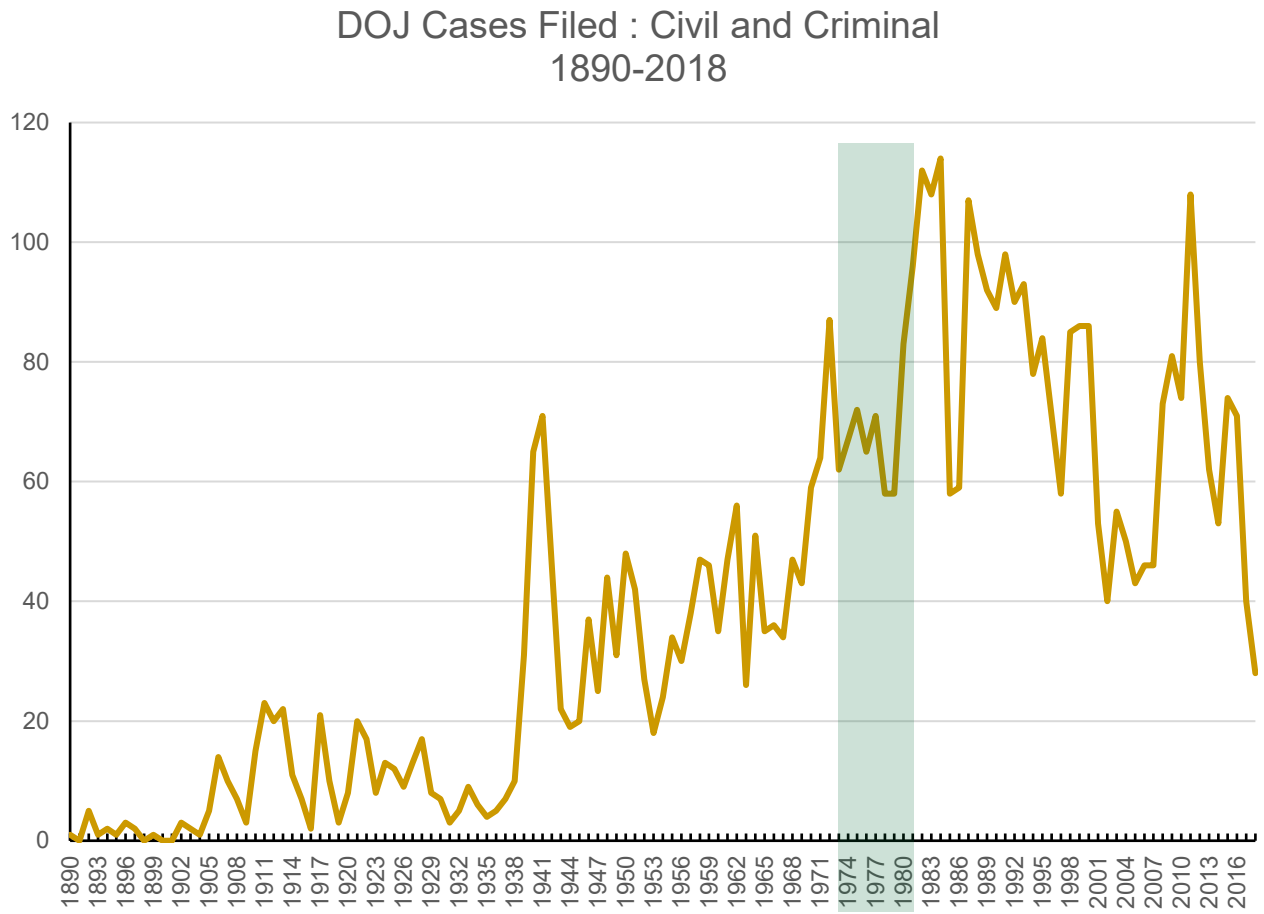
- As part of the response, courts begin to "loosen" antitrust restrictions to maximize output and industrial productivity
  - Antitrust narrowly limited to competition concerns
    - *Professional Engineers*
  - Explicitly adopt the "consumer welfare" standard
    - *Reiter*
  - Continued aggressive 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—generally procompetitive, but where anticompetitive can be 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)

- Economic conditions—recovering, then pretty good, then not too good with a slow recovery, then COVID

Indicator	1973-1982	1983-2006
Real GDP (average annual growth)	2.4%	3.4%
Nonfarm business productivity (average annual rate)	1.0%	2.2%
Inflation (average annual change Dec. to Dec.)	8.7% Max = 13.3%	3.1% Max = 6.1%
Bank prime loan rate (annual—data series starts in 1956)	11.1% Max = 18.9%	8.0% Max = 12.0%
Unemployment (average monthly rate)	7.0% Max = 10.8%	5.9% Max = 10.4%
Median real family income (average annual change)	-0.2%	0.9%

The modern period (1982 to present)

- *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 readily morphed into the "consumer welfare standard" in the 1980s
    - Robert Bork popularized the term "consumer welfare" in The Antitrust Paradox (1978)
  - 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 seven 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
  - 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)
  - 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 comparatively 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 rejected

The Consumer Welfare Standard: The Textbook Model

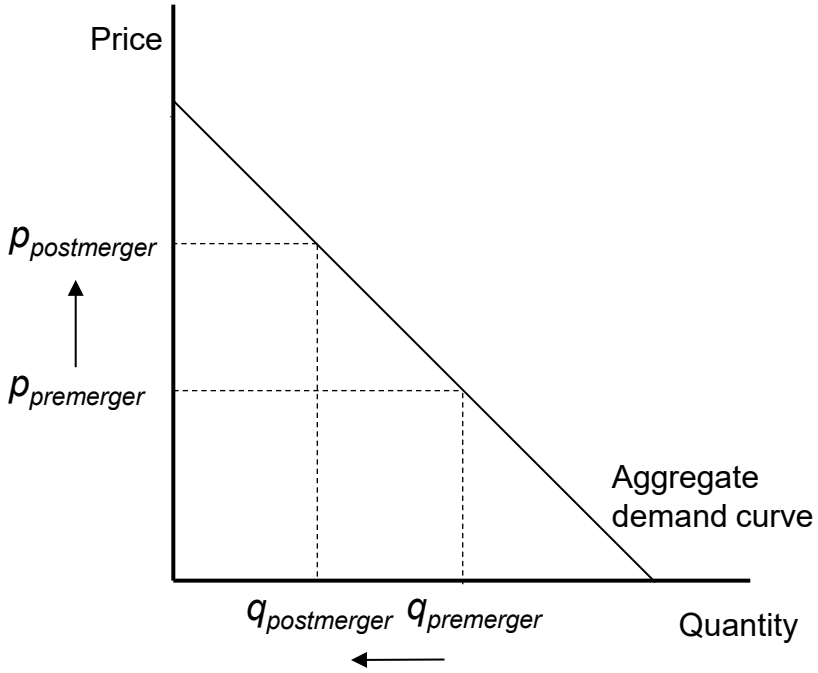
The consumer welfare standard in practice

- 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.

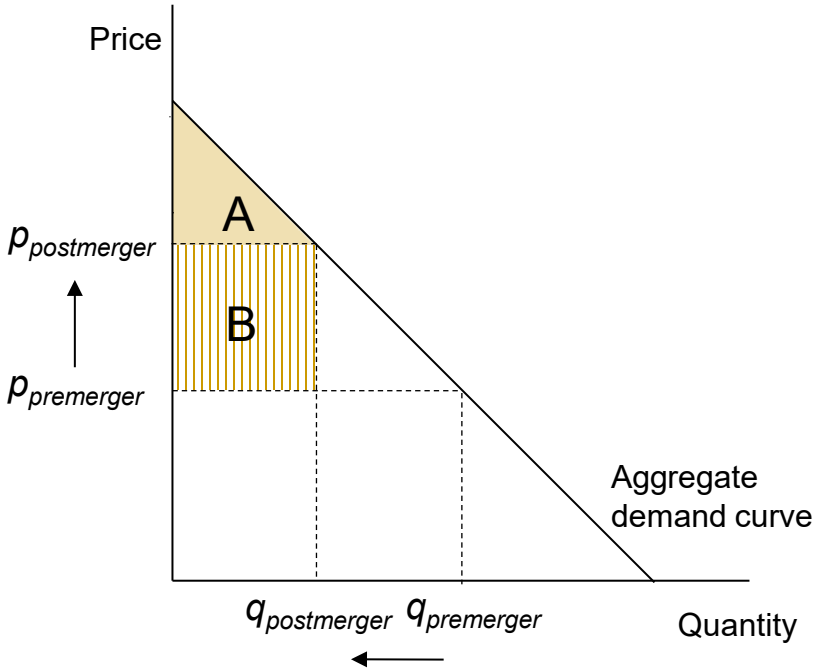
The consumer welfare standard: Textbook model

- 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"



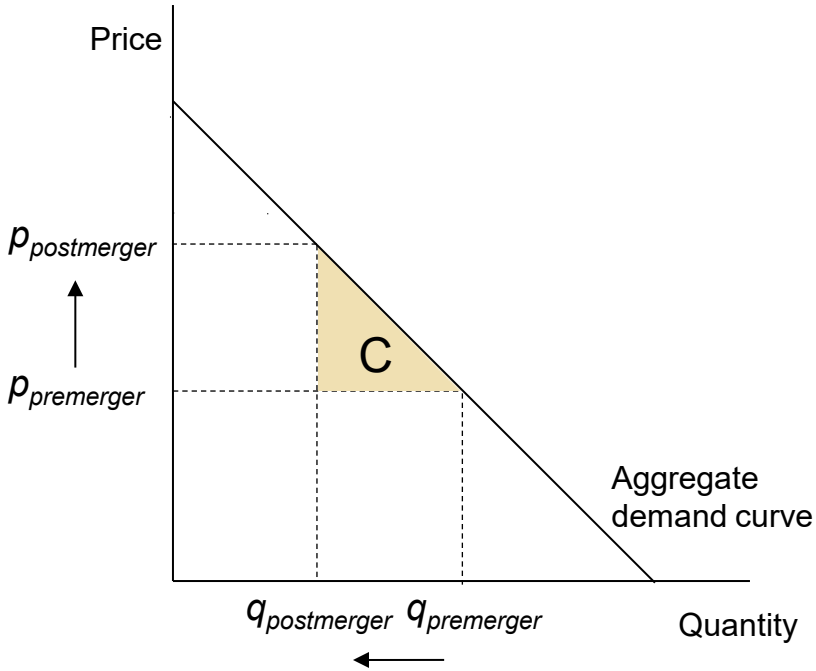
	Premerger	Postmerger
Consumers	A + B	A
Producers	0	B

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



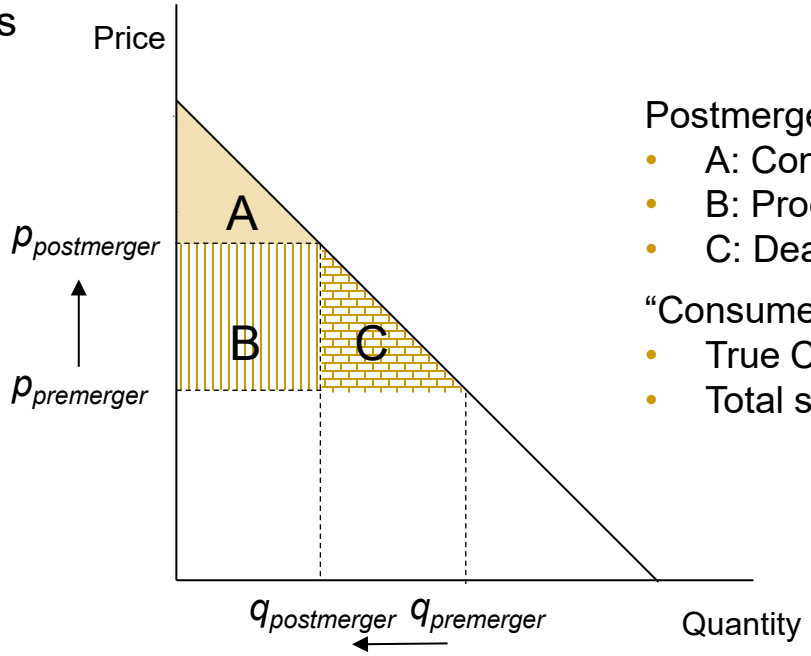
* Marginal customers here means customers that would purchase at the competitive price but not at the monopoly price

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

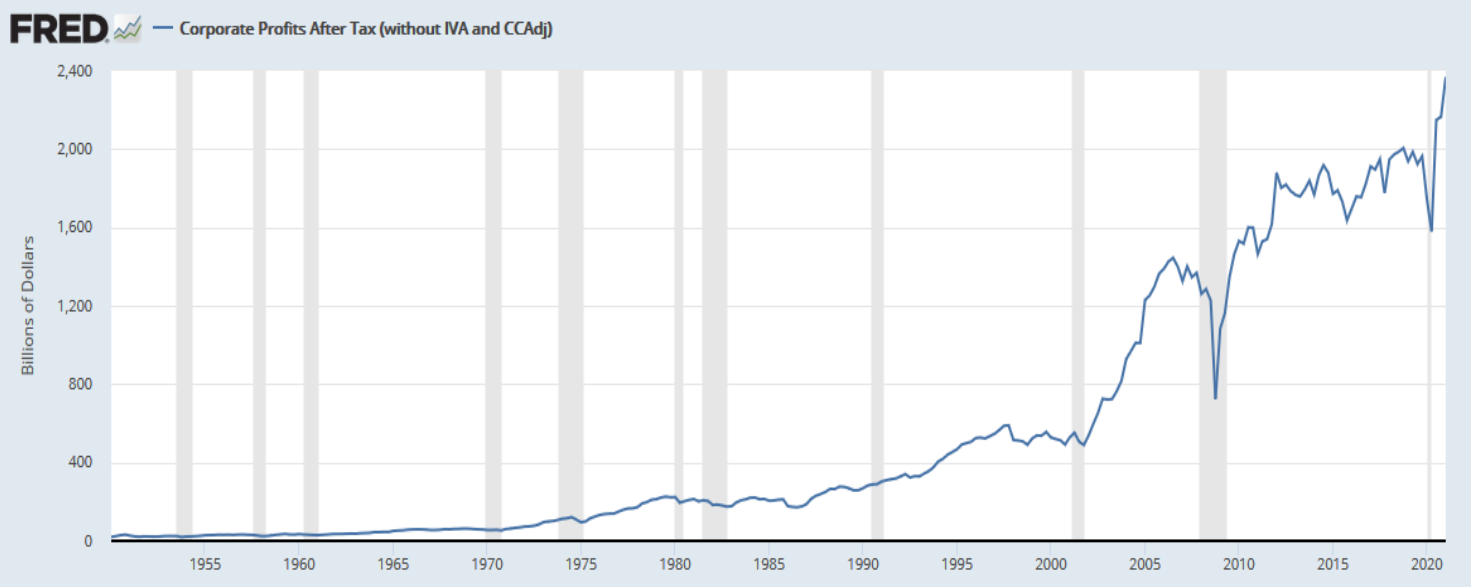
- The bottom line for the reformers:

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

Note: The slides that follow give the reformers' argument. They are not designed to give a neutral view and some of the studies cited have methodological flaws.

The reformers' argument

- Corporate profits are soaring in absolute dollars

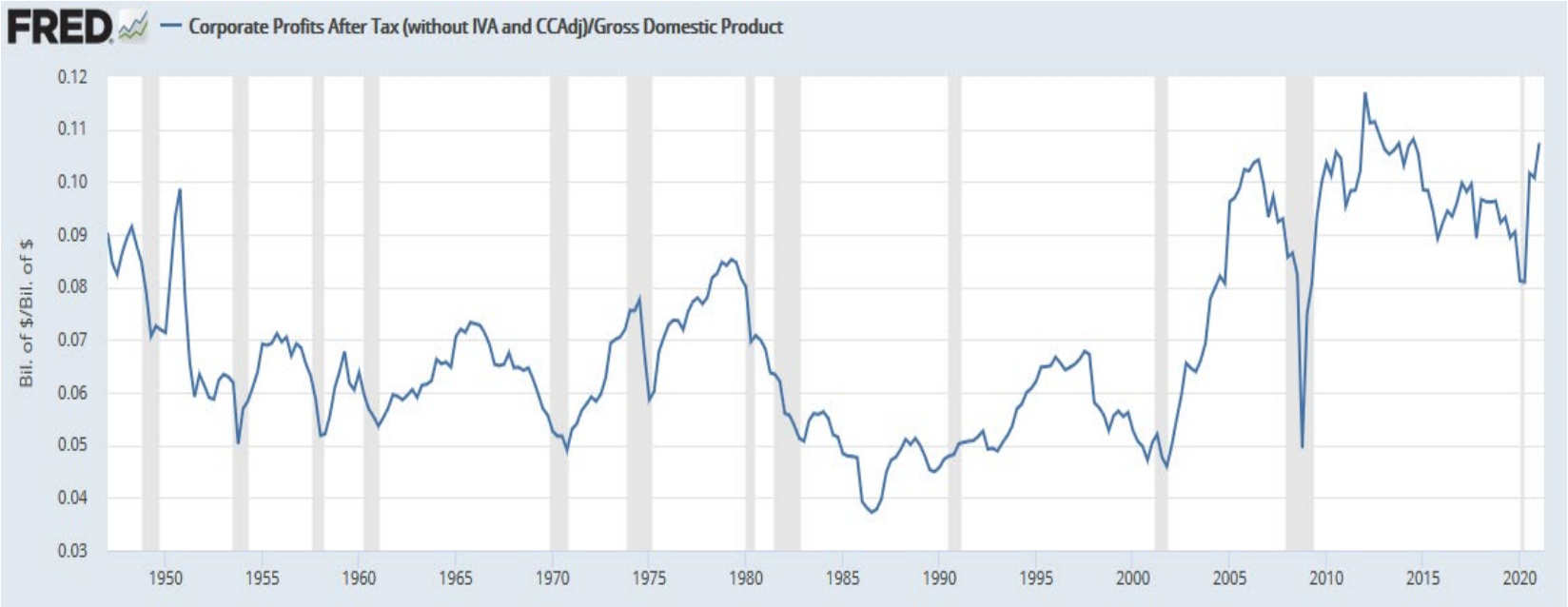


Shaded areas indicate U.S. recessions

Source: U.S. Bureau of Economic Analysis, Corporate Profits After Tax (without IVA and CCAdj) [CP], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/CP, July 31, 2021.

The reformers' argument

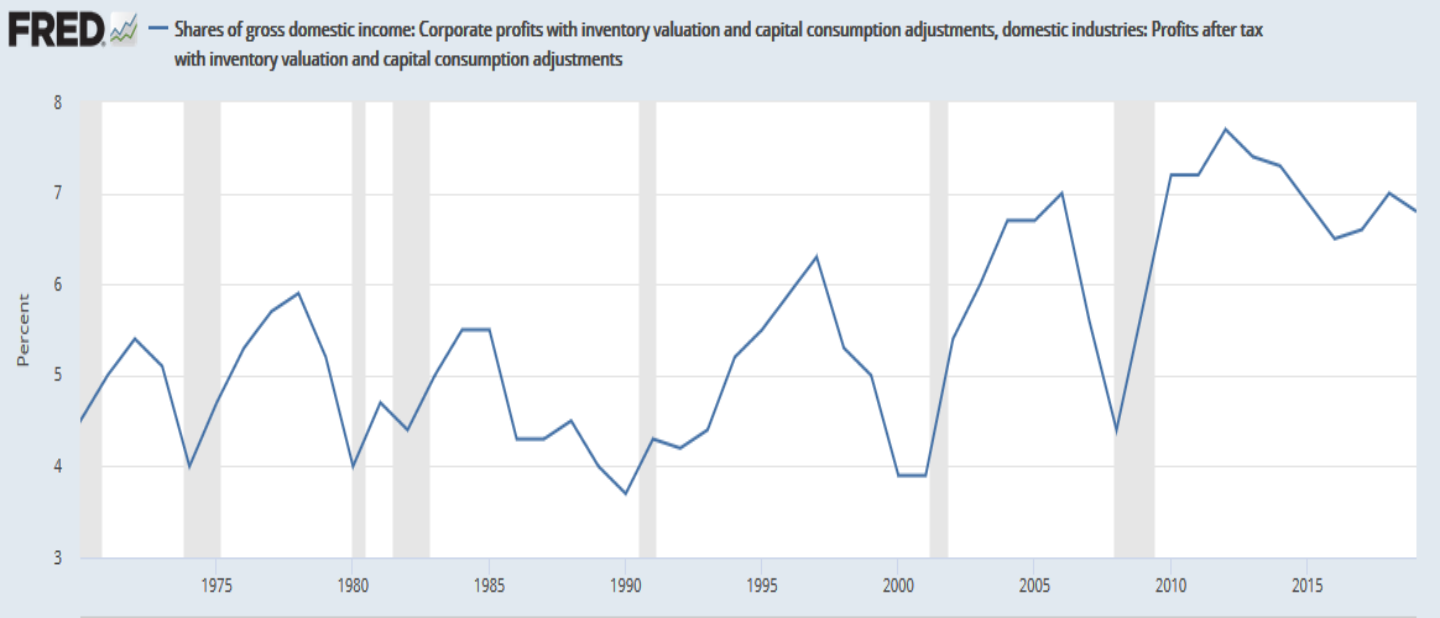
- . . . and as a percentage of GDP



Source: U.S. Bureau of Economic Analysis, Corporate Profits After Tax (without IVA and CCAdj) [CP], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/CP, August 1, 2021.

The reformers' argument

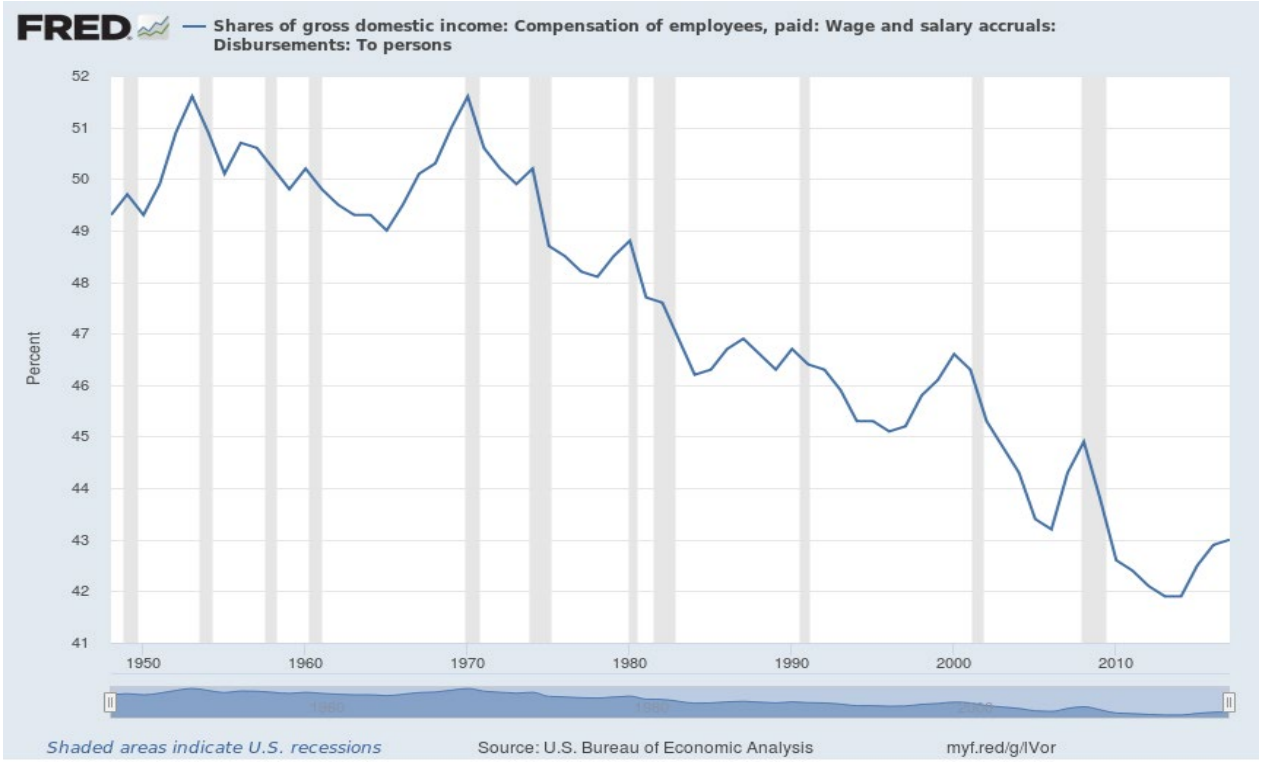
- Corporate profits account for an increasing share of gross domestic income



Source: U.S. Bureau of Economic Analysis, Shares of gross domestic income: Corporate profits with inventory valuation and capital consumption adjustments, domestic industries: Profits after tax with inventory valuation and capital consumption adjustments [W273RE1A156NBEA], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/W273RE1A156NBEA, August 2, 2021.

The reformers' argument

- . . .while the labor share of gross domestic income has dramatically declined

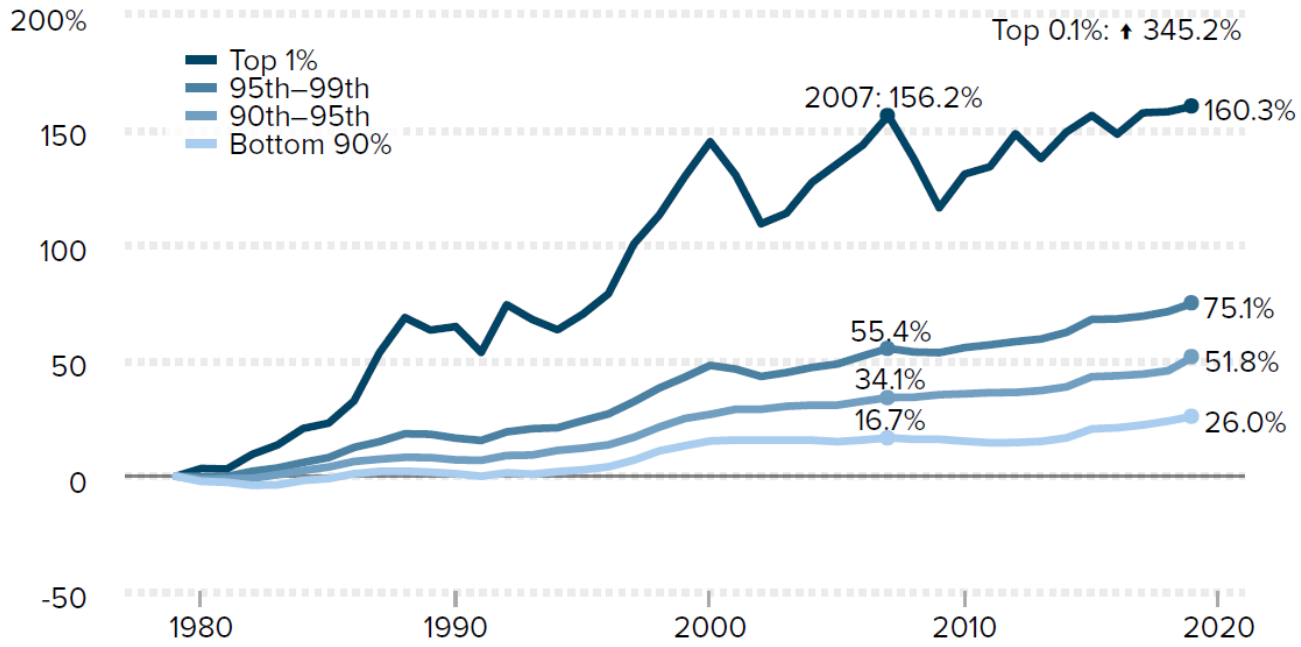


Source: U.S. Bureau of Economic Analysis, Shares of gross domestic income: Compensation of employees, paid: Wage and salary accruals: Disbursements: to persons [W270RE1A156NBEA], *retrieved from* FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/W270RE1A156NBEA, July 31, 2021.

The reformers' argument

- Real wages for average workers have largely stagnated

Cumulative percent change in real annual wages, by wage group, 1979–2019

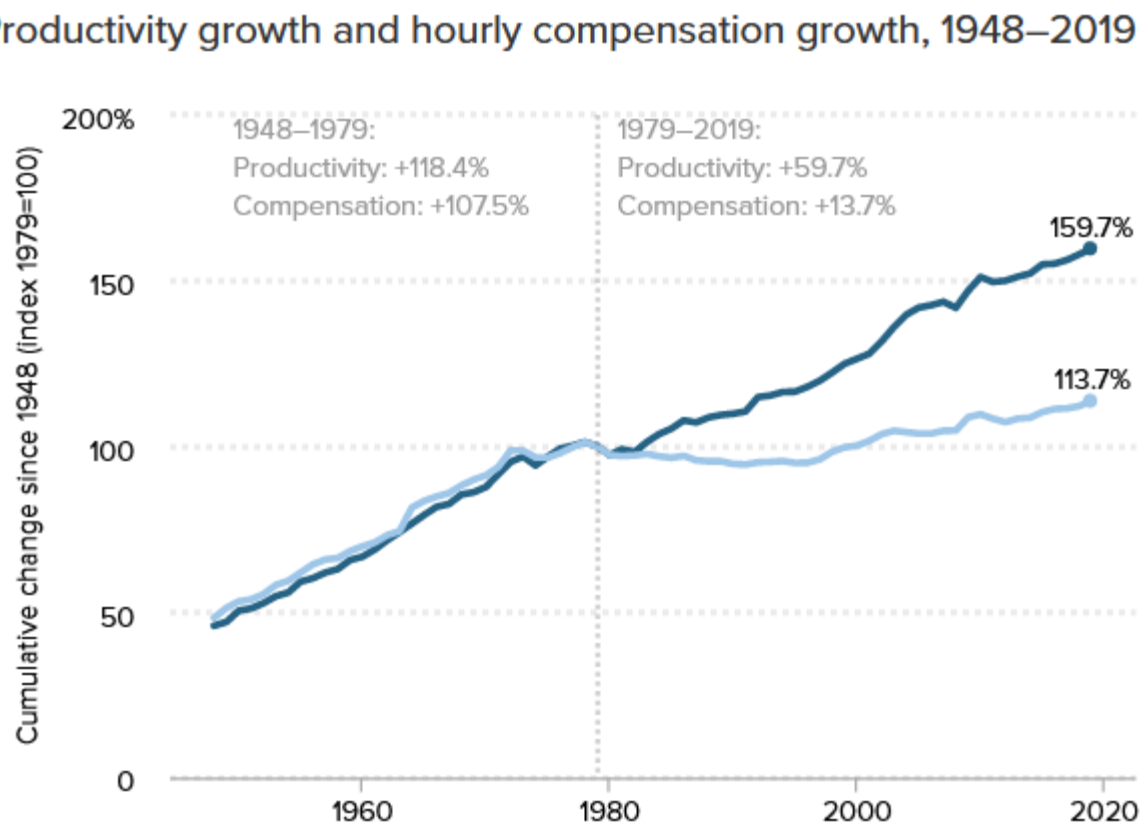


	CAGR
Top 0.1%	3.80%
Top 1%	2.42%
95th-99th	1.41%
90th-95th	1.05%
Bottom 90th	0.58%

Source: Lawrence Mishel & Josh Bivens, Identifying the Policy Levers Generating Wage Suppression and Wage Inequality 8 (Economic Policy Institute May 13, 2021), available at https://files.epi.org/uploads/215903.pdf.

The reformers' argument

- Moreover, workers are not being compensated with productivity growth

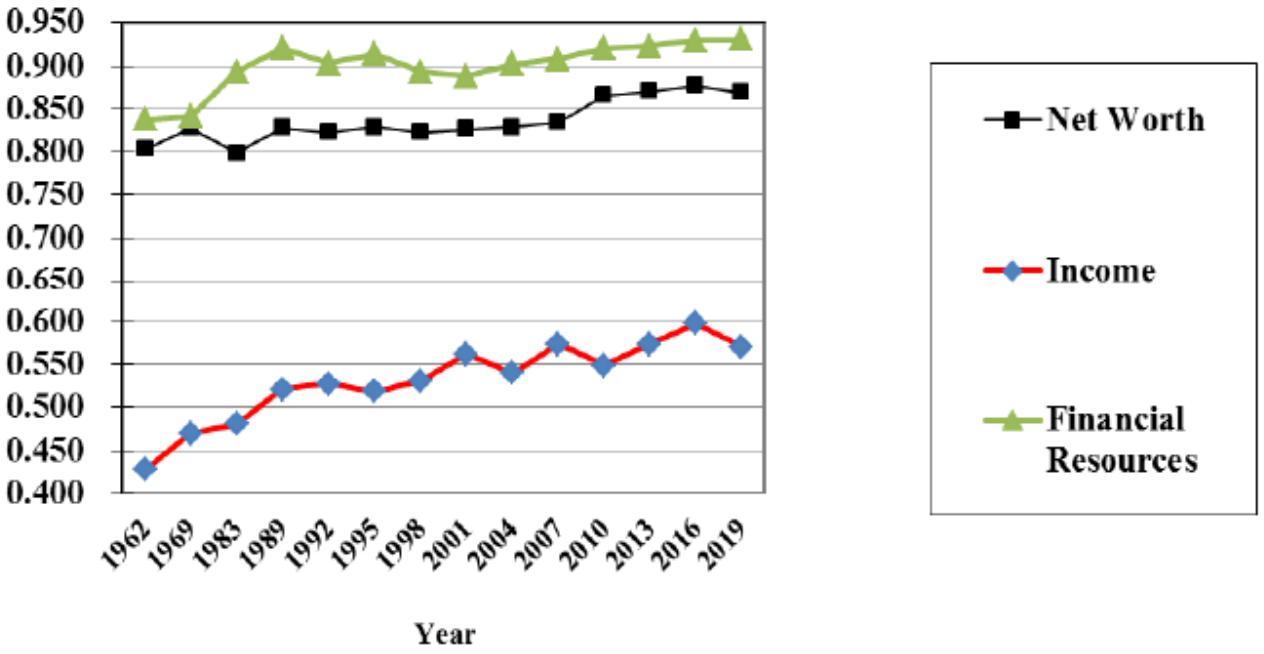


Source: Lawrence Mishel, Growing Inequalities, Reflecting Growing Employer Power, Have Generated a Productivity–Pay Gap since 1979 (Economic Policy Institute (Sept. 2, 2021), https://www.epi.org/blog/growing-inequalities-reflecting-growing-employer-power-have-generated-a-productivity-pay-gap-since-1979-productivity-has-grown-3-5-times-as-much-as-pay-for-the-typical-worker/.

The reformers' argument

- Income inequality correspondingly has grown increasingly worse . . .

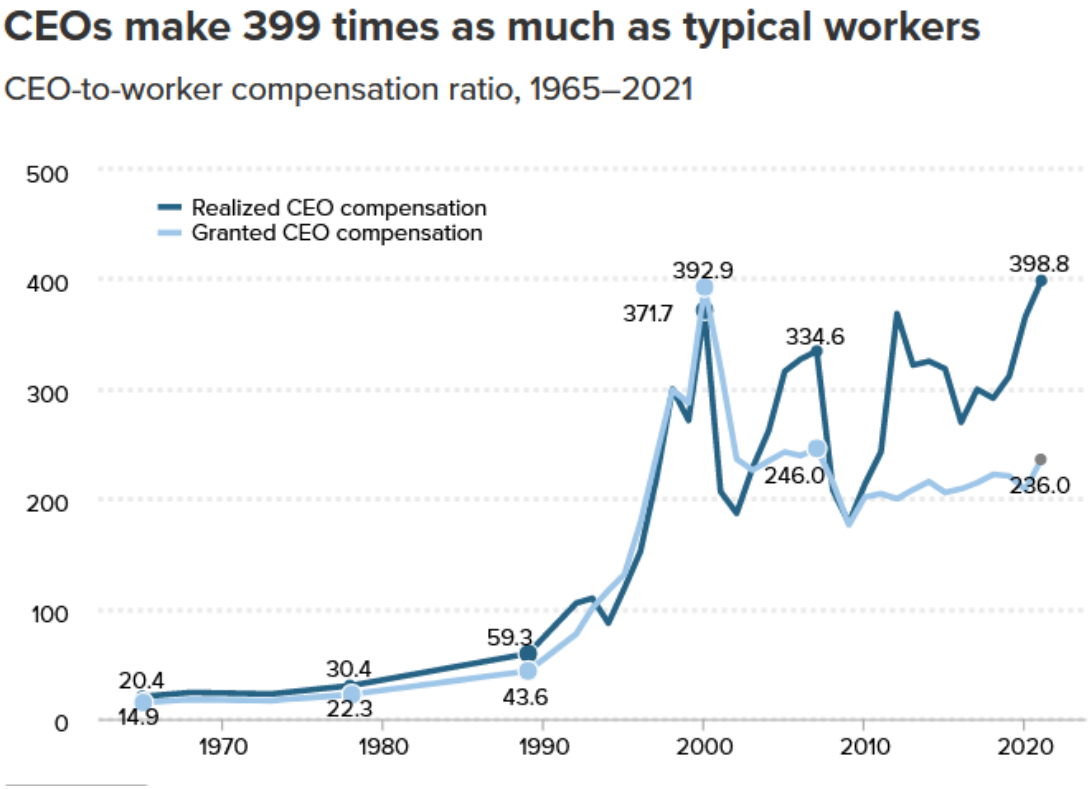
The higher the Gini coefficient, the greater the inequality



Source: Edward N. Wolff, Household Wealth Trends In The United States, 1962 to 2019: Median Wealth Rebounds... But Not Enough 71 (Figure 4) (NBER Working Paper No. 28383, Jn. 2021), http://www.nber.org/papers/w28383.

The reformers' argument

- . . . with CEOs on average now making 399x more than typical workers



Source: Josh Bivens and Jori Kandra, *CEO pay has skyrocketed 1,460% since 1978*, at 10 (Economic Policy Institute Oct. 4, 2022), *available at* https://www.epi.org/publication/ceo-pay-in-2021/.

The reformers' argument

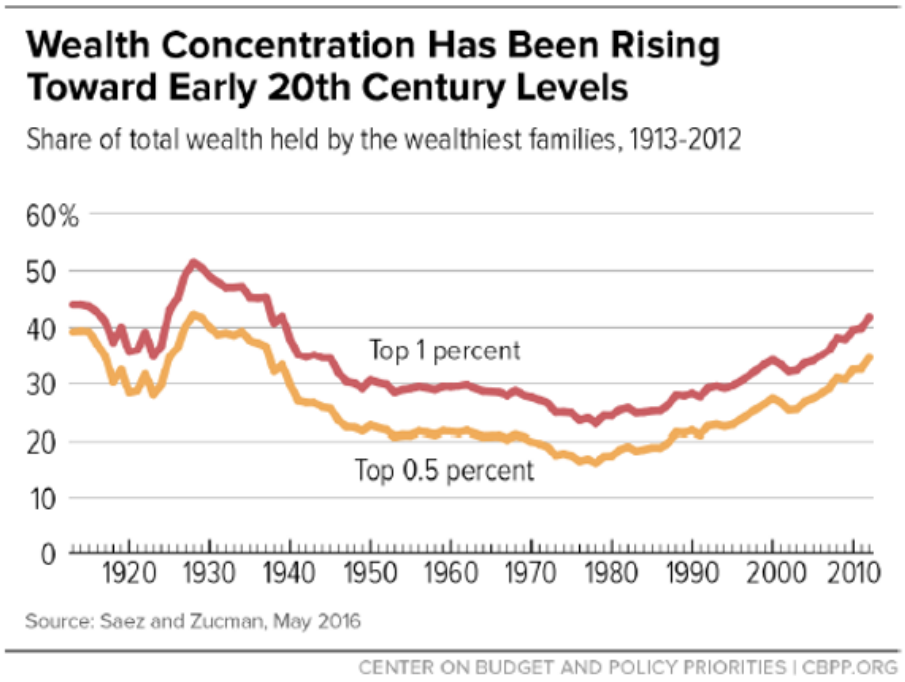
- The "American dream" of advancement over generations is declining

Percentage of U.S Children Earning More than Their Parents at Age 30 by Year of Birth, 1940-1984

Source: Peterson Institute for International Economics, How to Fix Economic Inequality? 7 (figure 7) (2020), https://www.piie.com/microsites/how-fix-economic-inequality.

The reformers' argument

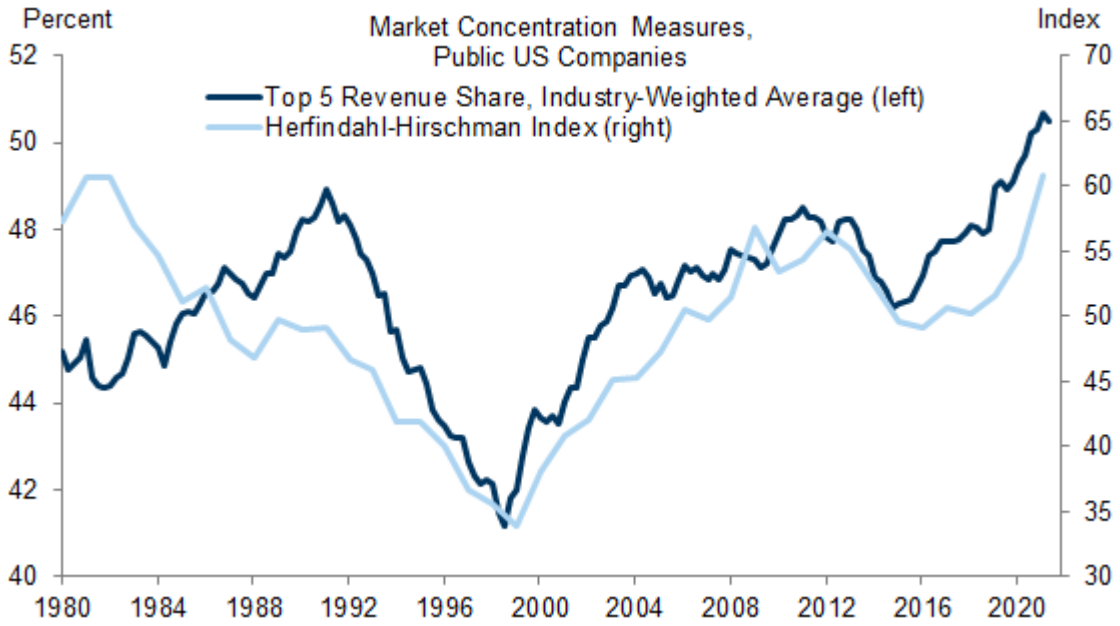
- Wealth is even more concentrated than income, with wealth inequality approaching the level of the 1920s



Source: Chad Stone, Danilo Trisi, Arloc Sherman & Jennifer Beltrán, A Guide to Statistics on Historical Trends in Income Inequality 16 (figure 6) (Center on Budget and Policy Priories updated June 13, 2020), https://www.cbpp.org/research/poverty-and-inequality/a-guide-to-statistics-on-historical-trends-in-income-inequality.

The reformers' argument

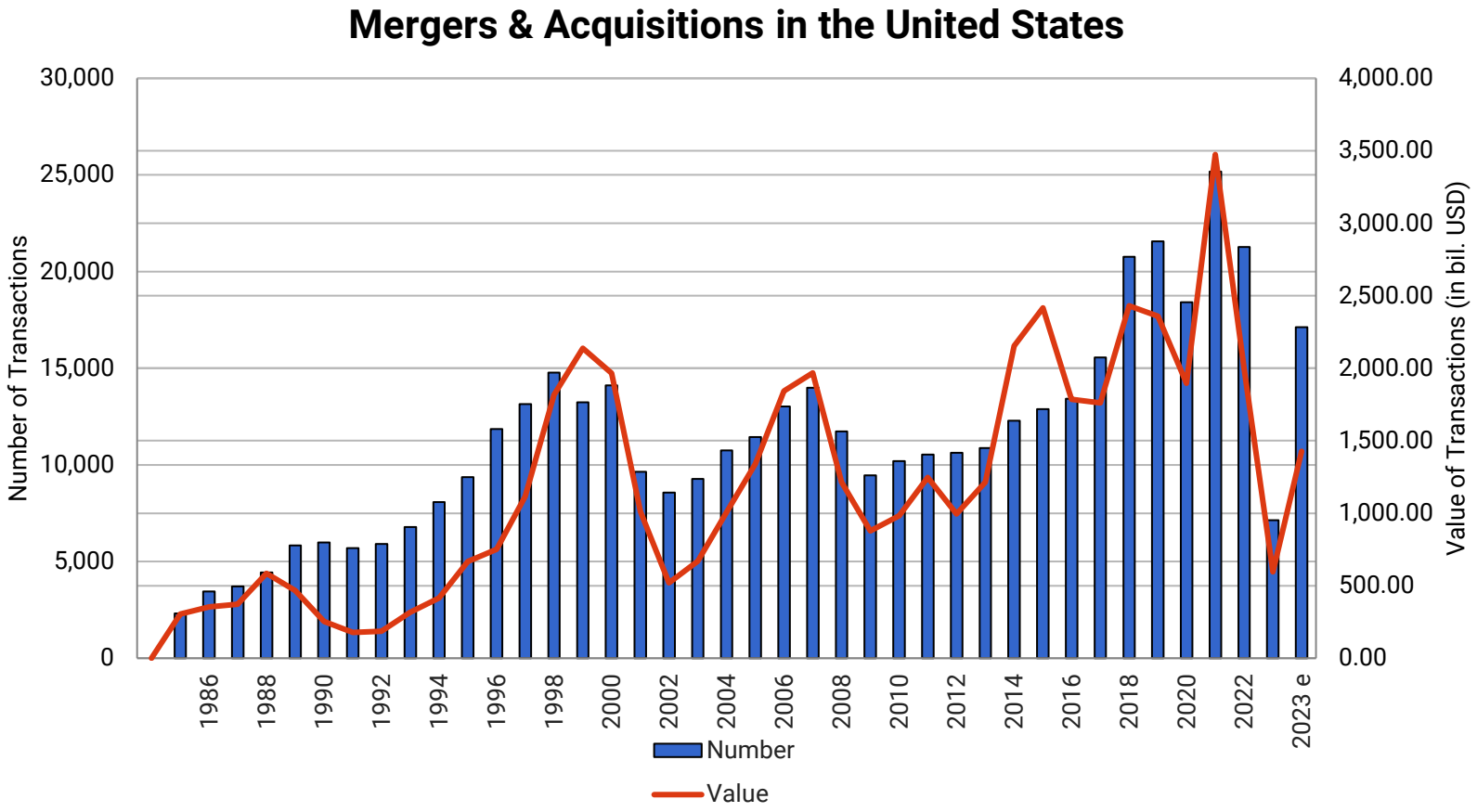
- Industrial concentration has been steadily increasing since the mid-1990s



Source: Joseph Briggs & Alec Phillips, *Concentration, Competition, and the Antitrust Policy Outlook* ex. 1 (Goldman Sachs US Economics Analyst July 18, 2021)

The reformers' argument

- Acquisitions are a significant source of increased concentration . . .



Source: Institute for Mergers, Acquisitions and Alliances (IMAA), M&A Statistics, https://imaa-institute.org/m-and-a-statistics-countries/#Mergers-Acquisitions-United-States-of-America (last visited Aug. 29, 2023).

The reformers' argument

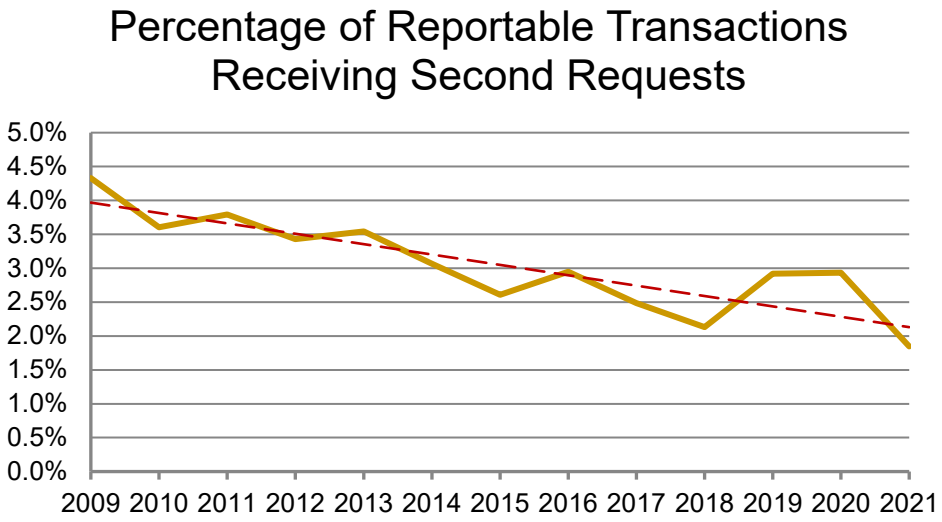
- . . . and some acquisitions have been "megadeals" . . .

Rank	Date	Acquiror	Target	Value (bil. USD)
1	2000	America Online Inc	Time Warner	164.747
2	2013	Verizon Communications Inc	Verizon Wireless Inc	130.298
3	1999	Pfizer Inc	Warner-Lambert Co	89.168
4	2016	AT&T Inc	Time Warner Inc	85.408
5	1998	Exxon Corp	Mobil Corp	78.946
6	2006	AT&T Inc	BellSouth Corp	72.671
7	1998	Travelers Group Inc	Citicorp	72.558
8	2001	Comcast Corp	AT&T Broadband & Internet Svcs	72.041
9	2018	Cigna Corp	Express Scripts Holding Co	69.770
10	2014	Actavis PLC	Allergan Inc	68.445
11	2017	Walt Disney Co.	21st Century Fox	68.422
12	2009	Pfizer Inc	Wyeth	67.286
13	2015	Dell Inc	EMC Corp	66.000
14	1998	SBC Communications Inc	Ameritech Corp	62.593
15	2015	The Dow Chemical Co	DuPont	62.111
16	1998	NationsBank Corp,Charlotte,NC	BankAmerica Corp	61.633
17	1999	Vodafone Group PLC	AirTouch Communications Inc	60.287
18	2002	Pfizer Inc	Pharmacia Corp	59.515
19	2010	Preferred Shareholders	AIG	58.977
20	2004	JPMorgan Chase & Co	Bank One Corp,Chicago,IL	58.663
21	2016	Bayer AG	Monsanto Co	56.598
22	1999	Qwest Commun Intl Inc	US WEST Inc	56.307
23	2015	Charter Communications Inc	Time Warner Cable Inc	55.638
24	2011	Shareholders	Abbott Laboratories-Research	55.513
25	2009	Vehicle Acq Holdings LLC	General Motors-Cert Assets	55.280

Source: Institute for Mergers, Acquisitions and Alliances (IMAA), M&A Statistics, https://imaa-institute.org/m-and-a-statistics-countries/#Mergers-Acquisitions-United-States-of-America (last visited Aug. 29 2023).

The reformers' argument

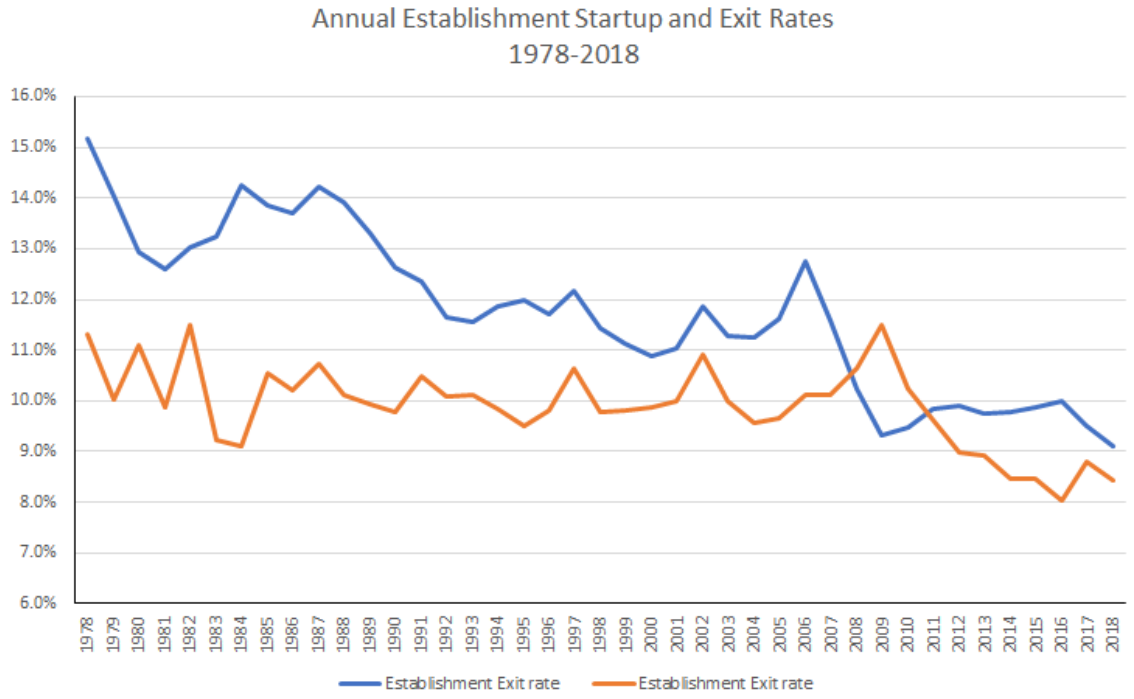
- . . . while HSR Act merger investigations have disproportionately declined



Source: Fed. Trade Comm'n & U.S. Dep't of Justice, Annual Reports to Congress (FY 1979-2021)

The reformers' argument

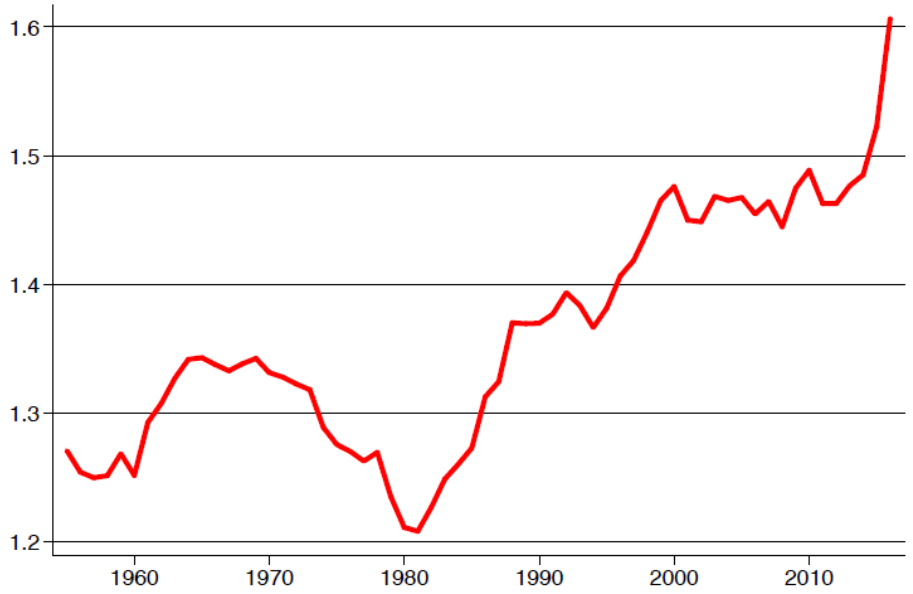
- At the same time, business start-up rates have been declining



Source: U.S. Census Bureau, Business Dynamics Statistics: Establishment Size: 1978-2018, https://data.census.gov/cedsci/table?q=BDSTIMESERIES.BDSESIZE&tid=BDSTIMESERIES.BDSESIZE&hidePreview=true.

The reformers' argument

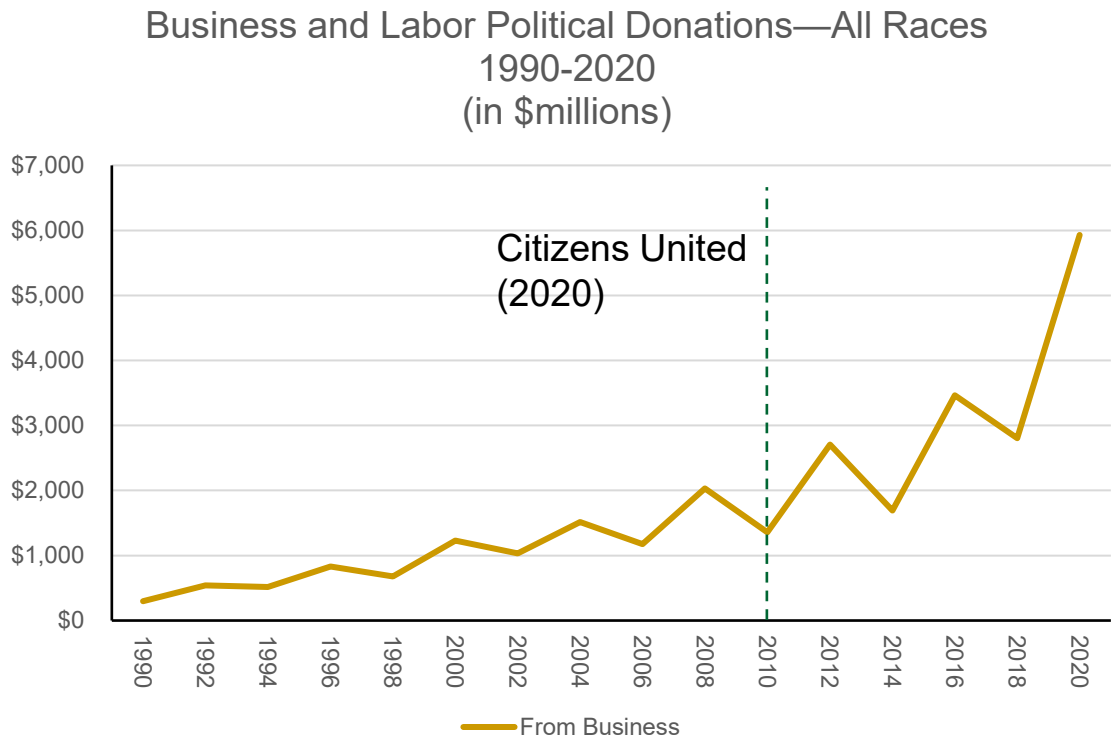
- Average markups have increased three-fold since 1980



Source: Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. Econ. 561, 571 (2020), *cited in* White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

The reformers' argument

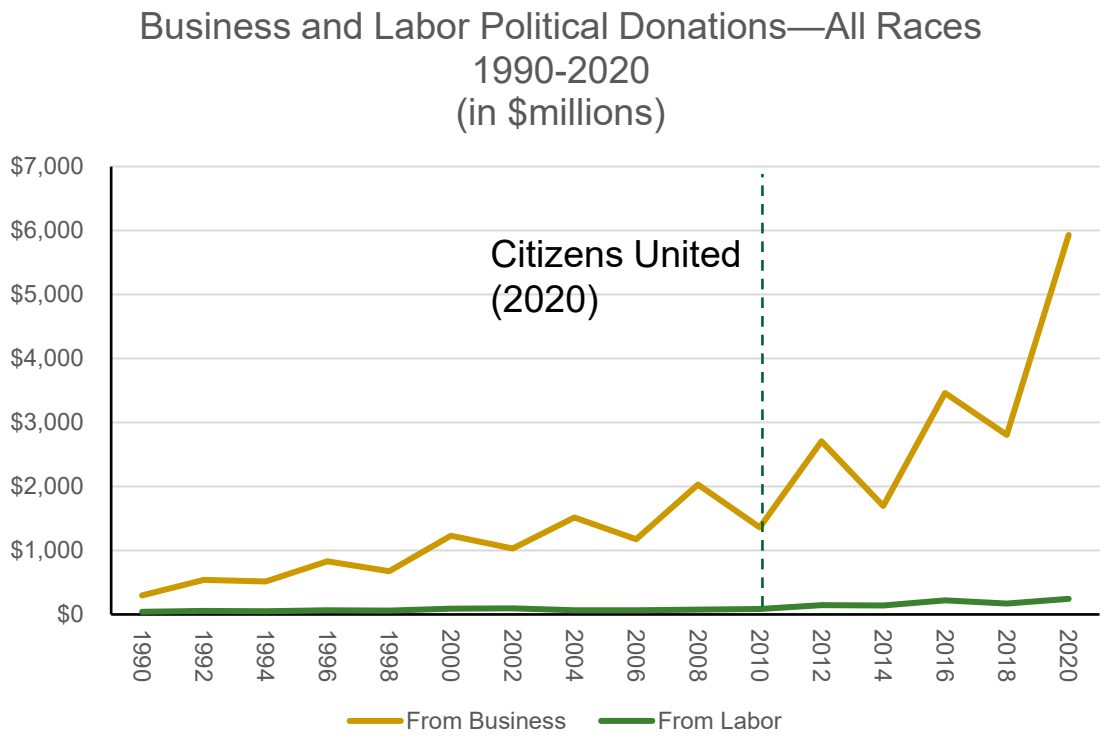
- Corporations are becoming more politically powerful, increasing their political campaign spending . . .



Source: Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups, https://www.opensecrets.org/elections-overview/business-labor-ideology-split.

The reformers' argument

- . . . and dramatically outspending labor



Source: OpenSecrets.org, Business-Labor-Ideology Split in PAC & Individual Donations to Candidates, Parties, Super PACs and Outside Spending Groups, https://www.opensecrets.org/elections-overview/business-labor-ideology-split.

The reformers' argument

- 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 broadened to include suppliers (especially labor)
  2. Assesses anticompetitive effect by comparing consumer welfare outcomes with the challenged conduct against outcomes in the "but for" world where the challenged conduct is prohibited
  3. Views historical enforcement outcomes as failing to identify and so permitting too many anticompetitive mergers and other types of anticompetitive conduct
  4. Believes that market power is typically durable and that markets do not adjust quickly—if at all—to eliminate market power
  5. Views the social harm of underenforcement of the antitrust laws to be greater than the social cost of overenforcement
  6. Would create presumptions to make prima facie proof of anticompetitive effect easier
  7. Very skeptical of any downward pricing pressure defenses to a prima facie case of anticompetitive effect
  8. Very demanding in accepting consent decrees to negate anticompetitive harm

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

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 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 of 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 heavy 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 two other Democrat commissioners, which gives Khan a working majority even if all 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 market 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

- Premises
  1. The democracy premise
  2. The economic premise
  3. The individual freedom premise
  4. Line drawing

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

[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
  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

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

The antimonopoly movement deconstructed

- Premises
  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 (six?) 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 a firm with 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 two 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 give the combined firm the *ability* to deny or anticompetitively price an important input or output (such as a distribution channel) to competitors
  - 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
  - Not a defense to a merger
  - 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

A Concluding Thought on the Courts

The courts as a brake on antitrust reform

- Strong judicial precedent reinforces the current "consumer welfare" approach
  - The Supreme Court has repeatedly cited consumer welfare as the lens through which to apply the antitrust laws over the last 40+ years
  - 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).