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# Antitrust on the Brink: The Calls for Radical Reform

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Presentation to the Antitrust Law Association

Georgetown University Law Center

September 16, 2021

# Antitrust on the Brink

- Four questions:
  - Where are we?
  - How did we get to the current regime?
  - What is the argument for reform?
  - What is going to happen?



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# WHERE ARE WE?

# The antitrust tectonic plates are shifting . . .

## ■ New monopolization cases



### □ United States v. Google LLC

- D.D.C. filed Oct. 20, 2020 (Amit P. Mehta, J.)
- DOJ and 14 states
- Market: Search and search advertising (monopoly maintenance)
- Challenges exclusive agreements
- Set for a September 2023 trial
- *Possible second action*: DOJ also investigating Google's digital advertising practices

### □ Texas v. Google LLC

- E.D. Tex. filed Dec. 16, 2020 (Sean D. Jordan, J.)
- 16 states plus Puerto Rico
- Market: Display advertising market on third-party websites (monopolization, attempted monopolization)
- Possible trial in March or April 2022

# The antitrust tectonic plates are shifting . . .

## ■ New monopolization cases



### □ Colorado v. Google LLC

- D.D.C. filed Dec. 17, 2020 (Amit P. Mehta, J.)
- 35 states plus Puerto Rico, Guam and D.C.
- Market: Search and search advertising (monopoly maintenance)
- Charges monopoly maintenance

### □ Utah v. Google LLC

- N.D. Cal. filed July 7, 2021 (James Donato, J.)
- 36 states plus D.C.
- Market: Google App Store (monopoly maintenance, unreasonable restraints, unlawful tying, exclusive dealing)

# The antitrust tectonic plates are shifting . . .

## ■ Monopolization cases



- ❑ FTC v. Facebook Inc.
  - D.D.C. filed Dec. 9, 2020 (James E. Boasberg, J.)
  - Market: Personal social networking (monopoly maintenance)
  - Requested relief includes divestiture of Instagram and WhatsApp
- ❑ New York v. Facebook Inc.
  - D.D.C. filed Dec. 9, 2020 (James E. Boasberg, J.)



- ❑ District of Columbia v. Amazon.com Inc.
  - D.C. Super. Ct. filed Mar. 25, 2021
  - Market: U.S. online retail sales (restraint of trade, monopoly maintenance under D.C. law)
- ❑ Amazon-MGM pending merger under scrutiny by the FTC

# The antitrust tectonic plates are shifting . . .

## ■ Legislation (selected examples)

### □ S. 225: Competition and Antitrust Law Enforcement Reform Act

#### ■ Introduced by Sen. Amy Klobuchar (D-MN) (Feb. 4, 2021)

#### ■ Would—

□ Define “market power” to include both sell-side and buy-side

□ Amend Section 7 by—

▪ Modifying the anticompetitive effects test (“appreciable risk” of an anticompetitive effect)

▪ Creating new rebuttable statutory presumptions establishing a prima facie case of anticompetitive effect:

▪ Acquiring or acquired firm > 50% market share

▪ Horizontal acquisition of a “maverick”

▪ Acquisition materially increases unilateral effects or coordinated effects

▪ Acquisitions of \$5 billion+ companies

▪ \$100 billion companies acquiring \$50 million+ companies

□ Create a new antitrust provision governing exclusionary conduct

□ Create a private right of action for violations of Section 5 of the FTC Act

□ Create sizeable civil penalties

□ Significantly increase the authorization of appropriations for the Antitrust Division and the FTC

#### ■ Pending in Senate Judiciary Committee

# The antitrust tectonic plates are shifting . . .

## ■ Legislation (selected examples)

### □ 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

#### ■ Pending in Senate Judiciary Committee

# The antitrust tectonic plates are shifting . . .

## ■ Legislation (selected examples)

### □ S. 2039: Tougher Enforcement Against Monopolists Act (TEAM Act)

#### ■ Introduced by Sen. Mike Lee (R-UT) (June 4, 2021)

#### □ Pending in Senate Judiciary Committee

#### ■ 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

# The antitrust tectonic plates are shifting . . .

## ■ Legislation (selected examples)

### □ H.R. 3816: American Choice and Innovation Online Act

- Introduced by David Cicilline (D-RI) (June 11, 2021)
- Would make it illegal for operators to favor their own products over those of competitors in the market that they operate
- Provides for civil penalties not more than
  - 15 percent of the total average daily United States revenue of the operator or
  - 30 percent of the total average daily United States revenue of the target
- Reported by House Judiciary Committee (24-20)

### □ H.R. 3825: Ending Platform Monopolies Act

- Introduced by Pramila Jayapal (D-Wash) (June 11, 2021)
- Would make it illegal for a covered platform to sell their own product on a market they operate
- Civil penalties (15% operator/30% target)
- Reported by House Judiciary Committee (21-20)

# The antitrust tectonic plates are shifting . . .

## ■ Legislation (selected examples)

- H.R. 3826: Platform Competition and Opportunity Act of 2021
  - Introduced by Hakeem Jeffries (D-NY) (June 11, 2021)
  - Would restrict mergers and acquisitions facilitated by “covered platforms”
  - Reported by House Judiciary Committee (23-18)
  
- H.R. 3849: Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021 (ACCESS Act)
  - Introduced by Mary Gay Scanlon (D-Pa) (June 11, 2021)
  - Would make it easier for consumers to leave the platform and take their data to competitors. Provides for portability of data and interoperability
  - Reported by House Judiciary Committee (25-19)

# The antitrust tectonic plates are shifting . . .

- 2021 Executive Order No. 14036
  - “Promoting Competition in the American Economy”
  - Signed by President Biden on July 9, 2021
  - Looks to a “whole of government” approach to improving competition
  - Asks 12 federal agencies for undertake 72 action items, including:
    1. DOJ and FTC encouraged to “enforce the antitrust laws fairly and vigorously”
    2. DOJ and FTC “encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines”
    3. DOJ encouraged (along with the Secretary of Commerce) “to consider whether to revise their position on the intersection of the intellectual property and antitrust laws”
    4. DOJ and FTC encouraged to revise guidelines “[t]o better protect workers from wage collusion”
    5. FTC encouraged “to exercise the FTC’s statutory rulemaking authority” in specific areas
      - Unfair anticompetitive restrictions on third-party repair or self-repair of items
      - “Pay for delay” agreements in prescription drugs
      - Unfair competition in major Internet marketplaces
      - Unfair tying practices or exclusionary practices in the brokerage or listing of real estate
      - “[A]ny other unfair industry-specific practices that substantially inhibit competition”

# The antitrust tectonic plates are shifting . . .

## ■ Biden administration appointments

### □ Brian Deese

- Director of the National Economic Council
- Senior Advisor to the President (Obama)
- Former deputy director and acting director of the Office of Management and Budget (Obama)
- Former deputy director of the National Economic Council (Obama)
- Committed antitrust reformer



### □ Tim Wu

- Special Assistant to the President for Technology and Competition Policy on the NEC
- Former Columbia law school professor
- Author, *The Curse of Big Bigness*
- A leading Neo-Brandeisian antitrust reformer



# The antitrust tectonic plates are shifting . . .

## ■ Biden administration appointments

### □ Lina Khan

- Chair, Federal Trade Commission
  - Along with the two other similar-minded Democrat commissioners, controls a majority of the FTC
- Term ends September 25, 2024
- Former Columbia law professor
- Author, *Amazon's Antitrust Paradox*
- Perhaps the leading Neo-Brandeisian antitrust reformer



### □ Jonathan Kanter

- Nominated for Assistant Attorney General
  - Confirmation expected late fall
- Former antitrust partner (Paul, Weiss and Cadwalader)
- Former FTC attorney (after law school)
- Made reputation attacking high tech companies on behalf of Microsoft



# The antitrust tectonic plates are shifting . . .

- Biden administration appointments
  - Gene Kimmelman
    - Senior Counselor to Associate Attorney General
    - Former member, Biden DOJ transition team
    - Former Chief Counsel to AAG Christine Varney (Obama)
    - Former President & CEO, Public Knowledge
    - A progressive antitrust reformer



# The antitrust tectonic plates are shifting . . .

## ■ Biden administration actions: All eyes on the FTC

June 15	Lina Khan sworn in as commissioner and named chair Breaks a 2-2 deadlock and gives the Democrat commissioners a 3-2 majority
July 1	FTC withdraws 2015 Policy Statement on Section 5 enforcement
July 1	FTC authorizes “investigations into key law enforcement priorities for the next decade”
July 9	Joint announcement with DOJ to review merger guidelines
July 21	FTC reinstates policy of including “prior approval” provisions in merger consent decrees
August 3	Alerts companies that the FTC’s merger reviews can remain open after the end of the HSR Act waiting period and that companies close at their own risk
August 6	Khan to Sen. Warren: “The antitrust agencies should more frequently consider opposing problematic deals outright” than accepting consent decrees
September 15	FTC withdraws vertical merger guidelines

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# HOW DID WE GET TO THE CURRENT REGIME?

# The common law nature of antitrust law

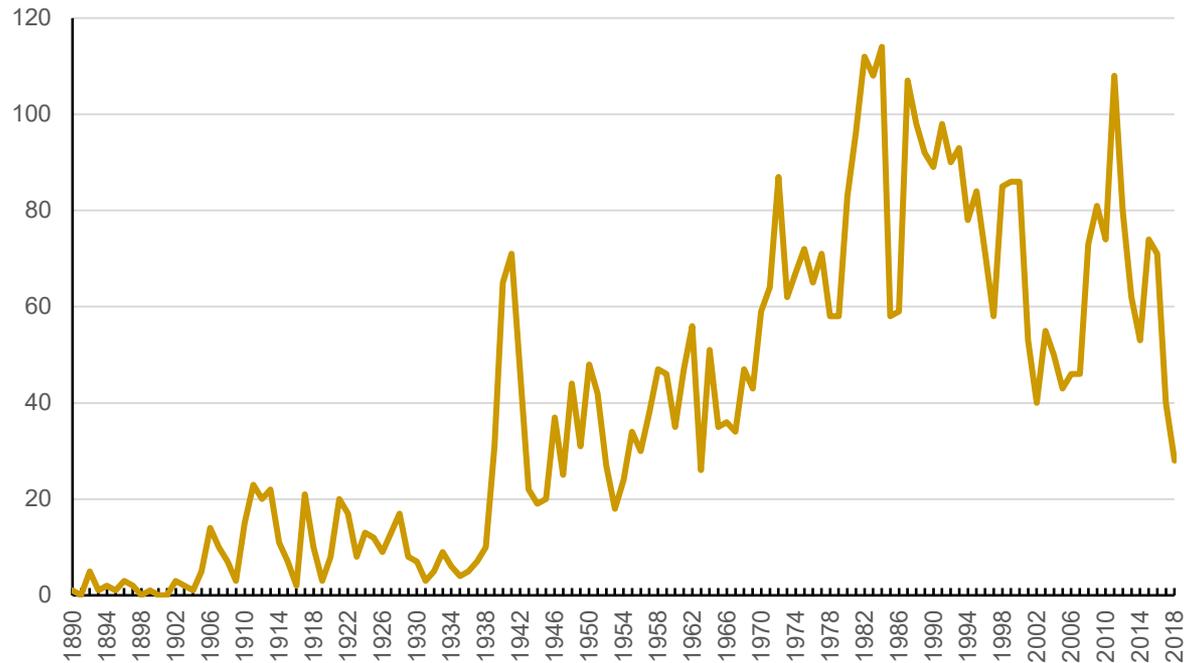
- The antitrust statutes contain vague, uninformative terms
  - “Restraint of trade”
  - “Monopolization,” “attempt to monopolize,” “conspiracy to monopolize”
  - “May be substantially to lessen competition, or to tend to create a monopoly”
  - “Unfair methods of competition”
- This is a defining feature of antitrust law, *not* a bug
  - This is an intentional part of the design of U.S. antitrust law from the beginning<sup>1</sup>
  - Framers of the Sherman Act used *common law terms of art* to enable the federal courts to continue to develop antitrust rules through the common law process

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

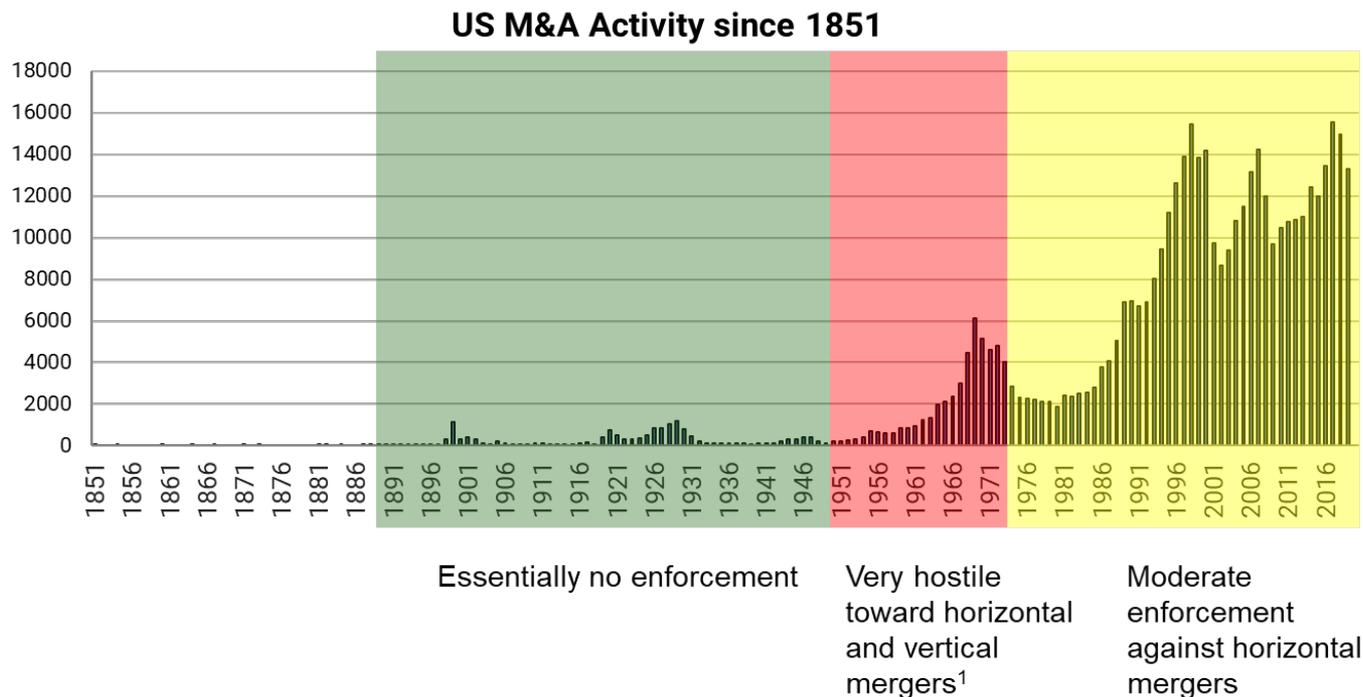
# The common law nature of antitrust law

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

DOJ Cases Filed : Civil and Criminal  
1890-2018



# The common law nature of antitrust law



<sup>1</sup> The uptick in M&A activity during this period was largely comprised of conglomerate mergers, which the agencies (with some notable early exceptions) did not challenge.

# The first 47 years (1890-1937)

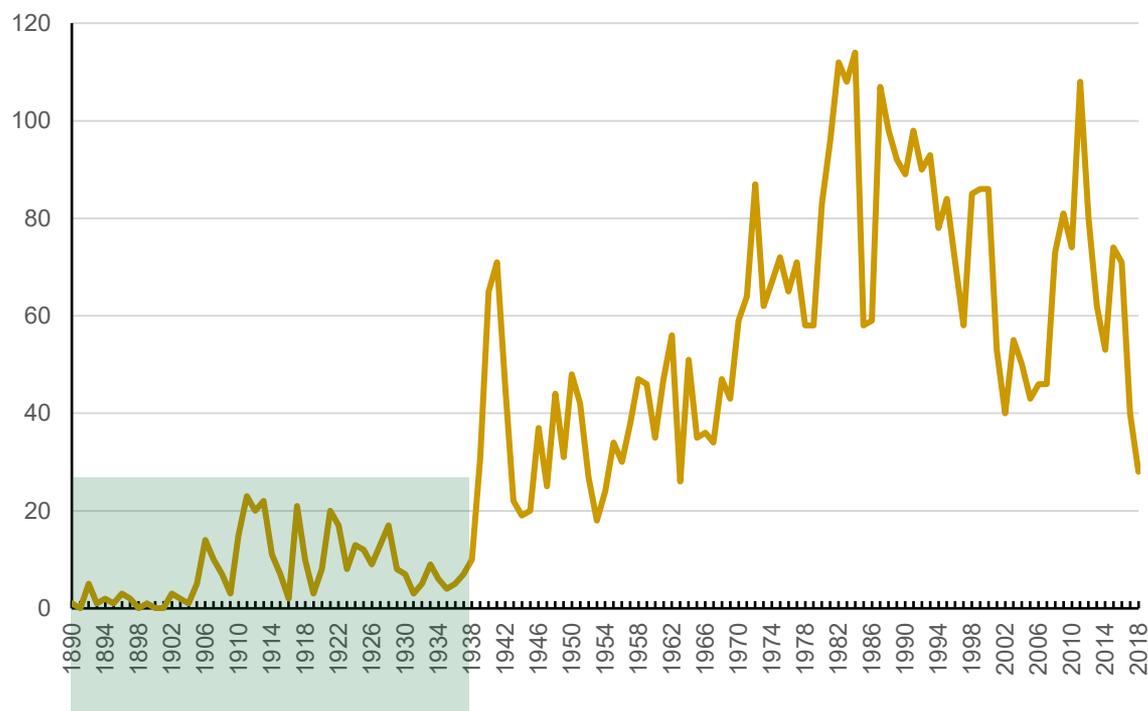
- Antitrust law was largely non-interventionist from 1890 to 1937
    - Some blips in the second Roosevelt and Taft administrations, and to a somewhat lesser extent in the Wilson administration
    - But overall—
      - WWI mobilization, much of which required extensive coordination among companies, increased real GDP by 23% between 1914 and 1920<sup>1</sup>
        - 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 Crash: The economy is not broken, so don't try to fix it by enforcing the antitrust laws*

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

# The first 47 years

DOJ Cases Filed : Civil and Criminal  
1890-2018



# 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—
    - Real GDP dropped 10%
    - Unemployment rose to 19%
    - Industrial production fell 32%
  - The Roosevelt administration came under assault in a very heated political environment

# The 1937-1938 recession and its aftermath

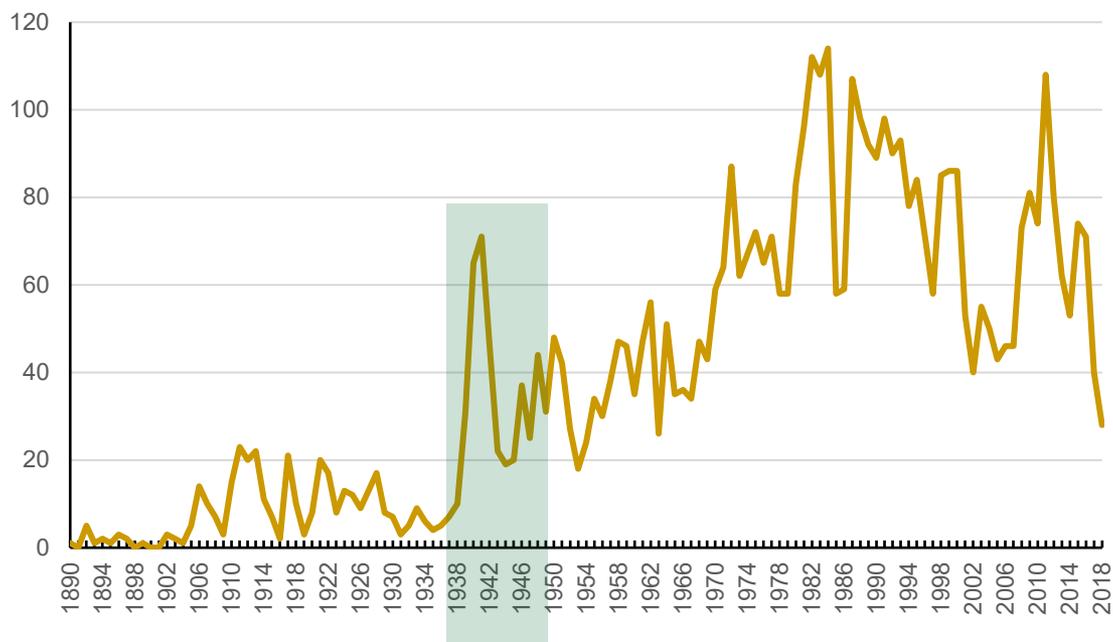
## ■ Roosevelt's response

- Roosevelt decided that big businesses were trying to ruin the New Deal by causing another depression that voters would react against by voting Republican<sup>1</sup>
- Roosevelt then launched a campaign asserting that big business combinations were the cause of the recession
- 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
- 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

<sup>1</sup> See, e.g., David M. Kennedy, *Freedom From Fear: The American People in Depression and War, 1929–1945*, at 352 (1999)

# The 1937-1938 recession and its aftermath

DOJ Cases Filed : Civil and Criminal  
1890-2018



# Post-World War II (circa 1950-1972)

## ■ Post-World War II (1950-1972)

- Very negative and widespread public reaction to the support by large industrial enterprises that supported the Nazi Germany and Imperial Japanese regimes
- The legislative history of the 1950 Celler-Kefauver Act<sup>1</sup> amendments to Section 7 of the Clayton Act was aggressively hostile to business combinations
  - Major concerns expressed in the legislative history<sup>2</sup>—
    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
- After the interruption of WWII, concerns resolidified about big business and expanded to include mergers as well as price-fixing combinations

*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*

<sup>1</sup> Ch. 1184, 64 Stat. 1125 (1950) (amending Section 7 of the Clayton Act).

<sup>2</sup> See *Brown Shoe Co. v. United States*, 370 U.S. 294, 311-23 (1962).

# Post-World War II (1950-1972)

## ■ Post-World War II (1950-1972)

- These concerns—
  - Had broad public support
  - 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 (1950-1972)

- Resulted in an increasingly restrictive antitrust regime
  - Further tightening on horizontal price fixing
    - Actually begin somewhat earlier (*Socony-Vacuum*)
    - Easing of rules to find concerted action (*Container Corp.*)
  - Horizontal mergers—close to per se unlawful
    - E.g., *Brown Shoe*, *PNB*, *Pabst/Blast*, *Von's Grocery*, *Potter Stewart rule*, 1968 Merger Guidelines
  - Vertical mergers—close to per se unlawful
    - *DuPont/GM*
  - Conglomerate mergers seriously challenged
    - *P&G*, *Falstaff*, *El Paso Natural Gas*, the DOJ potential competition campaign
  - Tightening of Section 2 prohibitions and enforcement
    - *Alcoa*
    - *Grinnell*, *IBM* (filed 1969), *AT&T* (filed 1974)
    - “Shared monopoly” theory

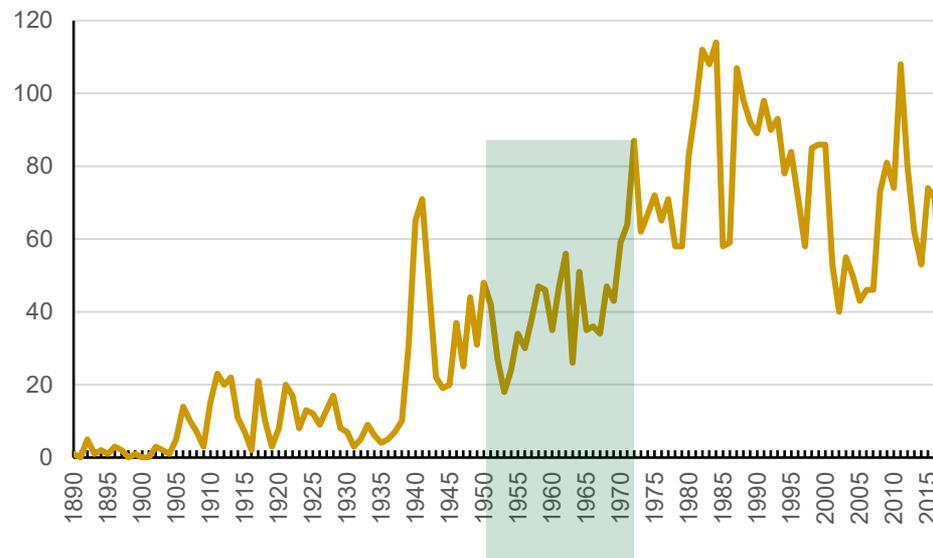
# Post-World War II (1950-1972)

- Resulted in an increasingly restrictive antitrust regime
  - Nonprice vertical restraints—per se unlawful
    - *Albrecht*
    - *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*
    - *Topco*

# Post-World War II (1950-1972)

- Resulted in an increasingly restrictive antitrust regime
  - Remedies and procedure
    - *DuPont* (1957) (essentially finding that the DOJ is cannot be time-barred in a government injunctive actions where there continue to be effects traceable to the acquisition and allowing challenge 30 years after acquisition)
    - *Hanover Shoe* (1968) (holding that Clayton Act § 4 does not recognize a “passing on” defense)

DOJ Cases Filed : Civil and Criminal  
1890-2018



# Post-World War II (1950-1972)

## ■ Post-World War II (1950-1972)

- To the extent this restrictive implementation of the law reduce 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) <sup>1</sup>	4.1%
Nonfarm business productivity (average annual rate) <sup>2</sup>	2.8%
Inflation (average annual change Dec. to Dec.) <sup>3</sup>	2.6% Max = 6.2%
Bank prime loan rate (annual—data series starts in 1956) <sup>4</sup>	5.8% Max = 8.0%
Unemployment (average monthly rate) <sup>5</sup>	4.6% Max = 7.5%
Median real family income (average annual change) <sup>6</sup>	3.3%

# The “malaise” period (circa 1973 to 1982)

- The “malaise” period (circa 1973 to 1982)
  - “Stagflation” gripped the nation
    - Significant inflation as a result of the Mideast oil shocks in 1973 and 1979 and the easy monetary policy of the late 1960s to finance the Vietnam War
    - “Productivity crisis” 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

*Note:* The appellation for this period was suggested by 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”).

# The “malaise” period (circa 1973 to 1982)

- Economic conditions—Not good times

Indicator	1950-1972	1973-1982
Real GDP (average annual growth) <sup>1</sup>	4.1%	2.4%
Nonfarm business productivity (average annual rate) <sup>2</sup>	2.8%	1.0%
Inflation (average annual change Dec. to Dec.) <sup>3</sup>	2.6% Max = 6.2%	8.7% Max = 13.3%
Bank prime loan rate (annual—data series starts in 1956) <sup>4</sup>	5.8% Max = 8.0%	11.10% Max = 18.9%
Unemployment (average monthly rate) <sup>5</sup>	4.6% Max = 7.5%	7.0% Max = 10.8%
Median real family income (average annual change) <sup>6</sup>	3.3%	-0.2%

# The “malaise” period (circa 1973 to 1982)

- The “malaise” period (circa 1974 to 1982) (con’t)
  - 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 the concerns in any event, especially given the perceived success of the Japanese keiretsu
  - Rapidly emerging (public) 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

*New emerging attitude:  
Maximize output and industrial productivity*

# The “malaise” period (circa 1973 to 1982)

- The “malaise” period (circa 1974 to 1982) (con’t)
  - Strong political pressures to address these concerns
  - First courts, and then reluctantly antitrust enforcement officials, responded to refocus antitrust law and enforcement on ensuring productive efficiency:
    - (Judicially) revised antitrust rules that were perceived as impeding productive efficiency
    - Strengthened enforcement against business practices that impeded productive efficiency
    - Congress did not interfere with these changes

# The “malaise” period (circa 1973 to 1982)

- 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 replaced by effects analysis
    - *General Dynamics*
  - Potential competition mergers
    - Courts rejected DOJ’s prosecution campaign

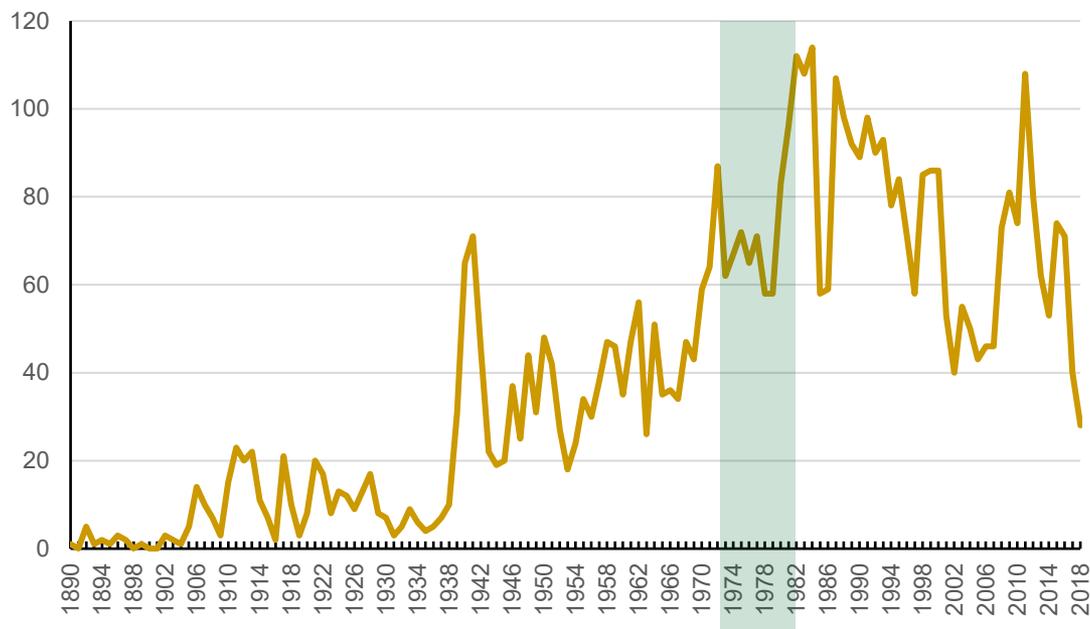
# The “malaise” period (circa 1973 to 1982)

- 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 *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 private antitrust standing
    - *Brunswick*, *Illinois Brick*, *J. Truett Payne*

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

# The “malaise” period (circa 1973 to 1982)

DOJ Cases Filed : Civil and Criminal  
1890-2018



# The modern period (circa 1982 to present)

- Ronald Reagan elected president in 1982
  - Major emphasis on growing the economy by reducing government intervention in private affairs: The four Reagan economic planks—
    - Reduce the growth of government spending
    - Reduce the federal income tax and capital gains tax
    - Reduce government regulation
    - 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 policy

# The modern period (circa 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 (circa 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) <sup>1</sup>	2.4%	3.4%
Nonfarm business productivity (average annual rate) <sup>2</sup>	1.0%	2.2%
Inflation (average annual change Dec. to Dec.) <sup>3</sup>	8.7% Max = 13.3%	3.1% Max = 6.1%
Bank prime loan rate (annual—data series starts in 1956) <sup>4</sup>	11.1% Max = 18.9%	8.0% Max = 12.0%
Unemployment (average monthly rate) <sup>5</sup>	7.0% Max = 10.8%	5.9% Max = 10.4%
Median real family income (average annual change) <sup>6</sup>	-0.2%	0.9%

# The modern period (circa 1982 to present)

## ■ Antitrust rules refashioned

- Further tightening and aggressive enforcement against “garden variety” horizontal price fixing
- But new limitations on finding concerted action
  - Single entities: *Copperweld*, *American Needle*
  - From circumstantial evidence: *Matsushita*, *Business Elecs.*, *Brooke Group*
- Continued reinforcement of the consumer welfare standard
  - *NCAA*, *Brooke Group*, *Weyerhaeuser*, *Leegin*, *American Express*, *Alston*
- 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
- Vertical mergers largely viewed as procompetitive
  - Only episodic government actions
- Conglomerate merger theories of harm rejected

# The modern period (circa 1982 to present)

## ■ Antitrust rules refashioned

- Significant loosening of restrictions on dominant firm behavior
  - *Spectrum Sports, Brooke Group, Trinko, Linkline, Weyerhaeuser*, DOJ Section 2 Report
  - Only episodic government actions (*Microsoft, American Airlines, Intel*)
  - But see *Aspen Skiing*, withdrawal of Section 2 report
- Significant loosening of restrictions on distributional restraints
  - *Monsanto, Kahn, Leegin*
  - But see *Kodak*
- Loosening on restrictions on some group boycotts
  - *Northwest Wholesale Stationers*
- New requirement for finding illegal tying arrangements
  - *Jefferson Parish*
- Remedies and procedure
  - *Monfort, Empagran, Twombly*
  - But see *California v. ARC America Corp*

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# The modern period (circa 1982 to present)

- Antitrust rules refashioned
  - Legislation
    - Foreign Trade Antitrust Improvements Act of 1982
    - National Productivity and Innovation Act of 1983
    - National Cooperative Research Act of 1984

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# WHAT'S THE ARGUMENT FOR RADICAL REFORM?

# The reformers' argument

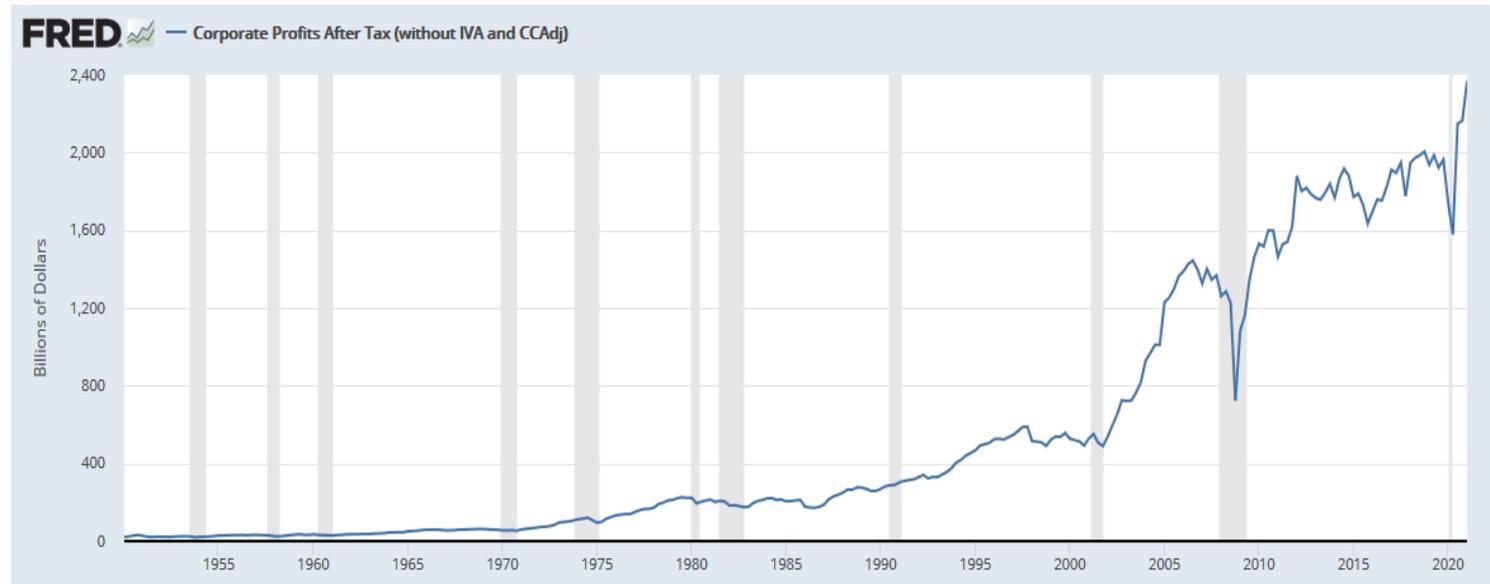
- The bottom line for the reformers

*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

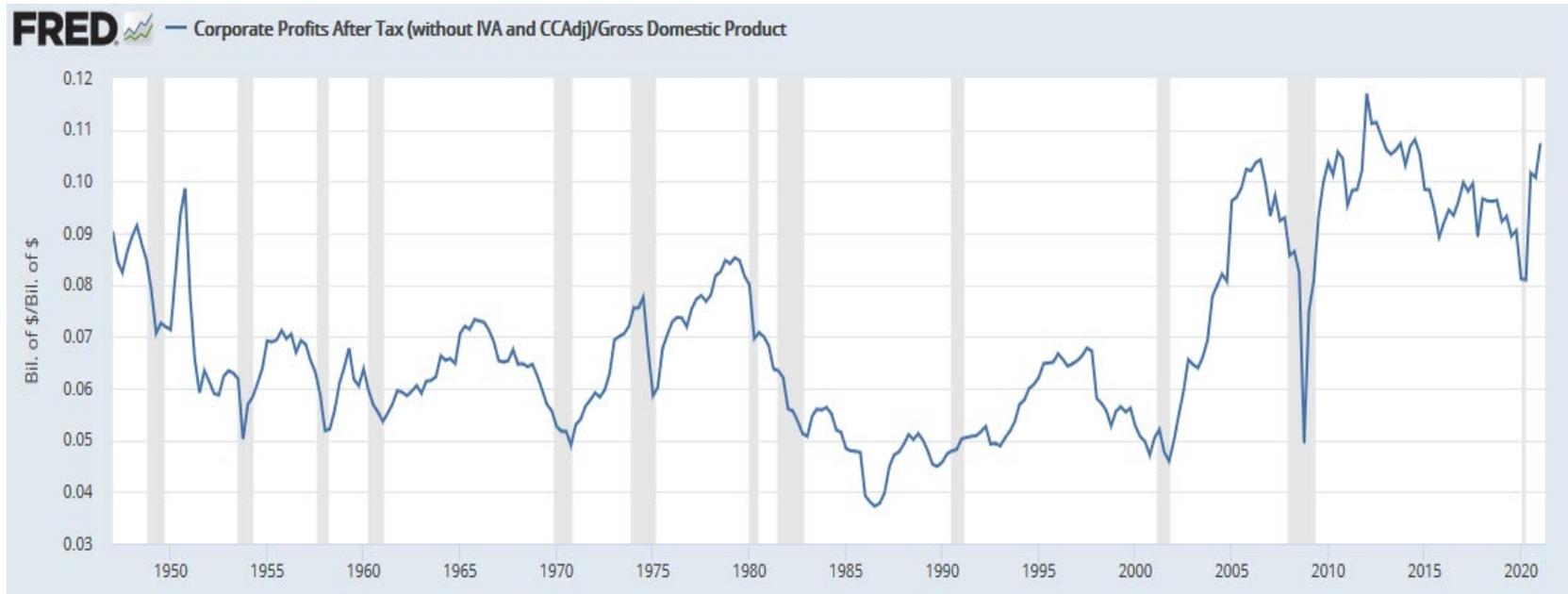


Shaded areas indicate U.S. recessions

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

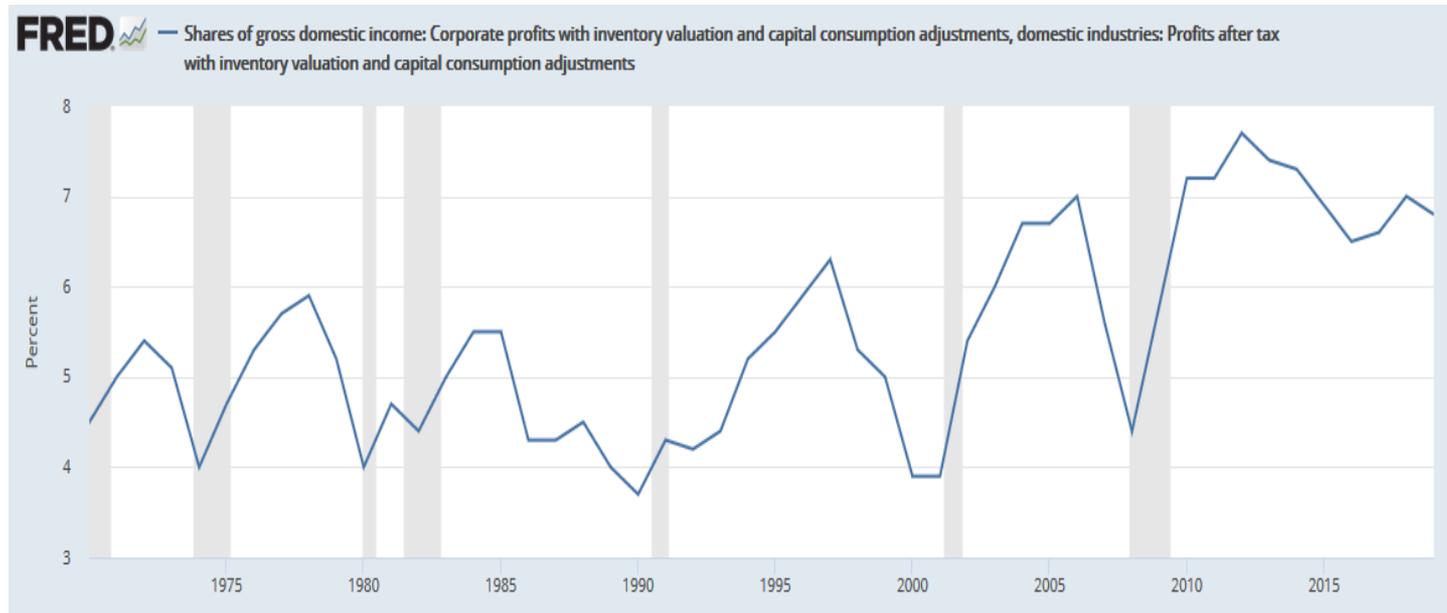
- . . . and as a percentage of GDP



Source: U.S. Bureau of Economic Analysis, Corporate Profits After Tax (without IVA and CCAAdj) [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

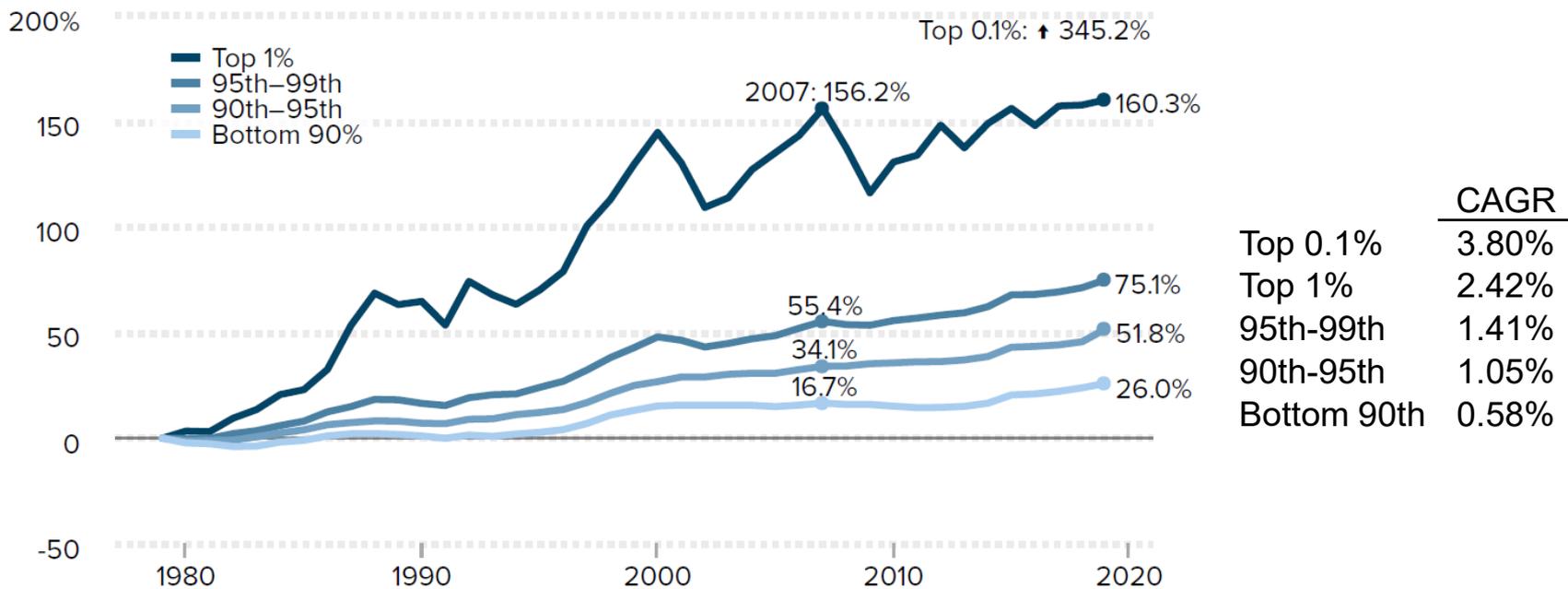


Source: U.S. Bureau of Economic Analysis, Shares of gross domestic income: Compensation of employees, paid: Wage and salary accruals: Disbursements: to persons [W270RE1A156NBEA], *retrieved from* FRED, Federal Reserve Bank of St. Louis; <https://fred.stlouisfed.org/series/W270RE1A156NBEA>, July 31, 2021.

# The reformers' argument

- Real wages for average workers have largely stagnated

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

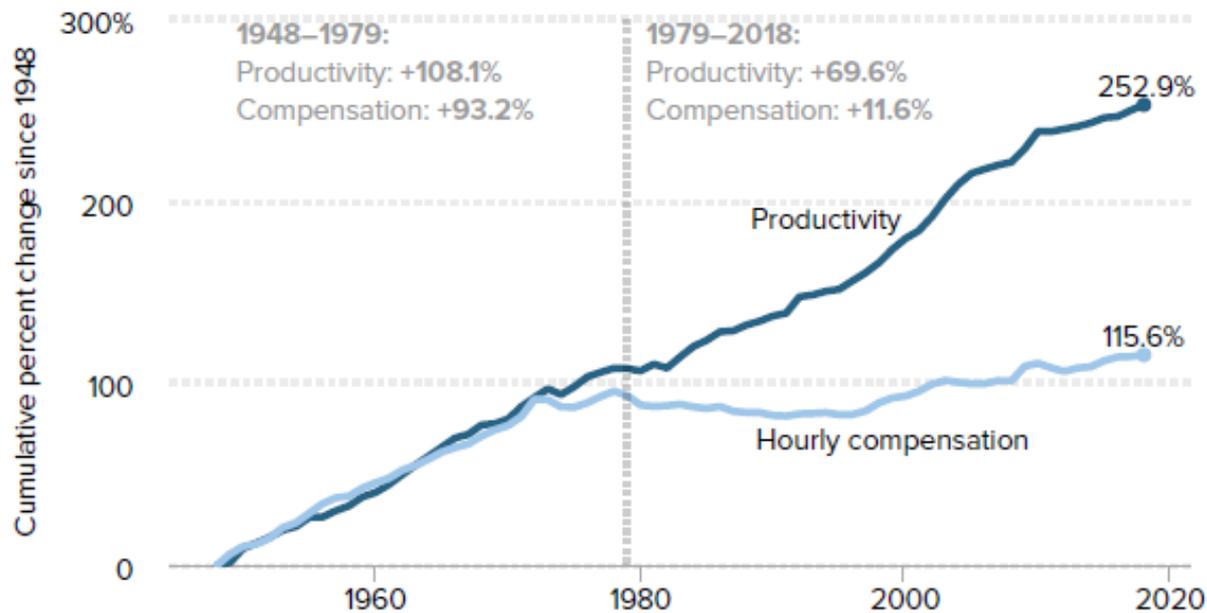


Source: Lawrence Mishel & Josh Bivens, Identifying the Policy Levers Generating Wage Suppression and Wage Inequality 8 (Economic Policy Institute May 13, 2021), available at <https://files.epi.org/uploads/215903.pdf>.

# The reformers' argument

- Moreover, workers are not being compensated with productivity growth

Productivity growth and hourly compensation growth, 1948–2018

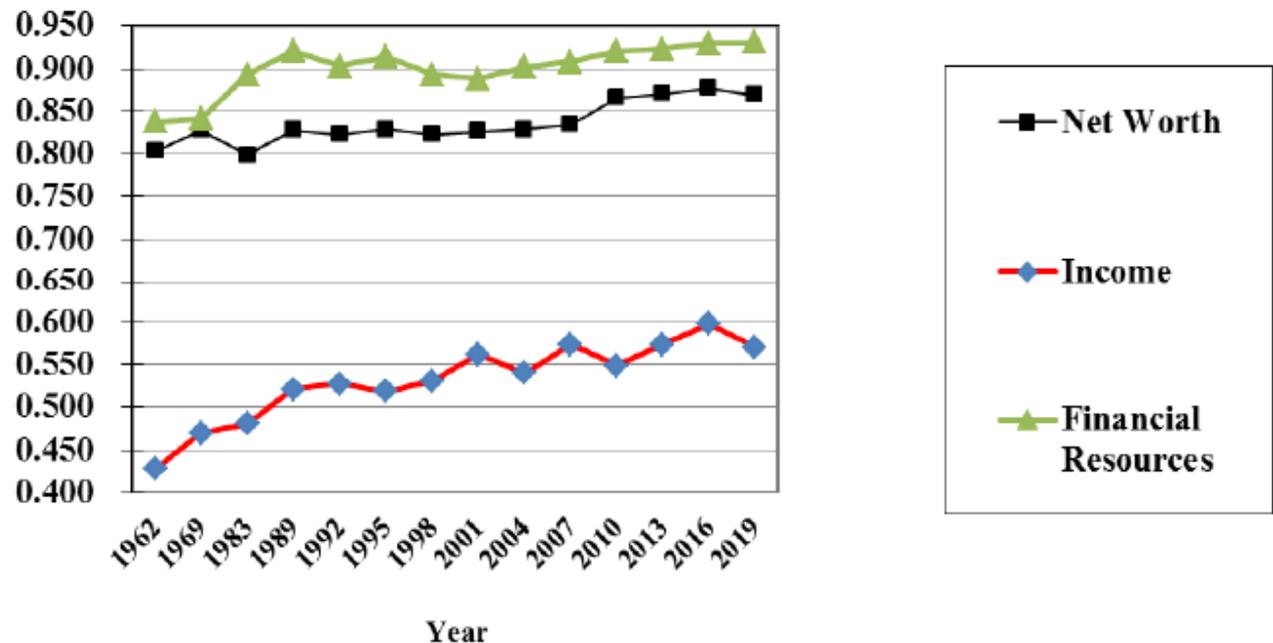


Source: Elise Gould, State of Working America Wages 2019, at 38 (Economic Policy Institute 24 (Feb. 20, 2020), <https://files.epi.org/pdf/183498.pdf>).

# The reformers' argument

- Income inequality correspondingly has grown increasingly worse . . .

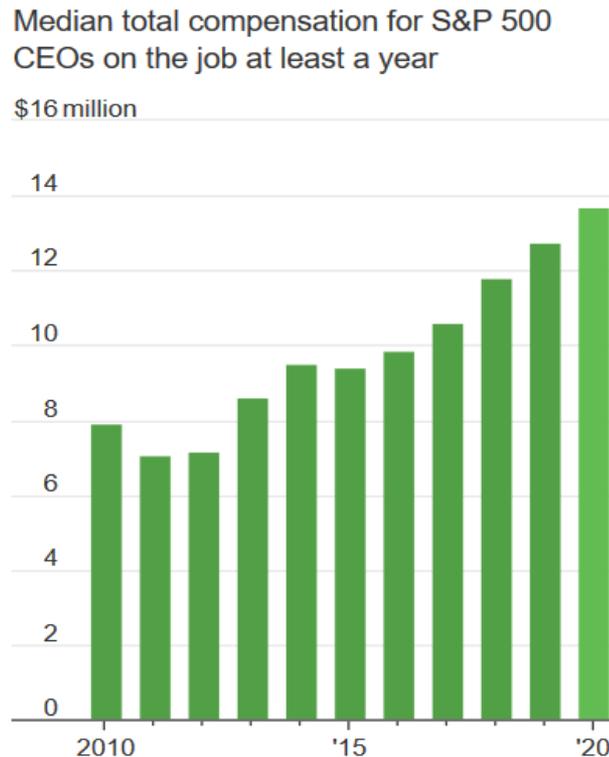
The higher the Gini coefficient, the greater the inequality



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

- . . . and CEO compensation has skyrocketed



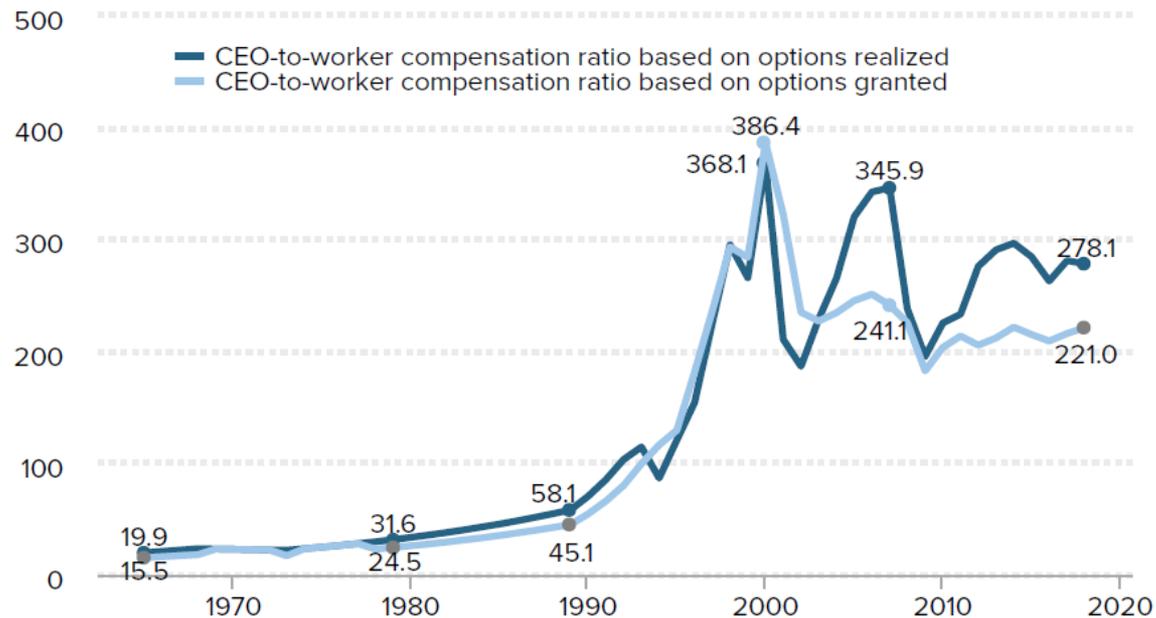
Note: 2020 reflects companies disclosing pay through April 8

Source: Theo Francis & Kristen Broughton, CEO Pay Surged in a Year of Upheaval and Leadership Challenges, *Wall. St. J.*, Apr. 11, 2021, available at <https://www.wsj.com/articles/covid-19-brought-the-economy-to-its-knees-but-ceo-pay-surged-11618142400>.

# The reformers' argument

- CEOs on average now make 278x more than typical workers

CEO-to-worker compensation ratio, 1965–2018

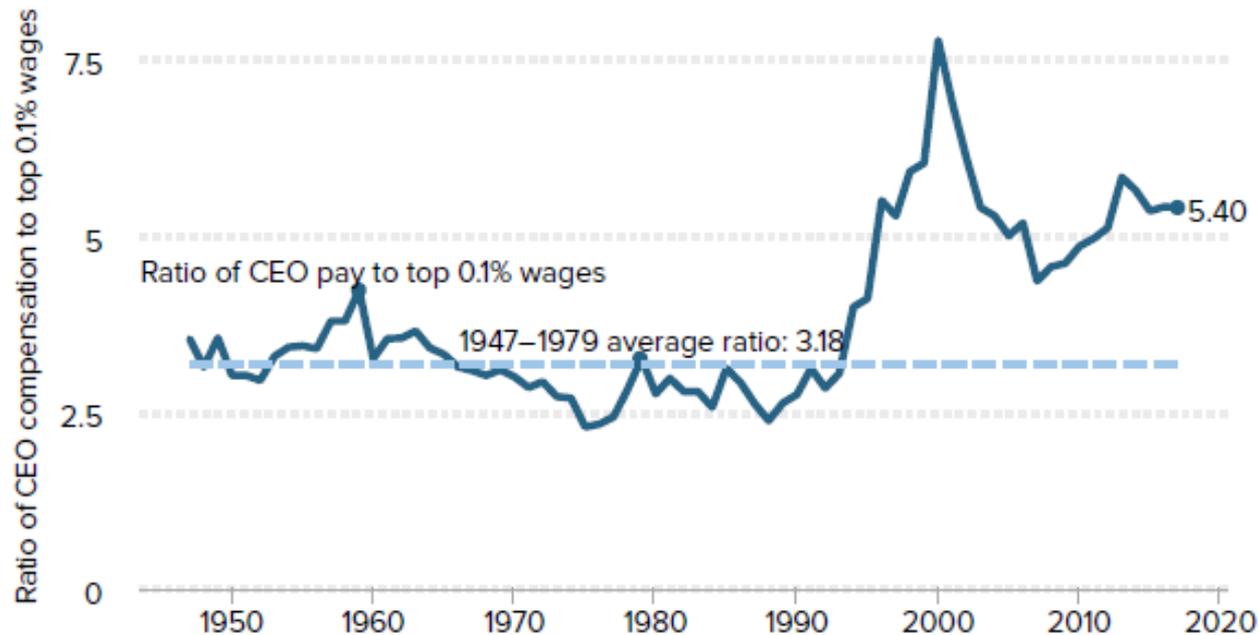


Source: Lawrence Mishel & Julia Wolfe, CEO Compensation Has Grown 940% since 1978, at 14 (Economic Policy Institute 1979), *available at* <https://www.epi.org/publication/ceo-compensation-2018/#:~:text=CEO%20compensation%2C%20CEO-to-worker%20compensation%20ratio%2C%20and%20stock%20prices,%20%2029.7%20%2017%20more%20rows%20>.

# The reformers' argument

- CEOs even make 5x more than the top 0.1% of workers

Comparison of CEO compensation with top 0.1% wages,  
1947–2017



Source: Lawrence Mishel & Julia Wolfe, CEO Compensation Has Grown 940% since 1978, at 20 (Economic Policy Institute 1979), available at <https://www.epi.org/publication/ceo-compensation-2018/#:~:text=CEO%20compensation%2C%20CEO-to-worker%20compensation%20ratio%2C%20and%20stock%20prices,%20%2029.7%20%2017%20more%20rows%20.>

# The reformers' argument

- Total compensation for 10 highest paid CEOs in 2020

Rank	CEO Company	Total Compensation	Change in Pay	Company FY Revenue (\$M)
1	Larry Culp General Electric (GE)	\$72,728,233	208%	\$79,619
2	John J. Donahoe II Nike (NKE)	\$53,499,980	n/a	\$37,403
3	Satya Nadella Microsoft (MSFT)	\$44,321,788	3%	\$143,015
4	Thomas M. Rutledge Charter Commnc's (CHTR)	\$38,670,620	353%	\$48,097
5	Alfred F. Kelly Jr. Visa (V)	\$26,364,928	9%	\$21,846
6	Steven Mollenkopf Qualcomm (QCOM)	\$25,930,689	12%	\$23,531
7	Kevin P. Hourican Sysco (SYY)	\$25,872,425	n/a	\$52,893
8	Brian T. Moynihan Bank of America (BAC)	\$25,266,597	-1%	\$74,208
9	Michael F. Neidorff Centene (CNC)	\$24,956,777	-6%	\$111,115
10	Stephen J. Squeri American Express (AXP)	\$24,156,744	2%	\$31,357

Source: Dan Marcec , Equilar 100: The Highest-Paid CEOs at the Largest U.S. Companies (Apr. 20, 2021), <https://www.equilar.com/reports/80-highest-paid-ceos-2021-equilar-100.html>.

# 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



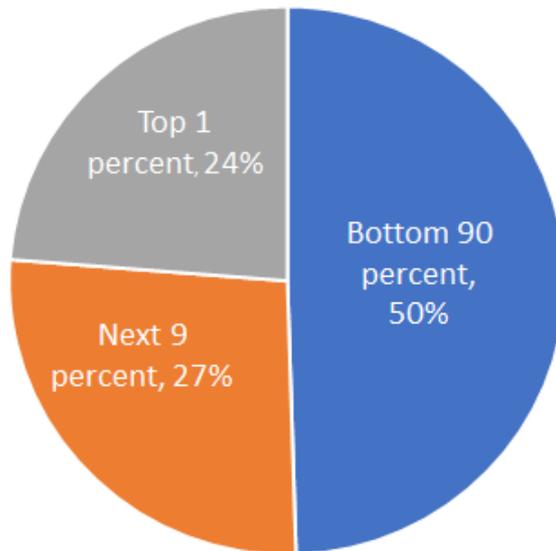
**Note:** Children's income is the sum of individual and spousal income at age 30, excluding immigrants after 1994. Parental income is the sum of the spouses' incomes for families in which the highest earner is ages 25-35.

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

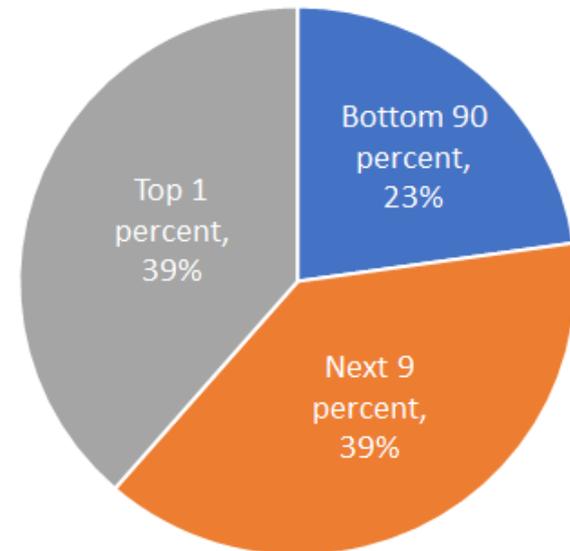
# The reformers' argument

- Wealth is even more concentrated than income . . .

Distribution of Before-Tax Income, 2016



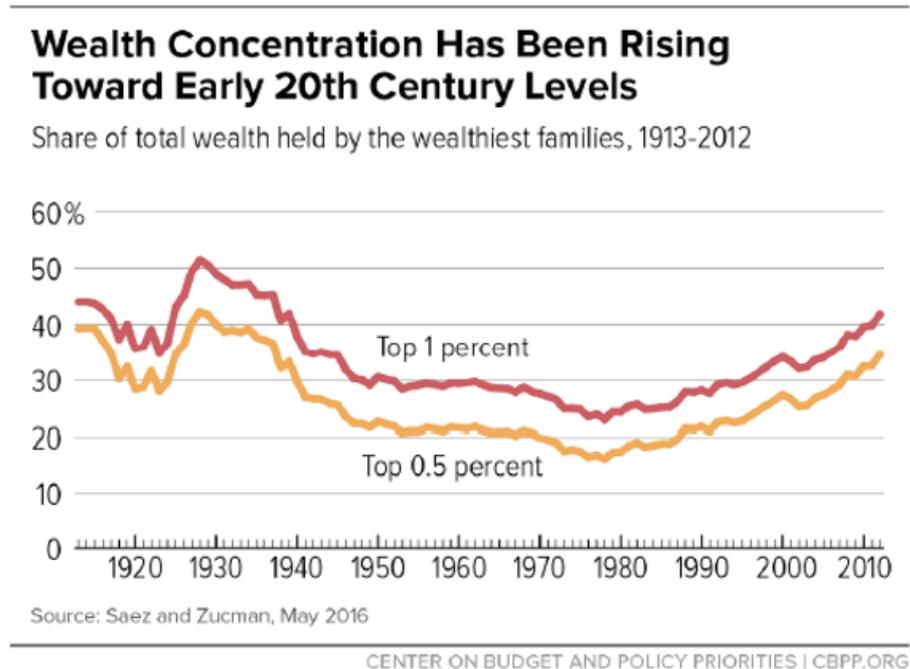
Distribution of Wealth, 2016



Source: Chad Stone, Danilo Trisi, Arloc Sherman & Jennifer Beltrán, A Guide to Statistics on Historical Trends in Income Inequality 14 (figure 4) (Center on Budget and Policy Priorities 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

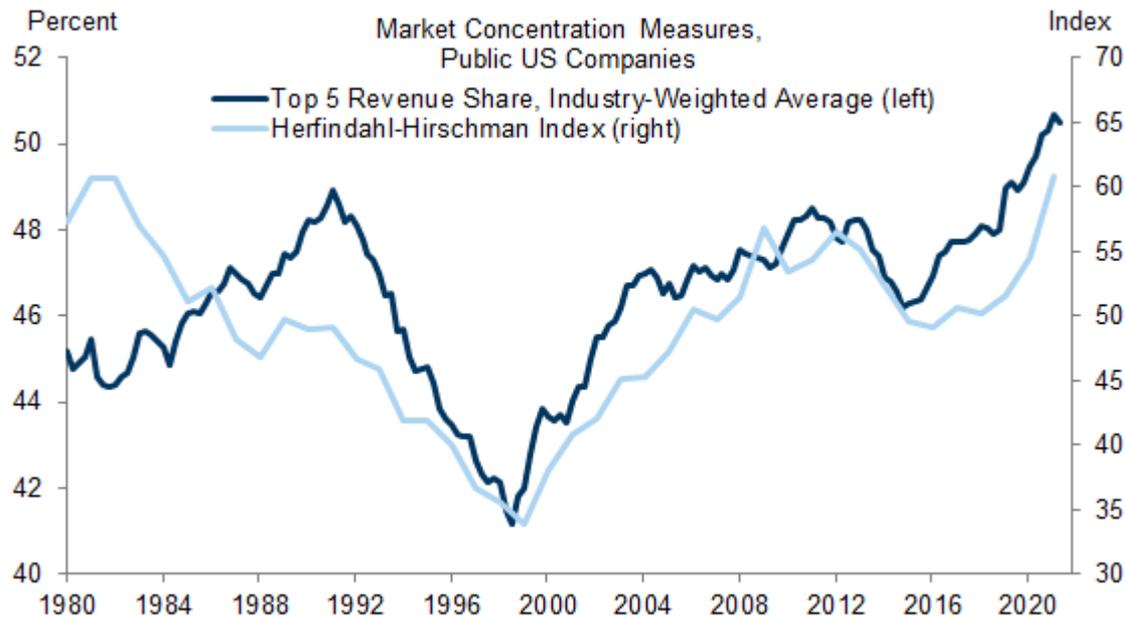
- . . . with wealth inequality approaching the level of the 1920s



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 Priorities 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

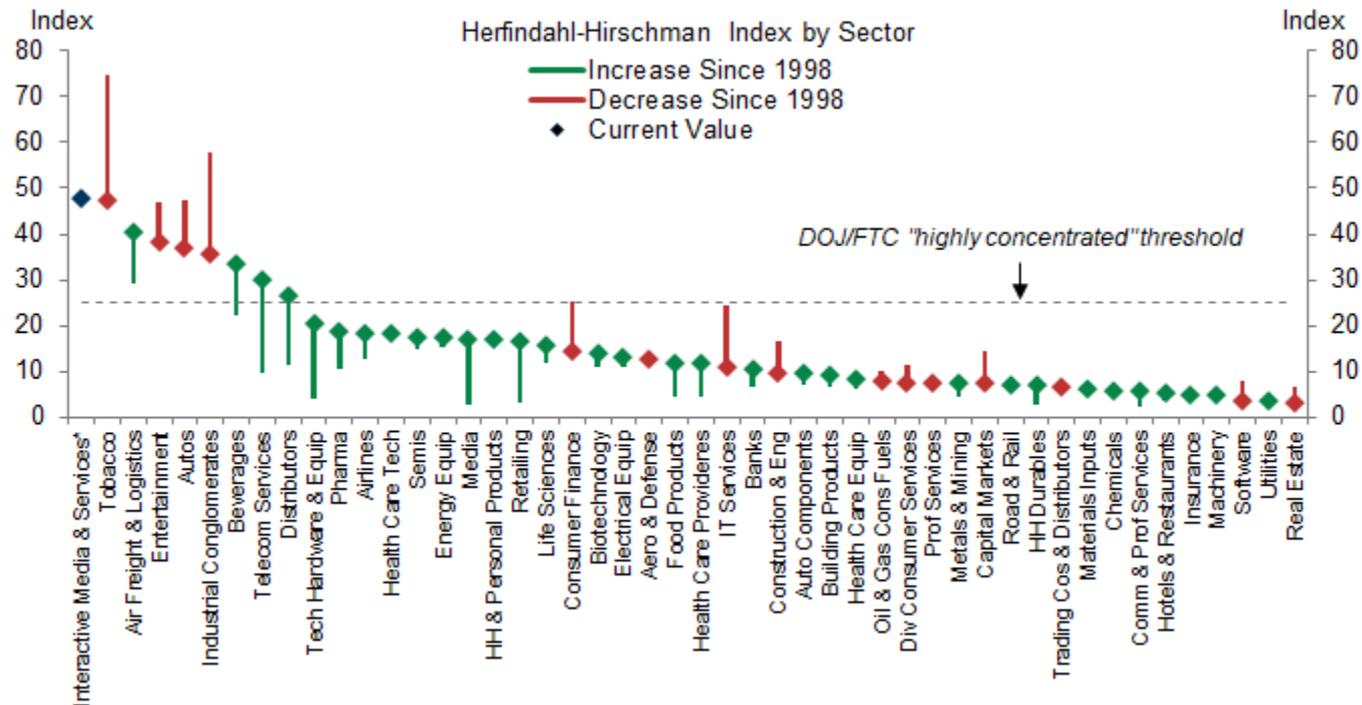
- Industrial concentration has been steadily increasing since the mid-1990s



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

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



\*The Interactive Media & Services industry was only created in 2018 during the GICS reclassification, so no change since 1998 is shown.

Source: Joseph Briggs & Alec Phillips, *Concentration, Competition, and the Antitrust Policy Outlook* ex. 2 (Goldman Sachs US Economics Analyst July 18, 2021) (using 3-digit Global Industry Classification Standard (GICS) codes to define “markets”)

# The reformers' argument

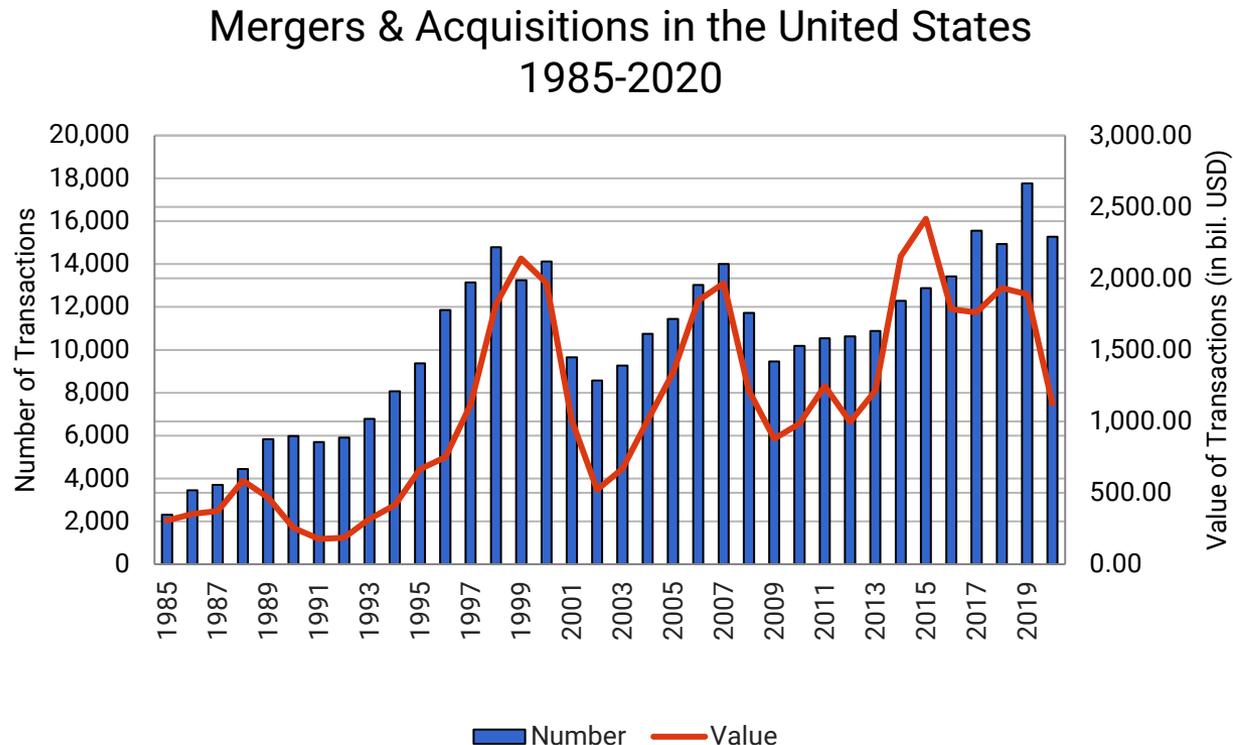
- Many industries have become highly concentrated: Some examples—

Industry	Companies	Approximate share
Wireless phone service	AT&T, Verizon, T-Mobile	~90%+
Smartphone platforms	Apple, Android	~100%
Airlines	AA, UA, Delta, SW	~80%
Beer	Anheuser Busch, MillerCoors	~76%
Drug stores	CVS, Walgreens, Rite Aid	~90%+
Health insurance	Anthem, Blue Cross Blue Shield, United Healthcare, Aetna, Cigna	~80%+
Wholesale poultry	Pilgrim's Pride, Tyson, Purdue, Sanderson	~60%
Beef processing	Cargill, Tyson Foods, JBS, National Beef Packing	~85%

Source: Anecdotal evidence reported by various journalists

# 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. 2, 2021).

# The reformers' argument

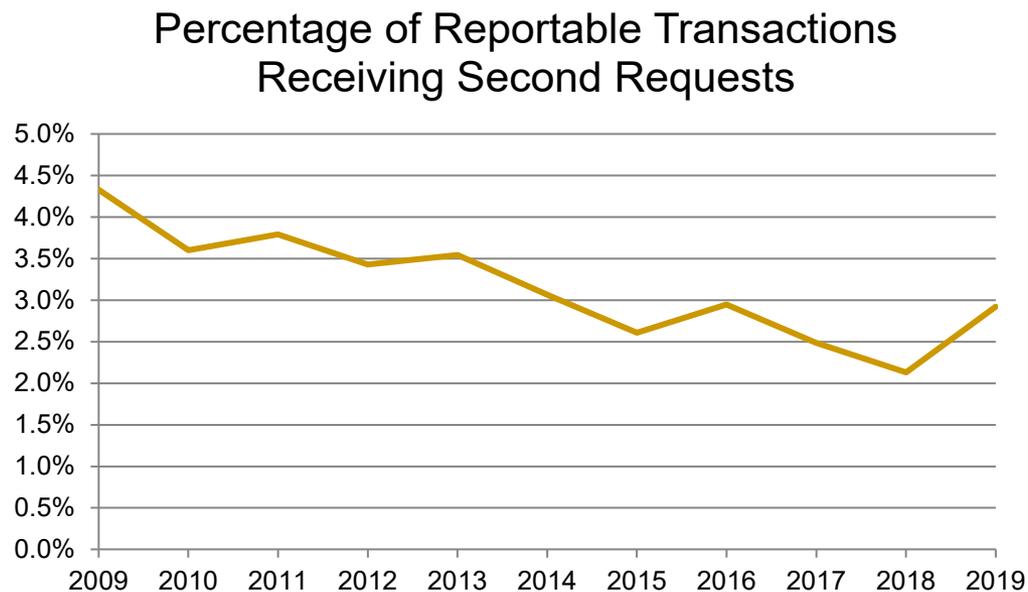
- ... and some acquisitions have been “megadeals”

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. 2, 2021).

# The reformers' argument

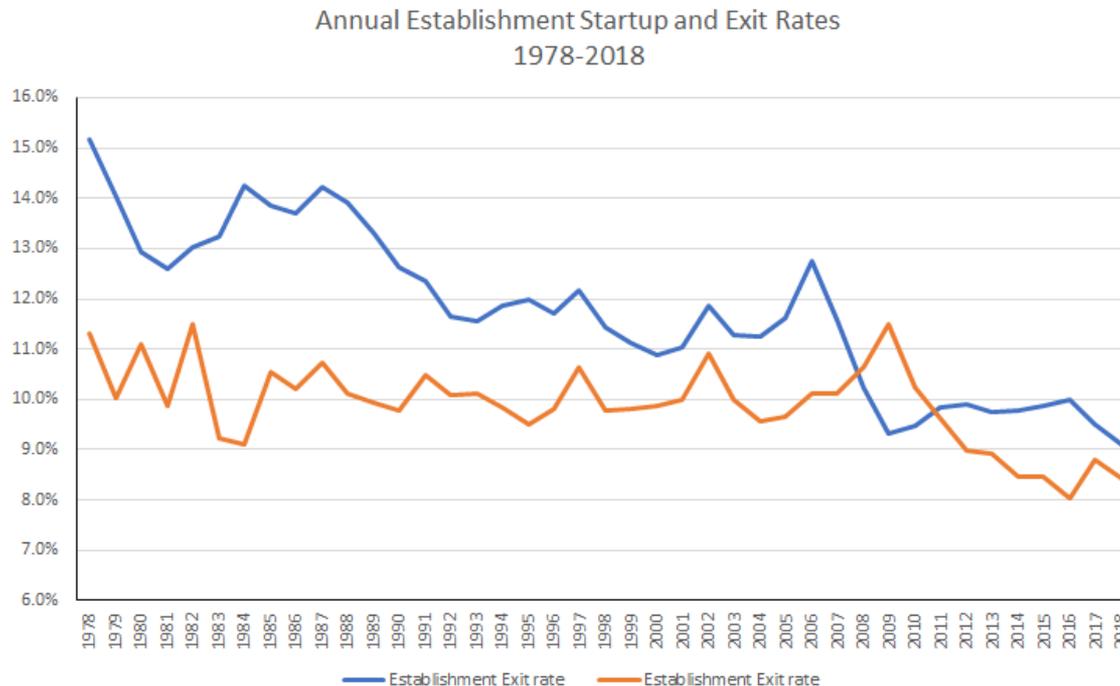
- . . . while HSR Act merger investigations have disproportionately declined



Source: Fed. Trade Comm'n & U.S. Dep't of Justice, Annual Reports to Congress (FY 1979-2019)

# The reformers' argument

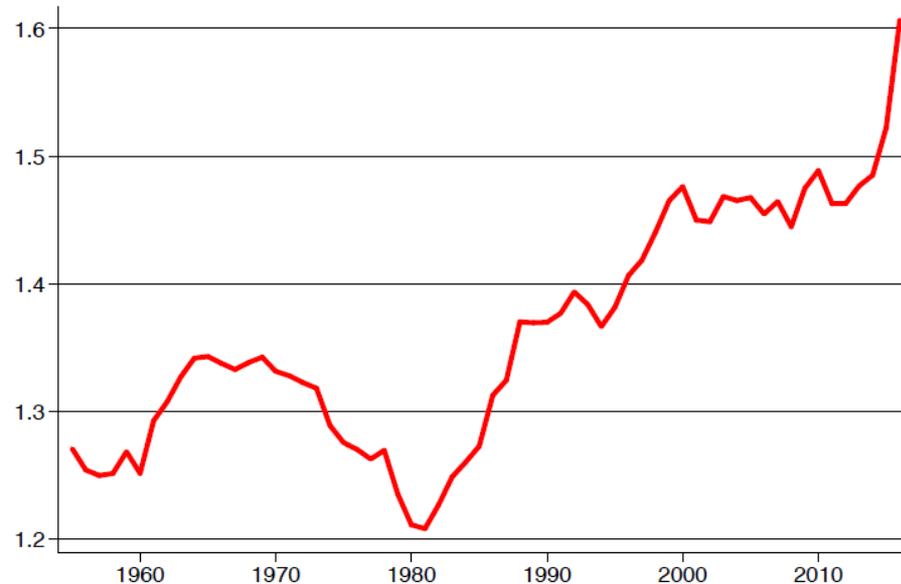
- At the same time, business start-up rates have been declining



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

# The reformers' argument

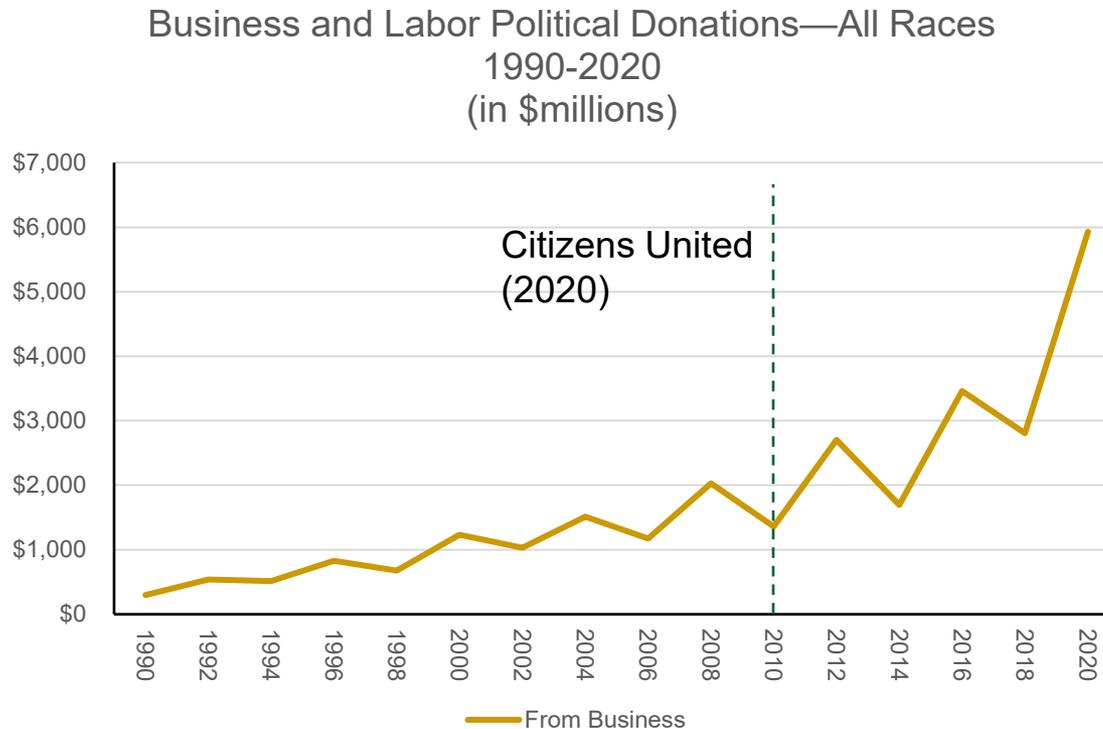
- Average markups have increased three-fold since 1980



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

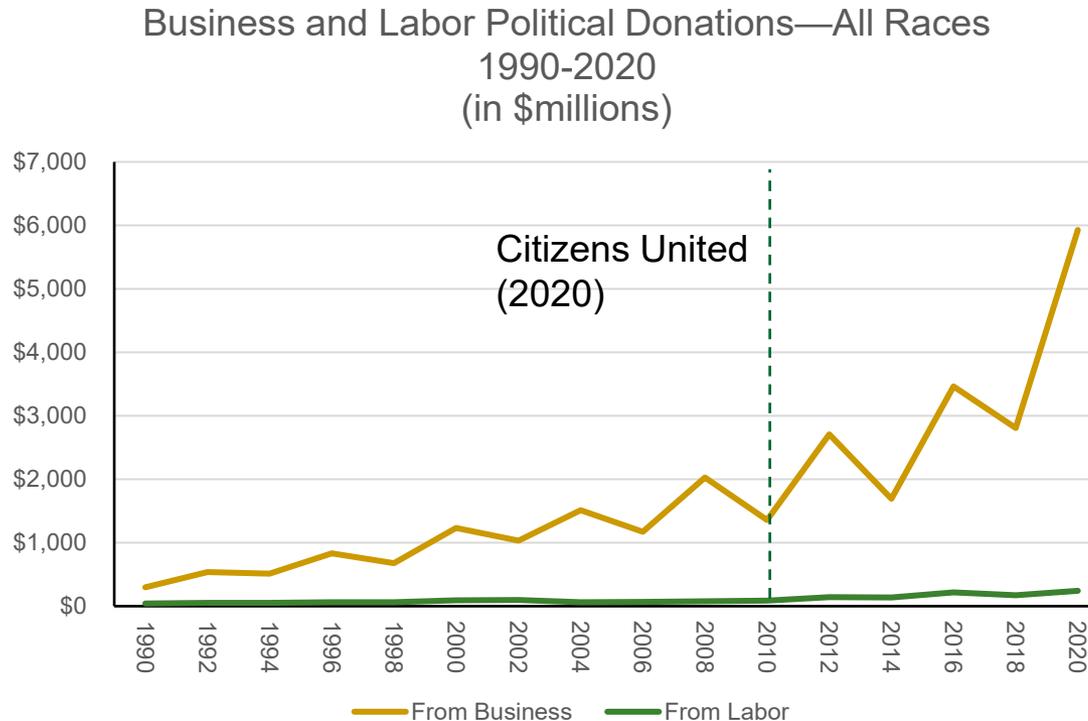
- Corporations are becoming more politically powerful, increasing their political campaign spending . . .



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

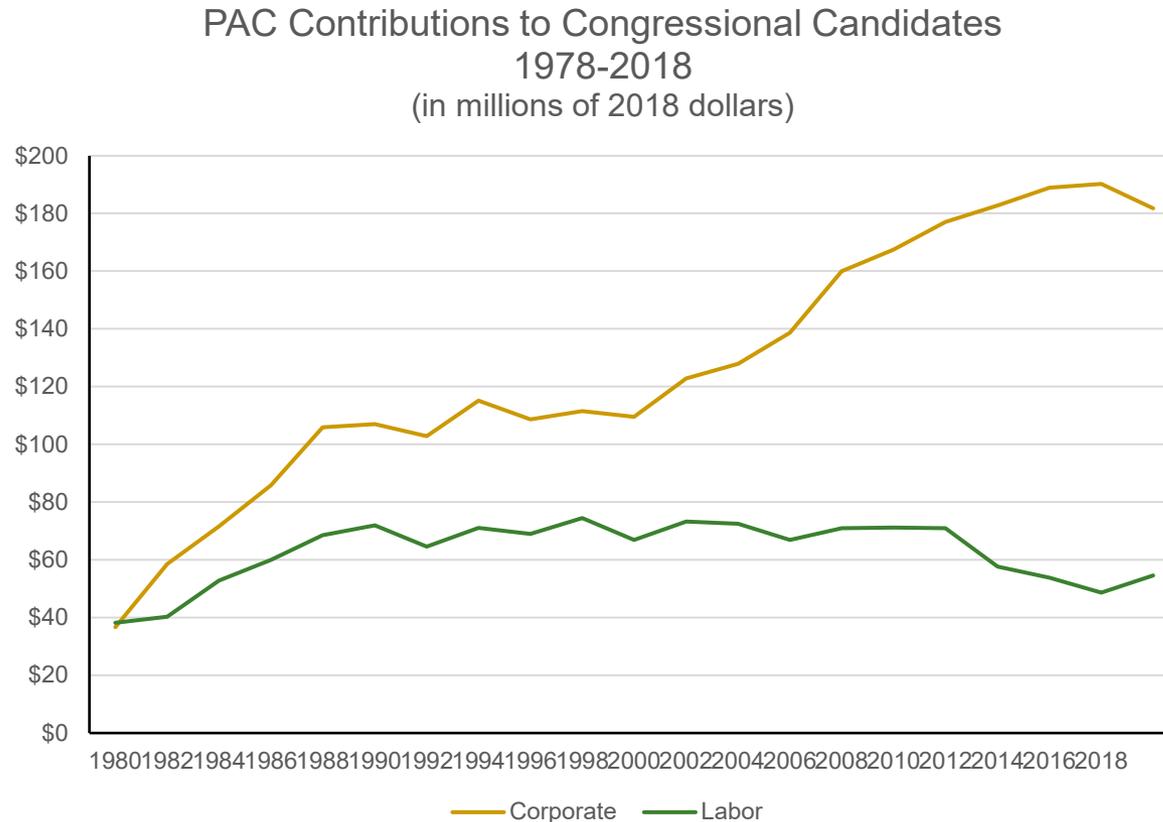
- . . . and dramatically outspending labor



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

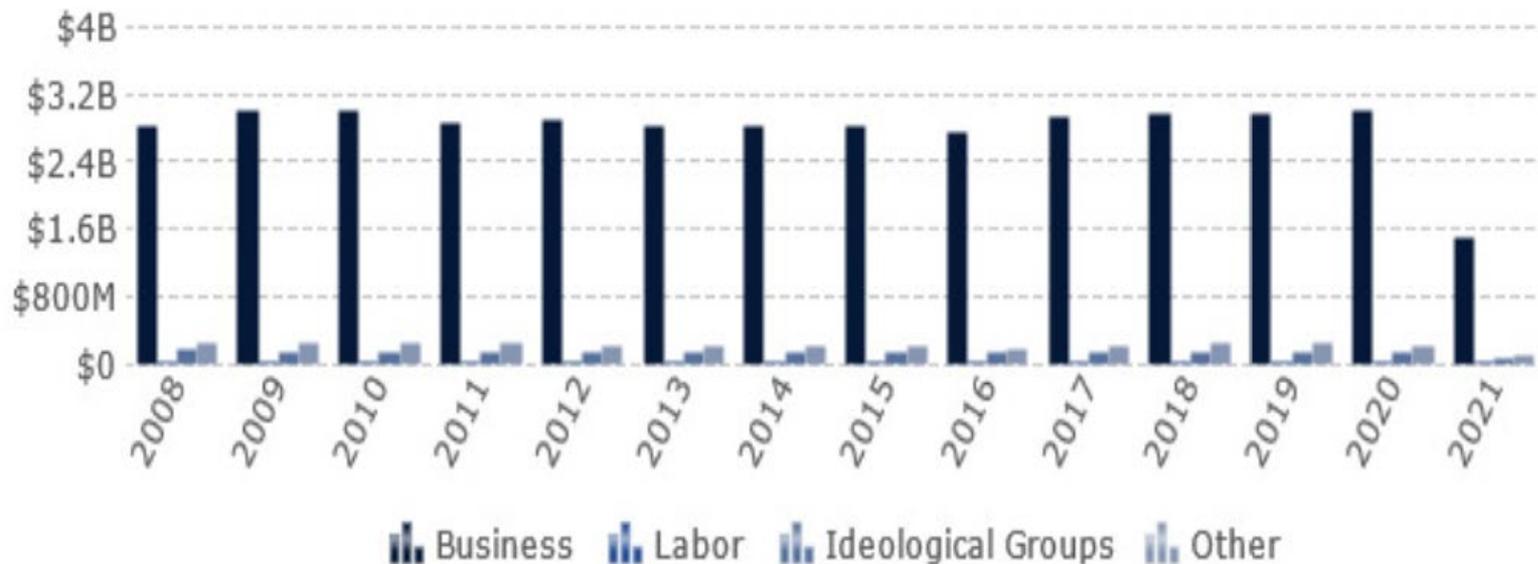
- The spread in congressional races is significant



Source: Brookings Institution, Vital Statistics on Congress: Campaign finance in Congressional Elections tbl. 3-10, <https://www.brookings.edu/multi-chapter-report/vital-statistics-on-congress/> (last visited Aug. 3, 2021).

# The reformers' argument

- . . . and corporate lobbying expenses greatly outstrip labor



Source: OpenSecrets.org, Business, Labor & Ideological Split in Lobbying Data, <https://www.opensecrets.org/federal-lobbying/business-labor-ideological?cycle=2020>.

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# The reformers' argument

- Bottom line:

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

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# Modern critiques of merger antitrust law

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

# The progressive critique

## ■ Basic ideas<sup>1</sup>

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. Believes that market power is typically durable and that markets do not adjust quickly—if at all—to eliminate market power
4. Views historical enforcement outcomes as failing to identify and so permitting too many anticompetitive mergers and other types of anticompetitive conduct
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 defenses to a prima facie case of anticompetitive effect
8. Would be very demanding in accepting consent decrees to negate anticompetitive harm

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<sup>1</sup> Progressives come in many varieties. These appear to me to represent the core beliefs of progressive generally.

# The progressive critique

- Implications for merger antitrust law and enforcement
  1. Will continue to focus on outcomes for consumers
  2. Will 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 will retain judicial tests for market definition
    - But where direct evidence of anticompetitive effects is available (most likely in consummated transactions), probably would not require rigorous proof of market definition
  4. Will lower thresholds for challenging horizontal and vertical mergers
  5. Will lower thresholds for challenging acquisitions of actual potential competitors and “nascent” competitors
  6. Will likely shift the burden of proof to merging parties where the acquiring firm is sufficiently large (“superfirms”)
    - That is, merging parties will bear the burden of proving that the transaction is not anticompetitive

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# The progressive critique

- Implications for merger antitrust law and enforcement
  7. Will continue—and probably increase—hostility to defenses that offset anticompetitive effect
  8. Will continue practice of accepting consent decree to “fix” problem
    - BUT will a much heavily burden on the parties to prove that the “fix” will negate the anticompetitive concerns

# The Neo-Brandeisian “antimonopoly movement”

## ■ Lina Khan’s five principles<sup>1</sup>

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

<sup>1</sup> 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 of the other two Democrat commissioners and so controls a majority of the Commission.

# 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
- 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 antimonopoly movement deconstructed

## ■ Premises

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

# The antimonopoly movement deconstructed

## ■ Premises<sup>1</sup>

### 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

<sup>1</sup> *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
- Deal with the egregious cases first and worry about line drawing and close cases later

# 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 should be	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

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# WHAT IS GOING TO HAPPEN?

# No earthquake yet

## ■ Monopolization cases

- FTC's Facebook complaint dismissed with leave to replead
  - Amended complaint filed
- NY's Facebook complaint dismissed
  - On appeal to the D.C. Circuit
- Epic's Apple case rejected monopolization claims on the merits
- Most cases will not be decided on the merits for years and then almost certainly will be appealed

## ■ Merger cases

- Expect many companies to litigate any doctrinally new theories of anticompetitive harm
- Expect more companies to "litigate the fix" if the investigating agency rejects a consent settlement
- Perhaps some HSR litigation of the permissible scope of a second request

---

# But no earthquake yet

## ■ Legislation

- Five House bills out of committee are being held by leadership as “not ready”
- No movement of Senate bills out of committee
- Serious question of whether any of the major reform bills will pass
  - Especially if the Senate filibuster stays in place

# But no earthquake yet

- Administration actions
  - Some procedural reforms that will not change substance
  - No new complaints, guidelines, or speeches to announce substantive changes in prosecutorial decision
  - No new announced competition rule-making under Section 5 of the FTC Act

*But it is still very early!*

# But no earthquake yet

- Will the courts act as a brake?
  - Strong judicial precedent reinforcing 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
    - The reform movements have nothing comparable
  - Generally a conservative bench
    - Almost all judges have grown up in the current antitrust regime
    - 6 of 9 (66.6%) Supreme Court justices were appointed by Republican presidents
    - 95 of 179 (53.0%) federal court of appeals judges were appointed by Republican presidents
    - 307 of 679 (45.2%) district court judges were appointed by Republican presidents
  - 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
      - *FTC v. AMG Capital* (June 21, 2021) (9-0): FTC Act § 13(b) does not authorize FTC to seek monetary relief
      - *NCAA v. Alston* (Apr. 22, 2021) (9-0): Affirming judgment for college players in challenge to NCAA compensation restrictions using traditional approach
    - Conservative majority could grant cert and likely overturn any FTC rule making under Section 5 as contrary to the “non-delegation” doctrine