

International Antitrust Law and Policy

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Class 1: Introduction
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Recurring themes of international antitrust law

Laws are mostly national, but most markets don't stop at national borders

- As of 1/1/2009, there are 193 nations, 110 of which have competition laws
- Dramatic growth of competition laws in the last 30 years – coincides with rapid economic globalization
- Some markets are entirely within a political boundary
 - Cement, restaurants, groceries at retail, regulated markets (e.g., FDA approved medical devices)
- Others transcend national boundaries
 - Oil, steel, bauxite, internet advertising, etc.

Who should regulate economic events that involve multiple jurisdictions?

- In 2001, the U.S. DOJ approved the merger of GE and Honeywell. The European Commission didn't, and the deal was dead.
- U.S. agency and political reaction was hostile
 - Charles James, AAG: "This merger was procompetitive and beneficial to consumers. The U.S. antitrust laws protect competition, not competitors. Today's EU decision reflects a significant point of divergence."
 - Senator Ernest Hollings, Chairman of the Senate Commerce Committee: "The Commission applies a double standard by swiftly approving mergers involving European companies and holding up those of US groups."
 - Senator Phil Gamm: "It's a very real question – what power the EU should have in dealing with two companies that are fundamentally American companies."

Two normative principles: conduct v. effects

- At the core of the U.S. protest against the EU prohibition of GE/Honeywell was the notion that: “This is our merger because the firms are based in the U.S.”
- Implied normative claim: “That nation should have exclusive jurisdiction over a transaction where the protagonists are located.”
- More generalized: “That nation should have exclusive jurisdiction where the conduct in question occurred.”
(= conduct principle)
- EU response: “Any nation where the effects of the conduct are felt should have concurrent jurisdiction.”
(= effects doctrine) Pioneered by the U.S. in *U.S. v. Alcoa*, 148 F.2d 416 (2d Cir. 1945)

The easy cases: all domestic, all foreign

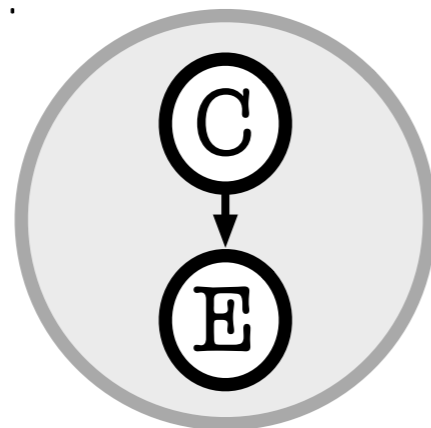
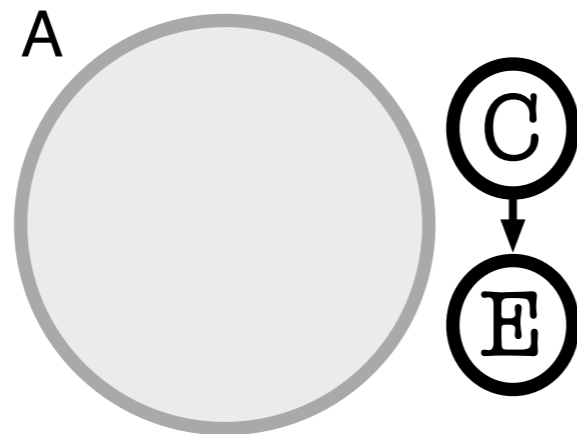


Figure 2



- If conduct (C) and effects (E) are all domestic, no jurisdictional issues arise. A has exclusive jurisdiction.
- Note that in a federation such as the U.S., State antitrust issues may arise at the sub-national level, e.g., a cement cartel spanning both CA and NV.
- If neither C nor E has any domestic impact, no jurisdictional issues arise. A has no jurisdiction.
- Substantive antitrust doctrine developed within the “all domestic” paradigm of a closed economy
 - As a result, domestic antitrust usually reflects the interests of both producers and consumers, as both constituencies are domestic and both vote

The harder cases: domestic and foreign involvement

Figure 3

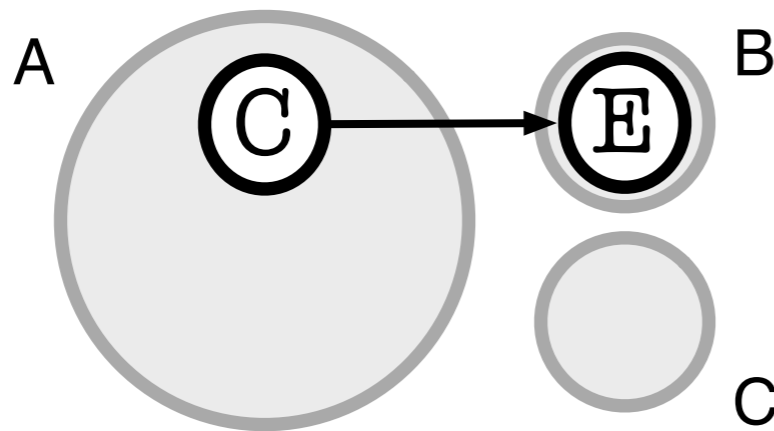
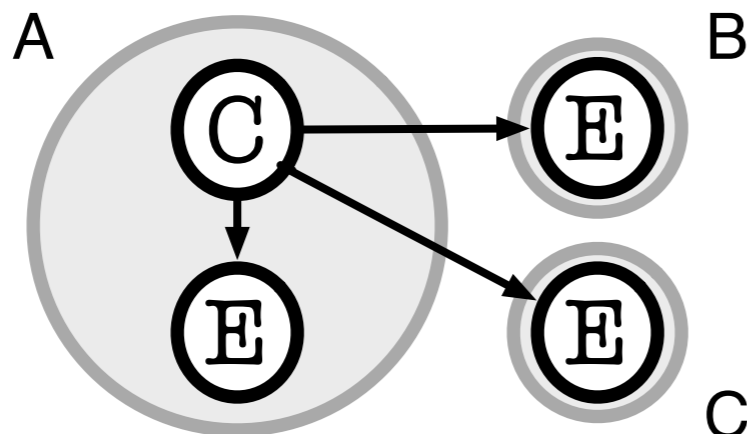


Figure 4



- Two firms in A conspire (= conduct) to raise prices for widgets sold to customers in B.
- Under a conduct principle, A has exclusive jurisdiction. Under an effects principle, B has jurisdiction.
- B has every incentive to apply an effects principle. It wants to protect its customers (voters) from foreign exploitation.
- A, however, has no national political incentive to protect B's customers, because they don't vote. A may therefore push for a conduct principle (and then legalize export cartels.)
- In global markets, domestic conduct (in A) will harm customers in A, B, and C
- As a result, the "effects doctrine" has become the global standard.

Under the effects doctrine, conflict among jurisdictions is unavoidable

- As a result of the effects doctrine, multiple countries have jurisdiction over conduct with transnational effects
- Whenever multiple regulators have concurrent jurisdiction, there is the potential for conflict
 - Jurisdictions may disagree about substantive standards, e.g., foreclosure effects from a merger (GE/Honeywell), access to IP (MSFT), resale price maintenance, etc.
 - Jurisdictions also disagree about remedies, e.g., criminal sanctions for cartel offenses, treble damages for private plaintiffs

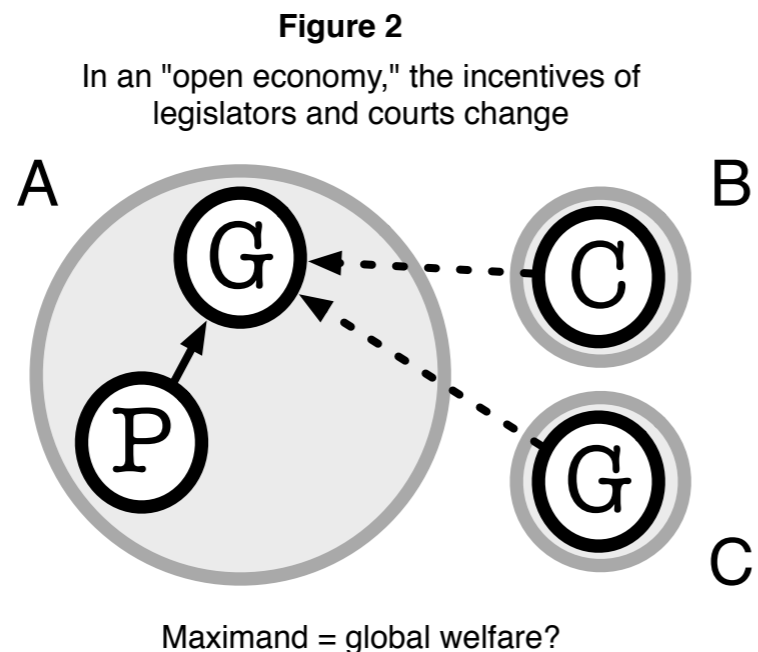
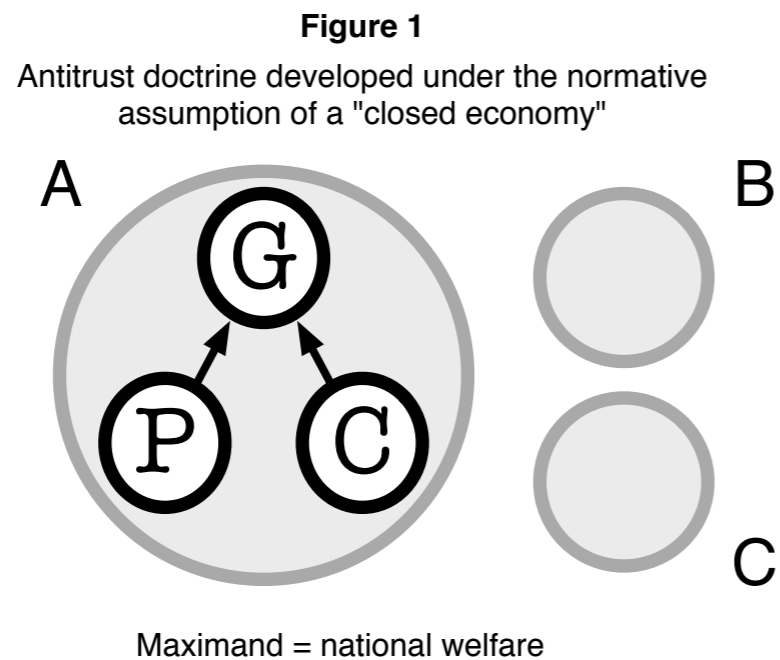
How should conflicts be resolved?

- Deference or “negative comity”
- Bilateral agreements
- Multilateral agreements
- Global solutions (e.g., a WTO antitrust regime)
 - A global solution could maximize “global welfare.”
 - But “every time we transfer some power over commerce from the nation state to the international arena, for example the WTO, ... we give up democratic control unless we, the citizens, get some equivalent democratic consideration in return. Usually, we do not.” (John Ralston Saul)

Avoiding conflicts before they arise: convergence

- Conflict arises only if different jurisdictions apply different standards and/or remedies
- Convergence helps avoid conflicts by harmonizing the laws of various jurisdictions
- The ICN had great success in the merger notification arena – but in more substantive matters, actual convergence has been limited
 - Many states still take the position: “converge my way – or else”
 - In competition law, one size does not fit all. Thus, there may be significant value in different approaches.

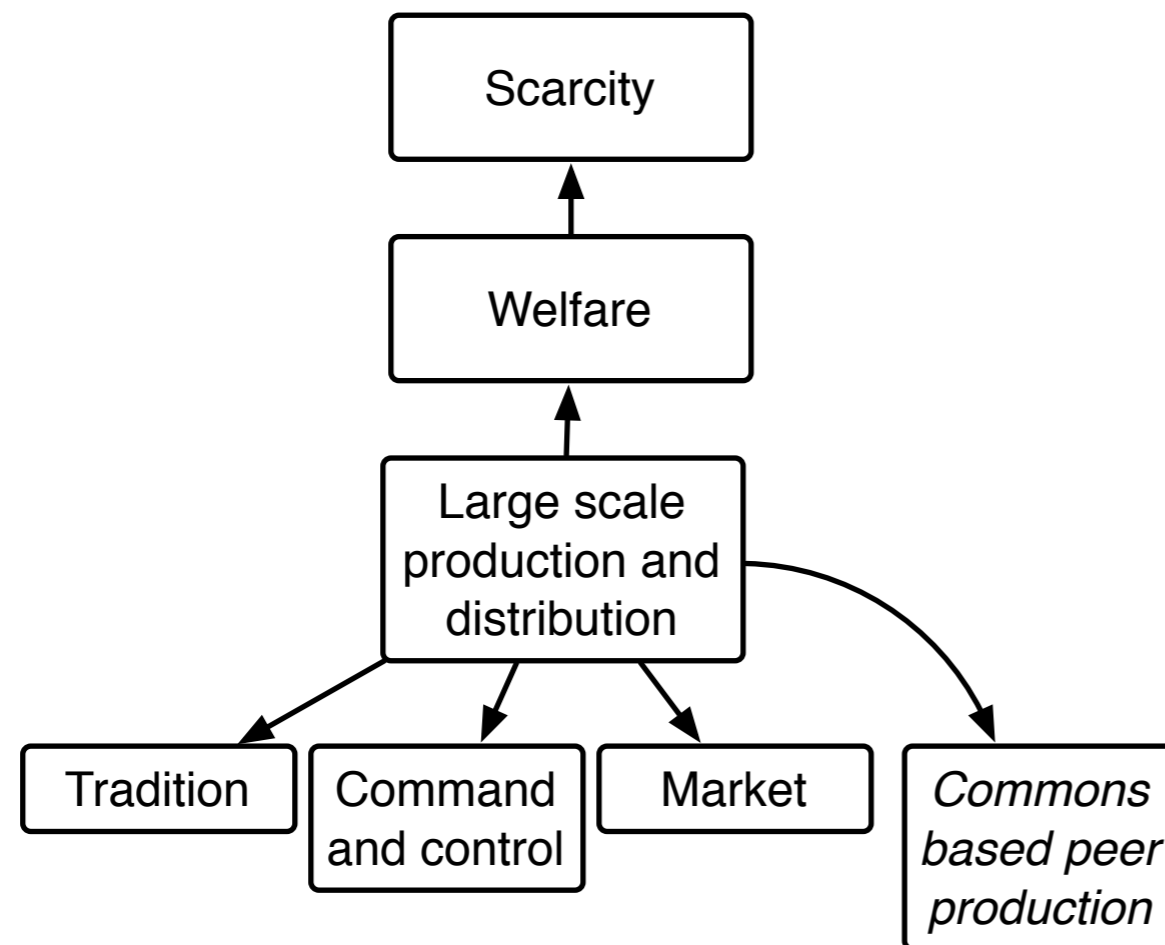
Closed and open economies, national and global welfare maximands



- Antitrust doctrine developed under the assumption of a “closed economy” where all producers (P) and consumers (C) affected by anticompetitive conduct are domestic and have some measure of influence on their government (G).
- The result is a “bargain” between P and C as to how surplus should be allocated (Baker, [Competition Policy as a Political Bargain](#), 2005)
- The welfare maximand is national welfare. As a result, cartels, for example, are usually illegal because they shrink the national economic pie
- The “bargain” incentives change when C and P are no longer under the same G (open economy)
 - An export cartel increases national welfare of the P’s home state – but it reduces global welfare.
 - Should global welfare thus be the maximand?

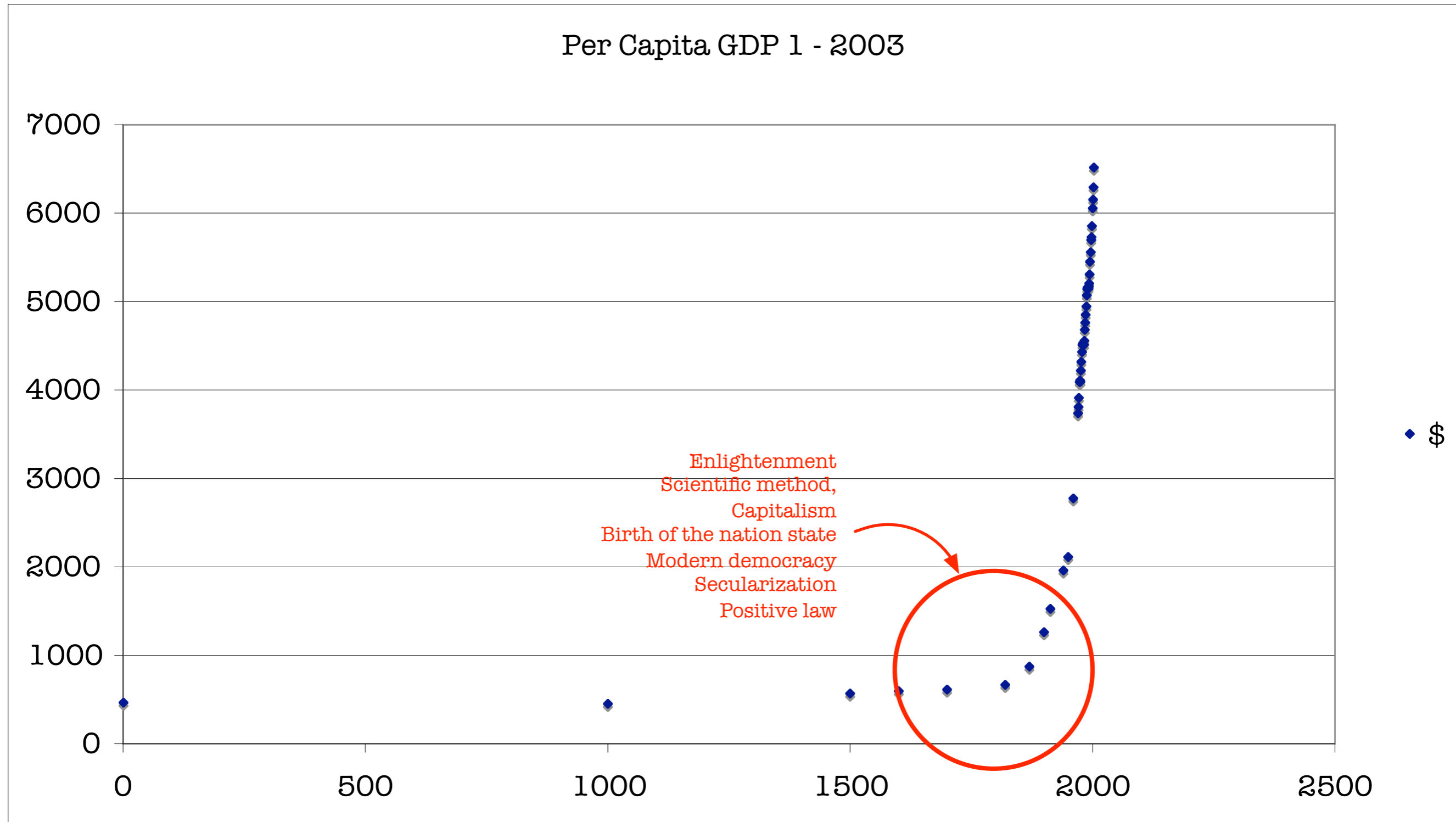
First principles: markets and competition

Why have markets in the first place?



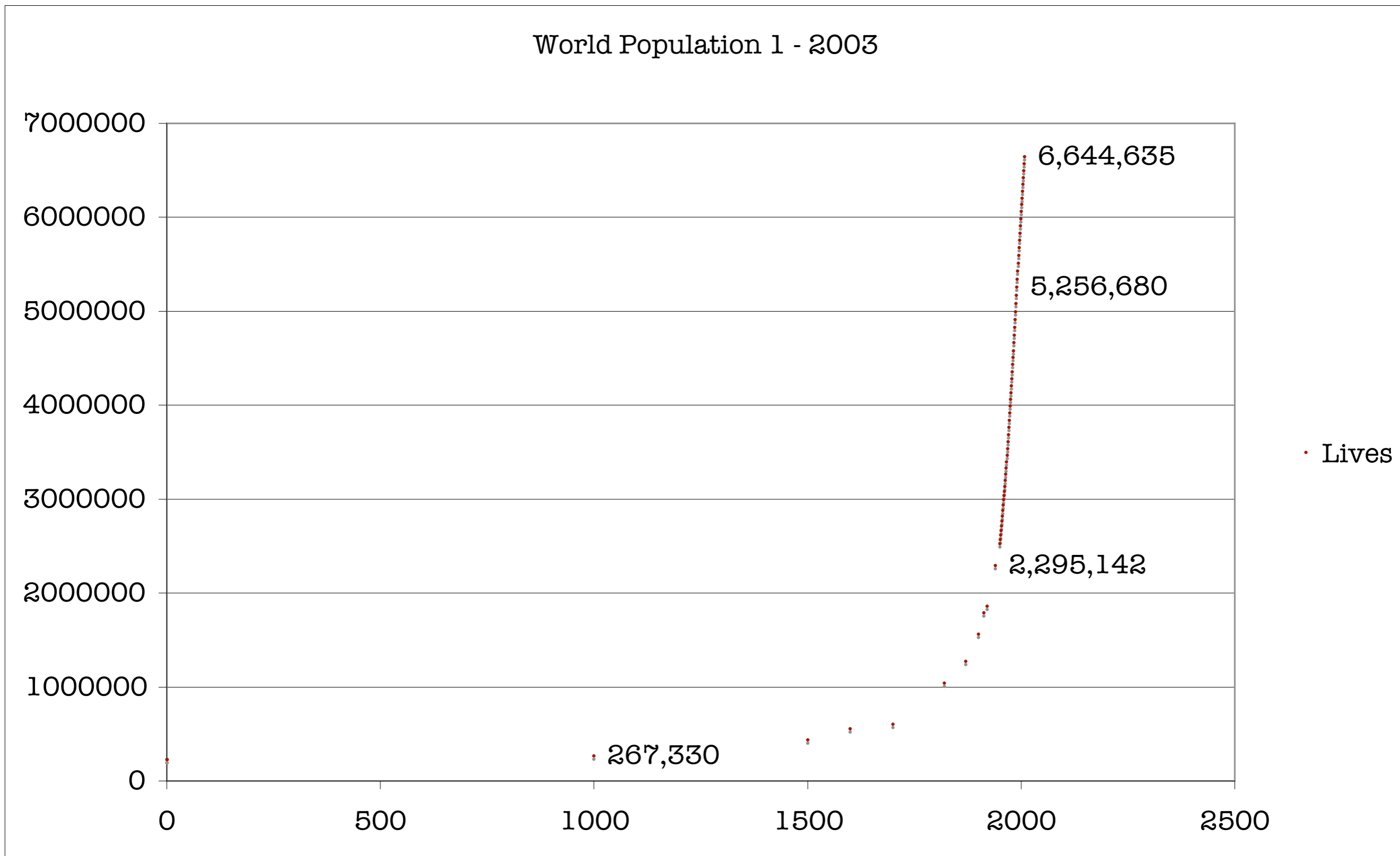
- All political units have to address the problem of scarcity. Alleviating scarcity means increasing welfare
 - I.e., quantity, quality, and variety of consumer goods
- Increasing welfare requires large scale production and distribution
- There have only been three major ways to do so: tradition, command and control, and – since the 17th Century – the market
 - Heilbroner, [The Worldly Philosophers](#) (1999)
- Markets have been revolutionary engines of wealth creation: no central authority, no traditions, empowerment of the individual, changing one's lot in this life

With the explosion of wealth ...

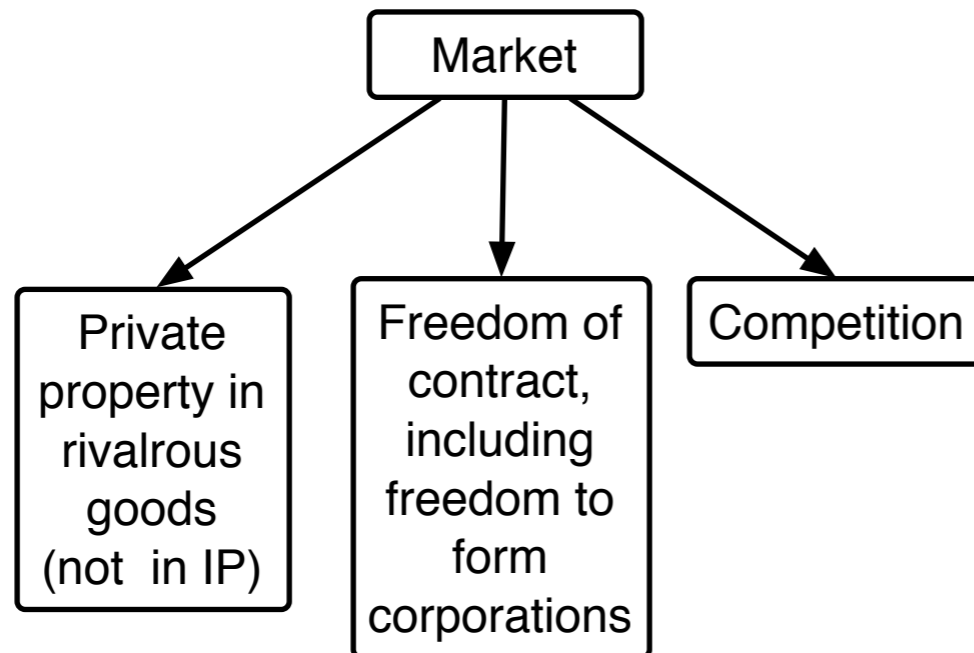


Source: Angus Maddison, <http://www.ggdc.net/maddison/>

... world population increased



If one decides on a market system, what other choices are implied?



- A functioning market requires private property in rivalrous goods, freedom of contract, and competition
- Functioning markets align the individual profit motive with the common good, i.e., “(your) greed is good (for all)”
 - This alignment of private and public interests is the core of the hopeful creed of capitalism
 - Functioning markets maximize allocative, productive, and dynamic efficiency
- Competition ensures the alignment of the individual profit motive with the promotion of social welfare
 - Monopoly, in contrast, breaks the alignment. Under monopoly, my greed is primarily good for me and bad for everyone else

What is the purpose of competition laws?

- Antitrust law rests on the premise that markets produce their beneficial effects (and are reliably self-correcting) only under conditions of effective competition or rivalry
- Antitrust protects the legislative decision for competition as the general rule of trade from being undermined by private market participants – by agreement or unilaterally

Efficiency and non-efficiency effects of functioning (i.e., competitive) markets

- **Efficiency effects of competitive markets**
 - Allocative efficiency (US, EU)
 - Productive efficiency (US, EU)
 - Dynamic efficiency (US, EU)
- **Non-efficiency effects of competitive markets**
 - Market integration (EU)
 - Employment (EU)
 - Provide the tax base for member states to promote social justice and protect the environment (EU)
 - Protecting the democratic process from concentrated economic power (historically in the U.S.)
 - Preserving conditions of relative bargaining equality under which contracts can reasonably be trusted to produce fair results