If we let subjective antitrust standards breed crony capitalism, history will repeat itself. We should listen to the past's warnings.

Critics of America's leading technology businesses claim Congress should follow Europe's lead and politicize antitrust enforcement even if doing so means protecting a corporation from competition at consumers' expense. But this defies logic and ignores history. The United States has already tried the flawed antitrust doctrine of focusing on protecting competitors. It failed. We then learned from this mistake and refocused our antitrust law on the protection of consumers, not corporations.

Today's antitrust regime is not perfect, but it reflects a century-plus of accumulated wisdom to promote America's global competitiveness and consumer well-being.

THE GILDED AGE AND ANTITRUST'S BEGINNINGS 1888-1900

Before state antitrust laws or the Sherman Act, American common law of contracts governed claims of trade restraints.

"General" restraints were unlawful because they were broader than necessary to accomplish legitimate business goals while "partial" restraints were lawful if ancillary to legitimate public interests and no more restrictive than necessary. Trade mergers and conspiracies were assumed to raise prices and restrict output—and were thus considered unlawful forms of destructive competition.

While courts had some limited remedial powers, most simply refused to enforce general restraints. Lawmakers decided to change that.

1890
Congress passes the Sherman Act, the country's first antitrust law

1897
United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290: 5 to 4 decision

The Supreme Court rules that the Sherman Act protects "small dealers and worthy men," even if consumers end up paying higher prices.

PROGRESSIVE REFORMS, EXPERTISE, & FLEXIBILITY 1900-1939

*Around the turn of the century, the Supreme Court abandoned its literal interpretation of the Sherman Act in favor of the **rule of reason**. The rule of reason helps the court evaluate a business's practices likely effect on its competition. If the practices are more procompetitive than anticompetitive, they are lawful.*

We can trace today's consumer welfare standard to this era, despite some critics who believe it was invented by the Chicago School of Economics in the 1970s. And as the cases show, many of today's still-held antitrust laws enjoyed broad consensus.

1904

Northern Securities Co. v. United States, 193 U.S. 197: 5 to 4 decision

Both the majority and dissenting opinions including Chief Justice White and progressive icon Oliver Wendall Holmes agreed that a business's large size is not per se unlawful, unless that size was gained from unlawful combinations.

1911

Standard Oil Co. v. United States, 221 U.S. 1: 8 to 1 decision

Court decided that the Sherman Act does not prohibit monopolies, it prohibits monopolization. Businesses can legally become a monopoly, so long as it is through "normal methods of industrial development" and not anticompetitive conduct.

1914

The Clayton Act and the Federal Trade Commission Act

1918

Chicago Board of Trade v. United States, 246 U.S. 231, 238: unanimous

This case set up what is today called the ***rule of reason***.

1920

United States v. United States Steel Co., 251 U.S. 417: 6 to 3 decision

The Supreme Court holds that a business's mere size by itself is not unlawful. In its decision, the Court also notes that consumers reported no complaints of harm from U.S. Steel's size, a signal of consumer welfare further joining the antitrust narrative.

PROGRESSIVE ANTITRUST: FROM WORLD WAR II THROUGH THE WARREN COURT 1940-1969

During World War II, the Supreme Court moved away from the Rule of Reason and adopted strict per se rules. That trend accelerated during the 1960s, when economic growth was strong and trust in government high, the Supreme Court jettisoned the rule of reason and embraced per se rules, to the detriment of dynamic competition. Because the economy was growing so much, however, the trade-off between promoting efficiency and protecting inefficient firms was not as pronounced as it would be years later.

1948

FTC v. Morton Salt Co., 334 U.S. 37: 7 to 2 decision

The Supreme Court doubles down on businesses by making it illegal for large firms to compete simply because they have too much money.

1956

United States v. E.I. duPont de Nemours & Co., 353 U.S. 586: 4 to 3 decision

The Supreme Court clarifies that monopoly power is the "power to control prices or exclude competition." To determine whether there's monopoly power, one must first define the relevant market to include the product at issue and all "commodities reasonably interchangeable by consumers for the same purposes."

1962

Brown Shoe Co. v. United States, 370 U.S. 294: unanimous decision

The Supreme Court returns to its early understanding of how antitrust law is meant to protect "viable, small, locally owned business," even when "occasional higher costs and prices might result from the maintenance of fragmented industries and markets."

1968

U.S. Dep't of Justice, Merger Guidelines

Government declares that its analysis of mergers should care mostly about a business's market share, disregarding any likely benefits to consumers or competition.

CONSUMER WELFARE ERA: PUTTING CONSUMERS FIRST 1970-PRESENT

By the mid-1970s, the Supreme Court could no longer ignore trade-offs. As a result, the Court slowly moved away from the per se rules of the Warren Court and explicitly embraced the consumer welfare standard.

1977

Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54: 6 to 2 decision

In a 6 to 2 decision, the Supreme Court overrules Schwinn and holds that a business violates antitrust laws only when it acts unreasonably to restrain trade. This reorients antitrust doctrine to focus on the consumer welfare standard.

1978

Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695: unanimous decision

The Supreme Court focuses on objective facts and tangible benefits. Here, it held that courts must consider whether a restraint of trade is largely procompetitive or anticompetitive in effect.

1979

Reiter v. Sonotone Corp., 442 U.S. 330: unanimous decision

Stevens, White, and Burger joined together with the rest of the court to unanimously agree that consumer welfare is a core goal of the Sherman Act: "Congress designed the Sherman Act as a 'consumer welfare prescription.'"

1990

U.S. v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990)

Soon to be Supreme Court Justices Thomas and Ruth Bader Ginsberg applied the consumer welfare standard and rebuked market concentration as the principal concern of antitrust law.

2004

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398: unanimous decision

The Supreme Court unanimously identifies that lower prices for consumers that also result in short-term profit losses do not de facto violate antitrust law. This allowed businesses to compete on price without fear they would be violating antitrust law.

2006

Illinois Tool Works v. Independent Ink, Inc., 547 U.S. 28: 8 to 0 decision

The Supreme Court weakened the per se prohibition against tying.

2007

Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312: unanimous decision

The Supreme Court reverses the prior standard of guilty until proven innocent for corporations. Accusers must now prove that the defendant's business activities were anti-competitive instead of forcing the defendant to prove their innocence. This forces everyone to look even more at if consumer harm exists.

2009

Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438: unanimous

A unanimous Supreme Court discourages courts from taking on cases claiming antitrust action because competitors' prices were too low.

2018

Ohio v. American Express, 138 S. Ct. 2274: 5 to 4 decision

The Supreme Court updates its antitrust doctrine for contemporary markets, holding that in today's economy, it may be necessary for the consumer welfare standard to consider effects on multiple groups of consumers who use the same platform.