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Federal Trade Commission

Shiny Baubles & Smooth Pebbles:
The Role of Pragmatic Skepticism in Competition Law Jurisprudence

Remarks at the *Concurrences* Writing Awards Dinner

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Thank you for that kind introduction, I am delighted to be back speaking to you again this year. I will note that this event is definitely one of the highlights on the antitrust calendar.

In this week already filled with panels and roundtables, I do not intend to give a major policy speech tonight. Rather, as we gather here among many old friends and colleagues this evening to honor the best in antitrust writing, I want to take just a few minutes to talk about the steps that should follow the kind of work we celebrate tonight. How should we integrate antitrust scholarship into concrete enforcement norms? In other words, how and when should the very best ideas from the thought leaders in our field start to directly influence real cases?

As a preview to assessing that question, I'd ask you all to think back, to a time not all that many years ago. A time when conglomerate mergers were viewed with deep suspicion, resale price maintenance was even worse, and rigorous, empirical economic analysis too often occupied a peripheral role in our enforcement decisions. You know, the good old days.

[1] The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

We didn't get from there to here by accident. The fierce criticism of a determined band of scholars and academics, most prominently led by Robert Bork, drove a revolution in scholarly thinking about antitrust in the later years of the 20th century. In turn, that revolution in scholarship eventually spawned a revolution in enforcement. The process took decades, but today we are living in a world that looks very little like the one Judge Bork took direct aim at in *The Antitrust Paradox*.[2] So anyone who tells you that scholarship doesn't have a major role to play in the development of antitrust doctrine really needs to spend a little time studying our recent history.

While our field may be in a much more settled and sensible place these days, it would be a mistake to think that today's broad, general consensus somehow limits the importance of new, original scholarship. In some ways, the need is as great as it has ever been.

The world out there is not just sitting still, waiting for all of us to figure it out. When you embrace free market capitalism, what you are really embracing is not just an economic system, but also a willingness to accept and even embrace constant, continuing change. Vibrant, competitive markets are rarely static for long. As entrepreneurs continually invent entirely new business models and the economy re-orders itself around those changes, competition enforcement must endeavor to keep up, if it is to both fulfill its mission and remain relevant.

Without a doubt, the best antitrust scholarship helps us all to make sense of these changes. Great scholarship can pierce through the swirling complexity of the modern economy and provide insights that drive us all towards better and more refined enforcement decisions.

There is, naturally, considerable pressure to integrate new scholarship quickly. After all, who does not want us all to get better at this, given the stakes? At the end of the day, antitrust

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[2] Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (Basic Books) (1978).

enforcement is about maintaining the vitality of our economy and improving the living standards of our citizens. We protect the competitive process not only because we strongly believe in maximizing individual autonomy and economic liberty, but also because competition is a principle driver of economic growth. That is no small thing.

Beyond the broader policy issues, the exercise of our authority often involves the expenditure of significant sums of other people's money. There is no such thing as a trivial antitrust case to the specific parties that are caught up in the matter.

I am acutely aware of the responsibilities the President has asked me to assume and the impacts that my actions can have. So I understand, as well anyone, the impulse to grab for that shiny new theory that seems to provide a better or more accurate representation of the world.

However, I'd like to suggest tonight that, as enforcers, our approach to new scholarship must necessarily be a cautious one. I have spoken before about the concept of "regulatory humility" or understanding the limits of our own knowledge when considering whether to apply the considerable authority granted to us.

When I came back to the FTC headquarters as a Commissioner, they gave me a lovely new office. They gave me a computer, a phone, and all the usual office supplies, and then they sat me down in my nice new office and made me sign about 150 pieces of human resources paperwork in a row.

Nowhere in all that blizzard of paperwork, or in any of the hundreds of briefings I've had since that day, did I find out where they kept the magic crystal ball that would allow me to gaze out unerringly into the future, so I could know the decisions I make today will turn out to be correct tomorrow.

As enforcers, we are nothing more than citizens entrusted to execute the will of the people to the best of our ability. We have no special powers of prediction, and any one of us can be spectacularly wrong about how we expect the future to turn out. Regulatory humility is really about understanding and internalizing the limits of our own knowledge when we wield the considerable powers entrusted to us.

What I'd like to suggest tonight is that just as enforcers don't always get it right, well-intentioned academics and thoughtful, seasoned practitioners are also not infallible. To guard against the adoption of ultimately erroneous scholarship, I think we all need to treat efforts to pull or move enforcement in new directions with something approaching the same degree of healthy professional skepticism that scientists routinely subject major new scientific discoveries to. In brief, pragmatic skepticism has been embraced by the scientific community and I believe it has an important role to play in ours as well.

So when someone comes to me suggesting that a particular matter fits nicely into the latest interesting theory that some very thoughtful person has recently written about, I am certainly willing to hear the rest of that story. But I also want to know what the well-supported empirical analysis shows, what the parties' documents and testimony may suggest and the like. In short, I want as much probative, reliable information as can be mustered on all sides of the question. And I'm going to be pretty hesitant to embrace novel theories that conflict with the answers that the well-established antitrust toolkit already provides.

I take that approach because when matters reach my desk, I am playing with real money, in ways that can have a real impact on both the broader economy and on people's lives. I have a responsibility to do my very best to get it right, and to treat the real individuals who find themselves in front of the Federal Trade Commission fairly and justly.

Some might criticize my pragmatic skepticism, suggesting that I am being overcautious or insufficiently creative. Here is why I don't spend a lot of time fretting about that criticism: there is a free market for new ideas in this field, and it works an awful lot like a free market for material goods. The best ideas tend to win out over time, while the trendy, flashy and ultimately unsupportable theories are debunked or fade away. The process is not always neat and tidy, but eventually the best ideas emerge from the rough and tumble world of critical skepticism intact. Much like pebbles emerging from a riverbed, the rough edges and imperfections are eventually smoothed away, and what remains is ready to join our collective wisdom.

This process may not move quickly enough for some people, but it works. *The Antitrust Paradox*[3] was originally published way back in 1978. Plenty of people disagreed with it at the time it came out. But, over time, many of its key insights became part of our generally accepted, common understanding.

When I look at the articles we were asked to judge tonight, I have no concerns about stagnation. Competition law is going to continue to grow and improve: there are simply too many bright, creative and serious people working in our field for us to stand still. We need not fear the constant re-examination and rigorous testing of both our existing core principles and the creative output of today's strongest scholars. We are fortunate to stand here today on a strong foundation, a foundation largely shaped by these very processes. I have no doubt that the intellectual underpinnings of our critical mission to protect competition and consumers will only improve in the years ahead.

And with that, I'm pleased to introduce Johannes Laitenberger, who is giving out the award for the Most Innovative Soft Law Categories. Thanks again for having me.

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[3] *Id.*