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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

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

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

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

Some might criticize my pragmatic skeptic
