



UNITED STATES OF AMERICA
Federal Trade Commission

Prepared Closing Remarks of Commissioner Noah Joshua Phillips*

**2019 Antitrust Writing Awards Gala Dinner
Concurrences Review and The George Washington University Law School**

**National Press Club
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Good evening and thank you for having me. I'm thrilled to have been able to serve this year as a Board Member and to help select the winning articles announced tonight. I want to thank Concurrences and GW Law, not only for hosting us all, but for helping to foster the important written work we are here to celebrate.

Antitrust law benefits from rich efforts by scholars, practitioners, jurists, enforcers, economists, and other experts to better understand evolving marketplaces and behaviors. It is perhaps unique in the wide-ranging combination of intellectual forces it routinely brings to bear. As these Awards demonstrate, not only thorough academic contribution, but also shorter articles aimed at practitioners strengthen this field. And they come from expert sources across the globe.

At a time when antitrust is front-and-center in the popular press, these efforts—your efforts—could not be more important. Discussion of competition law is now a part of the zeitgeist in a way it has not been for quite some time—if ever.

* The views expressed below are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

While many of the notions about antitrust that dominate the public debate today themselves are nothing new, the speed with which they are traveling and the extent to which these conversations pervade the popular dialogue seems unprecedented—thanks in part, I suppose, to the very companies many of the loudest critics view as evidence of antitrust enforcers’ failures.

Much of the popular conversation today is critical of antitrust enforcers: we have not been doing enough, we have been asleep at the wheel, we are afraid to take the drastic steps required, and so on. But a substantial share of criticism is reserved for the folks in this room: the judges, academics, and lawyers whose work must be tested, by the empirical method and by courts of law. Writing an op-ed is easy. The criticisms tend to present antitrust as failing to update or to react in any way to the world around it for the last thirty or so years. But I think the corpus of work we celebrate tonight belies that account as a caricature.

Authors with many different viewpoints—including numerous current and former enforcers, like our host Bill Kovacic—have continued to engage in difficult questions over the last several decades. This serious and thoughtful work has helped to shape the law in the U.S., and abroad. Today, antitrust articles are frequently cited in U.S. court cases, including Supreme Court cases. This is a testament to the fact that competition experts have continued to engage with timely, difficult issues. While the law might not always move in the direction or with the speed critics—on all sides—demand, a lack of introspection is not the source of these alleged failures.

I am happy to have opportunities, like the one tonight, to support efforts to further this introspection. As an enforcer, I often face difficult questions of how best to vindicate my agency's goal of protecting competition and consumers. And the more I and my fellow enforcers are able to learn, the better. Your work is critical.

Tonight, because I can't resist the temptation, I would like to share my two-cents regarding some areas I hope authors will continue to explore in the coming year. Tech and antitrust questions dominate the public discourse, and they are important. But they are not everything. So I want to note some other important areas.

First, I hope to see literature analyzing how changing or increasing privacy regimes are affecting competition. Following implementation of GDPR last year, there has been a flurry of activity in other jurisdictions related to adopting more aggressive privacy regulations. While well-calibrated legislation can help to protect privacy interests that may not be adequately protected today, establishing more rigorous requirements can also increase costs for businesses and lead to unintended consequences. The public choice literature, for instance, establishes well that increasing regulatory hurdles is one of the most durable ways to increase competitors' costs. And it is smaller businesses that tend to be most adversely affected by increasing such hurdles, as they are less well-positioned than larger, better-funded counterparts to absorb these increased costs.

I worry ill-conceived laws might perversely help to entrench the very same large incumbents about which regulators are particularly worried. Developing our

understanding of how such legislation has been affecting competition will help enforcers to prioritize their efforts in light of any changes to the competitive landscapes privacy legislation might usher in, and guide policymakers coming up with new regulations.

Second, I hope research into areas where antitrust intersects with other legal areas, such as corporate and securities laws, continues. Antitrust law often has its own presumptions and insights, but drawing from other experiences can help to hone and to clarify our understanding of various conduct and behaviors. Over the last couple of years, for instance, we have observed several articles exploring the “common ownership” question; first from an antitrust perspective, but increasingly from a corporate and securities law perspective. As work continues to develop in this space, I and others pointed out that the assumptions on which the common ownership theory relies were often at odds with assumptions on which many corporate and securities laws are based. I laid out a research agenda to determine whether common ownership ought to be a focus for enforcers.

Third, I hope to see further research into the effects of non-competes, no-poach agreements, and professional licensing. It has recently come to light that non-compete and no-poach provisions may be far more prevalent across various sectors of the economy than we realized. And the number of licensed professions in the U.S. has increased significantly over the last several decades. Standing alone, not all of these restrictions may raise antitrust concerns in every case. But I fear the combination of the three may be having a pernicious effect on labor mobility. It is

critical that Americans be able to seek and take advantage of new and different job opportunities. As an enforcer tasked with protecting consumers and competition, the potential dampening of the free flow of labor markets is of great concern and more research here is critical.

Finally, I hope to see continued efforts analyzing competition in the highly-regulated healthcare space, and particularly regarding how firms might seek to exploit the regulatory regimes at play. Healthcare is an area that affects all Americans over the course of their lives, and it is one where we as a nation struggle to contain costs. Research in this area has illuminated various attempts by firms to game regulations, like the Hatch-Waxman Act—which was designed to promote competition—and the REMS program—which was primarily safety driven—in order to increase their profits. This research has helped to shed light on how firms in this space are likely to behave, and has been instrumental in guiding the Commission’s enforcement priorities, not to mention the development of case law. It has a real impact. Given the critical role of healthcare in the American economy, we would continue to benefit from further work here.

There is a lot to do. So, thanks in advance for all your work. Your efforts are critical to our national and even international project of protecting competition and consumers. So get to it!

Thank you.