
Chevron and Administrative Antitrust, Redux

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Abstract. In 2014, I published a pair of articles—Administrative Antitrust and Chevron and the Limits of Administrative Antitrust—that argued that the Supreme Court’s recent antitrust and administrative law jurisprudence was pushing antitrust law out of the judicial domain and into the domain of regulatory agencies. The first article focused on the Court’s then-recent antitrust cases and argued that the Court, which had abrogated most areas of federal common law, had shown a clear preference for handling common-law-like antitrust law on a statutory or regulatory basis where possible. The second article evaluated and rejected the Federal Trade Commission’s (“FTC’s”) long-held belief that its interpretations of the FTC Act do not receive Chevron deference. This Article will revisit those articles in light of the past decade of Supreme Court precedent. In reviewing those articles, this Article will argue that, for the same reasons that the Court seemed likely in 2013 to embrace an administrative approach to antitrust, today it is likely to view such approaches with great skepticism unless they are undertaken on a cautious and incrementalistic basis. That is, the Court will embrace an administrative approach to antitrust where it will prove less indeterminate than judicially defined antitrust law. If the FTC approaches antitrust law aggressively, decreasing the predictability of the law, the Court seems likely to close the door on administrative antitrust for reasons sounding in both administrative and antitrust law. This conclusion differs from other current work examining the Commission’s authority—such as on major questions grounds or whether the Commission has substantive “unfair methods of competition” rulemaking authority—in that it is primarily based on the Court’s views on the relationship of antitrust and administrative law.

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Introduction

In 2014, I published a pair of articles—*Administrative Antitrust*¹ and *Chevron and the Limits of Administrative Antitrust*²—that argued that the Supreme Court’s recent antitrust and administrative law jurisprudence was pushing antitrust law out of the judicial domain and into the domain of regulatory agencies. The first article focused on the Court’s then-recent antitrust cases, arguing that the Court, which had abrogated most areas of federal common law, had shown a clear preference for handling common-law-like antitrust law on a statutory or regulatory basis where possible.³ The second article evaluated and rejected the Federal Trade Commission’s (“FTC’s”) long-held belief that the Commission’s interpretations of the FTC Act do not receive *Chevron* deference.⁴

Together, these articles made the case (as a descriptive, not normative, matter) that we were moving toward a period of what I called “Administrative Antitrust.” From today’s perspective, it surely seems that I was right, with the FTC poised to embrace Section 5’s broad ambiguities to redefine modern understandings of antitrust law. Indeed, those articles have been cited by both former FTC commissioner Rohit Chopra and current FTC chair Lina Khan in speeches and other materials that have led up to our current moment.⁵

This article revisits those articles considering the past decade of Supreme Court precedent. It comes as no surprise to anyone familiar with recent cases that the Court is increasingly viewing the broad deference that has been characteristic of administrative law with what can, charitably, be called skepticism. While I stand by the analysis offered in my previous articles—and, indeed, believe that the Court maintains a preference for administratively-defined antitrust law over judicially-defined antitrust law—the Court today is less likely to defer to any agency interpretation of antitrust law that represents more than an incremental move away from extant law.

This article approaches this discussion in five parts. Part I offers some reflections on my prior articles. The piece on *Chevron* and the FTC, in particular, argued that the FTC had misunderstood how *Chevron* would

¹ Justin (Gus) Hurwitz, *Administrative Antitrust*, 21 GEO. MASON L. REV. 1191 (2014) [hereinafter *Administrative Antitrust*].

² Justin (Gus) Hurwitz, *Chevron and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209 (2014) [hereinafter *Limits of Administrative Antitrust*].

³ *Administrative Antitrust*, *supra* note 1, at 1192.

⁴ *Limits of Administrative Antitrust*, *supra* note 2, at 212.

⁵ See, e.g., Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357 *passim* (2020); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1678, 1681 (2020).

apply to its interpretations of the FTC Act because it was beholden to out-of-date understandings of administrative law. Part I makes the point that the sands of administrative law have continued to shift such that, if the FTC relies on the understanding at issue in that earlier article, it will likely find its new understanding of administrative law again out-of-date. Part II briefly recaps the essential elements of the arguments made in both of those prior articles, to the extent needed to evaluate how administrative approaches to antitrust will be viewed by the Court today. Part III summarizes some key elements of administrative law that have changed over roughly the past decade. Part IV then brings these elements together to look at the viability of administrative antitrust today and argues that the FTC's broad embrace of power anticipated by many is likely to meet an ill fate at the hands of the courts on both antitrust and administrative law grounds. Part V turns to focus on what will likely be the central question for evaluating any expansion of the FTC's authority—whether the FTC views its authority as broader than but fundamentally beholden to general antitrust principles or whether it instead views that authority as both broader than and fundamentally distinct from traditional antitrust law.

In reviewing my prior two articles in light of the past decade's case law, this Article reaches an important conclusion: for the same reasons that the Court seemed likely in 2013 to embrace an administrative approach to antitrust, today it is likely to view such approaches with great skepticism unless they are undertaken on a cautious and incrementalistic basis. Others are currently developing arguments that sound primarily in current administrative law: the major questions doctrine and the potential turn away from *National Petroleum Refiners Ass'n v. FTC*.⁶ My conclusion here differs in that it is based primarily in the Court's views on the relationship of antitrust and administrative law—that is, that the Court will embrace an administrative approach to antitrust where it will prove less indeterminate than judicially defined antitrust law. If the FTC approaches antitrust law aggressively, decreasing the predictability of the law, the Court seems likely to close the door on administrative antitrust for reasons sounding in both administrative and antitrust law.

⁶ 482 F.2d 672, 673–74 (D.C. Cir. 1973); *cert denied*, 415 U.S. 951 (1974) (holding that the FTC Act conferred on the FTC the authority to promulgate trade regulation rules which have effect of substantive law). For examples of others' arguments, see RULEMAKING AUTHORITY OF THE U.S. FEDERAL TRADE COMMISSION (Daniel A. Crane ed. 2022), for a collection of essays on the topic of notice-and-comment rulemaking in antitrust.

I. Setting the Stage, Circa 2013

A. *Net Neutrality and Administrative Antitrust*

It is useful to start by visiting the stage as it was set when I wrote *Administrative Antitrust* and *Limits of Administrative Antitrust* in 2013. I came to these articles having spent the early years of my career with the Department of Justice (“DOJ”) Antitrust Division’s Telecommunications Section. That was a great time to be involved on the telecom side of antitrust, especially for someone with an interest in administrative law. Recent important antitrust cases included *Pacific Bell Co. v. linkLine Communications*⁷ and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*⁸ and recent important administrative law cases included *National Cable & Telecommunications Ass’n v. Brand-X Internet Services*,⁹ *FCC v. Fox Television Stations*,¹⁰ and *City of Arlington v. FCC*.¹¹ Telecommunications law was defining the center of both fields.

I started working on *Administrative Antitrust* first, prompted by what I think today was an overreading on my part of the Court’s 2011 *American Electric Power Co. v. Connecticut*¹² opinion, in which the Court held broadly that a decision by Congress to regulate broadly displaces judicial common law.¹³ In *Trinko* and *Credit Suisse Securities (USA) LLC v. Billing*,¹⁴ the Court held something similar: roughly that regulation displaces antitrust law.¹⁵ Indeed, in *linkLine*, the Court had stated that regulation is preferable to antitrust law, known for its vicissitudes and adherence to the extra-

⁷ 555 U.S. 438, 442 (2009) (holding that a “price squeeze” claim cannot be brought under Section 2 of the Sherman Act when the claim is brought against a company acting in a partially regulated industry).

⁸ 540 U.S. 398, 415–16 (2004) (holding that a company cannot be sued under the Sherman Act if it fails to meet its duty to share its network with its competitors under the Telecommunications Act).

⁹ 545 U.S. 967, 980 (2005) (granting *Chevron* deference to the FCC’s interpretation of “telecommunications services” under the Communications Act).

¹⁰ 556 U.S. 502, 515 (2009) (holding that agencies need not prove that changes in regulation are “better,” just that the new policy is “permissible” and that there are good reasons for it).

¹¹ 569 U.S. 290 (2013) (granting *Chevron* deference to agencies’ interpretation of its own jurisdiction).

¹² 564 U.S. 410 (2011).

¹³ *Id.* at 415.

¹⁴ 551 U.S. 264 (2007).

¹⁵ *See id.* at 267; *Verizon Commc’ns., Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004).

judicial development of economic theory.¹⁶ *Administrative Antitrust* tied these strands together and argued that antitrust law, long discussed as one of the few remaining bastions of federal common law, would—and in the Court’s eye, should be—displaced by regulation.¹⁷

Antitrust and administrative law also came together—and remain together—in the debates over net neutrality. These debates are largely about the role the government plays in regulating how Internet Service Providers (“ISPs”) handle user data.¹⁸ In particular, it involves questions about whether the Federal Communications Commission (“FCC”) should take an antitrust-based or regulatory approach to concerns that, lacking significant competition, ISPs may have an incentive to handle that data so as to maximize their revenue at the expense of consumer welfare.¹⁹ Focused on more narrow legal questions, however, the net neutrality debate has come primarily to be about the FCC’s legal authority under the Communications Act, including whether ambiguity in the Act affords the Commission latitude to regulate ISPs as common carriers.²⁰ It was this nexus that gave rise to *Limits of Administrative Antitrust*, which I started in 2013 while working on *Administrative Antitrust* and waiting for the Court of Appeals for the D.C. Circuit’s opinion in *Verizon v. FCC*.²¹

In 2008, the FCC attempted to put in place net neutrality rules by adopting a policy statement on the subject.²² This approach was rejected by the Court of Appeals for the D.C. Circuit in 2010 on the grounds that a mere policy statement lacked the force of law.²³ The FCC then adopted similar rules through a rulemaking process, finding authority to issue those rules in its interpretation of the ambiguous language of Section 706 of the Telecommunications Act.²⁴ In January 2014, the court of appeals again rejected the specific rules adopted by the FCC, this time on the grounds that those rules violated the Communications Act’s prohibition

¹⁶ See *Pacific Bell Co. v. linkLine Communications*, 555 U.S. 438, 452 (2009) (“We have repeatedly emphasized the importance of clear rules in antitrust law.”).

¹⁷ *Administrative Antitrust*, *supra* note 1, at 1192–93.

¹⁸ See, e.g., J. Howard Beales III, Professor of Strategic Mgmt. & Pub. Pol’y, Geo. Wash. Sch. Bus., Comment Letter on Proposed Rule to Protect the Privacy of Customers of Broadband and Other Telecommunications Services (May 27, 2016), <https://perma.cc/B2GX-7JSR>.

¹⁹ See, e.g., *id.* at 3.

²⁰ See Robert E. Litan, *Regulating Internet Service Providers as Common Carriers Will Not Satisfy Net Neutrality Advocates*, BROOKINGS (May 12, 2014), <https://perma.cc/4T9N-F59Y>.

²¹ 740 F.3d 623 (D.C. Cir. 2014).

²² See Formal Complaint of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications, 23 FCC Rcd. 13028 (2008).

²³ *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010).

²⁴ Preserving the Open Internet; Broadband Industry Practices, 25 FCC Rcd. 17905, 17968 (2010).

on treating non-common carriers (ISPs) as common carriers.²⁵ But, critically, the court affirmed the FCC's interpretation of Section 706 as allowing it, in principle, to adopt rules regulating ISPs.²⁶

Unsurprisingly, whether the language of Section 706 was either ambiguous or subject to the FCC's interpretation had been a central debate within the regulatory community during 2012 and 2013.²⁷ The broadest consensus was, at least among my peers, strongly of the view that it was neither: the FCC and industry had long read Section 706 as not giving the FCC authority to regulate ISP conduct, and to the extent that it did confer legislative authority, that authority was expressly deregulatory.²⁸ I don't claim by any means that I was the only person arguing that the Court of Appeals for the D.C. Circuit was likely to find that *Chevron* applied to Section 706. But among critics of the FCC's efforts to implement network neutrality rules—of which I was one—the view was rare.

This discussion is unusually autobiographical. But it explains the context from which *Administrative Antitrust* developed to consider the widely-held view that the Federal Trade Commission ("FTC") would not receive *Chevron* deference for interpretations of its statute.²⁹ The previous decade of the Court's *Chevron* case law had followed a trend of increasing deference, such that it seemed likely the Court of Appeals for the D.C. Circuit would defer to the FCC's interpretations in the context of net neutrality. Starting with *Brand-X*, then *Fox v. FCC*, and then *City of Arlington*, the safe money was consistently placed on deference to the agency.³⁰ There was a natural convergence between the question of whether the FTC would similarly receive such deference and the ideas I

²⁵ *Verizon*, 740 F.3d at 628.

²⁶ *Id.*

²⁷ Compare Samuel L. Feder, Matthew E. Price & Andrew C. Noll, *City of Arlington v. FCC: The Death of Chevron Step Zero?*, 66 FED. COMM'NS. L.J. 47, 67 (2013), with Amanda Leese, *Net Transparency: Post-Comcast FCC Authority to Enforce Disclosure Requirements Critical to "Preserving the Open Internet"*, 11 NW. J. TECH. & INTELL. PROP. 81, 93–94 (2013).

²⁸ The earliest definitive statement of this view was made by FCC Chairman Bill Kennard in a 1998 speech: "While Section 706 evidences Congress's desire for rapid deployment of advanced telecommunications capability, it is not an independent grant of authority that would allow us to forebear from other provisions of the Act." Press Release, William E. Kennard, Chairman, Fed. Comm'ns Comm'n, Statement on FCC's Actions to Promote Deployment of Advanced Telecommunications Services by All Providers (Aug. 6, 1998), <https://perma.cc/HD7G-KHNU>. This followed a 1998 FCC report to Congress in which the Commission "conclude[d] that [Internet access service] is appropriately classed as an 'information service.'" *In Re Federal-State Joint Board on Universal Service*, FCC 98-67, Report to Congress, CC Docket No. 96-45, ¶ 80 (Apr. 10, 1998).

²⁹ See *infra* Section I.B.

³⁰ See *infra* Section III.A.

had explored in *Administrative Antitrust*, which, as discussed in the next section, I explored in *Limits of Administrative Antitrust*.

B. Section 5 and Unfair Methods of Competition

This was the setting in which I started thinking about what became *Limits of Administrative Antitrust*. If my argument in *Administrative Antitrust* was right—that the courts would push development of antitrust law from the courts to regulatory agencies—this would most clearly happen through the FTC’s Section 5 authority over unfair methods of competition (“UMC authority”). But there was longstanding debate about the limits of the FTC’s UMC authority.³¹ These debates included whether it was necessarily coterminous with the Sherman Act (so limited by the judicially-defined federal common law of antitrust).³²

And there was discussion about whether the FTC would receive *Chevron* deference to its interpretations of its UMC authority.³³ As with the question of the FCC receiving deference to its interpretation of Section 706, there was widespread understanding that the FTC would not receive *Chevron* deference to its interpretations of its Section 5 UMC authority.³⁴ *Limits of Administrative Antitrust* explored that issue, ultimately concluding that the FTC likely would indeed be given the benefit of *Chevron* deference.³⁵ And it traced the Commission’s belief to the contrary back to longstanding institutional memory of pre-*Chevron* judicial losses.³⁶

The FTC Act gives the Commission the power to prohibit “[u]nfair methods of competition in or affecting commerce.”³⁷ The Act purposely gave no definition of unfair methods of competition, thus leaving room for interpretation.³⁸ It is understood, however, that this authority is

³¹ *Limits of Administrative Antitrust*, *supra* note 2, at 250–58.

³² *Id.* at 212–13 (citing Edith Ramirez, Chair, Fed. Trade Comm’n, Keynote Address at the George Mason University School of Law 17th Annual Antitrust Symposium: The FTC: 100 Years of Antitrust and Competition Policy: Unfair Methods and the Competitive Process: Enforcement Principles for the Federal Trade Commission’s Next Century 6 (Feb. 13, 2014), <https://perma.cc/6M38-WPWZ> (“[W]here our expertise allows us to identify likely competitive harm, we should use the [Section 5] authority that Congress gave us 100 years ago to prohibit anticompetitive conduct that falls outside the scope of the Sherman Act.”)).

³³ *Limits of Administrative Antitrust*, *supra* note 2, at 247–62.

³⁴ *Id.* at 248.

³⁵ *Id.*

³⁶ *Id.* at 238–40.

³⁷ 15 U.S.C. § 45(a)(1)–(2).

³⁸ H.R. REP. NO. 63-1142, at 19 (1914) (“It is impossible to frame definitions which embrace all unfair practices. . . . Even if all known unfair practices were specifically defined and prohibited, it

broader than the Sherman and Clayton Acts—the primary antitrust statutes enforced by the Department of Justice and FTC.³⁹

The Supreme Court took the first crack at defining UMC in *FTC v. Raladam Co.*⁴⁰; their definition was twofold and required “the existence of present or potential competitors” and that “the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors”⁴¹ At the same time, the Court explained that the FTC’s powers were limited by the Act, and any other powers would have to come via Congress and cannot come from either the agency’s own powers or from the courts.⁴² Of course, this case came before the *Chevron* revolution in administrative law. In the contemporary era, there has been substantial debate about the scope of the Commission’s authority—both as to the legal scope of that authority under the law and the prudential scope of how the Commission should use that authority.⁴³

In 2015, the Commission adopted a bipartisan *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” under Section 5 of the FTC Act* (“2015 Policy Statement”).⁴⁴ Under this policy statement, the Commission committed to three principles: (1) that in bringing UMC cases it would “be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare”; (2) that it would evaluate these cases “under a framework similar to the rule of reason,” the framework used by courts in evaluating antitrust claims; and (3) that it would be less likely to bring a UMC claim where the underlying conduct could be challenged by existing antitrust laws.⁴⁵ This statement expressed the Commission’s view of its UMC authority as bound by the principles defining, and complementary to judicial understandings of, contemporary antitrust law. The prototypical example of conduct that UMC could reach but traditional antitrust law does not is the “invitations

would be at once necessary to begin once again.”); *see also* *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931) (“Undoubtedly [UMC] has a broader meaning but how much broader has not been determined.”).

³⁹ *See* *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454–55 (1986) (explaining that UMC covers “not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons” (citations omitted)).

⁴⁰ 283 U.S. 643 (1931).

⁴¹ *Id.* at 649.

⁴² *Id.*

⁴³ *See, e.g.*, Joshua D. Wright, Comm’r, Fed. Trade Comm’n, Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (June 19, 2013).

⁴⁴ This statement was adopted by a 4-1 vote. *See* Press Release, Fed. Trade Comm’n, FTC Issues Statement of Principles Regarding Enforcement of FTC Act as Competition Statute (Aug. 13, 2015), <https://perma.cc/7SL8-HC8F>.

⁴⁵ Fed. Trade Comm’n, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) [hereinafter Statement of Enforcement].

to collude.⁴⁶ Antitrust law requires an actual agreement in order to find liability for collusion, so firms cannot face liability for, in effect, attempting to collude (or, where there is no evidence of an actual agreement).⁴⁷ The FTC, however, can take action against such conduct using its UMC authority.⁴⁸

In 2021, the Democratic majority of the current FTC rescinded the 2015 UMC policy statement as one of its first acts under FTC Chair Lina Khan.⁴⁹ The FTC has yet to issue any revised guidance on its views on the scope of its UMC authority. Chair Khan, however, has spoken publicly about her views. For instance, she has spoken of the “ongoing project to reinvigorate the FTC’s standalone Section 5 authority,” explaining her view that Section 5 “is intended to go beyond the four corners of the Sherman Act and the Clayton Act.”⁵⁰ She has stated that she views the Commission’s UMC authority as going “to the heart of the FTC’s existence and reason for being,”⁵¹ and cited work such as that of Sandeep Vaheesan—who has argued that the FTC’s authority should be used to revitalize an “implicit moral conception of unfair competition” that predates antitrust law’s contemporary turn toward economic analysis and the consumer welfare principle.⁵² Contrary to the 2015 Policy Statement, which sought to ensure the Commission’s UMC authority would be used to complement contemporary antitrust law, Vaheesan’s approach—if embraced by Khan—would use that UMC authority as a repudiation of contemporary antitrust law.

⁴⁶ Noah Joshua Phillips & Christine S. Wilson, Comm’rs, Fed. Trade Comm’n, Dissenting Statement on the “Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act,” at 4 n.12 (July 9, 2021) [hereinafter Phillips & Wilson Dissent].

⁴⁷ See William H. Page, *Tacit Agreement Under Section 1 of the Sherman Act*, 81 ANTITRUST L.J. 593, 603 (2017).

⁴⁸ See Marcy C. Priedeman, *Section 5 of the FTC Act: Dark Cloud or Silver Lining?*, 19 NO. 1 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 69, 73–74 (2010).

⁴⁹ See Press Release, Fed. Trade Comm’n, *FTC Rescinds 2015 Policy that Limited its Enforcement Ability Under the FTC Act* (July 1, 2021) [hereinafter *FTC Rescinds Policy*], <https://perma.cc/S7PH-HB9M>; see also Phillips & Wilson Dissent, *supra* note 46.

⁵⁰ Interview by Eleanor Fox, Professor, N.Y.U., with Lina M. Khan, Chair, Fed. Trade Comm’n, in Geneva, Switz., YOUTUBE (July 20, 2022) [hereinafter *Fox-Khan Interview*], <https://perma.cc/BA4G-M5MV>; see also Gus Hurwitz, *FTC UMC Roundup – It’s Getting Hot in Here*, TRUTH ON MKT., July 22, 2022, <https://perma.cc/6EAG-JALJ>.

⁵¹ See Hurwitz, *supra* note 50.

⁵² Sandeep Vaheesan, *Antitrust Law’s Unwritten Rules of Unfair Competition*, PROMARKET (Nov. 17, 2021), <https://perma.cc/9ZLJ-64DT>.

II. The Administrative Antitrust Arguments

The context and setting in which those prior articles were written is important to understanding both their general arguments and the continual currents that propel us across antitrust's sea of doubt. But we should look at the specific arguments from each paper in some detail, as well.

A. Administrative Antitrust

The opening lines of *Administrative Antitrust* capture the curious judicial statute of antitrust law:

Antitrust is a peculiar area of law, one that has long been treated as exceptional by the courts. Antitrust cases are uniquely long, complicated, and expensive; individual cases turn on case-specific facts, giving them limited precedential value; and what precedent there is changes on a sea of economic—rather than legal—theory. The principal antitrust statutes are minimalist and have left the courts to develop their meaning. As Professor Thomas Arthur has noted, “in ‘the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law.’” . . .

This Article argues that the Supreme Court is moving away from this exceptionalist treatment of antitrust law and is working to bring antitrust within a normalized administrative law jurisprudence.⁵³

Much of this argument is based in the arguments framed above: *Trinko* and *Credit Suisse* prioritize regulation over the federal common law of antitrust, and *American Electric Power* emphasizes the general displacement of common law by regulation.⁵⁴ The article also observes the Court's focus at the time against domain-specific “exceptionalism.”⁵⁵ The Court's opinion in *Mayo Foundation for Medical Education and Research v. United States*⁵⁶ had rejected the longstanding view that tax law was “exceptional[]” in some way that excluded it from the Administrative Procedure Act and other standard administrative law doctrines.⁵⁷ So too, *Administrative Antitrust* argued, the Court's longstanding exceptional treatment of antitrust must also fall.

Those arguments can all be characterized as pulling antitrust law towards an administrative approach. But there was a push as well. In his *linkLine* majority opinion, Chief Justice John Roberts expressed substantial concern about the difficulties that antitrust law poses for

⁵³ *Administrative Antitrust*, *supra* note 1, at 1191 (footnotes omitted).

⁵⁴ *Id.* at 1193.

⁵⁵ *Id.* at 1210.

⁵⁶ 562 U.S. 44 (2011).

⁵⁷ *Administrative Antitrust*, *supra* note 1, at 1210.

courts and litigants alike.⁵⁸ His opinion for the majority notes that “[i]t is difficult enough for courts to identify and remedy an alleged anticompetitive practice” and laments “[h]ow is a judge or jury to determine a ‘fair price.’”⁵⁹ And Justice Stephen Breyer wrote in concurrence that “[w]hen a regulatory structure exists [as it did in this case] to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.”⁶⁰

In other words, as *Administrative Antitrust* argued, the Court is motivated both to bring antitrust law into a normalized administrative law framework and also to remove responsibility for the messiness inherent in antitrust law from the courts’ dockets. This latter point will be of particular importance when examining how the Court is likely to think about the FTC’s potential use of its UMC authority to develop new antitrust rules.

B. Limits of Administrative Antitrust

The core argument in *Limits of Administrative Antitrust* is more doctrinal and institutionally focused. In its simplest statement, the article merely applied *Chevron* as understood circa 2013 to the FTC’s UMC authority. There is little argument that “unfair methods of competition” is inherently ambiguous—indeed, the term was used expressly to give the agency flexibility and to avoid the limits the Court was placing upon antitrust law in the early twentieth century.⁶¹ It was unambiguously meant to be left to the agency to define.⁶²

Various arguments have been raised against application of *Chevron* to Section 5; the article goes through and rejects them all.⁶³ Section 5 has long been recognized as including but being broader than the Sherman Act.⁶⁴ *Petroleum Refiners* held that the FTC has substantive rulemaking authority, and subsequent legislative action recognized and did not alter that holding.⁶⁵ And the Supreme Court’s more recent opinion in *AT&T*

⁵⁸ See *Pac. Bell Tel. Co. v. linkLine Comms., Inc.*, 555 U.S. 438, 453 (2009).

⁵⁹ *Id.* at 453–54 (quoting *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990)).

⁶⁰ *Id.* at 459 (Breyer, J., concurring).

⁶¹ *Limits of Administrative Antitrust*, *supra* note 2, at 212.

⁶² *Id.* at 228.

⁶³ *Id.* at 250–265.

⁶⁴ *Id.* at 228.

⁶⁵ *Id.* at 233.

*Corp. v. Iowa Utilities Board*⁶⁶ made the *Petroleum Refiners* conclusion even more forceful.⁶⁷ Other arguments are (or were) unavailing.⁶⁸

The real puzzle that the paper unpacks is why the FTC ever believed it wouldn't receive the benefit of *Chevron* deference. The article traces this belief back to a series of cases the FTC lost in the 1980s, contemporaneous with the development of the *Chevron* doctrine.⁶⁹ The Commission had big losses in cases like *E.I. Du Pont de Nemours & Co. v. FTC*.⁷⁰ Perhaps most importantly, in its 1986 *Indiana Federation of Dentists* opinion (issued two years after *Chevron* was decided), the Court seemed to adopt a de novo standard for review of Section 5 cases.⁷¹ But, *Limits of Administrative Antitrust* argues, this is a misreading and overreading of *Indiana Federation of Dentists*.⁷² And it is a reading that misunderstands the case's relationship with *Chevron* (the importance of which did not start to come into focus for another several years).⁷³ A close reading of the decision actually suggests that it is entirely in line with *Chevron*.⁷⁴

The article's curious conclusion is that a generation of FTC lawyers, "shell-shocked by [the FTC's] treatment in the courts," internalized the lesson that they would not receive the benefits of *Chevron* deference and that Section 5 was subject to de novo review.⁷⁵ But it also declared that this would start to change as a new generation of lawyers, trained in the modern *Chevron* era, came to practice within the halls of the FTC.⁷⁶ Today, that prediction appears to have borne out. In cases argued around the turn of the century, such as *California Dental Association v. FTC*⁷⁷ and *Schering-Plough Corp. v. FTC*,⁷⁸ the Commission did not claim *Chevron* deference for

⁶⁶ 525 U.S. 366 (1999).

⁶⁷ See *id.* at 396–97 (granting the FCC authority to create regulations that increase competition pursuant to the 1996 Telecommunications Act).

⁶⁸ See *Limits of Administrative Antitrust*, *supra* note 2, at 250–62.

⁶⁹ See *id.* at 238.

⁷⁰ 729 F.2d 128, 139 (2d Cir. 1984) (holding that FTC did not have power to regulate legitimate, non-collusive business practices that substantially lessen competition unless there is an explicit agreement to do so or there is an "indicia of oppressiveness").

⁷¹ See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454–55 (1986) (contrasting judicial review of factual determinations—which get judicial deference—with judicial review of legal determinations—here, whether the Sherman Act was violated).

⁷² *Limits of Administrative Antitrust*, *supra* note 2, at 217.

⁷³ *Id.* at 264–70.

⁷⁴ *Id.* at 260–61.

⁷⁵ *Id.* at 261–62, 262 n.236 (quoting Daniel A. Crane, *Reflections on Section 5 of the FTC Act and the FTC's Case Against Intel*, COMPETITION POL'Y INT'L ANTITRUST J., no. 2, Feb. 2010 at 3–4).

⁷⁶ *Id.* at 261–62.

⁷⁷ 526 U.S. 756 (1999).

⁷⁸ 402 F.3d 1056 (11th Cir. 2005).

its interpretations of the FTC Act.⁷⁹ A decade later, around the time that these articles were being written, it was more common to see *Chevron* advanced by the FTC.⁸⁰ Even more recently, and most significantly, in 2020, former Commissioner Rohit Chopra and current Chair Lina Khan published an article which expressly argued that “[r]ulemaking under ‘unfair methods of competition’ . . . is eligible for Chevron deference.”⁸¹

III. A Decade Later

The conclusion from *Limits of Administrative Antitrust*—that FTC lawyers failed to recognize that the agency likely would receive *Chevron* deference because they were half a generation behind the development of administrative law doctrine—is an important one. Just as antitrust law has long been adrift in a sea of change, administrative law is also the subject of substantial waves of change. From today’s perspective, it might seem as though I wrote those articles at *Chevron*’s zenith. And watching the FTC consider aggressive use of its UMC authority today feels like watching a Commission that, once again, is half a generation behind the development of administrative law—though watching the agency’s response to the Court’s most recent cases does suggest a greater awareness of these changing tides.

A. *The Changing Administrative Law Landscape*

For something so central to the experience of American law, the very concept of administrative law is remarkably uncertain. Scholars and jurists have long debated the constitutional basis for federal agencies, with some going so far as to argue that administrative law is unconstitutional.⁸² After all, the Constitution only impliedly addresses the existence of agencies, although agencies have been part of the Constitutional order

⁷⁹ See Christian Carlson, *Antitrusting the Federal Trade Commission: Why Courts Should Defer to Federal Trade Commission Antitrust Decision Making*, 12 DEPAUL BUS. & COM. L.J. 361, 374–78 (2014). In *California Dental Association*, the FTC did argue for *Chevron* deference to its jurisdictional claims, but not for its substantive interpretation of Section 5. *Id.* at 375. In *Schering-Plough*, the Commission did not argue for *Chevron* deference at all. *Id.* at 377.

⁸⁰ See, e.g., Brief for the FTC at 37–40, *FTC v. Wyndham Hotels & Resorts, LLC*, 799 F.3d 236 (3d Cir. 2015) (No. 14-3514); Brief of Respondent FTC at 25–26, *N.C. State Bd. Dental Exam’rs v. FTC*, 575 U.S. 494 (2015) (No. 12-1172).

⁸¹ Chopra & Khan, *supra* note 5, at 375.

⁸² See, e.g., Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994).

since the founding years.⁸³ Over the course of the twentieth century, theories of administrative law grew alongside the administrative state from the “transmission belt” model of agencies as mechanistic translators of congressional intent to policy, to expertise-based understandings, and eventually to more politically-attuned theories such as Justice (then-professor) Elena Kagan’s theory of presidential administration.⁸⁴

Two central issues in these changing theories are the amount of independence agencies have in interpreting and implementing Congress’s statutory commands and the role of the courts in policing those efforts. The latter is, in effect, the central question of *Chevron*—whether courts are to defer to agencies’ interpretations of their statutes (presumably leaving it to Congress to correct any missteps), or instead whether Courts are to continue their traditional role of interpreting statutes and saying “what the law is.”⁸⁵ Decided in 1984, *Chevron* changed administrative law by placing a thumb on the scale of deference to agencies’ interpretations of the statutes they implement.⁸⁶

As Professor Tom Merrill recounts in describing the evolution of the doctrine, the Supreme Court did not view *Chevron* as a signal case—the case was driven to prominence more over the subsequent decade by the Court of Appeals for the D.C. Circuit than by the Supreme Court’s own design.⁸⁷ Regardless, the opinion set the stage for decades of uncertainty over the triggers for and scope of what came to be known as *Chevron* deference. As the Supreme Court came to grapple with these questions, cases like *United States v. Mead*⁸⁸ limited the application of the doctrine to agency decisions enacted with the force of law.⁸⁹ Cases like *Brand-X* made clear that agencies were to be the primary interpreters of their statutes, having the ability to override disagreeing judicial interpretations of

⁸³ Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REGUL. 363, 363–65 (1987).

⁸⁴ See, e.g., Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1517–21 (1992); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383–84 (2001).

⁸⁵ See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984).

⁸⁶ See *id.* at 865–66.

⁸⁷ THOMAS MERRILL, *THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE*, 83, 99 (2022) (“The *Chevron* story reveals a remarkable course of legal evolution in which a decision regarded by the Supreme Court as business-as-usual was interpreted by one of the courts of appeals as effecting a fundamental change in the law—and then the Supreme Court gradually acquiesced in this understanding.”).

⁸⁸ 533 U.S. 218 (2001).

⁸⁹ *Id.* at 221.

ambiguous statutes.⁹⁰ *Fox v. FCC* effectively held that agency interpretations are not subject to *stare decisis* and—committed as they are to the policy domain—can be changed with changing political administrations.⁹¹ And *City of Arlington* erased the difference between substantive and jurisdictional questions, empowering agencies to resolve ambiguous scopes of authority on their own.⁹²

Most of those cases were decided in the 2000s and pushed lower courts to interpret *Chevron* very broadly. By the time the Court of Appeals for the D.C. Circuit was considering the 2010 Open Internet Order, discussed above in Section I.A, it would have been surprising to administrative law scholars for the court to have *not* deferred to the FCC's interpretation of the Communications Act.

But the tide against *Chevron*'s expansive deference was already beginning to grow. Lower courts were still processing the Supreme Court's cases from the 2000s when the Supreme Court began to chart a different course. *City of Arlington* was likely a turning point—though affirming application of *Chevron* to agencies' interpretations of their own jurisdictional statutes in a 6-3 opinion, it generated substantial controversy at the time.⁹³ And a short while later the Court decided a case that many in the telecom space view as a sea change: *Utility Air Regulatory Group v. EPA* (“*UARG*”).⁹⁴ In *UARG*, Justice Antonin Scalia, writing for a 9-0 majority, struck down an EPA regulation relating to greenhouse gases. In doing so, he invoked language evocative of what today is being debated as the major questions doctrine—that the Court “expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”⁹⁵ Two years after that, the Court decided *Encino Motorcars, LLC v. Navarro*,⁹⁶ in which the Court acted upon the limit expressed in *Fox v. FCC* that agencies face heightened procedural requirements when changing regulations that “may have engendered serious reliance interests”⁹⁷

⁹⁰ Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

⁹¹ FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514–16 (2009).

⁹² City of Arlington v. FCC, 569 U.S. 290, 297–98 (2013).

⁹³ See generally Danieli Evans, *What Would Congress Want? If We Want to Know, Why Not Ask?*, 81 U. CIN. L. REV. 1191, 1207–13 (2013) (breaking down the majority and dissenting arguments of *City of Arlington*); Erin Murphy, *The Future of Agency Deference After Kisor v. Wilkie*, 51 ABA TRENDS, no. 1, Sept./Oct. 2019, at 12–13 (noting dissatisfaction among some jurists with the power of the administrative state).

⁹⁴ 573 U.S. 302 (2014).

⁹⁵ *Id.* at 324 (quoting *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 160 (2000)).

⁹⁶ 579 U.S. 211 (2016).

⁹⁷ *Id.* at 222 (internal quotation marks and citation omitted).

And like that, the dams holding back concern over the scope of *Chevron* burst. As Merrill explains,

[T]he Supreme Court after 2016 effectively stopped applying the *Chevron* doctrine as a reason to uphold an agency interpretation. The obvious evasion of the doctrine prompted Justice Alito to remark “that the Court, for whatever reasons, is simply ignoring *Chevron*,” which he characterized as “an important, frequently invoked, once celebrated, and now increasingly maligned precedent.”⁹⁸

Justices Clarence Thomas and Neil Gorsuch have openly expressed their views that *Chevron* needs to be curtailed or eliminated.⁹⁹ Justice Brett Kavanaugh has written extensively in favor of the major questions doctrine.¹⁰⁰ Merrill notes that “[i]n his last opinion addressing the *Chevron* doctrine before he retired, Justice [Anthony] Kennedy said he was troubled by what he perceived to be the ‘reflexive deference’ accorded to agency interpretations by lower courts based on ‘ cursory analysis.’”¹⁰¹ Each term, litigants are bringing more aggressive cases to probe and tighten the limits of the *Chevron* doctrine—in fall 2023, the Court will hear a case that asks directly “[w]hether the Court should overrule *Chevron*.”¹⁰² As discussed in the next section, perhaps the most expansive change to the *Chevron* doctrine—though ironically one that arguably doesn’t impact the doctrine at all—came with the Court’s embrace of the major questions doctrine in *West Virginia v. EPA*.¹⁰³

B. *The Major Questions Doctrine*

The Supreme Court’s opinion in *West Virginia v. EPA*—issued at the end of the 2022 term—is the culmination of the past decade’s efforts to pull back on the *Chevron* doctrine. It could well prove to more effectively address concerns about *Chevron* than overruling *Chevron* itself would. In a 6-3 opinion, the Court rejected a proposed EPA regulation that would “drive a[n] . . . aggressive transformation in the domestic energy industry . . . , entail billions of dollars in compliance costs . . . , require the retirement of dozens of coal-fired plants, and eliminate tens of thousands

⁹⁸ MERRILL, *supra* note 87, at 7 (footnotes omitted); see also Nathan Richardson, *Deference Is Dead (Long Live Chevron)*, 73 RUTGERS U. L. REV. 441, 443–44 (2021) (noting the growing trend of *Chevron* skepticism).

⁹⁹ *Michigan v. EPA*, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring); *Gundy v. United States*, 139 S. Ct. 2116, 2141–43 (2019) (Gorsuch, J., dissenting).

¹⁰⁰ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448–49 (2019) (Kavanaugh, J., concurring).

¹⁰¹ MERRILL, *supra* note 87, at 3.

¹⁰² See *Loper Bright Enters., Inc. v. Raimondo*, No. 22-451, 2023 WL 3158352, at *1 (U.S. May 1, 2023) (granting certiorari); *Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359, 374 (D.C. Cir. 2022) (establishing the question to which the Supreme Court granted certiorari).

¹⁰³ 142 S. Ct. 2587, 2608–09 (2022).

of jobs across various sectors.”¹⁰⁴ Most importantly, it did so by invoking—for the first time ever by name—the major questions doctrine. Under this doctrine, the Court explained, there must be a “clear statement” from Congress conferring authority for an agency to adopt a rule of “vast economic and political significance” before the agency may do so.¹⁰⁵

This Article is not suited to a fulsome discussion of the many questions raised by this case and doctrine.¹⁰⁶ The main focus, rather, is on the impact this doctrine is likely to have on the Federal Trade Commission’s UMC authority, which is the topic of Section IV.A. For present purposes, the takeaway is that the Court has said that agencies cannot do things that will have impacts of “vast economic and political significance” unless Congress has clearly indicated that they are empowered to do so.¹⁰⁷ This surely impacts the scope of the *Chevron* doctrine: if the meaning of an agency’s organic statute is ambiguous for purposes of *Chevron*’s step one, and if it could be fairly read to empower the agency to act in a manner that would have “vast economic and political significance” (so would be permitted under *Chevron*’s step two), the major questions doctrine nonetheless disallows that course of conduct.¹⁰⁸

As argued in Parts IV and V, this has important consequences for how the FTC uses its UMC authority. The scope of this authority is, on its face, quite broad and could be used with “vast economic and political significance.” Unsurprisingly, this should augur caution for the Commission. But it also leaves a clear opportunity for the Commission to use that authority in more modest ways.

C. *The Changing FTC*

A last significant change over the past ten years is the antitrust discourse and the FTC itself. At the time I wrote my prior articles, the FTC was—and had been for several years—embroiled in a debate about the

¹⁰⁴ *West Virginia*, 142 S. Ct. at 2604 (citation omitted).

¹⁰⁵ *Id.* at 2605, 2608–09 (internal quotation marks and citation omitted). In the opinion, the Court accepted the EPA’s decision, under a prior administration, to rescind its Clean Power Rule. The EPA did so by invoking the major questions doctrine, which, the EPA explained, citing to language from the Court’s prior decision in *Utility Air Regulatory Group*. See *Util. Air Regul. Grp. v. EPA*, 573 U. S. 302, 324 (2014) (holding that courts “expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance”).

¹⁰⁶ Legal scholars have published more than fifty academic articles and essays debating the meaning of the major questions doctrine in less than a year since *West Virginia v. EPA* was decided. See Beau J. Baumann, *The Major Questions Doctrine Reading List*, YALE J. ON REGUL.: NOTICE & COMMENT (Mar. 18, 2023), <https://perma.cc/S4YQ-RHEG>.

¹⁰⁷ *West Virginia*, 142 S. Ct. at 2605–06.

¹⁰⁸ *Id.*

scope of its UMC authority.¹⁰⁹ In the 2013–2015 timeframe there were two significant developments relating to this debate. First, the Commission invoked its UMC authority to hold a firm liable for monopolization for conduct (invitation to collude) that would not have been actionable under the Sherman Act.¹¹⁰ This decision was affirmed by the Court of Appeals for the Eleventh Circuit.¹¹¹ And second, in 2015, the Commission issued a “Statement of Enforcement Principles” regarding its use of its UMC authority.¹¹² Under this statement, the Commission would use its UMC authority in a manner consistent with judicial approaches to antitrust law—most notably by identifying the consumer welfare standard as the lodestone for use of this authority.¹¹³

Things began to change not long after the Commission issued this statement. In 2017, Lina Khan—now Chair of the FTC—published her law student note, *Amazon’s Antitrust Paradox*, in the *Yale Law Journal*.¹¹⁴ This was probably the inaugural moment for the neo-Brandeisian or “hipster” antitrust movement.¹¹⁵ As explained by former FTC Commissioner Joshua Wright: “Proponents of the Hipster Antitrust movement make a number of provocative proposals for changes to the current antitrust regime—most notably, the rejection of the consumer welfare standard.”¹¹⁶ This rejection of the consumer welfare standard placed the neo-Brandeisians in direct conflict with four decades of mainstream bipartisan antitrust law (not to mention the Commission’s still-recent UMC policy statement).

The 2020 presidential election, however, brought the neo-Brandeisians into power. Every movement has its horsemen. For the neo-Brandeisians, they are Jonathan Kanter (as head of the Department of Justice Antitrust Division), Lina Khan (as Chair of the Federal Trade Commission), and Tim Wu (as Special Assistant to the President for Technology and Competition Policy).¹¹⁷ Early in his term, President Biden

¹⁰⁹ See, e.g., *Limits of Administrative Antitrust*, *supra* note 2, at 212; *Administrative Antitrust*, *supra* note 1, at 1191–92.

¹¹⁰ Press Release, Fed. Trade Comm’n, FTC Issues Opinion and Final Order Finding McWane, Inc. Unlawfully Maintained Its Monopoly in Domestic Pipe Fittings by Excluding Competitors (Feb. 6, 2014), <https://perma.cc/3GXS-Q37P>.

¹¹¹ *McWane, Inc. v. FTC*, 783 F.3d 814, 819 (11th Cir. 2015).

¹¹² See Statement of Enforcement, *supra* note 45.

¹¹³ *Id.*

¹¹⁴ Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 *YALE L. J.* 710, 712 (2017).

¹¹⁵ See Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 *ARIZ. ST. L.J.* 293, 315, 341 (2018); Lina M. Khan, Editorial, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 *J. EUR. COMP. L & PRAC.* 131, 131 (2018).

¹¹⁶ Wright et al., *supra* note 115, at 314.

¹¹⁷ As observed by the *New York Times* in its discussion of Kanter’s nomination:

brought Tim Wu into his administration to work on competition issues.¹¹⁸ Wu was joined in the administration soon thereafter by Lina Khan, who was first appointed to and then immediately named Chair of the FTC. She immediately rescinded the Commission's 2015 UMC policy statement.¹¹⁹ A week later, President Biden signed Executive Order 14036, *Promoting Competition in the American Economy*—a vast kitchen-sink of directives requiring ostensibly competition-related action from agencies across the government.¹²⁰ And only weeks after announcing that Executive Order, President Biden appointed Jonathan Kanter to the Antitrust Division of the Justice Department as Assistant Attorney General.

The neo-Brandeisians' ascendance to power in the Biden administration marks a near-180-degree change in antitrust policy from where it stood ten years ago. This is remarkable in its own right. But it is also important to the administrative antitrust argument. As Section IV.B discusses further, an important reason that I argued in my prior articles that the Supreme Court would embrace the administrative approach to antitrust is that it believes (or believed) that the FTC's approach to antitrust would be complementary to and more predictable than the judicial approach.¹²¹ But that assumption today seems quite suspect.

Kanter's nomination will please progressives who want to rein in corporate power. A slogan some adopted after President Biden took office was "Wu & Khan & Kanter." . . . This refers to a trio of Big Tech critics that includes Tim Wu, now part of Biden's National Economic Council, and Lina Khan, who now heads the F.T.C.

Andrew Ross Sorkin, Jason Karaian, Sarah Kessler, Stephen Gandel, Michael J. de la Merced, Lauren Hirsch & Ephrat Livni, *Another Big Tech Critic Joins Biden's Antitrust Team*, N.Y. TIMES (Oct. 28, 2021), <https://perma.cc/TL2Z-3ZQ2>. Politico offered this account:

In March, Biden installed Tim Wu at the White House, a move that raised cautious optimism among anti-monopoly advocates that Biden, long-viewed as a centrist from corporate-friendly Delaware, might take the issue of corporate power more seriously than his Democratic predecessor. The March nomination of Lina Khan to the Federal Trade Commission heartened them more.

Now Khan's elevation to FTC chair and the nomination of Kanter to helm DOJ's antitrust enforcement is electrifying Democrats who have come to view former president Barack Obama's administration as too beholden to Wall Street, corporate giants like Google and the lawyers, lobbyists and policy wonks who work for them.

It's the fulfillment of a campaign that had even been emblazoned on a coffee mug as a progressive calling card: Wu & Khan & Kanter.

Leah Nysten & Emily Birnbaum, *Biden Picks a Third Trustbuster for his Administration, Putting Big Tech on Notice*, POLITICO (Oct. 28, 2021, 1:59 PM), <https://perma.cc/XEWS-M2XM>.

¹¹⁸ Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), <https://perma.cc/M6WV-UG7>.

¹¹⁹ FTC Rescinds Policy, *supra* note 49.

¹²⁰ John Cassidy, *The Biden Antitrust Revolution*, NEW YORKER (July 12, 2021), <https://perma.cc/8E62-2K9N>.

¹²¹ *Administrative Antitrust*, *supra* note 1, at 1191–92.

IV. Administrative Antitrust, Redux

The prospects for administrative antitrust look very different today than they did a decade ago. While the basic argument continues to hold—the Court will likely encourage and welcome a transition of antitrust law to a normalized administrative jurisprudence—the Court seems likely to afford administrative agencies (viz., the FTC) much less flexibility in how they administer antitrust law than it would have a decade ago. This includes through both the administrative law vector, with the Court reconsidering how it views delegation of congressional authority to agencies such as through the major questions doctrine and agency rulemaking authority, as well as through the Court’s thinking about how agencies develop and enforce antitrust law.

A. *Major Questions and Major Rules*

This trend is hotly debated in the context of the major questions doctrine and the ongoing vitality of *Petroleum Refiners*. These debates are only briefly recapitulated here. As discussed above, the major questions doctrine is an evolving doctrine and was only recently expressly embraced by the Supreme Court. This doctrine requires Congress to speak clearly when delegating authority to agencies to address major questions—that is, questions of vast economic and political significance.¹²² So, for instance, the Court may allow an agency to develop rules governing mergers when tasked by Congress to prohibit acquisitions likely to substantially lessen competition. But it is unlikely to allow that agency to categorically prohibit mergers based upon a general congressional command to prevent unfair methods of competition.¹²³ The first of those is a narrow rule based upon a specific grant of authority; the other is a very broad rule based upon a very general grant of authority. Or, to take another example, the Court is unlikely to allow the FTC to use competition law to regulate labor practices broadly, particularly where Congress has developed a separate regulatory regime governed by a separate regulatory body to occupy the field of labor law and regulation.¹²⁴

¹²² *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022).

¹²³ In January 2022 the FTC and DOJ announced the beginning of a process to review and revise the Horizontal Merger Guidelines. See Lina M. Khan, Chair, Fed. Trade Comm’n, Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement 1 (Jan. 18, 2022), <https://perma.cc/PW9V-4NEQ>.

¹²⁴ In January 2023, the FTC issued a notice of proposed rulemaking to ban the use of noncompete clauses. Press Release, Fed. Trade Comm’n, FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (Jan. 5, 2023), <https://perma.cc/FSP8-HAZ3>. As Eric Posner has noted, “There is this very close and complicated relationship between labor law and

This is not to argue that the FTC has no unique antitrust powers under its UMC authority. To the contrary, as Part V discusses, the Commission clearly has unique antitrust authority that is broader than the traditional antitrust laws. But the key is that this is *antitrust* authority—not general authority to structure the economy or define business practices around what the Commission deems “unfair” absent any externally-imposed constraints.

Unlike the major questions doctrine, which has been a major topic of discussion in administrative law circles for the past several years,¹²⁵ interest in the *Petroleum Refiners* question has been more muted and mostly confined to discussions focused on the FTC and FCC. The issue raised by *Petroleum Refiners* is much narrower but equally important for the FTC’s potential use of its UMC authority. *Petroleum Refiners* is a 1973 case in the Court of Appeals for the D.C. Circuit that found that the FTC Act’s grant of power to make rules to implement the Act confers broad rulemaking power relating to the substantive provisions of the Act.¹²⁶ In other words, prior the 1973, the FTC had at most limited authority to make substantive antitrust rules with the force of law.¹²⁷ It could bring individual cases alleging UMC violations—and perhaps, over time, these cases would influence judicial and legislative understandings of substantive antitrust law.¹²⁸ But it could not prescribe or enact antitrust rules that would affect an entire industry or the entire economy.¹²⁹ In 1999, the Supreme Court

antitrust law that has to be maintained.” Makenzie Holland, *Experts Debate Antitrust Law Enforcement Benefits*, TECHTARGET (June 17, 2022), <https://perma.cc/P9W8-D5YD>.

¹²⁵ See Baumann, *supra* note 106.

¹²⁶ Nat’l Petroleum Refins. Ass’n v. FTC, 482 F.2d 672, 677 (D.C. Cir. 1973).

¹²⁷ See Jennifer Cascone Fauver, *A Chair with No Legs? Legal Constraints on the Competition Rule-Making Authority of Lina Khan’s FTC*, 14 WM. & MARY BUS. L. REV. 243, 255–59 (2023).

¹²⁸ *Id.*

¹²⁹ An important and tricky subsequent history to *Petroleum Refiners* should be relayed in brief. Soon after this case was decided, the FTC enacted separate, very aggressive, rules under its consumer protection authority, a separate grant of authority under the FTC Act to proscribe unfair or deceptive acts or practices. *Id.* at 260; 15 U.S.C. § 45. In response to this, Congress adopted the Magnusson-Moss Warranty Act, which put in place heightened rulemaking procedures for the FTC’s consumer-protection rulemaking but not for the FTC’s antitrust rulemaking. Fauver, *supra* note 127, at 259. The legislative history, however, shows stark disagreement between the House and Senate. The view on the House side was that the FTC did not and should not have antitrust rulemaking authority—because it did not have such authority (despite *Petroleum Refiners*), the FTC Act did not need alteration. On the Senate side, the view was that *Petroleum Refiners* did give the FTC substantive antitrust rulemaking authority. Interestingly, the legislative history suggests that the Senate preferred for the Commission to have different rulemaking procedures for its antitrust and consumer-protection authorities in order to run an experiment of sorts, with the intent of returning to the question after a few years to develop new rulemaking procedures based upon what it learned from this experiment. *Limits of Administrative Antitrust*, *supra* note 2, at 299 n.81, 231, 234–35. That never happened. In any event, and despite different understandings between the two sides of Congress as

reached a similar conclusion in *Iowa Utilities Board*, finding that a provision in Section 201 of the Communications Act allowing the FCC to create rules to implement that section of the Act conferred substantive rulemaking power running throughout the Act.¹³⁰

Both *Petroleum Refiners* and *Iowa Utilities Board* reflect previous generations' and jurists' understanding of administrative law—and particularly the relationship between the courts and Congress in empowering and policing agency conduct.¹³¹ That understanding is best captured in the evolution of the non-delegation doctrine and the courts' broad acceptance of broad delegations of congressional power to agencies in the latter half of the twentieth century. *Petroleum Refiners* and *Iowa Utilities Board* are not non-delegation cases. But similar to the major questions doctrine, they go to similar issues of how specific Congress must be when delegating broad authority to an agency.

In theory, there is little difference between an agency that can develop legal norms through case-by-case adjudications that are backstopped by substantive and procedural judicial review, and authority to develop substantive rules backstopped by procedural judicial review and by Congress as a check on substantive errors. In practice, there is a world of difference between these approaches. As with the Court's recent embrace of the major questions doctrine, were the Court to review *Petroleum Refiners* or *Iowa Utilities Board* today, it seems at least possible, if not outright likely, that a majority of the Justices would not so readily find agencies to have substantive rulemaking authority without clear congressional intent supporting such a finding.

The best explanation for this conclusion—to which I have no authority to cite other than my own gloss on evolving judicial norms—is that in latter half of the twentieth century the Court was concerned about the “hydraulic pressure” that each branch (including the judiciary) faces to expand its own authority,¹³² but that it recognizes today that it took that concern too far and abdicated its responsibility to police the other branches.¹³³ A generation or two ago, this manifested as broad deference to agencies as closer to Congress and often better equipped than the

to what authority the FTC actually did have under existing law, the ultimate committee report indicated that the amendments to the FTC Act would “not affect any authority of the FTC under existing law to prescribe rules with respect to unfair methods of competition” in or affecting commerce. *Id.* at 234–35.

¹³⁰ *AT&T Corp. v. Iowa Utils Bd.*, 525 U.S. 366, 378 (1999).

¹³¹ *Nat'l Petroleum Refins. Ass'n*, 482 F.2d at 674; *Iowa Utils. Bd.*, 525 U.S. at 377–78.

¹³² *INS v. Chadha*, 462 U.S. 919, 951 (1983) (discussing the “hydraulic pressure[s] inherent within each of the separate Branches to exceed the outer limits of its power”).

¹³³ See Justin (Gus) Hurwitz, *Chevron's Political Domain: W(h)ither Step Three*, 68 *DEPAUL L. REV.* 615, 626–27, 632 (2019).

courts to “say what the law is.” A consequence of this permissive attitude towards agencies is that Congress itself had less need to engage in its Constitutional duty as a legislature to “say what the law is.” And so it abdicated that difficult task to the Executive and its agencies. The present retrenchment—of which the embrace of the major questions doctrine is a part—is correcting the judiciary’s own abdication of its constitutional role of ensuring that the other branches do not abdicate their own constitutional obligations.

In sum, both ideas—the major question doctrine and limits on broad rules made using thin grants of rulemaking authority—present potential limits on the potential scope of rules the FTC might make using its UMC authority. But the administrative antitrust may also find a tepid judicial reception on antitrust concerns as well.

B. *Limits on the Antitrust side of Administrative Antitrust*

The potential limits on FTC UMC rulemaking discussed above sound in administrative law concerns. Indeed, many of the arguments advanced in *Administrative Antitrust* and the Court’s opinions on the antitrust-regulation interface echo traditional administrative law ideas.¹³⁴ For instance, much of the Court’s preference that agencies’ given authority to engage in antitrust or antitrust-adjacent regulation take precedence over the application of judicially-defined antitrust law track the same separation of powers and expertise concerns that are central to the *Chevron* doctrine itself.¹³⁵

But the antitrust-focused cases—*linkLine*, *Trinko*, *Credit Suisse*—also express concerns specific to antitrust law.¹³⁶ Chief Justice Roberts notes that the Justices “have repeatedly emphasized the importance of clear rules in antitrust law,”¹³⁷ and the need for antitrust rules to “be clear enough for lawyers to explain them to clients.”¹³⁸ As reflected in *Trinko*, “[a]ntitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue.”¹³⁹ And the Court and antitrust scholars have long noted that antitrust law has curiously evolved over time following developments in economic theory.¹⁴⁰ The Court expressed

¹³⁴ See generally *Administrative Antitrust*, *supra* note 1.

¹³⁵ *Id.* at 1217, 1223.

¹³⁶ *Id.* at 1222.

¹³⁷ *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 452 (2009).

¹³⁸ *Id.* at 453 (internal quotation marks and citation omitted).

¹³⁹ *Verizon Commc’ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004).

¹⁴⁰ Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 U. PA. L. REV. 2061, 2065 (“Judicial decision making in antitrust thus needs to be able to adapt to . . . the evolution of economic thinking with respect to both substantive

concern about this extra-judicial development of the law, which in part animates its preference for agencies—which can presumably leverage greater economic expertise in ensuring that the law tracks the development of economic thought.¹⁴¹ But the assumption behind this preference is that relying on agencies to translate development in economic thought into the law would buffer the antitrust endeavor against abrupt shocks, not buffet it upon the seas of change.

The Court's cases in this area express hope that an administrative approach to antitrust could give a clarity and stability to the law that is currently lacking.¹⁴² These antitrust rules are rules of vast economic significance: they are “the Magna Carta of free enterprise[;]”¹⁴³ our economy organizes itself around them; and substantial changes to these rules could have a destabilizing effect that runs far deeper than Congress is likely to have anticipated when tasking an agency with enforcing antitrust law.¹⁴⁴ Empowering agencies to develop these rules could, the Court's opinions suggest, allow for a more thoughtful, expert, and deliberative approach to incorporating incremental developments in economic knowledge into the law.¹⁴⁵ But if an agency's administrative implementation of antitrust law does not follow this path—especially if the agency takes a disruptive approach to antitrust law that deviates substantially from established antitrust norms—this defining rationale for an administrative approach to antitrust would not hold.

The courts could respond to such overreach in several ways. They could invoke the major questions or similar doctrines, as above. They could raise due process concerns, tracking *Fox v. FCC* and *Encino Motorcars*, to argue that any change to antitrust law must not be unduly disruptive to engendered reliance interests. They could argue that the FTC's UMC authority, while broader than the Sherman Act, must be compatible with the Sherman Act—and that while the FTC has authority

antitrust standards and fact-finding tools that is the result of new theoretical work and empirical findings . . .”). Kratz also points to examples of the Court relying on economic theory when making legal rules about antitrust. *Id.* at 2066 n.16.

¹⁴¹ *linkLine*, 555 U.S. at 452 n.3.

¹⁴² *Administrative Antitrust*, *supra* note 1, at 1220.

¹⁴³ *Trinko*, 540 U.S. at 415.

¹⁴⁴ *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Professor Thomas Nachbar emphasizes the Magna Carta theme by explaining that antitrust law serves a constitutional function to prevent “regulatory harm” (assertion of law-like control over the conduct of others outside the sphere of one's own property interests). See Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57, 69, 77–79 (2013). But see Daniel A. Crane, “*The Magna Carta of Free Enterprise*” Really?, 99 IOWA L. REV. BULL. 17, 23 (“[A]lthough the Supreme Court has described the Sherman Act as the ‘magna carta of free enterprise’, the U.S. antitrust laws are not understood as constitutional in any meaningful sense.”).

¹⁴⁵ *Administrative Antitrust*, *supra* note 1, at 1227.

for the larger circle in the antitrust Venn diagram, the courts should continue to define the inner core of conduct regulated by the Sherman Act.

A final aspect to the Court's likely approach to administrative antitrust falls from the Roberts Court's decision theoretic approach to antitrust law. First articulated in Judge Frank Easterbrook's *The Limits of Antitrust*, the decision theoretic approach to antitrust law focuses on error costs of incorrect judicial decisions and the likelihood that those decisions will be corrected.¹⁴⁶ The Roberts Court has strongly adhered to this framework in its antitrust decisions. This can be seen, for instance, in Justice Breyer's statement that "[w]hen a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits."¹⁴⁷

The error costs framework described by Judge Easterbrook focuses on the relative costs of errors, and correcting those errors, between judicial and market mechanisms.¹⁴⁸ In the administrative antitrust setting, the relevant comparison is between judicial and administrative error costs. The question on this front is whether an administrative agency, should it get things wrong, is likely to correct itself. Here there are two models, both of concern. The first is that in which law is policy or political preference.¹⁴⁹ Here, the FCC's approach to net neutrality and the National Labor Relation Board's approach to labor law loom large: a dramatic swing between binary policy preferences held by different political parties as control of agencies shifted between administrations. The second model is one in which Congress responds to agency rules by refining, rejecting, or replacing them through statute.¹⁵⁰ Here, again, net neutrality and the FCC loom large, with nearly two decades of calls for Congress to clarify the FCC's authority and statutory mandate while the agency swung between policies with changing administrations.

Both models reflect poorly on the prospects for administrative antitrust and suggest a strong likelihood that the Court would reject any ambitious use of administrative authority to remake antitrust law. The stability of these rules is simply too important to leave to change with changing political wills. And, indeed, concern that Congress no longer does its job of providing agencies with clear direction—that Congress has abdicated and passed to agency heads its job of making important policy

¹⁴⁶ Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 10 (1984).

¹⁴⁷ *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 459 (2009) (Breyer J., concurring).

¹⁴⁸ Easterbrook, *supra* note 146, at 1–2.

¹⁴⁹ *Administrative Antitrust*, *supra* note 1, at 1239.

¹⁵⁰ *Id.* at 1242–43.

decisions—is one of the animating concerns behind the major questions doctrine.

V. **Pizza Not Donuts: What Modern Administrative Antitrust Looks Like**

My general conclusion from 2014, that we are moving towards an era of administrative antitrust, still stands true, but with nuance. The general concerns and lessons of *Trinko*, *linkLine*, *Credit Suisse*, and similar antitrust cases remain. Regulatory agencies are better positioned to be the primary stewards of a developing antitrust law. As discussed above, those cases identify a variety of reasons for this comparative advantage, from substantive matters such as expertise to the frequency of cases, to procedural advantages such as the ability to issue guidance documents and legislative rules, as well as reasons relating to separation of powers and rule of law concerns.

The two greatest challenges to this role are the major questions doctrine and the likelihood that the Court today would reject the FTC's substantive rulemaking authority (that is, that it would reject the court of appeal's *Petroleum Refiners* decision). Were the Court to reject *Petroleum Refiners*, that would largely end the administrative antitrust experiment—at least, until and unless Congress intervenes to expressly give the Commission such authority. Administrative antitrust, on the other hand, could survive under the major questions doctrine. The question is, in what form?

The answer is “pizza, not donuts.” There is widespread, longstanding agreement that the FTC's UMC authority is broader than traditional antitrust law.¹⁵¹ But there is also at least uncertainty and possibly disagreement about how much broader that authority is.¹⁵² The FTC's UMC authority is best thought of as the crust on a pizza—part of the same dough that makes up the rest of the pie, all of which is cooked together—and not as a donut—a hollow bread baked around and separate from some other core. In the “pizza” model, the FTC's UMC authority is part of, and cannot diverge substantially from, the rest of the pie. In the “donut” model, the donut can be whatever the FTC wants it to be, untethered from the Court's understanding of antitrust law.

So long as the FTC sticks to the “pizza” model of its UMC authority, it likely will not run into trouble, either as a matter of the major questions doctrine or the Court's willingness to defer to it on antitrust matters. Over recent generations, antitrust law has converged around a common set of

¹⁵¹ See *FTC v. Brown Shoe Co.*, 384 U.S. 320–21 (1966).

¹⁵² See, e.g., Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 505–06.

principles, most notably the consumer welfare standard.¹⁵³ The FTC's UMC authority both encompasses and is broader than that law—importantly, through the same grant of legislative authority.¹⁵⁴ To the extent that the FTC's authority is coextensive with judicial understandings of antitrust law (that is, so long as the FTC is enforcing the Sherman and Clayton Acts through its Section 5 authority), it must abide by judicially defined antitrust norms. But where it acts upon its unique UMC authority, the Commission faces a choice: whether to constrain itself to extant antitrust norms or to defy them.

If the Commission accepts extant antitrust norms as a constraint on its authority, its decisions are likely to be welcomed by the judiciary; if it eschews them, its decisions are likely to face rebuke. That rebuke could come either in the form of a denial of deference or a rejection of a decision as presenting major questions to which Congress must speak more clearly. The Court has identified predictability and stability as virtues of antitrust law and expressed frustration with its extrajudicial development as economic knowledge advances.¹⁵⁵ The central premise of administrative antitrust is that the FTC can lend greater stability to industry understanding of antitrust norms and incorporate advances in economic knowledge into the law more smoothly than the judiciary can.¹⁵⁶ Judicial respect for, and acceptance of, the FTC's use of its UMC authority is incumbent on it being used in this way. Conversely, should the FTC use its authority in a way that disrupts established understandings of antitrust law—of “the Magna Carta of free enterprise”—it is hard to imagine such interventions being received as anything other than presenting major questions that can only be addressed with clear direction from Congress.

There is, however, reason to believe that current FTC leadership views its UMC authority as an opportunity to chart such a dramatic departure from established understandings of antitrust law. For instance, in a July 2022 keynote, FTC Chair Lina Khan discussed the FTC's “ongoing project to reinvigorate the FTC's standalone Section 5 authority.”¹⁵⁷ In this interview, Chair Khan explained that she believes the Commission's UMC authority “is intended to go beyond the four corners of the Sherman Act

¹⁵³ See, e.g., Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 GEO. MASON L. REV. 1435, 1437–38 (2019).

¹⁵⁴ See Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 3 (Nov. 10, 2022).

¹⁵⁵ See *Administrative Antitrust*, *supra* note 1, at 1220.

¹⁵⁶ See *id.*

¹⁵⁷ Fox-Khan Interview, *supra* note 50.

and the Clayton Act.¹⁵⁸ She further explained that she aims “to make sure that [the FTC is] resuscitating this tool and making the best use of it.”¹⁵⁹

Chair Khan’s comments above were made on July 20, 2022, only a few weeks after *West Virginia v. EPA* was decided by the Supreme Court. To her credit, she acknowledged the legal risk that the FTC faces should it push too far beyond the boundaries of established antitrust law, noting particularly that the FTC is “in a moment in our legal environment where there are a whole set of legal challenges to the FTC’s authority,” and explained that this “complicates how we’re approaching what level of risk we’re comfortable with and that sort of thing.”¹⁶⁰

However, speaking just a day later, she emphasized her expansive view of the FTC’s UMC authority:

[W]hat do we really mean by Unfair Methods of Competition? This is in some ways a question that goes to the heart of the FTC’s existence and reason for being. I take very seriously that the text of the FTC statute uses this term Unfair Methods of Competition, but I think there are really still basic questions to be engaged in regarding how we distinguish fair from unfair methods of competition, questions that are rarely frontally engaged among antitrust practitioners but that are really critical for us as we chart a path forward.¹⁶¹

In making these comments she cited the work of activists like Sandeep Vaheesan as influential to her thinking—work that expressly characterizes the FTC’s UMC authority as “expansive” and calls for antitrust interventions that reject the consumer welfare standard.¹⁶²

The Court’s recent cases—most notably *West Virginia v. EPA*, but more generally the contraction in the Court’s once-expansive deference to agencies like the FTC—seem to answer Chair Khan’s questions: it is not for her, or the courts, but for Congress to decide the expansive contours of “unfair methods of competition.” For the time being, established principles that underlie antitrust law provide meaning to Section 5. The FTC is free to expand upon, while also adhering to the broad principles of, those principles. But to go father is to break the crust from the pizza, making a donut—an unexplored country for antitrust administrators in a territory that only Congress can define.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Gus Hurwitz, *FTC UMC Roundup – It’s Getting Hot in Here*, TRUTH ON MKT. (July 22, 2022), <https://perma.cc/6EAG-JALJ>.

¹⁶² Vaheesan, *supra* note 52; Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 W&M L. REV. ONLINE 119, 136 (2022).

Conclusion

In 2013, it seemed clear that the Court was pushing antitrust law in an administrative direction, as well as that the FTC would likely receive broad *Chevron* deference in its interpretations of its UMC authority to shape and implement antitrust law. Roughly a decade later, the sands have shifted and continue to shift. Administrative law is in the midst of a retrenchment, with skepticism of broad deference and agency claims of authority.

Many of the underlying rationales behind the ideas of administrative antitrust remain sound. Indeed, the FTC will likely play an increasingly large role in defining the contours of antitrust law, and the Supreme Court and lower courts will welcome this role. But that role will be limited. Administrative antitrust is a preferred vehicle for administering antitrust law, not for changing it. Should the FTC use its power aggressively, in ways that disrupt long-standing antitrust principles or seem more grounded in policy better created by Congress, it is likely to find itself on the losing side of a judicial opinion.