

Chevron and Administrative Antitrust, Redux

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CSAS Working Paper 22-17

Antitrust and the Administrative State
September 15, 2022

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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 long-since abrogated most areas of federal common law, had shown a clear preference that common-law-like antitrust law be handled on a statutory or regulatory basis where possible. The second article evaluated and rejected the FTC’s long-held belief that the Commission’s interpretations of the FTC Act do not receive *Chevron* deference.

Together, these articles made the case (as a descriptive, not normative, matter) that we were moving towards 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.³

This essay 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 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—I find it less likely today that the Court would defer to any agency interpretation of antitrust law that represents more than an incremental move away from extant law.

¹ 21 GEO. MASON L. REV. 1191 (2014).

² 76 U. PITT. L. REV. 209 (2014).

³ Rohit Chopra† & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357 (2020); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 (2020).

I will approach this discussion in five parts. First, I will offer some reflections on my prior articles. The piece on *Chevron* and the FTC, in particular, argued that the FTC had misunderstood how *Chevron* would apply to its interpretations of the FTC Act because it was beholden to out-of-date understandings of administrative law. I will make the point below 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. I will then briefly recap 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. The third part of the discussion will then summarize some key elements of administrative law that have changed over roughly the past decade. I then bring these elements together to look at the viability of administrative antitrust today, arguing 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. Finally, I turn to focus on what will likely be the central question for evaluating the 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 these past articles in light of the past decade's case law, this essay 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*.⁴ 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 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.

⁴ Natl. Petroleum Refiners Ass'n. v. FTC, 482 F.2d 672 (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). See generally RULEMAKING AUTHORITY OF THE U.S. FEDERAL TRADE COMMISSION (Daniel Crane, ed.) (2022).

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 Antitrust Division's Telecommunications Section. This 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 v. linkLine*⁵ and *Verizon v. Trinko*⁶, and recent important administrative law cases included *Brand-X*⁷, *FCC v. Fox*⁸, and *City of Arlington v. FCC*.⁹ 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 of the Court's 2011 *American Electric Power Co., Inc. v. Connecticut*¹⁰ opinion, in which the Court held broadly that a decision by Congress to regulate broadly displaces judicial common law. In *Trinko* and *Credit Suisse*¹¹, the Court had held something similar: roughly that regulation displaces antitrust law. Indeed, in *linkLine* the Court had stated that regulation is preferable to antitrust, known for its vicissitudes and adherence to the extra-judicial development of economic theory.¹² *Administrative Antitrust* tied these strands together, arguing 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.

Antitrust and administrative law also came together—and remain together—in the debates over net neutrality. The net neutrality involves the role of the government in regulating how Internet Service Providers handle user data and, in particular, whether the FCC should take an antitrust-based or regulatory approach to concerns that, lacking significant competition, they

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

⁶ 540 U.S. 398 (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).

⁷ Natl. Cable & Telecommunications Ass'n. v. Brand X Internet Services, 545 U.S. 967 (2005) (granting *Chevron* deference to the FCC's interpretation of “telecommunications services” under the Communications Act).

⁸ 556 U.S. 502 (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).

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

¹⁰ 564 U.S. 410 (2011).

¹¹ Credit Suisse Securities (USA), LLC v. Billing, 551 U.S. 264 (2007).

¹² *linkLine*, 555 U.S. at 452 (“We have repeatedly emphasized the importance of clear rules in antitrust law”).

may have an incentive to handle that data so as to maximize their revenue at the expense of consumer welfare. Focused on more narrow legal questions, however, the net neutrality debate has come to focus on the FCC's legal authority under the Communications Act, including whether ambiguity in the Act affords the Commission latitude to regulate Internet Service Providers as common carriers. 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 DC Circuit's opinion in *Verizon v. FCC*.¹³

In 2008 the FCC attempted to put in place net neutrality rules by adopting a policy statement on the subject.¹⁴ This approach was rejected by the DC Circuit in 2010, on the grounds that a mere policy statement lacked the force of law.¹⁵ 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.¹⁶ In January 2014, the DC Circuit again rejected the specific rules adopted by the FCC, on the grounds that those rules violated the Communications Act's prohibition on treating non-common carriers (ISPs) as common carriers.¹⁷ But, critically, the court affirmed the FCC's interpretation of Section 706 as allowing it, in principle, to adopt rules regulating ISPs.¹⁸

Unsurprisingly, whether the language of Section 706 was either ambiguous or subject to the FCC's interpretation was a central debate within the regulatory community during 2012 and 2013. 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.¹⁹ I was seemingly the lone voice arguing among my peers that the DC Circuit was likely to find that *Chevron* applied to Section 706 and that that FCC's reading was

¹³ 740 F.3d 623 (D.C. Cir. 2014).

¹⁴ *In re Formal Compl. of Free Press & Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 F.C.C.R. 13,028 (2008).

¹⁵ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

¹⁶ *In re Preserving the Open Internet*, 25 F.C.C.R. 17905 (2010).

¹⁷ *Verizon*, 740 F.3d at 628.

¹⁸ *Id.*

¹⁹ See generally Jeremy D. Lemon, *Reclassifying Broadband Internet Access: Who Cares What Congress Wants Anyway?*, 6 Liberty U.L. Rev. 137 (2011); Rob Freiden, *From Bad to Worse: Assessing the Long-Term Consequences of Four Controversial FCC Decisions*, 77 Brook. L. Rev. 959 (2012); Jason Chun, *What About the Kids? The FCC's Current Deregulatory Platform Poses a Threat to the Country's Youth*, 71 Admin. L. Rev. 607 (2019). See also Hurwitz, *supra* note 2, at 248–265 (addressing the arguments of those who do not believe that the FCC was granted authority).

permissible on its own (that is, not taking into account restrictions such as the prohibition on treating non-common carriers as common carriers).²⁰

I had thought this conclusion was quite obvious. The past decade of the Court's *Chevron* case law followed a trend of increasing deference. Starting with *Brand-X*, then *Fox v. FCC*, and *City of Arlington*, the safe money was consistently placed on deference to the agency.

B. Section 5 and Unfair Methods of Competition

This was the setting in which I started thinking about what became *Chevron and the 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"). But there was longstanding debate about the limits of the FTC's UMC authority.²¹ These debates included whether it was necessarily coterminous with the Sherman Act (so limited by the judicially-defined federal common law of antitrust).²²

And there was discussion about whether the FTC would receive *Chevron* deference to its interpretations of its UMC authority.²³ 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. *Chevron and the Limits of Administrative Antitrust* explored that issue, ultimately concluding that the FTC likely would indeed be given the benefit of *Chevron* deference, and traced the Commission's belief to the contrary back to longstanding institutional memory of pre-*Chevron* judicial losses.²⁴

The FTC Act gives the agency the power to prohibit "[u]nfair methods of competition in or affecting commerce."²⁵ The Act purposely gave no definition of unfair methods of competition,

²⁰ Hurwitz, *supra* note 2, at 248–265.

²¹ Hurwitz, *supra* note 2, at 250–58.

²² *Id.* at 216 (citing to Edith Ramirez, Chairwoman, 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), available at http://www.ftc.gov/system/files/documents/public_statements/314631/140213section5.pdf (“[W]here our expertise allows us to identify likely competitive harm, we should use the [Section 5] authority that Congress gave us [one hundred] years ago to prohibit anticompetitive conduct that falls outside the scope of the Sherman Act.”)).

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²⁴ Hurwitz, *supra* note 2, at 218–220.

²⁵ 15 U.S.C. § 45(a)(1)–(2).

thus leaving room for interpretation.²⁶ It is, however, understood that this authority is broader than the Sherman and Clayton Acts—the primary antitrust statutes enforced by the Department of Justice and FTC.²⁷

The Supreme Court took the first crack at defining UMC in *Raladam*; their definition was twofold and required “the existence of present or potential competitors” and “the unfair methods must be such as injuriously affect or tend thus to affect the business of these competitors”.²⁸ 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.²⁹ 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.³⁰

In 2015, the Commission adopted a bipartisan Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act.³¹ Under this policy statement, the Commission committed to three principles: that in bringing UMC cases it would “be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare”; 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 that it would be less likely to bring a UMC claim where the underlying conduct could be challenged by existing antitrust laws.³² 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 “invitation to collude.” Antitrust law requires an actual agreement in order to find

²⁶ 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 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”).

²⁷ See *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (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.”)

²⁸ *Raladam*, 283 U.S. at 649.

²⁹ *Id.*

³⁰ See generally *Statement of Commissioner Joshua D. Wright on the Proposed Policy Statement Regarding Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act* (June 2013).

³¹ This statement was adopted by a 4-1 vote. See https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

³² *Id.*

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

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.³³ The FTC has yet to issue any revised guidance on its views on the scope of its UMC authority. Chair Khan has, however, 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.”³⁴ 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,” 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.³⁵ 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.

II. The Administrative Antitrust Arguments

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

A. *Administrative Antitrust*

The opening lines of this paper 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—

³³ See <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act>; see also https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissents-ec5enforcementprinciples.pdf.

³⁴ Interview with Elanor Fox. See also <https://truthonthemarket.com/2022/07/22/ftc-umc-roundup-its-getting-hot-in-here/>.

³⁵ See, e.g., <https://www.promarket.org/2021/11/17/antitrust-enforcement-unfair-competition-ftc/>.

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.³⁶

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. The article adds, as well, the Court’s focus at the time against domain-specific “exceptionalism.” Its opinion in *Mayo*³⁷ 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 doctrine—and, so too, 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 *Trinko* majority opinion, Chief Justice Roberts expressed substantial concern about the difficulties that antitrust law poses for courts and litigants alike.³⁸ His opinion for the majority notes that “it 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?’”³⁹ And Justice Breyer writes in concurrence, that “[w]hen a regulatory structure exists [as it does in this case] to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.”⁴⁰

In other words, as the argument in *Administrative Antitrust* goes, 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 as we turn to how the Court is likely to think about the FTC’s potential use of its UMC authority to develop new antitrust rules

B. Chevron and the Limits of Administrative Antitrust

³⁶ Hurwitz, *supra* note 1, at 1191.

³⁷ *Mayo Found. for Med. Educ. & Research v. U.S.*, 562 U.S. 44 (2011).

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The core argument in *Limits of Administrative Antitrust* is more doctrinal and institutionally-focused. In its simplest statement, I merely applied *Chevron* as it was 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, and the power granted to the FTC, expressly to give the agency flexibility and to avoid the limits the Court was placing upon antitrust law in the early 20th century.⁴¹ It was unambiguously meant to be left to the agency to define.

There are various arguments against application of *Chevron* to Section 5; the article goes through and rejects them all.⁴² Section 5 has long been recognized as including but being broader than the Sherman Act. *Petroleum Refiners* has long held that the FTC has substantive rulemaking authority, and subsequent legislative action recognized the holding in *Petroleum Refiners* and did not alter it. And the *Petroleum Refiners* conclusion was made even more forceful by the Supreme Court’s more recent opinion in *Iowa Utilities Board*.⁴³ Other arguments are (or were) unavailing.

The real puzzle the paper unpacks is why the FTC ever believed it wouldn’t receive the benefit of *Chevron* deference. The article traces it back to a series of cases the FTC lost in the 1980s, contemporaneous with the development of the *Chevron* doctrine. The Commission had big losses in cases like *E.I. Du Pont*, and *Ethyl Corp*.⁴⁴ Perhaps most important, in its 1986 *Indiana Federation of Dentists* opinion⁴⁵ (issued two years after *Chevron* was decided), the Court seemed to adopt a *de novo* standard for review of Section 5 cases. But, *Limits of Administrative Antitrust* argues, this is a misreading and overreading of *Indiana Federation of Dentists* (a close reading of which actually suggests that it is entirely in line with *Chevron*), and it misunderstands the case’s relationship with *Chevron* (the importance of which did not start to come into focus for another several years).⁴⁶

The curious conclusion of the argument is, in effect, that a generation of FTC lawyers, “shell-shocked by its treatment in the courts,” internalized the lesson that they would not receive

⁴¹ Hurwitz, *supra* note 2, at 248–49.

⁴² *Id.* at 248–265.

⁴³ *AT&T Corp. v. Iowa Utilities Bd.*, 526 U.S. 366 (1999) (granting the FCC authority to create regulations that increase competition pursuant under the 1996 Telecommunications Act).

⁴⁴ *E.I. du Pont de Nemours & Co. v. F.T.C.*, 729 F.2d 128 (2nd Cir. 1984) (holding that FTC did not have power to regulate legitimate, noncollusive business practices that substantially lessen competition unless there is an explicit agreement to do so or there is an “indicia of oppressiveness”).

⁴⁵ *Ind. Fed’n. of Dentists v. FTC*, 476 U.S. 447 (1986) (holding that courts review FTC legal determinations under Section 5 of the FTC Act *de novo*, thus giving limited deference to the FTC).

⁴⁶ Hurwitz, *supra* note 2, at 264–270.

the benefits of *Chevron* deference and that Section 5 was subject to *de novo* review but also 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.⁴⁷ Today, that prediction appears to have borne out. While courts still review the FTC’s findings *de novo*, they will now defer to a finding by the FTC that a particular commercial practice has violated the FTCA.⁴⁸

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 feels 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 remarkable uncertain. Scholars and jurists have long debated the Constitutional basis for federal agencies—the Constitution has the most basic concept of agency relationships, though agencies have been part of the Constitutional order since the founding years—some going so far as to argue that administrative law is unconstitutional. Over the course of the 20th 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) Kagan’s theory of presidential administration.

⁴⁷ Hurwitz, *supra* note 2, at 261–62 (citing to Daniel Crane, *Technocracy and Antitrust*, 86 Tex. L. Rev. 1159 (2008)).

⁴⁸ *McWane, Inc. v. FTC*, 783 F.3d 814, 825 (11th Cir. 2015) (quoting *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1063).

A central question to these changing theories is the amount of independence agencies have in interpreting and implementing Congress's statutory commands, and the role of the courts in policing those efforts. This 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.” Decided in 1984, *Chevron* changed administrative law by placing a thumb on the scale of deference to agency interpretations of statutes they implement.

As Tom Merrill recounts 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 DC Circuit than by the Supreme Court's own design.⁴⁹ Regardless its path, the opinion set the stage of 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, we saw cases like *Mead* limit the application of the doctrine to certain types of agencies decisions, or agency decisions made in certain ways.⁵⁰ 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 ambiguous statutes.⁵¹ *Fox v. FCC* effectively finds 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.⁵² And *City of Arlington* erased the difference between substantive and jurisdictional questions, empowering agencies to resolve ambiguous scopes of authority on their own.⁵³

Most of those cases were decided in the 2000s and pushed lower courts to interpret *Chevron* very broadly. By the time the DC Circuit was considering the 2010 Open Internet Order, discussed above in Part 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.

This is also when 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, but the

⁴⁹ Thomas Merrill, THE CHEVRON DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE, 83, 99 (2020) (“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.”)

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Supreme Court was beginning 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.⁵⁴ 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* (UARG).⁵⁵ In *UARG*, Justice Scalia, writing for a 9-0 majority struck down an EPA regulation relating to greenhouse gasses. 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.”⁵⁶ Two years after that, the Court decided *Encino Motorcars*, in which the Court acted upon a limit expressed in *Fox v. FCC* that agencies face heightened procedural requirements when changing regulations that “may have engendered serious reliance interests.”⁵⁷

And like that, the dams holding back concern over the scope of *Chevron* have burst.⁵⁸ As discussed by Tom Merrill, “the 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.’⁵⁹ Justices Thomas and Gorsuch have openly expressed their views that *Chevron* needs to be curtailed or eliminated.⁶⁰ Justice

⁵⁴ See generally Danieli Evans, *What Would Congress Want? If We Want to Know, Why Not Ask?*, 81 U. Cin. L. Rev. 1191 (2013); Erin Murphy, *The Future of Agency Deference After Kisor v. Wilkie*, 51 No. 1 ABA Trends 12 (September/October 2019).

⁵⁵ *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302 (2014).

⁵⁶ *Id.* at 324.

⁵⁷ *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016).

⁵⁸ It bears note that the precise point at which “the dam” can be said to have broke is in the eye of the beholder. From my perspective—and likely that of most communications scholars and, I expect, energy law scholars—*UARG* was a watershed moment that changed the nature of litigation and advocacy before the Federal Communications Commission and led then-Judge Kavanaugh to write an extensive DC Circuit dissent defending and articulating his views of the major questions doctrine. For others, *City of Arlington* was likely the high water mark—and Chief Justice Roberts’s dissent the turning point. And of course changes in the composition of the Court have played an important role, as well—though this is easy to overstate once one considers the extent to which some Justices appear to have changed their views over time. The ultimate reality of course is most likely that there was no single case, or even group of cases, that particularly drove this change.

⁵⁹ Merrill at 7. See generally Nathan Richardson, *Deference is Dead (Long Live Chevron)*, 73 RUTGERS L. REV. 441 (2021).

⁶⁰ *Gundy v. U.S.*, 139 S. Ct. 2116, 2141–43 (2019) (Gorsuch, J., dissenting); *Michigan v. E.P.A.*, 576 U.S. 743, 760–64 (2015) (Thomas, J., concurring).

Kavanaugh has written extensively in favor of the major questions doctrine.⁶¹ Tom Merrill notes that, “in his last opinion addressing the Chevron doctrine before he retired, Justice 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.’”⁶² Each term litigants are more aggressively bringing more aggressive cases to probe and tighten the limits of the *Chevron* doctrine.

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*, decided on the last day of the 2022 term.⁶³

B. The Major Questions Doctrine

The Supreme Court issued its opinion in *West Virginia v. EPA*, at the end of the 2022 term. In this opinion, the Court rejected a proposed EPA regulation that “would drive an 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 of jobs across various sectors.”⁶⁴ Most important, it did so by invoking—for the first ever by name—the Major Questions Doctrine. Under this doctrine, the Court explained, there must be a “clear statement” from Congress where an agency is to adopt a rule of “vast economic and political significance.”⁶⁵

This article is not suited to a fulsome discussion of the many questions raised by this case and doctrine. My 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 part 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. 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 1, and could be fairly read to empower the agency act in a manner that would have “vast economic and political significance” (so would be permitted under *Chevron*’s step 2), the Major Questions Doctrine nonetheless disallows that course of conduct. But it is unclear whether this is properly

⁶¹ *Kisor v. Wilkie*, 139 S. Ct. 2400, 2448–49 (2019) (Kavanaugh, J., concurring).

⁶² Merrill at 3.

⁶³ *West Virginia v. EPA*, 597 U.S. ____ (2022).

⁶⁴ *Id.* at 10

⁶⁵ *Id.* at 11.

(or best) understood as narrowing the scope of agency action permissible under *Chevron*. The alternative (and probably better) understanding is that it is a narrowing of the scope of agency action (or, alternatively, a clarification of the requirements Congress must meet when delegating expansive authority to an agency). Under this reading, *West Virginia* only incidentally affects *Chevron* – it is merely saying that an agency cannot interpret an ambiguous statute in a Constitutionally-problematic way.

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 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 scope of its UMC authority. 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 Sherman Act.⁶⁶ This decision was affirmed by the 11th Circuit Court of Appeals.⁶⁷ And, second, in 2015 the Commission issued a “Statement of Enforcement Principles” regarding its use of its UMC authority.⁶⁸ 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.⁶⁹

Things began to change not long after this statement was issued. In 2017 Lina Khan—now Chair of the FTC—published her law student note, *Amazon’s Antitrust Paradox*, in the Yale Law Journal.⁷⁰ This was probably the inaugural moment for the “neo-Brandesian” or “hipster”

⁶⁶ *McWane* (Feb 6, 2014).

⁶⁷ <https://www.ftc.gov/news-events/news/press-releases/2015/04/federal-appeals-court-upholds-ftc-order-found-mcwane-inc-unlawfully-maintained-monopoly-domestic>

⁶⁸ *Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act* (Aug 13, 2015).

⁶⁹ *Id.*

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antitrust movement.⁷¹ 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.”⁷² This rejection of the consumer welfare standard placed the neo-Brandesians 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-Brandesians into power. Every movement has its horsemen. For the neo-Brandesians, they are Joe Kanter, Lina Khan, and Tim Wu.⁷³ Early in his term, President Biden brought Tim Wu into his administration to work on competition issues. Wu was joined in the administration soon thereafter, with Lina Khan first being appointed to, and immediately being named Chair of, the FTC. She immediately rescinded the Commission’s 2015 UMC policy statement.⁷⁴ A week later, President Biden signed Executive Order 14036, on *Promoting Competition in the American Economy*—a vast kitchen-sink of directives requiring ostensibly competition-related action from agencies across the government. And only weeks after announcing that Executive Order, Joe Kanter was appointed.

The neo-Brandesians’ ascendance to power in the Biden administration marks a near 180 degree change in antitrust policy from where it stood 10 years ago. This is remarkable in its own right. But it is also important to the administrative antitrust argument. As will be discussed further in Part IV.B, an important reason that I have argued 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—an assumption that today seems quite suspect.

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

⁷¹ See Joshua Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293 (2018) ; Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMP. L & PRACTICE 131 (2018).

⁷² *Requiem for a Paradox* at 314.

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⁷⁴ <https://www.ftc.gov/news-events/news/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under-ftc-act>

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 they 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

Two places where we see this trend are being hotly debated by many: the major questions doctrine and ongoing vitality of *National Petroleum Refiners*. These are only briefly recapitulated here. The major questions doctrine is an evolving doctrine, as discussed above only recently expressly embraced by the Supreme Court in *West Virginia v. EPA*. This doctrine requires that Congress to speak clearly when delegating authority to agencies to address major questions—that is, questions of vast economic and political significance. So, for instance, while the Court may allow an agency to develop rules governing mergers when tasked by Congress to prohibit acquisitions likely to substantially lessen competition, it is unlikely to allow that agency to categorically prohibit mergers based upon a general Congressional command to prevent unfair methods of competition.⁷⁵ 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, 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.⁷⁶ These are both examples of regulations that are believed to be under consideration by the current FTC.

This is not to argue that the FTC has no unique antitrust powers under its UMC authority. To the contrary, as is discussed in Part V 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.

⁷⁵ See proposed Merger Guidelines revisions.

⁷⁶ See, e.g., Memorandum of Understanding between the FTC and NLRB; Eric Posner’s comments.

The major questions doctrine has been a major topic of discussion in administrative law circles for the past several years.⁷⁷ Interest in the *Petroleum Refiners* question has been more muted, mostly confined to those 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 DC Circuit case 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.⁷⁸ In other words, prior the 1973 the FTC did *not* have authority to make substantive antitrust rules with the force of law. It could bring individual cases alleging violations of its UMC authority—and perhaps over time these cases would influence judicial or legislative understandings of substantive antitrust law. But it could not prescriptively enact antitrust rules that would affect an entire industry or the entire economy.⁷⁹

In 1999, the Supreme Court reached a similar conclusion in *Iowa Utilities Board*, finding that a provision in Section 202 of the Communications Act allowing the FCC to create rules for the implementation of that section of the Communications Act conferred substantive rulemaking power running throughout the Communications Act.⁸⁰

Both *National Petroleum Refiners* and *Iowa Utilities Board* reflect previous generations or jurists' understanding of administrative law—and particularly the relationship between the courts and Congress in empowering and policing agency conduct. That understanding is best captured in the evolution of the non-delegation doctrine, and the courts' broad acceptance of

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⁷⁹ There is an important and tricky subsequent history to *Petroleum Refiners* that 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. FTC Act Section 5. 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. 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. That never happened. In any event, and despite different understandings between the two sides of Congress as 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.”

⁸⁰ *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

broad delegations of Congressional power to agencies in the latter half of the 20th century. *National 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 *National Petroleum Refiners Association* 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 20th century the Court was concerned about the “hydraulic pressure”⁸¹ that each branch (including the judiciary) faces to expand its own authority, but that it recognizes today that it took that concern to a far extreme that facilitated its own abdication of its responsibility to police the other branches.⁸² A generation or two ago, this manifested as broad deference to agencies as closer to Congress and often better equipped than the 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 legislature to “say what the law is,” so abdicated that difficult task to the Executive and its agencies. The present retrenchment—of which embrace of the Major Questions Doctrine is 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.

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.

B. Limits on the Antitrust side of Administrative Antitrust

⁸¹ See *INS v. Chadha*, 462 U.S. 919, 951 (1983) (discussing the “hydraulic pressures inherent within each of the separate Branches to exceed the outer limits of its power.”)

⁸² See Hurwitz, *Chevron's Political Domain: W(h)ither Step Thr olitical Domain: W(h)ither Step Three*, 68 DU PAUL L. REV. 615 (2019).

The potential limits on FTC UMC rulemaking discussed above sound in administrative law concerns. But the administrative antitrust may also find a tepid judicial reception on antitrust concerns, as well.

Many of the arguments advanced in *Administrative Antitrust* and the Court's opinions on the antitrust-regulation interface echo traditional administrative law ideas. 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.

But the antitrust-focused cases—*linkLine*, *Trinko*, *Credit Suisse*—also express concerns specific to antitrust law. Chief Justice Roberts notes that the Justices “have repeatedly emphasized the importance of clear rules in antitrust law,”⁸³ and the need for antitrust rules to “be clear enough for lawyers to explain them to clients.”⁸⁴ As reflected in *Trinko*, “Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue.”⁸⁵ And the Court and antitrust scholars have long noted the curiosity that antitrust law has evolved over time following developments in economic theory.⁸⁶ The Court expresses 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. 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 the institution 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. These are rules of vast economic significance: they are “the Magna Carta of free enterprise”; our economy organizes itself around them; 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

⁸³ *linkLine*, 555 U.S. at 452.

⁸⁴ *Id.* at 453.

⁸⁵ *Trinko*, 540 U.S. at 411.

⁸⁶ Michael L. Katz et al., *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 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.

antitrust law.⁸⁷ 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.

If an agency’s administrative implementation of antitrust law does not follow this path—and 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 for the larger circle in the antitrust Venn diagram, the courts 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.⁸⁸ 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 “When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits.”⁸⁹

The error-costs framework described by Judge Easterbrook focuses on the relative costs of errors, and correcting those errors, between judicial and market mechanisms.⁹⁰ In the administrative antitrust setting, the relevant comparison is between judicial and administrative

⁸⁷ *United States v. Topco Assocs. Inc.*, 490 U.S. 596, 610 (1972), 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). See *contra* Daniel A. Crane, “*The Magna Carta of Free Enterprise*” Really?, 99 Iowa L. Rev. Bull. 17, 23 (“... ‘although 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”).

⁸⁸ Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984).

⁸⁹ *linkLine*, 555 U.S. at 459 (Breyer J., concurring).

⁹⁰ Easterbrook, *supra* note 50, at 2.

error costs. The question on this front is whether an administrative agency, should it get things wrong, is likely to correct. Here there are two models, both of concern. The first is that in which law is policy or political preference. Here, the FCC's approach to net neutrality and the NLRB's approach to labor law loom large: dramatic swing between binary policy preferences held by different political parties as control of agencies shifts between administrations. The second model is one in which Congress responds to agency rules by refining, rejecting, or replacing them through statute. 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 swings 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 its job of making important policy decisions and let them fall instead to agency heads—is one of the animating concerns behind the major questions doctrine.

V. Pizza not Donuts: What Modern Administrative Antitrust Looks Like

I stand by my general conclusion from 2014, that the we are moving towards an era of administrative antitrust, however I do so with nuance. The general concerns and lessons of *Trinko*, *linkLine*, *Credit Suisse*, and similar antitrust cases remain. Regulatory agencies are better positioned—for a variety of reasons, from expertise to the frequency of cases, to the ability to issue guidance documents and legislative rules, as well as for separation of powers and rule of law reasons—to be the primary stewards of a developing antitrust law.

The two greatest challenges to this are the likelihood that the Court today would reject the FTC's substantive rulemaking authority (that is, that it would reject the DC Circuit's *Petroleum Refiners* decision), and the Major Questions Doctrine. 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?

My answer to this is “pizza, not donuts.” There is widespread, longstanding, agreement that the FTC’s UMC authority is broader than traditional antitrust law.⁹¹ But there is also at least uncertainty and possibly disagreement is how much broader that authority is. By “pizza, not donuts,” I mean to say that 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 principles, most notably the consumer welfare standard. The FTC’s UMC authority both encompasses and is broader than that law—importantly, through the same grant of legislative authority. To the extent that the FTC’s authority is coextensive with judicial understandings of antitrust law (that is to say, so long as the FTC is enforcing the Sherman and Clayton Acts through its Section 5 authority), it must abide of judicially-defined antitrust norms. But where it acts upon its unique UMC authority, the Commission faces a choice: does it constrain itself to extant antitrust norms or 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 rejection 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. 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. 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

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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.

FTC Chair Lina Khan has recently spoken about her views on the FTC’s UMC authority, discussing her “ongoing project to reinvigorate the FTC’s standalone Section 5 authority” with NYU’s Eleanor Fox.⁹² In this interview she discussed her view that the Commission’s UM authority “is intended to go beyond the four corners of the Sherman Act and the Clayton Act,” and her efforts “to make sure that [the FTC is] resuscitating this tool and making the best use of it.”⁹³ At the same time, and to her credit, speaking shortly after *West Virginia v. EPA* was decided she also acknowledge the legal risk that the FTC faces should it push too far beyond the boundaries of established antitrust law, noting 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 explaining that this “complicates how we’re approaching what level of risk we’re comfortable with and that sort of thing.”⁹⁴

Yet at the same time, in another recent talk she spoke about her expansive view of the FTC’s UMC authority: “what 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.” In these same comments she cited the work of activists like Sandeep Vaheesan as influential to her thinking—activists who expressly characterize the FTC’s UMC authority as “expansive” and call for antitrust interventions that reject the consumer welfare standard.⁹⁵

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, there are the established principles that underlie antitrust law. The FTC is free to expand upon, while also adhering to, those principles. But to go father is to break the crust from the pizza making a donut—an unexplored

⁹² Interview with NYU’s Eleanor Fox, [URL].

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Sandeep Vaheesan, *Antitrust Law’s Unwritten Rules of Unfair Competition* (2021); Sandeep Vaheesan, *The Morality of Monopolization Law*, 63 W&M L. REV. ONLINE. 119, 128 (2022).

country for antitrust administrators in a territory that only Congress can define.

VI. Conclusion

Writing 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 rationale behind the ideas of administrative antitrust remain sound. Indeed, I expect the FTC will play an increasingly large role in defining the contours of antitrust law and that the Court and 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 the judicial opinion.