
**CHEVRON DEFERENCE AND THE FTC:
HOW AND WHY THE FTC SHOULD USE
CHEVRON TO IMPROVE ANTITRUST
ENFORCEMENT**

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The FTC does not promulgate antitrust rules and has never asked a court for Chevron deference in antitrust litigation. This Note addresses these omissions and argues that the FTC should undertake notice-and-comment rulemaking for the express purpose of attaining Chevron deference. More than a pragmatic litigation strategy, this approach will allow the FTC to properly express its expert opinions to generalist courts and, in this way, form an optimal antitrust regime.

The central step in this argument is to prove that Chevron deference is available to the FTC in its antitrust role. This question, while occasionally raised, has never been fully examined. Does the common law nature of antitrust undermine the FTC's claim? How does DOJ enforcement change the scope of section 5 delegation? This Note provides the first in-depth assessment of these questions and finds that the statutory text, judicial precedent, legislative history, and normative antitrust goals all confirm the suitability of Chevron deference to formal FTC interpretations.

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I. INTRODUCTION

In response to modern business practices, commentators are calling on the Federal Trade Commission's ("FTC" or "Commission") Bureau of Competition to adopt two previously rejected forms of regulation.¹ Most prominently,

¹ This is the FTC's antitrust division. Today, the antitrust and consumer protection divisions are distinct. They are in different bureaus and apply different enforcement mechanisms. See FEDERAL TRADE COMM'N, BUREAUS & OFFICES, <http://www.ftc.gov/about-ftc/bureaus-offices>

some argue that the FTC should ask courts to expand section 5 of the Federal Trade Commission Act (“FTC Act”)² to enjoin anti-competitive practices not currently prohibited by the Sherman Act.³ More tentatively, others argue that the FTC should use notice-and-comment rulemaking to regulate competition.⁴ Notably, both of these proposals lack an in-depth consideration of the role of *Chevron* deference.⁵ Advocates of expanding section 5 liability neglect to explore how the FTC can use *Chevron* deference to do so; advocates

(last visited Mar. 5, 2014). This Note discusses the FTC’s antitrust mandate except where mentioned otherwise.

² 15 U.S.C. § 45 (2012).

³ Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2012). See also Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 877 (2010); William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 930 (2010); FED. TRADE COMM’N, WORKSHOP ON SECTION 5 OF THE FTC ACT AS A COMPETITION STATUTE (2008), available at http://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf. More generally, see *infra* Part II.D.

⁴ See *infra* Part II.D. See also David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 ANTITRUST L.J. 1113, 1117–19 (2005); Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1206–09 (2008); C. Scott Hemphill, *An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition*, 109 COLUM. L. REV. 629, 678–80 (2009); William E. Kovacic, *Antitrust Policy and Horizontal Collusion in the 21st Century*, 9 LOY. CONSUMER L. REP. 97, 107–08 (1997); Adam Speegle, Note, *Antitrust Rulemaking as a Solution to Abuse of the Standard-Setting Process*, 110 MICH. L. REV. 847, 866 (2012).

⁵ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* deference and section 5 have never been properly examined. For the most thorough review, see Crane, *supra* note 4, at 1206–08 (raising, but not answering, the questions examined in Part III); see also Hemphill, *supra* note 4, at 644 (asserting that the “FTC possesses the power to promulgate rules with the force of law that are subject to deference under *Chevron*”); Daniel A. Farber & Brett H. McDonnell, “*Is There a Text in This Class?*” *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 656 (2005) (pointing out the inconsistent applications of deference to the FTC and Department of Justice); Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 GEO. L.J. 833, 894 (2001); Speegle, *supra* note 4, at 861–62.

of rulemaking rarely look to the consequences of these formal interpretations on future litigation. With these possibilities in mind, this Note proposes that the FTC should promulgate notice-and-comment regulations for the express purpose of attaining *Chevron* deference in antitrust litigation.

More than a pragmatic litigation strategy, this approach will allow the FTC to finally fulfill the competing ideals at the heart of its antitrust mandate. The FTC was designed to be an agency of norm-creators. Its powers and structure were also explicitly limited, however, to prevent it from becoming a technocracy run by, as President Woodrow Wilson worried, a “smug lot of experts.”⁶ Regrettably, in the rollback of antitrust enforcement since the 1980s, the FTC and courts have neglected this carefully-crafted balance and have turned the FTC into another enforcement agency, which acts parallel to the Department of Justice (“DOJ”) Antitrust Division.⁷ As a result of this enforcement-only approach, generalist courts have been deprived of the FTC’s norm-creating powers and have at times used incorrect presumptions to stymie FTC litigation.⁸ Importantly, these losses do not mean that the FTC should turn to regulation via technocratic rules: economic and political considerations urge case-by-case adjudication. They do suggest, however, that a more effective enforcement regime can be achieved if the FTC uses notice-and-comment rulemaking to attain *Chevron* deference in future litigation. That is, by using the *Chevron* framework, the FTC can create an antitrust regime capable of regulating ever-changing business practices. Simply stated, *Chevron* deference offers the FTC a route between technocracy and simple enforcement.

Before examining specific applications of *Chevron*, it is first necessary to examine whether FTC antitrust interpretations can receive *Chevron* deference. This question

⁶ Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 46 (2003) (“I don’t want a smug lot of experts to sit down behind closed doors in Washington and play providence to me.”).

⁷ See Crane, *supra* note 4, at 1206.

⁸ See *infra* Part IV.D and IV.E.

has never been fully examined.⁹ The case for *Chevron* deference relies on Congress granting the FTC a distinct, if undefined, law-making authority that extends further than the Sherman Act. If such authority exists, the FTC can appeal for judicial deference when acting within the space of this delegation.¹⁰ There are many reasons to think this delegation exists, but two concerns warrant further examination. Does the DOJ's parallel enforcement of the Sherman Act undermine the FTC's claim to *Chevron* deference? Similarly, does the judiciary's treatment of antitrust law as common law, rather than statutory law, undermine the FTC's claim to *Chevron* deference? This Note will show that statutory text, judicial precedent, legislative history, and normative antitrust goals all confirm the suitability of *Chevron* deference.

In summary, this Note argues that the FTC can and should use *Chevron* to create more effective antitrust regulation. Part II reviews the FTC's antitrust mandate and the *Chevron* doctrine. Part III presents the case for granting *Chevron* deference to formal FTC interpretations. Part IV explores specific scenarios in which the use of interpretations that will receive *Chevron* deference is particularly justified.

II. BACKGROUND LAW AND HISTORY

A. The Congressional Establishment of Antitrust Regulation

There are three foundational antitrust statutes: the Sherman Act, the Clayton Act, and the FTC Act. The

⁹ Two appellate courts have examined FTC antitrust claims and *Chevron* deference; both cases dealt with the same legal challenge to the Hart-Scott-Rodino Act. The courts split on the appropriateness of *Chevron*, but given the current *Chevron* interpretation, denying deference was correct because of the DOJ's identical role in enforcing the statute. See *Mattox v. FTC*, 752 F.2d 116, 123–24 (5th Cir. 1985) (granting *Chevron* deference). *But see* *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) (reaching identical interpretation, but denying *Chevron*). For academic commentary, see *supra* note 4.

¹⁰ See *infra* Part II.